



EC COMPETITION
POLICY NEWSLETTER

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A reformed competition policy: achievements and challenges for the future ⁽¹⁾

Mario MONTI, Commissioner of the European Commission responsible for Competition 1999-2004



PHOTO: MINISTRY OF ECONOMIC AFFAIRS, THE NETHERLANDS

Having reached the last days of my mandate, I take this opportunity to describe what I consider the main achievements of the last five years, characterised by the reforms and the modernisation of European competition policy. I will also elaborate on the challenges ahead, many of which are permanent challenges, since they are inherent in the Commission's function as a competition authority.

I am heartened by the wide acknowledgement that the Commission has enforced competition policy independently from national or specific interests. This recognition of independence and neutrality has been reflected in the recent publication of the CER by Alasdair Murray ⁽²⁾. Despite considerable pressures to influence decisions, this is the most important and long lasting legacy of this mandate. The exercise of an independent and neutral action is a permanent challenge that has to be met with

every new decision. Indeed, each intervention entails choices, a careful unbiased analysis and resolute action. If the Commission had been captured by specific interests or if public perception had been such, it would not have been possible to improve the position of competition policy in the draft Constitution or to attain other more specific achievements to which I will refer today.

The role of competition policy in the draft Constitution

The key role of competition policy in the construction of a single market, in guaranteeing a level playing field for firms operating in Europe and in promoting an open market has been acknowledged from the foundation of the European Communities. Nowadays, on the eve of a European Constitution, the draft Treaty preserves and enhances the role of competition policy in various ways:

- *First*, the draft Constitution is even more resolved than previous Treaties when it stipulates that ‘the Union shall offer its citizens... an internal market where competition is free and undistorted’. This objective constitutes a true guiding principle for the interpretation of specific competition provisions, and to ensure consistency between the different policies and activities of the Union.
- *Second*, competition rules are listed amongst the select group of six areas of exclusive competence bestowed on the Union. Moreover, competition policy has been portrayed as the ‘fifth freedom’ of the chapter on the internal market.
- *Third*, the draft Constitution confirms the Commission's direct enforcement powers in the field of competition. This is very relevant taking into account that it constitutes an exception to the generalisation of the co-decision procedure. The draft is now explicit not only on the possibility to issue decisions and European regulations, but also on its powers to investigate infringements and to impose measures, conditions and remedies. Therefore, the

⁽¹⁾ Speech delivered at the Center for European Reform, Brussels, 28 October 2004.

⁽²⁾ ‘A fair referee? The European Commission and EU competition policy’.

Commission's function as 'guardian of the Treaty' has been fully confirmed in the competition field.

Consumer interest confirmed as the main goal of competition policy

This mandate has also consolidated consumer interest as the central goal of competition policy. This has been reflected in the policy approach followed in different areas. For instance, appropriate efficiencies may countervail anticompetitive mergers and agreements only if they ultimately benefit consumers. Consumer interest has a bearing in priority setting. Cases that directly affect consumer interests have been given preference. The establishment of bi-annual competition days is the most obvious example of the importance given to consumer interests in public communication. Finally, we have ensured that the views of consumer organisations are heard during investigations by appointing a consumer liaison officer. This has been echoed in the aforementioned CER paper, together with some ideas to further stimulate the involvement of consumer organisations. After a constant effort during this mandate to enforce competition rules for the sake of consumers, I feel entitled to say that only a very poorly informed observer can still resort to the catchphrase that the main goal of competition policy in Europe is a different one, such as protecting competitors.

Competition policy is now clearly grounded in sound micro-economics

I have been very conscious of the fact that competition policy influences investment decisions, business acquisitions, pricing policies and economic performance. Therefore, a major trend of this mandate has been to ensure that competition policy is fully compatible with economic learning. Furthermore, competition policy is an instrument to foster economic growth, to promote a good allocation of resources and to strengthen the competitiveness of the European industry for the benefit of the citizens. These objectives would only be randomly achieved, at the expense of numerous errors, if we were to ignore economic thinking and market dynamics.

This approach has inspired new legislation. For example, as regards the new merger test including unilateral effects or the new block exemption regulations. It has also influenced the policy line, as in the case of the vertical and horizontal antitrust guidelines or the merger guidelines, and influences case work. Finally, the appointment of a Chief

Economist assisted by a team of industrial economists shows my determination to ensure the quality and the influence of economic advice in enforcement and policy making.

This relevant trend, as well as the consumer oriented approach mentioned before, has facilitated and established the grounds for even further international convergence with other competition law enforcers, in particular with the US. Examples of this phenomenon are the new merger guidelines or the approach to hardcore cartels and leniency programs to fight cartels.

Competition policy becomes a tool for structural reform

Another important evolution has been an increased use and presentation of competition policy as a tool to foster structural reform and to promote the 'Lisbon agenda' strategy: to make of the EU 'the most competitive and dynamic knowledge-based economy in the world' by 2010. The recent Commission Communication on pro-active competition policy represents a first step to render more visible the role of competition policy as a key instrument to enhance the competitiveness of European industry.

Further to its general contribution to economic growth and competitiveness, competition policy favours the liberalisation of monopolized markets in sectors such as telecommunications, energy, postal services or transport. This has a positive impact on consumers and encourages investments and innovation. In all enforcement areas, competition policy has been a tool for structural reform. Some examples of this function in the field of anti-trust are the Deutsche Post case, several cases on airline alliances or the removal of territorial sales restrictions for gas supplies, while in the field of mergers there are cases such as the Telia/Telenor, the EDF/ENBW or the BSCH/Champalimaud. Clearly, State aid control has also been useful to foster liberalisation and to further cross-border market integration.

Consolidation of competition policy in Central and Eastern Europe

The enlargement negotiations led to the creation of competition authorities in all the new Member States and remaining candidates for accession, thereby extending competition policy enforcement throughout Central and Eastern Europe. The significance of this event is easily grasped by noting that some of these States were part of the Soviet Union less than 15 years ago.

Enhanced international co-operation in the area of competition

The Commission has played a leading role amongst competition authorities world-wide to foster international co-operation in this area. It has been a founding member of the ICN. This major multilateral forum has quickly grown into a well consolidated network with 86 members that has been productive in different areas of activity, such as international cartels or procedural and jurisdictional issues in the merger field. The Commission has continued to contribute to the other salient multilateral fora on competition: the OECD and the WTO. It has further engaged in international bilateral co-operation to a level unknown before, in particular with the US.

I would like to devote the last part of my intervention to briefly recall the main achievements of this mandate in each field of competition policy and enforcement. I will also mention what I consider as standing challenges in each of those areas.

Antitrust

- There is now a framework to allow the Commission to concentrate on proper enforcement priorities: Major changes such as the modernisation of procedures, the introduction of an economic approach and a careful priority setting have allowed the Commission to move from being an authority mainly processing notifications to an authority focused on prosecuting cross-border cartels and other antitrust infringements of major economic impact.
- A level playing field across the EU for cross-border agreements has been established. Article 3 of Regulation 1/2003 ensures for the first time that a single set of antitrust rules will apply to agreements that have an impact on cross-border trade. Since all competition authorities and national judges are bound by this provision, companies operating across the EU will only need to respect the EU antitrust standard when concluding their agreements, rather than adding to it 25 national rules, as was the case before May 1st, 2004.
- Another development is the creation of the ECN, the network of competition authorities in the EU: The decentralisation of the application of EU competition rules has been accompanied by an enhanced and institutionalised co-operation amongst all EU competition authorities. We have devised a framework to allocate antitrust cases, provided for the necessary means and guarantees to exchange information between EU enforcers and working groups

have been set up for a variety of sectors and issues. This strengthened co-operation leads to more convergence and higher enforcement efficiency across the EU. In my view, the ECN could become a model for other enforcement areas of EU law.

Challenges

- **Pro-active enforcement.** After the abolishment of the notification system, the Commission will concentrate on the prosecution of infringements on the basis of complaints, leniency applications and *ex officio* investigations. It is therefore particularly important to be increasingly aware of market dynamics and performance, sector particularities and obstacles to competition. The recent Commission Communication ‘A pro-active competition policy for a competitive Europe’ already portrays what the future may bring as regards sectoral studies, sectoral inquiries and market investigations.
- **Review in the field of Article 82 EC.** Our policy has undergone a substantial review in all fields of our competence in order to identify possible issues ripe for systematisation, improvement, modernisation or refining in the light of economic thinking. The enforcement of Article 82 EC has not been spared to the extent that Regulation 1/2003 also applies to this provision. However, a review of our policy in this field has only started. There might be scope to offer a comprehensive and systematic approach to abuses of dominance, thereby fostering consistency in a context of multiple enforcers, along with transparency for business.
- **Private enforcement.** The Commission is currently looking at the conditions under which private parties can bring actions before the national courts of the Member States for breach of the Community competition rules. As ruled by the European Court of Justice in *Courage v Crehan*, the full effectiveness of Article 81 would be at risk if it were not open for individuals to claim damages for losses caused by infringements of EC competition law. A study recently published by the Commission found that private action is ‘totally underdeveloped’ in the EU. Such low levels of private enforcement means there is less incentive for companies to comply with the EC competition rules. To facilitate the consultation of all stakeholders and stimulate debate, the Commission will shortly start work on the drafting of a Green Paper on the private enforcement of EC competition law.

- **More emphasis on government restrictions on competition.** Further to the rules addressed to undertakings and further to the rules on State aid, the Treaty contains some provisions addressed to Member States. In the first place, State measures that impose or induce anti-competitive behaviour by undertakings, reinforce the effects of such behaviour or delegate regulatory powers to private operators violate Articles 10 and 81/82 EC. Likewise, Article 86 forbids Member States from adopting measures regarding public undertakings or undertakings enjoying special or exclusive rights that would be contrary to the competition rules of the Treaty. The Commission is responsible for the enforcement of these provisions and this is an area where it would seem to be possible to be more active in the future.

Mergers

- Consolidation of a world-wide leading merger control system.

The recent reform of the EU merger control regime has transformed a very effective system into an even better one. The Merger Regulation has served Europe well. However, it is in constant revision, so as to ensure that it is fitted to grapple with the evolving challenges which it faces. In designing the reform, we were conscious of the need not to undermine the very real merits inherent in the existing system: it has provided a ‘one stop shop’ for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions in the EU; it has guaranteed that merger investigations will be completed within tight deadlines corresponding to the needs of business; transparency has been maintained in the rendering of decisions — each and every merger notified to the Commission results in the adoption and publication of a reasoned decision. In a nutshell, the key rationale underlying the reform was two-fold. On the one hand, it was designed to enhance the transparency and efficiency of the Commission's merger control system and policy. And secondly, it sought to guarantee the system's continuing effectiveness in tackling anti-competitive mergers.

Taking the latter point first, how have we reinforced the effectiveness of our merger control? First, the substantive test has been re-worded so as to make it clear that the Regulation covers all mergers that ‘significantly impede effective competition, ... in particular as a result of the creation or strengthening of a dominant position’ and that there is not some category of post-merger

scenario that we would not be able to tackle. The wording of the new test focuses more directly on the effects on competition arising from a concentration than the old ‘dominance test’, but by retaining the notion of dominance it does not ignore the importance of structural factors in analysing post-merger scenarios.

Second, we have improved the Commission's decision-making process, making sure that our investigations of proposed mergers are firmly grounded in sound economic reasoning. There has been a considerable evolution in economic thinking in recent years, and at the same time we have been facing increasingly rigorous scrutiny in the Community courts — a welcome development, but also a challenging one! To meet these challenges, I have made the enhancement of the Commission's economic expertise a priority: we have seen the appointment of a new Chief Economist, with a skilled team of industrial economists, whose involvement in the decision-making process has ensured that case-handlers can benefit from this expert resource, while decision-makers can enjoy the benefit of an expert, independent and objective opinion on a case's merits.

Third, we have — for the first time in the merger control area — adopted comprehensive guidance on the Commission's approach to the analysis of the competitive impact of mergers between competing firms (horizontal mergers). This guidance, combined with the new test and the enhancement of our economic expertise, should ensure a sounder and more predictable enforcement policy.

How have we improved the transparency and efficiency of the system? First, as I just mentioned, the Commission has adopted comprehensive guidance, thereby providing a clear insight into our enforcement policy. At the same time, the systematic appointment of internal peer review panels for second phase cases, has in my view also reinforced the Commission's objectivity as a regulator by strengthening the already considerable internal checks on the soundness of the investigators' preliminary conclusions.

The new Regulation moreover provides for a number of changes which are aimed at increasing the flexibility of the system while retaining the principle of ex-ante control with clear, legally binding deadlines. In essence, the possibility to extend the deadlines in second phase should enable both the Commission and the parties to better prepare their case, while allowing for greater consultation of third parties and Member States. Moreover, it will be possible to notify a transaction prior to the conclusion of a binding

agreement provided that there is a good faith intent to enter into an agreement. These more flexible rules should allow companies to better organise their transactions without having to fit their planning around unnecessarily rigid rules, and should again facilitate international cooperation in merger cases.

Challenges

The main challenge facing us is, first and foremost, to ensure the determined and consistent implementation of the reforms. The Commission should remain vigilant of the need to constantly guarantee the objectivity of its investigation process, and of the need to re-assure the outside world that it is indeed a regulator of unimpeachable integrity and objectivity. I believe that the internal reforms I have just described should enable us to do so. Other possible challenges are:

- ensuring consistency between the approach to 81/82 and merger control;
- ex-post analysis of the effectiveness of our merger control policy.

State Aid

We can look back with satisfaction on the results of our work in recent years in the field of State aid. We have taken a number of important decisions covering such diverse issues as stranded costs in the energy sector, the competition implications of new market instruments being developed to meet the Kyoto targets, or public banks.

Reduction of the overall level of state aid granted.

The edition of the State aid scoreboard adopted in April 2004 shows that there is a continuing downward trend in aid levels, with Member States broadly meeting the commitments they gave in the Stockholm and Barcelona European Councils to reduce overall aid levels, and reorient aid towards horizontal objectives, such as research and development, development of SMEs etc, and away from the more distortive forms of individual aid.

Particularly as a result of the changes following enlargement, we need to try to refocus our efforts so that we can concentrate our time and resources on important cases which present real competition concerns at the Community level. There are three pillars to State aid reform: **procedural reform**, improvement of the **economic under-pinning** of State aid control and reform of State aid control **instruments**.

Procedural reform: a series of changes to simplify and modernise procedures have been

identified and a Regulation laying down detailed provisions for the implementation of the State aid procedural regulation, including new provisions regarding notification forms, standardised reporting, the interest rate to be used for recovery of illegally granted aid and rules relating to time-limits has been adopted by the Commission and published in the Official Journal. It will be up to the new Commission to consider whether there is a need for other Communications of a procedural nature, in particular as regards the conduct of formal investigations.

The use of enhanced economic methods of investigation, through the reinforcement of the economic resources of the DG, including the contribution of the Chief Economist and the increased recourse to outside consultants, are key elements in **improving the economic underpinning of decisions**. In order to enable scarce resources to be concentrated on cases which give rise to important competition concerns, **new instruments** are being developed to allow for the very simplified treatment of cases which do not give rise to significant concerns as regards distortion of competition or effect on trade.

As regards **the reform of the State aid instruments, as requested by the European Council**, high priority will be given to the adoption of appropriate instruments in order to increase legal certainty regarding the application of the State aid rules to the provision of compensation for the cost of providing **services of general economic interest**. A package of three instruments has been submitted for consultation with Member States, the European Parliament and other interested parties. New guidelines on **rescue and restructuring aid** have been adopted recently in order to remedy the weaknesses identified in the current guidelines before their expiry in October 2004.

As regards **existing instruments**, following the adoption of amendments to the SME and training aid block exemptions, priority will be given to updating and simplifying the State aid frameworks, in particular taking account of the needs for enlargement. This is a complex exercise which will last several years.

Challenges

The Communication on a proactive competition policy already sets out an Agenda of concrete measures for the future development of the State aid rules over the horizon of 2005-2006. In my view, it will remain essential to continue the steady

elimination of incompatible aid and the reorientation of compatible aid towards horizontal objectives that help to develop the Lisbon Agenda.

Final remark

I want to finish by recalling my initial reflection: My action as Commissioner for competition has been guided by the conviction that a strong and

independent Commission is crucial wherever the common interest must be protected against national and vested interests. In each intervention during my mandate I devoted my efforts to making independent and neutral assessments having in mind the common European interest and that of consumers. In my view, this is the only way to properly develop the function I have had the privilege to fulfil.

Following an in-depth investigation the Commission approved the creation of the Sony/BMG music recording joint venture on 19 July 2004

Peter EBERL, Directorate-General Competition, unit B-3

Over the last 15 years, the music industry has witnessed the process of gradual consolidation. The Commission has analysed a number of these concentrations under the Merger Regulation, including EMI/Virgin,⁽¹⁾ Seagram/Polygram (creating Universal Music),⁽²⁾ EMI/Time Warner⁽³⁾ and Bertelsmann/Zomba.⁽⁴⁾ On 19 July 2004, in its most recent decision in this sector the Commission authorised the creation of the Sony and BMG's joint venture for recorded music following an in-depth investigation. The Commission decided to approve the transaction after a detailed analysis and following the parties' response to the Statement of Objections and an Oral Hearing.

The proposed creation of the SonyBMG joint venture was notified on 9 January 2004 and was therefore assessed under the substantial test of Council Regulation (EEC) 4064/89.⁽⁵⁾ The joint venture will combine Sony and Bertelsmann's recorded music businesses worldwide, except for Japan. The scope of the joint venture covers only so-called '*Artist and Repertoire*' (A&R) activities, which comprise the discovery and development of performing artists (singers), and in addition the marketing and sale of records. By contrast, SonyBMG will not be active in the manufacturing and the physical distribution (logistics) of records as these activities remain in the hands of each of the parent companies. Likewise, Sony and Bertelsmann's music publishing businesses are not integrated into the joint venture.

Market structure

The record industry is characterised by the strong position of the five 'majors', namely Universal Music, Sony Music, EMI, Warner Music and Bertelsmann Music Group (BMG) which all have

a worldwide presence and account together for approximately 80% of the market, both in Europe and worldwide. In the European Economic Area (EEA), the rest of the market is composed of a large number of 'independents' with mostly national activities and much lower market shares than those of the majors. Following the merger, Universal and SonyBMG will both have market shares of approximately 25%, ahead of EMI and Warner. Some independents were concerned that the increased degree of concentration might lead to the foreclosure of smaller record labels, for example regarding their access to media and distribution. These concerns were carefully assessed in the Commission's competitive analysis of the proposed transaction.

Since 2000, demand for recorded music has decreased in most European countries. However, there are conflicting opinions as to the causes of this decline. Whilst the music majors and some experts mainly blame illegal downloading (in particular peer-to-peer file sharing) and counterfeiting, some recent empirical studies conclude that '[illegal] file sharing can only explain a tiny fraction of this decline'.⁽⁶⁾ Other explanations received in the market investigation pointed to a perceived high price level of records and the failure of the record companies to satisfy consumer tastes. However, more recently there have been some signs of a market recovery in the U.S., as well as in the UK and some other European countries.

The Commission's Decision

The Commission examined whether the proposed concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the

⁽¹⁾ Case No IV/M.202 – Thorn EMI / Virgin Music; Commission Decision of 27 April 1992.

⁽²⁾ Case No IV/M.1219 – Seagram / Polygram; Commission Decision of 21 September 1998.

⁽³⁾ Case No COMP/M.1852 – Time Warner / EMI; concentration abandoned.

⁽⁴⁾ Case No COMP/M.2883 – Bertelsmann / Zomba; Commission Decision of 2 September 2002.

⁽⁵⁾ Cf. Article 26(2) of Council Regulation (EC) No 139/2004.

⁽⁶⁾ Cf. F. Oberholzer, K. Strumpf: *The Effect of File Sharing on Record Sales – An Empirical Analysis*, Harvard, March 2004.

following markets: (i) recorded music; (ii) licences for online music; and (iii) online music distribution. In addition, as both parent companies remain active as music publishers, the Commission also assessed whether the joint venture would result in the coordination of Sony and Bertelsmann's competitive behaviour in the music publishing market which is closely related to the recorded music market.

The relevant markets

The market for recorded music comprises the recording of music in different formats, in particular CDs. In this case it was not necessary to decide whether this market should be further segmented on the basis of different genres or compilations. The geographical scope of the market for recorded music was considered to be national, in particular because consumer preferences and prices vary significantly among Member States.

The Commission concluded that the emerging online music markets are separate from the recorded music market. This distinction is mainly based on differences regarding the modes of distribution, the scope of the users' rights, and the characteristics of demand (online demand focuses on single tracks whereas the large majority of CD sales are albums). Within online music, two markets could be distinguished: (i) the wholesale market for licences for online music where online music service providers acquire licences from record companies to exploit the music of the artists of these record labels; and (ii) the retail market for online music distribution where service providers deliver online music to end-consumers, either for (permanent) downloading or (temporary) streaming. The Commission considered that both online markets were still national in scope, in particular because the (wholesale) licence agreements are usually concluded on a country-by-country basis with territorial restrictions and differences in prices and rules of usage. As a consequence service providers propose country-specific offers at the retail level. The Commission recognises, however, that the geographical scope of these markets may become larger in the future if cross-border licence arrangements develop and pan-European online music platforms emerge.

Creation or strengthening of a dominant position

On the market for recorded music, the Commission examined whether the proposed concentration would either create or strengthen a collective dominant position of the four remaining major record companies. The market investigation indicated a number of market characteristics which appeared to be conducive to collective dominance, such as multi-market contacts due to the vertical integration of the majors, a stable common customer base, and the weekly publication of charts. In addition, there are considerable structural links among the majors in the form of compilation, licensing and distribution joint ventures and agreements. The Commission's assessment was conducted in line with the criteria laid down by the European Courts, ⁽¹⁾ in particular in the Court of First Instance's *Airtours* judgement of 2002. ⁽²⁾ According to the CFI, in order to establish collective dominance, the Commission must prove a common understanding of the companies as to the scope of coordination, for example regarding prices. Furthermore, the markets must be sufficiently transparent to enable the companies involved to monitor whether the terms of the common understanding are adhered to by the other participants. In addition, there must be a deterrent mechanism in case of deviation. Finally, customers as well as current and future competitors should not be able to jeopardise the results expected from the coordination.

In assessing whether there was an existing collective dominant position on the national markets for recorded music that could be strengthened as a result of the concentration, the Commission examined whether a coordinated pricing policy of the five majors could be identified for the last four years. For this purpose the Commission examined in a three-step analysis whether there had been any alignment of (i) average wholesale net prices, (ii) wholesale list prices, and (iii) discounts to customers. As far as net prices are concerned, the Commission analysed the development of average wholesale net prices for each major's 100 top-selling albums which cover 70-80% of their total music sales. The econometric analysis of these data showed a certain parallelism of the five majors' wholesale average prices in most of the countries considered. However, the correlation of

⁽¹⁾ Cf. Court of Justice, Joint cases C-68/94 and C-30/95, *France v. Commission* ('Kali&Salz'), ECR 1998, I-1375; Court of First Instance, Case T-102/96, *Gencor v. Commission*, ECR 1999, II-753.

⁽²⁾ Court of First Instance, Case T-342/99, *Airtours v. Commission*, ECR 2002, II-2585.

the price development among the majors was not sufficiently close to establish by itself price coordination in the past.

Secondly, the Commission therefore examined whether any price coordination could have been reached in using list prices, so-called 'Published Prices to Dealers' (PPDs), as focal points. Although some of the majors apply more than 100 PPDs in some countries, the investigation showed that each party's five most important PPDs account for 50-80% of their respective total sales, depending on the country. In addition, the Commission found that the most important PPDs of all majors are usually set relatively close to each other. On the basis of the list price analysis price coordination would thus have been possible.

Thirdly, the Commission looked at any indications of coordination on the level of discounts. According to the parties, different kinds of discounts are granted to their customers, namely file and campaign discounts on the invoice level, as well as retrospective discounts on a volume basis and 'co-op' spending for marketing measures. The market investigation showed that, although the relative importance of these discounts varies to some extent among Member States, invoice discounts are regularly the most important category of discounts. However, in a customer-by-customer comparison the Commission found a certain degree of fluctuations and differences between the parties' invoice discounts as well as variations over time and from album to album. The market investigation indicated that these fluctuations are mainly the result of so-called '*campaign discounts*'. On the basis of these observations the Commission could therefore not find sufficient evidence that invoice discounts have been aligned between the parties.

The Commission further assessed whether the market for recorded music has been sufficiently transparent to enable the majors to monitor each other's pricing behaviour. Whilst the investigation indicated a certain degree of transparency with respect to weekly charts and the use of PPDs, it also showed that some discounts are less transparent. The rather flexible use of campaign discounts decreased transparency and made the monitoring of any common understanding quite difficult. In addition, market transparency was somewhat reduced by the largely differentiated music content, in spite of a certain homogeneity in the format, pricing and marketing of records. On balance the Commission therefore concluded that there was not sufficiently strong evidence to establish an existing collective dominant position

of the five majors in the markets for recorded music.

The Commission also examined whether the concentration would create a collective dominant position on the markets for recorded music. The proposed operation leads to a consolidation from five to four majors and thereby reduces the number of competitive relationships among them. This would in principle facilitate the monitoring of the market. However, in view of the lack of sufficient transparency on the level of discounts in the past, the Commission did not find sufficient evidence to prove that the reduction from five to four majors in itself would alter the market structure substantially enough to result in the likely creation of collective dominance in the recorded music markets.

On the wholesale market for licences for online music, the Commission examined whether the concentration would lead to the creation or strengthening of a collective dominant position of the majors. As this market is currently emerging and no public industry data is available, it is difficult to determine the market positions of the different record companies. On the basis of the information collected by the Commission it appears that the market positions of the majors on the wholesale market for licences for online music are by and large similar to their positions on the markets for recorded music.

Regarding prices, some responses of market players stated that online licence fees were quite high given the cost savings for the production and distribution of the physical carrier and given that no obsolescence costs are incurred. The Commission thus further investigated whether there was any alignment of licence fees. However, it found some differences among the majors in terms of prices and rules of usage and therefore concluded that there was not sufficient evidence of an existing collective dominant position. Regarding the possible creation of a collective dominant position on the market for licences for online music, the Commission did not find sufficient evidence that the reduction from five to four majors would lead to a coordination of prices and usage conditions since these are currently in flux due to the developing state of the market. Therefore, the likely creation of collective dominance on this market could not be established.

Concerning the retail market for online music distribution, third parties raised concerns that, as a result of the transaction, Sony could obtain a position of single dominance on the national markets for online music distribution via its Sony Connect music downloading service. These third parties

feared that Sony could use the joint venture's music content, in combination with Sony's proprietary compression/decompression ('codec') format and its proprietary digital rights management system ('DRM'), to foreclose competitors in the downstream market for online music distribution. However, the investigation revealed that Sony Connect was only launched in some European countries in July 2004 and faces a number of serious actual or imminent competitors such as OD2, Apple's iTunes, RealNetworks and Microsoft. The Commission therefore concluded that Sony was unlikely to achieve a position of single dominance in the national markets for online music distribution.

Spill-over effects

Both Sony and BMG continue to be active — outside SonyBMG — as music publishers, via BMG Music Publishing and Sony/ATV Music Publishing, a joint venture between Sony and Michael Jackson. The Commission therefore assessed, on the basis of Article 2 (4) of the EC Merger Regulation, any potential spill-over effects of the transaction on the upstream markets for music publishing. Music publishers manage the rights of authors and composers as opposed to record companies which sign singers and other performing artists. Authors and composers receive different kinds of royalties from the various users of their lyrics and melodies: 'mechanical rights' which are due by record companies for the reproduction of musical works; 'performance rights' which are payable by radio and TV broadcasters, concert organisers, or discotheques for the public performance of songs; 'synchronisation rights' which are due for the use of musical works in movies and other audiovisual works; and 'printing rights' which are payable by publishers of sheet music. It was not necessary for the Commission to decide whether the music publishing market should be further segmented on the basis of the type of publishing right. Likewise, and in spite of some indications for national markets, the geographical scope of the market could also be left open.

In its assessment pursuant to Article 2 (4) of the Merger Regulation, the Commission examined the likelihood of coordination of the competitive behaviour of BMG Music Publishing and Sony/ATV in music publishing with a view to favouring SonyBMG on the downstream market for music

recording. However, the administration of mechanical rights and performance rights, which are the relevant publishing rights at stake, is mainly carried out by the collecting societies such as GEMA in Germany or SACEM in France. Licences are granted by the collecting societies on a non-discriminatory basis and royalties are agreed between collecting societies, publishers, authors and composers. In light of these facts the Commission concluded that the creation of the SonyBMG joint venture would not be likely to have as its effect the coordination of the competitive behaviour of Sony and BMG's publishing businesses.

