

**Directorate General for Competition**  
**Annual Activity Report 2008**

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## 1. POLICY ACHIEVEMENTS

### 1.1. Achievements by policy area

The mission of the Directorate General for Competition (DG COMP) is to enable the Commission to make markets work better for the benefit of European consumers and businesses through the development and enforcement of competition rules and competition advocacy, furthering a pro competitive regulatory framework at EU and Member State level. Moreover, DG COMP has a key role safeguarding the internal market while designing the framework for appropriate responses to significant changes in the market environment as have occurred during the financial crisis in the autumn of 2008. Effective competition contributes to a larger choice of products and services, lower prices and better quality. It stimulates knowledge and innovation and creates incentives for businesses to invest, leading to increased productivity and the creation of more and better jobs. It is a crucial factor for the creation of proper conditions for economic growth and prosperity.

2008 witnessed the genesis of the most serious economic crisis in EU history. The crisis started in the financial services sector before the real economy was contaminated. In the last quarter, DG COMP displayed unprecedented mobilisation and responsiveness with a view to devising the appropriate response to this crisis. This was possible thanks to the combined commitment of staff and the flexibility allowed by DG COMP's project based organisation. In particular, DG COMP reprioritised its activities to be able to respond to the crisis situation. Some activities were scaled down to free the staff resources necessary to handle the crisis.

410 State aid notifications were received in 2008. Among these, 35 notifications were measures in support of financial institutions in response to the sudden crisis which arose in the autumn. These aimed at avoiding a possible implosion of the European banking system. Decisions authorising aid to the financial sector had to be adopted in times of acute crisis within a very short time frame, whilst ensuring that the aid granted did not exceed what was strictly necessary and that distortions of competition were kept to a minimum. Maintaining this discipline was essential with a view to avoiding that problems be exported from one Member State to another.

Because of the pressure on human resources in the field of State aid control – which is set to continue to increase<sup>1</sup> - , DG COMP was quickly granted additional resources based on the administrative arrangements decided by SG, ADMIN and BUDG (including the granting of an advance of 30 posts from DG Competition's APS 2009 allocation of 45 posts and allowing for the recruitment of some 30 additional FTEs for the 2009-2010 period<sup>2</sup>). However, DG COMP remains relatively understaffed compared to some other competition authorities, such as the US Department of Justice and Fair Trade Commission or the Japan Fair Trade Commission if it is taken into account that 1) there are significant differences in the size of the economy and the population of the

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<sup>1</sup> The economic and financial crisis will put further pressure on State aid control in 2009-2010 in particular because of a surge of aid measures aiming at (i) the stabilisation of the financial system or (ii) softening the spill over of the financial crisis into the real economy.

<sup>2</sup> These 30 additional FTE come from, on the one hand, the ongoing intra-Commission redeployment exercise related to the financial crisis and, on the other, from the recruitment of additional national experts

jurisdictions compared and 2) as opposed to most other competition authorities DG COMP devotes substantial resources to State aid control.

In terms of enforcing the competition rules applicable to undertakings, DG COMP's activity remained at a sustained level in 2008. The relevant indicators here are the number of cartel decisions (8 plus 4 statements of objections), of anti-trust non cartel decisions (6 plus 5 statements of objections) and of merger notifications (347). The amount of fines imposed in cartel cases reached EUR 2.3 billion<sup>3</sup>.

Competition enforcement by the European Commission was complemented by effective and coherent application of European competition law by national competition authorities (in the framework of the European Competition Network) and national courts.

- **General objective: "To support growth, jobs and competitiveness"**

Competition policy directly contributes to real GDP growth through driving efficiency and improving productivity, although the growth rate of real GDP per capita is dependent on a number of factors outside the control of competition policy. As explained by the Commission in its latest economic forecasts<sup>4</sup>, GDP in the European Union is expected to fall by 1.8 % in 2009 as a result of the impact on the real economy of the financial crisis. Competition policy plays an important role in limiting this slowdown and in preparing the ground for economic recovery post crisis.

An overview of the decisions adopted in 2008 demonstrates that DG COMP continues to focus its enforcement activities on economic sectors that are crucial to (i) the competitiveness and growth of the EU economy in line with the renewed Lisbon Strategy for growth and jobs and (ii) to consumers. The most prominent decisions concerned among others undertakings active in energy, transport, the ICT and automotive industries.

In 2008, DG COMP continued its follow up of the two sector inquiries on energy and on financial services with vigorous enforcement action. This is especially apparent in the energy sector where 2 decisions and 3 statements of objections were adopted. Furthermore, the energy sector inquiry served as a valuable input into the third energy liberalisation package which the Commission has proposed to achieve the internal market for gas and electricity. DG COMP also continued to provide guidance to the European banking industry on the competition aspects of the self regulatory project creating a Single Euro Payment Area (SEPA). In 2008, DG COMP also initiated a major new sector inquiry in the area of pharmaceuticals.

In the field of telecommunications, DG COMP has been working with DG INFSO on two major Recommendations. The Recommendation on the regulatory treatment of fixed and mobile termination rates in the EU was presented as a draft for public consultation on 26 June 2008. It aims at bringing wholesale rates for termination on individual networks down to an efficient level, and at

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<sup>3</sup> In 2007, the respective indicators were 8 decisions and 11 statements of objections in cartels, 6 decisions and 4 statements of objections in non-cartel antitrust, 402 merger notifications and EUR 3.3 billion in fines for cartel cases.

<sup>4</sup> IP/09/67

harmonizing the approach to regulating these rates. The Recommendation on Next Generation Access Networks, published as a draft for public consultation on 18 September, addresses the regulation of next generation fibre optic networks in order to stimulate investment while at the same time safeguarding competition in the market for high speed broadband services.

With respect to State aid control, DG COMP has worked through the adoption by the Commission of a General Block Exemption Regulation, giving automatic approval for a range of aid measures in favour of SMEs, research, innovation, regional development, training, employment and risk capital. The Regulation reduces the administrative burden for public authorities, the beneficiaries and the Commission, as well as it encourages Member States to focus their state resources on aid that will be of real benefit to job creation and Europe's competitiveness. In this respect, the data until autumn 2008 showed that Member States had continued to move towards the objective of better targeted aid. In particular, Member States have on average awarded 80% of their aid to horizontal objectives in 2007<sup>5</sup>, with increased spending on R & D and environmental aid. At the same time, the Commission adopted guidance documents on the application of State aid rules to measures taken in relation to financial institutions and introduced a temporary framework for State aid measures to support access to finance by companies operating in the real economy.

- **General objective: "To protect competition on the market as a means to enhance consumer welfare in the EU"**

Undistorted competition on the market is a means to enhance consumer welfare by driving both static efficiency, including productive and allocative efficiency, and dynamic efficiency, in particular in the form of innovation.

The present value of customer savings resulting from the application of competition policy tools in 2008 is estimated around EUR 11 billion. The detection and dismantling of cartels as the most harmful form of anti-competitive practices has continued to be a high priority. In 2008, the Commission imposed on firms involved in cartels a total amount of EUR 2.3 billion.

Similarly, DG COMP continued to act against the more harmful forms of unilateral conduct of dominant firms. In particular, the European Commission adopted a decision that renders legally binding commitments offered by E.ON following an investigation under Article 82 of the Treaty. The effect of this decision will be to open the German electricity market to effective competition. Moreover, two important decisions were adopted with a view to ensuring compliance with the competition rules: (1) a fine of EUR 38 million was imposed for the breach of Commission seals during an inspection and (2) a penalty payment of EUR 899 million was imposed on Microsoft for late compliance with its obligations under the Commission's March 2004 Decision, bringing the total amount of fines and penalty payments imposed in 2008 to EUR 3.2 billion.

