

**EN**



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.6.2008  
SEC(2008) 2038

**COMMISSION STAFF WORKING DOCUMENT**

**Annex to the**

**REPORT FROM THE COMMISSION**

**Report on Competition Policy 2007**

{COM(2008) 368}

## TABLE OF CONTENTS

I – Instruments.....	9
A – Antitrust – Articles 81, 82 and 86 EC .....	9
1. Applicable rules .....	9
1.1. Continuing the fight against cartels.....	9
1.2. Other agreements and concerted practices .....	9
1.3. Abuse of dominant positions (Article 82 EC).....	10
1.4. State measures.....	10
2. Application of Articles 81, 82 and 86 EC .....	10
2.1. Cartels .....	10
2.2. Other agreements and concerted practices .....	12
2.2.1. Antitrust enforcement in the financial services sector .....	12
2.3. Abuse of dominant positions (Article 82 EC).....	13
2.3.1. Margin squeeze in a regulated sector .....	13
2.3.2. Commission Decision providing guidance on long-term agreements in the Dstrigas case.....	13
2.4. State measures.....	14
2.4.1. Full application of competition law in the regulated electronic communications sector .....	14
2.4.2. Effective use of the periodic penalty payments tool under Article 228 EC.....	15
2.4.3. Infringement proceedings concerning failure to implement the Financial Transparency Directive .....	16
3. Selected Court cases.....	16
3.1. The CFI reiterates settled case law on refusal to supply in the Microsoft case .....	16
3.2. The CFI upholds the Commission's decision on predatory pricing by Wanadoo .....	17
3.3. The CFI finds that Commission letters cannot be appealed in the context of the Article 7 procedure.....	18
3.4. CFI judgment in <i>Akzo</i> defines the limits of legal professional privilege .....	19
3.5. CFI judgment in the DSD case concerning abuses within the German system for the collection and recycling of packaging waste .....	20
B – Merger control .....	21

1.	Applicable rules .....	21
1.1.	Guidance on jurisdiction in merger control: Commission Consolidated Notice on Jurisdiction .....	21
1.2.	Guidance on the assessment of mergers: Commission Guidelines on Non-horizontal mergers.....	22
1.3.	Guidance on the assessment of mergers: draft Revised Commission Notice on Remedies .....	23
2.	Application of the merger control rules .....	24
2.1.	Overview .....	24
2.2.	Remedies in non-horizontal cases.....	25
3.	Selected Court cases.....	26
3.1.	Jurisdiction in merger cases .....	26
3.1.1.	Cementbouw v Commission .....	26
3.2.	Substantive assessment of mergers .....	27
3.2.1.	Sun Chemicals and others v Commission.....	27
3.3.	Damages for alleged losses resulting from a Commission merger decision.....	28
3.3.1.	Schneider Electric v Commission .....	28
C –	State aid control.....	29
1.	Applicable rules .....	29
2.	Application of the State aid rules .....	30
2.1.	Overview .....	30
2.2.	Applying regional aid rules.....	31
2.3.	Applying the State aid framework for Research, Development and Innovation (R&D&I).....	32
2.4.	Assessing risk capital financing for SMEs.....	33
2.5.	Assessing training aid .....	33
2.6.	Taxation cases .....	34
2.7.	Aid for rescuing and restructuring firms in difficulty.....	34
2.8.	Aid for environmental protection.....	35
2.9.	Enforcing and monitoring State aid decisions .....	36
2.10.	The application of State aid rules in particular sectors .....	37
2.10.1.	Steel.....	37

2.10.2.	Shipbuilding .....	38
2.10.3.	Coal .....	38
2.10.4.	Agriculture .....	39
2.10.5.	Fisheries .....	39
3.	Selected Court cases.....	40
3.1.	Definition of aid .....	40
3.2.	Procedural issues.....	40
3.3.	Recovery of aid .....	43
D -	The role of competition policy in the wider policy framework .....	44
II –	Sector Developments .....	45
A –	Energy .....	45
1.	Overview of the sector .....	45
2.	Policy developments .....	46
2.1.	Antitrust enforcement.....	47
2.2.	Mergers: concurrent application of internal market and competition rules (Article 21 of the Merger Regulation).....	49
2.3.	State aid: investigations opened in respect of regulated electricity tariffs that may favour certain undertakings.....	50
B –	Financial services .....	52
1.	Overview of the sector .....	52
2.	Policy developments .....	53
2.1.	Sector inquiry into retail banking.....	53
2.2.	The Commission prohibits MasterCard's Multilateral Interchange Fees for certain cross-border card payments in the EEA.....	54
2.3.	Morgan Stanley/Visa International and Visa Europe.....	55
2.4.	Groupement des Cartes Bancaires .....	57
2.5.	Business insurance sector inquiry .....	58
2.6.	State aid in the financial services sector .....	59
2.7.	Mergers in the financial services sector .....	61
C –	Electronic communications .....	61
1.	Overview of the sector .....	61

2.	Policy developments .....	62
2.1.	Review of the Regulatory Framework: reduction of markets subject to <i>ex ante</i> regulation.....	62
2.2.	Application of the Regulatory Framework and other policy developments .....	64
2.3.	Developments in the area of State aid.....	65
2.3.1.	Support for broadband services.....	65
2.3.2.	Aid to Greek incumbent operator.....	67
2.4.	Merger Control.....	67
D – Information technology .....		68
1.	Overview of the sector .....	68
2.	Policy developments .....	69
E – Media and Sport.....		71
1.	Overview of the sector .....	71
2.	Policy developments .....	73
2.1.	Digital Broadcasting.....	73
2.2.	Public service broadcasting.....	74
2.3.	Rights management and online distribution.....	75
2.4.	Premium sport content .....	76
2.5.	White Paper on Sport .....	77
2.6.	Film and other audiovisual works .....	77
2.7.	Application of merger control.....	78
F – Automotive industry .....		78
1.	Overview of the sector .....	78
2.	Policy developments .....	79
2.1.	Antitrust enforcement.....	80
2.2.	Merger Control.....	81
2.3.	State aid control.....	82
G – Transport .....		83
1.	Overview of the sector .....	83
2.	Policy developments .....	85

2.1.	Road Transport.....	85
2.2.	Rail Transport and Combined Transport.....	86
2.2.1.	Railways liberalisation: further integration of European rail transport markets.....	86
2.2.2.	Applying Merger Rules to rail transport – DeutscheBahn /EWS .....	87
2.2.3.	Applying State aid rules to rail transport .....	88
2.3.	Inland Navigation.....	88
2.4.	Maritime Transport .....	88
2.4.1.	Policy developments .....	88
2.4.2.	Applying State Aid Rules to Maritime Transport.....	89
2.5.	Aviation.....	90
2.5.1.	Enforcement of Article 81 – SkyTeam airline alliance.....	90
2.5.2.	Applying merger rules to aviation.....	91
2.5.3.	International Aviation Policy – Application of Regulation (EC) No 847/2004.....	92
2.5.4.	International aviation policy – application of the Horizontal Mandate .....	92
2.5.5.	Applying State Aid Rules to Air Transport.....	93
2.5.6.	International aviation policy – EU-US open aviation agreement .....	94
H –	Postal services .....	94
1.	Overview of the sector .....	94
2.	Policy developments .....	95
2.1.	Objectives of the Commission .....	95
2.2.	Initiatives of the Commission .....	96
III –	The European Competition Network and cooperation with National Courts .....	98
A –	General overview .....	98
1.	COOPERATION ON POLICY ISSUES .....	99
1.1.	Further convergence of national laws and instruments in the context of enforcement of Regulation 1/2003 by NCAs.....	100
1.2.	Cooperation in individual cases .....	100
1.2.1.	Case allocation .....	101
1.2.2.	Coherent application of the rules .....	101
2.	Application of EU Competition rules by National Courts In The EU: Report on the implementation of Article 15 of Regulation 1/2003 .....	102

2.1.	Assistance in the form of information or in the form of an opinion .....	102
2.1.1.	The opinions requested by Swedish courts .....	102
2.1.2.	The opinion requested by a Spanish court .....	103
2.2.	Judgments of national courts.....	104
2.3.	Amicus curiae intervention under Article 15(3) of Regulation 1/2003 .....	104
2.4.	Financing the training of national judges in EU competition law .....	105
IV – International activities.....		105
A – Enlargement, Western Balkans and Neighbourhood policy .....		105
B – Bilateral co-operation .....		106
1.	Agreements with the USA, Canada and Japan.....	106
2.	Cooperation with other countries and regions .....	107
C – Multilateral co-operation .....		108
1.	International Competition Network .....	108
1.1.	Working Groups.....	108
1.2.	OECD.....	109
V – Outlook for 2008 .....		110
A – Antitrust.....		110
B – Mergers.....		110
C – State aid .....		110
D – International activities .....		110
E – Sector Developments .....		111
1.	Electronic communications.....	111
2.	Information Technology.....	112
3.	MEDIA.....	112
4.	Health-related markets .....	113
5.	Financial services sector .....	114
6.	Postal services .....	115
VI – Interinstitutional cooperation .....		116
1.	European Parliament .....	116



2.	Council .....	117
3.	European Economic and Social Committee and Committee of the Regions.....	117

# I – Instruments

## A – ANTITRUST – ARTICLES 81, 82 AND 86 EC

### 1. APPLICABLE RULES

#### 1.1. Continuing the fight against cartels

1. A key aspect in the detection of cartels is the Commission leniency policy, which offers incentives to cartelists to report their illegal activities. December 2006 saw the introduction of a revised leniency notice (the 2006 Notice)<sup>1</sup>. The 2006 Notice is the Commission's third leniency notice following earlier versions in 1996 and 2002, and applications under the revised notice have been forthcoming in 2007. The Commission received 20 applications for immunity<sup>2</sup> and 11 applications for a reduction of fines under the 2006 Notice from the date of its introduction to the end of 2007.
2. In particular, the 2006 Notice subjects not only immunity applicants but also applicants for a reduction of fines to a number of conditions in order to qualify for lenient treatment. Accordingly, all applicants must cooperate fully and continuously with the Commission, must immediately cease participation in the infringement and must not have tampered with evidence or disclosed the fact or content of their application. One remaining distinction between conditions for immunity and reduction of fines is that applicants that have coerced other undertakings to participate in the cartel will not be eligible for immunity, although they may qualify for reduction. The Commission carefully assesses compliance with these cumulative conditions.

#### 1.2. Other agreements and concerted practices

3. The Commission's 2005 *Green Paper on damages actions for breach of the EC anti-trust rules* received strong support in a European Parliament resolution calling on the Commission to prepare a White Paper with detailed proposals to ensure more effective antitrust damages claims<sup>3</sup>. In preparing this White Paper, the Commission consulted widely with representatives of Member State governments, judges from national courts, representatives of industry, consumer associations, the legal community and many other stakeholders. In parallel, the Commission services drafted an extensive impact assessment report analysing the problems in this area and possible solutions. In order to assist the Commission services in this task, a

---

<sup>1</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

<sup>2</sup> Where several applications for immunity have been received for the same alleged infringement, the first application is counted as an immunity application and the subsequent ones as applications for a reduction of fines unless the first application is rejected.

<sup>3</sup> European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207 (INI)), available at: <http://www.europarl.europa.eu/oeil/file.jsp?id=5378362>

consortium of independent experts drafted a very comprehensive study on the welfare impact and potential scenarios involved in more effective claims for damages. Both the impact assessment report and the study are due to be published at the same time as the White Paper.

4. Following a consultation, on 13 September the Commission adopted draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, with a view to final adoption in 2008<sup>4</sup>. The Guidelines set out the principles that the Commission will follow when defining markets and assessing cooperation agreements involving maritime cabotage, liner and/or tramp vessel services, following the repeal of Regulation 4056/86 containing the liner conference block exemption, and the extension of the scope of Regulation 1/2003 to include cabotage and tramp vessel services.

### **1.3. Abuse of dominant positions (Article 82 EC)**

5. During 2007, the Commission services continued their reflections on the feedback it received in response to the DG COMP Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, and are in the process of analysing the comments received and of the Commission's ongoing enforcement experience in this area. In this context, the judgment of the Court of First Instance in September upholding the Commission's substantive finding that Microsoft abused its dominant position, thereby supporting the Commission's analytical approach in the areas of tying and refusal to supply, is a welcome development.

### **1.4. State measures**

6. As part of the Single Market Review concluded by the Commission on 20 November, particular attention was given to the issue of services of general economic interest (SGEs), including social services of general interest (SSGI) in the form of a Communication<sup>5</sup> which notes that, in the field of State aid, the decision and the framework on State aid in the form of public service compensation adopted in 2005 (often referred to as the 'Altmark package'), has already made a significant contribution to simplifying the applicable rules. An accompanying Staff Working Paper provides technical guidance in the form of answers to frequently asked questions, including on the basis of legislation, case law and Commission decisions related to SGEs and in particular SSGI<sup>6</sup>.

## **2. APPLICATION OF ARTICLES 81, 82 AND 86 EC**

### **2.1. Cartels**

7. The Commission continued to attach high priority to the detection, investigation and sanctioning of cartels in 2007. The focus of the Commission's activities was on significant hard core cartels, in particular those with a European or worldwide scope.

---

<sup>4</sup> OJ C 215, 14.9.2007, p. 3; see also Press release IP/07/1325, 13.9.2007.

<sup>5</sup> See COM(2007) 725 final.

<sup>6</sup> SEC(2007) 1516.

The Commission issued eight final decisions<sup>7</sup> in which it fined 41<sup>8</sup> undertakings a total of EUR 3 334 million (compared with 2006 when there were seven final decisions, 41<sup>9</sup> undertakings fined and a total of EUR 1 846 million). The Commission imposed the highest fine per cartel case to date of EUR 992 million in the *Elevators and Escalators* case and also, in the same case, the highest fine per undertaking for a cartel violation with the imposition of a penalty of EUR 477 million on the ThyssenKrupp group.

8. The Commission has been able to detect a number of cartels on its own initiative. The recent cases of *Elevators and Escalators*, *Fasteners*, *Professional Videotape* and *Flat Glass* demonstrate that, although the Commission's leniency policy is an effective tool in detecting cartels, the Commission is not dependant on evidence provided by leniency applicants to uncover cartel behaviour. The Commission continues to place considerable weight on such *ex officio* investigations, which may result from market monitoring, sector enquiries, complaints and via the national competition authorities in the European Competition Network.
9. On-site inspections covering a wide variety of sectors included calcium carbide<sup>10</sup>, power transformers<sup>11</sup>, marine hoses<sup>12</sup>, hardware for windows and doors<sup>13</sup>, international freight forwarding<sup>14</sup>, cathode ray tubes<sup>15</sup> and exotic fruit<sup>16</sup>. A number of these inspections were coordinated with other competition authorities around the world. In addition, in the *Marine Hoses* case, which itself involved cooperation between the EU, US, UK and Japanese authorities, the Commission exercised for the first time its power to conduct a search of a private home.
10. The Commission has also sought to impose appropriate sanctions to punish those participating in cartels and to ensure effective deterrence from entering into cartel behaviour. The new Guidelines on Fines<sup>17</sup>, introduced in 2006, were applied for the first time in *Professional Videotape* and employed subsequently in *Flat Glass* and *Chloroprene Rubber*. Under the new guidelines, fines better reflect the overall economic significance of the infringement as well as the respective shares of the companies involved.

---

<sup>7</sup> Case COMP/38.899 *Gas Insulated Switchgear* Commission decision, 24.1.2007; Case COMP/38.823 *Elevators and Escalators* Commission decision, 21.2.2007; Case COMP/37.766 *Netherlands Beer* Commission decision, 18.4.2007; Case COMP/39.168 *Hard Haberdashery:Fasteners* Commission decision, 19.9.2007; Case COMP/38.710 *Bitumen Spain* Commission decision 3.10.2007; Case COMP/38.432 *Professional Videotapes* Commission decision, 20.11.2007; Case COMP/39.165 *Flat Glass* Commission decision, 28.11.2007; Case COMP/38.629 *Chloroprene Rubber* Commission decision, 5.12.2007.

<sup>8</sup> This figure does not include the companies that received immunity from fines for cooperation under the Leniency Notice.

<sup>9</sup> This figure includes two undertakings where decisions have been readopted.

<sup>10</sup> MEMO/07/22, 18.1.2007.

<sup>11</sup> MEMO/07/53, 13.2.2007.

<sup>12</sup> MEMO/07/163, 3.5.2007.

<sup>13</sup> MEMO/07/276, 4.7.2007.

<sup>14</sup> MEMO/07/406, 11.10.2007.

<sup>15</sup> MEMO/07/453, 8.11.2007.

<sup>16</sup> MEMO/07/534, 30.11.2007.

<sup>17</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, pp. 2-5.

11. Three points in particular emerge from the Commission's fining decisions. First, there continued to be a significant increase in the amount of the fine imposed on repeat offenders. In *Elevators and Escalators* the fines for ThyssenKrupp companies were increased by 50%, in *Gas Insulated Switchgear* ABB's fine was increased by 50% and in *Chloroprene Rubber* the fines of Bayer and ENI were increased by 50% and 60% respectively. The seriousness with which the Commission views repeat offences is reflected in the new Guidelines on Fines, which provide for increases of up to 100% for such instances of recidivism.
12. Second, obstructing a Commission investigation during on-site inspections incurs severe penalties. Sony's fine in the *Professional Videotape* case was increased by 30% for a refusal by one of its employees to answer questions when under an obligation to respond, while another Sony employee was found to have shredded documents during the inspection.
13. Third, leaders of the cartel are likely to have the level of their fines increased. In *Bitumen Spain*, the fine for Repsol and Proas was increased by 30% for their leadership role. In *Gas Insulated Switchgear*, fines were increased by 50% for Siemens, Alstom and Areva for their leadership role as secretary of the cartel.

## **2.2. Other agreements and concerted practices**

### *2.2.1. Antitrust enforcement in the financial services sector*

14. The decisions adopted by the Commission during the second half of 2007 in *Groupement des Cartes Bancaires* (see II.B.2.4.), *Morgan Stanley/Visa* (see II.B.2.3.) and *MasterCard* (see II.B.2.2.) provide useful guidance with respect to the competition principles to be applied to the payments sector. Such guidance is important for the integration of the payments, especially so in the context of Single Euro Payments Area (SEPA). SEPA is an initiative set up by the European banking industry, represented by the European Payments Council, to create an integrated market for payment services which is subject to effective competition and where there is no distinction between cross-border and national payments within Europe.
15. The decision in *Groupement des Cartes Bancaires* illustrates that behaviour by a payment card scheme that forecloses national markets by keeping competitors at bay will not be tolerated. The decision in *Morgan Stanley/Visa* makes clear that unjustified exclusion from the market of certain members without valid reasons which leads to foreclosure is prohibited. It signals that membership rules and competition clauses are likely to be closely scrutinised by competition authorities to ensure the non-discriminatory and proportional application of such schemes.
16. Finally, in *MasterCard*, the Commission analysed MasterCard's cross border intra-EEA multilateral interchange fees (MIFs) for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards. While the decision does not declare MIFs illegal as such, it does make clear that, in order to comply with Article 81 EC, such fees must contribute to technical and economic progress and benefit consumers.

## 2.3. Abuse of dominant positions (Article 82 EC)

### 2.3.1. Margin squeeze in a regulated sector

17. On 4 July, the Commission adopted a decision against the Spanish incumbent telecoms operator *Telefónica* for a very serious abuse of its dominant position in the Spanish broadband market. The fine imposed on *Telefónica* amounted to EUR 151 875 000. The Commission found that *Telefónica* had imposed a margin squeeze between the wholesale prices it charged to competitors and the retail prices it charged to its own customers from 2001 to 2006. *Telefónica*'s competitors were forced to make losses if they wanted to match *Telefónica*'s retail prices. The conduct contributed to consumers paying among the highest retail prices in the fifteen old EU Member States (EU-15), and broadband penetration remained well below the average EU-15 rate. The abuse ended with the Spanish regulator's decision of 21 December 2006 to lower *Telefónica*'s wholesale prices (a reduction of between 22% and 61% depending on the download speed of the offer).
18. This decision shows that the Commission is ready to act forcefully against price abuses, even in a scenario where the industry under examination is subject to sector-specific regulation. In the present case, regulation did not preclude *Telefónica* from taking the initiative to avoid the margin squeeze by decreasing its wholesale prices or increasing its retail prices.
19. Both *Telefónica* and the Spanish Government have appealed against the Commission decision before the Court of First Instance (CFI)<sup>18</sup>. The decision also gave rise to private enforcement for harm caused by violations against competition law, which the Commission in principle encourages<sup>19</sup>. For example, on 6 November the consumers association, *Ausbanc Consumo*, filed a claim against *Telefónica* for damages for harm caused to all consumers and the Spanish market. According to *Ausbanc*, the harm caused amounted to EUR 458 million.

### 2.3.2. Commission Decision providing guidance on long-term agreements in the *Distrigas* case<sup>20</sup>

20. On 11 October the Commission adopted an Article 9 Decision concerning the long-term gas supply contracts concluded by *Distrigas* in Belgium. Under this decision, the Commission makes legally binding until 2011 a set of commitments offered by *Distrigas* to address concerns raised by the Commission in the course of an investigation under Article 82.
21. The Commission's concerns were that *Distrigas* could be dominant on the market for the supply of gas to large customers in Belgium and that its long-term gas supply contracts in this market could make it difficult for other gas suppliers to build up a portfolio of customers. The concerns focused on two related factors: the duration of the contracts and the volumes of gas tied to *Distrigas*.

---

<sup>18</sup> Case T-336/07, OJ C 269, 10.11.2007, p. 55.

<sup>19</sup> White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

<sup>20</sup> Case COMP/37.966 *Distrigas*.

22. To address these concerns, Distrigas proposed to conclude no new gas supply contracts with gas resellers for a term of more than two years. The maximum duration of new contracts with other large gas customers (industrial consumers and electricity generators) would be five years, except for new gas-fired power plants, for which a longer duration may be justified on efficiency grounds. Furthermore, Distrigas would ensure that an average of 70% of the gas demand that it has contracted to supply to these customers would return to the market every year (in principle because the contract expires).
23. While Distrigas enjoys some flexibility in meeting this average over the lifetime of the commitments, at least 65% of its total contracted volumes must return to the market each year (and on average, over the whole period of commitments, at least 70%). The commitments also ensure that, even if its sales volumes decrease, Distrigas would be able to tie a certain fixed volume of gas for more than a year ahead. This maximum fixed volume represents about 20% of the total sales to these customers.
24. The commitments also ensure that the rights of Distrigas' existing customers under long-term contracts would not be affected. For such customers, Distrigas will grant unilateral rights of termination with prior notice without indemnity. These contracts will be treated as short-term contracts for the purpose of the commitments.
25. The effect of these commitments is to ensure that Distrigas does not tie an excessive proportion of customers for more than one year ahead, while allowing Distrigas as much flexibility as possible in managing its portfolio of contracts.

#### **2.4. State measures**

##### *2.4.1. Full application of competition law in the regulated electronic communications sector*

26. In June the Commission closed an infringement procedure against the Czech Republic which had limited the power of the Czech Competition Authority (Czech NCA) to apply Articles 81 and 82 EC to anticompetitive behaviour in the electronic communications sector<sup>21</sup>. Following a reasoned opinion in March<sup>22</sup> the contested provision of the Czech Competition Act was repealed and EU competition rules can now be fully applied by the Czech NCA.
27. The contested provision ruled out the applicability of the Czech Competition Act (which inter alia contains the conditions under which the Czech NCA applies Articles 81 and 82) to anticompetitive behaviour which was at the same time in breach of obligations under the EU regulatory framework for electronic communications (Regulatory Framework)<sup>23</sup>. This was contrary to EU law, which does not allow any such limitation of the applicability of EU competition rules. On

---

<sup>21</sup> See Press Release IP/07/956, 28.6.2007.

<sup>22</sup> See Press Release IP/07/400, 23.3.2007. The reasoned opinion was the second step of the infringement procedure under Article 226 EC and followed the sending of a letter of formal notice in July 2006.

<sup>23</sup> See Directives 2002/21/EC (Framework Directive), 2002/20/EC (Authorisation Directive), 2002/19/EC (Access Directive), 2002/22/EC (Universal Service Directive).

the contrary, it provides that both competition law and sector-specific regulation can apply to the same set of facts.

28. More specifically, neither the EC Treaty nor secondary Community legislation, notably Regulation 1/2003, allows any exemptions from the applicability of Articles 81 and 82 to the electronic communications sector. The Regulatory Framework cannot – and does not – exclude the application of Articles 81 and 82 either. The decision against the Spanish incumbent telecoms operator *Telefónica* for a very serious abuse of its dominant position in the Spanish broadband market referred above (paragraph 17) is a clear example of this. In fact, the Regulatory Framework explicitly acknowledges the primary role of competition law remedies in the electronic communications sector.
29. Therefore, the Commission considered that the Czech Republic had not met its obligations to take all appropriate measures to fulfil its obligations arising from the EC Treaty (Article 10), in combination with its obligations to designate a competition authority or authorities with the power to apply Articles 81 and 82 in individual cases and so ensure effective compliance with these articles (Articles 35 and 5 of Regulation 1/2003).

#### 2.4.2. *Effective use of the periodic penalty payments tool under Article 228 EC*

30. In enforcing Directive 2002/77/EC on competition in the markets for electronic communications networks and services<sup>24</sup> (based on Article 86 EC), the Commission's right under Article 228 to ask the Court of Justice (ECJ) to impose periodic penalty payments proved to be an effective tool. In response to a reasoned opinion based on Article 228 issued to Luxembourg for failure to comply with a ECJ ruling<sup>25</sup>, Luxembourg announced the adoption of two new regulations establishing transparent procedures for operators wishing to roll out their networks alongside State and municipal roads, thereby ending the infringement.
31. In most infringement procedures the Member States complied before Article 228 procedure was started. For example, in July the Commission withdrew<sup>26</sup> its pending appeal at the ECJ under Article 226 against Hungary after the latter abolished a provision of its Media Act that prevented cable operators from providing cable TV services to more than one third of the Hungarian population. This restriction, which infringed Directive 2002/77/EC on competition in the markets for electronic communications networks and services, prevented investments for the provision of broadband services, including 'triple play' services (voice telephony, broadband internet access and cable TV distribution) by the cable TV operators in competition with the incumbent operator which offered its services throughout the whole of the country.

---

<sup>24</sup> Directive 2002/77/EC of 16.9.2002 (Liberalisation Consolidation), OJ L 249, 17.9.2002, p. 21.

<sup>25</sup> See Press Release IP/07/10, 28/6/2007.

<sup>26</sup> See Press Release IP/07/1137, 19.6.2007.



#### 2.4.3. *Infringement proceedings concerning failure to implement the Financial Transparency Directive*

32. In 2007 the infringement proceedings against Austria, Spain, Slovenia and Poland were closed following the adoption of the required measures to transpose Commission Directive 80/723/EEC (the Transparency Directive)<sup>27</sup>, as amended, into national law. New infringement proceedings were initiated against seven Member States for non-communication or non-conformity of the national transposition measures (Belgium, Denmark, Italy, Luxembourg, the United Kingdom, Slovakia and Latvia). The Transparency Directive imposes a general obligation of transparency in financial relations between public authorities and public undertakings. This is crucial in terms of enabling the Commission to check that public money is used to pay for the provision of public services.

### 3. SELECTED COURT CASES

#### 3.1. **The CFI reiterates settled case law on refusal to supply in the Microsoft case**

33. On 17 September the CFI delivered its judgment<sup>28</sup> on Microsoft's application for annulment of the Commission's 2004 Decision, which found that Microsoft had abusively leveraged its PC operating system dominance onto the market in work group server operating systems by withholding essential interface information necessary to enable competing work group server operating systems to communicate with the Windows PC operating system. The 2004 Decision also established that Microsoft abusively leveraged its dominant position in the PC operating system market onto the streaming media player market by distributing its Windows PC operating system only together with Windows Media Player.
34. The CFI upheld all substantive findings of the Commission, i.e. the findings of abuse with regard to the refusal to disclose interoperability information and the tying of Windows Media Player to Windows, as well as the findings with regard to the fine. The Court annulled only the provisions relating to the powers granted to the Monitoring Trustee and the order that Microsoft bear the associated costs. Microsoft did not appeal against the CFI judgment.
35. As regards **refusal to supply**, the CFI reiterated well-established case law<sup>29</sup> stating that the exercise of an exclusive right by the owner of the intellectual property right may give rise to an abuse only in "exceptional circumstances". The Court noted that *"the following circumstances, in particular, must be considered to be exceptional:*
- *in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;*

---

<sup>27</sup> Commission Directive 2006/111/EC of 16.11.2006 codified and replaced the original Transparency Directive and its amendments.

<sup>28</sup> Case T-201/04 *Microsoft v Commission*.

<sup>29</sup> Case 238/87 *Volvo* [1988] ECR 6211, Joined Cases C 241/91 P and C 242/91 P *RTE and ITP v Commission* [1995] ECR I 743 ("Magill"), Case C 418/01 *IMS Health* [2004] ECR I 5039.

- in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
- in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand."<sup>30</sup>

36. As regards **tying**, the CFI fully confirmed the 2004 decision's findings that (i) Microsoft is dominant in the tying product market (PC operating systems); (ii) the tying and tied products (Windows PC operating system and the Windows Media Player) are two separate products; (iii) Microsoft afforded consumers no choice to obtain the tying product without the tied product; (iv) the tying foreclosed competition and (v) there was no objective justification for the tying.

### **3.2. The CFI upholds the Commission's decision on predatory pricing by Wanadoo**

37. On 30 January, in the *France Télécom (formerly Wanadoo) v Commission*<sup>31</sup> case, the CFI upheld the Commission's decision and confirmed that France Télécom had abused its dominant position on the French high-speed internet access market<sup>32</sup>.

38. On 16 July 2003 the Commission imposed a fine of EUR 10.35 million on Wanadoo for charging predatory prices for its Pack eXtense and Wanadoo ADSL services<sup>33</sup>.

39. The CFI confirmed the Commission's market definition of high-speed internet access for residential customers, separate from the low-speed internet access market. The CFI held that the rapid growth of the sector does not preclude the application of competition rules.

40. On predatory pricing the CFI restated previous case law<sup>34</sup>, ruling that prices below average variable costs give grounds for assuming that a pricing practice is eliminatory and that, if the prices are below average total costs but above average variable costs, those prices must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.

41. The CFI also ruled that the Commission enjoys broad discretion as regards the method of calculation as to the rate of recovery of costs and that it is for the applicant to prove the unlawfulness of any such methodology. Concluding that the Commission applied the correct methodology in establishing that there was predatory pricing, the CFI found that the Commission provided solid and consistent evidence as to the existence of a plan of predation for the entire infringement period.

---

<sup>30</sup> Paragraph 332 of the judgment.

<sup>31</sup> Case T-340/03 *France Télécom SA (formerly Wanadoo SA) v Commission* [2007] (not yet reported).

<sup>32</sup> France Télécom decided to appeal against the CFI judgment. The case is pending before the ECJ – see case C-202/07 P *France Télécom SA v Commission*.

<sup>33</sup> Case COMP/38.233 Commission decision, 16.7.2003.

<sup>34</sup> Case C-62/86 *AKZO v Commission* [1991] ECR I-3359.

### 3.3. The CFI finds that Commission letters cannot be appealed in the context of the Article 7 procedure

42. On 12 December the CFI adopted an order in the *Vodafone Spain v Commission* case<sup>35</sup> declaring Vodafone's action for annulment inadmissible and clarifying that a Commission letter of comments issued within the Community consultation mechanism under Article 7 of the Framework Directive does not constitute an act producing binding legal effects and is therefore not amenable to judicial review<sup>36</sup>.
43. National regulatory authorities (NRAs) are required under the EU Regulatory framework for electronic communications (Regulatory Framework) to define and analyse relevant markets susceptible to sector-specific *ex ante* regulation<sup>37</sup> and to make the respective draft measures accessible to the Commission and the NRAs in other Member States for comments. The NRA concerned shall then take the utmost account of such comments before adopting the final decision<sup>38</sup>.
44. In the case at issue, the Spanish NRA notified a draft measure<sup>39</sup> proposing, first, to find that Vodafone and two other companies jointly enjoyed significant market power (SMP)<sup>40</sup> in the wholesale market for the supply of access and call origination on public mobile telecommunications networks in Spain and, second, to impose an obligation on Vodafone and the other two companies to respond to reasonable requests for access to their networks and to offer reasonable terms for the supply of access services.
45. The Commission sent the Spanish NRA a letter with comments regarding joint SMP (equivalent to collective dominance) and the relevant market. While the comments expressed the Commission's satisfaction that there was sufficient evidence to conclude that joint SMP existed, it was also noted that any concrete evidence of developments in the retail market not linked to the regulatory measures in the relevant market that would cast doubt on the sustainability of the joint SMP would require a review of the relevant market.
46. The Spanish NRA then adopted the final measure, against which Vodafone appealed before the Spanish Supreme Court. Vodafone brought an action for annulment of the Commission's letter of comments before the CFI. In dismissing Vodafone's action as inadmissible, the CFI significantly clarified the nature of both a letter of comments under Article 7 of the Framework Directive (FD) and of the Community consultation mechanism.
47. The CFI concluded *in casu* that neither the content of the contested act nor the legal context in which it was adopted shows that it constitutes an act producing binding legal effects. According to the CFI, the wording of Article 7(5) FD ("*shall take the*

---

<sup>35</sup> Order of the CFI adopted on 12.12.2007 in Case T-109/06 *Vodafone España SA and Vodafone Group plc v Commission*.

<sup>36</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). The Framework Directive is the cornerstone of the Regulatory Framework. Articles 15 and 16 FD.

<sup>37</sup> Articles 15 and 16 FD.  
<sup>38</sup> Article 7(3) and 7(5) FD respectively.

<sup>39</sup> Draft measure ES/2005/0330.

<sup>40</sup> Significant market power is equivalent to dominance under EU competition law.

*utmost account of comments*") underlines the non-binding nature of a Commission letter under Article 7(3) FD. The context of the consultation mechanism also shows that the letter of comments constitutes a preparatory Community act that cannot be the subject of an independent action for annulment.

48. Finally, the CFI found that the contested act was in any event not of direct concern to Vodafone, arguing that although the NRA concerned must "take the utmost account" of Commission comments, it has some leeway to determine the content of the final measure, so that a Community act based on Article 7(3) FD cannot be regarded as directly affecting the legal situation of the undertakings concerned.

### **3.4. CFI judgment in *Akzo* defines the limits of legal professional privilege**

49. On 17 September, the Court of First Instance delivered its judgement in an action lodged by Akzo dealing mainly with the issue of legal professional privilege<sup>41</sup>. Although the Court found that the Commission had committed some procedural errors, it rejected the main pleas, dismissing the broad interpretation of the concept of legal professional privilege advanced by Akzo.
50. On the first main substantive point the Court ruled that the material scope of legal professional privilege extends only to documents which were drawn up exclusively for the purpose of seeking advice from an external lawyer in exercise of the rights of defence. Second, the Court clarified that the personal scope of legal professional privilege excludes in-house lawyers, even where they are members of the bar in their Member States. The rationale for this narrow interpretation is that in-house lawyers are functionally, structurally and hierarchically integrated in the companies that employ them and are, therefore, not independent.
51. In terms of procedure, the Court rules that undertakings do not have to disclose documents that are protected by legal professional privilege until (i) the Commission has decided that the document must be disclosed and (ii) the time-limit for appealing this decision before the Court has lapsed. Undertakings must immediately upon request of the Commission inspectors substantiate any claim that a document falls under legal professional privilege. In order to determine if such a claim is well-founded, the Commission officials are entitled to take a cursory look at the document unless the undertaking provides appropriate reasons why even such a cursory look would give the Commission access to information that is covered by privilege.
52. Where an undertaking abuses claims of legal professional privilege, the "Court would point out that the Commission has the means, where appropriate, to discourage and penalise such conduct. In fact, such conduct may be penalised under Article 23(1) of Regulation No 1/2003 (...) or be taken into account as aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty under the competition rules"<sup>42</sup>.

