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I – Instruments

A – ANTI-TRUST – ARTICLES 81, 82 AND 86 EC

1. APPLICABLE RULES

1.1. White Paper on damages actions for breach of the EC anti-trust rules

1. On 2 April, the Commission adopted the White Paper on damages actions for breach of the EU anti-trust rules¹, to which is annexed a Commission Staff Working Paper, which explains in more detail the policy proposals. The White Paper follows on from a Green Paper on the same subject, published in December 2005, on the public consultation and on opinions of the European Parliament (EP) and of the European Economic and Social Committee (EESC) on that Green Paper.
2. The White Paper is part of an ongoing policy project of the Commission. The European Court of Justice (ECJ) has stated that, under EU law, any individual can claim compensation for harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC². The Commission has found that, in practice, victims of anti-trust infringements only rarely obtain compensation. The White Paper is focussed on changing this current ineffectiveness by making this right to compensation more effective in Europe. The White Paper puts forward concrete proposals to overcome the obstacles which are currently standing in the way of effective compensation.
3. The primary objective pursued is to improve compensation of all victims. At the same time, more effective compensation mechanisms will inherently produce beneficial deterrent effects. The proposals in the White Paper consist of balanced measures which are rooted in European legal culture and traditions and are designed to overcome the obstacles identified by the Commission.
4. The individual policy proposals of the Commission address the following issues:
 - **Collective redress** - through either (a) **group actions** brought by victims acting together or (b) **representative actions** brought, for example, by a consumer group or business association on behalf of all consumers or businesses who have suffered a harm;
 - **Access to evidence** crucial for the bringing of the claim and under the control of the other party;

¹ Further information on this issue and on the policy initiative of the Commission in this field can be accessed here: <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

² 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.

- **Final Infringement decisions by national competition authorities** are binding in subsequent civil actions for damages – a similar rule already exists for Commission decisions under Article 16(1) of Regulation (EC) No 1/2003;
 - If an element of **fault (intent or negligence)** has to be proven for the claim to succeed, the burden of proof should lie with the infringer;
 - Clarification of what **type of damages** compensation can be claimed for;
 - Clear rules on the **passing-on defence**, making it easier for **indirect victims to sue** and making it clear that, while the passing-on defence is admissible, the burden of proof lies with the infringer;
 - Clear **limitation periods**, taking into account in particular the case of continuous infringements;
 - **Cost rules** for actions for damages;
 - Interaction between **leniency programmes** and actions for damages.
5. The White Paper triggered a broad debate among stakeholders, and a large number of comments were submitted in the framework of the public consultation, which resulted in an almost unanimous approval of the general approach to antitrust damages actions pursued by the Commission, namely the guiding principle of compensation. There was a wide acknowledgement of the existence of obstacles that prevent effective redress for victims of infringements of the competition rules. Different opinions were voiced as to the substantive measures suggested in order to remedy the problems identified.
6. In its White Paper, the Commission has stated that it intends to draw up non-binding guidance for quantification of damages in anti-trust cases in order to facilitate this calculation. The Commission has since awarded a contract for an external study on the quantification of damages.

1.2. Cartels

1.2.1. *The Settlements Package*

7. The Commission has introduced a new mechanism which will allow the Commission to settle cartel cases by means of a simplified procedure. Under this procedure, the parties - having seen the evidence in the Commission file - choose to acknowledge their involvement in the cartel, the precise nature of their infringement and their liability for it. In return for this acknowledgement, the fine is reduced by 10%. Settlements aim to simplify the administrative proceedings and could result in fewer Commission resources being devoted to litigation before the Community courts in cartel cases. This will in turn free up Commission resources to pursue other cases.
8. Cooperation within the Settlements Package is different from the voluntary production of evidence to initiate or advance the Commission's investigation, which is already covered by the Leniency Notice. The Leniency Notice rewards companies involved in a cartel which voluntarily disclose its existence to the Commission and

provide evidence to prove the infringement. The Settlements Notice will reward concrete contributions to procedural efficiency.

9. Parties have neither the right nor the duty to settle, but in cases where companies are convinced that the Commission could prove their involvement in a cartel to the required legal standard, a settlement can be reached with the Commission on the scope and duration of the cartel, and on the individual liability of the companies involved. To this end, parties will be informed about the likely objections and the evidence supporting those objections, and will be given the opportunity to state their views before formal objections are sent out. If the parties choose to introduce a settlement submission acknowledging the objections, the Commission's statement of objections (SO) would reflect the contents of the submission by the parties and therefore could be much shorter than a SO issued without prior cooperation. Since parties will have been heard in anticipation of the "settlement" SO, other procedural steps can be simplified in order that, following confirmation by the parties, the Commission can proceed swiftly to adopt a final decision after consulting Member States in the Advisory Committee of representatives of all Member States.
10. A settlement only takes place when the Commission decision reflects the parties' settlement submissions. The Commission may only depart from the parties' settlement submissions by reverting to the standard procedure. In addition, if no settlement were explored or reached, the standard procedure would apply by default.
11. The legislative package consists of a Commission Regulation³ together with a Commission Notice (the settlement notice)⁴ explaining the new system in detail. The settlement package entered into force on 1 July 2008.

1.3. Other agreements and concerted practices

1.3.1. Vertical agreements

12. 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. 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.
13. The current EU block exemption regulation applicable to vertical agreements (the BER)⁵ forms a package with the guidelines on vertical restraints (the Guidelines)⁶. This package was the first of a new generation of exemption regulations and guidelines inspired by a more economic and effects-based approach. The basic aim of this regulatory framework was to simplify the rules applicable to supply and distribution agreements and to reduce the regulatory burden, especially for

³ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases ([OJ L 171, 1.7.2008, p. 3](#)).

⁴ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases ([OJ C 167, 2.7.2008, p. 1](#)).

⁵ Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ([OJ L 336, 29.12.1999, p. 21](#)).

⁶ Commission Notice Guidelines on Vertical Restraints ([OJ C 291, 13.10.2000, p. 1](#)).

companies lacking market power, such as small and medium-sized enterprises (SME), while ensuring a more effective control of agreements entered into by companies holding market power.

14. In early 2008, the Commission began to review the regulatory framework for the assessment of the vertical agreements under EU competition law, given that the BER is due to expire on 31 May 2010. The Commission is examining how the rules on vertical agreements 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 NCA in the European Competition Network (ECN) in which context a working group has been set up to discuss the application of, and experience with, the current rules. The review will continue throughout 2009.

1.3.2. *The Review of the Motor Vehicle Block Exemption Regulation*

15. In accordance with Article 11(2) of Regulation 1400/2002, the Commission adopted, on 31 May, an evaluation report on the operation of the motor vehicle block exemption Regulation⁷ (MVBER). The adoption of this report was the first formal step in a procedure that will ultimately decide the form and content of the regime that is to apply to the motor vehicle sector after the period of validity of the MVBER ends in May 2010. It contains an in-depth analysis of how the Regulation has operated, although without making, at this stage, any concrete proposals for the future.
16. The MVBER sets out the conditions for the block exemption of motor vehicle distribution and after-sales service agreements. It was adopted in July 2002 and became applicable on 1 October 2003. Its main goal was to create a safe harbour for such agreements, reflecting the more economic and effects-based approach of Regulation 2790/1999⁸ (which applies to vertical agreements in all sectors other than motor vehicles), but at the same time introducing more detailed provisions and stricter conditions specific to the motor vehicle sector.
17. The Evaluation Report was drawn up on the basis of an extensive fact-finding exercise which began in 2007 and involved all the various groups of stakeholders in the motor vehicle industry. In summary, the evidence uncovered by the Commission's fact-finding exercise shows that, on the market for the sale of new vehicles, competition between car manufacturers has become more intense mainly owing to external factors such as manufacturing over-capacity, technological innovation and closer integration of global markets. On the aftermarkets, independent repairers now have better access to technical information, thanks to Commission enforcement actions⁹. Meanwhile, the number of authorised repair outlets has increased, because – in line with general competition policy – manufacturers (whose networks have high market shares as regards the repair of their

⁷ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector ([OJ L 203, 1.8.2002, p. 30](#)).

⁸ See footnote 5.

⁹ In September 2007, the Commission adopted four decisions that legally bind *DaimlerChrysler*, *Toyota*, *General Motors* and *Fiat* to commitments to provide technical information about car repairs to all independent garages in the EU. The decisions were adopted under Article 9(1) of Regulation 1/2003.

vehicles) must allow everyone into their networks, provided that quality criteria are met. Suppliers of spare parts have maintained their competitive position *vis-à-vis* the vehicle manufacturers' own spare parts distribution channels.

18. The report concludes that the general framework of the MVBER has had positive effects overall. However, many of the detailed sector-specific provisions, such as those allowing dealers to run showrooms without repair shops, have proved unnecessary, and some may have been counter-productive. For instance, the higher (40%) market share threshold below which quantitative selective distribution agreements may benefit from the exemption may have skewed manufacturers' choices towards a uniform distribution model. In addition, over-prescriptive rules in areas such as multi-brand vehicle sales and the opening of additional sales outlets may have encouraged the introduction of more onerous dealership standards, thereby making distribution more expensive – to the detriment of consumers. Other provisions, such as those obliging manufacturers to give independent repairers access to technical information, have been effective, but in the future will be superseded by rules in other EU policy areas (namely, Council Regulation 715/2007 on motor vehicle emissions¹⁰). The suggestion from this report, therefore, is that car owners might benefit from improvements in competition if less complex rules were to apply to the sector.
19. Following the publication of the Report, the Commission received around 115 comments from a wide range of stakeholders, including vehicle manufacturers, dealers and authorised repairers, the independent motor trade, consumers, national authorities and the legal community. By far the most contributions came from authorised car dealers, but there were only a limited number of replies from consumer associations.
20. The main points raised by the stakeholders fall into two broad categories. In essence, the first category reflects a concern that bringing the motor vehicle sector under the common rules on vertical restraints could adversely affect the current level of protection of competition in the market. These provisions in the regulation include the protection of parallel trade, the exemption of location clauses in selective distribution agreements (namely, in specific situations where the protection of intra-brand competition might deliver benefits to consumers), the linking of sales and after-sales activities, the availability of technical information to independent operators, and the protection of alternative channels for spare parts distribution. The second category seems to relate less to competition issues than to commercial concerns, although the latter are still politically sensitive nevertheless. These concerns relate to dealer protection and multi-branding.
21. The form and content of the future regime will be decided in the next stage of the review process, which will include as a next step the publication of a Commission Communication based on an impact assessment of a range of possible options.

¹⁰ 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](#)).

1.3.3. *Review of the Insurance Block Exemption Regulation*

22. DG Competition is currently carrying out a review of the Block Exemption Regulation in the insurance sector¹¹ (hereinafter 'the Insurance BER') with a view to determining whether a new Insurance BER should be adopted before the current one expires on 31 March 2010.
23. The key policy issue at stake is whether a new Insurance BER should be adopted, taking into consideration the reasons for the adoption of the current BER in 2003, the development of the sector since then, submissions from market participants and the Commission's overall policy objectives.
24. The Final Report of the Commission's sector inquiry into business insurance – published on 25 September 2007 – did not directly investigate this matter. However, some comments received in the context of the inquiry argued in favour of maintaining an Insurance BER beyond March 2010. Clearly, therefore, there was a need for full consultation and a review in order to analyse all issues and arguments, and to determine whether the insurance sector would still require specific rules on the application of Article 81(3) EC beyond March 2010.
25. The review exercise started in November 2007 with the consultation of the ECN, followed by the publication of a consultation paper in April 2008¹². The Commission is required to submit to the EP and Council, by 31 March 2009, a report on the functioning of the Insurance BER together with options for amendment as may appear necessary in the light of experience.
26. Of the 58 replies to the consultation, by far the majority (46) of respondents are in favour of renewal, 11 are equivocal and only one (an Italian Consumer Association) is unequivocally against renewal. Of the 12 NCA that responded, only three are unequivocally against renewal. Four are in favour of renewal, one is in favour of renewal with amendments and four are undecided. By far the greatest number of contributions came from insurers' and brokers' associations (26), as well as from insurance companies and brokers (8). All of these undertakings were in favour of renewal. Other entities, such as law firms, actuaries or individual citizens, also replied in favour of renewal. DG Competition sent targeted questionnaires to all national consumer associations and to several large insurance customers. Seven consumer organisations/groups representing consumers replied: one was in favour of renewal, one was against and the five others were undecided, but reported a range of problems in relation to the functioning of the Insurance BER. Of the seven associations of undertakings representing customers to whom targeted questionnaires were sent, only the Federation of European Risk Management Associations (FERMA) replied and it favoured renewal. Targeted questionnaires were also sent to Supervisory Authorities in all Member States, of which eight replied. Slovakia, Romania, Spain and Latvia were unequivocally in favour of renewal; Italy, Czech Republic and Portugal were uncertain, but leaned in favour of renewal; Belgium was undecided.

¹¹ Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector ([OJ L 53, 28.2.2003, p. 8](#)).

¹² See Press Release [IP/08/596](#), 17.4.2008.

27. Whether the Insurance BER should be renewed or not depends on the answers to the following questions:

- Do the business risks or other issues in this sector make it "special" and different from other sectors, and does this lead to an enhanced need for cooperation?
- If so, does this enhanced need for cooperation require a legal instrument such as the BER or Guidelines to protect or facilitate it (in comparison to other sectors, for example, where there is a high level of cooperation without such a legal instrument)? and
- If so, is the current BER the most appropriate legal instrument for this purpose (or would partial renewal, amended renewal or Guidelines be preferable)?

28. If it is decided to renew the Insurance BER or any part of it, drafting and internal consultation will take place in the second half of 2009 with a view to adoption at the beginning of 2010. Should the Commission decide against renewal, a Communication to that effect will be published in 2009.

1.4. Abuse of dominant positions (Article 82 EC)

29. On 3 December, the Commission issued Guidance on its enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings. This followed the publication by the Commission, in December 2005, of a Discussion Paper on the application of Article 82 to such conduct.

30. The Guidance sets out an effects-based approach to Article 82. The Commission will pursue, as a matter of priority, exclusionary conduct by dominant undertakings that is likely to restrict competition in such a way as to have harmful effects on consumers. The Guidance establishes the analytical framework that the Commission employs in determining whether the exclusionary conduct of a dominant undertaking is likely to result in consumer harm.

31. The Guidance consists of a general part, which sets out the main principles of an effects-based approach to determining enforcement priorities in the application of Article 82, and then applies this general analytical framework to 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 provides transparency and predictability as to the circumstances that are liable to elicit an intervention from the Commission. Even more importantly, it is meant to dissuade dominant undertakings from engaging in certain types of conduct in the first place.

2. APPLICATION OF ARTICLES 81, 82 AND 86 EC

2.1. Cartels

32. In 2008, the Commission continued to attach high priority to the detection, investigation and sanctioning of cartels. The Commission's activities were focused on

significant hard-core cartels, in particular those with a European or worldwide scope. The Commission issued seven final decisions¹³ in which it fined 34¹⁴ undertakings a total of EUR 2 271 million (compared to 2007 when eight final decisions were issued, and 41 undertakings were fined a total of EUR 3 338 million). The Commission imposed the highest fine per cartel case to date of EUR 1 383 million in the *Car Glass* case and also, in the same case, the highest fine per undertaking for a cartel violation, imposing a penalty of EUR 896 million on Saint Gobain.

33. A key aspect in the detection of cartels is the Commission's leniency policy, which offers incentives to cartel members to report their illegal activities. December 2006 saw the introduction of a revised leniency notice (the 2006 Notice)¹⁵. The 2006 Notice is the Commission's third leniency notice, following earlier versions in 1996 and 2002, and applications under the revised notice were made in 2008. The Commission received 50 applications for immunity¹⁶ and 30 applications for a reduction of fines under the 2006 Notice from when it entered into force up to the end of 2008.
34. Although the leniency policy is an effective tool in detecting cartels, recent decisions such as *NBR*, *International Removal Services* and *Car Glass* show that the Commission is able to uncover cartel behaviour on its own initiative, outside of its leniency policy. The Commission continues to place considerable weight on such *ex officio* investigations, which may result from market monitoring, sector enquiries and complaints, and also via national competition authorities in the ECN.
35. Once it has detected the existence of a cartel, the Commission has proceeded to exercise its powers of investigation, in particular its power to conduct inspections of business premises. On-site inspections have taken place in a wide variety of sectors, which include ship classification¹⁷, cement¹⁸, the international airline passenger sector¹⁹, consumer detergents²⁰, traders and distributors of cereals and other agricultural products²¹ and smart card chips²². Moreover, the Commission exercised for the second time its power to conduct a search of a private home.
36. The Commission has also sought to impose appropriate sanctions to punish those participating in cartels and to put in place suitable deterrence against entering into

¹³ Case COMP/38.628 *NBR* (not yet published in the OJ), Case COMP/38.543 *International removal services* (not yet published in the OJ), Case COMP/38.695 *Sodium chlorate* (not yet published in the OJ), Case COMP/39.180 *Aluminium fluoride* (not yet published in the OJ), Case COMP/39.181 *Candle Waxes* (not yet published in the OJ), Case COMP/39.188 *Bananas* (not yet published in the OJ) and Case COMP/39.125 *Car Glass* (not yet published in the OJ).

