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COMPETITION LAW IN THE EUROPEAN COMMUNITIES

CONTENTS

Definition of the Product Market

Despite its specialised character, a recently reported case does in fact raise a point of general principle. Some weeks ago the Commission expressed its concern that, by setting up a joint venture *providing information technology solutions to the problems of port terminal operators*, an established firm in the field of information technology and a new firm in the same field would be in a position to dominate the market. The narrower the market definition, the easier it is to show the risk of dominance. Moreover, the Commission had to take into account the fact that both the IT firms sharing responsibility for the joint venture were subsidiaries of companies "active in container terminal services and intermodal transport"; the in-depth investigation was therefore fully justified.

In the event, the proposal was approved. The Commission authorised the creation by Maersk Data (USA) Inc and Eurogate IT Services GmbH (Germany) of a joint venture called Global Transport Solutions LLC. The investigation had shown that the proposed transaction did not give rise to any competition concerns, since there were several other established competitors in the market. Potential customers of GTS would also be competitors in the downstream market for terminal operation; it was therefore likely that they would prefer an independent supplier. Finally, potential clients had produced, and would also in the future be able to produce, the required software in-house or to collaborate with other software producers to satisfy their requirements. This was a happy outcome. However, if the market had been defined in some other way (perhaps, as providing information technology solutions to commercial firms, or providing consultancy services to port terminal operators), the competition concerns might not have arisen in the first place.

Access to facilities by third parties

Another point of principle, raised both in the report in this issue on the gas cases (page 109) and in a recent statement by the Commission, is that of access to networks and other facilities. In the gas cases, the network was the gas grid. In the other case, concerning "public postal operators" and often referred to as the REIMS II case, the parties to the Agreement for the Remuneration of Mandatory Deliveries of Cross-Border Mails will be required to give the same treatment to third parties as to themselves. The agreement governs the remuneration that public postal operators pay each other for the delivery of incoming cross-border mail. The previous agreement had been exempted and appeared to work well; but the exemption has expired. The Commission intends to exempt the follow-up agreement from the anti-trust rules for another limited period of time, but is also intent on fostering competition in the newly opened market for outgoing cross-border mail. The decision exempting the agreement from the antitrust rules will therefore require the REIMS II parties to deliver mail for third party operators according to the same terminal dues they charge among themselves. ■

SUPPLY AGREEMENTS (BREWING): THE INTERBREW CASE

Subject: Supply agreements
Conditions (of approval)
Tying arrangements
Non-competition clauses

Industry: Brewing

Parties: Interbrew and others

Source: Commission Statement IP/03/545, dated 15 April 2003

(Note. British readers are familiar with the concept of "tied houses"; but the present case has a somewhat wider impact, affecting the whole sector of pubs, restaurants and hotels – known in Commission jargon as "horeca" outlets. The arrangement approved by the Commission involves a substantial relaxation of the tying principle. On the whole, the arrangement probably benefits the consumer; but it remains to be seen whether the restrictions on tying are likely to lead to any reluctance by the brewers to grant loans to outlets on favourable terms.)

Today the Commission approved the amended supply agreements between Interbrew, the largest brewer in Belgium, and pubs, restaurants or hotels, located in Belgium. As a condition of approval, the Commission has required Interbrew to amend these agreements in order to offer competitors access to the tied outlets. The Commission pointed out that consumers would now have an additional choice of beer brands in more than 10,000 outlets which had so far been exclusively supplied by Interbrew and that, in view of Interbrew's strong position, this could be expected to bring an extra dynamic to the Belgian beer market. The amended agreements will give Belgian outlets - those having concluded loan agreements as well as those having entered into a lease or sublease agreement with Interbrew - significantly increased commercial freedom to carry beers not brewed by Interbrew.

Loan agreements

For the more than 7000 outlets which have so far been entirely tied to Interbrew under a loan agreement, the non-competition obligation (that is, a clause forcing them to serve exclusively Interbrew's beer) vis-à-vis Interbrew will in the future be limited to draught pils. The exclusivity covers the Stella, Jupiler and Safir lager brands which are served from 30 liter or 50 liter kegs. Only in the unlikely event that Interbrew's draught pils would account for less than 50% of the outlet's total beer throughput, the outlet has to ensure that it purchases the shortfall also from Interbrew's portfolio of brands. Therefore, these outlets will now be able to buy from Interbrew's competitors: a) any draught beer other than pils and b) any beer (including pils) in bottles or cans. A loan agreement is an agreement whereby Interbrew provides independent outlets with a loan, a bank guarantee or valuable

material (such as cooling installations). It usually has a maximum duration of five years.

In addition, the outlets can now also terminate their loan agreement more easily. They can do so at any time before normal termination after five years provided they give Interbrew three months' notice. If the outlets do so, they (or the competing brewer from whom they intend to buy in future) must of course repay the outstanding capital of the loan or the remaining value of the material (or return this material in kind). However, in the event of their having to repay the outstanding capital of the loan, they do not have to pay the usual penalty the lender is normally entitled to claim from them for early repayment.

Lease or sublease agreements

The non-competition obligation of the more than 3000 other outlets which operators lease or sublease from Interbrew will be limited to draught beer. This gives competing brewers the opportunity to sell their bottled or canned beer, including pils, to these outlets. In addition, the outlet operator will have the right to serve one draught beer other than pils as "guest beer". Interbrew will be obliged to accept such a guest beer even if it brews this type of beer (for example, white beer, amber beer, and so on) itself. The Commission accepts that this guest beer will be supplied by Interbrew or a wholesaler appointed by it. The Commission will review the impact of the guest beer clause after one year of operation to verify whether it has given competing brewers a real entry into Interbrew's lease and sublease outlets.

Under a lease or sublease agreement lasting for at least nine years, Interbrew owns the outlet and lets it to an independent operator or it is the principal lessee of this outlet and sublets it to such an operator.

Commission's approval

The Commission has informed Interbrew that its amended agreements no longer lead to an appreciable restriction of competition. Before the Commission reached its final position, it collected and examined comments from other stakeholders in the sector (in particular competitors, wholesalers and outlets). Interbrew has undertaken to implement the amended agreements within two months after the Commission's approval.

The competition policy context

Interbrew is the largest Belgian brewer and holds an overall market share of roughly 56% of the Belgian outlet sector. Due to this market share, it is the only Belgian brewer whose exclusivity agreements are clearly not covered by the Block Exemption Regulation on Vertical Agreements from the end of 1999. This Block Exemption Regulation allows a brewer with a market share not exceeding 30% to oblige outlets to buy all their beer from it in exchange for a five year loan or for as long as they would lease or sub-lease the premises from it. This new regime came into force on 1 January 2002.

