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# Summary of the working document "The Commission and the Rhodia case"

- Député européen (Verts, France) - Économie - Libéralisation-Concurrence -

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**The 2004 competition policy report describes, in paragraphs 228-229, an amendment to decision 1378 of 9 August 1999 of DG Competition (DG 4) relating to the Rhone-Poulenc-Hoechst merger. Such a retroactive modification is exceptional.**

The "Rhodia case" unfolded between 1999 and 2004, via a civil trial in India brought on by the stock exchange authorities and a civil and penal trial in France. The 1999 decision was taken under Karel van Miert's tenure as Commissioner in charge. From end 1999 to January 2004, the monitoring of the Rhodia case (Hoechst/Rhone-Poulenc had by then been renamed to Aventis) fell udner Mario Monti's competence. The 2004 report was drafted under the responsibility of the new commissioner, Mrs. Neelie Kroes. For convenience's sake, we will follow this timing.

**I.Decisions during the Van Miert period (1999)**

Decision 1517 on the request for purchase of Allbright and Wilson (A&W) by Donau (Chemie [1]). The authorization was granted to Rhodia which, at the time, was under the control of Rhone-Poulenc (RP) which owned 67% of shares, with Donau Chemie simultaneously claiming to be independent from RP. DG 4 considered that the purchase by Donau Chemie was in reality a purchase on RP's behalf. Why the need for such a cover? RP had wished to buy A&W, but run up against a competing takeover bid. But RP could obviously not buy A&W without DG 4's authorization. Thus, the shelter provided by Donau Chemie was used to temporarily bypass this obstacle.

Decision 1378 on the RP-Hoechst merger. In parallel, DG 4 allowed the RP-Hoechst merger to go ahead, resulting in the creation of Aventis, but, to avoid an excessive dominant position in certain segments of the chemical industry, it accepted RP's proposal: to relinquish control of Rhodia. RP was thereon obliged to inform DG 4 of any transactions, particularly if they were to be financial, between RP and Rhodia.
The two simultaneous DG 4 decisions had, whether intentional or not, several consequences.

The Commission, trying to avoid being duped with regards to the fact that it was on Rhodia's account that Donau Chemie was buying A&W, validated this still hypothetical final purchase. It enabled RP to play with contradictory arguments during 1999 vis-à-vis markets and the various competition regulators, in particular in the United States, the European Union and India. Rhodia then announced the imminent purchase of A&W, causing a spectacular increase of its share price, but A&W's accounts would never be consolidated neither in the Rhodia accounts, nor in those of Donau Chemie at the end of 1999. Nevertheless, they would eventually reveal a hidden liability.

By accepting, in exchange for the Aventis merger, Rhodia's independence with regards to RP, DG 4 had committed itself to monitor Rhodia's viability and independence. But, in the eyes of the general public, what this decision actaully gives is the impression that RP had abandoned Rhodia forced by antitrust laws. In reality, the danger of an Aventis-Rhodia conspiracy still remains, with the Commission having 'de facto' rubberstamped this situation.

Of course, the Directorate of Competition has neither the obligation to examine the sincerity of the accounts, nor to examine the relevance of an industrial strategy aimed at developing on the one hand Aventis, and on the other hand, Rhodia-A&W. However, shareholders can accuse DG 4 of consciously giving the green light to maneouvers which have by now have been condemned in India and are likely to be in France.

In parallel to these events, in May 1999, Karel van Miert exempted RP of a very heavy fine (Euros115 million) for

participating in an illegal agreement on the vitamins market. At the time of these facts, Mr. Fourtou was at the helm of RP. Today he is the Vivendi head, where he had Mr. Karel van Miert appointed in 2004 to the Board of Directors.

**II. 1999 - 2004: the Monti period.**

The independence and viability of Rhodia should have been the subject of close monitoring by the Commission, under decision 1378. But, during this period, RP literally wrecked Rhodia. These actions, which led Rhodia to the edge of the bankruptcy, had to be communicated to DG 4, according to decision 1378, which had 7 days to react.