In the area of merger control, the Commission continued to safeguard consumer interests as illustrated by the Friesland Campina case. This merger was authorised subject to conditions, *i.e.* only after the Commission was reassured that its concerns for competition in fresh dairy product markets (yoghurt, quark, flavoured drinks, custard, porridge and cheese) had been resolved and effective competition would not be impeded to the detriment of Dutch consumers.

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<sup>5</sup> This compares with around 50% of aid to horizontal objectives only in the mid-1990s.

In State aid, DG COMP has continued to focus enforcement towards measures that lead to the largest misallocation of resources (as opposed to aid granted for Lisbon Agenda related objectives or regional objectives). For example, the Commission adopted negative decisions in 2008 in sectors such as electrical power generation, postal services, car sector or ship building. As the last edition of the Scoreboard notes however, rescue and restructuring aid is likely to increase significantly in some countries following the financial crisis. This is directly related to the exceptional circumstances on the financial markets and the compelling necessity to stabilise the European banking systems.

In 2008, further progress has been made towards the execution of recovery decisions, i.e. Commission decisions ordering the recovery of illegal State aid by the Member State:

- Over the last year, the total number of pending recovery cases has remained stable at 46 (compared to 47 on 31/12/2007, 60 at the end of 2006 and 94 at the end of 2004).
- The amount of illegal and incompatible aid recovered has further increased from €2.3 billion in December 2004 to €9.3 billion at 31 December 2008 (i.e. 90.7% of the total amount to be recovered). The percentage of illegal and incompatible aid still to be recovered has fallen accordingly (from 75% at the end of 2004 to 9.3% at the end of 2008).

- **General objective: To foster competition culture**

Knowledge of the benefits of competition is essential for citizens to exploit their opportunities as consumers, for businesses to compete on the merits and for policy makers to bring initiatives that do not disproportionately restrict the competitive process.

DG COMP's action in terms of enforcement and advocacy contribute to raising the awareness of consumers and business alike of the importance and benefits of competition. For example, the publication of the preliminary report on the competition inquiry into the pharmaceutical sector<sup>6</sup>, has benefited from a wide press coverage. This has put into the public domain that competition in this industry does not work as well as it should: pharmaceutical companies have engaged in practices with the objective of delaying or blocking market entry of generic medicines with some EUR 3 billion of estimated lost savings for EU public health budgets<sup>7</sup>. Other policy initiatives have a similar effect. For example, the Online Commerce Roundtable initiative<sup>8</sup> comprising senior consumer and industry representatives hosted by Commissioner Kroes was instrumental in highlighting that the internal market is not yet a reality on the Internet and that on line music services escape competition to the detriment of consumers.

According to a 2006 Eurobarometer survey, 67% of EU citizens consider that increased competition in markets, such as transportation and telecommunications, is a good thing. According to another

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<sup>6</sup> IP/08/1829

<sup>7</sup> The estimate is based on a sample of medicines that faced loss of exclusivity in the period 2000 to 2007 in 17 Member States. It estimates that savings of around € 3 billion would have been possible on that sample over this period if generic medicines had entered the market without delay.

<sup>8</sup> IP/08/1338

2006 Eurobarometer survey, more than 82% of business leaders in the EU consider it important that fair competition is ensured in the single market, while more than 68% of business leaders in the EU consider it important that sectors, such as energy, transport, telecommunications and postal services are further opened up to competition.

*What is the impact of competition policy on EU society?*

Competition policy makes markets work better for the benefit of European consumers and businesses. While competition is not an end in itself, it is the best means of ensuring that markets deliver the goods and services which companies and ordinary people want. On markets where there is more than one supplier, firms compete on price, quality, choice and innovation for the benefit of consumers in general, whether they are individuals or businesses. Competition also spurs competitiveness by encouraging companies to innovate and to become more efficient. This is why a system of ensuring undistorted competition is regarded as an integral part of the Internal Market.

| <b>POLICY AREA: <u>COMPETITION POLICY</u></b> |   |  |  |                            |  |
|---|---|--|--|----------------------------|--|
| <b>GENERAL OBJECTIVES</b>                     |   | <b>Impact indicators</b>   |  |                            |  |
|   |   | <b>Indicator</b>   | <b>Target (long-term)</b>  | <b>Milestones (if any)</b> | <b>Situation at year end</b>   |
| 1.  | To protect competition on the market as a means to enhance consumer welfare in the EU | Future customer savings resulting from the application of competition policy tools   | Maximum impact for consumers through enforcement action  |                            | EUR 11 billion (rough estimate of the customer savings resulting from cartel, antitrust, liberalisation and merger cases in 2008)  |
| 2.  | To support growth, jobs and competitiveness   | Changes in long-term real output and real prices rooted in the competitive market environment<br><br>Proxy: growth rate of real GDP per capita     | Optimal long-term outcome of the competitive markets in terms of real output expansion and real price stability<br><br>Proxy: a growth rate considered to be in line with the Community Lisbon Programme |                            | 1% (2008, EU-27) (European Commission, Interim Forecast, January 2009)   |
| 3.  | To foster competition culture   | Ratio of positive replies in surveys conducted among citizens, businesses and policy makers on their knowledge of and attitude towards competition | Highest possible ratio of positive replies   |                            | 67% of EU citizens consider that increased competition in markets, such as transportation and telecommunications, is a good thing. More than 82% of business leaders in the EU consider it important that fair competition is ensured in the single market (Eurobarometer) |

## 1.2. Achievements by ABB Activities

DG COMP's work is divided into the following activities:

- Control of State aid,
- Cartels, antitrust and liberalization,
- Merger control,
- Policy, coordination, European Competition Network and international cooperation,

### 1.2.1. Activity "Control of State Aid"

There were two major drivers for State aid activity during the year 2008: firstly during the whole year the continuation of state aid policy under the State Aid Action Plan, and secondly as of the second half of the year the financial crisis followed by the economic crisis.

DG COMP had a crucial role in devising the Commission's response to the financial crisis with a view to the stabilisation of the European financial sector during the last quarter. As of 13 October, it published guidance<sup>9</sup> on how Member States could best support financial institutions in the financial crisis whilst respecting EU state aid rules and so avoiding excessive distortions of competition. The guidance set out specific conditions<sup>10</sup> under which support schemes such as guarantees or recapitalisation schemes could be cleared by the Commission very quickly. On 5 December, further guidance<sup>11</sup> was given setting out how Member States can recapitalise banks to ensure adequate levels of lending to the rest of the economy and stabilise financial markets whilst avoiding excessive distortions of competition. The guidance provided by the Commission contributed:

- For the rescue of the European financial industry without problems being exported from one Member State to another; and
- Important aid measures to be authorised in record times in the midst of an acute crisis; rapidity in making these decisions was essential to help restore confidence on the financial and interbanks markets; DG COMP displayed unprecedented mobilisation and responsiveness to this effect and adopted several decisions in a short period of time (e.g. there was a period of 8 weeks when more than 20 decisions were adopted).

As of mid-November, DG COMP focussed on limiting the risks for the real economy associated with a credit crunch in times of recession, the challenge for the European Union being to avoid public intervention which would undermine the objective of a less and better targeted State aid. With this objective in mind, DG COMP was on the front line with the adoption of a temporary

<sup>9</sup> 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

<sup>10</sup> It is clear that any disproportionate distortions of competition such as, for example, discriminating against financial institutions based in other Member States and/or allowing beneficiary banks to unfairly attract new additional business solely as a result of the government support would not be allowed under the State aid rules.

<sup>11</sup> 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, OJ C 10, 15.1.2009

framework<sup>12</sup> under the State aid rules to guide Member States in tackling the effects of credit squeeze on real economy. This Framework was included in the measures announced by the Commission in its 26 November European Economic Recovery Plan and was approved in record time following consultation with Member States. On 30 December, the first two decisions approving aid measures to tackle the real economy crisis were already adopted.

