



EUROPEAN COMMISSION

Brussels, 3.6.2010
SEC(2010)666 final

COMMISSION STAFF WORKING DOCUMENT

Accompanying the

REPORT FROM THE COMMISSION

on Competition Policy 2009

COM(2010)282 final

TABLE OF CONTENTS

I – Instruments.....	8
A – State aid control.....	8
1. Shaping and applying the rules	8
1.1. State aid control – the Simplification Package	14
1.2. Recovery policy	15
1.3. State aid enforcement by national courts	16
1.4. Monitoring of State aid measures	17
1.5. Horizontal State aid.....	18
1.6. Coal	19
1.7. State aid in the agricultural sector.....	19
2. Selected Court cases.....	21
2.1. Notion of aid	21
2.2. Compatibility assessment.....	23
2.3. Procedural issues.....	24
2.4. Recovery of aid	25
B – Antitrust – Articles 101, 102 and 106 TFEU.....	25
1. Shaping and applying the rules	25
1.1. Enforcement rules	25
1.2. Private enforcement of the EU antitrust rules	27
1.3. Cartels	29
1.4. Other agreements and concerted practices.....	31
1.4.1. The review of the Block Exemption Regulation on Vertical agreements.....	31
1.4.2. The review of the Block Exemption Regulations on Horizontal agreements.....	32
1.4.3. The review of the Motor Vehicle Block Exemption Regulation	33
1.4.4. The review of the Insurance Block Exemption Regulation	34
1.4.5. The Review of the Consortia Block Exemption Regulation.....	35
1.5. Abuse of dominant positions (Article 102 TFEU).....	37
1.6. State measures (Public undertakings/Undertakings with exclusive and special rights)	38

2.	Selected Court cases.....	39
2.1.	Case C-8/08 T-Mobile Netherlands & Others v. Raad van bestuur van der Nederlandse Mededingingsautoriteit (NMa).....	39
2.2.	Case C-429/07, Inspecteur van de Belastingdienst v. X BV.....	40
2.3.	T-301/04, Clearstream Banking AG and Clearstream International SA v. Commission.....	41
2.4.	Case C-202/07 P, France Télécom SA v. Commission	42
2.5.	Case C-125/07 P e.a., Bank Austria v Commission.....	43
2.6.	Case C-97/08P, Akzo Nobel et al. v. Commission	44
	C – Merger control	45
1	Shaping and applying the rules	45
1.1.	The Merger Report.....	46
2.	Selected Court cases.....	47
2.1.	Case C-440/07 P, Commission v. Schneider Electric SA.....	47
	II – Sector Developments	47
	A – Financial services	47
1.	Overview of sector	47
2.	Policy developments	48
2.1.	Financial services – State aid	48
2.2.	Financial services – Merger control.....	54
2.3.	Financial services – Antitrust.....	54
2.3.1.	Single Euro Payments Area	55
2.3.2	Payment cards	56
2.3.3	Financial market data distribution.....	56
2.3.4.	Securities Trading, Clearing and Settlement (C&S).....	57
2.3.5.	OTC Derivatives	57
2.4.	Insurance sector.....	58
	B – Energy and Environment	58
1.	Overview of sector	58
2.	Policy developments	58
2.1.	Antitrust enforcement.....	59

2.1.1.	Decisions	60
2.1.2.	Other procedural steps.....	61
2.2.	Merger control.....	62
2.3.	State aid enforcement.....	64
C – Electronic communications		68
1.	Overview of sector	68
2.	Policy developments	69
2.1.	Application of the Regulatory Framework and other policy developments	69
2.2.	State aid.....	71
D – Information technology		73
1.	Overview of sector	73
2.	Policy developments	74
3.	Main Cases.....	75
E – Media		77
1.	Overview of sector	77
2.	Policy developments	78
2.1.	Roundtable on opportunities and barriers to on-line distribution of music	78
2.2.	Digital broadcasting	78
2.3.	Sports.....	79
2.4.	Public service broadcasting.....	79
2.5.	State aid for films	80
2.6.	Newspapers	81
F – Pharmaceutical industry & Health		81
Pharmaceutical Industry		81
1.	Overview of sector	81
2.	Policy developments	82
2.1.	Pharmaceutical Sector Inquiry	82
2.1.1.	Competition between originator and generic companies – The issues	83
2.1.2.	Competition between originator companies – The issues.....	85
2.1.3.	Policy recommendations and the way forward.....	86

2.2.	Developments on Parallel Trade	87
2.3.	Merger Cases in the Pharmaceutical Sector	88
	Health Care Services	88
1.	Overview of sector	88
2.	Policy developments	89
	G– Transport	91
1.	Overview of sector	91
2.	Policy developments	92
2.1.	Road Transport.....	92
2.2.	Rail Transport and Combined Transport.....	94
2.3.	Inland Navigation.....	95
2.4.	Maritime Transport	95
2.4.1.	Policy developments	95
2.4.2.	State aid cases	96
2.5.	Aviation.....	98
2.5.1.	Policy developments	98
2.5.2.	State aid cases	100
2.6.	Ship Classification	101
2.7.	International aviation policy – EU-US cooperation.....	102
	H – Postal services	103
1.	Overview of sector	103
2.	Policy developments	103
2.1.	State aid.....	104
2.1.1.	Deutsche Post.....	104
2.1.2.	Belgian Post	105
2.1.3.	Royal Mail.....	105
2.1.4.	Unlimited guarantee to the French La Poste.....	105
2.2.	Infringement procedures	106
2.3.	Merger control.....	106
	I – Automotive industry	106

1.	Overview of sector	106
2.	Policy developments	107
2.1.	Antitrust and Advocacy.....	107
2.2.	State aid to the car sector	108
J – Food industry		111
1.	Overview of sector	111
2.	Policy developments	111
III – Consumer activities		112
1.	Key actions.....	112
IV – The European Competition Network and cooperation with National Courts – Overview of cooperation.....		114
A – General overview		114
1.	Cooperation on policy issues	114
1.1.	Convergence of ECN leniency programmes.....	115
1.2.	Cooperation in individual cases	116
1.2.1.	Case allocation	116
1.2.2.	Coherent application of the rules	117
2.	Application of EU Competition rules by National Courts in the EU: Report on the implementation of Article 15 of Regulation 1/2003	117
2.1.	Assistance in the form of information or in the form of an opinion	117
2.1.1.	The opinion requested by a Belgian court.....	117
2.1.2.	The opinion requested by a Lithuanian court.....	118
2.1.3.	The opinions requested by Spanish courts.....	118
2.2.	<i>Amicus curiae</i> interventions under Article 15(3) of Regulation 1/2003	119
2.3.	Financing the training of national judges in EU competition law	120
V – International activities		120
A – Multilateral cooperation		121
1.	International Competition Network	121
2.	OECD.....	121
3.	UNCTAD	122

B – Bilateral cooperation.....	122
1. Agreements with the USA, Canada, Japan and South Korea	122
2. Cooperation with other countries and regions	123
C – Enlargement.....	124
VI – Interinstitutional cooperation	125

I – Instruments

1. The Lisbon Treaty entered into force on 1 December 2009. Since then, the numbering of the articles has changed. For antitrust, Articles 81, 82 and 86 EC have respectively become Articles 101, 102 and 106 TFEU. The provisions are in substance identical. However, throughout this document, references to the old numbering have been maintained when they relate to proceedings taken before 1 December 2009. Similarly, old references to EC Treaty articles in the field of State aid (Articles 87 to 89 EC) have been maintained when the procedural steps referred to occurred before the entering into force of the Lisbon Treaty.
2. Also, since 1 December 2009, the Court of First Instance (CFI) is named the General Court. However, the term CFI has been maintained in the present Communication for those judgments taken before that date.

A – STATE AID CONTROL

1. SHAPING AND APPLYING THE RULES

3. Since the onset of the financial crisis, the Commission has adopted four major guidance documents specifically for State aid to financial institutions. The Banking and Recapitalisation communications¹ adopted in 2008 allowed to preserve financial stability and to prevent a credit crunch whilst keeping distortions of competition to a minimum. The Recapitalisation Communication in particular proved to be essential for providing systemic banks with a sufficient capital base in line with State aid rules so that they could continue to fulfil the role as a lender to the real economy. The level of remuneration for State capital, in combination with step-up mechanisms in schemes and individual measures, ensures that this capital is paid back as early as economic circumstances permit.
4. Between October 2008 and 31 December 2009, the Commission approved guarantee schemes for 12 Member States². Seven Member States implemented pure recapitalisation schemes³, whilst seven Member States designed mixed/holistic schemes with both instruments⁴. Spain, Slovenia, the United Kingdom, Hungary and Germany also implemented other forms of support schemes.

¹ Communication from the Commission - The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis. (OJ C 270, 25.10.2008, p. 8); Commission Communication - Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition. (OJ C 10, 15.1.2009, p. 2).

² Cyprus, Denmark, Finland, Ireland, Italy, Latvia, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.

³ Denmark, Finland, France, Italy Poland, Portugal and Sweden.

⁴ Germany, United Kingdom, Greece, Austria, Poland, Hungary and Slovakia.

5. In terms of aid to individual entities, in 2009 the Commission approved recapitalisation and other support measures to 29 entities⁵.
6. The 2008 communications were complemented in 2009 by the Communication on the Treatment of Impaired Assets in the Community banking sector ("Impaired Assets Communication")⁶ and by the Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (Restructuring Communication)⁷.
7. The Impaired Assets Communication responded to a growing consensus on the need to tackle the root causes of the crisis in the form of toxic assets on banks' balance sheets. Thus, on 25 February 2009, the Commission set out in this communication how it would assess under State aid rules asset relief measures for financial institutions. The communication is based on the principles of transparency and disclosure, adequate burden-sharing between the State and the beneficiary, and prudent valuation of assets based on their real economic value. Given the complexity surrounding the appropriate valuation of the assets, the Commission decided to call upon technical experts to undertake the valuation in an independent manner. Such experts were chosen under a framework contract following a tender procedure.
8. The Restructuring Communication, issued on 14 August 2009 and dealing with banks which are under obligation to restructure, reflects the Commission's thinking for a future beyond the current crisis. It contains rules for those beneficiaries that were not only in need of short-term rescue aid, but required aid to implement structural changes to their business models. The Communication retains the main principles of the Community Guidelines on rescue and restructuring aid to companies in financial difficulties, but has been adapted to the extraordinary economic circumstances of the financial crisis. The main conditions that need to be complied with are the following: First, banks that are obliged to restructure need to demonstrate their capacity to return to long-term viability without State support. Second, they have to contribute to the restructuring costs (burden-sharing) and they thirdly have to adopt measures to limit competition distortions.
9. The above principles contribute to addressing the issue of moral hazard. In order not to reward the risky behaviour that occurred in the past, the communications require appropriate remuneration of the aid, and impose temporary restrictions on coupon and dividend payments to bond- and shareholders. Tailor-made, case-specific measures to limit the distortions of competitions resulting from the aid, which are predominately determined by the relative/absolute size of the aid and the position of the beneficiary on the relevant markets, are also necessary for the aid to be compatible with the Treaty.

⁵ ING, KBC, Parex Banka, Anglo Irish Bank, Bank of Ireland, Allied Irish Bank, Fortis, Dexia, Nord LB, IKB, Kaupthing Bank Finland, Ethias, SdB, Banco Privado Portugues, Hypo Real Estate, WestLB, Fionia, HSH Nordbank, Hypo Tirol, LBBW, Kaupthing Luxemburg, Caisse d'Epargne/Banque Populaire, Mortgage Bank of Latvia, Northern Rock, Commerzbank, Lloyds Banking Group, BAWAG, Hypo Group Alpe Adria and RBS.

⁶ Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector (OJ C 72, 26.3.2009, p. 1).

⁷ Communication from the Commission "The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules" (OJ C 195, 19.8.2009, p. 9).

10. Between October 2008 and 31 December 2009, the Commission had adopted 73 decisions in relation to 33 schemes and 68 decisions on individual measures to 38 banks. These 141 decisions encompass 21 Member States. Because of the urgency, some of those decisions were taken overnight, to avoid a domino effect and the major collapse of the EU's financial system.
11. To further limit negative spill-over effects of the financial crisis to the real economy, the Commission also amended the Temporary Framework⁸ to provide Member States with additional possibilities to tackle the effects of the credit squeeze on the real economy. The amended Framework⁹ takes into account different levels of collateralisation (in particular for low rating categories) when calculating the permissible guarantee premiums. Furthermore, rules were clarified for guarantees with underlying loans exceeding a maturity of 2 years. In October, the Commission adopted another amendment to the Framework, in order to allow for a separate compatible limited amount of aid of EUR 15.000 for farmers¹⁰. A technical modification of the Framework was introduced in December to further facilitate access to finance especially in Member States with low labour costs by allowing to determine the maximum amount of an investment loan covered by a guarantee either on the basis of the total annual wage bill of the beneficiary or on the basis of the EU27 average labour costs¹¹.
12. By 31 December 2009, the Commission had approved 79 measures in 25 Member States aimed at stabilising companies and jobs in the real economy¹². Out of these measures, 18 related to guarantees, 11 to short-term export credit measures, nine to reduced interest rate loans, six to risk capital measures and five to reduced interest rate loans for green products. A large number of the measures approved (30) related to the granting of up to EUR 500 000 per undertaking.
13. According to the Temporary Framework, Member States had to provide a report to the Commission by 31 October, to give feedback on the implementation of the Framework and on its effectiveness in the reactivation of the bank lending and in supporting companies¹³. To this end, the Commission prepared a questionnaire which was also published on DG Competition's webpage, so as to also obtain comments from interested parties.
14. The Commission prolonged the validity of the current Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, which would have

⁸ Communication from the Commission – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 16, 21.1.2009, p. 1).

⁹ Communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (consolidated version) (OJ C 83, 7.4.2009, p. 1).

¹⁰ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 261, 31.10.2009, p. 2).

¹¹ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 303, 15.12.2009, p. 6).

¹² Excluding temporary measures in the agricultural sector.

¹³ See point 6 of the Communication from the Commission – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 16, 21.1.2009, p. 1).

expired in October¹⁴. Since their adoption in 2004, the Commission has applied these guidelines in numerous cases. Experience has shown that the guidelines provide a sound basis for the control of this type of State aid. The economic crisis has created a difficult and unstable economic situation. To ensure continuity and legal certainty in the treatment of State aid to enterprises in financial difficulty, the Commission extended the validity of the existing guidelines until October 2012.

15. In 2009 the Commission authorized, under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty¹⁵, State aid granted and planned by Poland to Gdansk Shipyard for its restructuring¹⁶. The Commission found compatible the aid already received by the yard since 2004 in the amount of EUR 94 million as well as the planned aid of EUR 35 million. In addition, the Commission approved production guarantees for the yard for a total amount of EUR 122 million. By this decision the Commission finalized an in-depth investigation launched in June 2005¹⁷ following a notification of aid to the yard dating from October 2004, soon after the Polish accession to the EU.
16. In its decision the Commission concluded that the restructuring plan by new private owner of the yard, ISD Polska, proposed a sustainable business strategy based on diversification of the yard's activities and synergies with other companies in the Group of ISD Polska. This restructuring plan allayed the Commission's doubts on the ability of the yard to restore long-term viability. The plan also envisaged a significant private contribution to finance the cost of the restructuring, ensuring that the State support would be limited to the necessary minimum.
17. Finally, the Commission took into account that without the prolonged State support, the yard would long have become insolvent and bankrupt. By keeping the inefficient Gdansk Shipyard afloat, the aid crowded out more efficient competitors, which could have benefited, in terms of increased market shares, from the yard's exit from the market. It was thus important to ensure that far-reaching and meaningful measures limiting the distortion of competition created by the aid were implemented. In its decision the Commission concluded that the planned reductions of the yard's production capacity combined with the committed production cap comply with these requirements without jeopardizing the yard's viability.
18. The Commission completed the implementation of the State Aid Action Plan (SAAP)¹⁸ by adopting guidance papers on training aid¹⁹ and aid to disabled and disadvantaged workers²⁰. The General Block Exemption Regulation (GBER)²¹

¹⁴ Prolongation of Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 156, 9.7.2009, p. 3).

¹⁵ OJ C 244, 1.10.2004, p. 2.

¹⁶ Case C18/2005.

¹⁷ OJ C 220, 8.9.2005, p. 7.

¹⁸ State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009 (COM(2005)107 final, 7.6.2005).

¹⁹ Communication from the Commission - Criteria for the compatibility analysis of training State aid cases subject to individual notification (OJ C 188, 11.8.2009, p. 1).

²⁰ Communication from the Commission - Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification (OJ C 188, 11.8.2009, p. 6).

enables Member States to grant a large number of aid measures, including training aid and aid for the employment of disabled or disadvantaged workers, without prior notification to the Commission. However, as individual aid measures involving large aid amounts can entail a higher risk of distorting competition, notification remains necessary for such measures. The guidance papers on training aid and employment aid set out the criteria for the Commission's assessment of the compatibility of such individually notified aid measures. Guidance is provided on the information required and on the assessment methodology. The criteria are based on the principles of the Commission's SAAP, in particular the balancing test that weighs the positive effects brought about by the aid against the negative impact a potential distortion of competition might entail.

19. The European Commission also adopted a guidance paper setting out criteria for the in-depth assessment of regional aid to large investment projects²². The Regional Aid Guidelines 2007-2013²³ foresee that large investment projects above certain thresholds need to be individually notified to the Commission. For such projects where the aid beneficiary has a market share of more than 25 % or where the production capacity created by the project exceeds 5 % of the market (if the market concerned is considered as underperforming), the Commission has to open a formal investigation. Regional aid to such large investment projects may carry a greater risk of distorting competition and thus requires a detailed compatibility assessment. The criteria for the in-depth assessment of regional aid to large investment projects, which are based on the principles of the SAAP, and in particular the balancing test, detail how the Commission shall evaluate the positive and negative effects of such aid. Member States have to provide information on the project's contribution to regional development as well as the appropriateness, proportionality and incentive effect of the aid. Negative effects include the crowding-out of private investment or effects on trade such as displacement of investments. The Dell Poland case (C 46/2008) was the first case where the Commission conducted the type of assessment detailed in the guidance paper. The Commission concluded that the investment project by Dell to set up a manufacturing plant in Łódź would significantly contribute to regional development and that these benefits outweighed any potential negative effects on competition and loss of jobs elsewhere.
20. A public consultation was launched on "Common principles for an Economic Assessment of the Compatibility of State aid under Article 87(3) EC". The document sets out the general framework underlying the economic analysis of State aid. It aims at providing coherence in the application of State aid rules. It clarifies the overall principles of State aid compatibility analysis which are (and have already been) translated into more specific rules for particular kinds of aid.
21. In the field of Services of General Economic Interest (SGEI), the Commission responded to 16 questions by citizens, stakeholders and public administrations in the

²¹ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 EC (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

²² Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects (OJ C 223, 16.9.2009, p. 3).

²³ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

framework of the Interactive Information Service²⁴. These answers further clarified several aspects of the application of the SGEI Package, including the notion and the content of the act of entrustment, the margin of discretion Member States have in the organisation of SGEI, but also the general conditions of application of State aid rules and the notion of SGEI itself.

22. The autumn 2009 State aid Scoreboard²⁵ shows that the overall aid volume rose in 2008 from around 0.5% of GDP to 2.2% of GDP or EUR 279.6 billion due to the financial and economic crisis. Crisis-related aid represented roughly 1.7% or EUR 212.2 billion and related to aid to financial institutions only²⁶. Aid to the real economy under the Temporary Framework started to be implemented by Member States only in 2009. Crisis measures aside, total aid amounted in 2008 to 0.5% of GDP or EUR 67.4 billion, a level similar to 2007 and the years before. Aid was mainly directed towards horizontal objectives of common interest (on average 88%), of which regional aid, research and development and environmental aid represented around two-thirds whereas rescue and restructuring aid fell. Although figures for 2009 are not yet available, we do not expect the volume and share of non-financial aid to dramatically change in 2009.
23. Reform introduced by the SAAP continued to bear fruit. Aid granted through block exemption, in particular the GBER, rose significantly in terms of the aid volume and represented EUR 10 billion or 19% of total aid in 2008, compared to 2007 (EUR 6.3 billion or 13%) and 2006 (EUR 3 billion or 6% of total aid). Another 76% of total aid was granted through schemes and only 5% represent individual aid.
24. In the field of State aid in the electronic communications sector, the Commission encourages State aid measures that are aimed at providing equitable broadband coverage at affordable prices for European citizens. In 2009, the Commission continued to address in its decisions two major trends of public intervention on the broadband market: support for affordable basic broadband services in areas where such services do not exist and public intervention in support of very high speed broadband networks ("next generation" networks).
25. On the basis of its decisional practice, in September the Commission adopted Guidelines on the application of State aid rules to public funding for the rapid deployment of broadband networks, which also addressed public funding to the deployment of so-called next generation access broadband networks²⁷. In 45 decisions the Commission had clarified the conditions under which such support would be compatible with the State aid provisions (inter alia, detailed mapping showing the need for broadband coverage, transparent tendering process, technology neutrality of the aid, open wholesale access). These conditions are incorporated in the Guidelines and will equally apply to next generation access support.

²⁴ http://ec.europa.eu/services_general_interest/registration/form_en.html

²⁵ COM(2009) 661 final, 7.12.2009.

²⁶ The maximum volume of Commission approved measures set up by Member States in 2008 to stabilise the financial markets amounted to € 3361 billion. According to the annual reports submitted by Member States, Member States implemented measures amounting to a nominal value of € 958 billion. According to first estimates, the aid element of the support measures put in place in 2008 – as proxy for the benefits passed by the State to the benefitting financial institutions – amounted to € 212.2 billion.

²⁷ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235, 30.9.2009, p. 7.

26. In the media sector, the Commission adopted on 2 July a revised Broadcasting Communication which aims at showing the specific mechanisms on which the Commission's assessment of publicly funded new media services²⁸ is based (see section II.E.2.4). The new framework provides more flexibility for the financing of public service broadcasters and at the same time clarifies the requirements for an effective control of the public service mission at the national level. It adapts the framework to the fast changing market environment while maintaining the core principles of the Commission's policy based on the Amsterdam Protocol (see section II.E.2.4) and the jurisprudence of the European Court of Justice²⁹. A center piece of the new Communication is the prior evaluation of new audiovisual services at national level. Publicly funded audiovisual services must perform their remits in an economically neutral way, i.e. satisfy the social, democratic and cultural needs of a society without distorting cross border trade and competition contrary to the common interest.
27. In January, the Commission decided to extend the validity of the State aid assessment criteria of the 2001 Cinema Communication³⁰ until 31 December 2012³¹. Under the current criteria, State support for film production can be exempted under certain conditions, in particular where that support concerns cultural films, while respecting certain thresholds regarding territorial requirements and aid intensity. A number of different trends have emerged since the 2001 Cinema Communication which will require some refinement of these criteria and a possible extension of the scope of application in due course. These trends include support for aspects other than film and TV production (such as film distribution and digital projection), as well as competition among some Member States to use State aid to attract inward investment from large-scale, mainly US, film production companies.

1.1. State aid control – the Simplification Package

28. Following the SAAP, the Commission adopted a Simplification Package to modernise and simplify State aid procedures. This Package (in force since 1 September 2009) comprises a Best Practice Code³² and a Notice on a Simplified Procedure³³, both of which aim at improving the effectiveness, transparency and predictability of State aid procedures, within the existing legal context of the Procedural Regulation³⁴.
29. The Simplified Procedure aims at improving the Commission's treatment of straightforward cases, such as those clearly in line with existing Guidelines or

²⁸ Communication on the application of State aid rules to public service broadcasting of 2 July 2009, OJ C 257, 27.10.2009.

²⁹ Judgment Altmark Trans, C-280/00; Judgment Chronopost, 83/01P.

³⁰ Communication on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 43, 16.2.2002, p. 6.

³¹ Communication concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001, OJ C 31, 7.2.2009, p. 1.

³² Code of Best Practice for the conduct of State aid control procedures (OJ C 136, 16.6.2009, pp. 13-20).

³³ Notice from the Commission on a simplified procedure for treatment of certain types of State aid (OJ C 136, 16.6.2009, pp. 3-12).

³⁴ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

established Commission decision-making practice. The Commission wants to ensure that clearly compatible aid measures are approved within one month from a complete notification by a Member State. This procedure requires important adaptations to the Commission's and Member States' working methods. Arrangements to this effect (templates, standard decisions etc.) have been put in place. A transparency provision also ensures that third parties can provide input.

30. The Best Practices Code details how all other State aid procedures should be carried out in practice. It includes a certain number of voluntary arrangements between the Commission and Member States to achieve more streamlined and predictable procedures at each step of a State aid investigation. Consequently, the Commission should be able to deliver State aid decisions within more business relevant deadlines.

1.2. Recovery policy

31. When a negative decision is taken in cases of unlawful State aid, the Commission shall decide that the Member State must take all necessary measures to recover the aid from the beneficiary. Recovery has not been conceived as a penalty, but as a means to restore the situation previous to the granting of the illegal and unlawful aid. This objective is obtained once the aid (plus compound interests) is repaid by the recipient who enjoyed an advantage over its competitors on the market.

32. A Member State is deemed to comply with the recovery decision when the aid (plus compound interests) has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market conditions. Where the Member State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Commission may initiate infringement proceedings:

- The Commission may refer the matter directly to the Court of Justice (CoJ) in accordance with Article 108(2) TFEU.
- If the Member State concerned has not complied with a judgment of the CoJ, the Commission may pursue the matter in accordance with Article 260(2) TFEU. If the CoJ recognises that the Member State did not comply with its judgment, the CoJ may impose the payment of penalties on the Member State.

33. It is essential for the credibility of the Commission's State aid policy that recovery decisions are enforced effectively and immediately. However, enforcement of the recovery orders by the Member State is not always easy due to the obstacles existing in the different national legal and judicial systems. In 2007, the Commission therefore adopted a Notice on the implementation of decisions ordering Member States to recover unlawful and incompatible State aid (Recovery Notice)³⁵ in order to clarify the applicable rules and give Member States concrete guidance on how to achieve a more immediate and effective execution of recovery decisions. So far, the adopted measures have proven to be successful.

³⁵ Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, pp. 4-17).

34. By 31 December, the amount of illegal and incompatible aid recovered had further increased from EUR 2.3 billion in December 2004 to EUR 10.4 billion. The percentage of illegal and incompatible aid still to be recovered has evolved accordingly (from 75% at the end of 2004 to 12% at 31 December 2009). The share of the total amount recovered has however slightly decreased between 2008 and 2009 (from 90.9% to 88%), due to seven new recovery decisions adopted in 2009 and high amounts of aid identified³⁶ in several 2008 decisions. In order to ensure better enforcement of its decisions, the Commission initiated actions under Article 108(2) TFEU³⁷ in five cases, and an action under Article 260(2) TFEU³⁸ in one case, thus leading to 27 cases under litigation. DG Competition currently has 44 pending active recovery cases.

	2000 –2009
Decisions adopted	140
Cases closed	85
Aid amount known (in mio EUR)	11 806,5
Amounts recovered (in mio EUR)	10 391,8
Recovery interests	2 336,5
Amounts outstanding	1 414,6
% recovered	88%

1.3. State aid enforcement by national courts

35. The enforcement of the State aid rules by the Commission is, for the time being, the most important system of State aid review in the EU. National courts could nevertheless play a important role in the State aid field, since they can offer possible complainants effective legal protection "close to home", including remedies unavailable at Commission level. According to a recently updated study³⁹, more and more cases are brought before national courts, covering an increasing variety of issues.

³⁶ This is due to the fact that the Commission cannot always quantify the aid amount to be recovered (in such cases, Commission decisions include information enabling the Member State to determine the aid amount).

³⁷ Actions under Article 108(2) TFEU are aimed at condemning a Member State for non-implementation of a State aid recovery decision.

³⁸ Actions under Article 260(2) TFEU are infringement actions aimed at condemning a Member State for non-implementation of a Court judgment, and may include the payment of fines (periodic penalties and/or lump sums).

³⁹ 2009 Study on the enforcement of State aid law at national level. See: http://ec.europa.eu/competition/court/state_aid_info.html

36. The potential of private State aid enforcement underlies a new Notice on State aid Enforcement by National Courts⁴⁰ issued by the Commission in April. This new Notice has two key objectives:
- To provide more detailed guidance to national courts and to potential claimants on all aspects of private State aid enforcement. This guidance is based on the existing CoJ case law on the role of national courts in the State aid field. The guidance covers issues such as the protection of individual rights, the recovery of illegal aid, interim relief and damages actions.
 - To offer national courts more practical and user-friendly Commission support in their daily work. National judges would thus be able to ask the Commission for information in its possession and/or for its opinion on the application of the State aid rules. A number of such requests have already been received following the publication of the Notice.
37. The Commission also undertook additional advocacy and public awareness efforts to ensure wide-spread use of the Notice, in particular through web pages dedicated to national judges⁴¹.

1.4. Monitoring of State aid measures

38. To ensure effective enforcement of the State aid rules, in which an increasing number of aid measures are no longer subject to the notification obligation (–see GBER), the Commission has stepped up ex post monitoring since 2006.
39. Since then, the Commission has covered an important part of the main substantive types of aid: the SME block exemption regulation (hereinafter, "BER"), training BER, employment BER, regional BER, the Research, Development and Innovation (R&D&I) Framework, the environmental guidelines and the rescue and restructuring guidelines. The Commission has also addressed aid measures adopted by 24 of the 27 Member States of the Community, thereby ensuring a balanced geographical coverage. Monitoring takes place both at the level of the general legislation outlining the conditions for the scheme and at the level of important individual decisions implementing such schemes (typically cases above EUR 500 000).
40. The analysis of the results of the first exercises shows that, overall, this part of the existing State aid architecture (schemes and BERs) functions in a satisfactory manner. In a minority of cases substantive problems or procedural issues (such as transparency, reporting, speed and quality of answers) were identified. The cases in which no appropriate solution was yet identified are currently still being investigated (2 in 2006, 2 in 2007, at this stage 2 in 2008). Finally, it has to be noted that all Member States have cooperated with the Commission, albeit many have submitted the requested information requested with considerable delay. The CFI also delivered a judgment⁴² which confirms the legality of the monitoring exercises.

⁴⁰ OJ C 85, 9.4.2009, p. 1.

⁴¹ http://ec.europa.eu/competition/court/state_aid.html

⁴² Judgment in Case T-376/07, *Germany v Commission*, 25.11.2009.

1.5. Horizontal State aid

41. In 2009, the Commission approved 29 aid schemes and adopted 4 non aid decisions on the basis of the Community Framework for research and development and innovation⁴³; 19 out of these measures were pure R&D schemes, 2 were innovation-oriented schemes and 12 were mixed, pursuing both R&D and innovation objectives. In addition, and following an in-depth economic assessment, the Commission has decided not to raise objections on 9 individually notifiable aids to large R&D projects. Furthermore, it has monitored information submitted on aids to 73 other R&D projects, which exceed EUR 3 million although without falling under the duty for individual notification.
42. As to State aid granted in favour of R&D projects under the GBER⁴⁴, there were 51 schemes providing aid for fundamental research, 186 for industrial research and 181 for experimental development. At the same time, the GBER was also used by Member States for measures relating to innovation, 57 of which referred to industrial property rights for SMEs, 26 to young innovative enterprises, 47 to innovation advisory and support services, and 23 to the loan of highly qualified personnel.
43. As far as environmental aid is concerned, the Commission approved 34 aid schemes and four individual applications, most of them under the Environmental Aid Guidelines⁴⁵. Furthermore, the Commission cleared one case as not constituting State aid. Moreover, following a formal investigation procedure, the Commission took two negative decisions, one conditional decision as well as a positive decision. At the same time the Commission decided to open formal investigations in four other cases related to environmental aid.
44. In the area of risk capital financing for SMEs, and in addition to the six aid schemes authorised under the Temporary Framework, the Commission approved 25 measures under the Risk capital guidelines⁴⁶; 16 of these complied with the safe harbour provisions allowing for a light assessment. The Commission has conducted a detailed assessment of the compatibility of the measures in seven other cases, and considered that they did not involve State aid in the remaining two cases. Furthermore, 13 additional aid schemes have been implemented in 2009 under the GBER, which Member States also start to use for risk capital purposes.
45. In total the Commission received some 971 aid measures which have been implemented in 2009 under the GBER. Apart from the above-mentioned objectives, these exempted aid measures covered also the fields of employment aid, training aid, aid for environmental purposes⁴⁷ and regional aid.
46. In the field of regional aid, in 2009 the Commission approved 45 schemes, mostly on the basis of the Guidelines on national regional aid for 2007-2013⁴⁸, as well as 12 ad

⁴³ OJ C 323, 30.12.2006, p. 1.

⁴⁴ OJ L 214, 9.8.2008, p. 3.

⁴⁵ OJ C 82, 1.4.2008, p. 1.

⁴⁶ OJ C 194, 18.8.2006, p. 2.

⁴⁷ 124 aid measures; [more information will be available in 2010 on the basis of the national annual reports for 2009](#).

⁴⁸ OJ C 54, 4.3.2006.

hoc aid measures in favour of single enterprises for investments in areas under the Regional Aid maps 2007-2013⁴⁹.

47. On the basis of the same Guidelines on national regional aid for 2007-2013, the Commission approved State aid to nine large investment projects⁵⁰ and decided to initiate the formal investigation procedure regarding two others⁵¹ as well as one *ad hoc* regional aid case⁵². The Commission also closed the formal investigation procedure for two other large investment projects with a positive decision⁵³.
48. Under the Temporary Framework, in 2009 the Commission adopted 30 decisions approving limited amounts of compatible aid schemes, 15 decisions approving measures for State aid in the form of guarantee and 9 decisions approving measures in the form of subsidized interest rates.

1.6. Coal

49. Following a sharp fall during the last quarter of 2008, mainly due to the economic crisis, coal prices are now returning to the levels registered at the end of 2007 (around EUR 56 per tonne of coal equivalent). Negotiated prices for 2010 are expected to be low in this range with an increasing trend. Recent forecasts until 2020 foresee a constant rise of coal prices which should, however, remain below EUR 100 per tonne of coal equivalent.
50. During 2009 the Commission approved aid to the coal sector in Germany⁵⁴, Slovakia⁵⁵ and Spain⁵⁶. These aid schemes are intended to support access to coal reserves and to restructure the coal sector in these countries.
51. In view of the forthcoming expiry of Regulation (EC) No1407/2002⁵⁷ (on 31 December 2010), the Commission carried out a public consultation on the future policy options with respect to the aid to the coal industry⁵⁸.

1.7. State aid in the agricultural sector

52. The Commission assesses State aid granted to the agriculture and to the forestry sector on the basis of the Guidelines for State aid in the agriculture and forestry

⁴⁹ Decisions to be found at: http://ec.europa.eu/competition/state_aid/regional_aid/regional_aid.html
⁵⁰ In the energy sector: Case N538/2008 Ersol Thin Film; Case N453/2008 Sunfilm AG; Case N539/2008 ASI Industries/Ersol Solar Energy; Case N180/2009 EnPlus Centrale Termoelettrica di San Severo. In the automotive sector: Case N473/2008 Ford España; Case N671/2008 Aid to Mercedes Benz Manufacturing Hungary; Case N635/2008 Fiat Sicily; Case N674/2008 Volkswagen Slovakia. In the paper industry: Case N203/2008 Hamburger Spremberg GmbH.

⁵¹ Case N113/2009 Aid to Audi Hungaria Motor Ltd and Case N588/2008 Petróleos de Portugal – Petrogal S.A.

⁵² Case N357/2008 Fri-el Acerra s.r.l.

⁵³ Case C21/2008 Sovello Ag (formerly EverQ) and Case N46/2008 Aid to Dell Poland.

⁵⁴ Case N563/2008 *Aid for German hard coal in 2009* (OJ C 199, 25.8.2009, p. 1).

⁵⁵ Case N347/2009 – Slovak Republic, Baňa Dolina a.s.

⁵⁶ Case NN20/2009, ex N647/2008 *Aid for the coal sector in 2008-2010* (OJ C 234, 29.9.2009, p. 5).

⁵⁷ OJ L 205, 2.8.2002, p. 1.

⁵⁸ http://ec.europa.eu/energy/coal/consultations/2009_07_15_en.htm

sector 2007 to 2013⁵⁹. In 2009, the Commission registered 139 new State aid notifications and adopted 146 decisions. State aid decisions adopted in relation to four separate issues merit a closer look.

53. First, in the aftermath of the dioxin contamination of pigs, cattle and pigmeat and beef products, first discovered in Ireland in December 2008, the Commission adopted three State aid schemes⁶⁰ authorising Ireland and the United Kingdom (region of Northern Ireland) to grant compensation to processors and primary producers who suffered losses as a result of the dioxin incident. In addition to the compensation for the losses, support would be granted towards the transport, rendering and slaughtering costs in order to ensure the safe destruction of the eligible products and animals.
54. Second, on 28 January the Commission adopted a final negative decision with recovery concerning the contingency plans in the French fruit and vegetable sector designed to prevent or mitigate the potential effects of a surplus of French fruit and vegetables on the Community market⁶¹. It was found that the sums allocated for financing contingency plans between 1992 and 2002 (between EUR 14 and 46 million a year), constituted operating aid, likely to disturb seriously the operation of the common organisation of the market in fruit and vegetables. On 8 April France filed an appeal⁶² against the negative decision of the Commission seeking the annulment of the decision, on the grounds that it does not constitute State aid.
55. Third, on 3 June the Commission approved an aid scheme⁶³ designed to compensate for the damages caused in North-West France by the passage of storm Klaus on 24 January 2009. This climatic phenomenon was recognised by the Government as “natural disaster”. The estimated budget of the scheme was approximately EUR 791 million.
56. Finally, the Commission approved a final negative decision with recovery concerning an Italian aid scheme providing for exemptions from excises duties applicable to diesel used for heating greenhouses between October 2000 and the end of 2004⁶⁴. After having examined all data received from Italy, the Commission noticed that the aids could not be justified in the light of the Community guidelines concerning State aid in the agriculture and forestry sector 2007-2013 (because they were not granted without differentiation between operators), nor in the light of the Community Guidelines on State aid for environmental protection from 1994 and

⁵⁹ Community guidelines for State aid in the agriculture and forestry sector 2007-2013 (OJ C 319, 27.12.2006, p. 1).

⁶⁰ Case N643/2008 *Special measures relating to meat products of animal origin from pigs following a dioxin contamination in Ireland* (OJ C 36, 13.2.2009, p. 1), case N147/2009 *Pigmeat Processors hardship assistance (Northern Ireland)* (OJ C 147, 27.6.2009, p. 5) and case NN44/2009 *Special measures relating to a dioxin contamination in Ireland*.

⁶¹ Case C29/2005 *'Contingency plans' in the fruit and vegetable sector implemented by France* (OJ L 127, 26.5.2009, p. 1).

⁶² Case T-139/09 *France v Commission* (OJ C 141, 20.6.2009, p. 49).

⁶³ Case N227/2009 *Régime d'aides destiné à secourir les forêts de Sud-Ouest de la France sinistrées par la tempête Klaus du 24 janvier 2009* (OJ C 189, 12.8.2009, p. 4).

⁶⁴ Joint State aid cases C6/2004 and C5/2005 *Exonération d'accises sur les carburants agricoles* (OJ L 327, 12.12.2009, p. 6).

2001, applicable during the above-mentioned period. Italy challenged the Commission's decision before the CFI.

57. In the context of the exceptional and transitory financing problems linked to the financial crisis and its impact on the agricultural sector, the Commission adopted on 28 November an amendment to the Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, enabling the Member States to grant compatible limited amount of aid of EUR 15 000 for undertakings active in the primary production of agricultural products⁶⁵. This amount can be granted once per undertaking until 31 December 2010. Any agricultural *de-minimis* aid received since the beginning of 2008 by individual undertakings in compliance with Commission Regulation (EC) No 1535/2007⁶⁶ has to be deducted from this amount. A scheme put in place under the newly introduced possibility will have to be open to all primary producers and it will have to complement a general scheme put in place by the Member State concerned.

