Aid authorised for the development of Gerona airport

The Autonomous Community of Catalonia has been authorised to pay aid amounting to a total of EUR 1 million for the period 2002 - 2005 to Intermed SL. This money will serve to develop Gerona airport in connection with the launch of the Gerona-Madrid route.

The Commission recognised that such aid would allow the development of a secondary airport, currently underused, which represents a cost to the community as a whole. Therefore, the aid was held to be compatible with the common market on the basis of Article 87(3)(c) EC.

However, in light of its decision concerning Ryanair at Charleroi airport, the Commission has now laid down specific conditions that the Spanish authorities must satisfy. Firstly, the aid for opening new routes must be necessary, proportionate, transparent and non-discriminatory. Sanctions must be imposed if the carrier fails to fulfil its commitments. Secondly, the aid must be limited to 3 years and cover a maximum of 50% of the net start-up costs. [Véronique Corduant]

ECJ rejects European Broadcasting Union's appeal

The ECJ has rejected the appeal brought by the European Broadcasting Union (EBU) against the CFI's ruling annulling the Commission decision to grant the EBU an Article 81(3) exemption for its Eurovision system.
Eurovision is a television programme exchange system based on the understanding that member radio and television organisations will offer other members their coverage of national sporting and cultural events likely to be of interest to them. It is co-ordinated by a professional association, the EBU, whose active members may participate in the joint acquisition and sharing of television rights to international sporting events, known as "Eurovision rights".

The Commission had granted an exemption, under Article 81(3) EC, to the Eurovision TV programme exchange system.

Four non-EBU members challenged the Commission's exemption decision before the CFI. They contested the rules governing the joint acquisition of television rights for sporting events, the exchange of the signal for sports broadcasts under Eurovision and contractual access for third parties to that system, which, according to them, gave rise to serious restrictions on competition. The four applications focused in particular on the sublicensing system governing access to the Eurovision system for third parties broadcasting free-to-air.

On 8 October 2002, the CFI annulled the Commission's decision, concluding that the Commission wrongly decided that the sublicensing system guaranteed competitors of EBU members sufficient access to the transmission rights for sporting events which EBU members hold by virtue of their participation in that purchasing association. As a result, it annulled the exemption.

The EBU brought an appeal before the ECJ that nevertheless confirmed the CFI's ruling (Order of 27 September 2004, case C-470/02 P). [Filip Ragolle]

**Antitrust**

**Coca-Cola undertakes to cease anti-competitive practices**
Further to the commitment by The Coca-Cola Company to amend or cease some of their practices for the distribution of carbonated soft drinks, the Commission has agreed to close its 5-year probe against the U.S. beverage producer.

The company's undertakings will be published in the Official Journal for third-party comments and will be binding on Coca-Cola pursuant to Article 9 of Regulation 1/2003. This means that Coca-Cola may incur a fine for failing to honour its commitment.

In short, Coca-Cola has undertaken to forego:

- exclusivity arrangements. Coca-Cola customers will remain free to buy carbonated soft drinks from any supplier of their choice
- target and growth rebates, thus opening the market to potential competitors
- use of Coca-Cola's strongest brands to sell less popular products
- exclusivity for shelving products in Coca-Cola's coolers. Where Coca-Cola provides a free cooler and there is no other chilled beverage capacity in the outlet to which the consumer has direct access, the outlet operator will be free to use at least 20% of the cooler provided by Coca-Cola for any product of its choosing

[Indiana de Seze]

**German postal law breaches EU competition rules**
On 20 October 2004, the European Commission decided that the German postal law unlawfully induces Deutsche Post AG ("DP") to abuse its dominant position by granting discriminatory discounts in the field of mail preparation services.

Upon a complaint by BdKEP, a German association of postal service providers, the Commission decided that certain provisions of the German Postal Act violate the EU competition rules because they induce DP, Germany's incumbent postal services operator, to abuse its dominant position by discriminating against commercial mail preparation firms. The incriminated provisions encourage DP to grant quantity-based discounts to bulk mailers who feed self-prepared mail directly into sorting centres but bar it from granting such discounts to commercial firms that handle mail preparation services for others.
Mail preparation consists of collecting items, sorting by destination and delivering them to public access points. DP has the exclusive right to distribute letters below 100 grams (the so-called reserved area). Mail preparation services, including pre-sorting the mail and its transport from the sender’s premises to a chosen point in the incumbent’s network, do not fall within the ambit of the reserved area of the EU Postal Directive.

The Commission acted on the basis of Article 86(3) EC which allows it to address decisions to Member States in order to ensure that they do not enact or maintain in force any measures which allow or encourage public undertakings to violate the EU competition rules (see Article 86(1) EC).

The German government has failed to demonstrate that the discriminatory tariffs were justified on the basis of Article 86(2). This provision contains an exception to the prohibition laid down in Article 86(1) EC where the application of the competition rules to undertakings entrusted with the operation of services of general economic interest would obstruct the performance, in law or in fact, of the particular tasks assigned to them. The Commission recalls that, as established in its 1998 Notice on the application of the competition rules to the postal sector, intermediaries should be able to choose freely amongst available access points to the public postal network.

Whilst acknowledging the infringement, Germany has, so far, refused to amend the law in a satisfactory manner. It now has two months to inform the Commission of the measures it will take to comply with EU law. [Filip Ragolle]

**Euro conversion commission: German banks did not infringe competition law**

The CFI has annulled a Commission decision that had fined five German banks for jointly fixing the commission on Euro conversion operations.

