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## **REPORT FROM THE COMMISSION**

### **Report on Competition Policy 2006**

{SEC(2007)860}

1. In 2006, competition policy continued to safeguard and create the conditions which allow markets to function competitively to the benefit of European consumers and businesses. This entailed addressing market failures resulting from anti-competitive behaviour by market participants and from certain market structures, on the one hand, and contributing to an overall economic policy framework across economic sectors that is conducive to effective competition, on the other hand.
2. The first section of this report provides an overview of how the instruments of competition policy, namely the antitrust, merger and State aid rules, were further developed and applied in general. The second section discusses how the mix of these and other instruments was used in selected priority sectors to pursue the aims of competition policy. The third section gives an overview of cooperation within the European Competition Network (ECN) and with national courts. In section four, international activities are discussed. Finally, in section five, a brief description of interinstitutional cooperation is given. Further information can be found in a detailed Commission Staff Working Document<sup>1</sup> and on the website of the Competition Directorate General<sup>2</sup>.

## 1. INSTRUMENTS

### 1.1. Antitrust – Articles 81 and 82 EC

#### 1.1.1. *Shaping the rules and policy*

3. In addition to the appropriate sanctions to punish and deter cartels, effective action against cartels requires incentives to participants to report cartels. The Commission took an important step towards uncovering and putting an end to cartels by adopting a **revised Notice on Immunity from Fines and Reduction of Fines in Cartel Cases**<sup>3</sup>. Improvements have been made in several areas to provide more guidance to applicants and to increase the transparency of the procedure. These amendments reflect more than four years of experience in applying the 2002 Leniency Notice<sup>4</sup> and are fully in line with the ECN's Model Leniency Programme, also adopted in 2006. Improvements include clarification of the thresholds for immunity and reduction of fines and the conditions that must be fulfilled by applicants, and amendments to the procedure, such as introducing a discretionary marker system.
4. Fines are of central importance in deterring companies from breaking competition rules. In order to increase the deterrent effect of its sanctions, the Commission adopted **new Guidelines on the method of setting fines** imposed on undertakings that have infringed Article 81 or Article 82 EC<sup>5</sup>. According to the new Guidelines, for each participant in the infringement, the basic amount of the fine will be based on a percentage of its yearly sales of the product to which the infringement relates, in

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<sup>1</sup> SEC(2007)860

<sup>2</sup> <http://ec.europa.eu/comm/competition/>

<sup>3</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006).

<sup>4</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002).

<sup>5</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006).

the geographic area concerned, and may be up to 30 % of the relevant sales. In order to fully reflect the duration of the infringement, the corresponding amount will then be multiplied by the number of years of the undertaking's participation. Furthermore, in the case of repeat offenders, the Commission may increase the fine by up to 100 % – with each prior infringement justifying an increase of the fine – and it will take into account not only its own previous decisions but also those of National Competition Authorities (NCAs) applying Article 81 or Article 82 EC.

5. Facilitating private enforcement will help ensure that those damaged by infringements of EC competition law can exercise their right to compensation, adding to overall deterrence levels as a complement to public enforcement. **The Green Paper on damages actions for breach of the EU antitrust rules** as contained in Articles 81 and 82 of the EC Treaty<sup>6</sup> has been met with broad interest in the antitrust community and has been discussed widely in Europe and elsewhere. During a public consultation the Commission received almost 150 submissions from governments, competition authorities, industry, consumer organisations, lawyers and academics. The vast majority of the respondents agreed that victims of competition law infringements are entitled to damages, and that national procedural rules should be conducive to exercising this right effectively. The European Economic and Social Committee also welcomed the Commission initiative in its opinion on the Green Paper<sup>7</sup>. As a follow-up to the Green Paper, the Commission has included in its 2007 legislative and work programme the preparation of a White Paper on antitrust damages actions<sup>8</sup>.
6. The promotion of competition principles through **advocacy** continued both within and outside the Commission, the aim being to ensure that legislation, at EU or Member State level, that pursues legitimate policy objectives, does not cause undue harm to competition. Competition advocacy had, in particular, an important role to play in the legislative process relating to the REACH Regulation<sup>9</sup>. Similarly, the Commission continued its efforts to encourage Member States to review restriction of competition in the key area of professional services as an important contribution towards meeting the Lisbon objectives.

#### 1.1.2. *Applying the rules*

7. The Commission continued to give a high priority to the detection and deterrence of **cartels**. It focused its actions on significant hard-core cartels of mainly worldwide or European scope and involving a number of economic entities. The Commission issued **seven final decisions**<sup>10</sup> in which it fined 41 undertakings<sup>11</sup> a total of EUR

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<sup>6</sup> The Green Paper, adopted by the Commission in December 2005, can be found at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>

<sup>7</sup> The opinion of the EESC can be found at [http://eescopinions.eesc.europa.eu/EESCopinionDocument.aspx?identifier=ces\int\int306\ces1349-2006\\_ac.doc&language=EN](http://eescopinions.eesc.europa.eu/EESCopinionDocument.aspx?identifier=ces\int\int306\ces1349-2006_ac.doc&language=EN)

<sup>8</sup> The Commission's legislative and work programme for 2007 is available at [http://ec.europa.eu/atwork/programmes/index\\_en.htm](http://ec.europa.eu/atwork/programmes/index_en.htm)

<sup>9</sup> Commission proposal for a Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals, COM(2003) 644 final.

<sup>10</sup> Case COMP/38.620 *Hydrogen peroxide and perborate (Bleaching chemicals)* Commission decision, 3.5.2006; Case COMP/38.645 *Methacrylates (Acrylic glass)* Commission decision, 31.5.2006; Case COMP/38.456 *Bitumen Netherlands* Commission decision, 13.9.2006; Case COMP/38.121 *Fittings*

1 846 million (compared with 33 undertakings and a total of EUR 683 million in fines in 2005). The decisions issued show the economic significance of the sectors involved and the duration of the cartels, hence the average fine per undertaking has increased significantly.

8. At the end of 2006 the Commission had received a total of 104 applications for immunity and 99 applications for a reduction of fines under the 2002 Leniency Notice. Four of the cartel decisions adopted in 2006 were based on the 2002 Leniency Notice and one on the 1996 Leniency Notice. In these cases the Commission also granted substantial reductions of fines for a total of 10 companies in return for evidence provided to the Commission.
9. Further steps were taken to sanction **abuses of dominance**. The Commission focussed on network industries that are key for European competitiveness and the development of the knowledge economy in Europe: the Commission opened proceedings against *Telefónica*, for an alleged "margin squeeze" in the Spanish broadband Internet access markets<sup>12</sup>, and against *Distrigaz*, for an alleged practice preventing new suppliers from entering the Belgian gas market<sup>13</sup>. The Commission also adopted a final decision finding that *Tomra*, a producer of reverse-vending machines, violated Article 82 EC by operating a system of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, which restricted or at least delayed the market entry of other manufacturers of reverse-vending machines<sup>14</sup>.
10. Sound economic assessment and a focus on conduct which is likely to harm competition, and consequently consumers, improve the effectiveness of competition policy. Reflections continued in this area following the public consultation on the **Discussion Paper on the application of Article 82 EC to exclusionary abuses**. The most important topics raised by the submissions were discussed at a public hearing held in Brussels, attracting about 350 participants from Europe, the United States, Japan and Korea.
11. Article 9 of Regulation 1/2003 allows the Commission to make commitments binding on undertakings, when such commitments meet the concerns expressed by the Commission in antitrust proceedings. **Commitments** continued to be an effective means of addressing competition problems. In 2006, the Commission adopted four commitment decisions<sup>15</sup>.