¹⁴ This figure does not include the companies that received immunity from fines for cooperation under the Leniency Notice.

¹⁵ Commission Notice on Immunity from fines and reduction of fines in cartel cases ([OJ C 298, 8.12.2006, p. 17](#)).

¹⁶ Where several applications for immunity have been received for the same alleged infringement, the first application is counted as an immunity application and the subsequent ones as applications for a reduction of fines unless the first application is rejected.

¹⁷ See [MEMO/08/65](#), 30.1.2008.

¹⁸ See [MEMO/08/676](#), 5.11.2008.

¹⁹ See [MEMO/08/158](#), 11.3.2008.

²⁰ See [MEMO/08/424](#), 20.6.2008.

²¹ See [MEMO/08/496](#), 10.7.2008.

²² See [MEMO/09/1](#), 7.1.2009.

cartel behaviour. The new Guidelines on fines²³, introduced in 2006, were exclusively applied in the above decisions. Three points in particular are evident from Commission's decisions to impose fines in 2008. First, companies that obstruct the Commission's investigations risk severe penalties of up to one percent of annual turnover. The Commission imposed a fine of EUR 38 million on E.ON for the breach of a Commission seal in E.ON's premises during an inspection. Second, repeat offenders continued to see a significant increase in the amount of fine imposed. Arkema's fine was increased by 90% in *Sodium Chlorate* and Saint Gobain's by 60% in *Car Glass*. Moreover, ENI and Bayer, which had seen their fines increased as repeat offenders in the *Chloroprene Rubber* case in 2007, also had their fines increased for that reason in the *Candle Wax* case (ENI) and the *NBR* case (Bayer). Third, the Commission has shown that, under exceptional circumstances, it may use its discretion to reduce a fine. In the *International Removal Services* case, although the Commission saw no grounds for reducing the amounts of the fines for four undertakings, who claimed their inability to pay²⁴, the Commission exceptionally took into account the inability to pay and the particular circumstances concerning the individual situation of a fifth undertaking, Interdean, and reduced its fine by 70%.

2.2. Other agreements and concerted practices

37. In the context of rights management, the Commission adopted, on 16 July²⁵, a decision based on Article 81 EC prohibiting European Economic Area (EEA) collecting societies which are members of the *International Confederation of Societies of Authors and Composers (CISAC)* from maintaining membership restrictions and exclusivity clauses under their reciprocal bilateral agreement. The decision also prohibits a concerted practice which extended the traditional national monopolies of collecting societies into the cable, satellite and internet sectors and resulted in strict segmentation of the market along national borders.

2.3. Abuse of dominant positions (Article 82 EC)

38. In November, a commitment decision was adopted rendering legally binding commitments proposed by E.ON to address concerns raised in the course of an investigation pursuant to Article 82 EC. This investigation was started as a follow up to the energy sector inquiry carried out in 2006. In the course of this investigation, the Commission came to the preliminary conclusion that E.ON might have infringed Article 82 by withdrawing available generation capacity from the German wholesale electricity markets and have deterred new investors in electricity generation. Furthermore, the Commission had concerns that E.ON may have favoured its production affiliate in terms of providing balancing services, while passing the resulting costs on to final consumers, and thus prevented other power producers from exporting balancing energy into its transmission zone. E.ON offered to divest around 5000 MW of its generation capacity to meet concerns regarding the generation market and to divest its extra-high voltage network to remove the incentive of the operator of that network to favour a particular supplier.

²³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 ([OJ C 210, 1.9.2006, p. 2](#)).

²⁴ See paragraph 35 of the above mentioned Guidelines on fines.

²⁵ Case [COMP/38.698 CISAC](#) (not yet published in the OJ).

39. Microsoft was the first company in the history of competition policy in the EU to have penalty payments imposed on it for non-compliance with a previous decision of the Commission. The Commission pursued its proceedings against *Microsoft* to ensure compliance with the 2004 Decision and with the principles laid down in the judgment of the Court of First Instance (CFI) of 17 September 2007, with regard to the pricing and licensing terms for the interoperability information that Microsoft has to disclose as part of the remedy imposed by the 2004 Decision. In 2006, the Commission had imposed on Microsoft a definitive penalty payment of EUR 280.5 million for not providing complete and accurate interoperability information. After a SO sent in March 2007, the Commission adopted on 27 February a decision concluding that Microsoft had not complied with its obligation to offer the complete and accurate interoperability information on reasonable and non-discriminatory terms by 21 October 2007. A definitive penalty payment of EUR 899 million was imposed on Microsoft²⁶.
40. In the *Intel case*, a supplementary statement of objections (SSO) was issued on 17 June reinforcing the Commission's preliminary view outlined in a SO of 26 July 2007 that Intel had infringed EC Treaty rules on abuse of a dominant position with the aim of excluding its main rival, AMD, from the x86 Central Processing Units (CPU) market.
- 2.4. State measures: Public undertakings and/or undertakings with exclusive or special rights**
41. The Commission was also active in the area of Article 86 EC in 2008.
42. In March, the Commission adopted a decision finding that the Greek State had infringed Article 86 in conjunction with Article 82 EC by maintaining in force legal provisions which guaranteed the state-owned incumbent Public Power Corporation (PPC) access to almost all exploitable lignite mines in Greece²⁷. Lignite-fired power generation being the cheapest form of electricity production in Greece, this situation created an inequality of opportunity between market operators and allowed PPC to maintain its dominant position on the wholesale electricity market. Greece was requested to submit proposals on how to ensure that competitors obtain sufficient access to lignite which - should the Commission consider the proposals to be satisfactory – be made legally binding on the Greek State by way of a second decision.
43. On 7 October, the Commission adopted a decision finding that, by extending the monopoly of the postal incumbent, Slovenská Pošta, to services for the delivery stage of hybrid mail, without justification, the Republic of Slovakia had infringed Article 86 EC (in conjunction with Article 82 EC)²⁸. The decision finds that, in the Republic of Slovakia, the delivery of hybrid mail²⁹ was open to competition until recent amendments to the postal legislation, and that several private operators had

²⁶ Case [COMP/34.792 Microsoft](#) (not yet published in the OJ).

²⁷ See Press Release [IP/08/386](#), 5.3.2008.

²⁸ Case COMP/39.562 *Slovakian postal Law* ([OJ C 322, 17.12.2008, p. 10](#)). See also Press Release [IP/08/1467](#), 7.10.2008.

²⁹ Hybrid mail is a specific form of postal services where the content is electronically transferred from the sender to the postal service operator who then prints, envelopes, sorts and delivers the postal items.

accordingly entered that market. The decision also finds that the Republic of Slovakia failed to provide evidence that this re-monopolisation of the delivery of hybrid mail was necessary for the provision of the postal universal service. The Republic of Slovakia had one month to inform the Commission of the measures undertaken to put an end to the infringement. In the absence of any such measure being submitted to the Commission, the latter initiated an infringement procedure against the Republic of Slovakia, for non compliance with the decision of 7 October³⁰.

3. SELECTED COURT CASES

3.1. The CFI upholds the Commission's Deutsche Telekom decision³¹

44. On 10 April, in the *Deutsche Telekom v Commission* case, the CFI upheld the Commission decision of 21 May 2003 and confirmed that Deutsche Telekom had been abusing its dominant position on the markets for direct access to its fixed telephone network³².
45. The Commission had imposed a fine of EUR 12.6 million on Deutsche Telekom for charging its competitors for (wholesale) access to its network higher prices than the retail prices it charged its own retail customers. This pricing in the form of a margin squeeze forced competitors to charge their customers prices that were higher than those charged by Deutsche Telekom to its own end-users, or incur losses.
46. In its judgment the CFI rejected all the arguments put forward by Deutsche Telekom. The Court confirmed that the Commission had correctly found that Deutsche Telekom can be held responsible under competition law for the margin squeeze although its fees met the general price indications imposed by the competent National Regulatory Authority (NRA). The CFI found that during the period when the anti-competitive conduct took place Deutsche Telekom had sufficient discretion to end or to reduce the margin squeeze, but did not use that discretion in a manner that would avoid violating competition law.
47. Regarding the methods used by the Commission to assess the existence of a margin squeeze, the CFI held that the abusive nature of the conduct in question was connected to the spread between the prices for wholesale access and the related retail prices. For this reason, the Commission was not required to demonstrate that the retail prices of Deutsche Telekom were, as such, abusive.
48. The CFI also ruled that the decisions of national authorities in respect of Community telecommunications law do not in any way affect the Commission's power to find infringements of competition law.

³⁰ See Press Release [IP/08/1997](#), 17.12.2008.

³¹ Case [T-271/03](#) *Deutsche Telekom AG v Commission*, not yet reported in the ECR.

³² Deutsche Telekom decided to appeal against the CFI judgment and the case, [C-280/08 P](#) *Deutsche Telekom v Commission*, is pending before the ECJ.

3.2. AC Treuhand v. Commission³³

49. In its appeal, the applicant, *AC Treuhand*, essentially disputed the importance that the Commission attributed to its activity in the organic peroxides cartel³⁴. *AC Treuhand* was not a producer of the cartel products but a consultancy firm which provided the cartel members with clerical-administrative services subject to their instructions.
50. In order to hold this consultancy firm liable under Article 81(1) EC, the CFI stated that an agreement incompatible with Article 81 EC is merely another way of indicating coordinated and/or collusive conduct which is restrictive of competition and in which at least two distinct undertakings participate, after expressing their joint intention to conduct themselves on the market in a particular way. In that regard, any restriction of competition within the common market which comes as a result of collusive conduct may be qualified as an agreement restrictive of competition under Article 81(1) EC. For this provision to apply, it is not relevant whether the undertaking concerned is active on the particular market where the restriction of competition takes place. The CFI also stated that, under Article 81(1) EC, the undertaking may participate in the implementation of a restriction of competition even if it does not restrict its own freedom of action on the market on which it is primarily active.

3.3. Lelos & others v. GlaxoSmithKline³⁵

51. The background to this judgment is an Article 234 EC procedure (preliminary reference) which relates to the application of Article 82 EC in the pharmaceutical sector. Specifically, the ECJ had to address the question of whether the refusal by a dominant pharmaceuticals company to supply certain medicinal products to wholesalers engaged in parallel trade may constitute an abuse of that company's dominant position. In that context, the national court making the referral asked the ECJ about the relevance of a series of factors, such as the degree of regulation to which the pharmaceuticals sector is subject in Member States, the impact of parallel trade on the revenues of the pharmaceuticals companies, and the question of whether parallel trade is capable of generating financial benefits for the ultimate consumers of the medicinal products.
52. The ECJ held that Article 82 EC must be interpreted to mean that a dominant pharmaceuticals company which, in order to put an end to parallel exports carried out by certain wholesalers from one Member State to other Member States, refuses to meet *ordinary* orders from those wholesalers, is abusing its dominant position. In other words, the ECJ found that a refusal to meet orders which are *out of the ordinary* will not be considered an abuse of dominance. The ECJ left it to the national courts to determine whether the orders in dispute are out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in that Member State in the light of both (i) the size of those orders in relation to the requirements of the market in the (exporting) Member State concerned, and (ii) the

³³ Case [T-99/04 AC - Treuhand AG v Commission of the European Communities](#), not yet reported in the ECR.

³⁴ Case [COMP/37.857 Organic peroxides](#) (OJ L 110, 30.4.2005, p. 44).

³⁵ Joined Cases [C-468/06 to C-478/06 Sot. Lelos kai Sia EE & Others v GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE](#), not yet reported in the ECR.

previous business relations between the dominant pharmaceuticals company and the wholesalers concerned.

53. It is noteworthy that the ECJ also stressed the relevance of the single market imperative in European competition law. To this end, the ECJ reiterated its previous case-law in relation to Article 81 EC, whereby any agreement which tends to restore national divisions in trade between Member States – i.e. which may frustrate the objective of the EC Treaty to achieve the integration of national markets through the establishment of a single market – is considered to have as its object a restriction of competition within the meaning of Article 81 EC. Hence, the ECJ made it clear that vertical agreements which aim at preventing or restricting parallel exports are still considered anti-competitive *by object* – i.e. it is not necessary to show that the agreement has anti-competitive effects in order to find an infringement of Article 81(1) EC.

3.4. Competition Authority v. Beef Industry Development Society³⁶

54. In this preliminary ruling under Article 234 EC, the ECJ had to rule on the scheme of the *Beef Industry Development Society* in Ireland under which some of the beef processors undertake to leave the processing industry in order to reduce overcapacity. This scheme came out of a market study commissioned by the Irish Government and industry representatives, which found that there was considerable overcapacity in the processing industry, which would lead to a decline in profitability.

55. The ECJ found that a reduction of capacity under the circumstances of this case has as its object a restriction of competition and, consequently, an assessment of its actual effects was not necessary in order to deem it incompatible with Article 81(1) EC. In its ruling, the ECJ did not expressly exclude the possibility that a reduction of overcapacity could result in economies of scale among processors that stay in the industry. However, it was for the defendant to prove under Article 81(3) EC that these positive effects offset the negative effects associated with reductions of capacity.

3.5. The ECJ clarifies the obligations of collecting societies as regards royalties setting under Article 82 EC

56. On 11 December, the ECJ issued a preliminary ruling in a case brought by two TV channels, *Kanal 5 and TV 4 AB*, against *STIM*, the Swedish collecting society, for abuse of a dominant position³⁷. The ruling is important in two respects. The Court first held that a copyright management organisation with a dominant position does not abuse that position when it bases its music royalties charges to commercial TV channels partly on the broadcasters' revenues, under the condition that the sum is proportionate to the amount of music used and provided that no other viable method of supervision enables the use of those works and the audience to be identified more precisely. Secondly, the Court also held that a copyright management organisation is

³⁶ Case [C-209/07](#) *Competition Authority v Beef Industry Development Society Ltd. and Barry Brother (Carrigmore) Meats Ltd.*, not yet reported in the ECR.

³⁷ Case [C-52/07](#) *Kanal 5 Ltd TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, not yet reported in the ECR.

likely to exploit its dominant position in an abusive manner if it applies with respect to private and public broadcasters dissimilar conditions for the calculation of royalties to equivalent services, unless such a practice can be objectively justified.

3.6. The ECJ rules against the Italian scheme of frequency allocation for terrestrial television broadcasting

57. On 31 January, the ECJ delivered its judgment in a reference for a preliminary ruling in the case *Centro Europa 7*³⁸. The judgment arose from a referral by a national Court (the "*Consiglio di Stato*") originating from the fact that Centro Europa 7, though holding a legitimate title to broadcast in Italy since 1999, was never granted the necessary frequencies to start operating, while other TV operators in Italy were allowed to broadcast on the basis of temporary titles. The ECJ ruled that a national system of frequency allocation "*which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria*" is incompatible with Article 49 EC and with Directives 2002/21/EC (the Framework Directive³⁹), 2002/20/EC (the Authorisation Directive⁴⁰) and 2002/77/EC (the Competition Directive⁴¹).

B – MERGER CONTROL

1. APPLICABLE RULES

1.1. The Remedies Notice

58. Remedies are modifications to a merger proposed by the merging parties to eliminate competition concerns identified by the Commission. In order to provide improved guidance on questions related to remedies, the Commission adopted, on 22 October, a new notice on Remedies⁴² (the Remedies Notice) while also amending the Implementing Regulation⁴³ (together known as the remedies reform or, simply, reform). The Remedies Notice replaces and updates the previous remedies notice from 2001. The remedies reform is mainly a codification of recent past practice of the Community Courts⁴⁴ and of the Commission, but it also provides a number of

³⁸ Case [C-380/05](#) *Centro Europa 7* [2008] ERC I-349.

³⁹ 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](#)).

⁴⁰ 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](#)).

⁴¹ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services ([OJ L 249, 17.9.2002, p. 21](#)).

⁴² Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ([OJ C 267, 22.10.2008, p. 1](#)).

⁴³ Commission Regulation (EC) No 1033/2008 of 20 October 2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ([OJ L 279, 22.10.2008, p. 3](#)).

⁴⁴ See, in particular, Cases [C-12/03 P](#) *Commission v Tetra Laval* [2005] ECR I-987, [C-202/06 P](#) *Cementbouw Handel & Industrie v Commission* [2007] ECR I-12129, [T-119/02](#) *Royal Philips*

clarifications, taking into account the conclusions drawn from the Remedies Study⁴⁵ and the replies to the public consultation on a draft Remedies Notice.