In the past, Interbrew had the right, like any other brewer, to tie outlets without much legal constraint. Indeed the previous Block Exemption Regulation provided in practice a safe haven even for brewers with very substantial market shares. In view of the changed situation, Interbrew notified its brewery contracts and offered some amendments. The Commission found these amendments insufficient. After lengthy discussions and additional concessions made by Interbrew, the Commission is now satisfied that the amended brewery contracts no longer restrict competition in an appreciable manner.

Dealing with the underlying case the Commission has kept the Belgian competition authority informed throughout the procedure. It also responded to a request from the Dutch competition authority (NMa) to obtain guidance from it in the context of its handling of brewery contracts notified by Heineken, the leading Dutch brewer with a market share also exceeding 30%. The NMa approved Heineken's amended brewery contracts on 29 May 2002, broadly following the line suggested by the Commission.

In view of the need to intensify contacts with the National Competition Authorities (NCA) through the European Competition Network (ECN), the Commission intends to organise a workshop with them in the near future. This will provide it with an opportunity to ensure a coherent application of the principles underpinning its above mentioned Block exemption and its corresponding Guidelines on vertical restraints to brewery contracts throughout the Community. ■

State Aid: the Scott Paper Case

The Court of First Instance has confirmed the Commission's decision of July 2000 to recover State aid granted illegally to the Scott Paper Company in August 1987. In the judgment, the Court endorses the Commission's interpretation of the 10-year limitation rule and concludes that recovery of the aid granted to Scott Paper in August 1987 was not time-barred. The Court upholds the Commission's view that a request for information it sent in January 1997 effectively interrupted the 10-year limitation period. The judgment concerns aid granted by City of Orléans and the Conseil Général du Loiret to the US company Scott Paper in August 1987 and was intended to induce Scott Paper to locate a new factory in Orléans and not in any other part of France or the European Union. Most of the local authorities' aid was in the form of a land sale at below market price.

Source: Commission Statement IP/03/532, dated 10 April 2003

The texts referred to on page 116 of this issue are published at the following website:

http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments

[General Note. The two reports below are not directly connected. However, what they have in common is the fact that both involve the French government's alleged failure to implement European Community Directives in the field of telecommunications, with particular reference to the Directives' aim to encourage greater competition. The cases also involve the Commission's intention to initiate legal proceedings against the French government: in the first case, on account of a failure to implement a decision by the Court of Justice, and in the second, on account of a failure to implement a Directive. The procedure for initiating legal proceedings against a Member State's government is laid down in Article 228 of the EC Treaty. Before the Commission can take legal action against the Member State, it must first prepare a "reasoned opinion".]

The French Telecommunications Case (1)

COMPETITION (TELECOMS): COMMISSION STATEMENT

Subject: "Free competition"
Implementation of directive
Reasoned opinion
Transparency
Proportionality

Industry: Telecommunications (universal service and interconnection)

Source: Commission Statement IP/03/515, dated 8 April 2003

(Note. Competition in the postal sector is largely dependent on the arrangements made for financing a universal postal service. This was the subject of a Directive, which was in turn the subject of proceedings in the Court of Justice against the French Republic. The Court's held against France; and the Commission is now threatening legal action unless the Court's judgment is fully implemented.)

A judgment handed down by the Court of Justice of the European Communities in December 2001 criticised France's system for financing universal service in telecommunications. Almost sixteen months later, the Commission has concluded that insufficient remedial action has been taken. It has therefore decided to serve formal notice on the French authorities to comply fully with the Court's ruling. The Court of Justice judgment of 6 December 2001 confirmed all the complaints put forward by the Commission when it started proceedings in April 2000. The Court took the view that the lack of transparency in certain aspects of the French arrangements and the methods used to calculate some cost components of universal service were incompatible with the Directives on full competition in telecommunications markets and on interconnection.

Following this judgment, the French Government altered some of the calculations of the net cost of universal service between 1997 and 2000. These corrections produced a significant reduction in the financial cost of universal

service, which was divided by four over that period. However, the French authorities have, in the Commission's view, failed to comply fully with the Court of Justice judgment. First, the total respective contributions by the different service providers to financing universal service from 1997 to 2001 have still not been published, contrary to the requirements of the Directive on interconnection. Second, the method used to calculate the "C1" net cost component of universal service from 1998 to 1999 is still not transparent. Third, the arrangements for the settlement of overpayments by alternative service providers to France Télécom or to the universal service fund are not appropriate. In particular, the French Government initiated recovery of the alternative providers' nett contributions for 2002 in the summer of that year, even though those providers' claims for 2001 pursuant to the Court judgment had still not been established and the amounts paid to France Télécom between 1997 and 1999 had not been refunded to them.

One of the main objectives of the procedure which culminated in the Court of Justice had been to ensure that service providers who had contributed to the universal service fund could in practice rapidly recover the overpayments. The Commission is thus forced to conclude that one of the essential aspects of the Court judgment has not been given full effect. The Commission has accordingly decided to serve formal notice on the French authorities pursuant to Article 228 EC. The French Government has one month in which to reply. If France still fails to comply with the Court of Justice judgment in respect of the issues raised, the Commission will send the French authorities a reasoned opinion and, if appropriate, will ask the Court to impose a fine. The Commission's aim is not to call into question the principle of the financing of universal service in France; it is merely seeking to ensure that the Court judgment is complied with in full.

Directives EC/19/96 (on "full competition") and EC/33/97 (on "interconnection") authorise the establishment of mechanisms for sharing the net cost of universal service when providing this service represents an unfair burden on the operator in question. However, Member States availing themselves of this option must comply with various provisions designed to ensure that the cost of universal service is assessed in a transparent and proportionate way. The purpose of these provisions is to guarantee that the financing mechanism does not result in excessive charges being made on the competitors of the service provider responsible for universal service to the latter's benefit.

A financing mechanism of this type was set up in France as early as 1997. French law identifies three universal service cost components, referred to as C1, C2 and C3. Until 2000 more than 85% of contributions by alternative service providers (telecommunications operators and internet access providers) took the form of direct payments to France Télécom (C1 and C2), the balance (C3) transiting via a universal service fund administered by the Caisse des Dépôts et Consignations (Consignments and Loans Fund). Since 2000 all payments have been made via the universal service fund. France and Italy are the only Member States in which responsibility for providing universal service effectively results in compensation being paid to the former telecommunications incumbent.

The Commission first started administrative proceedings against France in 1998, followed by a referral to the Court of Justice on 17 April 2000 comprising six detailed complaints. The Court ruled against France on 6 December 2001 in respect of all six complaints presented by the Commission. During 2002, while not amending the Decree of 13 May 1997 governing universal service, the French authorities undertook to recalculate the figures for previous years. However, they have failed to take action on all aspects of the Court ruling. In particular, the issue of refunds to service providers for the C1 and C2 components from 1997 to 1999 has not been resolved.