Conclusion

The Sony/BMG case illustrates the different steps in the Commission's competitive analysis which are required to establish that a concentration would lead to the creation or strengthening of collective dominance. The Commission carried out a very careful investigation in order to comply with the high standard of proof set by the CFI in its *Airtours* judgement. In the course of the enquiry millions of data sets were processed in order to analyse the past pricing behaviour of the five majors. After a careful analysis the Commission concluded, however, that the evidence available was not sufficiently strong to prove collective dominance and therefore approved the merger. Nevertheless, the high degree of concentration in the music industry remains a concern and the Commission will continue to closely monitor the development of the music markets. It is noteworthy that any future concentration will be assessed under the EC Merger Regulation No 139/2004.

The Sony/BMG case also provides an example of effective and close EU-U.S. cooperation in the field of merger control. It is interesting to note that the Federal Trade Commission (FTC) had similar concerns and reached the same conclusions as the European Commission. When the FTC closed its investigation on 28 July 2004, Commissioner Mozelle Thompson observed: '[...] The industry is highly concentrated among record labels, and the proposed joint venture will only enhance this concentration. [...] I acknowledge, however, that our investigation to date has not unearthed sufficient evidence on which to conclude with reasonable certainty that the proposed venture is likely to facilitate coordination in the relevant market in violation of the antitrust laws.[...]' (1).

(1) Statement of Commissioner Mozelle W. Thompson (FTC File No. 041-0054); published on the FTC website: <http://www.ftc.gov/os/caselist/0410054/040728mwtstmnt0410054.pdf>.

Presumed margin squeeze for broadband access in Germany: settlement with Deutsche Telekom

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In February 2004, the Directorate-General for Competition concluded a settlement with Deutsche Telekom AG (DT) in a case concerning a presumed margin squeeze for broadband access in Germany. The investigation had been opened in 2002, following a complaint by QSC AG, an alternative German provider of DSL services that is competing with DT. According to the complainant, the margin between DT's retail tariffs for ADSL and the corresponding wholesale tariffs for line sharing was insufficient to allow new entrants to compete with DT on the retail market. This in turn was supposed to have allowed DT to become the quasi-monopolist for ADSL services in Germany, ever since those broadband services were offered on the mass market.

The settlement followed preliminary investigations in accordance with the method for assessing a margin squeeze as developed in the Commission decision of 21 May 2003 ('Deutsche Telekom'), where DT's pricing strategy for local access to the fixed telephony network was found to be contrary to Art. 82. ⁽¹⁾ In that decision, the scope of the abuse was however considerably larger than in the case now settled, since it referred to DT's pricing strategy for access to its local fixed telephony network whereas this case referred to DT's pricing strategy for mere broadband access.

1. Broadband access in Germany

Broadband access to end-customers allows for the provision of a wide range of electronic communications services, such as high speed Internet access and the transmission of important data volumes. Those services can be delivered via the fixed telephony network as well as other technologies, such as upgraded cable TV networks. However, no competing technology is sufficiently developed in Germany in order to present an economically viable alternative for DT's competitors. As it is also economically impossible for new entrants to fully replicate DT's local communication infrastructure (local loops) that was built over a century under a state monopoly, new entrants need

access on fair and non-discriminatory terms to those local loops to be able to offer broadband services to end-users.

The frequency spectrum of local loops can be split into a low frequency range, suited for the provision of traditional voice telephony services, and a high frequency range enabling the provision of broadband access. When both are rented out to new entrants, this amounts to full local loop unbundling, whereas the renting out of the mere high frequency range leads to the shared use of local loops (line sharing). Similarly to local loop unbundling, line sharing enables new entrants to offer individually composed services to end-users via a direct connection. In contrast to local loop unbundling, this direct link however relates to the data transmission part of a local loop only so that another operator may still offer its voice telephony services via the same shared line.

Both full local loop unbundling and shared access to local loops were imposed on notified incumbent operators by way of an EU-Regulation as from 1 January 2001. ⁽²⁾ Despite this clearcut regulatory obligation, line sharing has only been made available in Germany in March 2002, when the line sharing tariffs were first set by the German regulatory authority for telecommunications and post (RegTP). According to the preliminary investigations in this case, DT has adopted an anti-competitive tariff structure since then, by not respecting a sufficient margin between the line sharing tariffs at wholesale level and its ADSL tariffs at retail level. As RegTP did not regard those retail tariffs as being subject to ex ante regulation, DT could fix them autonomously.

In this context, is also noteworthy that, during the past years, DT has not offered competitors other complementary wholesale products such as bitstream access or ADSL resale which would also have enabled new entrants to directly provide end-users with broadband services. ⁽³⁾ As a result and despite of numerous alternative operators present

⁽¹⁾ OJ L 263, 13.10.2003, p. 9; under appeal before the CFI as case T-271/03.

⁽²⁾ Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18.12.2000 on unbundled access to the local loop, OJ L 336, 30.12.2000, p. 4. Full local loop unbundling had already been made available in Germany from 1 January 1998 onwards.

⁽³⁾ After the settlement, DT has meanwhile introduced an ADSL resale offer.

on the German market, in 2003 DT still held more than 90% of all ADSL lines marketed by then.

2. The settlement and its implementation

The settlement followed preliminary investigations of the Commission according to the margin squeeze test as it was established in the decision of 21 May 2003. Therein, the Commission stated that a margin squeeze can be found to exist if a vertically integrated operator which is dominant both on the wholesale and the retail market, charges its competitors prices for wholesale access which are either higher than the respective retail prices or lead to a margin between both prices which is insufficient to cover the product-specific costs for the provision of the retail services. Under such a margin squeeze, competitors can never make a profit, because they also have other costs to incur before being able to make comparable retail service offerings.

However, instead of opening formal proceedings against DT, the Commission has accepted DT's commitments to fully close the presumed margin squeeze on a lasting basis as from 1 April 2004. ⁽¹⁾ In its commitments, DT offered first of all to refrain from charging the monthly line sharing fees from its competitors between 1 April 2004 and 31 December 2004. From 1 January 2005 onwards, DT proposed to substantially reduce its line sharing tariffs on a lasting basis. DT also decided to increase some of its ADSL retail tariffs as from 1 January 2005. As the line sharing tariffs are subject to approval by RegTP, DT committed itself to file a request for their reduction, so that RegTP was obliged to take a decision about those tariffs. Finally, DT committed to regularly report facts and figures to enable the Commission to check and ensure that no margin squeeze for broadband access will reappear.

After the Commission accepted these commitments in February 2004, DT publicly announced in March 2004 that it intended to substantially lower its line sharing tariffs on a permanent basis and that it will increase some of its ADSL tariffs as of 1 January 2005. Accordingly, DT applied in April 2004 to RegTP for a substantial decrease of the monthly line sharing tariff (about 50%) which

was granted at the end of June 2004. ⁽²⁾ Following those announcements and tariff changes, the Commission was therefore in a position to conclude that DT has implemented its commitments. The case could therefore be closed.

3. The role of the German regulator — Scope for the Commission to act

RegTP has played an important role in this case. By approving the substantial decrease of DT's monthly line sharing tariff, it has enabled DT to remedy the presumed margin squeeze to a large extent at the wholesale level. In doing so, RegTP has supported the Commission's intention to terminate the presumed anti-competitive tariff structure quickly and in a consumer-friendly manner.

On the other hand, RegTP has already had a significant influence over the tariff structures which were subject to this case before the Commission started its investigations. In March 2002, RegTP fixed the line sharing tariffs for the first time, however without carrying out a full-fledged margin squeeze test which should have taken into account the level of DT's ADSL tariffs.

Despite the fact that a regulatory decision had thus contributed to the presumed margin squeeze, the investigations were directed against DT. This is due to the fact that DT had over the entire period under examination, i.e. since March 2002, enough entrepreneurial freedom to terminate the margin squeeze, in particular by increasing the retail tariffs for ADSL.

4. Impact of the settlement

Since the settlement only became fully effective with RegTP's decision approving the reduced monthly line sharing tariffs at the end of June, it is yet too early to judge about the market impact of the new tariff structure because it usually takes new entrants six to nine months to roll-out their network in order to provide end-users with broadband access via line sharing. ⁽³⁾ However, in other EU Member states, like France for example, the decrease of line sharing tariffs has led to a substantial rise in the number of shared lines.

⁽¹⁾ It should however be noted that DT has offered its commitments on the reservation of its rights concerning its appeal of the Commission decision of 21 May 2003.

⁽²⁾ Decision BK 4a-04-026 of 25 June 2004.

⁽³⁾ In this context, it is worthwhile noting that, after the decision of 21 May 2003, the number of newly unbundled local loops per quarter has recently become the highest ever since the full liberalisation.

Commission authorizes restructuring aid to Alstom under conditions

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1. Introduction

On 7 July 2004 the Commission adopted a decision to authorize State aid to Alstom under a series of important and innovative conditions. This decision closes the investigation procedure initiated in September 2003. The assessment phase of the case has attracted intense interest from the media and from interested parties: indeed the Commission has received submissions from numerous actors — competitors, clients, suppliers, trade unions, local authorities — who intervened in the procedure. The attention the case received can be attributed to the importance of the company — Alstom is a leading engineering group which employed more than 100 000 persons in 2003 — and to the high amount of aid France intended to grant.

2. Alstom's activities and competitors

Alstom is an engineering group which had a turnover of € 21.3 billions for the year 2002-2003. It is active in three different markets:

- It designs, builds and services infrastructures and systems for the power generation market (hereafter 'Power'). Besides Alstom, three other players offer a broad range of products and have a significant market share at world level: GE, Siemens and Mitsubishi HI.
- It designs, builds and services products and systems for the rail transport market (hereafter 'Transport'). Alstom is a leader player in that market together with Bombardier and Siemens.
- It builds complex ships, mainly LNG tankers and cruise ships (hereafter 'Marine'). The latter market is dominated by European companies, namely Alstom, Fincantieri, Aker Kvaerner and Meyer. Marine represents a smaller share of Alstom turnover than Power and Transport.

Until 2003, Alstom was also active in building infrastructures for transmission and distribution of power (hereafter 'T&D').

One characteristic of these markets is the importance of being able to obtain guarantees, more

precisely bonding. Bonding is provided through a financial institution by the supplier (e.g. Alstom) to the buyer of goods that can be delivered several years after being ordered... The purpose of bonding is to guarantee the buyer against the risk that the supplier does not deliver the ordered good, or delivers a good that does not fulfil all the requirements. The cost and availability of bonding to the supplier depend on its financial strength and is inversely related to the risk the financial institutions attribute to its business.

3. On the way to bankruptcy

During the three fiscal years from 2001-2002 to 2003-2004, Alstom booked cumulated losses of nearly € 3.5 billion which led the company to the verge of bankruptcy. Alstom's equity was close to zero at the end of this period, from more than € 2 billion at the start. The company was consecutively facing increasing difficulties to satisfy its bonding needs on the market, which in turn limited the possibility to conclude new contracts. Therefore, in the summer of 2003, Alstom called upon the State for help in order to avoid imminent bankruptcy.

It seems that this situation was mainly the consequence of insufficient risk management and strategic errors. Firstly, in 2000 Alstom bought the gas turbine business of ABB and all contractual liabilities linked to it. It rapidly turned out that the delivered turbines did not match the performances promised to clients. In total, financial compensations to clients and technical improvements on the delivered turbines represented an unexpected cost of € 4 billion for Alstom. Secondly, the company provided guarantee on loans granted to clients upon order of cruise ships. When some clients filed for insolvency, Alstom was liable for nearly € 1 billion. Thirdly, Alstom began the building of a series of trains before the receipt of all the specifications. As the latter turned out to be different than expected, Alstom had to perform adaptations representing € 140 million additional costs.

Besides these company-specific problems, the economic environment was also less favourable from 2001 onwards. After years of strong growth, demand for power plants and cruise ships began to decline. Moreover, after 11 September 2001, risk aversion increased and financial institutions were more reluctant to grant bonding, especially to less solid companies.

4. State aid and private financial contribution

The decision adopted by the Commission recognised that Alstom fulfilled the conditions to be eligible for rescue and restructuring aid. In particular, the Commission found that a restructured Alstom can operate as a healthy market player in the world industry. For this reason, the Commission authorised the involvement of the French State alongside private operators in the turnaround of the company.

The decision authorises the following State aid:

- € 100 million of short term and 300 million of long term senior loans
- Participation up to € 1 billion in two capital increases
- A second rank guarantee of € 1.25 billion covering an 8 billion bonding facility. During the past twelve months, the State also provided a guarantee on another bonding facility. This one year guarantee was considered to represent € 411 million of aid. In total, guarantees on bonding therefore represent half of the more than € 3 billions of aid authorised.
- In order to replace bonding unavailable when Alstom was on the verge of bankruptcy in 2003, the government provided written guarantees to Gaz de France and SNCF for the good execution of the orders they placed to Alstom during that period.

Besides this public intervention, financial institutions and other private investors intervene massively to provide Alstom with new financial means. The conditional decision is based on their participation in the following form:

- € 300 million of senior loans
- € 2.1 billion of subordinated loans (part of which can be converted in capital)
- Participation between € 1.13 and € 1.3 billion in three capital increases
- Bonding facility of € 8 billion (2 year revolving period). As first losses on this facility are guaranteed by a cash collateral (€ 700 million) and in second rank by the State, the exposure of the banks amounts to € 6.05 billion.

Finally, Alstom generated itself financial means. The restructuring plan started in March 2003 led to the sale of two major departments, small gas turbines to Siemens and T&D to Areva, which brought in nearly € 2 billion. The revenue of additional divestitures required by the Commission will increase this amount. Additionally, Alstom will use € 700 million raised by means of the last capital increase to create a first loss guarantee covering the € 8 billion bonding facility.

5. Conditions linked to the authorisation of the restructuring aid

The *Community guidelines on State aid for rescuing and restructuring firms in difficulty* were the legal base used by the Commission for the assessment of the aid. They establish a set of conditions which have to be fulfilled in order to consider the aid as compatible with the common market on the basis of Article 87 (3) (c) of the Treaty:

5.1. Restoration of viability

Combined with the financial injections exposed in section 4, the wide reaching operational restructuring plan presented by France following the decision to initiate the investigation procedure and consisting of reorganisation, plant closures and personnel reductions, was deemed sufficient to tackle the majority of the problems and overcapacity identified by the Commission. However, two weaknesses remained and endangered long term prospects. On the one hand, restructuring in the Marine sector was insufficient in comparison with the level of orders expected for the next years. This sector had to break even from a lower level of demand. On the other hand, the net income of Alstom foreseen at the end of the restructuring period was very low and could not be considered as a sufficient buffer against unexpected problems.

Accordingly, in addition to the full execution of the restructuring plan, the authorisation of the aid is conditional on deeper restructuring in the Marine sector and, in order to improve long term viability, on the conclusion of one or several industrial partnerships covering a significant part of Alstom's activities. The partners have to be financially sound and to contribute to the partnership from a financial and an industrial perspective.

5.2. Avoidance of undue distortions of competition

Without the aid granted by France, Alstom would have gone bankrupt. Part of its activities would

have been taken over, but others would have simply disappeared. This could have been the case for the Gas Turbine and Marine sectors, where the bulk of Alstom's problems comes from. The State intervention, by keeping Alstom alive, creates an important distortion in these markets where most of the competitors, have large plants and employ tens of thousands of workers within the European Union. Accordingly, the Commission had to put conditions in order to minimize distortions created by the aid and to compensate competitors.

In this context, section 2 here above illustrates one of the main challenge the Commission faced, namely the oligopolistic structure of Alstom's markets. As compensatory measures, 'traditional' divestments could have reinforced this structure and created or strengthened dominant positions. In order to solve one distortion of competition this may have created another one. Another analytical challenge was the assertion of Alstom that within the Power sector, the most important sector of the company, the sale of certain departments would put the whole chain of value at risk and make the company not viable. The decision adopted by the Commission solves these constraints by a careful choice of the activities to sell and by including a series of rarely used — but foreseen in the guidelines — measures to limit Alstom presence on certain markets:

- In addition to the sales of the small gas turbines and the T&D sectors, which represented 20% of Alstom's turnover, additional divestitures representing another 10% was required.
- A joint venture has to be created, covering the hydro power activities of Alstom.
- The conclusion of industrial partnerships, in addition to improve viability, will force Alstom to share its control on important activities. If the partner is controlled by the State, previous approval of the Commission is required in order to avoid hidden subsidies.

Three other conditions were specifically targeted at the Transport sector:

- France committed itself to several structural measures which should contribute to the opening of the French rolling stock market, which now remains to a large extent national.
- Margin in the different sub-sectors will be yearly controlled during 4 years to verify the absence of predatory pricing
- Total amount devoted to acquisitions of companies during the next four years is capped to € 200 million.

Eventually France committed itself to sell its participation in Alstom's capital before 4 years. As State aid takes to a large extent the form of capital injection, the exit of the public shareholder will contribute to restore initial competitive situation in this market.

5.3. *Aid limited to the minimum*

The limitation of aid to the minimum represented a challenge for the Commission as financial needs of Alstom were huge. The company needed to reconstitute its equity after its total depletion due to several billion losses. In addition restructuring costs should amount to nearly 1 billion. Finally, it was impossible for Alstom to recover without the availability of bonding. In this context, the Commission recalled several times that the contribution from financial institutions, private investors and the company itself has to be increased to the maximum possible. The Commission estimates this is the case in the package included in the conditional decision described in section 4. It is worth noting that the maximum exposure of the State is considerably lower in this package than the package initially foreseen by the French authorities. Moreover, the early amortisation of the State guarantee on the bonding facility and its exit as shareholder will limit the length of the aid

The control on margins and on the size of acquisitions in the Transport sector mentioned previously will avoid that State aid, which became necessary because of exceptional losses in the Marine and gas turbine sectors, is diverted to Transport in order to finance predatory behaviours. Indeed, in a conglomerate structure such as Alstom's, it was impossible to direct State aid to specific sectors. The aid was granted at Corporate level. Pricing policy and external growth, since they constitute external behaviours, can be controlled by the Commission and will be used as indicators to check that the advantage of the aid is not used where it was not needed.

6. Conclusion

The Alstom case illustrates the paramount importance of State aid control performed by the Commission. On the one hand, France legitimately wanted to avoid bankruptcy of such a high profile engineering group. On the other hand, its intervention had to be controlled in order to avoid that the whole burden of the adjustment falls on Alstom's competitors and their tens of thousands of European workers.

France Télécom bénéficie de deux aides d'Etat illégales

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Au début du mois de décembre 2002, les Autorités françaises ont formellement notifié à la Commission les mesures qu'elles entendaient adopter pour sortir France Télécom («FT») de la crise financière dans laquelle l'entreprise se trouvait. Ces mesures comprenaient notamment la mise en place par l'ERAP (un Etablissement Public Industriel et Commercial) d'une avance d'actionnaire de 9 Mrds € sous forme d'une ligne de crédit au profit de FT. Cette avance d'actionnaire s'inscrivait dans le contexte du plan de redressement dénommé «Ambition 2005» qui a été présenté par les nouveaux dirigeants de l'entreprise le 4 décembre 2002. Le plan Ambition 2005 reposait sur les volets suivants: (i) opérationnel (dit «plan TOP»), l'entreprise devant améliorer ses résultats opérationnels pour dégager 15 Mrds € additionnels de flux de trésorerie; (ii) refinancement de la dette pour un montant de 15 Mrds €; et (iii) renforcement des fonds propres avec une opération d'augmentation de capital de 15 Mrds €. L'avance d'actionnaire constituait ainsi l'anticipation de la participation de l'Etat à l'opération d'augmentation de capital en question.

Ayant des doutes quant à la légalité des mesures notifiées au regard des règles sur les aides d'Etat, la Commission a ouvert, en janvier 2003, une procédure formelle d'examen à l'encontre du projet d'avance d'actionnaire. Cette ouverture de procédure a également couvert le régime de la taxe professionnelle applicable à l'entreprise, le régime en cause ayant fait l'objet d'une plainte. Les investigations de la Commission ont duré jusqu'à la moitié de l'année 2004. Vu la complexité du cas, la Commission a estimé opportun de faire appel à un expert externe. Suite à un appel d'offre, le cabinet NERA et le professeur Berlin ont été chargés d'analyser plusieurs questions de nature économique et juridique. Finalement, le 2 août dernier, la Commission a adopté deux décisions séparées: une sur l'avance d'actionnaire et l'autre sur le régime de la taxe professionnelle.

I. Avance d'actionnaire et déclarations des autorités publiques

Le contexte factuel

Le contexte factuel a été un élément clé dans le raisonnement de la Commission. A ce titre, il est nécessaire de rappeler certains faits essentiels.

Notamment, France Télécom a accumulé une dette d'un montant de 63 milliards d'euros au 31 décembre 2001 (avec un ratio d'endettement passant de 0,78 en 1999, 0,89 en 2000 et 0,92 en 2001). En 2002, le marché a anticipé le fait que FT aurait des difficultés à refinancer sa dette et en conséquence, durant la première moitié de l'année 2002, la notation de FT n'a cessé d'être dégradée par les agences de notation. En juillet 2002, alors que la notation de FT était au seuil de la dégradation à un niveau de *junk bonds*, le gouvernement a publiquement déclaré son intention de soutenir l'entreprise. Toute dégradation de la notation de FT à un niveau de *junk bonds* aurait eu de graves conséquences financières pour l'entreprise, pouvant aller jusqu'à remettre en question la recapitalisation telle qu'elle a finalement été réalisée ainsi que les conditions entourant le projet d'avance lui-même. L'Etat a confirmé à plusieurs reprises, et de manière de plus en plus précise, son soutien à l'entreprise durant les mois de septembre, octobre puis décembre 2002. Ces déclarations ont créé un effet d'attente et de confiance sur les marchés financiers empêchant la dégradation de la notation de FT au rang de *junk bonds*. Cet effet a également été relevé par l'étude effectuée par NERA. L'expert a ainsi mis en évidence que la réaction du marché ainsi que les commentaires des analystes financiers confirmaient que le marché avait considéré ces déclarations comme une stratégie d'engagement crédible de l'Etat vis-à-vis de France Télécom. Ainsi, l'intention affichée par l'Etat de soutenir l'entreprise a été déterminante — selon les agences de notation elles-mêmes — pour empêcher toute dégradation ultérieure de la notation.

Les interventions orales de l'Etat relatives au soutien de l'entreprise se sont achevées par le communiqué du ministère des finances du 5 décembre 2002 dans lequel étaient annoncées la future augmentation de capital et l'anticipation de la participation de l'Etat sous forme de la ligne de crédit.

Points juridiques soulevés par le cas

La question de savoir si les déclarations en question (vu qu'elles avaient produit des effets sur les marchés financiers) devaient être considérées comme des aides d'Etat à part entière a été soulevée. En effet, il existait des éléments, notam-

ment de droit national, qui tendaient à démontrer qu'un investisseur privé qui aurait fait les mêmes déclarations aurait été lié par ses propos. En d'autres mots, il a été discuté du point de savoir si ces déclarations devaient être considérées comme des promesses contraignantes pour le gouvernement susceptibles ainsi d'engager les ressources de l'Etat. La Commission a conclu que, même si la thèse selon laquelle les déclarations constituaient des aides n'était pas manifestement infondée, elle ne disposait pas d'élément suffisant pour conclure avec certitude que cette thèse était applicable au cas d'espèce. En revanche, il est apparu clairement aux yeux de la Commission que les mesures notifiées ne pouvaient pas être analysées sans prendre en compte les déclarations par lesquelles l'Etat avait manifesté son intention de prendre les mesures adéquates pour résoudre les difficultés financières de FT, à savoir les mesures qui ont été notifiées en décembre. La Commission a conclu que le soutien octroyé par la France à FT, par l'intermédiaire du projet d'avance d'actionnaire, examiné à la lumière des déclarations répétées du Gouvernement, constituait une aide d'Etat.

L'avance d'actionnaire

Dans ce contexte, la Commission a examiné l'offre de projet d'avance d'actionnaire. Tout d'abord, la Commission a dû répondre à l'argument soulevé par les Autorités françaises selon lequel comme le contrat d'avance n'avait pas été signé par FT, il n'y avait pas eu engagement de ressources d'Etat. Or, l'annonce de la mise à disposition de l'avance couplée avec la réalisation des conditions préalables à cette mise à disposition (lesquelles donnaient au marché l'impression que l'avance était déjà en place) et finalement l'envoi à FT du contrat signé par l'ERAP ont entraîné une charge potentielle pour les ressources de l'Etat ⁽¹⁾. En effet, FT aurait pu signer ce contrat à tout moment s'octroyant ainsi le droit d'utiliser cette ligne de crédit.

L'offre de l'avance d'actionnaire a amélioré de manière significative la situation financière de l'entreprise notamment au regard de ses problèmes de trésorerie. Par conséquent, les services ont examiné s'il s'agissait d'un avantage que FT n'aurait pas obtenu dans des conditions normales de marché conformément au principe de l'investisseur privé avisé.

L'application du principe de l'investisseur privé avisé

En résumé, les conditions de marché ont été influencées par les déclarations du gouvernement.

Ces interventions préalables doivent donc être prises en compte lors de l'analyse de la présence d'aides dans les mesures de décembre et l'application du principe de l'investisseur avisé doit se fonder sur une situation de marché non contaminée par l'impact des déclarations. Par conséquent, l'examen de la Commission a été effectué en prenant en considération la situation antérieure aux déclarations, dont l'offre de l'avance constitue la matérialisation. Compte tenu de la situation financière très déséquilibrée de France Télécom, du fait que le plan de désendettement annoncé par les dirigeants en mars 2002 avait été jugé irréaliste, que France Télécom avait perdu la confiance des marchés, qu'à cette époque aucune mesure visant à améliorer la gestion de l'entreprise et ses résultats n'avait été prise ni un audit approfondi commandé, que le gouvernement n'avait pas, selon ses dires, une idée claire de la solution à apporter pour résoudre la crise de FT, la Commission a conclu qu'un actionnaire privé avisé aurait été plus prudent. Un investisseur avisé n'aurait très vraisemblablement pas, en juillet 2002, formulé de telles déclarations de soutien susceptibles, d'un point de vue purement économique, d'engager sérieusement sa crédibilité et sa réputation et, d'un point de vue juridique, à même de le lier dès cette date à soutenir financièrement l'entreprise. En toute vraisemblance, préalablement à de telles déclarations d'un soutien ouvert et inconditionnel, un actionnaire privé aurait d'abord vérifié la situation financière de l'entreprise dans les détails et se serait fait une idée sur les solutions à apporter. Il est d'autant moins probable qu'un investisseur avisé aurait offert d'octroyer une avance d'actionnaire en assumant à lui seul un risque très important.

Le principe d'égalité entre entreprises privées et publiques

D'autre part, la Commission n'a pas accepté l'argument selon lequel cette approche violerait le principe d'égalité entre investisseur privé et investisseur public. A ce propos, la Commission a précisé qu'il n'était pas question d'empêcher l'Etat de se comporter comme un investisseur privé avisé et de formuler, le cas échéant, des déclarations de soutien qu'un investisseur privé avisé ferait et encore moins d'obliger l'Etat à notifier toute déclaration. Cela étant, il ne suffit pas pour un Etat membre de déclarer se conformer au principe de l'investisseur avisé pour respecter le contenu de ce principe. Lorsque l'Etat envisage d'adopter des mesures de soutien au bénéfice d'une entreprise ayant des difficultés et qu'il envisage de communi-

⁽¹⁾ Ce qui selon la jurisprudence est suffisant pour conclure qu'une aide a été octroyée au moyen de ressources d'Etat.

quer son intention au marché, il doit s'efforcer de ne pas créer de distorsions de concurrence et de respecter, le cas échéant, les règles sur les aides. Ainsi, lorsque le soutien étatique est susceptible de constituer une aide, toute déclaration de soutien doit être accompagnée d'une réserve explicite selon laquelle toute intervention ultérieure sera préalablement notifiée à la Commission et mise en place uniquement après avoir été approuvée. Une telle réserve rend les déclarations conditionnelles, elle exclut que les déclarations mêmes puissent constituer des aides et permet par ailleurs d'examiner toute intervention ultérieure de l'Etat sur la base de la situation de marché existante lors de l'intervention.

La compatibilité de l'aide

La Commission a conclu que l'aide n'était pas compatible avec le marché commun. La Commission a en effet relevé que la seule dérogation qui pourrait être applicable en l'espèce était celle relative aux aides au sauvetage et à la restructuration mais que l'aide ne respectait pas les conditions posées par les lignes directrices approuvées par la Commission en la matière ⁽¹⁾. Les aides au sauvetage et à la restructuration entraînent un effet distortif sur la concurrence. Par conséquent, elles peuvent uniquement être acceptées dans des conditions strictes. Notamment, pour ce qui est des aides au sauvetage, il doit être démontré qu'en l'absence d'aide, l'entreprise aurait dû faire face à des problèmes sociaux aigus. Pour ce qui est des aides à la restructuration, il doit être démontré qu'il existe des éléments permettant de compenser les distorsions de concurrence induites par l'aide. En l'espèce, aucune de ces conditions n'était remplie. En résumé, l'aide ne peut pas être considérée comme aide au sauvetage parce qu'il n'a notamment pas été démontré qu'en l'absence d'aide l'entreprise aurait dû faire face à des problèmes sociaux aigus. De même, elle ne peut pas être considérée comme une aide à la restructuration parce que les autorités françaises n'ont notamment pas fourni d'éléments permettant de compenser les distorsions de concurrence induites par l'aide.