59. First, the reform imposes more stringent information requirements on the parties. It is essential that the Commission should be able to conclude with certainty that the remedies will be viable and effective. The Commission must therefore have all necessary information in order to assess remedy proposals. For this purpose, the reform introduces a new "Form RM". This is a form that enables the notifying parties to systematise the information to be provided and also allows the Commission to assess the precise scope of the business to be divested and its links to the parties.
60. Secondly, the reform clarifies and tightens up the requirements for the sufficient scope of divestitures and for the suitability of purchasers. In particular, it explains the application of "up-front buyer" provisions and "fix-it-first" solutions that can address possible uncertainties in finding a suitable purchaser.
61. Thirdly, the reform provides that carve-outs may be accepted in certain circumstances, but that the parties are obliged to finalise such carve-outs prior to the sale to a purchaser, in order to minimise the risk of deterioration of the business to be divested while it is in the hands of the parties pending divestiture. In this respect, as well as generally, the reform also provides for strengthened powers for monitoring trustees.
62. Finally, as to non-divestiture remedies, the Remedies Notice - consistent with past practice - underlines that such remedies are only acceptable where they are equivalent in their effects to a divestiture. Access commitments are only acceptable if there is a sufficient likelihood that they will actually be used by competitors in practice. The Remedies Notice further stresses that difficulties of monitoring and risks concerning effectiveness may lead to non-divestiture remedies being rejected.

2. APPLICATION OF THE MERGER CONTROL RULES

63. The level of merger notifications continued at record levels in 2008, with a total of 347 transactions being notified to the Commission. Although this is lower than the record level reached the previous year, it is still the third highest level on record.
64. In total, the Commission adopted 340 final decisions during the year. Of these final decisions, 307 transactions were cleared without conditions during Phase I. A total of 118 decisions were cleared without conditions under the normal procedure and a further 189 were cleared using the simplified procedure. There were also 19 transactions cleared in Phase I, but subject to conditions.
65. The Commission initiated ten Phase II proceedings during the year. There was a notable increase in the number of Article 8 decisions adopted (14, or 4.0% of all

Electronics v Commission [2003] ECR II-1433, [T-158/00](#) *ARD v Commission* [2003] ECR II-3825, [T-210/01](#) *General Electric v Commission* [2005] ECR II 5575, [T-87/05](#) *EDP v Commission* [2005] ECR II-3745 and [T-177/04](#) *Easy Jet v Commission* [2006] ECR II-1931.

⁴⁵ [Merger Remedies Study](#), DG Competition, European Commission, October 2005, Office for Official Publications of the European Communities, ISBN 92-79-00420-4.

notifications as opposed to 2.5 % the previous year) and in the number of Phase I (10, representing 2.9% in 2008 as opposed to 1.2% in 2007) and II withdrawals (3, amounting to 0.9% in 2008 against 0.7% in 2007).. No prohibition decisions were taken during the year. In general, the proportion of notified concentrations resulting in either a prohibition or withdrawal in 2008 was within the usual range, as the chart below indicates.

Chart 1 –Prohibitions and Phase II withdrawals, 1998-2008

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Notifications	276	330	335	277	211	247	313	356	402	347	3094
Prohibitions	1	2	5	0	0	1	0	0	1	0	10
Phase II withdrawals	5	5	4	1	0	2	3	2	2	3	27
Regulatory Risk	2.2%	2.1%	2.7%	0.4%	0.0%	1.2%	1.0%	0.6%	0.7%	0.9%	1.2%

3. SELECTED COURT CASES

3.1. Sony BMG/Impala

66. On 10 July, the ECJ set aside the CFI ruling concerning the Commission's decision to clear a joint venture between the two recorded music divisions of *Sony and Bertelsmann*⁴⁶. The CFI had annulled the Commission decision on a number of procedural and substantive grounds. The case has now been referred back to the CFI. The ruling provides a number of clarifications as regards the substantive assessment of collective dominance, and the Commission's merger review process more generally. First, it makes clear that there is no higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving them. Thus, the standard of proof for prohibiting mergers must be the same as that applied when clearing them. Second, the ECJ clarifies the role of the SO and acknowledges that the Commission is not obliged to maintain the preliminary factual or legal assessments set forth in the SO. Third, the ECJ considers that there is no ground to apply particularly demanding requirements as regards the probative value of the evidence and arguments put forward by the notifying parties in reply to the SO compared to those of other interested parties. Finally, the ruling provides some clarification with regard to the standard of reasoning in Article 8(2) ECMR decisions and points out that the Commission is not obliged to state reasons as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or of secondary importance to the appraisal of the concentration.

⁴⁶ Case [C-413/06 P](#) *Bertelsmann and Sony Corporation of America v Impala*, not yet reported in the ECR.

3.2. MyTravel

67. On 9 September, the CFI dismissed, in the *MyTravel* judgment⁴⁷, the claim for damages that followed the annulment⁴⁸ of the Commission's 1999 decision prohibiting the concentration between *Airtours* (renamed MyTravel in the meantime) and *First Choice*⁴⁹. MyTravel had applied for damages for the loss it allegedly suffered by reason of the unlawfulness of the proceedings for determining whether the concentration referred to the CFI was compatible with the common market. In particular, MyTravel had requested the CFI to order the Commission to pay it an amount in respect of the period between the adoption of the prohibition decision and the date on which it could, in principle, have acquired First Choice⁵⁰.
68. According to settled case-law, in order for the Commission to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions a number of conditions must be satisfied: (i) the institution's conduct must be unlawful, (ii) actual damage must have been suffered and (iii) there must be a causal link between the conduct and the damage pleaded⁵¹. In its judgment of 9 September, the CFI confirmed that, as regards the first of these conditions, the mere annulment of a decision prohibiting a merger is not, in itself, sufficient to make the Commission liable for damages, in the absence of a "manifest and grave" infringement of EC law⁵². The CFI based itself on the landmark judgment *Bergaderm*⁵³ and concluded that a Community institution may only be liable where it commits a sufficiently serious breach of a rule of law intended to confer rights on

⁴⁷ Case [T-212/03](#) *My Travel v Commission*, not yet reported in the ECR. In a related case, the CFI rejected almost in its entirety the applicant's request to be granted access to a number of internal documents of the Commission (See Case [T-403/05](#) *My Travel v Commission*, not yet reported in the ECR).

⁴⁸ Case [T-342/99](#) *Airtours v Commission* [2002] ECR II 2585. The CFI declared the plea related to the lawfulness of the Commission's assessment of the effects of the *Airtours/First Choice* concentration on competition in the common market to be well founded, without examining the plea which concerned the lawfulness of the Commission's assessment of the commitments submitted during the administrative procedure.

⁴⁹ Case [COMP/M.1524](#) *Airtours/First Choice* (OJ L 093, 13.4.2000. p. 1). The Commission had considered that the acquisition by *Airtours* of *First Choice* would create a collective dominant position on the market for UK short-haul holiday packages.

⁵⁰ MyTravel had originally estimated the damage at (at least) GBP 518 million. This amount included loss of profits of *First Choice*, loss of synergy savings and abortive bid costs, less successful bid execution costs.

⁵¹ Case [26/81](#) *Oleifici Mediterranei v EEC* [1982] ECR 03057. Case [T-383/00](#) *Beamglow v Parliament and Others* [2005] ECR II-5459.

⁵² It shall be recalled that the non-contractual liability of the Community in the exercise of merger control has also been the object of a recent judgment of the CFI (Case [T-351/03](#) *Schneider Electric v Commission*, not yet reported in the ECR). The illegality identified in that case did not concern errors in the substantive assessment of the Commission but a procedural violation affecting the rights of defence of the applicant (see Case [T-310/01](#) *Schneider Electric v Commission* [2002] ECR II-4071). In its judgment in Case T-351/03, the CFI ordered the Community to make good, first, the expenses incurred by the applicant in respect of its participation in the resumed merger control procedure which followed the judgment annulling the decision prohibiting its proposed concentration and, second, two thirds of the loss sustained as a result of the reduction in the transfer price of the target which the applicant had to concede to the transferee in exchange for the postponement of the effective date of sale. This judgment is currently under appeal (Case [C-440/07 P](#) *Commission v Schneider Electric*): on 3 February 2009 Advocate General Ruiz-Jarabo adopted his Opinion proposing to set aside in part the CFI judgment and limit the compensation granted to *Schneider Electric*.

⁵³ Case [C-352/98 P](#) *Bergaderm and Goupil v Commission* [2000] ECR I-5291.

individuals. The decisive criterion is, in that regard, whether the institution manifestly and gravely disregarded the limits on its discretion.

69. Thus, according to the CFI, equating the annulment of a merger decision with a sufficiently serious breach of EC law without further analysis would risk compromising the Commission's capacity to fully function as a regulator of competition, as a result of the inhibiting effect that the risk of having to bear the losses alleged by the undertakings concerned might have on the control of concentrations. This effect would be contrary to the general Community interest. The CFI noted, however, that the right to compensation for damage resulting from the conduct of the Commission comes into play where such conduct takes the form of action that is 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 latter, operating normally, are subject.
70. In its *MyTravel* judgment, the CFI concluded that, in the case at issue, there was not such a sufficiently serious breach of a rule of law, either at the stage of the Commission's assessment of the effects of the Airtours/First Choice concentration on competition in the common market or at the stage of its analysis of the commitments submitted by the parties.
71. In particular, the CFI, although recognizing that manifest and grave defects affecting the economic analysis underlying a prohibition decision of a concentration could in principle give rise to compensation, stressed the fact that the application of competition law involves complex and difficult intellectual exercises, in particular in the field of merger control, in view of the time constraints to which the Commission is subject and the prospective nature of its analysis. In the case at issue, the CFI considered that the economic situation in question was especially complex, inasmuch as the Commission was required to assess the possible creation of a collective dominant position of an oligopolistic nature on a market for a product combining different services and on which competition was practised more in relation to capacity than to prices. The CFI also took account of the discretion enjoyed by the Commission in maintaining control over Community competition policy. On this basis, the CFI concluded that the errors of assessment established by the Court in its judgment annulling the Airtours' prohibition decision, taken either individually or cumulatively, was not sufficient to give rise to the non-contractual liability of the Community in the case at issue.
72. Lastly, it should be noted that the *MyTravel* judgment also gives some guidance regarding the possibility for the Commission to reject remedies submitted after the relevant deadline. The CFI reiterated, in line with the EDP case law⁵⁴, that the Commission has a duty of diligence in that it has to examine whether or not those commitments clearly, and without the need for further investigation, resolve the competition concerns previously identified, except where there is not, in any event, sufficient time to consult the Member States about those proposed remedies.

⁵⁴ Case [T-87/05](#) *EDP v Commission* [2005] ECR II-3745.

3.3. Application of Article 21 of the EC Merger Regulation (ECMR)

73. In 2008, both the ECJ and the CFI reminded Member States of their obligations under Article 21 of the EC Merger Regulation (ECMR) and of the powers of the Commission to ensure the effective application of this provision.
74. It is recalled that, pursuant to Article 21 ECMR, the Commission has exclusive competence to assess the competitive impact of concentrations with a Community dimension, and Member States cannot apply their national competition law to such operations. However, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the ECMR⁵⁵ and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules are expressly regarded as legitimate interests in that connection. Before these measures may be taken, any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with Community law.
75. On 25 April 2006, the Commission authorized the concentration by which *E.ON* would acquire control of *Endesa* by way of public bid⁵⁶. On 27 July 2006, the Spanish authorities (the *Comisión Nacional de la Energía*, the Energy Regulator) made the authorization of the said concentration subject to a number of conditions⁵⁷, subsequently modified by decision of the *Ministro de Industria, Comercio y Turismo* (Minister of Industry, Tourism and Trade). By decisions of 26 September and 20 December 2006, the Commission found that Spain had violated Article 21 ECMR by imposing the said conditions without previous communication to the Commission and without its prior authorization, and ordered that these conditions be withdrawn. Owing to the failure of the Spanish authorities to comply with the decisions in question, the Commission started infringement proceedings under Article 226 EC. In April 2007, the *Comisión Nacional del Mercado de Valores* (the Spanish Stock Exchange authority) officially declared that E.ON's public bid had failed to attain a majority of Endesa's share capital. The operation was therefore abandoned.
76. In its judgment in *Commission v Spain*⁵⁸, the ECJ found that Spain had violated EC law by failing to comply with the above-mentioned Article 21 decisions. The ECJ confirmed that, before adopting the contested measures, Spain should have communicated to the Commission the legitimate interests that those measures were intended to protect (namely, the guarantee of the supply of energy). The ECJ also stated that, when a Member State disagrees with an Article 21 decision by the Commission, it must challenge the legality of that decision before the Community Courts and cannot simply fail to comply with it. The ECJ declared finally that, contrary to what the Spanish authorities had argued, the mere fact that the

⁵⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the [control of concentrations between undertakings](#) (the EC Merger Regulation) (*OJ L 24, 29.1.2004, p. 1*).

⁵⁶ Case [COMP/M.4110 E.ON/Endesa](#) (*OJ C 114, 16.5.2006, p. 4*).

⁵⁷ The *Comisión Nacional de la Energía* acted in implementation of its newly-acquired powers granted by Royal Legislative Decree 4/2006, of 24 February 2006. The ECJ has later found that, by attributing these powers to the Energy Regulator, Spain had infringed Articles 43 and 56 EC (see Case [C-207/07 Spain v Commission](#), not yet reported in the ECR).

⁵⁸ Case [C-196/07 Commission/Spain](#), not yet reported in the ECR.

concentration had been abandoned in the meantime did not render the infringement proceedings devoid of purpose and did not make it impossible to implement the Commission's decisions.

77. The Endesa undertaking was the subject of a subsequent public bid, on this occasion a joint offer by *Acciona* and *Enel*, notified to the Commission on 31 May 2007⁵⁹. This concentration was approved on 5 July 2007. The *Comisión Nacional de la Energía* had authorised the operation on 4 July 2007, subject to a number of conditions, which were later modified by the competent Minister. By decision of 5 December 2007, the Commission found that Spain had violated Article 21 ECMR, as well as the Treaty provisions on free movement of capital and goods and freedom of establishment, and demanded that the said conditions be withdrawn. Spain challenged the legality of this decision before the CFI⁶⁰ and filed an application for interim measures requesting the suspension of the implementation of the said decision. By order of its President in *Spain v Commission*, the CFI rejected this application of interim measures⁶¹.

C – STATE AID CONTROL

1. APPLICABLE RULES

78. At the beginning of 2008 the Commission's focus in the State aid field was to continue with the implementation of the State Aid Action Plan (SAAP)⁶². However, the sudden onset of the financial and economic crisis shifted that focus, and the Commission rapidly issued three Communications on the role of State aid policy in the context of the crises and the recovery process.
79. In the context of the financial crises, the Commission first gave guidance on the application of State aid rules to measures taken in relation to financial institutions⁶³. By way of exception these guidelines were based on Article 87(3)(b) EC providing for aid to remedy serious disturbances in the economy of a Member State. The rules require that the measures taken do not give rise to disproportionate distortions of competition, for example by 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 government support. Other requirements include measures being limited in time and adequate contributions from the private sector. The Commission announced the aim to approve schemes that comply with this guidance within very short deadlines (24 hours, if possible).
80. Subsequently, the Commission complemented and refined its guidance in a new Communication on how Member States can recapitalise banks under the current

⁵⁹ Case [COMP/M.4685 Acciona/Enel/Endesa](#) (OJ C 130, 12.6.2007, p. 19).

⁶⁰ Case [T-65/08 Spain v Commission](#), not yet reported in the ECR.

⁶¹ Case [T-65/08 R Spain v Commission](#), not yet reported in the ECR.

⁶² 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](#)).

⁶³ 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](#)).

financial crisis⁶⁴ to ensure adequate levels of lending to the rest of the economy and to stabilise financial markets whilst avoiding excessive distortions of competition. The Communication entails, in particular, guidance on the adequate pricing of State capital injections into banks designed to stabilise the banks themselves. Also, it addresses the necessity of appropriate safeguards to ensure that the public capital is used to sustain lending to the real economy and not to finance commercial conduct to the detriment of competitors who manage without State aid. Furthermore, it distinguishes between, on the one hand, banks that are fundamentally sound and receive temporary support to enhance the stability of financial markets and foster undisturbed access to credit for citizens and companies and, on the other hand, distressed banks whose business model has brought about a risk of insolvency.