The French Telecommunications Case (2)

COMPETITION (TELECOMS): COMMISSION STATEMENT

Subject: "Free competition"
Implementation of directive
Reasoned opinion
Transparency
Equal treatment
Complaints

Industry: Telecommunications; cable networks

Source: Commission Statement IP/03/520, dated 9 April 2003

(Note. In view of a complaint by the trade association representing cable network operators, the Commission has taken the view that these operators are not given equal treatment in France when competing to provide access to telephone and Internet services; and that this inequality has led to the tiny proportion of access services these operators are currently able to provide. Given that the combined effects of two Directives in this field were intended to guarantee greater competition in this sector, the Commission considers that France has failed to comply with the Directives; it has accordingly issued a "reasoned opinion".)

On 8 April 2003 the Commission decided to send France a reasoned opinion for having failed to comply with the "Full Competition" and "Cable" Directives by maintaining special arrangements for the provision of telecommunications services by cable. The combined effect of the two Directives for cable operators is to remove restrictions on the provision of telecommunications services on cable networks, which until recently were essentially dedicated to the distribution of television programmes.

The two Directives required Member States to allow cable television network operators to provide telecommunications services under the same conditions as any other telecommunications operator. One of the objectives of the Cable Directive was to develop competition between infrastructures for the provision of telecommunications services. As far as the regulatory framework is concerned, the Directive stipulates that authorisation procedures must be identical if the same

services are being provided, regardless of whether the service is provided on cable networks or on public telecommunications networks.

The Commission considers that France has not complied with the Directives, since on two important points it has maintained separate regulatory arrangements for telecommunications services provided by cable operators. In the first place, the provision of telephone services by cable operators requires systematic prior consultation of all the municipalities concerned, which then issue an opinion. For the provision of other telecommunications services, such as Internet access, the cable operators are required to inform the relevant municipalities in advance. These requirements, which do not apply to the other telecommunications operators, seriously handicap cable operators' business and discourage them from attempting to move into these fields. One cable operator was actually refused permission to provide telephone services in a number of municipalities after they had issued an unfavourable opinion.

In addition, cable network operators do not enjoy the same rights to use public facilities as the operators of other telecommunications networks. In particular, the charges for use of public facilities are not subject to the same ceilings. These various handicaps have prevented the cable networks from developing fully as an infrastructure for the provision of telecommunications services.

Directive EC/51/95 (the Cable Directive) was designed to remove restrictions on the provision of telecommunications services by cable television network operators. Together with Directive EC/19/96 (the Free Competition Directive), it was intended to have the effect of allowing cable television network operators to provide telephone and Internet access services under the same conditions as any other operator using any other infrastructure. Furthermore, the two Directives provided that cable operators must be able to have non-discriminatory access to infrastructure in establishing their networks. The purpose of these provisions was to stimulate competition in the telecommunications sector by fostering the growth of telecommunications services provided on platforms other than the traditional telephone networks.

Failure to comply with the Directives and the maintenance of discriminatory regulations that are unfavourable to cable operators help to explain the minor role played by cable operators in the telecommunications sector. Cable network operators account for less than 0.2 % of access to fixed telephony services, less than 15% of high-speed Internet access and less than 4% of Internet access markets as a whole.

The Commission's investigation is in response to a complaint which the French Association of Multi-Service Network Operators (AFORM) lodged with the Commission in October 2001. In its reasoned opinion adopted on 8 April, the Commission gives France two months to bring its legislation into line with Community law. ■

[General Note. This report combines commentaries on the Gasunie and DONG Cases. The Commission has also published a survey of the series of cases leading to the liberalization of the gas market throughout the European Union.]

MARKET ACCESS (GAS): THE GASUNIE CASE

Subject: Market access
Transparency
Complaints

Industry: Gas

Parties: Nederlandse Gasunie NV
Marathon

Source: Commission Statement IP/03/547, dated 16 April 2003

(Note. This a classic case involving market access: in this instance, access to a gas pipeline network. By offering certain undertakings to the Commission, the Dutch gas company concerned has avoided penalties; and, in addition to the main undertaking regarding access, an important subsidiary undertaking provides for the requisite degree of transparency. The Commission's investigations were prompted largely by complaints made by a gas producer.)

The Commission's competition department has decided to close its probe into the suspected refusal by Dutch gas company Gasunie to grant access to its pipeline network to the Norwegian subsidiary of the United States oil and gas producer Marathon in the nineties. Network access is a key plank of European Community legislation to create a European single market for gas; and any unjustified refusal to grant access is a violation of the Community's competition rules. Marathon experienced difficulties in a number of European countries; but Gasunie, like Thyssengas in the past, has taken measures to improve transparency of its access regime and to better handle access requests. The investigation continues regarding the behaviour of three other incumbent gas companies in Europe, which had rejected Marathon's access request.

According to the Commission, this second breakthrough in the Marathon case shows how competition policy can contribute effectively to ensure a fair and non-discriminatory access to national gas pipelines. Access to gas pipelines is essential to the introduction of competition in the European gas markets to the benefit of industry users and, ultimately, the consumer. The Commission thanks the Dutch regulator for its co-operation in this case and hopes to continue working with other national authorities, particularly in France and Germany, where progress in the access regimes is most needed.

The Marathon case concerns the alleged joint refusal to grant access to continental European gas pipelines in the nineties by a group of five European gas companies, among them NV Nederlandse Gasunie and Thyssengas GmbH, a German gas company with which the Competition Department reached a settlement in late 2001. The other companies concerned with the case are large German and French operators. The case was originally triggered by a complaint from the Marathon's Norwegian subsidiary.

The European gas directive of 1998 provides for a so-called Third Party Access (TPA) regime: that is, a regime allowing gas suppliers and shippers to use the gas pipelines owned by the incumbent operators in the market. Refusal to grant access can also be, and has in the present case been, tackled as a potential abuse of a dominant position or, when the refusal is carried out jointly, as a restrictive concerted practice.

Following lengthy discussions with the Commission, Gasunie has undertaken on behalf of its transportation arm Gastransport Services to increase transparency as regards access to its network, to manage better the capacity available and to speed up its handling of access requests. This has led the Commission to close the case, since the undertakings will contribute to a better functioning of the gas transmission market in the Netherlands. The Commission co-operated closely with the Dutch energy regulator Dte in its handling of the case. Dte plays an active role in the Dutch market and will continue to monitor Gasunie's access regime.

The main undertakings entered into by Gasunie are as follows.

- To improve the transparency of its access regime Gasunie will publish on its Internet site - in absolute figures - the contracted transport capacity at all entry and all major exit points of its gas network. It will also carry information about the capacity still available. This undertaking relates not only to cross-border points, but also to domestic/national entry/exit points and will make it easier for shippers to obtain information about available transmission capacity.
- As regards balancing, Gasunie will assist shippers with a flexible supply source to avoid a situation in which the input and withdrawal of gas into the system are not identical or deviate from the forecasted volumes. In this respect Gasunie will introduce an online balancing system to avoid a situation in which suppliers or shippers are charged high prices for the gas supplied by Gasunie to cover an unexpected increase or decrease in consumption by one of their customers.
- Finally, Gasunie undertakes to improve its handling of access requests by introducing online screen-based booking procedures, which will lead to the elimination of the, at times lengthy, response times. Online bookings are particularly relevant for short term trading.