2. SELECTED COURT CASES

58. In 2009, the Community Courts handed down several judgments which had implications for State aid control in general and for the areas of definition of state aid, compatibility of aid, procedural issues and recovery in particular. A summary of the main judgments is set out below.

2.1. Notion of aid

59. In case *Iride SpA and Iride Energia SpA v Commission*⁶⁷, the CFI upheld a Commission decision declaring that the aid to AEM Torino for stranded costs was compatible subject to the effective recovery of the earlier illegal aid granted to this company. AEM Torino claimed that the stranded costs compensation did not constitute aid. The CFI followed the Commission confirming in particular the fulfilment of the **State resources and imputability** criteria. The CFI considered that the resources at stake were collected from private persons but transferred to a public Fund under constant control of the State. Furthermore, the Fund had no legal personality distinct from that of the State, who should be regarded as the owner of the funds.
60. The CFI also confirmed the Commission's position stating that the beneficiary received an economic advantage which it would not have obtained under normal market conditions. In fact, the alteration of the legislative framework in the electricity sector which occurred as a result of Directive 96/92/EC⁶⁸ has to be considered as part of normal market conditions. When AEM Torino made the

⁶⁵ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 261, 31.12.2009, p. 2).

⁶⁶ Commission Regulation (EC) No 1535/2007 of 21 December 2007 on the application of Articles 87 and 88 EC to *de minimis* aid in the sector of agricultural production (OJ L 337, 21.12.2007, p. 35).

⁶⁷ Case T-25/07 – *Iride SpA and Iride Energia SpA v Commission*.

⁶⁸ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, pp. 20-29.

investments that gave rise to the stranded costs in question, it was taking the normal risks related to possible legislative amendments.

61. As to the **notion of selectivity**, the CFI ruled in case *Italian Republic v Commission*⁶⁹ that the tax advantages granted by the Italian authorities to newly listed companies were selective, since they were available only to undertakings newly listed on regulated markets and having obtained the listing during the brief period for which the aid scheme was applicable. Furthermore, the measure was not justified by the nature and the overall scheme of the Italian tax system and in any case Italy did not demonstrate that it was justified by the alleged objective, i.e. to encourage listing on the stock exchange.
62. In joined cases *Basque tax credits*⁷⁰, the CFI upheld the negative Commission's decisions on the tax reductions granted by the Basque authorities. The Court confirmed that the measures were selective and restricted to undertakings which have at their disposal significant financial resources. The Court also noted the discretionary powers of the Basque authorities relating to the amount of the tax credit and the scope of the eligible investment. The CFI also found that the measures were not justified by the nature and the internal logic of the tax system as to restrict entitlement to aid to a limited category of businesses is not symptomatic of a general intention to encourage investment and, in any case, general objectives of economic policy are extraneous to the tax system.
63. The CFI upheld in joined cases *Italian Republic v Commission*⁷¹ the Commission's decision stating that a three-year income tax exemption and the possibility to contract reduced-interest loans with Cassa Depositi e Prestiti granted to utilities companies with a majority public shareholding, must be considered as State aid. These measures had the effect of strengthening the competitive position of the undertakings concerned vis-à-vis that of privately owned operators, Italian or other, and conferring a selective **advantage**.
64. In its judgment of 15 December 2009⁷², the General Court annulled the Commission's decision declaring aid granted in favour of EDF incompatible with the common market as the Commission failed to assess whether the French State acted according to the private investor principle.
65. The case *AceaElectrabel v Commission*⁷³ provides interesting clarifications on the **identification of the aid beneficiary and the notion of economic entity**. The CFI underlined that the Commission has in the context of State aid broad discretionary powers to determine if an undertaking which forms part of a group should be considered as a single economic entity or a legally and financially autonomous unit. It upheld the Commission's conclusion that, based on a number of elements, the

⁶⁹ Case T-211/05 – Italian Republic v Commission.

⁷⁰ Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01; see similarly T-30/01 to T-32/01; T-86/02 to T-88/02; T-230/01 to 232/01; T-267/01 to 269/01.

⁷¹ Case T-222/04 – Italian Republic v Commission, T-189/03 – ASM Brescia SpA v Commission, T-309/02 – Acegas-APS SpA v Commission, T-301/02 – AEM SpA v Commission, T-300/02 – Azienda Mediterranea Gas e Acqua SpA (AMGA) v Commission, T-297/02 – ACEA SpA v Commission, T-292/02 – Confederazione dei Servizi v Commission.

⁷² T-156/04 – EDF v Commission.

⁷³ Case T-303/05 – AceaElectrabel v Commission.

“old” and the “new” beneficiary constituted a single economic entity, for the purpose of applying the Deggendorf jurisprudence (see paragraph 69 below).

66. In the same case, the CFI also confirmed that aid in a sector which is subject to liberalisation at EU level can lead by itself to a real or potential **impact on competition and trade**. The CFI thereby rejected the argument that heating through a municipal heating network is not in competition with any other products.
67. The ECJ confirmed in case *Commission v Italy and Wam*⁷⁴ the judgment of the CFI which had annulled the Commission’s decision for reasons of insufficient motivation on the existence of aid. The ECJ stated that in the specific circumstances of the case (small amounts of aid for market penetration targeting specifically third countries), the Commission did not properly motivate how the aid affected competition and trade between Member States. However, it confirmed the traditional EC jurisprudence concerning the meaning of these two notions.

2.2. Compatibility assessment

68. In case *FAB v Commission*⁷⁵, the CFI endorsed the Commission’s policy regarding the funding of digitisation of broadcasting. The Court confirmed that the Commission was entitled to assess compatibility according to the criterion of market failure and that the Commission had not exceeded its discretion under Article 87(3)(c) EC (current Article 107(3)(c) TFEU) when finding that the aid was incompatible. In fact, Germany was not able to demonstrate that the financial support granted for terrestrial digital television was an appropriate and necessary means to enable the switch-over from analogue to digital broadcasting.
69. In case *Iride SpA and Iride Energia Spa v Commission*⁷⁶, as well as in case *AceaElectrabel v Commission*⁷⁷ the CFI upheld the Commission's application of the Deggendorf case law. It confirmed that in its compatibility assessment the Commission has to take account of all relevant factors, including earlier non-recovered aid, regardless of whether the earlier aid was granted as individual aid or under an incompatible aid scheme.
70. On 9 September the CFI ruled on Case T-369/06 *Holland Malt*⁷⁸, dismissing the four grounds of appeal raised by Holland Malt. The judgment confirmed the factual assessment of the Commission on the existence of overcapacity and the lack of normal market outlets. In addition, the Court stated that a Member State has to provide all information necessary to enable the Commission to verify that the conditions of Article 87(3)(c) EC are satisfied and that the Commission is under no obligation to consider on its own motion and on the basis of prediction, what information might have been submitted to it.

⁷⁴ Case C-494/06 – *Commission v Italy and Wam*.

⁷⁵ Joined cases T-8/06 – *FAB Fernsehen aus Berlin GmbH v Commission*, T-21/06 – *Germany v Commission*, T-24/06 – *MABB v Commission*.

⁷⁶ Case T-25/07 – *Iride SpA and Iride Energia Spa v Commission*.

⁷⁷ Case T-303/05 – *AceaElectrabel v Commission*.

⁷⁸ Case T-369/06 *Holland Malt v Commission* [2009] (OJ C 256, 24.10.2009, p. 23).

2.3. Procedural issues

71. In case *FAB v Commission*, the CFI found that the application of the Media Authority (MABB, the public body granting the aid) was not admissible. The Court considered that MABB was not independent but part of the State, because it was under budgetary and legal supervision. In addition, its resources were State resources because they came from charges imposed by the public authorities and non-used resources went back to the Länder.
72. The ECJ dismissed the Commission's appeal to set aside the judgment of the CFI, which had partially annulled the Commission's decision of 9 April 2002 because the Commission had not sufficiently motivated why it ordered to recover jointly and severally from *SKL-M and MTU Friedrichshafen GmbH (MTU)*⁷⁹ the amount of EUR 2.71 million. The Court clarified that, although in case of lack of cooperation the Commission can decide on the basis of the information available, it cannot presume solely on the basis of a negative presumption, based on a lack of information, that an undertaking has benefited from aid. It must ensure that the information at its disposal, even if incomplete and fragmented, constitutes a sufficient basis on which to make such conclusion, in particular where the Commission orders, as in the present case, the recovery of the aid.
73. In case *NDSH AB v Commission*⁸⁰, the CFI clarified that, when the examination of a complaint does not reveal the existence of illegal aid, the Commission does not need to take a decision. This is in particular the case where the complaint concerns existing aid. In such a case, it is sufficient to inform the complainant by an informal communication under Article 20(2) of Regulation 659/1999 EC⁸¹, which does not constitute an actionable measure for the purposes of Article 230 of the EC Treaty.
74. In the *Commission v Koninklijke FrieslandCampina NV*⁸² case, the ECJ set aside the judgment of the CFI in case T-348/03, which partially annulled the Commission's negative decision regarding the Dutch tax scheme for international financial activities insofar as it excluded transitional periods for certain beneficiaries and referred the case back to the CFI. The ECJ confirmed the CFI assessment as regards the admissibility of an action by a potential beneficiary of a scheme. However, the Court considered that the CFI erred in law by accepting the existence of legitimate expectations also for companies which did not benefit from the scheme but merely submitted an application when the Commission opened the investigation procedure on the compatibility of the scheme. The Court also stated that the CFI erred in law by finding the Commission to have breached the equal treatment principle by allowing transitional periods only for companies already accepted by the scheme and not for those with a pending application at the date of the opening.
75. Finally, the CFI confirmed in case *Germany v Commission*⁸³ the Commission's powers to request additional information on block exempted schemes for monitoring

⁷⁹ Case C-520/07 P – Commission v MTU Friedrichshafen GmbH.

⁸⁰ Case T-152/06 – NDSH Nya Destination Stockholm Hotell & Teaterpaket AB v Commission.

⁸¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, p. 1).

⁸² Case C-519 P/2007 – Commission v Koninklijke FrieslandCampina NV.

⁸³ Case T-376/07 – Germany v Commission.

purposes. It thus rejected Germany's argument that information could only be requested where the Commission had evidence raising doubts about compliance.

2.4. Recovery of aid

76. In *Italian Republic v Commission*⁸⁴, the CFI upheld the Commission's negative decision with recovery and confirmed that the Commission is not required to analyse the individual measures granted under an aid scheme.
77. In *Commission v Hellenic Republic*⁸⁵, the Court for the first time imposed penalties in a State aid case for non compliance with a previous 2005 judgment, which confirmed the non implementation of a recovery decision. Greece was ordered to pay to the Commission EUR 16 000 for each day of delay to comply with the judgment, as well as a lump sum of EUR 2 million. These amounts were based on the duration of the infringement, its degree of seriousness and the Member State's ability to pay.

B – ANTITRUST – ARTICLES 101, 102 AND 106 TFEU

1. SHAPING AND APPLYING THE RULES

1.1. Enforcement rules

78. On 29 April, the Commission adopted its Report on the functioning of Council Regulation 1/2003⁸⁶. The Regulation introduced the most far-reaching reform of the rules for enforcing the EU competition rules in more than 40 years. It abolished the centralised notification and authorisation system and replaced it by a system based on the direct application of Articles 101 and 102 TFEU. The Regulation also granted the Commission enhanced investigation and decision-making powers and empowered national competition authorities (NCAs) and courts to apply the EU antitrust provisions in their entirety, including with regard to agreements the assessment of the conditions under Article 101(3) TFEU.
79. In its Report the Commission takes stock of how the modernisation of EU antitrust enforcement rules has worked since the entry into force of the Regulation on 1 May 2004. It describes the experience in all major areas covered by the Regulation and evaluates the progress made by introducing new instruments and working methods.
80. The main conclusion of the Report is that Regulation 1/2003 has contributed to stronger enforcement of antitrust rules within the EU. The change from the centralised notification system to one of direct application has worked very smoothly in practice without any major difficulties with the direct application of Article 101(3) TFEU, which has been widely welcomed by stakeholders.
81. The Report shows that EU competition rules have to a large extent become the 'law of the land' for the whole of the EU. This is the result of Article 3(1) of the Regulation which obliges NCAs and courts to apply Articles 101 and 102 TFEU to

⁸⁴ Case T-222/04 – *Italian Republic v Commission*.

⁸⁵ Case C-369/07 – *Commission v Hellenic Republic*.

⁸⁶ COM(2009)206 final, accompanied by a Staff Working Paper, SEC(2009)574 final.

all cases within their scope. It has led to a very significant increase in the application of the EU antitrust provisions. At the end of March 2009 more than 1000 cases had been pursued by both the Commission and NCAs in a wide variety of sectors, making a single legal standard a reality on a very large scale.

82. The system change also supported a shift in the Commission's priorities to areas where it can make an important contribution to the enforcement of Articles 101 and 102 TFEU, such as cartels and other serious infringements, and led to an increase in the number of enforcement decisions adopted. It has allowed the Commission to become more proactive, tackling weaknesses in the competitiveness of key sectors of the economy in a focused way by using sector inquiries as a major investigative tool. Accordingly, the new enforcement system is more focused on giving general guidance that can be useful to numerous undertakings and other enforcers instead of offering comfort to individual agreements.
83. The Regulation entrusts NCAs with a key role in the effective and consistent enforcement of the EC antitrust rules. The Commission had been informed by the end of the reporting period of more than 300 envisaged decisions by the national authorities on the basis of Article 11(4) of the Regulation and none of these cases resulted in the Commission relieving a national authority of its competence for reasons of coherent application of the EU antitrust rules. The Report confirms that cooperation within the European Competition Network (ECN) has successfully contributed towards the aim of ensuring consistency. The ECN has proven to be an innovative model of governance for the implementation of EU law by the Commission and Member State authorities and a successful forum for discussing both specific cases and general policy issues. The flexible and pragmatic arrangements on work sharing and cooperation within the ECN introduced by the Regulation have worked well over the past five years.
84. National courts are also empowered by the Regulation to apply both Article 101 and 102 TFEU in full. They have used this power in a number of sectors and have tackled a range of issues. By the time of the report, the Commission had issued 18 opinions on questions concerning the application of the EU antitrust rules. In addition, both the Commission and the NCAs have submitted observations as *amicus curiae* under Article 15(3) of the Regulation. The Commission has used this power on two occasions during the reporting period when it considered that issues arose as to the coherent application of the EU competition rules.
85. Finally, the Report highlights a number of aspects which merit further evaluation, in view of enabling the Commission to assess, in a next stage, whether further policy initiatives are deemed appropriate. The Report first mentions certain specific issues relating to the Commission's enforcement powers including, for example, a perceived lack of clarity in Article 22(2) of the Regulation, which provides the Commission with the power to request NCAs to carry out inspections on its behalf. Second, the Report identifies the persisting substantive divergence of national laws in the area of unilateral conduct. The convergence rule contained in Article 3(2) of the Regulation does not cover unilateral conduct and, as a result, Member States remain free to enact and maintain stricter national rules. This divergence was criticised by the business and legal community and the Report foresees an assessment of the extent of the problems caused by this divergence and of the need for action at European level.

86. Third, the Regulation does not formally regulate or harmonise neither the procedural divergence nor the variety of sanctions which still exist when NCAs are applying Articles 101 and 102 TFEU. Although such differences do not impede the functioning of Regulation 1/2003 as such and many Member States have voluntarily aligned elements of their procedures with Commission procedures, there may be potential for further enhancing effective enforcement and cooperation. Fourth, in response to stakeholders requests for greater recourse by the Commission to *amicus curiae* interventions the Report calls for a reflection on how to further develop this practice. Moreover, it proposes to explore options for ensuring effective access to national court judgments as the obligation for the Member States to transmit these judgments under Article 15(2) of the Regulation has not functioned optimally. Finally, the Report considers that in the context of third country enforcement the current legal framework may benefit from further clarification to enhance existing levels of protection against disclosure of information from the Commission's file, as well as of disclosure of the Statement of Objections (SO) and non-public version of the Commission Decision.

1.2. Private enforcement of the EU antitrust rules

87. The EU antitrust rules are enforced not only by the Commission and NCAs (public enforcement). Given that these rules have direct effect, they confer rights on individuals, including the right to damages, that can be enforced before national courts (private enforcement). The European Court of Justice (ECJ) has pronounced that the full effectiveness of the EU antitrust rules would be put at risk if it were not open to any individual to claim damages for harm caused by infringements of these rules⁸⁷. Yet, in practice the victims, often consumers and SMEs, only rarely obtain compensation.

88. The Commission has therefore launched a policy project aimed at ensuring the effectiveness of EU antitrust damages actions. The Commission's 2005 Green Paper⁸⁸ identified the main obstacles to effective enforcement and launched a public debate on various options to overcome them. The Commission's 2008 White Paper⁸⁹ put forward concrete suggestions, such as:

- clarifying what type of damages can be claimed by whom;
- facilitating the position of consumers and other indirect victims in situations where an illegal overcharge has been passed on to them;
- improving the efficiency of follow-on actions for damages by providing that final infringement decisions of NCAs constitute sufficient proof of an infringement;
- ensuring that claimants can obtain fair access to evidence through disclosure in court;

⁸⁷ Joined Cases C-295/04 to C-298/04 Manfredi [2006] ECR I-6619. See also Case C-453/99 Courage vs. Crehan [2001] ECR I-6297. While the ECJ only refers to infringements of Article 81 EC, it follows from the Court's reasoning that the same considerations apply for Article 82 EC as well.

⁸⁸ COM(2005) 672 final, see <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

⁸⁹ COM(2008) 165 final, see <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

- providing for effective collective redress; and
 - suggesting rules to ensure a smooth interplay between private and public enforcement, including protection of leniency programmes.
89. On 25 March, the European Economic and Social Committee adopted an opinion on the White Paper⁹⁰ that welcomes the White Paper and explicitly calls on the Commission to propose appropriate follow-up measures to achieve the White Paper's objectives.
90. On 26 March, the European Parliament adopted a resolution on the White Paper⁹¹ that welcomes the White Paper and stresses that effective enforcement of the EU antitrust rules requires that victims of breaches of these rules must be able to claim compensation for the damage suffered. The resolution agrees with the main finding of the White Paper, namely that consumers as well as businesses are currently hampered in exercising their right to compensation. The resolution also agrees with the overall objective of the White Paper, namely that measures are to be taken to ensure full compensation of the victims, while avoiding excessive litigation, and broadly supports the policy suggestions of the White Paper.
91. As regards collective redress, the Parliament's resolution acknowledged the importance of collective redress mechanisms for the ability of victims to obtain compensation in cases of scattered damage, and welcomed the suggestions in the White Paper to set up collective redress mechanisms which are designed to include safeguards against excessive litigation. The resolution encouraged the Commission to give careful consideration to the possibility of a horizontal or integrated approach to collective redress and to ensure consistent treatment of damages claims in the area of EU competition law and in other areas, such as consumer protection laws. It stressed, however, that such a horizontal or integrated approach does not necessarily require a single horizontal instrument and, moreover, must not delay or avoid the development of proposals and measures identified as necessary for the full enforcement of the EU antitrust rules.
92. The Commission services have started work on the technical instruments designed to achieve the objectives of the White Paper, while taking due account of the resolutions, opinions and comments received within the public consultation.
93. Apart from the follow-up measures to the White Paper, the Commission services have started work on a non-binding guidance on quantification of damages. The 2005 Green Paper already identified the existence of a number of specific difficulties faced by parties as well as judges with regard to quantification of harm resulting from breaches of the EU antitrust rules. In the White Paper, the Commission therefore committed to publishing a pragmatic, non-binding guidance paper designed to facilitate quantification of damages. In 2008, the Commission signed a contract for the provision of an external study on this subject-matter. Key aspects to be addressed in the guidance include the conceptual framework for quantifying antitrust damages,

⁹⁰ Opinion of the European Economic and Social Committee on the White paper on damages actions for breach of the EC antitrust rules, OJ C 228, 22.9.2009, p. 40.

⁹¹ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)).

including identification of the types of harm that can be inflicted by various infringements of Articles 101 and 102 TFEU, concrete methods that can be employed in quantifying the harm, as well as any economic insights that can be useful to judges and parties when estimating the harm suffered.

1.3. Cartels

94. In 2009, the Commission continued its strong enforcement record for the application of the antitrust rules to cartel cases by adopting six decisions⁹² imposing fines amounting to EUR 1 623 million⁹³, on 43 undertakings⁹⁴. An important cartel case concerns the Commission's 2009 decision relating to the energy markets (E.ON/GDF), imposing fines of EUR 553 million on GDF Suez as well as on the German E.ON group for participating in a market sharing arrangement relating to the French and German gas markets.
95. For the first time it served a cartel decision to undertakings in Slovakia and Slovenia in the *Calcium Carbide* case. The fight against cartels with an international dimension continued to be very successful, epitomized by the decisions in *Marine Hoses* (a market sharing and price fixing cartel for which the EU co-operated with the US, UK and Japan⁹⁵), as well as in *Power Transformers* (a market sharing agreement between European and Japanese producers. The Commission has also underscored its policy of deterrence towards companies that are repeat offenders⁹⁶.
96. The coordination between competition authorities during the investigation period was important, particularly in *Marine Hoses* as the UK and the US also foresee criminal prosecution of individuals for cartel violations. This demanded a particularly sensitive and coordinated approach, ensuring the integrity of the respective procedures. The case showed how well competition authorities worked together and coordinated their efforts without compromising procedural protections offered under their laws, be it of administrative or of criminal nature.
97. In the case of Heat Stabilisers the Commission fined the Swiss based company AC Treuhand again for its active role as facilitator in a cartel. AC Treuhand already received a fine from the Commission in 2003 for the same function, but in the context of another cartel. Back in 2003 the Commission imposed a mere symbolic fine on AC Treuhand of EUR 1 000 as it was to a certain extent a novelty to impose a fine for this kind of role⁹⁷. This time, however, the Commission calculated the fine based on the gravity, duration and deterrent effect taking into account AC Treuhand's

⁹² Cases COMP/39406 *Marine Hoses*; COMP/39401 *E.on/GDF*; COMP/39396 *Calcium Carbide*; COMP/37956 *Concrete reinforcing bars (re-adoption)*; COMP/39129 *Power Transformers* and COMP/38589 *Heat Stabilisers*.

⁹³ In 2008 the Commission issued seven final decisions in which it fined 37 undertakings a total of EUR 2 271 million.

⁹⁴ This figure includes those companies which received immunity from fines under the Leniency Notice.

⁹⁵ See Annual Competition Report 2007, p. 43.

⁹⁶ See Case COMP/39396, *Calcium carbide* and COMP/38589 *Heat Stabilisers*.

⁹⁷ See Case COMP/37857, *Organic peroxides*, OJ L 110, 30.4.2005, p. 44 upheld by T-99/04 from 8 July 2008 [2008] ECR II-1501.

involvement in the cartel activities leading to a total amount of EUR 348 000⁹⁸. Apart from Treuhand, the Commission also fined a number of EU and US undertakings.

98. The Court confirmed its jurisprudence and thereby the Commission's practice in relation to parental responsibility in case C-97/08P, *Akzo Nobel et al. v. Commission*. According to the Court, the Commission is entitled to assume that the parent company which owns 100% of its subsidiary forms one undertaking with the latter and therefore may be held responsible for the payment of the cartel fine (for more details see point 171 below).
99. With *Concrete Reinforcing Bars* the Commission sent, yet again⁹⁹, the clear message that cartel participants cannot escape fines if, for procedural reasons, the Court quashes the Commission's decision. In 2009 the Commission readopted its initial decision from 2002 after the judgment of the CFI in 2007¹⁰⁰ and retained all eight undertakings, confirming an almost identical fine to them¹⁰¹.
100. The Leniency policy of the Commission continues to prove helpful in detecting and investigating cartels. About 75% of cartel investigations are based on immunity applications. Undertakings which provided significant added value when cooperating with the Commission during the investigation received substantial reductions to their respective fines for which the cartel decisions in 2009 are a case in point.
101. The Commission attaches great importance to the protection of its leniency programme and more generally to the protection of the integrity of its enforcement procedure. That is why the Commission intervened in a US Court¹⁰², where the discovery of leniency material as well as other documents from the Commission file were being ordered, in a matter relating to the Commission investigation into *Flat Glass*, a case decided end of 2007. The intervention by the Commission in this case was successful, as discovery was avoided through settlement of the parties.
102. In order to detect and/or examine cartels, Regulation 1/2003 gives the Commission powers of investigation, notably the power to conduct inspections either at business premises or in private homes. During 2009, on-site inspections took place in a wide variety of sectors, such as *Power Cables*¹⁰³, *Compressors for Refrigeration*¹⁰⁴, *Shrimps*¹⁰⁵, *Special glass sector*¹⁰⁶ as well as *Cement and related products*¹⁰⁷.

98

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1695&format=HTML&aged=0&language=EN&guiLanguage=en>

99 See also Case COMP/39234 *Alloy surcharge readoption* (OJ L 182, 12.7.2007, pp. 31-32 and non-confidential version of the decision on the website of DG Competition). The undertaking submitted an appeal which was fully rejected by the CFI in T-24/07 *Thyssen Krupp Stainless AG/Commission* [2009]. The latter's judgment is currently under appeal.

100 T-77/03 *Feralpi Siderugica SpA/Commission* [2007] ECR II-139 Summ.pub.

101 With the re-adoption decision the Commission imposed a fine of EUR 83,250 million, reducing the fine for one of the undertakings from EUR 16,140 million to EUR 14,350 million because of a shift in the latter's relative size.

102 Flat Glass Antitrust Litigation (II) Civil Action No 08-mc-180 MDL No. 1942.

103 Case COMP/39610.

104 Case COMP/39600.

105 Case COMP/39633.

106 Case COMP/39605.

1.4. Other agreements and concerted practices

103. In July, the Commission adopted its final report on the sector inquiry into pharmaceuticals (launched in 2008) identifying serious shortcomings in the sector.
104. Concerning the application of the antitrust rules to non-cartel cases, the Commission adopted, on 14 October, a commitment decision¹⁰⁸ under Article 9(1) of Council Regulation (EC) No 1/2003 rendering legally binding commitments offered by the International Association of Classification Societies (IACS) to address concerns raised in the course of an investigation pursuant to Article 81 EC and Article 53 of the EEA Agreement in the worldwide ship classification market.
105. The Commission also opened proceedings in relation to the cooperation between certain STAR alliance and Oneworld airline companies on transatlantic routes.
106. The Commission is presently in the process of reviewing a number of Block Exemption Regulations and, when relevant, accompanying guidelines relating to the application of Article 101 TFEU, which are due to expire in the near future. These reviews concern in particular the Block Exemptions for Vertical Agreements and for Horizontal Agreements as well as the sector specific Block Exemption for Insurance. The revisions of the Block Exemptions for Motor Vehicles and for Maritime Transport (liner shipping consortia) were concluded in 2009.

1.4.1. *The review of the Block Exemption Regulation on Vertical agreements*

107. Vertical agreements are agreements for the sale or purchase of goods or services between companies operating at different levels of the distribution chain, for example between a manufacturer, a wholesaler and a retailer. Vertical agreements are pervasive: indeed, the vast majority of agreements entered into between firms are vertical, as this term covers agreements relating to the purchase of inputs and distribution of outputs.
108. In 2009, the Commission continued its review of the current EU block exemption regulation applicable to vertical agreements (the BER) and the accompanying guidelines on vertical restraints (the Guidelines). In 1999, this package was the first of a new generation of exemption regulations and guidelines inspired by a more economic and effects-based approach which, in the Commission's and the NCAs' assessment, has worked well in practice.
109. The Commission issued draft BER and Guidelines for public consultation in July, where the Commission proposed to maintain, in essence, the current rules, while at the same time adapting and refining them to take account of developments in the marketplace, in particular the market power of buyers, and the continuous increase of on-line sales.
110. In order to reflect the increased attention to buyer power issues, the Commission proposed that for a vertical agreement to benefit from the block exemption, not only the supplier's market share (as is currently the case) but also the buyer's market share

¹⁰⁷ Case COMP/39520.

¹⁰⁸ Case COMP/39416 *Ship Classification*.

should not exceed 30% on the affected markets where the buyer resells the contract products. In addition, the Commission added in the draft Guidelines two new sections which provide guidance on the assessment of restraints which are mainly buyer driven, namely upfront access fees, such as slotting allowances, and category management.

111. Regarding on-line sales, on the one hand there is a need to protect consumers' possibilities to purchase to their advantage across borders, which is greatly facilitated by the internet. On the other hand, certain sales restrictions that aim at limiting or preventing distributors from taking unfair advantage of marketing and brand promotion undertaken by others (i.e. free riding) may enable consumers to benefit from better services. The Commission's suggested approach therefore refines, in the on-line context, the distinction, between sales made as a result of active marketing and sales made as a result of the consumer taking the initiative (i.e. between active and passive sales), and explains how the revised texts would deal with conditions imposed in relation to internet sales, such as a requirement imposed by a supplier that the distributor should have a "brick and mortar" shop before engaging in on-line sales.
112. The Commission received some 160 contributions from a wide range of stakeholders, including businesses, consumer organisations, national authorities, academics and the legal community. The stakeholders expressed strong support to maintain in force a system of block exemption and accompanying Guidelines, which is considered to have overall worked well in practice. The stakeholders commented extensively on the two major issues, in particular the extension of the market share threshold to buyers and the treatment of restrictions on the use of the internet. Beyond these issues, the Commission's proposed approach to hardcore restrictions was generally welcomed, in particular the clarification that also hardcore restrictions may individually fulfil the conditions of Article 101(3) TFEU.
113. The Commission services are currently analysing the results of the public consultation in order to propose a final text for the adoption by the College. The new rules should enter into force upon the expiry of the current BER in May 2010.

1.4.2. The review of the Block Exemption Regulations on Horizontal agreements

114. Horizontal agreements are agreements between competitors operating at the same level, cooperating in areas such as research and development, joint production or selling, information exchange, standardisation etc. Such agreements may lead to important efficiencies and increased consumer welfare. However, since they imply cooperation by competitors they also risk leading to anti-competitive effects.
115. The Block Exemption Regulations for Specialisation agreements¹⁰⁹ ("Specialisation BER") and for Research and Development agreements¹¹⁰ ("R&D BER") expire on 31 December 2010. The Commission has therefore started the revision of these

¹⁰⁹ Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) to categories of specialisation agreements, OJ L 304, 5.12.2000, p. 3.

¹¹⁰ Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) to categories of research and development agreements, OJ L 304, 5.12.2000, p. 7.

regulations and the accompanying horizontal guidelines¹¹¹. The horizontal guidelines cover not only specialisation and R&D agreements but also other types of agreements such as production, commercialisation and joint purchasing agreements and aim at giving guidance on how to assess such agreements under EU competition law.

116. The Commission is in the process of examining how the Specialisation and the R&D BERs have been applied so far and whether there is a need to amend the current rules. This work is done in close cooperation with the NCAs within the European Competition Network. A first consultation of stakeholders took place at the turn of 2008/2009. The Commission intends to publish the draft block exemption regulations and guidelines in early 2010.

1.4.3. The review of the Motor Vehicle Block Exemption Regulation

117. On 28 October, the Commission adopted a set of draft guidelines and a draft Block Exemption for the motor vehicle sector ("Motor vehicle BER"). These two draft instruments apply to agreements for motor vehicle distribution (primary market) as well as to the markets for repair, maintenance and the distribution of spare parts (aftermarket). They are intended to replace the existing BER¹¹² as of 1 June 2010 with regard to the aftermarket, and as of 1 June 2013 for the primary market. Following the Advisory Committee meeting with Member States, on 21 December the Commission published the two documents for public consultation until 10 February 2010.

118. The two draft texts follow the course set in the Commission's Communication of 22 July. That Communication identified clear differences between the primary market, on which competition is strong, and the markets for repair and maintenance and spare parts, on which competition is more limited due to their brand-specific nature.

119. An in-depth market analysis¹¹³ revealed that there are no significant competition shortcomings justifying distinguishing the markets for new motor vehicles from other economic sectors. The markets are fairly open, with relatively low barriers to entry. Technology is an increasingly important factor driving competition. Model ranges have expanded, and manufacturers tend to have a global or regional presence rather than simply having a strong position on their home market. This vigorous and increasing inter-brand competition has translated into highly competitive price levels.

120. The Commission believes that car distribution agreements should not be treated differently from any similar agreements in other sectors. The draft BER therefore provides that the future general Block Exemption for vertical restraints will take the place of the current specific rules for such agreements. However, in order to protect

¹¹¹ Commission Notice – Guidelines on the applicability of Article 81 to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2.

¹¹² Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, pp 30-41.

¹¹³ See Evaluation Report on the operation of Commission Regulation (EC) 1400/2002 of 28 May 2008 and the Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle sector of 22 July 2009 (COM(2009)388 final), including an Impact Assessment Report (SEC(2009)1052).

investments made by car dealers under the old rules, for instance in multi-brand sites, it is proposed that this changeover will not occur until 31 May 2013. As to the assessment of such agreements after this date, the draft Guidelines give explanations on key issues such as the protection of cross-border trade in cars and the approach to be taken should single-branding arrangements between manufacturers and dealers lead to competing manufacturers being shut out of a particular market.

121. In the Communication, the Commission took the line that the application of the future general Block Exemption to the motor vehicle aftermarkets might prove insufficient to protect competition. Sector-specific provisions were needed in a number of areas, although the Communication left open the question as to what form they would take.
122. The draft Guidelines adopted on 28 October deal with issues such as access to the franchised repair networks, the provision of technical information to independent repairers, and refusals to honour warranties unless all repairs have been carried out in the authorised networks. The Block Exemption was considered a more appropriate instrument for protecting competition as regards the supply of spare parts, in particular since market definition in this area can be problematic, and contains specific hardcore clauses in this respect. The draft proposal foresees that new rules will apply to agreements for repair and maintenance and to the distribution of spare parts from 1 June 2010.

1.4.4. The review of the Insurance Block Exemption Regulation

123. The Commission has carried out a review of the functioning of the current Block Exemption Regulation in the insurance sector¹¹⁴ ("the current Insurance BER") with a view to determining whether a new Insurance BER should be adopted before the current one expires on 31 March 2010.
124. Under the Implementing Regulation¹¹⁵, the Commission is required to submit a report to the European Parliament and Council on the functioning of the Insurance BER, six years after its entry into force, together with any proposals for amendment which would derive from experience.
125. The Commission began its review of the functioning of the Insurance Block Exemption Regulation (the Review) in November 2007 by consulting NCAs and in April 2008 it launched a public consultation. In addition, the Commission sent targeted questionnaires to certain stakeholders, public authorities and consumer organisations. Following closure of the consultation, the Commission sent follow-up questionnaires to certain stakeholders including small and medium-sized insurers, pools and producer federations of security devices. The NCAs were closely involved in the review.
126. The primary original objective of the current Insurance BER was to facilitate the Commission's task in view of the large number of notifications being received. Since

¹¹⁴ Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53, 28.2.2003, p. 8).

¹¹⁵ Council Regulation (EC) 1534/91, OJ L 143, 7.6.1991, p. 1.

the adoption of Regulation 1/2003 and the consequent abolition of the notification system, such objective is no longer of relevance. To assess whether to renew the current Insurance BER, the Commission asked: (i) whether the business risks or other issues in the insurance sector make it "special" and different from other sectors and whether this leads to an enhanced need for cooperation; (ii) if so, whether this enhanced need for cooperation requires a legal instrument such as for example, the BER to protect or facilitate it; and (iii) if so, whether the current BER is the most appropriate legal instrument (or whether partial renewal, amended renewal, or Guidelines would be preferable).

Report to European Parliament and Council

127. On 24 March, the Commission adopted its Report¹¹⁶ to the European Parliament and Council which is accompanied by a detailed Working Document. The documents analyse in detail the Commission's findings during the Review. On 2 June the Commission held a public event, in order to hear further reactions on the Report and accompanying Working Document.

Public Consultation on Draft New Insurance BER

128. The Commission's conclusion on the basis of the evidence it found during the Review is that it is not appropriate to renew two of the four exemptions in the current Insurance BER, i.e. the exemptions for standard policy conditions ("SPCs") and security devices.
129. The Commission considers that both SPCs and agreements on security devices are not specific to the insurance sector and as such do not require a sector-specific BER. However, the Commission is considering addressing both SPCs and security devices in the general standardisation chapter in its Horizontal Guidelines which are currently being revised.
130. The evidence did however support renewal of the BER for the remaining two categories of agreements, namely joint compilations, tables and studies as well as agreements on co-insurance and co-reinsurance pools. The draft new Insurance BER therefore exempts both these categories. This draft was published for consultation on 5 October for 8 weeks.
131. The Commission plans to have the new Insurance BER adopted and published before expiry of the current Insurance BER on 31 March 2010.

1.4.5. The Review of the Consortia Block Exemption Regulation

132. On 28 September the Commission adopted Regulation (EC) No 906/2009 on the application of Article 81(3) EC to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)¹¹⁷. This Regulation allows operational cooperation to provide a joint liner shipping service between liner shipping carriers subject to certain conditions. Such type of cooperation has been

¹¹⁶ COM/2009/0138.

¹¹⁷ OJ L 256, 29.9.2009, p. 31.

exempted from the EU competition rules since 1995. The new Regulation enters into force on 25 April 2010 for a duration of five years.

133. Liner shipping involves the transport of cargo on a regular basis to ports of a particular geographic route, in accordance with time tables and sailing dates advertised in advance and available to any transport user. A consortium is an operational cooperation agreement between two or more liner shipping carriers to provide a joint liner shipping service on a given route. Due to the high level of investment required to set up a service with fixed schedules, liner shipping is mostly provided by groups of shipping lines organised in consortia.
134. The review of the Regulation was launched with a general market investigation in the summer of 2007, followed by a public consultation in October 2008. The aim was to incorporate amendments necessary due to the repeal of the liner conference Block Exemption Regulation 4056/86¹¹⁸ and the adoption of Regulation 1/2003, as well as to better reflect current market practices and to bring the consortia block exemption in line with other block exemption regulations for horizontal cooperation between companies.
135. The new Regulation has reduced the market share threshold to 30% from previously 35% or 30% depending on whether a consortium operated within or outside a liner shipping conference. Furthermore the Regulation clarified that for assessing the market share threshold the sum of the market shares of the individual consortium members in the relevant market needs to be taken into account. For that purpose not only the volumes the consortium member transports within the consortium in question is relevant, but also all volumes carried by it outside the consortium need to be taken into account. Such volumes might either be carried by the member, on the basis of a parallel individual service, or by another carrier on behalf of that member, on the basis of a slot charter arrangement or another consortium agreement.
136. In view of the increasing cross-linking of consortia and their members, the Regulation clarifies in its recitals that the Commission may withdraw the benefit of the block exemption if a consortium agreement has effects incompatible with Article 81(3) EC that may derive from the existence of links between the consortium and/or its members and other consortia and/or liner carriers on the same relevant market.
137. Finally the scope of the Regulation was widened to include all liner shipping services transporting cargo, whether containerised or not. The list of exempted activities was revised to better reflect current market practices. The new Regulation simplifies the conditions which a consortium agreement has to comply with in order to benefit from the Block Exemption Regulation. In particular, it sets the maximum duration of the so-called exit clauses and lock-in provisions in case a member wants to withdraw from the consortium.

¹¹⁸ Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 EC to maritime transport, OJ L 378, 31.12.1986, p. 4.