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(*Copper fittings*) Commission decision, 20.9.2006; Case COMP/38.907 *Steel beams (re-adoption)* Commission decision, 8.11.2006; Case COMP/38.638 *Synthetic rubber (BR/ESBR)* Commission decision, 29.11.2006; Case COMP/39.234 *Alloy surcharge (re-adoption)* Commission decision, 20.12.2006.

<sup>11</sup> This figure does not include the companies that received immunity from fines for cooperation under the Leniency Notice.

<sup>12</sup> Case COMP/38.784 *Telefónica* (for details of the case see point 0).

<sup>13</sup> Case COMP/37.966 *Distrigaz*, see Commission press release MEMO/06/197, 16.5.2006.

<sup>14</sup> Case COMP/38.113 *Prokent/Tomra*.

<sup>15</sup> Case COMP/38.381 *De Beers* Commission decision, 22.2.2006; Case COMP/38.173 *FA Premier League* Commission decision, 22.3.2006; Case COMP/38.348 *Repsol CPP* Commission decision, 12.4.2006; Case COMP/38.681 *Cannes Extension Agreement* Commission decision, 4.10.2006.

12. 2006 was the first year when the Commission had to use its powers to fix a **periodic penalty payment**, under Article 24(2) of Regulation 1/2003, in order to compel an undertaking to comply with a decision ordering it to bring an infringement of Article 81 or 82 EC to an end. It imposed on Microsoft a definitive penalty payment of EUR 280.5 million for non-compliance with certain of its obligations under the decision of 2004, which found an infringement of Article 82 EC.
13. Regulation 773/2004 provides that the time-limit for the reply to the Statement of Objections shall have regard both to the time required for the preparation of the submission and to the urgency of the case and shall be at least four weeks from the point in time when access to file is given<sup>16</sup>. In order to better reflect this regulatory framework and to ensure the timely enforcement of the competition rules, the Commission will modify its current practice for setting time-limits for replying to Statements of Objections<sup>17</sup>. A longer period than the minimum foreseen in Regulation 773/2004 will be granted where the circumstances of the case so require, in particular in complex cases, in cases with a voluminous file or where holiday periods affect the ability of the given undertaking to reply. This is without prejudice to the possibility for undertakings to ask the Hearing Officer for an extension.

## 1.2. Merger control

### 1.2.1. *Shaping the rules and policy*

14. In order to provide better guidance on jurisdictional questions in merger control, the Commission published a **new draft Commission Consolidated Jurisdictional Notice** under the Merger Regulation<sup>18</sup> for public consultation. This Notice will replace the existing four Jurisdictional Notices, all adopted by the Commission in 1998 under the previous Merger Regulation 4064/89<sup>19</sup>. These are (i) the Notice on the concept of concentration<sup>20</sup>, (ii) the Notice on the concept of full-function joint ventures<sup>21</sup>, (iii) the Notice on the concept of undertakings concerned<sup>22</sup>, and (iv) the Notice on calculation of turnover<sup>23</sup>. The new Notice will therefore cover, in one document, all issues of jurisdiction which are relevant for establishing the Commission's competence under the Merger Regulation (except for referrals). It is expected to be adopted in 2007.

### 1.2.2. *Applying the rules*

15. The **number of mergers notified** to the Commission in 2006 **reached a record level of 356**, surpassing the previous record number reached during the last merger wave in 2000. In total the Commission adopted 352 final decisions during the year,

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<sup>16</sup> See Case T-44/00 *Mannesmannröhren-Werke AG* [2004] ECR II-2223, para. 65.

<sup>17</sup> See XXIIIrd Report on Competition Policy 1993, point 207.

<sup>18</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

<sup>19</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

<sup>20</sup> OJ C 66, 2.3.1998, p. 5.

<sup>21</sup> OJ C 66, 2.3.1998, p. 1.

<sup>22</sup> OJ C 66, 2.3.1998, p. 14.

<sup>23</sup> OJ C 66, 2.3.1998, p. 25.

207 of which were taken in accordance with the simplified procedure. In Phase I, 323 transactions were cleared without conditions and 13 transactions were cleared subject to conditions. There was a slight increase in the number of Phase II proceedings, with 13 such cases being opened during the year, compared to 10 in 2005. There were 10 decisions adopted pursuant to Article 8, with two concentrations being abandoned by the notifying parties during Phase II. There were no prohibition decisions.

16. The Commission gained further experience applying the **new substantive test**, introduced in the Merger Regulation in 2004. Two noteworthy cases of "non-coordinated" effects were *Linde/BOC*<sup>24</sup>, concerning – inter alia – the worldwide wholesale market for helium, and *T-Mobile Austria/tele.ring*<sup>25</sup>, concerning the Austrian retail market for the provision of mobile telephony services to end customers. In both cases, the Commission found that the merger would significantly impede competition, although the merged entity would not become the market leader in the relevant market. Both cases were cleared subject to sufficient remedies proposed by the parties.
17. Careful consideration was given to substantiated claims that **efficiencies** would be likely to result from the notified transactions in three decisions, *Korsnas/AD Cartonboard*<sup>26</sup>, *Inco/Falconbridge*<sup>27</sup> and *Metso/Aker Kvaerner*<sup>28</sup>. The Commission assessed the extent to which these efficiencies would impact on an overall appraisal of the competitive effects of the transactions in question, in line with the approach set out in the Horizontal Merger Guidelines<sup>29</sup>.

### 1.3. State aid control

#### 1.3.1. *Shaping the rules and policy*

18. Significant progress was made in **modernising the current framework of State aid rules**, in line with the State Aid Action Plan (SAAP) launched by the Commission in 2005. The four guiding principles of this modernisation are: less and better targeted State aid; greater emphasis on economic analysis; more effective procedures, including better enforcement, higher predictability and enhanced transparency; and a shared responsibility between the Commission and the Member States. The consultation process showed clear support for these principles and they were at the heart of the policy developments in 2006.
19. The Commission simplified the approval of regional aid by adopting a **block exemption Regulation for regional investment aid**<sup>30</sup>. Member States no longer have to notify regional investment aid schemes to the Commission if those schemes

<sup>24</sup> Case COMP/M.4141 *Linde/BOC* Commission decision, 6.6.2006.

<sup>25</sup> Case COMP/M.3916 *T-Mobile Austria/tele.ring* Commission decision, 26.4.2006.

<sup>26</sup> Case COMP/M.4057 *Korsnäs/Assidomän Cartonboard* Commission decision, 12.5.2006.

<sup>27</sup> Case COMP/M.4000 *Inco/Falconbridge* Commission decision, 4.7.2006.

<sup>28</sup> Case COMP/M.4187 *Metso/Aker Kvaerner* Commission decision, 12.12.2006.

<sup>29</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraphs 76-88 (OJ C 31, 5.2.2004, p. 5).

<sup>30</sup> Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29).

comply with the new Regional Aid Guidelines<sup>31</sup> and the approved regional aid map for 2007-2013. In 2006, regional aid maps identifying the disadvantaged regions eligible for aid and the maximum aid intensities allowed in these regions were approved for 18 Member States.