In December 2001, the Commission adopted a decision whereby five German banks (Commerzbank, Dresdner Bank and HVB were each fined EUR 28 million; DVB fined EUR 14 million; and VUW fined EUR 2.8 million) were found to have colluded since 1997 in order to set the conversion fee on the Euro zone currencies during the transition period preceding the adoption of the Euro.

During this transition period, from 1 January 1999 to 31 December 2001, the currency conversion rates were frozen, thus removing the risk of conversion operations. The prices for changing cash in the EU-11 area were thus supposed to go down. However, banks believed that administration costs were still incurred and that they should charge the customers for these costs, although in a transparent manner and abandoning the conversion margin.

In order to anticipate this transition period, these five banks held a meeting on 15 October 1997 where they agreed on a number of points, including the need to compensate the administration costs by payment of a global commission of about 3% in order to recoup 90% of their income through currency conversion operations.

Based on two diverging sets of meeting minutes, on declarations made by the persons present at the meeting, as well as the behaviour of the banks during the transition period, the Commission decided to fine the banks for infringing Article 81(1) EC.

The five banks prevailed in their appeal to the CFI, which held that the Commission failed to show evidence of an anti-competitive agreement in the sense of Article 81(1). The court found that it was normal for the banks to anticipate the introduction of the Euro and that a commission fee was the only logical solution to recoup their costs. The commission rate was discussed as likely to be between 2 and 6%, which was deemed to reflect the situation of the market, and nowhere was it shown that a common rate was to be applied.

This judgment is very likely to be appealed as the Commission did not file its response within the deadline. The Commission may thus appeal in order to have a chance to put forward its defence (Judgment of 14/10/2004 in joined cases T- 44, 54, 56, 60 and 61/02). [Indiana de Seze]

**Procedure**

**Consultation on new Notice on access to file**

The Commission proposes to adopt a new Notice on the rules for access to file in Article 81 and 82 EC proceedings.

Access to the Commission file is provided for in Regulation 1/2003 and in the Merger Control Regulation, as well as in their respective implementing Regulations. The proposed draft Notice establishes the framework for exercising the right of defence set out in those Regulations. It will replace the 1997 Notice adopted in the same area.

The Commission has thus published the draft text of the new Notice in Official Journal C 259 of 21 October 2004 and is expecting comments from interested parties by 2 December 2004. [Indiana de Seze]
**State aid**

**Germany to recover more than EUR 3 billion, plus interest, from seven regional public banks**

Germany has been ordered by the Commission to recover about EUR 3 billion, plus interest, from seven regional public banks. This decision ends the investigation into the Landesbanken which occupied the Commission for about 10 years and which culminated with a landmark agreement, in 2001 and 2002, on the issue of the State guarantees attached to the banks’ statute.

At the beginning of the nineties, the introduction of the Own Funds and Solvency EU Directives required German public banks to take up large amounts of new capital in order to maintain their level of activities. That capital was provided by the German regional governments (Länder), which partly or fully own the banks, by way of a transfer of public housing and other assets.

This triggered a complaint by the Association of German Private Banks (BdB) as they were under the same obligation to increase their solvency ratios without, however, being able to rely on public support. The complaint concerned the following seven banks: Westdeutsche Landesbank Girozentrale (WestLB), the biggest of the German public banks, but also Landesbank Berlin, Norddeutsche Landesbank, Bayerische Landesbank, Hamburgische Landesbank, Landesbank Schleswig-Holstein and Landesbank Hessen-Thüringen.

In 1999, the Commission adopted a first negative decision concerning the transfer to WestLB and ordering the recovery of some EUR 800 million. In 2003, however, the CFI annulled the decision, taking the view that the Commission had not sufficiently explained its calculations but confirming the decision on the substance.

The Commission’s assessment has shown that the remuneration agreed by the Länder in return for the transfer of assets was very low (less than 1%) and did not correspond to the normal return on investment that a private investor would have expected (which has been estimated at some 6-7%). The Commission has, therefore, established that the reduced remuneration constitutes State aid within the meaning of Article 87(1) EC and has ordered Germany to take measures to recover the difference from the Landesbanken. Last September the regional banks and Länder, as well as the plaintiff, reached an agreement on appropriate rates and methods for remuneration (see Competition Express, Issue 30). Drawing on this agreement, the Commission has now ordered recovery. The amounts to be recovered from each bank vary from EUR 979 million plus interest (WestLB), to EUR 6 million plus interest (Landesbank Hessen-Thüringen).

The Landesbanken affair is not totally over because the Commission still has to render a decision on recapitalisation of the public banks as currently envisaged by the Länder. [Filip Ragolle]

**Italian disaster aid scheme under review**

The Italian government adopted a law allowing compensation to enterprises located in municipalities affected by natural disasters in 2002. Such aid to make good the damage caused by natural disasters or exceptional occurrences can be held compatible with the common market on the basis of Article 87(2)(b) EC.

However, the Commission did not find sufficient guarantees to ensure that the aid would be granted to the victims only and that the amount of aid would not exceed the damage. No connection exists between the damage suffered and the aid mechanisms because the amount of aid granted depends on the level of investments made during the previous years.

During the formal investigation procedure, the Italian authorities also failed to provide the necessary information to enable the Commission to determine whether the aid scheme could benefit from exemptions for regional aid and/or for small and medium-sized undertakings.

Despite its negative decision concerning the overall aid scheme, the Commission acknowledged that individual aid payments could be approved. [Véronique Corduant]
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