La non-récupération de l'aide

Lorsque la Commission arrive à la conclusion qu'une aide est incompatible avec le marché commun, elle en ordonne la récupération conformément à la jurisprudence de la Cour et à l'article 14 du règlement de procédure n. 659/99 sous réserves que la récupération de l'aide ne soit pas

contraire à un principe général du droit communautaire. En l'espèce, la Commission a conclu que la récupération de l'aide serait contraire à deux principes de droit communautaire: le principe du respect des droits de la défense et le principe de la confiance légitime. En ce qui concerne le premier principe, en raison de la difficulté à isoler l'avantage lié exclusivement aux mesures notifiées, la Commission n'a pas été en mesure d'obtenir une évaluation raisonnable de l'impact financier «net» de ces mesures. Elle n'a pas, par conséquent, été à même de quantifier l'aide de manière suffisamment précise ni de fournir les paramètres permettant une telle quantification dans la phase d'exécution de la décision. Ordonner la récupération de l'aide dans une telle situation aurait été susceptible d'être contraire au principe du respect des droits de la défense de l'Etat membre. En ce qui concerne le principe de la confiance légitime, la Commission a souligné que pris isolément, le projet d'avance d'actionnaire aurait probablement été considéré comme ne constituant pas une aide au regard du traité. La Commission a remarqué qu'il s'agissait de la première fois qu'elle arrivait à la conclusion qu'une mesure devait être considérée comme une aide en raison de faits précédant sa notification. Ainsi, dans la mesure où l'aide dépend de comportements qui ont précédé la notification du projet de l'avance, un opérateur diligent aurait pu avoir confiance en la légitimité du comportement de la France qui, de son côté, avait dûment notifié le projet d'avance. Par conséquent, FT avait pu légitimement avoir confiance quant au fait que l'Etat français avait respecté les règles relatives aux aides d'Etat.

A la lumière de ce qui précède, la Commission a considéré qu'ordonner la récupération de l'aide serait contraire aux principes généraux du droit communautaire.

II. Taxe professionnelle

Le 13 mars 2001 l'association de collectivités territoriales françaises a déposé une plainte auprès de la Commission européenne dénonçant le régime spécial de taxe professionnelle applicable à FT.

Dans sa *décision d'ouverture* ⁽²⁾, la Commission a constaté que ce régime présentait, a priori, tous les éléments constitutifs d'une aide d'Etat (régime mis en place par l'Etat avantageant sélectivement une entreprise active dans un secteur ouvert à la concurrence internationale).

⁽¹⁾ Communication de la Commission – lignes directrices communautaires pour les aides au sauvetage et à la restructuration d'entreprises en difficulté, JO 288 du 9 octobre 1999.

⁽²⁾ Décision du 30.1.2003, JO C 57 du 13.3.2003, p. 5.

Dans le cadre de la *procédure formelle*, les autorités françaises n'ont pas contesté l'existence d'un régime spécial de taxe professionnelle applicable à FT, mais elles ont soutenu que ce régime ne lui a procuré aucun avantage et qu'il n'a nullement affecté les ressources publiques, parce qu'il s'est traduit par une surimposition de FT par rapport au droit commun. Par ailleurs, selon les autorités françaises, le régime en question constituerait un régime d'aides existantes ne pouvant pas faire l'objet d'une récupération.

Dans sa *décision finale* ⁽¹⁾, la Commission a constaté que la loi n° 90-568 ⁽²⁾ a mis en place deux séries de règles dérogatoires au droit commun: un régime fiscal «transitoire» applicable du 1^{er} janvier 1991 au 1^{er} janvier 1994, puis un régime «définitif» applicable à partir du 1^{er} janvier 1994 et sans limitation de durée.

a) *Le régime applicable entre 1991 et 1994*

L'article 19 de la loi n° 90-568 a prévu qu'entre le 1^{er} janvier 1991 et le 1^{er} janvier 1994, FT serait assujettie aux seuls impôts et taxes effectivement supportés par l'Etat. En d'autres termes, pendant cette période, FT, à l'instar l'Etat, ne devait pas payer des impôts tels que la taxe professionnelle, la taxe foncière ou l'impôt sur le revenu. Pendant la même période, et en vertu du même article, FT devait faire des contributions au budget de l'Etat «au titre du prélèvement au profit du budget général».

L'analyse de la Commission dans le cadre de la procédure formelle a montré que l'historique et les modalités de définition du prélèvement spécial (paiement forfaitaire, montant fixé au vu des excédents d'exploitation de l'entreprise dans le passé) rapprochaient ce dernier d'une participation aux résultats de gestion. Par ailleurs, même s'il n'était pas explicitement lié par la loi à la taxe professionnelle, ce prélèvement semblait lié au régime fiscal spécifique applicable à FT (la loi n° 90-568 a prévu dans le cadre du même chapitre intitulé «fiscalité», dans le même article et pour la même période, que FT ne devait pas payer d'impôts et qu'elle devait payer le prélèvement). Par conséquent, la Commission a considéré que le prélèvement versé par FT à l'Etat entre 1991 et 1994 remplissait une double fonction: il valait en partie paiement de différents impôts et — pour le surplus

— il valait participation de l'Etat propriétaire aux résultats de l'entreprise.

Dans la mesure où FT a été assujettie à un prélèvement spécial, de nature mixte valant en partie paiement d'impôts, et qui était supérieur à la somme des impôts et taxes dont FT était exonérée, la Commission a considéré que FT n'a pas bénéficié d'un avantage pour la période entre 1991 et 1994 au titre du régime spécial de taxe professionnelle.

b) *Le régime applicable entre 1994 et 2003*

A partir du 1^{er} janvier 1994, FT a été soumise au régime fiscal de droit commun, à l'exception des impositions directes locales (taxe foncière, taxe professionnelle) pour lesquelles la loi n° 90-568 a prévu des conditions particulières concernant le taux, la base et les modalités d'imposition. Ce régime particulier de taxe professionnelle, prévu sans limitation de durée, a été aboli par la loi de finances pour 2003 ⁽³⁾.

La Commission a considéré que la différence entre la taxe professionnelle effectivement payée par FT et celle qui aurait été due en vertu du droit commun constitue une aide car elle représente un avantage octroyé au moyen de ressources qui auraient autrement intégré le budget de l'Etat.

La Commission a ainsi rejeté l'argument des autorités françaises selon lesquelles la sous-imposition de FT au titre de la période «définitive» (1^{er} janvier 1994 — 1^{er} janvier 2003) serait compensée par une sur-imposition (due au paiement du prélèvement) au cours de la période «transitoire» (1^{er} janvier 1991 — 31 décembre 1993). Compte tenu du principe posé par la jurisprudence qui stipule qu'une aide donnée à une entreprise ne peut être «compensée» par une charge spécifique pesant sur la même entreprise à un autre titre ⁽⁴⁾, la Commission ne pouvait admettre que la «sous imposition» de FT au titre de la taxe professionnelle à partir de 1994 puisse être compensée par le prélèvement spécial payé par FT entre 1991 et 1994, lequel n'était pas spécifiquement lié à la taxe professionnelle. Par ailleurs, un calcul global, tel que celui proposé par les autorités françaises impliquerait la requalification ex post du surplus d'imposition prétendument payé par FT au cours de la période «transitoire» comme une avance d'impôt (un crédit d'impôt) à déduire des années futures, ce qui n'était

⁽¹⁾ Décision du 2.8.2004, non encore publiée.

⁽²⁾ Loi n° 90-568 du 8.7.1990, JORF p. 8069.

⁽³⁾ Loi de Finances pour 2003 (n° 2002-1575 du 30 décembre 2002), JORF p. 22025.

⁽⁴⁾ La Cour a ainsi exclu qu'un dégrèvement des charges sociales afférentes aux allocations familiales qui bénéficie à certaines entreprises «compense» une charge supplémentaire pesant sur ces mêmes entreprises au titre de l'assurance chômage (CJCE arrêt du 2.7.1974, aff. 173/73, Italie/Commission, Rec. 709).

nullement l'objet de la loi n° 90-568, lorsqu'elle a instauré ces deux régimes.

Pareillement, la Commission a rejeté l'argument des autorités françaises qui consistait à dire que le régime d'aides en question a été institué il y a plus de 10 ans et qu'il constituait un régime d'aides existantes ne pouvant pas être récupérées. La Commission a ainsi rappelé que les règles communautaires sur la prescription des aides d'Etat ne prévoient nullement que l'écoulement d'un délai de 10 ans transforme un régime d'aides illégales en aides existantes. L'article 15 du règlement (CE) n° 659/1999 ⁽¹⁾ prévoit simplement que les aides ayant bénéficié à une entreprise il y a plus de dix années ne peuvent pas être récupérées. Or, dans la mesure où le régime en question a octroyé à FT un avantage fiscal chaque année à partir de 1994 et puisque la décision d'ouverture date du 30 janvier 2003, la Commission doit ordonner la récupération de l'aide en question dans son intégralité.

En conclusion, la Commission a décidé que la différence entre la taxe professionnelle effectivement payée par FT et celle qui aurait été due en vertu du droit commun du 1^{er} janvier 1994 au 31 décembre 2002 constitue une aide d'Etat. En l'absence de tout argument avancé par les autorités françaises pour montrer sa compatibilité, la Commission a considéré que cette aide était incompatible avec le marché commun et a ordonné sa récupération. Comme les informations présentées par les autorités françaises concernant le calcul de cette aide étaient partiellement contradictoires, la Commission ne l'a pas quantifiée, mais a invité les autorités françaises à collaborer avec elle pour définir le montant exact de l'aide à récupérer.

Remarques finales

En ce qui concerne la décision relative à l'avance d'actionnaire et aux déclarations de l'Etat, l'enseignement que l'on peut en tirer est que les déclarations de l'Etat, même lorsqu'il ne peut pas être affirmé avec certitude qu'elles constituent une aide à part entière, doivent être prises en compte, au regard des aides d'Etat, dans l'analyse des mesures étatiques auxquelles elles sont liées. Bien évidemment, l'Etat actionnaire a le droit de faire des déclarations que ferait un investisseur privé pour soutenir une entreprise et préserver ses intérêts patrimoniaux. Cependant, la Commission doit

prendre en considération tous les éléments pertinents de chaque cas d'espèce. L'Etat est également une puissance publique, ses déclarations peuvent donc relever de ce rôle et les effets des déclarations de l'Etat peuvent aller au delà des effets que pourraient engendrer les déclarations d'un investisseur privé. Les Etats membres doivent donc s'efforcer de ne pas faire des déclarations qu'un investisseur privé ne ferait pas ou ne serait pas en mesure de faire. Si un Etat veut néanmoins manifester son intention de faire le nécessaire pour sortir une entreprise d'une situation de crise financière, il est probable qu'un tel soutien relève plutôt de son rôle de puissance publique que de celui d'opérateur économique et que finalement il comportera l'octroi d'une aide d'Etat. Dans une situation pareille, pour éviter toute violation du Traité, l'Etat devrait dire clairement que son soutien est conditionnel au contrôle du respect des règles sur les aides d'Etat par la Commission.

Par ailleurs, la décision de la Commission concernant la taxe professionnelle est intéressante en ce qu'elle illustre comment le principe de prescription posé par le règlement de procédure s'applique aux régimes d'aides. La prescription implique l'impossibilité de récupérer des aides octroyées plus de 10 ans avant l'action de la Commission, mais ne signifie nullement que les régimes d'aides illégales sont transformés en régimes d'aides existantes du seul fait que 10 ans se sont écoulés depuis leur instauration. La décision de la Commission est également intéressante en ce qu'elle rappelle qu'une aide donnée à une entreprise ne peut pas être considérée comme «compensée» par une charge spécifique pesant sur l'entreprise à un autre titre. Admettre le contraire permettrait aux Etats d'invoquer toutes sortes de désavantages ou charges que supportent les entreprises à divers titres pour soutenir que les aides incompatibles identifiées par la Commission ne font que compenser ces charges et ne confèrent donc pas d'avantage réel. Cette décision s'inscrit ainsi dans la ligne de la pratique décisionnelle de la Commission ⁽²⁾ qui conformément à la jurisprudence ⁽³⁾ a toujours rejeté l'idée qu'une mesure constitutive d'une aide d'Etat puisse perdre son caractère d'aide, du seul fait que l'entreprise bénéficiaire serait soumise par ailleurs à des charges particulières dérogeant au droit commun.

⁽¹⁾ Règlement (CE) n° 659/1999 du Conseil du 22 mars 1999, JO 83 du 27.3.1999, p. 9.

⁽²⁾ Voir la décision de la Commission du 11 décembre 2001 relative au régime d'aides d'Etat mis en œuvre en Italie en faveur des Banques (JO 13.7.2002, L 187, p. 27).

⁽³⁾ Voir l'arrêt de la Cour de Justice du 2 juillet 1974, aff. 173/73, Italie/Commission, Rec. 709.

The European Court of Justice clarifies the powers of the Council in State aid cases

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On 29 June 2004 the Court of Justice annulled a Council decision adopted on the basis of Article 88(2), 3rd paragraph EC, authorising Portugal to grant State aid to pig farmers ⁽²⁾. The amount of State aid authorized was the same as should have been repaid by 2116 farmers under two final negative decisions of the Commission of 25 November 1999 and 4 October 2000. The Court of Justice found that the Council's power to declare a measure of State aid compatible with the common market is exceptional in character, and ruled that where the Commission had already initiated the procedure laid down by the treaty and the three-month time-limit laid down by the latter had expired, the Council no longer had the power to adopt such a decision following the application of a member state. It also ruled that the Council had no power to adopt such a decision where the Commission had already declared the aid in question incompatible with the common market.

1. Procedure under Article 88(2) 3rd paragraph

Art 88 (2) paragraph 3 EC states:

'On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Art 87 or from the regulations provided for in Art 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure

provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.'

If a Member State makes such a request to the Council, negotiations take place directly between the Member States. There is no Commission proposal to be made or to be discussed. The Commission may be asked how it would deal with the aid under 'normal' State aid rules, and how it sees the merit of these cases. The Commission may choose to say nothing, support approval by the Council, or recommend the Council not to approve. It is important that any Council decision defines precisely what is being authorized by it, in order to know whether it is identical with State aid measure which are or will be examined by the Commission if and when notified.

Such a derogation of State aid rules by a Council decision is in principle only possible if the decision is justified by exceptional circumstances. The Court has accepted that the Council disposes of a large margin of interpretation — the Court will limit its assessment to verifying whether there was any manifest error of assessment ⁽³⁾.

If the Commission has already initiated the formal investigation procedure, the application by the Member State to the Council suspends that procedure until the Council decides. If no Council decision follows within three months of the application, the Commission may continue the procedure.

⁽¹⁾ The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.

⁽²⁾ C-110/02, 29.7.2004.

⁽³⁾ In case C-253/84, 15.1.1987, the Court avoided ruling on this point, although the Advocate-General indicated that in his view it had not been shown that there were exceptional circumstances justifying the Council decision. But in case C 122/94, 29.2.1996, ECR I-881, the Court went further and indicated that the Council has a large discretion.

2. Past use of Article 88(2), 3rd paragraph

The Council has used this procedure in the past in the agriculture sector: for example, several various distillation aids have recently been approved by the Agriculture Council which would probably not have been allowed under State aid rules as they seemed to constitute pure operating aid ⁽¹⁾.

Outside the agriculture sector, the use of Article 88(2), 3rd paragraph is extremely rare ⁽²⁾. The most recent case concerns the Belgian coordination centers ⁽³⁾, which was also linked with another Council decision in the agriculture sector ⁽⁴⁾ (and further linked to the approval of the Savings Directive — Belgium and Italy refused to approve the Directive at the beginning of 2003 until a satisfactory arrangement had been found to largely relieve Italian milk producers from the obligation to repay illegal state aid which they had received from their Government, and to find a satisfactory compromise regarding the Belgian Coordination Centres regime which had been condemned by the Commission).

Meanwhile, the Commission has brought a similar annulment procedure ⁽⁵⁾ as in the Portuguese case against the decision by the Council which authorised Belgium to renew the application of a preferential tax scheme to certain coordination centres whose approval was to expire before the end of 2005. The Council took this decision on 16 July 2003; the Commission considered that like in the Portuguese pig case, the Council's decision is unlawful, because it came after a final decision taken by the Commission on 17 February 2003. That case is still pending.

3. Facts and procedure

In 1999 and 2000 the Commission adopted two final decisions ⁽⁶⁾ against several measures executed by Portugal for the purpose of assisting intensive livestock farmers of the pig sector. As those aids were declared unlawful and incompatible, repayment was ordered. Portugal did not appeal those decisions, but on 23 November 2001, it requested the Council to adopt, on the basis of Article 88(2) 3rd paragraph, a decision authorising it to grant aid to Portuguese pig farmers obliged to repay the aid and declaring that aid compatible with the common market.

Acceding to that request, the Council adopted the contested decision, Article 1 of which is worded as follows: *'Exceptional aid by the Portuguese Government to the Portuguese pig sector involving the grant of aid to beneficiaries covered by the Commission Decisions of 25 November 1999 and 4 October 2000, totalling not more than EUR 16,3 million, equivalent to the amounts which those beneficiaries must reimburse under those Decisions, shall be considered compatible with the common market.'* The Council took its decision more than 15 months after adoption of the Commission's second final negative decision.

For the Commission the Council's use of Article 88 to cancel out *de facto* the financial impact of the two final decisions

— unacceptably violated the legal security of all the interested parties;

⁽¹⁾ On 19.12.2000 the Council adopted three Decisions declaring aid to be granted in Germany (Rhineland Palatinate), Italy (for the production of 'Asti' and 'Moscato d'Asti') and France for the distillation of certain wine sector products to be compatible with the common market. On 22.5.2001, the Council adopted a Decision on the granting of exceptional national aid by the Portuguese Government for the distillation of certain wine sector products.

⁽²⁾ In the transport sector: see Council Decision of 3 May 2002 on the granting of a national aid by the authorities of the Kingdom of the Netherlands in favour of road transport undertakings, OJ L 131, 16.5.2002, p. 12; Council Decision of 3 May 2002 on the granting of a national aid by the authorities of the Italian Republic in favour of road transport undertakings, OJ L 131, 16.5.2002, p. 14; Council Decision of 3 May 2002 on the granting of aid by the French Government for road transport undertakings, OJ L 131, 16.5.2002, p. 15.

⁽³⁾ Council Decision of 16 July 2003 on the granting of aid by the Belgian Government to certain coordination centres established in Belgium, OJ L 184, 23.7.2003, p. 17.

⁽⁴⁾ Council Decision of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers, OJ L 184, 23.7.2003, p. 15.

⁽⁵⁾ See press release IP/03/1032, 16 July 2003.

⁽⁶⁾ Commission decision 2000/200/EC of 25 November 1999 concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig-farming sector, OJ L 66, 14.3.2000, p. 20; Commission decision 2001/86/EC of 4 October 2000 on the aid scheme implemented by Portugal in favour of the pigfarming sector, OJ L29, 31.1.2000, p. 49.

- involved an assumption by the Council of a position of higher authority that infringes both the Commission's decision-making power and the Court's jurisdictional power;
- raised questions of principle, on the reality of the Commission's authority in State aid policy matters and on the allocation of responsibilities between the Institutions as intended by the Treaty itself.

The Court accepted that the Council could no longer exercise the exceptional power conferred upon it by Article 88(2) 3rd paragraph in order to declare aid compatible which has previously been considered incompatible by the Commission. This limitation in time of the exceptional power of the Council pursuant to Article 88(2) 3rd paragraph also contributes to legal certainty, and avoids that the same State aid can be the subject of contrary decisions by the Commission and the Council.

Furthermore, the Court considered that the Council could also not declare compatible with the common market a new aid designed to compensate the beneficiaries of unlawful and incompatible aid for the repayments they are required to make. Such power of the Council would thwart the effectiveness of recovery decisions taken by the Commission.

4. Conclusion

The Court reaffirmed the central role of the Commission in matters of State aid control. The powers attributed to the Council by virtue of Article 88(2) 3rd paragraph EC are exceptional and time-limited.

The Court also emphasized that the effectiveness of Commission decisions need to be ensured, both by the Member States and by the Council:

'43. In those circumstances, to hold that a Member State is able to grant to beneficiaries of unlawful aid, which has previously been declared incompatible with the common market by a Commission decision, new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that decision, would clearly amount to thwarting the effectiveness of decisions taken by the Commission under Articles 87 EC and 88 EC.'

'47. It follows from the whole of the above considerations that, on a proper interpretation of the third subparagraph of Article 88(2) EC, the Council cannot, on the basis of that provision, validly declare compatible with the common market an aid which allocates to the beneficiaries of an unlawful aid, which a Commission decision has previously declared incompatible with the common market, an amount designed to compensate for the repayments which they are required to make pursuant to that decision.'

This is also in line with Article 14(3) of Regulation 659/1999 ⁽¹⁾ which states: *'[...] recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. [...]*

The confirmation of the principle of effectiveness ('*effet utile*') for recovery decisions is may be even more important than the limitation of the scope of Article 88(2) 3rd paragraph. It is clear that in principle it excludes new aid to compensate for previously granted unlawful and incompatible aid which needs to be recovered. The previous behaviour of the Member State is thus an element which should be taken into account in any State aid analysis.

⁽¹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

La Cour de justice précise les notions de ressources d'État et d'imputabilité à l'État: l'affaire Pearle BV

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L'arrêt de la Cour du 15 juillet 2004 dans l'affaire Pearle, a donné l'occasion à la Cour de Justice d'apporter des précisions importantes sur les critères de ressources d'Etat et d'imputabilité, qui constituent deux critères constitutifs de la notion d'aide d'Etat au sens de l'article 87 paragraphe 1 du traité.

1. L'affaire en cause

La loi néerlandaise du 27 janvier 1950 sur l'organisation professionnelle organise notamment la composition et la mission des organismes professionnels auxquels est confiée une responsabilité dans l'aménagement et le développement de leur secteur d'activité.

En application de cette loi, la direction d'un tel organisme peut, sauf exceptions, édicter les règlements qu'elle estime nécessaires à la mise en œuvre de ses objectifs, tant dans l'intérêt des entreprises du secteur en cause que des conditions d'emploi des salariés. Ces règlements doivent être approuvés par le Conseil socio-économique, et ne doivent pas entraver la concurrence. Le Conseil socio-économique n'est pas un organe de l'Etat, mais il s'agit d'un organisme qui regroupe des représentants des entreprises, des salariés et de l'Etat. Les règlements des organismes professionnels ne sont donc pas juridiquement approuvés par l'Etat.

Pour faire face à leurs charges, les organismes peuvent instituer des prélèvements sur les entreprises des secteurs en cause. Ces prélèvements sont de deux natures: les **prélèvement généraux** concernent le fonctionnement de l'organisme en tant que tel, et les **charges affectées obligatoires** visent des objectifs spécifiques. Il est important de souligner que ces prélèvements peuvent être recouverts par commandement d'huissier, et que les entreprises du secteur ne peuvent donc pas s'y soustraire.

A partir de 1988, l'organisme professionnel HBA a imposé à ses membres qui assurent la vente au détail de matériel d'optique, une charge affectée

obligatoire destinée à financer une campagne publicitaire collective en faveur des entreprises du secteur de l'optique.

Trois sociétés de vente de matériel d'optique, dont Pearle BV, ont demandé à la juridiction nationale d'annuler les règlements établissant la charge affectée obligatoire, au motif que les sommes ainsi perçues étaient utilisées pour financer des aides d'Etat illégales. La juridiction nationale saisie du litige a posé à ce sujet une question préjudicielle à la Cour, visant notamment à déterminer si la mesure en cause constitue une aide d'Etat qui devrait être notifiée préalablement à la Commission conformément aux dispositions de l'article 88 paragraphe 3 du traité.

2. Les précédents jurisprudentiels

Dans le domaine des aides d'Etat, le débat sur la question des ressources d'Etat n'est pas nouveau. Dès 1978, la Cour avait souligné dans son arrêt Van Tiggele ⁽¹⁾, que la notion d'aide au sens de l'article 87 du traité CE exige de démontrer l'existence de ressources d'Etat. Cette exigence avait été rappelée dans plusieurs arrêts ultérieurs, notamment dans l'arrêt Sloman Neptun du 17 mars 1993 ⁽²⁾, contre l'avis de l'Avocat Général. Néanmoins certains arrêts ultérieurs avaient pu introduire quelques doutes à ce sujet ⁽³⁾, qui ont été dissipés par l'arrêt du 13 mars 2001 dans l'affaire C-379/98 PreussenElektra AG.

Dans l'affaire PreussenElektra, la Cour avait à examiner une réglementation nationale obligeant des entreprises privées d'approvisionnement en électricité à acheter l'électricité produite à partir de sources d'énergies renouvelables à des prix minimaux supérieurs aux prix du marché. La Cour a constaté qu'un tel système confère un avantage incontestable aux entreprises de production 'd'électricité verte', mais que celui-ci ne comporte aucun transfert de ressources d'Etat, et ne constitue donc une aide d'Etat au sens de l'article 87 du traité. Dans son arrêt, la Cour confirme donc sans ambiguïté que seules les mesures financées par des

(1) Affaire C-82/77. Rec 1978 p. 25.

(2) Affaires jointes C-72/91 et C-73/91 rec 1993 p. I-887.

(3) Notamment arrêt Commission/France du 30 janvier 1985. Affaire C-290/83. Rec 1985 p. 439.

ressources d'Etat sont susceptibles de constituer des aides d'Etat, sans toutefois apporter de précisions quant aux contours et limites de la notion de ressources d'Etat.

La Cour a toutefois apporté des précisions en ce sens dans son arrêt Stardust du 16 mai 2002 (C-482/99), en rappelant que l'article 87.1 *'englobe tous les moyens pécuniaires que les autorités publiques peuvent effectivement utiliser pour soutenir des entreprises, sans qu'il soit pertinent que ces moyens appartiennent ou non au patrimoine de l'Etat. En conséquence, même si les sommes correspondant à la mesure en cause ne sont pas de façon permanente en possession du Trésor Public, le fait qu'elles restent constamment sous contrôle public, et donc à la disposition des autorités nationales compétentes, suffit pour qu'elles soient qualifiées de ressources d'Etat'* (voir arrêt du 16 mai 2000, France/Ladbroke Racing et Commission, C-86/98 P).

La Cour en tire la conclusion importante que les ressources à disposition **d'entreprises publiques** constituent des ressources d'Etat, car ce dernier *'est parfaitement en mesure, par l'exercice de son influence dominante sur de telles entreprises, d'orienter l'utilisation de leurs ressources pour financer le cas échéant, des avantages spécifiques en faveur d'autres entreprises'*. Toute intervention financière opérée par une entreprise publique, indépendamment de l'origine de ses fonds, est ainsi réputée effectuée avec des ressources publiques, et peut donc constituer une aide d'Etat, notamment si elle n'est pas effectuée selon les règles du marché. Le fait que l'entreprise publique utilise ses fonds propres et ne reçoive aucun transfert de ressources de l'Etat pour le financement de ladite opération n'est pas pertinent ⁽¹⁾.

Les Etats membres peuvent également recourir au système des **fonds**, c'est-à-dire un système par lequel les autorités publiques imposent des contributions à certaines entreprises, dont le produit alimente un *'fond'* qui finance certaines mesures de soutien des entreprises en cause. Un tel système mobilise-t-il des ressources d'Etat au sens de l'article 87 du traité?

La Cour s'est prononcée à ce sujet dans son arrêt Italie contre Commission du 2 juillet 1974 (173-73), qui précise notamment que *'les fonds dont s'agit étant alimentés par des contributions obligatoires imposées par la législation de l'Etat et étant, ainsi*

que le cas d'espèce le démontre, gérés et répartis conformément à cette législation, il y a lieu de les considérer comme des ressources d'Etat au sens de l'article 87, même s'ils sont administrés par des institutions distinctes de l'autorités publique'.

Cette jurisprudence a été ultérieurement confirmée par:

- l'arrêt de la Cour du 22 mars 1977 dans l'affaire Steinike & Weinlig (78/76), qui précise: *'attendu qu'une mesure de l'autorité publique favorisant certaines entreprises ou certains produits ne perd pas son caractère d'avantage gratuit par le fait qu'elle serait partiellement ou totalement financée par des contributions imposées par l'autorité publique et prélevées sur les entreprises concernées'*.
- l'arrêt de la Cour du 11 novembre 1987 dans l'affaire France contre Commission (259/85), qui précise: *'il convient tout d'abord de souligner que le seul fait pour un régime de subvention bénéficiant à certains opérateurs économiques d'un secteur donné d'être financé par une taxe parafiscale prélevée sur toute livraison de produits nationaux de ce secteur ne suffit pas pour enlever à ce régime son caractère d'aide accordée par l'Etat au sens de l'article 87 du traité'*.