20. The Commission also adopted the **new State aid framework for Research, Development and Innovation (R,D&I)**<sup>32</sup>. The objective of the framework is to help Member States channel a larger share of their total State aid budgets towards boosting R,D&I and to help them target R,D&I State aid on the best projects, on the basis of economic analysis. This should minimise distortions of competition and trade and maximise public spending efficiency. It is clear from the new rules that the refined economic approach developed in the SAAP is now a reality and is becoming a cornerstone of the Commission's State aid policy.
21. Furthermore, **new Risk capital Guidelines**<sup>33</sup> were adopted, allowing Member States to improve access to finance for SMEs. They cover risk capital measures for investment in SMEs in their early (seed, start-up) and expansion stages. Given the importance of SMEs in terms of spurring economic growth and creating lasting employment, the guidelines form an important part of the Commission's competitiveness strategy<sup>34</sup>.
22. Finally, the Commission adopted a **new de minimis Regulation**<sup>35</sup> exempting small subsidies from the obligation to be cleared by the Commission in advance. Under the new Regulation, aid of up to EUR 200 000 granted over three fiscal years will not be regarded as State aid.
23. In 2007, the Commission intends to continue to implement the SAAP by adopting new guidelines on environmental protection, new rules for aid in the form of guarantees, a new notice on the Commission's reference rates and a notice on the recovery of illegal or incompatible aid.

#### 1.3.2. *Applying the rules*

24. There was a **significant increase in the State aid control workload**, with **921 new cases registered** in 2006 (a 36 % increase compared with the previous year). The Commission took **710 final decisions**<sup>36</sup>, a 12 % increase compared to 2005. In the vast majority of cases, the Commission approved the measures, concluding that the examined aid was compatible (91 % of all decisions) with the State aid rules or did not constitute State aid (4 % of all decisions). Where the Commission had doubts whether certain aid measures complied with the rules, it carried out a formal investigation. At the end of this investigation procedure, the Commission either took

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<sup>31</sup> The Commission adopted new Regional Aid Guidelines (RAG) for the period 2007-2013 in December 2005 (OJ C 54, 4.3.2006, p. 13).

<sup>32</sup> OJ C 323, 30.12.2006, p. 1.

<sup>33</sup> OJ C 194, 18.8.2006, p. 2.

<sup>34</sup> See Communication "Working together for growth and jobs – A new start for the Lisbon strategy", COM(2005) 24 final, 2.2.2005.

<sup>35</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006).

<sup>36</sup> Excluding decisions to open the formal investigation procedure, corrigenda, injunctions, proposals for appropriate measures.

a positive, conditional or no aid decision (3 % of all decisions) or found that the aid did not comply with State aid rules (2 % of all decisions).

25. The main **regional aid** cases concerned large investment projects covered by the 2002 Multisectoral framework on regional aid for large investment projects<sup>37</sup>. The Commission approved aid in 9 Polish cases concerning investment for the production of flat screen TV modules by *LG Philips LCD Poland Sp. z o.o.*<sup>38</sup>. In addition, the Commission approved aid for two German investment projects in the solar (photovoltaic) energy sector, namely *First Solar GmbH*<sup>39</sup> and *HighSi GmbH*<sup>40</sup>, and one investment in a new tyre production plant from a Korean firm in Hungary<sup>41</sup>.
26. In the area of **State aid for R,D&I**, a major scheme concerning the French Innovation Agency<sup>42</sup> was approved, for which the State allocated a budget of EUR 2 billion. In line with the new framework, the impact of the aid on competition was carefully analysed in some aeronautic cases - concerning aid to *Rolls-Royce*<sup>43</sup> and to *Eurocopter*<sup>44</sup> - and in the first large project notified by the French Agency, called *BioHub*<sup>45</sup>.
27. Concerning **risk capital measures**, the Commission approved *Investbx*<sup>46</sup>, an investment vehicle creating a means for SMEs in the West Midlands region of the UK to raise equity capital. Scouting costs, i.e. costs linked to the selection of innovative companies for the purpose of investment by risk capital funds (such as screening costs, consultancy on the business plan, etc.) have also been approved in an Italian case<sup>47</sup>.
28. Whilst the "polluter pays principle" means that polluters should not be relieved of the obligation to pay for their own waste, the Commission has allowed **environmental aid** in several cases. A large number of the measures approved serve the support of renewable energy production, using different aid instruments for that purpose, mostly

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<sup>37</sup> OJ C 70, 19.3.2002, p. 8.

<sup>38</sup> Case N 245/2006 *LG Philips LCD Poland Sp. z o.o.* (not yet published), Case N 246/2006 *Ohsung [Dong Seo] Display Poland Sp. z o.o.* (not yet published), Case N 247/2006 *Lucky SMT Sp. z o.o.* (not yet published), Case N 248/2006 *Dong Yang Electronics Sp. z o.o.* (not yet published), Case N 249/2006 *Heesung Electronics Poland Sp. z o.o.* (not yet published), Case N 250/2006 *LG Chem Poland Sp. z o.o.* (not yet published), Case N 251/2006 *LG Innotek Poland Sp. z o.o.* (not yet published), Case N 256/2006 *LG Electronics Wroclaw Sp. z o.o. - House appliances* (not yet published), Case N 257/2006 *LG Electronics Wroclaw Sp. z o.o. - TV sets* (not yet published).

<sup>39</sup> Case N 17/2006 *First Solar GmbH* (OJ C 259, 27.10.2006, p. 13).

<sup>40</sup> Case N 409/2006 *HighSi GmbH* (not yet published).

<sup>41</sup> Case N 34/2006 *Hankook Tire Hungary Ltd* (OJ C 232, 27.9.2006, p. 2).

<sup>42</sup> N 121/2006 *Soutien de l'Agence de l'innovation industrielle en faveur des programmes mobilisateurs pour l'innovation industrielle* (not yet published).

<sup>43</sup> N 193/2006 *Large R&D aid to Rolls Royce et al. – Environmentally Friendly Engine (EFE)* (not yet published).

<sup>44</sup> N 186/2006 *Soutien d'Eurocopter pour le développement d'un hélicoptère de transport moyen tonnage EC175* (not yet published).

<sup>45</sup> N 708/2006 *Soutien de l'Agence de l'innovation industrielle en faveur du programme de R&D BioHub* (not yet published).

<sup>46</sup> C 36/2005 *Investbx* (not yet published).

<sup>47</sup> N 9/2006 *Risk capital funds in favour of innovative SME located in Mezzogiorno* (OJ C 218, 9.9.2006, p. 9).



investment aid and operating aid in the form of tax reductions or feed-in tariffs<sup>48</sup>. As regards waste management, the Commission continued its practice and assessed recycling management measures in the Czech republic<sup>49</sup> and the UK<sup>50</sup> on the basis of Article 87(3)(c).

29. **Training aid** can contribute to the European common interest by increasing the pool of skilled workers and improving the competitiveness of Community industry. In 2006, there were 57 measures submitted by Member States under the block exemption Regulation for training aid<sup>51</sup>. In addition, the Commission received a number of notifications concerning, in particular, training aid in the car industry<sup>52</sup>. The Commission verified that the aid indeed supports training activities that would not have been undertaken in the absence of aid.
30. **Rescue and restructuring (R&R)** aid to firms in difficulty may be regarded as legitimate only if strict conditions are fulfilled. During 2006 the Commission applied the amended rules, laid down in the 2004 R&R Guidelines, in a number of decisions. On the basis of these Guidelines it took three rescue aid decisions<sup>53</sup>, two no objections decisions as regards restructuring aid<sup>54</sup>, one positive decision<sup>55</sup> and no negative decision. In addition, a number of decisions taken were still based on the 1999 R&R Guidelines<sup>56</sup>.
31. In the field of **fiscal aid**, the Commission found that a preferential tax regime in Spain in favour of outward foreign direct investments was State aid, improving the trading conditions of the beneficiaries in exporting goods and services from Spain to foreign markets<sup>57</sup>. It concluded that the aid was incompatible with the common market because it remitted internal taxes on export in breach of Article 92 EC.
32. Finally, continuing efforts were made to implement **recovery decisions** more effectively and immediately. The number of outstanding recovery decisions continues to decrease. At the end of 2006, there were 60 pending recovery decisions,

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<sup>48</sup> See for example: NN162/A/2003 and N317/A/2006, *Austria, support of electricity production from renewable sources under the Green Electricity Act (feed-in tariffs)* (OJ C 221, 14.9.2006, p. 9), NN162/B/2003 and NN317/B/2006, *Austria, support of CHP production under the Green Electricity Act (support tariff)* (OJ C 221, 14.9.2006, p. 9.)