Notwithstanding the crisis, DG COMP's activity in the field of State aid control remained at a sustained level throughout the year. In 2008, the Commission adopted 515 decisions in the field of State aid. This number represents a slight decrease as compared to the previous years. This should be interpreted in the context of a significant increase of measures falling under the scope of the newly introduced block exemption rules, including the new general block exemption Regulation<sup>13</sup>. In the first three quarters of 2008, Member States informed the Commission that they implemented an additional number of 680 block exempted measures, which suggests that DG COMP's efforts towards simplification of State aid procedures bring the expected efficiencies. The new guidelines on guarantees<sup>14</sup> follow a similar rationale in so far as they set out clear and transparent methodologies to calculate the aid element in guarantees and provide simplified rules for SMEs.

Furthermore and in line with the State Aid Action Plan launched in 2005, DG COMP continued to refine the economic analysis of State aid and to concentrate its enforcement on the most distortive cases. In particular, following an in-depth economic assessment, the Commission has adopted 13 individual decisions authorising aid for large R&D projects in 2008. The new guidelines<sup>15</sup> on environmental aid adopted on 23 January are also indicative of DG COMP's efforts in this respect. They recognize the market failure that companies do not fully account for the costs of pollution for societies, and they provide a framework to redress this failure, striking a balance between the preservation of competition and support mechanisms for targeted aid supporting the environment. The framework should incentivise Member States and industry to increase their efforts for the environment. In 2008, 34 decisions were adopted in the environmental field.

Finally, the effectiveness and credibility of state aid control presupposes a proper enforcement of the Commission's decisions. The latest figures indicate that significant progress has been made in the execution of recovery decisions since 2005. By the end of June 2008, there were only 47 pending recovery decisions compared with 93 at the end of 2004.

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<sup>12</sup> Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C16, 22.1.2009

<sup>13</sup> 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 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008

<sup>14</sup> Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008

<sup>15</sup> Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008

**ACTIVITY: CONTROL OF STATE AID**

**SPECIFIC OBJECTIVE 1: Less aid granted by Member States**

| <i>Result Indicators</i>   | <i>Situation at year end</i>  | <i>Target (mid-term)</i>                        |
|--|---|---|
| Overall level of State aid granted by Member States expressed as a percentage of GDP (less agriculture, fisheries and transport) | 0.40% of GDP (2007), compared to 0.59% of GDP (average 1996-2000) and 0.42% of GDP (2006) | Decrease in the indicator's level <sup>16</sup> |

*Main policy outputs*

Decisions relating to notified and non-notified State aid measures

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<sup>16</sup> This indicator attributes a positive value to the overall decrease of State aid. Such a general aim has however to be understood as a long term objective, which may allow for deviations to cater for Member States different needs and preferences as to the use of state aid to promote growth and jobs, provided the aid fulfils the compatibility conditions set by the Commission. The need to sustain structural reform or specific action for cohesion and competitiveness may push Member States to allow for more aid in a given moment, as long as it is in the Community interest.

## SPECIFIC OBJECTIVE 2: Better aid granted by Member States

| <i>Result Indicators</i>   | <i>Situation at year end</i>   | <i>Target (mid-term)</i>          |
|--|--|-----------------------------------|
| Percentage of State aid granted by Member States for horizontal objectives | 80% of the overall amount of aid (2007) <sup>17</sup> , compared to 55% (average 1996-2000) and 85% (2006) | Increase in the indicator's level |

| <i>Main policy outputs</i>   |
|--|
| Decisions relating to notified and non-notified State aid measures |

<sup>17</sup> This "good" aid (aid pursuing horizontal objectives or pursuing regional development) can be also set forth as separate result indicators (breakdown of the overall percentage of State aid granted for horizontal objectives and with the exclusion of State aid to agriculture, fisheries and transport):

| State aid granted for                   | % of the overall amount of aid |
|---|--------------------------------|
| R&D                                     | 15%                            |
| Innovation                              | n.a. (introduced in 2007)      |
| Employment                              | 5%                             |
| Regional aid (equity & social cohesion) | 20%                            |
| Training                                | 1%                             |
| SMEs                                    | 10%                            |
| Environmental purposes / energy saving  | 25%                            |
| Other horizontal objectives             | 4%                             |

### SPECIFIC OBJECTIVE 3: Effective prevention and recovery of incompatible State aid

| <i>Result Indicators</i>   | <i>Situation at year end</i>  | <i>Target (mid-term)</i>                        |
|--|---|---|
| Percentage of "bad" State aid <sup>18</sup>  | 0.08% of GDP (2007), compared to 0.27% of GDP (average 1996-2000) and 0.06% of GDP (2006) | Decrease in the indicator's level <sup>19</sup> |
| Percentage of incompatible aid recovered   | 92% (as of June 2008), compared to 80% (as of June 2007)                                  | Increase in the indicator's level <sup>20</sup> |
| Average age of pending recovery cases, including the time required for the Member States to take all necessary steps to recover the aid from the beneficiaries | 48 months (as of June 2008), compared to 51.3 months (as of July 2007)                    | Decrease in the indicator's level               |

| <i>Main policy outputs</i>  |
|---|
| Final decisions and appropriate measures for incompatible State aid cases |

<sup>18</sup> The effectiveness of prevention activities is hard to measure. Member States may already have adjusted their behaviour in line with the State aid rules established by the Commission – it is not easy to find an indicator measuring behaviour which did not take place. Furthermore, certain behaviour (or inaction) can also be attributed to internal considerations (e.g. budgetary constraints). Also, even during the investigation by the Commission of notified aid, certain adjustments may occur in the light of pre-notification meetings or questions asked by the Commission services. Again, no precise indicator exists to measure such corrective actions occurring during the life of the procedure. Finally, it would give a wrong picture if one only looks at the total amount of incompatible aid which is being recovered as indicator, since far from being "prevented", this aid has been granted and is still with the beneficiaries concerned, distorting competition and trade, until full recovery has taken place.

Hence, it seems methodologically sounder to set an objective benchmark against which to track the performance of the Commission, which in particular if tracked over time (to correct for possible temporary fluctuations to take account of the different needs of Member States at some point in time) should give an idea of the impact that the Commission has had in preventing "bad" aid. To that effect the average figure of aid as % of GDP in the 5 year period before the Lisbon agenda is used as absolute benchmark for measuring the impact that State aid control has had in preventing "bad" aid.

<sup>19</sup> Planning assumption. As State aid activity is driven partially by notifications, it is not possible to provide a clear target for this indicator.

<sup>20</sup> This indicator is very much a "moving target", because it can be influenced by several factors such as recent decisions not yet implemented, annulment of a decision by the court, and in particular, by the fact that often the aid amount is quantified during the recovery procedure. That is why also the average age needs to be added as indicator.

### 1.2.2. Activity "Cartels, Antitrust and Liberalisation"

Clearly, detecting, dismantling and sanctioning anti-competitive practices has a direct impact on markets, consumers welfare, and more generally, the European economy. Effective competition contributes to a larger choice of products and services, lower prices and better quality.

On 30 June 2008, DG COMP introduced a settlement procedure<sup>21</sup> for cartels with a view to simplifying and further accelerating administrative proceedings in cartel cases and possibly reducing litigation before the European Courts. Moreover, the Commission adopted 8 decisions and 4 statements of objections in the field of cartels during the year 2008. These included the Carglass case, which resulted in the highest fine ever imposed on a single undertaking. Economic literature [Connor & Boltova, 2005] suggests that cartels can impose an average overcharge of 20%-34%. The cartel overcharge not only negatively affects consumer welfare (welfare distribution effect) but also leads to a deadweight loss for the entire economy. In 2008, the cumulated value of sales of goods and services by cartels prohibited by the Commission's decisions was estimated at EUR 2.6 billion.