L'existence de ressources d'Etat est une condition nécessaire pour que l'article 87 CE puisse trouver application. Toutefois, dans son arrêt Stardust du 16 mai 2002 (C-482/99), la Cour a rappelé que cette condition n'est pas suffisante, et qu'il convient de démontrer que la mesure en cause est imputable à l'Etat ⁽²⁾.

S'agissant en particulier d'entreprises publiques, la Cour souligne que même si un Etat membre *'est en mesure de contrôler une entreprise publique et d'exercer une influence dominante sur les opérations de celle-ci, l'exercice effectif de ce contrôle dans un cas concret ne saurait être automatiquement présumé... Il est nécessaire d'examiner si les autorités publiques doivent être considérées comme ayant été impliquées d'une manière ou d'une autre, dans l'adoption de ces mesures'*.

Il convient toutefois de souligner que la Commission ne doit pas démontrer que l'Etat *'a incité concrètement l'entreprise publique à prendre les mesures d'aide en cause'*, mais l'imputabilité peut être déduite *'d'une ensemble d'indices résultant*

⁽¹⁾ Voir notamment arrêt du 8 mai 2003, République italienne & SIM 2 Multimedia SpA c/Commission, Aff jointes C-328/99 et C-399/00, point 33, et arrêt de la Cour du 29 avril 2004, République Hellénique/Commission C-278/00, points 51/54.

⁽²⁾ Dans son arrêt Pearle du 15 juillet 2004, la Cour confirme que le critère des ressources d'Etat et le critère de l'imputabilité sont deux critères distincts (attendu 35).

des circonstances de l'espèce et du contexte dans lequel cette mesure est intervenue'.

3. La réponse de la Cour dans l'affaire Pearle

Au cas d'espèce, la Cour écarte l'applicabilité de l'article 87.1 en se fondant sur les éléments suivants:

- Même si HBA constitue un organisme public, il n'apparaît pas que la campagne publicitaire ait été financée par des moyens laissés à la disposition des autorités nationales. Ces fonds ont en effet été collectés auprès des affiliés de HBA au moyen de contributions affectées obligatoirement à l'organisation de la campagne publicitaire.
- Les frais exposés par HBA pour la campagne publicitaire étant entièrement compensés par les contributions imposées aux entreprises bénéficiaires de ladite campagne, l'intervention de HBA ne tendait pas à créer un avantage qui constituerait une charge supplémentaire pour l'Etat ou pour HBA.
- L'initiative pour l'organisation de la campagne publicitaire émane d'une association privée d'opticiens et non du HBA. Le HBA a agi en faveur d'un objectif purement commercial et non dans le cadre d'une politique définie par les autorités néerlandaises.
- Le cas d'espèce se diffère de l'arrêt *Steinike & Weinlig* (affaire 78-76), car dans cette affaire, le fonds était financé à la fois par des subventions directes de l'Etat, et par des contributions des entreprises dont le taux et la base de perception étaient fixés par la loi. Par ailleurs, le fonds mettait en œuvre une politique définie par l'Etat. De même, dans l'affaire relative à l'arrêt *France/Commission* du 11/11/1987 (affaire 259/85), le fond recevait le produit de taxes parafiscales prélevées en vertu d'un décret, et mettait en œuvre les actions décidées par l'Etat.

La Cour en tire la conclusion que 'les articles 87.1 et 88.3 doivent être interprétés en ce sens que des règlements adoptés par un organisme professionnel de droit public aux fins du financement d'une campagne publicitaire organisée en faveur de ses membres et décidée par eux, au moyen de ressources prélevées auprès desdits membres et affectées obligatoirement au financement de ladite campagne, ne constituent pas une partie intégrante d'une mesure d'aide au sens de ces dispositions et n'avaient pas à être notifiés préalablement à la Commission dès lors qu'il est établi que ce financement a été réalisé au moyen de ressources dont cet organisme professionnel de droit public n'a eu,

à aucun moment, le pouvoir de disposer librement'.

4. L'arrêt Pearle: évolution ou confirmation de la jurisprudence établie?

La publication de l'arrêt Pearle a pu susciter des interrogations quant à sa portée et ses conséquences sur l'analyse de nombreux cas de soutiens étatiques financés au moyen de fonds ou de taxes parafiscales. Certains arguments avancés par la Cour pour écarter l'applicabilité de l'article 87 paragraphe 1 soulèvent en effet des interrogations. L'approche générale paraît toutefois se situer dans la ligne de la jurisprudence traditionnelle en matière de ressources d'Etat et d'imputabilité à l'Etat.

4.1. Remarques sur quelques aspects de l'arrêt

4.1.1. Le contrôle de l'utilisation des moyens de financement

Au point 36 de l'arrêt, la Cour souligne que la mesure en cause n'a pas été financée avec des moyens laissés à la disposition des autorités nationales, mais uniquement avec des contributions collectées auprès des entreprises et affectées obligatoirement au financement de la campagne.

Dans son arrêt *France/Ladbroke Racing et Commission* (C-86/98P), la Cour avait en effet souligné que pour constituer des ressources d'Etat, il n'est pas nécessaire que les sommes en cause soient de façon permanente en possession du Trésor public, mais qu'il suffit 'qu'elles restent constamment sous contrôle public, et donc à la disposition des autorités nationales compétentes'.

Au cas d'espèce, il convient de constater que l'intervention de l'Etat se situe très en amont, puisque celui-ci se limite essentiellement à fixer la composition et la mission des organismes professionnels conformément aux dispositions de la loi de 1950. Dans le cadre de leurs activités, ces organismes disposent de larges compétences, y compris pour imposer des contributions financières aux entreprises du secteur et les conditions d'utilisation de ces ressources en dehors de tout contrôle étatique. Les autorités nationales ne peuvent donc à aucun moment disposer de ces ressources.

On pourrait déduire de cette argumentation que la disposition des ressources est en fait laissée à l'organisme professionnel. Au point 41 de l'arrêt ainsi que dans le dispositif, la Cour indique toute-

fois que ‘ce financement a été réalisé au moyen de ressources dont cet organisme professionnel de droit public n'a eu, à aucun moment, le pouvoir de disposer librement’. Cet argument soulève des interrogations.

Il est vrai que la liberté d'action d'un tel organisme professionnel est encadrée par la loi de 1950, qui dispose notamment que les charges affectées obligatoires doivent être utilisées pour des objectifs spécifiques. Toutefois, la décision d'affecter une charge obligatoire relève essentiellement de la compétence de l'organisme professionnel. En conséquence, celui-ci peut rapidement, et sans contrôle étatique, décider de modifier l'affectation de ressources, ou instaurer une nouvelle charge obligatoire, dont les seules différences seraient la dénomination et les conditions d'utilisation.

4.1.2. *Sur l'absence de charges supplémentaires pour l'Etat*

Au point 36 de l'arrêt, la Cour indique notamment que ‘les frais exposés par l'organisme public aux fins du financement de ladite campagne étant entièrement compensés par les charges prélevées sur les entreprises qui en ont profité, l'intervention du HBA ne tendait pas à créer un avantage qui constituerait une charge supplémentaire pour l'Etat ou pour cet organisme’.

La Cour renvoie à ce sujet à son arrêt du 17 mars 1993, *Sloman Neptum* ⁽¹⁾. Cet arrêt portait sur l'application par l'Allemagne, aux navires marchands immatriculés dans son registre international de navigation maritime, d'un régime permettant de soumettre les marins ressortissants de pays tiers, à des conditions de travail et de rémunération moins favorables que celles prévues par le droit national. Le régime en cause avait pour effet de décharger les armateurs employant de tels marins du paiement de certaines charges, notamment de cotisations de sécurité sociale plus élevées, dues en cas d'emploi de marins allemands. La Cour a estimé que ‘le régime en cause ne tend pas, de par sa finalité et son économie générale, à créer un avantage qui constituerait une charge supplémentaire pour l'Etat ou pour les organismes susmentionnés, mais seulement à modifier, en faveur des entreprises de navigation maritime, le cadre dans lequel s'établissent les relations contractuelles entre ces entreprises et leurs salariés. Les conséquences qui en résultent, tenant tant à la différence de base de calcul des cotisations sociales, mentionnée par la juridiction nationale, qu'à l'éventuelle perte de ressources fiscales imputable au faible niveau des rémunérations, invoquée par

la Commission, sont inhérentes à ce régime et ne constituent pas un moyen d'accorder aux entreprises concernées un avantage déterminé’.

Il n'est pas établi que les situations du cas *Sloman Neptum* et du cas *Pearle* soient véritablement comparables. Dans le cas *Sloman Neptum*, il s'agissait d'une réglementation nationale ayant des implications indirectes en matière de rentrées fiscales. La Cour a considéré à juste titre que ces ‘pertes fiscales’ sont inhérentes au régime en cause.

Dans le cas *Pearle*, il ne s'agit pas d'une réglementation nationale ayant des conséquences indirectes quant aux rentrées fiscales, mais de l'établissement d'une nouvelle charge qui porte sur le financement d'une campagne de publicité. Cette campagne de publicité décidée par l'organisme professionnel implique une charge supplémentaire qui doit être payée. La question est alors d'apprécier si cette charge est payée avec des ressources publiques ou des ressources privées. Le fait que le bilan financier pour l'Etat ou l'organisme professionnel soit finalement neutre ne paraît pas directement pertinent aux fins de la qualification de ressources publiques.

L'importance de cette question doit être soulignée dans le cadre de la politique des aides d'Etat. Il est en effet fréquent que les Etats membres établissent de nouvelles mesures, financées par des cotisations, redevances ou taxes parafiscales, dont le produit ‘équilibre’ les nouvelles charges ainsi créées. En pareille hypothèse, le bilan financier est toujours neutre pour l'Etat. Considérer qu'il n'y a pas abandon de ressources d'Etat, signifierait que de nombreuses interventions étatiques destinées manifestement à soutenir certaines entreprises, échapperaient aux dispositions des articles 87 et 88 du traité.

4.1.3. *S'agissant de l'initiative de la mesure et de son objectif commercial*

Au point 37 de l'arrêt, la Cour souligne notamment que ‘l'initiative pour l'organisation et la poursuite de la campagne publicitaire concernée émane de la NUVO, une association privée d'opticiens, et non du HBA. Comme le souligne M. L'Avocat général au point 76 de ses conclusions, le HBA a servi uniquement d'instrument pour la perception et l'affectation de ressources générées en faveur d'un objectif purement commercial fixé préalablement par le milieu professionnel concerné et qui ne s'inscrivait nullement dans le cadre d'une politique définie par les autorités néerlandaises’.

(1) Aff C-72/91 et C-73/91, Rec. p. I-887, point 21.

Cet argument soulève également quelques interrogations.

Dans le domaine des aides d'Etat, il n'est pas rare que l'Etat ne soit pas à l'origine d'une mesure, mais que celle-ci soit suggérée, voire fortement demandée par l'industrie. A titre d'exemple, une aide au sauvetage ou à la restructuration est généralement attribuée suite à une demande pressante de l'entreprise en cause et non sur initiative de l'Etat. De même, certains régimes d'aide applicables à toutes les entreprises d'un secteur d'activité peuvent trouver leur origine dans une demande des représentants de l'industrie. Tel peut notamment être le cas lorsqu'un secteur d'activité est victime de calamités naturelles et se tourne vers l'Etat pour obtenir des aides financières. Le fait que l'initiative d'une mesure émane de l'Etat ou des entreprises n'apparaît pas constituer un critère déterminant pour qualifier la mesure d'aide d'Etat.

Une intervention étatique en faveur de certaines entreprises peut trouver son origine dans une demande des représentants du secteur économique, mais s'intégrer néanmoins dans une politique définie par l'Etat. Il peut s'avérer particulièrement délicat de tracer la limite entre les intérêts purement commerciaux des entreprises et 'l'intérêt général' poursuivi par l'Etat dans le cadre de sa politique. A titre d'exemple, une campagne publicitaire en faveur des opticiens peut constituer une opération commerciale en faveur des entreprises en cause, mais pourrait également être présentée comme une opération nationale de santé publique. Par ailleurs, les aides individuelles s'intègrent rarement dans le cadre d'une politique définie par l'Etat. Une intervention financière étatique en faveur d'une entreprise publique en difficulté obéit généralement plus à des objectifs commerciaux, qu'à des objectifs politiques préalablement définis. Une telle intervention financière constitue néanmoins une aide d'Etat au sens de l'article 87CE.

4.2. *La confirmation de la jurisprudence traditionnelle*

Si certains arguments de l'arrêt examinés de façon isolée soulèvent des interrogations, l'approche générale retenue par la Cour ne paraît pas modifier la jurisprudence traditionnelle relative aux fonds, mais tend plutôt à la confirmer.

La jurisprudence traditionnelle ⁽¹⁾ considère qu'une mesure financée par un fond est imputable à l'Etat et met en œuvre des ressources d'Etat, essentiellement quand trois critères sont remplis:

- L'établissement de la mesure en cause est décidé par l'Etat;
- L'Etat établit des contributions obligatoires auprès des entreprises, dont il fixe les montants, les taux ou autres critères de calcul. Ces contributions peuvent couvrir tout ou partie des besoins des fonds en cause;
- L'Etat définit les conditions d'utilisation, de gestion ou de répartition de ces ressources.

Ces critères ne sont pas remis en cause par l'arrêt Pearle. Dans cet arrêt, la Cour se fonde en effet essentiellement sur les critères suivants pour écarter l'applicabilité de l'article 87 paragraphe 1:

- La campagne de publicité en cause n'a pas été décidée, ni même entérinée, par l'Etat, mais par la seule organisation professionnelle.
- Les contributions obligatoires, leur montant et leurs conditions d'utilisation n'ont pas été décidés par l'Etat, mais par HBA.
- L'Etat ne contribue pas directement au financement qui est assuré à 100% par les cotisations.
- Les ressources prélevées auprès des entreprises sont affectées obligatoirement au financement de la mesure. L'Etat n'a aucun contrôle sur l'utilisation de ces ressources.

Sous une présentation différente, les critères se rejoignent dans une très large mesure. Dans son arrêt Pearle, la Cour insiste d'ailleurs sur les éléments qui différencient cette affaire des arrêts Steinike & Weinlig et France/Commission. Il est constant que dans ces deux dernières affaires, le rôle de l'Etat était déterminant pour l'établissement de la mesure et son financement, alors que dans l'affaire Pearle, l'Etat est largement absent.

D'une façon générale, le rôle effectif de l'Etat constitue le critère essentiel pour apprécier si la mesure en cause est susceptible de relever de l'article 87 CE. Lorsque l'Etat intervient pour mettre en place la mesure et assurer son financement, les critères d'imputabilité et de ressources d'Etat apparaissent réunis.

Il convient de constater que la plus grande partie des mesures financées au moyen de fonds remplissent ces critères. A l'exception de cas spécifiques, comme le cas d'espèce, il est difficile d'envisager la mise en place de tels fonds sans intervention des autorités publiques. Sauf exception, une intervention de l'Etat est en particulier indispensable pour rendre les contributions obligatoires.

(1) En particulier arrêt Italie/Commission du 2 juillet 1974, aff 173-73, arrêt Steinike & Weinlig du 22 mars 1977, aff 78-76, et arrêt France c/Commission du 11 novembre 1987, aff 259-85.

5. Conclusion

Au total, la portée de l'arrêt Pearle apparaît devoir être limitée au cas particulier des organisations professionnelles aux Pays Bas, dont les modalités de fonctionnement obéissent à des conditions tout à fait spécifiques.

D'une façon plus générale, deux aspects relatifs aux fonds, non directement abordés ou développés par l'arrêt, méritent d'être mentionnés.

Le premier aspect porte sur l'existence d'un avantage au sens de l'article 87 paragraphe 1, dans le cas de mesures financées par des contributions imposées aux entreprises bénéficiaires de ladite mesure. Lorsque le cercle des redevables coïncide avec celui des bénéficiaires de la mesure, il est parfois plaidé que les entreprises ne bénéficient pas d'avantages, car elles reçoivent simplement un 'service pour lequel elles ont contribué'. La question de l'avantage est mentionnée au point 36 de l'arrêt, mais non développée par la Cour.

Deux remarques peuvent être formulées à ce sujet. Si les ressources avec lesquelles la mesure est financée sont qualifiées de ressources d'Etat, le critère de l'avantage est nécessairement rempli. En pareille hypothèse, la mesure est en effet juridiquement payée avec des ressources étatiques, et non avec les ressources des entreprises. Ces ressources ont en effet perdu leur qualité de ressources privées du fait du système de fond mis en place par les pouvoirs publics. Une telle distinction peut certes apparaître purement juridique, voire 'artificielle', mais semble devoir être maintenue pour préserver la logique générale et l'effet utile de l'article 87 CE.

En tout état de cause, de telles mesures sont généralement mises en place car l'avantage global escompté par la mesure dépasse largement l'avantage individuel que chaque entreprise retirerait si elle devait financer seule la même mesure. Dans le cas contraire, on ne comprendrait pas pour quelles raisons les entreprises financeraient de telles mesures.

Le second aspect porte sur la conformité d'une mesure telle que celle du cas d'espèce, avec

d'autres dispositions du traité en matière de concurrence, en particulier les articles 10 et 81. Dans le cas d'espèce, le litige était lié au fait que l'organisation professionnelle avait la possibilité de rendre obligatoire pour toutes les entreprises du secteur, le financement d'une campagne de publicité, alors que certaines entreprises estimaient que cette campagne commune ne répondait pas à leur intérêt commercial. L'organisation professionnelle avait donc la possibilité de rendre obligatoire une mesure qui résultait d'une concertation entre les entreprises en cause. Une telle pratique est-elle compatible avec les dispositions des articles 10 et 81? Deux approches paraissent envisageables.

Une première approche pourrait considérer qu'en instituant un cadre juridique qui permet de rendre obligatoire la mesure, l'Etat assure son efficacité et évite que certaines entreprises échappent au paiement de la contribution. Une telle approche apparaît en particulier défendable lorsque la mesure en cause répond à des objectifs d'intérêt général, comme l'hygiène, la santé publique, la sécurité alimentaire... En pareille hypothèse, il est en effet important que toutes les entreprises concernées participent équitablement au financement de la mesure. L'approche apparaît par contre moins défendable lorsque la mesure en cause ne relève pas de l'intérêt général.

La seconde approche consisterait à qualifier la mesure en cause d'accord ou de décision d'association d'entreprises au sens de l'article 81 du traité. Si cette mesure a un effet anticoncurrentiel, le fait pour l'Etat membre de la rendre obligatoire serait susceptible de contrevenir aux dispositions de l'article 81 en liaison avec l'article 10 ⁽¹⁾. Dans le cas d'une campagne publicitaire obéissant à un objectif purement commercial, on peut en effet se demander pour quelles raisons toutes les entreprises du secteur devraient nécessairement y participer. Si certaines entreprises estiment qu'elles ont un intérêt concurrentiel à développer leur propre publicité, l'obligation qui leur est imposée de participer au financement d'une campagne globale n'a-t-elle pas pour effet de limiter la concurrence, voire de renforcer les effets anticoncurrentiels de la décision d'association d'entreprises?

(1) Notamment arrêt Van Eycke du 21.9.1988, Aff 267/86. Rec 1988, p. 4769.

European Competition day in Amsterdam, 22 October 2004

The 10th European Competition Day was organised during the Dutch EU Presidency and announced under the important message of 'COMPETE'. It follows a previous Consumer Conference the 21 October. During his presentation Commissioner Mario Monti received a warm ovation from the audience, the Dutch authorities and the other participants for his excellent work and his personal commitment during the years he was responsible for Competition Policy in the European Commission.

PHOTOS: MINISTRY OF ECONOMIC AFFAIRS, THE NETHERLANDS



M. Pieter Kalbfleisch



M. Mario Monti



M. Emil Paulis

Some of the issues presented were the following:

1. Welcome: Pieter Kalbfleisch, Director General Netherlands Competition Authority
2. Companies must ensure that competition law becomes 'ordinary law': Jan Willem Oosterwijk, Secretary-general of the Ministry of Economic Affairs.
3. 'Competition for Consumers' benefit': Commissioner Mario Monti, Member of the European Commission responsible for Competition.
4. 'A Competition Policy for Lisbon': Mme Pervenche Berès, Member of the European Parliament, Chairman of the Committee on Economic and monetary Affairs in the European Parliament.
5. Presentation of the Study commissioned by the Commission on Private Enforcement of the European Competition rules: Emil Paulis, Director. Directorate General for Competition, European Commission.
6. 'Private Enforcement — Consumers' Point of View': Dominique Forest, Senior Economic Adviser. European Consumers' Organisation BEUC.
7. 'Promoting compliance = promoting competition', John Fingleton, Chairperson, Irish Competition Authority.

The proceedings reports are available on the web: <http://www.consumerandcompetition.nl>

We would like to bring to your attention a few key quotations from some speakers in order to give a better vision of the challenges ahead for Competition Policy identified during the Competition Day.

Jan Willem Oosterwijk, Secretary-General of the Ministry of Economic Affairs:

I think we all agree that commissioner Monti has achieved a great deal in the last 5 years and can look back with the utmost satisfaction. He has been the driving force behind the promotion of competition to the benefit of consumers throughout Europe. I trust that his successor will prove to be a worthy promoter of competition and will continue to place consumer welfare at the core of competition.

So companies will become increasingly responsible for their share of enforcement of competition rules. As I said, this is becoming ever more important. The call for private enforcement is growing louder all the time. Public opinion increasingly demands clearer compliance with competition rules. Infringement of these rules not only damages the business climate in our country, but also the reputation of the infringing company. This is why it is crucial that companies work internally on compliance with the rules.

Competition Commissioner Mario Monti:

I would like to turn now from the results of DG Competition's technical work on substance to its external relationship with consumers. Here also we have been working hard to promote consumer interests and we have put in place a series of institutional reforms designed with exactly that purpose in mind. I believe that I have met the priority of explaining the benefits of competition policy which I set out before the European Parliament. I am confident that these reforms will continue to have influence in future years.

Consumers and the organisations which represent them is a key in the fight to ensure that the law is complied with. Together with the Commission and the national authorities, consumer associations have an important role to play in competition advocacy. Consumers can help to punish violations exposed by means of a complaint to a public competition agency.

Ms Pervenche Berès, Member of the European Parliament:

Competition policy must evolve and adapt to meet the strategic objectives of Lisbon.

The benefits of a market economy for consumers are no longer questioned. In reality the ultimate justification for competition policy to interfere directly into companies' decisions is the wellbeing of consumers. However if we want to reinforce the consumers' role in the markets there is still a pending action to undertake by competition authorities, that is to fully incorporate this potential to daily competition practice via consumers' organisations.

If the consumer is at the centre of competition policy it is simply because he has the right to make his choice in the market. However, for a citizen to become a consumer he or she needs to become a worker first. And citizens who cannot exercise this right of choice are totally put aside by market forces. This is an important issue to be considered within the social cohesion objective as set out in Lisbon.

Mr Dominique Forest, Senior Economic Adviser to BEUC:

The (Ashurst) report outlines ways to streamline procedures for competition-based damage claims (e.g. the creation of specialised courts, removal of limitations on standing etc.). The aim would be to set up clear, simple, expeditious and easy-to-access procedures. We would very much support any initiative to remove restrictions on standing — especially with regard to consumer organisations.

Clear and transparent procedures would not be enough: access to information and the burden of proof are key obstacles for the involvement of consumers and consumer organisations. In antitrust cases, without information/evidence, a complaint has limited chances of being considered as it is up to the complainant to provide elements of proof in the first instance.

Next European Competition Days

The European Competition Day during the EU Presidency by Luxembourg will take place 3 May 2005 in Luxembourg. During the EU Presi-

dency by United Kingdom a joint Competition and Consumer day will take place 15 September 2005 in London. Program announcements will be available in our web site and also on the Member states EU Presidency web-sites.

Energy day: First sectoral high-level meeting within the ECN

Robert KLOTZ and Harold NYSSENS, Directorate-General Competition, unit B-1

On 21 September 2004, the Directorate-General for Competition organised a high-level meeting relating to energy with the national competition and regulatory authorities (NCAs and NRAs respectively). The purpose of the meeting was to discuss the main outstanding obstacles to effective competition in electricity and gas, as well as work sharing between the authorities concerned. The importance of this event was due to three major events that occurred over the last few months: first, the modernisation of the rules for the competition law enforcement, second a series of crucial legislative measures adopted at European level, and third the enlargement of the EU with ten new members.

Major recent developments

The **modernisation** with the entry into force of the new regulation for the implementation of the EC competition rules on 1 May 2004 has led to a framework in which a larger number of authorities are enabled to fully apply competition rules, also to the energy sector. Therefore the need for co-operation within the network of European competition authorities (ECN) with regard to coherent enforcement and division of tasks has become more important. The purpose of the meeting was, first, to exchange views and experiences in order to identify the most crucial problems to tackle in the short and medium term and, second, to debate about how to determine the authority or authorities best placed to deal with the key problems identified. The coordination should concern not only the allocation of cases, but also their subsequent investigation and conclusion. The Energy Day was thus a kick-off meeting for closer co-operation between competition authorities. However, it was designed in a way to reflect the wider picture of the energy markets, so that the national energy regulators were invited and closely involved in the process.

The second set of EC directives aiming at the further **liberalisation** of the gas and electricity markets was adopted in June 2003 and had to be transposed in national law by July 2004. These directives foresee, amongst others, the extension of the unbundling obligations between network and transport activities within the energy companies: from now on, these companies should be

operating through different legal entities and under separate management and organisation. The second main novelty, concerning the network, is the move away from negotiated third party access to mandatory regulated third party access. This access regime is to be monitored and carried out by NRAs. The ultimate aim of these directives is, beyond the creation of an integrated European energy market, to ensure that all energy customers in the EU can benefit from competitive offers both as regards services and prices. Households should also benefit from market opening, at the latest by July 2007.

Main outcome of presentations and discussions

The Directors-General of DG COMP and DG TREN, Philip Lowe and François Lamoureux, stated in their **opening speeches** that the liberalisation of the energy markets will only become a lasting success if both the competition tools and national energy legislation are enforced effectively in the crucial period ahead of us. Vigorously fighting cartels and abusive behaviour as well as strict scrutiny of mergers and acquisitions are therefore key elements for the market opening. Mr Lowe stressed that this will certainly be a policy priority for DG COMP in the near future. Mr Lamoureux added that if the combined impact of the directives and the competition rules do not lead to tangible results, it can not be excluded that new legislation should be adopted with more far-reaching obligations on the companies and wider powers for the regulators.

The **morning panel** was chaired by Sir John Mogg from the UK energy regulator (Ofgem) and discussed the respective roles and tasks of the different authorities. The question of ‘who does what?’ was considered to be particularly relevant in the energy sector, where certain competition problems can be addressed either with regulatory tools or with antitrust tools. In this respect, a distinction must however be drawn between supply and transport. Supply markets cannot be considered as natural monopolies. It should therefore be determined to which extent pioneering antitrust and merger enforcement provide sufficient tools to foster competition in the current gas

and electricity market constellation. The transport networks by contrast have to be generally regarded as natural monopolies, because it is unlikely that any newcomer will be able to replicate the existing infrastructure, due, amongst others, to economic and environmental constraints. Sector-specific regulation is thus warranted in order to allow for market entry by suppliers not related to the company owning the network. The use of antitrust tools in this area nevertheless remains possible to the extent transmission system operators are acting in an autonomous way, without state compulsion. More particularly, overlaps could persist mainly in the area of network-related abuse cases regarding access and pricing issues.

The panellists emphasised the need to create a framework for co-operation between DG COMP, NCAs, NRAs, and possibly other authorities such as consumer bodies. It was regarded as important that these authorities are independent from business. Several participants stressed the need for NCAs and NRAs to exchange views on the use of their respective competences. For example, if no case allocation system is foreseen and no co-operation takes place, there is a risk that NCAs and NRAs might not come to the same conclusions or even to contradictory conclusions. This could lead to legal uncertainty which makes investment decisions unnecessarily difficult. On the other hand, it must also be avoided that certain damaging practices would not be addressed by any authority due to a lack of coordination. Specific issues also addressed include possible measures by NCAs and NRAs to enhance transparency in the market, to tackle the dangers of strategic behaviour and similar forms of abuse by large market players, as well as to improve market monitoring.

The **afternoon panel** was chaired by Alberto Heimler from the Italian Competition Authority (AGCM) and addressed selected substantive competition problems in the energy sector. After the removal of the main legal barriers to market entry like legal monopolies, the national energy regulators are expected to focus their activities on network-related entry barriers. However, this appears not to be sufficient to solve all the competition problems in the energy sector which can stem from restrictive agreements and abuse of dominance as well as from anticompetitive market structures. Hence the importance of effective antitrust and merger control.