<sup>49</sup> OJ C 202, 25.8.2006, p. 9.

<sup>50</sup> OJ C 209, 31.8.2006, p. 8.

<sup>51</sup> Commission Regulation (EC) No 68/2001 of 12 January 2001, as amended by Commission Regulation (EC) No 363/2004 of 25 February 2004 and by Commission Regulation (EC) No 1976/2006 of 20 December 2006, on the application of Articles 87 and 88 of the EC Treaty to training aid.

<sup>52</sup> Two cases were decided in 2006: C 40/05 *Ford Genk (Belgium)* and N 653/05 *Webasto (Portugal)*. For three other cases, the Commission had not taken a final decision by the end of 2006.

<sup>53</sup> Cases NN 14/06 *Ottana Energia* Commission decision, 12.12.2006 (not yet published), NN 16/06 *CIT* Commission decision, 7.7.2006 (OJ C 244, 11.10.2006, p. 14), N 28/06 *Techmatrans* Commission decision, 20.2.2006 (OJ C 87, 11.4.2006, p. 2).

<sup>54</sup> Cases N 464/05 *AB Kauno* Commission decision, 22.2.2006 (OJ C 270, 7.11.2006, p. 2), N 632/05 *Energetyka Wislosan* Commission decision, 19.7.2006 (OJ C 232, 27.9.2006, p. 2).

<sup>55</sup> Case C 44/2005 *Huta Stalowa Wola* Commission decision, 20.12.2006 (not yet published).

<sup>56</sup> Cases C 3/2005 *FSO* Commission decision, 20.12.2006 (not yet published), C 25/2005 *Frucona Košice* Commission decision, 7.6.2006 (not yet published), C 42/2005 *Konas* Commission decision, 26.9.2006 (not yet published), C 1/2005 *Euromoteurs* Commission decision, 26.4.2006 (OJ L 307, 7.11.2006, p. 213).

<sup>57</sup> Case E22/2004 *Incentives for export related investments*.

compared to 75 at the end of 2005. During 2006, 21 pending recovery cases were closed, whilst six new recovery decisions were taken. Of the EUR 8.7 billion of aid to be recovered under decisions adopted since 2000, some EUR 7.2 billion (i.e. 83 % of the total amount) had been effectively recovered by the end of 2006. The Commission took legal action against Member States under either Article 88(2) or Article 228(2) EC for not effectively implementing recovery decisions in five cases involving three Member States<sup>58</sup>.

## 2. SECTOR DEVELOPMENTS

### 2.1. Energy

33. Despite two waves of liberalisation efforts at European level, significant rises in gas and electricity wholesale prices, persistent complaints about entry barriers, and limited customer choice led the Commission to open an inquiry into the functioning of European gas and electricity markets in June 2005. The **final report on the sector inquiry**, which was adopted by the Commission on 10 January 2007<sup>59</sup>, provided a broad insight into the functioning of gas and electricity markets at all levels of the supply chain. The core competition problems identified include highly concentrated wholesale markets, insufficient unbundling of network and supply activities, insufficient or unavailable cross-border capacity, lack of reliable and timely information on network availability, limited retail competition and the small size of balancing zones. The sector inquiry's findings have informed the Commission's competition enforcement policy in separate individual cases, and have made a major contribution to policy formulation as regards the next steps in liberalising European electricity and gas markets.
34. The Commission has carried out a number of own-initiative **antitrust investigations**, in addition to having received and investigated several complaints. The issues that are being investigated include hoarding of network and storage capacity, long-term capacity reservations, strategic underinvestment in networks to protect downstream supply interests, blocking of interconnectors to favour domestic consumption, market sharing and long-term contracts between wholesalers/retailers and downstream customers. Important investigations have also been conducted at Member State level, for instance by the Danish, German and Italian Competition Authorities<sup>60</sup>.
35. Long-term contracts with customers have also been identified as a competition problem in energy markets outside the gas and electricity sectors. The Commission adopted a **commitment decision** under Article 9 of Regulation 1/2003 concerning the petrol station network of *Repsol*, a Spanish supplier of motor fuels<sup>61</sup>. The commitments offered by *Repsol* will free hundreds of service stations from long-term

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<sup>58</sup> CR 57/03 *Tremonti Bis*, CR 36/01 *Beaulieu Ter Lembeek*, CR 8/04 *Fiscal incentives for newly listed companies*, CR 13/B/03 *France Telecom Business tax Scheme* and CR 57/02 *Article 44 Septies CGI*.

<sup>59</sup> COM(2006) 851 final.

<sup>60</sup> The Danish Competition Authority has intervened against excessive prices and market manipulation in Western Denmark, the German Competition Authority has intervened against long-term gas supply agreements between wholesalers and Stadtwerke, and the Italian Competition Authority has intervened against failure to expand capacity in order to protect dominance on the downstream supply market.

<sup>61</sup> Commission decision in Case COMP/38.348 *Repsol CPP*, 12.4.2006.

exclusive supply contracts, thereby bringing a wider choice and scope for reduced prices to the benefit of the consumer.

36. In the field of energy **mergers**, the Commission adopted a large number of decisions. The most complex cases from a competition point of view were *DONG/Elsam/Energi E2*<sup>62</sup> and *Gaz de France/Suez*<sup>63</sup>. Both concentrations, as originally notified, would have resulted in a significant impediment to effective competition and were only cleared on the basis of comprehensive structural remedies offered by the parties. In the *E.ON/Endesa* case, the Commission took two decisions pursuant to Article 21 of the Merger Regulation requiring Spain to withdraw certain conditions illegally imposed on the transaction, which itself had already been cleared by the Commission.
37. In the area of **State aid control**, work has continued with a view to finding a solution to the problems caused by long-term contracts between public network operators and generators in Hungary<sup>64</sup> and Poland<sup>65</sup>, foreclosing significant parts of the wholesale markets. The Commission also analysed several regulated tariff schemes in Italy<sup>66</sup>, where certain industrial companies benefit from favourable electricity tariffs below the market price. The State aid aspects of the reorganisation of nuclear liabilities of the public sector were considered in a case concerning the United Kingdom<sup>67</sup>. The State aid decisions in the area of renewable energy have focused on verifying the necessity of such aid and ensuring that the public financing covers only the extra costs in respect of generation and supply as compared to conventional energy sources. Finally, under the EU Emission Trading Scheme (EU ETS), the Commission has assessed the National Allocation Plans (NAPs) for the second trading period (2008-2012) under the criteria of Annex III of the ETS Directive<sup>68</sup>, including criterion 5 providing that allocation must not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities, in accordance with the requirements of the Treaty, in particular Articles 87 and 88 EC thereof. The Commission took decisions under the EU ETS on the NAPs for the second trading period of 10 Member States.