1.5. Abuse of dominant positions (Article 102 TFEU)

138. The "Commission's Guidance on its enforcement priorities in applying Article 82 EC of the Treaty to abusive exclusionary conduct by dominant undertakings" was published in the Official Journal (OJ)¹¹⁹.
139. On 13 May, the Commission adopted a prohibition decision in the *Intel* case¹²⁰ finding that Intel had infringed Article 82 EC by engaging in illegal anticompetitive practices with the aim of excluding competitors from the market for x86 Central Processing Units (CPU). These practices harmed consumers throughout the EEA. By undermining its competitors' ability to compete on the merits of their products, Intel's actions undermined competition, reduced consumer choice and hindered innovation.
140. In the *Microsoft* case, the commitments offered by Microsoft provide for a timely and satisfactory solution to the competition concerns raised by the Commission in a Statement of Objections in January 2009 related to the tying of Microsoft's web browser Internet Explorer to its dominant client PC operating system Windows. Microsoft committed (a) to distribute a Choice Screen software update to users of Windows client PC operating systems within the EEA by means of Windows Update that will offer users an unbiased choice between the most widely used web browsers in the EEA, and (b) to make available a mechanism in Windows 7 and subsequent versions of Windows in the EEA enabling PC manufacturers and end users to turn Internet Explorer on and off. The commitments were made binding on Microsoft by a Decision of 16 December 2009¹²¹.
141. In the *Rambus* case, the Commission had expressed concerns that Rambus was imposing unreasonable royalties for the use of certain patents for DRAM chips used in virtually all PCs. The Commission adopted a decision on 9 December 2009 that renders legally binding commitments offered by Rambus that in particular put a cap on its royalty rates¹²². In 2008, worldwide DRAM sales exceeded US\$ 34 billion (more than EUR 23 billion). Rambus committed to put a worldwide cap on its royalty rates for five years. Rambus agreed to charge zero royalties for the earlier generations of chips concerned in combination with a maximum royalty rate of 1.5% for the later generations of chips concerned. This is substantially lower than the 3.5% Rambus was previously charging. The case shows once more that an effective standard-setting process should take place in a non-discriminatory, open and transparent way to ensure competition on the merits and to allow consumers to benefit from technical development and innovation¹²³.
142. In the field of energy, the Commission adopted a further decision as part of the follow-up of the energy sector inquiry in 2007. In March 2009, the Commission adopted a decision rendering binding divestiture commitments from the German gas

¹¹⁹ OJ C 45, 24.2.2009, p. 7.

¹²⁰ Case COMP/37990 *Intel* (OJ C 227, 22.9.2009, p. 13).

¹²¹ The Decision is published on the website of the Directorate-General for Competition under "*Antitrust cases*".

¹²² A non-confidential version of the Decision and the commitments is available on the Commission's website at: <http://ec.europa.eu/comm/competition/antitrust/cases>.

¹²³ The decision and the commitments are published on the website of the Directorate-General for Competition under "*Antitrust cases*".

incumbent RWE which committed to divesting its Western German gas transmission network¹²⁴.

143. The Commission also initiated proceedings against the Polish and Slovakian incumbents in the broadband market¹²⁵ and against Svenska Kraftnät concerning the Swedish electricity transmission market¹²⁶.
144. Lastly, in the field of financial services, the Commission sent a SO to Standard & Poor's (S&P) in October, outlining the preliminary view that S&P infringed its dominant position in relation to issuance and licensing of securities identifier codes called ISINs¹²⁷. The Commission also opened formal proceedings against Thomson Reuters concerning the use of RICs¹²⁸.

1.6. State measures (Public undertakings/Undertakings with exclusive and special rights)

145. In 2009, the Commission was also active in the area of Article 106 TFEU.
146. On 2 February, following up on the infringement proceedings initiated in the course of 2008¹²⁹, the Commission sent a Reasoned Opinion¹³⁰ to the Slovak Republic requesting it to bring the Slovak Competition Act in conformity with EU law. The Reasoned Opinion concerned in particular Section 2(6) of the Slovak Competition Act, which excluded the applicability of the Act in situations where the conduct of the undertakings is at the same time subject to sector specific ex-ante regulatory obligations (such as in the electronic communications, energy or postal sectors), thus limiting the ability of the NCA to effectively apply Articles 81 and 82 EC to anticompetitive behaviour which would also fall within the competence of regulatory authorities. In the Reasoned Opinion the Commission considered this provision of the Competition Act to be incompatible with Article 10 EC and Regulation 1/2003 and enjoined the Slovak Republic to take the necessary measures to put an end to the infringement. Following the Reasoned Opinion, the Slovak Republic repealed the contested provision in its entirety with effect from 1 June. On 25 June the Commission therefore adopted a decision to close the infringement procedure¹³¹.

¹²⁴ See IP/09/410, 18.3.2009.

¹²⁵ MEMO/09/203, 27.4.2009.

¹²⁶ Status October 2009 (commitments Microsoft and Svenska Kraftnät being market tested).

¹²⁷ ISIN are the global identifiers for securities and are governed by International Standardisation Organisation (ISO) standard 6166. They are indispensable for a number of operations that financial institutions carry out (for instance, reporting to authorities or clearing and settlement) and cannot be substituted by other identifiers for securities. See also MEMO/09/508.

¹²⁸ RICs are short, alphanumeric codes that identify securities and their trading locations. They are used to retrieve information from Thomson Reuters' real-time datafeeds, for example real-time information on stock prices at a certain exchange. See also IP/09/1692 of 10.11.2009.

¹²⁹ The Commission sent a letter of formal notice to the Slovak Republic on 6 June 2008. The Slovak Government replied to the letter of formal notice on 14 August 2008.

¹³⁰ See Press Release IP/09/200, 2.2.2009.

¹³¹ See Press Release [IP/09/1182, 23.7.2009](#). The successful resolution of this case follows a previous infringement procedure against the Czech Republic where similar problematic legislation was also repealed in 2007.

147. In August, the Commission adopted a decision pursuant to Article 86(3) EC by which it has accepted commitments made by Greece to ensure fair access to Greek lignite deposits¹³².
148. On 10 May 2007, the Commission adopted a decision on the basis of Article 86(3) EC finding that the exclusive right for the distribution of a savings book product (Livret A) granted by France to three banks (Banque Postale, Caisses d'Épargne and Crédit Mutuel) constituted an infringement of Article 86(1) EC in conjunction with the freedom of establishment and the freedom to provide services (Articles 43 and 49 EC) due to the resulting obstacles for French and foreign competitors to enter and develop the market for liquid savings in France. The decision also set a deadline to amend the legislation within nine months. As no such amendment was adopted within the prescribed period, the Commission sent a Letter of Formal Notice on 5 June 2008 with a view to obliging France to ending the infringement. As a result of the infringement proceedings, France opened up the distribution of Livret A on 1 January 2009. Since then, a significant number of new "livret A" accounts have been opened in banks which are now enabled to distribute these accounts and the brokerage fees have been cut by nearly half. On 8 October the European Commission therefore decided to close the infringement procedure.
149. The Commission pursued its infringement proceedings under Article 226 EC against the Slovak Republic for the non-implementation of the 2008 Commission decision on the Slovakian postal Law¹³³.

2. SELECTED COURT CASES

2.1. Case C-8/08 T-Mobile Netherlands & Others v. Raad van bestuur van der Nederlandse Mededingingsautoriteit (NMa)

Criteria for establishing a concerted practice

150. The background to this case is a reference for a preliminary ruling under Article 234 EC from a Dutch court in the proceedings between five mobile telephone network operators¹³⁴ and the Dutch competition authority (NMa). The NMa imposed a fine on the mobile telephone operators active in the Netherlands for exchanging information and agreeing, during a meeting, on the reduction and "standardisation" of the fees for postpaid subscriptions required by dealers who sell to final consumers those subscriptions on behalf of the telecom operators. This decision was appealed before the referring court which referred to the ECJ several questions related to the interpretation of Article 81 EC.
151. On 4 June, the ECJ clarified, in accordance with existing jurisprudence, when a concerted practice, in particular an exchange of information between competitors, restricts competition by object. According to the ECJ, the criteria laid down in the

¹³² OJ C 243, 10.10.2009, p. 5.

¹³³ Case COMP/39562 *Slovakian postal Law* (OJ C 322, 17.12.2008, p. 10). See also Press Release IP/08/1467, 7.10.2008.

¹³⁴ T-Mobile Netherlands BV (previously Ben Nederland BV); Orange Nederland NV (previously Dutchtone NV); KPN Mobile NV; Telfort BV (previously O2 Netherlands BV) and Vodafone Libertel NV.

Court's case-law for the purpose of determining whether an agreement has as its object a restriction of competition are applicable *mutatis mutandis* to a concerted practice. Accordingly, there is no need to consider the effects of a concerted practice where its anti-competitive object is established. A concerted practice pursues an anti-competitive object where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. The prohibition in Article 81 EC is not limited to concerted practices which have a direct effect on the prices paid by end users, since Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

152. In addition, contrary to the opinion of its Advocate General, the ECJ held that the presumption of a causal connection between the "concertation" and the conduct of the undertakings on the market established in the case law does not constitute a procedural rule, but rather stems from Article 81(1) EC, and it consequently forms an integral part of the applicable Community law, which has to be followed by the national enforcers. The ECJ finally ruled that the presumption of a causal connection between "concertation" and market conduct can be established even if the concerted practice is an isolated event, one meeting of the undertakings being enough for this presumption to apply. The ruling of the ECJ therefore strengthens the enforcement of Article 81 EC since the presumption established in the case law facilitates considerably the bringing of evidence of a concerted practice.

2.2. Case C-429/07, Inspecteur van de Belastingdienst v. X BV

Deductibility of fines for tax purposes and the effectiveness of EU competition law

153. The background to this case is a reference for a preliminary ruling under Article 234 EC from a Dutch court (the referring court) in the proceedings between the Dutch Tax authorities and a company, X BV who was trying to partially deduct the amount of the fine imposed by the Commission from the amount of its taxable profits.
154. This ruling of the ECJ of 11 June relates to the interpretation of Article 15(3) of Regulation 1/2003, which provides that the Commission may submit on its own initiative written observations (intervention as *amicus curiae*) to national courts applying Articles 81 and 82 EC where "*the coherent application of Articles 81 or 82 EC so requires*". The ECJ ruled that the option for the Commission, acting on its own initiative, to submit written observations to courts of the Member States is subject to the sole condition that the coherent application of Articles 81 or 82 EC so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 or Article 82 EC. The ECJ stated further that the effectiveness of the fines imposed by the Commission relates to the coherent application of Articles 81 and 82 EC. The effectiveness of the

Commission's decision by which it imposed a fine on a company might be significantly reduced if the undertaking concerned was allowed to partially deduct the amount of that fine from the amount of its taxable profits. The ECJ concluded on this basis that the Commission was entitled to submit its written observations in this case. The ruling of the ECJ, by an extensive interpretation of the Commission's possibilities to intervene as *amicus curiae* in national proceedings, strengthens the Commission's role in ensuring uniform and effective application of competition rules by national courts in the EU. The Commission has subsequently submitted its written observations opposing tax deductibility of competition fines.

2.3. T-301/04, Clearstream Banking AG and Clearstream International SA v. Commission

Refusal to supply certain post-trading services in the financial sector

155. The case concerns an appeal before the CFI launched against the Commission's decision COMP/38096 *Clearstream (Clearing and Settlement)*. The Commission found in its decision that Clearstream Banking AG (CBF), the German Central Securities Depository, and Clearstream SA, its 100% shareholder, had infringed Article 82 EC by refusing to supply certain clearing and settlement services¹³⁵ to one of its customers, Euroclear Bank SA (EB) as well as by applying discriminatory prices to the same customer.
156. In their appeal, the applicants contested the definition of the product market and hence the dominant position held by CBF. The applicants claimed also that their conduct was not abusive with regard to the refusal to supply as the difficulties resulting in the delay of linking EB to CBF's settlement processing system were attributable to EB. Furthermore, the applicants argued that the pricing was not discriminatory, as foreign central securities depositories (CSDs) and international central securities depositories (ICSDs) like EB received different service packages involving different costs.
157. On 9 September, the CFI dismissed the appeal in its entirety. The judgment of the CFI confirming the Commission's decision is particularly important since competition in the post-trading arena is still limited and national monopolies of historic incumbents are often reinforced by various state measures.
158. First, as regards market definition the Commission argued that a distinction had to be made between primary and secondary clearing and settlement services. The CFI confirmed this definition by rejecting the applicants' argument that the persons requesting post-trading clearing and settlement services are the sellers and the buyers of the security transaction and that therefore there should be one general market for clearing and settlement services in which those seeking services are the parties to the securities transaction. The CFI reached the conclusion that CBF's custody monopoly in respect of securities issued under German law results in a monopoly of primary

¹³⁵ Clearing and settlement are post-trading processes in relation to the transactions in securities. Clearing ensures that the seller and the buyer have agreed on an identical transaction and that the seller is entitled to sell the securities in question. Settlement refers to the final transfer of the ownership of the securities from seller to buyer and the final transfer of the funds from buyer to seller as well as the relevant annotations in securities accounts.

clearing and settlement for those securities. This market definition proposed by the Commission and the differentiation between primary and secondary clearing and settlement services constitutes a good basis for future cases.

159. Secondly, the case was the first major case relating to the technically complex and evolving sector of cross-border post trading services for securities. Cross-border arrangements in the EU on clearing and settlement are still considered to be complex and fragmented, imposing costs, risks and inefficiencies on investors, institutions and issuers.

2.4. Case C-202/07 P, France Télécom SA v. Commission

Criteria for establishing an abuse in the form of predatory pricing

160. On 2 April the ECJ dismissed in its entirety France Télécom's appeal of a 2007 judgment of the CFI¹³⁶. The 2007 judgment had confirmed the Commission decision of 2003 imposing a fine of EUR 10.35 million on Wanadoo Interactive S.A. (Wanadoo), at the time a subsidiary of France Télécom¹³⁷, for an abuse of a dominant position in the form of predatory pricing.
161. The judgment of the ECJ confirms the Commission's finding that Wanadoo abused its dominant position on the French market for high-speed internet access for residential customers by charging below cost prices for its Pack eXtense and Wanadoo ADSL services. The Commission also found that Wanadoo had developed a plan aimed at excluding competitors from the market for high speed internet access, restricted market entry by competing internet providers and thus harmed consumers.
162. In 2007, the CFI dismissed France Télécom's action for annulment against the Commission decision, holding that the Commission correctly concluded that Wanadoo had abused its dominant position in the French market for high-speed internet access. The CFI upheld all aspects of the Commission decision including the amount of the fine imposed on Wanadoo.
163. In its judgment the ECJ approved the CFI's and Commission's definition of predatory pricing as it results from the previous case law such as *AKZO v. Commission*¹³⁸, and *Tetra Pak v. Commission*¹³⁹. The ECJ confirmed, first, that price below average variable costs must always be considered abusive and, second, that prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate competitors can be shown.
164. In addition, the ECJ held that the CFI was right in confirming that for a finding of predatory pricing the Commission was not required to prove that Wanadoo had the possibility of recouping its losses. The ECJ also stated that this interpretation does not preclude the Commission from finding that the possibility of recoupment of

¹³⁶ Case T-340/03.

¹³⁷ Wanadoo merged with France Télécom on 1 September 2004.

¹³⁸ Case C-62/86 *AKZO v. Commission*.

¹³⁹ Case C-333/94 P *Tetra Pak v. Commission*.

losses may be a relevant factor in assessing whether or not the practice concerned is abusive.

165. In addition, the Court held that demonstrating that it is possible to recoup losses is not a necessary precondition for finding a predatory pricing. It stated that the lack of any possibility of recoupment is not sufficient to prevent the undertaking concerned reinforcing its dominant position, so that the degree of competition existing on the market is further reduced and customers suffer loss as a result of the limitation of the choices available to them. Nevertheless, the Court stated that this does not preclude the Commission from finding such a possibility of recoupment to be a relevant factor in assessing whether or not the practice concerned is abusive, for example to assist in excluding economic justifications other than the elimination of a competitor or in establishing that a plan to eliminate a competitor exists.

2.5. Case C-125/07 P e.a., *Bank Austria v Commission*

Burden of proof as regards effects of price fixing cartels

166. In a judgment rendered on 24 September¹⁴⁰, the ECJ clarified the Commission's burden of proof in qualifying price fixing cartels as "very serious" due to restrictive effects on the market¹⁴¹.
167. In 2002, the Commission qualified a price fixing cartel on the Austrian banking market (the "Lombard Club")¹⁴² for several reasons as "very serious" amongst others because it led to effects on the market concerned. Indeed, the Commission could prove that the banks had implemented their agreements. The banks had claimed, based on an economic study, that the cartel had had no effects on the Austrian banking market. The Commission rejected the conclusion in the study that the cartel had not affected the business strategies of the banks involved. The possibility that interest rates and bank profit margins in Austria developed more or less similarly to those in a neighbouring country cannot prove that the cartel did not produce effects on the Austrian market. In the Commission's view, it was only relevant whether and to which extent the cartel influenced the banks' business strategies and decisions, i.e.: whether the agreed interest rates were also implemented. The Commission demonstrated that this was indeed the case, based on ample evidence in the file.
168. The CFI in 2006 upheld the Commission's conclusion¹⁴³.

¹⁴⁰ Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P.

¹⁴¹ The Commission's then Guidelines on Fines provided, at Section 1, that, for the purpose of calculating the amount of fines, the basic amount is to be determined according to the criteria set out in Article 15(2) of Regulation No 17, namely the gravity and duration of the infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements will thus be put into one of three categories: minor infringements, serious infringements and *very serious* infringements.

¹⁴² Commission Decision of 11.6.2002 (OJ L 56, 24.2.2004, p. 1)

¹⁴³ T-257/02 e.a. *Bank Austria v Commission*, 14.12.2006. For finding that a cartel is very serious due to effects on the market, it was not necessary for the Commission to demonstrate that the agreement had actually led to higher transaction prices than those which would have prevailed in the absence of the cartel. Such burden of proof would in fact absorb considerable resources, given that it would necessitate hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify.

169. However, on appeal, Advocate General (AG) Bot recommended that the ECJ set aside the CFI's ruling on this point and consequently that the fines be reduced¹⁴⁴. AG Bot found that a fine distinction should have been drawn between the implementation of a cartel and its effects on the market. The Commission could not derive effects on the market from the mere implementation of the cartel. Rather, the Commission should have investigated transaction prices before the infringement started and after it was implemented. The AG did not further consider the CFI's view that such burden of proof was disproportionate¹⁴⁵. Advocate General Bot also upheld the appellants' arguments regarding the attribution to central institutions of market shares held by banks operating in decentralised sectors.
170. On 24 September, the ECJ finally did not follow the opinion of its AG on these two points, and upheld the CFI judgment in all respects. Like the CFI, the ECJ found that the Commission had sufficiently demonstrated effects on the market by proving the implementation of the cartel. The cartel members had announced the agreed prices to their customers, they gave instructions to employees to use them as a basis for negotiations and they monitored their application by competitors' and their own sales departments¹⁴⁶. The ECJ also upheld the attribution to central institutions of market shares held by banks in the decentralised sector. The ECJ noted that the Commission had thereby sought to ensure that the level of fines imposed on central institutions appropriately reflects the gravity of their own unlawful conduct. The central institutions had played an essential role within their respective networks through exchanges of information and as representatives of the decentralised sectors within the cartel.

2.6. Case C-97/08P, Akzo Nobel et al. v. Commission

Liability of a parent company for the behaviour of a subsidiary

¹⁴⁴ Opinion of AG Bot delivered on 26.3.2009 in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P. AG Bot considered that the fact that the Commission did not demonstrate the alleged effects of the infringement on the market called in question the assessment of the starting amount of the fine fixed by reference to the gravity of the infringement.

¹⁴⁵ T-257/02 e.a. *Bank Austria v Commission*, of 14.12.2006 ("Moreover, it would be disproportionate to require such proof ..."). Indeed, demonstrating a causal link between a cartel agreement and final consumer prices presupposes the use of highly abstract hypothetical models which would have to eliminate external factors influencing final consumer prices such as, for instance, inflation or the collapse of the stock market as a consequence of the financial crisis in 2008.

¹⁴⁶ C-125/07 e.a. *Bank Austria v Commission*, of 24.9.2009 and T-257/02 e.a. *Bank Austria v Commission*, of 14.12.2006. Both Courts also dismissed as irrelevant the fact that some members of the cartel had (as it so often happens) cheated on their competitors by offering prices under/above the agreed upon interest rate. See also Case C-534/07 *Prym and Prym Consumer v Commission*, of 3.9.2009, paragraphs 79-83.

171. On 10 September the ECJ confirmed its jurisprudence and the judgment of the CFI¹⁴⁷ on the question if a parent company may be held liable for the payment of the fine imposed resulting from the involvement of the subsidiary in an infringement. The judgment confirmed that in case a parent company holds – directly or indirectly - 100% of the capital of the subsidiary which infringed competition rules, the Commission may apply the rebuttable presumption that the parent company did exercise decisive influence over the conduct of the subsidiary and thus infer that both constitute a single undertaking within the meaning of Article 81 EC. In these circumstances, it is for the parent company to show that the subsidiary was able to determine its business policy autonomously, having regard in particular to the economic and legal links between them such as a unitary organisation of personal, tangible and intangible elements pursuing a specific economic aim on a long-term basis. In case the parent company fails to rebut the presumption the Commission may hold the parent company liable for the payment of the fine as imposed on the directly involved subsidiary.

C – MERGER CONTROL

1 SHAPING AND APPLYING THE RULES

172. In 2009 the number of mergers notified was below the record levels of previous years. In total, 259 transactions were notified to the Commission and 243 final decisions were adopted. Of these final decisions, 225 transactions were approved without conditions during Phase I, 82 decisions were approved without conditions under the normal procedure and 143 (or 63.6%) were cleared using the simplified procedure. A total of 13 transactions were cleared in Phase I subject to conditions.
173. Furthermore, the Commission initiated five Phase II proceedings, with three decisions adopted subject to conditions. Two cases were withdrawn in Phase II and six cases in Phase I. No prohibition decisions were taken during the year.
174. The legal powers provided for in Article 21(4) of the EC Merger Regulation allow the Commission to intervene in order to deter and ultimately prevent Member States from preventing or restricting the takeover of domestic companies by companies from other Member States on unjustified grounds. This provision also provides a procedural framework to exchange views in a timely manner with Member States to distinguish interventions with a "protectionist" motivation from a genuine pursuit of legitimate public interests (other than competition). From its inception, there have been fewer than 20 cases in application of Article 21. After a period of more frequent

¹⁴⁷ Case T-405/06, *Arcelor Mittal et al. v Commission*, judgment of 31.3.2009, paragraph 89; Case T-85/06, *General Química, SA et al. v Commission*, judgment of 18.12.2008, paragraph 62; Case T-69/04 *Schunk et al. v Commission*, judgment of 8.10.2008, paragraph 56; Case T-112/05, *Akzo et al. v Commission* [2007] ECR II-5049, paragraph 60; Joined Cases T-71/03 etc, *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 60; Case T-354/94, *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 80, upheld in case C-286/98P, *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27, 28 and 29; Case 107/82, *AEG v Commission*, [1983] ECR 3151, paragraph 50. See also the Opinion of AG Kokott in case C-97/08 - the appeal to the Akzo judgment in case T-112/05 paragraphs 46-76.

application of Article 21, in 2009 no new proceeding was opened under this provision.

1.1. The Merger Report

175. On 18 June the Commission presented a report to the Council on the application of the European Community Merger Regulation (ECMR)¹⁴⁸. The Commission had an obligation to report to the Council on the application of the ECMR five years after its entry into force. In preparation for this report, the Commission launched a public consultation which focused, in particular, on the application of the jurisdictional thresholds and the referral mechanisms, but also on general issues relating to the application of the ECMR.
176. The report concludes that overall, the jurisdictional thresholds and the referral mechanisms have provided the appropriate legal framework for a flexible allocation and re-allocation of cases between the Commission and the NCAs. In fact, the jurisdictional thresholds, including the "two-thirds rule", have in most cases been effective in distinguishing cases that have Community relevance from those with a primarily national nexus. Also, the pre-notification referral mechanisms introduced in 2004 have significantly contributed to the efficient allocation of merger cases to the authority which is more appropriately placed to carry out a review and have avoided unnecessary parallel proceedings. For example, it is estimated that during the period 2004 to 2008, these referral mechanisms reduced the number of potential parallel proceedings from around 1 000 to about 150. During the same period 40 cases were referred from the Commission to NCAs. The report also finds that the post-notification mechanisms in the hands of the Member States provided by the ECMR have proven to continue to be useful in re-allocating cases notwithstanding the introduction of the pre-notification referral mechanisms.
177. The report nevertheless highlights areas where there may be potential room for improvement: For example there were a small number of cases which potentially had cross-border effects across the Community which nevertheless were assessed by NCAs as a result of the operation of the "two-thirds rule". Also, in some cases, companies continue to notify mergers to three or more NCAs rather than make a single notification to the Commission (about 100 cases in 2007). There may therefore be further scope to achieve a "one-stop-shop" review for such cases, e.g. through the increased use of referral mechanisms. Conversely, there may also be scope for more referrals in the direction of the Member States. In this regard, some concerns were raised by stakeholders regarding the cumbersomeness and the length of the pre- and post-merger referral procedures. The public consultation also suggested that efforts towards further convergence of the various national rules governing merger control and their relation to Community rules would be beneficial to alleviate any difficulties encountered in connection with multiple filings.

¹⁴⁸ Communication from the Commission to the Council of 18 June 2009, Report on the functioning of Regulation No 139/2004 (COM(2009)281 final), and the accompanying Commission staff working paper (SEC(2009)808 final/2).

2. SELECTED COURT CASES

2.1. Case C-440/07 P, Commission v. Schneider Electric SA

Causal link between an infringement of the rights of defence by the Commission and the loss suffered by a notifying party in the context of non-contractual liability

178. By its appeal, the Commission requested the ECJ to set aside the judgment of the CFI in which the CFI found the Community liable in damages as a result of the infringement by the Commission of the rights of the defence of the notifying undertaking (Schneider) in the merger case COMP/M.2283 *Schneider/Legrand*. The ECJ partially annulled the CFI judgment. The ECJ upheld the CFI's finding that, in the present case, the violation of the rights of the defence resulted in a sufficiently serious breach of Community law capable of engaging the non-contractual liability of the Community.
179. However, the ECJ ruled that the CFI incorrectly held there to be a direct causal link between the Commission's illegality and the loss suffered by Schneider as a result of the reduction in the transfer price of the target company (Legrand). The ECJ considered that the direct cause of the damage claimed by Schneider was Schneider's decision to allow the transfer of Legrand to take effect, which it was not obliged to take following the annulment by the CFI of the Commission decisions declaring its proposed acquisition of Legrand incompatible with the common market and ordering it to separate itself from Legrand.
180. The ECJ nevertheless upheld the judgment of the CFI in so far as it ordered the Community to make good the loss represented by the expenses incurred by Schneider as a result of its participation in the resumed merger control procedure following the annulment by the CFI of the Commission's incompatibility and separation decisions.

II – Sector Developments

A – FINANCIAL SERVICES

1. OVERVIEW OF SECTOR

181. Financial markets continue to be crucial to the functioning of modern economies. They are the lifeblood of the real economy as they provide and facilitate businesses' and consumers' access to finance. The more integrated and the more competitive they are, the more efficient the allocation of capital and long-run economic performance will be. With the financial and economic crisis continuing into 2009, the year has been another extremely difficult one for the financial sector and EU governments have continued to take a series of emergency measures.
182. Therefore, in the field of State aid, the Commission has played a leading role by providing legal certainty as regards Member States' measures. Building on its 2008 Communications on Banking and Recapitalisation, the Commission issued an

Impaired Assets Communication on 25 February¹⁴⁹ and a Restructuring Communication on 22 July¹⁵⁰.

183. The Commission also ensured that national measures did not exported problems across borders. The Commission approved, subject to conditions, a number of restructuring measures in respect of banks that have received state support which should lead to the restoration of long-term viability in the sector and a return to normal market conditions. In 2008 and 2009, the Commission authorised over 30 rescue schemes in 19 countries and a large number of measures in favour of specific credit institutions. The overall authorised aid amounts to more than EUR 3.630 billion or approximately 29% of the EU-27 GDP¹⁵¹.
184. The Commission's actions contributed to maintaining financial stability whilst ensuring that a level playing field to the benefit of consumers and competition.
185. In 2009 merger activity in the financial sector declined as a result of the financial crisis. However, cases notified in 2009 and the implementation of remedies from earlier cases often raised difficult jurisdictional and procedural questions.

2. POLICY DEVELOPMENTS

2.1. Financial services – State aid

The financial crisis

186. Since the beginning of the financial crisis, the role of the Commission in the field of competition policy was twofold: (i) to support financial stability by rapidly giving legal certainty to measures taken by Member States and (ii) to maintain a level playing field and ensure that national aid measures would not simply export problems to other Member States.
187. In 2009, the restructuring of many European banks became the biggest challenge. Restoring the viability of the EU banking sector as a whole includes restoring viability of individual financial institutions. Restructuring is a prerequisite for the return to viability of credit institutions, lending to the real economy, re-establishing a level playing field across institutions, and for the smooth functioning of the European internal market.
188. The restructuring process of banks is based on the crisis-related State aid rules as laid down in the Restructuring Communication of 22 July 2009. The communication provides guidance on the conditions under which restructuring aid for banks in need of financial assistance beyond an emergency rescue can be authorised. The first principle is the return to *long-term viability* without State aid, based on a sound restructuring plan (including stress-testing of the bank's financial projections). The second principle is *burden sharing* between the bank/its stakeholders and the State. Shareholders and other capital holders must adequately contribute to bearing the

¹⁴⁹ OJ C 72, 26.3.2009.

¹⁵⁰ OJ C 195, 19.8.2009.

¹⁵¹ EU-27 GDP of 2008. See also State aid Scoreboard Autumn 2009 at: http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html

costs of financial, organisational and other necessary restructuring measures. Finally, the third principle requires *measures to limit competition distortions*. These usually comprise structural measures (divestitures) and behavioural measures (e.g. acquisition bans, limitations to aggressive commercial behaviour financed by State aid). The measures are decided on a case-by-case basis.

189. The Commission requests detailed regular reports on the implementation of the restructuring plans. Moreover, separate managers, monitoring trustees and divestiture trustees can be appointed to ascertain that the approved restructuring plans are being implemented properly.
190. In the course of 2009, the discussion began on how to return to market discipline in the financial sector. While it seemed too early to withdraw support measures to the economy and the financial sector, a debate about how to incentivise banks to progressively return to the markets began.
191. Discussions on a gradual phasing out of financial support to banks when the situation allows it took place with Member States and the European Central Bank in the context of the wider policy debate on how to best pave the way for a return to normal market conditions.

Restructuring cases

192. In 2009, the Commission approved, subject to specific conditions, a number of restructuring measures in respect of banks that received State support. The restructuring aims at restoring long-term viability of the institutions concerned without the need for further State aid and at encouraging the return to normal market conditions in the financial sector.

Commerzbank AG (DE)

193. Commerzbank is a credit institution with a total group balance sheet of approximately EUR 1 100 billion. It is the second biggest private credit institution in Germany since its acquisition of Dresdner Bank AG ("Dresdner Bank") in 2008.
194. In December 2008 and January 2009, Commerzbank received capital injections 1 amounting to EUR 18.2 billion from SoFFin¹⁵² under the German bank rescue scheme. The capital was granted in the form of ordinary shares (25% plus one share) and silent participations. In addition, SoFFin provided a guarantee for bond issuances worth EUR 15 billion.
195. On 7 May, the Commission approved that recapitalisation of Commerzbank (The total amount corresponds to 8.2% of risk weighted assets). It was one of the Commission's first decisions on a restructuring case originating from the financial crisis.
196. The main element of Commerzbank's viability plan is the focus on its core businesses, namely retail and corporate banking. To achieve that, Commerzbank will

¹⁵² The *Sonderfonds Finanzmarktstabilisierung*, created by the German government for dealing with the banking aid measures.

sell a significant amount of ownership stakes and other assets, amounting to roughly 45% of its current balance sheet total.

197. The plan also includes a number of measures which are aimed at keeping the aid to the minimum necessary and which, at the same time, limit its potential to distort competition. These measures include divestments by Commerzbank of activities and the sale of subsidiaries (including the sale of its subsidiary Eurohypo) to address the Commission's concerns regarding possible distortions of competition due to the large size of the aid granted.
198. The Commission found that the large-scale divestments and the suspension of payments of dividends and interest provided for in the plan limit the aid to the minimum necessary and ensure an adequate contribution of the bank and its owners to the restructuring.
199. In addition, behavioural measures in the Commission's Decision limit organic and external growth at the expense of competitors that have not received State support, which have become a standard of other restructuring decisions in the meantime. Commerzbank is subject to a ban of acquisitions of financial institutions and is furthermore not allowed to do business under more favourable price conditions than its top three competitors in markets/products where it has a market share above 5%. Commerzbank must not pay out dividends and coupons on own funds instruments for the business years 2009 and 2010 unless there is a binding legal obligation to do so. Moreover, Commerzbank must not liquidate any reserves in order to make such payments possible.

ING (NL)

200. Based in the Netherlands, ING operates in more than 50 countries, with a balance sheet of EUR 1.332 billion in 2008.
201. In November 2008 the Dutch authorities granted a recapitalisation for the benefit of ING amounting to EUR 10 billion. On 26 January 2009, the Dutch government provided ING with an impaired asset measure of USD 39 billion. In October 2009, the Netherlands have provided a detailed commitment to bring the measure fully in line with the Impaired Assets Communication of 25 February 2009 in particular by raising the guarantee fee, lowering the funding fee and reducing the management fee. In addition, ING had received guarantees on medium-term liabilities amounting to about EUR 12 billion under the Dutch guarantee scheme. The total aid amount corresponds to 5% of risk weighted assets.
202. On 18 November 2009, the Commission approved ING's restructuring plan and illiquid asset back-up facility. Actions in the plan include the reduction of the risk profile of ING's balance sheet and the divestment of activities amounting to 45 % of the balance sheet, including ING's insurance and asset management. The Netherlands also committed that ING adheres to a temporary acquisition ban of other firms.
203. The plan also envisages additional guarantees of up to EUR 10 billion provided by the Netherlands to make this carve-out possible. In addition to regular monitoring reports, trustees will be appointed, subject to the Commission approval, to monitor the implementation of various commitments foreseen in the restructuring plan. The Netherlands committed to a clear timetable for implementing the restructuring plan.

204. The Commission considered the proposed measures sufficient in respect to burden-sharing, and appropriate and proportional to offset the competition-distorting effects of the aid measures in question, namely the recapitalisation, the impaired asset measure, the already granted liability guarantees and the liability guarantees foreseen in the restructuring plan. Also, the Commission considered that additional aid deriving from the modified terms of the repayment conditions for the capital from the Netherlands was sufficiently taken into account with the presented measures foreseen in the restructuring plan and can therefore be considered compatible.
205. In particular the structural and behavioural commitments as described above are sufficient to mitigate the distortions of competition stemming from such a large amount of aid. The use of trustees for monitoring the implementation of the restructuring plan is also viewed positively.

Royal Bank of Scotland (UK)

206. RBS has been particularly hit by the financial crisis, because of its risky lending activities, its aggressive acquisition policy and its very leveraged balance sheet. As a consequence, RBS has received the largest aid by a Member State with GBP 45.5 billion of recapitalisation, a GBP 8 billion of contingent capital and participation in the UK asset protection scheme for a portfolio of GBP 281 billion of impaired assets (total restructuring aid between 11.3% and 19.6% of risk weighted assets). As a consequence, the State is now the controlling shareholder with an economic ownership of 84% of the capital of the bank.
207. The restructuring plan was submitted to the Commission on 2 June 2009 and is based on the run-off of a risky and funding-consuming loan portfolio. These actions are necessary to restore the bank's long-term viability. Following the discussion with the Commission, the plan also contains some material divestments as well as some behavioral commitments in order to address issues of viability, burden-sharing and limitations of distortions of competition. In addition, following a detailed evaluation of the expected losses of the assets covered by the asset protection scheme, it was decided to increase the first loss tranche – the amount of credit losses borne by RBS - from GBP 43 billion to GBP 60 billion. This means that the State will only indemnify the bank for the losses exceeding that amount. This significant adjustment put the measure in line with the Impaired Assets Communication of 25 February 2009.
208. The divestments proposed consist of: (i) a divestment of 318 branches and associated customers in the SME and mid-corporate banking market; (ii) the sale of Global Merchant Services, a transaction service business; (iii) the sale of the RBS insurance business, which is the leading UK general insurance company; (iv) the sale of a business active in commodities trading; and v) the sale of a contingent divestment representing in the event its core Tier 1 capital ratio declines to below 5% or RBS falls short of its balance sheet reduction targets.
209. RBS will respect an acquisition ban for at least three years. RBS will pay an adequate remuneration for its capital injection which is in line with the Commission's Recapitalisation Communication, as well as for its guarantees on medium-term liabilities in line with the UK guarantee scheme which, in turn, is in line with the Banking Communication. Except when it is legally compulsory, RBS will not pay

dividends or coupons on existing hybrid capital instruments for a period of two years.

210. The bank also committed to a cap in its overall annual position in the Global Debt League Table, to be in the leading edge of implementing the G20 principles and the UK Financial Services Authority (FSA) code on remuneration practices and bonuses, as well as not to make any reference to State support in its marketing.
211. The Commission considered that RBS' restructuring plan entails sufficient structural and behavioural measures to address the distortion of competition created by the aid and that the restructuring measures are apt to enable RBS to restore its long-term viability. Therefore, the Commission approved under EU State aid rules the impaired asset relief measure and the restructuring plan of Royal Bank of Scotland on 14 December 2009.
212. The restructuring plan has a number of provisions with regards to the monitoring of the plan (monitoring trustee), the enforcement of divestments (divestiture trustee if divestments not completed by the deadlines) and the preservation of the value of the businesses (hold separate manager).

Lloyds Banking Group (UK)

213. The Lloyds Banking Group ("LBG") was formed through the acquisition of Halifax Bank of Scotland (HBOS) by Lloyds TSB announced in September 2008. It rapidly turned out that the situation of HBOS was much worse than expected. Therefore, this acquisition, while allowing the group to consolidate its leading position on the UK retail market, contributed to LBG's difficulties which lead to the need for State intervention in the bank.
214. In its decision of 13 October 2008, the Commission approved a package of financial support measures to the banking industry in the UK. On the basis of that scheme LBG received a capital injection of GBP 17 billion, of which GBP 2.3 billion was repaid in June 2009.
215. In addition, the State participated in LBG's rights issue of November 2009, amounting to a State participation of GBP 5.9 billion to maintain its 43.5% shareholding. In total, the recapitalisations by the State corresponds to 4.1% of the risk weighted assets of the bank at the end of 2008.
216. LBG submitted a restructuring plan on 16 July 2009. After discussions with the UK authorities, the Commission approved a modified plan on 18 November 2009. The measures described in the approved restructuring plan will result in the disposal or run-down of non-core businesses and activities resulting in an asset reduction of around GBP 181 billion by the end of 2014. In order to limit the distortion of competition created by the aid LBG will divest part of its UK retail banking activities by selling more than 600 branches accounting for a market share of 4.6% in the current account segment. In addition, LBG will respect a number of behavioural commitments such as an acquisition ban for at least three years.
217. LBG will pay an adequate remuneration for its capital injection which is in line with the Recapitalisation Communication. LBG will also pay an adequate remuneration for its guarantees on medium-term liabilities in line with the UK guarantee scheme

which, in turn, is in line with the Banking Communication. Finally, LBG will comply with the Commission's policy on Tier 1 and Tier 2 capital instruments, i.e. during two years LBG will not pay investors any coupon on existing hybrid capital instruments (issued before 3 November 2009) unless there is a legal obligation to do so.

218. The Commission concluded that the restructuring plan enables LBG to restore its long-term viability, is sufficient in respect to burden-sharing requirements and contains sufficient structural and behavioural measures to offset the distorting effects of the aid measures in question. The Commission has therefore concluded that the aid was compatible pursuant to Article 87(3)(b) EC.

