ISSN 1025-2266

European Commission
Competition

COMPETITION POLICY
NEWSLETTER

2011 > NUMBER 3

Covering
1 May to
31 August 2011

Inside:

And main developments and articles on
antitrust — merger control — state aid control

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The Competition Policy Newsletter contains information on EU competition policy and cases.
Articles are written by staff of the Competition Directorate-General of the European Commission.
The newsletter is published three times a year. Each issue covers a four-month period:

- Issue 1: from 1 September to 31 December of the previous year
- Issue 2: from 1 January to 30 April.
- Issue 3: from 1 May to 31 August.

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Luxembourg: Publications Office of the European Union, 2012

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Printed in Luxembourg

PRINTED ON RECYCLED PAPER

European Commission

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Antitrust

Telekomunikacja Polska Decision: competition law enforcement in regulated markets

by Damian Kamiński, Anna Rogozińska, Beata Sasinowska (1)

1. Introduction

On 22 June 2011 the Commission imposed on telecoms operator Telekomunikacja Polska S.A. (TP) a fine of € 127.5 million for refusing to supply wholesale broadband products to alternative operators (AOs). The decision found that TP's behaviour aimed at hindering alternative operators' access to TP's wholesale products at every stage of the process.

The finding of the abuse under Art 102 TFEU takes place in a regulated market, where the national regulator is particularly active. The pattern of behaviour over time that the Commission qualifies as abusive is different from the individual violations of national rules that TP was found to have committed by the Polish regulator.

The abuse started on 3 August 2005 and lasted at least until 22 October 2009, when, following the opening of proceedings by the Commission and an agreement signed between TP and the National Regulatory Authority, UKE, the market situation improved significantly.

The Commission applied Art 102 TFEU to the telecoms sector before in a number of cases: against Wanadoo (a subsidiary of France Telecom) in a predatory pricing case, and against Deutsche Telekom and Telefónica for engaging in margin squeeze practices respectively on the German and Spanish markets. This is, however, the first Article 102 TFEU decision addressed to a company from a Member State that joined the EU in 2004.

2. Timeline

The Commission initiated proceedings on 17 April 2009. On 26 February 2010 the Commission adopted a Statement of Objections ("SO"). An Oral Hearing took place on 10 September 2010. On 28 January 2011, the Commission sent TP a letter indicating some specific pieces of evidence relating to the Commission's existing objections, which the Commission said it might use in a potential final decision.

In the course of the investigation the Commission carried out an inspection at TP's premises and sent a number of requests for information to TP, major market players and UKE.

3. Relevant markets and dominance

Having analysed demand and supply substitutability and competitive constraints, the Commission identified three relevant product markets:

(i) the market for wholesale broadband access ("the wholesale market for BSA (2)");

(ii) the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location ("the wholesale market for LLU (3)");

(iii) the retail mass market, which is the downstream market of standard broadband products offered at a fixed location by telecommunications operators to their own end-users, whether provided through DSL, cable modem, LAN/WLAN or other technologies such as FTTx, CDMA, WiMAX, FWA and satellite. The relevant retail market excludes mobile broadband services.

The relevant geographic market covers the entire territory of Poland.

TP is the owner of the only nation-wide access network and is the only supplier of LLU and BSA in Poland. Therefore, in the wholesale markets TP has a market share of 100%.

In the period covered by the decision (2005-2009), TP also held high market shares in the retail market. In revenue terms TP's market shares ranged between 46% and 57%. In terms of number of lines, TP's market shares were between 40% and 58%. In addition, the presence on the market of PTK (TP's subsidiary) adds to the overall market share of the TP group in the retail market.

Furthermore, there are significant barriers to entry and expansion in the relevant markets. They arise from the fact that duplicating TP's network is not economically viable. Other barriers include investment and sunk costs, limited products and price differentiation as well as the absence of

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

(2) BSA stands for bitstream access.

(3) LLU stands for local loop unbundling.

countervailing buying power. The identified high barriers to entry and expansion are consistent with the observed market structure, where each of TP's competitors is left with a small market share of maximum 9% (in terms of number of lines) in the case of Netia, TP's biggest xDSL competitor.

4. Abuse of a dominant position

4.1. Refusal to supply – legal framework

The case law established that an undertaking enjoying a dominant position is under a special responsibility not to allow its conduct to impair genuine undistorted competition on the internal market. ([4])

In this case the Commission established that TP had been abusing its dominant position in the Polish broadband access markets by refusing to give access to its network and supply BSA and LLU wholesale products to alternative operators.

Although undertakings are, as a rule, free to choose their business partners, the Commission considers that in the present case the intervention on competition law grounds is justified. The Commission in its Guidance on the enforcement priorities in applying Article 102 TFEU ([5]) indicates that cases of refusal to supply constitute an enforcement priority if the following conditions are met: (i) the refusal relates to a product or service which is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on that downstream market; and (iii) the refusal is likely to lead to consumer harm. ([6])

The Court of Justice further clarified that the conditions for a refusal to supply to be abusive do not necessarily apply when assessing conduct which consists of supplying services or selling goods on conditions which are disadvantageous or under which there might be no purchaser. ([7])

The national sector-specific regulation already imposed on TP obligations to provide access to, and use of, specific network facilities. ([8]) Under the Polish Telecommunications Law TP has had an obligation to supply BSA and LLU access since 1 October 2003. The national regulation is based on the EU regulatory framework for electronic communications. Such access obligations result from a balancing by the public authorities of the incentives of TP and its competitors to invest and innovate. The need to promote downstream competition in the long term by imposing access to TP's upstream inputs exceeds the need to preserve TP's *ex ante* incentives to invest in and exploit the upstream infrastructure for its own benefit. ([9])

Furthermore, there is no alternative infrastructure in Poland which would enable AOs to offer retail broadband services on a national scale and which would be substitutable to TP's local access network. AOs have to request access to TP's wholesale broadband products or duplicate TP's infrastructure. The latter it is not an economically viable option. Moreover, there are additional constraints: the development of an electronic communications network entails numerous administrative obstacles, such as obtaining permits from local authorities, complying with local development plans etc. This would make the network roll-out process even more costly, longer and difficult. Furthermore, TP rolled out its local access infrastructure over a long period of time protected by exclusive rights and was for decades able to fund investment costs through monopoly rents from the provision of voice telephony services and from State funds.

Therefore, TP's duty to supply the upstream inputs (BSA and LLU access) is related to the finding that a denial of access to the upstream product or access on unreasonable terms and conditions having a similar effect would hinder the emergence and/or continuation of sustainable competition at the retail level.

4.2. TP's strategy

TP's abusive conduct was part of TP's strategy to limit competition on the markets at all stages of the process of accessing TP's network and using its wholesale broadband products. An internal document confirms that TP's strategic approach to wholesale broadband services was to *"minimize PKO* [TP's Wholesale Division] *sales to protect retail revenues"*. Various other internal documents also

([4]) See Judgment of the Court of Justice of 9 November 1983 in Case 322/81, *Michelin v Commission* [1983] ECR 3461, at paragraph 57, and Judgment of the CFI of 9 September 2009 in Case T-301/04, *Clearstream*, ECR [2009], p.II-3155 at paragraph 132.

([5]) Commission Decision of 24 March 2004 in case COMP/37.792 *Microsoft*, para. 547.

([6]) See *"Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings"*, Communication from the Commission C(2009) 864 final of 9 February 2009, OJ 2009/C 45/02.

([7]) Judgment of the Court of Justice of 17 February 2011 in Case C-52/09, *TeliaSonera Sverige* not yet reported, at paragraph 55.

([8]) Namely *inter alia* the obligation to: negotiate in good faith, give third parties access, provide specified services on a wholesale basis for resale, provide collocation or other forms of facility sharing, provide access to operational support system and interconnect networks or network facilities.

([9]) *"Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty* [now 102 TFEU] *to abusive exclusionary conduct by dominant undertakings"*, paragraph 82.

indicate that TP planned and engaged in abusive practices aimed at creating *"impediment(s) to* [alternative] *operators' access to the local loop", "delaying the implementation of a regulatory* [BSA] *offer"* and *"limiting wholesale offers for* [BSA and LLU] *products."* Such strategy is also visible in tangible obstacles that AOs faced at each stage of accessing TP's wholesale products.

4.3. Elements of the abuse

The decision identifies a number of abusive practices, which had a cumulative, negative impact on the ability of AOs to access the incumbent's network and effectively compete on the retail market. The evidence gathered shows that TP was:

- proposing unreasonable conditions governing AOs' access to the wholesale broadband products;

- delaying the negotiation process: in 70% of negotiations TP did not meet a 90-day regulatory deadline for concluding negotiations;

- limiting access to its network by *inter alia* rejecting AOs' orders on unreasonable grounds or proposing difficult technical conditions for connecting to TP's network;

- limiting access to subscriber lines by *inter alia* rejecting AOs' orders to activate subscriber lines on unreasonable grounds or limiting the availability of subscriber lines;

- refusing to provide reliable General Information ("GI") indispensable for AOs, or providing inaccurate information.

4.3.1. Unreasonable conditions

TP was under a regulatory obligation to offer access and collocation contracts with conditions not worse than the ones guaranteed by the Reference Offers ("ROs"). The decision lists many contractual clauses contained in TP's standard contracts, which were disadvantageous to AOs and which did not even meet the minimum standards set in the ROs. Despite several revised drafts of TP's standard contracts, TP's subsequent proposals still did not even come close to the ROs' stipulations. The fact that AOs had very limited bargaining power vis-à-vis TP aggravated their situation. AOs were forced to accept TP's proposal, refer the case to the regulator, or abandon the negotiation and the market entry. As a result, UKE had to intervene on the AOs' side on a regular basis, imposing decisions on TP which removed the unfavourable contractual clauses.

4.3.2. Delaying tactics at different stages of the negotiation process

In addition to unreasonable contract clauses, TP used various delaying tactics throughout the negotiation process, including at least the following: (i) delaying the start of the access negotiations (for instance, one AO received a draft contract after 226 days instead of three days, as required by the regulation), (ii) further delays at the stage of negotiating contract clauses when AOs were forced to negotiate even the minimum conditions guaranteed by law, (iii) AOs could not be certain that the negotiated compromise would be reflected in the final contract, as TP's representatives were not authorised to commit the incumbent, and (iv) delaying the contract signature (i.e. the contract agreed between TP and AOs required the approval of intermediate departments of TP, which sometimes took up to three months).

4.3.3. Limited access to TP's network

AOs ran into difficulties again at the stage of accessing TP's network. In particular, TP rejected a high number of AOs' BSA and LLU orders on formal and technical grounds. Rejections were mainly due to: (i) unnecessary formal requirements imposed by TP for completing the orders, as well as (ii) unjustified technical rejections and, at least until 2007, a lack of satisfactory alternative solutions when there was no technical possibility to connect to the network in the way requested by AOs. Furthermore, TP proposed exaggerated cost estimates for LLU collocation, which often resulted in a very high percentage of locations not being accessed by AOs despite the positive outcome of the technical verification. Moreover, TP delayed the implementation of orders and delayed execution of certain collocation works. The evidence in the file shows that TP applied better conditions to its subsidiary PTK.

4.3.4. Limited access to subscriber lines

TP also hindered AOs' access to subscribers, particularly by rejecting many AOs' orders on formal and technical grounds. As a result, AOs could not provide service to a large number of customers who had signed up for it. At the same time, PTK, TP's subsidiary, enjoyed a lower rejection rate. Rejections were caused by two factors: (i) the use of outdated TP data to verify AOs' orders and (ii) a faulty verification mechanism on TP's side. Furthermore, AOs faced limited availability of subscriber lines linked to the failure to provide BSA services on WLR ([10]) lines and delays in the repair of faulty lines. In

([10]) Wholesale Line Rental used for the provision of fixed telephony.

practice, TP prevented AOs from upgrading their narrowband clients to broadband, thus limiting their ability to expand and grow on the retail broadband market. Finally, TP significantly delayed the implementation of AOs' orders for subscriber lines.

4.3.5. Refusal to provide the reliable information indispensable for AOs

AOs need reliable and accurate information to make sound decisions regarding access to TP's wholesale broadband products at specific locations. The decision finds that TP did not provide AOs with reliable information or provided incomplete information. Also, TP provided the data in a format (such as paper or scanned pdf) which was difficult to process and failed to provide an IT interface enabling AOs to have efficient access to BSA and LLU-related information and to process orders. The incompleteness and unreliability of the GI provided by TP possibly resulted in increased costs for AOs and the inability to implement their business plans.

Additionally, the evidence in the file illustrates that TP provided PTK with supplementary channels of information as well as with additional information which was not made available to other AOs. So the process of obtaining the GI was quicker and cheaper for PTK and led for example to a reduced number of order rejections. This also indicates that TP could have improved the quality of GI and the information channels, but that it refused to do so.

4.4. Likely impact on competition and consumers

TP's abusive conduct in the wholesale market was capable of restricting competition in the retail market. Access contracts that include burdensome obligations may diminish the quality of the product or increase AOs' costs or limit their sales. Lengthy negotiations and access procedures may benefit the incumbent, especially when introducing new services. There is empirical evidence that TP's refusal to supply was likely to reduce the rate of entry by competitors on the retail market for DSL services. There was a low take-up of BSA and LLU lines.

TP's refusal to supply was likely to have a detrimental impact on end users, which is reflected in low broadband penetration, high broadband prices and low average broadband connection speeds. In January 2010, broadband penetration in Poland was only 13.5%, one of the lowest in Europe and significantly below the EU average of 24.88%. Further, Poland has one of the lowest broadband speeds in Europe, with over 66% of connections falling in the range of 144Kbps and 2 Mbps compared to an EU average of 15,4% for this segment (data for 2009). Finally, retail broadband prices in Poland are the second highest in the OECD area (date for 2009).

4.5. Objective justifications

Exclusionary conduct may escape the prohibition of Article 102 TFEU if the dominant undertaking can provide an objective justification for its behaviour or if it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant company. ([11])

TP denied the existence of the abuse. It admitted certain difficulties in providing access to its wholesale broadband products, in particular in 2006 and 2007, but argued that they could be explained *"by the technical efforts and internal reorganization which TP had to undergo in a very short period of time to adjust to the new regulatory environment."* TP explained that it had to manage simultaneously several projects on various wholesale services and had difficulties in developing proper IT systems and in finding human resources to perform certain projects.

The Commission did not accept TP's arguments. The case file contains solid evidence of TP's exclusionary conduct. Contemporaneous internal documents confirm that TP's strategy was designed to impede the AOs' access to TP's network. The incumbent had a lot of time to prepare its internal resources and IT systems for upcoming access obligations (imposed in 2005 for LLU and 2006 for BSA). TP had been aware of these obligations at least since 2003, when the decision identifying TP as an SMP (significant market power) operator was issued. The signature of TP's Agreement with UKE in October 2009 and the improved treatment of AOs that followed prove that TP could have applied effective access conditions also prior to the Agreement.

5. TP's arguments

TP argued during the administrative procedure that the Commission had limited itself to verifying the consistency of TP's behaviour with regulatory obligations. This is incorrect. Although the regulatory context was a key factor for the assessment under competition law, the Commission conducted an in-depth assessment of TP's behaviour under Art. 102 TFEU on the basis of a large number of documents in the file. The decision did not qualify as an abuse one or more breaches of a particular

([11]) See judgement of the General Court of 30 sept. 2003 Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* (Michelin II) [2003] ECR II-4071, at paragraphs 107-109.

regulatory obligation vis-à-vis a given AO, but rather examined TP's pattern of behaviour vis-à-vis a large number of AOs over more than four years, which qualified as a refusal to supply wholesale inputs.

TP also questioned the Commission's competence in the case, claiming that the existing regulatory framework was efficient and guaranteed competition on the market and TP had already been subject to sanctions for breaching regulatory obligations. To address these arguments the decision evokes jurisprudence of the European courts which held that competition law may apply where sector specific legislation exists. For example, the recent judgment by the Court of Justice in *Deutsche Telekom* explains that *"the competition rules laid down by the EC Treaty supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets"*. ([12]) The General Court also found that even under the assumption that the regulator is obliged to consider whether the behaviour of the company concerned is compatible with Article 102 TFEU, the Commission would not be precluded from finding that the company was responsible for an infringement of Article 102 TFEU. ([13]) To this end the decision recalls that the decisions of the regulator that TP refers to do not contain any findings on Article 102 TFEU. Finally, the intervention of the Commission was justified, as (despite the regulation in place and the sanctions imposed by UKE) TP did not change its anticompetitive behaviour, which negatively affected the development of wholesale broadband services in Poland. TP appealled the Commission's decision on 28 October 2011 (case T-486/11, pending). TP mainly contests the level of the fine.

6. Remedies and fines

The decision required TP to bring the infringement to an end to the extent that any of the identified abusive practices was still ongoing, and to refrain from any practices which would have the same or similar object or effect as described in the decision.

The decision imposed a fine taking into account the gravity and the duration of the infringement (four years and two months). No aggravating or mitigating circumstances were taken into account. In view of the partial overlap of facts between the Commission's decision and two regulatory sanctions imposed by UKE, the Commission decided to deduct the sum of two fines imposed by UKE and paid by TP in the amount of € 8.5 million. The final fine amount was € 127.5 million.

([12]) See judgement of the Court of Justice of 14 October 2010 in Case C-280/08 *Deutsche Telekom*, at paragraph 92, ECR [2010], p.I-9555.

([13]) Judgment of the General Court of 10 April 2008 in Case T-271/03, *Deutsche Telekom*, ECR [2008] II-477, at paragraph 113 and judgment of the Court of Justice of 14 October 2010 in Case C-280/08 *Deutsche Telekom* at paragraphs 80-96.

The Suez Environnement seal case – EUR 8 million fine for breaching a Commission seal during an inspection

by Céline Gauer, Karine Bansard and Flavien Christ(1)

In April 2010 the Commission conducted an inspection at the premises of water management companies in France, including Lyonnaise des Eaux (LDE), a subsidiary of French group Suez Environnement, because of suspicions of anti-competitive behaviour in the water and waste water markets.

When they arrived at LDE's headquarters in Paris on the second day of the inspection, the Commission officials conducting the inspection found that a seal had been breached. The Commission swiftly opened a standalone procedure against Suez Environnement for alleged breach of seal on LDE premises. LDE and Suez Environnement admitted that an LDE employee had breached the seal, arguing that it was an unintentional act. On 24 May 2011(2), the Commission adopted a decision under Article 23(1)(e) of Council Regulation (EC) No 1/2003(3) imposing a fine of EUR 8 million jointly and severally on Suez Environnment and LDE for this breach of the Commission's procedural rules. This was the second time the Commission imposed a fine for breach of seal(4). This article sets out the main factual and legal elements on which the decision is based.

1. The Facts

Between 13 and 16 April 2010 the Commission carried out unannounced inspections at the premises of water management companies in France, on suspicion of anti-competitive behaviour in the water and waste water markets. LDE, a wholly-owned subsidiary of the French group Suez Environnement, was among the inspected companies. On the first day, the inspection team searched several offices at LDE's headquarters in Paris and collected a large number of documents. In accordance with the Commission's standard practice, the Commission officials affixed seals to the doors of offices that had not been or were only partially searched at the end of the first day, in order to prevent any unauthorised access overnight. The company's representative was duly informed of the significance of the seals and of the consequences of any breach.

Commission seals are 20 cm long and 7 cm wide self-adhesive strips of plastic. Each seal bears a serial number. When the seal is affixed, the two sections on either side of the middle section featuring the 12 stars of the European Union are uniformly red in colour. The physical properties of the seal mean that, when it is removed, some of the glue used to affix it to the door and doorframe remains on its surface. As a result, the side sections of the seal become partially transparent, so that the wording 'OPENVOID' stands out in these areas. In addition, 'OPENVOID' letters in red remain visible across the entire surface covered by the seal on the door and doorframe.

When the inspection team returned to LDE's headquarters on 14 April, the Commission officials noted that one of the seals affixed the night before displayed 'OPENVOID'. In addition, red marks were visible on the door just above the section of the seal affixed to it. The state of the seal was documented in a report signed by representatives of the company, the national authority and the Commission. Photographs and a video recording of the seal were attached to the report.

At their own initiative, Suez Environnement and LDE immediately launched internal investigations. In less than 48 hours they were able to identify the person responsible for breaking the seal, and while the Commission inspectors were still present at the site, they provided the Commission representative with a detailed statement in which that person unequivocally admitted to having breached the seal. During two interviews with Commission officials in the following days, that person confirmed his responsibility for the seal breach. At their own

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(2) Commission decision of 24 May 2011 in Case COMP/39.796 – *Suez Environnement breach of seal*. No appeal was lodged before the General Court against the decision. The decision can be found at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39796.

(3) OJ L 1, 4.1.2003, p. 1 (in the following text all references to Articles mean those of Regulation 1/2003). Regulation 1/2003 as amended by Regulation (EC) No 411/2004 (OJ L 68, 8.3.2004, p. 1).

(4) Commission Decision of 30 January 2008 relating to a proceeding under Article 23(1) of Council Regulation (EC) No 1/2003 in Case COMP/39.326 — *E.ON Energie AG* (OJ 2008/C 240/6), confirmed in appeal by the General Court Judgment of 15 December 2010 in Case T-141/08 *E.ON Energie v Commission*, OJ 2011/C 38/10. The case is currently pending before the ECJ (Case C-89/11 P: Appeal brought on 25 February 2011 by E.ON Energie AG (OJ 2011/C 152/11)).

initiative, the parties also provided the Commission with video recordings and statements by two LDE employees confirming the version of events given by the person who admitted to having broken the seal.

2. Standalone procedure

As in the E.ON case([5]), the Commission decided to pursue this procedural infringement with a standalone procedure. Separating these proceedings from those concerning potential breaches of Article 101 or Article 102 of the Treaty on the Functioning of the European Union ("TFEU") allows the Commission to take a prompt decision sanctioning the infringement. Opening a standalone procedure swiftly after a breach of seal occurs confirms the seriousness of the infringement, whether it is committed intentionally or not. In fact, seals are a crucial instrument to protect the effectiveness of Commission inspections, which are one of the most important powers of investigation the Commission has to detect infringements of Articles 101 and 102 of the TFEU.