## 2.2. Financial services

38. A number of indicators such as market fragmentation, price rigidity and lack of customer mobility suggest that competition in the EU retail banking market does not work effectively. Therefore, the Commission decided in June 2005<sup>69</sup> to open an **inquiry into the retail banking sector**, in particular in relation to cross-border competition. Two interim reports, one on card payments and another on current accounts and related services, were published for consultation and presented at a public hearing in 2006. The final report on retail banking was published on 31

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<sup>62</sup> Case COMP/M.3868 *DONG/Elsam/Energi E2* Commission decision, 14.3.2006.

<sup>63</sup> Case COMP/M.4180 *Gaz de France/Suez* Commission decision, 14.11.2006.

<sup>64</sup> OJ C 324, 21.12.2005, p. 12.

<sup>65</sup> OJ C 52, 2.3.2006, p. 8.

<sup>66</sup> OJ C 145, 21.6.2006, p. 8 and OJ C 214, 6.9.2006, p. 5.

<sup>67</sup> OJ L 268, 27.9.2006, p. 37.

<sup>68</sup> Directive 2003/87/EC establishing a scheme for greenhouse gas emission trading, OJ L 275, 25.10.2003, p. 32, as amended by Directive 2004/101/EC, OJ L 338, 13.11.2004, p. 18.

<sup>69</sup> Commission decision, 13.6.2005 (OJ C 144, 14.6.2005, p. 13).

January 2007. Potential competition problems identified included entry barriers, market fragmentation along national lines and the high degree of concentration among issuers and acquirers of payment cards.

39. The Commission also continued its extensive **sector inquiry in business insurance**, also launched in June 2005. The interim report on business insurance was published on 24 January 2007, and the final report is scheduled for September 2007.
40. The Commission assessed and cleared a large number of **concentrations** in the area of financial services. In the case involving the acquisition of *Gerling Versicherungsgruppe* by *Talanx Aktiengesellschaft*<sup>70</sup>, the Commission's extensive market investigation revealed that the proposed acquisition was likely to significantly reduce competition as regards liability insurance for pharmaceutical companies in Germany. To address these concerns, Talanx committed to divest the pharmaceutical liability business of its subsidiary HDI as far as it concerns insurance for German companies outside the obligatory product liability insurance.
41. The Commission also had to ensure, through its **State aid control**, a level playing field in financial services, especially for new entrants and foreign banks. As regards *Crédit Mutuel*<sup>71</sup>, the Commission continued to investigate the possible existence of an overcompensation for distributing the 'livret bleu' and, in addition, infringement proceedings were opened against the special rights granted to La Poste, the Caisses d'Épargne and Crédit Mutuel to distribute the 'livret A' and the 'livret bleu'. The Commission took a final negative decision demanding the repeal of Luxembourg's existing fiscal aid scheme in favour of the "1929 exempt, milliardaire and financial holdings"<sup>72</sup>. The scheme was considered as hidden subsidy to holdings providing certain financial services to related and unrelated business entities within a multinational group.

### 2.3. Electronic communications

42. The vast majority of providers of electronic communication services operate within the confines of the EU regulatory framework for electronic communications networks and services<sup>73</sup>. This framework is designed to facilitate access to legacy infrastructure, foster investment in alternative infrastructure and bring about choice and lower prices for consumers. It currently recommends 18 specific product and

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<sup>70</sup> Case COMP/M.4055 *Talanx/Gerling* Commission decision, 5.4.2006.

<sup>71</sup> OJ C 210, 1.9.2006, p. 12.

<sup>72</sup> OJ L 366, 21.12.2006, p. 47.

<sup>73</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108, 24.4.2002, p. 21), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51), Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

services markets at both wholesale and retail level for ex ante regulation by national regulators. In June, the Commission published a **draft revised text of the list of markets susceptible to ex ante regulation**<sup>74</sup>, which recommends a significant reduction in the number of markets on that list. In general, the Commission considers that where wholesale regulation is efficient, the conditions at retail level should allow effective competition.

43. Under the **Article 7 procedure**<sup>75</sup>, the Commission continued to ensure that regulation across the EU is consistent and based on competition law principles, is limited to markets where there is a persistent market failure and is rolled back only where an effectively competitive outcome would no longer depend on ex ante regulatory intervention. The Commission assessed 244 notifications from national regulators and adopted 156 decisions. The Commission did not require any NRA to withdraw the draft measure. The draft measure was withdrawn by the NRA on its own motion in one case.
44. **Broadband access markets** provide an interesting example of the simultaneous application of ex ante sector-specific regulation and ex post competition law. The Commission sent a statement of objections to the Spanish incumbent operator preliminarily finding that *Telefónica* had been abusing its dominant position on the broadband access markets in Spain by way of a margin squeeze infringing Article 82 EC. Under the Article 7 procedure, the Commission ensured that national regulators would also include very high speed digital subscriber line access in the relevant market for wholesale broadband access where these are substitutable independently of the infrastructure over which they are delivered. Finally, under the State aid rules, the Commission has approved several projects involving State funding for broadband infrastructure and services, mostly concerning rural or remote areas with no or only limited broadband coverage<sup>76</sup>. On the other hand, the Commission decided to prohibit public funding for the planned construction of a fibre access network in the Dutch town of Appingedam<sup>77</sup>, as the project concerned an area already served by broadband networks at prices similar to other regions.
45. In the area of **mobile telephony**, the Commission has so far not objected, under the Article 7 procedure, to the view of some national regulators that regulatory intervention on the wholesale market for mobile access and call origination might be necessary to avoid consumer harm<sup>78</sup>. The merger control instruments were also used

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<sup>74</sup> 'Commission staff working document, public consultation on a draft Commission recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services', available at: [http://europa.eu.int/information\\_society/policy/ecom/doc/info\\_centre/public\\_consult/review/recommendation\\_final.pdf](http://europa.eu.int/information_society/policy/ecom/doc/info_centre/public_consult/review/recommendation_final.pdf)

<sup>75</sup> Under Article 7 of the Framework Directive, national regulators must notify to the Commission the results of their competition law based analysis of the 18 markets.

<sup>76</sup> See for instance Cases N 398/2005 *Development Tax benefit for broadband in Hungary* Commission decision, 16.5.2006, N 118/2006 *Development of broadband communication networks in rural areas of Latvia* Commission decision, 7.6.2006, N 264/05 *Broadband for rural Tuscany* Commission decision, 13.9.2006, N 222/2005 *Aid to bridge the digital divide in Sardinia* Commission decision, 22.11.2006.

<sup>77</sup> Case C 35/2006 *Broadband development Appingedam* Commission decision, 19.7.2006.

<sup>78</sup> See notifications from Cyprus, Ireland, Malta, Spain and Slovenia. The Irish NRA has, however, withdrawn its SMP designation in the course of national court procedures.

to ensure that concentrations between mobile operators would not significantly impede effective competition<sup>79</sup>.