---

<sup>41</sup> Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akzo Chemicals v Commission*.  
<sup>42</sup> Paragraph 89 of the judgment.

### 3.5. CFI judgment in the DSD case concerning abuses within the German system for the collection and recycling of packaging waste

53. On 24 May the CFI<sup>43</sup> upheld the Commission decision of April 2001<sup>44</sup> concerning the payment provision in an agreement between the German system for the collection and recycling of packaging waste called Duales System Deutschland (DSD) and its clients. This originally industry-led system serves to meet recycling requirements in the form of quotas laid down in the German packaging ordinance implementing EC Directive 94/62 on packaging and packaging waste. Manufacturers and retailers, who have the legal obligation to take back sales packaging, conclude a contract with DSD which guarantees to install a collection and recycling service in such a way that the companies are exempted from their legal obligations. The contract also regulates the use of the Green Dot trademark on the packaging and determines the fee to be paid by DSD's clients.
54. The Commission found that DSD had abused its dominant position by obliging its clients to pay for all packaging brought on to the German market that bears the Green Dot trademark, whether DSD actually provides its exemption service or not. Whenever the client intends to use the services of competitors for parts of its packaging, the provision leads to a double payment situation for the clients or forces them to introduce costly double-packaging lines, given that DSD requires the packaging exempted by its system to be marked with the Green Dot.
55. The CFI found that the Commission rightly concluded that there was a mismatch between the service provided by DSD and the fee due by its clients, and recognised that selective marking as required by DSD to avoid the double-payment situation leads to significant additional costs for manufacturers and distributors of sales packaging and therefore has the effect of dissuading them from using competing systems.
56. Given the practical functioning of the collection and recovery system operated by DSD, CFI disagreed with DSD's description of the function of the Green Dot. The CFI confirmed that the decision does not adversely affect the essential function of the Green Dot as a trademark. The CFI found that the remedy<sup>45</sup> ordered by the Commission was proportionate and did not constitute an imposition of a compulsory licence.

---

<sup>43</sup> Judgment of 24.5.2007 in case T-151/01 *DSD v Commission* not yet reported. DSD filed an appeal against the judgment to the ECJ.

<sup>44</sup> Case COMP/34.493 *DSD* OJ L 166, 21.6.2001, p. 1.

<sup>45</sup> The remedy prevented DSD from charging a fee for the part of the sales packaging bearing the “Green Dot” for which it can be shown that the take-back and recovery obligation, as set out in the German packaging ordinance, has been properly fulfilled by another party (see MEMO/07/205, 24.5.2007).

## B – MERGER CONTROL

### 1. APPLICABLE RULES

#### 1.1. Guidance on jurisdiction in merger control: Commission Consolidated Notice on Jurisdiction

57. On 10 July the Commission adopted the Commission Consolidated Jurisdictional Notice under the Merger Regulation (the "Jurisdictional Notice" or the "Notice")<sup>46</sup>. The Jurisdictional Notice replaces the four previous Notices dealing with jurisdictional issues under the Merger Regulation, a measure was strongly welcomed in the course of the consultation<sup>47</sup>.
58. All previous Notices were adopted by the Commission in 1998 under the previous Merger Regulation 4064/89. These are (i) the Notice on the concept of concentration<sup>48</sup>, (ii) the Notice on the concept of full-function joint ventures<sup>49</sup>, (iii) the Notice on the concept of undertakings concerned<sup>50</sup> and (iv) the Notice on calculation of turnover<sup>51</sup>.
59. The Notice covers all issues relevant for the Commission's jurisdiction under the Merger Regulation, with the exception of referrals<sup>52</sup>. The rationale of the consolidation of the four previous Notices in one document was to make the Jurisdictional Notice more user-friendly and to allow notifying parties to establish more easily whether the Commission is competent for an envisaged transaction. This consolidation also removes the overlaps between four notices and thus eliminates the possibility of conflicting interpretations.
60. The adoption of the Jurisdictional Notice was not only an exercise of consolidation as is clear from the sources used in amending the Notice:
61. First, the Jurisdictional Notice takes into account the changes introduced by the new Merger Regulation in relation to jurisdictional issues.
62. Second, it also incorporates recent case-law. For example, a number of issues arising from the judgments of the Court of First Instance ("CFI") in the cases *Cementbouw*<sup>53</sup> and *Endesa*<sup>54</sup> are included in the Jurisdictional Notice.

---

<sup>46</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. Currently, the Jurisdictional Notice can be found in English, French and German on DG COMP's web-site under [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_jn.html](http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html)

<sup>47</sup> The comments can be found on DG COMP's web-site under [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_jn.html](http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html)

<sup>48</sup> OJ C 66, 2.3.1998, p. 5.

<sup>49</sup> OJ C 66, 2.3.1998, p. 1.

<sup>50</sup> OJ C 66, 2.3.1998, p. 14.

<sup>51</sup> OJ C 66, 2.3.1998, p. 25.

<sup>52</sup> See Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.

<sup>53</sup> Judgment in Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319; see also opinion of AG Kokott in Case C-202/06 *Cementbouw v Commission* 26.4.2007, paragraph 56 (not yet reported).

63. Third, the developments in the Commission's decisional practice in recent years are reflected in the Jurisdictional Notice.

## **1.2. Guidance on the assessment of mergers: Commission Guidelines on Non-horizontal mergers**

64. On 28 November the Commission adopted Guidelines<sup>55</sup> on the assessment of non-horizontal mergers under the Merger Regulation. Non-horizontal mergers include vertical mergers, such as the acquisition of a supplier by a customer (for example, a car manufacturer acquiring a gearbox supplier), and conglomerate mergers, which concern companies whose activities are complementary or otherwise related (for instance, a company producing razors buying a company producing shaving foam).

65. The Guidelines, which provide guidance to companies as to how the Commission will analyse the impact of such mergers on competition, complement the existing Guidelines on horizontal mergers, which deal with mergers of companies who compete on the same markets.

66. Horizontal mergers can lead to the loss of direct competition between the merging firms. By contrast, vertical and conglomerate mergers do not immediately change the number of competitors active in any given market. As a result, the main potential source of anti-competitive effects in horizontal mergers is absent from vertical and conglomerate mergers. The latter are thus generally less likely to create competition concerns than horizontal mergers. In addition, vertical and conglomerate mergers may also improve a company's efficiency by better co-ordinating their different production stages.

67. The Guidelines were adopted after extensive consultation with Member States and the general public. Thirty-two papers were submitted in response to the public consultation launched on 13 February. The vast majority of respondents supported the issuing of guidelines. In addition, the consultation produced a number of valuable comments on individual sections of the draft, which have been taken into account in the final text. Member States' experts endorsed the Guidelines in several rounds of consultation.

68. The Guidelines provide examples, based on established economic principles, of where vertical and conglomerate mergers may significantly impede effective competition in the markets concerned. For instance, they outline the circumstances under which a vertical merger could be likely to result in competing companies being denied access to an important supplier or facing increased prices for their inputs, and thus ultimately lead to higher prices for consumers.

69. The Guidelines also indicate levels of market share and concentration below which the Commission is unlikely to identify competition concerns (so-called "safe harbours").

70. By way of example, the energy sector is one area where vertical and conglomerate issues can be of concern, as illustrated by the Commission's decision to prohibit the

---

<sup>54</sup> Judgment in Case T-417/05 *Endesa v Commission*, [2006] ECR II-2533.

<sup>55</sup> <http://ec.europa.eu/comm/competition/mergers/legislation/legislation.html>

proposed takeover of *GDP* by *EDP* and *ENI*<sup>56</sup>. The proposed merger of the electricity and gas incumbents in Portugal could, for example, have created considerable obstacles to new entrants to the Portuguese electricity market using gas-fired power stations. Another recent example is the acquisition of Pfizer's Consumer Healthcare division by Johnson & Johnson. Without the divestiture remedies imposed by the Commission, the transaction would have given J&J control over key inputs for nicotine patches produced by its main competitor, GSK. The result for consumers attempting to quit smoking could have been higher prices and less innovative products for their nicotine replacement therapy.

### 1.3. Guidance on the assessment of mergers: draft Revised Commission Notice on Remedies

71. To clarify its policy with regard to remedies in merger control, the Commission launched a public consultation on the draft Revised Remedies Notice. Remedies are modifications to a merger proposed by the merging parties to eliminate potential competition concerns identified by the Commission. In order to give guidance on the interpretation of the EC Merger Regulation with regard to remedies, the Commission adopted in 2001 a first Remedies Notice<sup>57</sup> under the EC Merger Regulation. The Revised Remedies Notice will update and replace the current notice.
72. The revision reflects *i*) the conclusions from the Commission's 2005 Merger Remedies Study<sup>58</sup> which undertook a comprehensive review of past merger cases involving remedies; *ii*) recent case law, such as the judgments in the *EDP*<sup>59</sup>, *General Electric*<sup>60</sup>, and *Cementbouw*<sup>61</sup> cases, which gave useful guidance on the legal framework for accepting or rejecting remedies as well as on more specific issues concerning their design; *iii*) the experience gained in the Commission's practice in the past years in the field of remedies, including the *GdF/Suez*<sup>62</sup> and *Inco/Falconbridge*<sup>63</sup> cases; and also *iv*) the changes brought about by the recast Merger Regulation of 2004 to the extent that they are relevant to remedies.
73. The revision makes it clear that the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. A general requirement for meeting this standard is that there has to be a possibility of monitoring the binding commitments. In order to allow the Commission to properly assess remedies the draft revised notice introduces a new information form to be submitted by the parties to describe their proposals for remedies<sup>64</sup>.

---

<sup>56</sup> Case COMP/M.3440 *ENI/EDP/GDP* Commission decision, 9.12.2004.

<sup>57</sup> Commission Notice on Remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3.

<sup>58</sup> DG COMP, Merger Remedies Study, October 2005.

<sup>59</sup> Judgment of the CFI in Case T-87/05 *EDP v Commission* [2005].

<sup>60</sup> Judgment of the CFI in Case T-210/01 *General Electric v Commission* [2005].

<sup>61</sup> Judgment of the CFI in Case T-282/02 *Cementbouw v Commission* [2006].

<sup>62</sup> Case COMP/M.4180 *GdF/Suez* Commission decision 14.11.2006.

<sup>63</sup> Case COMP/M.4000 *Inco/Falconbridge* Commission decision 4.7.2006.

<sup>64</sup> This will also require an amendment of Commission Regulation (EC) No 802/2004 on implementing the EC Merger Regulation.



74. The draft Revised Remedies Notice provides extended guidance on the suitability of the various types of remedies, clearly setting out that divestiture commitments are the preferred remedies because they are the most effective way to restore competition. Non-divestiture remedies (for instance, remedies giving competitors access to infrastructure, networks, key technology or essential inputs) may only be acceptable in certain circumstances when their effects will be equivalent to those of a divestiture. Apart from this, the revision maintains the Commission's existing scepticism towards behavioural remedies, i.e. commitments merely to refrain from certain commercial behaviour. Due to the absence of effective monitoring of the implementation of such remedies, the Commission may accept them only exceptionally and in specific circumstances.
75. As the proper implementation of the remedies in the interim period is of decisive importance for their overall effectiveness, the draft Revised Remedies Notice reinforces the requirements for the implementation of commitments. In particular, it strengthens the tasks of the Monitoring Trustee overseeing the implementation of divestiture remedies and clarifies the role of the Hold Separate Manager, responsible for the management of the divested business.

## 2. APPLICATION OF THE MERGER CONTROL RULES

### 2.1. Overview

76. In 2007 the number of merger cases notified to the Commission reached an all-time record of 402. This figure represents an increase of more than 12% compared to the 356 transactions notified in 2006. In the last quarter of the year the number of notifications fell in relation both to the previous quarters and to the last quarter of 2006. This appears to be due to the effects of the global credit squeeze.
77. In total, the Commission adopted 396 final decisions in 2007. A total of 368 were cleared in first phase without conditions. Nearly two-thirds (the equivalent of 238 decisions) of the unconditional first phase clearances were adopted under the simplified procedure. A further 18 transactions were cleared in first phase subject to conditions.
78. Ten decisions were adopted after in-depth Phase II investigations. Five of these were cleared without conditions, in four cases the clearances were subject to conditions and one transaction was prohibited. During the year the Commission opened 15 Phase II proceedings, up from 13 in the previous year. In addition, two notifications were withdrawn in the second phase. The table below, which lists the number and percentage of prohibitions and second phase withdrawals over the last ten years shows that the figures for 2007 fall within the usual range.

Chart 1 – Prohibitions and Phase II withdrawals, 1998-2007

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total 10 years
Notifications	224	276	330	335	277	211	247	310	356	402	2977

Prohibitions	2	1	2	5	0	0	1	0	0	1	12
Phase II withdrawals	4	5	5	4	1	0	2	3	2	2	28
Regulatory risk	2.7%	2.2%	2.1%	2.6%	0.4%	0.0%	1.2%	1.0%	0.6%	0.7%	1.3%

## 2.2. Remedies in non-horizontal cases

79. Cases involving vertically related markets in 2007 included *Evrz/Highveld*<sup>65</sup> and *Johnson and Johnson/Pfizer Consumer Healthcare*<sup>66</sup>. A more detailed explanation of this case is given here to illustrate the Commission's approach.
80. This case concerned the acquisition by Johnson & Johnson ("J&J") of Pfizer's entire consumer healthcare division, Pfizer Consumer Healthcare ("PCH"). The merger gave rise to a problematic vertical relationship in the area of nicotine replacement therapy (NRT) products, more particularly with regard to nicotine patches.
81. J&J, through its subsidiary ALZA (acquired in 2001), is active in the development and manufacturing of innovative drug-delivery systems such as transdermal drug-delivery patches. ALZA supplied all GSK's needs for nicotine patches and cooperated with GSK in the development of nicotine patch products. GSK sells nicotine patches supplied by ALZA under its brand NiQuitin.
82. Among PCH's activities acquired by J&J was the Nicorette business, which produces a wide range of NRT products, including nicotine patches. Therefore, following the merger, GSK would find itself in a situation where it would be supplied with nicotine patches by its main competitor.
83. Nicotine patches are pharmaceutical products; any change in their manufacturing process requires the approval of the relevant health authorities. They are also branded consumer products. These factors explain why the main players in the market are vertically integrated or have long-term exclusive supply agreements.
84. The market investigation concluded that the new entity would have the ability and an incentive to foreclose GSK, its competitor on the downstream markets. Given the existing ALZA-GSK supply agreement, there was no risk that ALZA could refuse to supply GSK, but rather a risk that the new entity would seek to reduce the competitiveness of GSK's NiQuitin patches by, for example, limiting or reducing supply, lowering quality, increasing costs, or disrupting R&D. The provisions of the existing contract were not sufficient to prevent such a strategy. The new entity would increase its own downstream sales as the market investigation showed that a significant proportion of customers would purchase Nicorette if they no longer had access to NiQuitin. Such an input foreclosure strategy would reduce the competitive

<sup>65</sup> Case COMP/M.4494 *Evrz/Highveld* Commission decision, 20.2.2007.

<sup>66</sup> Case COMP/M.4314 *Johnson and Johnson/Pfizer Consumer Healthcare* Commission decision, 11.12.2006.

constraints that NiQuitin exerts on Nicorette, leading to reduced choice and increased prices for consumers.

85. The Commission took the view that behavioural commitments would not be sufficient to exclude the risk of input foreclosure. Therefore J&J committed to divest ALZA's nicotine patch manufacturing business. In March, the Commission approved the sale of ALZA's international nicotine patch business to GSK, enabling GSK to become an independent vertically-integrated producer of nicotine patches.

### **3. SELECTED COURT CASES**

#### **3.1. Jurisdiction in merger cases**

##### *3.1.1. Cementbouw v Commission*

86. On 18 December the Court of Justice rejected an appeal lodged by the Dutch firm Cementbouw against the CFI's judgment of 2006 in case T-282/02 *Cementbouw/Commission*, by which the CFI had upheld a Commission decision clearing an implemented concentration on the condition that the operation be unwound within a given deadline<sup>67</sup> (case C-202/06P *Cementbouw/Commission*).
87. Haniel and Cementbouw acquired joint control of the company CVK in 1999 through a series of transactions. Prior to 1999, CVK was a joint selling cooperative comprising all (eleven) sand lime brick producers in the Netherlands. These eleven producers (the "CVK members") were individually controlled by either Haniel, Cementbouw or a third company, the German company RAG. . In 2002, the Commission cleared the operation on the condition that the parties fulfilled a commitment to dissolve CVK within a certain deadline. Previously the Commission had rejected a first commitment offered by the parties, which only amounted to Haniel and Cementbouw giving up their joint control over CVK, but leaving the Pooling Agreement linking the CVK members and, hence, CVK's role as a single dominant supplier of wall building materials in place.
88. Following the Commission's decision in 2002, CVK was dissolved into two competing groups, owned by Haniel and Cementbouw respectively. Even though Haniel and Cementbouw implemented the Commission's decision, Cementbouw appealed against it to the CFI. In February 2006, the CFI rejected the appeal, stating the Commission was right both in assuming jurisdiction over the case, in its assessment of the competition impact of the operation, and in insisting that competition be fully restored.
89. Cementbouw appealed the Commission's clearance decision before the Court of Justice on the sole ground of CFI's analysis as regards the remedy. The CFI had stated in this respect that the Commission's jurisdiction over the entire transaction (including both the conclusion of the Pooling Agreement and the acquisition of joint control over CVK by Haniel and Cementbouw) had not ended when the parties offered their first set of commitments to give up joint control but leaving the Pooling Agreement in place. The Court of Justice in its judgment confirmed that the CFI –

---

<sup>67</sup> Case COMP/M.2650 *Haniel/Cementbouw/JV (CVK)* Commission decision, 26.6.2002.

and hence the Commission's decision – was correct also in this respect. In the view of the Court, the CFI did not violate the principle of proportionality by considering that the Commission was not required to accept the first commitment offered by the parties, since that commitment was viewed as insufficient to restore effective competition in the relevant market.

### **3.2. Substantive assessment of mergers**

#### *3.2.1. Sun Chemicals and others v Commission*

90. On 29 May 2006 the European Commission approved the acquisition by Hexion Specialty Chemicals ("Hexion", USA), owned by the investment fund Apollo, of Akzo Nobel's Inks and Adhesive Resins business ("IAR", the Netherlands). The transaction concerned in particular the market for resins used in the printing ink and adhesives industries.
91. The transaction gave rise to various overlaps in different types of resins. The overlaps were limited to one single application: the production of inks. However, the Commission considered that the transaction would be unlikely to give rise to unilateral or co-ordinated anti-competitive effects and therefore cleared the transaction.
92. On 9 October 2006, three customers - Sun Chemical Group BV, Siegwerk Druckfarben AG and Flint Group Germany GmbH - lodged an appeal before the CFI against the decision, alleging that the Commission had failed to follow the Horizontal Merger Guidelines and that the decision was flawed by errors of law, fact and appraisal.
93. On 9 July, the CFI dismissed the appeal, rejecting all grounds of complaint. In relation to the Horizontal Merger Guidelines, the CFI stated that the Commission is not required to analyse all the factors mentioned in the guidelines in every case and does not have to deal explicitly with all the matters of law and fact which may be connected with the merger and/or raised during the administrative procedure, particularly when these matters appear to be manifestly irrelevant, insignificant or of secondary importance.
94. As regards the assessment of market share levels and market concentration, the CFI stated that a Herfindahl-Hirschman Index (HHI) exceeding the guideline thresholds does not give rise to a presumption of competition concerns and that, although this is a useful first indication of market structure, the Commission is not required to assess the HHI in every decision.
95. The CFI upheld the Commission's findings that the market was characterised by excess capacity and that, in order to discourage any anticompetitive conduct, it is not necessary for the merged entity's customers to be able to transfer all their orders to other suppliers, but only a substantial part of their orders.
96. As regards the assessment of the buyer power enjoyed by some customers (including the applicants), the applicants argued that the Commission did not take into account the fact that their in-house production only covered one type of rosin resin that could be used exclusively for the production of a limited range of inks. The CFI, however,

supported the Commission's conclusion that the customers would still have the ability to exert pressure on their suppliers, either by threatening to stop purchasing this specific type of resin or by freeing up the capacity of other suppliers who could then produce the rosin resins.

97. The CFI dismissed all the remaining grounds of appeal. This case was dealt with by the CFI by way of expedited procedure in only nine months.

### **3.3. Damages for alleged losses resulting from a Commission merger decision**

#### *3.3.1. Schneider Electric v Commission*

98. On 11 July the Court of First Instance ("the Court") delivered an interlocutory judgment in the Schneider/Commission case. Schneider claimed that the manifest errors of assessment and the breach of its right to be heard found in *Schneider I*<sup>68</sup> constituted "sufficiently serious breaches" such as to render the Community liable to compensate the damage which it incurred by reason of its resale of Legrand at a price below that which it had to pay to acquire it. Moreover, Schneider maintained that the Commission had committed a number of breaches other than those contained in the decision declaring the merger between Schneider and Legrand incompatible with the common market, and claimed a series of additional heads of damage.

99. In its judgment, the Court analysed the allegations of fault extraneous to the incompatibility decision and found that none constituted a "sufficiently serious breach". As regards the faults contained in the decision, it declined to rule on the substantive errors of assessment, since they could not result alone in the annulment of the decision. In contrast, the Court held that the breach of the right to be heard found in *Schneider I* constituted a "sufficiently serious breach of a principle of law which confers rights on individuals", which could constitute a ground for liability on the part of the Community. Next, while it rejected most of the heads of damage claimed, the Court found that a causal link did exist between the violation of the right to be heard and the two following heads of damage:

- the fees incurred by Schneider in having the merger examined a second time following *Schneider I*, and
- the reduction in the resale price of Legrand which Schneider had to grant so as to defer the resale pending the delivery of the judgment in *Schneider I* and thus give Schneider the chance to benefit from the re-examination of the merger, should the Court annul the incompatibility decision.

100. The Community was therefore found to have to compensate Schneider with respect to both heads of damage. However, given that Schneider was found to have contributed to its own damage by assuming the real risk of an incompatibility decision subsequent to the acquisition of the control of Legrand and, as a consequence, of a forced resale, the amount of damages due in relation to the reduction in the resale price of Legrand was reduced by one third.

---

<sup>68</sup> Affaire T-310/01 *Schneider Electric v Commission* Judgment of 22.10.2002.

101. The Commission has lodged an appeal against the CFI interlocutory judgment to the Court of Justice. Should the Court of Justice uphold the interlocutory judgment, the CFI will have to decide on the amount of damage to be compensated in a subsequent judgment.

## **C – STATE AID CONTROL**

### **1. APPLICABLE RULES**

102. In 2007, the Commission pursued the implementation of the State Aid Action Plan launched in 2005. The Commission adopted a new method for setting reference and discount rates<sup>69</sup> more closely in line with market principles as it contains a system taking account of the specific situation of the company or project and will thus contribute to a better economic approach to State aid analysis, as announced in the State Aid Action Plan.
103. The Commission launched a consultation on a draft General Block Exemption (GBER)<sup>70</sup>. This GBER will simplify and consolidate into one text five existing block exemptions for aid to SMEs, research and development aid in favour of SMEs, aid for employment, training aid and regional aid. In addition, the scope of the existing block exemptions will be extended to cover certain categories of new aid, in particular environmental aid, aid in the form of risk capital as well as research and development aid in favour of large companies. Certain rules will also be simplified and harmonised across different categories of aid. For instance, SME bonuses will be identical for all categories of aid. The draft GBER forms part of the State Aid Action Plan designed to simplify the rules and concentrate on the cases where the most distortion occurs. A first discussion with Member States already took place in 2007. A new meeting will take place in 2008 and the GBER should be adopted by the Commission in June 2008.
104. On 13 June 2007 the Commission decided to extend its 2001 Cinema Communication until 31 December 2009 at the latest. The Cinema Communication contains rules on State aid to cinematographic and other audiovisual works.
105. In 2007 the Commission also launched the procedure for the revision of the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees. A first consultation of Member States and stakeholders took place during the summer.
106. Following the Commission's work on the new de minimis and regional aid rules, the focus of the draft is two-fold. First, it clarifies the conditions relating to the presence or absence of aid in the form of guarantees. Second, it quantifies the relevant amount of aid on the basis of market references and risk analysis.

---

<sup>69</sup> Not yet published in OJ.

<sup>70</sup> OJ C 210, 8.9.2007, pp. 14-40.

107. During 2007 the Commission also prepared draft guidelines on State aid to railway undertakings<sup>71</sup>. In the context of market opening, where companies are gradually confronted with increased competitive pressure, there is a need for improved transparency and legal certainty.

## 2. APPLICATION OF THE STATE AID RULES

### 2.1. Overview

108. Following the exceptionally large number of State aid notifications in 2006 (922), the number of new cases notified by Member States in 2007 was 777<sup>72</sup>, significantly above the level in 2004 and 2005. The decrease from 2006 is in line with the Commission's commitment to facilitate the granting of aid through block exemptions and to focus policy on the most distortive types of aid. In 2007, Member States introduced more than 1 100 measures without prior notification to the Commission, compared to 410 block exempted measures in 2006. In agriculture alone, the number of block exempted measures increased from 119 in 2006 to 496 in 2007. Member States also put into effect around 200 measures under the recently-introduced block exemption for regional aid.
109. The Commission took 629 final State aid decisions<sup>73</sup> in 2007. In the vast majority of cases, the Commission approved the measures without a formal investigation, concluding that the examined aid was compatible with the State aid rules (87% of all decisions in 2007) or did not constitute State aid (5% of all decisions). Where the Commission has doubts whether certain aid measures comply with the rules, it carries out a formal investigation during which third parties and all Member States are invited to provide observations. At the end of this investigation procedure, the Commission either takes a positive, conditional or no aid decision (3% of all decisions) or finds that the measure does not comply with State aid rules and hence is not compatible with the common market, and therefore takes a negative decision (5% of all decisions).
110. The Commission published two editions of the State aid Scoreboards<sup>74</sup> in 2007. The autumn 2007 update<sup>75</sup> looked at the extent to which Member States have responded to the Lisbon targets of less and better-targeted aid, and also included a special outlook on aid approved in 2007 under the new framework for research, development and innovation (R&D&I). The spring 2007 update<sup>76</sup> included a focus on unlawful aid awarded by Member States. The Commission continues to publish the electronic

---

<sup>71</sup> [http://ec.europa.eu/dgs/energy\\_transport/state\\_aid/consultation\\_ms\\_en.htm](http://ec.europa.eu/dgs/energy_transport/state_aid/consultation_ms_en.htm)

<sup>72</sup> Of the 777 notifications, 53% mainly concerned the manufacturing and service sectors, 33% agriculture, 8% transport and 6% fisheries.

<sup>73</sup> Included in this figure are: decisions on the absence of State aid, decisions not to raise objections, positive decisions, conditional decisions and negative decisions.

<sup>74</sup> [http://ec.europa.eu/comm/competition/state\\_aid/studies\\_reports/studies\\_reports.html](http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.html) An online Scoreboard contains electronic versions of all Scoreboards, as well as a set of key indicators and a wide array of statistical tables.

<sup>75</sup> COM(2007) 791 final, 13.12.2007, State Aid Scoreboard, autumn 2007 update.

<sup>76</sup> COM(2007) 347 final, 28.6.2007, State Aid Scoreboard, spring 2007 update.

newsletter "State Aid Weekly e-News"<sup>77</sup> which is distributed to more than 3000 subscribers.

111. Progress in terms of a key objective of the State Aid Action Plan - i.e. that the Member State should grant both less and better-targeted aid - is being made. The latest State aid Scoreboard shows that Member States have over the past six years been moving towards the European Council objective of less and better-targeted aid. In particular, the EU-10 Member States have progressively reoriented their state aid towards horizontal objectives of common interest such as regional development, R&D, SMEs and protecting the environment. With the exception of Malta and Hungary, they have all directed more than 85% of their aid to horizontal objectives, which places them at or above the EU average. R&D aid has increased only moderately in the EU, but with the new R&D framework a further increase is expected in the future.

## 2.2. Applying regional aid rules

112. During 2007, the Commission approved the regional aid maps<sup>78</sup> of Bulgaria and Romania, as well as those for Belgium, Cyprus, Denmark, France, Italy, the Netherlands, and Portugal. As a result, regional aid maps covering the period 2007-2013 have now been approved for all Member States.
113. In two successive decisions the Commission approved a methodology for calculating the aid intensity of State guarantees granted on investment loans<sup>79</sup> and working capital loans<sup>80</sup> in Germany. Four other Member States have notified proposed methods for determining the aid intensity of State guarantees to be assessed by the Commission in accordance with the arrangements provided for in Article 2(2) of Regulation (EC) No 1628/2006<sup>81</sup>.
114. The Commission authorised regional aid for a number of large investment projects, such as the establishment of two chemical production plants<sup>82</sup> and three separate investment projects in the pulp and paper sector<sup>83</sup> in Portugal, the extension of an electricity generation plant in Hungary<sup>84</sup>, a plant for the production of solar energy modules in Germany<sup>85</sup>, the expansion of a car manufacturing plant in Slovakia<sup>86</sup> and an automotive investment project in the Czech Republic<sup>87</sup>. The Commission also authorised German aid to AMD for the conversion and extension of its existing micro-processor wafer plants in Dresden<sup>88</sup>. In one case, concerning *Ibiden*<sup>89</sup> in

---

<sup>77</sup> [http://ec.europa.eu/comm/competition/state\\_aid/newsletter/index.html](http://ec.europa.eu/comm/competition/state_aid/newsletter/index.html)

<sup>78</sup> [http://ec.europa.eu/comm/competition/state\\_aid/regional\\_aid/regional\\_aid.cfm](http://ec.europa.eu/comm/competition/state_aid/regional_aid/regional_aid.cfm)

<sup>79</sup> Case N 197/2007 *Method to calculate the aid element in guarantees*.

<sup>80</sup> Case N 541/2007 *Amendment to the German guarantee method to include guarantees for working capital*.

<sup>81</sup> OJ L 302, 1.11.2006, p. 29.

<sup>82</sup> Case N 898/2006 *Repsol Polimeros*, N 899/2006 *Artensa*.

<sup>83</sup> Case N 900/2006 *CELBI*, N 838/2006 *Soporcel*, N 564/2006 *About the future*.

<sup>84</sup> Case N 907/2006 *Mátraí Erőmű*.

<sup>85</sup> Case N 863/2006 *Avancis*.

<sup>86</sup> Case N 857/2006 *Kia Motors Slovakia*.

<sup>87</sup> Case N 661/2006 *Hyundai Motor Manufacturing Czech*.

<sup>88</sup> Case N 810/2006 *AMD Dresden*.

<sup>89</sup> Case C 21/2007 *IBIDEN Hungary Ltd*.



Hungary, the Commission opened a formal investigation because of doubts over the definition of the relevant product markets and the market share of the beneficiary.

115. A proposed ad hoc regional investment aid to Glunz & Jensen<sup>90</sup> in Slovakia was deemed incompatible as it would have created significant distortions of competition in the market for graphic arts pre-press processing equipment in which the company has an important share. Doubts about the incentive effect of further ad hoc aid for Alas in Slovakia prompted the Commission to open a formal investigation<sup>91</sup>.
116. As regards the outermost regions, the Commission approved ten aid schemes providing exemptions from tax and social security contributions in the French overseas *départements*<sup>92</sup>, as well as a reduction in excise duty on traditional rum<sup>93</sup>. A scheme providing tax reductions to companies set up in the free zone of Madeira was also approved<sup>94</sup>.
117. In Greece, the Commission found that tax breaks of approximately EUR 200 million<sup>95</sup> given to thousands of companies in a wide range of sectors were incompatible with the single market and need to be recovered from the beneficiaries.

### **2.3. Applying the State aid framework for Research, Development and Innovation (R&D&I)**

118. Notifications of aid for R&D&I pending on 1 January, as well as all new notifications received in the reporting year, were assessed on the basis of the new framework<sup>96</sup>. In 2007, the Commission approved 48 notified schemes, 28 of which were pure R&D schemes, four were pure innovation aid schemes and 16 covered both R&D and innovation. In addition, the Commission approved four *ad hoc* aid measures below the threshold triggering a detailed assessment under Chapter 7 of the Framework. Two decisions on R&D schemes concluded that no aid was involved.
119. The Commission took eight decisions following a detailed assessment of large amounts of aid to projects under Chapter 7 of the Framework. It authorised a number of projects financed by the French Industrial Innovation Agency - two R&D aid projects ("*NanoSmart*" and "*HOMES*") totalling EUR 119 million<sup>97</sup>, EUR 26.5 million in aid for the NeoVal R&D programme<sup>98</sup>, EUR 37.6 million in aid towards the "*Télévision Mobile Sans Limite*" R&D project<sup>99</sup> and EUR 31 million aid for the OSIRIS R&D programme<sup>100</sup>. The Commission also authorised EUR

---

<sup>90</sup> Case C 12/2007 *Glunz&Jensen*

<sup>91</sup> Case N 843/2006 *ALAS Slovakia*.

<sup>92</sup> Cases N 522/2006, N 524/2006, N 529/2006, N 540/2006, N 542/2006, N 559/2006, N 560/2006, N 627/2006, N 667/2006, N 668/2006.

<sup>93</sup> Case N 530/2006 *Taux d'accise réduit sur le rhum «traditionnel» produit dans les départements d'outre-mer*.

<sup>94</sup> Case N 421/2006 *Zona Franca Madeira*.

<sup>95</sup> Case C 37/2005 *Tax-exempt reserve fund for certain companies*.

<sup>96</sup> OJ C 323, 30.12.2006, p. 1.

<sup>97</sup> Cases N185/2007, OJ C 284, 27.11.2007, p. 3 and N89/2007, OJ C 275, 16.11.2007, p. 3.

<sup>98</sup> Case N 674/2006, OJ C 120, 31.5.2007, p. 2.

<sup>99</sup> Case N 854/2006, OJ C 182, 4.8.2007, p. 5.

<sup>100</sup> Case N 349/2007, OJ C 304, 15.12.2007, p. 5.

12.25 million of R&D aid for the SOITEC group<sup>101</sup>. In March, the Commission opened an in-depth investigation into a proposed loan of EUR 27 million to Spanish company ITP for the development of the Trent 1000 aircraft engine<sup>102</sup>.

#### 2.4. Assessing risk capital financing for SMEs

120. In 2007 the Commission approved 19 notified schemes under the risk capital guidelines<sup>103</sup>. Eleven of the schemes were found to respect the safe harbour provisions of Chapter 4 of the Guidelines and were approved after a light assessment. Five of the schemes were approved after a more detailed assessment under chapter 5 of the Guidelines. Finally, three schemes were found not to constitute aid. The Commission opened proceedings regarding one scheme in Saxony-Anhalt, Germany<sup>104</sup>.

#### 2.5. Assessing training aid

121. Although training aid is covered by a block exemption regulation<sup>105</sup>, the Commission is required to assess projects exceeding EUR 1 million. In the reporting period the Commission took six decisions (final decisions or decisions to open formal investigations) concerning training aid.

122. In a number of cases, the Commission focussed on the need to ensure that aid is only granted where it is a necessary incentive for the training activity (and is not diverted into operating aid by subsidising training that the beneficiary would have carried out in any event and thus simply provides windfall gains for the beneficiary).