In addition to these main undertakings, Gasunie agreed to make available the opportunity to link other pipelines to its own pipeline system. For further details, interested parties can consult Gastransport Services' website shortly.

Following explicit requests from the Commission's Competition Directorate General as well as the Dutch regulator Dte, Gasunie has already improved its access regime. The improvements relate, in particular, to the introduction of short-term transport contracts for one day, the introduction of interruptible transport contracts for congestion scenarios and the introduction of a bulletin board allowing traders to bundle their access requests and balancing needs. The Competition Department welcomes Gasunie's early implementation of these undertakings.

The Commission services also accepted Gasunie's undertaking to maintain an entry/exit system for its access regime. The advantage of such a system is that shippers are obliged to book capacity only at the relevant entry and exit points and do not have to pay for gas transports along - often fictitious - contractual transport routes, which do not coincide with the physical gas flows. In this respect the Dutch system is superior to the system applied in other Member States.

The undertakings came into force on 21 April 2003 and will remain in place until January 2007. A trustee, who will report regularly to the Commission services, will monitor compliance.

The investigation was triggered by a complaint against five European companies. The investigation continues with regard to the other three companies in France and Germany. The complaint was later withdrawn after Marathon and the European companies reached an out of court settlement, but DG Competition continued its investigation as the settlement did not remove the suspected infringements.

The DONG Case

SUPPLY AGREEMENTS (GAS): THE DONG CASE

Subject: Supply agreements

Industry: Gas

Parties: DONG (Danish Oil and Natural Gas)
DUC (Danish Underground Consortium)
Shell
AP Møller
Chevron/Texaco

Source: Commission Statement IP/03/566, dated 24 April 2003

(Note. Gas producers on the Danish market combined in a group, DUC, to supply gas to the distributor, DONG. The agreement had certain strings attached. One of them was an obligation on DUC, to which the Commission objected, to offer all their gas first to DONG. More broadly, the Commission objected to the joint marketing agreements which, in the Commission's view, fell

outside the scope of the Block Exemption Regulation on Specialisation Agreements.)

The Commission's competition department and the Danish Competition authority have settled an anti-trust investigation involving the Danish gas supplier DONG and the country's main gas producers Shell, A.P Møller and ChevronTexaco after the latter undertook to market their production individually. DONG also agreed to release the producers, grouped in a cooperative called DUC, from the obligation to offer all their gas first to DONG. The successful outcome follows the settlement reached in 2002 with the Norwegian gas producers and is another step towards the creation of a European single market for gas, which will lead to improved services and lower prices for businesses and consumers alike. The investigation also provides a good example of how the Commission and the national competition authorities can work together to foster a more competitive business environment. The Commission considers that the undertakings received will contribute to the creation of a competitive gas market in Denmark and neighbouring countries.

The investigation by the Commission's Competition Directorate General (DG Competition) of the joint marketing of North Sea gas by the parties to the Danish Underground Consortium (DUC) started in July 2001. DUC, which accounts for 90% of Danish gas production, comprises Shell (46%), A.P Møller (39%) and ChevronTexaco (15%). The investigation also concerned certain aspects of the supply relationship between DUC and DONG as established in Gas Sales Agreements in 1979, 1990 and 1993 between DONG and each of the DUC partners. By means of these contracts the DUC partners sell DONG enough gas to satisfy the entire Danish demand and to supply additional volumes to Sweden and Germany. In the course of its investigation the Commission learnt that these Gas Supply Agreements had been notified to the Danish Competition Authority.

The Commission initially focused its attention on the joint marketing arrangements and DUC's understanding that the scheme was covered by Regulation EC/2658/2000, which exempts certain forms of joint distribution (the Specialisation Block Exemption). DG Competition disagreed with the assessment of the parties and, following the example of the Norwegian gas companies in the GFU case, the DUC partners - while reserving their legal position - agreed to cease their joint marketing arrangements and to market their gas individually in future.

To facilitate the establishment of new supply relationships the DUC parties will also offer in total seven billion cubic meters of gas for sale to new customers over a period of five years starting 1st January 2005 or earlier if possible, that is to say, when new gas volumes are available. On an annual basis this corresponds to approximately 1.4 BCM, or 17% of the total production of the DUC parties. When accepting this undertaking, DG Competition noted that a significant number of customers inside and outside Denmark have actively looked for alternative sources of supply in the past and continue to do so today.

Both the Commission and the Danish competition authorities expect that this undertaking will facilitate bringing competition to the Danish market, which is still dominated by DONG, and will increase competition in neighbouring Netherlands and Germany. It is significant that the DUC parties and DONG have decided to build a new pipeline linking the Danish gas fields with the existing infrastructure to the European continent. This new pipeline is expected to be operational by 1 January 2005 at the latest.

In the course of the investigation, DG Competition and the Danish competition authority, which - following the explicit request of the parties - participated in the settlement discussions, also established that the gas supply agreements concluded between the DUC partners and DONG contained certain provisions, which were considered to be anti-competitive. These will now be ended. They include a provision obliging DONG to report to the DUC partners the volumes sold to certain categories of customers to obtain a discount or special prices and the obligation imposed on the DUC partners to offer all their future gas finds first to DONG. In the latter respect DONG undertook to refrain from buying the volumes dedicated by the DUC partners to new customers. DONG also undertook not to buy any new DUC gas during the period from today to three years after the commissioning of the new pipeline.

Moreover DONG undertook to release the DUC partners from the "necessary adjustment mechanism", which it interpreted as a right to reduce the volumes bought from the DUC partners when these start selling gas into the Danish market. DONG argued that the supply contracts with the DUC partners contained a "take-or-pay provision" obliging DONG to pay for the gas, even if not taken. DONG claimed that it would need the protection of the Danish market in order to respect the take-or-pay obligations. DG Competition and the Danish competition authority accepted this argument as long as DONG's ability to sell the gas outside Denmark were reduced due to limited interconnections. While reserving its legal position, DONG undertook to release the DUC partners from the clause six months after the commissioning of the new pipeline.

To facilitate the market entry of the DUC partners and potentially other suppliers into Denmark, DONG also undertook to introduce an improved access regime for its off-shore pipelines linking the Danish gas fields with the Danish main land. In this respect, DONG undertook in particular to increase the transparency of the system by publishing information on available capacity, to allow for short term trading in line with the access regime applying to its on-shore pipelines and to introduce interruptible transport contracts.

