Aviation

Consultation on IATA Interlining System

Block Exemption Regulation No 1617/93 allows air carriers to co-operate and combine their services in a more flexible and effective manner, permitting them to offer passengers more choice of routes and easier journeys. This practice - called interlining - is set up through a number of agreements negotiated and managed under the auspices of the International Air Transport Association (IATA), which regroups most of the air carriers in the world.

Regulation 1617/93 has been regularly amended in order to strictly allow block exemptions that continued to be justified on the basis of Article 85(3) EC. At present, only two of the initial four block exemptions remain in force, namely those in favour of consultations on passenger tariffs on scheduled air services, and arrangements on slot allocation and airport scheduling, in so far as they concern services between airports located in the European Community.

In practice, the aim of the IATA passenger tariff conferences is to facilitate interlining and enable passengers to use a single ticket to travel with more than one airline, whereas the aim of the IATA Schedule Coordination Conferences is to improve interline connections and handling arrangements, which become more and more crucial with the increasing congestion of airports.

Regulation 1617/93 applies until June 2005. Accordingly, the Commission has issued a consultation paper with a view to gathering information from interested parties on the main issues that it has identified from the application of the agreements concerned (http://www.europa.eu.int/comm/competition/antitrust/others/consultation_paper_en.pdf). Those comments are expected by 6 September 2004 and should help the Commission when conducting the competition assessment of the issues identified in order to decide to discontinue or extend the scope of the Regulation. [Veronique Corduant]
Commission condemns Belgian architects’ fee system
The scale of recommended minimum fees of the Belgian Architects Association has been found to breach EU competition rules. Taking into account the fact that the fee scale was abolished in 2003, the Commission imposed a fine of EUR 100,000.

The recommended minimum fee scale used by the Belgian Architects Association lays down an architect’s fees as a percentage of the value of the works realised by the contractor and applies to all architectural services provided in Belgium by independent service providers.

In the Commission’s view, the recommended fee scale constitutes an infringement of Article 81 EC because it seeks to co-ordinate the pricing behaviour of architects in Belgium, something which is not necessary for the proper practice of the profession. According to the Commission, the fees should reflect an architect’s skills, efficiency and costs – and perhaps reputation – and should not be dependent solely on the value of the works or the price of the contractor. In any event, the architect should determine the fee independently of competitors and in agreement with the client only. [Filip Ragolle]

CFI reduces fines on steel tube producers cartel by EUR 13 million
The CFI has ruled that, in a decision fining a cartel of eight producers of seamless carbon-steel pipes and tubes used in the oil industry, the Commission had failed to produce evidence covering the alleged duration of the infringement, and has thus reduced the total fines from EUR 99 million to approximately EUR 86 million. Four of the producers concerned are Japanese undertakings.

Seven of the eight undertakings fined contested the 1999 Commission decision before the CFI, arguing that the Commission had erred in concluding that the companies had entered into an agreement (the so-called Europe-Japan Club) which had led to market allocation for a total of six years.

Firstly, the duration of the infringement was reduced by the CFI. Although the cartel members started meeting up in 1977, the Commission considered that the infringement began in early 1990. According to the Commission, it was impossible to apply Article 81 EC before the beginning of 1990 because until then, voluntary agreements on restraint of imports between the EC and Japan were in force.

However, the Commission failed to produce evidence of the date on which the voluntary restraint agreements came to an end. The Japanese producers, on the contrary, prevailed in proving that those international agreements had lasted longer, i.e. until 31 December 1990. The starting date of the infringement was thus wrong.

The CFI also held that the Commission had failed to establish that the infringement had continued beyond 1 July 1994, in the case of the Japanese undertakings. Consequently, the end date was also found to be wrong. The duration of the infringement was therefore reduced, and so were the fines imposed on the companies.

Secondly, the amount of the fine imposed on each of the Japanese producers was further reduced by 10% in order to take into account the additional infringement committed by European producers and for which they had unfairly not been fined. (Judgment of 8 July 2004 in Cases T-44/00, T-48/00, T-50/00 and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 Mannesmannrohren-Werke AG, Corus UK Ltd, Dalmine SpA, JFE Engineering Corp. (formerly NKK Corp.), Nippon Steel Corp., JFE Steel Corp. (formerly Kawasaki Steel Corp.) and Sumitomo Metal Industries v Commission) [Indiana de Seze]

Statement of objections to the French banking sector
The French payment card system is managed by an economic interest group called “Groupement des Cartes Bancaires (‘GCB’)”. The Board of Directors of GCB consists of representatives from nine major French banks (BNP-Paribas, Caisse d’Epargne, Crédit Agricole, Crédit Mutuel, CIC, Crédit Lyonnais, La Poste, Natexis Banques Populaires and Société Générale).