Inspections enable the Commission to identify infringements of competition rules in cases where evidence of these infringements is held in places and forms which make it easy to conceal or destroy in the event of an investigation. In this respect, the power to conduct inspections is essential to ensuring the effective protection of competition in the internal market. The European legislator recognised the importance of this power by substantially increasing the maximum fine that can be imposed under Regulation 1/2003, in comparison with the previous Regulation 17/62, for a procedural breach relating to a Commission inspection.

3. The infringement

The Decision's finding of a breach of seal was based on several legal considerations concerning Article 23(1)(e).

First, for the purpose of establishing the infringement it is not necessary for the 'OPENVOID' wording to appear on the entire surfaces of the two side sections of the seal. A seal is considered to have been broken if the 'OPENVOID' wording appears, indicating that it has been removed from the surface to which it was affixed. In this case, the 'OPENVOID' letters were apparent on the right-hand section of the seal (affixed to the door) and on a small part of the left-hand section of the seal (affixed to the doorframe). This indicates that the seal was peeled off the door and part of the doorframe so that access to the sealed office was possible.

([5]) See E.ON Energie AG v Commission, cited above.

Secondly, the Commission does not have to prove any effect or consequences of a seal breach. Indeed, for the purposes of establishing the infringement it is irrelevant whether one or more people entered the office or whether documents stored there disappeared subsequent to the breach of the seal. The provision in Article 23(1)(c) relates to the breach of the seal *per se* and not to the potential consequences, including access to the sealed premises or tampering with documents. As the General Court ruled in the E.ON case: *'the Commission must provide evidence that the seal was broken. However, it is not required to demonstrate that access was indeed gained to the sealed premises or that anybody tampered with the documents stored there'*([6]).

Thirdly, in order to establish the infringement, it is not relevant whether the seal was broken intentionally or negligently. Article 23(1)(e) refers explicitly to both scenarios([7]). Breaches of seal are therefore defined as objective infringements. This means that undertakings to which inspection decisions are addressed must take all necessary measures to prevent any tampering with the seals affixed by the Commission during the inspections. As ruled by the General Court in the E.ON case: *'it should be noted that it is the responsibility of the applicant to take all the measures necessary to prevent any handling of the seal at issue, especially as the applicant had been clearly informed of the significance of the seal at issue and the consequences of its breach'*([8]). Accordingly, in the absence of any evidence demonstrating intention, and except in cases of *force majeure*, it must be considered that a broken seal is, at least, the result of negligence on the part of the undertaking in question[9]. In their reply to the statement of objections, Suez Environnement and LDE acknowledge *'that the elements establishing an infringement arising from negligence [may] be described as such by the Commission'*([10]).

4. Fine

Article 23(1)(e) provides that the Commission can impose a fine of up to 1% of a company's total turnover for a seal broken either intentionally or negligently. The amount of the fine should be proportionate and determined in the light of the gravity of the infringement and the particular circumstances of the case. However, there are no guidelines([11]) in

([6]) *E.ON Energie AG v Commission*, cited above, paragraph 256.
([7]) *E.ON Energie AG v Commission*, cited above, paragraph 256.
([8]) *E.ON Energie AG v Commission*, cited above, paragraph 260.
([9]) *E.ON Energie AG v Commission*, cited above, paragraphs 254 to 262.
([10]) Paragraph 75 of the Decision.
([11]) The Fines Guidelines (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p.2) only apply to breaches of Article 23(2)(a) of Regulation 1/2003, i.e. breaches of Articles 101 or Article 102 of the TFEU.

place defining the specific criteria and methods to be applied in setting fines for procedural breaches. The Commission therefore enjoys a wide margin of discretion in determining the exact amount of the fine for this type of infringement.

When setting the fine in this case, the Commission took into account, first and foremost, that breaches of seals must as a matter of principle be regarded as serious infringements in that they hamper the effectiveness of Commission's inspections. Accordingly, the level of the fine has to ensure a sufficient deterrent effect, so that it is clearly not in an undertaking's interest to breach a seal and destroy incriminating evidence rather than face a penalty for a substantive infringement. As ruled by the General Court in the E.ON case: *'a fine of EUR 38 million cannot be considered disproportionate to the infringement given the particularly serious nature of a breach of seal, the size of the applicant and the need to ensure that the fine has a sufficiently deterrent effect, so that it cannot prove advantageous for an undertaking to break a seal affixed by the Commission in the course of an inspection'*(12).

The Commission also took into account the fact that LDE and Suez Environnement form a large corporate group with legal expertise in competition law, and so were perfectly aware of the penalty they could face in the event of an infringement of this kind. In this respect, the Decision notes that LDE had been duly advised by the Commission representative that it was responsible for ensuring that the seals affixed during the inspection remained intact, and that the Commission had previously imposed a fine for a breach of seal. In 2008, the Commission fined E.ON Energie EUR 38 million for breaking a seal affixed during an unannounced inspection.

However, the Commission also took into consideration the immediate and constructive cooperation provided by Suez Environnement and LDE. They voluntarily and without delay passed on to the Commission a great deal of information shedding light on the facts and facilitating the Commission's investigation. Suez Environnement and LDE also provided a detailed statement by an LDE employee in which this person unequivocally admitted to having broken the seal. Additionally, in their reply to the statement of objections, Suez Environnement and LDE accepted the Commission's conclusions concerning the substance of the facts, their legal nature and the attribution of liability for the infringement to both of them.

(12) *E.ON Energie AG v Commission*, cited above, paragraph 294.

5. Liability for the infringement

In this case, the infringement was committed in LDE's business premises and, according to the information provided by LDE, by one of its employees. As such, the liability for the infringement can be attributed to LDE.

As LDE is a wholly-owned subsidiary of Suez Environnement, the liability for the infringement can also be attributed to the parent company.

In this respect, the Decision clarifies that the rules governing liability for infringements of competition rules are the same for both infringements of the substantive rules in Articles 101 and 102 of the TFEU, and for infringements of the procedural rules relating to the Commission's powers of investigation. Since procedural infringements relating to the Commission's powers of investigation aim to prevent or hinder detection of infringements of substantive rules, the rules on liability for procedural infringements must be governed by the same principles as the rules on liability for substantive infringements.

This analysis is also confirmed by Article 23 of Regulation 1/2003, which refers in the same way to '*undertakings and associations of undertakings*' in connection with both fines imposed for infringements of the procedural rules (paragraph 1) and fines imposed for infringements of substantive rules (paragraph 2).

For these reasons, there must be parallelism between the rules applied to parental liability for substantive and procedural infringements. This is consistent with the case-law of the European Court of Justice in the *Akzo* case(13) where no distinction is made between substantive and procedural infringements(14).

Additionally, in this case, a number of circumstances prior and subsequent to the discovery that the seal had been broken indicated that Suez Environnement was closely involved in the inspection conducted at LDE headquarters. For instance, lawyers employed by Suez Environnement were on LDE premises even before the breach of seal had been discovered.

(13) Judgement of the Court of Justice of 10 September 2009 in Case C-97/08 *Akzo Nobel NV and Others v Commission*, ECR 2009 Page I-8237.

(14) For more details on the imputation of liability to parent companies for procedural infringements, see Philip Kienapfel, "Geldbuße im Siegelbruch-Fall bestätigt" in Österreichiche Zeitschrift für Kartellrecht, April 2011/ Nr 2, page 67. See also Ralf Sauer in Schulte/Just (eds.), Kartellrecht (2011), Art. 23 para. 1 and Céline Gauer "Antitrust fact-finding in administrative proceedings before the European Commission" forthcoming in 2011 Fordham Comp. L. Inst. (B. Hawk ed. 2012).

For these reasons, the Decision was addressed to LDE and to Suez Environnement, and both were held jointly and severally liable for the infringement.

6. Conclusion

The Decision in the Suez Environnement seal case illustrates a wider trend by the Commission to pursue procedural infringements relating to inspections using standalone procedures. As already mentioned, in January 2008, the Commission imposed a fine of EUR 38 million on German company E.ON Energie for the breach of a seal affixed in its premises during an inspection([15]). In March 2012, the Commission imposed a fine of EUR 2.5 million on Czech companies EPH and J&T Investment Advisors for having obstructed an inspection([16]).

It is also important to be aware of the context; the Commission is investigating an increasing number of *ex officio* cases, in which inspections are a key tool for gathering evidence of breaches of Articles 101 or Article 102 TFEU. In this context, standalone prosecution of procedural infringements leading to the swift imposition of appropriate sanctions is essential to safeguard efficient enforcement of the Treaty provisions.

([15]) Commission Decision of 30 January 2008, cited above.

([16]) See press release at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/319&format=HTML&aged=0&language=EN&guiLanguage=en

Merger: main developments between 1 May and 31 August 2011

by John Gatti ([1])

1. Introduction

The Commission received 135 notifications between 1 May and 31 August 2011, a substantial increase of 45% over the previous four months and an even larger increase of 67% over the corresponding period of 2010. The Commission adopted a total of 121 first phase decisions of which 120 were unconditional clearances. Over 60% of these decisions were adopted under the simplified procedure. One first phase transaction was cleared conditionally. One case was withdrawn in phase II while two operations were cleared unconditionally after a second phase investigation. There was one decision under Article 4(4) to partially refer a case with a Union dimension back to a Member State. Member States accepted nine requests from parties for cases to be referred to the Commission and refused none under Article 4(5). Finally the Commission made one complete referral to a Member State following a request made under Article 9.

2. Summaries of decisions taken in the period

2.1 Summaries of decisions taken under Article 6(2)

BASF/Ineos Styrene

On 1 June 2011 the European Commission cleared under the EU Merger Regulation the creation of a joint venture combining the existing styrene monomer, polystyrene and acrylonitrile-butadiene-styrene (ABS) businesses of INEOS of Switzerland and BASF of Germany. The decision is conditional upon the divestment of activities in the ABS sector.

BASF is the world's largest chemical company. It is mainly active in the supply of chemicals, crude oil and natural gas, including specialty chemicals, plastics, performance products, functional solutions and agricultural solutions. INEOS is a conglomerate that produces a range of chemicals including petrochemicals, specialty chemicals and oil products.

The proposed joint venture would have combined INEOS's and BASF's existing styrene monomer, polystyrene and acrylonitrile–butadiene-styrene (ABS) businesses, together with certain minor related products.

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

The Commission's investigation revealed that the proposed transaction would not significantly modify the structure of the majority of the relevant markets, as a number of credible and significant competitors would continue to exercise a competitive constraint on the joint venture.

However, the Commission found that the proposed transaction, as initially notified, would have raised competition concerns in the market for ABS, where the merged entity would have had a strong position in a market that was already concentrated. ABS is a chemical product used in a variety of applications including, for instance, refrigerator door caps, vacuum cleaner components, washing machine panels, computer keyboards and housings, dashboard components and steering wheel covers.

To remedy the Commission's concerns, the parties offered to divest part of INEOS's ABS production business thus reducing the overlap. The Commission's market test showed that the divested businesses would be viable and that the commitments would resolve all identified competition concerns.

2.2 Summaries of decisions taken under Article 8

Votorantim/Fischers

The Commission approved on 4 May 2011 the creation of a joint venture between the Brazilian groups Votorantim and Fischer that will combine their respective activities in the orange juice sector.

Votorantim and Fischer, two Brazilian firms, notified the Commission at the end of November of their plans to combine their respective Citrovita and Citrosuco orange juice operations. They requested regulatory clearance from the Commission because their sales in Europe exceed the thresholds that trigger EU jurisdiction over mergers and acquisitions.

The Commission began its in-depth investigation over concerns that the merged entity might be able to increase prices for customers. The joint venture creates the world's largest producer and supplier of orange juice to companies that supply end consumers with branded or private label products. It will also hold important market positions in a number of by-products obtained from the orange juice extraction process, such as orange oils and essences, orange pulp and citrus pellets. The by-products are used in the production of chemicals and solvents, aromas and fragrances, paints and cosmetics and animal feed.

The Commission's in-depth examination showed that despite the joint venture's leading position on the orange juice market, it would continue to face competitive pressure from other established suppliers. It showed that these suppliers would not be restricted in their access to fresh oranges and would therefore be able to counteract any strategy on the part of the joint venture to increase prices by reducing output. The Commission's in-depth investigation also revealed that many customers have multiple sources of supply and that switching costs are low given the commodity-type nature of the orange juice produced by the joint venture and its competitors.

The in-depth investigation also ruled out the possibility that the creation of the joint venture could lead to an increased risk of coordination on the orange juice market as the transaction increases the asymmetry in market shares between the main suppliers and does not appear to change the current situation in a way that would make coordination more likely, stable or effective.

UPM/Myllykoski

The Commission cleared the proposed acquisition of Myllykoski Corporation and Rhein Papier GmbH ("the Myllykoski Group") by UPM-Kymmene Corporation ("UPM") on 13 July 2011. Both groups are active in the paper and pulp industries. The Commission's in-depth investigation confirmed that the merged entity would continue to face competition from a number of other strong competitors and customers would still have sufficient alternative suppliers in all markets concerned.

The Commission examined the competitive effects of the proposed acquisition in the markets for the supply of magazine paper, newsprint, the acquisition of recovered paper, wood procurement and the production of wood pulp, as well as a number of vertical relationships.

The Commission opened an in-depth investigation after a preliminary assessment, because it had doubts about the transaction's compatibility with the internal market in relation to magazine paper and particularly in the supercalendered (SC) paper segment where the combined entity would have high market shares. SC paper is a non-coated paper used for catalogues and direct marketing materials. The production of all papers involves the use of calendars at the end of the manufacturing process to smooth the surface.

Following a detailed investigation, the Commission found that the parties' competitors have significant spare capacity which would enable them to react to any attempts by Finland's UPM to raise prices. Furthermore, the demand for magazine paper is forecast to remain stable or even slightly decline, so sufficient capacity will remain available on the market in the future. Moreover, a new type of paper, known in the industry as SC-B Equivalent, was introduced recently on the market and the Commission's investigation showed that the new products derived from this paper are competing directly with one type of SC, namely SC-B paper. These recent market entrants are already putting significant competitive pressure on the parties and their importance is expected to increase in the near future. The Commission therefore concluded that the transaction would not raise competition concerns.

2.3 Summaries of decisions taken under Article 9

LGI/KBW

On 17 June 2011 the Commission referred the assessment of the proposed acquisition of Kabel Baden-Württemberg (KBW) by Liberty Global Inc. (LGI) to the German competition authority (Bundeskartellamt) at the latter's request. After a preliminary investigation, the Commission found that the proposed transaction may significantly affect competition in the market for the provision of free-TV services to housing associations, where contracts with tenants are negotiated collectively. This represents a large market in Germany.

Germany asked for the referral of the case arguing that it threatened to significantly affect competition in some of its domestic TV-related markets. Currently, there are three regional cable TV operators in Germany: Kabel Deutschland, Unitymedia (owned by LGI since 2010) and KBW. The proposed transaction would bring together the second and third largest regional cable TV operators in the country. The proposed transaction will now be examined by the Bundeskartellamt under national law.

The Commission's preliminary investigation, conducted in close cooperation with the Bundeskartellamt, revealed that the proposed transaction risked significantly affecting competition for the retail supply of free-TV services to housing associations in Germany. Currently, regional cable operators do not compete with each other. However, it cannot be excluded that this is the result of co-ordination among the operators and that the proposed transaction would strengthen such coordination among the three regional operators. Moreover, the proposed transaction might affect competition in the national market for the wholesale supply of TV signal transmission services.

The Commission decided to refer the entire case to the Bundeskartellamt because almost all the markets potentially affected are national or regional and the Bundeskartellamt has significant experience in this sector.

Votorantim / Fischer / JV
Squeezing oranges, not consumers

By Jose Maria Carpi Badia, Patrick D'Souza, António Seabra Ferreira, Robert Thomas, Michalina Zięba (1)

Introduction

Last year the Commission adopted a decision in what has come to be known as the "orange juice case" (3), as it dealt with the creation of the leading orange juice supplier to the European market.

The Brazilian groups Votorantim and Fischer ("the notifying parties") wanted to merge their respective orange juice subsidiaries Citrovita and Citrosuco in a full function joint venture ("JV"). The JV would become the largest orange juice supplier to Europe and the merged entity would face only two other sizeable suppliers: the Brazilian juice producer Cutrale and the international agricultural and commodities group Louis Dreyfus Commodities ("LDC").

During the investigation, it became apparent that orange juice is a homogeneous good and that the major suppliers are vertically integrated to varying degrees. The main concerns customers raised were related to price increases by the JV. Consequently, the Commission's assessment paid particular attention to the ability and incentive of the remaining competitors to counteract any attempt by the JV to increase prices unilaterally. The capacity constraints of the main competitors along the supply chain were therefore investigated in detail.

The decision provides two important insights. On substance, it shows how the Commission approaches mergers in homogeneous goods markets where concentration on the supply side is relatively high. On procedure, the Commission used a considerable amount of economic data obtained from the notifying parties and their main competitors. The outcome of the case shows that the Commission is prepared to clear cases that are examined in-depth early after proceedings are initiated, as soon as sufficient facts are available. (4)

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

(3) Case M.5907

(4) The Commission's decision has already attracted a good deal of attention. See: Dominique Berlin, Horizontal overlaps: The European Commission clears without any condition the merger of activities of two of the main players in the orange business in Brazil after an in-depth investigation (*Votorantim/Fischer/JV*), Concurrences, N° 1-2012, n°42282, www.concurrences.com.

The relevant markets

The main focus of the case was orange juice production and supply, though the Commission also examined a number of by-products of the juice production process. (5)

Most of the orange juice consumed in Europe is imported from Brazil, which is the most important orange growing area in the world and accounts for 38% of global orange production according to industry figures. Brazil's share of global orange juice production is, at 58%, even higher than its share of fresh orange production. Brazil and the US, which is the second largest producer, together account for 89% of world orange juice production.

Oranges can be processed into two main types of juice: "frozen concentrated orange juice" ("FCOJ") and "not from concentrate orange juice" ("NFC"). FCOJ is concentrated orange juice from which excess water has been removed by an evaporation process. Transported to Europe by ship, FCOJ is reconstituted by drinks companies before being packaged and sold to consumers. NFC is not concentrated and retains its original volume from the processing plant to the supermarket shelf.

The notifying parties submitted that the effects of the transaction should be assessed on a market comprising the production and wholesale supply of all fruit juices. But the Commission's investigation confirmed the market was no broader than that of orange juice only. This conclusion was supported, *inter alia*, by the responses of the many drinks companies contacted as part of the investigation. Moreover, an analysis of wholesale and retail level pricing data did not prove that orange juice and apple (or other) juice(s) exert a significant competitive constraint on each other that would justify including orange juice and other fruit juice products in the same market.

Having concluded that the relevant product market was no broader than orange juice, the Commission then examined whether it would be appropriate to distinguish between FCOJ and NFC. Although the facts collected during the Commission's investigation pointed towards both limited demand-side and supply-side substitutability between FCOJ and NFC, which could suggest separate product

(5) These by-products included orange oil and essences, orange terpene, citrus pulp and citrus pellets.

markets, the Commission ultimately left this point open as it was not critical for the competitive assessment of the transaction.

The concerns raised in the initial phase of the investigation

The qualitative and quantitative evidence examined during the initial phase of the investigation provided support for different (mutually exclusive) theories as to how prices could increase after the transaction.

The transaction could have given rise to non-coordinated effects. The JV would become the world's leading orange juice producer and largest supplier of orange juice to the EEA with a market share of 40-50%. Furthermore, on the overall market for the production and wholesale supply of orange juice (encompassing both FCOJ and NFC) to the EEA and, alternatively, in a market for the production and wholesale supply of FCOJ to the EEA, the concentration would have reduced the number of main competitors from four to three. The theory of harm was therefore based on the JV being able to increase prices and decrease output, without being counterbalanced by the remaining competitors, notably due to capacity constraints.

Moreover, Citrovita was the only large FCOJ producer which was not yet active in NFC, so it could have been a potential entrant in the latter segment. Consequently, the transaction could also possibly have led to the elimination of a potential competitor, again a non-coordinated effect.

Finally, the transaction could also have given rise to coordinated effects since it would reduce the number of main competitors from four to three.

The information gathered from the many recipients of the Commission's requests for information, conference calls, and internal documents combined with market data analysis pointed mainly to a potential distortion of competition via non-coordinated behaviour, notably through an increase in prices.

In order to analyse thoroughly the above theories of harm, the Commission opened an in-depth investigation of the case ("phase two") on 7 January 2011. This investigation also aimed to assess the impact of the proposed JV on a number of orange juice by-products.

The phase two investigation

The phase two investigation explored in detail the various strategies, in particular output reduction, through which the JV could achieve higher prices.

As identified at the end of the phase one investigation, several elements pointed towards non-coordinated effects. The JV would have a combined market share of 40-50%; as the clear market leader, it would be the main beneficiary of a price increase; and the number of alternative suppliers would be limited. These concerns were supported by a number of customer responses to the Commission's requests for information sent in phase one.

Against this background, the in-depth investigation involved more far-reaching and detailed data requests to the notifying parties and their main competitors, complementing the phase one requests. Specific attention was given to elements with particular importance for switching and capacity constraints, i.e. the varieties of oranges available for processing, the distance between the various plants and orange groves and the existence of idle capacity at the various stages of production (access to oranges, processing, storage/logistics and transport).

This quantitative approach was complemented by comprehensive requests for information addressed to the notifying parties' customers as well as to their main and smaller competitors in the orange juice market. The investigation was widened through extensive telephone interviews with Brazilian orange growers and further requests for internal documents addressed to the notifying parties.

Homogeneous products and low switching costs

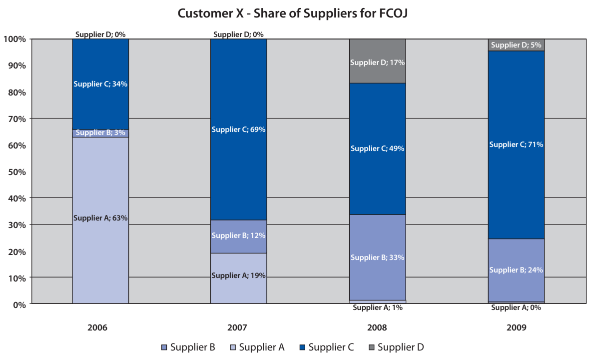
In homogenous markets, a merger is less likely to result in anti-competitive effects the lower switching costs are for customers and the less capacity-constrained competitors are. However, both conditions have to be fulfilled simultaneously. Low switching costs ensure that customers can shift their purchases away from the JV in case of a price increase, while the absence of capacity constraints ensures that competitors can respond to such a shift in demand by significantly expanding output, provided they have an incentive to do so.