In non-cartel antitrust proceedings, the Commission adopted 6 decisions and 4 statements of objections during the year 2008. The most prominent decisions concerned among others undertakings active in the energy (E.ON electricity and breach of seals) and ICT industries (Microsoft penalty payment). Moreover, the interim report of the sector inquiry launched in the pharmaceutical sector was published. It found that originator companies engage in practices with the objective of delaying or blocking market entry of competing medicines.

The detection and dismantling of cartels and other harmful anti-competitive practices will remain a high priority in the coming years. As expected in the previous report, the trend towards a sustained number and a growing complexity of investigations has continued in 2008.

#### **ACTIVITY: CARTELS, ANTITRUST AND LIBERLIZATION**

**SPECIFIC OBJECTIVE 1: Effective detection, sanctioning, deterrence and remedying of the most harmful cartels between undertakings**

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<sup>21</sup> To this effect, Commission Regulation (EC) n° 773/2004 on procedures for applying Articles 81 and 82 of the EC Treaty was amended to accommodate the settlement option within the existing framework. Changes in the Regulation include (i) the introduction of "settlement" variants in provisions including the initiation of proceedings, access to file and oral hearings and (ii) procedural flexibility through the possibility to choose a different sequence of procedural steps, moving some to before the adoption of the SO.

Moreover, the specifics of the new procedure on settlements were set out in a Settlement Notice which provides guidance for the legal and business community. Companies will be able to anticipate the type and extent of cooperation expected from them in order to settle and estimate the individual benefits of settling.

| <i>Result Indicators</i>  | <i>Situation at year end</i>    | <i>Target (mid-term)</i>  |
|---|---------------------------------|---|
| Cumulated value of sales of goods or services by cartels prohibited by Commission decisions | ≈ EUR 2.6 billion <sup>22</sup> | Stable level of the indicator adjusted for growth and inflation |

| <i>Main policy outputs</i>   |
|--|
| Decisions applying the prohibition rules of Article 81 of the EC Treaty (cartel decisions) |

**SPECIFIC OBJECTIVE 2: Effective detection, sanctioning, deterrence and remedying of the most harmful anti-competitive practices by undertakings other than cartels**

| <i>Result Indicators</i>  | <i>Situation at year end</i>  | <i>Target (mid-term)</i>  |
|---|-------------------------------|---|
| Size of the markets to which the anti-competitive practice prohibited by Commission decisions relates | ≈ EUR 3 billion <sup>23</sup> | Stable level of the indicator adjusted for growth and inflation |

| <i>Main policy outputs</i>  |
|---|
| Decisions applying the prohibition rules of Articles 81 and 82 EC (restrictive agreements other than cartels and abuses of dominant position) |

<sup>22</sup> Based on cartel decisions adopted in 2008. The future customer savings due to these cartel decisions are estimated to be EUR 1.2 billion. This estimation assumes that: (a) the average expected life span of a cartel at the time of its discovery is 5 years, (b) the average cartel gain from setting a cartel price equals 10% of the value of the sales of goods or services to which the cartel infringement directly or indirectly relates and (c) the annual discount rate of 3.5% for year n+1 to n+4 is applicable. Each of these assumptions is conservative; the true savings could be significantly higher.

<sup>23</sup> Based on Commission decisions adopted in 2008. The future customer savings resulting from these decisions are estimated to be EUR 300 million. This estimation assumes that the customer saving corresponds to 10% of the size of the relevant market(s) to which the anti-competitive practice relates. The 10% value is based on an analogy to the SSNIP (Small but Significant and Non-transitory Increase in Price) test.

**SPECIFIC OBJECTIVE 3: Effective detection, sanctioning, deterrence and remedying of the most harmful anti-competitive practices by Member States**

| <i>Result Indicators</i>   | <i>Situation at year end</i>  | <i>Target (mid-term)</i>  |
|--|-------------------------------|---|
| Size of the markets to which the anti-competitive practice prohibited under Article 86 of the EC Treaty or challenged under Article 226 of the EC Treaty relates | ≈ EUR 5 billion <sup>24</sup> | Stable level of the indicator adjusted for growth and inflation |

| <i>Main policy outputs</i>  |
|---|
| Decisions under Article 86 of the EC Treaty and referrals to the Court of Justice under Article 226 of the EC Treaty dealing with illegal State measures, in particular in the liberalised network industries and financial services. |
| Assessment of notifications from national regulatory authorities under Article 7 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.  |

*1.2.3. Activity "Merger Control"*

With a total of 347 notifications received in 2008, i.e. the third highest number of notifications received in a calendar year since the introduction of EU merger control in 1990, activity remained at a sustained level although down 14% compared to 2007, the all time peak with 402 notifications. Competition concerns were identified in 25 cases, all of which were approved subject to remedies. Five of these conditional clearance decisions followed a Phase II investigation, while 20 remedy cases were concluded in Phase I. The remedy cases covered a variety of sectors from the financial information sector (the Thomson / Reuters case) to the food sector (the Friesland / Campina case).

In 2008 DG COMP has continued to work towards providing maximum transparency regarding its practice in the field of merger control. A new notice on remedies<sup>25</sup> was adopted to ensure that competition concerns are dealt with more effectively and to clarify to companies involved in merger cases how best to address competition concerns. A public consultation on the functioning of the EC Merger Regulation was launched. The purpose of the review is to evaluate how the rules on jurisdictional thresholds and referral mechanisms have worked in practice during the four years the Merger Regulation has been applied. Based on the feedback received and on its own experience in applying the Regulation, DG COMP will report back to the Council by July 2009.

The Commission's merger control remains very effective in ensuring the maintenance of competitive product and service markets in Europe. At the same time, the Commission is making

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<sup>24</sup> Based on measures taken in 2008. Figure does not include the size of electronic communications markets analysed by national regulatory authorities under Article 7 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.

<sup>25</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C267, 22.10.2008

important progress in ensuring that its policy and law enforcement remains consistent, transparent and based on sound economic reasoning.

|   |
|---|
| <b>ACTIVITY: MERGER CONTROL</b>   |
| <b>SPECIFIC OBJECTIVE: Effective prevention of the anticompetitive effects of mergers</b> |

| <i>Result Indicators</i>   | <i>Situation at year end</i>    | <i>Target (mid-term)</i>  |
|--|---------------------------------|---|
| Size of relevant markets affected by corrective merger decisions <sup>26</sup> | ≈ EUR 5.5 billion <sup>27</sup> | Stable level of the indicator adjusted for growth and inflation <sup>28</sup> |

|  |
|--|
| <i>Main policy outputs</i>                               |
| Decisions applying the rules of the EC Merger Regulation |

#### 1.2.4. Activity "Policy, Coordination, European Competition Network and International Cooperation"

Effective competition policy instruments are a prerequisite to sound enforcement and advocacy policy. In particular, competition legislation and guidance must be kept under constant review in order to adapt the rules to new market developments. In 2008, DG COMP continued a number of major policy projects. Further to the initiatives mentioned in sections 1.2.1 to 1.2.3 above, the most prominent examples are:

- the adoption of the White Paper on Damages Actions for Breach of the EC antitrust rules which presents a set of recommendations to ensure that victims of competition law infringements have access to truly effective mechanisms for claiming full compensation for the harm they have suffered;

<sup>26</sup> For the purposes of this document, corrective merger decisions are prohibition decisions and clearance decisions with remedies.

<sup>27</sup> Indicated value is based on 21 of the 24 corrective merger decisions adopted by the Commission in 2008, for which the monetary value of the markets on which the concentration would have significantly impeded effective competition was available. The future customer savings resulting from these corrective merger decisions are estimated to be EUR 5.5 billion. This estimation assumes that the future customer savings resulting from corrective merger decisions correspond to 10% of the size of the relevant market(s) on which the concentration would have significantly impeded effective competition. The 10% value is based on an analogy to the SSNIP (Small but Significant and Non-transitory Increase in Price) test.