In 2002, GCB notified a new scheme to the Commission providing for higher charges to be paid to GCB by banks issuing bank cards (‘CB cards’). The purported objective of this plan was to increase the number of traders accepting CB cards as a means of payment and to expand the number of automatic teller machines available to cardholders.

However, the Commission rapidly found that the notified measures stemmed from a hidden agenda designed to foreclose the market to new entrants. Indeed, before the measures were launched, other banks not members of GCB began to offer CB Visa cards much cheaper compared to the nine banks involved in the agreement.
Dawn raids carried out in May 2003 on the premises of GCB and some banks yielded the evidence needed by the Commission to prove the existence of a secret anticompetitive agreement aiming at the exclusion of new entrants to the market. The new level of charges to be paid to GBC no longer allowed competitors to issue CB cards at an attractive price. Furthermore, the nine banks benefited from the scheme inasmuch as the new level of charges did not apply to them and the charges paid were redistributed between them.

GCB and the nine banks involved have three months to reply to the Commission’s preliminary position on the infringement of the competition rules as outlined in the statement of objections. [Veronique Corduant]

Merger

Commission fines Tetra Laval for providing incorrect information in Sidel acquisition
On 7 July 2004, the Commission fined Swiss/Swedish group Tetra Laval for having twice omitted to send information during the investigation carried out in 2001 on the purchase of the French company, Sidel. On the basis of the previous merger regulation in force at the time of the investigation, the fine stands at EUR 90,000.

It is the fifth time the Commission has had to fine parties to a merger for such an infringement. Previous cases involved SANOFI/SYNTHELABO, KLM/MARTINAIR, DEUTSCHE POST/TRANS-O-FLEX in 1999, and BP/ERDOLCHEMIE in 2002.

The Commission decided to fine Tetra Laval for not having provided all the necessary information on its "Tetra fast" technology. The facts date back to 2001, when the Commission had prohibited the Tetra/Sidel merger. The Commission then had to approve it in 2002, after its first decision was cancelled by the CFI.

A new Court ruling, based on a Commission appeal, is expected (pending cases C-12/03 P and C-13/03 P, Commission v Tetra Laval). Advocate General Tizzano has, however, proposed that the ECJ reject the appeal. While recognising that the CFI committed several errors of law, the Advocate General felt that there were no grounds for rescinding the contested ruling. [Indiana de Seze]

Commission extends probe into paper board and tubes JV between Sonoco and Ahlstrom
The Commission has initiated proceedings in the planned joint venture (JV) between the Luxembourg subsidiary of US packaging company Sonoco and Finnish fibre-based materials firm Ahlstrom (through its German subsidiary), which would combine their European core board and paper core activities.

Core board is a paper/board material made from recycled material. Paper cores are tubes produced from core board by winding processes, normally used as the base around which various products (paper, film, adhesive tape, fabric and yarn) are wound.

After an extended preliminary investigation, the Commission has identified potentially reduced competition in the markets for high-end paper mill cores (tubes for winding magazine paper) in Northern Europe and for low-end cores (less sophisticated tubes for winding paper, film or textile) in Scandinavia. The Commission has until 11 November 2004 to take a final decision. [Indiana de Seze]

In-depth investigation into Continental/Phoenix merger
An in-depth investigation has been opened into the proposed acquisition of Phoenix AG, a German producer of rubber products, by its rival company Continental AG. The transaction would combine two of the leading producers of technical rubber products in Europe.

During the first phase of the investigation, the Commission identified potential competition concerns in several markets, in particular in the field of air springs and heavy conveyor belts. The merger would result in the creation of Europe's number one supplier of air springs for commercial and passenger cars and railway vehicles. The new group would also be the biggest producer in Europe of heavy steel cord conveyor belts used for the transport of heavy bulk goods and filter belts for drying raw materials during transport. Furthermore, the Commission has found evidence that the two latter markets are protected by significant entry barriers.

Continental has quickly offered remedies, but these do not remove all the Commission’s competition concerns, since some of them were only identified at a late stage of the first-phase investigation. The Commission therefore decided to initiate phase two proceedings. [Veronique Corduant]
State aid

**New Guidelines on rescue and restructuring aid**

The Commission has adopted new Guidelines on State aid for rescuing and restructuring firms in difficulty, which will come into force on 10 October 2004 and replace the current 1999 Guidelines. The Guidelines set out the conditions under which short-term rescue aid and longer-term restructuring aid can be granted to firms facing bankruptcy.

The main changes compared to the current 1999 Guidelines are as follows:

(i) Rescue aid

Unlike the current rules, the new Guidelines allow execution of urgent restructuring measures, even in the rescue period. The rescue period is now clearly limited to six months. At the end of this rescue period, the aid needs to be reimbursed. Rescue aid can still only be granted in the form of reimbursable loans. Irreversible capital injections by public authorities remain prohibited. The new guidelines introduce a simplified procedure for rescue aid which does not exceed EUR 10 million.