During phase one, the Commission already had some indications that the relevant product markets were largely homogenous. The phase two investigation enabled the Commission to deepen its understanding of the characteristics of FCOJ and NFC as well as the procurement market, where fresh oranges are traded.

Based on this investigation, the Commission concluded that although there are differences in taste and quality between oranges produced in Brazil and other countries such as Mexico, Cuba or Spain, these differences are rather limited across oranges produced in Brazil. Orange groves are concentrated in São Paulo State, a region known as the "citrus belt", which is as large as Belgium. More than 90% of the oranges processed into juice in Brazil come from the citrus belt. Moreover, all the main orange juice producers have processing plants in the region and procure almost all their orange requirements within the region. Since they all face similar or even identical supply conditions for their inputs and apply the same processing technology, their orange juice has similar characteristics.

Indeed, most customers in the EEA confirmed that the four main players, Citrovita, Citrosuco, Cutrale and LDC, were equally able to provide FCOJ in the requested volumes and quality. Quotes are usually requested from all main players, multi-sourcing is a common practice, switching costs are low – all suppliers have their terminals located in the same area in the EEA (Ghent, Antwerp and Rotterdam) – and switching takes place on a regular basis. The Commission also undertook a detailed analysis of customer-level sales data from the JV and its competitors, including all sales of FCOJ and NFC by the four main suppliers for the years 2006-2009. Figure 1 shows an example of the data analysis undertaken for a large customer:

Figure 1: Example of a customer X in the EEA switching its FCOJ requirements between suppliers during the period 2006-2009 – Source: market investigation



Customer X tends to use at least three suppliers but over time it reallocated its purchases from Supplier A (who was the main supplier in 2006) to Supplier C (who was the main supplier in 2007-2009). As of 2008, customer X bought only minimal volumes from supplier A. Customer X also started purchasing FCOJ from supplier D in 2008. For all the largest customers, similar yearly changes can be observed.

In conclusion, the in-depth investigation showed that suppliers competed closely with each other, that switching costs were low and that all four suppliers were generally seen as highly interchangeable by customers.

Therefore, should the JV unilaterally increase its prices following the merger, their customers would face no difficulty in switching significant sales to the notifying parties' competitors unless these competitors encountered significant barriers to expansion.

Spare capacity along the supply chain

While the homogeneity of the product and the ability of customers to switch suppliers are important elements limiting the risk that the proposed transaction would harm customers, this is only one part of the story. In addition, it was necessary to demonstrate that competitors could respond to any strategy leading to output restrictions and price rises. Thus, the ability of competitors, in particular LDC and Cutrale, to expand their production of orange juice became another cornerstone of the case.

As the supply chain for orange juice (FCOJ or NFC) involves several stages – starting with the orange and ending at the port in Europe – the ability to expand production could encounter several bottlenecks. So the Commission investigated plant level capacity and production data at each level of the production and supply chain of orange juice (and FCOJ in particular) starting with the processing capacity as well as storage and transport/logistic facilities available to the notifying parties' competitors. Detailed data on the procurement of oranges were requested from the notifying parties and their main competitors.

Starting at the procurement level, the phase one investigation identified a number of constraining factors: the land available for planting orange trees, the growing conditions, demand for oranges from the fresh fruit market, the proximity of oranges to the processing plant, as well as the specifications and quality standards of oranges demanded by the bottlers. It was already argued that the four main suppliers were located and procured their oranges from within the citrus belt and therefore were able to deliver almost identical products. The in-depth investigation showed that several suppliers had recently invested in new orange groves beyond the replacement of old trees, ultimately increasing their in-house capacity. Moreover, a detailed analysis of the four main suppliers' contract portfolios confirmed that each year a significant number of contracts and respective volumes of oranges become available on the procurement market to all processors. This meant that even if the JV were to reduce its procurement of oranges – with the ultimate objective of decreasing output and increasing prices for orange juice – these oranges would in all likelihood be available on the spot market to its competitors. Finally, while the area of land available for growing oranges was limited and faced competition from other crops, in particular sugar cane, improved technology, better disease control and denser planting were expected to result in increased orange yields from existing groves.

The Commission therefore concluded that there were hardly any capacity constraints at the level of fruit procurement.

In order to assess the capacity constraints at the processing level, the Commission compiled during the in-depth investigation capacity utilisation data on a monthly basis for each plant of the four main orange juice suppliers. This refined approach enabled the Commission to take into account the seasonality of the orange processing industry and to analyse capacity constraints during the peak of the harvest season. The analysis led to the conclusion that spare capacity for orange juice exists at the processing level for the notifying parties' competitors. For one competitor, about 10-20% of total processing was not utilised in the last two years and the capacity utilisation was even lower just before or just after the peak month. Though some competitors indicated that during the peak of the crop season they fully utilised their capacity in most (but not all) plants, others exhibited spare capacity.

The analysis confirmed the ability of competitors to expand production at the processing level using different avenues in case of an orange juice price increase: some respondents indicated that they could theoretically process up to 10-20 million boxes of additional oranges (in particular by lengthening the production season in order to process the late season fruit), while others replied that they could bridge potential shortages of oranges with stored orange juice as well as by processing additional boxes using their spare capacity. ([6])

After processing the oranges into juice, the product needs to be shipped to ports in the EEA and so capacity constraints in relation to transport/logistics could prevent competitors from expanding their supply. However, during the initial investigation as well as the in-depth investigation, almost all competitors confirmed that there are no possible capacity constraints in transport/logistics. While at the time Citrosuco was shipping orange juice for LDC under a contract expiring in 2012, there were no indications that LDC would be short of transport capacity if Citrosuco did not renew the contract and instead shipped FCOJ produced by Citrovita. First, such a reallocation of transport would free up third-party capacity (especially in view of the fact that at the time Citrovita was renting space on third party vessels), which could be used by LDC. Second, the investigation confirmed that alternatives should be available in the market for bulk transport (namely the possibility of leasing space for bulk transportation on third-party vessels). Finally, no substantiated concerns were voiced about potential storage capacity bottlenecks at the terminals in Brazil and in the EEA. Consequently, the Commission concluded that no capacity constraints existed in relation to transport or logistics in the supply of orange juice.

Given the absence of capacity constraints at all levels of the supply chain, the ability of the JV's competitors to expand production in case of an orange juice price increase was established. However, that ability alone is only a necessary, but not sufficient, condition to counteract a price increase. Thus, the Commission also looked at the incentives of competitors to increase supply. Respondents in the market investigation, in particular the main competitors Cutrale and LDC, highlighted a particular feature of the orange juice production process, namely the importance of economies of scale. According to them, orange juice producers have an incentive to use as much capacity as possible in their plants since "the higher […] capacity usage rates during the season, the lower the per unit processing cost will be." Indeed, if the JV were to reduce output following the transaction, the optimal reaction of competitors would be to increase their sales. When a competitor sets its output level pre-merger, profit optimization implies that the margins gained on additional quantities equal the profit lost due to the depressing effect that the output expansion would have on the prices of existing sales. If the JV decreased its production to push up prices, the competitors' additional margins on the additional quantities would increase, giving them an incentive to expand production in response. Due to the absence of capacity constraints in this market, however, competitors would be able to serve the freed demand without substantially increasing marginal cost, which means that the impact on price of such an output reduction would necessarily be limited (and hence not profitable for the combined entity).

As a result, competitors would not only have the ability, but also the incentive to use existing spare capacity to counteract a potential price increase by the notifying parties. Although the proposed transaction would result in the creation of the leading supplier of orange juice, in particular of FCOJ, to the EEA, the Commission was able to conclude that the establishment of the JV would be unlikely to result in anti-competitive effects in the market for the production and wholesale

([6]) A box is the standard term in the industry for 40.8 kg of oranges.

supply of orange juice (or alternatively of FCOJ) in the EEA. ([7])

Conclusion

The case showed in an exemplary way the relevance of the Horizontal Merger Guidelines, which provided the analytical ground for assessing the case. Indeed, the decision carefully analysed potential non-coordinated effects in a homogeneous product market using the concepts of closeness of competition, switching costs, alternative suppliers and the importance of spare capacity. Moreover, the outcome of the case demonstrated that the Commission is prepared to clear cases which warrant an in-depth examination early after the initiation of proceedings, once sufficient facts are available.

([7]) The in-depth investigation also ruled out the possibility that the creation of the joint venture could lead to an increased risk of coordination on the orange juice market, as the transaction increases the asymmetry in market share between the main suppliers and does not appear to change the current situation in a way that would make coordination more likely, stable or effective. The Commission also concluded that the proposed joint venture would not lead to anti-competitive harm in the NFC orange juice market, in which Citrovita was not active and was not perceived as a potential competitor to Citrosuco. In the case of the by-products obtained from the orange juice extraction process, the Commission concluded that the JV would continue to face competitive pressure from the same companies that are already active on the orange juice market. In addition, alternatives exist for some of the by-products in certain end applications.

State aid: main developments between 1 May and 31 August 2011

by Alessandra Forzano and Danilo Samà ([1])

Policy developments

In the second quarter of 2011 no legislation was adopted in the State aid field. The public consultations launched in the previous quarter on the EU Emission Trading Scheme (ETS), on regional airports and public funding to broadband networks, were closed.

Decisions adopted([2])

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

Crédit Mutuel

On 24 May 2011, following a formal investigation started in 1998, the Commission decided that *Crédit Mutuel* was not overcompensated for distribution of the *Livret bleu* savings account in France([3]). In 1975 France created the *Livret bleu* savings account and entrusted *Crédit Mutuel* with its distribution. In 1991, *Crédit Mutuel* gradually had to transfer the funds collected through the *Livret bleu* accounts to the *Caisse des Dépôts et Consignations* (CDC), which, in return, paid *Crédit Mutuel* a commission. In 2009 France liberalised the rules on the distribution of the *Livret bleu* and *Livret A* tax-free savings accounts, allowing all banks to market them. The Commission's decision has established that *Crédit Mutuel* was not overcompensated for distribution of the *Livret bleu* from 1991 to 2008 and the investigation was closed.

The Commission holds that *Crédit Mutuel* benefited from State aid from 1991 to 2008 for distributing the *Livret bleu* accounts in France. However, this aid is deemed compatible with the EU rules on State aid and services of general economic interest, since the institution was not overcompensated for performing the public service, which consisted of collecting savings to fund the social housing sector through the CDC. This ruling is supported by three main considerations:

(i) the Commission excluded from its calculations certain revenues received by *Crédit Mutuel* before the 1991 Government Order transferring the funds gathered via the *Livret bleu* accounts to the CDC, since those revenues could clearly not be linked to the transfer, initiated after the Order, of the funds to the CDC;

(ii) the Commission deemed it justified for *Crédit Mutuel* to generate a profit margin (a limited one since the activity involves little risk) for collecting the funds;

(iii) the method used from 1991 to 2005 to assess whether overcompensation had taken place consisted of comparing the amount of aid received with the net costs incurred over the period, rather than comparing the aid received each year with the net costs incurred over that same year (in which case overcompensation for a given year could not be offset against under-compensation for another year).

Decisions taken under Article 107(1) TFEU

Ålands Industrihus

On 13 July 2011 the Commission adopted a negative decision([4]) concerning financing in the form of guarantees and other equity interventions granted by the local government of Åland to *Ålands Industrihus Ab* (ÅI), a state-owned commercial property company in the Åland islands, in the Baltic Sea between mainland Finland and Sweden.

The Commission's investigation covered several capital increases and guarantees for bank loans that were granted to ÅI by the local government for the purpose of developing the "iTiden" office park in Mariehamn, the regional capital. The Commission established that the return the local government expected on its investments was much lower than the return a private investor would have demanded, and that the public guarantees were also priced below market levels. Consequently, the company received funding on much better terms than other firms, which had to obtain financing on the private markets. This gave ÅI an unfair advantage over its competitors. The Commission therefore ordered Finland to recover the aid, around €4.7 million, plus interest from the time the aid was granted.

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

([2]) This is only a selection of the decisions adopted in the period under review.

([3]) C 88/1997 (ex NN 183/1995).

([4]) SA.21654 (ex C 6/2008, ex NN 69/2007).

Aid to certain Greek casinos

Following an in-depth investigation, on 24 May 2011([5]) the Commission found that the different taxation of casino entrance fees is unlawful aid because it creates fiscal discrimination in favour of public casinos and causes the State to forgo revenues which it would otherwise have collected. The measure distorts competition and affects trade between Member States, as operators in this sector are often international hotel groups, whose decisions to invest or divest can be affected by the selective measure. The Commission found that the declared objective of discouraging gambling cannot be reconciled with the fact that the lower-priced casinos include those closest to the major centres of population in Greece, or with the explicit possibility to admit customers without payment.

The Commission ordered recovery by Greece from the State-owned casinos, starting from 1999. In the absence of complete information regarding the aid amounts, the Commission provided Greece with guidance on how to calculate the recovery amount and requested Greece to cancel all outstanding fiscal advantages deriving from the measure. It notes that Greece is considering changing the pricing regime to eliminate discrimination between casinos.

In 2009 the Commission received a complaint alleging that the taxation of admissions to casinos in Greece was discriminatory and entailed State aid in favour of the public casinos. Under Greek law, admission tickets are taxed at a uniform 80%, but the price of tickets, which is regulated, is €6 for State-owned casinos, whereas private ones are required to charge €15. This means that private casinos must pay a €12 admission tax per person (80% x 15) to the State, while public casinos (and also a single private casino exceptionally treated as a public one) only pay €4.8 (80% x 6).

Decisions taken under Article 107(2)(a) TFEU

Social support for individual consumers

German tax exemption for flights to and from North Sea islands

On 29 June 2011, the Commission authorised([6]) a plan by Germany to exempt selected groups of passengers to and from seven German islands (Juist, Norderney, Helgoland, Baltrum, Langeoog, Wangerooge, Borkum) from a newly-created tax on air transport. This is to avoid penalising islanders who already pay comparatively more for air travel.

([5]) SA.28973 (ex C 16/2010, ex NN 22/2010).
([6]) SA.32888.

The measure is an exemption from a new German air transport tax. Since 1 January 2011 all passengers departing from German airports are subject to an air transport tax, the amount of which depends on their final destination (€8 for domestic, EU and EEA destinations). The exemption is limited to residents of the islands, medical flights and civil servants working on the islands. Thus, the aid is limited to flights between islands that face a connectivity problem due to ferries that can only run at high tide and in good weather conditions. Germany requires passengers to prove their eligibility for the scheme. The annual budget for the aid is estimated to be around €120,000.

Article 107(2)(a) TFEU permits aid of a social character, providing it is granted to individuals on the basis of conditions where there is no discrimination related to the origin of the products or services concerned. The German tax exemption is in line with the Commission's decision practice that residence on an island may be regarded as a social handicap.

Decisions taken under Article 107(2)(b) TFEU

Natural disasters

German *ex ante* disaster aid scheme

On 10 May 2011 the Commission approved([7]) a scheme notified by Germany to grant support for damage caused by natural disasters in the Federal State of Bavaria. The aid can be granted over a six-year timeframe in the form of direct grants, interest subsidies or guarantees to enterprises active in all sectors, except agriculture, and will only cover certain categories of uninsurable disasters for which there is a consolidated Commission practice (i.e. earthquakes, landslides, floods and avalanches).

The key aspect of the case is that the Commission accepted this notification and adopted a decision before a natural disaster actually occurred (*ex ante* disaster aid scheme). However, aid can be granted only if a natural disaster occurs and once the requirements of the scheme are met. Thus, the Federal State of Bavaria will be able to start implementing aid measures without any further authorisation from the Commission.

Even though no common definition of a "natural disaster" exists, the categories covered by the notified scheme are in line with the Commission's practice and the jurisprudence of the European Court of Justice. Moreover, the German authorities must inform the Commission about every concrete application of the notified scheme within fifteen days,

([7]) N 274b/2010.

starting from the first implementation of the measures. If an event does not qualify as a natural disaster, the Commission would take appropriate action.

Decisions taken under Article 107(3)(b) TFEU

Banking

Schemes

The Commission extended certain bank guarantee schemes for credit institutions in Greece, Hungary, Ireland, Lithuania, Poland, Portugal and Spain([8]). The extended schemes comply with the 2010 Communication on support measures for banks during the financial crisis. Furthermore, the Commission approved an amendment to a winding-up scheme in Denmark([9]) and prolonged recapitalisation schemes in Greece, Poland and Portugal([10]).

Ad hoc aid

Agricultural Bank of Greece

On 23 May 2011 the Commission approved([11]) the restructuring plan of the Agricultural Bank of Greece (ATE), judging it apt to restore the bank's long-term viability whilst ensuring it shares the burden of its restructuring and limits distortion of competition in the Greek retail banking market.

ATE is the fifth largest banking group in Greece. With assets totalling around €30 billion at the end of 2010, ATE has approximately 6% of total bank assets in Greece. ATE's difficulties arose mainly from poor asset quality (weighing on profitability and on solvency) and from a traditionally low pre-impairment profitability. ATE received State capital of €675 million in 2009 under the support measures for credit institutions in Greece. It also benefitted from the Greek State guarantee and bond loan schemes. In April 2011, the bank announced a share capital increase of €1,259.5 million of which up to €1,144.5 million would be subscribed by the Greek State and at least €115 million would be subscribed by market investors. Furthermore, the bank committed to reducing its overall assets by 25% during the restructuring period through sales, the run-off of certain securities portfolios and reduction of total loan balances.

The Commission concluded that the restructuring plan submitted in April 2011 should allow ATE to return to long-term viability. It also contains sufficient measures to ensure that the bank's owners contribute adequately to the cost of restructuring and to limit the distortion of competition brought about by the state support. Therefore the plan fulfils the criteria of the Commission's Restructuring Communication for banks. The plan was also assessed in the context of the international macro-financial assistance programme by the International Monetary Fund (IMF), the European Central Bank (ECB) and the EU, where Greece reaffirmed its commitment to fully implement the restructuring plan of ATE.

Hypo Alpe Adria Group

On 19 July 2011 the Commission temporarily approved([12]) a €200 million asset guarantee, which Austria granted to the bank at the end of 2010. Given the specific characteristics of the guarantee, which shelters the bank from losses already incurred, the Commission assessed the aid under the rules applicable for capital injections and found that the terms are in line with the Commission's guidance documents on the recapitalisation of financial institutions during the crisis. In particular, the bank will have to pay back any amounts actually paid out by Austria. The additional aid became necessary after an asset screening exercise revealed the need for further asset write-downs.

On the same day the Commission also decided to extend([13]) its in-depth investigation into the bank's newly submitted restructuring plan, in order to take into account the additional aid, as to date the information provided did not allay all the doubts raised by the Commission regarding HGAA's return to long-term viability, and necessary safeguards to limit distortion of competition.

HGAA is the sixth largest Austrian bank. A former subsidiary of the German BayernLB, it was taken over by the Republic of Austria in December 2009, when Austria had to grant emergency aid in the form of a €650 million recapitalisation operation.

Amagerbanken

On 6 June 2011 the Commission granted temporary approval([14]) to Danish support for the liquidation of *Amagerbanken*, which was declared bankrupt in February 2011. The aid is limited to what is necessary to facilitate an orderly wind-up of *Amagerbanken*, the country's eighth largest bank, which has been in trouble since it was severely hit by the 2008 financial crisis. The liquidation is being carried out in accordance with the Danish scheme for winding up

([8]) Greece: SA.33153; Hungary: SA.32994, SA.32995; Ireland: SA.33006; Lithuania: SA.33135; Poland: SA. 32946 SA.33008; Portugal: SA.33178; Spain: SA.32990.
([9]) SA.33001.
([10]) Greece: SA.33154; Poland: SA.33007; Portugal: SA.33177.
([11]) SA.31154 (N429/2010).
([12]) SA.32172.
([13]) SA.32554.
([14]) SA.32634.

financial institutions in distress. The plan involves measures that require swift Commission approval, which is being granted provisionally.

The Commission found that in the present case the bank, its shareholders and its subordinated debt holders are contributing sufficiently to the State aid effort. Moreover, measures will be taken to limit the negative spill-over effects for other competitors. Therefore, the measures, comprising a conditional agreement on the transfer of assets and certain liabilities, a liquidity facility agreement and a subordinated loan, can be considered proportionate to the objective, well targeted and limited to the minimum necessary and thus temporarily compatible with Article 107(3)(b) TFEU as set out in the Commission's guidance on aid for banks during the crisis. The measures in favour of *Amagerbanken* are approved for six months or, if the Danish authorities submit a wind-up plan within six months, until the Commission has adopted a final decision on that plan.

Eik Bank

On 6 June 2011 the Commission cleared([15]) Danish support for the liquidation of Eik Bank, as it provides for an orderly wind-up of the bank and foresees sufficient safeguards to limit distortion of competition. The bank, until 2010 the biggest financial institution in the Faroe Islands, with significant retail and corporate banking activities in the rest of Denmark, ran into severe liquidity and solvency difficulties due to excessive lending in risky projects and entered into the Danish scheme for the winding-up of financial institutions in distress.

Some activities were offered for sale in a public tender while others were transferred to the publicly owned Danish Financial Stability Company (FSC), to be either sold or liquidated. Denmark's declared objective is for the liquidation to be finalized within a maximum of five years.

The Commission found that the liquidation support measures, comprising asset and liability transfers, liquidity facility agreements, credit facilities, capital injections and a loss guarantee, are compatible with the internal market. In particular, the aid is limited to what is necessary to carry out an orderly wind-up of the bank. Moreover, the fact that the parts of the bank which are not sold will not pursue any new activities but merely phase out on-going operations will limit potential distortion of competition.

Anglo Irish Bank and Irish Nationwide Building Society

On 29 June 2011, the Commission cleared([16]) a joint plan for Anglo Irish Bank (Anglo) and Irish Nationwide Building Society (INBS) whereby they will be merged and resolved over a period of 10 years. The two Irish financial institutions received massive state support during the crisis after they overexposed themselves to the commercial loan and property development sector, which eventually caused their downfall.