## 2.4. Information technology

46. The Commission continued to ensure that competition is not distorted in the information technology sector, characterised by digital convergence, the growing importance of interoperability and the key role of standard-setting organisations.
47. Further steps were taken to ensure that *Microsoft* complies with its obligations under the decision of 2004<sup>80</sup>, which found an infringement of Article 82 EC, namely to (i) supply complete and accurate interoperability information, and (ii) make that information available on reasonable terms. As *Microsoft* did not provide the required complete and accurate interoperability information, the Commission adopted a decision imposing on *Microsoft* a penalty payment of EUR 280.5 million for non-compliance with its obligations.
48. In the area of **merger control**, the Commission assessed whether or not concentrations of network equipment manufacturers significantly impede effective competition. In this context, the Commission cleared the proposed merger between *Nokia* and the network equipment business of *Siemens AG*, concluding that the transaction would not significantly impede effective competition in the mobile network equipment sector<sup>81</sup>. Similarly, the Commission cleared the proposed merger between *Alcatel* and *Lucent Technologies*, concluding that the market structure for the supply of optical networking equipment and broadband access solutions would remain competitive even after the proposed transaction<sup>82</sup>.
49. In the field of **State aid control**, the Commission reviewed the proposed French tax incentive to support the creation of video games. It decided to open a formal investigation on whether this tax incentive pursues a genuine cultural goal, in view of the wider context, in particular the fierce competition from US, Canadian and Japanese video-game makers as well as the technological and economic leap of new-generation consoles.

## 2.5. Media

50. Market developments in the media sector include an increase in the overall number of distribution channels, greater consumer choice and demand for content, and the switch from analogue to digital broadcasting, which is already providing consumers with better picture quality and a greater variety of programmes. The main objective of competition policy in the media sector is to guarantee a level playing field, whether between different commercial operators or between commercial operators and publicly-funded operators.

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<sup>79</sup> Case COMP/M.3916 *T-Mobile Austria/tele.ring* Commission decision, 26.4.2006. See also paragraph 0 above.

<sup>80</sup> See also paragraph 0 above.

<sup>81</sup> Case COMP/M.4297 *Nokia/Siemens* Commission decision, 13.11.2006.

<sup>82</sup> Case COMP/M.4214 *Alcatel/Lucent* Commission decision, 24.7.2006.

51. In the area of **digital broadcasting**, following a complaint by the Italian consumer association *Altroconsumo*, the Commission opened infringement proceedings to investigate whether the Italian legislation regulating digital switchover imposes restrictions on broadcasters and grants competitive advantages to existing analogue operators, contrary to the Competition Directive<sup>83</sup> and other relevant provisions of the Regulatory Framework for telecommunications. It has opened formal State aid inquiries concerning measures facilitating digital switchover in two German *Länder*, Bavaria<sup>84</sup> and North Rhine-Westphalia<sup>85</sup>, to see whether the aid is limited to the minimum necessary and does not unduly distort competition. In decisions concerning France<sup>86</sup> and Italy<sup>87</sup>, the Commission has given more details of the conditions for granting subsidies to consumers to buy digital decoders, such as respecting the principle of technological neutrality.
52. In line with the "Broadcasting Communication"<sup>88</sup>, the Commission continued to approve State financing for **public service broadcasters** where the State funding did not exceed the public service costs<sup>89</sup>. In recent cases, the Commission has also asked Member States to introduce mechanisms to avoid overcompensation<sup>90</sup> and it has asked for aid to be recovered if a public service broadcaster has received more public funds than necessary. However, the Commission has accepted that it may be justifiable for public service broadcasters to keep a surplus as a buffer against possible fluctuations in costs/revenues<sup>91</sup>.
53. The Commission continued to give high priority to ensuring that **premium content** is made available under open and transparent conditions allowing a maximum number of operators to bid for the rights. In the *English Premier League (FAPL)* commitment decision<sup>92</sup>, the Commission confirmed the basic principles established in the *UEFA Champions League* and *Bundesliga* decisions with respect to joint selling of sport media rights<sup>93</sup>. In the area of mergers, the acquisition by *CVC*, a

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<sup>83</sup> Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ L 249, 17.9.2002, p. 21).

<sup>84</sup> Case C33/2006 *Introduction of digital terrestrial television (DVB-T) in Bavaria* at [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/C-33-2006-WLWL-en-19.07.2006.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-33-2006-WLWL-en-19.07.2006.pdf)

<sup>85</sup> Case C34/2006 *Introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia* at [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/C-34-2006-WLWL-en-19.07.2006.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-34-2006-WLWL-en-19.07.2006.pdf)

<sup>86</sup> Case N111/2006 *Aide à la TNT dans les régions sans simulcast* at [http://ec.europa.eu/community\\_law/state\\_aids/comp-2006/n111-06.pdf](http://ec.europa.eu/community_law/state_aids/comp-2006/n111-06.pdf); Case N546/2006 *Fonds d'aide à des particuliers sous conditions de ressources dans la perspective de la fin de la radiodiffusion analogique* at [http://ec.europa.eu/community\\_law/state\\_aids/comp-2006/n546-06.pdf](http://ec.europa.eu/community_law/state_aids/comp-2006/n546-06.pdf)

<sup>87</sup> Case N270/2006 *Subsidies to digital decoders with open API* at [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/N-270-2006-en-WLWL-24.01.2007.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-270-2006-en-WLWL-24.01.2007.pdf)

<sup>88</sup> Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320, 15.11.2001, p. 5).

<sup>89</sup> Cf. Commission decision approving the financial restructuring plan for the Portuguese PSB in July 2006 (State aid NN 31/2006 – Portugal).

<sup>90</sup> Cf. Commission decision closing the existing aid investigation concerning the general financing regime for the Portuguese public service broadcaster RTP (State aid E 14/2005 – Portugal).

<sup>91</sup> Cf. Commission decision concerning the *ad hoc* financing of Dutch public service broadcasters adopted in 2006 (State aid C 2/2004 – the Netherlands).

<sup>92</sup> Case COMP/38.173 *Joint selling of the media rights to the FA Premier League* at [http://ec.europa.eu/comm/competition/antitrust/cases/index/by\\_nr\\_76.html#i38\\_173](http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_76.html#i38_173)

<sup>93</sup> Case COMP/37.398, *Joint selling of the commercial rights of the UEFA Champions League* (OJ L 291, 8.11.2003, p. 25) and Case COMP/37.214, *Joint selling of the media rights to the German Bundesliga* (OJ L 134, 27.5.2005, p. 46).

private equity firm, of *SLEC*, the owner of the Formula One Group and of all TV rights to the Formula One competition<sup>94</sup>, was cleared on the condition of a divestiture ensuring that competition would not be significantly impeded as regards the selling of the TV rights in Italy and Spain to the two most popular motor sport events in the EU.

54. The Commission assessed State aid measures for **films and other audiovisual works** on the basis of the "Cinema Communication"<sup>95</sup>, which sets out the criteria for approval of such aid under the cultural exemption from the general ban on State aid. The three most significant decisions in 2006 concerned the French film support schemes<sup>96</sup>, the UK film tax incentive scheme<sup>97</sup> and the new German Film Fund<sup>98</sup>. All these measures were approved by the Commission on the basis of an undertaking that they would be amended by the national authorities to take account of any changes in the State aid rules during their period of operation.
55. In the context of **rights management**, the Commission adopted the *Cannes Extension Agreement* commitment decision<sup>99</sup>, ensuring that record producers can continue to receive rebates from collecting societies on copyright licence fees paid and that potential entry by collecting societies into the music publishing or record production markets is not impeded. The Commission also issued a Statement of Objections against *CISAC* (the "International Confederation of Societies of Authors and Composers") and the individual collecting societies in the EEA Member States which are members of *CISAC*<sup>100</sup>. The Commission expressed concerns about certain provisions in the *CISAC* model contract and in bilateral agreements between *CISAC* and its members which extend the traditional offline national monopolies of collecting societies into the online sector.