The Danish competition authority will monitor whether the DUC partners and DONG respect their undertakings to the two competition authorities. A non-confidential version of the undertakings will be published on the Internet site of the companies concerned. ■

PROCEDURE (ALL INDUSTRIES): COMMISSION STATEMENT

Subject: Procedure

Industry: All industries

Source: Commission Statement IP/03/603, 30 April 2003

(Note. It is useful for practitioners and others to have some knowledge of the internal procedures of the Commission in its anti-trust role; and the statement by the Commission of its intentions in the forthcoming year – dominated by the likely consequences of enlargement of the European Union – is a helpful guide.)

The Commission has decided on the first major re-organisation of its Directorate General for Competition for 13 years. Prompted by the modernisation of the European Communities' anti-trust rules, and reforms in merger and state aid control, the re-organisation of the DG is designed to increase the efficiency of the Commission's competition law enforcement in due time for Enlargement on 1st May 2004. Responsibility for the handling of merger and anti-trust cases will progressively be integrated into sectoral Directorates. A new enforcement unit is created to enforce the Commission's state aids decisions and ensure recovery of illegal subsidies. The re-organisation is designed to pave the way for the Commission to enforce competition law in a Union of 25 Member States and to raise the standards of its enforcement activity across the board. It will spread the best practice developed by the Merger Task Force throughout the Department, while making better use of the specific sectoral expertise of the anti-trust units; and it will establish a sound basis for co-operation between the Commission and national competition authorities.

The new organisation of DG Competition is based on a sector-specific organisation of merger control. Merger control units will be integrated into four sector-specific anti-trust Directorates. A smaller Merger Task Force will remain to ensure effective co-ordination of merger control across the DG. The sector-specific responsibilities of anti-trust and state aid units have also been revised with a view to balancing their workload. Finally, a new unit has been created devoted to the enforcement of the Commission's state aids decisions. By May 2004, provided the greater sectoral emphasis provides overall benefits, the transition will be completed. Mergers will then be dealt with in five sectoral anti-trust and merger directorates.

The re-organisation aims at enhancing sectoral knowledge of markets in view of the critical importance of dialogue with Member States' competition authorities and industry on important sectoral developments. It is also designed to ensure effective use of the Department's scarce staff resources and increased flexibility in their allocation between merger and anti-trust work. In parallel, the reorganization aims to strengthen internal decision-making procedures. The creation of a team headed by a new Chief Competition Economist, reporting

directly to the Director General, aims to strengthen in-house economic expertise. New panel procedures also introduce systematic internal scrutiny of decisions on major competition cases by a team whose main role will be to look at each of these cases from a fresh point of view.

Challenges ahead

DG Competition is faced with three major challenges in the years ahead :

- The coming into force on 1st May 2004 of the new procedural rules for the enforcement of the anti-trust rules set out in Articles 81 and 82 of the Treaty;
- The on-going negotiation in Council of a recast Merger Regulation which, the Commission hopes, will also come into force on 1st May 2004;
- Preparing a comprehensive reform package in the state aid field during 2004 designed to streamline procedures and to allow the Commission to focus on those state aids which are most likely to distort competition.

The forthcoming Enlargement will have significant consequences for DG Competition. Based on an analysis carried out in 2001, the estimated increase in workload will be between 30 and 40%.

The most recent judgments of the Court of First Instance, particularly in the fields of merger and State aid control, have also drawn attention to the issue of the burden of proof incumbent on the Commission in adopting negative decisions. This has led the Commission to review and strengthen internal procedures to ensure the rigour and objectivity of the legal and economic analysis at the basis of its decisions as well as to guarantee respect for due process.

The Merger Task Force

Created in 1990 when the European Merger Control Regulation came into force, the Merger Task Force has examined more than 2000 notified mergers to deadlines which are amongst the strictest deadlines in the world. More than 95% of mergers have been cleared within one month, in the so-called first phase examination. Only 18 mergers have been prohibited since 1990, representing less than 1% of the total notified concentrations.

The size of the Merger Task Force has grown steadily since its inception, although far from matching the increase in annual merger notifications, for example the more than doubling between 1995 and 2002. Today, nearly 60 graduate case-handlers are employed in a total staff of 96. Today's sectoral anti-trust directorates (Directorates C-F) account for a total of some 230 staff members, of whom roughly 160 are graduate case-handlers. Some 135 members of staff currently work on state aids within DG Competition; roughly 85 are graduate case-handlers. In total, DG Competition employs slightly more than 600 members of staff. In this first phase of the re-organisation of merger and anti-trust work, roughly a quarter of the present Merger Task Force staff will be re-deployed to merger units within the sectoral anti-trust directorates. ■

MERGERS (ALL INDUSTRIES): COMMISSION GUIDELINES

Subject: Mergers
Undertakings by parties
Divestiture
Trustee Mandates

Industry: All industries

Source: Commission Statement IP/03/614, dated 2 May 2003; Commission's Explanatory Note; Commission Guidelines on Divestiture Commitments and on Trustee Mandates

(Note. In recent reports on cases in which the parties to mergers and acquisitions have offered undertakings, often involving some form of divestiture, making it easier for the Commission to approve the proposed operations, there has been some discussion of the criteria governing the form and content of undertakings of this kind. The Commission has now codified these criteria in the form of guidelines. The Explanatory Note is set out below; the full texts of the Guidelines are on the Internet (see page 104). The Commission texts use the word, "commitments", when the word "undertakings" would be more appropriate in English. The Commission may have felt that this could be confused with the use of the word "undertakings" in the sense of companies and other legal entities.

The guidelines containing standard texts for divestiture commitments and trustee mandates are designed to help merging parties and their legal representatives in their dealings with the Commission and are designed to enhance efficiency and transparency of merger proceedings. Under the Merger Regulation companies can offer commitments in order to enable the Commission to clear a merger or an acquisition which otherwise would create or strengthen a dominant position. Timing is crucial under the legally-binding timetable set in the Regulation when merging parties reach the stage of offering commitments to the Commission. To increase efficiency, consistency and transparency of the negotiation and implementation of remedies, the Commission has developed a Standard Model for Divestiture Commitments and a Standard Model for Trustee Mandates under the Merger Regulation. These two standard texts will serve as best practice guidelines for the negotiation of remedies under the Merger Regulation.

These best practice guidelines will streamline the negotiation of the terms and conditions for commitments and trustee mandates and will relieve the merging parties of having to negotiate terms and conditions for such commitments from scratch under tight time constraints. The Standard Models are neither intended to provide an exhaustive coverage of all issues that may become relevant in a merger case, nor are they legally binding upon parties. Rather, they contain all standard provisions that should be included in divestiture commitments and trustee mandates and leave the flexibility to adapt the texts to the case in question. The standard models rely upon divestiture commitments as the common form of

remedy in merger cases. These commitments are thus most suited for a standard texts. However, it should be emphasized that the Commission will consider the acceptability of other types of commitments in appropriate circumstances.