<sup>28</sup> Planning assumption. As the merger control activity is driven by notifications, it is not possible to provide a clear target for this indicator.

- the publication of guidance on enforcement priorities in applying EC Treaty rules on abuse of a dominant market position (Article 82) to abusive exclusionary conduct by dominant undertakings<sup>29</sup>; this paper outlines the analytical framework that DG COMP employs when assessing the most commonly encountered forms of exclusionary conduct, such as exclusive dealing, rebates, tying and bundling, predatory practices, refusal to supply and margin squeeze; this represents an important contribution towards further reinforcing the transparency and predictability for stakeholders of DG COMP's priorities as a competition enforcer; and
- The adoption of Guidelines on the application to maritime transport services of EC Treaty rules on restrictive business practices (Article 81); following the repeal of Council Regulation 4056/86 which allowed liner shipping operators an exemption from EU competition rules, liner companies have to assess themselves whether their business practices comply with the competition rules. The Guidelines should help maritime operators in this process and ensure that the new regime fosters competitive markets.

A common competition culture is now emerging within the European Competition Network, which also works as a catalyst for convergence beyond the coherent application of the EC antitrust rules in particular cases. The smooth functioning of the European Competition Network (ECN) is illustrated by the absence of use by the Commission of proceedings initiated under Article 11(6) of Regulation 1/2003; the article allowing the Commission to take over cases being brought by national competition authorities. In 2008 DG COMP reviewed, on the basis of the formal cooperation provisions, 61 envisaged decisions from national competition authorities. It also provided up-stream cooperation in a similar number of cases. In addition, 30 meetings at various levels within the ECN took place to exchange and coordinate on issues of horizontal cooperation (e.g. in cartel investigations, sector inquiries) as well as on sector-specific topics (e.g. energy, electronic communications, financial services, food, motor vehicles and other sectors).

In addition, in order to ensure that regulation at national level does not contain unnecessary competition restrictions, DG COMP continued to actively participate in the screening of national progress reports submitted by Member States in the context of the Lisbon strategy.. In this process, DG COMP made more than 20 proposals for country-specific recommendations and "points-to-watch" in the area of competition.

Finally, DG COMP continued to be active in international fora such as the International Competition Network and the OECD, to develop bi-lateral cooperation with other competition agencies, to contribute to the preparation of the Free Trade Agreements with our major trading partners, and to contribute to the enlargement process for all candidate countries.

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<sup>29</sup> IP/08/1877

**ACTIVITY: POLICY, COORDINATION, ECN AND INTERNATIONAL COOPERATION**

**SPECIFIC OBJECTIVE 1: The development and/or revision of EC competition law and policy to reflect market realities and contemporary economic and legal thinking and to give clear guidance to courts, national authorities, and economic operators**

| <i>Result Indicators</i>   | <i>Situation at year end</i>  | <i>Target (mid-term)</i>   |
|--|---|--|
| EC competition law and policy which reflects market realities and contemporary economic and legal thinking | <p>More than 20 key legislative and non-legislative policy documents delivered in recent years<sup>30</sup>. More specifically in 2008, the following legislative and non legislative policy documents were adopted:</p> <ul style="list-style-type: none"> <li>- State aid: the General Block Exemption Regulation, the environmental guidelines, the notice on guarantees, the prolongation of the framework on State aid to shipbuilding, 3 Commission Communications in response to the economic and financial crisis</li> <li>- Antitrust/Cartels: the new settlement procedure in Cartel cases, the White Paper on private enforcement, the guidelines on enforcement priorities concerning Article 82, the new guidelines on the application of the competition rules in maritime transport</li> <li>- Merger control: the new notice on remedies (including the corresponding amendments in the implementing Regulation)</li> </ul> | Delivery of at least 10 additional key legislative and non-legislative policy documents until 2009 |

*Main policy outputs*

<sup>30</sup> Including, but not limited to Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Notice on cooperation within the Network of Competition Authorities, Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Guidelines on the application of Article 81(3) of the Treaty, Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty, Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Guidelines on Vertical Restraints, Regulation on the application of Article 81(3) of the Treaty to categories of specialisation agreements, Regulation on the application of Article 81(3) of the Treaty to categories of research and development agreements, Guidelines on the applicability of Article 81 to horizontal co-operation agreements, Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, the revised Merger Regulation, Guidelines on the assessment of horizontal mergers, Guidelines on the assessment of non-horizontal mergers, Regulation on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, Community Framework for State aid for Research and Development and Innovation, Guidelines on state aid to promote risk capital investments in small and medium-sized enterprises, Guidelines on State aid for rescuing and restructuring firms in difficulty, Regulation on the application of Articles 87 and 88 of the EC Treaty to training aid, Regulation on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, Regulation on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, Block Exemption Regulation for regional aid and the Community framework for State aid in the form of public service compensation.

Measures developing the EC competition law and policy such as reviews of the existing secondary legislation, policy guidance documents and guidelines

## SPECIFIC OBJECTIVE 2: Effective and coherent application of EC competition law in the EU

| <i>Result Indicators</i>   | <i>Situation at year end</i>   | <i>Target (mid-term)</i>  |
|--|--|---|
| Number of cases signalled to the ECN   | 160 <sup>31</sup>  | Stable indicator  |
| Number of envisaged enforcement decisions and similar case consultations in the ECN  | ≈ 90 <sup>32</sup>   | Stable indicator  |
| Number of proceedings initiated under Article 11(6) of Regulation 1/2003 with a view to ensuring consistent application of competition rules | 0 <sup>33</sup>  | Level of the indicator to remain zero <sup>34</sup>   |
| Improved functioning of the State aid network  | Several multilateral and bilateral meetings and upstream assistance and guidance in 2008 | Increasing number of multilateral and bilateral meetings and upstream assistance and guidance |

### *Main policy outputs*

Make the enforcement system created by Regulation 1/2003 an effective and coherent enforcement by the Member States' competition authorities and courts by making optimal use of the policy role of the Commission among the enforcers in the EU.

Maintain and further enhance close cooperation and increasing convergence in an enlarged EU.

### *Main expenditure-related outputs*

Contribute to effective and coherent enforcement of EC competition rules by national courts through funding training of judges.

<sup>31</sup> Based on data from 2008.

<sup>32</sup> Based on actual and provisional data from 2008.

<sup>33</sup> Based on data from 2008.

<sup>34</sup> Zero level of this indicator implies that the coherent application of EC competition law through the ECN network will allow the Commission to abstain from taking over cases on which a competition authority of a Member State is already acting.

**SPECIFIC OBJECTIVE 3: Pro-competitive regulatory framework at national level**

| <i>Result Indicators</i>  | <i>Situation at year end</i> | <i>Target (mid-term)</i> |
|---|------------------------------|--------------------------|
| Country specific recommendations and points-to-watch relating to Guideline 13 in the Annual Progress Report under the Lisbon strategy | 24 <sup>35</sup>             | Stable indicator         |

| <i>Main policy outputs</i>  |
|---|
| Proposals for country specific recommendations and points-to-watch relating to Guideline 13 in the Annual Progress Report |

**SPECIFIC OBJECTIVE 4: Pro-competitive regulatory framework at EU level**

| <i>Result Indicators</i>   | <i>Situation at year end</i> | <i>Target (mid-term)</i> |
|--|------------------------------|--------------------------|
| The ratio of pro-competitive modifications to initiatives at EU level taken into account | N.A.                         | 100%                     |

| <i>Main policy outputs</i>   |
|--|
| Pro-competitive modification proposals to legislative and policy initiatives at EU level |

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<sup>35</sup> Based on the Annual Progress Report of December 2007.