## 2.6. Transport

56. Further to the Commission's legislative initiatives in the field of transport policy with a view to creating EU-wide integrated and competitive transport markets, the goal of competition policy is to ensure that the efficient functioning of these markets is not hindered by anti-competitive practices or distortions of competition. Competition problems may exist, in particular, in the form of protected national haulage markets in the case of road transport, low levels of interoperability and weak coordination of

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<sup>94</sup> Case COMP/M.4066, *CVC/SLEC*, at [http://ec.europa.eu/comm/competition/mergers/cases/index/m81.html#m\\_4066](http://ec.europa.eu/comm/competition/mergers/cases/index/m81.html#m_4066)

<sup>95</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works (COM(2001) 534 final of 26.9.2001, OJ C 43, 16.2.2002).

<sup>96</sup> Case NN 84/05: [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/NN-84-2004-WLWL-fr-22.03.2006.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-84-2004-WLWL-fr-22.03.2006.pdf)

<sup>97</sup> Case N 461/05: [http://ec.europa.eu/community\\_law/state\\_aids/comp-2005/n461-05.pdf](http://ec.europa.eu/community_law/state_aids/comp-2005/n461-05.pdf)

<sup>98</sup> Case N 695/06:

[http://ec.europa.eu/comm/competition/state\\_aid/register/ii/by\\_case\\_nr\\_n2006\\_690.html#695](http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_n2006_690.html#695)

<sup>99</sup> Case COMP/38681 *Cannes Agreement*, commitments at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38681/commitments.pdf>. See also Press Release IP/06/1311, 4.10.2006.

<sup>100</sup> Press Release MEMO/06/63, 7.2.2006.



infrastructure in the case of rail transport, and lack of transparent access to competitive port services in the case of maritime transport.

57. In the case of **road transport**, the Commission maintained its policy of approving State aid in order to favour the uptake of cleaner technology, in particular on old vehicles<sup>101</sup>, and of approving State aid for public service obligations<sup>102</sup>.
58. The Commission adopted several State aid decisions to promote **rail transport**. It authorised a Czech aid measure consisting in guaranteeing a loan to Czech Railways to facilitate the purchase of new passenger rolling stock<sup>103</sup> and allowed the Netherlands to grant aid for the deployment of the European Train Control System<sup>104</sup>. Concerning State aid to rail infrastructure, the Commission decided in one case that the financing and supervision of the construction of new railway infrastructure did not constitute economic activities, but fell within the public policy remit<sup>105</sup>.
59. In the area of **maritime transport**, the liner conference block exemption contained in Council Regulation 4056/86 was repealed by Council Regulation 1419/2006<sup>106</sup>. This was done since the four cumulative conditions of exempting price fixing and capacity regulation under Article 81(3) EC were no longer met. The same Regulation also extended the scope of Regulation 1/2003 so as to include cabotage and tramp vessel services. In line with a request from the European Parliament and given that Regulation 1/2003 did not apply in full to the liner sector, the Commission has undertaken to issue guidelines on the application of competition law to maritime services so as to help smooth the transition to a fully competitive regime. Concerning State aid in maritime transport, the Commission favours tight convergence of aid schemes to achieve the best possible level playing field within Europe, including towage and dredging activities. It has insisted on the dismantling of any nationality clause attached to schemes exempting ship-owners from payment of the social contributions of their seafarers.
60. In the area of **air transport**, the Commission adopted Regulation 1459/2006 discontinuing the exemption, from the prohibition under Article 81(1) EC, of IATA passenger tariff conferences for routes within the EU from 1 January 2007. The new regulation also discontinues the exemption for slots and scheduling conferences for routes within the EU. In two of its decisions<sup>107</sup> adopted under Council Regulation 847/2004<sup>108</sup>, the Commission found that bilateral air service agreements concluded between Member States and third countries may infringe Articles 10 and 81 EC read jointly by requiring or encouraging air carriers designated under these agreements to agree on or coordinate tariffs and/or the capacity they operate. In the area of antitrust,

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<sup>101</sup> N 400/2006 Italy adopted on 6.12.2006 and N 573/2005 Denmark to be adopted.

<sup>102</sup> See Commission decision N 604/2005, 16.5.2006 (OJ C 209, 31.8.2006) and Commission decision N 556/2005, 19.7.2006 (OJ C 207, 30.8.2006).

<sup>103</sup> Commission decision N 565/2005, 22.2.2006, C(2006) 457 final.

<sup>104</sup> Commission decision N 622/2005, 7.6.2006, C(2006) 2077 final.

<sup>105</sup> N 478/2004, 7.6.2006 (OJ C 209, 31.8.2006).

<sup>106</sup> OJ L 269, 28.9.2006, p. 1.

<sup>107</sup> Commission decisions C(2006) 2009, 31.5.2006 and C(2006) 2010, 20.6.2006.

<sup>108</sup> Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (OJ L 157, 30.4.2004, p. 7).

the Commission sent a Statement of Objections to members of the *SkyTeam airline alliance*, expressing concerns about a number of routes in respect of which the SkyTeam cooperation could have a negative effect on competition. The Commission also continued its examination of State aid to carriers in difficulty<sup>109</sup>, adopted a number of decisions concerning start-up aid<sup>110</sup> and aid to airports<sup>111</sup>, and dealt with cases involving aid to both airlines and airports<sup>112</sup>. Finally, the Commission decided to refer Greece to the European Court of Justice for its failure to recover illegal State aid, estimated to amount at least to EUR 160 million, granted to Olympic Airways between 1998 and 2002.

## 2.7. Postal services

61. The postal sector is undergoing significant changes: altered customer needs, organisational change, gradual market opening, automation/new technologies and electronic substitution. In this market environment the main pillars of the Commission's policy have been a staged reduction of the services for which monopoly rights are granted to Universal Service Providers (USPs), on the one hand, and the preservation of competition in liberalised areas of the postal market, to avoid de facto re-monopolisation by USPs, on the other hand.
62. Regarding the application of **State aid rules** to the postal sector, in the light of the *Chronopost*<sup>113</sup> and *Altmark*<sup>114</sup> case law, the Commission has deepened its analysis of the accounts of USPs so as to ensure the absence of overcompensation and of cross-subsidisation. In particular, the Commission has examined the methods applied by the postal operators to allocate costs between universal services and other services and to calculate the financial burden of the public tasks.
63. The Commission declared compensation for Services of General Economic Interest (SGEI) compatible with the State aid rules, in line with the 2005 Community Framework<sup>115</sup>, only where the amount of the compensation did not exceed the costs of the public service obligation (provided that other conditions of the 2005 Framework were also met)<sup>116</sup>.
64. Besides assessing the compatibility of compensation granted to postal operators for providing SGEI, the Commission examined whether postal operators were enjoying other advantages. For example, in the case "*France; Recommandation proposant l'adoption de mesures utiles concernant la garantie illimitée de l'Etat en faveur de La*

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<sup>109</sup> *Cyprus Airways* (OJ C 113, 13.5.2006, p. 2).

<sup>110</sup> Notably in relation to Malta (N640/06 - adopted on 22 November).

<sup>111</sup> Notably a case involving capital expenditure for six small airports in Ireland (N353/06 - adopted on 26 September).

<sup>112</sup> *DHL Leipzig – Halle Airport*, adopted on 22 November.

<sup>113</sup> Joined cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost SA* [2003] ECR I-6993.

<sup>114</sup> Case C-280/00, *Altmark Trans GmbH* [2003] ECR I-7747.