The standard models are based upon the experience the Commission has gained in fashioning remedies in the last 12 years since the implementation of the Merger Regulation and on the Commission's remedies policy as set out in the Notice on Remedies, adopted in December 2000. They also take account of the results of the consultation for the draft model texts launched by the Commission last year. The Commission received a considerable number of positive replies from National Competition Authorities, the business and legal community as well as from trustees. The respondents acknowledged that the standard models would expedite the proceedings and allow the merging parties to concentrate more on the actual substance and implementation of commitments. Following the consultation, the standard texts were substantially amended.

The Standard Model for Divestiture Commitments describes all requirements for achieving full and effective compliance with divestiture commitments. More specifically, it is designed (i) to describe clearly the divestiture procedure, the business to be divested, and the obligations of the parties in relation to the divestment business for the interim period until divestiture has been completed and (ii) to set out the qualifications which the Commission requires for an acceptable purchaser for the divested business. The Standard Models for Trustee Mandates sets out the role and function of both types of trustees referred to in the Standard Commitments, that is the Monitoring and the Divestiture Trustee. It prescribes in detail the role and function of the trustee in the process in order to enable the trustee to expedite compliance with the commitments.

The Commission expects that the standard texts, as well as the explanatory note, will evolve, based on ongoing practice, and will regularly be up-dated, taking into consideration both the developments of the Commission's remedies policy and the experience gained from working with the merging parties and trustees.)

Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and Trustee Mandates

1. The European Commission's model texts for divestiture commitments and trustee mandates are designed to serve as best practice guidelines for notifying parties submitting commitments under the EC Merger Regulation. (Council Regulation EEC/4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended.) These texts are (1) the model to be used for divestiture commitments (the "Standard Model for Divestiture Commitments" or the "Standard Commitments"); and (2) the model for the mandate of the two types of trustees referred to in the Standard Commitments, that is, the mandate appointing monitoring and divestiture trustees (the "Standard Trustee Mandate").

2. The model texts (the "Standard Models") are based upon the experience the Commission has gained to date in fashioning remedies from previous merger cases and are drafted in line with the remedies policy set out in the Commission's

Notice on Remedies 2 (the "Remedies Notice"). The Standard Models are neither intended to provide an exhaustive coverage of all issues that may become relevant in all cases, nor are they legally binding upon parties in a merger procedure. Rather, they contain the elements for all standard provisions that should be included in commitments and trustee mandates relating to divestitures. In providing a framework for commitments and trustee mandates to be submitted in concrete cases, the Standard Models leave the flexibility to adapt the texts to the specific requirements of the case in question.

3. The Standard Models are designed to apply to all remedy proceedings in both Phase I and Phase II, therefore to all Commission decisions according to Articles 6(2) and 8(2) of the Merger Regulation. The Standard Models deal specifically with divestiture commitments inasmuch as the Commission's Remedies Notice stipulates that divestiture commitments are normally the preferred form of merger remedies; they are also the most common. However, it should be underlined that the Commission will consider the acceptability of other types of commitments in appropriate circumstances, as set out in the Remedies Notice. (See Commission Notice on remedies acceptable under Council Regulation EEC/4064/89 and Regulation EC/447/98.) Individual provisions contained in the Standard Models can be used in cases involving such other types of commitments.

4. Finally, it is expected that the text of these models will evolve, based on ongoing practice, and will be regularly up-dated by the Commission, taking into consideration both the developments of the Commission's remedies policy and the experience gained from working with the merging parties and trustees in future matters.

The Purpose of the Standard Models

5. The Commission recognises that timing is crucial when merging parties reach the remedies stage in merger review procedures, where they offer commitments in order to resolve the Commission's competition concerns in a given case. Through the use of standardised models, the merging parties and the Commission will be relieved of the heavy demands – both in terms of time and resources – that would otherwise be required to negotiate the standard terms and provisions for commitments and trustee mandates under tight time constraints. The use of standardised models will expedite the proceedings and allow the merging parties to concentrate more on the actual substance and implementation of the commitments.

6. The use of the standard models will ensure consistency across cases and will thereby contribute to increasing the level of transparency and legal certainty for the merging parties offering commitments to the Commission.

Overview of the Contents of the Standard Models

7. The Standard Model for Divestiture Commitments sets out all requirements for achieving full and effective compliance with divestiture commitments offered by the merging parties (the "Parties") to obtain a clearance decision. More

specifically, this Model is designed (i) to describe clearly the business to be divested ("Divestment Business"), the divestiture procedure and the obligations of the parties in relation to the Divestment Business for the interim period until divestiture has been completed, (ii) to set out the various responsibilities that the merging parties will thereby have, respectively, to the Commission, the Trustee, and the Divestment Business; and (iii) to enshrine the importance which the Commission places upon requiring an acceptable purchaser for the Divestment Business in order to ensure the viability and competitiveness of the new entity in the market where the divestiture takes place.

8. The Standard Model for Trustee Mandates sets out the role and functions of the Trustee, as provided in the Standard Commitments, in a contractual relationship between the Parties responsible for the divestiture and the Trustee. As the Commitments set out the basis for the responsibilities of the Trustee, the Standard Trustee Mandate has been prepared in conformity with the requirements laid down for the Trustee in the Standard Model for Divestiture Commitments.

9. Although the Standard Trustee Mandate is a bilateral contract between the Parties responsible for the divestiture and the Trustee, this document forms the basis for a tri-partite relationship among the Commission, the Trustee, and the Parties. The relationship between the Parties and the Trustee is not a traditional trusteeship. The Trustee rather benefits from a status which makes it independent from the Parties and which is characterised by the role of the Trustee to monitor (Monitoring Trustee) or even to effectuate (Divestiture Trustee) the Parties' compliance with the commitments. Accordingly, the Parties are not entitled to give instructions to the Trustee, whereas the Commission is allowed to do so. This specific relationship is also confirmed by the fact that the Trustee Mandate requires the Commission's approval.

10. The Standard Trustee Mandate is designed (i) to facilitate the smooth and timely appointment of the Trustee and the approval of the Trustee Mandate; (ii) to clarify the relationship among the Commission, the Trustee, and the Parties; and (iii) to set out the tasks of the Trustee in the process in order to enable the Trustee to expedite compliance with the commitments. Whereas the Standard Trustee Mandate defines the role of a Monitoring and a Divestiture Trustee in one text, they can be assigned to different Trustees in practice.

11. In providing guidance for the interpretation of the Standard Texts, a certain hierarchy is established. The Standard Trustee Mandate should be interpreted in the light of the Standard Commitments, as they lay the foundation for the application of the Trustee Mandate. To the extent that they are attached as conditions and obligations, the commitments are to be interpreted in the light of the respective Commission decision. Moreover, both Standard Texts should be interpreted in the general framework of Community law, in particular in the light of the EC Merger Regulation, and by reference to the Commission's Remedies Notice setting out the Commission's remedies policy.