123. Thus, in the *GM Antwerp*<sup>106</sup> case, the Commission found part of the notified state aid incompatible, as it would have served to finance training activities which the beneficiary would have carried out anyway, even without aid. Such aid would not serve the common interest by increasing training activities and would simply distort competition. In *Fiat*<sup>107</sup> and *Club Med Guadeloupe*<sup>108</sup> the Commission found the aid necessary and compatible.

124. Similarly, in the *DHL Leipzig/Halle* case<sup>109</sup> the Commission initiated the investigation because it had doubts whether DHL would not have to provide the training to its employees anyway. DHL needs to employ workers with sophisticated technical skills which are to a large extent required by law and necessary for its operations. Doubts as to the incentive effect of the training aid have also led the

---

<sup>101</sup> Case N 887/2006, OJ C 200, 28.8.2007, p. 2.

<sup>102</sup> Case C 9/2007, OJ C 108, 12.5.2007, p. 18.

<sup>103</sup> OJ C 194, 18.8.2006, pp. 2-22.

<sup>104</sup> OJ C 246, 20.10.2007, p. 20.

<sup>105</sup> Commission Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20).

<sup>106</sup> Case C 14/2006, *Training aid to General Motors Antwerp* (OJ L 243, 18.9.2007, p. 71).

<sup>107</sup> Case N 541/2006 *Fiat Auto S.p.A.* (OJ C 220, 20.9.2007, p. 2).

<sup>108</sup> Case N 206/2007 *Training aid for Club Med Guadeloupe* (OJ C 284, 27.11.2007, p. 5).

<sup>109</sup> Case C 18/2007 *Training aid for DHL Leipzig* (OJ C 213, 12.9.2007, p. 28).

Commission to open formal investigations in the *Vauxhall*<sup>110</sup> and *Volvo Cars Ghent*<sup>111</sup> cases.

## 2.6. Taxation cases

125. On 10 October<sup>112</sup>, the Commission opened the formal investigation procedure with respect to a tax incentive for the acquisition by Spanish companies of significant participations in foreign companies. The tax measure allows Spanish companies to amortise over a 20-year period the goodwill deriving from the acquisition of significant shareholdings in foreign companies, whereas there is no similar measure relating to the goodwill arising from domestic acquisitions. A shareholding is deemed significant if it represents at least 5% of the share capital of the target company. Considering the due diligence investigation required in such transactions, it could be argued that in practice this scheme can only apply for relatively large acquisitions, and that it therefore confers a selective advantage that may be qualified as State aid
126. On 7 February the Commission opened the formal investigation procedure against the so-called "group interest box" (Groepsrentebox) notified by the Dutch authorities<sup>113</sup>. On 21 March the Commission also opened proceedings against a similar scheme which was already in force in Hungary<sup>114</sup>. Both schemes reduce the tax burdens on companies in respect of the net balance of interest received from and paid to affiliated companies.
127. The Commission considered that the reduced tax burden in respect of a certain type of revenue (interest) would, according to the source of the revenue (intragroup), confer an economic advantage granted through State resources on certain undertakings only. The Commission also considered that this advantage was likely to distort competition and affect trade between the Member States. Indeed, the advantage would appear to be substantially higher in the context of international group financing activities. For these reasons, it could constitute State aid.

## 2.7. Aid for rescuing and restructuring firms in difficulty

128. In a number of rescue aid cases the Commission again emphasised that such aid is no more than a temporary measure facilitating the preparation of a restructuring plan or the liquidation of the company. Accordingly, in the *Ottana*<sup>115</sup>, *Ixfin*<sup>116</sup> and *New Interline*<sup>117</sup> cases, the Commission opened the formal procedure because rescue aid had not been repaid within the statutory six months deadline and no serious restructuring plan had been submitted. In the *Ernault*<sup>118</sup> case, a restructuring plan had been submitted subsequent to the granting of rescue aid but was later withdrawn by

---

<sup>110</sup> Case C 23/2007 *Vauxhall Motors Ltd Training aid for Ellesmere Port* (OJ C 243, 17.10.2007, p. 4).

<sup>111</sup> Case C 35/2007 *Training aid to Volvo Cars Ghent* (OJ C 265, 7.11.2007, p. 21).

<sup>112</sup> OJ C 311/2007, 21.12.2007, p. 21.

<sup>113</sup> IP/07/154, 7.2.2007.

<sup>114</sup> IP/07/375, 21.3.2007.

<sup>115</sup> Case C 11/2007 *Aiuto alla ristrutturazione di Ottana Energia Srl* (OJ C 122, 2.6.2007, p. 22)

<sup>116</sup> Case C 59/2007 *Aiuto al salvataggio alla Ixfin SpA* (decision of 11.12.2007, not yet published).

<sup>117</sup> Case C 13/2007 *Aiuto al salvataggio della New Interline SpA* (OJ C 120, 31.5.2007, p. 12).

<sup>118</sup> Case C 32/2005 *Aide à la restructuration d'Ernault* (OJ L 277, 20.10.2007, p. 25).

the Member State. The Commission explained that the aid had to be repaid at the latest at the time of withdrawal of the plan.

129. In the reporting period the Commission approved a number of restructuring aid measures including *Javor Pivka*<sup>119</sup> and *Novoles Straza*<sup>120</sup> (both approved under the 1999 rescue & restructuring guidelines), *Techmatrans*<sup>121</sup> and *Bison-Bial*<sup>122</sup>. In other cases the Commission found the aid incompatible (e.g. *Nuova Mineraria Silius*<sup>123</sup> and *Biria*<sup>124</sup>) or opened a formal investigation because of doubts regarding compatibility (e.g. *Legler*<sup>125</sup>, *FagorBrandt*<sup>126</sup> or *Fluorite di Silus*<sup>127</sup>).
130. 2007 also saw a number of restructuring aid cases linked to the privatisation of publicly held companies. In two cases involving Romania (*Automobile Craiova*<sup>128</sup> and *Tractorul*<sup>129</sup>), the Commission opened the formal investigation because of doubts that the conditions attached to the privatisation might confer an advantage on the undertakings that are being privatised and consequently entail State aid to their benefit. In particular, conditions aimed at securing a certain future production level, especially in the case of a structurally loss-making company, are capable of having an effect similar to restructuring aid and are paid for by the State in the form of reduced proceeds from the privatisation.
131. The current 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty<sup>130</sup> are due to expire on 9 October 2009. In accordance with the 2006 State Aid Action Plan, DG Competition launched a review of the guidelines in 2007 in order to identify the potential need for changes to the rescue and restructuring rules.

## 2.8. Aid for environmental protection

132. During 2007, approximately 65 State aid cases were approved by the Commission on the basis of the Community guidelines on State aid for Environmental Protection<sup>131</sup>.
133. In November, the Commission approved a British case (*WRAP Printing and Writing Paper Scheme*)<sup>132</sup> concerning investment in new capacity for recycling paper. The

---

<sup>119</sup> Case C 19/2006 *Restructuring aid for Javor Pivka* Commission decision of 10.7.2007 (not yet published).

<sup>120</sup> Case C 20/2006 *Restructuring aid to Novoles Straza* Commission decision of 10.7.2007 (not yet published).

<sup>121</sup> Case C 6/2007 *Restructuring aid for Techmatrans*, Commission decision of 28.11.2007 (not yet published).

<sup>122</sup> Case C 54/2006 *Restructuring aid for Bison-Bial*, Commission decision of 12.9.2007 (not yet published).

<sup>123</sup> Case C 16/2006 *Restructuring aid to Nuova Mineraria Silius* (OJ L 185, 17.7.2007, p. 18).

<sup>124</sup> Case C 38/2005 *Biria Gruppe* (OJ L 183, 13.7.2007, p. 27).

<sup>125</sup> Case C 39/2007 *Aiuto di stato per la ristrutturazione del gruppo Legler* (OJ C 289, 1.12.2007, p. 22).

<sup>126</sup> Case C 44/2007 *Restructuring aid to FagorBrandt* (OJ C 275, 16.11.2007, p. 18).

<sup>127</sup> Case C 60/2007 *Aid to Fluorite di Silius S.p.A* Commission decision, 11.12.2007 (not yet published).

<sup>128</sup> Case C 46/2007 *Privatisation of Automobile Craiova, Romania* (OJ C 248, 23.10.2007, p. 25).

<sup>129</sup> Case C 41/2007 *Privatisation of Tractorul, Romania* (OJ C 249, 24.10.2007, p. 21).

<sup>130</sup> OJ C 244, 1.10.2004, p. 2.

<sup>131</sup> OJ C 37, 3.2.2001, p. 3

<sup>132</sup> Case C 45/2005, *Waste and Resources Action Programme (WRAP) Printing and Writing Paper Scheme* (not yet published in the OJ).

scheme was approved because it respected the requirements that apply to this type of investment: (a) the aid does not indirectly relieve the polluters from a burden that should be borne by them, (b) the investment goes beyond the "state of the art", (c) the treated materials would otherwise be treated in a less environmentally friendly manner, and (d) the investment increases collection of those materials. The approval was possible due to the fact that the scheme is confined to addressing the proven market failures in using recycled paper as raw material.

134. During 2007 work on revised Community guidelines on State aid for Environmental Protection continued as part of the wider energy and climate change package. The guidelines were adopted on 23 January 2008<sup>133</sup>.

## **2.9. Enforcing and monitoring State aid decisions**

135. In 2007 the Commission continued its efforts to achieve more effective and immediate execution of recovery decisions. Information submitted by the Member States concerned shows that significant progress towards recovery was made during that period. The number of recovery decisions awaiting implementation was reduced from 60 at the end of 2006 to 47 at the end of 2007. In all, 23 recovery cases were closed, whilst 9 new recovery decisions were adopted. The progress made is also reflected in the amounts of aid recovered. Of the EUR 8.9 billion of illegal and incompatible aid to be recovered under decisions adopted since 2000, some EUR 8.2 billion (i.e. 91.2% of the total amount) had been effectively recovered by the end of 2007. In addition, a further EUR 2.4 billion in recovery interests had been recovered.

136. As announced in the State aid Action Plan<sup>134</sup>, the Commission continued to take a strict line towards Member States that failed to effectively implement recovery decisions addressed to them. In 2007 the Commission initiated legal action under either Article 88(2) EC or Article 228(2) EC for failure by Member States to comply with recovery obligations. It took such action in a total of five cases involving Italy and Spain.

137. The future General Block Exemption Regulation (GBER) is expected to lead to a significant widening of the scope of the current Block Exemption Regulations and to a large increase in the amounts of block exempted State aid. *Ex post* monitoring therefore becomes particularly relevant as a way of ensuring the correct application of these measures by Member States. Against this background, the Commission had carried out a pilot project involving the *ex post* monitoring of several block exemption regulation (BER) measures in 2006. This pilot exercise proved useful and the Commission therefore launched a second exercise in 2007. A final report on the results of this exercise should be completed in June 2008.

138. Given that effective and prompt recovery is essential to ensure that an end is put to distortions of competition resulting from illegal and incompatible aid, the Commission saw a need to summarise the case law and its policy in this area in the

---

<sup>133</sup> Not yet published in the OJ. The guidelines are available in English, French and German on the website: [http://ec.europa.eu/comm/competition/state\\_aid/reform/reform.cfm](http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm). Until the publication of the new guidelines, the 2001 guidelines on State aid for Environmental Protection are applicable.

<sup>134</sup> [http://ec.europa.eu/comm/competition/state\\_aid/reform/reform.cfm](http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm)

form of a Notice<sup>135</sup>. The main aim of the Notice was to build on the progress made to date and to outline how the Commission and the Member States could cooperate more effectively to ensure effective and swift implementation of the Commission's recovery decisions.

139. The Notice highlights the key principles of recovery policy as contained in Articles 14 and 15 of the Procedural Regulation. It recalls the basic principle contained in Article 14 (3) of the Procedural Regulation that recovery is carried out under national law, as long as the provisions of national law allow immediate and effective recovery. The content of the Notice in this respect is largely shaped by the relatively strict interpretation of the Member States' recovery obligations by the Community Courts, in particular in two judgments handed down in 2005 and 2006 respectively<sup>136</sup>.
140. The Notice also contains best practice guidelines for the Commission and for the Member States in connection with recovery, as well as a description of the Commission's new approach towards the setting of recovery deadlines<sup>137</sup>.
141. In relation to the role of the Member States, the Notice deals with a number of issues such as the internal responsibilities for recovery, issues arising in the event of litigation before national or Community Courts, and the specific issues arising in relation to recovery from beneficiaries in financial difficulties.
142. Finally, the Notice recalls the possible consequences of a failure by a Member State to implement a Commission recovery decision. It emphasises that the Commission will require Member States to suspend the payment of any new – even compatible – aid to beneficiaries who have not yet repaid incompatible aid previously granted to them.

## **2.10. The application of State aid rules in particular sectors**

### *2.10.1. Steel*

143. The Commission continues to adopt a restrictive approach to State aid in the steel sector. Given that restructuring and investment aid to the steel sector is generally prohibited under EU rules, the Commission did not authorise any new aid in 2007. It continued to monitor aids under restructuring and business plans authorised prior to the 2004 accession.

---

<sup>135</sup> Towards an effective implementation of Commission decisions ordering Member States to recovery unlawful and incompatible State aid (OJ C 272, 15.11.2007).

<sup>136</sup> The most recent confirmation of this strict approach was adopted in the France Telecom case, C-441/06 *Commission v France*, which was decided on 18.10.2007. See also Case C-415/03, *Commission v Greece* [2005], ECR I-03875 and Case C-232/05, *Commission v France* [2006].

<sup>137</sup> To date, the Commission's negative decisions usually contained a single deadline by which the Member State had to inform the Commission of the measures taken to comply with a given decision. According to the interpretation of the Community Courts, this deadline (which was usually set at two months) also determined the date by which the Member State had to complete the recovery. It is intended that future decisions will contain two separate deadlines, two months for informing the Commission of the intended recovery measures and a further two months for the completion of the recovery.

144. The Commission's monitoring of these plans was successfully completed in 2007 as regards the Czech Republic (three steel companies, all of which are now considered viable under the plans) and Poland (eight undertakings, of which five were considered viable and three are in liquidation). The monitoring of Slovakia has given rise to litigation. Monitoring continues for Bulgaria and Romania.
145. In this context, the Commission took a decision approving a modification of an individual business plan of the Czech steel producer *VPPFM*<sup>138</sup>. In addition, the Commission closed two formal investigation procedures in the *Technologie Buczek*<sup>139</sup> and *Arcelor Huta Warszawa*<sup>140</sup> cases with negative decisions, concluding that State aid had been misused. The Commission also opened formal investigations into State aid linked to the terms of privatisation of *Mittal Steel Roman*<sup>141</sup>, a Romanian steel manufacturer, and concerning aid to the restructuring of the Polish seamless steel tube sector<sup>142</sup>.

#### 2.10.2. Shipbuilding

146. Work was started in 2007 on the review of the Framework on State Aid to Shipbuilding<sup>143</sup>. A decision on the future of this Framework is due by 31 December 2008, when the current provisions expire.
147. Following the opening of the investigation procedure The Commission adopted two negative decisions prohibiting aid to the Portuguese shipyard *Estaleiros Navais de Viana do Castelo S.A*<sup>144</sup>. In both cases Portugal had notified the aid to shipbuilding on the basis of the Regulation concerning a temporary defensive mechanism (TDM Regulation)<sup>145</sup>. The TDM Regulation entered into force on 3 July 2002 and expired on 31 March 2005. However, Portugal only approved the aid internally and notified it to the Commission after the TDM Regulation had expired.
148. The Commission pursued its formal investigations into the restructuring of the Polish shipyards in Gdynia, Szczecin and Gdansk<sup>146</sup>. In the latter case it issued an information injunction to Poland.

#### 2.10.3. Coal

149. After the ECSC Treaty expired, the Council adopted an exemption regulation<sup>147</sup> based on Article 87(3)(e), laying down favourable rules for State aid for hard coal and meta-lignite. In 2007 the Commission took relatively few decisions in the coal

<sup>138</sup> Case N 350b / 2006 *Changes of IBP of VPPFM* (OJ C 200, 28.8.2007, p. 1).

<sup>139</sup> Case C 23/2006 *Technologie Buczek*, decision of 23.10.2007 (not yet published).

<sup>140</sup> Case C 51/2006 *Arcelor Huta Warszawa*, decision of 11.12.2007 (not yet published).

<sup>141</sup> Case C 40/2007, *Privatisation of Mittal Steel Roman* (OJ C 287, 29.11.2007, p. 29).

<sup>142</sup> Case C 48/2007, *Restructuring of the Polish tube sector* (OJ C 282, 24.11.2007, p. 21).

<sup>143</sup> Framework on State aid to Shipbuilding (OJ C 317, 30.12.2003, p. 11).

<sup>144</sup> Case C 26/2006, *Temporary Defensive Mechanism for Shipbuilding, Portugal* (OJ L 219, 24.8.2007, p. 25), and Case C 32/2007, *TDM aid to ENVC*, Commission decision of 11.12.2007 (not yet published).

<sup>145</sup> Council Regulation (EC) N° 1177/2002 concerning a temporary defensive mechanism to shipbuilding (OJ L 172, 2.7.2002, p.1), as amended by Council Regulation (EC) N° 502/2004 of 11 March 2004 (OJ L 8, 19.3.2004, p. 6).

<sup>146</sup> Cases C 17/2005, C 18/2005 and C 19/2005.

<sup>147</sup> Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry.

sector, and no decision in the lignite sector. In particular, it approved the plan for access to coal reserves in Romania. Following this decision, only one plan for access to coal reserves remains, namely that of Spain, which notified it in 2006.

#### 2.10.4. Agriculture

150. In 2007 the Commission adopted a new *de minimis* Regulation for primary production in agriculture, processing and marketing activities<sup>148</sup> that had already been brought within the scope of the general *de minimis* Regulation<sup>149</sup>. Compared with the previous *de minimis* Regulation for agriculture<sup>150</sup>, the main new elements are: increase of the individual ceiling to EUR 7 500 per beneficiary over a period of three fiscal years; increase of the national ceiling to 0.75% of the value of the agricultural production; extension of the scope of the Regulation to include guarantees as well as other types of measures considered as transparent under certain conditions, as in the general *de minimis* Regulation.
151. The new Regulation, covering the period 2008-2013, has been designed primarily to allow Member States to react quickly in cases of emergency, such as natural disasters.

#### 2.10.5. Fisheries

152. In July, the Commission adopted a new *de minimis* Regulation specific to the fisheries sector<sup>151</sup>. This new Regulation has increased the ceiling of *de minimis* aid from the previous ceiling of EUR 3 000 (which was laid down in provisions common to fisheries and agriculture in the former *de minimis* Regulation) to EUR 30 000 per fishing enterprise per three-year period<sup>152</sup>. Moreover, the Member States must comply with the condition that the total amount of aid granted to all enterprises during that 3-year period does not exceed 2.5% of the annual fisheries output of the Member State concerned (the total amount having been 0.3% in the former Regulation).
153. A draft of a new exemption Regulation<sup>153</sup>, intended to replace Regulation No 1595/2004 which expired on 31 December 2004, was presented to Member States in an Advisory Committee on State aid in October. The second meeting of this Committee will be held early in 2008 with a view to adopting the Regulation shortly after.
154. During 2007, 49 new State aid cases were registered and 17 decisions adopted.

---

<sup>148</sup> Regulation (EC) No 1535/2007 (OJ L 335, 21.12.2007, p. 35).

<sup>149</sup> Regulation (EC) No 1998/2006 (OJ L 379, 28.12.2006, p. 5).

<sup>150</sup> Regulation (EC) No 1860/2004 (OJ L 325, 28.10.2004, p. 4).

<sup>151</sup> No 875/2007 of 24 July 2007.

<sup>152</sup> No 1860/2004.

<sup>153</sup> OJ C 248, 23.10.2007.



### 3. SELECTED COURT CASES

#### 3.1. Definition of aid

155. In the *Bouygues Télécom* case<sup>154</sup>, the CFI confirmed a Commission decision stating that by retroactively adapting the amount to be paid by Orange and SFR for the UMTS licence in connection with a first call for applications, in the light of the amount paid in connection with a second call for application by Bouygues Telecom, the French State did not grant any State aid to SFR and Orange. The CFI ruled that the fact that the State may have waived resources by retroactively adapting the amount of the licences may indeed have created an advantage for the beneficiaries of the reduction in the fee. However, this was not considered sufficient to prove the existence of a State aid incompatible with the common market, given the specific provisions of Community law on telecommunications read in the light of the common law on State aid. The waiver of the claim at issue was considered inevitable by the CFI, as the general scheme of the telecommunication system required non-discriminatory treatment of operators.
156. In the *Olympic Airways* case<sup>155</sup>, the CFI partially annulled the relevant Commission decision in that it had considered the non-payment by Olympic Aviation (a subsidiary of Olympic Airways) of value added tax (VAT) on aviation spare parts as State aid. The CFI found that the Commission could not, in principle, presume solely on the basis of the non-payment that the undertaking concerned had enjoyed an advantage. The Commission should have verified whether the non-payment of VAT conferred a real cash advantage on the undertaking concerned.
157. The CFI also issued its judgment in *Salvat père & fils e.a. v Commission*<sup>156</sup> concerning the Rivesaltes Plan and the CIVDN parafiscal levies, through which France sought to help wine production in the region in question (in particular through a set-aside premium and through an aid for promotion, partially financed by inter-professional levies). The CFI rejected the case brought by the aid recipient seeking to annul Commission Decision 2007/253/EC, which declared this aid incompatible. The judgment clarifies the financing of agricultural inter-professions in relation to the *Pearle* judgment<sup>157</sup>, while limiting its scope. Claimants invoked the *Pearle* judgment to deny that a State-resource character could be imputed to inter-professional levies (financing of the measure) and to the set-aside premium (financed partly by levies but also by the State budget). The CFI established the existence of State resources having regard to the role played by the French State in the inter-profession context.

#### 3.2. Procedural issues

158. In the *Lucchini* case<sup>158</sup>, the Grand Chamber of the ECJ confirmed in an important ruling that national judges must ensure the effectiveness of Community law, including the provisions on the control of State aid. Community law therefore precludes the application of a provision of national law which seeks to lay down the

---

<sup>154</sup> Case T-475/04 *Bouygues Télécom v Commission*.

<sup>155</sup> Case T-68/2003 *Olympiaki Aeroporia Ypiresies AE v Commission*.

<sup>156</sup> T-136/05, CFI judgment of 20.9.2007.

<sup>157</sup> Case C-345/02 *Pearle BV*.

<sup>158</sup> Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato/Lucchini SpA*.

principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.

159. In the *Koninklijke Friesland Foods* case<sup>159</sup>, building on the judgment of the ECJ in the *Belgian coordination centres* case<sup>160</sup>, the CFI partially annulled the decision of the Commission concerning a Dutch tax scheme in favour of international financing activities insofar as the decision did not contain a transitional period for companies whose applications to benefit from the litigious aid scheme were pending at the date of the opening of the procedure. The Commission has appealed against the judgment.
160. In the *Freistaat Sachsen* case<sup>161</sup>, the CFI annulled a decision of the Commission to the extent that it declared certain aspects of the notified scheme incompatible. The Commission had based its incompatibility assessment on the fact that the aid provided under the scheme exceeded the aid intensities provided for in SME block exemption No 70/2001<sup>162</sup> adopted a few days after the scheme had been notified, although this block exemption regulation did not contain any explicit transitional provisions. The CFI essentially considered that the rules to be applied on a given notification case were the rules in place at the date on which the notification took place. The Commission has appealed against the judgment.
161. In a case concerning failure to act initiated by *Asklepios Kliniken*<sup>163</sup>, the CFI clarified that the Commission was entitled to defer its examination of the questions of fact raised by the complaint, pending clarification of the legal framework in the context of the proceedings in the *Altmark* case<sup>164</sup>.
162. In the parallel *Bouychou* and *FG Marine* cases<sup>165</sup>, the CFI had occasion to decide on two actions for damages following the annulment, by the ECJ, of the decision of the Commission in the *Stardust* case<sup>166</sup>. The CFI considered that the causal link between the Commission decision annulled by the ECJ and the alleged damage of the applicants had been broken as the cessation of payments decided by the beneficiary of the aid was not the direct consequence of the decision of the Commission. Indeed, at the date of declaration of cessation of payments, the Commission decision had not yet been notified to the French State. The debt to the French State was therefore not yet enforceable.
163. In *Technische Glaswerke Ilmenau v Commission*<sup>167</sup> the CFI ruled, for the first time in the field of State aid, that the Commission should base its refusal to grant access to documents on the precise information contained in the documents, and not on a general analysis by category of documents. An individual and concrete examination

---

<sup>159</sup> Case T-348/03 *Koninklijke Friesland Foods v Commission*.

<sup>160</sup> Cases C-182/03 and C-217/03 *Forum 187 et al. v Commission*.

<sup>161</sup> Case T-357/02 *Freistaat Sachsen v Commission*.

<sup>162</sup> Commission Regulation No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ L 10, 13.1.2001, p. 33.

<sup>163</sup> Case T-167/04, *Asklepios Kliniken v Commission*.

<sup>164</sup> Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

<sup>165</sup> Case T-344/04, *Bouychou v Commission* and case T-360/04 *FG Marina SA v Commission*.

<sup>166</sup> Case C-482/99, *France v Commission (Stardust)* [2002] ECR I-4397.

<sup>167</sup> T-237/02, CFI judgment of 14.12.2006.

is not necessary, however, if the Commission gives as its reason that access should manifestly have been refused due to the particular circumstances of the case. The Court does not completely deny the possibility for the Commission to refuse access to documents on the basis of Article 4(2) of Regulation 1049/2001. However, in the case at hand, the CFI held that the Commission should have indicated in detail the reasons why the exception applied to the categories of documents and that it could not rely on purely hypothetical grounds. The Commission appealed this judgment to the ECJ.

164. In *Fachvereinigung Mineralfaserindustrie v Commission*<sup>168</sup>, the CFI dismissed an action for annulment of two Commission decisions brought by a professional association. The Court confirmed in one of the judgments that, since the applicants had not sought annulment on the ground that the procedural safeguards provided for by Article 88(2) EC were infringed, the mere fact that the applicants may be considered to be parties "concerned" could not be sufficient to regard them as having been individually affected by the contested decision.
165. In *Spain v Lenzing*<sup>169</sup>, the ECJ dismissed an appeal against the CFI judgment which partially annulled a non-aid Commission decision challenged by Lenzing (competitor of the Spanish beneficiary "Sniace"). The Court confirmed that the CFI did not merely note in general terms that Lenzing and Sniace were in competition with each other, but that the CFI had in fact based its findings regarding the adverse effect on Lenzing's position on the market on a number of factors adduced by Lenzing in respect of the competitive situation and effect of the aid on Sniace's prices.
166. In *Sniace v Commission*<sup>170</sup>, the ECJ also dismissed the appeal against the CFI judgment declared inadmissible the action initiated by Sniace against a Commission decision. The latter considered that the measures adopted by Austria in favour of Lenzing were in part not an aid and in part compatible aid. The ECJ confirmed that the appellant was not individually concerned by the contested decision owing to two factors: the limited role played by Sniace in the formal examination procedure and Sniace's failure to demonstrate that its position on the market was substantially affected.
167. The Court stated that comparable situations were not treated differently. Sniace's situation could clearly be distinguished, in an essential respect, from that of the applicant in *Lenzing v Commission*. In the latter case, the applicant was in direct competition with the recipient of aid on the market concerned and this was considered by the CFI to be a determining factor in its assessment of the applicant's capacity to bring proceedings against the Commission's decision.
168. In *Stadtwerke Schwäbisch Hall and Others v Commission*<sup>171</sup>, the ECJ annulled a CFI judgment because the Court considered that the CFI had construed the applicant's request incorrectly, as they had only asked for the decision to be annulled. The CFI had stated that the objective of the appeal was to protect the applicants' procedural rights.

---

<sup>168</sup> T-375/03, CFI judgment of 20.9.2007; T-254/05, CFI judgment of 20.9.2007.

<sup>169</sup> C-525/04 P, ECJ judgment of 22.11.2007.

<sup>170</sup> C-260/05 P, ECJ judgment of 22.11.2007.

<sup>171</sup> C-176/06 P, *Stadtwerke Schwäbisch Hall and Others v Commission*, ECJ judgment of 29.11.2007

169. In *Ireland and others v Commission*<sup>172</sup>, the CFI annulled the Commission's final negative decision on the ground of an infringement of the duty to give reasons with regard to the non-application of Article 1(b)(v) of Regulation No 659/1999<sup>173</sup> in the State aid field (Procedural Regulation) to the exemption from excise duty on mineral oils. The CFI considered that, given the particular circumstances of the contested exemptions, the Commission should have ascertained whether the measures could be regarded as existing aid by reason of the fact that, at the time they were put into effect, they did not constitute aid, but that they subsequently became aid due to the evolution of the common market and without having been altered by the Member States concerned in accordance with the abovementioned article of the Procedural Regulation. The Commission has appealed against the judgment.

### 3.3. Recovery of aid

170. In the *MTU* case<sup>174</sup>, the CFI interpreted Article 13(1) of the Procedural Regulation, which empowers the Commission to adopt a decision on the basis of the information available if a Member State fails to comply with an information injunction from the Commission. The CFI concluded that Article 13(1) does not allow the Commission to impose on a particular undertaking an obligation to repay a fixed part of the amount of the aid declared to be incompatible, where the transfer of State resources from which that undertaking benefited was hypothetical. The CFI underlined that the Member State concerned was, in any event, under an obligation to require recovery from the actual beneficiaries under the Commission's supervision, without it being necessary for the Commission to name those beneficiaries expressly in the recovery decision. The Commission has lodged an appeal against this judgment.
171. In *Scott v Commission*<sup>175</sup> the CFI annulled a final negative decision with recovery on the grounds of erroneous assessment of the amount of State aid. The judgment lays an obligation on the Commission to take into account the comments of the beneficiary filed after the time limit in certain circumstances. In this respect it referred to some errors by the Commission in the calculation of the aid amount. The CFI also annulled the decision, for insufficient statement of reasons, in so far as it relied on the interest rate applied by the Commission in *Département du Loiret v Commission*<sup>176</sup>. The Commission has lodged an appeal against these judgments.
172. In *Commission v Spain*<sup>177</sup> the Court confirmed the failure of Spain to adopt, within the period prescribed, the measures necessary to implement the Commission's recovery decisions. In *Commission v Italy*<sup>178</sup>, the ECJ condemned Italy for failure to execute a Commission recovery decision. The Court confirmed the settled case-law that the only reason justifying non-execution is the complete impossibility to implement the decision, which was not proven in this case.

---

<sup>172</sup> T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06, Alumina cases, CFI judgment of 12.12.2007

<sup>173</sup> Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

<sup>174</sup> Case T-196/2002 *MTU v Commission*.

<sup>175</sup> T-366/00, CFI judgment of 29.3.2007.

<sup>176</sup> T-369/00, CFI judgment of 29.3.2007.

<sup>177</sup> C-177/06, ECJ judgment of 20.9.2007.

<sup>178</sup> C-280/05, ECJ judgment of 6.12.2007.

173. In *Commission v France*<sup>179</sup>, the ECJ condemned France for failing to comply with a Commission recovery decision concerning France Télécom as well as for breach of the loyal cooperation obligation under Article 10 EC. The Court confirmed the well established case-law according to which the Commission, when ordering the recovery of the aid declared incompatible with the Common market, is not obliged to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the Member State itself to work out that amount, without too much difficulty.
174. In the present case the ECJ considered that the Commission gave sufficient indications to France as to how the aid component should be determined. Finally, it was stressed that, in the event of serious difficulties encountered while fixing the precise amount to be recovered, the Member State is obliged to cooperate actively with the Commission in order to find an acceptable solution.

## D - THE ROLE OF COMPETITION POLICY IN THE WIDER POLICY FRAMEWORK

175. During 2007 the Commission reviewed the Lisbon strategy<sup>180</sup> with a view to its final phase (2008-2010)<sup>181</sup>. The review proposes to further embed competition in the wider Lisbon strategy framework. A particular focus is placed on the need to step up market monitoring combined, if necessary, with enforcement in the service and network industry sectors<sup>182</sup>. These proposals are in line with the Single Market Review carried out by the Commission during 2007. The importance of reforms in the area of competition is reflected by the very large number –in both relative and absolute terms - of recommendations proposed for endorsement by the Council under Article 99 EC.
176. For example, the review proposes that competition policy should contribute to the Lisbon strategy objectives in the gas, electricity and financial services sector through the following-up of sector inquiries launched in 2005<sup>183</sup>. Competition policy is also considered as a complementary instrument in connection with efforts to enhance the efforts being made to ensure interoperability and standardisation in a timely manner. The review also mentions 'competition rules' among the policies where the EU can contribute specific expertise which could be beneficial to its key partners. This is closely linked to the need to ensure fair competition and a level playing field internationally<sup>184</sup>.

---

<sup>179</sup> C-441/06, *Commission v France (France Télécom)*, ECJ judgment of 18.10.2007.

<sup>180</sup> The Commission's Communication on the 'Strategic Objectives 2005-2009' states that "[t]he top priority today is to restore sustainable dynamic growth in Europe in accordance with the Lisbon strategy". COM(2005) 12 final, see page 3.

<sup>181</sup> Communication from the Commission to the European Council: Strategic report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008-2010) Keeping up the pace of change Part I (COM(2007) 803 final).

<sup>182</sup> Proposal for a Community Lisbon Programme 2008 – 2010 Brussels, 11.12.2007, COM(2007) 804 final. See in particular Objective 5: The Community will strengthen the single market, increase competition in services, and take further steps to integrate the financial services market.

<sup>183</sup> See the previously mentioned objective 5 as well as objective 8 concerning Energy and climate change. See also the annex listing the EC level measures concerning these objectives.

<sup>184</sup> See section 3.4 of the Strategic report (COM(2007) 803 final) mentioned above.

177. The following Section II on Sector Developments contains numerous examples of how competition policy during 2007 contributed to the Commission's wider policies.
178. A concrete example of how competition policy can support the objectives of other Community policies and initiatives is the guidance given in relation to the significant exchange of data required by the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)<sup>185</sup>. In this context it was deemed necessary to issue specific competition law guidance to the industry on data sharing<sup>186</sup>. The guidance is provided in the form of practical rules helping undertakings to avoid a breach of competition law by e.g. reducing the frequency of information exchanges and using an independent third party to anonymise the individual data.

## II – Sector Developments

### A – ENERGY

#### 1. OVERVIEW OF THE SECTOR

179. European energy policy is built around three pillars: sustainability, security of supply and competitiveness. Reducing greenhouse gases is vital to combating climate change, and all European consumers (households as well as commercial and industrial users) depend heavily on the secure and reliable provision of energy at competitive prices. These objectives can only be effectively met through a properly functioning, competitive European energy market which sends the right signals to investors and policy makers. This requires continued efforts to open up Europe's gas and electricity markets to competition and create a single European energy market.
180. Competition policy in the energy field aims at ensuring a secure flow of energy, in particular electricity and gas, at competitive prices to the EU's households and businesses. An open and competitive single EU market would also guarantee a secure provision of energy in the future by sending the necessary signals for investment and making the European market attractive to external suppliers. Such a market would also be open to new energy mixes, and would play a major role in developing and deploying new environmentally friendly technologies. Prices that reflect costs will help encourage energy efficiency, thereby supporting sustainability and security of supply.
181. The Commission's competition sector inquiry into the European gas and electricity markets<sup>187</sup> concluded that energy markets are not functioning properly. As a result, Europe's consumers, businesses and the economy as a whole are still not benefiting

---

<sup>185</sup> Regulation (EC) No 1907/2006 (OJ L 396, 30.12.2006, p. 1).