Anglo and INBS together have received a total of €34.7 billion in capital injections to cover the losses on their impaired property loans. Both institutions also benefitted from guarantees and an impaired asset measure. These measures were necessary because of the very poor quality of the loans resulting from risky lending practices in the past and the drop in prices on the commercial property market combined with the on-going crisis on financial markets. After several rescue measures in favour of the two institutions and the submission of several individual restructuring plans by the Irish authorities, a joint restructuring plan for Anglo and INBS was submitted to the Commission on 31 January 2011 in the context of the Programme for Support for Ireland.

The joint plan fulfils the EU criteria on restructuring aid for banks as: (i) it provides for an orderly resolution of both institutions; (ii) it contains appropriate measures to ensure that burden-sharing is achieved by their stakeholders; and (iii) it limits the distortion of competition through the complete exit of Anglo and INBS from the markets in which they operate (mostly Ireland, UK and US). The Commission has therefore approved all aid measures granted to Anglo, INBS and to the merged entity as restructuring aid and closed its investigation into the restructuring of Anglo.

Bank of Ireland

On 11 July 2011, the Commission temporarily approved[17] the recapitalisation of the Bank of Ireland (BoI) by the Irish authorities of up to €5.35 billion, after a first €3.5 billion restructuring plan was approved in July 2010. This follows from the calculations of the Irish central bank, in March 2011, of the capital needed to deleverage and meet higher than normal loan-to-deposit ratios to be able to resist stress situations.

The prudential capital assessment review carried out by the Irish central bank was required under the Programme for Support for Ireland agreed in November 2010 between the Irish authorities, on one hand, and the EU, ECB and IMF, on the other. The Support Programme requires BoI to increase its capital to meet new regulatory requirements during the period 2011 to 2013. The €85 billion

([15]) SA.31945.
([16]) SA.32504 and C11/2010 (ex N 667/2009).
([17]) SA.33216.

EU-IMF Support Programme comprises €35 billion to meet the recapitalisation needs of the financial sector and to act as a contingency fund (half of this is provided by Ireland itself).

The Commission found that the measure is necessary to increase the bank's solvency ratios and maintain confidence in the Irish financial markets. Therefore, it temporarily authorised the measure as emergency aid subject to the submission of a revised restructuring plan. The final approval of the measure is conditional on the plans ensuring: (i) a return to long term viability of the bank; (ii) adequate participation in the restructuring costs by shareholders and subordinated debt holders; and (iii) proper measures to limit the distortion of competition created by the State support.

Allied Irish Banks/Educational Building Society and Irish Life & Permanent Group Holdings

On 15 July 2011 the Commission temporarily approved([18]) a recapitalisation worth up to €13.1 billion of an entity resulting from the merger of Allied Irish Banks and Educational Building Society (AIB/EBS), as well as a recapitalisation worth up to €3.8 billion of Irish Life & Permanent Group Holdings (IL&P) (20 July 2011), both by the Irish authorities. These recapitalisations also arise from the Support Programme's stress test requirements.

The Irish State will purchase ordinary shares (in AIB/EBS for €5.0 billion, in IL&P for €2.3 billion), contingent capital notes (in AIB/EBS for €1.6 billion, in IL&P for €0.4 billion) and it will inject a capital contribution in the banks' reserves (in AIB/EBS for €6.5 billion, in IL&P for €1.1 billion).

As in the Bank of Ireland case, the Commission found the measures to be necessary to increase the banks' solvency ratios, to enable them to resist stress situations, and to preserve stability on the Irish financial markets. The Commission will take a final decision on aid to AIB/EBS and IL&P based on the new restructuring plans that Ireland committed to submit in due course to take account of this additional State support.

Hypo Real Estate

On 18 July 2011 the Commission approved([19]) restructuring aid consisting of capital injections of €10 billion, an asset relief measure with an aid element of about €20 billion, as well as liquidity guarantees amounting to €145 billion for the banking group Hypo Real Estate (HRE).

In 2008 HRE faced a severe liquidity shortage after the interbank lending markets dried up in the aftermath of the Lehman Brothers bankruptcy. In 2009 HRE was nationalised and Germany notified the first version of the restructuring plan. After the opening of an in-depth investigation triggered by doubts on the bank's viability and the adequacy of the measures aimed at burden sharing and minimising distortion of competition, the restructuring plan was finally updated in June 2011.

The Commission concluded that the restructuring plan of HRE and its core bank Deutsche Pfandbriefbank (Pbb) is liable to restore Pbb's long-term viability while ensuring that the bank and its former owners adequately contribute to the restructuring costs and that distortion of competition created by the aid are mitigated. All business activities of the HRE group will be phased out (in particular, budget and infrastructure finance, capital markets and asset management activities), except for the activities of Pbb (essentially public investment and real estate finance). At the end of 2011 Pbb's adjusted balance sheet size will be around 85% smaller than HRE group's balance sheet size at the end of 2008. This will adequately address distortion of competition created by the massive State support received by the German banking group during the financial crisis.

Real economy cases adopted under the Temporary Framework

Schemes

The Commission authorised the prolongation of certain schemes allowing compatible aid in the form of guarantees in Greece, Latvia, Luxembourg and Spain([20]). Furthermore, the Commission decided to extend the authorisation of short-term export credit insurance schemes in Belgium, Denmark and Luxembourg([21]).

Decisions taken under Article 107(3)(c) TFEU

Rescue and Restructuring

Ruse Industry

On 13 July 2011 the Commission found([22]) that the Bulgarian metal manufacturer Ruse Industry received subsidies in the form of unpaid debts to the State of around €3.7 million.

([18]) SA.33296.
([19]) SA.28264 (ex C 15/2009 and N 196/2009).
([20]) Greece: SA. 33204; Latvia: SA.32051; Luxembourg: SA. 33287; Spain: SA.32986.
([21]) Belgium: SA.32159; Denmark: SA.32573; Luxembourg: SA. 32846.
([22]) SA.28903 (ex C 12/2010).

The company had been in difficulties for several years. In June 2009, the Bulgarian authorities notified([23]) plans to restructure Ruse Industry to the Commission. After the Commission opened an in-depth investigation in April 2010, Bulgaria withdrew the notification in November 2010 and filed for bankruptcy proceedings against Ruse Industry, but the Commission continued its investigation in view of the State's failure to enforce its debt in previous years. It concluded that Ruse Industry benefitted from State aid, as any other creditor would have sought repayment of the debt sooner and more effectively. This distorts competition *vis-°à-vis* other companies, which had to operate their businesses without such support and were subject to the discipline of credit markets. In order to remedy this distortion, the Commission ordered recovery of aid to Ruse Industry.

This was the first time the Commission issued a recovery order to Bulgaria which covers aid granted as from 1 January 2007, when Bulgaria became a member of the EU. The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid, thereby cancelling or at least alleviating the distortion of competition brought about by the aid.

Research, Development and Innovation

Institut Français du Pétrole

By decision of 29 June 2011([24]) the Commission concluded that the unlimited State guarantee granted to the *Institut Français du Pétrole Énergies Nouvelles* (IFP) constitutes compatible State aid as long as the IFP's economic activities are conducted solely on an ancillary basis and are connected with its main activity, which is public research.

The IFP is a research body with legal status of *Etablissement public à caractère industriel et commercial* (EPIC). Most of its budget is devoted to non-economic activities, such as independent R&D, training and dissemination of research results. Its economic activities (contractual research, leasing of facilities, exclusive transfer of technology to its commercial subsidiaries) are very limited and are covered only collaterally by the State guarantee.

The Commission considered that IFP derives only limited financial benefits from the guarantee in terms of its economic activities. In particular, IFP conducted contractual research accounting for only a small portion of its activities over the reference period (2006-2009). The Commission found that, insofar as this contractual research was closely linked to IFP's main activity of independent public research, the State guarantee had not altered the trading conditions to a degree contrary to EU interests. Furthermore these ancillary activities had a positive impact on the spread of scientific knowledge.

Energy & Environment

Romanian Green Certificates

By decision of 13 July 2011([25]), the Commission found that Romania's plan to support the production of energy from renewable energy sources is in line with the 2008 Environmental Aid Guidelines, as it creates clear incentives for increased use of renewable energy, while containing safeguards to limit distortion of competition. The scheme will run until the end of 2016 to help Romania reach the mandatory national renewable energy target set under EU legislation by 2020.

Green certificates are granted to electricity producers for each MWh generated from wind, hydro, biomass, landfill gas, sewage plant treatment gas or solar. If the energy is produced in high efficiency co-generation plants, a bonus is applied. The certificates issued by the State to the producers can be sold to the energy suppliers on a specific market, independent of the electricity market. The electricity suppliers must acquire annually a certain number of green certificates and if they fail to do so they must pay a penalty. The penalties are collected by the transmission system operator and transferred to the Romanian Environmental Fund, which uses them for support to small individual producers of electricity from renewable sources.

Other

Urban regeneration in Northwest England

On 13 July 2011 the Commission cleared under EU State aid rules([26]) an investment fund that will support sustainable urban regeneration in the Northwest region of England, a common interest objective promoted by the EU cohesion policy through the Joint European Support for Sustainable Investment in City Areas initiative (JESSICA).

JESSICA is a new financial instrument created by the Commission in cooperation with the European Investment Bank (EIB). In the context of this initiative, the Northwest Regional Development Agency (NWDA) has established and notified to the Commission the Northwest Urban Investment Fund (NWUIF), a £100 million Holding Fund

([23]) N 389/2009.
([24]) C 35/2008 (ex NN 11/2008).
([25]) SA.33134.
([26]) SA.32835.

which will be managed by the EIB. The NWUIF will receive £50 million funding from the European Regional Development Fund (ERDF) and the equivalent match funding of £50 million from the NWDA.

The fund will provide debt and equity investment to promoters and other private investors with a view to fostering urban regeneration projects and unlocking sustainable development in the Northwest's urban areas.

The NWUIF will target regeneration projects with a financial viability gap that would not be undertaken by the market on its own. Private investors will finance at least 50% of each project, thus creating a leverage effect. Moreover, each project must have a business plan to ensure repayment of the public investment. Incentives for private investors will be limited to the minimum necessary to trigger urban projects and may not exceed a so-called Fair Rate of Return, established through a competitive process or, where this is not possible, by an independent expert. Professional and independent fund managers will ensure prudent investment decisions and the financial sustainability of the funds.

The NWUIF will operate as a Holding Fund deploying resources via investment intermediaries, so-called Urban Development Funds (UDFs). The selected UDFs (Merseyside UDF and Evergreen UDF) will provide sub-commercial loans and equity to urban regeneration projects that form part of integrated sustainable urban development plans. Each UDF will have to invest its resources by the end of 2015.

With this first decision, the Commission has clarified the guiding principles for the assessment of similar support measures that several Member States are currently envisaging. The Commission has considered that aid granted pursuant to this initiative in the form of sub-commercial loans and equity capital is compatible with Article 107(3)(c) TFEU as it allows tackling urban regeneration market failures identified in preparatory studies.

No aid

France's fourth 3G mobile phone licence

On 10 May 2011 the Commission rejected complaints filed by three mobile phone operators already active in the French market, as it found that the procedure for awarding France's fourth 3G mobile phone licence in 2009 did not involve any State aid. The award was made by a transparent and open procedure in accordance with EU regulations and resulted in a competitive outcome([27]).

For ten years France had been trying to bolster competition and foster growth in the mobile phone services market by authorising a fourth operator. A number of failed attempts demonstrated that the conditions previously on offer were dissuasive. In 2009 France therefore decided to subdivide the frequencies initially intended for a fourth operator into three batches and to launch separate calls for tender. The first, in 2009, was set aside for new entrants. The beneficiary, Free Mobile, was chosen on the basis of a comparative procedure in which qualitative criteria such as the project's coherence and planned national coverage were assessed. Bidders also had to agree to pay a spectrum usage fee, comprising a fixed fee of €240 million and 1% of related turnover. The three operators already active in the French market (Orange, SFR and Bouygues Télécom) claimed that the fixed fee was not high enough and thus constituted State aid.

The Commission considers that Member States, when allocating frequencies for mobile communications, act as regulators and are obliged to take into account the goal of facilitating increased competition. Therefore, any loss in revenue for the State when awarding frequencies does not necessarily constitute State aid. Moreover, France had taken sufficient precautions to ensure a competitive outcome and the call for tenders was carried out transparently. Since only one undertaking responded to the call, the Commission noted, moreover, that a bidding procedure would probably have resulted in an even lower fee. For these reasons, the Commission found that the fourth operator did not benefit from a selective economic advantage which might constitute State aid.

Casino Mont Parnès

On 24 May 2011 the Commission rejected([28]) a complaint from a bidder who had been excluded from the tender process, and found that the sale took place in an open and unconditional bidding procedure and Greece is assumed to have obtained a market conform price. Thus the Commission concluded that the terms of the sale of the Greek State's 49% stake in Casino *Mont Parnès* were market conform and therefore free of State aid.

([27]) SA.29191.

([28]) SA.16408 (ex C 15/2010, ex NN 21/2010)

The Assignment of Spectrum and the EU State Aid Rules: the case of the 4th 3G license assignment in France

By Christian Hocepied and Ansgar Held ([1])

1. The French 4th mobile communications licence

On 5 May 2011, the Commission decided that the level of the fee charged by the French government in 2009 for spectrum assignment to the fourth mobile operator did not entail any State aid in the meaning of Article 107(1) TFEU ([2]).

1.1. The licensing of mobile operators in France

In 2001, the French authorities launched a call for applications for the provision of mobile telephony licences under the UMTS standard in the so-called 3G spectrum band ([3]). The lifetime of the licences was to be 15 years. Contrary to the approach in Member States like the UK and Germany, which awarded 3G licences under an auction procedure, France used a 'comparative' tendering procedure (*'beauty contest'*). Applications were to be rated according to different qualitative criteria, such as scale and speed of network deployment. Moreover, to be eligible, all applicants had to commit to pay an initial spectrum fee of €4.95 billion.

The spectrum available for 3G mobile communications in France was divided into four lots of 15 Mhz each. Given that there were only three mobile telephony operators in France at that time, the French authorities were expecting that the tender would lead to new entry and increased competition in the French mobile telephony market.

However, only the two largest mobile operators, France Télécom, which a few months later became Orange France ('Orange') and Société française du radiotéléphone – SFR ('SFR'), applied for spectrum licences. Other operators chose not to tender, primarily because of the high initial fee.

Following this partial failure, the French authorities revised the application conditions, reducing the initial spectrum fee to €619 million complemented by an annual spectrum fee calculated as a percentage of the turnover generated by the use of those frequencies. At the same time, the validity of the licences was extended to 20 years instead of 15. In December 2001, the French authorities launched the call for applications for the remaining two spectrum lots. However, only the third incumbent, Bouygues Télécom, applied.

1.2. The retroactive reduction of the initial spectrum fees

When the third 3G licence was awarded to Bouygues Télécom, the terms of the licences of Orange and SFR were aligned with the terms of the licence granted to Bouygues Télécom. Bouygues, however, considered that the retroactive reduction of its competitors' spectrum fees constituted illegal State aid and complained to the Commission. By decision dated 20 July 2004 (State aid NN 42/2004), the Commission decided not to raise objections to the fee alignment. It considered that it was legitimate to avoid discrimination between the three competitors on the French mobile market. This decision, appealed by Bouygues, was confirmed by the Court of First Instance and the European Court of Justice ([4]).

In 2007 the French government launched a new call for applications, under the same conditions as in 2002, to assign the remaining spectrum and ensure the entry of a fourth mobile communications operator. This time there was an applicant: Free (subsidiary of Illiad). But its application was rejected because it did not commit to pay the initial spectrum fee of €619 million.

1.3. The fourth and fifth calls for applications

Following the failure of this process, the French government decided in 2008 to modify the design of the call for applications and consulted the French telecom regulator (Autorité de Régulation des Communications Electroniques et des Postes – ARCEP) and the highest French administrative court, the Conseil d'Etat, on possible amendments. Following these consultations, the remaining 15 MHz was

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

([2]) Commission Decision of 10 May 2011 in State Aid case No SA.29191 (ex CP 258/2009, CP 367/2009 and CP 56/2010) *France – 4th UMTS licence* (OJ 5.7.2011 C 196 p.6).

([3]) The frequency bands 1,885-2,025 MHz and 2,110-2,200 MHz, as defined by the World Administrative Radio Conference in 1992 (WARC-92) for the exploitation of mobile communications technology, such as UMTS.

([4]) ECJ, C-431/07 P, Bouygues and Bouygues Télécom v Commission, 2 April 2009; CFI, T-475/04, Bouygues and Bouygues Télécom v Commission.

split into three lots of 5 MHz each. The first lot was reserved for a new entrant. The initial one-off fee for the first UMTS spectrum lot was fixed at €240 million by Decree 2009/948 of 29 July 2009. In addition, the nine qualitative criteria used in 2001 for the award procedure, such as the credibility of the project, the business plan, territorial coverage and the type of contracts proposed to mobile virtual network operators, were maintained to rank the bids.

While initially several operators expressed interest ([5]), only Free applied. ARCEP accepted this application on 17 December 2009 and on 13 January 2010 granted the authorisation.

The call for applications for the remaining two lots of 5 MHz was launched on 25 February 2010, with the following award criteria: i) the level of commitments made to improve the hosting conditions offered to MVNOs, and ii) the financial bid, i.e. the amount that the applicant committed to pay as initial spectrum fee above the minimum of €120 million. SFR made the highest bid (€300 million) and France Télécom/Orange the second highest (€282 million) and were each assigned a spectrum lot.

2. The 4th mobile communications licence

2.1. The complaints

ARCEP granted the fourth licence to Free on 13 January 2010. However, on 10 August 2009 the Commission had already received a complaint from Orange against the level set for the initial spectrum fee. On 20 November 2009, a complaint was also lodged by SFR. Bouygues initially challenged the selection process only before the French courts. However on 1 March 2010 Bouygues too lodged a complaint with the Commission.

According to all complainants, the price difference between the fourth licence and the three first licences constitutes State aid. They argue that the fourth licence is part of the same procedure which started in 2000. So, in order to respect the principle of non-discrimination, the initial spectrum fee for the fourth licence should be the same as the price set for the first three operators. They admit that less spectrum was assigned in 2009, but argue that the value of spectrum is not directly proportional to its amount. Taking into account the monetary erosion since 2001, Orange claims that the initial fee should have been set at €900 million at least. SFR argues that the late arrival of the fourth operator on the market cannot justify a reduced initial spectrum fee, because the French mobile market has still big growth potential. Bouygues also considers that the initial spectrum fee was set below its market value, which it estimates on the basis of two different calculation methods.

On 28 June 2010, the Commission communicated its preliminary findings to the complainants, informing them that the granting of the fourth mobile licence had not involved a selective advantage to the operator concerned and did not constitute State aid within the meaning of Article 107 (1) TFEU. All three complainants reacted, maintaining their claims. They repeated that the spectrum for the fourth licence has an economic value and that assigning it on terms that do neither reflect this economic value is, by definition, State aid. They criticized the Commission for not having discussed the spectrum value estimates they had provided, nor the methods used for these estimates. They maintained that in any case, the Commission should have reviewed in detail the hypotheses and calculations used by the French government to set the initial fee. SFR added that Free would likely also have agreed with the fee, if set at for example €410 million. There was no justification to reduce the initial fee by 60% in comparison with 2001. Orange and Bouygues emphasized that if the initial fee had been reduced to make sure that a fourth entrant would apply, it would corroborate the existence of State aid as an incentive to entry.

2.2. The position of the French government

The French authorities provided several arguments to justify the different initial spectrum fees set in 2001 and 2009. First, they said that the evolution of market conditions since 2001 required lowering the initial spectrum to make market entry possible. Second, the reduced spectrum also justifies a lower spectrum fee. With less spectrum an operator must limit the number of customers, reduce quality or invest in additional antennas. France considers that this approach is in line with the *Connect Austria* judgment in which the Court explained that the economic value of licences must be determined "*taking account inter alia of the size of the different frequency clusters allocated, the time when each of the operators concerned entered the market and the importance of being able to present a full range of mobile telecommunications systems*" ([6]).

At the same time, the French authorities emphasized that the initial spectrum fee (€240 million) had been set on the basis of objective financial studies

([5]) The possible candidates were: Orascom, Kertel, Bolloré, Nulmericable-VirginMobile. See press articles in Reuters (22 and 26 October 2009) and LesEchos (29 October 2009). According to these articles, they cited unfavourable conditions and uncertainty about the project's costs to explain why they refrained from putting in a bid.

([6]) Case C-462/99, Connect Austria [2003] ECR I-5197, para 93.

analysing the fees paid for 3G licences in other European countries as well as stock market data and simulations with the discounted cash flow method. For example, the study by Professor Mucchielli (Sorbonne University) estimated the value of the spectrum at €200-250 million. The French authorities also sought a valuation from the independent committee in charge of the government's patrimonial interests (Comité des Participations et Transferts - CPT), assisted by HSBC bank. They estimated the value of the spectrum at €240 million, the amount eventually used by the French government.

2.3. The judgment of the French Council of State

In parallel with the State aid complaints to the EU Commission, SFR and Bouygues had asked the French Conseil d'Etat to annul Decree 2009-948 of 29 July 2009 setting the initial spectrum fee, mainly on grounds of national administrative law. On 12 October 2010, the Conseil d'Etat rejected all their claims. It took the view that treating existing operators and the entrant identically would have constituted discrimination against the latter and a barrier to entry in the market. Second, the Conseil rejected the argument that technological developments in recent years (resulting in lower equipment costs) would have been favourable to an entrant and would effectively neutralize the disadvantages of its later entry into the market. Moreover, the Conseil found that since 2000 the difference in the situations of the incumbent operators and a new entrant had changed to the detriment of a new entrant. Pursuing its public policy objective of fostering competition on the French mobile telephony market, the French government was, according to the Conseil, therefore fully justified in updating the regime initially foreseen for entrants. Furthermore, the Conseil rebutted the criticism that the spectrum would have a value for Free higher than the initial spectrum fee, since the tender conditions set for all by the decree contemplated the potential value of the spectrum for a theoretical entrant and obviously aimed to entice more applicants than only Free. Finally, the Conseil observed, somewhat in passing, that "*For the same reasons, the grant of a 3G licence to a fourth operator on different financial conditions in comparison to those of the other three licensees does not constitute state aid within the meaning of EU law*".