KBC

219. KBC is a Belgium-based bank with a total balance sheet of EUR 355 billion (as per December 2008), which got into difficulties largely because of the substantial downward revaluation of its portfolio of Collateralised Debt Obligations (CDOs).
220. In December 2008, KBC received a recapitalisation of EUR 3.5 billion. This measure was approved for a period of six months and subject to the submission of a plan showing how KBC would return to viability within this period.
221. On 22 January 2009, a second recapitalisation of EUR 3.5 billion was announced by the Belgian authorities. On 14 May 2009, an asset relief measure, covering the losses on a CDO portfolio with a notional value of EUR 20 billion was announced by Belgium. Consequently, the total aid amount corresponds to at least 4.1% of risk weighted assets. On 30 June 2009, the Commission initiated the formal investigation procedure with regard to several aspects of that asset relief measure, while it approved the second recapitalisation as rescue aid for a period of six months and subject to the submission of a restructuring plan. The Belgian authorities submitted a restructuring plan on 30 September 2009.
222. On 18 November 2009, the Commission approved the restructuring plan, concluding that it met the criteria of the Restructuring Communication. The Commission found that the restructuring measures proposed by the Belgian authorities were appropriate to enable KBC to restore its long-term viability through the run-off of KBC Financial Products, the unit that originated the CDOs which were the cause of most of its problems, and the divestment of subsidiaries that either cannot operate on a stand-alone basis or do not fit in the refocused KBC business model.
223. The restructuring plan furthermore provided for sufficient own contribution and burden-sharing through the listing of two fully-owned subsidiaries in the Czech Republic and Hungary on local stock exchanges and the divestment of KBC's European Private Banking business unit. The Commission also concluded that KBC pays a remuneration for the aid which is higher than the minimum required in the Recapitalisation Communication.
224. Finally, the Commission concluded that appropriate and proportional measures to offset the market-distorting effects of the aid measures in question have been put into place amounting to around 17% of KBC's total balance sheet. More specifically, this includes the sale of Centea (bank) and Fidea (insurer) in Belgium, businesses in Central and Eastern Europe (CEE) as well as various merchant banking and leasing

operations. These divestments should, amongst others, help stimulate competition on the concentrated Belgian market. KBC is also subject to behavioural constraints, including an acquisition ban and a price leadership ban in countries where the market share is higher than 5% (except Belgium). Moreover, KBC will not pay investors any coupon on hybrid capital instruments during 3 years, unless there is a legal obligation to do so. KBC will also refrain from calling hybrids during this period.

2.2. Financial services – Merger control

225. In 2009 merger activity in the financial sector declined as a result of the financial crisis. However, cases notified in 2009 and the implementation of remedies from earlier cases often raised difficult jurisdictional and procedural questions. Two main points should be noted about the merger activity in the financial sector in the past year.
226. Firstly, the acquisition of majority stakes in financial institutions by Member States raised jurisdictional questions, in particular, whether nationalisations of financial institutions were notifiable under the Merger Regulation. This required an assessment of whether or not the nationalised entity would continue to act independently in the market post-nationalisation, or whether the nationalised entity should be considered as part of a single economic entity with other state-controlled undertakings. In most cases, the Commission was satisfied that the arrangements put in place by the Member States ensured the independence of the nationalized banks and thus that no concentration took place. However, in one case the facts were different and a concentration was subsequently notified¹⁵³.
227. Secondly, divestiture commitments had to be closely monitored in a number of cases and the implementation of commitments was made more difficult by market circumstances. In the *Fortis/ABN AMRO Assets*¹⁵⁴ case, dating from 2007, Fortis had committed to the Commission not to merge the Dutch activities of ABN Amro and Fortis without prior divestments. During the financial crisis the Dutch State acquired control of the Dutch parts of both banks and took over Fortis' position in the Consortium Agreement. The Commission extended the deadline for divestiture several times. The Parties finally signed a Sales and Purchase Agreement on 23 December 2009 which remains subject to a certain number of closing conditions

2.3. Financial services – Antitrust

228. Whilst in some fields of the financial services sector like payment systems and payment cards, the Commission has been very active in the past, the Commission is only starting to intensify its work in antitrust in other sectors like banking, securities, trading, clearing & settlement infrastructure, insurance and financial market data distribution.

¹⁵³ Case COMP/M.5528 *SOFFIN/Hypo Real Estate*. The nationalisation of Hypo Real Estate Bank by the Federal Republic of Germany.

¹⁵⁴ Case COMP/M.4844 *Fortis/ABM AMRO Assets*.

2.3.1. *Single Euro Payments Area*

229. SEPA (Single Euro Payments Area) was an important focus of antitrust advocacy in the field of financial services in 2009. SEPA is a self regulatory initiative launched by the European Banking Industry and led by the European Payments Council (EPC) to move to an integrated Euro payments area, ensuring that cross border payments become as easy and efficient as domestic payments. Once fully implemented, SEPA will cover credit transfers, payment cards and direct debits. SEPA, whilst primarily devised by the industry itself, is strongly supported by the European Central Bank (ECB) and the Commission. Since it is based on decisions of and agreements between undertakings that are (potential) competitors it deserves close competition scrutiny. It also needs to be implemented in accordance with the existing Community framework for payment services.
230. As a result of the informal dialogue ("the Dialogue") with the EPC launched in October 2007, a number of competition concerns were addressed. For instance the SEPA Card framework (SCF) was clarified to the extent that SEPA compliant card schemes do not need to cover all 32 states of the SEPA territory. New schemes stand a real chance of entering the market. In the course of 2009, informal discussions with potential new entrants – Payfair and Monnet in particular – were held, notably to clarify the compatibility of their envisaged financing mechanisms with competition rules and to encourage the creation of a competitive SEPA-wide payment cards market.
231. The Dialogue continued in 2009, with a focus on interchange fees for SEPA Direct Debit (SDD), governance of the EPC and of the schemes as well as standardisation. With SEPA Direct Debit launched on 2 November 2009, it was urgent to provide the necessary incentives for banks to migrate. As SEPA involves agreements between competing parties, collective financing arrangements for SDD must comply with the EC Treaty competition rules. As a result, the Commission and the ECB clarified in September 2008 that a transitional default multilateral interchange fee (MIF) for cross border SDD transactions, as well as maintaining the same interchange fees as *domestic* legacy direct debit for *domestic* SEPA transactions could be envisaged for a short and well defined transition period. This was taken on board in the discussions on and incorporated in Regulation 924/2009 which applies from 1 November 2009. In addition, the joint Commission and ECB statement of March 2009¹⁵⁵ clarified financing principles. On the basis of the information available, the Commission's preliminary assessment was that there appeared to be no clear and convincing reasons for per transaction MIFs to exist after 31 December 2012. This provided the industry with the clarity needed to agree on the launch of this scheme. The EPC took a decision to this effect at the end of March.
232. In addition, the joint statement said that the Commission expected to be in a position to provide further guidance by November 2009 (provided that the Commission will have received the necessary contributions by relevant market actors). Even though no submissions have been received, a Commission working document that aims to consult on further guidance to participants in the SDD scheme as regards the assessment of collective financing mechanisms under European competition rules

¹⁵⁵ Joint statement by the European Commission and the European Central Bank clarifying certain principles underlying a future SEPA direct debit (SDD) business model, SEC(2009)397.

was released and a public consultation launched on 3 November, for contributions to be received by 14 December. The Commission will then decide on next steps and it may, if appropriate, decide to adopt final guidance to provide greater clarity and predictability on the general framework of analysis.

233. The momentum created in the earlier stages of the Dialogue should help to tackle the remaining obstacles to the achievement of a truly competitive European payment cards market. Reinforcing and strengthening the competition dimension of SEPA will in turn help to achieve better services at a better price for retailers and consumers.

2.3.2 *Payment cards*

234. Following its decision prohibiting MasterCard's cross border Multilateral Interchange Fees (MIFs) in 2007¹⁵⁶, the Commission continued to closely monitor MasterCard's implementation of the Decision. In June 2008, MasterCard withdrew its cross border MIFs. However, on 1 October 2008 it increased certain acquirer fees. This led to negotiations with the Commission's services on compliance, which, in April 2009, resulted in a decision by MasterCard to reintroduce substantially lower cross-border MIFs¹⁵⁷ to repeal the scheme fee increases, and to change its system rules as of July 2009 in order to increase transparency and competition in the payment cards market¹⁵⁸. These changes were considered by The Commissioner for Competition to be sufficient in order to conclude that it was not appropriate to pursue MasterCard for non-compliance with the Decision of 19 December 2007 or for infringing the antitrust rules. Implementation of these undertakings is closely monitored by an independent trustee.

235. Further to the Commission's opening of investigations in March 2008 regarding VISA Europe's cross border MIFs, a SO was sent in April 2009. A hearing took place in this case on 30 November and 1 December 2009. The investigation is on-going.

236. In addition, in May the Commission has commissioned a study comparing the costs of payments by cash and by cards, which is carried out by an external consultant

2.3.3 *Financial market data distribution*

237. The financial sector is highly dependent on the delivery of highly precise market data in relation to prices and structures of securities. A large number of internal and external banking applications rely upon encoded standards and identifiers that permit to recognise securities and interoperate. The sector of market data distribution in general is characterised by a high degree of concentration, as well as by competition issues related to standard setting, IP rights and interoperability or possibility to switch providers.

238. In 2009 the Commission opened formal proceedings against Standard & Poors' for allegedly abusing its dominant position related to the issuance and licensing of

¹⁵⁶ COMP/34579; <http://ec.europa.eu/competition/antitrust/cases/decisions/34579/en.pdf> The decision is currently under appeal before the General court of the European Union.

¹⁵⁷ Following the new methodology, the maximum weighted average MIF per transaction is now reduced to 0.30% for consumer credit cards and to 0.20% for consumer debit cards.

¹⁵⁸ See IP/09/515 and MEMO/09/143.

securities identifier codes called ISINs¹⁵⁹. The Commission also opened formal proceedings against Thomson Reuters concerning the use of RICs¹⁶⁰. The Commission will investigate Thomson Reuter's practices in the area of real-time market datafeeds and in particular, whether customers or competitors are prevented from mapping RICs to alternative identifiers of other datafeed providers and whether this potentially creates a "lock-in"-effect for customers as the replacement of RICs in customers' applications may be a long and costly procedure. Such a practice may potentially constitute an infringement of Article 102 TFEU.

2.3.4. *Securities Trading, Clearing and Settlement (C&S)*

239. The implementation of the Markets in Financial Instruments Directive (MiFID) has contributed to opening up these markets. Significant changes to market structures were observed, especially with the entry of new players like Multilateral Trading Facilities (MTFs) on the trading layers and new Central Counterparties (CCPs) on the clearing layer. On the post-trading layer, the Code of Conduct which was signed by the post-trade infrastructure providers ensured positive developments on the level of unbundling the services and increasing the level of price transparency. But the progress in the implementation of interoperability links with the competitors that operate or will operate behind the same trading venue is slow. From a competition policy perspective, a closer scrutiny of the sector and the market practices that determine slow progress in opening up these markets might be required.

240. While each case has to be assessed individually, the Clearstream judgment (see paragraphs 155 to 159) brought some clarification with regard to the market definition and the differentiation between primary and secondary clearing and settlement services, which will serve as a good basis for future cases. Furthermore, the judgment clearly illustrates special obligations of incumbent infrastructures in the area of Clearing and Settlement (C&S) that enjoy dominant positions in a given market when dealing with market access requests from other infrastructures wishing to compete.

2.3.5. *OTC Derivatives*

241. In the area of derivatives, on 20 October, the Commission adopted a Communication on ensuring efficient, safe and sound derivatives markets that sets out the future policy actions to increase transparency of the derivatives market and reduce counterparty and operational risks. In response to the Commission's call for central clearing of credit default swaps (CDS), ten major dealers committed to clear CDS on European reference entities through central counterparties (CCPs) established and regulated in the European Union. The high degree of concentration in CDS markets both on the level of market data and transactional levels as well as possibly emerging

¹⁵⁹ ISIN are the global identifiers for securities and are governed by International Standardisation Organisation (ISO) standard 6166. They are indispensable for a number of operations that financial institutions carry out (for instance, reporting to authorities or clearing and settlement) and cannot be substituted by other identifiers for securities. See also [MEMO/09/508](#).

¹⁶⁰ RICs are short, alphanumerical codes that identify securities and their trading locations. They are used to retrieve information from Thomson Reuters' real-time datafeeds, for example real-time information on stock prices at a certain exchange. See also [IP/09/1692](#) of 10.11.2009.

concentration on the clearing layer require closer market monitoring from the competition policy point of view.

2.4. Insurance sector

242. In the field of insurance, the current Insurance Block Exemption Regulation (BER) expires on 31 March 2010 (see Section I.B.1.4.4. above).

B – ENERGY AND ENVIRONMENT

1. OVERVIEW OF SECTOR

243. 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. Interconnections between European gas and electricity grids need to be substantially improved. These objectives can only be met effectively through a properly functioning and 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 to create a single European energy market.
244. Competition policy in the energy field aims at ensuring a secure flow and supply of energy at competitive prices to the EU's households and businesses. An open and competitive single EU market will guarantee a secure provision of energy in the future by sending the necessary signals for investment and making it attractive to suppliers. Such a market will also be open to new energy mixes and will 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.

2. POLICY DEVELOPMENTS

245. The Internal Energy Market package proposed by the Commission on 19 September 2007 was adopted in 2009. It is recalled that the Commission's Final Report on the energy sector inquiry¹⁶¹ was a key element in the Commission's resolve to propose an improved regulatory framework for electricity and gas. Subsequent to the conclusion of the first reading on 9 January 2009¹⁶², the European Parliament, the Council and the Commission entered into intensified discussions ("trilogue") with a view to reaching agreement on the package in the second reading. These discussions succeeded¹⁶³ and the package was adopted on 13 July¹⁶⁴.

¹⁶¹ 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, 10.1.2007), and DG Competition report on energy sector inquiry (SEC(2006)1724, 10.1.2007).

¹⁶² Adoption of the Council's Common Position on 9 January 2009.

¹⁶³ Cf Position of the European Parliament of 22 April 2009 and Council Decision of 25 June 2009.

246. On 6 April the European Parliament and the Council adopted the climate-energy legislative package containing measures to fight climate change and promote renewable energy that had been proposed by the Commission in January 2008. This package is designed to achieve the EU's unilateral commitment of a 20% reduction in greenhouse gases compared to 1990 and a 20% share of renewable energy in the EU's total energy consumption by 2020. The package contains a directive on renewable energy establishing sustainability criteria for biofuels and bioliquids¹⁶⁵ which are also relevant for the assessment of State aid in that area. Moreover, as part of the package, the Council adopted a Directive revising the EU Emissions Trading System (ETS) for greenhouse gases¹⁶⁶. Under the revised directive up to 300 million emission allowances (at current EUA price worth some EUR 4 billion) will be set aside for the financing of clean technologies. They will contribute to the funding of up to twelve demonstration projects in carbon capture and storage and also innovative renewable energy projects.
247. Furthermore, on 13 July the European Parliament Council adopted a regulation¹⁶⁷, which had been proposed by the Commission in November 2008 as a response to the financial crisis with the aim of reinforcing the EU's energy supply. The projects in the field of energy supported under the regulation will contribute to achieving the objectives of security of energy supply and reducing greenhouse gas emissions. A financial envelope of nearly EUR 4 billion is foreseen in the following 3 areas: gas and electricity interconnection, offshore wind technology and Carbon Capture and Storage.
248. After adoption of a second Strategic Energy Review in 2008¹⁶⁸ and endorsement of its main conclusions by the European Council in March 2009, the Commission adopted on 16 July a proposal for a Regulation concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC¹⁶⁹.

2.1. Antitrust enforcement

249. The work in 2009 concentrated on carrying forward existing Article 102 and 101 TFEU cases.

¹⁶⁴ OJ L 211, 14.8.2009.

¹⁶⁵ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16).

¹⁶⁶ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140, 5.6.2009, p. 63).

¹⁶⁷ Regulation (EC) No 663/2009 of the European Parliament and of the Council of 13 July 2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy (OJ L 200, 31.7.2009, p. 31).

¹⁶⁸ See Press release IP/08/1696, 13.11.2008

¹⁶⁹ COM(2009)363; see also IP 09/1153, 16.7.2009. The Commission also adopted a proposal for a regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Community and repealing Regulation (EC) No 736/96, COM(2009) 361; see also IP/ 09/1152, 16.7.2009.

2.1.1. Decisions

250. In *RWE Gas Foreclosure*¹⁷⁰, the Commission adopted on 18 March a decision¹⁷¹ under Article 9 of Regulation 1/2003 rendering commitments previously proposed by RWE legally binding upon RWE and closing its investigation. The Commission had concerns that RWE may have abused the dominant position on its gas transmission network to restrict its competitors' access to the network, thereby violating Article 82 EC. The Commission's suspicion related to a possible refusal to supply gas transmission services to other companies and to network-related behaviour aiming at lowering the margins of RWE's downstream competitors in gas supply ("margin squeeze"). In reaction to the Commission's concerns, RWE offered to divest its entire Western German high-pressure gas transmission network¹⁷². On 5 December 2008, the Commission had consulted interested parties on the commitments proposed by RWE¹⁷³. The respondents confirmed that the commitments were necessary and proportionate to remedy the concerns. The divestment constitutes a clear-cut and lasting solution to the concerns the Commission raised, ensuring that RWE will no longer be able to use the control of its network to favour its own gas supply affiliate over its competitors.
251. In *E.ON/GDF*¹⁷⁴ the Commission adopted on 8 July a decision under Article 7 of Regulation 1/2003, imposing total fines of EUR 1 106 million on E.ON and GDF Suez for market sharing in breach of EC Treaty rules on cartels and restrictive business practices (Article 81 EC)¹⁷⁵. After conducting surprise inspections in 2006¹⁷⁶ and formally opening proceedings in July 2007¹⁷⁷, the Commission had issued a SO to E.ON and GDF Suez in June 2008¹⁷⁸ and both companies had the opportunity to fully exercise their rights of defence. The infringement took the form of an agreement between E.ON and GDF, according to which they would not sell gas transported via the MEGAL pipeline in the other party's home market. The agreement was concluded in 1975, when the parties concerned decided to jointly build the MEGAL pipeline across Germany to import Russian gas into Germany and France. It was maintained after European gas markets were liberalised, and only abandoned definitely in 2005. The fines in this case were the first Commission fines imposed for an antitrust infringement in the energy sector and constitute the highest fines imposed in 2009.
252. The *Gaz de France Foreclosure*¹⁷⁹ case addresses suspected abusive behaviour by the French incumbent GDF Suez. The Commission was concerned in particular that GDF Suez might be closing off competitors from access to gas import capacity into France and that it thereby might have infringed EC Treaty rules on abuse of a dominant market position (Article 82 EC) in the gas sector. GDF Suez proposed to address the Commission's concerns through a major structural reduction in its long-

¹⁷⁰ Case COMP/39402 on the initiation of proceedings see MEMO/07/186, 11.5.2007.

¹⁷¹ See IP/09/410, 18.3.2009.

¹⁷² See MEMO/08/355, 31.5.2008.

¹⁷³ See MEMO/08/768, 5.12.2008.

¹⁷⁴ Case COMP/39401.

¹⁷⁵ See IP/09/1099, 8.7.2009.

¹⁷⁶ See MEMO/06/205, 17.5.2006.

¹⁷⁷ See MEMO/07/316, 30.7.2007.

¹⁷⁸ See MEMO/08/394.

¹⁷⁹ Case COMP/39316.

term reservations of gas import capacity into France. The proposed remedies foresee a very significant immediate reduction of the long-term capacities held by GDF and a reduction to below 50% within 4-5 years. The Commission received commitments offered by GDF Suez to remedy these concerns and reviewed the commitments in close cooperation with the French energy regulator. On 8 July, the Commission invited interested parties to present their comments on the commitments offered by GDF Suez. On 2 December, the Commission adopted a decision under Article 9 of Regulation 1/2003 making the commitments legally binding on GDF Suez. The commitments will make it easier for competitors to enter the French gas market and so contribute to delivering the benefits of the Single Market to French energy consumers in terms of greater choice of gas supplier and more competition on prices.

253. On 6 August, the European Commission accepted commitments made by Greece to ensure fair access to Greek lignite deposits¹⁸⁰. The commitments were made to comply with a decision adopted by the European Commission on 5 March 2008¹⁸¹ which found that Greece had infringed competition rules (Articles 82 and 86 EC) by maintaining rights giving the state-owned electricity incumbent Public Power Corporation (PPC) privileged access to lignite. In particular, Greece has committed to granting exploitation rights to four lignite deposits through public tenders excluding PPC, to ensure that competitors of PPC in the Greek electricity market obtain access to lignite and to lignite-fired generation. The Commission's decision makes the proposals legally binding on Greece and requires the commitments to be implemented within one year. The Commission's decision makes sure that competitors of PPC will get fair access to lignite, which is crucial to allow new entrants into the Greek electricity generation market. This should ensure greater choice of electricity supplier for Greek consumers and increase the security of supply.

2.1.2. *Other procedural steps*

254. The Commission addressed a SO to *ENI S.p.A.* on 6 March¹⁸². The SO sets out the Commission's preliminary view that the management and operation of natural gas transmission pipelines by ENI may be in breach of EC Treaty rules on abuse of a dominant market position (Article 82 EC). This behaviour concerns an alleged refusal to grant access to capacity available on the transport network (capacity hoarding), the granting of access in an allegedly less useful manner (capacity degradation) and an alleged strategic limitation of investment (strategic underinvestment) in ENI's international transmission pipeline system. These practices allegedly took place despite very significant short- and long-term demand from third party shippers. The SO indicates that these practices may have weakened competitors on the market, and harmed customers in Italy. In the interest of ENI's exercise of its rights of defence, a hearing took place in this case on 27 November.
255. In the *Svenska Kraftnät*¹⁸³ case the Commission opened proceedings on 23 April¹⁸⁴. On 6 October, the Commission launched a market test¹⁸⁵ inviting comments from

¹⁸⁰ See IP/09/1226, 6.8.2009.

¹⁸¹ See IP/08/386, 5.3.2008.

¹⁸² Case COMP/39315. See [MEMO/09/120](#), 19.3.2009.

¹⁸³ Case COMP/39351.

¹⁸⁴ See MEMO/09/191, 23.4.2009.

interested parties on the commitments offered by Svenska Kraftnät (SvK), the Swedish transmission system operator, following the Commission's concerns that SvK might have breached EC Treaty antitrust rules on the abuse of a dominant market position (Article 82 EC). The Commission's concerns relate to the Swedish electricity transmission market, and in particular that SvK is limiting the amount of export transmission capacity available on electricity interconnectors situated along Sweden's borders, with the objective of relieving internal congestion on its network. This would appear to favour consumers in Sweden over consumers in neighbouring EU and EEA Member States by reserving domestically produced electricity for domestic consumption. To alleviate these concerns, SvK has offered to subdivide the Swedish transmission system into two or more bidding zones and to manage congestion in the Swedish transmission system without limiting trading capacity on interconnectors. If the result of the market test is positive, the Commission may adopt a decision under Article 9 of Regulation 1/2003, making the commitments legally binding on SvK.

256. In the *EDF Customer Foreclosure* case¹⁸⁶, in which a SO was sent to the party concerned in December 2008¹⁸⁷, the Commission launched a market test on 4 November. The European Commission thereby invited comments from interested parties on commitments offered by the French energy company EDF. These commitments seek to address the Commission's concerns that EDF may be abusing its dominant position in France. Under the proposed commitments, EDF would ensure that competitors could compete for on average 65% of the electricity it contracts with large industrial users in France each year during the period of the commitments. Should EDF's market share fall, this percentage would be reduced but the volumes which EDF could contract for more than one year would be capped. In addition, the duration of any new contract concluded with large industrial users would not exceed five years. Therefore, the proposed commitments have the potential to provide actual and potential competitors with a regular opportunity to acquire EDF customers. If the market test indicates that EDF's proposals would remedy the Commission's competition concerns, the Commission may adopt a decision under article 9 of Regulation 1/2003 making the commitments legally binding on EDF. Together with the reform of the regulated electricity market being implemented by the French government¹⁸⁸, the commitments in this case have the potential to constitute an important step towards a fully competitive electricity market in France.

257. Furthermore, on 11 March, the Commission carried out surprise inspections in the French electricity sector¹⁸⁹.

2.2. Merger control

258. In 2009 the European Commission cleared three transactions concerning the supply of gas and electricity with remedies: Vattenfall's acquisition of Nuon Energy¹⁹⁰,

¹⁸⁵ See IP/09/1425, 6.10.2009.

¹⁸⁶ Case COMP/39386 *Long term electricity contracts in France*.

¹⁸⁷ See MEMO/08/809, 29.12.2008.

¹⁸⁸ See below (State aid section). See MEMO/09/394.

¹⁸⁹ Case COMP/39442. See MEMO/09/104, 11.3.2009.

¹⁹⁰ Case COMP/M.5496 Vattenfall/Nuon decision.

RWE's purchase of Essent¹⁹¹ and Segebel's acquisition by EDF¹⁹². In all of these three cases the Commission identified competition problems and the parties offered remedies that resolved these issues. Furthermore, the Commission cleared unconditionally two cases¹⁹³ arising from the remedies given by E.ON antitrust proceedings¹⁹⁴.

Vattenfall/Nuon

259. Vattenfall, which is ultimately controlled by the Swedish State, operates along the entire energy chain. Its main activities are in Sweden, Germany, Finland, France, Denmark and Poland. Nuon Energy is also active across the entire energy chain, in the production and supply of electricity and gas, and in the supply of heating and cooling services. It is mainly active in The Netherlands but also has activities in Belgium and Germany.
260. When assessing the Vattenfall/Nuon case, the Commission's investigation revealed that the proposed transaction would not raise competition concerns on most relevant markets due to the minor horizontal overlaps between the parties' activities. However, the Commission found that the two firms' retail operations in Germany and in particular the supply of electricity to small commercial and domestic customers in Berlin and Hamburg raised competition issues. Vattenfall was the incumbent supplier and Nuon the strongest new entrant in these cities. Consequently the proposed transaction would have further strengthened the position of Vattenfall, reversing a substantial part of the gains of market liberalisation.
261. To resolve these competition concerns, Vattenfall proposed to divest Nuon Deutschland GmbH, Nuon Energy's electricity retail business in Germany. This divestiture will ensure that effective competition is maintained.

RWE/Essent

262. RWE is active on both electricity and natural gas markets in most EU Member States and in particular in Germany, the UK, the Czech Republic and Hungary. Essent is active in the electricity and natural gas markets, mainly in The Netherlands and to a lesser extent in Germany and Belgium. The two companies' activities overlap in the electricity and gas markets in both The Netherlands and Germany.
263. In this case the Commission's investigation found that the proposed transaction would have raised competition concerns in the German wholesale electricity and gas markets. At the time of the proposed transaction, Essent had a controlling shareholding in Stadtwerke Bremen AG (SWB), which, like RWE, is active in these markets. On the wholesale electricity market, the Commission found that the proposed transaction would have strengthened RWE's current collective dominant position (together with at least E.ON) by removing SWB as an actual competitor while at the same time increasing RWE's incentives to withdraw generation capacity to raise prices.

¹⁹¹ Case COMP/M.5467 RWE/Essent.

¹⁹² Case COMP/M.5549 EDF/Segebel.

¹⁹³ Case COMP/M.5512 Electrabel/E.ON (certain assets) and M.5519 E.ON/Electrabel acquired assets.

¹⁹⁴ Cases COMP/39388 and COMP/39389 E.ON electricity.

264. On the gas wholesale market the Commission was concerned that the proposed transaction would have given rise to a vertical relationship, resulting in closing off supplies to customers, between the upstream market for gas short-distance wholesale supply and the downstream markets for gas retail sales in RWE's TSO area.
265. To resolve these competition concerns, RWE proposed to divest Essent's controlling shareholding of 51% in SWB and thus transferring swb's gas and electricity operations to an independent third party.

EDF/Segebel

266. On 23 September, EDF notified a proposed concentration whereby EDF would obtain 51% stake in SPE by acquiring Segebel. EDF is active, in France and other countries, in the generation and wholesale trading of electricity and in the transmission, distribution and retail supply of electricity, as well as in the provision of other electricity-related services. Its presence in Belgium had been relatively limited, although it was the third largest operator. SPE is a Belgian company active in the production of electricity and in the trading and supply of electricity and gas in Belgium. It is the second largest electricity operator in Belgium, after the incumbent operator GDF SUEZ (Electrabel).
267. Although the Commission's investigation revealed that the transaction would not significantly affect competition on most relevant markets, competition concerns were identified, in particular with regard to the Belgian wholesale electricity market. These arose because the transaction removed EDF as a significant potential entrant in this market. The incentives of the merged entity to develop new generation capacity in Belgium would be significantly reduced because of the concentration.
268. To remove the Commission's concerns, EDF proposed the immediate divestment of the assets of the company responsible for the development of one of the two sites and the divestment of the assets of the other company if, by a later date, EDF had not taken a final investment decision or had decided not to develop the remaining site.
269. On 14 October, the Belgian NCA requested the partial referral of the transaction to allow it to assess the Belgian electricity markets under Belgian competition law. As the Commission was the better placed authority to review the transaction and because the commitments solved the identified competition concerns, the Commission, on 12 November, refused the referral request and approved the transaction subject to commitments.

2.3. State aid enforcement

270. In the area of State aid control the Commission has made progress with regard to French regulated electricity tariffs¹⁹⁵. These tariffs are lower than market prices and provide French companies with an economic advantage. They also contribute to the foreclosure of the French electricity market since mainly EDF was entitled to provide such tariffs. The Commission had opened a State aid procedure against regulated electricity tariffs for French companies in 2007. On 19 the Commission welcomed the French government's announcement of a reform plan providing for a phasing-out

¹⁹⁵ Case C17/2007 (ex NN19/07) *Regulated electricity tariffs in France* (OJ C 96, 25.4.2009, p. 18).

of the tariffs and a mechanism aimed at stimulating competition on the electricity market by ensuring access to competitors to a certain percentage of EDF nuclear generation capacity at a regulated price. The adoption of the French legislation is required before the Commission can take a final decision¹⁹⁶. In addition, a similar State aid procedure against Spanish regulated tariffs is still pending¹⁹⁷.

271. A distinction can be made between regulated tariffs and preferential tariffs. While regulated tariffs usually apply to the whole of the economy of a Member State, preferential tariffs apply only to certain sectors or individual companies. So far, the Commission has taken decisions only on preferential tariffs. In particular, the Commission adopted on 18 November a negative decision with recovery in the preferential tariffs for Alcoa plants in Veneto and Sardinia¹⁹⁸, reaffirming the negative approach already taken in the Terni case in 2007 towards this type of operating aid given for competitiveness reasons and distorting competition in the Single market¹⁹⁹. Following the opening of the formal investigation procedure²⁰⁰, Italy decided to withdraw a notification for a preferential tariff for selected energy-intensive industries in Sardinia on 30 September. In the meantime the Commission is assessing a notification from Germany concerning electricity tariffs for certain energy intensive industries²⁰¹.
272. In the area of renewable energies the Commission authorised a Cypriot scheme²⁰², three Danish schemes²⁰³ and an Austrian scheme subsidising feed-in tariffs in favour of producers of renewable energies²⁰⁴. Concurrently the Commission opened an in-depth investigation in certain provisions of the Austrian scheme which seem to favour large energy consumers²⁰⁵. The Commission expressed doubts with regard to the compatibility of the scheme with State aid rules since the partial exemption of energy intensive industries from the feed-in tariffs may provide these industries with an unfair competitive advantage that does not seem justified by the logic of the system.
273. At the same time the Commission cleared a Danish project to grant CO₂ tax exemptions to companies covered by the EU's Emissions Trading Scheme (EU ETS), subject to conditions²⁰⁶. After an in-depth investigation, opened in September 2006, the Commission concluded on 17 June 2009 that if the proposed full tax exemption would be implemented, some of the environmental objectives inherent to a tax on energy products would be lost. The Commission also had concerns that a

¹⁹⁶ MEMO/09/394, 15.9.2009.

¹⁹⁷ Case C3/2007 *Regulated electricity tariffs in Spain* (OJ C 43, 27.2.2007, p. 9).

¹⁹⁸ Case C36b/2006 *Preferential electricity tariff – Alcoa*.

¹⁹⁹ Case C36a/2006 *Preferential electricity tariff - Terni companies* (OJ L 144, 4.6.2008, p. 37).

²⁰⁰ Case C36/2008 *State aid in favour of the Sulcis integrated power plant* (OJ C 240, 19.9.2008, p. 14).

²⁰¹ Case N452/2009 *Aid for the production of non-ferrous metals*.

²⁰² Case N143/2009 *Aid scheme to encourage electricity generation from large commercial wind, solar, photovoltaic systems and biomass* (OJ C 247, 15.10.2009, p. 2).

²⁰³ Case N359/2008 *Supplement for electricity generated by incinerating biomass* (OJ C 179, 1.8.2009, p. 1); Case N354/2008 *Supplement for electricity from new wind turbines* (OJ C 143, 24.6.2009, p. 6); Case N356/2008 *Supplement for electricity generated with bio gas* (OJ C 151, 3.7.2009, p.16).

²⁰⁴ Case N446/2008 *Second amendment of the Green Electricity Act 2008* (OJ C 217, 11.9.2009, p.12).

²⁰⁵ C24/2009 (ex N446/2008) *Second amendment of the Green Electricity Act 2008* (OJ C 217, 11.9.2009, p. 12).

²⁰⁶ Case C41/2006 *Modification of the CO₂ tax for quota-regulated fuel consumption in the industry* (the public version is not yet available).

full tax exemption would distort competition by increasing tax differentiations in an area where the EU has harmonised taxes and set tax minima to create a level playing field between companies. The Commission therefore approved the measure on the condition that it is amended, so that all the companies concerned pay an energy tax and thus respect at least the harmonised minima tax levels. Furthermore the Commission approved NOx tax reductions for the Danish cement industry which was the first of such cases to be approved under the new rules for aid in the form of reductions of environmental taxes in the Environmental Aid Guidelines²⁰⁷. Another case of waste tax reductions for the Danish cement industry has been made subject to an in-depth investigation because of doubts with regard to the necessity and proportionality of the measure²⁰⁸. In a similar Dutch case on tax exemptions for the ceramic industry the Commission concluded on 15 December 2009 after an in-depth investigation that the measure was incompatible with the internal market since the tax exemptions could not be found necessary or proportional²⁰⁹.

274. On the other hand the Commission authorised under State aid rules a scheme proposed by the United Kingdom introducing a trading system for CO₂ emissions related to energy consumption²¹⁰. The scheme does not fall under the rules for exemptions from environmental taxes of the Environmental Aid Guidelines, because of its innovative character and because of the specific objective it pursues. The national system, called "the Carbon Reduction Commitment" (CRC), applies to non energy intensive sectors of economy e.g. hospitals, hotels, banks, not covered by the EU ETS. In these sectors, energy costs are so minor that the additional costs related to the introduction of the system would not be enough to trigger a change in behaviour of the companies. Therefore in addition to all allowances in the CRC system being sold by auction, participants' environmental performance would be ranked in a performance league table and the auction revenue would be paid back to participants as a subsidy. Participants ranked on the top of the Performance League Table would benefit the most from the recycling mechanism. The measure is in line with Article 87(3)(c) EC because it pursues an objective of common interest in a necessary and proportionate way.
275. Furthermore, the Commission has approved a Polish²¹¹, a Lithuanian²¹² and a Bulgarian²¹³ scheme providing for tax reduction to stimulate the production of certain forms of biofuels. In the Polish case the tax reductions were accompanied by supply obligations and in the Bulgarian and Lithuanian cases such type of obligations are not in force but were about to be implemented. The coexistence of supply obligations and tax reductions may raise the question of the need for aid since both instruments pursue the same goal of bringing biofuels to the market. However, in all of these cases the duration of the schemes was limited to less than three years. This timeframe should enable the Member States to collect sufficient data to assess the

²⁰⁷ Case N327/2008 *NOx tax reductions for large polluters and companies reducing pollution, and tax reductions for biogas and biomass* (the public version is not yet available).

²⁰⁸ Case C30/2009 (ex N328/2008) *Tax exemption for pollution from companies' own cement production* (the public version is not yet available).

²⁰⁹ Case C5/2009 (ex N210/2008) *Exemption from environmental taxes for ceramic producers* (the public version is not yet available).

²¹⁰ Case N629/2008 *Carbon Reduction Commitment (CRC)*.

²¹¹ Case N57/2008 *Operating aid for biofuels – Poland* (OJ C 247, 15.10.2009, p. 1).

²¹² Case N372/2007 *Support for biofuel* (OJ C 106, 8.5.2009, p. 14).

²¹³ Case N607/2008 *Tax reductions for biofuels*.

long term effects of the coexistence of these two instruments in the market for biofuels. Also, in the Polish case the incentive effect was justified as being temporary because the functioning of the obligation was expected to drive the demand for biofuels up to a level when it was not excluded that for a limited time companies subject to the obligation will rather pay a fine than comply with the obligation. In such a case, the environmental effect would not be reached by applying the obligation alone.

276. Furthermore the Commission dealt with a number of measures promoting electricity and heat generation and distribution infrastructure. With regard to Austria, the Commission approved a scheme supporting the construction of combined heat and power plants (CHP plants)²¹⁴ under the Environmental Aid Guidelines as well as a scheme promoting the construction of district heating and cooling installations²¹⁵ which was approved partly under the Environmental Aid Guidelines and partly under Article 87(3)(c) EC. Moreover, the Commission authorised three Polish schemes on heating distribution networks²¹⁶, on electricity connection networks for renewable energies²¹⁷ and on modernisation of electricity distribution networks²¹⁸ directly under Article 87(3)(c) EC. Also, in the United Kingdom the Commission cleared a scheme for a tender to conduct two front end engineering and feasibility studies (FEED studies) on two industrial-scale carbon capture and storage (CCS) demonstration projects. The FEED studies should reduce the technical, environmental and financial risks of the construction of a commercial scale coal-fired power plant equipped with post-combustion CCS technology²¹⁹.
277. Finally, on the basis of the Temporary Framework²²⁰ the Commission approved national aid schemes from France, United Kingdom, Spain, Germany and Italy²²¹. The Temporary Framework had been introduced in 2009 in order to give Member States additional possibilities for providing businesses with improved access to financing during the economic and financial crisis. Since the schemes fulfilled the conditions set out in the Temporary Framework, they were found compatible with Article 87(3)(b) EC, which permits aid intended to remedy a serious disturbance in the economy of a Member State. The approved schemes support businesses faced with financing problems because of the credit squeeze, while at the same time preserving investments in products with an environmental benefit (i.e. green products). The schemes were dealt with in an accelerated procedure as compared to standard cases.

²¹⁴ Case N461/2008 *Law on Combined Heat and Power Stations (CHP)* (OJ C 109, 13.5.2009, p. 1).

²¹⁵ Case N485/2008 *Aid Scheme for District Heating and Cooling Infrastructure and Cooling Installations (AT)* (OJ C 191, 14.8.2009, p. 1).

²¹⁶ Case N54/2009 *Aid for modernisation of heating distribution networks in Poland* (OJ C 204, 29.8.2009, p. 2).

²¹⁷ Case N55/2009 *Aid for constructing and modernisation of electricity connection networks for renewable energies in Poland* (OJ C 206, 1.9.2009, p. 3).

²¹⁸ Case N56/2009 *Aid for modernisation and replacement of electricity distribution networks in Poland* (OJ C 206, 1.9.2008, p. 4).

²¹⁹ Case N74/2009 *CCS Demonstration Competition – FEED* (OJ C 203, 28.8.2009, p. 2).

²²⁰ Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

²²¹ N11/2009 (France), N72/2009 (United Kingdom), N140/2009 (Spain), N426/2009 (Germany), N542/2009 (Italy).