(ii) Restructuring aid

The new Guidelines clarify that the aid beneficiary should make a real contribution toward the cost of its restructuring. For SMEs, the contribution should amount to at least 25% of the restructuring costs, for medium-sized enterprises 40%, and for large undertakings the percentage should normally be at least 50%.

(iii) “One time, last time” rule

The new Guidelines clarify the application of the so-called "one time, last time" rule: neither new rescue aid nor new restructuring aid may be granted during a period of 10 years following the granting of restructuring aid.

[Filip Ragolle]

**Major victory of the Commission against the Council**

In case C-110/02, *Commission v. Council*, the ECJ clarified the division of powers between the Commission and the Council in State aid cases.

Under the EC Treaty rules on State aid, the Commission is responsible for determining whether an aid measure is compatible with the common market. Nevertheless, pursuant to the third paragraph of Article 88(2) EC, the Council, on application of a Member State, may decide that an aid measure is to be regarded as compatible with the common market when exceptional circumstances justify such a decision. In that case, if the Commission has already opened a State aid proceeding, it must suspend it until the decision of the Council, which has three months to do so (see fourth subparagraph of Article 88(2) EC). If the Council does not take a decision within that time-limit, it is up to the Commission to decide.

In the case at issue, the Commission had adopted two decisions in 2000 and 2001 declaring Portuguese aid granted to pig farmers in 1994 and 1998 incompatible with the common market and ordering reimbursement of the aid. In 2002, the Council adopted a decision authorising the aid prohibited by the Commission.

The Commission consequently brought an action before the ECJ for annulment of the Council’s decision. The ECJ decided that where the Commission has already initiated the procedure laid down in Article 88(2) EC and the three-month time-limit laid down in the fourth subparagraph of that provision has expired, the Council no longer has the power to adopt a decision authorising the State aid. The ECJ ruled that the Council is neither entitled to adopt such a decision if the Commission has already taken a negative decision. The ECJ consequently annulled the Council decision authorising the aid in question. [Filip Ragolle]

**Aid for Alstom approved, subject to conditions**

The agreement concluded at the end of May between Mr. Sarkozy, French Minister of Economy and Competition Commissioner Monti on the restructuring aid for Alstom (see Competition Express Issue 25) has been approved by the Commission. The aid is subject to strict conditions.

The approval decision provides, *inter alia*, for various compensatory measures, including divestments reducing the group’s size by 10% in addition to the 20% reduction undertaken by Alstom under the current restructuring plan. The new divestments involve some EUR 1.6 billion and include industrial boilers, transport operations in Australia and New Zealand and freight locomotives in Spain, plus EUR 800 million in other business activities to be specified at a later stage.
The decision further provides that Alstom must, within four years, enter into one or more long-term industrial partnerships with respect to a significant part of Alstom’s activities. These partnerships must be concluded with firms that are not, de jure or de facto, individually or jointly, controlled by the French Government. In the energy sector, an initial partnership will be established for hydropower, with a joint venture being set up under joint control.

In the transport sector, the Commission also obtained a commitment from France to open up the French market for railway equipment.

France finally undertook to divest itself of any capital stake within twelve months of Alstom obtaining an “investment-grade” rating, and in any event within four years. [Filip Ragolle]

Decision on Swedish energy tax relief
As from 2002, Swedish manufacturing companies have been exempted from paying an energy tax on electricity. State aid rules allow such relief from energy taxes, provided that the companies concerned still have an incentive to further reduce energy consumption, either by paying a significant amount of the tax or by entering into binding environmental agreements. However, in this case, neither of these conditions was met for the period from 1 January 2002 to 30 June 2004. The Commission, therefore, took the view that the scheme had granted a competitive advantage to the manufacturing industry in comparison with the other sectors and declared the measure incompatible with the common market.

However, the Commission does not request full recovery of the tax exemption for the entire period during which the aid was not in line with the State aid rules. The Commission takes the view that only the difference between the exemption and the tax burden that would have accrued under the 2004 energy tax Directive should be recovered. That Directive, which came into force in 2004, sets minimum tax rates. The Commission took into account that the tax relief is in line with State aid rules where companies still pay the minimum tax rates of a harmonised tax. Thus, it accepted to apply the same principle to the Swedish national tax also before the energy tax Directive actually entered into force. Furthermore, the Commission found that the recovery period should only start on the date when the Commission published its decision to open the investigation procedure regarding this case in the Official Journal, i.e. as from 9 August 2003. [Veronique Corduant]

Contact Details

Wilko van Weert
competition.express@twobirds.com

Bird & Bird
Rue de la Loi 15
B-1040 Brussels
Belgium
Tel: +32 2282 6000
Fax: +32 2282 6011

www.twobirds.com

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