Were they? And was DG 4 aware that it should have alerted the markets, or ensured that the auditors do so? Or, having been informed, did it judge that, having this information, it could keep it for itself without becoming an accomplice to market manipulation of financial markets? Or even more so, if it was not informed, how to explain that the experts instructed to monitor an agreement, particularly if financial, between Aventis and Rhodia, did not do so?

In 2003, RP and Rhodia signed an agreement according to which RP discharged itself on Rhodia, for a lump sum, of all the environmental risks which Rhodia had taken on board at the time of separation. Very quickly, this amount was shown to be much lower than the already detected risks: the "environmental crimes" of Silver Bow in the United States and of Cubatao in Brazil. On 15 January 2004, the justice system of the United States imposed on Rhodia an enormous fine for Silver Bow's environmental misdeeds. On 29 January, Aventis notified DG 4 of a request to end the obligation to separate itself from what remained of Rhodia, and as of the next day, obtained this authorization (rectifying decision 1378 of the summer of 1999). In exchange, Aventis yielded control of its subsidiary company Wacker Chemy.

Was the Commission informed of the 2003 agreement, this "hit and run offence" which, in practice, transferred the environmental risks, henceforth certain, of a flourishing company, Aventis, towards an insolvent company, Rhodia? At the same time, the European directive on environmental responsibility for companies was about to be adopted in 3rd reading. Did DG 4 not consider that it was its duty to inform the competent authorities? If not, what consequences should we draw from this case with regards to the functioning of European authorities?

**III. 2005: The Kroes period**

As from the summer of 2005, your rapporteur is examining the 2004 annual report on competition policy. He has noticed that the 1999 decisions have disappeared from DG 4'S site, something which is unheard of. This withdrawal has thwarted the work of your rapporteur, as well as that of the complainants, small and large, in the Rhodia trial. These complainants are composed of people with big fortunes, but also a myriad of Rhodia employees who had been convinced into buying shares of their company and who were at the same time laid off and ruined by the Rhodia failure.

As the Rhodia scandal developed, our chairwoman, Mrs. Bérès, challenged Mrs. Kroes, Competition Commissioner, which answered by letter on 24 October 2005.

Mrs. Kroes should however refrain from participating in this debate. Indeed, she undertook the commitment, at the time of her nomination as Commissioner, not to intervene in competition cases involving companies on whose board of directors she had sat. However, PriceWaterhouseCoopers (PWC) is involved in the Rhodia case. And Mrs. Kroes was a member of its board when PWC was Rhodia's auditor.
The arguments in her response of 24 October 2005 are on the one hand, questionable, and on the other, unacceptable.

*1.DG 4 does not have the obligation to examine accounting sincerity or the viability of mergers, but only their effects on competition.*

It is true, and this it is one of the issues that should be re-examined in the light of this case. Was it not the duty of DG 4 to inform other controlling authorities? Shouldn't we define the procedures and the duties that arise in such situations? In addition, as the guardian of competition, DG 4 had well and truly the duty to intervene vis-à-vis any Aventis operation leading to the sinking of its competitor, Rhodia.

*2.The Commission cannot impose a fine on Aventis, the only possible decision being to call into question the Hoechst-RP merger.*

Does that mean that the apparent failures to fulfill Aventis' responsibilities, as a result of decision 1378, can be sanctioned only by "the nuclear option" which is to put into question the Hoechst-RP merger? Is there not a more proportional sanction? And if not, wouldn't it be necessary to invent one? And moreover, are the misdeeds that small? Thousands of redundancies, thousands of savers ruined, hundreds of employees or neighbors seriously ill following contact with poisonous substances? Governments left without options vis-à-vis vanished polluters?

*3.In any event, any action against the failures of initial decision 1378 would be cancelled by the new rectifying decision of January 2004.*

In other words, the Commission would have the power to amnesty whomever it wants despite 5 years of misdeeds, and to self-amnesty itself for its own responsibilities!

**Conclusions**

Far from us the idea that Parliament should ask for a codecision right or even a call-back right on the specific decisions taken by the Directorate for competition. But the magnitude of the suspicions that the Rhodia case creates, lead your rapporteur to ask for the setting-up of an inquiry committee. It would not have another aim but to identify the possible malfunctioning of the system in order to avoid this from happening again, and to formulate for reforms proposals to this effect.

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[1] Annotation by the Secretariat.