Moreover, the information gathered in preparation of the Energy Day shows that some national

competition authorities have gained considerable experience in this field over the last few years. Almost all of them have dealt with merger cases in gas or electricity. Various competition authorities have also looked into presumed abusive behaviour by energy companies, e.g. long-term agreements, refusal to supply cases, as well as access pricing issues. However, not all those cases have shown a successful outcome. The fact that competition problems remain is evidenced notably by the low degree of market entry by newcomers, low switching rates in many countries and the limited amount of liquidity in many national energy markets. Many EU Member states are also experiencing continuously increasing wholesale and retail prices. In view of tackling this type of issues, the Commission has already dealt with a number of cases regarding restrictive agreements and abusive behaviour in the past years. Examples include upstream competition for gas production and gas supply, downstream competition in transport agreements, and access to gas networks. The Commission has also dealt with a number of important merger cases and finally also looked into State aid in the energy sector.

The panel discussion focussed on two selected issues which are to be considered as most important for developing and sustaining competition in the energy sectors at this stage. These issues were, on the one hand, long-term supply agreements in the gas sector, with the related question of the gas-oil price link, and on the other hand, merger control.

In his **key note address**, Competition Commissioner Mario Monti first explained how the Commission has used the different instruments available in the European competition tool box in the energy area in a coordinated fashion. ⁽¹⁾ He underlined that the Commission has a number of specific powers not available to national competition authorities which allow it to tackle also government-induced distortions in the market. He went on to highlight that the Competition DG would from now on focus on the most severe type of infringements, which was likely to lead to more formal decisions and less settlements than in the last years. Mario Monti finally touched upon a recurrent issue underlying many recent energy cases treated by the Commission's competition services: the apparent tension between competition principles and measures to ensure security of energy supply. One of the main challenges for competition authorities in this area is to avoid being drawn into a purely dogmatic application of

(1) This speech is available on the DG Competition website, http://europa.eu.int/comm/competition/index_en.html.

antitrust rules without full consideration to the effects of its intervention and, at the same time, avoid the trap of too prudent an antitrust policy because of overestimation of the security of supply arguments.

First conclusions and next steps

As a **conclusion** of the presentations and discussions of this first high level meeting, Deputy Director-General Götz Drauz underlined that liberalisation, initiated by means of legislative measures must be made operational by achieving effective competition. This task will only be

completed once all energy customers are able to benefit from choice between operators, better service and eventually lower prices. Both competition authorities and energy regulators play a key role in this respect. The big challenge ahead is to apply the antitrust rules in a way that fits the specific market structure and functioning of the gas and electricity sector.

The discussions at the Energy Day were only the starting point for a closer co-operation between all the authorities concerned and the upcoming regular ECN energy sub-group meetings will present the opportunity to go into greater detail.

Commission imposes fine on Topps for preventing parallel imports of Pokémon stickers and cards

Christoph HERMES, Directorate-General Competition, unit C-3

1. Introduction

On 26 May 2004, the Commission adopted a decision finding that The Topps Company Inc and its European subsidiaries, Topps Europe Ltd, Topps International Ltd, Topps UK Ltd and Topps Italia SRL, (all referred to as 'Topps' if not indicated otherwise) infringed Article 81(1) of the Treaty. A fine of EUR 1.59 million was imposed. ⁽¹⁾ The decision concluded that Topps entered into a series of agreements and concerted practices with several of its intermediaries in the United Kingdom, Italy, Finland, Germany, France and Spain with the object of restricting parallel imports of Pokémon collectibles from February 2000 until November 2000.

2. The company and the products

Topps is a group of companies (with annual net sales of EUR 481.34 million world-wide and EUR 198.24 million within the EEA for the fiscal year 2000) producing collectible products and confectionery popular with young children. Collectibles are items like stickers, trading cards or removable tattoos which follow certain themes (e.g. soccer players of Premier Leagues or characters of a particular cartoon series).

3. The case

The case originated with a complaint by a French retailer and concerned Pokémon collectibles. Pokémon is the name for a whole range of characters originally developed for the Nintendo 'Game Boy' videogame but also used, under a licence, by Topps to illustrate collectible products like stickers or trading cards. In 2000, there was a huge demand for such Pokémon collectibles while prices between Member States differed significantly. Families in high-price countries like Finland had to pay more than twice as much for the same Pokémon stickers as families in Portugal.

The evidence gathered by the Commission through a series of information requests showed that Topps initiated and co-ordinated a policy with the overall objective of preventing parallel imports of Pokémon collectibles in the EU. In this context, Topps actively involved its intermediaries in monitoring the final destination of Pokémon products and tracing parallel imports back to their source. Topps requested and received assurances that stock would not be re-exported to other Member States. In some cases where intermediaries did not co-operate, Topps threatened to terminate their supply.

Restrictions of parallel trade constitute by-object violations of Article 81(1) of the Treaty. They jeopardise a fundamental principle of the internal market and deprive consumers of its benefits by artificially reinforcing different price levels between Member States. They have been unequivocally condemned by the Commission many times in the past. ⁽²⁾

The block exemption regulations No 1983/83 (applicable until 31 May 2000) and No 2790/1999 did not apply since the restrictions aimed at guaranteeing absolute territorial protection, thereby covering both active and passive sales. Nor could the agreements benefit from an individual exemption under Article 81(3) of the Treaty since they did not result in any improvement of the distribution of these products and were detrimental to consumers.

The decision was addressed to all four European Topps subsidiaries which participated in the anti-competitive agreements and concerted practices, and also to the ultimate US parent company. The latter was held liable because it was in a position to decisively influence the conduct of its wholly owned subsidiaries. In such cases, the Commission may, on the basis of the case law of the Court ⁽³⁾, legally presume that this power to influence had been actually exercised. Topps did not succeed in rebutting this legal presumption which

⁽¹⁾ IP/04/682 of 26 May 2004.

⁽²⁾ See, e.g., Commission decision of 30 October 2002 in Case number COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega, OJ L 255, 8.10.2003, p. 33.

⁽³⁾ Judgment of the Court in Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50.

was, on the contrary, confirmed by the parallel involvement of all European subsidiaries and by the dual position of one Topps employee as both Managing Director of the Irish subsidiary and Vice President (International) of the US parent company. The decision was not addressed to Topps' intermediaries because their responsibility for the infringement was less significant.

4. Fine

In fixing the amount of the fine under Article 23(3) of Regulation (EC) No 1/2003, the Commission considered, on the one hand, that the prevention of parallel imports between Member States is by its nature a very serious violation of Article 81(1) of the Treaty. As regards the actual impact of the infringement, however, the evidence in the Commission file did not show that the restrictions of parallel imports were applied systematically to all intermediaries or products. Some of the agreements or concerted practices appear not to have been implemented in full and may have had a

limited effect in terms of value of the goods concerned. Concerning the size of the relevant market, the Commission also took into account that the restrictive effects would have been mainly limited to the importing Member States. Therefore, the infringement committed by Topps was considered serious. The facts that Topps terminated the infringement after the first Commission intervention and that it co-operated with the Commission during the proceedings were considered as attenuating circumstances.

5. Conclusion

The present decision constitutes an addition to the list of precedents where the prevention of parallel trade between Member States has been condemned. On the basis of convincing evidence gathered at the very beginning of the proceedings, the Commission was able to prove the existence of a serious infringement of competition law. Topps did not appeal the decision within the timeframe set in Article 230 of the Treaty.

Overview of EU securities trading and post-trading arrangements in the EU-25

*Rosalind BUFTON and Eduardo MARTINEZ RIVERO,
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The transfer of securities from seller to buyer is a process with financial, fiscal and legal consequences. Historically, these have been transposed into a series of technical processes adapted to the requirements of each national environment. As a consequence, post-trade processing of securities is relatively efficient in each national system within the EU. However, as each group of experts which has reported on this sector has underlined, cross-border processing is complex and costly. Furthermore, whilst certain national systems are well known, details of other EU systems, particularly those in the new Member States and those emerging at EU level, are less well known. When coupled with the fact that certain functions (eg clearing and settlement) may be organised differently from one country to another and conducted by a single institution in some and by several in others, this makes an exact understanding of how trading and post-trading functions in the EU-25 very difficult. Finally, the increasing importance of cross-border trading and the emergence of new structures for providing cross-border services mean that this sector is increasingly subject to scrutiny under EU competition law as well as preparing for significant regulatory reform.

Correct understanding of market organisation and structure is fundamental to any analysis by DG Competition. So, in cooperation with the National Competition Authorities, many of whom were assisted by national regulatory experts in this sector, DG Competition decided to compile an overview of the securities trading and post-trading infrastructures in the EU. It takes the form of a general introduction to the sector (for transactions in equities, bonds and government bonds as well as, to a lesser extent, derivatives), describing the main functions (trading, clearing and central counterparties, settlement, custody) and infrastructures (exchanges, clearing institutions and central counterparties, central securities depositories and international central securities depositories at primary level and intermediaries of all categories at secondary level), its main evolutions and in particular the key players at EU level. The second part of the report gives a presentation of the situation in each Member State (EU 25). Consequently it is a photograph of the complex EU landscape in securities trading, clearing and settlement

as of February 2004 including the emerging structures at EU level.

In addition to describing systems, this overview comments on access arrangements and makes an inventory of exclusive arrangements.

When DG Competition asked industry providers and users about competition in the sector, several respondents declared that exclusive arrangements are obstacles to competition. Typically, were mentioned requirements that trades executed on platform A must be cleared and settled in institutions B and C. However, the responses were neither fully documented nor homogeneous. In fact before any further analysis can be made it is necessary to identify the relationships which might be considered as exclusive arrangements and their nature: legal, contractual or 'business rules'. The overview concludes that exclusive arrangements are pervasive in the EU securities post-trading sector. However it also notes some developments which appear to denote greater liberalisation and others which might tend towards greater restriction.

The report does not attempt to enter into a competition assessment of individual mechanisms as such an approach requires further in-depth investigative work which is on-going. Although exclusive arrangements per se are not anti-competitive, the scope of this sector's activity needs to be examined particularly under competition law in the light of the Single Market objectives to ensure that free circulation of capital, goods and services is indeed enabled including through competition in this sector as in others and that exclusive arrangements do not result in situations leading to higher than necessary charges for users.

Nor does the report make recommendations concerning optimal structures for providing services to the sector and the way in which these should be regulated. This is part of the aim of the Communication on Clearing and Settlement published by the Commission on 28 April 2004. Responses to the communication are currently being studied.

The overview is published on DG Competition's web site. Comments from all interested parties on the content and the issues raised on the report are welcome and should be addressed to the e-mail address indicated on the web site by 15 December 2004.

Two important rejection decisions on excessive pricing in the port sector

Michel LAMALLE, Lenita LINDSTRÖM-ROSSI and Antonio Carlos TEIXEIRA, Directorate-General Competition, unit D-3

On 23 July 2004, the Commission took two decisions rejecting two complaints lodged in 1997 by ferry operators — Scandlines Sverige AB (hereinafter ‘Scandlines’) and Sundbusserne AS (hereinafter ‘Sundbusserne’) — against the Port of Helsingborg (Helsingborgs Hamn AB hereinafter ‘the Port’) in Sweden. Helsingborgs Hamn AB is a limited liability company wholly owned by the City of Helsingborg.

These two parallel complaints related to alleged abuses under Article 82 EC. Both notably alleged that the Port charges excessive port fees for services provided to ferry operators active on the Helsingborg-Elsinore route (‘the HH-route’) between Sweden and Denmark.

Article 82 EC prohibits any abuse of dominant position consisting in ‘*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*’ (emphasis added). In practice, unfair pricing is commonly referred to as ‘excessive’ pricing.

From the beginning, the two cases were considered as being important, notably because of their potential impact on the transportation of passengers and goods on the HH-route, which is one of the main ferry routes in the EU in terms of volume of traffic. They required considerable investigation due to the complex factual and legal issues involved. Based on the available evidence, the Commission has come to the conclusion that the two complaints should be rejected.

The decisions, even though they are rejection decisions, have a wider relevance for excessive/unfair pricing issues, notably because the existing case law in this field of competition law is rather limited (mainly *United Brands* ⁽¹⁾). The decisions notably address elements that should be taken into account when determining the economic value of a service and whether a price is unfair and thus constitutes an abuse of a dominant position within the meaning of Article 82 EC.

DG Competition will make a non-confidential version of these two decisions available on its

website. The present article presents the key features of the approach taken by the Commission in this case.

Methodology followed by the Commission in assessing whether the port charges are excessive/unfair

The approach taken by the Commission in this case focuses on the central question to be addressed in an excessive/unfair pricing case, i.e. the relation between the price and the economic value of the service/product. In *United Brands*, the European Court of Justice (hereinafter ‘ECJ’) has defined what may constitute an excessive/unfair pricing abuse under Article 82. In paragraph 250 of that judgment it stated that ‘*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse*’.

In *United Brands*, the ECJ remained, however, very open as to the choice of a methodology and referred to several possibilities to determine whether prices are excessive/unfair:

- The ECJ mentions in paragraph 251 the possibility, ‘*inter alia*’, to make a comparison between the selling price of the product in question and its cost of production, which could disclose the amount of the profit margin.
- The ECJ explained in paragraph 252 that the questions to be determined are ‘*whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products*’ (emphasis added).
- The ECJ acknowledges that ‘*other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair*’ (paragraph 253).

⁽¹⁾ Case 27/76, *United Brands v Commission* [1978] ECR 207.

The Commission followed in this case the methodology set out by the ECJ in paragraph 252 of the *United Brands* judgement. The Commission has therefore sought to determine the costs actually incurred by the Port in providing the products/services in question (the costs of production) and made a comparison with the prices actually charged. The Commission has then assessed whether the prices are unfair when compared to prices charged by the Port to other users or by other ports, or whether the prices are unfair in themselves.

Determination of the costs incurred by the Port in the provision of port services to the ferry-operators

In the absence of a realistic breakdown of the Port's costs allocated to ferry-operators, the Commission has sought to make an approximate calculation and allocation of these costs, based on data made available by the Port, mainly from the audited financial reports.

This was made with great difficulty in this case but it was not possible to determine with certainty all relevant incurred costs. It should be noted that most of the costs of the Port are indirect costs which had to be allocated between the different categories of users, using keys of repartition. Furthermore, most of these costs are fixed costs, whereas the variable costs (i.e. costs that vary with the number of calls made by the ferry-operators in the port of Helsingborg or the number of passengers/vehicles transported onboard the ferries) are proportionally very low.

It must be recalled that the burden of proof is on the Commission to demonstrate, based on cogent evidence, the existence of an abuse under Article 82 of the EC Treaty. In this respect, the ECJ stated in *United Brands* that *'however unreliable the particulars supplied by [the dominant company]..., the fact remains that it is for the Commission to prove that [the dominant company] charged unfair prices'*.⁽¹⁾ In that particular case, the Court found that the basis for the calculation of the production costs of *United Brands* adopted by the Commission was open to criticism, and that any doubt must benefit the alleged infringer.⁽²⁾

Based on the Commission's approximate cost/price analysis, it appeared that the ferry-operations

generate profits whereas, in general, the other operations of the port generate losses.

Both complainants contended that the profit margin derived from the ferry-operations exceeds what they consider to be reasonable and that this would be sufficient to conclude that the port charges are excessive/unfair.

With regard to the relation between the price and the costs, the Commission concluded in the two decisions that, even if it were to be assumed that the profit margin of the Port is high, this would not necessarily lead to the conclusion that the price is unfair and would thus constitute an abuse prohibited under Article 82 EC, provided that this price has a reasonable relation to the economic value of the product/service supplied. This is one of the main conclusions in this case. The Commission considered that, in order to decide whether Article 82 had been infringed, it had to proceed to the second question as set out by the ECJ in paragraph 252 of the *United Brands* judgement, i.e. to determine whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports.

Whereas it appears evident that the test set out by the Court in paragraph 252 of the *United Brands* judgement is twofold, the complainants suggested that both limbs of the test actually address the same question, i.e. whether the price is excessive in relation to the economic value of the service. For the sake of clarity, the Commission has followed the sequence of questions set out by the Court in paragraph 252 of the *United Brands* judgement. However, it is clear from this judgement itself, that this is one methodology amongst others possible (see paragraph 253) and that the main question is whether the price has a reasonable relation to the economic value of the service (see paragraph 250).

Assessment of whether the port charges are unfair when compared to the price of 'competing products'

Following the test set out by the ECJ in paragraph 252 of the *United Brands* judgement, the Commission has examined whether the port charges would be unfair when compared to prices charged (i) by the Port to other users or (ii) by other ports with ferry traffic.

⁽¹⁾ Case 27/76, *United Brands v Commission* [1978] ECR 207, at paragraph 264.

⁽²⁾ *Ibid*, at para 265.

In this case, there are difficulties in making meaningful comparisons between prices charged for the provision of port services, notably because the services provided to the different users in the port of Helsingborg or in other ports are not comparable or because a direct comparison between the different charging systems is not straightforward. Against these difficulties, the Commission has nevertheless sought to make such comparisons and come to the conclusion that there is insufficient evidence to conclude that the port fees charged by the Port to the ferry-operators would be unfair when compared to the port fees charged by the Port to other users or to the port fees charged in other ports (including the port of Elsinore located at the opposite side of the HH route).

Assessment of what constitutes the ‘economic value’ of the service provided by the Port in this case and of whether the port charges are unfair in themselves

As underlined above, the decisive test in *United Brands* about the fairness of a price concerns the relation between the price charged and the economic value of the product/service. However, the ECJ did not specifically set out how the ‘economic value’ of a product/service should be determined.

The complainants considered that the economic value of the product/service should be determined by following a ‘cost-plus approach’. According to such an approach, the economic value of a product/service should be calculated by adding to the costs incurred in the provision of this product/service a reasonable profit which would be a pre-determined percentage of the production costs. Since the port charges, which are based on the approximate cost allocation made by the Commission, seem to exceed the costs borne by the Port in providing port services to the ferry-operators, plus what the complainants would consider to be a reasonable margin, the complainants claimed that the port charges in question would then have to be found unfair within the meaning of Article 82.

While not excluding that the question whether a price is unfair may be assessed within a ‘cost-plus framework’, the Commission considered in these two decisions that the economic value of the product/service cannot, however, as explained

below, simply be determined by adding to the costs incurred in the provision of the product/service, a profit margin which would be a pre-determined percentage of the production costs.

Firstly, it should be recalled that there are uncertainties as regards the precise determination of the production costs that the Commission has taken into account.

Secondly, there is no information on what a ‘reasonable’ profit margin of a ferry-port should be. It was not possible in this case to establish valid benchmarks as concerns the profitability of ferry-operations in ports. The determination of such benchmarks would need the same amount of effort for each port as the one required for the port of Helsingborg, with similar uncertainties as regards the precise level of the costs, profits and equity attributable to the ferry-operations. Even if benchmarks on profits of ferry-ports could be established, they would in principle only be considered as an indication and would not be conclusive in themselves as to whether the price charged bears any reasonable relation to the economic value of the services provided.

The ‘cost-plus approach’ suggested by the complainants takes only into account the conditions of supply of the product/service. The Commission considered, however, that the economic value should be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product/service.

In this respect, the two decisions note that the ferry-operators benefit from an excellent location of the port of Helsingborg and that this should be taken into account in the assessment of the economic value of the service provided by the Port and in its price. The fact that the port services are provided by the Port at this specific place allows both passengers and ferry-operators to cross the Øresund in an expeditious way ⁽¹⁾, which is in itself valuable, creates and sustains demand both on the downstream market (the market for transport services on ferries) and the upstream market (the market for the provision of port services to ferry-operators). This specific feature does not necessarily imply higher production costs for the provider of the port services. However, it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.

⁽¹⁾ The sailing distance between Helsingborg and Elsinore, which is the shortest between Sweden and Denmark, allows them to operate a frequent 20-minute-shuttle service, which is more cost-efficient and attractive for passenger and vehicle traffic. This particular ferry-route is, therefore, unique compared to most other international ferry routes.

It is concluded in the two decisions that, despite an extensive analysis, there is not sufficient evidence that the Port charges prices that would have 'no reasonable relation to the economic value' of the service provided. There is therefore no sufficient

evidence to establish that the Port charges excessive/unfair prices and thereby abuses its dominant position within the meaning of Article 82 EC. Scandlines has appealed the rejection decision to the Court of First Instance.

Liberal professions and recommended prices: the Belgian architects case

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In the context of the Commission's endeavours to eliminate restrictive and unjustified rules in the liberal professions sector, it took a decision on 24 June 2004, condemning the recommended minimum fee scale operated by the Belgian Architects' Association. The Association has decided not to appeal this decision.

Background

The European Council meeting in Lisbon in March 2000 approved a programme of economic reform aimed at making the EU the most competitive and dynamic knowledge based economy in the world by 2010. In improving the competitiveness of the European economy an important part is to be played by professional services. Professional services are usually characterised by a high level of regulation, in the form of either state regulation or self-regulation by professional bodies. Some of this regulation is potentially restrictive, the five main categories being (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi disciplinary practices.

The Decision on the scale of minimum fees drawn up by the Belgian Architects' Association is in line with the Commission's overall policy towards services in general and professional services in particular. This policy is reflected in the proposals for Directives on services ⁽¹⁾ and on professional qualifications, ⁽²⁾ and the Commission communication on competition in professional services. ⁽³⁾ In this Communication, the Commission acknowledged that some regulation in the sector of professional services may be justified, for instance to reduce the asymmetry of information between customers and service providers. It, however, expressed its belief that in some cases more pro-competitive mechanisms than those which presently exist can and should be used.

Like fixed prices, recommended prices too have a significant negative impact on competition. They can facilitate coordination of prices between service providers. They can mislead consumers as to the price levels that might be reasonable and as to whether prices are negotiable. It is true, at least in theory, that they can provide consumers with useful information about the average costs of services, but there are alternative methods of providing price information of this kind. For example, the publication of historical or survey-based price information by independent parties (such as a consumer organisation) might provide a more trustworthy price guide for consumers which distorts competition to a lesser extent. In that regard it is worth noting that the Office of Fair Trading (OFT) in the United Kingdom in 2001 came to the conclusion that the Royal Institute of British Architects' (RIBA) indicative fee guidance could facilitate collusion. The OFT in 2003 accepted RIBA's new fee guidance based on historical information and the collation of price trends that did not provide a lead on the current year's prices.

In 2000, the turnover achieved in the provision of architectural and engineering services and related technical consultancy in Belgium amounted to € 4.4 billion. This corresponds to 15% of the turnover achieved in the Belgian construction sector.

The Decision

The fee scale

A scale of minimum fees was adopted by the National Council of the Belgian Architects' Association in 1967, and was amended several times after; the most recent amendment, in June 2002, described it as a 'guideline' (*indicatif/leidraad*). The recommended minimum fee scale was meant to apply to all architectural services provided by independent practitioners in Belgium, regardless of whether the intervention of an architect was

⁽¹⁾ Proposal for a Directive of the European Parliament and the Council on services in the internal market, COM(2004) 2.

⁽²⁾ Amended proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications (presented by the Commission pursuant to Article 250(2) of the EC Treaty), COM(2004) 317.

⁽³⁾ Report on Competition in Professional Services, COM(2004) 83, 9 February 2004.

legally required or not. It laid down the architects' fees as a percentage of the value of the works realised by the entrepreneur.

Decision by an association of undertakings

The Commission considers that the Association's decision of 12 July 1967, laying down the original version of the fee scale, must be considered an independent act of a prescriptive character for which the Association, acting as an association of undertakings, is wholly responsible. The decision is neither a State measure nor simply an act preparatory to a State measure and the Association was not legally obliged to adopt this decision. Furthermore, the Commission comes to the conclusion that the Association intended to coordinate its members' behaviour in the market through its decisions laying down and amending the scale. According to the case law of the Court, an act described as a recommendation may be contrary to Article 81, whatever its legal status, if it constitutes the faithful reflection of a resolve on the part of an association of undertakings to coordinate the conduct of its members' on the market in accordance with the terms of the recommendation ⁽¹⁾.

Restriction of competition

In the Decision, the Commission sets out the evidence relating to the decision to establish the fee scale, the legal context, and the conduct of the Association that has satisfied the Commission that the decision to establish the scale is a decision of an association of undertakings which has the restriction of competition as its object. This is despite the fact that the Association has described the scale as a 'guideline', and despite the fact that not all architects have perceived or treated it as compulsory.

The evidence indicating that the scale sought to restrict competition includes the intentionally rule making tone of the title and of the recitals in the preamble, the fact that for 18 years the Association drew up and circulated a standard contract in which the only option for determining fees was a reference to the scale, and the fact that the Association went far beyond merely circulating information to its members, to clients and to the courts.

According to the preamble of the fee scale, rates lower than those set out in the scale will not enable

the architect to perform all the duties incumbent upon him conscientiously and responsibly; if he failed to apply them, he would run the risk of neglecting his client's interests; he would therefore undermine the honour and dignity of the profession of which the Association is guardian. The Commission notes in its decision that undermining the honour and dignity of the profession may give rise to disciplinary penalties.

With regard to the assistance given to clients and to the courts, the Commission points out that, if necessary in the event of a dispute, questions relating to the level of fees may be put to the governing bodies of the Association. While such a practice is not likely to encourage the conclusion of agreements restricting competition ⁽²⁾, the same cannot be said when a scale of fees is published with a view to preventing such disputes. In other words, while a professional association may, in certain circumstances, legitimately pronounce *ex post* on the level of fees being claimed, it may not attempt to harmonise the level of fees *ex ante*.

With regard to the limits of the instructions that may be given to members by a professional organisation, any help provided towards management must not directly or indirectly affect the free play of competition within the profession. In particular, any instructions given in this respect should not have the effect of diverting undertakings from taking direct account of their costs when they individually determine their prices or fees. However, the Association did not circulate information to its members to enable them to determine their fees according to their costs ⁽³⁾; it circulated a scale of minimum fees. In addition, the scale creates a somewhat artificial link between the cost of the building work and the architect's fees. While it is true that the cost of the work is a determining factor in the insurance premium to be paid by the architect, there is no other direct link between the cost of the work and the architect's costs, or any necessary link with the value added by his services.

Although the Commission concludes that the decision establishing the scale had the restriction of competition as its object, it goes on to set out evidence showing that the scale was applied at least to some extent.

⁽¹⁾ Court of Justice in Case 45/85 *Verband der Sachversicherer* [1987] ECR 405, paragraph 32; see also Joined Cases 209 to 215 and 218/78 *Van Landewyck* [1980] ECR 3125, paragraph 86.

⁽²⁾ See Court of Justice in Case C-221/99 *Conte* [2001] ECR I-9359.

⁽³⁾ See Commission Decision 96/438/EC in Case IV/34.983 – Fenex, OJ L 181, 20.7.1996, p. 28, paragraphs 60-65.

The Wouters case-law

According to the *Wouters* case-law⁽¹⁾ of the Court of Justice, a decision by an association of undertakings does not infringe Article 81(1) of the EC Treaty when, despite the effects restrictive of competition that are inherent in it, it is necessary for the proper practice of the profession, as organised in the Member State concerned. The Commission takes the view that the establishment of a recommended minimum fee scale by the Architects' Association cannot be considered as necessary in order to ensure the proper practice of the architect's profession. The scale does not prevent unscrupulous architects from offering poor quality services, and it may even protect them by guaranteeing them a minimum fee. Furthermore, the scale may discourage architects from working in a cost efficient manner, reducing prices, improving quality or innovating.

The end of the infringement and the fine

After receiving the statement of objections in November 2003, the Association withdrew the scale of fees and took the steps necessary to publicise the fact. The Commission therefore concludes in its decision that the infringement has come to an end.

Though the decision fixing or recommending minimum fees is a very serious infringement, the Commission qualifies the infringement as serious in light of the circumstances that the fee scale has probably not been applied universally by all architects and the geographical scope of the decision was limited to one Member State. Since the

infringement lasted for over 35 years, it is an infringement of long duration.

The Commission decides to grant a substantial reduction of the amount of the fine, imposing a fine of € 100 000. Indeed, it is plausible that there was reasonable doubt on the part of the Association as to whether its fee scale did indeed constitute an infringement at least until the Commission adopted in 1993 its CNSD Decision prohibiting the fixed fee scale of the Italian customs agents⁽²⁾. Furthermore, the Commission's policy, set out in its Report of 9 February 2004, is to encourage the national regulatory authorities and professional bodies to revise and amend their restrictive rules, and give them the opportunity to do so. The amount of the fine also reflects a gradual approach⁽³⁾ by the Commission in fining anti-competitive practices in the professions.

The situation in the Member States

At the initiative of the national competition authorities, recommended prices for architectural services have already been terminated in Finland, France, and the United Kingdom. The Slovak Chamber of Architects has recently withdrawn its recommended fee scale. According to a fact-finding exercise by DG Competition, recommended prices for architects seem to exist in Czech Republic, Hungary and Slovenia (recommended prices established by public authorities and professional associations for some kinds of services). The Commission will be discussing the situation shortly with the national competition authorities in the framework of the European Competition Network.

⁽¹⁾ Case C-309/99 *Wouters* [2002] ECR I-1577.

⁽²⁾ Commission Decision 93/438/EEC in Case IV/33.407 – CNSD, OJ L 203, 13.8.1993, p. 27.

⁽³⁾ In its first decision concerning tariffs of professional bodies, in 1993, the Commission condemned the fixed tariffs of the association of Italian customs agents without imposing a fine. In 1996, the Commission took a decision concerning the recommended tariffs of the association of Dutch forwarding agents, imposing a symbolic fine of € 1000.