Legal questions raised by the complaints

The complaints raise two important State aid issues: i) is compliance with the EU Directives harmonizing spectrum assignment procedures enough to avoid State aid, and ii) if a parallel assessment is required, should the Commission second guess the "objective" value of spectrum, to determine whether Member States are foregoing revenues when setting spectrum fees? The case also raised a further issue, given that the highest administrative jurisdiction in France made a finding of the absence of State aid.

2.4. Interplay with EU Directives

In Decision NN 76/2006 – Czech Republic [7], the Commission acknowledged that the EU State aid rules did not require Member States to charge a market price when assigning spectrum for mobile communications services, as under Article 7(4) of Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) Member States have the choice between competitive (i.e. auctions) and comparative selection procedures ('beauty contest') for the assignment of spectrum.

Article 5 of the Authorisation Directive moreover provides that rights of use must be granted "*through open, transparent and non-discriminatory procedures*". Where the Member States grant rights of use for radio frequencies, under Article 7 of the Directive they are allowed to impose fees "*which reflect the need to ensure the optimal use of these resources*". In this case, the fees, under Article 13 of the Directive, must be "*objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive)*". Under the EU regulatory framework, the Member States are thus entitled to review and even differentiate spectrum fees, particularly if this is conducive to greater entry and competition in the market.

The question is whether, when a Member State complies with all these conditions, it is still possible that the procedure provides a selective economic advantage to the beneficiary in the meaning of Article 107(1) TFEU.

As in the Czech precedent, the Commission did not consider that the mere fact that the EU regulatory framework had been complied with, and that the spectrum had been assigned under an open procedure, based on transparent, objective, proportional and non-discriminatory criteria, *ipso facto* excluded the possibility that the tender procedure might have provided an economic advantage and/or distorted competition.

2.5. Determination of spectrum value

There is no market for spectrum and thus no 'market price'. Spectrum is a public resource. Member States grant temporary rights of use to specific parts of the spectrum, according to administrative

(7) http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-76-2006-WLWL-en-20.12.2006.pdf.

procedures. In certain Member States, rights of use can, after a specific time, be transferred. Generally there is no secondary market in rights of use, which would allow determining easily the value of rights of use. On the other hand, spectrum for the provision of mobile communications services has an economic value.

However, under the EU regulatory framework, Member States may assign such spectrum on the basis of criteria other than the maximisation of income from spectrum fees. Member States may assign spectrum also on the basis of qualitative criteria and thus waive financial revenues, as it were, in exchange for other policy objectives such as cheaper retail tariffs, better geographical coverage, more advanced services etc. This might result in economic externalities and social benefits that are not reflected in the amounts collected in the form of spectrum fees.

The EU State aid provisions must however be complied with where a Member State changes the assignment procedures or spectrum fees over time. Reducing spectrum fees may constitute a waiver of state resources, which is one of the cumulative conditions of Article 107(1) TFEU. In such cases, the Commission needs to examine whether the measure confers a selective advantage to the assignee ([8]). This was the issue in the Czech precedent, in the Bouygues case and in the complaints discussed here.

In the Czech precedent, the Commission reviewed the reasons why similar procedures in 2001 and 2005 resulted in different spectrum fees. It found that the different fees resulted from changes in market and economic circumstances ([9]). The Commission concluded that there had been no discrimination and for that reason there had been no advantage in the sense of Article 107(1) TFEU, and thus no aid.

The Bouygues case concerned the retroactive reduction of the initial spectrum fees that had been agreed by Orange and SFR in 2001. The Commission found that the prior award of licences to Orange and SFR did not give them a selective advantage of a temporal nature given the fact that they were not yet using their licences when Bouygues obtained its own licence.

([8]) See for example Case T-475/04 Bouygues and Bouygues Télécom v Commission [2007] ECR II-2097, point 111: *"the fact that the State may have waived resources and that this may have created an advantage for the beneficiaries of the reduction in the fee is not sufficient to prove the existence of a State aid incompatible with the common market, given the specific provisions of Community law on telecommunications in the light of common law on State aid. The abandonment of the claim at issue here was inevitable because of the general scheme of the system, apart from the fact that the claim was not certain …"*

([9]) Point 34.

In the case at stake, the facts were significantly different. Whereas in the Bouygues case both calls for applications were part of the same procedure, the 2009 call was launched under different legal rules and concerned a different amount of spectrum. The initial spectrum fee was not based on the same methodology as in 2001, but on a new set of studies and methodologies. A comparison of the 2001 and 2009 spectrum fees was therefore not relevant. The Commission no-aid Decision of 5 May 2011 therefore assesses on its own merits the initial spectrum fee set by the French government for the fourth licence, without taking the 2001 prices as a benchmark. The starting point of the assessment is that not only auctions allow market prices to be determined. Comparative procedures ('beauty contests') also lead to market outcomes, given that commitments made under the qualitative award criteria have also an economic cost for the applicant. The 'price' paid for the spectrum is thus both the spectrum fee and the cost of the commitments under the qualitative criteria. In its Decision, the Commission noted for example that Free made more ambitious commitments in terms of quality and coverage ([10]) than the minimum in the call for applications.

The Decision lists several elements indicating that the award procedure for the fourth licence actually led to a market outcome:

a) transparent process: the government launched a call for applications allowing any interested party, apart from the incumbents, to make a bid. None of the other operators that initially expressed an interest complained that they were excluded from the tender;

b) the failed call for applications of 2007 with an initial spectrum fee of €619 million shows that the willingness to pay, and thus the market value for potential entrants, was lower. Unlike incumbent operators, the new entrant would have to face competitors with an installed mobile customer base. Moreover the market was in the meantime reaching saturation. Obtaining market share for an entrant would require an aggressive pricing strategy, which reduces profit margins. With the entry of the fourth operator, competition would increase and the economic value of each mobile licence might therefore be reduced;

c) setting the spectrum fee too high in "beauty contests" will exclude potential applicants and favour applicants already controlling assets that can be used to deploy mobile communications networks. Potential applicants' willingness to pay often differs significantly. Applicants have

([10]) See points 71 and 72.

different reservation prices ([11]) because their respective cost of fulfilling qualitative requirements do differ (for example, certain applicants already have infrastructure and an installed customer bases, whereas others do not);

d) the French authorities have carried out a thorough analysis to determine the market value of the spectrum. The assumptions used in the studies for the French government appear not out of line with the market consensus, and

e) the fees that SFR and Orange proposed for the remaining two lots of 5 MHz in 2010 were in the same range as the initial fee set for the fourth licence. The outcome of these tender procedures suggest that if the French government had used an auction to assign the fourth licence, it would probably have yielded a lower fee since the incumbent operators were not allowed to bid for the fourth licence.

The procedure having led to a competitive outcome, the Decision concludes that no selective advantage was granted to the assignee.

2.6. The no-aid finding by the French Conseil d'Etat

In its judgment of 12 October 2010, the French Conseil d'Etat found that "*the grant of a 3G licence to a fourth operator in different financial conditions in comparison to those of the other three licensees does not constitute state aid within the meaning of EU law*" making a final finding regarding the interpretation of Article 107(1) TFEU.

The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid. However, where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of the *Commission notice on the enforcement of State aid law by national courts* ([12]). They must refer the matter to the ECJ for a preliminary ruling under Article 267 TFEU when their decisions regarding an interpretation of EU law can no longer be appealed.

The no-aid finding by the Conseil d'Etat could have brought about a contradiction between its final judgment and a Commission Decision if the latter subsequently had reached the opposite conclusion. Under the case law of the Court ([13]), the no-aid finding of the Conseil would then cease to benefit from the principle of *res judicata*. Whether such national decision would constitute exceptional circumstances that could be deemed sufficient to create legitimate expectations is not completely clear under the current case law of the Court of Justice ([14]).

In this case, the finding of the Conseil d'Etat had no consequence because the Commission's assessment confirmed the conclusion of the French Court. The lack of coordination in this case may however be a symptom of a more general problem, which might need to be dealt with in the future.

3. Conclusion

The Commission decided not to open a formal investigation under Article 108(2) TFEU. This is required when the Commission has serious doubts as to whether aid is compatible with the internal market, such as when complex calculations are necessary. However this case did not require complex calculations, as the tender process chosen has led to a market outcome. Moreover, there were precedents and case-law. In addition, all three incumbents had lodged complaints. All stakeholders therefore had the opportunity to express their views, doing away with the need to open a formal investigation. In addition, there was no need to obtain more information than the information already contained in the studies used by the French government and the alternative studies commissioned by the complainants. Moreover, the opening could have delayed the deployment of the fourth mobile operator in France and postponed further competition, to the detriment of the consumer.

None of the complainants challenged the Commission Decision, which suggests that both the reasons on which it is based and the decision not to open a formal investigation were robust and do not give rise to much legal criticism.

The Commission Decision on the French fourth mobile communications licence is not likely to be the last regarding the level of spectrum fees. Given that the EU Regulatory Framework for electronic Communications sets the promotion of competition as an important objective, there may be more cases of incumbent operators complaining about 'lighter' conditions for later entrants. The Commission might even have to examine such cases under Article 107 (3) c TFEU, given that the EU Framework give broad discretion to Member States to adopt pro-competitive licensing terms.

([11]) The "reservation" price is the maximum price a bidder would be willing to pay.

([12]) OJ 9.4.2009, C 85 p. 1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:085:0001:0022:EN:PDF.

([13]) See for example Judgment of 18 July 2007, Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, formerly Lucchini Siderurgica SpA*.

([14]) See, *inter alia*, Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 75.

The Resolution of Anglo Irish Bank and Irish Nationwide Building Society

by Christophe Galand, Minke Gort (1)

1. Introduction

Of the banks that have received State aid during the financial crisis, few have received as much aid relative to their risk-weighted assets as Anglo Irish Bank (Anglo) and Irish Nationwide Building Society (INBS). Both institutions failed on a massive scale following their speculative lending during the Irish commercial property boom and the onset of the financial crisis at the end of 2008.

According to the Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (2) (Restructuring Communication), an orderly winding-up should be considered for banks that cannot be restored to long-term viability. The case of Anglo and INBS is one of the few Commission decisions to apply the Restructuring Communication to the resolution of failed institutions.

The choice of an aid instrument, especially during the financial crisis, should be carefully considered with a view to keeping the aid well targeted and to a minimum, in accordance with the Commission Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (3) (Banking Communication).

The response of the Irish authorities to the failing of the banks at the start of the crisis was to guarantee many of the liabilities of the Irish banks, including Anglo and INBS, without knowing the depth of the difficulties these institutions were facing. As a result, private debt was transformed into public debt, which put pressure on the Irish Sovereign. In the end, the cost to the Irish state of the massive recapitalisations necessary to avoid a disorderly failure of Anglo and INBS indirectly forced it to request the European Union and the International Monetary Fund for assistance.

2. Beneficiaries

At the beginning of the crisis, around the time of the introduction of the blanket guarantee on liabilities in Irish banks by the Irish authorities in September 2008, Anglo had a balance sheet of approximately EUR 100 billion, around 50% of Irish GDP. At the time, Anglo was one of the largest Irish banks in terms of balance sheet size. In terms of its business model, Anglo was a 'monoline' bank specialising in commercial real estate lending in three core markets: Ireland, the United Kingdom and the United States. Its market share in lending to Irish firms (both property and non-property lending) was around 20% in March 2009. The market share in UK property lending was estimated at 3.3% for that year. Risk management in Anglo was not sufficiently developed and allowed uncontrolled balance sheet growth combined with risky lending practices (such as high loan-to-value lending and interest-only lending), in particular during the years of the Irish property boom. Between 1984 and 2008, the bank's balance sheet had a compound annual growth rate (CAGR) of approximately 30%. Anglo funded the growth of its commercial property loan book almost entirely by wholesale funding, its market share in the Irish retail savings market in September 2009 being 6%, while in the UK retail saving market, its market share was around 1%.

INBS by the end of 2008 had a balance sheet of around EUR 14 billion, making it the sixth largest Irish domestic bank by balance sheet size. INBS, as a building society, originally focussed on providing retail mortgages and retail savings products to its customers. In the years preceding the financial crisis, INBS aggressively increased its activities in risky commercial property lending, which became its main activity. Its exposure to land and property development loans grew significantly in the period of the Irish property boom, with a CAGR for commercial lending approximately three times higher for the period from 2001-2009 compared to the CAGR for its retail mortgage lending for the same period. INBS's total loan book at the end of 2008 amounted to EUR 11 billion, divided between around EUR 8 billion in commercial land and property development loans and around EUR 3 billion in retail mortgages. Lending by INBS was funded by EUR 6.7 billion in deposits as at the end of 2008, while the remainder was funded by wholesale funding.

The business models of both institutions proved to be unsustainable and led to unprecedented financial difficulties and losses in the context of the

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

(2) OJ C 195 of 19.8.2009, p. 9.

(3) OJ C 270 of 25.10.2008, p. 8.

global financial crisis. Both were overly concentrated on commercial property lending, leading to excessive exposure to that sector of the economy which was particularly hard-hit during the financial crisis as commercial property prices decreased peak-to-trough by more than 60% in Ireland. In addition, in both cases lending was partly financed by wholesale funding, a source of funding which dried up as a result of the financial crisis. Since the beginning of the financial crisis, Anglo and INBS have registered heavy losses mainly driven by impairment charges on their respective commercial loan books.

As the difficulties being experienced by Anglo started to surface, the Irish authorities decided to nationalise the institution in January 2009. INBS was de facto nationalised following the first recapitalisation it received in March 2010.

3. State measures

The massive failure of both Anglo and INBS led to a bail-out of both institutions by the Irish taxpayer on an equally grand scale. Both institutions benefitted from a guarantee on the majority of their liabilities (at least 75%) through the Credit Institutions Financial Support Scheme (CIFS) ([4]) from September 2008 to September 2010. The CIFS scheme was replaced by the Eligible Liabilities Guarantee scheme (ELG), ([5]) which ensured that a considerable amount of the liabilities of Anglo and INBS continued to be guaranteed. Anglo and INBS also benefitted from a guarantee on short-term liabilities ([6]). In addition, Anglo received a guarantee on certain of its off-balance sheet liabilities ([7]).

The two institutions also received six recapitalisations between them, four to Anglo for a total of EUR 29.3 billion ([8]) and two to INBS for a total of EUR 5.4 billion ([9]). In addition, both benefitted from an asset relief scheme, which allowed them to transfer a significant part of their commercial land and property development loans in tranches to the National Asset Management Agency (NAMA) at a discount ([10]). Anglo transferred EUR 35 billion in loans at an average discount above 50%, while INBS transferred EUR 8.9 billion in loans at an average discount of 64%. It has to be noted that the size of the recapitalisations received by both institutions was partly due to the losses resulting from the transfer of the commercial land and property development loans at a loss to NAMA. Finally, both institutions, in order to ensure they could fund their balance sheet, received Emergency Liquidity Assistance (ELA) from the Irish Central Bank, which was partly guaranteed by the Irish State.

Both Anglo and INBS were required to submit restructuring plans following the various rescues. Anglo successfully submitted three restructuring plans (one end 2009 and two in 2010) while INBS submitted one restructuring plan in June 2010. However, following the decision by the Irish authorities to merge Anglo and INBS with a view to working out the respective loan books, the authorities submitted a joint restructuring plan for both institutions at the end of January 2011. The joint restructuring plan sets out how the Irish authorities plan to resolve Anglo and INBS over a period of 10 years. The joint restructuring plan is based on the merger of Anglo and INBS into the Irish Bank Resolution Corporation (IBRC), after the sales of their respective deposit books. IBRC is a licensed financial institution, fully regulated by the Central Bank of Ireland and State owned. IBRC will work-out the legacy commercial property loan book of Anglo over a period of ten years through redemptions and sales and work-out the retail mortgage book of

([4]) Commission Decision in Case NN 48/2008, *Ireland - Guarantee Scheme for banks in Ireland*, OJ C 312, 6.12.2008, p. 2.

([5]) See Commission Decision in Case N 349/2009, *Ireland - Credit Institutions Eligible Liability Guarantee Scheme* (OJ C 72, 20.3.2010, p. 6), subsequently prolonged until 30.6.2010 by Commission Decision in Case N 198/2010, *Ireland - Prolongation of the Eligible Liabilities Guarantee Scheme* (OJ C 191, 15.7.2010, p. 1), extended until 31.12.2010 by Commission Decision in Case N 254/2010, *Ireland – Extension of the ELG scheme until 31 December 2010*, (OJ C 238, 03.9.2010, p. 2), again extended until 30.6.2011 by Commission Decision in Case N 487/2010, *Extension of the ELG scheme until June 2011*, (OJ C 159, 28.5.2011, p.5), subsequently extended until 31.12.2011 by Commission Decision in Case SA.33006, *Prolongation of the ELG scheme until December 2011*, (OJ C 317, 29.10.11, p. 5) and extended until 30.6.12 by Commission Decision in Case SA.33740, *Extension of ELG scheme until June 2012*, not yet published.

([6]) Commission Decision in Case N 347/2010, *Prolongation of the guarantee for certain short-term liabilities and interbank deposits*, (OJ C 37, 5.2.2011, p. 4.).

([7]) Commission Decision in Case NN 35/2010 (ex N 279/2010), *Ireland -Temporary approval of the third recapitalisation in favour of Anglo Irish Bank*, (OJ C 290, 27.10.2010, p. 4.).

([8]) See Commission Decision in Case N 356/2009, *Recapitalisation of Anglo Irish Bank by the Irish State*, (OJ C 235, 30.9.2009, p. 3.), Commission Decision in Case NN 12/2010 and C11/2010 (ex N 667/2009), *Second rescue measure in favour of Anglo Irish Bank*, (OJ C 214, 7.8.2010, p. 3), footnote 7 above for the third recapitalisation and Commission Decision in Case SA.32057 (2010/NN), *Ireland - Temporary approval of the fourth recapitalisation and guarantee in respect of certain liabilities in favour of Anglo Irish Bank*, (OJ C 76, 10.3.2011, p. 4.).

([9]) See Commission Decision in Case NN 11/2010, *Ireland - Rescue measures in favour of INBS*, (OJ C 143, 2.06.2010, p. 23.) and Commission Decision in Case NN 50/2010 (ex N 441/201), *Ireland - Second emergency recapitalisation in favour of Irish Nationwide Building Society*, (OJ C 60, 25.2.2011, p. 6.).

([10]) Commission Decision in Case N 725/2009, *Ireland – Establishment of a National Asset Management relief scheme for banks in Ireland* – NAMA, (OJ C 94, 14.4.2010, p. 10.).

INBS. IBRC is not engaging in any new lending or other new activities. IBRC benefits from a continuation of the guarantees on the remaining deposits, the guarantee on certain off-balance sheet liabilities, the State guarantee on part of the ELA funding it receives and a guarantee on outstanding ELG wholesale funding. No further recapitalisation apart from those already received by Anglo and INBS is foreseen in the base case.

4. Procedural steps

The Commission has taken nine decisions for the two institutions combined. This number does not include the decisions taken by the Commission with regard to the schemes that Anglo and INBS have benefitted from (CIFS, ELG and NAMA). For Anglo, the decisions include: approval of a rescue recapitalisation on 14 January 2009 that was not carried out; the Anglo nationalisation decision on 14 February 2009 (the Commission found there was no State aid involved); the four decisions on the successive rescue recapitalisations of Anglo carried out on 26 June 2009, 31 March 2010, 10 August 2011 and 21 December 2010; and the final decision approving the joint restructuring plan on 29 June 2011. The decision of 31 March 2010 also included an opening of the formal investigation procedure into the first restructuring plan for Anglo, while the decision authorising the fourth recapitalisation also covered the guarantee on short-term deposits and certain off-balance sheet liabilities. In the case of INBS, two decisions were taken regarding its recapitalisation, on 30 March 2010 and 21 December 2010.

The decisions were taken on the basis of Article 107(3)(b) of the Treaty on the Functioning of the European Union.

5. Assessment of the resolution of Anglo and INBS

The final decision adopted by the Commission approving the restructuring of Anglo and INBS was based on the joint restructuring plan submitted by the Irish authorities on 31 January 2011. The Commission assessed this plan on the basis of the Restructuring Communication. However, instead of assessing whether Anglo and INBS would be returned to viability, the Commission in this case had to assess whether the resolution of the two institutions was in line with the Restructuring Communication. In addition, the Commission had to assess whether there had been sufficient burden-sharing and whether there were sufficient measures in place limiting the distortion of competition.

5.1. Orderly resolution of Anglo and INBS

Compared to the assessment of a financial institution's return to viability, the analysis of a bank's resolution is relatively straightforward. The Commission in these cases verifies whether a liquidation, wind-down or resolution is carried out in an orderly manner, taking into account chapter 5 of the Banking Communication with regard to limiting moral hazard, the period required for the resolution, the activities carried out by the institution during the resolution and burden-sharing.

In the case of Anglo and INBS, the Commission concluded that the work-out of the loan books of Anglo and INBS was carried out in an orderly manner, as the loan book will be reduced through the sale of loans and restructuring and redemption of the remainder over a period of ten years. The entity will have all the resources needed to carry out the work-out.

5.2. Own contribution/burden-sharing

In order to avoid moral hazard and to ensure that the aid necessary for a resolution is limited to the minimum, the Commission has to verify whether the own contribution by the institution and burden-sharing with the creditors has been sufficient. The guidance provided by the Restructuring Communication is therefore also relevant for resolution and liquidation cases.

In the case of Anglo and INBS, despite the massive aid already provided to both institutions, the Commission could still conclude that the aid was limited to the minimum on the basis that Anglo and INBS would both cease to operate on the market, and because the aid is strictly limited to financing the economic activities needed to work-out the loan books.

As for burden-sharing, it has to be noted that both the shareholders in Anglo and the members of INBS were totally wiped out and will not benefit from their economic ownership of either institution. The subordinated debt holders in both institutions furthermore contributed to the restructuring through the various liability management exercises conducted by Anglo and INBS.

5.3 Measures limiting the distortion of competition

The Restructuring Communication says that measures limiting the distortion of competition should be proportional to the aid received and the distortion of competition in the relevant markets. Anglo and INBS both received massive amounts of aid; Anglo received 43.9% of aid relative to its risk weighted assets (RWA) and INBS received 59% of aid relative to its RWA ([11]). These amounts justify far-reaching measures to limit the distortion of competition.