C – ELECTRONIC COMMUNICATIONS

1. OVERVIEW OF SECTOR

278. In 2009, it is estimated that growth in the electronic communications sector was close to zero. The sector however remained relatively resilient to the current economic crisis. More effective competition due to competition law enforcement, sector regulation, technological developments and new business models has resulted in lower prices for electronic communication services, investment in new network infrastructure and innovative service offers. Business and retail costumers have both benefited from a broad choice of electronic communications services in the fixed and mobile markets.
279. As regards retail competition, the trend of lower prices for electronic communications services persisted. In the light of the steady rise of Voice over Internet Protocol (VoIP) and fixed mobile convergence, the market for traditional fixed voice telephony continued to decline. In the mobile voice markets, penetration increased again, while growth of revenues slowed down. The broadband service market showed a slight increase of broadband penetration and an increase of average download speeds.
280. In the mobile market, decreasing prices for mobile voice services resulted in lower revenues for operators. This development was partially offset by increasing use of mobile data services. In addition, an increasing number of consumers decided to replace fixed access with mobile access only. This trend also reflected the advanced acceptance of mobile broadband by the consumers, even if prices and product characteristics widely differ throughout the EU. The trend towards fixed-mobile integration could also advance further, when mobile network operators will upgrade their networks to new transmission technologies that will allow download speeds up to 100 MBit/s. However, increased data traffic may only produce limited revenue growth given that retail offerings are increasingly based on flat rates.
281. In some Member States the fixed network operators have started the deployment of optical fibre networks to provide very high bandwidth broadband internet services, although these deployments have so far been very limited. In addition, many cable operators have also been upgrading their networks to deliver internet services up to 100 MBit/s. The upgrade of the existing infrastructure for electronic communications may bring large growth opportunities for the IT and content industries and for the European economy as a whole. Gradual availability of very high bandwidth will allow content providers to market new broadband applications and services. Consumers will not only benefit from higher download speeds and the availability of services, both for entertainment (on-line gaming, high-definition TV, etc.) and daily life (interactive applications, e-health, e-government, etc.) but also from wider choice and enhanced competition between operators.
282. Since the beginning of the Internet, network capacity and availability of bandwidth have influenced the offer of certain types of content/services on-line (the move from text based to image based websites; from web 1.0 to web 2.0 etc). The emergence of new content/services also creates a societal need for further increase in bandwidth,

even where it is not profitable for market operators to offer access, e.g. in remote and sparsely population areas. This often triggers use of public funding, and therefore numerous aid schemes have been motivated in the past by the need to follow the above evolution. Public intervention in some Member States is now gradually shifting towards support for very high speed broadband networks, the so-called "next generation access" (NGA) networks.

2. POLICY DEVELOPMENTS

2.1. Application of the Regulatory Framework and other policy developments

283. Providers of electronic communications services continued to operate within the confines of the EU regulatory framework for electronic communications²²², which is designed to facilitate access to legacy infrastructure, foster investment in alternative network infrastructure and bring choice and lower prices for consumers.
284. Ex ante regulation under the Regulatory Framework builds on competition law principles. This approach has been adopted by National Regulatory Authorities (NRAs) in their assessment of electronic communication markets. National regulators concluding that a market is not effectively competitive must identify operators with significant market power and impose appropriate regulatory obligations. Regulators are required to make accessible to the Commission and other regulators their proposals under a consultation mechanism provided by the Framework Directive (the so-called "Article 7 procedure"). These can comment on the regulator's draft measures. The Commission may also, following in-depth investigation, ask the regulator to withdraw a draft measure which concerns market definition or the assessment of the significant market power if it does not comply with EU law. In its new Recommendation on relevant product and service markets within the electronic communications sector the Commission identified seven specific product and services markets, susceptible to *ex ante* regulation²²³, both at wholesale and at retail level.
285. In 2009 the Commission received 161 notifications from NRAs and adopted 87 comments letters and 59 no-comments letters within the Community consultation mechanism under Article 7 of the Framework Directive. Five notifications were

²²² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108, 24.4.2002 p. 21), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51), Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

²²³ 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), replacing Commission Recommendation 2003/311/EC (2).

withdrawn by the notifying NRA, whereas 9 cases were still open at the end of the year. In one of these cases²²⁴, the Commission raised serious doubts as to the compatibility of the notified measures with EU law and opened a second phase investigation under Article 7(4) of the Framework Directive.

286. On 7 May the Commission issued a Recommendation on termination rates²²⁵ in view of the fact that termination rates of mobile operators as well as of fixed network operators are not consistently regulated in the EU, and the rates feature wide differences which cannot be explained solely by national circumstances. The Recommendation sets out a methodology for regulating termination rates, aiming at ensuring consistency of regulatory approaches and promoting competition. It indicates specifically that termination rates at national level should be set at the level of the real costs that an efficient operator incurs when receiving (terminating) a call in its network. This implies that the same (symmetric) termination rate will apply to all operators. The Commission expects that eliminating price distortions between phone operators across the EU will lower consumer prices for voice calls within and between Member States. All EU national regulators should apply the recommended approach to termination rates by the end of 2012. However, national regulators with limited resources may use different approaches for a limited further period as long as the resulting termination rates do not exceed the average level calculated according to the recommended cost methodology.
287. On 1 July a new EU Regulation on intra-community roaming became applicable. The new rules further reduce price caps for mobile roaming calls to EUR 0.43 for calls made abroad and EUR 0.19 for calls received abroad (per minute and excluding VAT) as from July 2009 with further yearly reductions, limit the price that consumers can be charged for sending a text message while abroad to EUR 0.11 excluding VAT (compared to a previous average of EUR 0.28) and reduce the cost of downloading data with a mobile phone while abroad by introducing a wholesale cap of EUR 1 per MB downloaded which will also be reduced on a yearly basis. The new roaming rules build on the first EU Roaming Regulation of 2007, which introduced the "Euro tariff" caps for calls made and received while travelling in the EU. As a result, Euro tariff roaming consumers saved on average 70% compared to 2005, before the EU acted. The new roaming rules will apply until the summer of 2012. The European Parliament and Council have asked the Commission to prepare an Interim report on the new rules and the developments of roaming services in the Community by June 2010. In addition, the Commission will review the functioning of the EU Roaming Regulation by June 2011 and would then propose the appropriate actions if required.
288. On 18 December new rules for the EU telecoms markets were published in the Official Journal of the European Union (the Telecoms package)²²⁶. The EU telecoms

²²⁴ Case AT/2009/970 concerning the Austrian Wholesale broadband access market.

²²⁵ Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU, OJ L 124, 20.5.2009. Termination rates are wholesale tariffs charged by the operator of a called party to the operator of the calling party's network. Operators have both the incentive and the ability to charge excessively high termination. The termination tariffs have a considerable impact on consumers' phone bills and are therefore subject to price regulation by the national regulatory authorities.

²²⁶ The Telecoms package consists (i) of the Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications

reform comprises two Directives amending five different EU Directives of the European regulatory framework (Framework Directive, Access Directive, Authorisation Directive, Universal Service Directive and the e-Privacy Directive) and a new Regulation setting up the European Body of Telecoms Regulators BEREC (Body of European Regulators for Electronic Communications).

289. The new telecoms rules comprise inter alia the following prominent reforms:
- The Commission acquires additional power to oversee regulatory remedies proposed by national regulators (e.g. the conditions on which network operators with significant market power have to grant access to the network; or concerning termination rates). The objective is to avoid inconsistent regulation that could distort competition in the single telecoms market.
 - The creation of the new European Telecoms Authority (BEREC). BEREC will provide opinions in the context of the Commission's analysis of remedies notified by national regulators, and will also advise, support and complement the independent work of national telecoms regulators, especially when it comes to regulatory decisions with cross-border relevance.
 - The introduction of the additional tool of functional separation that enables national telecoms regulators to oblige telecoms operators to separate communication networks from their service branches.
 - With regard to "net neutrality", i.e. the differentiation between the various data transmissions or data users on the internet, national telecoms authorities will have the power to set minimum quality levels for network transmission services. Furthermore network operators will be required to inform end-users – before signing a contract – about the nature of the service to which they are subscribing, including traffic management techniques and their impact on service quality.
290. The Member States are required to transpose the two Directives of the package into national legislation by 26 May 2011. BEREC is foreseen to be established in spring 2010.

2.2. State aid

291. There is widespread consensus about the crucial importance of investments in broadband infrastructures for the countries' economic and social development. The Commission actively supports the widespread availability of broadband services for all European citizens as laid down in the Lisbon strategy and the subsequent

networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services; (ii) of the Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws; and (iii) of the Regulation (EC) of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications and the Office (BEREC).

Communications²²⁷. The importance of broadband investments has been further stressed by President Barroso in the European Economic Recovery Plan (the "Recovery Plan")²²⁸, where the Commission decided to earmark part of EUR 1.02 billion from the European Agricultural Fund for Rural Development (EAFRD) to be invested in the roll-out of broadband networks in rural and remote areas.

292. The Commission encourages aid measures having the objective to provide adequate broadband coverage at affordable prices for all European citizens. In its assessment of public funding schemes under the State aid rules, the Commission acknowledges that, due to the economic or technological restrictions of broadband networks, private operators may not have sufficient market incentives to provide adequate broadband services, typically in rural and remote areas. The Commission has built up a clear and consistent State aid policy in the last years and endorses properly justified and proportionate broadband schemes if the distortion of competition and the effect on trade is limited²²⁹. Until 2009, the Commission has assessed and approved the use of State aid and other types of public funding of approximately EUR 2 billion²³⁰ in Europe that generated total investments in broadband networks of more than EUR 3 billion.
293. Building on the Commission's practice in this area, in order to help Member States to design State aid measures compatible with the Treaty, the Commission has adopted a horizontal document that lays down the detailed rules and conditions for public support of broadband infrastructure. Following consultation with all interested stakeholders, the "Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks" (hereafter: Broadband Guidelines) were adopted in September²³¹.
294. The Broadband Guidelines address not only aid to basic broadband networks (such as ADSL, cable, mobile, wireless or satellite broadband services) but also support to very high speed NGA networks (fibre-based or advanced upgraded cable networks, at the current stage).
295. The section on public funding of basic broadband networks outlines the Commission current case practice in this field. To grant State aid for broadband development, the granting authorities have to clearly identify the targeted areas requiring public support through a thorough market research and consultation with existing operators. Furthermore, a number of safeguards are included to limit distortion of competition and to minimise the use of public funds; for example, aid shall be granted via an open tender procedure, effective wholesale access shall be provided on the

²²⁷ See for instance "i2010 – A European Information Society for growth and employment, COM(2005)229 final, 1 June 2005; "eEurope 2005: An information society for all" COM(2002)263 final, "Bridging the broadband gap", COM(2006)129.

²²⁸ Communication from the Commission to the European Council, COM(2008)800.

²²⁹ See cases N238/2008 *Broadband infrastructure development*, OJ C 154, 7.7.2009; N153/2009 *Amendment of the State aid broadband scheme N266/2008*, OJ C 284, 25.11.2009; N183/2009 RAIN project, OJ C 216, 10.9.2009; N243/09 *Extension of broadband coverage in Niedersachsen*, OJ C 219, 12.9.2009; N172/2009 *Broadband development in Slovenia*, OJ C 264, 6.11.2009; N418/2009 - UK - *Northern Ireland*.

²³⁰ Out of which EUR 1.5 billion constituted as State aid within the meaning of Article 107 TFEU.

²³¹ OJ C 235, 30.9.2009, p. 7.

subsidised networks to other operators, the measure shall be neutral as regards the technology and adequate monitoring of the use of public funds shall be implemented by the granting authorities.

296. Concerning public funding of NGA networks, the main objective of the Commission is to accelerate the deployment of such networks, in order to avoid the creation of a new digital divide in the area of NGA networks. The Commission's policy in this field builds on the experience with "traditional" broadband networks and adds certain new specific safeguards to promote competition and limit crowding out of private investment. Since investments to NGA networks are just starting and are not completed yet, when a public authority intends to support the roll-out of an NGA network, it needs to take into account also the investments plans of the private operators for the next 3 years. Furthermore, in order to help existing basic broadband operators to upgrade their services, the new infrastructure shall support effective and full unbundling and satisfy all different types of network access that operators may seek.
297. For the cases in which a member State qualifies the operation of a broadband network as a service of general economic interest (SGEI), the Guidelines provide additional explanation about the way the existing case law applies in the broadband sector. In this context, the Commission approved public financing worth EUR 59 million for an NGA project in the French department of Hauts-de-Seine²³². The Commission concluded that the public funding constituted a compensation for complying with the obligations of a SGEI according to the Altmark criteria, and did not constitute State aid. The network will cover the entire French department of Hauts-de-Seine, including the non-profitable areas with a passive, neutral and open broadband network that will further stimulate competition and the provision of innovative services.

D – INFORMATION TECHNOLOGY

1. OVERVIEW OF SECTOR

298. The recent economic crisis negatively affected the global information and communications technology (ICT) industry during 2009, but a sudden upturn in global sales of ICT goods in May and June suggested that the industry may have reached a turning point and may be on the road to recovery²³³.
299. The ICT sector is of particular importance for driving innovation and realizing the potential of the digital economy. Information technology markets are frequently prone to network effects, as illustrated by the Commission's 2004 *Microsoft* case²³⁴. These effects may result in customer lock-in as well as in the emergence of dominant

²³² Commission decision of 30 September 2009 on N331/2008 "*Réseau à très haut débit en Hauts-de-Seine*".

²³³ See OECD report of August 2009 on "*The impact of the crisis on ICTs and their role in the discovery*" (<http://www.oecd.org/dataoecd/33/20/43404360.pdf>) and the summary on the OECD website at http://www.oecd.org/document/21/0,3343,en_2649_34223_43410005_1_1_1_1.00.html

²³⁴ Case COMP/37.792 *Microsoft* (OJ L 32, 6.2.2007, p. 23).

market positions, which are not in and of themselves problematic, but may necessitate timely competition law enforcement to ensure competition on the merits in the markets concerned or in related markets. In this context, interoperability and standards are key recurring issues in an increasingly inter-connected world.

300. The main features of the ICT sector as it stands today remain digital convergence and the growing importance of interoperability and standards.
301. Given that network effects are one of the major characteristics of the ICT sector, interoperability steadily growing in importance in the market. Although personal computers (PCs) are considered to be the main gateway to the digital world, users are increasingly accessing data through other devices such as smart-phones, which are able to communicate with each other and with computing devices. This reinforces the need for interoperability between software products and devices.
302. Also standards play an increasingly important role in the rapidly changing information society. Against this background, it is of utmost importance that standard-setting organisations establish rules which ensure fair, transparent procedures and early disclosure of relevant intellectual property.

2. POLICY DEVELOPMENTS

303. In the field of standard-setting, a number of developments occurred, particularly in relation to intellectual property rights (IPR). The Commission is currently reviewing the regime for the assessment of horizontal cooperation agreements under EU antitrust rules. To this end, it held a public consultation from 4 December 2008 to 30 January 2009²³⁵. The review also covers standard-setting with a view to providing more guidance on this topic. Furthermore, from 3 July to 15 September, a public consultation took place on the *Commission White Paper on Modernising ICT Standardisation in the EU*²³⁶.
304. The issue of *ex ante* disclosure came to the fore in these public consultations. To obtain more complete information about proposed licensing terms earlier in the standards development process, some standards development organizations consider adopting IPR policies that require or permit early disclosure of actual licensing terms. Some participants in standards development favour the adoption of such policies because they believe they promote competition between technological alternatives before a particular alternative is selected for inclusion in a standard.
305. The US standards development organization VITA already adopted an IPR policy including *ex ante* disclosure in 2006, while the discussion in the EU ensued in 2009. VITA adopted an IPR policy under which each member of a working group must not

²³⁵ The Commission's questionnaire and the replies to the consultation on the *"Review of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules"* can be found on the website of the Directorate-General for Competition under *"Public consultations"* (http://ec.europa.eu/competition/consultations/2009_horizontal_agreements/index.html).

²³⁶ The Commission's questionnaire and related documents can be found on the website of the Directorate-General for Enterprise and Industry under *"Public consultations"* (<http://ec.europa.eu/enterprise/newsroom/infocus/newsbytheme.cfm?lang=en&displayType=consultation&foT=pa>).

only identify all patents or patent applications of which the member that knowledge and that the member believes may become essential to the implementation of the future standard, but in addition the member must declare the maximum royalty rates and most restrictive non-royalty terms. A working group member who fails to disclose this information is obliged to license the essential claims of the undisclosed patent for implementation of the VITA standard to all interested parties on a royalty-free basis²³⁷.

306. Under the current European Telecommunications Standards Institute (ETSI) IPR policy, any public and unilateral *ex ante* disclosure of licensing terms by licensors of essential IPRs in ETSI is fully voluntary and for the sole purpose of assisting members in making informed decisions in relation to whether solutions best meet the technical objectives²³⁸.
307. At present, the Commission does not prescribe specific schemes to industry and standard setting bodies, but rather sets the limits within which these are free to adopt the policies of their choice. The upcoming guidelines on horizontal cooperation agreements will address various issues with respect to standardisation (i.e. ex-ante disclosure).

3. MAIN CASES

Intel

308. On 13 May 2009, the Commission adopted a prohibition decision against Intel. The Commission found that between October 2002 and December 2007 Intel had abused its dominant position on the market for x86 CPUs by engaging in two specific forms of illegal practice. First, Intel gave wholly or partially hidden rebates to computer manufacturers conditional upon (quasi) exclusivity for its x86 CPU. Intel also made direct payments to a major retailer to sell only computers with its x86 CPUs. Second, Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and/or to limit the sales channels available to these products. The Commission ordered Intel to cease its anticompetitive practices and refrain from engaging in similar or equivalent practices. The Decision also imposes on Intel a fine of EUR 1.06 billion, which is the highest fine ever imposed on a single company by the Commission. A provisional non-confidential version of the decision was published on 21 September on the website of the Directorate-General for Competition²³⁹. Intel lodged an appeal against the decision with the CFI on 22 July²⁴⁰.

Microsoft

309. In the *Microsoft* case, the Commission sent a SO to Microsoft in January 2009, outlining the preliminary view that Microsoft infringed its dominant position in the client PC operating system market by tying its web browser Internet Explorer to

²³⁷ See Vita's homepage under "*Disclosure/Licensing*" (<http://www.vita.com/disclosure/>).

²³⁸ See ETSI's homepage at <http://www.etsi.org/WebSite/AboutETSI/IPRsInETSI/IPRsinETSI.aspx>

²³⁹ The provisional non-confidential version of the decision is published on the website of DG Competition under "*Key Issues – Intel Antitrust Case*".

²⁴⁰ T-286/09 *Intel v Commission* (OJ C 220, 12.9.2009, p. 41).

Windows. The Commission was concerned that the tying distorted competition on the merits between competing web browsers insofar as it provided Internet Explorer with an artificial distribution advantage which other web browsers were unable to match. The Commission also took the preliminary view that, through the tying, Microsoft shielded Internet Explorer from head to head competition with other browsers which was detrimental to the pace of product innovation and to the quality of products which consumers ultimately obtain. In addition, the Commission preliminarily concluded that the ubiquity of Internet Explorer created artificial incentives for content providers and software developers to design websites or software primarily for Internet Explorer, which ultimately risks undermining competition and innovation in the provision of services to consumers.

310. In October, Microsoft proposed commitments in order to solve the competition concerns raised by the Commission in its SO. The Commission decided to put these proposals to a formal market test. Microsoft proposed to make available a mechanism in Windows client PC operating systems within the EEA that enables computer manufacturers (OEMs) and end users to turn off Internet Explorer in Windows 7 and subsequent versions of Windows. Under Microsoft's proposal, OEMs would be free to pre-install any web browser(s) of their choice on PCs they ship and set it as default web browser. Microsoft would distribute a Choice Screen software update to users of Windows client PC operating systems within the EEA by means of Windows Update. Users who have Internet Explorer set as their default web browser would be prompted with this Choice Screen. The Choice Screen would give users an opportunity to choose whether and which competing web browser(s) to install. The Choice Screen would display icons of and basic identifying information on the most widely-used web browsers. Following the result of the market test, Microsoft improved the design of the Choice Screen and agreed regular review. An Article 9(1) decision adopted on 16 December 2009 made these commitments binding on Microsoft for a period of 5 years²⁴¹.

Rambus

311. In the *Rambus* case, the Commission sent a SO to Rambus on 30 July 2007, in which it came to the preliminary conclusion that Rambus had infringed Article 82 EC by claiming unreasonable royalties for the use of certain patents for “*Dynamic Random Access Memory*” chips subsequent to a so-called “*patent ambush*.” Whilst disagreeing with the Commission's provisional findings, Rambus eventually decided to offer commitments to the Commission on 8 June²⁴². On 12 June, the Commission published a notice in the OJ pursuant to Article 27(4) of Regulation 1/2003, outlining its intention to adopt a decision under Article 9(1) of Regulation 1/2003 declaring the commitments to be binding on Rambus, subject to market testing²⁴³.
312. In light of the comments received, the Commission asked Rambus to clarify a number of issues, such as that all relevant current and future standards are covered and that the sale of patents to a third party would not affect the commitments. The Commission then concluded that the commitments in their final form, as modified by Rambus, were adequate to meet the competition concerns expressed in the SO.

²⁴¹ The commitments are published on the website of DG Competition under “*Antitrust cases*”.

²⁴² The commitments are published on the website of DG Competition under “*Antitrust cases*”.

²⁴³ Case COMP/38636 *Rambus* (OJ C 133, 12.6.2009, p. 16).

313. Therefore, on 9 December 2009, the Commission adopted a decision based on Article 9 of Regulation 1/2003 ("commitment decision"). This decision, which does not come to a finding on an infringement, legally binds Rambus to the commitments it offered²⁴⁴.
314. The Commission clarified in the decision that an effective standard-setting process should take place in a non-discriminatory, open and transparent way to ensure competition on the merits and to allow consumers to benefit from technical development and innovation. Abusive practices in standard setting can harm innovation and lead to higher prices for companies and consumers. For its part, the Commission will vigorously enforce the competition rules in this area, for the benefit of technical progress and European consumers.

E – MEDIA

1. OVERVIEW OF SECTOR

315. Two general trends in the media sector can be identified. Firstly, the multiplication of distribution platforms and ongoing technological development and changing consumption patterns are breaking down barriers between broadcasters and other media operators and will lead to increased competition between traditional actors like broadcasters and new players. Secondly, media convergence²⁴⁵ will demand new business models and the production of more content. Competition issues resulting from these trends affect both businesses and consumers. They generally fall into three categories: (i) availability of attractive content, (ii) access and digitisation issues (including "copyright" bottlenecks), and (iii) challenges posed by new revenue-generating models (a "monetisation" issue) as well as the limitations of State financed intervention in this sector.
316. Regarding State aid policy, private media 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 offers. They also allege that the State funding for public service broadcasters may exceed what is necessary for their public service mission, allowing them to subsidise commercial activities and to engage in anti-competitive practices. Private operators claim that the public funding of public service broadcasters' new media activities distorts competition and discourages private initiatives to develop new and innovative services.
317. The switch from analogue to digital broadcasting, which Member States are due to complete by the beginning of 2012²⁴⁶, is increasingly 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

²⁴⁴ The decision and the commitments are published on the website of DG Competition under "*Antitrust cases*".

²⁴⁵ The term media convergence relates to the consumer's ability to receive multiple services on a single device.

²⁴⁶ Commission Communication on accelerating the transition from analogue to digital broadcasting (COM(2005)204 final, 24.5.2005).

transmission platforms such as satellite, cable and terrestrial, and obliges broadcasters and network operators to update their transmission equipment and viewers to install digital decoders. The Commission is committed to support the switch off of analogue terrestrial TV broadcasting 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.

2. POLICY DEVELOPMENTS

318. 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. Roundtable on opportunities and barriers to on-line distribution of music

319. In 2009, the Commissioner for Competition continued discussions with senior consumer and industry representatives about the business opportunities created by the Internet and the existing barriers to, in particular, increased on-line distribution of music in Europe. In such context, a report on opportunities and barriers to on-line retailing was published in May 2009 and two further meetings of the Roundtable were held in September and October 2009 under the aegis of the Commissioner for Competition. These meetings were attended not only by the initial participants (iTunes, EMI and the French collecting society SACEM), but also by other important market players (Nokia, Amazon, the UK's PRS for Music and Sweden's STIM collecting societies and Universal Music Publishing). Consumers' interests were represented by the European Consumers' Organisation (BEUC). The Roundtable initiative resulted in two joint statements: a Joint Statement by the Roundtable participants on "General principles for the on-line distribution of music" and a statement from some Roundtable participants on a "Working Group on a Common Framework for Rights Ownership Information". Following the Roundtable, a number of participants announced concrete steps and commitments that should result in improved access of European consumers to music online²⁴⁷.

2.2. Digital broadcasting

320. In 2009, the Commission continued to closely monitor the transition from analogue to digital terrestrial broadcasting in Italy in the context of the infringement procedure that it had started in 2006 concerning the Italian broadcasting legislation. Following close contacts with the Commissioners for Competition and Information Society²⁴⁸, the Italian authorities adopted new criteria for the "digitization" of terrestrial television networks in Italy aimed at ensuring that more frequencies would be available to newcomers and to smaller existing broadcasters. The Italian Authority

²⁴⁷

²⁴⁸

All the documents are available at http://ec.europa.eu/competition/sectors/media/online_commerce.html
The Commission had sent to Italy a Reasoned Opinion in this case on 18.7.2007.

for Communications (AGCom) conducted a public consultation on draft tendering rules for the allocation of the frequencies at the end of 2009 and the tender is expected to be launched in early 2010.

321. As regards State aid, the Commission continued to monitor the transition (switch-over) from analogue to digital terrestrial broadcasting in the EU Member States. The CFI confirmed on 6 October a negative decision concerning Germany²⁴⁹, also based on a lack of technology neutrality of the scheme²⁵⁰.

2.3. Sports

322. On 12 October, the Commission issued a rejection decision for the lack of Community interest in the case *Certain joueur de tennis professionnel v. World Anti-Doping Agency, ATP Tour Inc. and International Council of Arbitration for Sport*²⁵¹. The case concerned a professional tennis player who complained against the alleged excessive scope of the international anti-doping rules and their application in his case. The complainant questioned the proportionality of the anti-doping rules applied by the three bodies – the World Anti-Doping Agency, the international tennis federation (ATP Tour Inc.) and the International Council of Arbitration for Sport (ICAS) and claimed that they together or separately breached Articles 81 and/or 82 EC. The Commission examined the complaint and rejected it for lack of Community interest, as the rules did not appear to be applied in a disproportionate manner. The Commission also noted that in the context of the application of legitimate anti-doping rules by the relevant sporting bodies, its role is not to act as an appeals body in individual cases.

2.4. Public service broadcasting

323. In line with the interpretative Protocol to the Treaty of Amsterdam on the system of public service broadcasting (the Amsterdam Protocol) and the jurisprudence of the European Court of Justice mentioned above, the Commission recognises that it is the prerogative of Member States to organise the functioning and funding of public service broadcasting. The objective of the Commission's policy is to ensure that public funding does not exceed what is necessary for public broadcasters to fulfil their public service mission and does not lead to unnecessary distortions of competition.
324. On 2 July, the Commission adopted a revised Broadcasting Communication which aims at demonstrating the specific mechanisms on which the Commission's assessment of publicly funded new media services is based²⁵². The new framework provides more flexibility for the financing of public service broadcasters and at the same time clarifies the requirements for an effective control of the public service mission at the national level. It adapts the framework to the fast changing market environment while maintaining the core principles of the Commission's policy based

²⁴⁹ Case C-25/2004 *DVB-T Berlin Brandenburg*.

²⁵⁰ Cases T-8/06, T-21/06, T-24/06.

²⁵¹ Case COMP/39471 *Certain joueur de tennis professionnel / Agence mondiale antidopage + ATP + CIAS*.

²⁵² Communication on the application of State aid rules to public service broadcasting of 2 July 2009, OJ C 257, 27.10.2009.

on the Amsterdam Protocol (see section 2.4) and the jurisprudence of the European Court of Justice²⁵³. A centerpiece of the new Communication is the prior evaluation of new audiovisual services at national level. Publicly funded audiovisual services must satisfy the social, democratic and cultural needs of a society without distorting cross border trade and competition contrary to the common interest of the European Union.

325. The Commission continued to approve State financing for public service broadcasters where both the public service remit and the financing are determined in full transparency and where the State funding does not exceed what is necessary to fulfil the public service mission. In 2009, the Commission also adopted a number of positive individual decisions concerning the financing of public service broadcasting systems in France, Spain, Austria and Denmark. Regarding the financing of Austria's public service broadcaster ORF, the Commission applied for the first time the revised Broadcasting Communication. The decision of 28 October accepts a number of commitments to modify Austria's existing aid scheme for ORF. This decision²⁵⁴ closed an investigation which started in January 2008 and was triggered by complaints from newspaper publishers and commercial television operators. On 1 September, the Commission also opened a formal investigation into the new system of financing the public service broadcaster France Télévisions in view of the phasing out of advertising by this chain. The opening decision raises preliminary concerns regarding a potential overcompensation by the envisaged measures and the way France Télévisions' funding will in the future be financed from taxes on telecom operators and on commercial television companies²⁵⁵. On 2 December the Commission opened for similar reasons the formal procedure to investigate the new financing of Spain's public broadcaster RTVE which is likewise triggered by the phasing out of advertising²⁵⁶. In July 2009 the Commission opened an in depth investigation regarding the restructuring plan for the Danish public service broadcaster TV2 Denmark²⁵⁷. Having agreed to rescue aid in favor of TV 2 in 2008, the Commission will now assess whether the restructuring support is necessary and whether the compensatory measures proposed by Denmark for mitigating the competition distortions, e.g. not to launch new pay channels, are proportionate to the strength of TV2 on the Danish market.

2.5. State aid for films

326. In January the Commission extended the validity of the State aid assessment criteria in the 2001 Cinema Communication, until 31 December 2012 at the latest. As in previous years, there were several State aid decisions approving film support schemes. The most notable of these in 2009 were the second package of Italian film tax incentives²⁵⁸, the French tax credit for foreign films²⁵⁹ and the Irish film support scheme²⁶⁰. The Commission also opened a formal investigation into the proposed

²⁵³ Judgment *Altmark Trans*, C-280/00; Judgment *Chronopost*, 83/01P.

²⁵⁴ Case E2/2008.

²⁵⁵ Case C27/2009.

²⁵⁶ Case C38/2009.

²⁵⁷ Case C19/2009.

²⁵⁸ Case N595/2008.

²⁵⁹ Case N106/2009.

²⁶⁰ Case NN10/2009.

Italian tax credit for digitisation of cinemas, the outcome of which is likely to set a precedent for the Commission's State aid assessment criteria for this type of support²⁶¹.

2.6. Newspapers

327. In June, the Commission adopted a proposal for appropriate measures necessary to make the Swedish press aid to high circulation metropolitan newspapers compatible with the State aid rules²⁶².

F – PHARMACEUTICAL INDUSTRY & HEALTH

PHARMACEUTICAL INDUSTRY

1. OVERVIEW OF SECTOR

328. In 2009 the Commission concluded its sector inquiry into the EU pharmaceutical sector. This inquiry dealt with the competitive relationship between originator and generic companies as well as between originator companies. It made important policy recommendations to improve the functioning of the sector. The Commission stepped up its antitrust enforcement and adopted a number of merger decisions. Finally, the ECJ adopted its long awaited judgment on the application of EU competition law to dual pricing mechanisms (parallel trade).
329. The pharmaceutical sector is essential for the health of Europe's citizens who need access to innovative, safe and affordable medicines. The sector is highly regulated and R&D driven. On the supply side, originator companies aim to bring innovative products to the market. The patent system provides the legislative framework allowing the companies to reap the benefits of their research and development activities. At the same time, public health systems are under financial constraints. Generic companies, which bring generic versions of previously patent protected products to the market, help to keep public budgets under control, as their products are much cheaper than the originator product whilst having the same therapeutic effects.
330. An intensified consolidation has been observed in the pharmaceutical sector in recent years. The consolidation concerns acquisition of generic and originator companies by other originator companies, as well as mergers between generic companies creating large multinationals.
331. On the demand side, the pharmaceutical sector is unusual in that, for prescription medicines, the ultimate consumer (the patient) is not the decision maker. Decisions are generally made by the prescribing doctors. The patient does not directly bear the costs either, as these are generally covered and/or reimbursed largely, or even wholly, by national health (insurance) schemes.

²⁶¹ Case C25/2009.

²⁶² Case E4/2008.

2. POLICY DEVELOPMENTS

2.1. Pharmaceutical Sector Inquiry

332. Given the importance of a well-functioning pharmaceutical sector and the presence of indications that competition in the pharmaceutical market in the European Union may not be working well, the Commission launched a sector inquiry into pharmaceuticals on 15 January 2008²⁶³. After the presentation of the Preliminary Report in November 2008²⁶⁴ and a subsequent public consultation involving all interested stakeholders, the Commission published its Final Report on 8 July 2009²⁶⁵.
333. The Final Report confirmed the preliminary findings of the sector inquiry suggesting that the behaviour of originator companies contributes to generic delay and is among the reasons for the difficulties encountered in bringing new medicines onto the market. The report also confirmed the important role of the legislative framework and called upon all stakeholders to ensure a proper implementation of the existing framework and to take the necessary measures adapting the framework in the areas of patent law, marketing authorisation and pricing and reimbursement.
334. The sector inquiry was part of well-established Commission policies and initiatives relevant to the pharmaceutical sector including the Lisbon Strategy, the Commission's Industrial Property Rights Strategy²⁶⁶, the Communication on a Renewed Vision of the Pharmaceutical Sector²⁶⁷ and the Innovative Medicines Initiative²⁶⁸.
335. Within this context, the pharmaceutical sector inquiry sought to examine the reasons for observed delays in the entry of generic medicines to the market and the apparent decline in innovation as measured by the number of novel medicines reaching the market. Taking into account that sector inquiries are a tool under EU competition law, the inquiry's main focus was company behaviour. The inquiry concentrated on those practices which originator companies may use to block or delay generic competition as well as to block or delay the development of competing originator products.

²⁶³ Commission decision of 15 January 2008 initiating an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003.

²⁶⁴ Pharmaceutical Sector Inquiry, Preliminary Report, DG Competition Staff Working Paper, 28.11.2008, available at: <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>

²⁶⁵ Commission Communication of 8 July on the Executive Summary of the Pharmaceutical Sector Inquiry Report, press release IP/09/1098, available at: <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>

²⁶⁶ Commission Communication of 16 July 2008 on an Industrial Property Rights Strategy for Europe, COM(2008)465 final.

²⁶⁷ See, in particular, Commission Communication of 10 December 2008 (COM(2008)666 of 10.12.2008: Safe, Innovative and Accessible Medicines: A Renewed Vision for the Pharmaceutical Sector).

²⁶⁸ The Innovative Medicines Initiative is a Public-Private Partnership (PPP) between the pharmaceutical industry represented by the European Federation of Pharmaceutical Industries and Associations (EFPIA) and the European Communities represented by the European Commission.

2.1.1. *Competition between originator and generic companies – The issues*

336. The results of the sector inquiry indicate that originator companies use a variety of instruments (referred to as "tool-box") to extend the commercial life of their medicines and suggest that the behaviour of companies contributes to generic delay.

Patent filing strategies

337. A strategy commonly applied by originator companies is to seek to extend the breadth and duration of patent protection by filing numerous patents for the same medicine (forming so-called "patent clusters" or "patent thickets"). Documents gathered in the course of the inquiry confirm that an important objective of this approach is to delay or block the market entry of generic medicines²⁶⁹. In some cases, individual blockbuster medicines can be protected by up to nearly 100 product-specific patent families, which can lead to up to 1 300 patents and/or pending patent applications across the Member States. This can cause uncertainty for generic competitors affecting their ability to enter the market.

Patent-related exchanges and litigation

338. Enforcing patent rights in court is legitimate and a fundamental right guaranteed by the European Convention on Human Rights. Like in any other industry the inquiry's findings show, however, that litigation can also be an efficient means of creating obstacles for generic companies, in particular for smaller ones. In certain instances originator companies may consider litigation not so much on its merits, but rather as a signal to deter generic entrants.
339. According to the conclusions of the pharmaceutical sector inquiry, between 2000 and 2007, originator and generic companies engaged in at least 1.300 patent-related contacts and disputes out-of-court concerning the launch of generic products for the 219 molecules in the sample under investigation. The number of patent litigation cases between originator and generic companies increased fourfold between 2000 and 2007. Whilst the originator companies initiated the majority of the 700 court cases reported to the Commission, generic companies won 62% of cases where a final judgment was given. Patent litigation took on average 2.8 years with considerable variations across EU Member States. Of the cases, in which the originator companies originally obtained interim injunctions, approximately 50% ultimately ended with an outcome that was favourable to the generic company (i.e. they won the main proceedings or a settlement was concluded that was beneficial for the generic allowing immediate entry or foreseeing a value transfer). The total cost of patent litigation in the EU in the cases reported is estimated to exceed EUR 420 million. In 11% of the final judgments reported, courts in different EU Member States gave conflicting final judgments on the same issue of patent validity or infringement.

Oppositions and appeals before the European patent office (EPO)

²⁶⁹ Under patent legislation, all patent applications do, however, need to be evaluated on the basis of the statutory patentability criteria by the patent offices, not on the basis of underlying intentions of the applicant.

340. The sector inquiry confirmed that the opposition rate (i.e. the number of oppositions filed per 100 granted patents) before the EPO is consistently higher for the pharmaceutical sector than across all other sectors. In the cases where they opposed a patent, generic companies prevailed in approximately 60% of final decisions rendered by the EPO (including appeal) in the period 2000 to 2007. The scope of the originator patent was restricted in another 15% of the cases. However, it took more than two years on average to obtain 80% of the final decisions which can limit generic companies' ability to clarify the patent situation of potential generic products in a timely manner.

Patent settlements and other agreements

341. The inquiry established that between 2000 and June 2008, more than 200 settlement agreements were concluded between originator and generic companies with nearly 50% restricting the generic company's ability to market its medicine. A significant proportion of these settlements contained – in addition to the restriction – a value transfer from the originator company to the generic company (e.g. direct payment, a licence, distribution agreement or a "side-deal"). Direct payments from originator companies to generic companies occurred in more than 20 settlement agreements and exceeded EUR 200 million. The latter type of agreements has attracted antitrust scrutiny in the USA.

Other practices affecting generic entry

342. The sector inquiry found that originator companies intervene before national marketing authorisation and/or pricing and reimbursement authorities claiming that generic medicines are less safe, less effective and of inferior quality or will violate their patent rights even though marketing authorisation bodies must not take this argument into account according to EU legislation. However, originator companies were rarely successful in challenging the decisions of national authorities in court, e.g. the success rate against marketing authorisations was only 2%. The sector inquiry estimated that in cases, in which interventions by originator companies took place, the duration of the authorisation procedures takes four months longer. The sector inquiry also observed information campaigns by originator companies against individual generic medicines and generic medicines in general.

Lifecycle strategies for second generation products

343. Incremental research is important as it can lead to significant improvements of existing products, also from the perspective of the patients. However, generic companies and consumer associations sometimes questioned the actual improvement of certain medicines in terms of therapeutic benefits. For 40% of the medicines in the sample selected, which had lost exclusivity between 2000 and 2007, originator companies launched second generation products, undertaking intensive marketing efforts with the aim of switching a substantial number of the patients to the new medicine prior to the market entry of a generic version of the first generation product. When the launch of a second generation product took place prior to the launch of the generic version of the first generation product the switching rates are reported to be significantly higher.

344. Patent and other strategies/instruments described above may sometimes be used cumulatively with a view to prolonging the life cycle of medicines depending on their commercial importance. The sector inquiry shows that more life cycle instruments are used for best-selling medicines.