Commission revises notices following adoption of the new merger regulation

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Following the adoption of the new Merger Regulation⁽¹⁾ and of the Implementing Regulation⁽²⁾, the Commission approved, in July 2004, three new notices dealing respectively with ancillary restraints, simplified procedure and case referral⁽³⁾. These notices are available on the DG COMP website and will be published in the OJ when all languages are available.

The new notice on ancillary restraints

General approach

The existing notice on ancillary restraints was revised in order to take account of the new Merger Regulation⁽⁴⁾. The new Merger Regulation provides explicitly that a decision declaring a concentration compatible with the Common Market *'shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration'*⁽⁵⁾. As further explained in recital 21, *'Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases'*. Accordingly, the parties to a transaction have to assess themselves whether a clause can be regarded ancillary or not to a merger. This approach is consistent with the régime for the enforcement of Articles 81 and 82 set out in Regulation (EC) No 1/2003.

However, in specific circumstances, the Commission retains a residual function. According to recital 21, the Commission should at the request of the undertakings concerned, expressly assess the ancillary nature of such restrictions if a case presents *'novel and unresolved questions giving rise to genuine uncertainty'*. The recital subsequently

defines a *'novel or unresolved question giving rise to genuine uncertainty'* as a question that is *'not covered by the relevant Commission notice in force or a published Commission decision.'*

Against this background, the main purpose of the new notice is to provide better guidance for the interpretation of the notion of *'ancillary restrictions'* in order to facilitate the parties' self-assessment and to improve legal certainty. The notice thus contains more clear-cut provisions, for example by simplifying the maximum periods for which restrictions can be accepted. It also covers the vast majority of clauses that, in the Commission's experience, are claimed to be ancillary to concentrations. However, it is acknowledged that agreements which depart from the principles set out in the notice may well be regarded as ancillary restrictions in exceptional circumstances. In line with recital 21 of the Merger Regulation, the notice refers parties seeking further guidance to the Commission's published decisions. When the specific circumstances of a case are neither covered by the notice nor by the Commission's decisional practice, the Commission will individually assess the case if the parties so request.

Main provisions

As regards the *'Common clauses in cases of acquisition of an undertaking'* (section III), the new notice considers *non-competition clauses* as ancillary restrictions for up to three years if both, know-how and good will are included, and for two years if only goodwill is transferred. The notice also clarifies the rules for the geographical scope of restrictions, for non-solicitation and confidentiality clauses. For *licence agreements*, the Notice still requires no time limit but sets out more clear-cut rules for territorial limitations and agreements which protect the licensor only. The maximum

(1) Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

(2) Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 (The 'Implementing Regulation') and its annexes (Form CO, Short Form CO and Form RS), OJ L 133, 30.4.2004, p. 1.

(3) The notice on case referral was discussed in the Competition Policy Newsletter, 2004-Summer-Number 2, page 83.

(4) Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

(5) See Article 6(1)(b), second subparagraph; Article 8(1), second subparagraph and (2), third subparagraph.

period for *purchase and supply obligations* has been extended from three to five years given the vertical character of these restrictions.

As regards ‘Common clauses in cases of joint ventures’ (section IV), while the previous notice provided a time limit of three years for non-competition clauses in joint ventures, the new Notice accepts these clauses for the whole lifetime of a joint venture. This is because the need for non-competition clauses in joint ventures is not generally limited to a transitional period, and, in any case, it is normally not realistic to expect effective competition between a joint venture and its parent companies. The wording of other provisions has also been simplified (e.g. those on the geographical scope of non-competition agreements or on non-solicitation and confidentiality clauses) in order to provide clearer guidance to the parties. The rules for licence agreements, purchase and supply obligations remain without significant changes.

The new notice on a simplified procedure for treatment of certain concentrations

The revised notice on a simplified procedure replaces the previous notice from 2000. The Notice has been revised in order to align the text with the wording of the new Short Form CO ⁽¹⁾. This has been achieved by making one substantive amendment — the inclusion of a new category of concentrations involving a change from joint to sole control — and other minor textual changes.

Simplified treatment of changes from joint control to sole control. The application of the simplified procedure is motivated by reference to the Commission's experience to date which has shown that changes from joint control by two or more companies to sole control by one company over a joint venture do not usually give rise to competition concerns. This is because the withdrawal of one or several controlling undertakings will inevitably reduce the number of undertakings concerned. It may also lead to little or no change in the running of the joint venture on the market. It will thus not normally result in a strengthening of

the combined market position of the remaining undertakings concerned, i.e., the sole controlling parent and the former joint venture, as compared with the situation prior to withdrawal.

However, under exceptional circumstances the change from joint to sole control might raise competition concerns. A particular competition concern could arise in circumstances where the former joint venture is integrated into the group or network of its remaining single controlling shareholder, whereby the disciplining constraints exercised by the potentially diverging incentives of the different controlling shareholders are removed and its strategic market position as a result is significantly strengthened.

The impact on competition caused by the change from joint to sole control has been discussed in few Commission decisions ⁽²⁾. For example, in *Deutsche Post/DHL (II)* ⁽³⁾, the Commission found that the impact of the transition from joint to sole control appeared to be limited as DHL already acted in the market to a large extent as a part of Deutsche Post group.

However, in one case (*KLM/Martinair*), the proposed acquisition of sole control raised competition concerns and led to the adoption of an Article 6(1)(c) decision ⁽⁴⁾. The Commission's investigation showed that the proposed change from joint to sole control would have a significant effect on the competitive position of KLM and Martinair in some markets. In particular it would allow KLM to fully integrate Martinair's activities with its existing activities resulting in the creation of dominant positions on two markets.

The safeguards and exclusions section of the notice (points 6-11) therefore describes scenarios in which changes from joint to sole control may give rise to competition concerns and stipulates that in such cases, the Commission may refrain from applying the simplified procedure and launch an investigation and/or adopt a full decision. As an additional safeguard the Commission may refrain from applying the simplified procedure in cases where neither the Commission nor the competent authorities of Member States have reviewed the prior acquisition of joint control of the joint venture in question.

⁽¹⁾ The Form CO is an annex to the draft revised Commission Regulation No 447/98 (the Implementing Regulation).

⁽²⁾ For example, COMP/M.2469 – Vodafone/Airtel Commission Decision of 26.06.2001 and Decision COMP/M.2691 – TUI/Nouvelles Frontières (II) of 26.8.2002.

⁽³⁾ Case No COMP/M.2908 – Deutsche Post/DHL, Commission decision of 21.10.2002.

⁽⁴⁾ Article 6 (1) (c) Decision IV/M.1328 – KLM/Martinair of 1.2.1999.

Relationship between notification requirements and the simplified procedure

The Notice also clarifies the link between the notification requirements of Form CO, the Short Form CO and the short form decision. The notice states that where the Commission receives a notification fulfilling the requirements of the notice, it will usually adopt a short form decision, however safeguards and exclusions are in place (points 6-11) to enable the Commission to launch an investigation and/or adopt a full decision in appropriate cases. In other words the Commission may also adopt a short form decision where it receives a full notification fulfilling the requirements of the simplified procedure.

Referral requests. The text of the notice (point 14) indicates that subject to the safeguards and exclusions, the simplified procedure may apply to situa-

tions involving a failed pre-notification request by the parties for referral to a Member State pursuant to Article 4(4), and to cases in which Member States request referral to the Commission under Article 4(5) and such request is granted.

Timing of short form decisions. The notice also indicates (point 17) that the Commission will endeavour to issue a decision as soon as practicable following expiry of the 15 working day period during which Member States may request referral pursuant to Article 9 of the Merger Regulation. This is the earliest point at which adoption of a decision is legally possible.

Ancillary restrictions. In view of changes to the Commission's policy concerning ancillary restrictions, the notice states that the procedure is not suited to cases in which the undertakings concerned request an express assessment of ancillary restrictions.

Merger control: Main developments between 1 May and 31 August 2004

Mary LOUGHRAN, unit C-4, and John GATTI, unit E-3, Directorate General Competition

Recent cases — Introductory remarks

The Commission received 93 notifications during this period. This represents a substantial increase of almost 40% over the number received in the previous four-month period and an increase of more than 20% in the number received in the corresponding period last year. The Commission adopted a total of 84 final decisions again representing a substantial increase of 47%, compared to the previous four month period. Of these, 80 transactions were cleared unconditionally pursuant to Art. 6 (1) (b) and 4 transactions were cleared subject to conditions taken pursuant to Art. 6 (2). Of the 80 unconditional clearances 52 decisions were taken in accordance with the simplified procedure. There were no prohibitions (pursuant to Art. 8(3)) during this period. One decision was taken in accordance with Article 8 (2) (Sony/BMG) without conditions. Three second phase investigations were opened pursuant to Art. 6 (1)(c). Finally the Commission took two referral decisions pursuant to Article 9 during the period. The most important decisions adopted during the period are summarised below.

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

Summaries of decisions taken under Article 8 (2)

Sony /BMG

This case is described in a separate article (see pages 7-10 above)

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

Group 4/Securicor

Group 4 Falck, a Danish company, and Securicor, a company based in the United Kingdom, are both providers of private security services. These

services include a wide range of activities such as cash transportation, guarding services, alarm systems and justice services (e.g. management of prisons and transport of prisoners). Group 4 Falck had activities around 80 countries. Securicor was present in a total of 50 countries. Combined, the merged entity would therefore be a close competitor to Securitas, the Swedish company that is the world leader.

Given the characteristics of the security business, in particular the existence of a different regulatory framework in each country, it was concluded that the provision of security services is made on a national or regional scale. Consequently, the Commission analysed this merger country by country. In this regard overlapping activities were identified in six European Union countries only: France, Germany, Ireland, Luxembourg, the Netherlands and the United Kingdom.

The Commission's investigation identified competition concerns in three geographical areas where the combined entity would be particularly strong. These were:

- cash transportation, manned guarding and alarm monitoring and response services in Luxembourg;
- manned guarding services in the Netherlands and
- cash transportation services in Scotland.

In order to address these competition concerns, Group 4 Falck and Securicor undertook to divest Securicor's security business in Luxembourg and Group 4 Falck's manned guarding business in the Netherlands and cash transportation activities in Scotland.

Owens-Illinois/BSN Glasspack

In June the Commission approved, subject to divestiture commitments, the acquisition of the French glass container manufacturer BSN Glasspack S.A. by its US-based competitor Owens-Illinois Inc. The transaction initially raised competition concerns because the two companies were direct competitors in a number of already highly-concentrated regional markets in the EU.

However, Owens-Illinois' commitments to divest two glass bottle plants, in Spain and in Italy, enabled the Commission to clear the deal.

Owens-Illinois is a US-based international manufacturer and seller of glass containers, glass container moulds and machinery for manufacturing glass containers, and plastic containers and associated equipment. In the European Economic Area, Owens-Illinois has glass manufacturing operations in Finland, Italy, Spain and the United Kingdom. Its EEA plastic packaging manufacturing business is located in Finland, the Netherlands and the United Kingdom. BSN manufactures and sells glass containers for beverages and food. BSN has production facilities in France, Belgium, Germany, the Netherlands and Spain. BSN is not active in plastic packaging manufacturing. The glass containers produced by the merging firms are used to package products such as soft drinks, wine, mineral water, olive oil, ketchup and other food products.

The merging firms' European plant networks are largely complementary on a national basis, i.e. they do not operate production plants in the same Member States. However, Owens-Illinois and BSN Glasspack are direct competitors in two regional markets comprising, on the one hand, North-Eastern Spain/ South-Western France and, on the other hand, South-Eastern France/ Northern-Italy. Glass containers are bulky products but they are, nevertheless, typically supplied within a range of 300-400km from the production plant which can encompass border regions.

The transaction, as originally notified, would have led to high market shares in the regions concerned and would have removed an important competitor in what are already highly-concentrated markets. Besides the merging partners, the only other big player in these regions is French company St. Gobain, the other competitors being rather small.

In order to alleviate the Commission's concerns, Owens-Illinois offered to divest a production plant to an independent and viable competitor in each of the two affected regions.

The transaction did not raise concerns in the rest of the EEA as the two partners' sales activities either do not overlap or, where they do, a number of large competitors, including St. Gobain, Rexam, Ardagh, Weigand and Allied Glass will remain after the transaction.

Syngenta/Advanta

In August the Commission authorised the acquisition of Dutch-based seed producer Advanta B.V. ('Advanta') by the Swiss Syngenta Crop Protec-

tion AG. ('Syngenta CP') belonging to Syngenta AG. Syngenta CP and Advanta are both active in breeding, production, processing and sale of various kinds of seeds. The notified transaction involved the acquisition of sole control of Advanta by Syngenta CP. Ultimately Syngenta intended to acquire and retain the North American business units of Advanta, whilst selling off Advanta's European business to a third party.

The Commission's market investigation showed that the transaction would raise serious competition concerns in a number of national markets for seeds within the EU (sugar beet seeds in Belgium, Finland, France, the Netherlands, Portugal, Spain, Austria, Ireland and Italy, maize seeds in Denmark, the Netherlands and the United Kingdom, sunflower seeds in Hungary and Spain, the French market for spring barley seeds and the UK market for vining pea seeds).

The Commission found that in these markets the operation would create a very strong market leader, often twice or more the size of the next competitor. In the market for sugar beet seeds, the proposed operation would bring together two of the three major European sugar beet seed breeding programmes, which are also the main suppliers of sugar beet seeds in Europe.

Syngenta's offer to divest Advanta's whole European business to an independent purchaser removes entirely the overlap of the parties' operations on all relevant markets within the European Union and hence also removes the Commission's competition concerns.

Dassault/Socpresse

Au mois de juin 2004, la Commission européenne a autorisé, en vertu du Règlement sur les Concentrations, l'acquisition de la Socpresse par le Groupe Industriel Marcel Dassault (GIMD), après que GIMD se soit engagé à céder le magazine *La Vie Financière* pour résoudre les problèmes de concurrence soulevés par l'opération.

Le 30 avril 2004, la Commission a reçu une notification par laquelle GIMD acquiert le contrôle de l'ensemble de la Socpresse. GIMD est un groupe français actif principalement dans les secteurs de l'aéronautique, de l'informatique et de la viticulture ainsi que de la presse magazine. GIMD édite notamment les magazines *Valeurs Actuelles*, *Le Journal des Finances*, *Finances Magazine* et *Le Spectacle du Monde*. Socpresse est aussi une société française de presse à la fois quotidienne nationale et régionale, presse magazine et presse spécialisée. Socpresse est la maison mère du Figaro Holding, qui édite le quotidien *Le Figaro* et

le Figaro Magazine, et de la société *Groupe L'Express-L'Expansion*, société éditant de nombreux magazines, dont *L'Express*, *L'Expansion*, *La Vie Financière* et *Mieux Vivre Votre Argent*.

L'enquête conduite par la Commission a montré que l'ensemble GIMD/Socpresse contrôlera un nombre de magazines économiques et financiers nettement plus important que ses concurrents, ce qui l'aurait placé dans une position privilégiée, notamment vis-à-vis des annonceurs souhaitant atteindre les lecteurs financiers. Pour ce faire, il pourrait s'appuyer sur la puissante régie publicitaire de la Socpresse, qui commercialise les espaces publicitaires de plus de 80 titres de presse quotidienne et magazine.

L'opération soulevait des problèmes de concurrence en France sur les marchés de la vente d'espaces publicitaires dans les magazines économiques et financiers où ni les concurrents, ni les acheteurs d'espaces publicitaires, c'est-à-dire les annonceurs, n'auraient été en mesure de contrebalancer la puissance combinée de Socpresse/GIMD qui aurait bénéficié de parts de marché proches de 50%. D'une manière générale, les annonceurs négocient individuellement avec les éditeurs ou leurs régies et ne bénéficient donc pas d'une véritable puissance d'achat.

Afin de résoudre les problèmes de concurrence et d'éviter une enquête approfondie, GIMD a proposé de céder le magazine économique et financier *La Vie Financière* édité par le Groupe Express-Expansion. La Commission a estimé ce remède suffisant pour dissiper ses doutes vu la qualité et la notoriété du titre. Toutefois, afin de s'assurer qu'une large majorité des journalistes travaillant à la rédaction de *La Vie Financière* suivra le magazine lors de sa cession, et renoncera donc à exercer la «clause de cession» prévue par le droit social français pour les titulaires d'une carte de presse, la Commission a précisé qu'elle attachera une attention particulière à ce que le repreneur du titre dispose d'une crédibilité suffisante en matière d'édition de presse pour assurer la pérennité du titre et une concurrence effective et durable sur le marché.

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

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 a 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 such cases to national authorities if they request a referral. This arrangement allows the best placed authority to deal with the case in line with the subsidiarity principle.

Accor/Colony

Le 19 avril 2004, la Commission a reçu notification d'un projet de concentration par lequel les entreprises Accor, Colony et la famille Barrière-Desseigne créent en commun le Groupe Lucien Barrière, société qui regroupera les actifs hôteliers et les casinos actuellement contrôlés, directement ou indirectement, par Accor et la famille Barrière-Desseigne. Accor Casinos a actuellement une société commune avec Colony. La nouvelle entreprise sera contrôlée en commun par Accor, Colony et Barrière-Desseigne, cette dernière y contribuant ses casinos et hôtels. Cette nouvelle entreprise deviendra le leader européen dans le secteur des casinos.

L'opération concerne essentiellement trois types de marchés en France, à savoir l'acquisition de licences de casinos par appels d'offres, l'exploitation de casinos et les marchés de l'hôtellerie. L'enquête de la Commission a montré qu'il n'y avait pas de risque de concurrence sur le marché des appels d'offres pour des licences d'exploitation de casinos où le Groupe Barrière sera confronté à des concurrents français importants, tels Partouche, Moliflor et Tranchant et/ou à des acteurs locaux et internationaux.

L'impact de l'opération dans le secteur hôtelier est minime puisqu'elle ne porte que sur 12 hôtels. Sur le troisième aspect, c'est-à-dire l'exploitation de casinos, le 13 mai 2004, les autorités françaises de la concurrence ont demandé un renvoi partiel, basée sur l'article 9 du règlement sur les concentrations de dimension européenne, de manière à pouvoir examiner elles-mêmes l'impact dans certaines régions. La Commission ayant constaté que l'exploitation des casinos est de dimension locale — les clients d'un casino proviennent en grande majorité d'une zone de chalandise située à moins d'une heure en voiture — a décidé de renvoyer en France l'appréciation de l'impact de l'opération sur la Côte d'Azur et sur la côte basco-landaise. La Commission a donné son approbation à l'opération pour le reste de l'Union européenne.

Kabel Deutschland/ish

In June the Commission decided to refer the examination of the intended acquisition of ish GmbH & Co. KG and ish KS NRW GmbH & Co. KG (both together: 'ish'), by Kabel Deutschland GmbH (KDG), the operator of the North Rhine-Westphalian regional broadband cable network, to the German competition authority. The German Federal Cartel Office had requested the referral because the operation threatened to strengthen the dominant positions of KDG in several markets for transmission services for TV and radio signals and related services.

KDG operates the former broadband cable network of Deutsche Telekom AG in all of Germany except in Bundesländer Hessen, Baden-Wuerttemberg and North Rhine Westphalia. In the latter regions 'ish' is the operator in broadband cable network. Both companies offer in their respective network areas the transmission of broadcast signals (TV and radio) as well as — to a smaller extent — internet access.

According to the notification KDG intended to acquire indirectly 100% of the shares in ish. KDG also planned to buy the two remaining regional broadband cable system operators in Germany, iesy Hessen and Kabel Baden-Wuerttemberg. Unlike the KDG/ish merger these two concentrations fell within the jurisdiction of the Federal Cartel Office and had already been notified there.

On 14 May 2004 the Federal Cartel Office made a request for referral of the case on the basis that the merger could lead to the strengthening of dominant positions on several markets within its jurisdiction. On the market for the feeding of broadcast signals, where broadcasters require their signals to be transmitted via the broadband cable, such a strengthening could — according to the Federal Cartel Office — result from the increase of reach that follows the combination of the two networks. Moreover, on the market for services for digital pay-TV, the market for delivery of signals from the regional broadband cable to the in-house cable systems and the market for the supply of signals to end customers competition could, in the view of the Federal Cartel Office, be further impeded if 'ish' were eliminated as a competitor of KDG which is already considered dominant on some regional markets.

The Commission came to the conclusion that the conditions for a referral to the Federal Cartel Office were met, given the national scope of the markets affected by the transaction. It considered that the Federal Cartel Office was best placed to analyse the identified preliminary competition concerns, as this requires the examination of local markets and specific national circumstances. As all three acquisitions planned by KDG, 'ish' (the subject of the referral request) iesy Hessen and Kabel Baden-Württemberg raised very similar issues it was considered that all three cases should be examined by a single competition authority.

Conditional decisions and EC State aid law: The MobilCom case

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I. Introduction

In July 2004 the Commission approved aid granted to MobilCom AG to help it with its restructuring in 2002/2003. The approval of the aid was however linked to conditions. To offset the distortions of competition caused by the aid, MobilCom and its affiliates must halt their online direct sales of MobilCom mobile telephony contracts for seven months.

The possibility to attach conditions to a positive decision is stipulated in Article 7(4) of the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now 88) of the EC Treaty ('Council Regulation (EC) No 659/1999')⁽¹⁾.

This possibility plays an important role in particular in major restructuring aid cases. The Commission made for example its final positive decision in the case *Bankgesellschaft Berlin*⁽²⁾ subject to a number of conditions concerning compensatory measures necessary to offset competitive distortions caused by the aid.

In this respect the MobilCom decision contains two interesting aspects which should be looked at in more detail in this article. The first aspect is the kind of compensatory measure which was made a condition subject to which the aid can be considered compatible with the common market. Whereas in the majority of the restructuring aid cases, in which conditions concerning compensatory measures have been included for the approval of the aid, these conditions were primarily of a structural nature, like for example the liquidation or the sale of parts of the company, the compensatory measure in the MobilCom case consists exclusively in a behavioural measure.

The second aspect concerns the way the condition and the compensatory measures were integrated in the decision and the legal basis for such a conditional decision. Whereas in most of the cases including the mentioned *Bankgesellschaft Berlin* case, the conditions contained in a final condi-

tional decision were agreed by the Member State, in the MobilCom case they were not previously accepted by the Member State.

Before looking into these issues, a short overview of the case shall be presented.

II. The restructuring of MobilCom

MobilCom is a mobile phone service provider. Before the restructuring MobilCom had also been active in the field of UMTS and landline/Internet. The company is located in Büdelsdorf, Schleswig-Holstein, Germany.

MobilCom ran into difficulties in 2002 when its main shareholder, France Télécom, announced its withdrawal from the UMTS business, and stopped all payments for the purpose of financing the UMTS business. At this time MobilCom had a significant amount of debts plus large current financing requirements to cover further network investments, ordinary organisational expenditure and interest. Since France Télécom had for months been MobilCom's sole remaining source of financing and there were no alternative financing options, MobilCom was directly threatened with insolvency.

Against this background Germany granted a first deficiency guarantee for a loan of EUR 50 million in September 2002 to provide immediate liquidity to the company. This aid was approved by the Commission as rescue aid in January 2003⁽³⁾ and was not part of the final conditional decision adopted in July 2004.

In order to ensure further funding, which was needed to finance the requisite reorganisation measures of the company, Germany and the *Land* of Schleswig-Holstein granted another 80% deficiency guarantee for a loan amounting to EUR 112 million in November 2002. The Commission considered that this measure constituted restructuring aid, which was however disputed by Germany and the company. This aid measure was approved subject to conditions in July 2004.

(1) OJ L 83, 27.3.1999, p.1.

(2) Commission decision of 18 February 2004 (not yet published in the OJ).

(3) OJ C 80, 3.4.2003, p. 5.

MobilCom implemented a restructuring plan. The basis of the strategy for restoring the firm's profitability was to concentrate strictly on the original core business as a service provider in the mobile telephony sector. The unprofitable UMTS business was completely discontinued. The restructuring plan also provided that MobilCom would withdraw from the Internet/landline sector. To this end, the landline division was integrated into Freenet.de AG, the internet daughter of MobilCom, and the stake in Freenet was partly sold later. The key components of the reorganisation strategy for the loss making mobile telephony/service provider sector were to cut 850 full time jobs, concentrate sales and customer services activities, which had previously been scattered over several sites, at the Büdelsdorf group headquarters and Erfurt, reduce customer acquisition costs (among other things by closing shops) and streamline customer portfolios. Overall, the emphasis would be on consolidation at smaller but more profitable customer and turnover levels.

In the meantime the restructuring of the MobilCom group has been completed, the company returned to profit and seems to have restored long-term viability. In September 2003 MobilCom reimbursed the two credit lines, for which the State guarantees were granted, and the State guarantees were given back.

III. Assessment of the restructuring aid: finding a compensatory measure

The Community Guidelines for rescuing and restructuring firms in difficulty ('R&R Guidelines')⁽¹⁾ lay down that restructuring aid can only be approved if undue distortions of competition are avoided. Therefore measures must be taken to mitigate as far as possible any adverse effect of the aid on competitors. This condition usually takes the form of a limitation on the presence which the company can enjoy on its markets after the end of the restructuring period.

The Commission held that competition was unfairly distorted by the granting of the restructuring aid primarily because MobilCom used the aid not only to restructure the company physically but also to reorient its marketing strategy and to focus on more profitable customer segments in its core business area as a mobile telephony service provider. The aid thus had a particularly damaging effect on competitors as they too have to target

their business strategies at more profitable customer groups because the German mobile telephony market is reaching a saturation level.

On top of that, in the years leading up to the crisis MobilCom had been focusing on the UMTS sector, using aggressive pricing to pursue an expansion strategy aimed solely at boosting its market share. In the end this strategy failed, forcing MobilCom to withdraw from the UMTS sector. However, the aid granted meant that MobilCom did not have to bear alone the negative consequences of the risky strategy it had pursued, while at the same time being able to benefit from the positive effects, such as the fact that, when slimming down its customer portfolio, it could count on a larger customer base. This meant that the aid gave MobilCom a substantial advantage over its competitors.

Although the position of MobilCom in the relevant market for mobile telephony may seem limited (MobilCom has an estimated market share of around 6% after restructuring), for the above reasons the Commission considered that the aid caused undue distortions of competition and that these distortions had not been sufficiently compensated by the measure to reduce market presence, in particular the company's withdrawal from the UMTS business and the reduction of jobs, which had been put forward by Germany.

Once it had been established that the aid led to undue distortions of competition which required further compensatory measures, an adequate compensatory measure had to be found. Normally, a compensatory measure should be integrated in the restructuring plan. However, as the restructuring of MobilCom was already terminated and the measures foreseen in the restructuring plan were not considered to be sufficient, a further measure had to be found.

The Commission finally opted for a behavioural measure, which constituted in the halting of the online direct sales of MobilCom telephony contracts. The Commission took the view that imposing a ban on direct online sales of MobilCom telephony contract for seven months should offset the competitive distortions created. For the company, direct online marketing represents an increasingly important channel for selling mobile telephony contract. Halting such marketing for a while will offer competitors a chance that customers will go to their websites and sign up for contracts.

(1) OJ C 288, 9.10.1999, p. 2.

All conceivable structural measures in order to further reduce the market presence of the MobilCom group as such appeared either inappropriate to the Commission to offset the competitive distortions or disproportionate to the effects of the aid. Moreover, pure service providers like MobilCom do not own and operate the infrastructure to set up mobile services but simply resell capacities of the network operators. The Commission therefore deemed in this particular case the found behavioural measure which aims at a compensation in the field where the aid produced its undue effects, namely in the field of the marketability of services, as the most suitable measure to counterbalance the distortions of competition.

IV. Legal basis of a conditional decision

The legal basis for a conditional decision as adopted in the MobilCom case is Article 7(4) of the Council Regulation (EC) No 659/1999 which lays down that the Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored.

As has already been pointed out above this possibility is regularly used particularly in major restructuring cases to compensate for the distortions of competition caused by the aid. Normally, discussion with the Member State take place and an agreement can be found on suitable compensatory measures which will be included as a condition in the approval decision. The Member State submits a preceded commitment to ensure the implementation of the compensatory measures.

When assessing the MobilCom case the Commission intended to pursue the same way. The Commission entered into discussion with Germany to see whether an agreement could be found on compensatory measures which would allow the approval of the restructuring aid. Despite intensive discussions on a compensatory measure no agreement could be reached between the Commission and Germany.

The Commission nevertheless considered that attaching a condition of a further compensatory measure to a positive decision was the most appropriate way to deal with the MobilCom case. The Commission took the view that Article 7(4) of the Council Regulation (EC) No 659/1999 does not require the agreement of the Member State for

attaching a condition to the decision subject to which the aid can be considered compatible with the common market. The Commission therefore decided to attach a condition to its authorisation of the aid although no agreement had been reached with Germany.

In its decision the Commission thus stated that it finds that the restructuring aid is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty if Germany fully implements the condition which was described in detail to close down the direct on-line distribution of MobilCom mobile telephony contracts.