81. In addition, the Commission adopted a new temporary framework⁶⁵ providing Member States with additional possibilities to tackle the effects of the credit squeeze on the real economy. The temporary framework introduces a number of temporary measures to allow Member States to address the exceptional difficulties of companies to obtain finance. In particular, Member States will be able, without notification of individual cases, to grant subsidised loans, loan guarantees at a reduced premium, risk capital for SMEs and direct aids of up to EUR 500 000. All measures are limited until the end of 2010 although, based on Member States' reports, the Commission will evaluate whether the measures should be maintained beyond 2010, depending on whether the crisis continues.
82. As regards the implementation of the SAAP, the Commission adopted, as announced, a General Block Exemption Regulation (GBER)⁶⁶ giving automatic approval for a range of aid measures and so allowing Member States to grant such aid without first notifying the Commission, provided that they fulfil all the requirements laid down in the Regulation. The Regulation authorises aid in favour of SME, research, innovation, regional development, training, employment, risk capital, environmental protection and entrepreneurship. As well as encouraging Member States to focus their State resources on aid that will be of real benefit to job creation and Europe's competitiveness, the Regulation reduces the administrative burden on public authorities, the beneficiaries and the Commission. This new GBER harmonises and consolidates into one text the rules which previously existed in five separate Regulations, and it broadens the categories of State aid covered by the exemption.
83. In the context of the Climate Change Package the Commission adopted new Environmental aid guidelines⁶⁷. In line with the reform of the State aid assessment architecture, the guidelines introduce a standard assessment for minor cases and a detailed assessment for cases that may involve significant distortions of competition.

⁶⁴ 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, p. 2](#)).

⁶⁵ 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](#)).

⁶⁶ 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, p. 3](#)).

⁶⁷ Community Guidelines on state aid for environmental protection ([OJ C 82, 1.4.2008, p. 1](#)).

Compared to the guidelines from 2001, the aid intensities have been increased considerably; in some cases they have been doubled. Furthermore, rules have been established for trading schemes and a refined economic approach has been introduced for the analysis of reductions in, or exemptions from, environmental taxes. The new rules require a facts-based necessity and proportionality test, unless the resulting tax level is above a harmonised minimum level.

84. The Commission prolonged the Framework on State aid rules for shipbuilding⁶⁸ for three more years, until 31 December 2011. This extension followed an earlier extension in 2006 of the Framework, which came into effect on 1 January 2004.
85. A new Notice on State aid in the form of guarantees⁶⁹ sets out clear and transparent methodologies to calculate the aid component of a guarantee and provides simplified rules for SMEs, including predefined safe-harbour premiums and single premium rates for low-amount guarantees. The SAAP provides for a new Notice as part of the Commission's efforts to clarify and simplify the State aid rules.
86. In addition, public consultations were launched on the following: new rules on public service broadcasting, the possible extension until 2012 of the Cinema Communication, the guidance documents on the in-depth assessment of regional aid to large investment projects and on criteria for the compatibility analysis in the field of training, as well as disadvantaged and disabled workers for State aid cases subject to individual notification.
87. As far as public broadcasting is concerned, based on recent decision-making practice and the results of the public consultation held between January and March, the Commission launched a review of the Broadcasting Communication. The main aims of the review are to provide greater clarity to all market participants and to secure a future-proof framework that is suitably adapted to the new technological environment. In November, the Commission presented a draft new Communication for further public consultation.
88. As regards the Cinema Communication, the Commission proposed that the validity of the State aid assessment criteria used for the 2001 Cinema Communication should be extended by a further three years until 31 December 2012. This proposal followed the publication of the final report of a study financed by the Commission, which examined the economic and cultural impact of territorial spending obligations in film support schemes. The conclusions of the report were not conclusive one way or the other, which suggested a need for further reflection. At the same time, the proposed text of the extension identified a number of trends affecting the film sector which may need to be reflected in a future Cinema Communication (scheduled for adoption in January 2009). By December, when the public consultation of the proposed text closed, a broad consensus in favour of the proposed text had emerged from those who contributed to the consultation.

⁶⁸ Communication from the Commission concerning the prolongation of the Framework on State aid to shipbuilding ([OJ C 173, 8.7.2008, p. 3](#)).

⁶⁹ Commission Notice on the application of Articles 87 and 88 EC to State aid in the form of guarantees ([OJ C 155, 20.6.2008, p. 10](#)) and Corrigendum to Commission notice on the application of Articles 87 and 88 EC to State aid in the form of guarantees ([OJ C 244, 25.9.2008, p. 32](#)).

89. The Commission also launched a number of public consultations on procedural issues such as a consultation on a draft Best Practice Code (BPC) on the conduct of State aid control proceedings⁷⁰ and on the draft notice on Simplified procedure (SP) for the treatment of certain types of State aid. The aim of both documents, in line with the SAAP, is to ensure greater transparency, predictability and efficiency of State aid procedures.
90. The draft BPC seeks to streamline the procedures by fostering cooperation between the Commission and Member States within the framework of the existing Procedural Regulation n° 659/1999⁷¹. Specifically, the draft BPC proposes to introduce: (i) more systematic pre-notification contacts to improve the quality of notifications, (ii) a mutually agreed planning of the handling of cases between the Member State concerned and the Commission for more complex cases, (iii) improvements in the information exchange between the Commission and (iv) a streamlined processing of complaints. Finally, in the event of Member States not providing the necessary information within the prescribed deadlines, the Commission would enforce existing procedural options more strictly than it has done in the past. This might involve deeming notifications to have been withdrawn or adopting decisions on the basis of the information available.
91. The existing simplified notification procedure provided for in Article 4 of Implementing Regulation n° 794/2004⁷² has reached its limits in terms of contributing to the efficiency of State aid procedures. Therefore, the draft SP proposes the setting up of a fully fledged, simplified approval procedure which would apply to measures squarely falling under the standard assessment sections (so-called "safe harbours") of existing horizontal Commission instruments, inspired by the merger simplified procedure⁷³ and going beyond simplified notification forms. By means of enhanced cooperation between the Member States and the Commission, these straightforward cases would be dealt with in an accelerated timeframe of one month after notification. In particular, the draft SP proposes the introduction of: (i) mandatory pre-notification contacts to ensure quality notifications and (ii) predictable stages of the procedure with clear deadlines, leading to a standardised short-form decision.
92. The discussion with the Member States and other stakeholders regarding the BPC and SP will take place early in 2009. The drafts are currently due to be adopted in the first half of 2009.
93. The Commission also consulted on a draft Commission Notice concerning the enforcement of State aid law by national courts (the Enforcement Notice). The Enforcement Notice would replace the 1995 Notice on Cooperation between national

⁷⁰ See Press Release [IP/08/1950](#), 11.12.2008.

⁷¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) EC ([OJ L 83, 27.3.1999, p. 1](#)).

⁷² Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 EC ([OJ L 140, 30.4.2004, p. 1](#)).

⁷³ Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 ([OJ C 217, 29.7.2000, p. 32](#)).

courts and the Commission in the State aid field⁷⁴ and its aim is to give clearer and more practical guidance to courts and potential claimants on legal issues in connection with domestic State aid litigation. In addition, the Enforcement Notice seeks to intensify the Commission's cooperation with national courts in the State aid area. In that respect, the Notice envisages the provision of Commission support for national courts based on the mechanisms already applied in the anti-trust field:

- National courts would be able to ask the Commission for information in its possession, and
- National courts would also be able to ask the Commission for its opinion on State aid issues which are relevant to a pending case.
- The Commission would aim to issue such opinions within four months.

94. To make the use of these cooperation mechanisms as user-friendly as possible, the Commission would establish a dedicated contact point for national courts and introduce better guidance on practical issues, such as the protection of confidential information. A first discussion of the draft Notice with Member States already took place in 2008. Based on the positive comments received, the Commission expects that the final version will be adopted in early 2009.

95. In 2008, the Commission continued its efforts to improve the enforcement and monitoring of State aid decisions. The Commission is seeking to achieve, on the basis of the recovery notice adopted in 2007, a more effective and immediate execution of recovery decisions. Information submitted by the Member States concerned shows that good progress towards recovery was made during that period. The number of recovery decisions awaiting implementation was slightly reduced from 47 at the end of 2007 to 46 at the end of 2008. In all, 17 recovery cases were closed, or provisionally closed, in 2008: those are cases where the recovery decisions were considered as being fully or provisionally implemented. In 2008, the Commission adopted 16 new recovery decisions. The progress made is also reflected in the amounts of aid recovered. Of the EUR 10.3 billion of illegal and incompatible aid to be recovered under decisions adopted since 2000, some EUR 9.3 billion (i.e. 90.7% of the total amount) had been actually recovered by the end of 2008. A further EUR 2.5 billion in recovery interests had also been recovered.

96. As announced in the SAAP, the Commission continued to take a strict line with Member States that failed to effectively implement recovery decisions addressed to them. In 2008 the Commission initiated legal action under either Article 88(2) EC or Article 228(2) EC for failure by Member States to comply with recovery obligations. It took decisions initiating Article 88(2) EC in five cases, involving Italy and Slovakia, as well as decisions to proceed under Article 228(2) EC in eight cases involving Italy and Spain.

97. As indicated above, the new GBER will lead to a substantial rise in the number and categories of measures which Member States may implement in the absence of prior notification to the Commission. The Commission, in its role as guardian of the

⁷⁴ [OJ C 312, 23.11.1995, p. 8.](#)

Treaty, will have to ensure that Member States implement those measures correctly, as set out in Article 10, paragraph 1, of the GBER. The GBER, in this perspective, sets out a series of measures to ensure the general transparency of block exempted measures, but also to enable effective Commission monitoring. More particularly, Article 9 GBER requires that the full text of aid schemes be published on the internet in order to ensure that GBER provisions are respected at Member State level.

98. Against this background, the Commission has, as announced in the SAAP, stepped up its *ex post* monitoring of several BER predating the GBER, on the basis of the experience gained in the 2006 monitoring pilot project. After three rounds of monitoring exercises, DG Competition has covered a significant part of the main substantive types of aid implemented under BER. DG Competition has now also addressed aid measures adopted by almost all of the 27 Member States of the Community, thereby ensuring a balanced geographical coverage. The analysis of the results of the first two exercises shows that, overall, the part of the existing State aid architecture allowing the approval of aid schemes and enabling Member States to implement aid measures under BER is working satisfactorily. In a minority of cases, substantive problems or procedural issues (such as transparency, reporting, speed and quality of answers) were identified. Those cases in which no appropriate solution could be found are still being investigated.
99. In the interests of increased transparency and better communication, DG Competition has published on its webpage a Vademecum on State aid rules⁷⁵ a concise summary of the main rules applicable to State aid control. It can serve as a first point of reference for Community, national and local stakeholders dealing with State aid control issues, and directs the reader to the relevant legal texts.

2. APPLICATION OF THE STATE AID RULES

100. The autumn 2008 update of the State aid Scoreboard⁷⁶ shows that Member States are increasingly using the possibilities offered by the recently revised EU State aid rules to better target their aid. On average, Member States granted 80% of their aid to horizontal objectives in 2007, compared to around 50% in the mid-1990s, with increased spending on Research and Development (R&D) and environmental aid. In the face of the current financial crisis, coordinated action by Member States and the Commission has ensured that support schemes for the financial sector were able to be implemented quickly in compliance with State aid rules.
101. Over the past 25 years, the overall level of State aid has fallen from over 2% of GDP in the 1980s to around 0.5% in 2007. Whilst highlighting the continuing trend for Member States to focus their aid on horizontal objectives, the Scoreboard nevertheless showed that, in the wake of the recent financial crisis, the share of rescue and restructuring aid is likely to increase significantly for some countries in 2008.

⁷⁵ The Vademecum is available at

http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html#vademecum

⁷⁶ Report from the Commission, State Aid Scoreboard - Autumn 2008 Update ([COM\(2008\) 751 final, 17.11.2008](#)).

102. Already in 2007, before the new GBER entered into force, block exempted aid measures accounted for 65% of all measures, compared with 40% in 2002. However, this is not yet reflected to the same extent in expenditure terms: 13% of total aid was awarded through the block exemptions in 2007 (compared with 6% in 2006).

2.1. Applying the State aid Framework for Research, Development and Innovation (R&D&I)

103. In 2008, the Commission approved 88 notified schemes on the basis of the 2006 Community Framework for research and development and innovation⁷⁷; 66 were purely R&D schemes, nine were innovation oriented aid schemes and 13 were mixed, pursuing both R&D and innovation objectives.

104. In three aid schemes⁷⁸ and two individual cases⁷⁹, the Commission concluded that there was no aid. In addition, two individual aid measures were approved after an examination on the basis of Chapter 5⁸⁰ of the Framework, and 16 individual aid measures were approved after a detailed assessment under Chapter 7 of the Framework⁸¹. Furthermore, the Commission adopted one decision to initiate a formal investigation procedure⁸² and one decision to close an opened Article 88(2) EC procedure following the withdrawal of the notification by the Member State⁸³.

105. In addition, an important decision⁸⁴ was adopted on several individual cases in the Italian aeronautical sector, following an assessment on the basis of the Community frameworks for State aid for R&D of 1996⁸⁵ and 1986⁸⁶. The decision, adopted on

⁷⁷ Community Framework for state aid for research and development and innovation ([OJ C 323, 30.12.2006, p. 1](#)).

⁷⁸ Fully in cases [N 480/2007 Reducción del impuesto sobre activos intangibles](#) (OJ C 80, 1.4.2008, p. 3) and [N 234/2007 Fomento de I+D+i](#) (OJ C 229 6.9.2008, p. 1), and partially in case [N 355/2007 Modulation des cotisations sur le chiffre d'affaires des spécialités pharmaceutiques remboursables](#) (OJ C 229, 6.9.2008, p. 5).

⁷⁹ Cases [N 365/2007 Errichtung des Fraunhofer Center for Silicon Photovoltaics](#) (OJ C 91, 12.4.2008, p. 10) and [N 343/2008 Individual aid to the College of Nyíregyháza](#) (OJ C 35, 12.2.2009, p. 4).

⁸⁰ [N 474/2007 NEDERLAND GATE – Innovative Pilot Safety. Individuelle O&O-steun aan THALES](#) (OJ C 94, 16.4.2008, p. 11) and [N 343/2008 Individual aid to the College of Nyíregyháza for the development of the Partium Knowledge Centre](#) (OJ C 35, 12.2.2009, p. 4).

⁸¹ List of individual aid measures approved after detail assessment under Chapter 7 of the R&D&I Framework: [N 447/2007 Turbomeca](#) (OJ C 94, 16.4.2008); [C 51/2007 Programme VHD](#) (OJ C 189, 26.7.2008, p. 14), [N 365/2007 Errichtung des Fraunhofer Center for Silicon Photovoltaics](#) (OJ C 91, 12.4.2008, p. 10), [N 435/2007 Programme MINimage](#) (OJ C 137, 4.6.2008, p. 1), [N 195/2007 FuE-Einzelbeihilfe für Rolls-Royce Deutschland – Entwicklungsprojekt BR725](#) (OJ C 118, 15.5.2008, p. 1), [N 469/2007 Programme "QUAERO"](#) (OJ C 243, 24.9.2008, p. 13), [N 602/2007 Programme MaXSSIMM](#) (OJ C 177, 12.7.2008, p. 3), [N 603/2007 Programme GENESIS](#) (Not yet published in the OJ), [N 597/2007 Programme LowCO2MOTION](#) (OJ C 299, 22.11.2008, p. 6), [N 647/2007 Projet "PAMELAT, Pointe avant mixte Latécoère, Recherche et innovation dans la filière composite aéronautique"](#) (OJ C 206, 13.8.2008, p. 4), [N 732/2007 \(C 33/2008\) Large R&D aid to Volvo Aero – Genx](#) (OJ C 253, 4.10.2008, p. 31), [N 1/2008 Programme H2O](#) (Not yet published in the OJ), [N 679/2007 Programme "DEFI COMPOSITE"](#) (OJ C 2, 7.1.2009, p. 18), [C 9/07 Industria de Turbo Propulsores \(ITP\)](#) (Not yet published in the OJ), [N 709/2007 Programme ADNA](#) (Not yet published in the OJ) and [N 733/2007 Programme "ISEULT-INUMAC"](#) (Not yet published in the OJ).

⁸² Case [N 732/2007 Large R&D aid to Volvo Aero – Genx](#) (OJ C 253, 4.10.2008, p. 31).

⁸³ Case [C 51/2007 Programme VHD](#) (OJ C 189, 26.7.2008, p. 14).

⁸⁴ [Case C 61/2003 Loi aéronautique italienne N808/85 cas individuels](#) (OJ C 284, 28.10.2008, p. 1).

⁸⁵ [OJ C 45, 17.2.1996, p. 5](#).

⁸⁶ OJ C 83, 11.4.1986, p. 2.

11 March, covers 17 R&D individual projects in the aeronautical sector supported by the Italian authorities during the 1990s. The decision requires an immediate reimbursement of the loans for most of the individual projects, with interest on arrears in certain cases. The beneficiaries have reimbursed around EUR 350 million within the time limit of two months set by the decision.

2.2. Assessing risk capital financing for SME

106. In 2008, the Commission approved 18 risk capital schemes under the Risk Capital Guidelines⁸⁷. Eleven schemes were assessed on the basis of Chapter 4 of the guidelines since they complied with the safe harbour provisions of the guidelines which allow a light assessment. Three schemes were assessed under Chapter 5 of the guidelines, following a detailed assessment⁸⁸. In three cases, the Commission considered that the scheme did not involve State aid⁸⁹. One scheme was partly considered as no aid and partly assessed under Chapter 4 of the Guidelines⁹⁰.