Impact of generic entry

345. The sector inquiry confirmed that, in many instances, generic entry takes place later than might be expected. For the sample of medicines facing loss of exclusivity in the period 2000 to 2007, the average time to enter after loss of exclusivity was almost eight months (on a weighted average basis), and still around four months for the most valuable medicines. Delays are important as the price at which generic companies enter the market was, on average, 25% lower than the price of the originator medicines prior to the loss of exclusivity. Two years after entry, prices of generic medicines were on average 40% below the former originator price leading to important savings for the national health systems. Econometric analysis suggests that a number of factors have an influence on the observed pattern and speed of generic entry, e.g. the turnover of the originator medicines before the expiry of the patent, data exclusivity or the regulatory environment.
346. In relation to the sample of medicines analysed, the report estimates that savings due to generic entry could have been 20% higher than they actually were if entry had taken place immediately following loss of exclusivity. Hence, the aggregate expenditure on the sample of EUR 50 billion would have been about EUR 15 billion higher without generic entry (evaluated at constant volumes). However, additional savings of some EUR 3 billion could have been attained, had entry taken place immediately. This is a very conservative estimate as volume developments and other factors were not taken into account in the calculations.

2.1.2. Competition between originator companies – The issues

347. The inquiry also sought to examine whether the behaviour of originator companies might be among the reasons for the difficulties to bring new medicines to the market²⁷⁰.

Patent strategies and litigation

348. While patent strategies to protect innovative efforts are legitimate, in certain cases, however, these strategies may interfere with the development of competing medicines. They are called by some originator companies "defensive patent strategies"²⁷¹. The inquiry unearthed a significant number of strategy documents confirming that originator companies engage in defensive patenting.

²⁷⁰ Other factors were cited by the originator industry for the decline in innovation such as increased scientific complexities, high attrition rates in late stage development and uncertainty about the financial rewards. These factors were not subject of the inquiry.

²⁷¹ The term "defensive" patents cannot be found in patent law and under such law all patent applications need to be evaluated on the basis of the statutory patentability criteria, not on the basis of underlying intentions by the applicant. Also, it is an inherent feature of a patent system to grant exclusive rights. The notion of "defensive patents" should therefore not be understood to mean that these patents are of a lower quality or value, but it tries to capture a classification made in industry for this type of patents from a commercial perspective.

349. The inquiry also found that originator companies engaged in litigation against other originator companies. 66 patent-related litigations were reported concerning 18 medicines. In 64% of the cases, litigation was concluded by means of settlement agreements.

Opposition and appeal before the EPO

350. Originator companies mainly opposed each other's secondary patents. The opposing originator companies were very successful when challenging the patents of other originator companies prevailing in nearly 70% of final decisions rendered by the EPO (including on appeal). In addition, the scope of the patents was reduced in another 19% of the cases.

2.1.3. Policy recommendations and the way forward

351. In the final report of the sector inquiry, the Commission invited all interested stakeholders to bring potential competition concerns to the attention of the competition authorities.
352. The Commission will address the issues identified in the course of the sector inquiry by applying increased scrutiny under EU competition law to the sector and by bringing specific cases, where appropriate. The first enforcement action is already under way²⁷². This case investigates amongst others patent settlement agreements concluded by Servier and a number of generic operators, which might be anti-competitive. This investigation does not form part of the sector inquiry, but the knowledge acquired during the sector inquiry has allowed the Commission to draw conclusions on the areas where Commission action based on competition law could be appropriate and effective.
353. In addition a number of surprise inspections were carried out.
354. With regard to the regulatory framework, the Final Report highlights three main areas of concerns: patents, marketing authorisation and pricing and reimbursement. With respect to patents the Commission reaffirms – on the basis of its findings – the urgent need for the establishment of a Community patent and of a unified specialised patent litigation system in Europe. The sector inquiry also fully confirms the relevance of the recent initiatives of the European Patent Office to ensure a high quality standard of patents granted and to accelerate procedures ("raising the bar").
355. With respect to marketing authorisation, the Commission will focus on the full implementation and effective enforcement of the regulatory framework, e.g. regarding the deadlines foreseen for marketing authorisation processes. Further analysis will be carried out looking into the cooperation between authorities and building up capacities/expertise throughout the EU. The Commission also reminded stakeholders of the prohibition of patent linkage and the need to stop unwarranted interventions.

²⁷² Case COMP/39612 *Servier* (perindopril), opening of proceeding on 2 July: http://ec.europa.eu/competition/antitrust/cases/decisions/39612/opening_proceedings.pdf

356. Concerning pricing and reimbursement, the Commission invites Member States to consider provisions that would grant pricing and reimbursement status to generic products automatically where the corresponding originator product already benefits from such a status and consider policies facilitating rapid generic uptake and/or generic competition. This might also include tender procedures, but stakeholders are reminded to consider not only the short term effects. Depending on the outcome of the various initiatives the Commission will examine the potential need for a review of existing EU rules in the area of pricing and reimbursement (Transparency Directive 89/105/EEC).
357. Based on the objectives outlined in this Communication, the Commission will continue to pursue a constructive dialogue with all stakeholders to ensure that the innovative potential of the Community's pharmaceutical industry can fully develop and that patients' benefit from better access to safe and innovative medicines at affordable prices without undue delays.

2.2. Developments on Parallel Trade

358. Parallel trade in medicines in the EU takes place because of the existing price differences between EU Member States. The long awaited judgment of the ECJ of 6 October 2009 in the case *Glaxo Wellcome* (hereafter GSK) provides important clarifications on restrictions of parallel trade in the pharmaceutical sector, in particular regarding so called dual pricing systems²⁷³.
359. The origin of the case is a Commission decision of 2001²⁷⁴, rejecting GSK's request for exemption under Article 81(3) EC regarding its dual pricing policy in Spain. The Commission found that dual pricing mechanisms was a restriction of competition "by object" and maintained that GSK had not established the positive effects of its dual pricing scheme for consumers in order to benefit from an exemption under Article 81(3) EC.
360. GSK lodged an appeal against the Commission decision before the CFI²⁷⁵ which held in 2006 that the dual pricing agreement at stake was not a restriction by object, but "by effect". The CFI annulled the Commission decision as the Commission had not taken into account all the factual arguments and relevant economic evidence submitted by GSK when evaluating whether the agreement could have benefited from an individual exemption.
361. In its judgment of 6 October 2009, following appeals by both GSK and the Commission, the ECJ held that the dual pricing scheme at stake is a "restriction by

²⁷³ See Case C-501/06 *GlaxoSmithKline v. Commission* (2009), available at: <http://eur-lex.europa.eu>. In March 1998, GSK notified to the Commission its pricing policy for 82 medicines in Spain applicable to Spanish wholesalers. According to the notified policy GSK charged a different price to wholesalers depending on the final destination of the product, i.e. if the product was intended for consumption in Spain a lower price would apply, and if exported, a higher price was charged. A number of wholesalers and wholesaler associations lodged complaints against this policy with the Commission, which in May 2001, adopted a decision declaring that GSK had infringed Article 81(1) EC.

²⁷⁴ See Commission decision 2001/791/EC relating to a proceeding pursuant to Article 81 EC in Case COMP/36957 *Glaxo Wellcome*, OJ L 302, 17.11.2001.

²⁷⁵ Case T-168/01 *GlaxoSmithKline v. Commission* (2006), available at: <http://eur-lex.europa.eu>

object" which infringes Article 81(1) EC²⁷⁶. However, the ECJ found no error in the assessment of the CFI regarding the loss in efficiency associated with parallel trade..

2.3. Merger Cases in the Pharmaceutical Sector

362. In 2009 a number of large mergers in pharmaceuticals took place, confirming the trend of consolidation in the industry. Three categories of cases can be identified. Firstly, mergers between originator companies whereby the rationale for the acquisition of another originator company appears to lie particularly in the broadening of R&D activities into further therapeutic areas and in the filling up of the R&D pipeline²⁷⁷. Secondly, mergers between generic companies²⁷⁸, which are leading to very significant players in generics markets. Thirdly, mergers between originator and generic companies²⁷⁹, whereby originators wish to pursue additionally a generics medicines business. All cases were cleared in the first phase either with or without commitments. Given that pharmaceutical companies are often active worldwide, the procedure involves cooperation with the US competition authority (the FTC) and other competition authorities outside Europe.
363. The assessment of pharmaceutical mergers has shown that animal health markets have generally become quite concentrated. Therefore, in order to allow the new entry of a purchaser into the field of animal health vaccines, the divestiture package in the Pfizer/Wyeth²⁸⁰ case included for the first time a production facility.

HEALTH CARE SERVICES

1. OVERVIEW OF SECTOR

364. Health care is a very important economic sector, representing about 9% of GDP in the EU, within which health services²⁸¹ account for the largest share with 6.5% of GDP. Member States bear directly or indirectly the largest share of the costs for the provision of health care, whereas consumers/patients pay directly out of their pockets over 11% of the costs, equivalent to EUR 122 billion per annum²⁸². In addition, price increases for health services are often paid for directly by patients inter alia via higher co-payments. This has potentially negative effects on consumer welfare and even possibly health status, an issue which has triggered a number of NCA-led initiatives²⁸³.

²⁷⁶ Case C-501/06 *GlaxoSmithKline v. Commission* (2009), available at: <http://eur-lex.europa.eu>
²⁷⁷ See Cases COMP/M.5476 *Pfizer/Wyeth*; COMP/M.5502 *Merck/Schering-Plough*, and COMP/M.5530 *Glaxo Smith Kline/Stiefel*.

²⁷⁸ See Case COMP/M.5295 *Teva/Barr*.

²⁷⁹ See Cases COMP/M.5253 *Sanofi-Aventis / Zentiva* and COMP/M.5555 *Novartis/Ebewe*.

²⁸⁰ See Case COMP/M.5476 *Pfizer/Wyeth*.

²⁸¹ Excluding medicines, government investment on education, health prevention and other therapeutics.

²⁸² DG Competition estimate based on data from the OECD 2008 Health database.

²⁸³ Including the Italian NCA ongoing inquiry in hospital markets, Dutch NCA report on health insurance (2007) and ongoing inquiry on hospital service prices, Irish NCA inquiry on dentists (2007), health insurance (2007) and physician services (2008), Polish and Portuguese NCAs reports on pharmacists (2004 and 2005), OFT survey on the private dentistry market (2003), Swedish NCA report on consumer welfare in health (2008).

365. The organisation of the health care sector is primarily the responsibility of Member States under Article 168 TFEU. However, to the extent that the activities in question involve offering goods and/or services on the market²⁸⁴, the provision of health care services is generally subject to EU competition rules.
366. In its mid-term review of the Community Lisbon Programme²⁸⁵, the Commission identified as a priority for action to ensure healthy and open competition in services markets alongside the need to modernize health care systems. The importance of effective competition in services markets with a view to strengthening the Single Market remains a key priority in the Community Lisbon Program for 2008-2010²⁸⁶.

2. POLICY DEVELOPMENTS

367. The provision of most health care services requires public support. Such support may not be considered State aid, provided that the strict conditions defined by the ECJ's case law are rigorously complied with²⁸⁷. Furthermore, should such financial support measure nevertheless constitute State aid, they can be declared compatible with the Treaty if they are necessary and proportionate to fulfil an appropriately entrusted public service mission, under certain conditions²⁸⁸.
368. In the field of State aid control regarding hospitals, compensations for SGEI are normally covered by the 2005 Commission Decision²⁸⁹, exempting them from notification without any predetermined ceilings, other than the costs incurred.
369. It is clear both from the case-law of the Court and from Article 168(5) that Community law does not detract from the power of the Member States to organize their social security and health care systems and to adopt, in particular, legal requirements intended to govern the provision of health services and medical care. Pursuant to case law, Member States enjoy a wide margin of discretion not only regarding the definition and entrustment of SGEI, but also as regards the determination of the cost compensation.
370. Over the past year, the Commission has received a number of complaints from private hospitals against allegedly unfair treatment or excessive compensation towards publicly-owned hospitals in various Member States, the latter often being subject to allegations of cross-subsidizing commercial activities from public

²⁸⁴ Cases 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Jointed cases C-180/98 to C-184/98, Rec.2000, p.I-6451.

²⁸⁵ COM(2005)24.

²⁸⁶ COM(2007)804.

²⁸⁷ C-280/00, *Altmark Trans*, 24 July 2003, [2003] ECR I-7747.

²⁸⁸ In particular, the Commission has explained the manner in which it intends to apply Article 106(2) TFEU within the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4-7) and the Commission Decision of 28 November 2005 on the application of Article 86(2) EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document number C(2005) 2673; OJ L 312, 29.11.2005, p. 67-73).

²⁸⁹ Commission Decision of 28 November 2005 on the application of Article 86(2) EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document number C(2005) 2673) OJ L 312, 29.11.2005, p. 67-73.

financing. Regarding State aid, in the area of health services, most of the complaints concerning subsidies for hospitals came from Member States who have already opened up their markets to competition (e.g. Germany and Belgium).

371. The constant contacts and cooperation between the Commission and the Member States have shown that some of the main challenges for national authorities have been to establish transparent entrustment acts which precisely define public services and their public funding, and to design an accurate separation of accounts between public and commercial services in order to ensure that public funds are not used to cross-subsidize other commercial activities.
372. In particular, the Commission has recently finalised its examination in a complex case concerning Belgium, where two Belgian associations representing the leading private hospitals operating in the Brussels Region complained about State aid received by the public hospitals operating within the same region. These public funds were granted for the provision of health and social services identified as SGEIs by the Member State. Consequently, the Commission assessed whether the corresponding activities qualified as economic or non-economic, and examined the definition and entrustment of the respective public service missions and the necessity and proportionality of the compensation received by the concerned public hospitals in respect thereof, as well as the absence of cross-subsidisation and compliance with EU transparency requirements. On 28 October, the Commission concluded its examination by adopting a positive decision which found that the public financing granted in favour of the public hospitals concerned for the provision of the public service missions entrusted to them was in line with the requirements set out under Article 86(2) EC²⁹⁰.
373. The Commission has also examined a case of particular interest in relation to State aid for health insurance in Ireland. The tax funded public health care system in Ireland has a very limited capacity and thus more than 50 % of the population has private medical insurance. Due to their importance in the overall health system, private insurers are subject to special regulation, which is designed to promote intergenerational solidarity²⁹¹. As insurers lack the ability to apply risk rated premiums, differences between their risk profiles can develop. Thus as a corollary to these regulations Ireland adopted the Risk Equalisation Scheme (RES), which involved financial transfers from insurers with a better risk profile to those with a worse one. The RES was authorised by the Commission under State aid rules²⁹², a decision upheld by the CFI in February 2008²⁹³, but subsequently struck down by the Irish Supreme Court under national law. The Irish authorities then devised an interim scheme of levies and tax relief in the health insurance sector that worked in a similar

²⁹⁰ Case NN54/2009 *Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique*. The public version of this decision is not yet available. It will be displayed as soon as it has been cleansed of any confidential information.

²⁹¹ For example insurers cannot reject customers seeking coverage, are obliged to provide a minimum of coverage and have to apply the same premium regardless of age, gender and health status.

²⁹² Case N46/2003 of 13 May 2003 *Risk equalisation scheme in the Irish health insurance market*, (OJ C 186, 6.8.2003).

²⁹³ Case T-289/03 *BUPA and Others v Commission*, 12.2.2008 (OJ C 79, 29.3.2008, p. 25). The judgment was notable for clarifying certain aspects of the State aid treatment of public services but above all for relaxing the strict Altmark criteria that had thus far determined the conditions under which public service compensation does not constitute aid.

way to the RES. The objective of the scheme is to promote intergenerational solidarity by decreasing the risk differentials for health insurers between old and young customers. In its decision of 17 June the Commission approved the new scheme, concluding that the measure was in line with the EU Framework for State aid in the form of public service compensation and as such compatible with Article 86(2) EC²⁹⁴.

374. In the area of antitrust, in October the Commission adopted a SO for a suspected infringement of Article 81 EC by the French Association of Pharmacists (i.e., Ordre National des Pharmaciens, Conseil National de l'Ordre des Pharmaciens, Section G de l'Ordre National des Pharmaciens and Conseil Central de la Section G de l'Ordre des Pharmaciens)²⁹⁵. In the SO, the Commission set out its preliminary conclusions concerning the market behaviour of ONP in the French market for clinical laboratory testing services, that may be contrary to EC Treaty competition rules. In particular, the Commission was concerned that ONP may be imposing minimum prices for clinical analysis and restricting the development of some market players with a view to protecting the economic interests of its members, the French pharmacists. The Commission considered that such behaviour may undermine competition and innovation in the provision of clinical analysis services to consumers. Moreover, ONP may be using the powers of public authority, delegated to it by the state for the supervision of professional deontology in the market, to champion private commercial interests.

G– TRANSPORT

1. OVERVIEW OF SECTOR

375. Transport is an essential component of the European economy. The transport industry as a whole accounts for 7% of GDP and for over 5% of total employment in the EU. Competition policy in the transport sector aims to ensure an efficient functioning of markets which have recently been liberalised or which are in the process of liberalisation. To this end, the regulatory framework continued to be modernised, bringing transport sector within the generally applicable competition rules. The regulatory work was complemented by investigation and enforcement actions.
376. The economic downturn in 2009 had a significant impact on almost all transport sectors, whether for freight or for passengers. Faced with the aftermath of the economic crisis, the airline industry continued to undergo a restructuring which included multiple mergers and financial difficulties/bankruptcies of both network and low-cost carriers. The Commission assessed a number of mergers and ensured that such consolidation was not to the detriment of consumers. Airport congestion also remained a critical issue.

²⁹⁴ Case N582/08 *Health Insurance intergenerational solidarity relief* (Ireland). Final decision C(2009)3572 final (OJ C 186, 8.8.2009).

²⁹⁵ Case COMP/39510 *LABCO/ONP*.

377. The maritime transport was also severely affected by the crisis, trying to cope with overcapacity, falling demand and tight credit leading to sharp decreases in rates. The Commission remained vigilant to any signs of crisis cartels, protectionist measures or other forms of anticompetitive behaviour.
378. The Commission's enforcement activity was also complemented by that of NCAs, in particular in areas where an investigation at national level is appropriate, such as in the case of airport infrastructure (degree of concentration with regard to London airports for instance).

2. POLICY DEVELOPMENTS

2.1. Road Transport

379. The new Regulation on public passenger transport services²⁹⁶ entered into force on 3 December. The regulation lays down the rules applicable to the compensation of public service obligations in inland traffic. Until the entering into force of the new rules, the Commission has continued to apply the existing State aid rules to public service contracts and public service obligations, clarified in the Altmark Judgment²⁹⁷.
380. On the basis of these rules, the Commission concluded that the new Danish system of reduced tariffs in favour of certain categories of passengers travelling in long-distance bus services involved State aid, compatible with the common market²⁹⁸. The aim of the scheme is to ensure adequate transport services to low-income groups of the population and overall to boost public transport. The scheme will also help to create harmonised conditions for competition between railway undertakings, which already receive compensation for giving similar or higher discounts, and long-distance bus operators.
381. As in previous years, the Commission received several notifications of subsidised regional bus services. In conformity with the Altmark ruling, the Commission declared as non-aid the compensations granted by Landkreis Sachsen-Anhalt in Germany for the public bus transport²⁹⁹. Similarly, the Commission concluded that the extension of the compensation for public services in the district of Wittenberg linked to supplementing the existing bus lines did not constitute State aid³⁰⁰.
382. The in-depth assessment started in March 2005 in relation to the restructuring aid in the form of capital injections granted to the Danish bus transport company Combus was concluded. Following the CFI's partial annulment in March 2004³⁰¹ of its previous decision adopted in March 2001, the Commission concluded that the aid

²⁹⁶ Regulation (EC) No. 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger services by rail and road and repealing Council regulations (EEC) No. 1191/69 and No. 1107/70 (OJ L 315, 3.12.2007).

²⁹⁷ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ("Altmark") [2003] ECR I-7747.

²⁹⁸ Case N332/2008 (OJ C 46, 25.2.2009).

²⁹⁹ Case N206/2009 (OJ C 255, 24.10.2009).

³⁰⁰ Case N207/2009 (OJ C 255, 24.10.2009).

³⁰¹ Case T-157/01 *Danske Busvognmænd/Commission* [2004] ECR II-917.

was incompatible with the common market and should be recovered from the company which received it³⁰².

383. In the field of urban transport, the Commission closed the formal investigation procedure regarding the State aid for reform of the financing method for the special pension scheme for the staff of the French public transport company RATP. The Commission considered that the reform notified by the French authorities constituted State aid benefiting the RATP but concluded that this reform was necessary to create equal conditions with regard to contributions for compulsory old-age pension insurance and to place the Ile-de-France transport company on an equal footing with its competitors³⁰³.
384. In line with the wider Community objectives of the common transport policy and environmental protection, the Commission authorised a regime promoting the purchase of more environmentally-friendly heavy goods vehicles in Slovenia³⁰⁴. Such vehicles use exhaust emission control equipment in anticipation of the deadline for the start of its mandatory use. As such, the Commission concluded that the measure was in line with the Environmental Guidelines. The Commission also authorised a German aid scheme aiming at supporting market acceptance of available highly efficient vehicle technologies³⁰⁵ and an aid scheme supporting the purchase of low-carbon buses in England. The main objective of the UK scheme is to reduce the CO₂ emissions produced by public buses through the introduction of a 'Green Bus Fund'³⁰⁶.
385. As regards the improvement of the public transport infrastructure, the Commission authorised several major projects. Among these, it declared the public financing of the construction and maintenance of the motorway A1³⁰⁷ and A2³⁰⁸ in Poland to be compatible State aid.
386. The Commission also adopted a non-aid decision concerning the financing of the planning phase of the Fehmarn Belt fixed link³⁰⁹. The Fehmarn Belt fixed link project will involve the construction and the exploitation of either a bridge or a tunnel to form a fixed road and rail link spanning the 19 km-wide Fehmarn Strait between the north of Germany and the south of Denmark. It is considered a key element for the completion of the main North-South route connecting central Europe and the Nordic countries and is regarded as contributing to the development of the trans-European transport network.
387. Finally, the Commission authorised the prolongation by one year of certain motorway concession contracts in France³¹⁰.

³⁰² Case C10/2005 (OJ L 345, 23.12.2009).

³⁰³ Case C42/2007 (OJ L 327, 12.12.2009).

³⁰⁴ Case N395/2008 (OJ C 125, 5.6.2009).

³⁰⁵ N457/2009.

³⁰⁶ Case N517/2009.

³⁰⁷ Cases N151/2009, N152/2009 (OJ C 164, 16.7.2009).

³⁰⁸ Case N462/2009.

³⁰⁹ Case N157/2009 (OJ C 202, 27.8.2009).

³¹⁰ Case N362/2009 (OJ C 264, 6.11.2009).

2.2. Rail Transport and Combined Transport

388. Despite full liberalisation in 2007, European rail freight transport markets are still characterised by limited competition and strong incumbents co-operating for cross-border rail freight transport. Since 2007, the Commission has assessed a number of merger cases in the railway sector. On 12 June, the Commission approved the acquisition of the Polish railway company PCC Logistics by Deutsche Bahn AG³¹¹. It is the Commission's policy to ensure that in line with the ECMR, mergers in the rail sector do not lead to a weakening of competitive constraints, for example, by reducing potential competition.
389. International rail passenger transport will be liberalised only as of 1 January 2010. In October, the Commission referred to France the assessment of a concentration by which SNCF would notably take joint control of Keolis, an undertaking active in passenger public transport³¹².
390. As in previous years, the Commission adopted several aid decisions to promote rail transport and combined transport. The Commission authorised the public funding for the construction and the upgrading of private sidings in order to increase rail freight traffic in Germany³¹³ and the prolongation of an aid scheme to support the costs associated with the installation of the European Train Control System (ETCS) on the railway line connecting the port of Rotterdam and Germany, exclusively used for freight transport³¹⁴.
391. Further aid measures were approved for the acquisition and modernisation of rolling stock in Bulgaria³¹⁵ and the Czech Republic³¹⁶. The Commission authorised a Czech regime aiming to ensure a gradual technical and operational interconnection of the Czech and the neighbouring railway systems, as well as amongst the individual entities involved in railway transport³¹⁷. The Commission also approved a German scheme providing for public funding for measures of noise reduction for existing railway freight wagons under the framework of the pilot project "Silent Rhein". The retrofitting of railway freight wagons which are mainly used in the Rhine valley with less noisy brake systems is envisaged in order to enhance noise-reduction³¹⁸.
392. The Commission also approved State aid for the high-speed rail link service between London and the Channel Tunnel as well as the restructuring of Eurostar (UK)³¹⁹. The measure was approved as restructuring aid and aid to promote a project of significant European interest.
393. In addition, the Commission authorised the prolongation or the setting up of several aid measures to promote combined transport and to achieve a traffic shift of freight

³¹¹ Case COMP/M.5480 (OJ C 185, 7.8.2009).

³¹² Case COMP/M.5557 *SNCF/CDPQ/Keolis/Effia*.

³¹³ Case N184/2009 (OJ C 246, 14.10.2009).

³¹⁴ Case N474/2009 (OJ C 264, 6.11.2009).

³¹⁵ Case N175/2009 (OJ C 246, 14.10.2009).

³¹⁶ Cases N409/2008, N410/2008 and N411/2008 (OJ C 106, 8.5.2009).

³¹⁷ Case N469/2008 (OJ C 53, 6.3.2009).

³¹⁸ Case N324/2009 (OJ C 299, 9.12.2009).

³¹⁹ Case N420/2008 (OJ C 183, 5.8.2009).

from road transport to other modes of transport in Belgium³²⁰, Austria³²¹, Germany³²², UK³²³, Italy³²⁴, Poland³²⁵ and Hungary³²⁶.

394. A positive decision was adopted concerning an amendment to a Dutch regime for the construction of inland transshipment terminals in order to shift more freight traffic from road to inland waterway and rail transport³²⁷. Along the same lines, the Commission authorised a State aid measure designed to shift traffic from road and increasing the efficiency and safety of freight transport by means of establishing a rail based combined transport between the Port of Naples and the Interporto di Nola³²⁸.

395. The Commission also authorised a Dutch aid scheme entailing the development and application of environmentally friendly techniques in the field of traffic and water management³²⁹.

2.3. Inland Navigation

396. In February, the Council adopted a codified version of the 1968 Regulation applying competition rules to transport by rail, road and inland waterway alike³³⁰.

2.4. Maritime Transport

2.4.1. Policy developments

397. In June a Communication on State aid to ship management companies³³¹ was adopted. The Communication lays down the criteria for eligibility of ship management companies for the reduction of corporate tax or the application of the tonnage tax under the Guidelines on State aid to maritime transport³³².

398. On 28 September the Commission adopted Commission Regulation (EC) No 906/2009 on the application of Article 81(3) EC to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)³³³. The revised consortia block exemption regulation will enter into force on 25 April 2010 and is part of the European Commission's effort to review transport regulations for the maritime transport sector (see section I.B.1.4.5).

³²⁰ Case N571/2008 (OJ C 160, 14.7.2009).

³²¹ Case N415/2008 (OJ C 53, 6.3.2009).

³²² Case N304/2008 (OJ C 106, 8.5.2009).

³²³ Case N247/2009 (OJ C 255, 24.10.2009).

³²⁴ Case N483/2009 (OJ C 280, 20.11.2009); case N259/2008 (OJ C 280, 20.11.2009).

³²⁵ Case N546/2008 (OJ C 203, 28.8.2009).

³²⁶ Case N316/2008 (OJ C 232, 26.9.2009).

³²⁷ Case N60/2009 (OJ C 125, 5.6.2009).

³²⁸ Case N449/2008 (OJ C 196, 20.8.2009).

³²⁹ Case N456/2008 (OJ C 188, 11.8.2009).

³³⁰ Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway (Codified version) (OJ L 61, 5.3.2009).

³³¹ Communication from the Commission providing guidance on State aid to ship management companies (OJ C 132, 11.6.2009).

³³² Commission Communication C(2004) 43 Community guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3).

³³³ OJ L 256, 29.9.2009, p. 31; See also Press Release [IP/09/1367](#), 28.9.2009 and [MEMO/09/420](#), 28.9.2009.

399. The abolition of the liner conference block exemption in 2008 forced major container shipping firms to adjust to the new regime. In non-containerised markets, the world's largest shipping conglomerate, Maersk, acquired Broström³³⁴ in 2009.

2.4.2. *State aid cases*

400. The Commission adopted positive decisions with regard to aid to seafarers in Italy³³⁵ and Finland³³⁶.

401. The Commission concluded the formal procedure opened in 2007 regarding the extension to dredging and cable-laying activities of the regime exempting maritime transport companies from the payment of the income tax and social contributions of seafarers ("DIS regime") in Denmark. The Commission had expressed doubts whether such activities constituted or could be assimilated to maritime transport. In the end, the Commission concluded that all dredging activities can be assimilated to maritime transport except for sailing at the places of extraction. In addition, it accepted the extension of the DIS regime to cable-laying vessels by applying by analogy the Maritime Guidelines³³⁷.

402. In addition, the Commission concluded several investigation procedures regarding tonnage tax schemes. Firstly, it finalised the in-depth assessment initiated in 2008 regarding amendments to the Irish tonnage tax scheme. In the opening decision, the Commission expressed doubts as to the removal of the time charter limit. The Commission concluded in the final decision that such amendments can contribute to the Community's interests in the field of maritime policy when, for a given tonnage tax company, each of the chartered-in vessels is either registered in a Community or EEA maritime register or its crew and technical management are carried out on the territory of the Community or the EEA³³⁸.

403. Moreover, the Commission concluded the investigation procedure initiated in 2007 regarding amendments to the Danish tonnage tax scheme. In line with the doubts expressed in the opening decision, the Commission found that the alleviation of information obligation for tonnage tax companies which carry out transactions with foreign (non-Danish) affiliates was not compatible with the common market. It was therefore not authorised³³⁹.

404. The Commission also approved an amendment to the Dutch tonnage tax scheme which reduces the tonnage tax base for large vessels and to ship management companies which exercise simultaneously crew management and technical management of vessels³⁴⁰ and the introduction of a tonnage tax scheme in Slovenia³⁴¹ and Poland³⁴².

³³⁴ Case COMP/M.5346 *APMM/Broström*.

³³⁵ Case N219/2009 (OJ C 196, 20.8.2009).

³³⁶ Cases N120/2009 (OJ C 232, 26.9.2009), N67/2009 (OJ C 232, 26.9.2009) and N300/2009 (OJ C 299, 9.12.2009).

³³⁷ Case C22/2007 (OJ L 119, 15.5.2009).

³³⁸ Case C2/2008 (OJ L 228, 1.9.2009).

³³⁹ Case C5/2007 (OJ L 315, 2.12.2009).

³⁴⁰ Case N457/2008 (OJ C 106, 8.5.2009).

³⁴¹ Case N325/2007 (OJ C 53, 6.3.2009).

³⁴² Case C34/2007.

405. As regards port infrastructure development projects, the Commission authorised the co-financing of the construction of a pedestrian bridge and of jetties in the passenger section of the Port of Piraeus. However, it expressed doubts regarding the public funding of the construction of a jetty and the acquisition of different types of equipment in the container terminal section of the same port, and opened the formal investigation procedure in their respect³⁴³.
406. The Commission subsequently separated its assessment of the public financing of the construction of the jetty from the acquisition of equipment elements and decided that the public financing for the construction of the jetty is compatible with State aid rules³⁴⁴.
407. The Commission also raised doubts as to whether the granting of the 35-year concession for the operation of a dry bulk terminal and two berths in Ventspils port involves aid at the level of the concession holders. The concession fees to be paid by the respective port service providers have been established on the basis of an independent valuation. The Commission has doubts that in this case the concession fee represents a market price³⁴⁵.
408. The Commission initiated a formal investigation procedure regarding certain fiscal measures in favour of the port sector in France³⁴⁶. The Commission also confirmed its view that, in the lack of an open, transparent and non discriminatory tendering procedure, a sale transaction carried out by the State does not involve aid elements to the buyer only if the market price is paid for the assets acquired thereafter.
409. The Commission concluded the formal investigation procedure initiated in 2008 regarding the public financing of ferry shipping services between the Scottish mainland and the islands off the west and north coasts of Scotland³⁴⁷. With the exception of one route in the western islands, these services are currently provided under public service contracts, which followed open public tender procedures. After an in-depth investigation, the Commission confirmed that the public service obligations for the western and northern islands were legitimately defined and entrusted on the operators, with the exception of the Gourock-Dunoon route. In the case of this route, the national authorities have committed to take the necessary steps to launch a public tender for its operation before the end of 2009. On the basis of the commitment from the national authorities to launch a public tender for the operation of the Gourock-Dunoon route, the Commission decided to close the procedure with a positive decision.
410. In line with the wider community objectives in the field of transport, the Commission authorised the prolongation of a UK aid scheme supporting the modal shift of freight from road to water by means of granting support to coastal and short sea shipping services on condition that they avoid journeys by lorry and they generate environmental benefits within the UK³⁴⁸.

³⁴³ Cases N169/2008, N105/2008 and N168/2008.

³⁴⁴ Case C21/2009.

³⁴⁵ Case N385/2009.

³⁴⁶ Case N614/2008 (C 122, 30.5.2009).

³⁴⁷ Case C16/2008.

³⁴⁸ Case N246/2009 (OJ C 209, 4.9.2009).

2.5. Aviation

2.5.1. Policy developments

411. The Regulation on computer reservation systems (CRS)³⁴⁹ entered into force on 29 March. The new rules aim to increase competition in the field of airline ticket distribution by reducing booking fees and allowing airlines to provide more travel options via the CRSs.
412. The new Directive on airport charges entered into force in March³⁵⁰. It applies to EU airports that are above a minimum size and establishes a common framework of airport charging thereby setting common principles to be observed by EU airports when determining the level of the charges in order to ensure that airport charges do not discriminate among airport users. The Directive sets forth a compulsory procedure for regular consultation between airport managing bodies and airport users, with the possibility for either party to have recourse to an independent supervisory authority whenever a decision on airport charges or the modification of the charging system is contested by airport users.
413. On 18 June the Council and the European Parliament approved an amendment to the existing rules³⁵¹, aiming at bringing more flexibility in slot allocation in order to counteract the impact of the crisis on air transport. The measure temporarily freezes the "use it or lose it" rule during the 2009 summer season and allows airlines to keep their rights over slots.
414. On April 8 the Commission decided to open two formal proceedings in its investigations of the airline cooperation on transatlantic flights³⁵². One case concerns the cooperation agreements concluded between three members of the oneworld airline alliance – British Airways, American Airlines and Iberia. The second proceedings relate to separate cooperation agreements entered into by four airlines of the Star Alliance – Lufthansa, United, Continental and Air Canada. In both cases the agreements provide for extensive cooperation between the parties, including revenue sharing, joint price-setting and coordination of capacity and schedules on transatlantic flights between Europe and North America. In the oneworld case, on September 30, the Commission sent a SO to British Airways, American Airlines and Iberia³⁵³. The Commission expressed concerns that the parties' agreements would have adverse effects for passengers on several transatlantic routes where British Airways, American Airlines and Iberia enjoy a strong market position and where barriers to entry are significant.

³⁴⁹ Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 (OJ L 35, 4.2.2009).

³⁵⁰ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 (OJ L 70, 14.3.2009).

³⁵¹ Regulation (EC) no 545/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EEC) no 95/93 on common rules for the allocation of slots at community airports (OJ L 167, 29.6.2009, p. 24).

³⁵² See Press Release [MEMO/09/168](#), 20.4.2009.

³⁵³ See Press Release [MEMO/09/430](#), 2.10.2009.

415. The airline industry faced significant turbulence in 2009. Following 2008's peak in fuel prices, the fall in passenger and cargo demand in 2009, in particular at the premium end of the fare scale, resulted in significant losses for many carriers. Both phenomena gave impetus to the pre-existing trend towards restructuring and consolidation in the sector. Given the legal framework applicable to transatlantic mergers, the restructuring took the form of intensified cooperation within global airline alliances resulting in joint venture agreements covering transatlantic routes. The European airline industry, on the other hand, went through a process of consolidation with mergers of both network and low-cost carriers³⁵⁴ taking place. Some large network carriers, in particular Lufthansa, seized this opportunity to expand via acquisitions of smaller regional players, namely Brussels Airlines³⁵⁵, Bmi³⁵⁶ and Austrian airlines³⁵⁷.
416. While the Commission encourages airline consolidation in Europe, it has to make sure that the latter does not take place to the detriment of consumers. It is in this context that in 2009 the Commission conducted several thorough first phase and two second phase market investigations. The 2009 airline merger wave also highlighted some policy issues, in particular as concerns the treatment of pre-existing agreements between the parties and remedies in the airline sector.
417. Pre-merger competition between the merging parties is often characterized by a network of pre-existing cooperation agreements ranging from simple code-sharing agreements to cost and revenue sharing joint ventures. These agreements have to be analyzed in order to determine the relevant counterfactual for the assessment of the effects of each transaction. Pre-merger cooperation that is contrary to Article 101 TFEU cannot be considered as a relevant counterfactual. In the context of merger control, if the illegality of a pre-merger agreement between the parties were not taken into account, the parties could argue that there would only be a small reduction or even no reduction of competition as a result of the merger. A merger decision in such circumstances would effectively incorporate and perpetuate the pre-merger illegality, since mergers that are approved under the ECMR are no longer challengeable under Article 101 TFEU. The Commission analyzed on a case-by-case basis the specific effects of the creation of a permanent structural link (as opposed to a contractual link) between the parties in order to assess the extent to which competition may be affected post-merger.
418. As concerns airline remedy policy, the Commission, in order to ensure the effectiveness of the slot remedies offered in appropriate airline cases, agreed remedies with the potential to foster entry at concerned airports by incentivising new entrants to create a base³⁵⁸. In addition, the Commission improved and substantially simplified the procedure for slot application for new entrants so as to provide additional incentives to new entrants to take up slots offered by the parties and thus further foster the effectiveness of the remedies.

³⁵⁴ Case COMP/M.5364 *Iberia/Vueling/Clickair*.

³⁵⁵ Case COMP/M.5335 *Lufthansa/Brussels Airlines*.

³⁵⁶ Case COMP/M.5403 *Lufthansa/bmi*.

³⁵⁷ Case COMP/M.5440 *Lufthansa/Austrian Airlines*.

³⁵⁸ Case COMP/M.5364 *Iberia/Vueling/Clickair*.

2.5.2. *State aid cases*

419. The economic and financial crisis has had a significant effect on the airline sector. The Commission authorised the rescue aid granted to the Austrian Airlines Group in the form of a loan guarantee³⁵⁹.
420. During 2009, the Commission also opened and subsequently closed the formal investigation procedure into the privatisation and restructuring of Austrian Airlines. The Commission had doubts whether sufficient compensatory measures had been proposed by the Austrian authorities to address the resulting market distortions³⁶⁰. In addition, the Commission could not conclude whether the amount of the aid element of the restructuring plan had been kept to a minimum nor whether the level of own contribution could be considered appropriate under the 2004 Guidelines.
421. In the final decision³⁶¹, the Commission concluded that, since the insolvency of the airline would have been a cheaper option for the State, the decision of Austria to accept a negative price amounted to a grant of State aid. After assessing the restructuring plan, the Commission concluded that this plan was in conformity with the applicable Community rules.
422. The Commission decided on certain changes envisaged by the Greek authorities in connection with the sales processes of Olympic Airlines, as authorised in 2008³⁶². The Greek authorities carried out a tender procedure in conformity with the Commission decision. However, no valid offers were received. Thus, the Greek authorities informed the Commission on their intention to carry out the sales by direct negotiation with interested parties. The Commission concluded that, given the specific circumstances of this case, and taking into account the financial turmoil, the direct sale solution was the most likely to maximise the value of the two companies and consequently the State aid to be recovered. However, the acceptance by the Commission of such amendment to the sale processes has been made subject to observance of several conditions³⁶³.
423. The Commission also approved the intention of the Greek authorities to cover part of the costs of the voluntary redundancy scheme to be implemented by Olympic Catering SA in respect of certain of its staff. The Commission considered that the measure, which pays part of the abnormal costs of the scheme, can be considered compatible with the common market. The abnormal costs in question result from certain Olympic Catering staff taking part in an early retirement voluntary redundancy scheme. These staff members enjoy a permanent status and salaries which were negotiated when the company was a state-owned undertaking and are therefore not comparable to normal market conditions³⁶⁴.