<sup>186</sup> [http://reach.jrc.it/docs/guidance\\_document/data\\_sharing\\_en.pdf](http://reach.jrc.it/docs/guidance_document/data_sharing_en.pdf)

<sup>187</sup> Communication from the Commission: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final report), COM(2006) 851 final, and DG Competition report on energy sector inquiry, SEC(2006) 1724.

from the full advantages that should flow from the opening up of European energy markets in terms of lower prices and a better choice of services.

182. Three major structural problems and a number of other barriers persist.
183. First, many energy markets are still too highly concentrated. The sector inquiry showed that incumbents have very high market shares in their respective national gas markets, as well as in several electricity markets. Many incumbents have retained firm control of the liberalised markets, and the markets themselves remain national in scope, with little new entry. All this enables incumbents to impose high prices through their market power. Moreover, to protect their market positions and profits, incumbents engage in various practices that make it harder for new entrants to compete.
184. Second, many energy markets are characterised by a high degree of vertical integration, in particular in the form of insufficient unbundling of network and supply activities. When incumbents control the network, they also control the supply market. It is therefore no surprise that incumbents view their networks as strategic assets that allow them to exclude competition through discrimination. Moreover, where network and supply companies are integrated there are too few incentives to invest in networks – and this represents a major obstacle to new entry and a threat to security of supply. Many of Europe's interconnectors are chronically congested, there are insufficient tradable supplies on energy markets, and long-term contracts contribute to the locking-in of markets, thereby preventing alternative suppliers from supplying customers on retail markets.
185. A third problem – of a structural nature – is the absence of cross-border integration and cross-border competition. Incumbents largely keep to their traditional markets, and rarely enter other national markets as large-scale competitors. While energy prices for commercial users vary significantly from Member State to Member State, the differences are not competed away through imports. Moreover, different market designs between Member States make transfers of energy from one point in Europe to another difficult.
186. In addition, the lack of transparency, for example with respect to available transport capacity, harms all operators except the incumbents. As a result, there is little trust in the pricing mechanisms. When prices do not react to changes in actual supply and demand, security of supply and investment in alternative energy sources is threatened.

## **2. POLICY DEVELOPMENTS**

187. On 10 January the Commission adopted a comprehensive package of measures to establish a new Energy Policy for Europe to combat climate change and boost the EU's energy security and competitiveness<sup>188</sup>. Together with this package, the

---

<sup>188</sup> Communication from the Commission to the European Council and the European Parliament - an energy policy for Europe COM(2007) 1 final.

Commission also adopted the Final Report of the competition energy sector inquiry<sup>189</sup>.

188. The inquiry's findings are followed up through a number of carefully selected competition cases to address the key structural problems mentioned above. It should be underlined that enforcement in such individual cases cannot open markets by themselves and that it is therefore necessary to complement the enforcement action with an improved legal framework. It is a legislative priority to reinforce the current insufficient level of network unbundling, in order to create the proper incentives for investment and do away with discrimination. To this end, DG Competition has worked very closely with DGs Transport and Energy in preparing the new legislative proposals.
189. The European Council in March and the European Parliament report on the Energy Package in July generally endorsed the Commission's January package. They also strongly supported the need for "effective unbundling". On this basis, the Commission put forward, on 19 September, a proposal for a third liberalisation package for the European electricity and gas markets<sup>190</sup>. It focuses in particular on (i) effective unbundling of transmission networks; (ii) strengthening of the powers and independence of regulators; (iii) cooperation between regulators and (iv) cooperation among transmission system operators.
190. A second package of energy proposals, focusing on renewable energy and climate change, was prepared by the Commission during 2007 and was adopted in January 2008. In support of the Commission's overall climate change and renewable energy policies, the package also includes new guidelines on State aid to environmental protection, specifying the conditions under which aid to environmental protection may be declared compatible with the Treaty.
191. Full and combined use of the Commission's powers under antitrust rules (Articles 81, 82 and 86 EC) as well as merger control (Regulation 139/2004) and State aid control (Articles 87 and 88 EC) is also needed in order to maximise the overall enforcement impact.

## **2.1. Antitrust enforcement**

192. Real competition requires, in particular, that entrants can access (1) energy; (2) networks and (3) customers.

---

<sup>189</sup> Communication from the Commission: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final report), COM(2006) 851 final, and DG Competition report on energy sector inquiry, SEC(2006) 1724.

<sup>190</sup> This package includes the following proposals: Proposal for a Directive amending Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, COM(2007) 528; Proposal for a Directive amending Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas, COM(2007) 529; Proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators, COM(2007) 530; Proposal for a Regulation amending Regulation (EC) No 1228/2003 (electricity), COM(2007) 531 and Proposal for a Regulation amending Regulation (EC) No 1775/2005 (gas), COM(2007) 532.



193. The Commission has focused in particular on cases in the electricity and gas sectors that address the main areas of market malfunctioning identified in the sector inquiry. These investigations include both foreclosure and collusion (market sharing) cases. In this work the Commission cooperates closely with National Competition Authorities (NCA)<sup>191</sup>.
194. As regards the foreclosure investigations, these initiatives cover practices along the value chain, including: foreclosure of downstream markets by long-term contracts with energy consumers; abusive practices by integrated network and supply companies in order to foreclose competitors from accessing networks (e.g. hoarding of network capacity and failure to invest); foreclosure of electricity retail markets by raising rivals' costs through the balancing system<sup>192</sup>; foreclosure of downstream markets through the control of gas import infrastructure and long-term gas procurement agreements. Other issues investigated include, for example, allegations of price manipulations on electricity markets through withdrawal of capacity by generators.
195. On 11 October the Commission adopted a decision under Article 9 of Regulation No 1/2003 imposing binding commitments on the Belgian energy company *Distrigas* to open the Belgian gas market (see also summary in I.A.2.3.2. above)<sup>193</sup>. The effect of these commitments is to ensure that *Distrigas* does not tie an excessive proportion of customers for more than one year ahead, while allowing *Distrigas* as much flexibility as possible in managing its portfolio of contracts.
196. As regards the electricity market, the Commission initiated proceedings on 18 July in two investigations concerning long-term contracts with final consumers (in particular large industrial consumers) in France<sup>194</sup> (*EDF*) and Belgium<sup>195</sup> (*Suez*). In view of the *de facto* and/or *de jure* exclusive nature of the supply relationship, the share of the market that is tied and the duration of these contracts, it is suspected that these contracts prevent customers from switching, thereby significantly foreclosing the market concerned.
197. On 11 May, the Commission initiated proceedings in two investigations where abusive practices relating to gas transport networks are suspected of causing downstream market foreclosure. One case concerns alleged capacity hoarding and strategic underinvestment by the Italian energy group *ENI* on the TAG and TENP gas pipelines, leading to the foreclosure of Italian supply markets<sup>196</sup>. The other case concerns suspicions that the German energy group RWE may have abused its dominant position in the regional markets for the transport and wholesale supply of

---

<sup>191</sup> A dedicated sub-group for energy has been set up as part of the cooperation within the European Competition Network (ECN). During 2007 this subgroup addressed national experiences in relation to competition case remedies.

<sup>192</sup> The balancing system serves to ensure that injections and withdrawals on the network are identical, in order to keep the system in equilibrium.

<sup>193</sup> Case COMP/37.966 *Distrigas*.

<sup>194</sup> See DG Competition website at <http://ec.europa.eu/comm/competition/antitrust/news.htm>

<sup>195</sup> See DG Competition website at <http://ec.europa.eu/comm/competition/antitrust/news.html>

<sup>196</sup> MEMO/07/187, 11.5.2007.

gas in North Rhine-Westphalia by raising rivals' costs and preventing (new) entrants from accessing capacity on gas transport infrastructure in Germany<sup>197</sup>.

198. The Commission also opened proceedings, on 18 July in a suspected collusion case under Article 81 EC, concerning the German E.ON group and the French GDF group (*E.ON-GDF*)<sup>198</sup>. The alleged infringement takes the form of an agreement and/or concerted practice restricting competition in the two companies' respective home markets, in particular concerning sales of natural gas transported over the MEGAL pipeline.
199. As regards territorial restrictions and price sharing mechanisms in gas import contracts, the Commission reached an understanding with Algeria on 11 July, following a protracted dialogue<sup>199</sup>. As a result, the Algerian gas producer Sonatrach will amend its contracts to ensure that importers are not restricted in reselling their gas within the EU. In particular, the use of price sharing mechanisms (obliging the importer to share part of its profits with the producer if the gas is sold outside the agreed territory or use) in liquefied natural gas (LNG) contracts will no longer be possible once the title to the gas has passed to the importer.

## **2.2. Mergers: concurrent application of internal market and competition rules (Article 21 of the Merger Regulation)**

200. The Commission adopted a number of decisions in the energy field in 2007. The most interesting case from the point of view of competition and regulation was Enel/Acciona/Endesa<sup>200</sup>.
201. The acquisition of joint control of Endesa by Enel and Acciona was notified to the Commission on 31 May and cleared unconditionally on 5 July. Enel and Acciona requested, under the relevant national law, the approval of the Spanish energy Regulator (Comision Nacional de Energia (CNE)) for their acquisition of Endesa.
202. On 4 July the CNE approved the transaction subject to eleven obligations, which included an obligation to inform CNE of all the strategic decisions taken by Endesa's board of directors in regulated markets and the right of CNE to revoke any Board decision if ENEL's vote in the Board has been necessary for the approval of such decision in order to avoid "the additional risks which may derive from the special powers that the Italian State still has in Enel" (Condition 9).
203. The Commission considered these conditions to be incompatible with Community law and in particular with Articles 43 and 56 EC. Moreover, it forwarded to Spain a preliminary assessment in which it expressed the view that Spain had violated Article 21 of the Merger Regulation by adopting, without prior notification to and approval by the Commission, measures which unduly restricted a concentration of a Community dimension (i.e. the Enel/Acciona/Endesa transaction) and which were not necessary for and proportionate to the protection of a legitimate interest and therefore not compatible with Community law.

---

<sup>197</sup> MEMO/07/186, 11.5.2007.

<sup>198</sup> See DG Competition website at <http://ec.europa.eu/comm/competition/antitrust/news.html>

<sup>199</sup> IP/07/1074, 11.7.2007.

<sup>200</sup> Case COMP/M.4685 *Enel/Acciona/Endesa* Commission decision, 5.12.2007.

204. Enel and Acciona appealed against some of the conditions of the CNE decision of 4 July to the Spanish Minister for Industry and Tourism. The Minister revoked some of CNE's conditions and amended others, leaving unchanged the conditions that were not appealed against.
205. The Commission considered that the remaining conditions as modified by the Minister were still contrary to Community law and ordered Spain, by a decision dated 5 December, to withdraw them by 8 January 2008 at the latest.

### **2.3. State aid: investigations opened in respect of regulated electricity tariffs that may favour certain undertakings**

206. In 2007, the Commission found indications that regulated electricity tariffs in Italy, Spain and France could amount to State aid to large and medium-sized electricity consuming companies.
207. In Italy, a preferential electricity tariff was originally established in 1962 for three companies, ThyssenKrupp, Cementir and Terni Nuova Industrie Chimiche, as compensation for the nationalization of a hydro power plant owned by Società Terni, of which the three beneficiaries are the legal successors. Under the expropriation arrangement, Società Terni was to receive electricity supplies at cost price throughout the remaining duration of the company's hydro power concession, i.e. until 1992. After a first prolongation from 1992 to 2007, which was cleared by the Commission in 1992 under the State aid rules, Italy further prolonged the preferential tariff from 2005 to 2010 without notifying the second prolongation to the Commission. In a decision taken in November<sup>201</sup>, the Commission found that the second prolongation of the tariff constituted incompatible State aid. While compensation granted by the State to a company in the context of an expropriation does not normally constitute State aid, in this case the preferential tariff could no longer be considered as compensatory, since the compensation already provided for in the original expropriation package was adequate, and since the predictability normally inherent in compensatory measures was lacking. The only effect of continuing to supply electricity to the beneficiaries below market price was to improve their competitive position vis-à-vis other EU producers who do not receive the same aid, by reducing the beneficiaries' ordinary operating costs and enabling them to sell their products at a lower price. The Commission found that none of the exceptions provided for in the EC Treaty for authorising such aid applied. The aid was therefore unlawful and must be recovered. The Commission decision is under appeal.
208. In France and Spain, electricity users can purchase their electricity either from the liberalised market or from the regulated market. On the regulated market, the prices, or "tariffs", are entirely regulated by the State. For some professional large electricity consumers in particular, the regulated tariffs are well below market prices. The tariffs are fully or partially financed by parafiscal levies imposed on all electricity consumers. The Commission is concerned that the preferential tariffs may distort competition between large and medium-sized companies on the internal market. In

---

<sup>201</sup> Decision of 20 November 2007 in State aid case C36/A/2006, not yet published in OJ, but available on the Internet site [http://ec.europa.eu/comm/competition/state\\_aid/register/](http://ec.europa.eu/comm/competition/state_aid/register/)

addition to distorting competition, the low tariffs may prevent the access of new entrants to the electricity market, which runs directly counter to the objective of creating a well-functioning Internal Electricity Market. The Commission has therefore opened investigations concerning the tariffs in both France and Spain<sup>202</sup>, the final outcome of which is still to be decided.

209. On 25 September the Commission adopted a State aid decision whereby it ordered the termination of long-term power purchase agreements (PPAs) entered into in the mid-nineties between power generators and the State-owned network operator in Poland. The PPAs were concluded for a period of 15 to 25 years and covered around 40% of the Polish power generation market. Their price formulae guaranteed the viability of the generators concerned for the entire duration of the agreements. Such conditions created a barrier to the proper liberalisation of the power generation sector. The Commission concluded in its decision that the PPAs conferred an undue advantage on their beneficiaries and ordered their termination. The same decision approves compensation for stranded costs for the generators that benefited from PPAs, on the basis of the Commission's Communication on State aids linked to stranded costs. Compensation for stranded costs is the tool that Member States can use to help smooth the transition to a liberalised market for the incumbents of the energy sector. A similar State aid procedure is on-going against PPAs covering around 80% of the power generation market in Hungary.

---

<sup>202</sup>

Concerning France, see decision of 13 June 2007 in State aid case C17/2007, OJ C 164, 18.7.2007, p. 9; and concerning Spain, see decision of 24.1.2007 in State aid case C3/2007, OJ C 43, 27.2.2007, p. 9.

## B – FINANCIAL SERVICES

### 1. OVERVIEW OF THE SECTOR

210. Financial markets are crucial to the functioning of modern economies. The more integrated and the more competitive they are, the more efficient the allocation of capital and long-run economic performance. Banking, insurance and securities are three major areas of the financial services sector.
211. The European banking sector has undergone significant growth and diversification over the last two decades. Today it directly provides over three million jobs in the EU. Retail banking remains the most important sub-sector of banking, representing over 50% of total EU activity in terms of gross income. The Commission estimates that in 2004 retail banking activity in the European Union generated gross income of EUR 250-275 billion, equivalent to approximately 2% of total EU GDP<sup>203</sup>. However, a number of indicators, such as market fragmentation, price rigidity and customer immobility, suggest that competition in the EU retail banking market may not have been working effectively. The Commission therefore decided in 2005 to open an inquiry into the retail banking sector, in particular in relation to cross-border competition. The final report of the inquiry was published in January 2007 (see [http://ec.europa.eu/comm/competition/sectors/financial\\_services/inquiries/retail.html](http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/retail.html) ).
212. To underpin the development of a single market for financial services and harness the full potential benefits of the euro, the European banking industry under the aegis of the European Payments Council (EPC)<sup>204</sup> is creating a Single Euro Payments Area (SEPA). SEPA, if properly implemented, will allow citizens, companies and other economic actors to make and receive payments in euros, within Europe, whether between or within national boundaries under the same conditions, rights and obligations, regardless of their location. In other words making euro payments throughout Europe would become as easy, cheap and secure as making national payments today.
213. SEPA aims at harmonising the millions of everyday electronic retail payments made with three payment instruments - payment cards, credit transfers and direct debits – using a single bank account.
214. The SEPA project is strongly supported by the European Commission and the European Central Bank (ECB). The two institutions share a common vision<sup>205</sup> for SEPA: an integrated market for payment services which is subject to effective competition. However, as the project is led by the EPC - which is an association of undertakings - its implementation merits close scrutiny from a competition viewpoint.

---

<sup>203</sup> Figures taken from Interim Report II of the sector inquiry into retail banking. (see [http://ec.europa.eu/comm/competition/sectors/financial\\_services/inquiries/interim\\_report\\_2.pdf](http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/interim_report_2.pdf))

<sup>204</sup> EPC now consists of 69 members (banks and national banking associations).

<sup>205</sup> [http://www.ecb.int/press/pr/date/2006/html/pr060504\\_1.en.html](http://www.ecb.int/press/pr/date/2006/html/pr060504_1.en.html)

215. Against this background, DG Competition, together with the national competition authorities, has started to examine a number of SEPA-related issues, including: the governance of the EPC and the schemes; access to card schemes and infrastructures, particularly for non-bank payment services providers; the split between card schemes and infrastructures; standardization, certification and compliance; multilateral interchange fees (MIFs); and migration, in particular for cards.
216. Another sector of financial services - namely insurance - is of vital importance for big and small businesses throughout the European Union. EU insurers collect EUR 375 billion in non-life premiums every year<sup>206</sup>. The functioning of this industry in a pro-competitive way is crucial not only for the insurance industry as such, but for the economy as a whole.
217. Business insurance is the most important sector of Non-life Insurance, generating gross premiums equivalent to around 3.3% of the EU's GDP. A competitive environment in business insurance is therefore key to European economic growth. Taking into account that competition in this sector within the common market may be restricted or distorted, the Commission initiated a sector inquiry into business insurance in 2005. The final report of that inquiry was published in September 2007.

## **2. POLICY DEVELOPMENTS**

### **2.1. Sector inquiry into retail banking**

218. On 10 January the European Commission published the Final Report of its sector inquiry into European retail banking markets<sup>207</sup>. It also adopted a Communication summarising the results of the inquiry and describing areas for further investigation and antitrust enforcement to open up markets and stimulate competition. The inquiry covers two aspects: markets for payment cards and payment systems, and markets for current accounts and related services (core retail banking products).
219. The findings confirmed that markets are still fragmented along national lines. Fragmentation means that the potential of a market of 450 million citizens is not being fully exploited, that consumers have limited choices and often pay more than they should for current accounts, loans or payments. Despite all efforts at European level to further integrate the EU financial services markets, access to several product markets and geographical markets still appears to be difficult. The high degree of variation in prices, profit margins and selling patterns *between Member States* and the contrasting homogeneity *within individual Member States* are indicative of regulatory or behavioural barriers.
220. The European payment card industry channels flows of EUR 1 350 billion per year, generating an estimated EUR 25 billion in fees for banks. The industry is highly concentrated, entailing high fees and high profitability. Another finding is that the rules governing the networks can also create significant barriers to entry. For

---

<sup>206</sup> Source: Swiss Re, Sigma 2/2005, p. 39 and 5/2006, p. 35; cf. Interim Report of the Business Insurance Sector Inquiry, p. 37.

<sup>207</sup> IP/07/114 and MEMO/07/40, 31.1.2007.

example, several national card schemes run by the main domestic banks are giving rise to competition problems.

221. There are large variations in payment card fees across the EU. Retailers in some countries pay fees up to four times higher than in other countries for accepting the same major credit card.
222. The publication of the report has already brought about changes in a number of Member States where market players and/or authorities have taken steps to address the competition concerns in the area of payment cards and payment systems<sup>208</sup>.
223. The findings of the sector inquiry also underlined the importance of close monitoring of the Single Euro Payments Area (SEPA). The inquiry raised concerns that the banking industry could use the migration to SEPA as a pretext to increase prices by abolishing efficient national schemes, giving rise to a situation of monopoly rents. The Commission – together with the national competition authorities – will therefore be following the SEPA developments with great attention.
224. Finally, the sector inquiry concluded that proportionate steps to enable customer mobility will enhance competition in the retail banking sector. Certain problems the inquiry identified in relation to customer choice and mobility in core retail banking activities (current accounts and related services) are being followed-up by national competition authorities and the Commission. In Hungary, for instance, the Competition Authority launched a sector inquiry on customer mobility. At the European level, the Commission, in the context of the Green Paper on Retail Financial Services<sup>209</sup>, has announced a series of initiatives including an invitation to the banking industry to develop a Code of Conduct on bank account switching<sup>210</sup>.

## **2.2. The Commission prohibits MasterCard's Multilateral Interchange Fees for certain cross-border card payments in the EEA**

225. On 19 December the Commission adopted a decision prohibiting MasterCard's multilateral interchange fees (MIFs) for cross-border card payments with MasterCard and Maestro branded consumer credit and debit cards between Member States of the European Economic Area (intra-EEA MIFs)<sup>211</sup>. The adoption of this decision virtually coincided with the expiry of the Commission's exemption of VISA's cross-border MIFs on 31 December, widely considered as the Commission's leading case on MIFs over the last five years<sup>212</sup>.
226. MasterCard's intra-EEA MIF is a charge levied on each payment at a retail outlet when the card payment is processed. This charge, which is paid by the acquiring

---

<sup>208</sup> Report on the retail banking sector inquiry, point B 2.2, p. 93 (electronic version).

<sup>209</sup> COM(2007) 226.

<sup>210</sup> SEC(2007) 1520 published alongside COM(2007) 724 final.

<sup>211</sup> IP/07/1959 and MEMO/07/590, 19.12.2007.

<sup>212</sup> In 2002, the Commission exempted a similar system proposed by Visa (see IP/02/1138) after Visa offered substantial reforms to its MIF. The exemption, however, expires on 31 December 2007 and Visa will from that moment on be responsible to ensure that its system is in full compliance with EU competition rules. See Commission Decision of 24.7.2002, *VISA II*, OJ L 318, 22.11.2002, p. 17 and Competition Newsletter 2002 Number 3, p. 33.

bank<sup>213</sup> to the issuing bank<sup>214</sup>, largely determines the price that merchants pay for accepting payment cards. The decision concluded that MasterCard's intra-EEA MIF inflated the cost of card acceptance by merchants without countervailing efficiencies. MasterCard was ordered to discontinue charging the fees. While no fines were imposed as MasterCard had given notification of its intra-EEA MIF and the specific circumstances of the case, the decision does provide for daily penalty payments in the event of failure to comply. If MasterCard does not withdraw its intra-EEA MIF by 20 June 2008 (i.e. six months after notification of the decision) the Commission may order MasterCard to pay 3.5% of its global daily turnover as a daily penalty.

227. The Commission's decision did not declare MIFs illegal as such. However, it did make clear that, where card schemes such as MasterCard operate on the basis of a business model that includes a MIF, the MIF must contribute to technical and economic progress and benefit consumers in order for it to comply with Article 81 EC. The onus for demonstrating these positive effects is on the payment association. The outcome of the Commission's assessment in a given case will depend on the claimed purpose, plausibility and implementation of the specific model underlying a MIF scheme, as well as the MIFs' object and effects on the relevant market(s). MasterCard's argument was that its MIF scheme maximised output while generating objective efficiencies to the benefit of consumers. Yet MasterCard has failed - after four years of in-depth investigation - to furnish empirical evidence to demonstrate any positive effects on innovation and efficiency which would allow a fair share of the alleged MIF benefits to be passed on to consumers. The Commission therefore concluded that MasterCard's MIF scheme did not fulfil the first three conditions of Article 81(3) EC.
228. The adoption of the decision follows the inquiry into retail banking (see 2.1. above), which found that interchange fee agreements might stand in the way both of a more cost-efficient payment cards industry and of the creation of SEPA. The inquiry also concluded that in five EEA countries (Denmark, Finland, Luxembourg, the Netherlands and Norway) payment card systems function without MIFs.

### **2.3. Morgan Stanley/Visa International and Visa Europe**

229. On 3 October the Commission fined Visa International and Visa Europe (Visa) the sum of EUR 10.2 million for refusing to admit Morgan Stanley as a member from March 2000 to September 2006<sup>215</sup>. The Commission took the view that Visa's behaviour constituted a serious infringement of Article 81 EC and Article 53 of the EEA Agreement<sup>216</sup>, as an effect of which Morgan Stanley was excluded from the market.

---

<sup>213</sup> An acquiring bank is a financial institution that has a contractual relation with a merchant for accepting a certain payment card.

<sup>214</sup> An issuing bank is a credit institution that has a contractual relation with a cardholder which allows for the provision and use of a payment card.

<sup>215</sup> Case COMP/37.860.

<sup>216</sup> Visa is a membership association, members of which engage in an economic activity. Hence, rules and regulations setting out the functioning of Visa, adopted by its board of directors, are regarded either as decisions of association or as agreements between undertakings within the meaning of Article 81(1) EC.



230. At the time of the infringement, the Morgan Stanley group owned the Discover card network in the US. However, Discover was not present on the UK market, or even on any of the EU markets. Until Visa finally admitted Morgan Stanley Bank as a member, the card operations of Morgan Stanley in the EU were confined to issuing MasterCard cards in the UK.
231. The case was initiated following a complaint submitted by Morgan Stanley in 2000. In 1999, Morgan Stanley incorporated Morgan Stanley Bank in the UK and in 2000 Morgan Stanley Bank's request to become a member of the Visa organisation was rejected by Visa.
232. The Commission's investigation revealed that retailers expect banks to offer card acceptance contracts as a package that includes both Visa and MasterCard. Visa's refusal to admit Morgan Stanley as a member therefore not only prevented Morgan Stanley from providing services to merchants as regards Visa transactions (which make up around 60% of the market), but also as regards transactions with other payment cards.
233. In August 2004 the Commission sent Visa a statement of objections setting out the preliminary findings of its investigation. Visa subsequently (in September 2006) concluded a settlement agreement with Morgan Stanley allowing it to become a Visa member. As a consequence, Morgan Stanley withdrew its complaint to the Commission.
234. The Commission found that the exclusion of Morgan Stanley from Visa membership restricted competition in the provision of credit card acceptance services to merchants in the UK. In the UK, the market for providing merchants with card acceptance capabilities (the so-called "acquiring" market) is highly concentrated.
235. Within a very narrow circle of possible entrants, Morgan Stanley was one of a small number of operators that actually considered entry and had the qualifications to operate efficiently. It was reasonable to assume that Morgan Stanley's entry would have positive effects on prices and on the quality of acquiring services in the UK.
236. As a reason for excluding Morgan Stanley from membership, Visa invoked an internal rule according to which it would not accept as a member any applicant deemed by the board of directors to be a competitor of the Visa scheme. However, the Commission's investigation showed that Morgan Stanley was not a competitor of Visa in the EU and had no plans to enter at the material time<sup>217</sup>. Furthermore, the internal rule was applied by Visa in a discriminatory manner, as Visa admitted Citigroup (the owner of the Diners Club network competing with Visa) and several shareholders of JCB Co. Ltd. (equally a competitor of Visa) as Visa members.
237. Although the complaint was withdrawn and the infringement ceased, the Commission decided to impose a fine, as Morgan Stanley was excluded from the UK acquiring market for six and a half years and more than two years after the Commission's statement of objections to Visa.

---

<sup>217</sup> Because it had no payment card network and - given the high entry barriers to the networks market - there was no realistic possibility that Discover, Morgan Stanley's US card network, would expand to the EU.

## 2.4. Groupement des Cartes Bancaires

238. In its decision of 17 October, the Commission concluded that the price measures of the Groupement des Cartes Bancaires (CB) had an object and an effect of restricting competition and hence infringed Article 81 EC<sup>218</sup>. The Groupement des Cartes Bancaires manages the "CB" card payment system in France, which accounts for over 70% of card payments in France. Visa and MasterCard cards issued in France operate within this system as "CB" cards. The Groupement, which has around 150 members, is managed by the largest French banks<sup>219</sup>.
239. The Commission found that the Groupement had adopted price measures hindering the issuing of cards at competitive rates by certain member banks in France, thereby keeping the price of payment cards artificially high to the benefit of the major French banks. The measures at issue were fees adopted by the Groupement which had to be paid by certain members under certain conditions on the basis of the number of cards issued, also taking into account the acquiring activity. A key measure was the "MERFA" ("Mécanisme Régulateur de la Fonction Acquéreur"), a formula determining whether a fee of up to EUR 11 on each card issued should be paid by member banks that are not "sufficiently" active in terms of acquiring merchants or installing automated teller machines (ATMs). The other measures at issue in the decision included a membership fee of EUR 12 per card, an additional membership fee and a "sleeping member" fee ("mécanisme de réveil des dormants") of EUR 12 per card issued in excess of a maximum number of cards stipulated by the Groupement. Although the fees were in principle applicable to all members of the Groupement, they were designed to hinder the issuing of cards at a price lower than that of the large banks.
240. Although the Groupement claimed that the measures were necessary to combat "free-riding" on the investments and to encourage new competitors to acquire merchants and install ATMs, the Commission's investigation revealed that the measures were introduced to restrict competition in the French payment card market and that this has in fact been their effect.
241. The implementation of the measures was suspended in 2004 pending the Commission decision on their compatibility with Community law. The measures nevertheless continued to have an effect on the market, since until they were abolished competitors of the major banks were forced to issue fewer cards at less competitive rates than they would have done if the restrictive measures had not existed.
242. The Commission ordered the Groupement to cancel the measures concerned with immediate effect and to avoid taking any measures in the future with a similar purpose or effect. In the specific circumstances of the case, the Commission decided not to impose a fine on the Groupement since the measures had been notified in December 2002 and were kept in effect only for a very short time after the entry into force of Regulation 1/2003.

---

<sup>218</sup> [http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38606/dec\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38606/dec_en.pdf)

<sup>219</sup> Crédit Agricole, Crédit Lyonnais, Crédit Mutuel, Crédit Industriel et Commercial, Société Générale, Crédit du Nord, BNP-Paribas, Natexis-Banques Populaires, the savings banks, the Post Office and Crédit Commercial de France.

## 2.5. Business insurance sector inquiry

243. The Commission decided on 13 June 2005 to initiate a sector inquiry into the provision of insurance products and services to businesses in the Community, based on Article 17 of Council Regulation (EC) No 1/2003<sup>220</sup>. Business insurance includes, inter alia, coverage for property risks and interruption of business; shipping; motor vehicles; general, professional and environmental liability; personal accidents and credit risks.
244. On 25 September, the Commission adopted the Final Report on the Business Insurance Sector Inquiry<sup>221</sup>, which was released together with a comprehensive working document of the Commission's services containing the full findings (the Working Document).
245. The Final Report and the Working Document focused on a number of key issues and concerns in relation to the financial aspects of the industry, the harmonization of premiums in coinsurance and reinsurance, the distribution of business insurance, the horizontal cooperation amongst insurers and the duration of business insurance contracts.
246. It appears from the findings of the sector inquiry that profitability in business insurance at the EU-25 level has been sustained over recent years in the majority of Member States, albeit with significant variations.
247. The Commission found that widespread practice<sup>222</sup> in both reinsurance and coinsurance markets almost always results in a *de facto* alignment of premiums and other conditions of coverage, including premiums.
248. The Commission's provisional view of the practices described is that individual instances of them, when they result from agreements between undertakings, may fall within the scope of Article 81(1) EC. The Commission questions in particular whether the element of premium alignment is indispensable, or whether the same efficiencies could not be achieved from auctioning the remaining part of the risk. However, the Commission has not at this stage heard persuasive arguments to justify their indispensability as required by Article 81(3) EC.
249. In respect of **insurance intermediaries**, the market surveys and the public consultation highlight the fact that current market practices - in particular the lack of spontaneous disclosure of remuneration received from insurers and other possible conflicts of interest - create an environment in which business insurance clients, in many cases, are unable to make fully informed choices. Disclosure by intermediaries of relevant information in relation to remuneration received from insurers and services provided to insurers may help mitigate conflicts of interest. The Commission intends to look at these issues anew in the framework of the Insurance Mediation Directive.

---

<sup>220</sup> [http://ec.europa.eu/comm/competition/sectors/financial\\_services/inquiries/decision\\_insurance\\_en.pdf](http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/decision_insurance_en.pdf)  
<sup>221</sup> IP/07/1390, 25.9.2007.

<sup>222</sup> The Commission's concerns relate exclusively to the procedure in two stages; this involves the selection of a lead insurer in the first round and then the attribution of the remaining risk to insurers who do not reassess it but simply conclude agreements on identical terms to those of the lead insurer.

250. Practices aimed at giving brokers an incentive to place business with particular insurers ("contingent commissions") have the potential to undermine fair competition in the insurance market. Such practices might result, instead, in insurers competing against each other on the level of remuneration afforded to brokers in an attempt to "buy" distribution, or at the very least to influence the broker's choice.
251. Some forms of cooperation between insurers are at present subject to a block exemption under Regulation (EC) No 358/2003. The **current Block Exemption Regulation** was adopted for a period of seven years and is thus due to expire on 31 March 2010.
252. In their responses, industry stakeholders were very much in favour of prolonging the current Block Exemption Regulation when it expires in 2010 and usually observed that the forms of cooperation and agreements exempted by the Block Exemption Regulation are pro-competitive. However, some respondents disputed that the insurance industry needs special treatment under antitrust rules.
253. Under the terms of the enabling legislation the Commission is required to submit, by 31 March 2009, a report on the functioning and future of the Block Exemption Regulation. A consultation process involving industry participants, consumers' organizations and other interested stakeholders is due to take place in 2008.
254. The Commission also looked at the **duration of contracts** and at clauses concerning their renewal and extension, because of the competition concerns to which a general practice of excessively long-term contracts might potentially give rise in terms of foreclosing the market to new entry. If customers are committed to the same insurer for a long period, this could affect competitors who are trying to gain access to the market or to increase their market share.
255. Further to the findings of the Interim Report (which showed that the average duration of contracts in Austria was 8 years, in Slovenia 7 years, in Italy and the Netherlands 6 years), the replies received were insufficient to dispel competition concerns in Austria. The Commission believes that it would be appropriate to give further consideration to the situation in Austria, without prejudging the route that this might take.

## 2.6. State aid in the financial services sector

256. On 18 July the Commission cleared the two remaining recapitalisation cases in the German Landesbanken sector (WestLB and Nord/LB) as complying with the private market economy investor test<sup>223</sup>. During the summer, the US subprime crisis began to impact seriously on several European banks, requiring considerable public support measures to keep the banks afloat. The Commission launched investigations into two cases concerning the German banks, IKB and Sachsen LB. For the UK bank, Northern Rock, a decision was taken on 5 December declaring rescue aid to be compatible with State aid rules<sup>224</sup>. Subsequent additional measures in support of Northern Rock are also being assessed.

---

<sup>223</sup> OJ C 4, 9.1.2008, p. 1.

<sup>224</sup> IP/07/1859, 5.12.2007.