Description of the Provisions of the Standard Models

12. The most important provisions contained in both Standard Models are briefly set out below.

Standard Model for Divestiture Commitments

13. The Standard Model for Commitments has the following main elements.

14. Section A contains a definitions section.

15. Section B contains the commitment to divest and the definition of the Divestment Business. After spelling out the general obligation to divest the Divestment Business as a going concern, paragraph 1 describes the divestiture procedure, which may take two phases. The Commitments provide that in the first phase (that is, the Divestiture Period), the Parties have the sole responsibility for finding a suitable purchaser for the Divestment Business. If the Parties do not succeed in divesting the business on their own in the Divestiture Period, then a Divestiture Trustee will be appointed with an exclusive mandate to dispose of the Divestment Business at no minimum price, in the Extended Divestiture Period. The individual deadlines are determined in the definitions section. The experience of the Commission has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the Divestment Business will be exposed to an extended period of uncertainty. The Commission will normally consider a period of around 6 months for the Divestiture Period and an additional period of 3 to 6 months for the Extended Divestiture Period as appropriate. These periods may be modified according to the particular requirements of the case in question.

16. The divestiture commitment will take a special form in those cases where the Parties propose an up-front buyer. The Parties commit not to implement the proposed concentration unless and until they have entered into a binding agreement with a purchaser for the Divestment Business, approved by the Commission. The qualification of the buyer are the same as in other divestiture commitments. The up-front buyer concept has been applied in several cases (Cases COMP/M.2060 – *Bosch/Rexroth*; COMP/M.1915 – *The Post Office/TPG/SPPL*; COMP/M.2544 – *Masterfood/Royal Canin*) and will be used in the specific circumstances as described in the Notice (Paragraph 18 of the Remedies Notice). The structure of the divestiture commitment also needs to be adapted in cases of alternative divestitures, in particular "Crown Jewels" structures, i.e. structures in which the Parties commit to divest a very attractive business if they have not divested the originally proposed business until the end of a period fixed in the commitments. The circumstances in which the Commission will accept alternative divestiture commitments are also set out in the Remedies Notice (Paragraphs 22, 23 of the Remedies Notice).

17. The divestiture commitment includes the commitment not to re-acquire direct or indirect influence over the Divestment Business (paragraph 3). This re-acquisition prohibition is limited to ten years after the date of the decision and serves to maintain the structural effects of the Commitments. The Commission

may grant a waiver if the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the concentration compatible with the common market.

18. Section B, together with the Schedule to the Commitments, defines what is included in the Divestment Business. The clear identification of the Divestment Business is of great importance as thereby the scope of the divestiture and of the hold-separate obligations are defined. As set out in the Notice, the Divestment Business is considered to be an existing entity that can operate on a stand-alone-basis (The importance of the divestiture of an on-going business for the success of the remedy has also been underlined by the FTC in a published study entitled *A Study of the Commission's Divestiture Process*, prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, p.10ff.) The Divestment Business is the minimum which is to be divested by the Parties in order to comply with the Commitments. In order to make the package more attractive to buyers, the Parties may add, on their own initiative, other assets (Cf. paragraph 21 of the Remedies Notice). The Divestment Business must include all the assets and personnel necessary to ensure the viability of the divested activities. Whereas this principle is set out as an undertaking of the Parties in paragraph 3 of the Standard Commitments, the Parties have to give a detailed factual description of the Divestment Business in the Schedule to the Standard Commitments.

19. The Divestment Business must comprise the Personnel and the Key Personnel retained by the Divestment Business as well as the personnel providing essential functions for the Divestment Business, such as the central R&D staff. The personnel (according to groups and functions performed) is to be listed in the Schedule to the Commitments, the Key Personnel is to be listed separately. The principle, indicated in paragraph 4 (d), is that the personnel should be transferred with the Divestment Business. If the Divestment Business takes the form of a company or if the transfer of undertakings legislation applies, the personnel will normally be transferred by operation of law. In other cases, the acquirer of the business can retain and select the personnel and can make offers of employment. The transfer – whichever form it takes - is without prejudice to the application of Council Directives, where applicable, on collective redundancies (Council Directive EC/59/98 on the approximation of the laws of the Member States relating to collective redundancies); on safeguarding employees rights in the event of transfers of undertakings (Council Directive EEC/187/77 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of a business, as amended by Council Directive EC/50/98); and on informing and consulting employees (Council Directive EC/45/94 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended by Directive EC/74/97), as well as relevant national law on these matters.

20. Furthermore, the Standard Commitments foresee that the Divestment Business shall be entitled to benefit from products or services provided by the Parties for a transitional period, determined on a case-by-case basis, if this is

necessary to maintain the full economic viability and competitiveness of the Divestment Business (paragraph 4 (e) of the Standard Commitments referring to the products or services listed in the Schedule).

21. Section C contains a number of related commitments, which are designed to maintain, pending divestiture, the viability, marketability and competitiveness of the Divestment Business. These provisions deal with the preservation of the divested entity's viability and independence, as well as the hold-separate and ring-fencing obligations. The Hold Separate Manager, to be appointed by the Parties and normally the manager of the Divestment Business, is responsible for the management of the Divestment Business as a distinct entity separate from the businesses retained by the Parties, and is supervised by the Monitoring Trustee.

22. In certain cases it may also be necessary for the hold-separate obligation to apply to the corporate structure itself. That is, in cases where the Divestment Business takes the form of a company and a strict separation of the corporate structure is necessary, the Monitoring Trustee must be given the authority to (i) exercise the Parties' rights as shareholders in the Divestment Business and (ii) to replace members of the supervisory board or non-executive directors on the board of directors who have been appointed on behalf of the Parties (cf. paragraph 8 of the Standard Commitments and paragraph 6 (d) of the Standard Trustee Mandate).

23. Of particular importance is the ring-fencing of competitively sensitive information of the Divestment Business. The parties are obliged to implement all necessary measures to ensure that they do not obtain such information of the Divestment Business and, in particular, to sever its participation in a central information technology network. The Monitoring Trustee may allow the disclosure of information to the divesting party if this is reasonably necessary for the divestiture of the Divestment Business or required by law (e.g. information necessary for group accounts).

24. The related commitments further contain a non-solicitation clause for Key Personnel of the Divestment Business. According to the experience of the Commission, the non-solicitation period, dependent on the circumstances of the case, should normally be two years. In addition, the Commission may request the inclusion of a non-compete clause in the commitments protecting the customers of the Divestment Business for a start-up period. This may be required to enable the Divestment Business to be active as a viable competitor in the market. The period for such customer protection clause will depend on the market in question.

25. During the Divestiture Phase, the divestiture lies in the hands of the divesting party. The Commission does not have a preference as to the method the parties use to select an acceptable purchaser as long as they meet the objective of the divestiture, to maintain or restore competition. However, as part of the due diligence procedure, it is foreseen that the divesting party shall provide to potential purchasers sufficient information as regards the Divestment Business and allow them access to its personnel (paragraph 11 of the Standard Commitments) in order to enable them to determine whether it will be possible to

maintain and to develop the Divestment Business as active and viable competitive force in the market after the divestiture.