2.3. Industrial restructuring

107. On 27 February, the European Commission closed its in-depth investigation under EC State aid rules into the privatisation of Automobile Craiova⁹¹. The investigation, which was opened in October 2007, found that Romania had imposed conditions on the sale that were not aiming at obtaining the highest possible sales price, but at ensuring a certain level of production and employment. Since the conditions attached to the sale directly reduced the sales price, the Commission found that the difference between the market value of the company and the sales price received by the Romanian authorities constituted State aid. In order to avoid companies receiving unfair advantages over competitors, aid can only be granted under strict conditions. None of these conditions applied to the privatisation, and the aid is therefore incompatible with the Single Market. In order to rectify the distortion of competition caused by the unlawful aid, the Romanian Government will have to recover EUR 27 million from Automobile Craiova.
108. On 6 November, following more than four years of investigation, the Commission concluded that the attempts of the Polish authorities to restructure the shipyards in Gdynia and Szczecin⁹² and to return them to viability have failed. Since the State aid granted to the shipyards over the years gave rise to disproportionate distortions of competition in breach of the EC Treaty State aid rules, that aid had to be recovered.

⁸⁷ Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises ([OJ C 194, 18.8.2006, p. 2](#)).

⁸⁸ Cases [N 263/2007](#) *Technology Founder Fund Saxony* (OJ C 93, 15.4.2008, p. 1), [N 521/2007](#) *Risikokapitalregelung, Clusterfonds Start-up!“ Freistaat Bayern* (OJ C 100, 22.4.2008, p. 2) and [N 700/2007](#) *Finance Wales JEREMIE Fund* (OJ C 331, 31.12.2008, p. 2).

⁸⁹ [N 836/2006](#) *Mittelstandsfonds Schleswig-Holstein* (OJ C 67, 12.3.2008, p. 1), [C 33/2007](#) *IBG Beteiligungsgesellschaft Sachsen-Anhalt mbH* (OJ C 246, 20.10.2007, p. 20), [N 389/2007](#) *Risk capital fund Niedersachsen* (OJ C 145, 11.6.2008, p. 1).

⁹⁰ [N 696/2007](#) *ERDF Risk Capital Fund Brandenburg* (OJ C 180, 17.7.2008, p. 3).

⁹¹ Case [C 46/2007](#) *Privatisation of Automobile Craiova* (OJ C 239, 6.9.2008, p. 12). See Pres Release [IP/08/315](#), 27.2.2008.

⁹² Cases [C 17/2005](#) *Restructuring aid for Stoczni Gdynia* (OJ C 220, 8.9.2005, p. 7) and [C 19/2005](#) *Restructuring aid for Szczecin shipyard* (OJ C 220, 9.9.2005, p. 7). See Press Release [IP/08/1642](#), 6.11.2008.

109. The Commission required Poland to recover the illegal State aid from Gdynia and Szczecin shipyards through a controlled sale of the yards' assets and subsequent liquidation of the companies. Such a solution should maximise opportunities for viable economic activities to continue at these sites, with good prospects for sustainable jobs there, while putting an end to the undue distortion of competition caused by the huge subsidies received by these yards in recent years. The Polish authorities have undertaken to sell the yards' assets through open, transparent, non-discriminatory and unconditional tenders. Given the fact that companies buying the assets under such tendering procedures will be free of the burden of having to repay past illegal State aid, the final outcome might be even more jobs secured than would have been the case if the proposed restructuring plans, which assumed significant job cuts, had been implemented.

2.4. Sports

110. In the field of State aid control, the Commission adopted a final decision approving the investment of the municipality of Rotterdam in the Sports Palace, forming part of the *Ahoy complex*⁹³. This measure had been notified by the Dutch authorities in order to obtain legal certainty. The measure involves an investment of up to EUR 42 million in the renovation and development of the Sports Palace, whereby the municipality acts as the owner of the complex, which has been leased to a private operator.
111. The Commission opened the formal investigation essentially because it had doubts about whether the private operator of the Ahoy complex would benefit unduly from the investment by the municipality. As part of the investigation, the Dutch authorities provided further information concerning, *inter alia*, the contractual relationship between the municipality and the operator as well as the multi-functionality of the Ahoy complex. Following an in-depth assessment of the case, the Commission found that the investment did not give undue advantages to the operator of the complex or any other company as the investment was properly taken into account in the sale and lease transactions concluded between the municipality and the operator. Therefore, the Commission concluded that no state aid was involved.

2.5. State aid in the agricultural sector

112. Notifications were assessed on the basis of the Guidelines for State aid in the agriculture and forestry sector 2007 to 2013⁹⁴.

⁹³ Case [C 4/2008](#) *Investment of the municipality of Rotterdam in the Ahoy complex* (OJ C 68, 13.3.2008, p. 14).

⁹⁴ [OJ C 319, 27.12.2006, p. 1.](#)

2007		→31/12/2008	
New cases registered ⁹⁵		254	144
Final decision ⁹⁶	N	187	121
	NN	18	18
	C	5	3
	Total	210	142
	Compatible	202	139
	Does not constitute State aid	2	1
	Total	204	140
	Investigations	positive decision	0
	conditional decision	0	1
	no aid decision	0	0
	negative decision	0	3
	withdrawal	4	0
	corrigenda	2	0
	Total	6	6

113. In 2007-2008, the Commission approved several aid schemes for the promotion of agricultural products⁹⁷. The Commission decided that for advertising that was generic in character no mention may be made of product origin and that, for Community-recognised denominations, the reference to the origin must correspond exactly to those references which have been registered by the Community. The origin of the products may be mentioned in the case of national or regional quality labels as a subsidiary message. The Commission allowed the use of corporate logos and names in State aid schemes under strict conditions only.

2.6. Coal

114. In 2008 coal spot market prices were extremely volatile. After strong rises from January to September, reflecting increased demand from the high-growth emerging countries, prices fell substantially in the last quarter following the financial crisis and was close to the levels registered at the beginning of the year.
115. In the same year the Commission approved aid to the coal sector in Poland⁹⁸, Hungary⁹⁹, Germany¹⁰⁰ and Spain¹⁰¹. These aid schemes are intended to support access to coal reserves and to restructure the coal sector in these countries.

⁹⁵ 10 NN cases not included.

⁹⁶ Excluding decision to open the formal investigation procedure, corrigenda, injunctions and proposals for appropriate measures.

⁹⁷ Example of cases: [N 135/2008 Promotion Fund Law \(Absatzfondsgesetz\)](#) (OJ C 30, 6.2.2009, p. 14), [N 529/2007 Agriculture and Horticulture Levy Board — Promotion and Advertising](#) (OJ C 101, 23.4.2008, p. 18), [N 653/2007 Welsh Red Meat — Advertising and Promotion Scheme](#) (OJ C 165, 28.6.2008, p. 1), [N 659/2007 QMS Meat Quality Advertising Scheme](#) (OJ C 241, 20.9.2008, p. 9) and [N 697/2007 QMS Meat Generic Advertising Scheme](#) (OJ C 207, 14.8.2008, p. 1).

⁹⁸ [Case N 575/07 Secteur du charbon 2008-2015](#) (OJ C 137, 4.6.2008, p. 2), the aid covers the period 2008-2010.

⁹⁹ [Case NN 3/08 Aid for coal industry \(2007-2010\)](#) (OJ C 323, 18.12.2008, p. 3), the aid covers the period 2007-2010.

¹⁰⁰ [Case N 631/07 Aides au charbon pour l'année 2008](#) (OJ C 42, 20.2.2009, p. 7), the aid covers year 2008.

116. The Commission also approved an aid scheme aimed at supporting the implementation of environmental rehabilitation projects in coal mines in Bulgaria that have ceased operating¹⁰². The projects are targeted at cleaning up the previous coal mining sites and re-cultivating land for agricultural and forestry purposes.
117. Lastly, the Commission approved the prolongation of an aid scheme implemented by the Spanish region of Castilla-León for research, development and innovation projects, as well as for projects aimed at environmental improvement related to coal mining, to be implemented in the period 2008-2012¹⁰³.

3. SELECTED COURT CASES

118. In 2008, the Community Courts delivered 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 these judgments is set out below.

3.1. The concept of aid

119. In the case *BUPA and Others v Commission*¹⁰⁴, the CFI upheld a Commission decision raising no objection to the establishment of a risk equalisation system on the private health insurance market in Ireland. The CFI confirmed that Member States have a wide margin of discretion in defining a SGEI mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging this mission. The Commission control is limited solely to ascertaining whether there is a manifest error of assessment. In particular, the CFI judgment found that the scheme did meet the Altmark criteria, thereby enabling an interpretation of these criteria that makes it possible to apply them to complex systems with several operators, unconventional public service obligations and sophisticated compensation formulas
120. In the *NOx trading permits case*¹⁰⁵, the CFI examined the notions of advantage and the justification of the selective nature of such trading permits. As to the notion of advantage, the CFI confirmed the Commission's finding that, where the State grants tradable emission permits to undertakings free of charge, it provides an advantage in the form of forgone revenues resulting from the market value of an intangible asset which the State could have sold or auctioned. As regards the notion of selectivity, the CFI ruled that the grant of emission credits was correctly limited under the scheme in question to a select group of beneficiaries with relevant thermal capacity. For the CFI, such a scheme is not selective, to the extent that the grant of credits is aimed at all those undertakings which are the biggest polluters, and that such a criterion is general and in conformity with the aim of the scheme of reference. It is justified by

¹⁰¹ [Case NN 80/06 and NN 81/06](#) *Aides à l'industrie du charbon pour l'année 2006* (OJ C 297, 20.11.2008, p. 1), the aid covers the period 2006-2007.

¹⁰² [Case N 261/07](#) *Coal sector (8 companies)* (OJ C 177, 12.7.2008, p. 1), the aid covers the period 2006-2007.

¹⁰³ [Case N 131/08](#) *Castilla-Leon - Aides aux mines de charbon*, (OJ C 329, 24.12.2008, p. 3).

¹⁰⁴ Case [T-289/03](#) *BUPA and Others v Commission*, not yet reported in the ECR.

¹⁰⁵ Case [T-233/04](#) *NOx trading permits*, not yet reported in the ECR.

the logic of the general system of which it is part. On 23 June, the Commission appealed this decision before the ECJ. The CFI partially annulled a Commission decision concerning the broadcasting sector, case *SIC v Commission*¹⁰⁶, insofar as it found that the exemption from registration charges does not constitute State aid.

121. In case *Chronopost v UFEX and Others*¹⁰⁷, the ECJ annulled the CFI judgment which, in turn, annulled a Commission decision concluding that the logistical and commercial assistance provided by La Poste to SFMI-Chronopost did not constitute State aid. The ECJ stated that it is necessary to take into account the fact that the transaction takes place between two companies within the same group and that, in those circumstances, the strategic considerations and synergies arising from the fact that Chronopost and La Poste belonged to the same group cannot be disregarded. Further, the CFI could not, without erring in law, conclude that it was unable to review whether the method used and the stages of the analysis followed by the Commission were free from error and compatible with the principles laid down by the ECJ for determining the existence or absence of State aid. The ECJ stated that the Commission cannot be criticised for having based the contested decision on the only data available at the time. Therefore, it confirmed the Commission Decision in question.
122. In the case *Deutsche Post AG (DPAG)*¹⁰⁸ the CFI annulled the Commission Decision stating that DPAG had used public funds – which were intended to compensate for universal service costs – to finance an aggressive pricing policy in its door-to-door parcel business. This behaviour was, therefore, not in line with the key principle according to which companies that receive State funding for services of general interest may not use these resources to subsidise activities open to competition, and the CFI ordered the recovery of the aid. It considered that the Commission had not shown that the transfer payments of public funds exceeded the amount of DPAG's uncontested net additional costs of providing a universal postal service. The Commission therefore failed to check whether the total amount of transfer payments made was less than the total amount of the net additional costs of providing a service of general economic interest, for which the company received compensation (in accordance with the conditions laid down in the Altmark judgment).
123. By its judgment in case *Alitalia v Commission*¹⁰⁹, the CFI confirmed the Commission's complex assessment adopted in its Decision of 18 July 2001 leading it to consider that the capital injection by Italy constituted compatible State aid and validated all the conditions resulting from the commitments provided by the Italian authorities. This judgment also shows that, notwithstanding the annulment in 2000 of a previous decision that came to the same conclusion, the Commission's assessment was correct in substance.
124. In case *Unión General de Trabajadores de La Rioja*¹¹⁰, the ECJ did not agree with the Commission's arguments alleging that the fiscal autonomy of the Basque Country

¹⁰⁶ Case [T-442/03 SIC v Commission](#), not yet reported in the ECR.

¹⁰⁷ Joined cases [C-341/06 P](#) and [C-342/06 P](#) *Chronopost v UFEX and Others*, not yet reported in the ECR.

¹⁰⁸ Case [T-266/02](#) *Deutsche Post AG (DPAG)*, not yet reported in the ECR.

¹⁰⁹ Case [T-301/01](#) *Alitalia v Commission*, not yet reported in the ECR.

¹¹⁰ Joined cases [C-428/06](#) to [C-434/06](#) *Unión General de Trabajadores de La Rioja*, not yet reported in the ECR.

constitutes State aid. The ECJ declared that, in order to determine whether laws adopted by an infra-State body constitute selective State aid, it is necessary to establish whether that body has sufficient institutional, procedural and economic autonomy (the Azores' criteria) in order for a law which it adopts within the limits of the powers conferred on it to be considered as being of general application within that infra-State body and as being non-selective. However, in that case the Court stated that it was for the national court to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy.

125. The CFI examined a range of issues concerning broadcasting public services in the joined case *TV 2 Denmark v Commission*¹¹¹. As to the definition of the public service mandate, the CFI upheld the findings of the Commission and confirmed the powers of the Member States to define broadcasting SGEI in broad and qualitative terms. The CFI held that the definition of the public service mandate should not be dependent on the activities of commercial broadcasters. The dual funding model of public service broadcasters was also confirmed. The CFI equally upheld the Commission's decision on the qualification of the licence fee revenues – collected from viewers but imposed by the Danish authorities – as State resources. At the same time, the CFI annulled the Commission decision finding that the Commission did not take all the information submitted during the investigation duly into account.
126. The CFI annulled the Commission decision on advantages granted by the Walloon Region and by Brussels South Charleroi Airport (BSCA) to *Ryanair*¹¹². The CFI rejects the Commission's view that, as the Walloon Region acted in its capacity of public authority, the fixing of landing charges and the guaranteed indemnity did not constitute an economic activity and therefore cannot be assessed by reference to the private investor principle. Instead, it considered the fixing of the amount of landing charges and the accompanying indemnity to be an activity that is directly connected with the management of airport infrastructure which constitutes, by reason of its nature, its purpose and the rules to which it is subject, an economic activity. Moreover, the airport charges must be regarded as consideration for services rendered at Charleroi Airport. With respect to BSCA, the CFI notes that it is economically dependent on the Walloon Region and should therefore have been considered by the Commission to be one and the same entity for the purposes of determining whether, taken together, they had acted as rational operators in a market economy.
127. In *British Aggregates Association v Commission*¹¹³, the ECJ sets aside a previous CFI judgment. With regard to material selectivity the Court focused on the effects of a measure, while taking the view that its objective is only of relevance for the assessment of compatibility. In contrast, the CFI had accepted that the pursuance of a policy objective (here: environmental protection) may render a dedicated levy non-selective. The ECJ also dismisses the distinction made by the CFI between, on the one hand, a partial exemption of certain companies from a levy and, on the other hand, the definition of the material scope of a levy. Finally, the ECJ confirmed that,

¹¹¹ Joined Cases [T-309/04](#), [T-317/04](#), [T-329/04](#) and [T-336/04](#) *TV 2 Denmark v Commission*, not yet reported in the ECR.

¹¹² Case [T-196/04](#) *Ryanair Ltd v Commission*, not yet reported in the ECR.

¹¹³ Case [C-487/06 P](#) *British Aggregates Association v Commission*, not yet reported in the ECR.

when it comes to assessing the concept of aid, the Community Courts are called upon to carry out a comprehensive review (which the CFI had failed to conduct).

128. In the *Gibraltar* case¹¹⁴ the CFI annulled the Commission's decision that declared the tax reform introduced in Gibraltar to be incompatible with the common market on account of the fact that the tax measures were both regionally and materially selective, thus constituting State aid within the meaning of Article 87(1) EC without there being any justification for compatibility. Concerning regional (i.e. geographical) selectivity, the CFI applied the Azores test and found that the Gibraltar measures comply with all three criteria. In particular, it found that the mere existence of financial transfers from the central government to the region (as was the case with Gibraltar) is not sufficient to infringe the third criterion. On the contrary, that criterion is not met only if the transfers are actually linked to the loss of tax revenue. Concerning material selectivity, the CFI found that the Commission had failed to carry out a proper assessment in that it failed to identify the general system, a possible derogation from which might have been regarded as selective and therefore as aid. The Commission will appeal this ruling before the ECJ.