**SPECIFIC OBJECTIVE 5: Strengthened international cooperation in enforcement activities and increased convergence of competition policy instruments across different jurisdictions; establishment of well-functioning competition regimes in candidate countries and potential candidate countries**

| <i>Result Indicators</i>  | <i>Situation at year end</i> | <i>Target (mid-term)</i> |
|---|------------------------------|--------------------------|
| Number of third countries with whom the EU has 1 <sup>st</sup> generation competition agreements              | 3                            | 4                        |
| Number of third countries with whom the EU has 2 <sup>nd</sup> generation competition agreements              | 0                            | 2                        |
| Number of third countries with whom the EU has free trade agreements containing competition/State aid clauses | 31                           | ≈ 50                     |
| Number of contributions to OECD and ICN   | 15                           | ≈ 15                     |
| Number of candidate countries with whom accession negotiations on the competition chapter have been opened    | 0                            | 1                        |

| <i>Main policy outputs</i>   |
|--|
| <p>Inclusion of competition and State aid provisions in the international agreements.</p> <p>Concluding of competition specific agreements.</p> <p>European Commission and US Department of Transportation Joint Research Project on Airline Alliances</p> |

**SPECIFIC OBJECTIVE 6: Implementing the Commission planning and programming process so that DG COMP delivers its policy objectives contributing to the overall Commission strategy in an effective, timely, efficient and accountable manner**

| <i>Result Indicators</i>  | <i>Situation at year end</i>                        | <i>Target (mid-term)</i>               |
|---|---|--|
| Timely preparation and delivery of the various elements of the Strategic Planning and Programming cycle (APS, CLWP, AMP and AAR)  | All documents delivered within the deadline in 2008 | All documents within the deadline      |
| Delivery rate (adoption by the College) of initiatives included in the Commission Legislative Work Programme and in the Catalogue | 100%  | 100% for the Commission Work Programme |
| Delivery rate of DG COMP commitments under the simplification rolling programme   | 100%  | 100%                                   |

| <i>Main policy outputs</i>  |
|---|
| Preparation and delivery of the various elements of the Strategic Planning and Programming cycle (APS, CLWP, AMP and AAR) |



## **Part 2 Management and internal control systems**

### **Section 2.1 - Inherent nature and characteristics of the DG's risk and control environment**

#### **2.1.1 DG COMP in 2008**

The principal activities of the DG are: enforcement of competition rules (roughly 57% of activities), sector inquiries and market monitoring, policy development, competition advocacy and international cooperation.

DG COMP is not a large spending DG and conventional financial management does not represent a critical challenge for DG COMP's operations. However, it cannot be excluded that contingent liabilities may give rise to financial consequences for DG COMP and this has been taken into account in its assessment.

The Court of First Instance accepted in 2007 that, as a matter of principle, the Commission could be held financially liable for damages caused by an annulled decision in the area of competition. Nevertheless, the likelihood of this materialising in the foreseeable future receded when the Court refused damages and recognised in 2008, in the "My Travel"<sup>36</sup> decision, that the question of compensation for damages can only arise where such conduct takes the form of "*action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally are objectively subject*" (para 43).

As a result of the judgment 17 September 2007, where the Court of First Instance ruled that the Commission should not have imposed on Microsoft the cost of the Trustee that was appointed to monitor Microsoft's compliance with the 2004 decision, the Commission was under the obligation to reimburse Microsoft for their costs in relation to the Trustee. DG COMP therefore requested and received through the Amending Budget No 3/2008 a budgetary re-enforcement (on the budget line "*Damage requests resulting from legal procedures against the Commission's decisions in the field of competition*") in order to meet this legal commitment. An initial invoice received from Microsoft, equivalent to 8.4 million EUR, was paid in the beginning of October and the final invoice was received at the end of the year and is expected to be paid in 2009.

#### **Main stakeholders**

DG COMP's stakeholders are all European consumers, who should ultimately benefit from its activities. Companies and Member States are subject to its enforcement or monitoring activities, other stakeholders also include the National Competition Authorities now connected within the European Competition Network and third country partners within the framework of international cooperation (in particular through the International Competition Network and its participation in OECD activities). DG COMP

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<sup>36</sup> Case T-212/03 judgement of CFI of 9 September 2008

also aims to provide intellectual leadership on competition issues, through continued participation to conferences and seminars involving, beyond the business community, the academic world.

### **Management mode**

In 2008, DG COMP continued to operate centralised financial circuits (implemented since 2005) as this is found to be the most efficient way of managing its administrative expenditures (7.1 million euro in 2008). In line with the principles of the Reform, centralised financial circuits facilitate a more efficient sharing of responsibilities between the operational directorates and the Resources Directorate, without de-responsibilising directors. The Director of Directorate COMP R (Registry and Resources) and Heads of Unit COMP R2 (Resources), COMP R3 (Information Technology) and COMP 01 (Communication policies and inter-institutional relations) are authorising officers by delegation. Operational directorates are responsible for the operational initiation and verification and for the quality control of the operations they undertake. For example, for studies, operational directors must give their agreement on each final report before the invoice is checked by Directorate COMP R, in order to take responsibility for the quality of the study before payment.

This system applies to most financial operations, including transactions made in the framework of budget lines received from other DGs by cross sub-delegation. It does not apply to the management of the "Training of judges" grant programme (+/- 800.000 euro), which remains under the responsibility of Directorate A (partially decentralised financial circuit). The issuing of recovery orders related to fines also remains under the responsibility of each Market and Cases director where the fine originates, although the financial transaction is centralised at the level of the Commission in DG Budget.

### **Separation of functions (Fin R Art. 60 § 4 - IR Art. 47)**

The principles concerning the segregation of duties are applied as follows: before a transaction is authorised, the operational initiation and verification is performed by the operational directorate, whereas the financial initiation and verification is performed by the financial cell in Unit COMP R2. The ex-ante and ex-post verification are separated duties from the operational initiation – officials or other desk officers in charge of verification are distinct from initiators and cannot be subordinated to the initiator of the transaction.

### **Documentation and support**

A manual of procedures is available on DG COMP's Intranet. It is currently being updated to describe the responsibilities of each financial actor, the corresponding financial workflow, in a clear and simple way, accessible for all officers who might intervene in the financial circuit, either as initiator or in the operational verification. The manual evolves according to the relevant elements that might arise in the financial circuit. Continued use of the check list for financial operations was made in 2008, which produced clear benefits in terms of control of transactions from the operational units.

### **Internal ACPC**

DG COMP's internal ACPC gives its opinion on the selection and evaluation procedure of proposed contracts to ensure that they comply with the Financial Regulation and Community Directives. The composition of the Committee was revised in 2008 to reflect changes in the organisation and new staff. During the year each file with a contract value exceeding 60.000 euro was checked by the Committee. The responsible Directorate submits the complete file to the Head of Unit COMP R2 for further distribution to the in-house ACPC. In 2008, the ACPC reviewed 7 calls for tenders and cleared them all.

### **2.1.2. Major events of the reporting year having an impact on reputation**

DG COMP's 2008 risk assessment identified three categories of risks for activities and internal management: risks affecting our enforcement activity, risks affecting the functioning of the DG and risks affecting DG COMP's reputation and/or causing harm to third parties. Given the characteristics of the DG risks and control environment outlined above, DG COMP has elaborated a specific methodology to assess the materiality of the third risk. The DG has also put in place reinforced procedures, such as the procedure for providing access to file in certain antitrust and merger cases, and has implemented a security action plan, as well as a revised ethics code, which reduce the likelihood of a reputational risk materialising. DG COMP has not identified in 2008 any event that could impact on the reasonable assurance.