In the assessment, the fact that both Anglo and INBS were to be resolved over time was taken into account, as this leads to a complete exit from the market by both institutions. In other words, the aid does not allow a competitor to stay on the market; it only serves to finance the orderly exit of both institutions. Furthermore, several commitments were provided by the Irish authorities to ensure that Anglo and INBS (IBRC) will not carry out any economic activities apart from the activities necessary to work-out the loan book. New lending is restricted to a minimum and must lead to an increase in the net present value of the loan concerned, while IBRC will also not be able to collect new deposits and will reduce the deposits it has on its balance sheet over time. The complete exit of Anglo and INBS from the market, combined with the commitments, provided the Commission with sufficient assurance that the distortions of competition would be limited.

6. Conclusion

This is one of the few resolutions of banks approved by the Commission. It is important because it shows how the Commission assesses a complete resolution or wind-down of a bank. This case also shows how the principles in both the Banking Communication and the Restructuring Communication interact in terms of the assessment of a wind-down and the assessment of burden-sharing and measures limiting the distortion of competition.

In addition, this case illustrates which kinds of commitments are necessary to ensure that the distortions of competition during the wind-down phase are limited to a minimum.

This case also underlines the fact that Member States must carefully select the aid measure used to rescue one or several financial institutions. To do this, they need to have accurate knowledge of the depth of the difficulties experienced by the institutions they are trying to save before providing any form of State aid. Indeed, in this case, having guaranteed most of the liabilities of Anglo and INBS and having taken the role of sole creditor of Anglo in place of private creditors, the Irish State could not let it fail, even when it turned out that the rescue would be extremely costly.

([11]) Only taking into account the recapitalisations and asset relief measure.

First JESSICA decisions: approach and implications

by Eglė Striungytė (1)

1. Introduction

The Commission has made increasing use of financial engineering instruments (2) in the 2007-2013 programming period. These instruments complement traditional grant funding and aim to make EU cohesion policy efficient and sustainable. The European Commission (Directorate-General for Regional Policy) in co-operation with the European Investment Bank (EIB) Group and the Council of Europe Development Bank have jointly developed a novel initiative, the *Joint European Support for Sustainable Investment in City Areas* (JESSICA). JESSICA allows Member States to invest Structural Fund resources in revolving funds to support sustainable urban development and regeneration. (3)

The increasing use of financial engineering instruments in EU cohesion policy explains the importance of two first Commission decisions on JESSICA cases. Both were adopted directly on the basis of Article 107(3)(c) TFEU. The first decision on *The Northwest Urban Investment Fund (JESSICA)* was adopted on 13 June 2011, followed by the *Andalucía Jessica Holding Fund* decision of 19 October 2011. (4) The Commission carried out an in-depth assessment applying the balancing test to assess the positive effects against potential negative effects of the aid.

On principle, State aid granted through revolving financial engineering instruments enables Member States to deliver policy objectives with less and better targeted State aid that focuses on enhanced financial leverage, investment risk mitigation and the involvement of financial intermediaries. However, State aid control also needs to address potential competition risks. In particular, there is a risk of crowding out other sources of funding and transferring all the risks to the public investor instead of mitigating them, thus creating inefficient market structures and potential competition distortions.

2. Main facts of the cases

2.1. Common features

Common characteristics of the cases, such as the funding architecture, the investment instruments and monitoring requirements, are defined in the Structural Fund Regulations governing financial engineering instruments (collectively referred to as the SF Regulations). (5) Under JESSICA, Structural Funds must be deployed through Urban Development Funds (UDFs) for equity, loans and/or guarantees provided to projects included in an integrated plan for sustainable urban development (IPSUD). The UDFs are investment vehicles that channel funds to projects and do not carry out activities themselves. In addition to the Structural Fund resources, the UDFs may also attract private funding. Optionally, the Member States can use Holding Funds (HFs), which are funds set up to invest in several UDFs.

The terms and conditions for public contributions are contractually defined and must comply with the relevant EU and national rules, including State aid rules. In both cases, funding agreements were signed at two levels: (i) the Funding Agreement between the Member State and the HF manager, which includes provisions for appraising and selecting UDFs, and (ii) the Operational Agreements between the HF manager and a number of UDF managers, whereby the HFs contractually oblige the UDFs to respect certain investment criteria and governance principles. The SF Regulations define the key elements to be included in the above funding agreements. (6)

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsi¬bility for the information and views expressed lies entirely with the author.

(2) Repayable instruments, such as equity, loans and guarantees.

(3) For more information, see: http://ec.europa.eu/regional_policy/thefunds/instruments/jessica_en.cfm http://www.eib.org/products/technical_assistance/jessica/background/index.htm?lang=en

(4) Case SA.32835/2011 *Northwest Urban Investment Fund* (OJ C 281 24.09.2011, p. 7-8), case SA.32147/2011 Andalucía Jessica Holding Fund (the public version of this decision is not yet available).

(5) Financial engineering instruments pursuant to Article 44 of Regulation (EC) No 1083/2006, (the ‘General Regulation’), Articles 3(2)(c), 4(1), 5(1)(d) and 6(2)(a) of Regulation (EC) No 1080/2006, (the ‘ERDF Regulation’), Article 11(1) of Regulation (EC) No 1081/2006, (the ‘ESF Regulation’) and Articles 43 to 46 of Regulation (EC) No 1828/2006, (the ‘Implementing Regulation’).

(6) Articles 43(3) and 44 of the Implementing Regulation set out provisions relating to investment policy and instruments, the investment process, governance rules, fund managers and fees, monitoring and reporting.

Both HFs and UDFs are managed by independent and professional fund managers who must have a track record and experience, and comply with regulatory and best practices. In both cases, the Member States appointed the EIB as a HF manager through a direct contract award, i.e. outside public procurement rules due to the special status of the EIB as an EU body. (7) In line with the SF Regulations, the EIB procured the UDFs through a transparent and competitive tender process by publishing a call for expressions of interest in the Official Journal of the EU and on the EIB's website.

The JESSICA investment approach essentially balances two main considerations. It seeks to (i) promote the policy objective of sustainable urban development by tackling "the high concentration of economic, environmental and social problems affecting urban areas" (8) and (ii) ensure financial self-sustainability so that the funds generate sufficient financial return to remain operationally viable. While not acting as a market economy investor (the funds will make sub-commercial investments to maximise policy impact), the funds must generate positive returns to repay the initial public investment, albeit below market rates.

2.2. Northwest Urban Investment Fund

The UK authorities established the Northwest Urban Investment Fund (NWUIF) in November 2009 in partnership with the EIB, appointed as NWUIF Manager, to support sustainable development in the urban areas of northwest England. GBP 100 million was contributed to the NWUIF - GBP 50 million from the ERDF and equivalent national match funding of GBP 50 million (GBP 12 million in cash and GBP 38 million in land assets at market value). During the 10 year lifespan of the NWUIF, subsequent investments of up to GBP 200 million are expected from capital receipts and returns from the initial investments. The NWUIF's, and consequently the UDFs, investment strategy essentially focuses on property regeneration projects aimed at bringing back into commercial use derelict, contaminated, under-used or vacant land or buildings in the identified strategic sites included in the relevant IPSUDs.

Following a tendering procedure, the EIB selected two UDFs (Merseyside UDF and Evergreen UDF). Merseyside UDF, established and managed by Igloo Regeneration Limited, focuses on the Merseyside sub-region. Evergreen UDF, established by several local authorities in the Northwest area and managed by CB Richard Ellis, focuses on the rest of the Northwest region. Each UDF received a GBP 30 million contingent loan on sub-commercial terms from the NWUIF (9), which the UDFs channelled together with an additional GBP 30 million of public/private match-funding for equity and/or debt investments in urban projects.

2.3. Andalucía Jessica Holding Fund

The Spanish authorities established the JESSICA Holding Fund Andalucía (JHFA) of EUR 86 million in May 2009 in partnership with the EIB, appointed as JHFA Manager. The overall objective of the JHFA is to facilitate sustainable urban development in Andalucía by supporting investments in projects carried out in the assisted area of Andalucía. The investment strategy of the JHFA focuses on a range of activities seeking to improve social integration, mobility, energy management and energy efficiency, reconversion of industrial and degraded areas, development of infrastructure, urban waste management, and social housing by supporting urban projects included in local IPSUDs. The EIB has selected two UDFs (Banco Bilbao Vizcaya Argentaria (BBVA) and Ahorro Corporación Financiera) following a tendering procedure and provided a sub-commercial contingent loan to finance equity and loan investments in urban projects.

3. Assessment

3.1. Private investors - State aid recipients

The Commission assessed State aid within the meaning of Article 107(1) TFEU at each level of the funding architecture. It considered that State resources were involved even if deployed via a number of investment intermediaries. Even though the HFs/UDFs operate independently of direct state interference and apply sound investment management

(7) The EIB may be mandated by the EU to carry out special financial tasks in support of economic and social cohesion. Article 175 of the TFEU empowers the EU to support the achievement of the objectives set out in Article 174 through actions which it takes, inter alia, through the EIB. The EIB is the only international financial institution over which the Commission exercises a de facto veto right in respect of proposed financing from own resources through the ex ante consultation procedure set out in Article 19 of the EIB Statute.

(8) Art 8 of the ERDF Regulation. JESSICA could supporting projects in the following areas: urban infrastructure (transport, water/waste water, energy), heritage or cultural sites (tourism or other sustainable uses), redevelopment of brownfield sites, creation of new commercial floor space for SMEs, IT and/or R&D sectors, energy efficiency improvements.

(9) The loan is to be repaid by 2031 with a minimum return expectation of not less than zero return net of management fees.

principles, their investment decisions remain imputable to the State. They must adhere to the investment conditions set out by the state in the funding agreements; thus the state exercises indirect control over its resources through contractual relationships with fund managers.

In its decisions, the Commission considered that the UDF managers were not State aid recipients, as their remuneration was determined in an open and non-discriminatory tendering process and so considered to be market-conform. Separation of accounts avoids any spill-over from economic activities possibly carried out by the UDF managers. The Commission considered that the UDFs, where they have a separate legal structure, were not State aid recipients either, as they are investment vehicles for transferring the public funds to urban projects and do not undertake any development activities themselves.

The Commission found that the preferential treatment of private investors at both the UDF and project levels constituted State aid. Notably, by analogy to the Risk Capital Guidelines (RCG) ([10]), the contingent loans provided by the HFs to the UDFs confer an economic advantage on the private investors in the UDFs, as it allows their investments to be made on more favourable terms than the public investment. Likewise, the UDF sub-commercial loans ([11]) and/or non-pari passu equity/quasi-equity invested in urban projects confer an economic advantage on project promoters, such as project developer and other investors, as it enhances their investment performance and favour their investments.

3.2. Compatibility approach

The Commission noted that the Member States correctly invoked Article 107(3)(c) TFEU as the basis for a compatibility assessment, as no specific secondary EU legislation appeared directly applicable to the cases. ([12]) While urban projects by their nature are diverse and, taken in isolation would fall under diverse legal frameworks, the JESSICA funds pursue a distinct policy objective of integrated urban development. This means that projects are inter-related and form part of an integrated plan. Moreover, to be effective, the funds need to operate under a coherent set of operating principles, which would not be possible if different rules were applied.

Extensive pre-notification discussions took place between the Commission, the Member States and the EIB throughout 2010-2011. As a result, a number of important principles were introduced to the measures to address competition concerns raised by the Commission. The developed compatibility approach sought to reflect business practice and rely on sound investment management principles, which would be suitable for diverse funding structures and instruments used under the JESSICA framework.

To assess the aid under Article 107(3)(c) TFEU, the Commission had to verify that the aid was: (i) well targeted to achieve an objective of common interest, (ii) well-structured (appropriate, necessary and limited to the minimum necessary), and (iii) did not result in undue and/or disproportionate distortions of competition or have a detrimental effect on intra-EU trade.

3.2.1. Targeting objectives of common interest

Promoting sustainable urban development is a common interest objective under Articles 4, 14 and 174 TFEU. The Commission noted that the HFs and the UDFs operate in line with the policy objectives set out in their investment strategies, which focus on supporting "the development of participative, integrated and sustainable strategies to tackle the high concentration of economic, environmental and social problems affecting urban areas". ([13]) It also noted that the EIB had assessed the investment strategies of potential UDFs in light of the HF Investment Strategies to ensure alignment with the HF policy objectives.

In particular, the Commission observed that the HFs/UDFs are designed to operate in line with the policy objectives set out in the applicable National Strategic Reference Frameworks and the priorities established in the relevant Operational Programmes. Moreover, each UDF's investment strategy was aligned to the relevant IPSUD, which sets out key priorities for the UDF according to the

([10]) OJ C 194, 18.8.2006, p. 2. By analogy to point 3.2. of the RCG, advantage could be excluded where investments are effected pari passu between public and private investors and public and private investors share exactly the same upside and downside risks and rewards and hold the same level of subordination, and normally where at least 50 percent of the funding is provided by private investors that are independent from the companies in which they invest.

([11]) According to its decision practice, in order to determine whether loans will be granted on favourable conditions, the Commission must verify if the interest rate on the loans in question complies with the Commission's reference rate set out in the Reference Rate Communication (OJ C 14, 19.1.2008, p. 6.).

([12]) This, however, does not rule out the possibility for Member States to devise measures that are in compliance with existing rules, when this suits their needs.

([13]) In line with Article 8 of the ERDF Regulation.

criteria set out in the Community Strategic Guidelines on Cohesion 2007-2013. ([14])

The Commission considered that the investment strategies of the HFs/UDFs were properly designed to facilitate economic efficiency by addressing identified market failures and to enhance socio-economic cohesion by promoting investments in deprived urban areas. The underlying business case for the HFs was developed based on the findings of ex ante assessment, notably JESSICA Evaluation Studies and other relevant studies submitted to the Commission. These established the rationale of the HF operations in light of existing market failures specific to the target areas.

The Commission noted that project eligibility requirements and restrictions set out in the HF Investment Strategies are well aligned with the identified market failures. The HFs' resources will be provided to support investments in new activities and exclude the re-financing of acquisitions or participation in completed projects. Investments should seek to address risks in the development and construction phase, thus excluding projects that are in the operating phase. Finally, investments in companies in difficulty within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([15]) are excluded.

3.2.2. Appropriateness

The Commission found the measures to be appropriate. The management of public funds is delegated to independent and professional intermediaries that are contractually required to take sound investment decisions while seeking to achieve policy objectives. The involvement of the intermediaries allows additional funding to be leveraged at fund level and mitigates investment risks through the 'portfolio effect'. In addition, there is a minimum requirement for private co-investment in each project to share investment risks. Finally, the revolving funds could be 'recycled' and made available for further reinvestments. While achieving the policy objectives, the funds capture the value created from investments and produce financial returns.

3.2.3. Necessity and incentive effect

As a general principle, the Commission considers that public intervention may be justified to address a financial viability gap. Such sub-optimal investment situations should not be due to poorly structured underlying investments, but rather due to market failures and/or location characteristics of underdeveloped areas. Therefore, any public investments must be justified by a robust business plan demonstrating that the investment would not have been carried out by the market without public support.

The Commission first verified whether any safeguards were in place ensuring that the public funds would be invested only in viable projects (or a project portfolio at UDF level) with the capacity to repay the investment, and also ensuring the operational viability of the HFs/UDFs. Investments should be repaid from project activities - grants may not be used for the repayment. The HF/UDF managers are to carry out an ex ante investment appraisal for each transaction using sound investment appraisal principles in line with best investment management practices. In this way they verify that each project's (or a project portfolio at UDF level) underlying business plan is feasible from the economic and technical points of view.

In this regard, the EIB carried out investment due diligence of potential UDFs based on their business plans. It verified the expected financial performance of potential UDFs, since repayment of HF resources ultimately depends on the performance of the underlying UDF project portfolio. ([16]) Moreover, since the EIB delegates individual investment decisions to the selected UDFs, it relies on their appraisal, risk management and monitoring standards. Therefore, the EIB also assessed the governance structure, investment process, exit policy, management capacity and structure as well as management remuneration of the potential UDFs.

Likewise, in line with their respective UDF investment strategies, the UDFs target viable urban projects with the capacity to generate positive investment returns and repay the UDF investments (albeit below market rates) based on realistic business plans and ex ante defined exit strategies. The assessment is carried out by professional and independent UDF managers who are contractually obliged to exercise due care. They also have an economic incentive to invest in viable businesses as their remuneration is linked to investment performance.

In the next step, the Commission assessed the safeguards for ensuring the necessity of aid. The

([14]) Article 8 of the ERDF Regulation and Section 2.1 of the Annex to Council Decision 2006/702/EC of 6 October 2006 on Community strategic guidelines on cohesion, OJ L 291, 21.10.2006. According to the Strategic Guidelines, the following aspects should be included in an integrated urban development plan: a definition of the target urban areas and the geographic focus of projects, an analysis of urban socio-economic and environmental needs, the demand for assets/services and a coherent development plan (a multi-purpose, multi-sector approach, including the elements of a land-use plan).

([15]) OJ C 244, 01.10.2004, p. 2.

([16]) Due diligence based on an indicative portfolio only means a list of projects for subsequent investment appraisal by the UDFs.

Commission noted that the funds should support only those projects (or a project portfolio at UDF level) that are not sufficiently viable from a commercial point of view and therefore would not be funded by the market on its own. In this respect, the HFs should select UDFs with an investment strategy that is intrinsically less profitable, as the indicative project portfolio would be perceived to be too risky and not generating sufficient returns to attract commercial funding to the UDFs. Likewise, before receiving sub-commercial funding from UDFs each project should demonstrate a viability gap by generating below market returns. ([17])

The Commission considered that the HF/UDF sub-commercial investments had an incentive effect as they enhanced expected investment performance for private investors. The nature and mix of the UDF investment instruments are project-specific depending on its financing needs. ([18]) The UDFs may offer a combination of subsidised loans and subordinated loans as well as non-pari passu equity. Essentially, the investment approach is based on project financing techniques that estimate and rank future investment returns in order of seniority, where senior debt is served before subordinated debt and equity claims come at the investment exit. This allows for various asymmetric profit and risk sharing arrangements between equity holders. ([19])

3.2.4. Proportionality

The Commission's decisions established a number of operational safeguards that limit the aid to private investors to the minimum necessary.

3.2.4.1. Private investment

To share investment risks and avoid market crowding-out, the Commission noted that the public funds are to be co-invested with private market-oriented investors, which must be free of any public support. ([20]) Firstly, the total private investment in any form in each deal must cover at least 30% of each project's costs in the *Andalucía Jessica Holding Fund* case, which takes into account that investments will be made in the assisted area, and at least 50% in the *Northwest Urban Investment Fund* case. Secondly, private investors in each deal must provide significant capital contribution (technically equity or equity-like investments) to each project where 'significant' is not defined in percentage terms, but will be determined on a case-by-case basis by the UDFs. Private investment may be made at UDF or project level, as long as the total private investment in each project complies with the above requirements.

3.2.4.2. Limiting advantage to private investors

The Commission considered that the aid was limited to the minimum necessary to close the viability gap, including generating a reasonable profit for private investors. The public funds provided on sub-commercial terms may improve expected investment performance for private investors at the UDF or project level up to a so-called Fair Rate of Return (FRR), which is a risk adjusted rate of return that is comparable with other opportunities in the market for this type of investment. ([21]) Any investment gains above the FRR shall be shared pro rata among public and private investors. Once the funding package is completed, no additional incentives which would exceed the FRR may be provided in relation to the same transaction.

The Commission found that the FRR would be determined objectively for each transaction involving public funds in one of two ways. The first is a competitive process, such as a public procurement process, where applicable, or competitive market testing addressed to several investors with at least two funding offers received, which allows selecting potential investors whose expected rate of return is the closest to the market and therefore considered to be the FRR. Where a competitive process is non-existent or limited (e. g. only one potential investor is offering funding and already owns a project asset), the FRR shall be determined by an Independent Expert, who determines the FRR by professional analysis of industrial benchmarks and

([17]) Any State aid, such as grant funding, received prior to the UDF investment reduces overall investment costs, which will be reflected in a reduced viability gap.

([18]) Under a project finance model, a project company typically raises equity and debt to finance the construction of the project and pays off the financing from the revenues that the project generates. The equity is provided by project promoters, which could be project developers and third-party financial investors that are responsible for project activities and provide investments in order to generate returns, while debt is normally raised by promoters in the market, especially when the project is in an operation phase and starts yielding returns.

([19]) A combination of non-pari passu equity investments could offered through a shared return structure (preferential returns, priority returns and/or different investment timing) and/or public investments being in a capped 'first loss' position. Preference, however, is given to the upside risk sharing instruments instead of just covering the downside risks.

([20]) The term 'private investor' means any investor, whether private or public, that invests its money in a profit-oriented way, following market economy logic in a way defined by the Court for meeting the requirements of the Market Economy Investor Principle. See for example case T163/05, *Bundesverband deutscher Banken/Commission*, OJ C 100 17.4.2010, page 37.

([21]) A risk adjusted hurdle rate essentially refers to the opportunity cost of capital, that is, the rate of return that the investor would accept in the capital markets for other investments of a similar risk profile.

market risk. Provisions are in place for the selection process, verification scope and methodology, independence and competence requirements for Independent Experts.

3.2.4.3. Professional and independent fund managers

The Commission took note that investment decisions at any level of the funding architecture are made by professional and independent fund managers. They are contractually obliged to operate within defined investment parameters and apply sound investment management principles. The management of the HFs and UDFs is overseen by investment boards made up of appointed representatives from key stakeholders, which will ensure the investments are made according to the Investment Strategies. The Commission also noted that if the UDF manager does not perform its tasks, the UDF will receive reduced management fees. The EIB has the right in the event of non-performance to terminate the Operational Agreement. In addition to contractual duties, the Commission noted that the UDF management fee includes a component linked to investment performance, which will incentivise the UDFs to take sound investment decisions and limit the aid to the minimum necessary.

3.2.4.4. Further requirements

In its decisions, the Commission introduced the requirement for Member States to submit a standardized information sheet (SIS) for each sub-commercial UDF investment exceeding EUR 5 million in a single project. This will allow the Commission to monitor compliance with the conditions of the decisions. To enhance the transparency of State aid, the Commission introduced an individual notification requirement for projects larger than EUR 50 million, irrespective of what proportion of these costs is financed by the UDFs. Finally, Member States must provide annual reports on State aid compliance to the Commission. State aid approvals are limited in time (5-10 years).