3.2. Compatibility assessment

129. In case *Olympiaki Aeroporia Ypiresies AE v Commission*¹¹⁵, the CFI partially annulled a Commission decision inasmuch as it declares incompatible certain measures to compensate for losses in the airline industry following the terrorist attacks of 11 September 2001. The CFI considered that where an aid measure satisfies the conditions of Article 87(2)(b) EC it must be declared compatible with the common market, even if the Commission adopted a different position in the context of an earlier notice concerning the measure in question. Accordingly, even if, in accordance with that communication, any compensation paid under Article 87(2)(b) EC must concern costs incurred during a defined period, aid compensating a loss which arose after that period, but having a direct causal connection with the exceptional occurrence concerned and being accurately evaluated, must be held to be compatible with the common market.

3.3. Procedural issues

130. The CFI partially annulled a Commission decision in case *SIDE v Commission*¹¹⁶. The CFI stated that while the Commission enjoys a wide discretion to allow aid by way of derogation from the general prohibition in Article 87(1) EC, that discretion cannot be used in order to disregard the fact that during the period in which the aid in question was unlawfully paid, it could have distorted competition in a manner contrary to the Community interest, as determined under the existing legislative framework.
131. The ECJ found in case *Athinaiki Techniki AE v Commission*¹¹⁷ that the CFI erred in law in considering an action for annulment as being inadmissible because it

¹¹⁴ Joined Cases [T-211/04 and T-215/04](#) *Government of Gibraltar v Commission*, not yet reported in the ECR.

¹¹⁵ Case [T-268/06](#) *Olympiaki Aeroporia Ypiresies AE v Commission*, not yet reported in the ECR.

¹¹⁶ Case [T-348/04](#) *SIDE v Commission*, not yet reported in the ECR.

¹¹⁷ Case [C-521/06 P](#) *Athinaiki Techniki AE v Commission*, not yet reported in the ECR.

concerned an act that has no legal effect (an administrative letter rejecting a complaint). Where it is apparent from the progress of the administrative procedure that the Commission has decided to bring an end to the preliminary investigation procedure on the ground that the State measure at issue does not constitute State aid, the contested act must be classified as a decision within the meaning of Article 4(2) of Regulation No 659/1999, read in conjunction with Articles 13(1) and the third sentence of Article 20(2) of that Regulation. Such decision constitutes an act open to challenge for the purposes of Article 230 EC (action for annulment).

132. In the case *Freistaat Sachsen*¹¹⁸ the ECJ set aside the judgment of the CFI, which partially annulled a Commission decision concerning the application of SME BER to projects notified to the Commission before the entry into force of that Regulation and referred the case back. The ECJ ruled that a notification by a Member State of an aid or a proposed aid scheme does not give rise to a definitely-established legal situation which would require the Commission to rule on its compatibility with the common market by applying substantive rules in force on the notification date. On the contrary, it is up to the Commission to apply the rules in force at the time when it announces its decision.

3.4. Recovery of aid

133. In the *CELF*¹¹⁹ case, the ECJ clarified that once the Commission has taken a positive view on an unnotified aid, EC law does not require the immediate recovery of the full amount of aid. However, national courts have to take into account the undue time advantage gained by the beneficiaries of unlawful aid which is subsequently found compatible by the Commission. In this case the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Under national law, the court may also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it subsequently. Finally, it may be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.
134. In case *Commission v Salzgitter*¹²⁰, the ECJ sets aside the judgment of the CFI which annulled a Commission decision concerning the obligation for Germany to recover incompatible State aid from the applicant and refers the case back to the CFI. The ECJ stated that, even though the CFI was entitled to hold that a beneficiary of State aid can rely on the principle of legal certainty to support an action for annulment of a decision ordering recovery of that aid, the CFI wrongly applied the principle in this case because it failed to examine whether the Commission had manifestly failed to act and had clearly breached its duty of diligence in the exercise of its supervisory powers (which are the only grounds which can render illegal a Commission decision ordering recovery of unlawful aid under the ECSC Treaty).
135. The ECJ confirmed in case *Commission v France*¹²¹ that France had failed to fulfil its recovery obligations.

¹¹⁸ Case [C-334/07 P](#) *Freistaat Sachsen v Commission*, not yet reported in the ECR.

¹¹⁹ Case [C-199/06](#) *Centre d'exportation du livre français*, not yet reported in the ECR.

¹²⁰ Case [C-408/04 P](#) *Commission v Salzgitter*, not yet reported in the ECR.

¹²¹ Case [C-214/07](#) *Commission v France*, not yet reported in the ECR.

136. In *Wienstrom v Bundesminister für Wirtschaft und Arbeit*¹²², the ECJ concluded that the prohibition on putting State aid measures into effect laid down in the last sentence of Article 88(3) EC does not require a national court to dismiss an action brought by a recipient of State aid against the Member State granting the aid concerning the amount of that State aid allegedly due in respect of a period predating a positive Commission decision.

II – Sector Developments

A – ENERGY AND ENVIRONMENT

1. OVERVIEW OF THE SECTOR

137. European energy policy is built around three pillars: sustainability, security of supply and competitiveness. Reducing greenhouse gases is vital to combating climate change, and all European consumers (households as well as commercial and industrial users) depend heavily on the secure and reliable provision of energy at competitive prices. These objectives can only be 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.
138. The aim of competition policy in the energy field is ensuring a secure flow of energy, in particular electricity and gas, at competitive prices to the EU's households and businesses. An open and competitive single EU market would also guarantee a secure provision of energy in the future by sending the necessary signals for investment and making the European market attractive to external suppliers. Such a market would also be open to new energy mixes and would play a major role in developing and deploying new environmentally friendly technologies. Prices that reflect costs will help encourage energy efficiency, thereby supporting sustainability and security of supply.

2. POLICY DEVELOPMENTS

139. On 10 January 2007, the Commission adopted a comprehensive package of measures to establish a new Energy Policy for Europe to combat climate change and boost the EU's energy security and competitiveness¹²³. Together with this package, the Commission also adopted the Final Report on the energy sector inquiry¹²⁴. On the basis of a general endorsement of the package by the Council in March 2007 and by the Parliament in July 2007, the Commission put forward a proposal for a third

¹²² Case [C-384/07](#) *Wienstrom v Bundesminister für Wirtschaft und Arbeit*, not yet reported in the ECR.

¹²³ Communication from the Commission to the European Council and the European Parliament – an energy policy for Europe ([COM\(2007\) 1 final, 10.1.2007](#)).

¹²⁴ 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](#)).

liberalisation package for the European electricity and gas markets on 19 September 2007¹²⁵. It focuses in particular on (i) effective unbundling of transmission networks; (ii) strengthening of the powers and independence of regulators; (iii) cooperation between regulators; and (iv) cooperation among transmission system operators.

140. The Internal Energy Market package proposed by the Commission on 19 September 2007 was the subject of intensive discussions between the three institutions in 2008. The Parliament adopted its first-reading opinions on the Energy Package in the summer (on 18 June for electricity and on 9 July for gas). The Energy Council reached a political compromise on 10 October 2008.
141. On 23 January the Commission put forward a far-reaching package of proposals that will deliver on the EU's ambitious commitments to fight climate change and promote renewable energy up to 2020 and beyond. In December, fully in line with the Commission's proposals, the European Parliament and Council reached an agreement on targets which will become legally binding by 2020. It has been agreed to cut greenhouse gas emissions by 20%, to establish a 20% share for renewable energy, and to improve energy efficiency by 20%. The agreement concerned revisions to the emissions trading system, the distribution of the reduction effort outside of the emissions trading system, binding national targets for the share of renewable energy produced, a legal framework for environmentally safe carbon capture and storage (CCS) as well as related proposals on CO2 emissions from cars and on fuel quality. This will help transform Europe into a low-carbon economy and increase its energy security. In support of the Commission's overall climate change and renewable energy policies, the package also includes new guidelines on State aid to environmental protection, specifying the conditions under which aid to environmental protection may be declared compatible with the Treaty. These Guidelines became applicable in April. In July, the Commission adopted the new General Block Exemption Regulation under which State aid for renewable energy and energy efficiency are exempted from notification when certain criteria are met.
142. On 13 November, the Commission adopted a Second Strategic Energy Review package¹²⁶, containing wide-ranging proposals on enhancing the security of energy supply and stressing, inter alia, the importance of the functioning of a competitive Internal Energy market for security of energy supply.
143. Addressing competition problems along the whole of the gas and electricity supply chains and making combined use of the full range of the Commission's powers, from anti-trust rules (Articles 81, 82 and 86 EC) to merger control rules (Regulation

¹²⁵ This package includes the following proposals: Proposal for a Directive amending Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity ([COM\(2007\) 528 final, 19.9.2007](#)); Proposal for a Directive amending Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas ([COM\(2007\) 529, 19.9.2007](#)); Proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators ([COM\(2007\) 530 final, 19.9.2007](#)); Proposal for a Regulation amending Regulation (EC) No 1228/2003 (electricity) ([COM\(2007\) 531 final, 19.9.2007](#)) and Proposal for a Regulation amending Regulation (EC) No 1775/2005 (gas) ([COM\(2007\) 532 final, 19.9.2007](#)).

¹²⁶ See Press release [IP/08/1696](#), 13.11.2008.

139/2004) and State aid rules (Articles 87 and 88 EC), continues to be of relevance in order to maximize the overall enforcement impact.

2.1. Anti-trust enforcement

144. Properly functioning energy markets require entrants to be able to access energy networks and customers. The Commission has continued to focus in particular on three general types of abuses in the electricity and gas sectors in order to address the main areas of market malfunctioning identified by the sector inquiry. These investigations focus on exclusionary conduct, exploitative abuses and collusion. Exclusionary conduct covers practices of vertically integrated incumbents relating to the networks. More specifically, the Commission investigated incumbents suspected of engaging in the foreclosure both of rivals and of customers.
145. Investigations concerning exploitative abuses include conduct engaged in by incumbents to decrease production to the detriment of consumers. The Commission is also investigating alleged collusion between incumbents in the form of market sharing.
146. In 2006 the Commission initiated investigations into the German electricity market as a follow-up to the energy sector inquiry¹²⁷. In the course of its investigation, the Commission came to the preliminary view that *E.ON* might have abused its dominant market position in two ways: first, as a wholesaler on the electricity market, by strategically withholding production capacity of certain power plants on the wholesale market in order to drive up the price (the Commission also had concerns that *E.ON* had devised and implemented a strategy to deter third parties from investing in electricity generation); and, secondly, as a transmission system operator, favouring its own production in the secondary electricity balancing market¹²⁸.
147. To address the concerns raised in the first case, *E.ON* proposed to divest about 5 000 MW, i.e. more than 20% of its generation capacity, from different types of technologies and fuels in Germany, effectively rendering *E.ON* unable to withdraw capacity in order to raise prices and also providing generation capacity to its competitors. To address the Commission's concerns in the second case, *E.ON* proposed to divest its transmission system business consisting of an Extra-High-Voltage line network and system operations currently run by *E.ON Netz*. This will remove the operator's incentive to favour a particular supplier and demonstrates how the general concerns expressed by the Commission in the sector inquiry on the consequences of vertical integration in this sector can be dealt with effectively.
148. On 12 June, the Commission consulted interested parties on the structural commitments proposed by *E.ON* to address these concerns of anticompetitive behaviour on the German electricity markets¹²⁹. The results confirmed that the commitments were proportionate and necessary to remedy the concerns. As a result,

¹²⁷ See [MEMO/06/483](#), 12.12.2006.

¹²⁸ Balancing energy is last minute electricity supply to maintain the frequency of the current in the network. The Commission had concerns that *E.ON* was favouring its own production affiliate, even if it charged higher prices, passing on the increased costs to the final customer, and that *E.ON* prevented other power producers from selling balancing energy into the *E.ON* markets.

¹²⁹ See [MEMO/08/396](#), 12.6.2008.

the Commission adopted a decision on 26 November which made the commitments offered by E.ON legally binding and closed its investigation¹³⁰.

149. As regards other cases concerning the electricity market, the Commission issued a SO to *Electricité de France (EdF)* on 23 December alleging customer foreclosure through *de facto* and/or *de jure* exclusive long-term contracts between EdF and large industrial users in France¹³¹. Furthermore, the Commission continued its investigation in *Suez/Electrabel* concerning the same alleged behaviour in Belgium¹³².
150. After conducting surprise inspections in 2006 on E.ON AG (E.ON), E.ON Ruhrgas AG and Gaz de France (GdF) premises in Germany and France¹³³ and formally opening proceedings in July 2007¹³⁴, the Commission issued a SO to *E.ON* and *GdF*. The alleged infringement takes the form of a suspected agreement and/or concerted practice between E.ON and GdF, according to which they would not sell gas in the other party's home market even after the liberalisation of the European gas markets. This alleged agreement and/or concerted practice concerns, in particular, supplies of natural gas transported via the MEGAL pipeline, which is jointly owned by E.ON and GdF and transports gas across southern Germany between the German-Czech and German-Austrian borders on the one side and the French-German border on the other side.
151. Furthermore, on 22 May the Commission decided to open formal proceedings against *GdF* for a suspected breach of EC competition law¹³⁵. The Commission proceedings focus on behaviour which may prevent or reduce competition on supply markets for natural gas in France. The potential infringement consists of behaviour that might prevent or reduce competition on downstream supply markets for natural gas in France via, in particular, a combination of long-term reservation of transport capacity and a network of import agreements, as well as through strategic underinvestment in import infrastructure capacity.
152. The Commission continued in 2008 to investigate *RWE's* alleged behaviour on the German gas transmission market after initiating proceedings in 2007¹³⁶. According to the Commission's preliminary assessment, RWE may have abused its dominant position on the gas transmission market within its network area, notably by refusing to supply gas transmission services to third parties and by trying to lower the profit margins of its downstream competitors in gas supply¹³⁷.
153. RWE offered structural commitments as a result of the preliminary assessment. It proposed to undertake to sell its gas transmission system network in the west of

¹³⁰ See Press Release [IP/08/1774](#), 26.11.2008.

¹³¹ See [MEMO/08/809](#), 29.12.2008.

¹³² See [MEMO/07/313](#), 26.7.2007.

¹³³ See [MEMO/06/205](#), 17.5.2006.

¹³⁴ See [MEMO/07/316](#), 30.7.2007.

¹³⁵ See [MEMO/08/328](#), 22.5.2007.

¹³⁶ See [MEMO/07/186](#), 11.5.2007.

¹³⁷ In particular the German gas supply market has been foreclosed by a) discriminatory rebate systems, b) inflation of network costs, c) maintenance of sub-networks and d) lack of effective congestion management.

Germany to an independent operator¹³⁸. The Commission invited comments from interested parties on the commitments offered on 5 December by RWE to meet concerns that it may have infringed EC Treaty rules on the abuse of a dominant market position¹³⁹. If the result of the market test is positive, the Commission will adopt a decision under Article 9 of Regulation 1/2003, making the commitments legally binding on RWE.

154. The investigation that was opened in 2007 into alleged capacity hoarding, capacity degradation and strategic underinvestment by the Italian energy group *ENI* on the Tag and the TENP gas pipelines, resulting in suspected downstream market foreclosure, is still ongoing¹⁴⁰.

2.2. Mergers

155. On 21 October, the Commission cleared – subject to conditions - the acquisition of the retail motor fuel businesses in Scandinavia (JET Scandinavia belonging to the American energy firm, ConocoPhillips)¹⁴¹ by the Norwegian energy firm StatoilHydro. This firm is an integrated oil and gas company active in the exploration and production of crude oil and natural gas. The company also refines and sells motor fuels and other oil derivatives. StatoilHydro operates fuel station networks in Scandinavia under the Statoil, Hydro and Uno-X brands. Jet Scandinavia operated fuel station networks in Denmark, Norway and Sweden under the JET brand.
156. The Commission found that the proposed transaction – as originally notified – would have raised serious competition concerns in Norway and Sweden. In Norway, the proposed transaction would have reinforced the oligopolistic structure of the Norwegian market, and StatoilHydro's position as the largest provider of motor fuels in Norway would have been strengthened. In Sweden, StatoilHydro was already the market's largest supplier and, by acquiring one of its main competitors, the company would have obtained a market share that was more than double the share of the second largest competitor. The Commission had further concerns because JET was the most efficient low-cost operator in both Norway and Sweden, with a strong brand and a proven track record of undercutting competitors' prices in markets with high entry barriers. To address the Commission's concerns, StatoilHydro offered to divest the entire JET network in Norway and a 158-station network in Sweden, made up entirely of unmanned fuel stations. In view of these commitments, the Commission concluded that the transaction would no longer raise serious competition concerns in Norway and Sweden. Independently of the competition assessment, StatoilHydro had decided to close a number of less efficient fuel stations in Sweden.
157. On 22 December, the Commission approved¹⁴² the proposed acquisition of British Energy (BE) by Electricité de France S.A (EdF). BE, active only within Great Britain, is present in the generation and wholesale trading of electricity and in the

¹³⁸ See [MEMO/08/355](#), 31.5.2008.