257. The support measures in these cases are assessed according to the market economy investor principle ("MEIP"). Under this test it is assessed whether, in similar circumstances, a private investor operating in normal conditions of a market economy would have entered into the transaction in question (e.g. providing loans or funds to the bank) and whether it would have done so on similar terms. The comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time. If a market economy investor could have acted in the same way, no State aid is involved.
258. On 13 November the Commission initiated the formal investigation procedure in respect of a French tax scheme for insurance companies that offer complementary health insurance contracts with strong solidarity components<sup>225</sup>. This is one of the rare cases where compatibility of the aid is claimed on the basis of Article 87 (2) (a), i.e. aid (i) with a social objective (ii) granted to the final consumers and (iii) without discrimination as to the origin of the product. As the aid is indirect, the Commission opened proceedings to ascertain that all three criteria are indeed present.
259. On 30 May the Commission opened the formal investigation procedure against an Italian tax scheme aimed at realigning the tax value of the assets of certain banks in Italy resulting from company reorganisation transactions under Law 218/1990 on the privatisation of the public banking sector in Italy<sup>226</sup>. Although it is not the first time that the Commission has investigated tax breaks relating to the reorganisation of the banking sector in Italy<sup>227</sup>, the Commission has never previously examined the compatibility of this subsequent tax scheme of 2003 aimed at clearing the suspended tax liabilities deriving from such reorganisations. In opening the formal investigation, the Commission took the view that the scheme seemed to provide a sizeable advantage to a limited number of Italian banks and that this seemed liable to distort competition, especially against the background of ongoing consolidation in the banking sector.
260. The recent turmoil in the financial markets triggered by the US subprime crisis has raised concerns among governments and regulators about financial stability. In this context the ECOFIN Council on 9 October adopted Conclusions suggesting a series of actions to enhance the arrangements for financial stability. In these conclusions the ECOFIN Council invited the Commission and Member States to work together towards clarifying when a banking crisis could be considered by the Commission as "a serious disturbance of the economy" under the Treaty and State aid rules, and invited the Commission to consider streamlining procedures to focus on how State aid enquiries under critical circumstances can be dealt with rapidly. In its Conclusions, the ECOFIN Council also set out a strategic Roadmap for the period until 2009.

---

<sup>225</sup> IP/07/1692, 14.11.2007.

<sup>226</sup> OJ C 154, 7.7.2007, p. 15.

<sup>227</sup> See Commission Decision 2002/581/EC of 11.12.2001 on the tax measures for banks and banking foundations implemented by Italy (OJ L 184, 13.7.2002, p. 27); Commission Decision 2000/600/EC of 10.11.1999 conditionally approving the aid granted by Italy to the public banks Banco di Sicilia and Sicilcassa (OJ L 256, 10.10.2000, p. 21); and Commission Decision 1999/288/EC of 29.7.1998 giving conditional approval to the aid granted by Italy to Banco di Napoli (OJ L 116, 4.5.1999, p. 36).

## 2.7. Mergers in the financial services sector

261. The Commission assessed and authorised a number of concentrations in the financial services sector. In the *ABN AMRO* cases<sup>228</sup>, the Commission analysed the proposed acquisition of the Dutch bank ABN AMRO by a consortium formed by RBS, Fortis and Santander. The three members of the consortium intended to distribute ABN AMRO's assets between themselves. The Commission therefore considered that the consortium's operation gave rise to three different concentrations. While the acquisitions proposed by RBS and Santander were unconditionally authorised by the Commission in Phase I, the Phase I clearance of the Fortis acquisition was subject to conditions. The extensive market investigation had revealed that the proposed acquisition raised competition concerns in commercial banking (defined for the purposes of the case as financial services to corporate customers with a turnover of EUR 2.5 million to EUR 250 million) and factoring. To address the Commission's concerns, Fortis undertook to divest a corporate banking business (consisting of ABN AMRO's subsidiary Hollandsche Bank Unie N.V. (HBU)), two corporate client departments, 13 "Advieskantoren" and ABN AMRO's Dutch factoring activities to a large international bank.

## C – ELECTRONIC COMMUNICATIONS

### 1. OVERVIEW OF THE SECTOR

262. Growth in the electronic communications sector in the EU was slightly slower in 2007 than in the preceding years. While traditional fixed voice services were continuing to decline, in the mobile voice market revenues continued to rise and penetration increased significantly while prices continued to fall<sup>229</sup>. The most dynamic segment, fixed broadband, continued to develop steadily, benefiting from continued investment by alternative operators and increased infrastructure competition. Mobile broadband take-up remained limited although is showing signs of growth.
263. Confronted with slower growth in their traditional revenues, telecom operators reoriented their business models towards convergent services (telecoms, media and internet). To support this shift, a new cycle of investment in convergent and high speed networks - the "Next Generation Networks" – has taken off, in particular in the form of large scale, fibre access roll-out projects.
264. Increased retail competition enabled consumers to continue to benefit from both lower prices and an increasing variety and quality of fixed and mobile communication services.
265. The vast majority of providers of electronic communications services continued to operate within the confines of the EU regulatory framework for electronic

---

<sup>228</sup> Case COMP/M.4843 *RBS/ABN AMRO assets* Commission decision, 19.9.2007, Case COMP/M.4845 *Santander/ABN AMRO assets* Commission decision, 19.9.2007 and Case COMP/M.4844 *Fortis/ABN AMRO assets* Commission decision, 3.10.2007.

<sup>229</sup> Progress Report on the Single European Electronic Communications Market 2007 (13th Report), p. 3.

communications (Regulatory Framework)<sup>230</sup>, which is designed to facilitate access to legacy infrastructure, foster investment in alternative network infrastructure and bring choice and lower prices for consumers.

## 2. POLICY DEVELOPMENTS

266. For most of 2007 the original Recommendation on the relevant markets remained in force<sup>231</sup>. This Recommendation identified 18 product and services markets, at both wholesale and retail level, as being susceptible to *ex ante* regulation. Within the Community consultation mechanism under Article 7 of the Framework Directive<sup>232</sup> (FD) the Commission assessed 170 notifications from NRAs and adopted 66 comments letters and 49 no-comments letters in 2007. In five cases, the Commission raised serious doubts as to the compatibility of the notified measures with EU law and opened second phase investigations under Article 7(4) FD. In one case the Commission adopted a veto decision<sup>233</sup>.
267. The work on the review of the Regulatory Framework continued during 2007 and resulted in the adoption in November of a comprehensive Commission proposal for a revised regulatory package (see 2.1. below).
268. As far as the application of EU competition law in the electronic communications sector was concerned, the most significant decision adopted by the Commission in 2007 was the decision of 4 July against Telefónica (see I.A.2.3. above). In this decision the Commission imposed a fine of over EUR 151 million on Telefónica for having abused its dominant position on the Spanish broadband market in the form of a margin squeeze between its wholesale and retail prices, despite the fact that sector-specific regulation was in place<sup>234</sup>.
269. The issue of unrestricted application of EU competition law in addition to sector-specific regulation was also addressed by the Commission in the infringement procedure against the Czech Republic (see I.A.2.4. above).

### 2.1. Review of the Regulatory Framework: reduction of markets subject to *ex ante* regulation

270. The review of the Regulatory Framework in the course of 2007 led the Commission to propose a regulatory package (covering the Directives and the Recommendation on relevant markets plus a proposal for a Regulation establishing a European

---

<sup>230</sup> Directive 2002/21/EC (Framework Directive) (OJ L 108, 24.4.2002, p. 33), Directive 2002/19/EC (Access Directive) (OJ L 108, 24.4.2002, p. 7), Directive 2002/20/EC (Authorisation Directive) (OJ L 108, 24.4.2002 p. 21), Directive 2002/22/EC (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51), Directive 2002/58/EC (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>231</sup> Commission Recommendation C (2003) 497, 11.2.2003, OJ L 114, 8.5.2003, p. 45.

<sup>232</sup> Directive 2002/21/EC of 7/3/2002 of the European Parliament and of the Council, OJ L 108, 24.4.2002, p. 33.

<sup>233</sup> For details on the second phase investigations and the veto decision see chapter "Application of the Regulatory Framework" below.

<sup>234</sup> For details see chapter "Margin squeeze in a regulated sector" (section "Application of Articles 81, 82 and 86 EC") above.

Electronic Communications Market Authority (EECMA)) in November<sup>235</sup>. With the exception of the new Recommendation on relevant markets, which entered into force in December, the legislative parts of the proposed regulatory package will enter into force after their adoption by the Council and the European Parliament, which is expected in 2010-2011.

271. The Recommendation on relevant markets is an important part of the Regulatory Framework. It lists those markets where, in the view of the Commission, *ex ante* regulation is the appropriate tool to promote competition, investment and consumer choice. From a competition policy perspective the main objective of the review has been to assess where *ex ante* regulation is still needed and where it can be lifted.
272. The Regulatory Framework is helping to make communications markets increasingly competitive. Competing operators are providing more fixed telephony services to consumers and building more core network infrastructure. Mobile network access and broadcasting transmission services are becoming increasingly competitive. Against this background the Commission has more than halved the number of markets susceptible to *ex ante* regulation, from 18 to 7. Following the adoption of the new Recommendation, *ex ante* regulation is now likely to be lifted in many areas and a greater part of the industry will be subject only to EU competition rules<sup>236</sup>. The markets for retail access, fixed call origination, fixed call termination, physical network infrastructure access, wholesale broadband access, terminating leased lines, and mobile call termination remain in the new Recommendation.
273. Where bottlenecks persist, *ex ante* regulation will therefore continue to be necessary in the future and will have to be even more effective. This is why the Commission's proposal contains an extension of the Commission's veto powers (currently only covering market definition and findings of significant market power) to include remedies. However, in order to already begin to address issues related to remedies, the Commission has started to work on Recommendations for remedies. The envisaged Recommendations would provide for regulatory oversight through advice to the NRAs on how to achieve a more harmonised remedial system further upstream (i.e. before the question of a veto decision even arises).
274. As part of the review of the Regulatory Framework, the Commission proposes to create an independent European Electronic Communications Market Authority with advisory powers to provide expert advice to the Commission on issues *inter alia* related to the national market assessments. The Authority would also assist the Commission in identifying the remaining bottlenecks where further harmonisation is needed.

---

<sup>235</sup> Commission proposal for a directive of the European Parliament and of the Council, SEC(2007)1472 and SEC(2007)1473, and Proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority COM(2007) 699 for an overview see the website of DG Information Society: [http://www.ec.europa.eu/information\\_society/policy/ecomm/library/proposals/index\\_en.htm](http://www.ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm)

<sup>236</sup> Commission recommendation of 17.12.2007 on relevant product and service markets within the electronic communications sector, OJ L 344, 28.12.2007, p. 65.



275. It is also proposed to introduce functional separation<sup>237</sup> as a measure in the NRA's tool-box. However, this remedy would be a last resort to be used by the national regulator only if other remedies have failed on a persistent basis. Moreover, the NRA would have to *inter alia* analyse the effects on the incumbent's incentives to invest in upgrading its network and on consumers.
276. Overall, the Commission proposal for the future regulation of electronic communications markets marks yet another important step in the transition of this sector from monopoly to competition. While parts of the sector will now be completely free of *ex ante* regulation, it will continue to be governed by competition law.

## 2.2. Application of the Regulatory Framework and other policy developments

277. On 11 January the Commission adopted its fifth veto decision<sup>238</sup> under Article 7(4) Framework Directive. The case concerned the retail markets for access to the public telephone network at a fixed location in Poland. The Commission had serious doubts about the market definition proposed by the Polish regulator, which included broadband connections (such as DSL connections) in the same product market as narrowband connections. Under the proposed measures broadband connections would be made subject to the same retail regulation as PSTN and ISDN connections. In its revised analysis<sup>239</sup> following the Commission's veto the Polish NRA still partially included retail broadband access in the market, which resulted in a further letter expressing serious doubts. In April, the Polish NRA decided to change its market definition by removing all retail broadband services from the scope of the product market definition, and the measures were finally able to be adopted.
278. In other cases, taking account of the Commission's position, several NRAs opted for withdrawal of draft measures. This was the case in a second-phase investigation concerning the wholesale broadband access market in Malta<sup>240</sup>. Similarly, the NRA withdrew the draft measure in a case concerning the wholesale market for mobile origination services to non-geographic numbers in Italy<sup>241</sup>. The Belgian NRA withdrew the notification in a case that concerned the wholesale markets for broadcasting transmission services (mostly TV transmission by cable) in the French-speaking part of Belgium<sup>242</sup>. Similarly, the Polish NRA withdrew a notification concerning the market for trunk segments of leased lines<sup>243</sup>.
279. Mobile telephony markets continued to receive attention from telecom regulators and competition authorities in 2007. This was partly due to their growing market share in comparison with fixed telephony, but also to the availability of new products and

---

<sup>237</sup> Functional unbundling involves incumbents running telephone networks as a separate business from that of providing call and internet services.

<sup>238</sup> PL/2006/0518. The second phase investigation was opened already in 2006.

<sup>239</sup> PL/2007/0593.

<sup>240</sup> MT/2007/0563.

<sup>241</sup> IT/2007/0575.

<sup>242</sup> BE/2007/0578.

<sup>243</sup> PL/2007/0668. Leased lines are connections, typically via underground fibre optic cables, that are owned by one operator and (partially) used by another operator. From an economic perspective leased lines are subdivided into terminating segments (between a network node and a final destination) and trunk segments (between two different network nodes)

services. 2007 was the year when 3G took off. Some 86 operators were offering 3G on a commercial basis at the end of 2007, up from 70 in 2006. 3G services have now become available in all Member States. It is expected that the greater availability of spectrum and flexibility of usage conditions, as proposed in the review of the Regulatory Framework, will stimulate further development of mobile data services.

280. In general, mobile telephony markets tend to be effectively competitive at the retail level. However, wholesale markets for mobile call termination and, under the previous Recommendation on relevant markets, for mobile access and call origination were recommended for *ex ante* regulation.
281. In 2007, five NRAs (Belgium, Estonia, Germany, Gibraltar and Hungary) notified draft measures applying to the wholesale market for mobile access and call origination. Only in Gibraltar was the market found not to be effectively competitive. This indicates that removing the market from the revised Recommendation was the correct course of action.
282. As regards wholesale markets for mobile call termination, all regulatory authorities found that each operator has a monopolistic position with regard to terminating calls on its mobile network. Consequently, *ex ante* remedies were imposed in most, if not all, Member States.
283. The consistently high international roaming charges led the Commission to propose a Roaming Regulation<sup>244</sup> on the basis of Article 95 EC. This regulation entered into force on 30 June and will be applicable for three years. As a result, in all Member States mobile operators were obliged to offer to all their customers by 30 July a Eurotariff, which in principle applied automatically from 30 September unless a customer chose to opt out. The Eurotariff sets a retail price cap for calls made or received abroad<sup>245</sup>. The Regulation also stipulates a price cap for wholesale roaming charges, and obliges operators to keep customers informed about roaming prices.
284. On 18 July the Commission closed proceedings conducted under Article 82 EC against Vodafone UK, O2 UK, Vodafone Germany and T-Mobile Germany, which concerned international roaming tariffs applied by these operators<sup>246</sup>.

### **2.3. Developments in the area of State aid**

#### *2.3.1. Support for broadband services*

285. Wide availability of broadband services at affordable prices is of crucial importance for the economic and social development of the European Union. In its assessment of public funding schemes under the State aid rules, the Commission acknowledges that, in the absence of public funding, private operators often have no economic incentive to offer broadband in scarcely populated areas. However, public support

---

<sup>244</sup> Regulation (EC)717/2007 of the European Parliament and of the Council of 27.6.2007 on roaming on public mobile telephone networks, OJ L171, 29.6.2007, p. 32.

<sup>245</sup> At EUR 0.49 excl. VAT for calls made and EUR 0.24 excl. VAT for calls received; these price caps will be further reduced in 2008 and 2009.

<sup>246</sup> Case COMP/38.097 *Follow up International Roaming UK* and case COMP/38.098 *Follow up International Roaming Germany*; no decision has been issued.

schemes for broadband have to be properly justified and proportionate either by pursuing an objective of social or economic cohesion or remedying a well-defined market failure.

286. During 2007 the Commission adopted several decisions concerning public funding schemes for broadband in rural or remote areas with no or only limited broadband coverage<sup>247</sup>. The Commission also accepted State intervention, in specifically defined circumstances, in favour of advanced broadband services in areas where the incumbent operators were only partly offering basic broadband services<sup>248</sup>. In a case relating to the procurement of broadband services by the public sector in Wales, the Commission also clarified certain aspects relating to the interface between public procurement and State aid rules<sup>249</sup>. As the project was only intended to meet the needs of public sector organisations, no State aid was present.
287. Following a complaint, the Commission conducted a preliminary investigation into the “Wireless Prague” project - the first municipal wireless network case assessed by the Commission under the State aid rules<sup>250</sup>. The case was considered by market observers as an important precedent and was watched closely by municipalities with similar plans.
288. During the Commission's preliminary investigation and following the opinion of the Czech competition authority, the Prague authorities considerably reduced the scope of the project. In particular, the modified project will now serve only the public sector and the free broadband access provided to citizens will be limited to public-sector websites and e-Government services. As no economic advantage within the meaning of Article 87(1) EC Treaty was granted to the selected service provider, to public-sector content providers or to citizens and businesses using the network, it was considered that no State aid was present.
289. After an in-depth investigation launched in December 2006, the Commission approved the investment by the municipality of Amsterdam in a glass fibre telecommunications network<sup>251</sup>. The municipality is investing on equal terms with two private investors active in the sector, both of which took significant stakes in the investment. In particular, all investing parties will bear any losses in the event of the business underperforming. The structure of the new company ensures that the private investors have significant stakes in the project in a set-up where no single shareholder can exercise sole control over the company. Together with the detailed analysis of the business plan, this information provided sufficient evidence for the Commission to conclude that the investment was in line with the market economy investor principle and therefore did not involve State aid.

---

<sup>247</sup> Cases N 475/2007 *National Broadband Scheme Ireland* Commission decision, 25.9.2007; N 473/2007 *Broadband connections for Alto Adige* Commission decision, 11.10.2007; N 570/2007 *Broadband in rural areas of Baden-Württemberg* Commission decision, 23.10.2007; N 442/2007 *Aid in favour of broadband in remote areas of Veneto* Commission decision, 23.10.2007.

<sup>248</sup> Cases N 746/2006 *North Yorkshire NYNET Project United Kingdom* Commission decision, 21.2.2007; N 890/2006 *Aide du Sicoval pour un réseau de très haut débit* Commission decision, 10.7.2007.

<sup>249</sup> Case N 46/2007 *Welsh Public Sector Network Scheme* Commission decision, 30.5.2007.

<sup>250</sup> Case NN 24/2007 *Prague Municipal Wireless Network* Commission decision, 30.5.2007.

<sup>251</sup> Case C 53/2006 (ex. N 262/2005) *Citynet Amsterdam* Commission decision, 11.12.2007.

290. The Commission emphasised that it is not sufficient for public authorities to become involved in projects merely by claiming that they are acting like a normal market investor. It needs be a comprehensively demonstrated, for instance by means of a sound business plan and a significant participation by private investors, that a public investment conforms to the conditions of the market. In addition, as stated in the decision concerning the above-mentioned case, the private parties would have to assume the commercial risk linked to the investment under the same terms and conditions as the public investor.

### 2.3.2. *Aid to Greek incumbent operator*

291. In June 2007 the Commission approved under Article 87(3)(c) EC the Greek government's plan to participate in OTE's early voluntary retirement scheme<sup>252</sup>. The case raised a number of issues, principally the definition of "aid" within the meaning of Article 87(1) of the Treaty as well as in relation to the scope of the compatibility assessment carried out under Article 87(3) with regard to undertakings that enjoyed a monopoly in the past and are now operating in liberalised but still regulated markets.

292. Owing to the quasi-permanent status of its employees, which was protected by law and dated back to the monopoly era, OTE could not dismiss its personnel like any other private company. Instead, OTE had to agree to an early voluntary retirement scheme (VRS). The material difference between OTE's VRS and an ordinary VRS was that, apart from the incentives to employees to take up the early retirement offer, OTE also had to make up the loss of future revenues or social advantages associated with the enjoyment of a permanent employment status and high salaries fixed by law. These "extra costs" were the main reason that led the Greek State to assume part of the overall costs of the VRS. In exchange, OTE had obtained the union's consent to put an end to the permanent employment status for future employees. In its notification the Greek State argued that its contribution did not procure any advantage to OTE since it simply represented compensation for a structural disadvantage within the meaning of the *Combus* judgment<sup>253</sup>.

293. Having opened a formal investigation, the Commission finally concluded that the notified measure, examined in conjunction with relevant case-law, including the *Combus* judgment, might be regarded as State aid. In any event, the matter did not need to be pursued since the scheme was in any event compatible with the common market under Article 87(3)(c) of the Treaty. The Commission found that the State's contribution did not exceed the amount of the verifiable "extra costs" incurred by OTE, that it was an appropriate instrument for reorganising the company and could pave the way for the company's envisaged privatisation.

## 2.4. **Merger Control**

294. In the area of merger control, the Commission assessed whether a merger between two foreign mobile network operators operating in two different countries would significantly interfere with effective competition. In such a case, even without horizontal overlaps, the issue stems from the vertical relationships between the

---

<sup>252</sup> Case C 2/2006 (ex. N 405/2005) *OTE – Early retirement scheme* Commission decision, 10.5.2007.

<sup>253</sup> Case T-157/01, *Danske Busvognmænd v Commission*, 16.3.2004, ECR II-0917.

markets for wholesale international roaming and the markets for fixed and/or mobile telecommunications in the countries where the parties to the transaction operate. This issue is particularly relevant to international roaming telecoms markets. In *France Télécom/Mid Europa Partners/One*, the Commission found that the transaction would not harm competition in any such markets and the merger was cleared without commitments<sup>254</sup>.

295. The Commission adopted a dynamic approach in respect of these fast-moving markets. An example is the *Syniverse/BSG*<sup>255</sup> merger where the Commission assessed the market for GSM roaming data clearing services. The characteristics of the market warranted a straight clearance decision (after an in-depth investigation) even though the merger entailed a reduction in the number of market players currently active in Europe. The necessary technology in order to enter this market was in fact available to new potential entrants, while technological advances underway were likely, in the short term, to re-shape the current market structure.

## D – INFORMATION TECHNOLOGY

### 1. OVERVIEW OF THE SECTOR

296. The information economy is a significant sector of economic activity. Including the provision of infrastructure and services for the creation, exchange and processing of information and communication services and the sale of information itself, this market is now in most developed countries in the range of 10% of GDP and accounts for more than half of their economic growth. Software is one of the key elements driving ICTs' role in the economy<sup>256</sup>. The information technology sector is characterised by digital convergence, the growing importance of interoperability and the key role of standard-setting organisations.
297. Digital convergence continues to restructure the three traditional market segments – IT, telecommunications, and media. Separate, vertically integrated networks are transformed into horizontally interconnected functional layers. In this new and evolving setting, network operators, IT players and the big media conglomerates all compete for market share. Convergence continues to redefine devices, endowing them with new functionalities. PCs are already being used to store and manipulate all types of media and are becoming the hubs of the digital world. Consumer equipment products such as hi-fis and cameras, communicate with each other and with computing devices.
298. The opportunities opened up by convergence and the demands on the high-tech ecosystem to deliver the benefits of convergence lead to a growing need and increasing scope for interoperability in terms of scope, scale and complexity. Indeed, given the prevalence of network effects in the ICT sector, interoperability is a crucial feature of these markets. Apart from the benefits of interoperability, other important

---

<sup>254</sup> Case COMP/M.4809 *France Télécom/Mid Europa Partners/One* Commission decision, 21.9.2007.

<sup>255</sup> Case COMP/M.4662 *Syniverse/BSG* Commission decision, 4.12.2007.

<sup>256</sup> OECD Information Technology Outlook 2006 Highlights.

objectives such as incentives for innovation and security also need to be taken into account in defining and enforcing competition policy in this dynamic sector.

299. In this context, standard-setting organisations can play a key role by facilitating interoperability. It is important that standard-setting organisations establish rules which ensure fair, transparent procedures and early disclosure of relevant intellectual property. The Commission will continue to follow the operation of standard-setting organisations in this regard.
300. Open source software has become an established feature of the mainstream software market. In fact, in many software markets it is now the only competitive constraint on incumbents. The “proprietary” business model, on the one hand, where the source code of the software is usually not made available and the “open source” business model, on the other hand, are not incompatible in the sense that the same company may develop and distribute certain products following the open source business model and other products in binary source code only (i.e. following the proprietary model).

## 2. POLICY DEVELOPMENTS

301. In 2007 the Commission continued its proceedings against Microsoft to ensure compliance with the 2004 Decision<sup>257</sup> with regard to pricing and licensing terms for the interoperability information in question (Interoperability Information). These terms should be reasonable and non-discriminatory, in accordance with Article 5 of the 2004 Decision. In 2006 the Commission had already imposed a definitive penalty payment of EUR 280.5 million on Microsoft for not providing complete and accurate Interoperability Information<sup>258</sup>. Consequently, on 1 March, the Commission issued a statement of objections addressed to Microsoft which set out the Commission's preliminary assessment that Microsoft had not complied with its obligation to offer complete and accurate Interoperability Information on reasonable and non-discriminatory terms<sup>259</sup>.
302. Following the judgment by the Court of First Instance (see I.A.3.1. above) dismissing the substantive elements of Microsoft's application for annulment of the 2004 Decision<sup>260</sup>, on 22 October Microsoft announced a significant reduction of its licence fees. It also offered an updated version of its relevant licence agreements. As of that date the Commission has no further objections concerning Microsoft's compliance with the 2004 Decision<sup>261</sup>.
303. A statement of objections was sent to Intel on 26 July indicating the Commission's preliminary conclusion that Intel has engaged in three types of abusive practices aimed at excluding AMD, Intel's main rival, from the x86 Computer Processing

---

<sup>257</sup> Commission decision of 24.5.2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation, Case COMP/37.792 *Microsoft*, OJ L 32, 6.2.2007, p. 23.

<sup>258</sup> [http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/art24\\_2\\_decision.pdf](http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/art24_2_decision.pdf)

<sup>259</sup> [http://ec.europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=MEMO/07/90|0|RAPID&lg=EN](http://ec.europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/07/90|0|RAPID&lg=EN)  
<sup>260</sup> IP/07/1567, 22.10.2007.

<sup>261</sup> [http://ec.europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/07/1567|0|RAPID&lg=EN](http://ec.europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/07/1567|0|RAPID&lg=EN)

Units (CPU) market. First, Intel provided substantial rebates to various Original Equipment Manufacturers (OEMs) conditional on them obtaining all or most of their CPU requirements from Intel. Second, in a number of instances, Intel made payments in order to persuade an OEM to either delay or cancel the launch of a product line incorporating an AMD-based CPU. Third, in the context of bids against AMD-based products for strategic customers in the server segment of the market, Intel on average offered CPUs below cost. Each abuse is provisionally considered to constitute an abuse of a dominant position (Article 82 EC) in its own right. In addition, the Commission's preliminary conclusion is that the three types of conduct reinforce each other and that they form part of a single overall anti-competitive strategy<sup>262</sup>.

304. The Commission sent a statement of objections to Rambus on 30 July. The statement of objections outlines the Commission's preliminary view that Rambus has abused a dominant position by claiming unreasonable royalties for the use of certain patents for "Dynamic Random Access Memory" chips (DRAMS) subsequent to a so-called "patent ambush." DRAMS are the computer's "working" memory. In 2006 worldwide sales of DRAM chips exceeded USD 34 billion. Virtually all PCs have DRAMs that are compliant with a standard developed by the standard setting body, JEDEC. Rambus owns and is asserting patents which, it claims, cover the technology included in these JEDEC standards.
305. The Commission's preliminary view is that Rambus engaged in intentional deceptive conduct in the context of the standard-setting process, for example by not disclosing the existence of the patent applications which it later claimed were relevant to the adopted standard. This type of behaviour is known as a "patent ambush". The Commission's preliminary view is that without its "patent ambush" Rambus would not have been able to charge the royalty rates that it is currently charging<sup>263</sup>.
306. On 30 August, the Commission opened proceedings<sup>264</sup> against Qualcomm Inc., a US chipset manufacturer and holder of IP rights in the CDMA and WCDMA standards for mobile telephony. The investigation results from separate complaints lodged by six European, US and Japanese mobile phone and/or chipset manufacturers. The complaints allege that Qualcomm's licensing practices are not Fair, Reasonable and Non-Discriminatory ("FRAND") and therefore may breach EC competition rules (Article 82 EC). The opening of proceedings does not imply that the Commission has conclusive proof of an infringement, but only that the Commission has decided to assign priority and more resources to analysing this case.
307. In the ICT sector the Commission also enforced the Merger Regulation with the aim of preventing effective competition from being hampered by merging companies, while maintaining opportunities and incentives for innovation. Against this background the Commission cleared a joint venture between ST Microelectronics and Intel<sup>265</sup> in the area of flash memory, a type of semiconductor memory used to retain content when a device is switched off. There are a number of applications that integrate flash memory, such as data storage cards, mobile phones, networking and telecom equipment. The investigation into this highly dynamic industry showed that

---

<sup>262</sup> See [http://ec.europa.eu/comm/competition/antitrust/cases/index/by\\_nr\\_75.html#i37\\_990](http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_75.html#i37_990)

<sup>263</sup> See [http://ec.europa.eu/comm/competition/antitrust/cases/index/by\\_nr\\_77.html#i38\\_636](http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_77.html#i38_636)

<sup>264</sup> See <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/39247/proceedings.pdf>

<sup>265</sup> Case COMP/M.4751 *STM/Intel* Commission decision, 10.8.2007

the market would remain competitive even after the proposed transaction, given that strong players are active in the marketplace. The Commission also concluded that innovation concerning the evolutionary floating gate technologies<sup>266</sup> underway in this area was not adversely affected by the merger.

308. In the area of mergers the Commission also opened an in-depth investigation into Google's proposed acquisition of DoubleClick, a transaction involving the markets for online advertising and intermediation services and technologies over the Internet<sup>267</sup>. This decision is without prejudice to the merged entity's obligations under Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data and the Member States' implementing legislation.
309. In the field of State aid the Commission adopted a final decision approving the French tax credit in respect of the creation of video games<sup>268</sup>. This measure had been notified under Article 87(3)(d) EC. It enables video game producers that are subject to taxation in France to deduct 20% of the eligible costs of production of certain video games. Only video games that meet certain criteria will be eligible.
310. The Commission opened the formal investigation because of doubts as to whether all video games eligible under the initial criteria had a verifiable cultural content as was claimed by the French authorities. Following this investigation, the French authorities were asked to clarify the selection criteria. The new selection test made it possible in this case to conclude that the measure in question had a genuine cultural objective. In addition, in view of the small market shares of the beneficiaries and the fact that the French authorities agreed to include sub-contracting expenses in the eligible costs, the measure was deemed to have a limited impact on competition and trade between Member States. This is the first time that the cultural exception laid down in Article 87(3) (d) has been applied to video games.

## **E – MEDIA AND SPORT**

### **1. OVERVIEW OF THE SECTOR**

311. As new technologies increase the number of ways in which people can access entertainment and information, competition to attract audiences in the media sector is becoming tougher. Traditional distribution channels, such as newspapers, television and compact discs, are facing competition from new distribution platforms such as the internet or mobile devices. The increase in the overall number of distribution channels is fuelling the demand for content. As a result, there is a trend towards consolidation between the more established media players and new media

---

<sup>266</sup> Floating-gate technologies are devices that retain the stored information even when not powered (non-volatile memory).

<sup>267</sup> Proceedings initiated on 13.11.2007 (see IP/07/1688). The merger was cleared without conditions on 11.3.2008 (see IP/08/426).

<sup>268</sup> Case C 47/2006 *Crédit d'impôt mis en place par la France pour la création de jeux vidéo* Commission decision, 11.12.2007.



businesses, as well as between the owners of infrastructure networks and content producers.

312. The switch from analogue to digital broadcasting, which Member States are due to complete by the beginning of 2012<sup>269</sup>, is already providing consumers with a greater number of TV channels and radio stations, and better sound and picture quality. The digital switchover concerns all commonly available broadcasting transmission platforms such as satellite, cable and terrestrial, obliging broadcasters and network operators to update their transmission equipment, and viewers to install digital decoders. The Commission is committed to supporting the digital switchover and recognises that the process may be delayed if left entirely to market forces. A number of Member States are providing public funding to encourage broadcasters and consumers to facilitate the switchover. The Commission has no general objection to the granting of State aid in this area. However, Member States have to demonstrate that the aid is a necessary and appropriate instrument, is limited to the minimum necessary and does not unduly distort competition.
313. Commercial operators continue to be concerned about State aid for public service broadcasters, with whom they compete for audience share, especially for what they consider to be purely commercial programmes such as live sports or blockbusters. They also allege that the State funding for public service broadcasters may exceed what is necessary for their public service mission, allowing such broadcasters to use these funds for their commercial activities. Commercial operators are also concerned that public broadcasters are engaging in anti-competitive practices, for example by inflating the price of television content such as sports rights. Private operators claim that the public funding of public service broadcasters' new media activities distorts competition and discourages private initiatives from developing new and innovative services.
314. Technological developments are also affecting the way copyright is administered, especially for works distributed over the internet. The tradition of managing rights based on territorial borders is not suited to online, EEA-wide distribution, which could bring many benefits to artists and consumers.
315. With firms joining forces in a context of continuous evolution of the media sector (such as the gradual digitalisation of content available for distribution across various platforms) there is an increased need to preserve the efficient competitive structure of network and multi-media markets. Therefore, the Commission's main concerns in the area of merger control are that mergers do not restrict consumer choice, that they maintain incentives and scope for technological innovation possible and that they ensure continued price competition. In this context, the Commission's aim is to preserve access to the key elements of competition in this sector (content, technology or interconnection).

---

<sup>269</sup> Commission Communication on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final (OJ C 49, 28.2.2006, p. 24).

## 2. POLICY DEVELOPMENTS

316. The Commission's main objective from a competition perspective is to ensure that there is a level playing field in the media sector, whether between different commercial operators or between commercial operators and publicly-funded operators.

### 2.1. Digital Broadcasting

317. In 2007, the Commission continued to monitor the switchover from analogue to digital broadcasting in the EU Member States. In July, the Commission sent Italy a reasoned opinion, which is the second stage of the infringement procedure under Article 226 of the EC Treaty that had begun in 2006 following a complaint by the Italian consumer association, Altroconsumo<sup>270</sup>. The Commission considers that the Italian legislation is contrary to the EU Regulatory Framework for Electronic Communications<sup>271</sup> as it places unjustified restrictions on the provision of broadcasting transmission services and attributes unjustified advantages to existing analogue operators. The Commission considers that there is a risk that existing situation in analogue TV, namely that only a few operators are able to compete on the market for broadcasting transmission services, will be reproduced in digital terrestrial TV, thereby further reducing choice for Italian consumers. The Italian authorities have drafted a law aimed, inter alia, at amending the existing broadcasting legislation. The draft law is pending before the Italian Parliament.

318. In the field of State aid the Commission continued throughout 2007 to apply the approach adopted in earlier decisions concerning State funding to support the digital switchover. The Commission approved three support schemes (two Italian<sup>272</sup> and one Spanish<sup>273</sup>) for the acquisition of digital decoders with open API<sup>274</sup> and for covering the costs of adapting existing collective analogue terrestrial antennas.

319. The Commission adopted two negative decisions regarding subsidy schemes in Italy<sup>275</sup> and in the German Land of North Rhine-Westphalia<sup>276</sup>. In the first case, Italy had provided subsidies to consumers for the acquisition of digital terrestrial decoders. The investigation led the Commission to conclude that the exclusion of satellite decoders from the measure introduced a distortion which was not necessary in order for the switchover to be carried out. An appeal against the decision was lodged before the Court of First Justice by the three main beneficiaries<sup>277</sup>.

---

<sup>270</sup> IP/07/1114, 18.7.2007.

<sup>271</sup> Notably, 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>272</sup> Cases N 270/2006 *Subsidy to digital decoders with open API* (OJ C 80, 13.4.2007), N 107/2007 *Subsidies to idTV – Italy* (OJ C 246, 20.10.2007).