## **Section 2.2 The functioning and effectiveness of internal control systems**

### **2.2.1. – Reporting on compliance with the requirements**

Apart from ICS 8, DG COMP is compliant with all internal standards requirements, namely ICS 1 - Mission, ICS 2 - Ethical and organisational values, ICS 3 - Staff, ICS 4 - Staff evaluation and development, ICS 5 - Objectives and performance indicators, ICS 6 - Risk management process, ICS 7 - Operational structure, ICS 9 - Management supervision, ICS 13 - Accounting and financial reporting, ICS 14 - Evaluation of activities, ICS 15 - Assessment of internal control systems, and ICS 16 - Internal Audit Capability.

*Requirements on which conclusive results were achieved in 2008:*

Concerning ICS 10 – Business continuity, DG COMP had developed its first business continuity plan in 2007 and was therefore already compliant. It was used for DG COMP's successful participation in the Commission business continuity exercise in December 2008. Nevertheless, an updating and upgrading of the plan started at the end of 2008 and it will be completed in 2009.

As regards ICS 11 – Document management, DG COMP is compliant with e-domec and systems were already fully compliant for the anti-trust and state aid instruments before 2008. Mergers moved to e-mergers in November 2008 and Horizontal Tasks, an electronic filing application, was implemented for non case-related documents. This means that the DG is now fully compliant with ICS 11.

For what pertains to ICS 12 – Information and communication, DG COMP is also compliant. In addition, the DG has further tested and developed in 2008 workload and performance indicators and started the review of its Intranet in view of a total overhaul in 2009.

*Requirements with which DG COMP did not yet fully comply on 31 December 2008:*

As regards of ICS 8 – Processes and procedures, an IAC audit performed in 2008 found that the documentation of procedures is fragmented in the financial area. The action plan with a target date of mid 2009 foresees the creation of a single set of clear, user friendly, promptly updated instructions available on the intranet, in order for DG COMP to reach full compliance on ICS 8.

### **2.2.2. – Reporting on the effectiveness of the implementation of the Internal Control Standards for Effective Management**

In 2008 DG COMP focused on 3 internal control standards: ICS 2 – Ethics and organisational values (in building block 1: Mission and Values), ICS 8 – Processes and procedures and ICS 11 – Document management (both in building block 4: Operations and Control Activities). Their effective implementation in specific areas was analysed by the IAC during the year.

#### **Building block 1 - Mission and Values**

##### **Summary of the situation:**

*ICS 2 – Ethics and organisational values*

DG COMP decided to focus on ICS 2 for the following reasons:

- Ethics are high on the Commission's agenda (the Commission' transparency initiative);
- Reputational risk: COMP's activities are exposed to potential conflicts of interests, potential misuse of insider info etc. Having the highest possible ethical standards contributes to protecting COMP from reputational risk.
- To encourage better cooperation from parties and third parties with a firm and transparent ethical framework.

DG COMP had already implemented a series of measures before 2008:

- Creation of the Ethics and Security Task Force;
- Overhaul of DG COMP's ethics code;
- Presentations given by the Director General to each Directorate following the revision of the code;
- Creation of the Ethics Compliance Officer (ECO) function;
- Compulsory ethics training presentation for all newcomers.

DG COMP decided to undertake the following additional actions in 2008:

- Use of annual declaration form regarding potential conflicts of interest for the hierarchy and horizontal staff;
- Use of case-based form regarding potential conflict of interest for staff assigned to cases;
- Regular monitoring of compliance declaration forms and reporting ethical issues to management;
- Further guidance as regards conflict of interest situations;
- DG COMP Code on Ethics for trainees.

**Assessment criteria:**

| <b>Level of Control</b>     | <b>Experience of the operation of the control system</b>  | <b>Capacity (staff)</b>   | <b>Capacity (systems&amp; procedures)</b>                                      |
|-----------------------------|---|---|--|
| Major improvement needed    | N/A   | N/A   | N/A  |
| Improvement needed          | N/A   | N/A   | N/A  |
| Minor/no improvement needed | No previous instances of inadequate / ineffective controls that exposed the DG to its key risks | Sufficient knowledge and skills are available to manage the key risks effectively | System controls / procedures are designed, implemented to manage the key risks |

## Conclusion on building block 1:

The standard is implemented in a way which goes beyond the base line compliance requirements which is appropriate for the DG's activity, as assessed by the IAC.

## Building block 4 - Operations and Control Activities

### Summary of the situation:

#### *ICS 8 – Processes and procedures*

DG COMP decided to focus on ICS 8 for the following reasons:

- Core business of competition law enforcement gives rise to complex activities and procedures where good process is essential (legal and regulatory aspects necessarily evolving);
- Activities involving many third parties (companies, industry, consumers, individuals, Member States, agencies, etc.);
- Some past events led to review and identification of areas for improvement;
- Numerous new staff joining the DG;
- Process and procedures particularly important in a project-based organisation like DG COMP;
- Need to ensure against risk of inefficient procedures.

DG COMP had already implemented a series of measures before 2008:

- Manuals of procedures (online, regularly updated and used);
- Implementation of action plan for access to file procedure;
- Training for newcomers and existing staff;
- IAC audits of core business areas are planned over a period of 3 years.

DG COMP decided to undertake the following additional actions in 2008:

- Design and implementation of an Action Plan for further security improvements, focusing on (a) building and infrastructure security, (b) circulation of information, (c) staff related issues and IT security and (d) training and awareness raising;
- Review documentation of procedures for non-case work (e.g. financial procedures);
- Review opportunities for simplification by using more electronic tools (e.g. electronic *signataires*) (preliminary steps in 2008 – expected to continue in 2009);
- Clarify who does what and when (preliminary steps in 2008 – expected to continue in 2009).

### Assessment criteria:

| Level of Control | Experience of the operation of the control system | Capacity (staff) | Capacity (systems& procedures) |
|------------------|---|------------------|--------------------------------|
|------------------|---|------------------|--------------------------------|

|                             |  |  |   |
|-----------------------------|--|--|---|
| Major improvement needed    | N/A  | N/A  | N/A   |
| Improvement needed          | N/A  | N/A  | As regards processes and procedures, an improvement of the documentation of procedures in the financial areas could improve efficiency. |
| Minor/no improvement needed | Access to File action plan implemented and audited with no new risk areas. | Strong emphasis on training, case team work, project management and checks and balances in core business activities. | N/A   |

### ICS 11 – Document management

DG COMP decided to focus on ICS 11 for the following reasons:

- Very high volume of documents produced, received and managed;
- The DG's activities entail a significant amount of document handling: need to be able to identify and retrieve the "right" document easily and accurately at any time;
- Management of sensitive documents;
- Increased number of access to documents requests.

DG COMP had already implemented a series of measures before 2008:

- Increased synergies between the registries in a single unit since 2007;
- Case management applications<sup>37</sup> are increasingly paperless;
- Need to know security measures implemented in case management applications<sup>37</sup>.

DG COMP decided to undertake the following additional actions in 2008:

- Mergers registry and document management moved to electronic platform;
- Horizontal tasks document management moved to electronic platform;

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<sup>37</sup> DG COMP uses four Case Management Applications (CMAs): Natacha (for Antitrust), CMS (for merger control), ISIS (for State aid control) and Chopin (for horizontal projects and tasks). These CMAs have three main functionalities:

(i) they play a role as the database containing all key information about past and on-going projects and cases, for example the number and name of the case, the date of opening, the parties or Member State(s) involved, the date of the final decision, and so on;

(ii) they include project management type functionalities: in particular CMAs include a calendar function which is helpful for the management of cases with a mandatory legal deadline like merger or State aid cases;

(iii) finally CMAs are the electronic repository for case documents; these repositories are e-Domec compliant.

- Strengthen and simplify paperless procedures, also with the support of e-greffe;
- Verify e-domec compliance;
- Incorporate security in every aspect of document management (e.g. new marking system).