¹³⁹ A summary of the commitments proposed by RWE has been published in the EU Official Journal ([OJ C 310, 5.12.2008, p. 23](#)) and the full non-confidential version of the commitments is available on the [Europa Competition website](#).

¹⁴⁰ See [MEMO/07/187](#), 11.5.2007.

¹⁴¹ Case [COMP/M.4919 StatoilHydro/ConocoPhillips](#).

¹⁴² Case [COMP/M.5224 EdF/BE](#).

retail supply of electricity to industrial and commercial customers. It focuses mainly on nuclear generation, and operates most of the nuclear generation capacity in Great Britain. EDF is a global company active in the generation and wholesale of electricity and in the transmission, distribution and retail supply of electricity to all groups of customers. The main effects of the transaction were therefore felt in the UK electricity markets.

158. This transaction has to be seen in the context of the UK government's objective of developing new nuclear power generation in the UK. Despite the fact that the proposed transaction did not lead to very high levels of concentration in terms of market shares in the affected markets (generation and wholesale of electricity; and the retail supply of electricity to industrial and commercial customers), the market investigation led the Commission to conclude that the transaction raised serious doubts as to its compatibility with the common market in four specific areas: (i) withdrawal of flexible generation capacity leading to price increases in the electricity wholesale market, (ii) decrease of liquidity in the wholesale market due to the increased use of own generated electricity to supply customers of the new entity instead of selling it in the wholesale market, (iii) very strong position with respect to the ownership of sites likely to be suitable for the development of new nuclear power generation sites and (iv) very strong position with respect to the ownership of rights to obtain additional connections to the transmission network.
159. In order to dispel these competition concerns, the Commission has accepted a remedy package proposed by the parties, which consists of the divestiture of two flexible generation power plants, a commitment to sell certain volumes of electricity on the wholesale market for a given period of time, the unconditional sale of one good site (to be selected by the purchaser from two alternatives) for the development of new nuclear generation capacity and, finally, the release of a transmission network connection agreement. The Commission considered that these commitments are sufficient to remove the competitive problems identified, as they significantly limit the ability and incentives of the new entity to engage in anti-competitive capacity withdrawal strategies or to reduce wholesale market liquidity. They facilitate new entry into the generation market in two ways: by facilitating access to new sites and by doing away with restrictions on connection to the transmission network.

2.3. State aid

160. In the area of **State aid control**, the Commission requested Hungary to end several long-term power purchase agreements (PPA)¹⁴³. These agreements grant favourable conditions to electricity generators selling electricity to the State-owned Magyar Villamos Művek Zrt. (MVM). Hungary is also requested to recover the aid granted since its accession to the EU in 2004. The PPA cover around two thirds of the electricity generated in Hungary. Even though these PPA agreements were concluded before the accession, they fall within the scope of EC State aid rules because they were applicable after accession (pursuant to point 3 of Annex IV to the Accession Act). They prevent competition on merits and close off a significant part of the

¹⁴³ Case [C 41/2005](#) *Hungarian stranded costs* (not yet published in the OJ). A few months before the Commission requested Poland to end similar long term power purchase agreements (Case [C 43/2005](#) *Stranded costs compensation in Poland*, not yet published in the OJ).

market from new entrants, thus distorting competition to the detriment of Hungarian electricity consumers. Nevertheless, the Commission has consistently acknowledged the major investments in power plants that were made by the power generators before the liberalisation of the electricity markets. The Commission has allowed other Member States to grant State aid in order to help power generators to recover such investments. In this context, in 2001, the Commission issued the "Stranded Costs Methodology"¹⁴⁴, which sets out the principles for assessing this form of aid. However, the PPA did not meet the criteria laid down in that methodology. If Hungary were to decide to notify a genuine stranded costs compensation scheme, this would need to be assessed on its own merits.

161. In the area of renewable energies the Commission approved aid of EUR 2 350 million for the use of renewable energies in Germany¹⁴⁵. Furthermore, the Commission authorised two Italian cases of State aid in the form of tax reductions to stimulate the production and the use of biodiesel¹⁴⁶. In both cases the tax reductions were accompanied by supply obligations. This coexistence of supply obligations and tax reductions was a novelty. Such a situation may raise the question of the need for aid, since both instruments (i.e. tax exemption and supply obligation) pursue the same goal of bringing biofuels to the market. However, for the cases at hand, this problem remained limited in the short run and the Commission was able to approve the schemes until the end of 2010. This timeframe should also be adequate to collect sufficient data in order to assess in more detail the long-run effects that the coexistence of these two instruments will have on the market.
162. In Austria, the Commission investigated the partial sale of a State-owned electricity provider¹⁴⁷. The Commission found that the market value of the shares was fixed by two independent experts on the basis of generally accepted market indicators and valuation standards. The Commission approved the sale on the grounds that the measure did not constitute State aid, since the State acted like a market economy investor operating under normal market economy conditions.
163. The Commission also investigated a public service compensation scheme notified by Spain. Under the scheme, Spain granted financial compensation to certain power generators for electricity produced from indigenous coal. Following extensive discussions with the Commission, Spain decided to withdraw the notification. The use of indigenous primary energy resources for power generation may, under certain circumstances, be regarded as a genuine Service of General Economic Interest (SGEI). However, the notified scheme was not in line with the rules applicable to State aids in the form of public service compensation.

¹⁴⁴ [Commission letter SG \(2001\) D/290869 of 6.8.2001](#) - Commission Communication relating to the methodology for analysing State aid linked to stranded costs.

¹⁴⁵ Case [N 287/2005](#) *Modification and prolongation of the aid scheme "Aid for the use of renewable energies"* (OJ C 261, 14.10.2008, p. 2).

¹⁴⁶ Cases [N 326/2007](#) *Prolongation tax exemption biodiesel* (OJ C 134, 31.5.2008, p. 1) and [N 63/2008](#) *Excise duty reduction for biofuels* (OJ C 323, 18.12.2008, p. 4).

¹⁴⁷ Case [N 90/2008](#) *Partial privatisation of Energie AG Oberösterreich by a private equity operation* (OJ C 216, 23.8.2008, p. 13).

164. As regards preferential electricity tariffs in Italy, the Commission opened a new procedure¹⁴⁸ in addition to the ongoing investigations (concerning, in particular, the aluminium producer Alcoa¹⁴⁹). Also, the Commission is continuing to investigate State aid cases related to regulated electricity tariffs in France¹⁵⁰ and Spain¹⁵¹.

B – FINANCIAL SERVICES

1. OVERVIEW OF THE SECTOR

165. 2008 proved to be extremely difficult for the financial sector, since the financial crisis hit the European economies in the autumn. Many EU governments reacted to this unprecedented crisis by taking measures to support financial stability (see 2.1.1. below).
166. Financial markets are crucial to the functioning of modern economies. The more integrated and the more competitive they are, the more efficient the allocation of capital and the long-run economic performance will be. Banking, insurance and securities are three major areas of the financial services sector.
167. The European banking sector has undergone significant growth and diversification over the last two decades. Today it directly provides over four million jobs in the EU. Retail banking remains the most important sub-sector of banking, representing over 50% of total EU banking activity in terms of gross income. However, the final report of the inquiry into the retail banking sector published in January 2007 underlined a number of competition issues.
168. Following the sector inquiry, and on the basis of cases which had already been investigated during the inquiry, several decisions were adopted in the area of financial services during 2007. At the end of 2007, the Commission adopted a decision prohibiting the cross-border Multilateral Interchange Fees (MIF) applied by MasterCard. In March 2008, the Commission opened an investigation regarding VISA's cross-border MIF. In June, MasterCard repealed these interchange fees¹⁵². The Decision in the MasterCard case is currently under appeal before the CFI.
169. To underpin the development of a single market for financial services and to harness the full potential benefits of the euro, the European banking industry is creating a Single Euro Payments Area (SEPA). SEPA is a self regulatory initiative from the European Payments Council (EPC), an association of undertakings, to move to an integrated euro payments area, ensuring that cross border payments become as easy and efficient as domestic payments. The SEPA framework for payment cards and the credit transfer scheme were launched in 2008 and the launch of the direct debit

¹⁴⁸ Case [C 36/2008](#) *State aid in favour of the Sulcis integrated power plant* (OJ C 240, 19.9.2008, p. 14).

¹⁴⁹ Cases [38a/2004](#) *Preferential electricity tariff in favour of Alcoa* (OJ C 30, 5.2.2005, p. 7), [C 38b/2004](#) *Preferential electricity tariff in favour of Portovesme, ILA and Euroallumina* (OJ C 30, 5.2.2005, p. 7), [C 13/2006](#) *Preferential Electricity Tariff for Energy Intensive Industry in Sardinia* (OJ C 145, 21.6.2006, p. 8) and [C 36b/2006](#) *Preferential electricity tariff – Alcoa* (OJ C 214, 6.9.2006, p. 5).

¹⁵⁰ Case [C 17/2007](#) *Regulated electricity tariffs in France* (OJ C 164, 18.7.2007, p. 9).

¹⁵¹ Case [C 3/2007](#) *Regulated electricity tariffs in Spain* (OJ C 43, 27.2.2007, p. 9).

¹⁵² See [MEMO/08/397](#), 12.6.2008.

scheme is scheduled for 2 November 2009. SEPA is intended to facilitate competition between banks by removing national barriers.

170. The SEPA project is supported by the European Commission and the European Central Bank (ECB). However, as the project is being led by the EPC, its implementation requires close competition scrutiny. Against this background, the Commission, together with the NCA, has addressed a number of SEPA related issues as part of an ongoing dialogue with the EPC.
171. Insurance is another financial service of vital importance for big and small businesses throughout the European Union. Business insurance is the most important sector of non-life insurance. A competitive environment in business insurance is therefore key to European economic growth. A number of competition issues in the sector were underlined in the Commission's final report on the sector inquiry into business insurance, which was published in September 2007¹⁵³, and in particular concerns related to the operation of the subscription process in coinsurance and reinsurance markets and conflicts of interest in brokerage. The former issue has been partly addressed by an industry initiative which the Commission is continuing to monitor, whilst the latter is more systemic in nature and will need to be addressed through channels other than competition policy.

2. POLICY DEVELOPMENTS

2.1. The financial crisis

2.1.1. Impact on financial markets

172. At the beginning of the autumn the financial crisis had a systemic impact on the economies of EU Member States. Many EU governments have taken measures to support financial stability, to restore confidence in the financial markets and to minimize the risk of a serious credit crunch.
173. In the field of competition policy – and, in particular, State aid control – the role of the Commission has been to support financial stability by rapidly giving legal certainty to the measures taken by Member States. The Commission also contributed to maintaining a level playing field and to ensuring that national measures would not simply export problems to other Member States.
174. In its October Communication on the "Application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis"¹⁵⁴, the Commission clarified its general approach and provided guidance on a number of State interventions, particularly on State guarantees, which were the most widespread response to the crisis in the initial phase.

¹⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance (Final Report) ([COM\(2007\) 556 final, 25.9.2007](#)).

¹⁵⁴ [OJ C 270, 25.10.2008, p. 8](#).

175. Subsequently, the recapitalisation of banks moved into the focus of Member States' attention. In December, the Commission provided guidance on the assessment of such measures under EU State aid rules in the Communication "The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition"¹⁵⁵.
176. The two communications provided crucial guidance to Member States on how to take effective measures to stabilise financial markets and ensure sustained lending to the real economy without creating undue distortions of competition by exporting problems from one Member State to the others.
177. The consistent methodology set out in these guidance documents has permitted the swift design and approval of a large number of national schemes and individual measures to tackle the crisis, whilst avoiding harmful economic imbalances between banks and between Member States.
178. The Commission approved aid in the following decisions on the basis of Article 87(3)(c): Sachsen LB¹⁵⁶, IKB¹⁵⁷, West LB¹⁵⁸, Roskilde Bank¹⁵⁹, Hypo Real Estate¹⁶⁰, Bradford and Bingley¹⁶¹.
179. Due to the deepening of the crisis, the Commission decided at the beginning of October 2008 to approve State aid under Art. 87(3)(b) – aid to remedy a serious disturbance in the economy of a Member State. In 2008, the Commission approved the following *aid schemes* supporting financial stability:
- eleven *guarantee schemes* (Denmark¹⁶², Finland¹⁶³, France¹⁶⁴, Ireland¹⁶⁵, Italy¹⁶⁶, Latvia¹⁶⁷, the Netherlands¹⁶⁸, Portugal¹⁶⁹, Slovenia¹⁷⁰, Spain¹⁷¹ and Sweden¹⁷²);
 - two *recapitalisation schemes* (France¹⁷³ and Italy¹⁷⁴);
 - one *asset purchase scheme* (Spain¹⁷⁵); and

¹⁵⁵ [OJ C 10, 15.1.2009, p. 2.](#)

¹⁵⁶ C 9/2008 *Restructuring aid to Sachsen LB, Germany.*

¹⁵⁷ C 10/2008 *Restructuring aid to IKB, Germany.*

¹⁵⁸ C 43/2008 *Restructuring aid to West LB, Germany.*

¹⁵⁹ N 366/2008 *Rescue aid to Roskilde Bank, Denmark.*

¹⁶⁰ NN 44/2008 *Rescue aid to Hypo Real Estate, Germany.*

¹⁶¹ NN 41/2008 *Rescue aid to Bradford and Bingley, UK.*

¹⁶² NN 51/2008 *Guarantee scheme for banks in Denmark.*

¹⁶³ N 567/2008 *Finnish guarantee scheme.*

¹⁶⁴ N 548/2008 *Financial support measures to the banking industry in France (refinancing), not yet published.*

¹⁶⁵ NN 48/2008 *Guarantee scheme for banks in Ireland.*

¹⁶⁶ N 520a/2008 *Guarantee scheme for Italian banks.*

¹⁶⁷ N 638/2008 *Guarantee scheme for banks.*

¹⁶⁸ N 524/2008 *Guarantee scheme for Dutch financial institutions.*

¹⁶⁹ NN 60/08 *Guarantee scheme for credit institutions in Portugal.*

¹⁷⁰ N 531/2008 *Guarantee scheme for credit institutions in Slovenia.*

¹⁷¹ NN 54b/2008 *Spanish guarantee scheme for credit institutions.*

¹⁷² N 533/2008 *Support measures for the banking industry in Sweden.*

¹⁷³ N 613/2008 *Financial support measures to the banking industry in France (recapitalisation).*

¹⁷⁴ N 648/2008 *Recapitalisation scheme.*

¹⁷⁵ NN 54a/2008 *Fund for the Acquisition of Financial Assets in Spain.*

- four *holistic schemes* with two or more of the above elements (Austria¹⁷⁶, Germany¹⁷⁷, Greece¹⁷⁸, United Kingdom¹⁷⁹).
180. The Commission also approved a number of *individual cases* in 2008, including recapitalisation, guarantee and liquidity cases: *ING*¹⁸⁰, *KBC*¹⁸¹, *Parex*¹⁸², *SNS Reaal*¹⁸³, *Bayern LB*¹⁸⁴, *Fortis*¹⁸⁵, *Dexia*¹⁸⁶, *Nord LB*¹⁸⁷, *guarantee for IKB*¹⁸⁸, *Carnegie Sweden*¹⁸⁹, *Aegon*¹⁹⁰, *Fortis Bank and Fortis Bank Luxembourg*¹⁹¹.
181. The Commission has acted quickly to restore confidence in the market. In adopting these decisions, it has provided clarity and legal certainty to the Member States and demonstrated that EU State aid policy reacts in a pragmatic and responsible manner to the evolving market circumstances.
182. Recapitalization in some cases has led to the State acquiring control over financial institutions, and the resulting issues to be considered under the ECMR. In keeping with the principle of neutrality as regards public or private ownership of the means of production which is set out in the Treaty, and more specifically with the principles laid out in the Merger Regulation and Jurisdictional Notice themselves, the Commission has considered that such operations are not notifiable concentrations in the event that the acquired institutions retain their independent power of decision-making and are not subject to commercial coordination with other State undertakings. In the opposite case the Commission would review such operations under the Merger Regulation as usual.