<sup>273</sup> Case N 103/2007 *Support for the acquisition of digital decoders and for the adaptation of antennas in Soria*, Commission decision, 25.9.2007 (OJ C 262, 1.11.2007).

<sup>274</sup> Open API is a word used to describe advanced program interfaces (API) that facilitate interoperability, i.e. portability of interactive content between delivery mechanisms with full functionality of the content intact.

<sup>275</sup> Case C 52/2005 (ex NN 88/2005) *Subsidy to digital decoders in Italy* (OJ L 147, 8.6.2007).

<sup>276</sup> Case C 34/2006 (ex N 29/2005) *Introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia*, Commission decision of 23.10.2007, not yet published.

<sup>277</sup> Cases T-96/07, T -177/07 and T-188/07.

320. The second case concerning North Rhine-Westphalia was very similar to the funding previously envisaged by the Land of Berlin-Brandenburg, which was declared incompatible with the EU State aid rules in November 2005<sup>278</sup>. The Media authority of the Land of North Rhine-Westphalia wanted to grant subsidies to commercial broadcasters present on the digital terrestrial platform to finance part of the transmission fees that these broadcasters pay to the operator of the DVB-T network. The investigation led the Commission to conclude that the planned funding was not an appropriate way to address specific problems in relation to digitisation and was not necessary to effect the switchover. The planned State aid disregarded the principle of technology neutrality and only envisaged supporting transmission over the digital terrestrial platform. The envisaged funding would thereby have distorted competition between terrestrial, cable and satellite transmission. The Media authority of the Land of North Rhine-Westphalia has appealed against the decision<sup>279</sup>.
321. The Commission closed the investigation into a similar scheme in the German Land of Bavaria<sup>280</sup> following the German authorities' decision to limit the subsidies to the de minimis threshold set in Regulation 1998/2006<sup>281</sup>.

## 2.2. Public service broadcasting

322. In line with the Interpretative Protocol on the system of public service broadcasting (Amsterdam Protocol), the Commission recognises that it is the prerogative of Member States to organise and fund public service broadcasting. The aim of the Commission's policy towards State aid for public service broadcasters is to ensure that public funding does not exceed what is necessary for them to fulfil their public service mission and does not lead to unnecessary distortions of competition.
323. The Commission considers that the financing of public service broadcasters by means of budgetary contributions or licence fee financing constitutes State aid, also in view of the conditions set out in the *Altmark* judgment<sup>282</sup>. State aid to public service broadcasters may, however, be declared compatible if it fulfils the requirements of Article 86(2) (as specified further in the *Broadcasting Communication*<sup>283</sup>). In its assessment of numerous complaints against the financing of public service broadcasters on the basis of the *Broadcasting Communication*, the Commission has further clarified and developed the requirements in its decisions.
324. The Commission accepts a broadly defined public service mission to offer balanced and varied programmes, including information as well as entertainment and sport. The Commission also recognises that the public service remit may include new

---

<sup>278</sup> Case N 25/2004 *Einführung von DVB-T in Berlin-Brandenburg* (OJ L 200, 22.7.2006, p. 14).

<sup>279</sup> Case T-2/08.

<sup>280</sup> Case C 33/2006 (ex N 576/2004) *Introduction of digital terrestrial television (DVB-T) in Bavaria*, not yet published.

<sup>281</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>282</sup> Case C-280/00, (Reference for a preliminary ruling from the Bundesverwaltungsgericht) *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

<sup>283</sup> Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320, 15.11.2001, p. 5).

media activities, provided that they serve the same democratic, social and cultural needs of society as traditional broadcasting.

325. The Commission continued to approve State financing for public service broadcasters where both the public service remit and the financing are determined in a fully transparent manner and where the State funding does not exceed what is necessary to fulfil the public service mission. In 2007, in line with its established decision-making practice, the Commission adopted two decisions concerning the financing of public service broadcasters pursuant to Article 86 (2) EC Treaty in conjunction with the Broadcasting Communication. The first concerned the financing by the Spanish Government of workforce reduction measures taken by the Spanish public service broadcaster, RTVE. The Commission approved the financing, taking the view that the measures allowed RTVE to provide a more cost-efficient public service which enabled it to reduce the overall need for public support<sup>284</sup>. The second decision concerned the general financing regime for public service broadcasters in Germany (ARD and ZDF). Having received undertakings from the German Government to amend the current financing regime by May 2009, the Commission closed the investigation. These undertakings concerned measures to ensure a more precise definition and a proper entrustment of the public service mission as regards new media activities, adequate safeguards against overcompensation and cross-subsidisation, observance of market principles in the public service broadcasters' commercial activities and greater transparency as regards the sublicensing of sports rights. In particular in terms of the possible offer of new media activities, the current legal framework will be amended to allow an evaluation of new offers based on a set of criteria and following a procedure which also allows third parties to submit their views<sup>285</sup>.
326. Under the Commission's rules concerning services of general economic interest, compensation paid to small local or regional public service broadcasters may be compatible with Article 86(2) and not subject to prior notification under certain conditions<sup>286</sup>.

### **2.3. Rights management and online distribution**

327. In April, the Commission sent a statement of objections to major record companies and Apple in relation to agreements between each record company and Apple deemed to restrict online music sales, in contravention to Article 81 EC. Apple operates an iTunes on-line store selling music downloads with different views in the European Economic Area (EEA). EEA consumers can only buy music from the view which is directed at their respective country of residence and which contains the music that is copyright-cleared for sale in that country. iTunes checks the consumers' country of residence through their credit card details. For example, in order to buy a music download in the UK, a consumer must use a credit card issued by a bank with

---

<sup>284</sup> The full text of the decision is published in English:  
[http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/NN-8-2007-WLWL-07.03.2007.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-8-2007-WLWL-07.03.2007.pdf)

<sup>285</sup> The full text of the decision is published in English:  
[http://ec.europa.eu/comm/competition/state\\_aid/register/ii/doc/E-3-2005-WLWL-en-24.04.2007.pdf](http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/E-3-2005-WLWL-en-24.04.2007.pdf)

<sup>286</sup> Commission decision, 28.11.2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

an address in the UK. The prices of downloads for UK consumers were appreciably higher than in the eurozone countries. The different treatment of UK consumers was a major concern for Which? - a UK consumer protection organisation - who filed a formal complaint with the Commission.

328. As part of these proceedings Apple announced that it would equalise its prices for downloads of songs from its iTunes online store in Europe by mid-2008, thus putting an end to the different treatment of UK consumers. The Commission's antitrust proceedings further clarified that the agreements between the major record companies and Apple do not force Apple to set up national online stores and to sell downloads only from the iTunes online store of the consumer's residence, provided that the record companies have licensed the song for the relevant country. Consequently, the Commission closed the case.
329. In the context of rights management, the Commission continued its assessment of the CISAC case after having issued a statement of objections<sup>287</sup> in 2006 against CISAC and the individual collecting societies in the EEA contracting countries that are members of CISAC. The Commission expressed concerns about certain provisions in the CISAC model contract and the systematic and uniform implementation of these provisions by CISAC members. According to the Commission's preliminary findings these restrictions of competition mean that right holders cannot select the EEA collecting society of their choice and commercial users cannot obtain multi-repertoire, multi-territorial licences for their satellite, cable and online activities. In 2007, CISAC and 18 EEA collecting societies offered commitments under Article 9 of Regulation No 1/2003<sup>288</sup>. These commitments were market tested by the publication of an Article 27(4) notice on 9 June<sup>289</sup>.

#### **2.4. Premium sport content**

330. The Commission continues to give high priority to ensuring that premium content is made available under open and transparent conditions that allow a maximum number of operators to bid for the rights. In 2007, the Commission closed its investigation under Article 81 EC concerning the joint buying of TV rights of sports events by the European Broadcasting Union (EBU) and its members.
331. EBU is an association of radio and TV broadcasting organisations. Its members are mainly public broadcasters. Through the joint buying agreement, EBU acquires audiovisual rights for international sports events on behalf of its members. There were concerns that competitors of EBU members, in particular commercial broadcasters, were not in a position to acquire the rights to broadcast these events in their respective national TV markets due to the existence of EBU's pan-European joint buying agreement. Until the end of the 1990s, the rights of the major international sports events such as the FIFA World Cup, the UEFA European Football Championship and the Olympic Games had systematically been sold to EBU, which shared the events among its members. However, the investigation revealed that the markets for the acquisition of top international sports rights have

---

<sup>287</sup> MEMO/06/63, 7.2.2006.

<sup>288</sup> IP/07/829, 14.6.2007.

<sup>289</sup> OJ C 128, 9.6.2007.

changed considerably in recent years. Contrary to the previous situation, EBU is no longer the sole buyer of premium international sports rights, as rights owners tend to diversify the sale pattern of their media rights. The Commission will continue to monitor the rapidly changing media sector. Access to premium content by broadcasters and, in particular, new media operators remains a concern for the Commission.

## **2.5. White Paper on Sport**

332. On 11 July the Commission adopted a White Paper on Sport<sup>290</sup> providing a strategic orientation on the role of sport in Europe, with the focus on its economic and social dimension. The EU antitrust rules are addressed in more detail in Annex I to the accompanying Staff Working Document "The EU and Sport: Background and Context"<sup>291</sup>. DG Competition was involved in the preparation of the White Paper, including its Annex I on "Sport and EU Competition rules", which provides an overview of the main case law of the Community Courts and the decision-making practice of the Commission with respect to the application of Articles 81 and 82 of the EC Treaty in the sport sector.
333. The White Paper also proposes a number of actions to be implemented or supported by the Commission. These actions are brought together in the Pierre de Coubertin Action Plan<sup>292</sup>. DG Competition is participating, together with other Commission services, in the implementation of the Action Plan especially as regards players' agents, licensing systems and selling of media rights.

## **2.6. Film and other audiovisual works**

334. The Commission continued to assess film support schemes on the basis of its 2001 Cinema Communication, which sets out the criteria under which such aid can be approved under the cultural exemption from the general ban on State aid. In June, the Cinema Communication was extended until 31 December 2009 at the latest.
335. The most significant decisions in 2007 concerned the *Dutch film support schemes*<sup>293</sup> and the *UK film production and development funds*. As with all other film support decisions in 2007, the Commission approved these measures on the basis 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.
336. Against the background of growing competition between film support schemes around the world to try to attract large film productions, particularly through tax incentives, the Commission continued to pay closer attention to such schemes.

---

<sup>290</sup> COM(2007) 391 final, available at [http://ec.europa.eu/sport/whitepaper/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/whitepaper/wp_on_sport_en.pdf)

<sup>291</sup> SEC(2007) 935, available at [http://ec.europa.eu/sport/whitepaper/dts935\\_en.pdf](http://ec.europa.eu/sport/whitepaper/dts935_en.pdf)

<sup>292</sup> SEC(2007) 934, available at [http://ec.europa.eu/sport/whitepaper/sec934\\_en.pdf](http://ec.europa.eu/sport/whitepaper/sec934_en.pdf)

<sup>293</sup> Case N291/07 *The Netherlands film fund*, Commission decision, 10.7.2007.

## 2.7. Application of merger control

337. A prominent example of application of the merger control in the media sector was the SFR/Tele2 merger<sup>294</sup>, where the concentration was approved subject to conditions ensuring effective competition in the French pay-TV market. SFR was controlled by Vodafone and Vivendi. Vivendi controlled the dominant player in the French pay-TV market, Groupe Canal+, which inter alia enjoyed a large measure of control over attractive television content for pay-TV (programmes and channels). Tele2 France was active in DSL TV. The DSL operators were collectively the main players capable of exerting competitive pressure on Canal+. The Commission ensured that, post-merger, other DSL operators would enjoy equal treatment with the new entity as regards access to television content owned by Groupe Canal+.
338. As regards the music industry, in the case of *Sony/BMG-II*<sup>295</sup> the European Commission granted regulatory approval to the joint venture combining the recorded music businesses of Sony and Bertelsmann, after the Court of First Instance had annulled the previous Commission decision of 2004. After a very extensive and in-depth investigation, the Commission concluded that the merger did not entail adverse horizontal coordination effects between the recording music companies as regards their pricing behaviour, nor as regards other non-price elements including cultural diversity aspects.
339. In the area of music publishing rights, the Commission cleared the merger between Universal and the BMG music publishing activities<sup>296</sup> on the condition that the new company divested several successful catalogues. The Commission concluded that, absent those remedies, the merger would have had adverse effects on the online music distribution via digital channels since the merged entity would have been in control of a large percentage of "must-have" titles through the combination of its publishing and recording rights.

## F – AUTOMOTIVE INDUSTRY

### 1. OVERVIEW OF THE SECTOR

340. The automotive industry is one of the most significant industries in the EU, accounting for around 3% of the EU's GDP<sup>297</sup> and employing around 2.3 million people directly<sup>298</sup>, with a further 850 000 engaged in the production of parts and components<sup>299</sup>. The EU remains the world leader in automobile production. Of the 69 million motor vehicles produced worldwide in 2006, 18.6 million (16.1 million

---

<sup>294</sup> Case COMP/M.4504 *SFR/Tele2* Commission decision, 18.7.2007

<sup>295</sup> Case COMP/M.3333 *Sony/BMG-II* Commission decision, 3.10.2007

<sup>296</sup> Case COMP/M.4404 *Universal Music Group/BMG Music Publishing* Commission decision, 22.5.2007.

<sup>297</sup> Cars 21 – A competitive Automotive Regulation System for the 21st century. Final Report to the European Commission 2006, p. 9.

<sup>298</sup> ACEA, European Automobile Industry Report 2007/2008, p. 2.

<sup>299</sup> Design Directive Impact Assessment, COM(2004) 582, p. 11.

passenger cars) – the equivalent of 27% of worldwide production – were manufactured in the EU<sup>300</sup>.

341. While the industry has been plagued by worldwide overcapacity in recent years, forcing certain manufacturers in Europe to close plants, other manufacturers have opened new manufacturing sites in the EU, taking advantage of the favourable cost situation in the new Member States and Eastern Germany, as well as the geographic proximity to Western European markets.
342. Automotive production in the new Member States increased (albeit from low initial levels) by 26% in 2006 compared to the previous year, making up 13% of EU production<sup>301</sup>.
343. The growing share of vehicles produced in the new Member States has led to the formation and development of clusters, in particular in southern Poland, eastern Czech Republic, western Slovakia and northern Hungary. Component suppliers tend to follow vehicle manufacturers. Investment in these locations reduces the overall costs in the European production chain and enhances the global competitiveness of the EU industry, as the bulk of direct investment originates from manufacturers of European origin.
344. The importance of the automotive sector extends beyond the primary market of manufacturing. Employment in the sales business and the aftermarket for the repair and maintenance of motor vehicles amounts to close to three million people<sup>302</sup>. In 2004, the turnover of the European market for the service and repair of motor was around EUR 100 billion.

## 2. POLICY DEVELOPMENTS

345. In 2007, DG Competition continued its enforcement and monitoring efforts in the automotive sector, including the manufacture of motor vehicles and components as well as the sale, maintenance and repair of motor vehicles. DG Competition monitors developments in the sector on an ongoing basis through its car price reports<sup>303</sup>.
346. The motor vehicle block exemption (Commission Regulation 1400/2002) lays down a regime specific to the automotive sector through 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 203/30, 1.8.2002)<sup>304</sup>. The Regulation aims at strengthening intra-brand competition in response to a perceived lessening of inter-brand competition due to the process of consolidation that the industry went through in the late 1990s and to

---

<sup>300</sup> ACEA, European Automobile Industry Report, p. 2.

<sup>301</sup> ACEA Economic Report.

<sup>302</sup> CECRA 2007 available at <http://www.cecra.eu/en/about/about.php>

<sup>303</sup> Latest car price report published 27 July 2007, [http://ec.europa.eu/comm/competition/sectors/motor\\_vehicles/prices/2007\\_05\\_full.pdf](http://ec.europa.eu/comm/competition/sectors/motor_vehicles/prices/2007_05_full.pdf)

<sup>304</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 203/30, 1.8.2002).



fears of market power being further concentrated in the hands of ever fewer incumbents.

347. However, there are ample indications – in the shape of falling real prices, a number of successful entries, relatively few exits, significant fluctuations in market shares, moderate and decreasing degrees of concentration, increased choice in the sub-segments of the market, a shortening of model life-cycles and higher rates of range renewal - that inter-brand competition in the car sales market is strong and increasing.
348. In 2007, work began on preparing the evaluation report for 2008 which is required by Article 11(2) of Regulation 1400/2002. This report, which will contain a wealth of statistical and other information on the state of the sector, will serve as the basis for determining the future regime governing the sector.
349. While there is healthy competition in the market for the sale of new cars, there seem to be rather more problems in the market for after sales services and, in particular, the market for components and parts for first assembly. Therefore, in addition to the aftermarket, where consumers are often captive, specific attention will be paid to the upstream market for parts and components.
350. The pressure exerted by vehicle manufacturers on their component and spare parts suppliers seems to have led some of these suppliers into conduct that may be anticompetitive. An example of such action is the suspected cartel in automotive glazing, where a statement of objections was sent in April to four companies active in the production and supply of car glass<sup>305</sup>.
351. In addition, merger activity upstream has resulted in high concentration in many parts markets, leaving only three to four suppliers.

## **2.1. Antitrust enforcement**

352. On 13 September, in order to increase competition in the aftermarket, the Commission adopted four decisions involving four car manufacturers related to access to technical information, which is a crucial input for independent repair shops. Independent repair outlets are important for European consumers because they exert competitive pressure on the franchised networks.
353. These four decisions legally bind DaimlerChrysler, Toyota, General Motors and Fiat to commitments to provide technical information about car repairs to all independent garages in the EU<sup>306</sup>. The decisions were adopted under Article 9(1) of Regulation No 1/2003. The commitments were given following a Commission investigation which found that inadequate access to the full range of technical information could force independent repairers out of the market and that the agreements between the carmakers and their authorised repairers were therefore likely to infringe EC Treaty rules on restrictive business practices (Article 81 EC). The resulting reduction in

---

<sup>305</sup> European Commission sends Statement of Objections to alleged participants in cartel for car glass. IP/07/147, 23.4.2007.

<sup>306</sup> See e.g. Commission decision of 13.9.2007 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/39.140 *DaimlerChrysler*) (OJ L 317, 5.12.2007, p. 76).

competition between car repairers could lead to less choice and higher prices for consumers. Independent repairers are often cheaper than authorised outlets, sometimes by over 50%. These differences are all the more significant when one considers that, over a car's lifetime, repair and maintenance costs can amount to the price originally paid for the car by its first owner.

354. As cars become more complex, even basic repairs require qualified technicians with access to brand-specific technical information. The Commission's preliminary finding in all four cases was that the carmakers seem to have withheld certain technical information from independent repairers and have provided other information in a way that does not meet the needs of independent repairers. The commitments which are made binding by the decisions are broadly similar and have three core elements. First, they clarify what is meant by technical information and require that all such information provided to authorised repairers must also be made available to independent repairers on a non-discriminatory basis. Second, although car manufacturers may withhold information relating to certain functions (anti-theft or performance-limiting functions of on-board electronics), they must ensure that the withholding of this information does not prevent independent repairers from performing repairs that are not directly related to these functions.
355. Third, the commitments ensure that independent repairers can obtain information that is both unbundled and priced in a way that takes into account the extent to which independent repairers use the information.
356. The websites chosen by the parties as their main means of providing technical information will be kept operational during the period of validity of the commitments. Access will be based on time slots, with the hourly price set at a level that ensures equality between independent and authorised repairers.
357. The commitments will be binding until the expiry of the motor vehicle block exemption (Commission Regulation (EC) 1400/2002) in May 2010. By then the Vehicle Emissions Regulation (Council Regulation (EC) 715/2007)<sup>307</sup> will have entered into force. This places an obligation upon vehicle manufacturers to provide independent repairers with standardised access to all technical repair information.

## **2.2. Merger Control**

358. After 2005 and 2006, 2007 was another year in which merger activity within the automotive industry largely involved the automotive supplier segment. A major deal in 2007 was the acquisition of Siemens VDO by Continental, resulting in an important tier-one supplier that was active on a world-wide scale.
359. On 29 November, the Commission cleared the proposed merger between the two German companies, Continental AG and Siemens VDO Automotive AG, under the

---

<sup>307</sup> Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ L 171, 29.6.2007, p. 1).

EU Merger Regulation<sup>308</sup>. The Commission concluded that the transaction did not raise serious doubts as to its compatibility with the common market.

### 2.3. State aid control

360. While there are no State aid rules specific to the automotive sector, a number of cases concerning this sector were addressed in 2007 under certain general State aid frameworks, such as the rules on regional aid<sup>309</sup> and restructuring aid.
361. On 11 May the European Commission authorised an *ad hoc* aid of EUR 111 million, by the Czech Government to Hyundai Motor Manufacturing Czech, a wholly owned subsidiary of the Korean Hyundai Motor Company, for the setting-up of a new passenger car production plant in the Moravia-Silesia region<sup>310</sup>.
362. Two months later, on 19 July, the European Commission authorised *ad hoc* aid of EUR 32 million that the Slovak Government planned to grant to Kia Motors Slovakia, a wholly owned subsidiary of the Kia Motors Corporation of Korea, for the expansion of its car manufacturing plant situated in Žilina, Slovakia<sup>311</sup>.
363. These two cases were declared to be compatible with State aid rules on large regional investment projects, also taking into account the Commission's cohesion policy.
364. The Commission also examined the terms of privatisation of State-owned car manufacturers. In the case of Automobile Craiova, a Romanian car plant (formerly Daewoo Craiova), the Commission opened the formal investigation procedure under Article 88(2) EC as the conditions attached to the privatisation appeared liable to confer an advantage on the undertaking undergoing privatisation<sup>312</sup>. In particular, conditions intended to secure a certain future production level for structurally loss-making companies are liable to have an effect similar to restructuring aid and are paid for by the State in the form of reduced proceeds from the privatisation.

---

<sup>308</sup> Case COMP/M.4878 *Continental/Siemens VDO* Commission decision, 29.11.2007.

<sup>309</sup> The relevant provisions are found in 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) or earlier provisions in the same field.

<sup>310</sup> N 661/2006 *Investment incentives for Hyundai Motor Manufacturing Czech* (OJ C 262, 11.1.2007, p. 2)

<sup>311</sup> N 857/2006 *Kia Motors Slovakia* (OJ C 214, 13.9.2007, p. 4).

<sup>312</sup> Case C 46/2007 *Privatisation of Automobile Craiova, Romania* (OJ C 248, 23.10.2007, p. 25).

## G – TRANSPORT

### 1. OVERVIEW OF THE SECTOR

365. The transport industry accounts for about 7% of European GDP and around 5% of employment in the EU.
366. Competition policy in the transport sector aims to ensure the efficient functioning of markets which have been recently liberalised or which are in the process of liberalisation. Making liberalisation a success requires action on two fronts. First, it means ensuring that the existing regulatory framework continues to be modernised where this has not been done to a sufficient extent. For decades, sector-specific rules governed the application of competition rules (both substantive and procedural) in the field of transport. Bringing transport within the generally applicable competition law framework remains a general objective of competition policy. Second, since it is essential that regulatory efforts are not hindered by anticompetitive conduct, other objectives of competition policy in this sector are vigilant monitoring of market developments and targeted enforcement actions. This is particularly true of markets where incumbents retain significant market power or where market players are now subject to the full force of competition law.
367. **Road transport of passengers and goods** in the EU is characterised by the predominance of small companies and the impact on competition of considerable differences in fuel tax levels between Member States.
368. In the area of road transport international markets are largely liberalised for both passenger and freight. National road haulage is also liberalised through a Council Regulation on cabotage<sup>313</sup> while national passenger markets are still largely protected. Demand is driven by the increasing importance of door-to-door and just-in-time service, contributing to strong sustained growth in road transport, which forms the largest component (44%) of intra-EU goods transport.
369. As a result, road congestion has increased and is costing the EU about 1% of GDP. Harmful emissions from road transport have declined significantly; the introduction of catalytic converters, particulate filters and other vehicle-mounted technologies, for example, has helped to reduce emissions of NOx and particulates by between 30% and 40% over the last 15 years, despite rising traffic volumes.
370. EU legislation has opened up the market for international transport of passengers. International bus lines are competing through low fares with international railway services and low-cost airlines. As to regular services, the Commission presented a proposal to Parliament and Council in May to simplify the procedures for issuing authorisations.

---

<sup>313</sup> Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State, OJ L 279, 12.11.1993, pp. 1–16.

371. The market for the national public transport of passengers has so far not been liberalised through Community legislation. A certain degree of market opening has resulted from the application of the Public Procurement Directives, which apply to contracts – other than concessions – that are concluded for the provision of public transport services. The Public Procurement Directives do not apply to concessions for public transport services, which are a common way of organising public transport, particularly in central Europe. The granting of such concessions nevertheless remains subject to the general rules of the EC Treaty.
372. The opening of the market for **rail freight transport** was completed in 2007. The third railway legislative package will also open up international passenger transport, including cabotage. Enforcement of the *acquis* by national regulatory bodies is needed to facilitate the spread of the improvement of performance of the railway sector, already observed in those Member States which have opened their markets, to the whole EU internal market. However, there remain structural obstacles to the competitiveness of the rail industry. These include technical barriers, such as low levels of interoperability, lack of mutual recognition of rolling stock, weak coordination of infrastructure and interconnection of IT systems, and the problem of the single wagon load<sup>314</sup>.
373. Major problems as regards competition in rail freight have been related to unbundling/independence of essential functions for non-discriminatory access to the network and a lack of administrative capacity and independence of rail regulatory bodies (as appears from the 2006 Commission report on the implementation of the First Railway Package<sup>315</sup> and recommendations made in the context of the Lisbon strategy<sup>316</sup>). The Commission has sent questionnaires to Member States to investigate in detail how they have implemented a number of key provisions of the first railway package. The aim of this investigation is to decide whether or not it is necessary to open infringement procedures against Member States to ensure that they comply with their Treaty obligation to fully and correctly transpose EU law.
374. Rail has shown its strength in **passenger transport**, in particular on high-speed connections between city centres. Enlargement has opened up further long-distance (over 500 km) rail links which, combined with efficient logistics operations, can compete with road transport in providing environmentally friendly door-to-door service.
375. With an annual volume of around 130 billion tonne-kilometres of freight, the modal share of river transport accounts for an overall 6% of the total **inland transport** in the European Union, but can be as high as 43% in North-Western Europe (e.g. in the catchment areas of major seaports).

---

<sup>314</sup> About 50% of rail freight transport in Europe is carried out as single wagonload traffic. However, due to high fixed costs (e.g. operation of marshalling and shunting yards as well as private sidings) this production mode is often not competitive compared to other modes such as road haulage.

<sup>315</sup> See the Commission report on the implementation of the 1st railway package COM(2006) 189 final of 3 May 2006.

<sup>316</sup> See the Commission recommendation of 11 December for a Council recommendation Brussels on the 2008 update of the broad guidelines for the economic policies of the Member States and the Community (COM(2007) 803 final). See in particular the recommendation in respect of France and Germany.

376. Traditionally, inland shipping has enjoyed a strong position in the long-distance haulage of bulk transport. In the last two decades, inland shipping has also successfully entered new markets, such as the hinterland transport of maritime containers, posting an annual growth rate in double digits.
377. **Maritime transport** of goods is crucial to the European economy. Transport by sea accounts for about 50% of the external trade in goods in terms of weight and about 20% of the trade between Member States.
378. The expected growth of sea transport will need to be absorbed through the EU's port infrastructure. Increased investment in ports and into the hinterland is necessary in order to improve and extend services so that ports become poles for growth instead of potential transshipment bottlenecks. A competitive ports sector depends on sound competition both within and between ports, clear rules for public contributions to investment and transparent access to port services, the availability of competitive services and an increase in quality employment.
379. The internal **air transport** market has become more of a reality, as well as an engine of growth. The restructuring of the sector and its integration are well advanced. The sector has developed substantially as a result of the growth of air connections in Europe, the growth and importance of low-cost carriers and the development of regional airports. The European Union is an important world player, both in terms of the production of aircraft and as regards the market for air transport services.
380. Financing of airports, start-up aid to airlines departing from regional airports and the conditions of providing airport services all play a role in shaping competition between airports.

## 2. POLICY DEVELOPMENTS

### 2.1. Road Transport

381. In the area of State aid, the Commission maintained its policy of approving aid to favour the uptake of cleaner technology, in particular on old vehicles. As in the past, the Commission approved State aid for the acquisition of lorries satisfying the Euro V pollution standard in anticipation of the compulsory application of the standard from October 2009 onwards. The Commission adopted a favourable decision in two cases during the reference period. The first was a German case related to guidelines for the promotion of environmental friendly heavy vehicles<sup>317</sup> and the second was an Italian case concerning environmental investment aid to Fercam<sup>318</sup>.
382. With regard to the application of public procurement and State aid rules to public service contracts and public service concessions, a revised regulation for public services in the field of land transport was adopted and will enter into force in

---

<sup>317</sup> Commission decision N 649/06, OJ C 139, 23.6.2007, p. 13.

<sup>318</sup> Commission decision N 607/06, OJ C 307, 18.12.2007, p. 10.

December 2009<sup>319</sup>. The main objectives of this Regulation are, first, to introduce the obligation to conclude a public service contract when a competent authority decides to grant an exclusive right to an operator and/or compensation, of whatever nature, in return for the discharge of public service obligations and, secondly, to introduce rules concerning certain tendering obligations when choosing the transport operator.

383. In the meantime the Commission is applying the existing State aid rules to public service contracts and public service obligations. In its *Altmark* ruling<sup>320</sup>, the Court clarified the circumstances under which public service subsidies will not be regarded as constituting State aid. Since this clarification of the applicable rules, the Commission has received a large number of complaints as well as certain notifications of subsidised local and regional bus services. Such complaints mainly focus on contracts that have been awarded without prior public tender. Indeed, without such a prior tender procedure, it is difficult to prove that the *Altmark* criteria are satisfied and thus that the compensation does not involve State aid. Following complaints by competitors in the bus transport sector, the Commission initiated formal investigation procedures in Germany<sup>321</sup>, Austria<sup>322</sup> and Ireland<sup>323</sup>. Further investigations in these and other Member State are ongoing.
384. Concerning State aid for road infrastructure in the context of the liberalisation of the road services sector in Finland, including road maintenance and road construction, the Commission, after opening the formal investigation procedure, cleared transitional aid to the incumbent while at the same time putting an end to the unlimited State guarantee<sup>324</sup>. The Commission took the view that the measures to assist the construction of a motorway<sup>325</sup> and a tunnel<sup>326</sup> in Greece did not constitute State aid because the respective concession agreements were concluded following tendering procedures conducted on an open and non-discriminatory basis, which ensured selection of the bids which were the least costly for the State and which incorporated the strictest profit-capping arrangements.

## 2.2. Rail Transport and Combined Transport

### 2.2.1. Railways liberalisation: further integration of European rail transport markets

385. As from 1 January, rail transport services for freight were fully opened to competition in the European Union.
386. As regards passenger transport, on 23 October the Council and the Parliament finally adopted the third railway package, ending a long legislative process begun in 2004

---

<sup>319</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

<sup>320</sup> Judgment of the Court of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ("Altmark") [2003] ECR I-7747.

<sup>321</sup> Commission decisions NN22/05 and NN55/07. Not yet reported.

<sup>322</sup> Commission decision C 16/07 (ex NN 55/06), OJ C 162, 14.7.2007, p. 19.

<sup>323</sup> Commission decision C 31/07 (ex NN 17/07), OJ C 217, 15.9.2007, p. 44.

<sup>324</sup> Commission decision C 7/2006, not yet reported.

<sup>325</sup> Commission decision N 508/07, OJ C 298, 11.12.2007, p. 4.

<sup>326</sup> Commission decision N 134/07, OJ C 234, 6.10.2007, p. 2.

with the proposals put forward by the Commission<sup>327</sup>. This package contains a full set of measures allowing the further liberalisation and integration of the railway sector. International passenger rail services will be opened up to competition from 1 January 2010.

387. Furthermore, as mentioned earlier, the Regulation on public passenger transport services by rail and by road (the so-called PSO Regulation) was also adopted on 23 October. This Regulation creates a new legal framework for public transport and will introduce some elements of liberalisation into local transport<sup>328</sup>.

#### 2.2.2. *Applying Merger Rules to rail transport – DeutscheBahn /EWS*

388. In November, the Commission cleared the proposed acquisition of English, Welsh & Scottish Railway Holdings (EWS), the successor of the freight business of the former UK national rail monopoly, by Deutsche Bahn (DB) - the state-owned German-based railway company<sup>329</sup>.

389. EWS is active in rail freight transport and related services in the UK and the Channel Tunnel; it also recently entered the French market. The DB Group is one of Europe's leading rail operators engaged in, *inter alia*, rail passenger and freight transport services in Germany, Italy, the Netherlands and Denmark. It also has a significant freight forwarding business (by all modes of transport), and a logistics and ancillary services business.

390. The proposed merger did not give rise to any significant overlaps in the activities of the parties. However, although there was no overlap in the parties' rail freight transport activities in any national geographic market, the Commission had concerns that the proposed transaction, as initially notified, would result in a lessening of competition in the French rail freight market. The French rail freight market is currently dominated by the incumbent rail operator, SNCF. The Commission's investigation indicated that EWS, although a new entrant in this market, was likely to exert significant competitive pressure on the French incumbent in the future. The Commission was concerned that DB would not have the same incentives to pursue rail freight transport expansion in France with the same intensity as EWS would if there were no merger, and that the merger would therefore lead to a lessening of competition on the French rail freight market. To address these concerns, DB undertook to carry out EWS's expansion plans in France and to provide non-discriminatory access to certain EWS training activities and maintenance facilities in France for a period of five years.

---

<sup>327</sup> Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, OJ L 315, 3.12.2007, p. 44. Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, OJ L 315, 3.12.2007, p. 51; Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315, 3.12.2007, p. 14.

<sup>328</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

<sup>329</sup> Case COMP/M.4746 *DeutscheBahn/EWS*, decision of 6.11.2007.



### 2.2.3. *Applying State aid rules to rail transport*

391. The Commission adopted several decisions to promote rail transport and combined transport. It authorised the renewal of a Czech aid measure which guarantees a loan to Czech Railways (Česke ráhy)<sup>330</sup> to facilitate the purchase of new passenger rolling stock. The Commission also adopted a final decision, following the opening of the procedure in 2006, concerning aid for the acquisition of certain mobile assets for the use of combined transport operations in Czech Republic<sup>331</sup>. The Commission also authorised the prolongation of an aid scheme for the development of certain private railway infrastructure (private sidings<sup>332</sup>) in Austria<sup>333</sup>. The Commission also decided to approve restructuring aid to the freight transshipment and logistics firm, InterFerryBoats<sup>334</sup>.
392. Concerning State aid to rail infrastructure, the Commission decided that rescue aid granted by the UK authorities to the Metronet Companies, (the entities responsible for the maintenance and upgrading of the London Underground) was compatible with the common market<sup>335</sup>.

## 2.3. **Inland Navigation**

393. The year 2007 was the first full year of the implementation of the NAIADES Action programme for the promotion of inland waterway transport at all levels (EU, MS and the industry itself), and on 5 December the Commission adopted a Communication containing a first progress report on NAIADES<sup>336</sup>. The report describes progress in a number of areas, including measures adopted by Member States to promote this environmentally friendly mode of transport.
394. As regards inland navigation, the Commission adopted several decisions to promote inland navigation. For example, it authorised an Italian measure to increase safety in inland and maritime transport of local nature<sup>337</sup>. The purpose of this measure aims is to scrap old vessels that do not comply with the latest safety measures.