Article 1(g) of the Council Regulation (EC) No 659/1999 states that any contravention of a conditional decision constitutes a misuse of aid. This means that in case of non-fulfilment of the condition the Commission can reopen the investigation procedure and potentially take a negative decision ordering recovery of the aid as laid down in Article 16 of the Council Regulation (EC) No 659/1999.

Furthermore Article 23 of the Council Regulation (EC) No 659/1999 lays down that where the Member State concerned does not comply with a conditional decision, the Commission may refer the matter to the Court of Justice of the European Communities direct in accordance with Article 93(2) (now 88(2)) of the Treaty.

In the MobilCom case the Commission thus reserved the right to make use of the competences assigned to the Commission by articles 16 and 23 of the Council Regulation (EC) No 659/1999 in case the conditions attached to the decision will not be fulfilled.

V. Conclusion

In the MobilCom case the approval of the restructuring aid was made subject to a condition that constituted a behavioural measure. This is different from other major restructuring aid cases in which conditions primarily in form of structural measures were attached to the final approval.

Also the decision to approve the restructuring aid to MobilCom subject to the condition that MobilCom and its affiliates must halt their online direct sales of MobilCom mobile telephony contracts for seven months introduces a novelty in so far as for the first time the Commission made the approval of a restructuring aid subject to a condition for which it had no preceded commitment of the Member State concerned that it will ensure the implementation.

Revision of the State aid Rescue and restructuring Guidelines

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1. Introduction

On 7 July 2004 the Commission approved in principle ⁽²⁾ revised Community guidelines on State aid for rescuing and restructuring firms in difficulty. In September 2004 the final adoption in all Community languages took place ⁽³⁾.

The new Guidelines build on the 1999 Guidelines ⁽⁴⁾. As the latter Guidelines contain a sunset clause and expire on 9 October 2004, new Guidelines became necessary. Also in the light of the Stockholm and Barcelona European Councils which called on Member States to continue to reduce state aid as a percentage of GDP while redirecting it towards more horizontal objectives of common interest a further tightening of discipline seemed warranted. Enlargement imposed a further incentive to review aid instruments in order to ensure that also in a Community with 25 Member States State aid discipline is maintained. The revision also offered the opportunity to tackle a series of problems which have been encountered in the 1999 Guidelines.

2. Problems encountered

2.1. Definitions

Some problems have been encountered already at the level of definitions.

- *What is a firm in difficulty?* For example, many telephone firms had to take huge provisions following the UMTS-license auction mania, which could lead to some of them technically qualifying as firms in financial difficulties, although their operating results might still be

positive (and might always have been positive) ⁽⁵⁾.

- *Newly created firms.* Aid to new firms is in principle excluded, though the guidelines did foresee a temporary exception for eastern German cases ⁽⁶⁾. However, experience shows that this is something which should not be pursued — new firms need to be sufficiently capitalised ab initio.
- *Groups of firms.* The guidelines state a firm belonging to a group is not normally eligible, except where the difficulties are the firm's own and are not the result of an arbitrary allocation of costs within the group, while the difficulties are too serious to be dealt with by the group itself. These criteria are not easily applicable. Also some questions are not clarified, e.g. can aid be given where the group itself is not in financial difficulties?

2.2. Rescue aid

Recently the Commission experienced also problems with regard to the rules concerning rescue aid.

- *One-time last time.* The guidelines provide that rescue aid is a one-off operation and that repeated rescue aids should be avoided. However, in some cases firms which were not yet eligible for restructuring aid because of the 'one time, last time' principle, obtained new rescue aid ⁽⁷⁾.
- *'Front-loading' / Avoidance of restructuring.* Member States may try to grant rescue aid as the conditions are less stringent than for

⁽¹⁾ The views expressed are purely those of the writers and may not in any circumstances be regarded as stating an official position of the European Commission.

⁽²⁾ PV(2004) 1665, see also IP IP/04/856, 7.7.2004.

⁽³⁾ Publication in the OJ forthcoming at the time of writing.

⁽⁴⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

⁽⁵⁾ Compare Aid C 13/2003 (ex NN 47/2002) – Business tax regime applicable to France Télécom and (ex N 779/2002) – Financial measures put in place by the State in support of France Télécom, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ C 57, 12.3.2003, p. 5; C13a/2003 and C13b/2003, not yet published; see IP/04/981, 20.7.2004.

⁽⁶⁾ The 1999 Guidelines foresaw an exception to the principle that a newly created undertaking may not benefit from rescue or restructuring aid. This exception was applicable to the so-called Auffanglösungen, firms created to take over the assets of a firm for which privatisation failed in the new German Bundesländern.

⁽⁷⁾ E.g. Bull, Commission decision of 13.11.2003, OJ L 209, 19.8.2003, p. 1.

restructuring aids, without being followed by a later restructuring. Furthermore, the amount obtained as rescue aid may have been higher than strictly necessary and may then have been partially used for restructuring purposes.

- *Applicable conditions.* In general, the conditions for rescue aid are hard to apply so that in the end most cases get waived through. In case where a firm is on the verge of bankruptcy the notification and standstill requirement laid down in Article 88 EC may be hard to respect as the firm may already have disappeared by the time the Commission adopts a decision ⁽¹⁾. Although the original idea seems to have been that rescue loans and guarantees should not extend for more than 6 months ⁽²⁾, the reimbursement of loans could apparently take up to 18 months ⁽³⁾ (which would lead to the strange situation that the guarantee granted for such a loan is pretty much meaningless as it would have been terminated before the reimbursement of the loan).

2.3. Restructuring aid

Restructuring aid has always proved more controversial and problematic.

- *Restructuring plan / Restoration of viability.* It appears extremely difficult to assess the chances of restoration of viability (cf. failed restructuring of the German *Philip Holzmann* ⁽⁴⁾, against the forecasts of Germany and the Commission backed by an independent expert). As regards the restructuring plan, the requirements which should be met are not easy to apply (duration of the plan must be ‘as short as possible’, restoration of the viability ‘within a reasonable time-frame’, etc.)
- *Compensatory measures.* When are the compensatory measures proposed sufficient in scope ‘to mitigate the potentially distortive effects of the aid on competition’? To determine the proportionality between compensatory measures and the distortive effects of the aid is an extremely difficult task. In addition, there may be sector-specific problems like in *Crédit Foncier de France* ⁽⁵⁾, where the

specific requirements in the banking sector on capital adequacy must be taken into account. Furthermore, for large conglomerates, particularly those active in the service sector, it may not always be clear in which part of the activities the compensatory measures must take place ⁽⁶⁾. Finally for firms active in oligopolistic markets a reduction of market presence, while indeed compensating competitors, may well damage competition to an extent larger than the State aid itself.

- *Aid limited to the minimum / Significant own contribution.* Finally, in most cases the Commission makes recourse to its powers of appreciation to determine whether the contribution by the beneficiary is ‘significant’ in the specific case. Cases are solved in an ad hoc manner; no guidance exists on the private coverage of restructuring costs required by the Commission. In addition, one can wonder whether there should not be an absolute cap in time and/or money-wise, e.g. no longer accepting aid over a very long period (say more than 5 years).

3. 2004 Guidelines

The new Guidelines do not entail a radical revision. There is no major overhaul of the principles underlying the 1999 Guidelines.

3.1. Definitions

In the introductory part of the new Guidelines (point 4) and in the extended impact assessment of the new Guidelines ⁽⁷⁾, it is better explained why rescue and restructuring aid is considered one of the most distortive types of aid. It allows a firm to remain active where the normal play of market forces would have resulted in it ceasing activities and leaving the market. As a result of the aid, inefficient firms can retain a position in the market which their competitors would have had the chance of occupying. The impact on the competitors of the aided firm is thus immediate: they are denied the chances that market forces would have offered them without State intervention. While the aided firm restructures at the expense of the State,

⁽¹⁾ E.g. British Energy, NN 101/2002, OJ C 39, 18.2.2003, p. 15.

⁽²⁾ See point 23(d) of the 1999 Guidelines.

⁽³⁾ See point 23(b) of the 1999 Guidelines.

⁽⁴⁾ Commission decision of 8.5.2001, OJ L 248, 18.09.2001, p. 46.

⁽⁵⁾ Commission Decision of 23.6.1999, OJ L 34, 3.2.2001, p. 36; see also pending case C 44/03, Bank Burgenland AG, OJ C 189, 9.8.2003, p. 13.

⁽⁶⁾ See also Philip Holzmann-case, points 105-111 of the Commission decision.

⁽⁷⁾ See website DG Competition.

its competitors, sometimes firms restructuring at their own cost, continue to feel the impact of the aid. In extreme cases, the saving of a firm may result in the bankruptcy of the other. Jobs provisionally safeguarded in a firm may be lost in another. In the short-term, consumers may consider this situation beneficial, as the State aid could lead to lower prices, and employees might feel reassured that their jobs are safeguarded. However, in the medium or long-term it is difficult to see the benefits of keeping an inefficient firm artificially alive at the expense of taxpayers.

The definition of firm in difficulty remains unchanged. However a novelty is the definition of what constitutes a ‘newly created firm’. A firm is in principle considered as newly created for a period of 3 years following the start of operations (which implies that a dormant shell firm could be considered as a new firm for a much longer period after incorporation).

Regarding groups of firms, it has been clarified that firms in difficulties can create subsidiaries whereby parent and subsidiary will be together considered as a group in difficulties (and hence eligible for rescue and restructuring aid).

3.2. *Rescue aid*

The concept of ‘rescue aid’ has been broadened to include certain urgent structural measures, like the immediate closure of a loss-making activity to ‘stop the bleeding’. However, it must be ensured that rescue aid is limited to reversible, temporary short-term financial support in the forms of loans or guarantees.

Once a restructuring or liquidation plan for which aid has been requested has been established and is being implemented, all further aid will be considered as restructuring aid ⁽¹⁾.

All rescue aids, be it loans or guarantees, would now clearly be limited to 6 months, unless the Member State has, within those 6 months, submitted a restructuring plan and the Commission has not yet decided on the plan. In this case, the rescue aid will normally be automatically prolonged.

A new simplified procedure is being proposed whereby the Commission will endeavour to adopt a decision within one month for cases where the

firm is undisputable a firm in financial difficulties and the amount of rescue aid is based on the past operating cash flow of the firm and does not exceed 10 million €. One could envisage that this experiment ultimately leads to a kind of block exemption approach for certain kinds of rescue aid ⁽²⁾. At this stage the new procedure seems however rather limited in scope: the threshold of 10 million € is relatively low. In addition, the formula based on past operating cash flow may not always be a reliable indicator for future liquidity needs.

3.3. *Restructuring aid*

The restructuring plan must no longer be endorsed by the Commission in the case of SMEs. Obviously, the difficulties the Commission encountered to assess restructuring plans for large firms will remain — though no longer assessing plans for SMEs may liberate resources to focus more on plans for large undertakings.

The new Guidelines explicitly provide that flaws in corporate governance need to be tackled ⁽³⁾.

The new Guidelines state as a general principle that compensatory measures must be taken to minimize the distortion of competition. These measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned. It is also explicitly confirmed that activities which would have been abandoned anyway are not included in the assessment of compensatory measures. Any rescue aid granted earlier must also be taken into account in assessment. Only small enterprises are normally exempted from providing compensatory measures.

The Guidelines also give minimum percentages of own contribution which need to be provided by the beneficiary. This contribution will need to be real - in the sense of actual, thus excluding excluding any future hypothetical profits — and completely free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability without distorting competition. The own contribution is set

⁽¹⁾ Cf. Alstom, C 58/2003 (ex NN 70/03), OJ C 269, 8.11.2003, p. 2.

⁽²⁾ Though it should be stressed that at this stage there is no legal basis for adopting such block exemption regulation, compare Council Regulation No 994/98, OJ L 142, 14.5.1998, p. 1.

⁽³⁾ Highly-publicized cases like ENRON and Parmalat seem to have inspired the drafters of the new Guidelines.

at minimum 25% for small enterprises, at minimum 40% for medium-sized enterprises and at minimum 50% for large firms. In special circumstances, less stringent requirements may be imposed. The proposed wording leaves sufficient flexibility to the Commission to require more or less contribution in the light of the specific circumstances. There is however a strong need for these indicative thresholds, as these will increase transparency and equal treatment of different Member States.

It follows that the new Guidelines propose a more differentiated approach between small, medium-sized and large enterprises than the 1999 Guidelines, which basically differentiated between SMEs and large undertakings. Some have expressed concerns about this differentiation as it would flout the Community policies in favour of SMEs ⁽¹⁾.

However, already the fact that the Commission differentiates between micro, small, medium-sized and large enterprises demonstrates that there are objective differences between these different categories.

This distinction becomes even more pronounced with the new definition which will enter into force on 1 January 2005 ⁽²⁾.

The new Guidelines propose a nuanced approach, more in line with economic reality than the old guidelines. Medium-sized enterprises are midway between small and large enterprises:

- Sometimes they receive the same favourable treatment: as mentioned above, both for small and medium-sized enterprises, the restructuring plan does not need to be endorsed by the Commission. Schemes are only possible for small and medium-sized enterprises.
- However, compensatory measures will normally be required from medium-sized enterprises (but obviously the size and market position of the firm will be taken into account — generally this will mean that the measures will be much less stringent than for large undertakings).

- The own contribution required is in between what will generally be required from small and large undertakings.

For assisted areas, the conditions regarding compensatory measures and own contribution can be softened.

No changes have occurred in the section on aid to cover the social costs of restructuring. This should be one of the issues for a further revision.

3.4. 'One time, Last time'

The 'one time, last time' principle, which provides that aid can be granted only once in a period of ten years, will now also apply to rescue aid. This should avoid situations where firms survive only through repeated State interventions, with a combination of rescue and restructuring aid.

3.5. Aid schemes for SMEs

The changes introduced reflect the changes for *ad hoc* aid. Also an explicit confirmation has been inserted that the threshold of 10 million € is for combined rescue and restructuring aid.

3.6. Agriculture sector

The rules have been considerably simplified. For processing and marketing of agricultural Annex I products, the normal rules will apply. Only for the primary production of agricultural products of Annex I to the Treaty the special provisions of chapter 5 will apply.

3.7. Appropriate measures — entry into force

Member States will be asked to adapt all existing rescue and restructuring aid schemes which remain in operation after 9 October 2004 to bring them into line with the new Guidelines within 6 months.

The new Guidelines will enter into force on 10 October 2004. Again, they will be valid for a period of 5 years.

⁽¹⁾ E.g. Sixth Report, 'Creating an entrepreneurial Europe: The activities of the European Union for small and medium-sized enterprises (SMEs)' – SEC(2003)58.

⁽²⁾ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003.

4. Conclusion

The Commission is making a serious effort to modernise the rules applicable to State aid control adopting new block exemption regulations ⁽¹⁾, clarifying and simplifying procedures and concepts ⁽²⁾, introducing more economic rationality ⁽³⁾ and trying to increase both its efficiency and credibility ⁽⁴⁾. The new rescue and restructuring Guidelines constitute an important element of this modernisation and streamlining of State aid control. They will tighten up the rules whereby the objective will be that only those firms which have clear prospects of restoring their viability and which will not damage competition in their efforts to restructure should benefit from public support.

This revision of the Guidelines is however only the first step of a longer and more ambitious program.

Various complex issues like the relationship with social aid or national insolvency laws have not been addressed in the new guidelines and will need careful consideration. Furthermore, the upcoming revision of the Guidelines on national regional aid may also lead to changes in many other State aid instruments. Since the rescue and restructuring Guidelines take regional policy into consideration, any profound reform of such provisions can only be done after the entry in force of the new regional aid policy.

(1) E.g. Commission Regulation (EC) No 363/2004 of 25 February 2004 amending Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid; Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development, OJ L 63, 28.2.2004, p. 20 ff.

(2) E.g., Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty , OJ L 140, 30.4.2004, p. 1.

(3) E.g., announced significant impact test.

(4) Increased focus on recovery by, amongst others, the creation of a new enforcement unit (I-3).

La révision de la Carte italienne des aides à finalité régionale suite aux calamités naturelles en Italie

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Introduction

Le 8 septembre 2004 la Commission a adopté une décision de modification de la partie de la Carte italienne des aides à finalité régionale pour la période 2000-2006 qui porte sur les régions éligibles à la dérogation prévue à l'article 87, paragraphe 3, point c) du traité CE. Cette modification découle de la nécessité d'intervenir au moyen d'aides à finalité régionale dans des zones frappées par des calamités naturelles. L'appréciation faite par la Commission se base sur les règles actuellement en vigueur (a) et prend en considération la situation spécifique des zones frappées par les calamités naturelles (b).

A) Les règles en vigueur

Par la politique de contrôle des aides d'Etat la Commission poursuit, entre autres, l'objectif traditionnel de la cohésion économique et sociale, notamment au moyen de la concentration des aides dans les régions les plus défavorisées et d'une modulation de leur intensité. La nécessité d'une concentration géographique découle du caractère exceptionnel des aides à finalité régionale, qui «...sont réservées à certaines régions particulières et ont pour objectif spécifique le développement de ces régions» (1). Ce caractère exceptionnel a d'ailleurs été souligné par la Cour de justice lorsqu'elle a rappelé la portée des dérogations au principe de l'incompatibilité des aides d'Etat visées à l'article 87, paragraphe 3, points a) et c), du traité CE (2).

La concentration des aides dans les zones moins développées a conduit à une situation dans laquelle l'étendue totale des régions aidées est inférieure à celle des régions non aidées. Le plafond de population couvert par ces aides a été fixé à 42,7 % de la population communautaire. Ce plafond a été ultérieurement réparti par Etat membre et comprend

les zones relevant de l'article 87, paragraphe 3, points a) et c), du traité CE.

Ce sont les cartes des aides à finalité régionale qui délimitent les régions éligibles à ces aides et précisent les intensités applicables dans les différentes zones. Les cartes actuellement en vigueur couvrent la période 2000-2006 (3) et ont été adoptées par la Commission sur la base des critères établis dans les lignes directrices concernant les aides à finalité régionale (4). Ces lignes directrices précisent également que «pendant la période de validité de la carte, les Etats membres peuvent demander des ajustement, en cas de changements significatifs prouvés des conditions socio-économiques» (5). Les modifications de la carte peuvent concerner tant les taux d'intensité que les régions éligibles.

La poursuite de l'objectif de la concentration demande également que toute modification éventuelle des cartes en vigueur respecte le plafond de population initialement attribué à chaque Etat membre. C'est la raison pour laquelle les lignes directrices précisent que l'inclusion éventuelle de nouvelles régions doit être compensée par l'exclusion des régions ayant la même population (6).

Pour ce qui concerne l'intensité de l'aide, les lignes directrices précisent qu'elle «...doit être adaptée à la nature et l'intensité des problèmes régionaux visés» (7). Une distinction est ainsi établie entre régions pouvant bénéficier de la dérogation prévue au point a) de l'article 87, paragraphe 3 du traité CE et la dérogation visée au point c) du même article. Les lignes directrices prennent donc en compte le niveau différent de développement (ou de retard de développement) qui caractérise les différentes régions. Cet élément de différenciation a d'ailleurs été précisé par la Cour de justice dans l'arrêt précité, lorsqu'elle affirme que l'emploi des termes «anormalement» et «grave» dans la dérogation contenue au point a) «...montre que celle-ci ne concerne que les régions où la situation écono-

(1) Lignes directrices concernant les aides à finalité régionale, «Introduction» (JO C 74 du 10.3.1998).

(2) Cf. arrêt du 14 octobre 1987, *Allemagne/Commission*, aff. 248/84, Rec. p. 4013, point 19.

(3) Les cartes sont disponibles sur le site internet de la Commission, à l'adresse suivante: http://europa.eu.int/comm/competition/state_aid/regional/2000/.

(4) Voir *supra*, note 1. Ci-après dénommées lignes directrices.

(5) Point 5.6 des lignes directrices.

(6) *Ibid.*

(7) Point 4.8 des lignes directrices.

mique est extrêmement défavorable par rapport à l'ensemble de la Communauté», alors que l'autre dérogation a une portée plus large, «...en ce qu'elle permet le développement de certaines régions, sans être limitée par les conditions économiques prévues à la lettre a)...».

A l'intérieur de ces deux catégories de régions, les lignes directrices établissent une modulation ultérieure des intensités des aides selon le niveau du produit intérieur brut (PIB) par habitant en standard de pouvoir d'achat (SPA) ou de la situation géographique et territoriale des régions. Par ailleurs, il importe encore de préciser que si, d'une part, l'éligibilité des régions bénéficiant de la dérogation visée au point a) de l'article 87 précité est déterminée par des critères automatiques (niveau du PIB par habitant en SPA), celle des régions visées par l'autre dérogation demande, de la part de la Commission, une appréciation de la méthodologie et des indicateurs proposés par les Etats membres.

Pour l'établissement des différentes cartes la Commission a donc veillé à ce que les intensités des aides soient modulées selon la gravité et l'intensité des problèmes régionaux, dans les limites des plafonds d'aides précisés par les lignes directrices. En cas de modification de la carte, la Commission doit encore veiller au maintien d'une modulation des intensités, mais l'entrée en vigueur du règlement (CE) n. 70/2001 ⁽¹⁾ introduit quelques nouveautés quant aux plafonds d'intensité d'aide. Pour ce qui concerne les zones couvertes par l'article 87, paragraphe 3, point c), du traité CE, selon l'article 4 dudit règlement l'intensité nette totale de l'aide peut s'élever jusqu'au 30%. En revanche, les lignes directrices ne prévoient que la possibilité d'autoriser, exceptionnellement, une intensité nette non supérieure à 20% pour les grandes entreprises et une majoration pour les PME de 10 points de pourcentage d'intensité brute. Si, pour les grandes entreprises, l'entrée en vigueur du règlement précité ne change rien, pour les petites et moyennes entreprises l'avantage est constitué par un petit différentiel dû au passage du calcul de l'intensité brute à l'intensité nette de la majoration.

B) La situation spécifique des zones frappées par les calamités naturelles

La situation à l'origine de la modification de la carte italienne est tout à fait spécifique. Elle découle des calamités naturelles successives qui ont frappé certaines parties du territoire de la région Molise pendant les mois d'octobre 2002 (séisme) et janvier 2003 (inondations).

L'article 87, paragraphe 2, point b) du traité CE prévoit explicitement une dérogation au principe de l'incompatibilité des aides pour les interventions visant à remédier aux dommages causés par des calamités naturelles ou par d'autres événements extraordinaires. Dans sa pratique constante, la Commission considère que les tremblements de terre et les inondations constituent des calamités naturelles au sens dudit article. L'Etat peut donc intervenir, mais il doit s'agir de mesures ciblées sur la compensation des dommages.

Dans un arrêt du 29 avril 2004, la Cour de justice a rappelé que seuls peuvent être compensés, au sens de l'article 87, paragraphe 2, point b) du traité, «*les désavantages économiques causés directement par des calamités naturelles ou par d'autres événements extraordinaires...*» ⁽²⁾. Dans ces conclusions concernant la même affaire, l'avocat général avait souligné la nécessité de l'existence d'un «*...lien clair et direct entre le fait générateur du dommage et l'aide d'Etat destinée à réparer le dommage*» ⁽³⁾. Il doit exister, en d'autres termes, un lien causal manifeste entre le dommage et la calamité naturelle ⁽⁴⁾.

Les deux calamités naturelles avaient néanmoins un impact plus large sur l'économie locale. En effet, suite à ces événements exceptionnels, les territoires concernés ont subi une forte dégradation des conditions socio-économiques et la nécessité d'interventions plus importantes que la simple compensation des dommages subis par les entreprises s'est faite sentir. En raison de leur nature propre, les aides à finalité régionale pouvaient donc constituer l'instrument d'intervention le plus approprié dans ces zones défavorisées.

⁽¹⁾ Règlement (CE) n° 70/2001 de la Commission du 12 janvier 2001 concernant l'application des articles 87 et 88 du traité CE aux aides d'Etat en faveur des petites et moyennes entreprises (JO L du 13.1.2001) modifié par le règlement (CE) n° 364/2004 (JO L 63 du 28.2.2004).

⁽²⁾ Arrêt de la Cour de justice, *Grèce c/ Commission*, aff. C-278/00, non publié, point 82.

⁽³⁾ Point 58 des conclusions.

⁽⁴⁾ Voir, en ce sens, la Communication de la Commission au PE et au Conseil portant « réaction de la Communauté aux inondations en Autriche, en Allemagne et dans plusieurs pays candidats », document COM(2002) 481 final, du 28.8.2002, p. 9.

La plupart de ces zones n'étaient toutefois pas éligibles aux aides à finalité régionales puisque, originellement, elles ne remplissaient pas les critères fixés par les lignes directrices, ni les conditions ultérieures fixées lors de l'élaboration de la carte. L'intensité d'aide aux investissements s'élevait donc à 7,5% et 15%, respectivement, pour les moyennes et petites entreprises en vertu du règlement n° 70/2001. Aucune aide à l'investissement n'était alors admise pour les grandes entreprises.

Les autorités italiennes ont ainsi notifié à Commission une proposition de modification de la carte qui portait sur deux volets: un remplacement des régions assistées à l'intérieur de la région Molise permettant d'inclure dans la carte l'ensemble des zones affectées par les calamités et une augmentation des intensités d'aides. Elles ont accompagné cette notification d'une série de données statistiques et économiques visant à démontrer l'existence de changements significatifs des conditions socio-économiques, ceci étant un élément d'analyse indispensable.

Sur la base des données fournies par les autorités italiennes, la Commission a pu apprécier l'existence d'une dégradation des conditions socio-économiques des zones frappées par les deux

calamités naturelles, mais également d'effets indirects qui intéressent d'autres parties de la région Molise ⁽¹⁾. Au-delà des données fournies par les autorités italiennes, la Commission a néanmoins tenu compte d'un élément fondamental: le caractère exceptionnel des deux calamités naturelles successives.

En guise de conclusion

L'examen de la décision de la Commission et de l'approche suivie par celle-ci permettent de conclure que, malgré leur apparence stricte, les règles qui régissent les aides à finalité régionale permettent la prise en compte des situations spécifiques. Dans le cas d'espèce, selon la Commission, sans une intervention au moyen d'aides à finalité régionales il n'était pas possible d'inciter les investisseurs à effectuer leurs investissements dans les zones concernées de la Région Molise et de maintenir un niveau de présence d'entreprises suffisant pour une reprise de l'activité économique. Les aides à finalité régionale, et cela jusqu'au 31 décembre 2006 (durée de validité de la carte), devraient donc pouvoir contribuer au rétablissement des conditions existantes avant les dates des deux calamités naturelles.

(1) L'analyse de la Commission peut être lue dans le texte de la décision dans la langue faisant foi, expurgé des éventuelles données confidentielles, qui sera disponible sur le site: http://europa.eu.int/comm/secretariat_general/sgb/state_aid.

State aid in the water sector: second circuit water — Belgium

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On 2 June 2004, the Commission decided that public support to water companies to create new infrastructure for the distribution of so-called grey water does constitute State aid within the meaning of Article 87(1) of the EC Treaty. The Commission rejected the arguments presented by the Belgian authorities that the criteria of the Altmark-ruling would apply. The aid measure was authorised directly under Article 87(1) of the EC Treaty, as the Community guidelines on State aid for environmental protection did not apply.

Description of the measure

In September 2003, the Belgian authorities notified an aid measure for Flemish water suppliers for the construction of second circuit water distribution networks and treatment facilities. The objective of the measure is to protect the groundwater reserves in Belgium. The Belgian authorities plan to replace the industrial use of groundwater by the use of alternative water sources, i.e. second circuit water or also called grey water.

The distribution of 'grey water' (e.g. purified waste water, rain water or surface water) can become necessary because of insufficient availability of groundwater at several locations in Belgium. The notified scheme should contribute to a good qualitative and quantitative status of the groundwater in accordance with Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ⁽¹⁾. The cost for the supply of grey water varies considerably, depending on e.g. the desired quality of the delivered grey water, the actual water source, the scale of the initiative and the distance to the grey water source. In any case prices of grey water supply are substantially higher than the current groundwater cost.

So far, there is no infrastructure for the distribution of grey water in Flanders. The Belgian authorities would like to grant investment aid to stimulate the construction of the alternative water supply. With the aid, the final price for the industrial users will be lower. At the same time, the Belgian authorities

will increase the groundwater prices, by means of an increase in groundwater charges. Herewith, the costs of groundwater will get equal to the costs of grey water.

The Belgian authorities plan to grant aid to existing Flemish drinking water suppliers, which are all public entities. The envisaged budget for 2004 amounts to 3 million EUR. As the Belgian authorities intend to wait for the results of the pilot project (minimum duration 2 years) before developing other projects, a total budget of 60 million EUR within the period of 10 years is expected to be the absolute maximum.

According to the Belgian authorities the construction of grey water circuits is a public service obligation. The drinking water companies, which will receive the support to construct grey water circuits, will not receive an advantage, because the granted compensation forms a reward to implement an obligation of public utility, more specifically the distribution — at an acceptable price — of alternative water distribution.