3.2.5. Avoiding distortions of competition and trade

In its assessment the Commission took into account the aid granting process, the characteristics of the relevant markets and the type and amount of aid. Overall, it found that distortions of competition and trade were limited as the aid is granted to efficient companies and is limited to what is necessary to close the viability gap and address market failures and socio-economic deprivation in urban areas. The UDFs were procured according to the principles of equal treatment, proportionality, non-discrimination and transparency. Urban projects will be selected in an open and non-discriminatory process.

On this basis, the Commission found that the positive effects outweigh the potentially negative effects of the aid and considered the aid was compatible with the TFEU on the basis of Article 107(3)(c).

4. Beyond the JESSICA decisions - financial instruments and State aid control

The first JESSICA decisions are a good example of how the Commission has dealt with financial engineering measures in the context of the JESSICA initiative, a novel EU cohesion policy instrument. The decisions could provide a blueprint for other Member States on how to design JESSICA State aid measures. These are important decisions also because the compatibility approach could be transposed across a broad range of policy deploying public funds through financial engineering instruments.

The Commission placed financial instruments at the heart of the Europe 2020 Strategy. Financial instruments are expected to play an important role in the new financial framework 2014-2020 as an alternative to non-reimbursable grants. The Commission has proposed common rules and guidance for innovative financial instruments – the so-called *Equity and Debt Platforms*. [22] The Commission's proposals for post-2013 cohesion policy also envisage strengthening the role of financial instruments, as effective tools to support Member States' efforts in delivering Europe 2020 targets and to promote social, economic and regional cohesion.

In this regard, the JESSICA decisions should provide an important input for the modernisation of future State aid policy and financial. The decisions set out operational safeguards based on well-established project finance techniques that focus on sound financial management principles and investment performance indicators that should be suitable to any forms of revolving financial instruments, deployed in any policy area.

[22] The Communication of 19 October 2011 on "A new framework for the next generation of innovative financial instruments – the EU equity and debt platforms" (COM(2011)622 final).

The rescue and restructuring of Hypo Real Estate

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1. Introduction

In this article, we briefly describe the case of State aid for Hypo Real Estate (HRE). HRE is a German banking group that got into difficulties in 2008 and was subsequently rescued and nationalised by Germany. In July 2011, the Commission approved the aid to HRE on the basis of an in-depth restructuring plan, which is currently being implemented.

2. Description of HRE and its difficulties

2.1. The history of HRE

In the autumn of 2002, the German HVB bank group decided, as part of a major reorganisation plan, to spin off its international commercial real estate finance business and the domestic mortgage bank participations, establishing HRE in 2003 as a specialised commercial real estate finance bank. In the beginning, HRE seemed to operate quite successfully, and between 2005 and 2008 HRE managed to be listed in the German DAX index, which is composed of the top 30 German companies. In 2007, HRE took over Dublin-based DEPFA Bank plc (Depfa) and extended its business to public sector and infrastructure finance. That transaction more than doubled HRE group's balance sheet, which by the end of 2008 grew to approximately EUR 420 billion.

2.2. HRE's difficulties in the context of the financial crisis

HRE's business model, i.e. financing long-term wholesale investments by short-term interbank funding, was at the root of its difficulties. In particular, the Depfa takeover exacerbated the asset and liability maturity mismatch in the group's portfolio. As long as there was an excess supply of liquidity available in the markets this appeared to be a profitable strategy, mainly because the inherent transformation risk was not appropriately priced in. At the end of September 2008, after Lehman Brothers applied for creditor protection, HRE faced a liquidity shortage which put the bank on the brink of insolvency. HRE was no longer able to obtain short-term financing on the markets and it did not have sufficient liquidity reserves to bridge the funding gap.

In addition, HRE faced possible capitalisation difficulties attributable to legacy assets that did not show an appropriate return on investment when considering their actual risk profile. Finally, a lack of IT and risk system consolidation between divisions made efficient management more difficult.

2.3. The bail-out of HRE

In order to alleviate HRE's liquidity constraints and to prevent its collapse, the German banking association tried at the end of September 2008 to set up a rescue system by providing about EUR 35 billion of liquidity to HRE. This was based on a guarantee by Germany which was approved by the Commission, on 2 October 2008, only under the condition that Germany submitted, within six months, a restructuring or liquidation plan for HRE, or proved that the guarantees were entirely redeemed. HRE continued to report heavy losses, so Germany not only had to provide further liquidity support but needed to inject capital as well. Finally, HRE was nationalised by Germany; this was achieved through a squeeze-out of the remaining shareholders.

In autumn 2010, a public winding-up institution (FMS Wertmanagement AöR - FMS-WM) was established for HRE. It manages a large portfolio of assets and derivatives taken over from the HRE group. The criteria that guided HRE in the selection process for the portfolio were that assets were either considered to be of no further strategic value, that they contained risks considered to be no longer acceptable, that they were too capital-intensive or that they were unsuitable as collateral to obtain future long term funding. FMS-WM has over the course of time taken over HRE assets with a nominal value of about EUR 210 billion, i.e. half the 2008 balance sheet total.

2.4. HRE now

The HRE group currently consists of Hypo Real Estate Holding AG (HRE Holding) and its subsidiaries pbb Deutsche Pfandbriefbank AG (PBB) and Dublin-based Depfa. PBB is the renamed core

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

banking entity of the group, the only part of the business that continues to operate as such in the market, focussing on real estate finance and public investment finance ([2]). Depfa is in run-down mode, no longer contracting new business.

By the end of 2011, HRE's core bank PBB was allowed to have an "adjusted strategic balance sheet" ([3]) total not exceeding EUR 67 billion. That means that its portfolio of real estate finance assets and interest bearing assets in the area of public investment finance was capped and could not exceed that threshold. As a result, although the HRE group's balance sheet is still relatively large, the core going concern of the institution has been severely cut down in size.

3. The in-depth investigation

In light of HRE's unfortunate former business strategy, the initial restructuring approach of April 2009 and the related refinancing needs, the Commission opened an in-depth investigation into State aid measures for HRE on 7 May 2009 ([4]), based on doubts regarding HRE's long-term viability. At that stage, the Commission also had doubts that sufficient measures to limit distortions of competition and to achieve adequate burden-sharing were included in the plan. The in-depth investigation was extended on 13 November 2009 and on 24 September 2010 because additional State aid measures for HRE had become necessary in the meantime.

4. Main features of the restructuring plan

On 1 April 2009, Germany notified the first draft of a restructuring plan for HRE and, after several modifications, submitted the final version of the plan on 14 June 2011. In view of the considerable state support which HRE had received, a deep restructuring of HRE was necessary not only to restore viability but also to minimise distortions of competition and to ensure adequate burden-sharing.

According to the restructuring plan, HRE – freed from its legacy of impaired assets with a nominal value of EUR 210 billion – will redesign its business activities in such a way that its core bank PBB can carry out its activities based on stable funding and improved internal control systems. Its future activities will be on a considerably smaller scale than HRE's activities before the crisis, whether measured in terms of balance sheet size, volume of new business, workforce, branch network or geographical scope.

PBB's adjusted strategic balance sheet total at the end of 2011 accounts for approximately 15 % of HRE's balance sheet size at the end of 2008. That reduction in size was accompanied by a substantial reduction of the workforce. More than 30 participations, one third of which are outside Europe, have already been divested or liquidated, or are in the process of liquidation. Twenty-six out of 32 branches have been closed. In addition, a multi-year group-wide transformation with a budget of approximately EUR 180 million has been launched to improve and integrate the IT systems.

PBB is the only subsidiary of HRE Holding which is continuing to generate new business; it pursues two strategic business lines, real estate finance and public investment finance. Both business lines target assets that are eligible for German covered bonds, either in the form of German mortgage bonds (*Hypothekenpfandbriefe*) or German public sector bonds (*öffentliche Pfandbriefe*). Refocusing HRE's business model in such a way that the bank will in future only acquire assets that are eligible for German covered bonds is a crucial element of the restructuring plan in order to achieve de-risking of its activities. The eligibility criteria set out in the German law for covered bonds (*Pfandbriefgesetz*) in essence only allow for a bond cover pool of good quality. Accordingly, PBB will no longer pursue other activities, in particular not budget finance business, infrastructure finance, capital markets and asset management activities.

In order to ensure that the business model set out in the restructuring plan is actually implemented, and to ensure that adequate burden-sharing is achieved and distortions of competition are limited to the minimum, Germany submitted a number of commitments. The following are key:

– the growth rates of PBB have to remain within defined limits, measured in terms of balance sheet size as well as volume of new business,

– the bank can acquire new business only on certain geographic markets,

– the bank must not acquire other businesses during the restructuring period,

– Germany will re-privatise PBB as soon as possible.

The Commission's investigation confirmed that HRE has a significant list of tasks to fulfil in order to restore long-term viability. The most important

(2) Public investment finance means those public finance activities that relate to specific projects and investments, as opposed to general purpose lending or the holding of (quasi-)government bonds.

(3) PBB's adjusted strategic balance sheet total is defined as the balance sheet total corrected for items that are in run-down mode or have been synthetically transferred to FMS-WM – accounts.

(4) OJ C 240, 7.10.2009, p. 11.

ones are the ongoing restructuring and cost cutting efforts; the further development of an adequate stable revenue generating business from the strategic pillars, independent from the revenues it is currently generating from the asset management mandate of FMS-WM; and further fine tuning and improving of risk management systems to allow strict monitoring and planning of risk positions.

5. The State aid approved for Hypo Real Estate

Based on the above business strategy, the Commission decided on 18 July 2011 [5] that Germany's State aid to HRE, consisting of capital injections of approximately EUR 9.95 billion (FMS-WM is the recipient of part of that capital), guarantees of EUR 145 billion and an asset transfer to FMS-WM with an aid element of about EUR 20 billion, was compatible with the internal market on the basis of Article 107(3)(b) of the Treaty on the Functioning of the European Union (TFEU) in the light of the commitments submitted by Germany.

Before reaching that final decision, the Commission took six decisions authorising a series of aid measures temporarily, respectively opening and extending the in-depth investigation:

– Decision of 2 October 2008; State aid NN44/2008 - Germany, Rescue aid for Hypo Real Estate [6];

– Decision of 7 May 2009 (Corrigendum of 24 July 2009); Staatliche Beihilfe C 15/2009 (ex N 196/2009) - Hypo Real Estate, Deutschland;

– Decision of 13 November 2009; State aids n° C 15/2009 (ex N 196/2009), N 333/2009 & N 557/2009 – Germany, Hypo Real Estate – Extension of formal investigation procedure, and temporary find capital injections compatible [7];

– Decision of 21 December 2009; State aid n° N 694/2009 – Germany, Emergency guarantees for Hypo Real Estate [8];

– Decision of 19 May 2010; State aid N 161/2010 – Germany, Further recapitalisation of Hypo Real Estate [9];

– Decision of 24 September 2010; State aids n° C 15/2009 (ex N 196/2009) & N 380/2010; Extension of scope of formal investigation procedure, winding-up institution, additional SoFFin guarantees for HRE; Hypo Real Estate, Germany [10].

According to the Commission decision of 18 July 2011, a monitoring trustee keeps the implementation of HRE's restructuring plan and the fulfilment of the commitments submitted by Germany under close surveillance, reporting to the Commission on a regular basis.

6. Interesting features of the HRE case

The HRE case is characterised by several interesting features. The most important ones are the following.

6.1. Procedurally long and complex case involving substantial aid amounts

The first rescue decision for HRE was adopted on 2 October 2008. This was the first decision adopted under the accelerated procedure [11] introduced during the financial crisis.

The final restructuring decision for HRE was adopted on 18 July 2011, i.e. nearly three years after the first rescue decision, which so far is one of the longest periods for a banking State aid case in the financial crisis. One of the reasons for the length was that it took some time to establish the actual portfolio of assets to be hived off, not least because the bank's IT and risk reporting systems at the time were inadequate.

The HRE case entailed seven Commission decisions. Hence, it is one of the banking State aid cases with the most decisions. On 7 May 2009, the Commission opened the in-depth investigation regarding State aid for HRE. After the opening of the investigation, HRE required further State aid from Germany. Each of these further State aid measures were individually approved by the Commission.

The German State aid package for HRE makes the HRE case one of the biggest State aid cases of the financial crisis, whether measured in absolute or relative terms. The amount of capital injection and the amount of State aid resulting from the relief measure together represent more than 20% of HRE's pre-crisis risk weighted assets. As regards state guarantees, HRE has so far received the highest amount of state guarantees compared to other State aided banks in Europe during the financial crisis.

(5) http://ec.europa.eu/competition/state_aid/cases/231241/231241_1279613_551_2.pdf
(6) OJ C 293, 15.11.2008, p. 1.
(7) OJ C 13, 20.1.2010, p. 58.
(8) OJ C 25, 2.2.2010, p. 14.
(9) OJ C 190, 14.7.2010, p. 7.
(10) OJ C 300, 6.11.2010, p. 6.
(11) See recital 53 of the Commission communication on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8.

6.2. Involvement of impaired assets measures through large bad bank

HRE´s bad bank, FMS-WM, was established in the autumn of 2010. FMS-WM acts independently of HRE and benefits from an obligation of SoFFin (Sonderfonds Finanzmarktstabilisierung – a public German Fund) to compensate losses. FMS-WM does not have a banking licence and hence does not have to fulfil the regulatory capital requirements of a bank.

FMS-WM holds a portfolio of securities, loans and derivatives. The loans portfolio consists of three main areas, namely commercial real estate/workout, value management (public sector linked structured products) and infrastructure. It has considerable exposure to PIIGS governments and quasi government entities.

FMS-WM has in the course of time taken over assets of HRE with a nominal value of about EUR 210 billion. This makes FMS-WM the biggest bad bank in Europe in the context of the current financial crisis. In the context of the transfer of assets from HRE to the bad bank, HRE needed additional short term guarantees from the state to bridge liquidity gaps caused by transfer counterparties demanding controlled settlement.

An assessment of the bad bank transfer revealed an *a priori* incompatible aid amount of more than EUR 15 billion, which according to the Impaired Asset Communication ([12]) ought to be recovered or clawed back over time. Although certain clauses allowing for contingent payments and profit skimming have been introduced, PBB was not able to provide for full recovery.

6.3. Considerable down-sizing of the business but no liquidation

Given the above features, in particular the inability to claw back the *a priori* incompatible aid amount involved in the asset transfer to FMS-WM and the other considerable aid amounts, a very far reaching restructuring plan including significant downsizing was necessary, not only from a long-term viability perspective, but also to mitigate the distortions of competition caused by allowing the undertaking to continue to be in business. On that basis, as explained above, PBB is only allowed to have an adjusted strategic balance sheet total of EUR 67 billion at the end of 2011. That threshold is equal to approximately 15% of HRE group's balance sheet at the end of 2008; the restructuring plan therefore targets a downsizing of approximately 85%, one of the most significant downsizings of aided banks in Europe in the financial crisis, in both absolute and relative terms.

The Commission carefully considered whether such massive State aid could still be found compatible with the internal market without liquidating the bank. First of all, after careful in-depth assessment on the basis of information provided by Germany, the Commission was able to conclude positively on the prospects of PBB, i.e. the core bank of the "new" HRE, to restore long-term viability, subject to full implementation of the restructuring plan. It noted the significant downsizing in terms of balance sheet size and scope of activities as well as the other limitations offered by Germany as measures limiting distortions of competition. The Commission considered that the nationalisation implied important burden-sharing by the former stakeholders, addressing moral hazard issues. It noted that although PBB contributes as much as possible to the restructuring costs and the claw back, this would not reach the level of own contribution normally required. However, the overall amount of downsizing was considered to be an adequate substitute for this lack of sufficient own contribution.

Overall, the conditions for finding the aid compatible with the internal market were considered to be met, allowing the Commission to take a positive conditional decision.

([12]) Communication from the Commission on the treatment of impaired assets in the Community banking sector OJ C 72, 26.3.2009, p. 1.

WestLB liquidation – the end of the saga

By Max Lienemeyer, Marcel Magnus ([1])

1. Introduction

On 20 December 2011, the European Commission approved the liquidation plan submitted by the German government for the commercial bank WestLB, majority-owned by the two savings banks associations in North Rhine-Westphalia and the federal state of North Rhine-Westphalia. After 30 June 2012, WestLB stopped new banking business. The plan aims at a sale and eventual winding down of its banking activities. In the medium term, the bank will be transformed into a run-down vehicle for servicing legacy positions that were transferred to a bad bank named EAA, while the brand name WestLB will finally disappear from the market.

That liquidation brings an end to the WestLB saga. The bank has not only often hit the headlines but has also been subject of several State aid investigations over the last decade ([2]). To put the decision taken in December 2011 into context, we briefly outline some common problems faced by most German Landesbanks and the specific situation of WestLB which led to the liquidation plan.

1.1. The wider context: German Landesbanks

The German public banking sector is made up of a large number of smaller savings banks on the one hand and a small number of very large Landesbanks – among those WestLB – on the other hand. For a long time Landesbanks benefitted from a competitive advantage in the form of State guarantees called *Gewaehrtraegerhaftung*, which gave them access to cheap funding. In 2001, the European Commission and the German government agreed to bring the *Gewaehrtraegerhaftung* to an end, albeit with a transitional period until the end of 2005. In general Landesbanks struggled to find a sustainable business model once they were deprived of the privilege of access to cheap financing. While banks in Germany in general tend to be less profitable than banks in other countries, as can be seen in the OECD Bank Profitability Database, Landesbanks performed even worse than the average German bank, and consequently were even more affected by the financial crisis. The poor profitability and inglorious track record of several Landesbanks in Germany led over time to difficulties, and the broad consensus in Germany was that the Landesbank sector needed to be reformed ([3]). That necessity was also highlighted in assessments made by external experts such as research institutes, regulators, the OECD and the IMF.

A detailed analysis of the underlying reasons for the Landesbanks' insufficient performance would go beyond the scope of this article. Still, one core aspect should be mentioned: the segregation of the German public banking sector ([4]) prevented Landesbanks from expanding into retail or small business banking, a business area which is in the hands of the savings banks. Landesbanks were hence left with wholesale and investment banking. So they expanded into business areas that they perceived to be profitable, and made large investments in foreign markets, buying for example structured credit products and bonds whose inherent risks they apparently underestimated. Those investments and similar exposures made them specifically vulnerable to the impact of the financial crisis. In consequence, first SachsenLB, then WestLB, and later on also BayernLB, HSH and LBBW had to be bailed out by the German taxpayer, who provided them with substantial State aid to weather the crisis. If it had not been for those substantial capital injections, guarantees and asset relief measures, losses related

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

([2]) Already in July 1999 the Commission took a negative final decision regarding capital transfers in favour of WestLB which occurred during the 1990s. That decision was annulled by the Court due to lack of motivation, and replaced by a new decision in October 2004. The total recovery including interest amounted to about EUR 1 billion. On 18 July 2007, the Commission took a decision to endorse five capital contributions as being eligible under State aid rules. Those capital contributions to WestLB were made between 2002 and 2005 and added up to approximately EUR 6 billion.

([3]) Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Das deutsche Finanzsystem: Effizienz steigern — Stabilität erhöhen' vom Juni 2008; Ziffer 246-260. (http://www.sachverstaendigenrat-wirtschaft.de/download/publikationen/expertise_finanzsystem.pdf)

([4]) In fact, the extent to which Landesbanks are vertically integrated with the savings banks branch network varies, with Helaba being a prominent example of a Landesbank that is rather well integrated and that was hardly affected by the financial crisis. Likewise it is true that, although Landesbanks share common features, notably their shareholder structures, their business models and respective risk appetites differ.

to these activities would have absorbed a major part or all of those banks' equity.

1.2. WestLB's specific situation

WestLB's quest for a sustainable business model goes back to 2001 when activities carried out in the public interest were separated from its economic activities. From the very beginning the bank's restructuring efforts focused on investment banking activities.

These efforts did not, however, lead to the desired results. Short term profits stemming from opportunistic, volatile and costly investment banking activities were followed by huge losses in 2002, 2003, 2004, and 2007 ([5]).

2. The May 2009 decision

At the beginning of 2008, remarkably even before the collapse of Lehman Brothers, which is often considered as the starting point of the financial crisis, WestLB was once again in desperate need of support. Its public shareholders had to shield a portfolio of toxic assets by a guarantee of EUR 5 billion. After notification of that aid, a restructuring plan was submitted for WestLB, outlining the measures intended to minimize the distortion of competition. In the assessment the Commission concluded that the bank was not in a position to reduce its activities significantly and to restore viability at the same time. The aid to WestLB was therefore authorized in May 2009 only under the condition that the bank would be sold as a whole or in parts by the end of 2011, or would otherwise need to cease its business activities. The decision provided that WestLB had to reduce its overall assets by 50%, cease risky activities like proprietary trading, and had to implement a reporting structure that would facilitate a sale in parts. Although all shareholders initially agreed to the proposal, it was eventually imposed as a conditional decision which was attacked in Court.

3. New aid – and a new final decision

3.1. The interim guarantee

Within only a few weeks after the decision of May 2009, WestLB informed the Commission that it needed considerably more State aid in order to escape bank resolution procedures. Due to the continuing deterioration of underlying securities in one of the bank's portfolios, the capital requirement increased sharply, resulting in a situation where WestLB's capital ratio fell significantly short of the regulatory minimum capital requirements. Hence, for reasons of financial stability the Commission authorized on 7 October 2009 a temporary asset guarantee of EUR 6.4 billion that enabled deconsolidation of the toxic portfolio. That measure was approved for two months until it was to be replaced by a permanent solution.

3.2. In-depth investigation of the bad bank

In late 2009 WestLB's shareholders agreed on a bad bank to free WestLB of its toxic and non-strategic assets and to significantly reduce its balance sheet. That bad bank, named Erste Abwicklungsanstalt (EAA), was the first bad bank set up under the umbrella of an agency (SoFFin) that Germany had established in the financial crisis to stabilize and restore confidence in its financial system.

EAA's task was to take over and wind up WestLB's toxic and non-strategic assets with a total initial nominal amount of approximately EUR 85 billion. In order to provide EAA with sufficient capital for the transfer, WestLB needed more State aid, namely a capital injection of EUR 3 billion. That capital was provided by SoFFin in the form of silent participation, as well as a further guarantee of EUR 1 billion by WestLB's public shareholders.