**Assessment criteria:**

| <b>Level of Control</b>     | <b>Experience of the operation of the control system</b>  | <b>Capacity (staff)</b>   | <b>Capacity (systems&amp; procedures)</b>  |
|-----------------------------|---|---|--|
| Major improvement needed    | N/A   | N/A   | N/A  |
| Improvement needed          | N/A   | N/A   | N/A  |
| Minor/no improvement needed | As regards document management, no previous instances of inadequate / ineffective controls that exposed the DG to its key risks | As regards document management, sufficient knowledge and skills are available to manage the key risks effectively | As regards document management, system controls / procedures are designed, implemented to manage the key risks |

**Conclusion on building block 4:**

- As regards processes and procedures, DG COMP continues to invest in ensuring processes and procedures are efficient because many of its activities are subject to tight legal deadlines and open to judicial review. However this is of course an area for continuous investment. Nevertheless, IAC audits found that the efficiency of the financial areas could be significantly enhanced by improved documentation of procedures which should include review and reporting mechanisms where appropriate.
- As regards document management, the use of electronic depositories is appropriate for DG COMP core activities and is increasingly desirable for all operations due to the size of the DG and the frequent need to store and retrieve large and/or shared documents. Security is strengthened through the "need to know" functions and another series of measures taken in the context of the Security Action Plan (e.g. new marking system).

**2.2.3. - Conclusion on the functioning and effectiveness of internal control systems**

The analysis of DG COMP's compliance with internal control standards requirements and the effectiveness of their implementation show that most standards have already been fully and effectively implemented by the DG. In the rare instances when this has not been the case, specific actions have been undertaken in order to swiftly reach compliance.

In addition, DG COMP continues to strengthen the implementation of its business framework by ensuring procedures are known by staff and are updated regularly, having in place appropriate checks and balances throughout its procedures and ensuring appropriate security measures are in place. During the audits performed in 2008, the IAC found no situation where the ICS was not implemented to the base line standard or was manifestly ineffective.

## **Section 2.3 - Building blocks towards reasonable assurance of the AOD for the legality and regularity of underlying transactions for the activities assigned to him**

### **2.3.1 - Assessment by management**

#### ***Input: Resources devoted to ex ante and ex post controls***

Staff involved in financial management: 1 AOD, 2 AOS with general sub-delegations, 9 AOS with limited sub-delegations.

There are 4 financial officers in the financial cell performing financial ex-ante controls.

Operational ex-ante controls are performed by the operational director in charge.

#### ***Output: Level and nature of controls carried out***

Every transaction is subject to first level ex-ante controls in accordance with our financial circuits. The controls are both operational and financial.

Specific attention is made to payment delays (e.g. follow-up, reporting)

#### ***Result: What the controls allowed to discover/remedy***

Ex-ante operational and financial controls allow the DG to discover mistakes and rectify these immediately.

One control revealed that one action grant may not have been executed in accordance with the grant agreement. The final payment of 23.564 euro (the total amount of the grant is 47.129 euro) was therefore refused pending further enquiries. OLAF has been informed.

Furthermore, the increased attention to the payment process have also allowed us to reduce the average payment delay from 33,56 days in 2007 to 23,03 in 2008.

The assurance that these controls are working effectively is obtained through the IAC yearly financial review. The review in 2008 detected an error rate for payments of the audited transactions of 0,53%.

Instances of overriding of controls or deviations from established policies in 2008: 3

- One deviation relates to a late signature of a purchase order from the contractor's part. The Implementing Rules stipulates that all contracts/purchase orders must be signed by both parties before work can start. The contractor failed, despite several reminders, to do this, but since the work was carried out as described in the contract it was appropriate to honour the invoice
- Another deviation is related to 2007's very tight budget situation. In order to pay for the contract of the Monitoring Trustee we were forced to make internal transfers from other budget lines. Since the need for those lines had been underestimated we had to pay for these expenses using 2008 credits
- The last deviation relates to a budgetary commitment made "à posteriori" following the judgment of the Court of First Instance in September 2007 in the Microsoft case, which partially annulled Article 7 of Commission Decision 2007/53/EC of 24 March 2004 "in so far as [...] all the costs associated with the appointment of the monitoring trustee, including his remuneration, be borne by Microsoft", and thus created a legal obligation. The budgetary commitment could only be made following the budgetary reinforcement received on Amending Budget No 3/2008 and upon receipt of the invoice for these costs.

None of the deviations are of a systemic nature, and in order to improve the reporting within the financial team we have put in place additional checks.

Number of negotiated procurement procedures. 2 (see annex 4)

Other indicators relating to procurement procedures:

- No complaints received from unsuccessful economic providers
- No cases received by the Ombudsman
- No proceedings initiated by providers against the Commission before the Court

### **2.3.2 – Results from independent audits during the reporting year**

The focus of the audit work performed by the IAC in 2008 was to continue reviewing competition enforcement processes. In addition, DG COMP's financial activities, although relatively limited, were audited. In 2008 this covered a sample of financial transactions and an audit of the financial circuits in DG COMP.. The annual audit of financial transactions also reviewed the implementation of the previous year's recommendations. In total 4 final audit reports (Audit of Financial Transactions, Audit of Antitrust procedures, Audit of financial circuits, Access to File) were issued and action plans received from auditees [three of them were optional].

Based on the results of the audits, the IAC believes that the internal control system in place provides reasonable assurance regarding the achievement of the business objectives set up for the activities audited.

In addition, one audit report was finalised by IAS in 2008 (Recovery orders) giving rise to one important recommendation only. The action plan indicates that the recommendation is now implemented.

### **2.3.3. – Follow up of action plans in reply to audit work performed in previous years and previous year's reservations**

- One IAS follow up audit (SPP/ABM Audit 2006) was finalised and concluded that all recommendations have been implemented.
- IAC financial review: all but one recommendation (documentation of procedures) implemented.

## **Part 3 Reservations and their impact on the declaration**

### **Section 3.1 Materiality criteria used**

DG COMP applies the guidelines provided in the communication COM(2003)28 final, completed by the discussions with the European Court of Auditors and the work done since, notably the work of families of DGs, which explain when a deficiency may be presumed to be material (and therefore highlighted in the form of a reservation).

DG COMP manages a very small budget and the number of transactions is limited. Therefore, materiality should rather be assessed in the framework of a system-based approach:

- First the seriousness (key control at stake? Preventive or detective control? Probability and impact of a real deficiency? Risk of errors or loss of efficiency?) and scope (which programme? which Member state or third country affected?) of the weakness identified should be assessed, together with mitigating controls and remedial measures in place.
- Then its maximum potential financial impact should be determined as precisely as possible, based either on results of actual ex post controls (sampling method, with a certain level of confidence) or on realistic default assumptions (financial corrections, 10 to 20 % of transactions within the system actually at risk, depending on the cause of error and the potential for timely discovery and recovery, for example).

### **Section 3.2 Making the reservation(s)**

The results of audit reports, internal control reviews and risk assessments as described here-above indicate that DG COMP's system of internal control has functioned as intended during 2008 and has not identified any material deficiencies. DG COMP therefore makes no reservation.

#### **Part 4. Declaration of assurance**

*I, the undersigned,*

*Director-General of DG COMP*

*In my capacity as authorising officer by delegation*

*Declare that the information contained in this report gives a true and fair view*

*State that I have reasonable assurance that the resources assigned to the activities described in this report have been used for their intended purpose and in accordance with the principles of sound financial management, and that the control procedures put in place give the necessary guarantees concerning the legality and regularity of the underlying transactions.*

*This reasonable assurance is based on my own judgement and on the information at my disposal, such as the results of the self-assessment, ex post controls, the work of the internal audit capability, the observations of the Internal Audit Service and the lessons learnt from the reports of the Court of Auditors for years prior to the year of this declaration.*

*Confirm that I am not aware of anything not reported here which could harm the interests of the institution.*

Brussels,

*(signed)*  
Philip LOWE