³⁵⁹ Case NN72/2008.

³⁶⁰ Case N663/2008 (OJ C 57, 11.3.2009).

³⁶¹ Case C6/2009.

³⁶² In 2008 the Commission found that the sale of certain assets of Olympic Airways / Olympic Airlines in bundled form did not involve State aid, provided that certain commitments made by the Greek authorities are fully complied with. These conditions mainly required that the sales should be carried out on the basis of a transparent, open and non-discriminatory public tender, accepting the highest bid.

³⁶³ Case N83/2009.

³⁶⁴ Case N487/2009.

424. Several State aids for investments in airport infrastructure were approved at airports in Italy (Falconara airport and Tuscan airports)³⁶⁵, Germany (Berlin Brandenburg International Airport, Kassel-Calden airport, Dresden airport, Münster/Osnabrück airport)³⁶⁶, UK (Newquay Cornwall Airport)³⁶⁷, Poland (Lublin-Świdnik, Modlin, Podlaskie, Olsztyn/Szymany, Zegrze Pomorskie, Łódź, Bydgoszcz, Rzeszów-Jasionka, Poznań-Ławica, Kraków-Balice, Warszawa-Okęcie, Katowice-Pyrzowice, Wrocław-Strachowice, Gdańsk-Rębiechowo, Szczecin-Goleniów airports)³⁶⁸, Lithuania (Vilnius, Kaunas and Palanga International Airports)³⁶⁹ and the Netherlands³⁷⁰. The Commission concluded that the measures were not prejudicial to the common interest as they could be deemed necessary and proportionate to reach objectives of Community interest. The Commission also authorised the co-financing of the apron-related equipment and other equipment necessary for the management of the Ostrava airport³⁷¹.
425. The Commission also authorised a regime put in place by the Flemish authorities intended, through the grant of "start-up" aid, at the creation of new air routes from Ostend-Bruges International Airport to other EU airports³⁷².
426. Finally, the Commission accepted the measures taken by France in view of bringing to an end the differentiation in passenger charges amongst national and EU flights, which in fact granted an advantage to airlines operating internal flights³⁷³.

2.6. Ship Classification

427. In 2008, the Commission started investigations into the worldwide ship classification market³⁷⁴ concerning the treatment by the International Association of Classification Societies (IACS) of third party classification societies which are not members of IACS.
428. In its preliminary assessment, the Commission took the preliminary view that IACS may have reduced the level of competition in the ship classification market, notably by decisions preventing classification societies which are not already members of IACS from joining IACS, from participating in IACS' technical working groups (which develop IACS' technical resolutions that lay down requirements and interpretations to be incorporated into the classification rules and procedures of individual classification societies) and from accessing to technical background documents which relate to IACS' technical resolutions and which are necessary to understand and apply these resolutions. Given the Commission's preliminary view that the ten members of IACS have a strong position on the market and that

³⁶⁵ Case N12/2009 (OJ C 164, 16.7.2009), case N45/2009 (OJ C 125, 5.6.2009).

³⁶⁶ Case NN25/2009 (OJ C 179, 1.8.2009), case N112/2008 (OJ C 97, 28.4.2009) case NN4/2009 (OJ C 125, 5.6.2009), case N30/2008.

³⁶⁷ Case N269/2009, (C 204, 29.8.2009).

³⁶⁸ Case N196/2008 (OJ C 204, 29.8.2009), case N472/2008 (OJ C 79, 2.4.2009), case N 570/2008 (OJ C 125, 5.6.2009).

³⁶⁹ Case NN9/2009.

³⁷⁰ Case NN43/2009 (OJ C 320, 24.12.2009).

³⁷¹ Case N307/2008 (OJ C 46, 25.2.2009).

³⁷² Case N377/2009.

³⁷³ Case E4/2007 (OJ C 83, 7.4.2009).

³⁷⁴ See MEMO/08/65, 30.1.2008.

classification societies which are not members of IACS may face significant competitive disadvantages, the Commission's preliminary assessment was that these decisions therefore raised concerns as to their compatibility with Article 81(1) EC and Article 53(1) EEA Agreement. Moreover, the Commission's preliminary view was that these decisions did not appear to fulfil the cumulative requirements for exemption under Article 81(3) EC and Article 53(3) EEA Agreement.

429. To address the Commission's competition concerns, IACS offered the following commitments:

- To set up objective and transparent membership criteria and to apply them in a uniform and non-discriminatory manner. The commitments foresee detailed rules, including clear deadlines, for the different steps of the membership application, suspension and withdrawal procedure.
- To ensure that classification societies which are not members of IACS will nonetheless be able to participate in IACS' technical working groups.
- To put all current and future IACS resolutions and their related technical background documents into the public domain at the same time and in the same way as they are made available to IACS members.
- To set up an independent appeal board to settle possible disputes about access to, suspension or withdrawal of membership of IACS, participation in IACS' technical working groups and access to IACS' resolutions and to their technical background documents.

430. Between 10 June and 10 July 2009, the Commission consulted interested parties on the commitments proposed by IACS³⁷⁵. The results of that consultation confirmed that the commitments were necessary and proportionate to remedy the concerns. As a result, the Commission adopted a decision on 14 October rendering the commitments offered by IACS legally binding, and closed its investigation³⁷⁶.

2.7. International aviation policy – EU-US cooperation

431. Under the framework of cooperation set up by Annex 2 of the EU-US Air Transport agreement, the Commission and the US Department of Transportation (DOT) continued their joint work on the research project on airline alliances³⁷⁷. The project has a quantitative and a qualitative part. The quantitative part of the project – analysis of the impact of alliances on fares and number of passengers – has been finalised resulting in a detailed report by the external consultant. A brief final report outlying the main qualitative findings is scheduled for publication early next year.

³⁷⁵ See Press release [IP/09/898](#), 10.6.2009.

³⁷⁶ See Press release [IP/09/1513](#), 14.10.2009.

³⁷⁷ See Press Release [IP/08/459](#), 18.3.2008.

H – POSTAL SERVICES

1. OVERVIEW OF SECTOR

432. The postal sector is of great significance for the economy of the EU, generating about 1% of EU GDP³⁷⁸. Virtually all Universal Service Providers (USP) in the EU are public undertakings controlled by the Member States.
433. Postal services are an essential vehicle of communication and trade, and they are also vital for many economic and social activities. Many key sectors, such as e-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 principally provided by USP and is fairly stable, with about 1.6 million persons employed³⁵¹.
434. Postal services are evolving substantially. Postal operators are facing fierce competition from electronic means of communication. This is in turn forcing them to adapt their businesses to better respond to customers' needs and to improve efficiency. The latter was also used as the main tool by USP to face the increasing number of postal competitors. In addition, physical mail is increasingly being supplemented by multi-channel delivery and tailor-made solutions for customers, for example via hybrid mail services.
435. Many postal operators are entering adjacent markets through developing IT services for their customers or other new or value-added services.
436. Despite the progress to-date, genuine competition is only just beginning to emerge even in cases where the monopoly has been completely abolished or substantially reduced. In the letter post segment, market shares of competitors, although increasing, remain at a low level even in Member States that have fully liberalised their postal markets. Estimated market shares of competitors in these Member States ranged from around 8% to 14% in 2007³⁵¹. Apart from the issue of the reserved area, other legal and strategic market entry barriers still persist.

2. POLICY DEVELOPMENTS

437. Under the third postal Directive³⁷⁹, most Member States, will have to accomplish full market opening by 31 December 2010 with a further two years allowed for eleven Member States³⁸⁰. The Directive provides in particular for the abolition of the

³⁷⁸ Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC) of 22.12.2008, SEC(2008)3076.

³⁷⁹ Directive 2008/06/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3).

³⁸⁰ Czech Republic, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Poland, Romania and Slovakia.

reserved area in all Member States, the confirmation of the scope and standard of postal universal service and the upgrading of the role of national regulatory authorities. The Directive also offers a variety of measures that Member States may take to safeguard and finance the universal service, if this proves to be necessary.

2.1. State aid

438. Within the postal sector, the State aid assessment carried out by the Commission includes a verification of the amount of compensation granted to postal operators in order to ensure that these compensations do not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit, and that commercial activities outside the SGEI are not cross-subsidised. The compatibility principles the Commission applies in its assessment are contained in the Community framework for State aid in the form of public service compensation (the Framework)³⁸¹. However, the new Postal Directive provides for a new method of calculating the net costs of postal universal services³⁸², which departs from the mere accounting approach of actual loss compensation embodied in the Framework. The possible implications of this method will have to be reflected in the future compensation mechanisms.

2.1.1. *Deutsche Post*

439. The Commission currently continues its investigation into the alleged overcompensation of *Deutsche Post AG*³⁸³ for carrying out its universal service obligations from 1989 to 2007. The main focus is on two public measures concerning the subsidy which Deutsche Post received from its affiliate Deutsche Telekom between 1990 and 1995 to cover its losses and the public financing which Deutsche Post has received since 1995 in order to finance the pension of its civil servants. It is important to note that the CFI annulled³⁸⁴ the 2002 Commission decision which had already found certain aid measures for Deutsche Post AG as incompatible. The Commission appealed this judgment³⁸⁵.

440. Following considerable delays incurred due to an initial refusal of Germany to provide all necessary accounting data for the period after 1995, the investigation was eventually continued based on accounting information for the whole period until 2007 which Germany submitted further to the issuance of an information injunction on 30 October 2008. The Commission has recently received the formal submission of the expert's final report aiming to quantify the possible amount of overcompensation; on that basis and the comments of the German authorities a final decision can be anticipated for the beginning of the year 2010.

³⁸¹ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, pp. 4-7).

³⁸² The cost for providing the universal service shall be calculated as the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without universal service obligations.

³⁸³ Case C36/2007 *Complaint against the German State for unlawful State aid to Deutsche Post* (OJ C 245, 19.10.2007 p. 21).

³⁸⁴ Case T-266/02 *Deutsche Post AG v Commission*, [2008] ECR II-01233.

³⁸⁵ Case C-399/08 *Commission v Deutsche Post AG* (OJ C 301, 22.11.2008, p. 18).

2.1.2. *Belgian Post*

441. The European Commission has opened a formal investigation procedure to examine whether measures in favour of La Poste, the Belgian postal operator, in particular the yearly compensation for public service obligations, are in line with EU State aid rules³⁸⁶.
442. The Commission's initial approval of a series of measures in favour of La Poste in 2003 was overturned by the CFI on 10 February, who found that a formal investigation procedure was required in order to guarantee the possibility for competitors to submit their views to the Commission. The Commission's current investigation, opened on 13 July, aims to establish in a comprehensive way whether the totality of the measures in favour of La Poste since its incorporation can be considered compatible with the Single Market. The investigation concerns a large number of measures, including the yearly compensation granted by Belgium for public service tasks, capital injections, relief of pension liabilities, transfer of buildings and tax exemptions. The investigation is progressing swiftly with active cooperation of the Belgian authorities.

2.1.3. *Royal Mail*

443. The European Commission has decided that four state measures granted in favour of the UK postal incumbent Royal Mail between 2001 and 2007 are in line with EU State aid rules³⁸⁷.
444. Further to a State aid investigation opened in 2007 following complaints by competitors, the Commission concluded that three loan measures granted in 2001-2007 did not contain State aid because they were granted under market conditions. The Commission authorised a fourth measure concerning Royal Mail's pension liabilities under EC Treaty rules allowing State aid to facilitate certain economic activities (Article 87(3)(c) EC) because it covered abnormal costs which had arisen from the previous period when Royal Mail had a monopoly over the letters market. None of the measures had been notified, because the UK had contended that they did not constitute State aid.
445. The decision adopted on 8 April does not cover measures initially announced by the UK authorities in December 2008 in response to the recommendations of the Hooper report, and currently still under discussion in the UK. This decision does not concern either the separate measures in favour of Royal Mail's subsidiary, Post Office Limited, which runs the network of post offices³⁸⁸.

2.1.4. *Unlimited guarantee to the French La Poste*

446. In 2007 the Commission opened the formal procedure to investigate the unlimited State guarantee resulting from the public-law status of the French La Poste³⁸⁹. The

³⁸⁶ Case C20/09 (ex N763/02) *La Poste* (OJ C 176, 29.7.2009, p. 17).

³⁸⁷ Case C7/07 (ex NN82/06 and NN83/06) *Alleged aid in favour of Royal Mail* (OJ L 210, 14.8.2009, p. 16).

³⁸⁸ The Commission approved a series of measures in favour of Post Office Limited, most recently in November 2007.

³⁸⁹ Case C56/2007 *Garantie d'Etat illimitée - La Poste* (France).

investigation includes an expert study that has concluded that La Poste indeed enjoys an unlimited guarantee due to its public-law status. In July, the French government adopted a bill of law providing for the incorporation of La Poste as a société anonyme, which would put an end to the guarantee. The law should be adopted early 2010. In consideration of the above, the Commission is currently finalising its decision.

2.2. Infringement procedures

447. The European Commission pursued an infringement proceeding under Article 258 TFEU against the Slovak Republic for the non-implementation of the 2008 Commission decision on the Slovakian postal Law³⁹⁰.
448. In its decision, the Commission found the re-monopolisation of the hybrid mail sector to the benefit of the postal incumbent Slovak Post to be in breach of competition rules. Hybrid mail is a service whereby the content of a communication is electronically transmitted from the sender to the service provider, which then prints, envelopes, processes and delivers the postal item to the final addressee. As a result of the Slovak postal law amendment, alternative postal operators were no longer allowed to deliver hybrid mail items, an activity previously open to competition.
449. Following the Commission's decision, Slovakia did not inform the Commission of any measures which would have put an end to the infringement. As a result, the Commission opened infringement proceedings and on 29 October issued a reasoned opinion in this case³⁹¹. Slovakia has an obligation to comply with the Commission's decision, failing which the Commission may bring the matter to the ECJ. In the meantime, the alternative operators may rely on the Commission's decision.

2.3. Merger control

450. On 21 April, the Commission cleared the first merger between incumbent postal operators, Posten (of Sweden) and Post Danmark³⁹². The transaction was cleared subject to conditions relating to parcel delivery services. The Commission's investigation showed that liberalisation of the Danish mail market (scheduled to take place before 2011) is not at risk, as the proposed merger was unlikely to increase barriers to entry or expansion, or impede competition in the Danish mail market.

I – AUTOMOTIVE INDUSTRY

1. OVERVIEW OF SECTOR

451. The motor vehicles sector was hit particularly hard by the economic crisis. Although world demand for cars in 2009 fell only by 2.4% compared to 2008 thanks to strong

³⁹⁰ Case COMP/39562 *Slovakian postal Law* (OJ C 322, 17.12.2008, p. 10). See also Press Release IP/08/1467, 7.10.2008.

³⁹¹ See Press Release IP/09/1632, 29.10.2009.

³⁹² Case COMP/M.5152.

demand in China³⁹³, car sales (passenger cars and light commercial vehicles up to 3.5to) in the EU decreased by 4.6% compared to 2008 and 12.5% compared to 2007³⁹⁴. In 2009, scrapping schemes were introduced in twelve Member States; they had a positive impact on sales in the short term, in particular in Germany, where the scheme had a significant budget (EUR 5 billion). On the basis of the information mechanism set up by Directive 98/34/EC, the national scrapping schemes containing in addition technical regulations were notified before adoption to the Commission and the Member States, which guaranteed transparency, exchange of information and the prevention of obstacles to the single market.

452. Falling demand and world overcapacity which have characterised the sector for some years resulted in bankruptcy proceedings of several major automotive suppliers, most notably the two US suppliers General Motors and Chrysler. As a consequence, two of GM's European operations, Opel/Vauxhall and Saab, were put up for sale and, in the case of Opel, required state loans to continue operations.
453. The second challenge the sector is currently facing is the transition towards greener cars. Increasing demand by customers for low emission cars and a tightening regulatory environment requires large scale investments for the development of vehicles which meet the standards of the future. The Commission authorised several State aid schemes in this respect. At the same time, the sector benefited from eased access to finance through loans and guarantees.

2. POLICY DEVELOPMENTS

2.1. Antitrust and Advocacy

454. The current Motor Vehicle Block Exemption Regulation (1400/2002) expires on 31 May 2010. The Commission carried out a review of the Regulation, and on 22 July it adopted a Communication on the future competition policy orientations for the sector. On the basis of those policy orientations the Commission adopted on 28 October a preliminary draft of a new Motor Vehicle Block Exemption Regulation and accompanying guidelines which were, after consultation with the Member States, published for public consultation on 21 December.
455. The Commission concluded that the markets for vehicle sales are competitive, due to a number of external factors such as structural overcapacities and technological innovation. As a consequence, real car prices, i.e. adjusted for inflation and quality improvements, have been falling for years leading to highly competitive price levels.
456. On the other hand, competition on the markets for vehicle repair and spare part distribution is much more limited, because there is a specific aftermarket for each brand of vehicle on which the car manufacturers enjoy a high market share. Vehicle repair is important for buyers, as it accounts for a significant portion of the lifetime cost of owning and running a vehicle. Therefore, the Commission distinguished in its

³⁹³ Global auto report, Scotia Bank, http://www.scotiacapital.com/English/bns_econ/bns_auto.pdf

³⁹⁴ ACEA, New registrations by country
http://www.acea.be/index.php/news/news_detail/new_vehicle_registrations_by_country/

Communication of 22 July between the markets for the sales of new motor vehicles and the repair and maintenance markets.

457. As it does not appear justified to treat the competitive vehicle sales markets any differently from other sectors, the Commission has proposed to remove the sector specific rules applying to the market for vehicle sales laid down in the current Motor Vehicle Block Exemption Regulation and apply the general competition rules on vertical agreements together with sector-specific guidelines. In order to give dealers time to adapt to the new rules, the Commission envisages prolonging the current rules regarding markets for new vehicle sales for three years.
458. With regard to the aftermarkets, the Commission has proposed to retain sector specific provisions, in the form of a focused block exemption in combination with guidelines. These sector specific provisions are designed to address efficiently, serious competition concerns, including the issue of independent operators' access to technical information, the free access to competing spare parts and the misuse of warranties.
459. These measures are fully coherent with initiatives taken by the EU institutions in other policy areas such as the proposal for liberalisation of the rules on design rights for replacement parts. In addition, very specific conditions for access to repair and maintenance information for passenger cars and light commercial vehicles have been set out in the legislation governing light duty vehicle emissions (Euro 5 and Euro 6 limit values)³⁹⁵.

2.2. State aid to the car sector

Temporary Framework

460. The Temporary Framework for State aid³⁹⁶ was widely used to support the car industry. For example, it allows financing of projects for the development of low emission vehicles. The Commission approved aid schemes for green products, i.e. "green cars", notified by France, UK, Spain, Germany and Italy³⁹⁷. Furthermore, the Commission approved several guarantee and/or loan schemes for a number of Member States, such as France, UK, Germany, Belgium (Flemish region), Sweden and Romania among others³⁹⁸.
461. In all cases of State aid to the car sector, the Commission continued to enforce a strict policy line. In particular, the Commission consistently indicated that it would not accept that State aid granted under schemes approved on the basis of the Temporary Framework would be subject – de jure or de facto – to protectionist

³⁹⁵ 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).

³⁹⁶ Under the Temporary Framework, the car industry can benefit from aid up to EUR 0.5 million per company for the next two years 'small amounts of aid', state guarantees on loans, subsidies loans, including specifically for green cars, and of facilitated access risk capital for SMEs.

³⁹⁷ N11/2009 (France), N72/2009 (UK), N140/2009 (Spain), N426/2009 (Germany), N542/2009 (Italy).

³⁹⁸ N23/2009 (France), N71/2009 (UK), N27/2009 (Germany), N117/2009 (Flemish region/Belgium), NN34/2009 (Sweden), N286/2009 (Romania).

conditions, such as conditions concerning the geographic location of investments. The Commission carefully examined each case that raised this type of protectionist concerns, ensuring that the aid was not biased by unjustified non-commercial considerations and that it contributed to the future viability of the car industry.

462. This approach was followed when early in 2009 France announced its intention to grant State aid to its national car producers on the basis of a scheme approved under the Temporary Framework³⁹⁹. Following extensive contacts between the Commission and the French authorities, the French authorities eventually made undertakings to the effect that the loan agreements intended for the car manufacturers would not contain any condition regarding either the location of their activities or a preference for France-based suppliers. A similar issue was raised in the context of State aid that Germany intended to grant to Adam Opel GmbH under an approved Temporary Framework scheme⁴⁰⁰, in connection with a sale by General Motors of its Opel/Vauxhall European operations to an investor. Eventually, General Motors reversed its decision to sell Opel and the investor's process was terminated.
463. As regards notified aid to the car industry, on 13 May the Commission authorised a EUR 11 million training aid for staff at the truck maker Scania's plants in Sweden⁴⁰¹. The training programme, that will increase the skills and problem-solving ability of blue-collar workers, was found compatible with Article 87(3) EC.
464. On 13 November, the Commission authorised a state guarantee from the Romanian State to Ford Romania SA⁴⁰². The Commission also authorised, on 2 December, a EUR 57 million training aid to Ford Romania SA, thus closing the investigation procedure on this case⁴⁰³.
465. On 5 June the Commission authorised state guarantees from the Swedish state to Volvo Personvagnar (Volvo PV)⁴⁰⁴. The guarantees will allow Volvo PV to access loans from the European Investment Bank to co-finance the development of environment-friendly cars. The Commission found that 90% of the guarantees met the conditions of the Temporary Framework, in particular as Volvo PV would pay an adequate remuneration for the guarantee and provide sufficient securities in case the guarantee would be drawn. The remaining 10% of the guarantees would be provided on market conditions and therefore do not constitute State aid.

Regional aids

466. The Commission authorised on 29 April regional investment aid for EUR 46 million, which the Italian authorities intended to grant to Fiat Group for a large investment project for the production of a new car model in Sicily⁴⁰⁵. Sicily is an area eligible for regional aid under Article 107(3)(a) TFEU, as a region with an abnormally low standard of living and high unemployment. The project aimed at the extension of the existing plant of Fiat in Termini Imerese in order to change the production process

³⁹⁹ N15/2009, OJ C 122, 30.5.2009, p. 1.

⁴⁰⁰ N38/2009, decision of 19.2.2009.

⁴⁰¹ N98/2009 *Training aid to Scania*, OJ C 147, 27.6.2009, p. 6.

⁴⁰² N478/2009 *Individual State Guarantee for Ford Romania S.A.*

⁴⁰³ Case C39/2008 (ex N148/2008) *Training Aid to Ford Craiova, Romania*.

⁴⁰⁴ N80/2009 *State guarantees in favour of Volvo Cars*, OJ C 172, 24.7.2009, p. 2.

⁴⁰⁵ Case N635/2008 *FIAT Termini Imerese*.

and to diversify its production, more specifically to produce a new passenger car under the Lancia brand to replace the existing small car model Lancia Ypsilon. The investment was expected to maintain existing jobs in the region. The Commission found the measure to be compatible with the requirements of the Regional Aid Guidelines 2007-2013 and in particular with the rules on large investment projects, because Fiat would not increase significantly its capacity.

467. On 29 October the Commission opened the formal investigation against Hungarian regional aid of some EUR 50 million for a large investment project of Audi Hungaria Motor Kft. in its existing plant in Győr⁴⁰⁶, since the 25% market share threshold applicable under the relevant regional aid rules for large investment projects was exceeded. Hungary intends to subsidise the installation of new high-tech engine production lines for new generation engines and engine components for a wide range of passenger car models of the Volkswagen-Porsche Group. The aid would take the form of a direct grant and a corporate tax allowance. In the preliminary investigation, the Commission carried out the "market share"-test under point 68(a) of the Regional Aid Guidelines regarding all individual passenger car segments. For several segments, both at EEA and global level, the 25% threshold set by the guidelines was exceeded.
468. On 13 July the European Commission authorised, under EC Treaty State aid rules, EUR 111.5 million of aid, which the Hungarian authorities intend to grant to Mercedes-Benz Hungary⁴⁰⁷, owned by Daimler AG, for the construction of a new car manufacturing plant in the region of Dél-Alföld. The investment project aimed at installing new machinery and equipment for the manufacture of two new passenger car models. The project involved investments eligible for the calculation of the aid of EUR 548.4 million and an aid amount of EUR 111.5 million in the form of a cash grant and a corporate tax allowance. In addition, Mercedes-Benz Hungary will receive financial support for railway access to the public railway network which amounts to some HUF 214 million (EUR 0.8 million). Mercedes-Benz Hungary will finance the project using own equity and bank loans. The measures are in line with the requirements of the Regional Aid Guidelines 2007-2013. In particular, the project will significantly contribute to the development of the region's economy, including the creation of 2 500 direct jobs, and respects the market share and capacity thresholds of the Regional Aid Guidelines
469. On 17 June, the Commission authorised EUR 51.9 million of aid, which the Spanish authorities intend to grant to Ford España⁴⁰⁸, part of the Ford Motor Company, for a radical transformation of the existing plant on Almussafes, in the Valencia region. The Commission's assessment found the measure to be compatible with the requirements of the regional Aid Guidelines 2007-2013. The investment guarantees the continuity of activity at the Almussafes plant and will maintain some 5 000 direct jobs at the plant. Ford's investment project is aimed at dismantling existing production lines and installing new machinery and equipment for the manufacture of three new passenger car models. The investment project involves costs eligible for

⁴⁰⁶ Case C31/2009 (ex N113/2009) *Audi Hungaria Motor Kft.*

⁴⁰⁷ N671/2008, see IP/09/1147 *State aid: Commission endorses EUR 111.5 million aid for Mercedes-Benz investment in Kecskemét, Hungary.*

⁴⁰⁸ N473/2008, see IP/09/958 *State aid: Commission endorses EUR 51.9 million aid for Ford investment in Almussafes, Spain.*

the calculation of the public support of EUR 493.6 million and an aid amount of EUR 51.9 million. Ford is financing the bulk of the project through its own resources.

J – FOOD INDUSTRY

1. OVERVIEW OF SECTOR

470. The food supply chain brings together the agricultural sector, the food processing industry and the distribution sector, altogether accounting for 6% of the EU added value and 12% of EU employment.
471. Reversing the trend of three decades of declining agricultural prices, in 2006 the prices of a number of commodities started to follow a steady upward course. Prices increased dramatically in the second half of 2007 and reached peak levels in the first months of 2008. Between September 2006 and February 2008, world agricultural commodity prices rose by 70% in dollar terms. In the EU, these price hikes caused a rapid increase in consumer food prices, which reduced household purchasing power. The extent of the price increases differed widely between Member States.
472. In 2008 the Commission initiated a process to provide both an immediate and a long-term response to the surge in food prices and to mitigate the impact on final consumers. In line with the Communication on "Tackling the challenge of rising food prices; Directions for EU action" of May 2008⁴⁰⁹, an inter-service Task Force was set up to examine the functioning of the food supply chain.
473. The Task Force produced a first report on the situation in a second Communication on "Food Prices in Europe" adopted on 10 December 2008⁴¹⁰. It proposed a roadmap to improve the functioning of the food supply chain. In terms of competition policy, it called for ensuring a vigorous and coherent enforcement of competition rules in the food supply markets by the Commission and NCAs. Given the difficult situation faced by the dairy sector, the Commission also adopted a "Report on the dairy market situation" in July 2009⁴¹¹.

2. POLICY DEVELOPMENTS

474. The Commission continued enforcing competition rules on food markets through the active monitoring of existing commitment decisions and pursued the assessment of cases in which inspections were carried out in 2008. The work of the Commission Food Task Force continued in 2009. In this context, the Commission undertook a

⁴⁰⁹ (COM(2008)321). The Communication analyses structural and cyclical factors and proposes a three-pronged policy response, including short-term measures in the context of the Health Check of the Common Agricultural Policy and in the monitoring of the retail sector; initiatives to enhance agricultural supply and ensure food security including the promotion of sustainable future generations of biofuels; and initiatives to contribute to the global effort to tackle the effects of price rises on poor populations.

⁴¹⁰ COM(2008)821.

⁴¹¹ http://ec.europa.eu/agriculture/markets/milk/report2009/index_en.htm

focused fact-finding exercise, holding a set of bilateral meetings with a number of European associations representing different players active in the food supply chain. The objective of these meetings was to obtain insights into the specific characteristics of food markets, in the light of the most recent economic developments. This exercise further aimed at identifying potential competition-related concerns that may affect the functioning of the food sector. Apart from hardcore restrictions on competition, this exercise identified some other practices as potentially harmful for competition. Such practices, which may merit a closer assessment by Competition Authorities, always on a case-by-case basis, relate to joint purchasing agreements ("buying alliances"); joint selling agreements; tying and bundling obligations; and the increased use of private labels. The results of this fact finding exercise were shared with NCAs and incorporated into a Communication on "A better functioning of the food supply chain", adopted by the Commission on 28 October⁴¹².

475. Given that food markets are often national/regional in scope, it is crucial for Competition Authorities to address potential malfunctioning within the food supply chain through a coherent and coordinated approach. To this end, in 2009, the European Competition Network has served as a forum for discussion and exchange of best practice on issues related to food markets. In this context, the Commission has organised two meetings of the ECN Food Subgroup in July and November..
476. The dairy sector is one of the sectors that have faced most difficulties in 2009. In view of these difficulties, the Commission adopted in July a "Report on the dairy market situation"⁴¹³. A High Level Group on Milk bringing together national agriculture experts was also set up and its work is ongoing. The Commission's dialogue with NCAs regarding the milk sector has also intensified through the creation of an ECN Joint Working Team on Milk whose work will continue throughout 2010.
477. At national level, as evidenced by the significant efforts deployed over the last two years by NCAs and which continued in 2009, ECN members have attached due priority to case-by-case investigations, as well as to broader inquiries regarding food markets, leading to the finding of an appreciable number of serious infringements, such as cartels and resale price maintenance cases. These infringements were swiftly remedied through cease-and-desist orders, accompanied where appropriate by substantial fines. Such cases spanned a variety of product markets, such as the dairy, milk, flour, bakery, pasta, eggs, poultry, beef, vegetables, fruit, olive oil, chocolate and herbs markets.

III – Consumer activities

1. KEY ACTIONS

478. The Consumer Liaison Unit has been in place and operational for over a year, pursuing the objectives of deepening DG Competition's engagement with consumer

⁴¹² http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf

⁴¹³ http://ec.europa.eu/agriculture/markets/milk/report2009/index_en.htm

representatives and developing new ways of communicating directly with the broader public.

479. In 2003 the Commission created the European Consumer Consultative Group (ECCG) as the Commission's main forum for engaging with consumer organisations⁴¹⁴. The ECCG constitutes a platform for general discussions on issues relating to consumer interests; it gives an opinion on Community matters affecting the protection of consumer interests and advises the Commission when it outlines policies and activities having an effect on consumers. The ECCG has set up a Subgroup on competition that now meets twice a year in Brussels. Subgroup meetings provide the opportunity to discuss, from a consumer point of view, Commission decisions and policy actions in the field of competition, thus matching consumer bodies' demands for a more practical approach to competition issues.
480. The ECCG Competition Subgroup consists of one national consumer organisation representative per EU Member State, plus one representative from BEUC and two from EEA observers (Iceland and Norway). The Commission provides the secretariat for the Subgroup.
481. In 2009 the themes discussed during Subgroup meetings reflected the importance of the economic and financial crisis. State aid measures, which could *a priori* seem remote for consumers, have raised strong interest among Subgroup members, who are fully aware that State aid is about taxpayers' money. The Commission's presentation on the economic and financial crisis and State aid led to fruitful discussions on the structure of the banking sector and its incentives to fulfil its role of financing the real economy. Particular emphasis was put on the passing-on of lower interest rates to consumers and the possible reinforcement of 'too-big-to-fail' banks through state support.
482. Another illustration of the potential impact of State aid on consumers' every day life came from the Commission's public consultation on digital cinema. It was underlined that conversion costs to a new technology could threaten the very existence of a large proportion of cinemas across Europe, especially smaller art houses. Consumers' representatives were therefore interested in raising the issues related to this matter (notably cultural diversity) back in their respective countries, so as to be better able to inform the Commission of which type of cinemas consumers think should be supported by public funding.
483. Other topics such as the Intel decision and the Pharmaceutical Sector Inquiry were on the agenda of the ECCG Competition Subgroup.
484. On 21 October, the Commission hosted a public event on "Competition and Consumers in the 21st century", bringing together consumer organisations, business representatives and academics as well as Member State judges and officials, to underline the impact of competition policy on European consumers' welfare and its synergies with consumer protection policy. In the opening speech, the Commissioner for Competition stressed the need for existing public enforcement to be complemented by effective damages action mechanisms at national level, in order to

⁴¹⁴ 2003/709/EC decision of 9 October 2003

allow consumers to be compensated for the harm suffered as a result of a breach of competition law.

485. Reaching out to consumers is not merely a question of explaining and discussing EU competition policy principles and achievements. It is also about empowering consumers; for if they understand better the mechanics of a competitive economy, they will play a more active role on the market by rewarding those suppliers that operate fairly and best respond to consumers' needs, thus ensuring that their voice be heard by businesses.
486. Much effort has been devoted to following a user-friendly approach in updating the consumer pages of the competition website by making use of different methods of communication. The explanatory pages now include a short video presenting the benefits of competition in consumers' everyday life. They also contain an interactive animation where visitors can see how actions by the Commission relate directly to everyday products.
487. Raising the public's awareness on competition issues is not only key to having consumers fully exerting their power of choice; it should also allow further improving the input they may give to the Commission.

IV – The European Competition Network and cooperation with National Courts – Overview of cooperation

A – GENERAL OVERVIEW

488. In 2009, the European Competition Network (ECN), i.e. the network for cooperation of the Member States' NCAs and the Commission for the enforcement of EU antitrust rules, continued to be a very active forum for discussion and exchange on good practices. As in previous years, it performed well under the mechanisms laid down in Regulation 1/2003, with a view to ensure the efficient and consistent enforcement of Articles 101 and 102 TFEU.

1. COOPERATION ON POLICY ISSUES

489. The ECN provides a platform for EU competition authorities to constructively coordinate enforcement action, ensure consistency and discuss policy issues of common interest. During 2009, the ECN met in the following fora.
- The annual meeting of the Director General of DG Competition and the heads of all NCAs took place on 13 October. For the first time the meeting was organised to include break-out sessions which allowed a more in-depth discussion. The sessions focussed on challenges in competition enforcement for all ECN members: priority setting, convergence/transparency of procedures, sanctions and criminalisation, cooperation in mergers. The meeting also addressed the Commission's actions in the financial crisis and endorsed unanimously the report on leniency convergence under the ECN Model Leniency Programme (see 1.1. below).

- Four ECN plenary meetings served as an important tool for debates about general issues of common interest and exchange of experiences and know-how. The plenary took part in the preparatory fact-finding work for the Report on the functioning of Regulation 1/2003, which the Commission issued on 29 April⁴¹⁵ (see section I.B.1.1.). Furthermore, the plenary participated in the preparation of the report on leniency convergence under the ECN Model Leniency Programme (see 1.1. below).
- Two working groups dealt with specific issues such as enhancing cooperation within the ECN. These working groups provided an excellent forum for sharing experiences on concrete issues and exchanging good practices. Two additional ECN working groups provided fora for discussions concerning the review of the Commission's policy on horizontal agreements and on vertical restraints. They explored the case experience in these fields and provided input for the Commission's review of the existing Block Exemption Regulations, and accompanying Guidelines, which are due to expire in 2010. Furthermore, the chief economists of the NCAs and DG Competition met for exchanges on matters within their area of expertise.
- Moreover, several ECN subgroups dedicated to particular sectors addressed sector-specific issues and engaged in a useful exchange of experience and best practices. For example, the subgroup on pharmaceuticals dealt with the results and follow-up to the Pharma Sector Inquiry (see II.F. above) and the Banking subgroup (see II.A. above) concentrated on further guidance in the area of MIFs and SEPA.

1.1. Convergence of ECN leniency programmes

490. During 2009, the ECN assessed the state of convergence in the field of leniency. On 13 October, the heads of the ECN authorities endorsed a report which reviews the state of convergence of the leniency programmes of the ECN members with regard to the provisions of the ECN Model Leniency Programme⁴¹⁶. The report is based on information from the competition authorities and covers developments up to 1 October. An annex to the report lists applicable leniency programmes.
491. The report concludes that the work within the ECN was a major catalyst in encouraging Member States to introduce leniency programmes and in promoting convergence between them. At the date of the report, twenty five Member States (all except Malta and Slovenia) and the European Commission operated leniency programmes. The first Slovenian leniency programme comes into force on 1 January 2010; the Maltese competition authority considers introducing a leniency programme in the near future. Reforms of existing leniency programmes were pending in five Member States. Hence, the convergence process is still on-going.
492. The ECN Model Leniency Programme⁴¹⁷ was endorsed by the ECN members on 29 September 2006. Just three years after its endorsement, most Member States revised

⁴¹⁵ Article 44 of Regulation 1/2003. COM(2009)206 final, accompanied by a Staff Working Paper, SEC(2009)574 final.

⁴¹⁶ The Report is available at <http://ec.europa.eu/competition/ecn/documents.html>

⁴¹⁷ Available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf

their existing programmes or adopted new ones to align with the ECN Model Leniency Programme. In the revision process, the ECN members essentially followed the key features of the Model Programme. The report also finds that full convergence has not yet occurred in all areas.

493. The purpose of the ECN Model Leniency Programme is to provide a basis for the soft harmonisation of the leniency programmes of the ECN members, setting out provisions that the ECN members believed every leniency programme should contain. It also introduced a model for a uniform summary application system at national level for immunity applications in cases where the Commission is particularly well placed to deal with the case⁴¹⁸. The report reviews in detail the textual convergence in areas such as the scope of leniency programmes, the types of applicants excluded from immunity, the marker system, the possibility of summary applications and of oral submissions, and the conditions for leniency.

1.2. Cooperation in individual cases

494. Cooperation between the ECN members in individual cases is organised around two principal obligations on the NCAs under Regulation 1/2003, namely to inform the Commission when new cases are opened (Article 11(3)) and before the final enforcement decision is taken (Article 11(4)). Informing the Commission and the Network about new cases facilitates swift reallocation of cases on a few occasions where it appears necessary and promotes enhanced and effective enforcement. The second requirement contributes to the coherent application of EU law.

1.2.1. Case allocation

495. The Commission was informed under Article 11(3) of the Regulation of 129 new case investigations launched by NCAs in 2009. Amongst the new cases, 62% concerned the application of Article 101 TFEU, 29% concerned the application of Article 102 TFEU and the remainder concerned the application of both Articles 101 and 102 TFEU. The figure for Article 101 TFEU cases includes notably the enforcement action of the NCAs in the area of cartels. Large numbers of cases could be observed *inter alia* in the energy, media, telecom, transport and financial services' sectors.
496. 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. As in previous years, in 2009 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 occur when a complainant or a leniency applicant chooses to contact both the Commission and one or more NCAs. In 2009, a small number of complaints were re-allocated from the Commission to 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.

⁴¹⁸ See paragraph 14 of the Network Notice, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(02):EN:NOT)

1.2.2. Coherent application of the rules

497. The Commission services reviewed 69 envisaged decisions under Article 11(4) of Regulation 1/2003, as well as advised on informal requests and queries from NCAs. The number of envisaged decisions went up by 15% compared with 2008. The envisaged decisions submitted to the Commission related to a broad range of infringements in different sectors of the economy.
498. To date, the Commission has not initiated proceedings with the view to ensure decision-making coherency as foreseen by Article 11(6) of Regulation 1/2003.