On 22 December 2009, the Commission opened an in-depth investigation, based on doubts that the measure was in line with the requirements of the impaired asset communication, as regards transparency, valuation and burden sharing. At the same time, the Commission's temporary approval was based on Germany's commitment to adjust both the remuneration and measures to limit distortion of competition, and to submit a new restructuring plan that adequately reflected the additional amount of State aid granted to WestLB. One of the main purposes of the in-depth investigation was to assess the real economic value of the toxic and non-strategic assets that had been transferred to EAA. The Commission hired external experts for that assessment.

The assessment has taken considerable time due to the sheer volume of the portfolio, the number of transactions involved, discussions, and the existence and impact of mitigating factors. To cut a long story short, the in-depth investigation finally came to the conclusion that the transfer of the portfolio of toxic and non-strategic assets to the bad bank happened at EUR 3.414 billion above the real economic value.

The aid amount was calculated as the difference between the market value of the portfolio and the

([5]) See table 4 in the Commission decision of 5 November 2010 in case C40/2009 on the Extension of formal investigation procedure, OJ C 23 2011 of 25.1.2011.

price at which the portfolio was transferred to the bad bank. According to the Commission's communication [6] such State aid is compatible as long as the price paid for the assets only exceeds (temporarily distorted) market prices but not the real values of the assets. In the case of WestLB, however, the in-depth investigation established that the transfer price exceeded the real economic value of the assets by EUR 3.414 billion. That amount, which is *a priori* incompatible with State aid rules, either had to be paid back by WestLB or be regained in another suitable form, for example by more in-depth restructuring or the sale of WestLB.

3.3. Consequences

The bad bank transfer involved an amount of State aid that by far exceeded the EUR 5 billion in aid that was subject to the May 2009 decision. For that reason Germany submitted a new restructuring plan, the assessment of which was the second phase of the in-depth investigation.

The new restructuring plan needed to take into account all the aid that was provided to WestLB, which required more in-depth restructuring, even in the context of the envisaged sale of WestLB.

A summary of related efforts reads as follows: in June 2010 SoFFin mandated the lawyer Friedrich Merz, formerly a politician and chairman of the CDU/CSU parliamentary party, to pursue the sale of WestLB, assisted by Morgan Stanley investment bank. A public tender for WestLB was launched in September 2010. A few weeks later BayernLB, another large German Landesbank, stepped forward and publically announced its interest in a merger with WestLB. In November 2010, however, BayernLB stopped those negotiations, indicating that due diligence had shown that a merger with WestLB would not lead to acceptable economic results.

Although later on some other well-known names of strategic investors, as well as a few exotic names, popped up in the financial newspapers and were supposedly interested in acquiring WestLB, in the end, after weighing all the risks none of them made a bid with terms and conditions acceptable to WestLB's shareholders. Consequently, in May 2011 the mandate of the divestiture trustee Merz was not prolonged.

From the Commission's point of view the failure of the sale efforts was a marked judgement on the credibility of WestLB's business model, as evidently no market investor was willing to "buy" the story that this bank would generate economically sufficient returns on investment.

Also the implementation of the old restructuring plan was lagging behind schedule. In particular, WestLB did not succeed in selling its most important subsidiary, WestImmo, a bank specialised in real estate financing. Therefore, the intended reduction of WestLB's balance sheet as stipulated in the decision did not materialize.

The bank then finally stated in its updated restructuring plan that adequate remuneration as well as more in-depth measures would jeopardize WestLB's prospects of returning to viability. Shrinking the bank's balance sheet size to less than 20% of its former size, a proposal made by WestLB in February 2011, clearly proved impossible since that exercise had stronger effects on revenues than on costs, making the business less and less profitable.

Not only did the question of how WestLB might build a sustainable business model on a much smaller scale than before remain unsolved; the same was true for the question of how the EUR 3.414 billion of incompatible aid could be repaid. Considering that WestLB was not able to generate the required funds internally, and that the intention to sell WestLB failed as well, there were no realistic alternatives left.

Once it had become clear that modifications of WestLB's restructuring plan would definitely not lead to a sustainable business model and State aid-compatible results, a more radical plan was worked out by Germany, the federal state of North Rhine-Westphalia, and the savings banks, which in essence suggested carving out a small part of WestLB's business, transferring that part to the savings banks, and liquidating the remainder.

4. The liquidation plan

That liquidation plan was submitted to the Commission on 30 June 2011. It said that WestLB would carve out the so-called Verbundbank, an entity which focuses on cooperation with savings banks and will employ about 400 employees, and that the remainder of assets would either be sold or liquidated. To this end, WestLB intended to transfer on 30 June 2012 all assets and liabilities to EAA, the bad bank that had already taken over its portfolio of toxic and non-strategic assets. After 30 June 2012, WestLB would no longer engage in banking business on its own account, no longer use its brand name, and be transformed into an asset manager. Banking licences not needed for the provision of asset management services would be withdrawn. Thus, significant and irreversible steps were laid out in the liquidation plan, which marked

[6] Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector, OJ C 72, 26.03.2009, pages 1-22

an irrevocable exit from the market for the majority of WestLB's former activities within 12 months.

In the decision taken on 20 December 2011 the Commission concluded that the liquidation plan fulfilled all relevant criteria of the Restructuring Communication and the Banking Communication and thus approved all aid measures. Consequently, the May 2009 decision had lost its object and was repealed.

As regards Verbundbank, the carved out entity will actually proceed with some of WestLB's former business activities. The 20 December 2011 decision says that the entity will not be run on a stand-alone basis – alleviating our concerns whether the entity would be sufficiently profitable to do so – but will be taken over by Helaba which is a viable bank. The carved out activities represent in terms of balance sheet size less than 20% of WestLB's former balance sheet and in terms of personnel less than 10% of WestLB's former staff.

In order to minimise distortions of competition, the winding-down of WestLB had to be limited to the shortest period possible, even if the process takes several years. The bank itself may only continue with asset management services that are a rather insignificant part of WestLB's bank activities. These services are nevertheless required by EAA in order to run down the assets. They will be provided by the rump of WestLB, the servicing platform. Third parties may contract those services as well, but only to a limited amount, offered at fair market prices, and under the condition that the servicing platform be sold before 31 December 2016 or will otherwise be liquidated. A transformation period is required simply to allow management to reorganize the structures, to carve out the servicing company and to establish at least a short track record in order to attract potential investors.

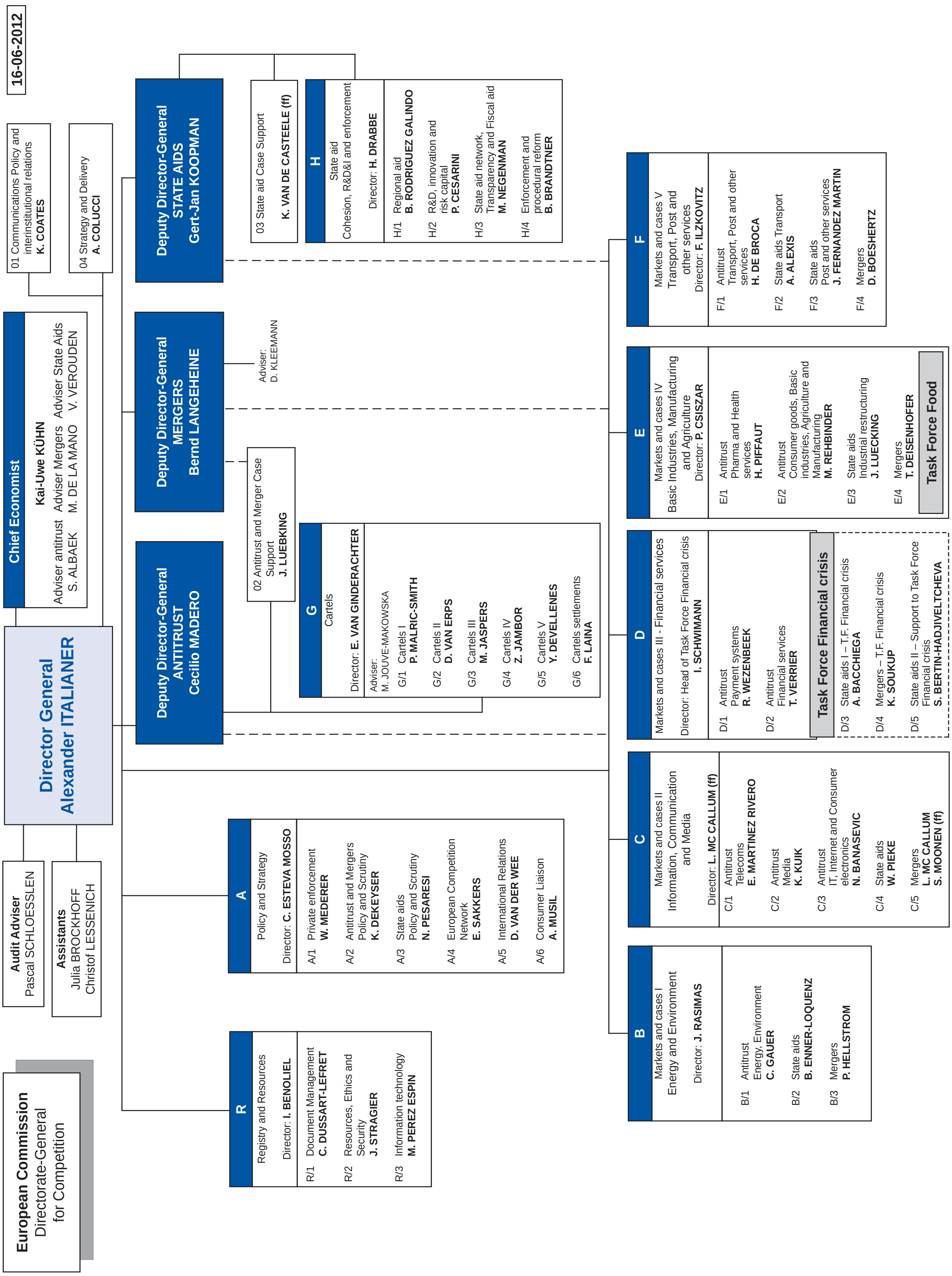
As regards burden-sharing, the liquidation plan is based on the concept that WestLB's shareholders will lose all their capital in WestLB. The savings banks have furthermore committed to provide EUR 1 billion of additional capital to enable the carve out of Verbundbank, while the federal state of North Rhine-Westphalia agreed to take the major part of the burden and committed to bear the costs associated with the liquidation of WestLB, a considerable part of which stems from pension liabilities. The overall agreement sufficiently takes into account both the respective burden-sharing capacities of the parties as well as the degree to which they were formerly involved in setting the bank's strategy and their degree of influence on the bank's corporate governance.

Since North Rhine-Westphalia has taken the largest burden of the WestLB shareholders, the concession to allow the servicing company to offer a limited range of services to third parties, which reduces the overall costs of the liquidation, was well justified.

5. Concluding remarks

The WestLB case demonstrates that ordinary winding down can be a realistic possibility for ailing banks. In fact, WestLB was not able to generate sufficient, permanent and risk-adequate profits in view of its high cost basis after having lost its cheap funding from *Gewährträgerhaftung*. After the attempt to sell the bank failed, liquidation, although costly in the short term, seemed inevitable and was in the long term preferable to repeated rescue operations. Nevertheless, the owners would probably not have agreed to a costly liquidation if they had not been faced with a credible alternative, a resolution under the new restructuring law passed by the Bund. Application of the restructuring law would in fact have implied that neither the owners nor the entire German public banking sector had been able to find a solution. The German federal savings banks association therefore decided to get involved and to take half the losses while the other half was shouldered by the Land of North Rhine Westphalia. In spite of the potential costs of redundancies, the parties managed to reduce costs by limiting the bank's activities to that of an asset manager on a going concern basis, while all assets were transferred to a bad bank. That provision reduced costs, as the bank does not have to report based on liquidation values and assets do not have to be sold in a fire sale. For the Commission that scenario was acceptable because the bank clearly stopped any new business and transferred economic responsibility for asset management services to another entity. Furthermore, the systemic risk of the bank's failure is now clearly contained. WestLB is so far the only major banking case where failed attempts at restructuring ended in liquidation. Assuming that other Landesbanks do not want to go the same route as WestLB, they will certainly want to make sure that they can provide and implement sound and achievable restructuring plans.

Organigram of the Competition Directorate-General (14 July 2012)



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Speeches

From 1 May 2011 to 31 August 2011

This section lists recent speeches by the Commissioner for Competition and Commission officials.

Full texts can be found on
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Documents marked with the reference
"SPEECH/11/…" can also be found on
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Joaquín Almunia, Vice-President European Commission responsible for Competition policy

SPEECH/11/17 - 14 January

How competition policy contributes to competitiveness and social cohesion

Lisbon, Portugal - Europa 2011 - Regulação e Competitividade

SPEECH/11/515 - 12 July

Competition policy in 2010 and the SGEI Brussels, European Parliament

SPEECH/11/481 - 28 June

Improving Europe's competitiveness in the global economy London, United Kingdom - British-American Business Conference

SPEECH/11/457 - 21 June

Las claves de la política de competencia en la estrategia europea Madrid, Spain -Jornadas Anuales de la CNC

SPEECH/11/451 - 17 June

Beyond the banking crisis: another chapter in Ireland's history of resilience

Dublin, Ireland - Federation of International Banks in Ireland

SPEECH/11/444 - 16 June

Public services for a better Europe Budapest, Hungary - The European Centre of Employers and Enterprises providing Public services

SPEECH/11/396 - 30 May

Fair process in the EU competition enforcement Budapest, Hungary - European Competition Day

SPEECH/11/385 - 26 May

An integrated approach to State aid Brussels - European State Aid Law Institute Conference

21 May

Commencement address at Suffolk University Boston, USA - Suffolk University, Boston

SPEECH/11/346 - 18 May

A new decade for the International Competition Network

The Hague, The Netherlands - 10th Annual Conference of the International Competition Network

SPEECH/11/337 - 16 May

Competition Policy Issues in Financial Markets London - CASS Business School

SPEECH/11/328 - 12 May

Reform of EU State aid rules on the Services of General Economic Interest en Committee of the Regions, Brussels - Committee of the Regions

SPEECH/11/300 - 02 May

Reforming EU State aid rules on public services: The way forward Brussels - European Policy Center

By the Competition Directorate-General staff

24 June

Alexander Italianer: The new economic climate: driving competition in key sectors London, Chatham House

01 June

Cecilio Madero Villarejo: Recent trends in EU merger control 7th International Conference on Competition Law and Policy, Beijing, China

30 May

Alexander Italianer: Closing remarks: Convergence in the ECN, the way forward European Competition Day, Budapest, Hungary

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From 1 May 2011 to 31 August 2011

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Antitrust

IP/11/34 - 14/01/2011

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IP/11/952 - 05/08/2011

Commission investigates luxury watch manufacturers

IP/11/893 - 15/07/2011

Commission investigates possible foreclosure of competitors from Austrian markets for management of packaging waste

IP/11/891 - 15/07/2011

Commission opens formal proceedings against Czech electricity incumbent CEZ

MEMO/11/505 - 13/07/2011

Commission welcomes Court judgment in the Elevators and Escalators cases

IP/11/861 - 12/07/2011

2010 was a very active year in competition enforcement and reforms, annual report shows

IP/11/842 - 06/07/2011

Commission welcomes improved market entry for lung disease treatments

IP/11/840 - 06/07/2011

Commission welcomes new decrease in problematic pharma patent settlements in the EU

IP/11/839 - 06/07/2011

Commission sends Statement of Objections to suspected participants in power cables cartel

IP/11/820 - 04/07/2011

Commission repeals Heat Stabilisers cartel decision for Ciba/BASF and Elementis after EU Court judgment

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Commission fines Telekomunikacja Polska S.A € 127 million for abuse of dominant position

MEMO/11/395 - 09/06/2011

Commission confirms investigation into suspected cartel in the sector of seatbelts, airbags and steering wheels

MEMO/11/355 - 27/05/2011

Commission confirms unannounced inspections in the engines' sector

IP/11/632 - 24/05/2011

Commission fines Suez Environnement and Lyonnaise des Eaux €8 million for the breach of a seal during an inspection

MEMO/11/307 - 17/05/2011

Commission confirms unannounced inspections in the container liner shipping sector

IP/11/571 - 16/05/2011

Commission market tests Standard & Poor's commitments on international securities identification numbers

Merger control

IP/11/997 - 30/08/2011

Commission approves proposed joint venture between Hochtief and GeoSea

IP/11/984 - 25/08/2011

Commission clears acquisition of US specialty chemical company Lubrizol Corporation by Berkshire Hathaway

IP/11/982 - 24/08/2011

Commission clears acquisition of G6 Rete Gas by F2i and AXA Private Equity

IP/11/980 - 23/08/2011

Commission clears acquisition of Amprion by Molaris and Commerz Real

IP/11/972 - 19/08/2011

Commission clears acquisition of the speciality chemicals company ISP by Ashland

IP/11/971 - 19/08/2011

Commission approves acquisition of Phadia by Thermo Fisher

IP/11/956 - 08/08/2011

Commission clears acquisition of Finnish Luvata's rolled copper products division by German copper producer Aurubis

IP/11/955 - 05/08/2011

Commission clears acquisition of German crane manufacturer Demag by US industrial group Terex Corporation

IP/11/954 - 05/08/2011

Commission clears acquisition of French chemicals company Rhodia by Solvay

IP/11/948 - 04/08/2011

Commission opens in-depth investigation into proposed merger between Deutsche Börse and NYSE Euronext

IP/11/949 - 03/08/2011

Commission approves acquisition of Belgian insurer Nateus by Bâloise of Switzerland

IP/11/947 - 02/08/2011

Commission approves acquisition security services company Niscayah by Securitas

IP/11/943 - 02/08/2011

Commission approves acquisition of Swiss pharma company Nycomed by Takeda of Japan

IP/11/930 - 26/07/2011

Commission approves acquisition of pharmaceutical supplier Capsugel by US investment fund KKR

IP/11/929 - 26/07/2011

Commission clears acquisition of the S-PVC business of Tessenderlo by Ineos

IP/11/928 - 26/07/2011

Commission clears acquisition of Medion by Lenovo

IP/11/924 - 25/07/2011

Commission clears acquisition of Tognum and Bergen by Daimler and Rolls-Royce

IP/11/922 - 25/07/2011

Commission approves acquisition of power conversion company Converteam by General Electric

IP/11/917 - 20/07/2011

Commission approves proposed joint venture between Trenitalia and Veolia Transport

IP/11/910 - 19/07/2011

Commission clears acquisition of Evonik's carbon black business by Rhône Capital and Triton

IP/11/899 - 19/07/2011

Commission approves acquisition of ThyssenKrupp Metal Forming by Corporación Gestamp, both suppliers to the automotive sector

IP/11/865 - 13/07/2011

Commission approves acquisition of Finnish paper company Myllykoski Group by UPM-Kymmene

IP/11/850 - 08/07/2011

Commission clears acquisition of Rio Tinto's talc business by Imerys

IP/11/848 - 07/07/2011

Commission approves acquisition of Janssen Animal Health by pharmaceutical group Eli Lilly

IP/11/832 - 05/07/2011

Commission approves acquisition of CEPSA by International Petroleum Investment Company

IP/11/821 - 30/06/2011

Commission approves acquisition of Austrian heating oil distributor OMV Wärme by a subsidiary of the Raiffeisen group

IP/11/819 - 30/06/2011

Commission clears acquisition of Bulgari by LVMH

IP/11/815 - 30/06/2011

Commission clears merger of Polish banking and insurance subsidiaries of Austria's Raiffeisen and Greece's EFG Eurobank Ergasias

IP/11/788 - 24/06/2011

Commission approves acquisition of internet retailer Redcoon by Media-Saturn

IP/11/787 - 24/06/2011

Commission clears acquisition of a controlling stake in Behr by Mahle

IP/11/780 - 23/06/2011

Commission approves acquisition of Siteco by Osram

IP/11/764 - 21/06/2011

Commission clears acquisition of iSOFT by CSC

IP/11/749 - 17/06/2011

Commission refers Liberty Global planned acquisition of German cable company KBW to German competition authority

IP/11/748 - 17/06/2011

Commission approves acquisition of biomedical company Beckman Coulter by technology group Danaher

IP/11/747 - 17/06/2011

Commission approves acquisition of automotive business of Keiper Recaro Group by Johnson Controls

IP/11/735 - 15/06/2011

Commission clears acquisition of Columbian Chemicals by Birla Group

IP/11/701 - 14/06/2011

Commission clears acquisition of Parmalat by Lactalis

IP/11/690 - 10/06/2011

Commission approves acquisition of Ferrosan's Consumer Health Care Business by Pfizer

IP/11/693 - 09/06/2011

Commission approves joint acquisition of German polyester producer Trevira by Indorama and Sinterama

IP/11/684 - 06/06/2011

Commission approves acquisition of Sanex by Colgate

IP/11/672 - 01/06/2011

Commission approves styrene joint venture of BASF and INEOS, subject to conditions

IP/11/661 - 30/05/2011

Commission clears Axa, Permira online travel agency joint venture

IP/11/660 - 30/05/2011

Commission opens in-depth investigations into two proposed acquisitions in the hard disk drive sector

IP/11/655 - 27/05/2011

Commission approves proposed acquisition of Kokerei Prosper by ArcelorMittal Bremen Gmbh

IP/11/617 - 19/05/2011

Commission clears proposed joint venture between Dutch pharma company DSM and Sinochem

IP/11/573 - 13/05/2011

Commission approves proposed stake of PetroChina in certain Ineos assets

IP/11/572 - 13/05/2011

Commission clears acquisition of Dionex by Thermo Fisher

IP/11/564 - 12/05/2011

Commission clears acquisition of British automotive repair company Speedy (Kwik-Fit) by Itochu of Japan

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Commission approves acquisition of joint control of Ansaldo Energia by First Reserve Fund and Finmeccanica

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Luxembourg: Publications Office of the European Union
2012 —57 pp. — 21 × 29.7 cm
ISSN: 1025-2266

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KD-AB-11-003-EN-C

Competition Policy Newsletter
Published three times a year by the
Competition Directorate-General of the European Commission
Editors: Kevin Coates, Julia Brockhoff, Christof Lessenich

Address:
European Commission
Competition Directorate-General
Communications Policy and Inter-Institutional Relations
1049 Bruxelles/Brussel
BELGIQUE / BELGIË

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