## 2.4. **Maritime Transport**

### 2.4.1. *Policy developments*

395. After a one-year consultation of all port stakeholders the Commission adopted, on 18 October, a Communication on Port Policy<sup>338</sup>, which forms part of a package on

---

<sup>330</sup> Case N 770/06 *State guarantee for the purpose of financing the purchase of railway rolling stock by Ceske Dráhy (Czech Railways)* decision of 10.5.2007 (OJ C 227, 27.9.2007, p. 4).

<sup>331</sup> C 12/2006 (ex N 13/05).

<sup>332</sup> Private sidings are railway track owned by undertakings used to dispatch and/or receive freight as part of their commercial activities.

<sup>333</sup> Case N 707/06, *Austria, Prolongation of aid scheme for the development of private railway sidings* (OJ C 137, 21.6.2007, p. 4).

<sup>334</sup> C 46/2005, not yet reported.

<sup>335</sup> Case NN 47/07 *United-Kingdom, Metronet Rail CV Limited and etronet Rail SSL Limited in administration (Rescue aid)*.

<sup>336</sup> COM(2007) 770 final.

<sup>337</sup> N 848/06, not yet reported.

<sup>338</sup> COM(2007) 616.

freight logistics<sup>339</sup>. The Communication sets out the main objectives of the European Ports Policy and outlines an action plan for achieving them. It also includes three sections on the application of the Treaty principles of freedom of establishment and freedom to provide services to port concessions, port services and work in ports.

#### 2.4.2. *Applying State Aid Rules to Maritime Transport*

396. In 2007 the Commission promoted the close convergence of aid schemes in maritime transport, including towage and dredging activities, which was aimed at achieving a level playing field within Europe as far as possible. In particular, the Commission approved the introduction of a Tonnage Tax in Poland<sup>340</sup>, but opened an investigation on features of the scheme that appeared not to be in line with former approved tonnage tax schemes. It also opened investigations with respect to Denmark's desire to introduce changes to the scope of its existing schemes for maritime transport (extension to cable laying activities)<sup>341</sup> and to bring in ring-fencing measures (alleviation of information obligations concerning intra-group transactions between a company benefiting from a tonnage tax scheme (tonnage company) and a foreign affiliate<sup>342</sup>, and alleviation of the conditions applying to the eligibility of chartered-in vessels on a time basis<sup>343</sup>).
397. As regards State aid for the provision of public service obligations in the maritime sector, the Commission adopted two positive decisions concerning Italy<sup>344</sup>. In addition, the Court of First Instance<sup>345</sup> dismissed the action for annulment of the Commission decision of 6 August 1999 concerning State aid to the Gruppo Tirrenia di Navigazione companies<sup>346</sup>.
398. The Commission took the view that the financing of certain port infrastructures, such as the Rotterdam main port development project<sup>347</sup>, the Eastern extension of the Muuga Port Harbour in Estonia<sup>348</sup> and a real estate exemption for Polish Ports<sup>349</sup>, did not constitute State aid.
399. In this context, public financing of transport infrastructure may raise State aid issues at two levels, i.e. at the level of the users and at the level of the manager/operator of the infrastructure in question. The Commission is of the view that, in general, no form of State aid within the meaning of Article 87(1) is present at the user's level if transport infrastructure is open to all potential users on equal and non-discriminatory terms. On the other hand, where public infrastructure is used to provide infrastructure for a particular user, giving it an unfair advantage over its competitors, the financing may fall within the prohibition laid down in Article 87(1).

---

<sup>339</sup> COM(2007) 606.

<sup>340</sup> N 93/06 (OJ C 300, 12.12.2007, p. 22).

<sup>341</sup> C 22/07, not yet reported.

<sup>342</sup> Case C 5/07, not yet reported.

<sup>343</sup> Case C 58/07, not yet reported.

<sup>344</sup> N 265/06 and N 62/05 (OJ C 196, 24.8.2007, p. 3).

<sup>345</sup> Case T-246/99, not yet reported.

<sup>346</sup> Case C 64/99 (ex NN 68/99) *Italy, State aid to the Gruppo Tirrenia di Navigazione companies* (OJ L 53, 26.2.2005, p. 29).

<sup>347</sup> N 60/06 (OJ C 196, 24.8.2007, p. 1).

<sup>348</sup> N 507/06 (OJ C 133, 15.6.2007, p. 4).

<sup>349</sup> N 510/05 (OJ C 238, 10.10.2007, p. 2).

400. At the level of the infrastructure manager/operator, there are generally no State aid elements involved in the financing of an infrastructure in cases when the port manager finances the infrastructure from its own resources, without intervention by the public authorities, in cases where the infrastructure cannot be exploited economically and its financing falls under the public policy remit, and/or when the behaviour of port managers/operators is guided by the prospects of profitability in the longer term.
401. The Commission continued to enhance maritime safety by approving an Italian scheme aimed at expediting the withdrawal of single-hull vessels<sup>350</sup>.
402. The Commission adopted favourable decisions as regards social aid for seafarers in Estonia<sup>351</sup>, Belgium<sup>352</sup> and Sweden<sup>353</sup>. The Commission adopted a positive decision concerning innovation aid for ship-owners in the Netherlands<sup>354</sup>. The Court of First Instance dismissed as inadmissible for want of a legal interest in bringing proceedings<sup>355</sup> the action against Commission Decision C (2002) 4370 final of 13 November 2002 not to raise objections to the Danish fiscal measures applicable to seafarers on board vessels registered in the Danish international register<sup>356</sup>.
403. The Commission also continued to investigate the injections of finance granted by the French State to Société Nationale Maritime Corse-Méditerranée in the context of its partial privatisation and the new restructuring plan, with a view, *inter alia*, to ensuring a level playing field in maritime cabotage.

## 2.5. Aviation

### 2.5.1. Enforcement of Article 81 – SkyTeam airline alliance

404. On 19 October the Commission invited interested parties to comment on the commitments proposed by eight members of the SkyTeam airline alliance, namely Aeromexico, Alitalia, CSA Czech Airlines, Delta Air Lines, KLM, Korean Air, Northwest Airlines and Air France<sup>357</sup>. These commitments are designed to meet concerns under Article 81 EC raised by the Commission in its statement of objections of 15 June 2006<sup>358</sup>. The Commission is concerned that the cooperation in passenger air transport services between these SkyTeam members may have adverse effects for passengers on a limited number of routes where they enjoy a strong market position and where barriers to entry are significant. To address these concerns, the parties have offered commitments designed to facilitate new entry on the routes in question, mainly by offering to make slots available at appropriate EU airports for competitors and by sharing their frequent flyer programmes.

---

<sup>350</sup> N 54/06 (OJ C 187, 10.8.2007, p. 1).

<sup>351</sup> N 65/07 (OJ C 307, 18.12.2007, p. 12).

<sup>352</sup> NN132/2000 and NN-73/03 (OJ C 238, 10.10.2007, p. 1).

<sup>353</sup> N 749/06 (OJ C 282, 24.11.2007, p. 2).

<sup>354</sup> N 225/06 (OJ C 196, 24.8.2007, p. 2).

<sup>355</sup> T-30/03, not yet reported.

<sup>356</sup> Appeal brought on 11 July 2007 in the ECJ, C-319/07 (OJ C 211, 8.9.2007, p. 27).

<sup>357</sup> IP 07/1558, 19.10.2007.

<sup>358</sup> MEMO/06/243, 19.6.2006.

405. Comments on the proposed commitments were received by 19 November. If the Commission's assessment of the comments supports the view that the proposed commitments were to resolve the competition concerns, the Commission would adopt a so-called "commitments decision" under Article 9 of Regulation 1/2003.

#### 2.5.2. *Applying merger rules to aviation*

406. On 27 June the Commission took a decision to prohibit the proposed takeover of Aer Lingus by Ryanair. The acquisition would have combined the two leading airlines operating from Ireland which compete vigorously against each other. Both Ryanair and Aer Lingus were by far the largest airlines offering short-haul flights to and from Ireland. Their position was particularly strong on routes to and from Dublin, where the merged entity would have accounted for around 80% of all intra-European traffic.

407. Consistent with its approach in previous airline merger cases, the Commission analysed the effects of the merger on the individual routes on which the two companies' activities overlapped. The Commission's extensive in-depth investigation of the case showed that Aer Lingus and Ryanair competed directly with each other on 35 routes to and from Ireland. On 22 of these routes, the merger would have presented customers with a monopoly. On the remaining routes, Aer Lingus and Ryanair were each other's closest competitors, and the merger would have significantly reduced consumer choice, with the merged entity holding a market share of between 60% and over 90%. Further, the market investigation revealed that competing airlines were unlikely to enter into direct competition against a merged Ryanair/Aer Lingus in Ireland. This was not only because the merged entity would be able to operate from the very large bases of Ryanair and Aer Lingus in Ireland, having access to customers through their two well-established brands, but also because Ryanair has a reputation of aggressive retaliation against any entry attempt by competitors. The likelihood of entry was further reduced by peak-time congestion at Dublin airport and other airports on overlapping routes. The Commission thus concluded that the proposed acquisition would have impeded effective competition on a large number of routes to and from Ireland, directly affecting more than 14 million passengers every year.

408. While Ryanair offered various remedies to resolve the competition issues identified, the Commission concluded that the scope of these remedies was insufficient to ensure that customers would not be harmed by the transaction. In particular, the limited number of airport "slots" offered was unlikely to stimulate market entry on the scale necessary to replace the competitive pressure currently exercised by Aer Lingus. Moreover, the remedies contained a number of other formal and substantive shortcomings and were thus not sufficient to remove the identified impediment to effective competition.

409. The facts of this case differed from those of previous airline mergers. This was the first time the Commission assessed a proposed merger of the two main airlines in a single country, with both operating from the same "home" airport, namely Dublin. It was also the first time the Commission assessed a merger of two "low-cost" airlines, operating on a "point-to-point" basis. Finally, the number of overlapping routes compared with previous airline cases is unprecedented.

### 2.5.3. *International Aviation Policy – Application of Regulation (EC) No 847/2004*

410. On 15 February and 31 May respectively, the Commission adopted two decisions<sup>359</sup> under Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries. In those decisions, the Commission sets out the criteria according to which it assesses the agreements negotiated by Member States with a view to authorising or not the provisional application or conclusion of such agreements by Member States in line with EU law.
411. It is settled case law that Article 10 EC, read in conjunction with Articles 81 and 82 EC, requires Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. This would be the case - the Court of Justice has declared<sup>360</sup> - if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 or to reinforce their effects. A fair proportion of bilateral air service agreements concluded between Member States and third countries require or encourage air carriers designated under these agreements to agree on or coordinate tariffs and/or the capacity they operate.
412. In its decisions under Regulation 847/2004, the Commission found that such air service agreements infringe Articles 10 and 81 when taken in conjunction. Accordingly, the Commission allows Member States to provisionally apply or to conclude such agreements, *inter alia* on condition that the provisions breaching Articles 10 and 81 are brought into line with EU law within 12 months of the date of notification of the decisions.

### 2.5.4. *International aviation policy – application of the Horizontal Mandate*

413. On 5 June 2003, the Council adopted a decision (the Horizontal Mandate) authorising the Commission to negotiate Community-level agreements with third countries to replace certain specific provisions agreed bilaterally by Member States. The rationale of these Community-level agreements, known as Horizontal Agreements, is to bring the air service agreements between Member States and third countries into line with EU law.
414. Four Horizontal Agreements containing provisions on EU competition law were signed in 2007 between the Community, on the one hand, and Paraguay, Malaysia, Kyrgyzstan and United Arab Emirates on the other. These Horizontal Agreements ensure that the 55 air service agreements between Member States and the four countries concerned are brought fully into line with EU law, *inter alia* by resolving any infringements of Articles 10 and 81 EC in these air service agreements. A further seven Horizontal Agreements were initialled in 2007 with Panama, Jordan, Armenia, Mongolia, Pakistan, Nepal and Kazakhstan, containing similar provisions and referring to 91 air service agreements between Member States and those seven countries.

---

<sup>359</sup> Commission decisions C(2007) 434, 15.2.2007 and C(2007) 2230, 31.5.2007.

<sup>360</sup> Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769, paragraph 16.

### 2.5.5. *Applying State Aid Rules to Air Transport*

415. During 2007, the Commission adopted several decisions in the air transport sector. This was partly the result of the successful dialogue with Member States aimed at bringing the existing aviation support measures into line with the 2005 Aviation State aid guidelines by June, as well as the result of a large number of complaints made in particular about the relations between airport managers and airlines.
416. The Commission approved State aid to investments in airport infrastructure at airports in Italy (Tortoli-Arbatax Airport in Sardinia<sup>361</sup>), Poland (Łódź, Rzeszów Jasionka<sup>362</sup>) United Kingdom (Newquay Cornwall Airport<sup>363</sup>) and Germany (Augsburg Airfield<sup>364</sup>, Memmingen Regional Airport<sup>365</sup>, Kiel-Holtenau<sup>366</sup>) where it concluded that the support measures envisaged were proportionate and necessary to the development of the airports. In other cases the Commission considered that financing of certain airport infrastructures – in the absence of a transfer of State resources - were not to be considered as State aid (the Rehabilitation of Tallinn Airport Airside project<sup>367</sup> and the Upgrading of Tallinn airport passenger terminal and plant health and veterinary border inspection point projects<sup>368</sup>).
417. Another category of support measures in Italy (Grosseto airport<sup>369</sup>, Puglia regional airports<sup>370</sup>), Belgium (Antwerp Airport<sup>371</sup>) and Sweden (Norrköping<sup>372</sup>) was linked to start-up aid for airlines departing from smaller regional airports where such temporary support was intended to contribute to the development of the airport and of the whole region.
418. The Commission also widened the scope of its inquiry relating to matters covered by the 2005 Aviation State aid guidelines. A number of formal investigation procedures were opened in respect of a number of airports. These cases involved the financing of the airports and business relationships with various airlines. The airports concerned were those of Lübeck-Blankensee<sup>373</sup>, Tampere-Pirkkala<sup>374</sup>, Berlin-Schönefeld<sup>375</sup>, Alghero<sup>376</sup>, Dortmund<sup>377</sup> and Pau-Bearn<sup>378</sup>.

---

<sup>361</sup> N 491/06 (OJ C 133, 15.6.2007, p. 4).  
<sup>362</sup> NN 22/07 & NN 21/07 (OJ C 319, 29.12.2007, p. 3).  
<sup>363</sup> N 303/07 (OJ C 319, 29.12.2007, p. 1).  
<sup>364</sup> N 619/06 (OJ C 133, 15.6.2007, p. 7).  
<sup>365</sup> N 620/06 (OJ C 133, 15.12.2007, p. 8).  
<sup>366</sup> NN 57/07 (OJ C 307, 18.12.2007, p. 11).  
<sup>367</sup> N379/06 (OJ C 196, 24.8.2007, p. 3).  
<sup>368</sup> N380/06 (OJ C 196, 24.8.2007, p. 4).  
<sup>369</sup> N 194/07 (OJ C 284, 27.11.2007, p. 2).  
<sup>370</sup> N 55/07 (OJ C 133, 15.6.2007, p. 10).  
<sup>371</sup> N 156/07 (OJ C 271, 14.11.2007, p. 2).  
<sup>372</sup> N 791/06 (OJ C 227, 27.9.2007, p. 6).  
<sup>373</sup> C 24/07 (OJ C 287, 29.11.2007, p. 27).  
<sup>374</sup> C 25/07 (OJ C 244, 18.10.2007, p. 13).  
<sup>375</sup> C 27/2007 (OJ C 257, 30.10.2007, p. 16).  
<sup>376</sup> C 37/2007 (OJ C 12, 17.1.2008, p. 7).  
<sup>377</sup> C 26/2007 (OJ C 217, 15.9.2007, p. 25).  
<sup>378</sup> C 53/2007, not yet reported.

419. During 2007 the Commission completed its investigation into government assistance to a carrier in difficulty (*Cyprus Airways*<sup>379</sup>), concluding that the restructuring plan submitted by the Cypriot authorities was compatible with the common market. In relation to the long-running case of Olympic Airways/Airlines, the Commission opened a further investigative procedure into alleged State aid granted to this company since 2005<sup>380</sup>. In addition, in the Olympic Airways dossier, the Court of First Instance<sup>381</sup> confirmed Commission Decision 2003/372/EC<sup>382</sup> while annulling it partially because it did not contain an adequate statement of reasons with regard to toleration of non-payment of charges due to Athens Airport and VAT on fuel and spare parts.

#### 2.5.6. *International aviation policy – EU-US open aviation agreement*

420. On 30 April, the European Union and the United States of America signed an agreement establishing an open aviation area between the EU and US<sup>383</sup>. This agreement, which enters into force on 30 March 2008, allows for the consolidation of the EU aviation sector by recognising all European airlines as "Community air carriers" and allowing any such Community air carrier to fly between any point in the EU and any point in the US, without any restriction on pricing or capacity.

421. This agreement replaces individual agreements between each Member State and the US, which usually included nationality restrictions on airlines and which the Court had found to be in breach of the Treaty<sup>384</sup>.

422. This agreement is a significant step towards liberalising international aviation and can be expected to foster competition on these markets. It also includes provisions for the strengthening of cooperation between the Commission and the US Department of Transportation (DoT) in the field of competition<sup>385</sup>. In this context, the Commission is committed to working with the DoT in order to promote compatible regulatory approaches on these markets.

## H – POSTAL SERVICES

### 1. OVERVIEW OF THE SECTOR

423. Postal services in the EU generate about 0.9% of the gross domestic product (GDP). The postal sector is thus very important for the EU economy as a whole. Virtually all Universal Service Providers ("USPs") in the EU are public undertakings controlled by the Member States, with the notable exception of Germany and the Netherlands.

424. Postal services are an essential vehicle of communication and trade, and they are vital for many economic and social activities. Many key sectors, such as e-

---

<sup>379</sup> C 10/06, not yet reported.

<sup>380</sup> C 61/07, not yet reported.

<sup>381</sup> T 68/03, not yet reported.

<sup>382</sup> C 19/02 (OJ L 132, 28.5.2003, p. 1).

<sup>383</sup> OJ L 134, 25.5.2007, p. 4.

<sup>384</sup> For instance Case C-466/98 *European Commission v UK* [2002].

<sup>385</sup> In particular Annex 2 of the agreement, *cf supra*.

commerce, publishing, mail order, insurance, banking and advertising depend on the postal infrastructure. Postal services bring social benefits which cannot always be qualified in economic terms. Postal services are labour intensive and are also one of the principal public employers in Europe. Employment in the sector is first and foremost provided by USPs and is fairly stable; USPs employ about 1.71 million persons<sup>386</sup>. However the number of jobs related to postal activities, i.e. that are directly dependent on or result from the postal sector<sup>387</sup>, is roughly 5 million.

425. Postal services are changing rapidly. The sector is at the crossroads of three dynamic business areas which are vital to the European economy, namely communications, advertising and transportation/logistics. The main drivers for change within the postal sector include demand and changing customer needs, organisational change, market opening, automation/new technologies and electronic substitution.
426. Most USPs in the EU are active in at least five separate service markets. All USPs provide express and unaddressed mail services. Similarly, most USPs offer mail preparation services, hybrid mail services, e-mail services and financial services. Eight public postal operators (“PPOs”), mainly active in Member States with high volume markets, are active in ten or more different mail related markets. To varying extents these activities share the same commercial and logistical infrastructure, which is also used for the provision of services under monopoly and/or universal service obligations.
427. The objective analysis of competitors' market shares of as well as the subjective perception of key players both confirm that, even in cases where the monopoly has been completely abolished or substantially reduced, real competition is only in its infancy. Meaningful competition in the letter post market has yet to develop. In the letter post segment, most of which is subject to monopoly rights, profit margins can vary between 10% and 20%, while in the parcel and express segment profit margins are between 2.5% and 10%<sup>388</sup>. Therefore, despite ongoing diversification of activities, monopolies are still the main source of cash flow and profits for USPs.

## **2. POLICY DEVELOPMENTS**

### **2.1. Objectives of the Commission**

428. Postal services are an important component of the internal market for services<sup>389</sup>. In connection with the relaunch of the Lisbon strategy in 2005, postal services were described as a source of economic growth and job creation<sup>390</sup>. The Commission also considered postal services to be an essential element for ensuring social and territorial cohesion and for contributing to competitiveness<sup>391</sup>. Postal services is

---

<sup>386</sup> WIK Consult, Main Developments in the Postal Sector (2002-2004), 2006.

<sup>387</sup> Pls Rambøll, Employment trends in the EU postal sector, October 2002.

<sup>388</sup> See Section 4.4 of Annex to Commission Report on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), SEC (2006) 1293.

<sup>389</sup> Communication from the Commission, Internal Market Strategy – Priorities 2003-2006, COM(2003) 238 final, p. 13.

<sup>390</sup> Presidency Conclusions, Brussels European Council, 22/23 March 2005.

<sup>391</sup> Communication from the Commission, Common Actions for Growth and Employment: The Community Lisbon Programme, COM(2005) 330 final.



moreover one of the sectors where the Commission's review of the Lisbon strategy conducted in December recommends enhanced monitoring from a competition policy point of view<sup>392</sup>.

429. The Postal Directive<sup>393</sup> in force lays down a harmonised regulatory framework, the main elements of which are the minimum characteristics of the universal postal service which is to be guaranteed by all Member States, quality standards for intra-EU cross-border services, tariff principles and principles governing transparency of accounts of universal service providers, and the separation of regulatory and operational functions in the postal sector and, especially, common maximum limits for those services which may be reserved by a Member State to its universal service provider(s) to the extent necessary to ensure the maintenance of the universal service. These maximum limits have been progressively reduced in 1999, 2003 and 2006.
430. The 2006 Commission Report on the application of the Postal Directive<sup>394</sup> confirmed that a wide range of high quality universal postal services are available throughout the Community, in compliance with the requirements of the Postal Directive. The guiding principles of the Commission's policy towards this sector are the preservation of this *acquis* and, at the same time, the adaptation to a more competitive and customer-focused environment. This policy has thus been geared, on the one hand, towards a stepwise reduction of the services on which monopoly rights are granted to USPs and, on the other hand, towards the preservation of competition in liberalised areas of the postal market so as to avoid a de facto re-monopolisation by USPs.

## 2.2. Initiatives of the Commission

431. On 18 October 2006, the Commission put forward a proposal to open EU postal markets fully to competition by 2009, in line with the indicative target date set out in the current Postal Directive. In 2007, the Commission actively negotiated its proposal under the co-decision procedure (Article 251 EC). Following Parliament's first reading of, the Council reached a political agreement in the Telecommunications and Energy Council in Luxembourg on 1 October. On the basis of this agreement, the common position was formally adopted by the Council on 8 November. Since the lead committee in the European Parliament (Transport and Tourism) supported the common position without any amendments, the Directive should be adopted soon. Although the starting date for market opening laid down in the Common Position is 2011 and, for certain Member States, 2013, which is later than the 2009 target date set in the original proposal, the Commission believes that the Common Position is a compromise that is acceptable for all. It achieves what the Commission was aiming for, namely unconditional market opening while safeguarding the universal service.

---

<sup>392</sup> Proposal for a Community Lisbon Programme 2008 – 2010 Brussels, 11.12.2007 COM(2007) 804 final. See in particular Objective 5: The Community will strengthen the single market, increase competition in services, and take further steps to integrate the financial services market.

<sup>393</sup> Directive 97/67/EC of the European Parliament and Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14), as amended by Directive 2002/39 of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21).

<sup>394</sup> COM(2006)596 final. Previous reports were COM(2005) 102 final and COM(2002) 632 final.

It also incorporates provisions that guarantee that market opening will work and monopoly is not introduced "by the back door".

432. Regarding the application of State aid rules to the postal sector in 2007, the Commission adopted several decisions with a view to ensuring that postal operators and their subsidiaries do not enjoy unduly granted advantages which could neutralise the effects of the on-going liberalisation.
433. In particular, the Commission thoroughly examined compensations for public service obligation granted to postal operators to ensure that these compensations do not exceed the actual costs of discharging the public service obligations and do not cross-subsidise commercial activities.
434. Where compensation for a service of general economic interest (SGEI) does not fulfil the conditions set out in the *Altmark*<sup>395</sup> case law, and therefore has to be characterised as State aid, it can nevertheless be declared compatible with the Treaty according to Art 86(2)<sup>396</sup>. The conditions under which compensation for SGEI can be declared compatible were clarified by the 2005 Community Framework<sup>397</sup>. The Framework requires in particular that the compensation does not exceed the costs incurred in discharging the public service obligations. Where the undertaking also carries out activities falling outside the scope of the SGEI, only the costs associated with the SGEI may be taken into consideration. In the light of the *Chronopost*<sup>398</sup> case law, the Commission has gone further into the analysis of 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.
435. On 7 March, as the requirements of the 2005 Community Framework were satisfied, the Commission authorised a proposed GBP 313 million funding by the UK Government to allow Post Office Ltd to continue to provide public services through the network of post offices in the financial year beginning 1 April<sup>399</sup>. On 29 November, the Commission authorised GBP 634 million for the following three years starting 1 April 2008, as well as the continuation, over the same period, of existing loan facilities which allow the network to fund the provision of cash services at post office counters<sup>400</sup>.
436. On 12 September, the Commission decided to open a formal investigation against Germany to assess whether Deutsche Post AG was overcompensated for the carrying

---

<sup>395</sup> Case C-280/00, *Altmark Trans GmbH* [2003] ECR I-7747.

<sup>396</sup> Under Article 86(2), undertakings entrusted with a SGEI can escape the application of the rules on competition if the application of these rules obstructs the performance, in law or in fact, of the particular tasks assigned to them.

<sup>397</sup> Community Framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4)

<sup>398</sup> Joined cases C-83/01 P, C 93/01 P and C 94/01 P, *Chronopost SA* [2003] ECR I-6993.

<sup>399</sup> Case N 822/2006, *Debt payment funding to Post Office Limited* (OJ C 80, 13.4.2007, p. 5)

<sup>400</sup> Case N 388/2007, *Post Office Ltd: Transformation*. The decision is available on DG Competition's website [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/](http://ec.europa.eu/comm/competition/state_aid/register/ii/) and is to be published in the OJ.

out of its universal service obligations<sup>401</sup> in addition to the aid already found to be incompatible in a 2002 Commission decision<sup>402</sup>.

437. In addition to assessing the compatibility of compensations granted to postal operators for providing SGEIs, the Commission examined whether postal operators were enjoying other advantages.
438. The Commission paid particular attention to the unlimited State guarantees granted to some postal operators. Such guarantees usually result in lower financing costs and distort competition. On 25 April, the Commission formally took note of the agreement by Poland to put an end to the unlimited State guarantee enjoyed by the Polish Post Office<sup>403</sup>. On 29 November, the Commission decided to launch an in-depth investigation to examine whether France's la Poste, as a public law entity, enjoys an unlimited State guarantee<sup>404</sup>.
439. The Commission also examined public aid to finance La Poste's pension scheme with a view to ensuring that such aid does not exceed what is necessary to put the beneficiary of the aid on an equal footing with its competitors as regards social security contributions and tax. On 10 October, the Commission gave conditional authorisation for public aid to finance La Poste's pensions for civil servants since, following the reform of the pensions, the social security contributions and tax paid by La Poste will be equivalent to those paid by its competitors<sup>405</sup>.
440. On 21 February, the Commission decided to open an in-depth investigation into a series of funding measures taken by the United Kingdom in favour of Royal Mail<sup>406</sup>. The Commission is examining whether these measures constitute State subsidies or whether they meet "market investor" conditions<sup>407</sup>.

### III – The European Competition Network and cooperation with National Courts

#### A – GENERAL OVERVIEW

441. 2007 was the third full year of implementation of the enforcement system set up by Regulation 1/2003. It saw a further strengthening of cooperation between the

---

<sup>401</sup> Case C 36/2007, *Complaint against the German State for unlawful state aid to Deutsche Post* (OJ C 245, 19.10.2007 p.21).

<sup>402</sup> Commission decision of 19 June 2002 on measures implemented by Germany for Deutsche Post AG (OJ L 247, 14.9.2002, p.27)

<sup>403</sup> Case E12/2005, *Unlimited State guarantee in favour of Poczta Polska* (OJ C 284, 27.11.2007).

<sup>404</sup> Case C 56/2007 (ex E15/2005), *Garantie illimitée de l'Etat en faveur de La Poste*. The decision is available on DG Competition's website [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/](http://ec.europa.eu/comm/competition/state_aid/register/ii/)

<sup>405</sup> Case C 43/2006, *Projet de réforme du financement des retraites des fonctionnaires de La Poste française*. The decision is available on DG Competition's website [http://ec.europa.eu/comm/competition/state\\_aid/register/](http://ec.europa.eu/comm/competition/state_aid/register/)

<sup>406</sup> Case C 7/2007 (ex NN 82/2006 and NN 83/2006), *Alleged aid in favour of Royal Mail* (OJ C 91, 26.4.2007, p. 34).

<sup>407</sup> Provision of funding on terms which would be acceptable to a private investor operating in a market economy is not considered to be State aid.

members of the European Competition Network (ECN), i.e. the EU Member States' National Competition Authorities (NCAs) and the Commission. The ECN continued to function well throughout the year under the mechanisms created by Regulation 1/2003 to ensure the efficient and consistent enforcement of Articles 81 and 82.

## 1. COOPERATION ON POLICY ISSUES

442. The actual intensity, scope and potential for cooperation within the ECN go beyond the legal obligations set out in Regulation 1/2003. The ECN provides a platform for EU competition authorities to constructively coordinate enforcement action, ensure upstream consistency and discuss policy issues of common interest. During 2007 the basic structure of the different ECN fora was maintained as follows.
443. First, the Director-General of DG Competition and the heads of all NCAs met for their annual meeting in the ECN context to discuss important competition policy issues.
444. Second, the NCAs and the Commission met on four occasions in so-called "plenary meetings", during which general issues of common interest relating to antitrust policy were debated and experiences and know-how were exchanged. Such discussions and exchanges further embed a common competition culture within the ECN.
445. A key area of policy discussed in 2007 was the ability of NCAs, in their application of Articles 81 and 82 EC, to disapply State measures that breach Article 10 in combination with the competition rules of the Treaty addressed to undertakings (following the CIF ruling<sup>408</sup> by the European Court of Justice). Typically, cases undertaken by the NCAs on this basis are complex, and a debate was held on the conditions that have to be met for the disapplication of anti-competitive State measures. These exchanges in the network enhance the ability of NCAs to tackle appropriate cases that involve the possible disapplication of State measures. The Plenary also discussed cartel-related issues, ex officio investigations and the use of commitment decisions within the Network.
446. Third, three working groups discussed specific issues. One working group covered cooperation issues within the Network more generally, such as cooperation in the context of sector inquiries and requests for assistance from NCAs pursuant to Article 22 of Regulation 1/2003. A second working group was dedicated to issues relating to abuse of a dominant position and a third working group, consisting of chief competition economists from the agencies within the ECN, addressed issues such as the competition implications of information sharing and the ex-post evaluation of competition policy enforcement. These working groups provided an excellent forum for sharing experiences on concrete issues and for developing best practices.

---

<sup>408</sup> Case C-198/01 *Conorzio Industrie Fiammiferi (CIF) and Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055.

447. Finally, 15 ECN sectoral subgroups<sup>409</sup> dedicated to particular sectors addressed specific issues and engaged in a useful exchange of experience and best practices. The sectoral subgroups ensure good upstream coordination and engender a common approach and broad consistency in the application of EU competition law, going beyond individual cases. For example, the Energy subgroup has been very productive, most notably with regard to remedies which were debated in detail by the heads of NCAs and national energy regulators.

### **1.1. Further convergence of national laws and instruments in the context of enforcement of Regulation 1/2003 by NCAs**

448. The year 2007 saw the continuation of the 'convergence' process observed in the context of Regulation 1/2003. Over and above the legal obligations arising from the implementation of the Regulation, there is a trend towards greater approximation of national procedural laws and policies.

449. A prime example of this trend towards further convergence is the ECN Model Leniency Programme<sup>410</sup>. The Programme, which was developed within the ECN working group on leniency during 2006, has already achieved very encouraging results in the course of the first year following its endorsement. Seven Member States (Belgium, Denmark, France, Italy, the Netherlands, Portugal and Czech Republic) have already revised their existing programmes or adopted new ones to align with the Model Programme. In addition, the following twelve Member States are currently in the process of adopting or revising leniency programmes: Bulgaria, Cyprus, Greece, Finland, Hungary, Latvia, Luxembourg, Poland, Romania, Sweden, Estonia and Spain. Today, all Member States, except for Slovenia and Malta, have adopted leniency programmes or are in the process of adopting them, compared to only four Member States operating such programmes in 2002. A full evaluation of the implementation of the Model Programme is scheduled for the end of 2008.

450. Currently, all but four Member States have abolished (or are in the process of abolishing) their notification system. New, often largely convergent, instruments are being used increasingly in practice. For example, a large number of NCAs now have the power to adopt commitment decisions in line with Article 9 of Regulation 1/2003. As a consequence, a significant increase in such decisions was observed in 2007 as a proportion of the decisions communicated to the Commission under Article 11(4) of Regulation 1/2003 (29 commitment decisions in 2007 as against 7 in 2006).

### **1.2. Cooperation in individual cases**

451. 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 (Article 11(3) of the Regulation) and before the final decision is taken (Article 11(4) of the Regulation). The first requirement of informing the Commission and the network facilitates the swift reallocation of cases

---

<sup>409</sup> Banking, Securities, Insurance, Food, Pharmaceuticals, Professional services, Healthcare, Environment, Energy, Railways, Maritime Transport, Motor vehicles, Telecoms, Media and Sports.

<sup>410</sup> The ECN Model Programme is available at [http://ec.europa.eu/comm/competition/ecn/index\\_en.html](http://ec.europa.eu/comm/competition/ecn/index_en.html) together with a list of frequently asked questions (MEMO/06/356, 29.9.2006).

on the few occasions where this appears necessary, and promotes enhanced and effective enforcement, while the second requirement plays an important role in ensuring the consistent application of EU law.

#### 1.2.1. Case allocation

452. The Commission was informed of approximately 140 new case investigations launched by NCAs in 2007. Amongst the new cases about which the Commission was informed under Article 11(3) of the Regulation, approximately 45% concerned the application of Article 81 EC, 31.5% concerned the application of Article 82 EC and 23.5% concerned the application of both Articles 81 and 82 EC. Clusters of cases were observed, inter alia, in the energy, food and media sectors.
453. With regard to work-sharing within the Network, the flexible and pragmatic approach introduced by the Regulation and the Network Notice continued to function very well in practice. In 2007, as in previous years, there were very few instances where case-allocation discussions took place, and even fewer occasions where a case changed hands. The situations where work-sharing plays a role typically arise when a complainant or a leniency applicant chooses to contact both the Commission and one or more NCAs. In 2007, a small number of complaints were re-allocated from the Commission to those NCAs that were willing to follow up the matters raised. Furthermore, in a limited number of instances, the Commission and NCAs agreed on a way of dividing work on a case-by-case basis.
454. The flexible approach of the Regulation and the Notice was confirmed by the Court of First Instance in its judgments in cases T-339/04 and 340/04 *France Telecom v. Commission*<sup>411</sup>. The Court ruled for the first time on questions of work sharing between the Commission and a NCA in the ECN. In essence, the CFI confirmed that the Regulation has not in any way established a division of competences that could preclude the Commission from investigating a case that a NCA is already dealing with. Nor can this be derived from the Joint Statement<sup>412</sup>, the Network Notice<sup>413</sup> or general principles of Community law, including subsidiarity.