<sup>115</sup> Community Framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

<sup>116</sup> See, for example, Case N 165/2005, *Government rural network support funding to Post Office Limited (POL) for 2006-2008* (OJ C 141, 16.6.2006, p. 2) and Case N 642/05, *State compensation to Posten AB for providing basic payment and cash facility services*.

*Poste*"<sup>117</sup>, the Commission recommended that France should end the unlimited State guarantee enjoyed by the French Post office in its capacity as a public body by the end of 2008.

65. Lastly, in addition to checking that subsidiaries of postal operators active in competitive markets outside the SGEI were not cross-subsidised, the Commission continued to ensure that these subsidiaries were not enjoying State aids. For instance, in the "*DHL Leipzig – Halle Airport*"<sup>118</sup> case, the Commission decided to open proceedings to determine whether the Land Sachsen and the publicly owned Leipzig Airport had acted as private investors when providing DHL with infrastructures and guarantees in case of a ban on night flights.

### **3. THE EUROPEAN COMPETITION NETWORK AND NATIONAL COURTS – OVERVIEW OF COOPERATION**

66. 2006 has been the second full year of implementation of the enforcement system set up by Regulation 1/2003. It saw a further strengthening of the cooperation between the members of the ECN, i.e. the EU Member States' NCAs and the Commission, on the one hand, and between national courts and the Commission, on the other.

#### **3.1. General overview**

67. Cooperation between the ECN members in individual cases is organised around two principal obligations on the part of the NCAs, namely to inform the Commission when new cases are opened and before the final decision is taken. The Commission was informed of some 150 new case investigations launched by NCAs. A small number of complaints were re-allocated from the Commission to NCAs that were willing to follow up the matters raised, whereas in a limited number of instances NCAs expressly drew the Commission's attention to suspected competition problems that appeared to have effects in several Member States.
68. The Commission - on the basis of the formal cooperation provisions – or its services – on an informal basis - have reviewed or given advice, regarding some 125 cases originating from NCAs. To date, the Commission has not made use of the possibility of relieving a NCA of its competence with a view to ensuring consistent application of competition rules by initiating proceedings under Article 11(6) of Regulation 1/2003.
69. The strength and the potential of the ECN cooperation go beyond the legal obligations set out in Regulation 1/2003. The ECN also provides a useful platform for EU competition authorities to coordinate enforcement action, ensure consistency upfront and discuss general policy issues. During 2006, such work took place in four different fora. First, the Director-General of the Competition DG and the heads of all the NCAs met for their annual meeting in the ECN context, where the ECN leniency model programme was endorsed. Second, the NCAs and the Commission met regularly in "plenary meetings" where general issues relating to antitrust policy were

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<sup>117</sup> Case E 15/2005, *Recommandation proposant l'adoption de mesures utiles concernant la garantie illimitée de l'Etat en faveur de La Poste* (not yet published).

<sup>118</sup> Case N 227/2006; *DHL – Leipzig Halle Airport* (OJ C 48, 2.3.2007, p. 7).

debated. Third, six working groups have been dealing with specific issues, such as sector inquiries or the abuse of dominant positions. Finally, 15 ECN sectoral subgroups were dedicated to particular sectors<sup>119</sup>.

### 3.2. Application of EU competition rules by national courts in the EU

70. Article 15(1) of Regulation 1/2003 allows national judges to ask the Commission for information in its possession or for an opinion on questions concerning the application of the EU competition rules. In 2006, the Commission issued one opinion to a court in the Netherlands and another opinion to a Belgian judge. A request from a Swedish judge was pending at the end of the year.
71. Article 15(2) of Regulation 1/2003 requires the Member States to forward to the Commission a copy of any written judgment issued by national courts deciding on the application of Articles 81 or 82 EC. The Commission received copies of some 30 judgments handed down in 2006, which were posted on the Competition DG's website in so far as the transmitting authority did not class them as confidential.
72. Article 15(3) of Regulation 1/2003 provides that where the coherent application of Articles 81 or 82 EC so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States, and may also make oral observations with the permission of the court in question. In 2006, for the first time since the entry into force of Regulation 1/2003, the Commission made use of this "amicus curiae" possibility, by presenting observations to the Cour d'appel de Paris concerning the interpretation of the motor vehicle block exemption regulation<sup>120</sup>.
73. Continuous training and education of national judges in EU competition law is very important in order to ensure both effective and coherent application of those rules. Since 2002, the Commission has co-financed several training projects each year and did so again in 2006, co-financing 15 projects for the training of national judges from all 25 EU Member States.

## 4. INTERNATIONAL ACTIVITIES

74. In the run-up to the accession of Romania and Bulgaria in January 2007, the Commission closely monitored the preparations for membership and assisted in the enforcement of the competition rules. It reviewed the State aid measures which Bulgaria and Romania notified in accordance with the existing aid mechanism established by the Accession Treaty. The Commission continued to assist Croatia and Turkey, as well as the Western Balkan countries, in further aligning their competition rules with EU law.
75. The Commission continued intensive cooperation with numerous competition authorities on a **bilateral** basis and in particular with the authorities of the

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<sup>119</sup> Banking, Securities, Insurance, Food, Pharmaceuticals, Professional services, Healthcare, Environment, Energy, Railways, Maritime Transport, Motor vehicles, Telecoms, Media, and Sports.

<sup>120</sup> Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30).

Community's major trading partners. Based on dedicated cooperation agreements in competition matters, cooperation with the United States, Canada and Japan included case-related contacts, coordinated enforcement action and discussions on remedies. The Competition DG offered assistance in the drafting of competition law in China and Russia.

76. In the framework of **multilateral** cooperation, the Competition DG continued to play a leading role in the International Competition Network, in which it is a member of the Steering Group, co-chair of the Cartels Working Group, and an active member of Working Groups on Mergers, Competition Policy Implementation, and Unilateral Conduct. Furthermore, the Competition DG continued to participate actively in and contributed to the work of the OECD Competition Committee.

## **5. INTERINSTITUTIONAL COOPERATION**

77. The Commission continued its cooperation with the other Community institutions and bodies.
78. Each year, the European Parliament issues an own-initiative report on the Commission's Annual Competition Report<sup>121</sup>. The Commission has also participated in discussions held in the European Parliament on Commission policy initiatives, such as on the State aid reform and the Green Paper on damages actions for breach of EC antitrust rules. The Commissioner responsible for Competition holds regular exchanges of views with the responsible Parliamentary Committees to discuss competition policy matters. The Committee in charge of Economic and Monetary Affairs receives regular lists of pending cases in the public domain as well as information on the main policy initiatives in the field of competition. Finally, the Commission also cooperates closely with Members of the European Parliament, responding to Parliamentary Questions (both oral and written)<sup>122</sup> and Petitions, as well as with the European Ombudsman.
79. The Commission also cooperates closely with the Council, informing it of important policy initiatives in the field of competition such as the State aid reform and the energy and financial services sector inquiries, and participates in Council working groups.
80. Furthermore, the Commission informs the European Economic and Social Committee and the Committee of the Regions about major policy initiatives and participates in debates that may be held by either Committee, for instance in connection with the adoption of the yearly report by the European Economic and Social Committee on the Commission's annual Report on Competition Policy.

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<sup>121</sup> In 2006, this concerned the Rapporteur Lipietz report on the Commission's 2004 Annual Competition Report.

<sup>122</sup> In 2006, approximately 551 written questions and 66 oral questions addressed to the Commission concerned (aspects of) competition policy.