26. The divesting party shall further submit regular reports on potential purchasers and developments in the divestiture process to the Commission and the Monitoring Trustee (paragraph 12 of the Standard Commitments). This reporting mechanism gives the Monitoring Trustee the basis on which to assess the progress of the divestiture process as well as potential purchasers (for the Trustee's report, see paragraph 23 (vi) of the Standard Commitments) and keeps the Commission informed.

27. Section D sets out the requirements to be met by the Purchaser. The aim of this section is to ensure that the Divestment Business will be sold to a suitable purchaser who is independent of and unconnected to the Parties, and who possesses the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in the marketplace. These Purchaser Requirements can generally be met by either industrial or financial investors. The latter must demonstrate the necessary management capabilities and "proven expertise" which can in particular be met by financing a management buy-out.

28. Section D also deals with the approval process. After finalising the agreement(s), the divesting party shall submit a fully documented and reasoned proposal to the Commission. The Commission will verify that the purchaser will fulfil the requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. One element for its assessment will be the report of the Monitoring Trustee according to paragraph 23 (vii). The Commission may approve the sale of the Divestment Business without parts of the assets or personnel of the Divestment Business if this does not affect the viability and competitiveness of the Divestment Business, in particular if the Purchaser provides for such assets or personnel itself.

29. Section E deals with both the Monitoring and Divestiture Trustees. It identifies the terms for their appointment, as well as the content of the Trustee Mandates, and conditions for replacement of the Trustee during the divestiture periods if that becomes necessary. A Monitoring Trustee must be proposed by the Parties within one week after the adoption of the decision, whereas a Divestiture Trustee must be proposed no later than one month before the end of the Divestiture Period, (paragraph 16 of the Standard Commitments). The Commission wishes to emphasise the importance it attaches to compliance with these deadlines in practise, as otherwise the Parties are in breach of the commitments and the divestiture procedure is endangered.

30. Section E also sets out the duties and obligations of both types of Trustees. The Monitoring Trustee's responsibilities (mainly set out in paragraph 23 Standard Commitments) relate to both the management of the Divestment Business during the hold-separate period and the monitoring of the divestiture process itself. The supervision of the management shall in particular ensure the viability, marketability and competitiveness of the Divestment Business and the

compliance with the hold-separate and ring-fencing obligations. The Standard Commitments further assign certain monitoring tasks concerning the divestiture process to the Monitoring Trustee in the Divestiture Period. Once the Parties have proposed a purchaser for the Divestment Business, the Monitoring Trustee assesses the independence and suitability of the proposed purchaser and the viability of the Divestment Business after the sale to the purchaser, in order to assist the Commission in assessing the suitability of the proposed purchaser.

31. In the Extended Divestiture Period, the Divestiture Trustee will have an exclusive mandate to sell the Divestment Business at no minimum price and is empowered to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale. However, it is foreseen that the Trustee has to protect the legitimate financial interests of the divesting parties, subject to its unconditional obligation to divest at no minimum price. The Divestiture Trustee must report regularly on the progress of the divestiture process.

32. Also in Section E (paragraphs 26 – 30), the duties and obligations of the Parties vis-à-vis the Trustee are defined. Beside the provision of information, the Parties are in particular obliged to provide the Monitoring Trustee with all managerial and administrative support necessary for the Divestment Business and to grant to the Divestiture Trustee comprehensive powers of attorney covering all steps of the sale of the Divestment Business. An indemnification clause is included in order to reinforce the independent status of the Trustee from the Parties. Such a clause is already common practice in the trustee mandates submitted to the Commission for approval. The Trustee may further, at the expense of the Parties, retain advisors with specialised skills, in particular for corporate finance or legal advice.

33. Section E further foresees that trustees may be removed only in exceptional circumstances and with the approval of the Commission before the complete implementation of the Commitments.

34. Section F contains a review clause, which allows the Commission to extend the periods specified in the Commitments and to waive or modify the undertakings in the Commitments. The Parties must show good cause in order to be able to benefit from the exercise of the review clause. Requests for the extension of time periods shall, normally, be submitted no later than one month before the expiry of the time period in question.

Standard Model for Trustee Mandates

35. The Standard Model for Trustee Mandates sets out the duties and responsibilities of both Monitoring and Divestiture Trustee in a single text. However, the language makes clear that the Commission does not have a preference for the appointment of a single person to serve in the dual role of both Monitoring and Divestiture Trustee. Rather, the decision as to whether one or more trustees are appointed should be determined on a case-by-case basis by the Parties. If more than one trustee shall serve in these roles, only the provisions

relevant for the Monitoring or Divestiture Trustee, respectively, have to be included in the individual mandate.

36. The Standard Trustee Mandate has the following main elements.

37. Section A contains some definitions and references to the definitions included in the Standard Commitments.

38. Sections B to G contain provisions regarding the appointment of the Trustee (Section B), its general duties (Section C), the specific duties and obligations of the Monitoring and Divestiture Trustees (Sections D and E), reporting obligations identifying certain important subjects that should be discussed in each report (Section G), and duties and obligations of the Parties vis-à-vis the Trustee (Section F). These arrangements are based on the provisions established in the Standard Commitments in relation to the Trustee and described above.

39. Sections H to J cover additional trustee-related provisions, including provisions regarding the remuneration of the Trustee(s), procedures concerning the termination of the Mandate, and certain additional provisions, such as determination of applicable national law.

40. In particular, the independence of the trustee and the absence of conflicts of interests of the trustee are of great importance for the Commission in deciding on the approval of the Trustee and the respective mandate. The provisions in the Standard Trustee Mandate (paragraphs 20 to 23) ensuring the independence of the trustee from the parties and the absence of conflicts of interest foresee the following procedure: (1) The Trustee must disclose all current relationships with the Parties (paragraph 20) at the time at which the Trustee Mandate is entered into. (2) During the term of the mandate, the Trustee undertakes not to create a conflict of interest by having or accepting employment or appointment as a Member of the Board of the Parties or by having or accepting any assignments or other business relationships with, or financial interests in, the Parties. (3) As legal consequences it is foreseen that, if the Trustee becomes aware of a conflict of interest during the Mandate, the Trustee must notify the Commission and resolve the problem immediately and, if the conflict of interest cannot subsequently be resolved, the Commission may require the termination of the trustee mandate. These rules concerning conflicts of interests apply to the Trustee itself, members of the Trustee Team and the Trustee Partner Firms as members of the same organisation. (4) For a period of one year following termination of the Mandate, the members of the Trustee Team shall not provide services to the Parties without the Commission's prior approval and must establish measures to ensure the integrity of the members of the Trustee Team.

41. In addition to the rules laid down in the Standard Trustee Mandate, it is up to the Parties and the Trustee to include provisions dealing with other potential conflicts of interests, such as conflicts of interests of the Trustee with potential purchasers. ■