In their notification, the Belgian authorities explained that the notified scheme does not constitute State aid within the meaning of Article 87(1) of the EC Treaty. According to recent case law of the Court of Justice ⁽²⁾, public service compensation does not constitute state aid within the meaning of Article 87(1) of the EC Treaty if it meets four conditions:

1. The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined.
2. The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.
3. The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

⁽¹⁾ OJ L 327, 22.12.2000, p. 1.

⁽²⁾ Judgment of 24 July 2003 in Case C-280/00 Altmark Trans and judgment of 27 November 2003 in Joined Cases C-34/01 to C-38/01 Enirirsorse SpA.

4. Where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

State aid or no State aid within the meaning of Article 87(1)?

The Commission has noted that the notified scheme is not imposing any obligation upon public water companies to invest in grey water circuits. The aid scheme merely provides for financial support in the event a public water company takes the initiative to invest in a grey water circuit and files a request for financial support with the competent public authorities. Secondly, the notified scheme is aimed at water companies that will provide grey water to a small amount of industrial undertakings in a certain area. The measure is not aimed at a large amount of companies or citizens. Therefore, the Commission does not consider the construction of a grey water network as a public service obligation.

Even if the measure could be considered as a public service obligation, the Commission has noted that seems too difficult to compare the costs of the envisaged projects with those of another similar company. Therefore, the level of compensation for the envisaged projects will not be determined on the basis of an analysis of the costs which a typical well run undertaking would have incurred. Herewith, the fourth criterion of the Altmark ruling is not met.

The advantage and selectivity criteria of State aid assessment are clearly met in this case. As regards the effect on competition and trade criterion the Commission noted that water supply is identified as task of municipal importance under Belgian law. All Flemish water companies are public entities, supervised by the Flemish minister of Internal Affairs, who is allowed to annul decisions if they are not in accordance with Belgian legislation or with the general interest. On the basis of the

existing legislation it is not possible for private persons to participate in these bodies or to start water distribution business ⁽¹⁾. Although at present the activities of the Flemish public water distributors are almost entirely concentrated on the home market, the decree on inter-municipal co-operation provides that municipalities and its formed co-operations can — in conformity with the conventions and international agreements that are in force — participate in corporate persons of public law that operate across the border. Furthermore, corporate persons, subject to a foreign legislation, can participate in co-operations in conformity with the Flemish decree, if they are entitled to do so by their own legislation. Therefore, the effect on competition and trade criterion of the definition of State aid within the meaning of Article 87(1) of the EC Treaty applies.

The Commission is therefore of the opinion that the notified scheme constitutes State aid measure within the meaning of Article 87(1) of the EC Treaty.

Compliance with the Treaty

Since the aid measure is not characterised as a public service obligation, the Commission did not assess the notified scheme under Article 86(2) of the EC Treaty (i.e. service of general economic interest).

The objective of the aid scheme is to protect the Flemish groundwater reserves, i.e. environmental protection. The scheme is aimed at investment aid. According to point 29 of the Community guidelines on State aid for environmental protection ⁽²⁾, hereinafter the environmental guidelines, investment aid may be granted to enable firms to improve on Community standards applicable, or when the firms undertake investment in the absence of Community standards applicable. The first possibility expressed in point 29 of the environmental aid guidelines, which allows aid to be granted in order to enable *firms* to *improve* on Community standards applicable, does not apply in this case. The aid is granted in order to improve the Flemish environment in general, and to help Belgium to achieve its obligations under the aforementioned Directive 2000/60/EC on Community action in the field of water policy ⁽³⁾. The aid is not granted to enable the water companies to improve on the standards applicable to them directly.

⁽¹⁾ Flemish communes could concede water distribution to private entities (EU rules on concessions would be applicable) but can also operate them themselves. Until now they have chosen the second option which prevents any competition on the Flemish market.

⁽²⁾ OJ C 37, 3.2.2001, p. 3.

⁽³⁾ OJ L 327, 22.12.2000, p. 1.

Furthermore, in the light of point 18 (b) of the environmental aid guidelines, which states that ‘aid may act as an incentive to firms to improve on standards or to undertake further investment designed to reduce pollution from their plants’, the Commission considers that point 29 of the environmental aid guidelines concerns cases of investment aid where an undertaking invests to improve its own environmental record. This is not the case under the present scheme. The aid scheme is related to environmental protection at the regional level (i.e. Flemish ground water reserves) and not at the individual level of the beneficiary ⁽¹⁾.

Therefore, the environmental aid guidelines are not applicable to the notified second circuit water scheme. Therefore the Commission had to consider whether this type of aid fulfils the criteria to be directly compatible with Article 87(3)(c) of the Treaty. Article 87(3)(c) of the Treaty states that ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’ may be considered to be compatible with the common market.

The Commission noted that the Belgian authorities are in control of the price-fixing of the grey water on the basis of public and transparent parameters. The objective is to offer grey water at a reasonable price. The parameters of compensation are calculated and assessed in detail before the start of the projects. The aid intensity is limited to 67% of the eligible investment costs. Point 37 of the environmental aid guidelines states that ‘eligible costs must be confined strictly to the extra investments costs necessary to meet the environmental objectives’, which is normally done by deducting, from the eligible investment costs, ‘the cost of a technically comparable investment that does not provide the same degree of environmental protection’. In the notified scheme, the Belgian authorities have not deducted the cost of any such comparable investment from the eligible investment costs. This approach appears to be justifiable given the specificity of the measure. The environmental aid guidelines are applicable to aid measures intended

to make a certain production process more environmentally friendly, by reducing its polluting emissions. This is why point 37 recommends the deduction from the eligible investment costs of a comparable, less environmentally friendly investment. In the notified scheme, however, the situation is different. It is the whole economic activity of the aid beneficiary (supply of second circuit water) that is environmentally friendly. It is therefore appropriate to consider that the whole cost of investment is eligible.

The aid intensity of the notified scheme is relatively high (67%) in comparison with the regular aid intensities under the environmental aid guidelines (30% to 50%). Nevertheless, at present there is no commercial interest to develop second circuit water distribution networks, since the cost of grey water supply by water companies would turn out substantially higher than the present costs of using groundwater for industrial undertakings. Moreover, the supply of water is exclusively entrusted to public water companies. The envisaged distribution of grey water is defined by act, including responsibility, sanctions and duration. The conditions and criteria to grant aid to the public water companies are clearly set out in the notified measure. The aid will be granted for investment projects in the form of one-off grants. The recipient water companies will engage in investments that are directly related to environmental protection at the regional level (Flemish ground water reserves) and not at the individual level of the beneficiary. Therefore, the Commission is of the opinion that the aid intensity of 67% of the eligible costs is acceptable.

The effect on competition and trade by this aid measure is expected to be very low. The Belgian authorities provided sufficient evidence that there is an environmental need for a switch in the use of groundwater by industrial companies to the use of grey water. Given the very low distortion of competition and the clear environmental public interest of the measure, the Commission authorised the notified scheme on the basis of Article 87(3)(c) of the EC Treaty.

⁽¹⁾ See also Commission Decision of 11.11.2003 C 21/2003 WRAP Environmental Grant Funding scheme and WRAP Leasing Guarantee Fund, (OJ L 102, 7.4.2004, p. 59) and Commission decision of N 208/2003 – Italy Region Emilia-Romagna Eco-incentives for companies (OJ C 38, 12.2004, p. 4).

The Commission opens investigation procedure regarding aid to Polish steel company Huta Czestochowa

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Introduction

On 19 May 2004, the European Commission took its first decision outside the interim procedure to launch an in-depth probe into possible aid granted to a company in a new Member State. The company concerned is the Polish steel producer Huta Czestochowa S.A. (hereinafter 'HCz'). As the company is in financial difficulties, Poland is currently planning financial measures in order to restructure the company. The Commission is now seeking clarification whether and what kind of restructuring State aids was and will still be granted to the company.

The context: Protocol No 8 of the Accession treaty

The case is particular, as State aid to the Polish steel sector is based on a special protocol to the Accession Treaty, Protocol No 8 on the restructuring of the Polish steel industry. ⁽¹⁾ With this Protocol Poland has obtained an approval that it may exceptionally grant restructuring State aid for its steel industry, although the granting of restructuring aid is under the EC State aid rules currently strictly prohibited. ⁽²⁾

Protocol No 8 is based on a national restructuring plan (Restructuring and Development Plan for the Polish Iron and Steel Industry), which was presented by the Polish government and finally accepted by the Council in June 2003, retroactively as of 1997. On the basis of the plan the protocol accepts the granting of State aid for the period of 1997 until 2003 up to a maximum of PLN 3,387 million (at that time about € 863 million). The granting of aid is made subject to several conditions, inter alia with reaching viability and the commitment to reduce capacity.

Moreover, the Protocol assures that restructuring State aid during the restructuring period from 1997 to 2006 may only be granted to companies listed in Annex 1 of the Protocol (point 6, last sentence).

Poland has selected 8 companies to be included in this list. HCz was not among them.

In order to assure that no additional restructuring aid is granted for the period of 1997 until 2006, point 18 gives the Commission the power in case of non-compliance to take 'appropriate steps requiring any company concerned to reimburse any aid granted'. The Commission considers the opening of procedure as a last means of 'appropriate steps'.

As the Commission had been informed that Poland was planning to restructure HCz without liquidating it, it had already prior to accession requested Poland to clarify this issue. Since no such clarification was obtained the opening of proceedings was launched.

The facts

HCz is the second biggest Polish steel producer. It is producing heavy plate, a product used for ship-building. The nominal capacity of the plate mill is about 1,000,000 tonnes.

HCz is owned by the Polish Ministry of Treasury and it is in financial difficulties. Because it was unable to service its debts (which exceeded by far its assets) most of its assets, including all steel assets, are pledged to major creditors. Consequently, in October 2002, HCz was put into administrative receivership.

Subsequently, the essential steel producing facilities were leased to a new operating company, which took over most employees from HCz and continued the production. This company is owned by another State owned company, which is trading in steel products.

Because of its financial difficulties HCz was in the last minute struck from the list of beneficiaries in Annex 1 to Protocol No 8. In fact, the national restructuring plan concluded in view of the large

⁽¹⁾ OJ L 236, 23.9.2003, p. 948.

⁽²⁾ See *Communication from the Commission on Rescue and Restructuring aid and closure for the steel sector* (OJ C 70 of 19.3.2002, p.22). Also regional investment aid is prohibited, see point 27 of the *Multisectoral framework on regional aid for large investment projects* (OJ C 70, 19.3.2002, p. 8).

amount of public aid necessary to restructure HCz: 'In such a circumstance the company shall be restructured by means of liquidation.'

Nevertheless, it was decided to endorse a restructuring plan for HCz pursuant to the Act on Public Aid for Entrepreneurs of Significant Importance for the Labour Market, which gives companies protection against liquidation during restructuring. This plan foresees the splitting up of the company into several entities. While one of these entities will own the steel assets, two other companies will receive the remaining assets (essentially land and several subsidiaries). While the steel assets are to be sold as a going concern to a strategic investor, the other assets will be given to State owned holding companies who will try to sell them over time.

The companies will be assigned to two groups of creditors: On the one hand, the shares in the company holding the steel assets will go to those creditors holding commercial claims. The commercial creditors comprise again two groups: Firstly, private creditors such as banks (their claims are partly secured, their average return in liquidation is estimated to be about 50%) and secondly, public creditors such as the electricity operator, railways etc. (their claims are not secured and their return in liquidation is estimated to be below 20%). On the other hand, the remaining assets will be used to satisfy the public claims such as social security contributions and tax (these claims are well secured with pledges on the steel assets; in liquidation an average return of about 85% was estimated).

The Polish government has come forward with calculations indicating that the public creditors holding public claims are compared to a liquidation loosing out in the restructuring. However, they also presented a calculation that the restructuring plan will yield for the State as a whole (including public creditors holding public claims and those holding commercial claims) globally a better return than liquidation. On this basis the restructuring should in the opinion of the Polish authorities not constitute State aid.

Assessment

In the opening decision the Commission is seeking clarification whether and what kind of restructuring State aids will have been granted since 1997 up to 2006. This period corresponds with the restructuring period covered by Protocol No 8, according to which no additional restructuring aids may be granted during this period.

The Commissions assessment focuses on doubts whether the envisaged restructuring of the company meets the private creditor test. The new restructuring plan gives the impression that the winding up of the company was avoided only with the help of a generous debt write-off of the public claims. This is because the State, although in the possession of pledges on the steel assets for its public claims, did agree to write off parts of these claims, the precise amount of which will only be established after the realisation of the sale of assets in the future, but which is clearly below the amount the State would have obtained in case of liquidation.

To this end the Commission recalls settled case law, according to which a private creditor would under normal market conditions be normally seeking to obtain payment of sums owed to him by a debtor in financial difficulties in a reasonable time. ⁽¹⁾ In particular, where a debtor in financial difficulties is proposing to reschedule debt in order to avoid liquidation, the Court of First Instance has established that every creditor must at least carefully balance the advantage inherent in obtaining the offered sum according to the restructuring plan and the sum likely to be obtained in the course of liquidation proceedings. ⁽²⁾ These decisions will according to the Court be influenced by a number of factors concerning securities, in particular whether the creditor has mortgages or only unsecured claims that are worthless since the secured claims will consume all the remaining resources.

In the light of the settled case law the Commission is not sure that the global assessment of public liabilities as proposed by the Polish authorities is correct.

⁽¹⁾ Case C-342/96 *Spain v Commission*, paragraph 46; Case 256/97 *DMT*, paragraph 24, Advocate General Opinion in Case 256/97 *DMT*, paragraph 38; Case T-152/99 *Hamsa*, paragraph 167.

⁽²⁾ Case T-152/99 *Hamsa*, paragraph 168.

In addition, the Commission has also doubts that the current operation of the steel production at the operating company is achieved without State aid. The terms of the lease agreement have not been open to the Commission and it is not sure how the company obtained its working capital. Moreover, rumours indicated that it had obtained several guarantees from its public holding company in order to pay its electricity bills.

Conclusion

The presented case is remarkable for two reasons:

Firstly, the investigation concerns a period that goes back until 1997, thus far beyond the accession of Poland to the EU. This does however not mean that the State aid rules are applied retroactively but that a special protocol to the Accession Treaty is enforced which gives a clear prohibition

for State aid since 1997, thus even before Poland's accession. In any event, although, the investigation concerns a set of facts that took place before accession, the Commission had to wait until Poland's accession in order to open proceedings. This case is however a very special case as it concerns the steel sector and a special protocol for Poland (which currently exists only for Poland and the Czech Republic).

Secondly, as regards its substance, the case at hand will involve a very detailed analysis of the private creditor test. The case involves a large number of public creditors, which have very different securities and therefore not clearly the same interests. However, should a global assessment of the claims indeed not be possible it will be difficult for Poland to argue the case on the merits unless it modifies the restructuring plan for HCz.

Commission approves aid for minimising chlorine transport

Anne Theo SEINEN, Directorate-General Competition, unit H-1

The Commission has not laid down general rules on compatibility of State aid that has the objective to increase safety of citizens and their environment. This does not mean that such aid is always incompatible with the common market. The Commission's Decision of 16.6.04 approving a subsidy in favour of Akzo Nobel in order to ban structural chlorine transport in the Netherlands is an exceptional example.

Currently, Akzo Nobel, a large multinational company in the chemical sector, transports substantial quantities of chlorine within the Netherlands. This transport is done by train and crosses densely populated areas. Despite strict safety measures, chlorine transport is never completely free of risk and *if* an accident happens, this may have very serious consequences. The Dutch authorities estimated that an accident, in a worst-case scenario, may entail some 5 000 casualties.

The authorities and Akzo Nobel agreed on a solution that consists in relocating chlorine production and a mono-chlorine acetic acid plant from Hengelo to Delfzijl and investing in new chlorine production facilities in Rotterdam. This will bring chlorine production and demand in equilibrium in all three places. Limited transport will be necessary only in case of maintenance or other disruptions of the chlorine production process. The investment cost in Delfzijl is estimated at € 167 million. The investment cost in Rotterdam is estimated at some € 40 million. In order to realise the investments, the Dutch authorities agreed to grant a subsidy amounting to € 32.5 million.

There are no specific rules foreseen for aid to increase transport safety as in the case at hand. The Commission considered, however, that it is appropriate to make an analogy to the principles underlying the rules for aid for environmental protection. In accordance with Directive 96/49 concerning the transport of dangerous goods by rail, there is no prohibition of structural chlorine

transport, and current chlorine transports in the Netherlands comply with all the safety standards foreseen in Community legislation, which nevertheless does not exclude the risk of an accident completely. In addition, in line with the Commission's Communication COM(2000) ⁽¹⁾ on the precautionary principle of 2 February 2000, the Dutch authorities based the notified measure on various studies on the safety risks of chlorine transport prior to the conclusion of the covenant. Scientific studies on transport safety have been conducted as well for other hazardous substances, notably ammonia and LPG. The chosen measure has been carefully evaluated by the Dutch authorities in the light of a cost/benefit study that assessed various alternative measures to reduce the risk linked to chlorine transport. Other solutions that would have a lesser impact on the market do not appear to exist.

In its assessment in analogy to the principles underlying the environmental aid guidelines, the Commission took into account that the new investments will be located in an assisted area eligible for regional aid, but also that the new facilities will have a somewhat larger capacity than the old ones and that Akzo, if it would not invest in Delfzijl, would have had to stop chlorine production in Hengelo on the basis of mercury cell technology by 2010. Furthermore, the new technology has lower operating cost, but these are offset by, amongst others, high start-up cost. Taking all these aspects into account, the Commission has found the aid compatible with the common market.

The Dutch authorities will withdraw the environmental permit for the chlorine and MCA production in Hengelo. On the basis of the generally applicable rules Akzo will receive a € 31.7 million indemnification. This covers a part of the damage as estimated by an independent expert. The Commission concluded that this indemnification falls within the general system and therefore does not constitute State aid in the meaning of Article 87(1) of the Treaty.

⁽¹⁾ Council Directive 96/49/EC of 23.7.1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail, OJ L 235, 17.9.1996, p. 25.

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3. Enforcement	<i>Wolfgang MEDERER</i>	02 29 53584/02 29 65424
	<i>Dominique VAN DER WEE</i>	02 29 60216

Reporting directly to the Commissioner

Hearing officer	<i>Serge DURANDE</i>	02 29 57243
Hearing officer	<i>Karen WILLIAMS</i>	02 29 65575

New documentation

European Commission Directorate-General Competition

This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: http://europa.eu.int/comm/competition/speeches/index_2004.html

Speeches by the Commissioner, 1 May 2004 – 31 August 2004

Access to content and the development of competition in the New Media market- the Commission's approach – Mario MONTI – Brussels, Belgium (Workshop on access to quality audiovisual contents and development of New Media) 8 July

Comments to the Speech by Hew Pate – Mario MONTI – Brussels (European Commission and the United States Mission) 2 June

Speeches and articles, Directorate-General Competition staff, 1 May 2004 – 31 August 2004

Competition law and rights management – Herbert UNGERER – Brussels, Belgium (Regulatory Forum, European Cable Communication Association (ECCA)) 23 July

The Review of the EU Competition Regulation for Maritime Transport – Joos STRAGIER – London, England (10th Annual EMLO Conference) 18 June

Legal framework to secure open Media Markets and the Independence of the Press, The Role of EU

Competition Law – Herbert UNGERER – Opole, Poland (Conference on Democracy and Human Rights in the EU) 5 June

Community Publications on Competition

New publications and publications coming up shortly

- *European Union Competition policy – 2003*
- *Study on the conditions of claims for damages in case of infringement of EC competition rules*
- *Modernisation of EC antitrust enforcement rules*
- *EU competition policy and the consumer*
- *Competition policy newsletter, 2005, Number 1 – Spring 2004*

Information about our other publications can be found on the DG Competition web site: <http://europa.eu.int/comm/competition/publications>

The annual report is available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Most publications, including this newsletter, are available in PDF format on the web site.

Press releases

1 May 2004 – 30 August 2004

All texts are available from the Commission's press release database RAPID at: <http://europa.eu.int/rapid/start/> Enter the reference (e.g. IP/04/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.

Antitrust

IP/04/1031 – 13/08/2004 – In-depth investigation into EDP/ENI's proposed acquisition of GDP

IP/04/1016 – 03/08/2004 – Commission files preliminary charges with respect to the membership rule of the VISA association

IP/04/1003 – 29/07/2004 – Car prices: lower in new Member States and converging in the euro zone

IP/04/994 – 26/07/2004 – Commission challenges UK international roaming rates

IP/04/912 – 14/07/2004 – Commission enquiry on financing of digital terrestrial television (DVB-T) in Sweden

IP/04/876 – 08/07/2004 – Commission challenges nine major French banking groups and Groupement des Cartes Bancaires 'CB'

IP/04/852 – 05/07/2004 – Commission extends probe into paper board and tubes JV between Sonoco and Ahlstrom

IP/04/841 – 01/07/2004 – Commission clears Statoil's sole control of Scandinavian petrol station chain SDS

IP/04/800 – 24/06/2004 – Commission condemns Belgian architects' fee system

IP/04/743 – 15/06/2004 – Commission goes to Court over discriminatory treatment against cable networks in France

IP/04/705 – 02/06/2004 – Final decision in Clearstream case

IP/04/682 – 26/05/2004 – Commission finds against Topps for barring imports of Pokémon stickers and cards from low price to high-price countries

IP/04/626 – 11/05/2004 – Connecting Europe at high speed: Commission takes stock of national broadband strategies

IP/04/616 – 07/05/2004 – Commission welcomes increased transparency in VISA and MasterCard cross border fees

IP/04/614 – 07/05/2004 – Commission approves modified aggregates levy for Northern Ireland

IP/04/597 – 06/05/2004 – EU-China agree terms for bilateral competition dialogue

IP/04/595 – 05/05/2004 – Chinese Prime Minister Wen Jiabao pays an official visit to the European institutions

IP/04/589 – 03/05/2004 – Nicolas Sarkozy, the French Minister for the Economy, Finance and Industry visits Mario Monti

IP/04/586 – 03/05/2004 – Commission opens proceedings into collective licensing of music copyrights for online use

IP/04/585 – 03/05/2004 – Commission clears new Porsche distribution and after-sales service arrangements

State aid

IP/04/981 – 20/07/2004 – Commission rules that France Télécom received illicit aid and orders that it be paid back to the state

IP/04/968 – 20/07/2004 – Commission approves aid for anti-pollution filters on Danish lorries

IP/04/965 – 20/07/2004 – Air transport: the Commission authorises rescue aid for the Italian airline Alitalia

IP/04/913 – 14/07/2004 – Commission approves Irish electricity supply scheme under the State aid rules

IP/04/911 – 14/07/2004 – Commission enquiry into State financing of switchover costs to a digital terrestrial television (DVB-T) project in Germany

IP/04/909 – 14/07/2004 – Commission gives green light to state aid in favour of Infineon chip production site in Vila do Conde (Grande Porto), Portugal

IP/04/907 – 14/07/2004 – Measures in favour of IPB / CSOB are not ‘applicable after’ accession

IP/04/905 – 14/07/2004 – Green light for MobilCom restructuring, but with strings attached

IP/04/904 – 14/07/2004 – Formal investigation concerning State aid measures in favour of Czech bank Agrobanka

IP/04/903 – 14/07/2004 – Commission approves Belgium Flemish aid for the inland navigation sector

IP/04/859 – 07/07/2004 – Aid for Alstom approved, subject to conditions

IP/04/856 – 07/07/2004 – New guidelines set forth Commission approach to saving companies in difficulty

IP/04/836 – 30/06/2004 – Commission authorises State aid for the promotion of bio-fuels in the Czech Republic

IP/04/835 – 30/06/2004 – The Commission gives its final green light to a range of aids for Belgian maritime transport undertakings while refusing some of the arrangements

IP/04/834 – 30/06/2004 – Italy: Commission approves regional aid to restructure road haulage and to develop combined transport

IP/04/833 – 30/06/2004 – Commission decides on the Swedish energy tax system 2002 to 2005

IP/04/761 – 16/06/2004 – Commission authorises aid for the distribution of cultural and social journals by non-profit organisations in Denmark

IP/04/760 – 16/06/2004 – Commission approves aid for international pipeline project

IP/04/755 – 16/06/2004 – The Commission authorises a Walloon aid scheme to promote inland waterway transport

IP/04/754 – 16/06/2004 – Green light under the State aid rules to the Finnish special credit institution Municipality Finance

IP/04/668 – 19/05/2004 – Commission authorises Germany to grant a EUR 3 billion aid to its coal industry

IP/04/667 – 19/05/2004 – Commission launches state aid probe with respect to Polish steel company Huta Czestochowa

IP/04/666 – 19/05/2004 – Commission orders Danish public broadcaster TV2 to pay back excess compensation for public service tasks

IP/04/646 – 15/05/2004 – The Commission clarifies the rules concerning aid to coal-mining companies

IP/04/633 – 12/05/2004 – Commission takes final decision on state aid to public shipyards in Spain

IP/04/615 – 07/05/2004 – Commission invites interested parties to submit comments on proposed UK Enterprise Capital Funds

Merger

IP/04/1049 – 27/08/2004 – Commission clears CVC's and Permira's acquisition of control over the AA

IP/04/1044 – 25/08/2004 – Commission opens in-depth investigation into Microsoft/Time Warner/ContentGuard JV

IP/04/1040 – 23/08/2004 – Commission clears Fox Paine's purchase of parts of Advanta operations

IP/04/1037 – 18/08/2004 – Commission clears merger between Japanese pharmaceutical firms Yamanouchi and Fujisawa

IP/04/1036 – 18/08/2004 – Commission clears Syngenta acquisition of seed producer Advanta subject to sale of European operations

IP/04/1026 – 11/08/2004 – Commission approves acquisition of British combat vehicles maker Alvis by BAE Systems

IP/04/1025 – 11/08/2004 – Commission clears acquisition of Nedcon Groep N.V. by Voestalpine AG in the storage systems sector

IP/04/1022 – 09/08/2004 – Commission approves Agfa's acquisition of Lastra

IP/04/1017 – 04/08/2004 – Commission clears the acquisition of Tibbett & Britten by Exel

IP/04/1014 – 03/08/2004 – Commission clears TPG's acquisition of Wilson Logistics

IP/04/1013 – 03/08/2004 – Commission accepts Wendel Investissement as buyer of the assets of Editis (formerly Vivendi Universal Publishing) divested by Lagardère

IP/04/959 – 20/07/2004 – Commission decides not to oppose recorded music JV between Sony and Bertelsmann

IP/04/889 – 12/07/2004 – Commission clears acquisition of Linde's refrigeration unit by United Technologies

IP/04/869 – 08/07/2004 – Commission approves acquisition of Dynamit Nobel by Rockwood Specialties Group

IP/04/863 – 07/07/2004 – Commission fines Tetra Laval for providing incorrect information in Sidel acquisition

IP/04/837 – 30/06/2004 – Commission clears acquisition of Leaseplan by VW and two financial investment companies

IP/04/823 – 29/06/2004 – Commission launches in-depth investigation into Continental's acquisition of Phoenix

IP/04/818 – 29/06/2004 – Commission clears creation of two joint ventures by Dow Chemicals and PIC

IP/04/817 – 29/06/2004 – Commission clears UNIQA's acquisition of control over Mannheimer

IP/04/777 – 22/06/2004 – Commission extends probe Areva/Urenco venture

IP/04/768 – 18/06/2004 – Commission approves acquisition of Flagship Foods by Danish Crown

IP/04/765 – 17/06/2004 – Commission gives conditional approval to the purchase of Socpresse by the Marcel Dassault Group

IP/04/752 – 16/06/2004 – Commission clears acquisition of German cable operator PrimaCom by Apollo and JP Morgan

IP/04/751 – 16/06/2004 – Commission clears KKR's acquisition of control over Vendex KBB

IP/04/733 – 10/06/2004 – Commission approves acquisition of Millennium Chemicals by Lyondell

IP/04/729 – 10/06/2004 – Commission clears take-over of BSN Glasspack by US bottle maker Owens-Illinois subject to conditions

IP/04/717 – 08/06/2004 – Commission refers probe of KDG's acquisition of the North Rhine Westphalian broadband cable network to the German Federal Cartel Office

IP/04/716 – 07/06/2004 – The Commission refers part of the Accor/Barrière/Colony dossier back to the French authorities; the other aspects of the operation are approved

IP/04/693 – 28/05/2004 – Commission clears merger between Group 4 Falck and Securicor subject to conditions

IP/04/686 – 27/05/2004 – Commission approves acquisition of Raisio Chemicals by Ciba Specialty Chemicals

IP/04/685 – 26/05/2004 – Commission approves acquisition of British combat vehicles maker Alvis by General Dynamics

IP/04/652 – 18/05/2004 – Commission clears merger between UPC and Noos

IP/04/643 – 14/05/2004 – Commission clears automotive JV between Hella, Behr and Plastic Omnium Auto Exteriors

IP/04/596 – 05/05/2004 – Commission clears Spanish JV between Iberia and ACS in handling equipment related services

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