#### 1.2.2. Coherent application of the rules

455. In 2007, the Commission services reviewed or advised on a very significant number of cases originating from NCAs, [following up on information provided under Article 11\(4\) or upon informal request](#). These cases related to a broad range of infringements in different sectors of the economy.
456. Cases dealt with by NCAs are often related to the Commission's own enforcement action. For example, the French competition authority accepted commitments from Citroën concerning competition concerns that were closely related to those addressed by the Commission in its decisions involving Toyota, Fiat, DaimlerChrysler and GM. Similarly, both the Commission and a number of NCAs have investigated multilateral interchange fees in different contexts. These types of cases call for very

---

<sup>411</sup> Judgment of 8 March 2007, not yet reported.

<sup>412</sup> Joint Statement of the Council and the Commission on the functioning of the Network available from the Council register at: <http://register.consilium.eu.int> (document No 15435/02 ADD 1).

<sup>413</sup> OJ C 101, 27.4.2004, p. 43.

close cooperation in order to achieve maximum consistency, for the benefit of undertakings that want a level playing field. It is important to underline, however, that the Network aims at coherence, not absolute uniformity. Ensuring an overall level playing field for European business is achieved when the same type of arguments and considerations govern enforcement action by ECN members. Market-specific or case-specific elements may result in a different outcome for cases that might initially appear to be the same. Different ECN members may also opt for different instruments – such as prohibition or commitment decisions – to address the concern identified.

457. For example, in 2007 the German NCA informed the Commission of its commitment decisions in respect of long-term gas supply agreements. These decisions are modelled on the E.ON Ruhrgas decision of the German NCA which, in essence, prohibited E.ON Ruhrgas from continuing the existing gas supply agreements and from concluding new agreements with regional and local gas resellers, if they exceed a two-year duration for a capacity coverage of more than 80% of the resellers' needs and if they exceed a four-year duration for a capacity coverage between 50 and 80%. These German gas cases may invite comparison with the Commission's commitment decision in the Distrigas case (see I.A.2.3.2. above). From the Commission's perspective, the approach adopted in both instances is an example of coherent application that follows common principles without seeking absolute uniformity of outcome. Both the Commission and the NCA looked at the overall foreclosure effect of the agreements under scrutiny, and a major element of their analysis was the consideration of the market coverage of such agreements. The outcome in both cases is adapted to the specific features of the undertakings and markets concerned and takes account of the ability of the undertakings concerned to implement the commitments.

458. To date, the Commission has not made use of the possibility of relieving an NCA of its competence in a given case by initiating proceedings under Article 11(6).

## **2. APPLICATION OF EU COMPETITION RULES BY NATIONAL COURTS IN THE EU: REPORT ON THE IMPLEMENTATION OF ARTICLE 15 OF REGULATION 1/2003**

### **2.1. Assistance in the form of information or in the form of an opinion**

459. 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.

460. In 2007, the Commission issued three opinions: two in reply to requests from Swedish courts and one to a Spanish court.

#### *2.1.1. The opinions requested by Swedish courts*

461. First, the Swedish Market Court (Marknadsdomstolen) submitted a request for an opinion at the end of 2006. This request related to: (i) the notion of "undertaking" under the Swedish Competition Act (which is to be interpreted in the light of Articles 81 and 82 EC) and (ii) the notion of "legitimate interest" for public authorities under Article 7(2) of Regulation 1/2003. The case concerned two municipalities in the

northern part of Sweden that had entered into an agreement with the dominant electricity provider, Ekfors, for the provision of network services and lighting for roads and other public places. Following a disagreement about the level of the fees, Ekfors decided to discontinue its services until the disagreement had been resolved and the municipalities were left without lighting. Ekfors argued in this context that the municipalities could not be regarded as "undertakings" and therefore had no "legitimate interest" to complain.

462. The Commission's opinion outlined the considerations that should be taken into account in order to assess whether an entity constitutes an undertaking. The opinion, inter alia, outlined criteria to distinguish (non-economic) public authority activity from economic activity and explained that the same entity can constitute an undertaking with respect to one activity while not constituting an undertaking with respect to another activity. As regards the notion of "legitimate interest" of public authorities under Article 7(2) of Regulation 1/2003, the opinion referred to the relevant paragraphs in the Commission Notice on the handling of complaints.
463. Secondly, further to a request received in 2006, the Commission provided an opinion to the Swedish Supreme Court (Högsta Domstolen). The case before this court concerned, inter alia, whether the port of Ystad had abused its dominant position as the provider of port services by charging excessive fees for the services used by the Danish state-owned ferry operator, Bornholms Trafikken.
464. The request for an opinion related to the definition of the relevant market. The Commission's opinion clarified the criteria and the evidence on which it relied to reach a decision on the relevant market in a case such as the one pending before the Högsta Domstolen. The opinion referred, in particular, to the Commission's Notice on the definition of relevant market and to the case law of the Court of Justice<sup>414</sup> and its own decision practice<sup>415</sup>.

#### 2.1.2. *The opinion requested by a Spanish court*

465. A request for an opinion was submitted in 2006 in the context of litigation between a supplier on the Spanish wholesale market for petroleum products and a service station operator. The Spanish court (Juzgado de lo Mercantil nº2 de Madrid) requested the Commission's opinion on the definition of the relevant market, whether such a contract between a wholesaler and a service station operator could affect inter-State trade and lead to a restriction of competition, which factors should be taken into account when assessing market foreclosure, and whether Community law allows the declaration of nullity of a contract after it has expired.
466. The opinion set out the criteria and the evidence on which the Commission relies to reach a decision on the relevant market in a case such as the one pending, in

---

<sup>414</sup> Cases C-179/90 *Merci convenzionali porto di Genova Spa. v Siderurgica Gabrielli SpA* [1991] ECR I-5889, at para. 15, Case C-18/93 *Corsica Ferries Italia v Corpo dei piloti del porto di Genova (Corsica Ferries II)* [1994] ECR I-1783, at para. 41.

<sup>415</sup> *Euro-Port A/s v Denmark (Port of Rødby)* (OJ L 55, 26.2.1994, p. 52 at para. 7), *Sea Containers v Stena Sealink* (OJ L 15, 18.1.1994, p. 8, at paras 12 and 65) and *Scandlines v Port of Helsingborg and Sundbusserne v Port of Helsingborg*, Commission Decision of 23 July 2004 which is published on the Commission's website (<http://ec.europa.eu/comm/competition/antitrust/cases/decisions/36579/en.pdf>).



particular by reference to the Commission's Notice on the relevant market and to its decision in Repsol<sup>416</sup>. It underlined that the issue of whether there is a restriction of competition has to be assessed in the context of the network of such contracts concluded by the wholesaler and that the effect on trade must be assessed accordingly. In this context, reference was made to the Commission's Notice on the effect on trade and the Commission's decision in Repsol. The opinion further explained how to assess whether the market is foreclosed in line with the European Court's case law (*Delimitis*) and Commission case practice (*Repsol*). Finally, the opinion confirmed that the principle of automatic nullity is absolute and is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned, including giving rise to retroactive effect<sup>417</sup>.

## **2.2. Judgments of national courts**

467. Article 15(2) of Regulation 1/2003 requires the EU 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 50 judgments handed down in 2007, which were posted on DG Competition's website in so far as the transmitting authority did not classify them as confidential (confidential judgments are merely listed).

## **2.3. Amicus curiae intervention under Article 15(3) of Regulation 1/2003**

468. 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.

469. The Commission decided to intervene as *amicus curiae* pursuant to Article 15(3) of Regulation 1/2003 in a case in the Netherlands concerning the tax deductibility of Commission competition fines. In the initial judgment of 22 May 2006 on this issue, the Dutch *Rechtbank van Haarlem* (Court of First Instance in Haarlem, particularly in tax matters) ruled that fines imposed by the Commission for infringement of EC competition rules are deductible from income tax. The court found that, although Dutch law provides that administrative fines cannot be deducted from income tax, fines imposed by the Commission cannot be understood according to the national definition of a "fine" as, unlike fines imposed under Dutch law, they consist of punitive elements and elements intended to neutralise illegal gains.

470. An appeal against this judgment was made to the *Gerechtshof van Amsterdam* (*Belastingkamer*) (Court of Appeal of Amsterdam, tax chamber). The Commission moved to intervene as *amicus curiae* to highlight that Community fines for breach of the EC competition rules are not intended to skim off illegal gains, and that the principle of equivalence would be breached if fines imposed under EC competition law could be deducted, unlike fines under national law. Moreover, it would go against the principle of effectiveness, because the impact of Commission decisions

---

<sup>416</sup> The complete decision is available on the Commission's website:

[http://ec.europa.eu/comm/competition/antitrust/cases/index/by\\_nr\\_76.html#i38\\_348](http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_76.html#i38_348)

<sup>417</sup> Case 48/72 *Brasserie de Haecht II* [1973] ECR 77, para. 26 and C-453/99 *Courage v Crehan* [2001] ECR I-6297, para. 22.

would necessarily be reduced if companies that were fined for violation of Articles 81 and 82 were able (at least partially) to deduct the amount from national income tax.

471. In an interim judgment of 12 September, the Gerechtshof van Amsterdam decided to ask for a preliminary ruling to the European Court of Justice under Article 234 EC regarding the possibility for the Commission to intervene on the basis of Article 15(3) in such national (tax) litigation. The Dutch court essentially considers that there is a reasonable doubt as to whether the Commission can submit observations in cases other than 'competition cases in the strict sense'.

#### **2.4. Financing the training of national judges in EU competition law**

472. 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 35 training projects, which by the end of 2007 had provided training for approximately 3 500 judges. A new Legal Base has been adopted on 25 September (Decision of the European Parliament and the Council No. 1149/2007/EC, establishing for the period 2007-2013 the specific programme "Civil Justice"). The corresponding Work Programme 2007 allows for action grants to support projects aimed at promoting judicial cooperation between, and the training of, national judges in the context of the implementation of Articles 81 and 82 EC including the issue of private enforcement, with the aim of contributing to the development and implementation of European competition policy and Community cooperation measures in the field of competition in order to ensure the consistency of Community competition policy. The budget foreseen for these action grants in 2007 is EUR 800 000. A call for proposals has been launched at the end of 2007.

### **IV – International activities**

473. In an increasingly globalised world economy, competition policy must also adopt a global outlook. DG Competition responds to this challenge by reinforcing and extending its relations with partners all over the world in both bilateral and multilateral fora. Commissioner Kroes attaches the highest importance to effective international co-operation in the area of competition. Her bilateral meetings with counterparts in the US, Japan and China, as well as her participation in the ICN annual conference, testify to this commitment.

#### **A – ENLARGEMENT, WESTERN BALKANS AND NEIGHBOURHOOD POLICY**

474. In the context of Enlargement, candidate countries must fulfil a number of requirements in the field of competition as a condition for joining the European Union. Candidate countries must adopt national legislation compatible with the EU acquis. They must also put in place the necessary administrative capacity and demonstrate a credible enforcement record. DG Competition provides technical assistance and support to help the candidate countries fulfil these requirements and it continuously monitors the extent to which the candidate countries are prepared for accession.

475. During 2007, cooperation with Croatia and Turkey was particularly close. These two candidate countries must fulfil "opening benchmarks" before accession negotiations on the competition chapter can start. Issues such as shipbuilding and steel restructuring were high on the agenda for Croatia, while Turkey has yet to introduce a system for the control and monitoring of State aid.
476. DG Competition assisted the Western Balkan countries in further aligning their competition rules with EU law. This included, among others, help in drafting laws on competition and State aid and advice on setting up the necessary institutions for the enforcement of these rules. DG Competition was involved in negotiating the competition provisions in the Stabilisation and Association Agreements with Serbia, Montenegro and Bosnia and Herzegovina.
477. In the framework of the Neighbourhood Policy, DG Competition monitored the implementation of the competition-related priorities in the bilateral Action Plans agreed between the EU and ENP countries, which set out an agenda of political and economic reforms in the short and medium term.

## **B – BILATERAL CO-OPERATION**

478. The Commission cooperates with numerous competition authorities on a bilateral basis and in particular with the authorities of the European Union's major trading partners. The European Union has entered into dedicated cooperation agreements in competition matters with the United States, Canada and Japan.

### **1. AGREEMENTS WITH THE USA, CANADA AND JAPAN**

479. As in previous years, there was very close co-operation with the United States of America. Based on two dedicated competition cooperation agreements<sup>418</sup>, there were frequent contacts between DG Competition and the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). These contacts ranged from cooperation in individual cases to more general matters relating to competition policy. Numerous meetings and video- or phone-conferences took place to discuss issues such as cooperation in cartel investigations, abuse of dominant positions or the application of competition rules in particular sectors.
480. In case-related contacts, case teams usually update each other on the status of the investigations (subject to the limits laid down in the above-mentioned bilateral agreements). Merger control, in particular, calls for effective co-ordination with the DoJ and the FTC. The 2002 EU-US Best Practices on Cooperation in Reviewing Mergers<sup>419</sup> provide a useful framework for cooperation, especially by indicating critical points in the procedure where cooperation could be particularly useful. The *Owens Corning/Saint Gobain* and *Schering-Plough/AkzoNobel* cases can be cited as examples of fruitful cooperation between the EU and US agencies.

---

<sup>418</sup> 1991 EU-US Competition Cooperation Agreement (OJ L 95, 27.4.1995, pp. 47 and 50) and 1998 positive comity agreement (OJ L 173, 18.6.1998, pp. 26-31).

<sup>419</sup> See [http://ec.europa.eu/comm/competition/mergers/legislation/eu\\_us.pdf](http://ec.europa.eu/comm/competition/mergers/legislation/eu_us.pdf)

481. Commissioner Kroes met her US counterparts, Chairman Deborah Majoras of the Federal Trade Commission and Tom Barnett, Assistant Attorney General, Department of Justice, at the annual bilateral meeting (held on 30 October in Washington) and on several other occasions.
482. Cooperation with the Canadian Competition Bureau is based on the EU/Canada Competition Cooperation Agreement signed in 1999<sup>420</sup>. Contacts between the Commission and the Bureau have been frequent and fruitful. Case-related contacts concerned mainly merger and cartel investigations. In the area of cartels the contacts focused on coordination of investigative measures; in the area of mergers the discussions centred on possible remedies. The Commission and the Canadian Competition Bureau also continued their dialogue on general competition issues of common concern. High-level meetings took place both in Brussels and Ottawa, and there were reciprocal visits between agency officials from both sides..
483. Cooperation with the Japan Fair Trade Commission (JFTC) is based on the 2003 Cooperation Agreement<sup>421</sup>. Commissioner Kroes met JFTC Chairman Takeshima at the occasion of the annual bilateral meeting on 14 September in Brussels. At the centre of discussions were policy initiatives on both sides, as well as recent enforcement actions. In addition to contacts on individual cases, the Commission and the JFTC continued their ongoing dialogue on general competition issues of common concern.

## **2. COOPERATION WITH OTHER COUNTRIES AND REGIONS**

484. The European Commission continued its close cooperation with the EFTA Surveillance Authority in enforcing the Agreement on the European Economic Area (EEA). Protocol 23 to the EEA Agreement was amended in order to allow the EFTA Surveillance Authority and the competition authorities of the EFTA States to participate in policy discussions within the European Competition Network.
485. Cooperation with China under the “EU-China competition policy dialogue”<sup>422</sup> remained a priority in 2007. Commissioner Kroes visited China for the annual bilateral meeting on 3 September. Contacts between DG Competition and the Chinese administration were intense and mainly dealt with questions concerning the newly adopted anti-monopoly law, the future implementing legislation and the administrative setup of the Chinese enforcement agencies. On 20-21 November, DG Competition organised a workshop in Brussels on EU merger control for a high-level delegation from the Ministry of Commerce and representatives of the Legislative Affairs Office of the State Council. It also hosted a visitor from the Ministry of Commerce for a period of five months.
486. In the course of the year, DG Competition and the Korean Fair Trade Commission (KFTC) met on several occasions to negotiate a bilateral cooperation agreement in the field of competition. This agreement will contain provisions on enforcement cooperation, notification, consultation and exchange of non-confidential information.

---

<sup>420</sup> 1999 EU-Canada Competition Cooperation Agreement (OJ L 175, 10.7.1999, p. 50).

<sup>421</sup> 2003 EU-Japan Competition Cooperation Agreement (OJ L 183, 22.7.2003, p. 12).

<sup>422</sup> Terms of Reference of the EU-China competition policy dialogue (May 2004).

Talks are fairly advanced. When it enters into force, the agreement will replace the existing Memorandum of Understanding<sup>423</sup> between DG Competition and the KFTC.

487. Moreover, DG Competition played an active role in the ongoing negotiations on Free Trade Agreements with India and South Korea, and on the trade part of the Association Agreements with the Andean Community, with a view to ensuring that anti-competitive practices (including State aid) do not erode the trade and other economic benefits sought through those agreements.

## **C – MULTILATERAL CO-OPERATION**

### **1. INTERNATIONAL COMPETITION NETWORK**

488. DG Competition continued to play a leading role in the International Competition Network (ICN). More specifically, DG Competition is a member of the Steering Group, co-chair of the cartels Working Group and an active member of the other Working Groups (on Mergers, Competition Policy Implementation, and Unilateral Conduct).
489. At the 2007 ICN Annual Conference (held in Moscow from 31 May to 1 June), Commissioner Kroes and Director-General Philip Lowe delivered keynote speeches.

#### **1.1. Working Groups**

490. The Unilateral Conduct Working Group (UCWG), which was set up in 2006, delivered its first results at the 2007 ICN conference in the form of reports covering the aims of legislation on unilateral conduct and definitions of dominance. The year 2006-2007 was UCWG's first year of activity. Its report to the Moscow Annual conference contains three parts: the objectives of laws regarding unilateral conduct, the assessment of dominance/Significant Market Power (SMP), and State-created monopolies. In 2007, UCWG also worked on Recommended Best Practices (RPs) for the assessment of dominance/substantial market power and State-created monopolies, as well as on a fact-finding report on two particular types of conduct: exclusive dealing/single branding and predatory pricing. The reports and the RPs will be presented at the 7th Annual Conference in Kyoto in April 2008.
491. The Cartels Working Group, co-chaired by DG Competition, presented a report to the 2007 annual conference on cooperation between competition agencies in cartel investigations (this report was drafted within DG Competition). The Working Group also delivered reports on obstruction of justice in cartel investigations, the interaction between public and private enforcement in cartel cases as well as a chapter on case initiation for the ICN cartel enforcement manual. The 2007 ICN Cartels workshop was held in El Salvador from 30 October to 1 November.

---

<sup>423</sup> Memorandum of Understanding on cooperation between the Fair Trade Commission of the Republic of Korea and the Competition Directorate-General of the European Commission (October 2004).

## 1.2. OECD

492. DG Competition continued to contribute actively to the work of the OECD Competition Committee and participated in all round tables on competition policy (including on refusal to deal and facilitating practices in oligopolies, dynamic efficiencies in merger analysis, evaluation of the actions of competition authorities, energy security and vertical mergers). DG Competition submitted contributions to all roundtables and gave presentations on the results of the energy sector inquiry, the maritime review, the draft EC guidelines on non-horizontal mergers (subsequently adopted in November) and the decision in the Ryanair/Aer Lingus merger case (see II.G.2.5.2. above).

## **V – Outlook for 2008**

### **A – ANTITRUST**

493. During 2008, the Commission will commence a review of the block exemption regulations on vertical restraints and horizontal cooperation which expire in 2010, with a view to either amending or extending them.

### **B – MERGERS**

494. During 2008, the Commission will undertake a review of the functioning of the jurisdictional provisions of the EC Merger Regulation, including the operation of the system of case referral between the Commission and Member States, with a view to submitting a Report to the Council of Ministers by 1 July 2009.

### **C – STATE AID**

495. In 2008, the Commission will continue to implement the State Aid Action Plan. The Commission will adopt, in particular, the new environmental State aid guidelines, the General Block Exemption Regulation and the new Communication on guarantees. The Commission will also ensure the effective implementation of these new texts, including in-depth assessment of major cases. As announced in the State Aid Action Plan, it will pursue the systematic recovery of incompatible aid in cooperation with Member States.
496. In the field of Services of General Economic Interest, the Commission will contribute to improving predictability by responding to questions from stakeholders in the context of the interactive information system announced in the Communication on services of general interest adopted on 20 November 2007<sup>424</sup>.

### **D – INTERNATIONAL ACTIVITIES**

497. DG Competition's work with the candidate countries, the Western Balkan countries and the Neighbourhood Policy countries will continue in 2008.
498. DG Competition intends to further strengthen its cooperation with the Korean competition authority by concluding a dedicated intergovernmental cooperation agreement in the field of competition.
499. The focus in 2008 will be on cooperation with emerging economies such as China and India.

---

<sup>424</sup> See the Commission Communication "Services of general interest, including social services of general interest: a new European commitment" (COM(2007) 725 final). The Communication accompanied the general Single Market Review Communication ("A single market for 21st century Europe") adopted on 20 November 2007.

500. The Commission will (continue to) negotiate Free Trade Agreements with a number of countries, e.g. Korea and India and Association Agreements with the Andean Community. DG Competition will contribute to the negotiations on the competition provisions of these agreements aimed at guaranteeing a level playing field for European companies.
501. The annual conference of the International Competition Network will be held in Kyoto, Japan from 14 to 16 April 2008. DG Competition will attend and play an active role in this important international event.

## **E – SECTOR DEVELOPMENTS**

### **1. ELECTRONIC COMMUNICATIONS**

502. The remedies imposed within the context of *ex ante* regulation remain an issue where the Commission intends to achieve a greater harmonisation of the regulatory principles applied by the NRAs. The wide discrepancy of termination rates in the EU demonstrates the need to achieve real cost orientation. The Commission also believes that asymmetric rates between operators are only justified in the case of cost differences outside the control of the operators, and that such asymmetries should be phased out over time. The Commission will cooperate with the European Regulators Group to propose a Commission Recommendation on remedies in termination markets. It is planned to adopt such a Recommendation by mid-2008.
503. Moreover, access to next generation networks is critically important for alternative network operators that have invested in infrastructure at the level of local exchanges. Effective remedies need to be devised which will address the issue of stranded investments while at the same time safeguarding incentives to invest in those next generation networks. A Commission Recommendation on the regulation of next generation access networks is scheduled to be adopted towards the end of 2008.
504. The Commission has started to review its Recommendation for the Article 7 Framework Directive (FD) notification procedure<sup>425</sup>. Based on the experience gained with more than 750 notifications under Article 7 FD<sup>426</sup>, it seems possible to simplify the notification procedure and to clarify some issues with the aim of streamlining existing administrative practices. The adoption of a new Procedural Recommendation is planned for Spring 2008. The Commission is required to report to Council and the European Parliament in 2008 on the functioning of the Regulation and in particular whether it should be extended in duration and/or scope to include other services such as roaming SMS or data.

---

<sup>425</sup> Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 190, 30.7.2003, p. 13).

<sup>426</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, pp. 33-50).



505. While in the area of State aid the Commission expects further cases of broadband support in densely-populated and rural areas to be notified for approval, the move towards “next generation networks” is expected to lead to new patterns of public intervention. The Commission will continue to monitor these developments to ensure that public intervention is targeted at genuine market failures and does not crowd out private investment. In the area of mergers, the Commission will continue to preserve the efficient competitive structure of electronic communications markets.

## **2. INFORMATION TECHNOLOGY**

506. The Commission will continue to monitor market developments closely and ensure that competition is not hindered, for example through reduced interoperability and compatibility with open standards. Continued attention will also be given to the growing importance of intellectual property rights in standards and the concomitant actions taken by standards-setting organisations to accommodate these rights. More broadly, it will continue to monitor developments in standard-setting bodies, so as to ensure that procedures within standard-setting bodies are transparent and that they contribute to the achievement of pro-competitive outcomes.
507. The Commission will, in particular, ensure that existing markets remain open and that entry into new markets is not blocked through unilateral actions by dominant companies or through restrictive agreements. By removing and preventing anticompetitive barriers to innovation and market entry, DG Competition will contribute to investment and growth in ICT markets and thereby to the deepening and extension of the European knowledge economy as a whole.

## **3. MEDIA**

508. Technological developments in the media markets will continue to raise new issues for the Commission's enforcement activities. Priorities will be similar to those in 2007. DG Competition will focus on ensuring that scarce premium media content is made available in compliance with EU competition rules, and will monitor the transition from analogue to digital broadcasting and maximise consumer benefits from new forms of distribution by fighting anti-competitive restrictions at both the collective rights management level and the distribution level. In addition, merger control will continue to preserve the efficient competitive structure of multimedia media markets.
509. The Commission will continue to apply its established policy concerning State aid for the digital switchover. As the target date approaches for the switchover from analogue to digital broadcasting, Member States are likely to propose further initiatives to facilitate the process. In assessing these initiatives, the Commission will pay particular attention to technological neutrality and to the ultimate objective of ensuring wide consumer access to digital broadcasting.

510. The Commission initiated the review of the Broadcasting Communication by launching a broad consultation in early 2008<sup>427</sup>, giving Member States and stakeholders the opportunity to submit their views on the various aspects of the public funding of public service broadcasting, including the scope of public service activities in the new media environment. After having analysed the submissions received, the Commission will come forward – where appropriate – with a proposal for a revised Broadcasting Communication, possibly by mid-2008.
511. The results of the Commission study into the economic and cultural effects of territorial conditions applied in film support schemes are expected in the first half of 2008. Having extended the Cinema Communication until 31 December 2009 at the latest, the Commission will need to consider the implications of the study for the Commission's future approach to State aid for films, including whether or not to review the cinema communication. Any changes to the Cinema Communication would require a process of formal consultation with the Member States and interested parties.

#### 4. HEALTH-RELATED MARKETS

512. In 2008 the work of DG Competition in the area of health-related markets will be largely determined by the inquiry into the pharmaceutical sector that was initiated on 15 January 2008<sup>428</sup>. The scope of the inquiry is defined as "*the introduction of innovative and generic medicines for human consumption onto the market*". In the context of this inquiry, unannounced inspections were carried out at a number of pharmaceutical companies in Europe. The inquiry is a response to indications that competition in pharmaceuticals markets in Europe may not be working properly: fewer new medicines are being brought to market, and the entry of generic medicines sometimes seems to be delayed. The inquiry will therefore examine the reasons for this state of affairs.
513. In particular, the inquiry will examine whether agreements between pharmaceutical companies, such as settlements in patent disputes, may infringe the Treaty's prohibition of restrictive business practices (Article 81 EC). It will also investigate whether companies may have created artificial barriers to entry (through the misuse of patent rights, vexatious litigation or other means) and whether such practices may infringe the Treaty's prohibition of abuses of dominant positions (Article 82 EC).
514. An interim report is due in the autumn of 2008 and final results are expected in the spring of 2009. The inquiry's findings will, if necessary, allow the Commission or the national competition authorities to focus any future action on the most serious competition concerns as well as to identify remedies to resolve the specific competition problems in individual cases.

---

<sup>427</sup> Further information is available on the website of DG Competition: <http://ec.europa.eu/comm/competition/consultations/open.html>

<sup>428</sup> For the press release and the Decision to open a sector inquiry, see EUROPA - European Commission - Competition.

## 5. FINANCIAL SERVICES SECTOR

515. The outlook of the financial services sector for 2008 is to a large extent determined by the entry into force of the Single Euro Payments Area (SEPA).
516. The SEPA framework for payment cards was launched on 1 January 2008. An important milestone in the SEPA migration process was reached on 28 January 2008 when the first electronic payments for credit transfers in euro were made throughout the EU and in the neighbouring countries of Iceland, Liechtenstein, Norway and Switzerland<sup>429</sup>, using the new SEPA standards. For technical and legal reasons the launch of the SEPA payment instruments for direct debits will take place subsequently<sup>430</sup>, but should not occur later than 1 November 2009. For card payments, the SEPA Cards Framework<sup>431</sup> has been in force since 1 January 2008.
517. The creation of a Single Euro Payments Area is expected to enhance competition by removing national barriers, thereby increasing competition between banks. If properly implemented, it is likely that the creation of a Single Euro Payments Area will – in whole or in part - remove the barriers to competition which were identified in the Financial Sector Inquiry Report<sup>432</sup>.
518. However, the design and implementation of the SEPA project is led by the EPC, which is an association of undertakings. SEPA thus consists of agreements and cooperation between competing undertakings. It therefore merits close competition scrutiny to assess whether the co-operation produces foreclosure effects which might amount to a restriction of competition (Article 81 EC). DG Competition's assessment takes into account the fact that the success of SEPA depends first and foremost on the proactive engagement and co-operation of the European payments industry. Nevertheless, restrictions on competition need to be justified: i.e. the undertakings need to demonstrate that their co-operation leads to increased efficiencies which not only benefit the industry but are also be passed on to consumers (Article 81(3) EC).
519. DG Competition is following the process of SEPA migration in close collaboration with DG Internal Market, the ECB and the EPC.
520. The possibility cannot be excluded that the instability and volatility which affected markets towards the end of 2007 will continue well into 2008. Against this background it is possible that banks may suffer significant losses, for example as a result of mortgage payment defaults or mortgage asset devaluation, in their 2007

---

<sup>429</sup> SEPA is currently defined as the area consisting of the 27 Member States plus Iceland, Liechtenstein, Norway and Switzerland.

<sup>430</sup> In order to allow for smooth SEPA direct debit implementation, the Payment Services Directive (PSD), as the necessary legal basis, needs to be transposed into national law of each Member State first by 1 November 2009.

<sup>431</sup> [http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework\\_027\\_05\\_Version2%200.pdf](http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework_027_05_Version2%200.pdf)

<sup>432</sup> For example, the SEPA Cards Framework (SCF) obliges payment card schemes to allow participation on the basis of transparent and non-discriminatory criteria, prevents discrimination according to nationality, imposes SEPA-wide, transparent pricing structures for payment card schemes and imposes unbundling of card scheme governance and management from infrastructure.

accounts. The possibility cannot be ruled out that other banks may need additional capital or State support in order to overcome the ongoing crisis.

## **6. POSTAL SERVICES**

521. In 2008, while the adoption of the Postal Directive is expected to happen swiftly, most EU Member States will still maintain monopoly rights to USPs. However, some Member States (Finland, Sweden, United Kingdom and, as of 1 January 2008, Germany) have abolished the reserved area, while others have a more reduced reserved area than is allowed under the Directive. This means that a significant share of EU letter post volumes is expected to be completely open to competition even ahead of the original 2009 deadline proposed by the Commission.
522. Irrespective of *de jure* market opening, the fact remains that, for most market segments and services, USPs in each Member State will retain a predominant position, as the need for an own network and strict industry requirements keep the barriers to entry in several Member States high.
523. The operators' focus on business segments is expected to continue because business products (unaddressed and addressed direct mail in particular) are showing substantially higher rates of growth than traditional letter mail.
524. In 2008, EU competition rules, in particular Articles 81-82 and 86 EC, will thus continue to apply in a context in which most USPs in the EU will still have legal monopolies or positions of unparalleled strength and in which the most dynamic segments of the market exist alongside such monopolies. The preparation for a more competitive environment by 2011 creates the risk of unlawful attempts by USPs to diversify and expand their operations and, possibly, leverage their market power in service or geographic markets neighbouring their monopoly, e.g. direct or express mail and business segments. Preserving residual or nascent competition in service markets adjacent to the monopoly will thus continue to be a key concern.
525. From an anti-trust point of view, the Commission will thus continue to give priority to investigations which concern EU-wide or cross-border issues, to address barriers to competition set up as a result of State measures or by attempts to unlawfully leverage market power and to set legal or economic precedents.
526. From a State aid viewpoint, the Commission will continue to ensure that Member States do not over-compensate postal operators entrusted with Services of General Economic Interest (SGEI) and that commercial activities outside the SGEI are not cross-subsidised. The Commission will also check that Member States do not grant other types of State aids to postal providers or to their subsidiaries, such as guarantees or funding which do not satisfy the "market investor" conditions.
527. Pending the final vote of the European Parliament on the new Postal Directive, the Commission will continue to prepare for market opening from 2011. In its current form the Directive mandates the Commission to provide assistance to Member States, in particular regarding the calculation of the net cost of the universal

service<sup>433</sup>. Accordingly the Commission has already started to examine the different methods for the calculation of the net cost of the universal service and will attach special importance to this issue throughout 2008.

## **VI – Interinstitutional cooperation**

528. The Commission continued its cooperation with the other Community institutions in accordance with the respective agreement or protocols entered into by the relevant institutions<sup>434</sup>.

### **1. EUROPEAN PARLIAMENT**

529. As is the case each year, the European Parliament issued an own-initiative report on the Commission's Annual Report on Competition Policy of the previous year, following an exchange of views on the issues raised in the report.

530. The Commission also participated in discussions held in the European Parliament on Commission policy initiatives, such as on State aid reform (in particular on the environmental guidelines and on the proposal for a General Block Exemption Regulation) and the inquiry into the financial services sector.

531. The Commissioner and/or the Director General responsible for Competition hold regular exchanges of views with the responsible Parliamentary committees on the subject of competition policy. In 2007, there were four exchanges of views were held with the Economic and Monetary Affairs Committee and one meeting with the Internal Market and Consumer Protection Committee. Issues of major importance during these 2007 meetings included the energy sector inquiry and its follow-up, implementation of the State Aid Action Plan, the report on the retail banking sector inquiry, the business insurance inquiry and the continued efforts to combat illegal cartels. Outside the framework of these more formalised meetings, cooperation with the European Parliament may also take the form of bilateral meetings with individual Members of Parliament on specific topics of interest to them.

532. The Committee on Economic and Monetary Affairs also receives regular lists of pending cases in the public domain, as well as information on the main policy initiatives in the field of competition.

533. Finally, the Commission also cooperates closely both with the European Ombudsman and Members of the European Parliament by replying to Parliamentary Questions and Petitions. In 2007, the Commission responded to 530 written

---

<sup>433</sup> See Article 23a and Annex I of the Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council amending Directive 97/67/CE with regard to the full accomplishment of the internal market of Community postal services.

<sup>434</sup> Framework Agreement of 26 May 2005 on relations between the European Parliament and the Commission; Protocol of Cooperation between the European Commission and the European Economic and Social Committee of 7 November 2005; Protocol on the Cooperation Arrangements between the European Commission and the Committee of the Regions of 17 November 2005.

questions, 77 oral questions and 39 petitions involving matters of competition policy<sup>435</sup>.

## **2. COUNCIL**

534. The Commission also cooperates closely with the Council, informing it of important policy initiatives in the field of competition, such as on the State aid reform and the energy and financial services sector inquiries; the Commission also attends meetings of Council working groups dealing with competition policy matters, and maintains close links with the respective Presidencies. Depending on the case, the cooperation may also consist in participation in informal Council formations or contributions to meetings of the European Council. In 2007, the Commission made contributions on competition policy mainly in respect of conclusions adopted in the Competitiveness Council (such as on the Lisbon strategy, Industrial policy and SME policy), the Transport, Telecommunications and Energy Council (Internal Energy Market Legislative Package) and Ecofin Council formations (Single Market Review, Single Euro Payments Area and risk capital).

## **3. EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND COMMITTEE OF THE REGIONS**

535. The Commission also 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 at the respective Committee, for instance in the case of the adoption of the annual report by the European Economic and Social Committee on the Commission's Annual Report on Competition Policy. In 2007, the Commissioner responsible for Competition met with the Section of the EESC responsible for Single Market, Production and Consumption to have an exchange of views on major policy developments, in areas such as State aid, financial sector inquiries and the fight against cartels.

---

<sup>435</sup> Of these the Commissioner in charge of Competition directly responded to 161 written questions, 14 oral questions and 14 petitions.