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

499. Article 15(1) of Regulation 1/2003 allows national judges to ask the Commission for information in its possession or for an opinion on questions concerning the application of the EU competition rules. In 2009, the Commission issued five opinions: one in reply to a request from a Belgian court, one to a Lithuanian court and three to Spanish courts.

2.1.1. The opinion requested by a Belgian court

500. On 2 February, the Commission received a request for an opinion from the Rechtbank van Koophandel te Dendermonde in the context of an action brought by BVBA DD Bikes (DD Bikes), a former authorised dealer and repairer for Ducati Motorbikes against BV Ducati North Europe (Ducati) for failure to be admitted to the Ducati authorised repair network.
501. In terms of whether the distribution system implemented by Ducati could benefit from the exemption provided by Regulation 2790/1999 on Vertical Restraints⁴¹⁹, it is noted in the opinion that it is first necessary to establish whether there is a separate market for the repair and maintenance of Ducati bikes and if so, the market share of Ducati as supplier of the spare parts is relevant. If Ducati's market share were to exceed 30% (subject to the two year grace period if the market share goes up to 35% or subject to one year if it rises above 35% according to Article 9 of Regulation 2790/1999) its agreements with its authorised repairers would not be able to benefit from the exemption provided by Regulation 2790/1999, but could still benefit from individual exemption depending on the competitive strength of the authorised dealers. If however, the national court did not find that there are separate markets for the sale of new motor bikes and their repair and maintenance respectively, the market share of Ducati on the primary market for the sale of new motor bikes is likely to be below 30%, and its agreements with its authorised repairers would prima facie be covered by Regulation 2790/1999.

⁴¹⁹ OJ L 336, 29.12.1999, p. 21.

2.1.2 *The opinion requested by a Lithuanian court*

502. The Commission replied to the request for an opinion by the Supreme Administrative Court of Lithuania, concerning the assessment of an agreement on information exchange. The affected markets were Lithuanian paper wholesale markets. The Commission observed that the assessment of a practice concerning the disclosure of information among competitors depends on whether it concerns an infringement by object or an infringement by effect. Insofar as the assessment of likely effects is concerned, the market structure is one of the factors to be taken into account. With reference to the case-law of the Community Courts, the Commission explained that it is necessary that the market structure is not "fragmented" or "atomised"; however, it does not follow that both elements of there being a "highly concentrated market" and the affected markets being "oligopolistic" in nature need to be established in every case for the purpose of establishing an infringement by effect. The Commission then examined (taking into account the nature of information) the criteria relevant for the assessment of the market structure in information exchange cases, where the assessed infringement is an infringement by effect. As whether the agreement in question constituted an infringement of Article 81 EC and whether it had appreciable effects on trade between Member States, the Commission concluded that the assessment depended on case-specific elements which were for the national court to assess.

2.1.3 *The opinions requested by Spanish courts*

503. Firstly, on 24 March, the Juzgado de lo Mercantil nº2 of Barcelona requested an opinion regarding the application of Article 81 EC in the context of litigation between Bright Service S.A. and REPSOL C.P.P., one of the largest suppliers on the Spanish wholesale market for petroleum products. The questions raised by the national court mainly concern the implications of a Commission decision of 12/04/2006⁴²⁰ (the REPSOL Decision) and whether it precludes national courts and competition authorities from assessing whether an exclusive supply agreement which is part of the commercial REPSOL network is harming or has infringed the competition rules. The opinion specifies that commitment decisions adopted by the Commission on the basis of Article 9 of Regulation 1/2003 do not conclude as to whether or not there has been or still is an infringement. Notwithstanding this, a national court cannot take a decision which would run counter to the operative part of the Commission's decision, i.e. which would conflict with the implementation of the commitments which were made binding by the REPSOL Decision.

504. Secondly, the Commission replied to a request from the Juzgado de lo Mercantil nº1 of Madrid in the context of litigation following the acquisition of Dalphi Metal España's (DME) car airbag and steering wheel business by TRW Automotive (TRW), a US automotive component manufacturer. This acquisition was approved by the Commission in 2005 under the EU Merger Regulation⁴²¹. This decision took into account the fact that at the time Takata-Petri (Takata), which is also a manufacturer of car airbags and steering wheels, held a minority stake in DME (21.6%) and had a shareholding of 49% in each of three DME production joint ventures. The Commission considered that this could not give rise to a risk of

⁴²⁰ Case COMP/38348 REPSOL C.P.P. SA - Distribution de Carburants et Combustibles .

⁴²¹ Case COMP/M.3972, TRW Aotomotive/Dalphi Metal España, Article 6(1)(b) non-opposition.

coordination between TRW and Takata on the markets for airbags and steering wheels.

505. Takata subsequently brought proceedings against some decisions taken by the Board of Directors of DME's production companies, in particular, against its refusal to give Takata access to the transfer prices charged to DME for certain products manufactured by DME's production companies on the grounds that this would infringe Article 81 EC. The questions raised by the court are addressed in the opinion as follows. Firstly, in terms of whether the "unilateral" provision of information by an undertaking to a competitor could constitute an exchange of information contrary to Article 81 EC, it is specified that the mere receipt of information by an undertaking could be anti-competitive because it could eliminate uncertainty about the future conduct of competitors and allow this undertaking to take into account this information in order to determine its policy on the market, although a case-by-case analysis of this is needed. Secondly, the exchange of historical data does not influence market conditions and therefore does not constitute an infringement of Article 81 EC. On the basis of Commission practice, information which is more than one year old can generally be regarded as "historical", however this has to be assessed taking into account the extent to which data becomes obsolete on the market concerned, and depending on the market structure in the case at hand.
506. The third opinion was requested by the Juzgado de lo Mercantil nº5 of Madrid regarding the application of Article 81 EC in the context of litigation between PETROCAT, a supplier on the Spanish wholesale market for petroleum products and two operators of service stations, CANALS y FILS S.L. and ZERO SETS S.L. With regard to the first question concerning whether a long term exclusive supply contract (of a duration of 27 years or more) can result in a significant restriction of competition contrary to Article 81 EC, the opinion specifies that the assessment of whether there is foreclosure has to be examined in the context of the overall competitive situation and existing economic and legal links (see the REPSOL Decision and the decision adopted by the Spanish Competition Authority in the CEPESA case). With regard to clauses in long term exclusive supply contracts which set the retail price, the opinion distinguishes between different types of contracts entered into between wholesaler distributor and service stations, according to the ownership and degree of risk involved in order to assist the national court in identifying whether the service station is ultimately an agent. If it is not a genuine agent, such a clause would violate Article 81(1) EC. The opinion also clarifies that in accordance with Article 5(a) of Regulation 2790/1999 on Vertical Restraints, exclusivity clauses of such long duration can only be exempted from the prohibition in Article 81(1) EC if the market share of the supplier is less than 30% and, if on 1 January 2003, the remaining duration of the contract would be less than five years or if the contractual goods or services are sold by the buyer from premises and land owned by the supplier or are rented by the supplier to third parties not connected with the buyer. It is noted in the opinion that these conditions should be interpreted restrictively and do not appear to be met in this case.

2.2. *Amicus curiae* interventions under Article 15(3) of Regulation 1/2003

507. Article 15(3) of Regulation 1/2003 provides that where the coherent application of Articles 101 or 102 TFEU 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.

508. In 2009, the Commission submitted written observations in one case before the Paris Court of Appeal, relating to a restriction of on-line sales in selective distribution agreements⁴²².
509. The Commission observed that a general prohibition of on-line sales imposed by the supplier on its selected distributors is an infringement by object under Article 81(1) EC, which is not block-exempted under Regulation 2790/1999. Moreover, the Commission observed that the notion of "objective justification", mentioned in point 51 of the Guidelines on Vertical Restraints, should be interpreted strictly and shall not replace the analysis of efficiencies under Article 81(3) EC. In general, only exceptional circumstances, external to the parties, may be considered as an objective justification for restrictions by object. If however the supplier proves that the conditions of Article 81(3) EC are fulfilled, the agreement may be individually exempted under that Article. On 29 October, the Paris Court of Appeal referred to the ECJ a question for preliminary ruling under Article 234 EC⁴²³.
510. Furthermore, the Commission's powers to submit written observations as *amicus curiae* in national court proceedings were addressed in the judgment of the ECJ of 11 June, in case C-429/07, *Inspecteur van de Belastingdienst v X BV*. In this judgment, the ECJ gave a broad interpretation of the condition of "*coherent application of Articles 81 and 82 EC*" as laid down in Article 15(3) of Regulation 1/2003 (see paragraph 153 above). Following the ECJ ruling, the Commission submitted its observations opposing tax deductibility of fines.

2.3. Financing the training of national judges in EU competition law

511. Continuous availability of training programmes for national judges in EU competition law contributes to the effective and coherent application of those rules. In 2009, 10 grant agreements were concluded for training of judges' programmes in various Member States.

V – International activities

512. In an increasingly globalised world economy, competition policy must also adopt a global outlook. The Commission is responding to this challenge by reinforcing and extending its relations with partners all over the world in both bilateral and multilateral *fora*. The Commission attaches the highest importance to effective international cooperation in the area of competition. Bilateral meetings between the Commissioner for Competition with counterparts in the United States, Brazil, Canada, Japan and China, as well as participation by the Commissioner for

⁴²² Case at Paris Court of Appeal, No RG 2008/23812, *Pierre Fabre Dermo-Cosmétique*.

⁴²³ Case C-439/09, *Pierre Fabre Dermo-Cosmétique*. The referred question is whether a general and absolute prohibition to sell contract goods to end users via the Internet, imposed on authorised distributors within the framework of a selective distribution network, constitutes an infringement of Article 81(1) EC, which is not exempted under Regulation No 2790/1999, however could possibly benefit from an individual exemption under Article 81(3) EC.

Commission in the February meeting of the OECD Competition Committee demonstrate this commitment.

A – MULTILATERAL COOPERATION

1. INTERNATIONAL COMPETITION NETWORK

513. DG Competition continued to play a leading role in the 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, agency effectiveness, unilateral conduct and advocacy).
514. DG Competition hosted on 22 and 23 January in Brussels a "Seminar on Competition Agency Effectiveness", the first such event of its type. The seminar addressed issues that are of central importance to the effectiveness of implementation of competition policies such as strategic planning of agency activities and prioritisation of actions, effective project delivery, evaluation and accountability and communication. Representatives of 47 competition agencies participated in the seminar, most of them heads of agencies or senior staff responsible for the planning of agency operations.
515. The 8th Annual Conference took place in Zürich (Switzerland) from 3 to 5 May.
516. The Merger Working Group continued its work to draft Recommended Practices in several areas of substantive merger analysis and presented them at the Annual Conference on Recommended Practices on competitive effects in horizontal merger review, on unilateral effects and on coordinated effects.
517. The Unilateral Conduct Working Group, which was set up in 2006, presented two reports on tying, bundled discounting and loyalty rebates. The Working Group also started preparations for a report on refusals to supply. In March the ICN held a workshop on Unilateral Conduct in Washington.
518. The Cartels Working Group, co-chaired by DG Competition, continued its work on the Anti-Cartel Enforcement Manual, in particular on searches and inspections and on developing an effective leniency program. The 2009 ICN Cartels workshop was held in Cairo (Egypt) from 27 to 29 October.

2. OECD

519. The Commission continued to contribute actively to the work of the OECD Competition Committee and participated in each of the three sessions held by the Committee in 2009. It submitted contributions to most roundtables on competition policy, including on the role of competition law in times of crises, the standard of merger review, two-sided markets, competition, patents and innovation, margin squeeze, state-owned companies and failing firm defence. The Commissioner for Competition made a speech on the "Road to recovery" in the context of the OECD session dedicated to the financial crisis.

3. UNCTAD

520. The Commission participated at the 10th annual conference of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy of the United Nations Conference on Trade and Development (UNCTAD). It submitted contributions to most roundtable discussions, such as the one on the relationship between competition and industrial policies in promoting economic development, the one on public monopolies, concessions, competition law and policy as well as the one on the role of economic analysis in competition cases.

B – BILATERAL COOPERATION

521. 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, JAPAN AND SOUTH KOREA

522. As in previous years, cooperation with the United States of America was intense. Based on two dedicated competition cooperation agreements⁴²⁴, contacts between DG Competition and the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC) were frequent. These contacts ranged from cooperation in individual cases to more general matters related to competition policy. Numerous meetings and video- or telephone-conferences took place to discuss issues such as cooperation in cartel investigations, abuse of dominance or the application of the competition rules in particular sectors. The Commissioner for Competition met her US counterparts, Chairman Jon Leibowitz of the FTC and Christine Varney, the Assistant Attorney General, at several occasions.
523. In case-related contacts, case teams regularly updated each other on the state of investigations (within the limits of the above-mentioned agreements). Merger control, in particular, requires good coordination with the DoJ and the FTC. The 2002 EU-US Best Practices on cooperation in reviewing mergers provided a useful framework for cooperation, especially by indicating critical points in the procedure where cooperation could be particularly useful. The *Pfizer/Wyeth* and *Panasonic/Sanyo* cases can be cited as examples of good cooperation between the EU and US agencies.
524. Cooperation with the Canadian Competition Bureau is based on the EU/Canada Competition Cooperation Agreement which was signed in 1999⁴²⁵. Contacts between the Commission and the Bureau have been frequent and fruitful. Case-related contact concerned mainly merger and cartel investigations. In the area of cartel cases this

⁴²⁴ Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ L 95, 27.4.1995, p. 47) and Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998, p. 26).

⁴²⁵ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1999, p. 50).

also included the coordination of investigative measures and, in the area of mergers, the discussion of possible remedies. The Commission and the Canadian Competition Bureau continued their dialogue on general competition issues of common concern. The Commissioner for Competition met the Head of the Canadian Competition Bureau, Melanie Aitken, at the annual bilateral high level meeting on 30 March in Toronto and officials from both sides conducted other reciprocal visits.

525. Cooperation with the Japan Fair Trade Commission (JFTC) is based on the 2003 Cooperation Agreement⁴²⁶. The Commissioner for Competition met with JFTC Chairman Takeshima during the EU-Japan High Level meeting on competition policy on 10 September in Brussels. At the centre of discussions were policy initiatives on both sides (especially merger remedies and the JFTC's draft guidance on unilateral conduct), 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.
526. On 23 May, the European Community and South Korea signed a bilateral cooperation agreement in the field of competition, which entered into force on 1 July 2009⁴²⁷. This agreement contained provisions on enforcement cooperation, notification, consultation and exchange of non-confidential information. The agreement supersedes the Memorandum of Understanding⁴²⁸ between DG Competition and the KFTC.

2. COOPERATION WITH OTHER COUNTRIES AND REGIONS

527. The European Commission continued its close cooperation with the European Free Trade Association (EFTA) Surveillance Authority in enforcing the Agreement on the European Economic Area (EEA).
528. Relations with Brazil have intensified with cooperation on cases and DG Competition hosting a visitor from CADE, the Brazilian decision-making competition authority, for a 3 month period. They reached a new level on 8 October when The Commissioner for Competition signed a Memorandum of Understanding (MoU) with the Brazilian Ministry of Justice and the heads of the Brazilian Competition Authorities in order to ensure a closer cooperation between DG Competition and its Brazilian counterparts. This MoU reflects the importance of Brazil as a trading partner for the EU and the maturity of its competition enforcement authorities.
529. Cooperation with China under the EU-China competition policy dialogue⁴²⁹ remained a priority in 2009 with the annual competition dialogue being held in Brussels on 22-23 June. In addition, contacts between DG Competition and the Chinese administration were intensive and dealt mainly with questions concerning

⁴²⁶ Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (OJ L 183, 22.7.2003, p. 12).

⁴²⁷ Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities (OJ L 202, 4.8.2009, p. 36).

⁴²⁸ 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).

⁴²⁹ Terms of Reference of the EU-China competition policy dialogue (May 2004).

the recently adopted anti-monopoly law and the implementing legislation which is being elaborated. Together with the Chinese Anti Monopoly Enforcements Authorities, the National Development and Reform Commission (NDRC), the State Administration of Commerce and Industry (SAIC) and Ministry of Commerce (Mofcom), DG Competition co-hosted several workshops in Beijing as well as the Competition Weeks in the provinces on EU merger control and antitrust issues for high-level representatives from the Anti Monopoly Enforcements Authorities. Moreover, high-level representatives visited the Anti Monopoly Enforcements Authorities in Beijing to discuss technical and enforcement cooperation. DG Competition is furthermore actively negotiating a competition chapter to be part of the 1985 upgrade agreement/Partnership and Cooperation Agreement.

530. Cooperation with India intensified during 2009 as India has appointed seven Commissioners to constitute the Competition Commission of India (CCI) which is entrusted with the enforcement of the 2002 Competition Act. India moreover notified the operative parts of the 2002 Competition Act regarding restrictive agreements, abuse of dominance and merger control, which is a pre-requisite for their enforcement. Consequently, a number of meetings between the CCI and high level DG Competition officials took place throughout 2009 and the Commissioner for Competition also paid a visit to the CCI in November. DG Competition is moreover engaged in technical cooperation with the CCI and it welcomed 6 high level CCI officials in September for discussions on the most efficient ways to combat cartels.
531. DG Competition played an active role in the ongoing negotiations on Free Trade Agreements (FTA) with India, Ukraine, India, South Korea, Andean Countries (Colombia and Peru) and Canada, and on the trade part of the Association Agreement with Central America, 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. DG Competition continued to play an active role in the negotiation of the competition chapter of Economic Partnership Agreements (EPAs) with five groupings of former ACP countries, (four in Africa and one in the Pacific). The FTA with South Korea was initialled on 15 October 2009 and is expected to be signed and enter into force during the course of 2010. It is the first time that an FTA contains a prohibition on certain types of subsidies. Moreover, DG Competition is negotiating competition provisions in a number of Partnership and Cooperation Agreements with Mongolia and certain ASEAN countries and in particular Vietnam, Indonesia, Thailand, Brunei, Singapore and Malaysia.

C – ENLARGEMENT

532. In the context of enlargement, candidate countries must fulfil a number of requirements in the field of competition policy 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.

533. During 2009, there was particularly close cooperation with Croatia and Turkey. These two candidate countries have to fulfil "opening benchmarks" before accession negotiations on the competition chapter can start. Croatia made important progress in meeting these opening benchmarks, including on the remaining important issue of the restructuring of its shipyards. Turkey has yet to introduce a system for the control and monitoring of State aid.
534. 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 to enforce these rules. DG Competition continued to help Macedonia improve the compliance of its fiscal legislation with Community rules on State aid.
535. DG Competition also took part in the preliminary discussions on Iceland's EU membership prospect.
536. In the framework of the European Neighbourhood Policy (ENP), 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. It also organised a certain number of seminars financed by the TAIEX program on competition-related issues for these countries.

VI – Interinstitutional cooperation

537. In 2009, the Commission continued its cooperation with the other institutions of the European Union in accordance with the respective agreements or protocols entered into by the relevant institutions⁴³⁰.
538. The Commission cooperates closely with the European Parliament (EP). In 2009, the EP adopted two resolutions on competition policy issues: a resolution on the White paper on damages actions for breach of the EC antitrust rules, and on the Annual Competition Reports for 2006 and 2007. In addition to the regular dialogue between the Commissioner for Competition and the ECON committee, the Commission participated in discussions held in other Parliamentary committees, and on a range of subjects including the Annual Competition Report, the White Paper on Damages Actions, the Broadcasting Communication, State aid and the financial crisis, the Pharmaceutical Sector Inquiry and the Motor Vehicle Block Exemption Regulation. Bilateral meetings with MEPs were held on these and on a range of other issues, including the Insurance Block Exemption Regulation.
539. The Commission also cooperates closely with both the European Ombudsman and Members of the EP by replying to Parliamentary Questions and Petitions. In 2009,

⁴³⁰ 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.

the Commission responded to 446 written questions, 38 oral questions and 43 petitions involving matters of competition policy⁴³¹.

540. The Commission cooperates closely with the Council by informing it of important policy initiatives in the field of competition, such as on State aid measures and guidelines for the banking industry and other additional State aid measures in the context of the financial and economic crisis. The Economic and Financial Committee (EFC), has been consulted on the Banking, Recapitalisation, Impaired Assets and Restructuring Communications, and on a review of guarantee and recapitalisation schemes. The EFC prepares the work for the Economic and Financial Affairs Council (ECOFIN) and includes a European Central Bank representative.
541. The Commission made contributions on competition policy in respect of conclusions adopted in the ECOFIN Council (Single Market Review, Single Euro Payments Area, exit strategies for the financial sector) and the European Council (exit strategies), the Competitiveness Council (such as on contribution to the EU2020 agenda, industrial policy or single market), the Transport, Telecommunications and Energy Council (Internal Energy Market legislative package, energy/climate package).
542. The Commission informs the European Economic and Social Committee (EESC) and the Committee of the Regions about major policy initiatives, and participates in debates that may be held in the respective Committee on those initiatives. During 2009, the EESC published reports on the Annual Competition Report 2007, and the White Paper on damages actions. DG Competition services have also attended working group meetings, and had bilateral meetings with EESC rapporteurs on a number of other subjects including SMEs adapting to global market changes, shipbuilding and State aid.

⁴³¹ Of these the Commissioner in charge of Competition directly responded to 149 written questions, 15 oral questions and 19 petitions.

ANNEX: State aid - Overview of national measures adopted as a response to the financial/economic crisis (2008 & 2009)

Brussels, January 2010

STATE AID: OVERVIEW OF NATIONAL MEASURES ADOPTED AS A RESPONSE TO THE FINANCIAL/ECONOMIC CRISIS

(See table attached in annex)

This information is compiled from a range of sources and is provided for information only. The European Commission cannot confirm the completeness or accuracy of the information.

COMMUNICATIONS FROM THE COMMISSION TO PROVIDE GUIDANCE TO MEMBER STATES

[Communication from the Commission](#) — The application of **State aid rules** to measures taken in relation to financial institutions in the context of the current global financial crisis, 13 October 2008 (see [IP/08/1495](#))

[Communication from the Commission](#) — The **recapitalisation of financial institutions** in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, 5 December 2008 (see [IP/08/1901](#))

[Communication from the Commission](#) on the Treatment of **Impaired Assets** in the Community Banking Sector, 25 February 2009 (see [IP/09/322](#))

[Communication from the Commission](#) - **Temporary framework** for State aid measures to **support access to finance in the current financial and economic crisis**, adopted on 17 December 2008 (see [IP/08/1993](#)), as amended on 25 February 2009.

[Communication from the Commission](#) - The return to **viability** and the assessment of **restructuring** measures in the financial sector in the current crisis under the State aid rules, 23 July 2009 (see [IP/09/1180](#))

STATE AID CASES - SITUATION AS OF 8 JANUARY 2010

Decisions adopted by the Commission in 2008/2009/2010⁴³²

	Member State	Type of measure / Beneficiary	Type of Decision	Date of adoption
	Austria	N557/2008 - Aid scheme for the Austrian financial sector (guarantees, recapitalisation & other)	Decision not to raise objections IP/08/1933	09 December 2008
		N352/2009 - Prolongation	MEX/09/0630	30 June 2009
		N663/2009 - Second prolongation	MEX/09/1217	17 December 2009
	Austria	N214/2008 - Recapitalisation of Hypo Tirol	Decision not to raise objections IP/09/928	17 June 2009
	Austria	N 640/2009 - BAWAG - capital injection	Decision not to	22 December 2009

⁴³² As a general rule, aid schemes are reviewable six months after approval. Some individual decisions are subject to a review and possible restructuring plan.

		and asset guarantee	raise objections IP/09/1989	
	Austria	C 16/2009 + N698/2009 – Emergency aid to Hypo Group Alpe Adria	Decision not to raise objections IP/09/1998	23 December 2009
	Belgium/France/ Luxembourg	NN45-49-50/2008 - Guarantee on liabilities of Dexia	Decision not to raise objections IP/08/1745	19 November 2008
		Prolongation	IP/09/1662	30 October 2009
	Belgium/France/ Luxembourg	C9/2009 - Guarantee in favour of Dexia on certain assets in FSA	Decision not to raise objections IP/09/399	13 March 2009
	Belgium/Luxembourg/ Netherlands	N574/2008 - Measures in favour of Fortis	Decision not to raise objections IP/08/1746	19 November 2008
	Belgium/Luxembourg/ Netherlands	NN42-46-53A/2008 - Restructuring aid to Fortis Bank and Fortis Bank Luxembourg	Decision not to raise objections IP/08/1884	03 December 2008
	Belgium/Luxembourg	N255/2009 and N274/2009 - Additional aid measures in favour of Fortis Bank and Fortis Bank Luxembourg	Decision not to raise objections IP/09/743	12 May 2009
	Belgium	N602/2008 - Recapitalisation measure in favour of KBC	Decision not to raise objections IP/08/2033	18 December 2008
	Belgium	NN57/2008 - Capital Injection for Ethias Group	Decision not to raise objections IP/09/254	12 February 2009
	Belgium	C18/2009 - Recapitalisation and asset relief for KBC Group	Decision not to raise objections IP/09/1063	30 June 2009
	Belgium	C18/2009 - Asset relief and restructuring package for KBC	Final conditional decision after formal investigation procedure IP/09/1730	18 November 2009
	Cyprus	N511/2009 - Cypriot scheme to support credit institutions (guarantee)	Decision not to raise objections IP/09/1569	22 October 2009
	Denmark	NN36/2008 - Rescue aid to Roskilde Bank	Decision not to raise objections (IP/08/1222)	31 July 2008
	Denmark	NN39/2008 - Liquidation aid to Roskilde bank	Decision not to raise objections	5 November 2008

			IP/08/1633	
	Denmark	NN51/2008 - Guarantee scheme for banks in Denmark	Decision not to raise objections IP/08/1483	10 October 2008
	Denmark	N31a/2009 - Recapitalisation scheme and amendment of the guarantee scheme NN46/2009 - Prolongation N628/2009 – Second prolongation	Decision not to raise objections IP/09/206 MEX/09 /0817 MEX/09/1217	3 February 2009 17 August 2009 17 December 2009
	Denmark	NN23/2009 - Rescue aid for Fionia Bank	Decision not to raise objections IP/09/819	20 May 2009
	Finland	N567/2008 - Finnish guarantee scheme N44/2009 - Amendment to the guarantee scheme N239/2009 - Prolongation and modification N674/2009 – Second prolongation and modification	Decision not to raise objections IP/08/1705 Decision not to raise objections IP/09/681 IP/09/681 MEX/09/1217	13 November 2008 5 February 2009 30 April 2009 17 December 2009
	Finland	NN2/2009 - Guarantee for Kaupthing Bank Finland	Decision not to raise objections IP/09/82	21 January 2009
	Finland	N329/2009 - Capital injection scheme	Decision not to raise objections IP/09/1303	11 September 2009
	France	N548/2008 - Financial support measures to the banking industry in France (Refinancing) N251/2009 - Extension of the scheme	Decision not to raise objections IP/08/1609 Decision not to raise objections IP/09/750	30 October 2008 12 May 2009

	France	N613/2008 - Financial support measures to the banking industry in France (Recapitalisation)	Decision not to raise objections IP/08/1900	08 December 2008
		N29/2009 - Amendment to the Decision	IP/09/158	28 January 2009
		N164/2009 - Amendment to the Decision	IP/09/461	23 March 2009
	France	N249/2009 - Capital injection for Caisse d'Epargne and Banque Populaire	Decision not to raise objections IP/09/722	8 May 2009
	Germany	C9/2008 - Restructuring aid to Sachsen LB	Conditional decision (after formal investigation procedure) IP/08/849	4 June 2008
	Germany	C10/2008 - Restructuring aid to IKB	Conditional decision (after formal investigation procedure) IP/08/1557	21 October 2008
	Germany	NN44/2008 - Rescue aid to Hypo Real Estate Holding	Decision not to raise objections IP/08/1453	2 October 2008
	Germany	N512/2008 - Aid scheme for financial institutions in Germany (guarantees, recapitalisations & other)	Decision not to raise objections IP/08/1589	27 October 2008
		N625/2008 - Amendment to the Decision		12 December 2008
		N330/2009 – Prolongation	EXME09 / 22.06	22 June 2009
		N665/2009 – Second prolongation	MEX/09/1217	17 December 2009
	Germany	N615/2008 - Guarantee and recapitalisation for Bayern LB	Decision not to raise objections IP/08/2034	18 December 2008
	Germany	N655/2008 - Guarantee for NordLB	Decision not to raise objections	22 December 2008

			IP/08/2056	
		N412/2009 - Prolongation	MEX/09/0910	10 September 2009
Germany		N639/2008 - Guarantee for IKB	Decision not to raise objections IP/08/2055	22 December 2008
Germany		N17/2009 - Guarantee for SdB – Sicherungseinrichtungsgesellschaft deutscher Banken mbH	Decision not to raise objections IP/09/114	22 January 2009
Germany		N244/2009 - Commerzbank capital injection	Decision not to raise objections IP/09/711	7 May 2009
Germany		C43/2008 - Aid for the restructuring of West LB	Conditional decision (after formal investigation procedure) IP/09/741	12 May 2009
Germany		N531/2009 - Temporary additional aid to West LB	Decision not to raise objections IP/09/1434	7 October 2009
Germany		N264/2009 - Recapitalisation of HSH Nordbank	Decision not to raise objections IP/09/854	29 May 2009
Germany		C17/2009 - Recapitalisation and asset relief for LBBW (Landesbank Baden Württemberg)	Decision not to raise objections IP/09/1058	30 June 2009
Germany		N314/2009 - German asset relief scheme	Decision not to raise objections IP/09/1216	31 July 2009
Germany		N400/2009 - Additional aid (guarantees) for IKB	Decision not to raise objections IP/09/1235	17 August 2009
Germany		Export credit scheme	Decision not to raise objections IP/09/1319	15 September 2009
Germany		C17/2009 - Landesbank Baden Württemberg "LBBW" - restructuring plan and impaired assets relief measure	Conditional decision (after formal investigation procedure) IP/09/1927	15 December 2009

	Germany	N694/2009 – State guarantees for Hypo Real Estate	Decision not to raise objections IP/09/1985	21 December 2009
	Germany	N555/2009 – Rescue aid for WestLB; in-depth investigation into bad bank	Decision not to raise objections IP/09/1996	22 December 2009
	Greece	N560/2008 - Aid scheme to the banking industry in Greece (guarantees, recapitalisation & other)	Decision not to raise objections IP/081742	19 November 2008
		Prolongation and modification	MEX/09/0918	18 September 2009
	Hungary	N664/2008 - Financial support measures to Hungarian financial industry in form of recapitalisation and guarantee scheme	Decision not to raise objections IP/09/253	12 February 2009
		N355/2009 - Prolongation and modification	MEX09 /0903	3 September 2009
		N662/2009 – Second prolongation	MEX/09/1217	17 December 2009
	Hungary	N 358/2009 - Hungarian Mortgage Support Scheme	Decision not to raise objections IP/09/1123	13 July 2009
		N603/2009 - Prolongation	Decision not to raise objections MEX 09/1124	24 November 2009
	Ireland	NN48/2008 - Guarantee scheme for banks in Ireland	Decision not to raise objections IP/08/1497	13 October 2008
	Ireland	N9/2009 - Recapitalisation of Anglo Irish Bank	Decision not to raise objections IP/09/50	14 January 2009
	Ireland	N356/2009 - Recapitalisation of Anglo Irish Bank	Decision not to raise objections IP/09/1045	26 June 2009
	Ireland	N61/2009 - Change of ownership of Anglo Irish Bank	Decision not to raise objections IP/09/271	17 February 2009

	Ireland	N149/2009 - Recapitalisation of Bank of Ireland	Decision not to raise objections IP/09/483	26 March 2009
	Ireland	N241/2009 - Recapitalisation of Allied Irish Bank	Decision not to raise objections IP/09/744	12 May 2009
	Ireland	N349/2009 - revised Irish guarantee scheme for financial institutions	Decision not to raise objections IP/09/1787	20 November 2009
	Italy	N520a/2008 - Guarantee scheme for Italian banks	Decision not to raise objections IP/08/1706	14 November 2008
		N328/2009 - Prolongation	IP/09/929	16 June 2009
	Italy	N648/2008 - Recapitalisation scheme	Decision not to raise objections IP/08/2059	23 December 2008
		N97/2009 - Amendment		20 February 2009
		N 466/2009 - Prolongation	MEX/09/1006	6 October 2009
	Latvia	NN68/2008 - Public support measures to Parex Banka	Decision not to raise objections IP/08/1766	24 November 2008
		NN3/2009 - Amendment to the Decision		11 February 2009
		N189/2009 - Amendment to the Decision	IP/09/732	11 May 2009
	Latvia	N638/2008 - Guarantee scheme for banks	Decision not to raise objections IP/08/2054	22 December 2008
		N326/2009 – Prolongation	MEX/09/0630	30 June 2009
		N664/2009 – Second prolongation	MEX/09/1217	17 December 2009
	Latvia	NN60/2009 - Capital injection for Mortgage Bank of Latvia	Decision not to raise objections	19 November 2009

			IP/09/1742	
	Luxembourg	N344/2009&N380/2009 - Restructuring aid for Kaupthing Bank Luxembourg	Decision not to raise objections IP/09/1107	9 July 2009
	Netherlands	N524/2008 - Guarantee scheme for Dutch financial institutions	Decision not to raise objections IP/08/1610	30 October 2008
		N379/2009 - Prolongation and modification	MEX/09/0707	7 July 2009
		N669/2009 – Second prolongation	MEX/09/1217	17 December 2009
	Netherlands	N528/2008 - Measure in favour of ING	Decision not to raise objections IP/08/1699	13 November 2008
	Netherlands	N569/2008 - Measure in favour of Aegon	Decision not to raise objections IP/08/1822	27 November 2008
	Netherlands	N611/2008 - SNS Reaal/New capital injection by Dutch authorities	Decision not to raise objections IP/08/1951	10 December 2008
	Netherlands	C10/2009 - ING Illiquid asset facility	Decision not to raise objections IP/09/514	31 March 2009
	Netherlands	C10/2009 - ING restructuring plan and illiquid asset back-up facility	Final conditional decision after formal investigation procedure IP/09/1729	18 November 2009
	Poland	N208/2009 - Polish support scheme for financial institutions (guarantee and liquidity support)	Decision not to raise objections IP/09/1360	25 September 2009
	Poland	N302/2009 – Polish bank recapitalisation scheme	Decision not to raise objections IP/09/1979	21 December 2009
	Portugal	NN60/2008 - Guarantee scheme for credit institutions in Portugal	Decision not to raise objections IP/08/1601	29 October 2008
	Portugal	NN71/2008 - State guarantee for Banco Privado Português	Decision not to raise objections IP/09/400	13 March 2009
	Portugal	N556/2008 - Bank recapitalisation scheme	Decision not to raise objections	20 May 2009

			IP/09/818	
	Slovakia	N392/2009 - Slovak bank support scheme	Decision not to raise objections IP/09/1889	8 December 2009
	Slovenia	N531/2008 - Guarantee scheme for credit institutions in Slovenia	Decision not to raise objections IP/08/1964	12 December 2008
		N331/2009 - Prolongation	EXME09 / 22.06	22 June 2009
		N651/2009 – Second prolongation	MEX/09/1217	17 December 2009
	Slovenia	N637/2008 - Liquidity scheme for financial sector	Decision not to raise objections IP/09/452	20 March 2009
		N510/2009 – Prolongation	MEX09/1910	19 October 2009
	Spain	NN54a/2008 - Fund for the Acquisition of Financial Assets in Spain	Decision not to raise objections IP/08/1630	4 November 2008
		Modification	Decision not to raise objections	8 April 2009
		N337/2009 - Prolongation	Decision not to raise objections MEX09/0807	7 August 2009
	Spain	NN54b/2008 - Spanish guarantee scheme for credit institutions	Decision not to raise objections IP/08/2049	22 December 2008
		Prolongation	Decision not to raise objections MEX09 / 0625	25 June 2009
		N588/2009 - Second prolongation	Decision not to raise objections MEX/09/1201	1 December 2009
	Sweden	N533/2008 - Support measures for the banking industry in Sweden	Decision not to raise objections	29 October 2008

		N26/2009 - Amendment to the decision	IP/08/1600	28 January 2009
		N154/2009 - Amendment and prolongation	IP/09/186 IP/09/652	28 April 2009
		N544/2009 - Prolongation	MEX/09/1026	26 October 2009
	Sweden	NN64/2008 - Emergency rescue measures regarding Carnegie Investment Bank	Decision not to raise objections IP/08/1977	15 December 2008
	Sweden	N69/2009 - Recapitalisation scheme	Decision not to raise objections IP/09/241	11 February 2009
		N436/2009 - Prolongation	Decision not to raise objections MEX09 / 0805	5 August 2009
	United Kingdom	NN41/2008 - Rescue aid to Bradford and Bingley	Decision not to raise objections IP/08/1437	1 October 2008
	United Kingdom	N507/2008 - Aid scheme to the banking industry in the UK (guarantees, recapitalisation & other)	Decision not to raise objections IP/08/1496	13 October 2008
		N650/2008 - Amendment to the Decision		23 December 2008
		N193/2009 – Prolongation	Decision not to raise objections IP/09/586	15 April 2009
		N537/2009 – Prolongation	MEX/10/13	13 October 2009
		N677/2009 - Prolongation	MEX/09/1217	17 December 2009

	United Kingdom	N111/2009 - Working capital guarantee scheme	Decision not to raise objections IP/09/471	24 March 2009
	United Kingdom	UK Asset backed Securities guarantee scheme	Decision not to raise objections IP/09/613	21 April 2009
		Prolongation	MEX/09/1027	27 October 2009
	United Kingdom	C14/2008 - Restructuring package for Northern Rock	Final conditional decision after formal investigation procedure IP/09/1600	28 October 2009
	United Kingdom	N428/2009 - Restructuring plan of Lloyds Banking Group	Decision not to raise objections IP/09/1728	18 November 2009
	United Kingdom	N422/2009 and N621/2009 - Royal Bank of Scotland, impaired asset relief measure and restructuring plan	Decision not to raise objections IP/09/1915	14 December 2009

Cases currently under formal investigation procedure (in-depth investigation under the EC Treaty's rules on state aid)

	Country	Type of measure / Beneficiary	Date of decision regarding the opening of formal investigation	
	Belgium/France/Luxembourg	C9/2009 - Restructuring of Dexia	13 March 2009 (IP/09/399)	<i>Case under assessment</i>
	Germany	C15/2009 - Aid package for Hypo Real Estate (restructuring)	7 May 2009 IP/09/712	<i>Case under assessment</i>
		Extension and temporary approval of capital injections	13 November 2009 IP/09/1708	
	Germany, Austria	C16/2009 - Aid package for Bayern LB and its Austrian subsidiary Hypo Group Alpe Adria	12 May 2009 IP/09/742	<i>Case under assessment</i>
		Extension	23 December 2009	

			IP/09/1998	
	Germany	C29/2009 - Aid package for HSH Nordbank AG	22 October 2009 IP/09/1577	<i>Case under assessment</i>
	Germany	C32/2009 - Support measures for German savings bank Sparkasse KölnBonn	5 November 2009 IP/09/1670	<i>Case under assessment</i>
	Germany	C43/2009 – WestLB: in-depth investigation into bad bank	22 December 2009 IP/09/1996	<i>Case under assessment</i>
	Latvia	C26/2009 - Aid package for JSC Parex Banka	29 July 2009 IP/09/1203	<i>Case under assessment</i>
	Netherlands	C11/B/2008 - State measures in favour of Fortis Bank Nederland (FBN) and the activities of ABN Amro	8 April 2009 IP/09/565	<i>Case under assessment</i>
	Portugal	C33/2009 - State guarantee for Banco Privado Português	10 November 2009 IP/09/1691	<i>Case under assessment</i>