2.1.2. *Impact on the real economy*

183. The financial crisis had a severe impact on the economy of the EU. Banks were deleveraging and becoming much more risk-averse than in previous years. Companies started to experience difficulties with access to credit. A serious downturn was starting to affect the wider economy.
184. The challenge for the Commission was to avoid public intervention which would distort competitive conditions on the Internal Market and undermine the objective of a well targeted State aid. Nevertheless, the Commission has recognised that, under certain conditions, there is a need for State aid to tackle the crisis. However, State aid

¹⁷⁶ N 557/2008 *Aid scheme for the Austrian financial sector.*
¹⁷⁷ N 512/2008 *Aid scheme for financial institutions in Germany.*
¹⁷⁸ N 560/2008 *Aid scheme to the banking industry in Greece.*
¹⁷⁹ N 507/2008 *Aid scheme to the banking industry in the UK.*
¹⁸⁰ N 528/2008 *Measure in favour of ING (recapitalisation), Netherlands.*
¹⁸¹ N 602/2008 *KBC Recapitalisation, Belgium.*
¹⁸² NN 68/2008 *Support measures for JSC Parex Banka, Latvia.*
¹⁸³ N 611/2008 *SNS Reaal/New capital injection by the Dutch authorities, Netherlands.*
¹⁸⁴ N 615/2008 *Guarantee and recapitalisation for Bayern LB, Germany.*
¹⁸⁵ N 574/2008 *Measures in favour of Fortis, Belgium/Luxembourg/Netherlands.*
¹⁸⁶ NN 45-49-50/2008 *Guarantee on liabilities of Dexia, Belgium.*
¹⁸⁷ N 655/2008 *Guarantee for Nord LB, Germany.*
¹⁸⁸ N 639/2008 *Guarantee for IKB, Germany.*
¹⁸⁹ NN 64/2008 *Emergency rescue measures regarding Carnegie Investment Bank, Sweden.*
¹⁹⁰ N 569/2008 *Measure in favour of Aegon, Netherlands.*
¹⁹¹ NN 42-46-53A/2008 *Restructuring aid to Fortis Bank and Fortis Bank Luxembourg.*

should not be used to postpone or avoid a necessary restructuring of companies faced with structural difficulties.

185. With this objective in view, the Commission has taken several steps to address the situation in the real economy, in addition to specific actions taken in the financial and banking sector.
186. In particular, the Commission adopted the "Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis"¹⁹².
187. This Temporary Framework gives Member States additional possibilities to tackle the effects of the credit squeeze on the real economy. In order to meet these objectives, Member States may, under certain conditions and until the end of 2010, grant e.g.:
- a lump sum of aid up to EUR 500 000 per company for the next two years to relieve their current difficulties,
 - State guarantees for loans at a reduced premium,
 - subsidised loans, in particular for the production of 'green' products (meeting environmental protection standards early or going beyond such standards),
 - risk capital aid up to EUR 2.5 million per SME per year (instead of the current EUR 1.5 million) in cases where at least 30% (instead of the current 50%) of the investment cost comes from private investors.

Also the burden of proof of market failures in the export credit insurance market is lowered.

188. The Commission adopted a "can do" approach, thereby ensuring that crisis measures are approved very swiftly. The first measures were approved at the end of 2008¹⁹³.

2.2. Single Euro Payments Area (SEPA)

189. SEPA has been an important focus of anti-trust advocacy in the field of financial services in 2008. 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. Its aim is to ensure that cross border payments become as easy and efficient to make as domestic payments. Once implemented, SEPA will cover credit transfers, payment cards and direct debit. SEPA is expected to enhance competition and to lead to efficiency gains. It is strongly supported by the Commission and the ECB.
190. However, since the implementation of SEPA is based on decisions by the EPC, which is an association of banks and banking associations representing the European banking industry, and is thereby based on decisions by and agreements between

¹⁹² [OJ C 16, 22.1.2009, p. 1.](#)

¹⁹³ Cases [N 661/2008](#) *KfW run loan component of German Konjunkturprogramm* (OJ C 29, 5.2.2009, p. 3) and [N 668/2008](#) *Federal Framework "Small amounts of compatible aid"* (not yet published in the OJ), both in Germany.

undertakings that are (potential) competitors, it requires close competition scrutiny. It also needs to be implemented in accordance with the existing Community framework for payment services.

191. In a detailed, in-depth analysis, Commission and NCA experts jointly identified competition concerns and raised a number of questions. In view of the exceptional character of the project and its important potential consequences for European companies and consumers, it was decided to address these concerns in an informal dialogue with the EPC which began in October 2007. Given the need for a common European approach, the ECB and DG Internal Market were closely involved in the dialogue.
192. The first milestone was reached in December 2007. This was an urgent priority as banks had to start making their card payments SEPA compliant by 1 January 2008. As a result of the dialogue, the SEPA Card framework (SCF) was clarified by the EPC, which explained that SEPA compliant card schemes did not need to cover all 31 States of the SEPA territory¹⁹⁴. To be compliant, a scheme is only required to operate in such a way that there are no barriers to effective competition between issuers, acquirers and processors. SEPA compliant card schemes should therefore be capable of being acquired or issued in any SEPA country. An obligation to cover the whole of the SEPA territory could have caused banks and national banking associations to abandon cheap and efficient national systems for one of the only two existing (more expensive) international schemes (i.e. Maestro/V-Pay for debit cards or MasterCard/Visa for credit cards). On the basis of the clarification provided, the geographical coverage will be decided by market forces alone. New schemes will now stand a real chance of entering the market, which should encourage the creation of a competitive SEPA-wide payment cards market. On 26 June the EPC published easy-to-read Questions and Answers document¹⁹⁵ clarifying key aspects of compliance with the SCF.
193. Intensive discussions also took place in meetings running from May until June, with a number of subsequent follow-up meetings. The dialogue will still be ongoing in 2009, but it can already be called a success, since the EPC was able to provide satisfactory clarifications on a number of the competition issues identified. For instance, the EPC clarified that national banking communities were not in a position to foreclose the market through national specifications (the so-called "Additional Options Services"). The rules and conditions of access to schemes by payment institutions and equal treatment for payment institutions and banks under the SCF were also clarified.
194. The dialogue with the EPC on SEPA provided substantial clarification to market players and other stakeholders in 2008, and is still on track for 2009. Interchange fees for SEPA Direct Debit, governance of the EPC and of the schemes, and also standardisation, will be on the agenda for discussion. The momentum created in the earlier stages of the Dialogue should help tackle the remaining obstacles to the achievement of a truly competitive European payment cards market. Reinforcing the

¹⁹⁴ EU27, other EEA countries (Norway, Iceland and Liechtenstein) and Switzerland

¹⁹⁵ Questions and Answers clarifying key aspects of the SEPA Cards Framework, <http://www.europeanpaymentscouncil.eu/documents/EPC075-SCF%20QAs%20Version10%20Final.pdf>

competition dimension of SEPA will in turn help to achieve better services at a better price for retailers and consumers.

C – ELECTRONIC COMMUNICATIONS

1. OVERVIEW OF THE SECTOR

195. The electronic communications sector in the EU is characterised by rapid technological and commercial changes. 2008 was the sixth consecutive year of increased investment in the sector. However, based on final data provided by the National Regulatory Authorities (NRAs), the rate of investment growth in 2007 was less than in 2006 and the trend is flattening out.
196. Growth of revenue was again slightly slower in 2008 than in the previous years. Due to more effective competition, technological developments and new business models, the broadband markets are developing rapidly. Penetration in the mobile voice markets increased again, while the growth of revenues slowed. Traditional fixed voice telephony continued to decline, whereas a steady rise of Voice over Internet Protocol (VoIP) and a continuing shift from fixed to mobile voice services were taking place.
197. In reaction to increased competition, mainly from new entrants and cable operators, many telecom network operators started to offer their customers convergent services (fixed and mobile voice telephony, broadband internet and television) some years ago. To support this strategy, as well as to reduce costs in the medium term, investments by the network operators in the roll-out of optical fibre networks have already taken place or have been announced. The roll-out of optical fibre networks itself will support new broadband applications and services that increasingly require higher bandwidths.
198. Retail competition has resulted in lower prices for electronic communications services. Consumers with a high usage profile, in particular, can in many cases benefit from flat rate fees for both fixed voice telephony and broadband internet. In general, prices for mobile services have also fallen during the year. The picture is one of increasing volume of communications and falling prices, suggesting that the average European consumer of electronic communications services in 2008 was better off than in the previous year.
199. With regard to broadband internet services customers have enjoyed higher bandwidths at lower prices.
200. Providers of electronic communications services continued to operate within the confines of the EU regulatory framework for electronic communications (Regulatory Framework)¹⁹⁶, which is designed to facilitate access to legacy infrastructure, foster

¹⁹⁶ 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

investment in alternative network infrastructure and bring choice and lower prices for consumers.

2. POLICY DEVELOPMENTS

2.1. Application of the Regulatory Framework and other policy developments

201. 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 actually competitive must identify operators with significant market power and impose appropriate regulatory obligations. Regulators are required to notify the Commission and the other regulators of their proposals under a consultation mechanism provided by the Framework Directive (the so-called "Article 7 procedure"). The other regulators can comment on the notifying regulator's draft measures. The Commission may also, following an in-depth investigation, ask the notifying regulator to withdraw a draft measure 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 has identified seven specific product and services markets, at both wholesale and retail levels, as susceptible to *ex ante* regulation¹⁹⁷.
202. In 2008 the Commission received 123 notifications from NRAs and adopted 85 comments letters and 33 no-comments letters within the Community consultation mechanism under Article 7 of the Framework Directive. In five cases, the Commission raised serious doubts as to the compatibility of the notified measures with EU law and opened second-phase investigations under Article 7(4) of the Framework Directive.
203. Taking account of the Commission's positions under Article 7(4) of the Framework Directive, several NRAs opted for the withdrawal of draft measures. This was the case in second-phase investigations concerning the wholesale national market for trunk segments of leased lines¹⁹⁸ and the market for transit services in the fixed public telephony network¹⁹⁹ in Poland. In both cases the Commission took the view, that in particular the data provided did not support the finding of significant market power in the markets concerned. The Slovenian NRA withdrew the notification in a case that concerned the wholesale market for access and call origination on public

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](#)).

¹⁹⁷ 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](#)).

¹⁹⁸ Case [PL/2008/0772](#) (SG-Greffe (2008) D/203315).

¹⁹⁹ Case [PL/2008/0766](#) (SG-Greffe (2008) D/203269).

mobile telephone networks in Slovenia²⁰⁰. With regard to a notification on the wholesale broadband access market in Spain, the Commission closed a second-phase investigation with comments after the Spanish NRA had responded to the serious doubts of the Commission by amending the proposed draft measure during the second-phase investigation²⁰¹.

204. The transition of the electronic communications sector from former national monopolies towards competition continued in 2008. Pursuant to the 2007 Recommendation on the relevant markets susceptible to *ex ante* regulation²⁰², the overall number of markets susceptible to *ex ante* regulation has been reduced from 18 to 7. According to the Recommendation when NRAs intend to regulate markets which are no longer listed, they should have recourse to the so called "three criteria"²⁰³ test. By stating these rules, the Recommendation is following the principles of the Regulatory Framework, the aim of which is to gradually reduce *ex ante* regulation as competition in the market develops. The new Recommendation has proved to be a strong instrument of deregulation. In 2008 most NRAs concluded that, even when national specificities are taken into account, a number of (and possibly all) markets that are no longer listed in the Recommendation have to be deregulated. A good example is the Czech market for retail fixed calls, which is no longer listed in the Recommendation on relevant markets. The Czech NRA, Český telekomunikační úřad (CTU), carried out the three criteria test, found the barriers to entry to be low and, consequently, proposed to withdraw the existing regulation. In contrast, the Polish NRA, Urząd Komunikacji Elektronicznej (UKE), proposed to maintain regulation on the market of transit services in the fixed public telephony network. After the Commission issued a letter expressing serious doubts in this case did the Polish NRA decide to withdraw the notification. Later, UKE re-notified its draft measure, concluding that the market was competitive, and proposed to withdraw the regulation.
205. The market analyses by NRAs have demonstrated increasing competition, particularly in the retail markets as a result of wholesale regulation. The regulatory framework allows also defining sub-national geographic markets where clear different conditions of competition arise. Some NRA have indeed demonstrated differentiated competitive conditions in certain markets, which has allowed regulation to focus on those areas where a need for *ex ante* regulation persists. As a consequence of this increased competition the British regulator, the Office of Communications (OFCOM), was the first NRA to identify different broadband markets in different geographic areas in a single country and proposed removing regulation in those geographic areas where there is now effective competition. The Commission approved the proposal on the basis of extensive data provided by

²⁰⁰ Case [SI/2008/0806](#).

²⁰¹ Case [ES/2008/0805](#).

²⁰² 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).

²⁰³ The "three criteria" are: (i) high and non-transitory barriers to entry, (ii) a market structure which does not tend towards effective competition within the relevant time horizon, (iii) the insufficiency of competition law alone to adequately address the market failure(s) concerned (see Commission recommendation of 17.12.2007 on relevant product and service markets within the electronic communications sector, cited above).

OFCOM. Following this decision, several other NRAs also examined geographic segmentation. In a case concerning the wholesale broadband access market in Austria, the Austrian NRA, Rundfunk und Telekom Regulierungs-GmbH (RTR) proposed defining a national market, albeit acknowledging certain geographic variations in competitive conditions when defining the remedies²⁰⁴. In a case concerning the market for wholesale broadband access and high-speed broadband access in Portugal, the Portuguese regulator, Autoridade Nacional De Comunicações (ANACOM), examined two different geographic areas where competitive conditions differed. ANACOM then decided to deregulate the geographic zones where structural competition problems no longer persist (e.g. densely populated zones like Lisbon or Porto).

206. The work on the review of the Regulatory Framework continued during 2008. On 24 September, the European Parliament adopted opinions on the Commission's legislative proposals at its first reading. On 27 November, the Council of the European Union reached a political agreement on the package of measures to reform the EU electronic communications framework.
207. Termination rates in the EU are high and are also not regulated consistently throughout the EU²⁰⁵. This allows operators to exploit their monopolistic termination market, which runs counter to the principles of competition law. This puts other operators and, ultimately, consumers at a disadvantage. Therefore, the Commission has already proposed a recommendation that should bring termination rates down to an efficient level, ensuring a consistent approach to regulating these rates. There are plans to adopt such a recommendation as early as possible in 2009.
208. Access to next generation networks is critically important for alternative network operators that have invested in infrastructure at the level of local exchanges. In order to provide more regulatory certainty for market players and to foster investment and competition in this area, the Commission is currently working towards a Recommendation on the appropriate regulatory approach and remedies applicable in the context of new generation network access.
209. For the purpose of simplifying and accelerating the implementation of regulatory measures the Commission has streamlined its Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive²⁰⁶. The aim of the new Recommendation is to reduce bureaucracy and ensure greater efficiency in the cooperation between NRAs and the Commission. In particular, it allows national regulators to use a simplified and shortened standard form to notify certain decisions to the Commission. The simplified procedure applies, for instance, to decisions to withdraw regulation on markets which the Commission has removed from the list of markets susceptible to *ex ante* regulation. It further invites NRAs to

²⁰⁴ Later, the decision by the Austrian NRA was overturned by the Austrian Administration Court.

²⁰⁵ According to the snapshot of mobile termination rates from the European Regulators Group ([ERG \(08\) 41 final](#)) mobile termination rates range from 2€/min (in Cyprus) to above 15€/min (in Bulgaria), the average being about 8.7€/min.

²⁰⁶ Commission Recommendation of 15.10.2008 on notifications, time limits and consultation provided for in Article 7 of Directive 2002/21/EG of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services ([OJ L 301, 12.11.2008, p. 23](#)).

submit the proposed market definition, the market analysis and the proposed remedies in a single stage instead of in several notifications.

2.2. Developments in the area of State aid

210. The Commission encourages State aid measures that aim to provide equitable broadband coverage at affordable prices for European citizens. In its assessment of public funding schemes under the State aid rules, the Commission acknowledges that, due to the economic principles or technological restrictions of broadband networks, private operators do 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 limited.
211. In 2008, some Member States focused primarily on supporting affordable basic broadband services, typically in rural areas where such services do not exist. Their ultimate aim is to provide broadband services for all citizens and companies no matter where they live or where they are located.
212. Commission decisions concerning State aid to broadband fell into this category in 2008. Several Member States took significant steps to bridge the "digital divide" in their territory, aiming to overcome the gap in terms of access to adequate broadband services between well-supplied urban areas and rural areas that were under-supplied or receiving no services at all. In general, after the public authorities had clearly identified the targeted areas requiring public support, via thorough market research and consultation with existing operators, the Commission asked for several safeguards to be implemented to limit distortion of competition and to minimize the use of public funds. Such safeguards included, *inter alia*, conducting an open tender procedure to grant aid, providing open wholesale access on the subsidized networks to other operators who could introduce competition where citizens had previously not had a choice, technological neutrality of the measures so that citizens should secure the best offer, or monitoring of the use of public monies by the granting authorities²⁰⁷.
213. Public intervention in some Member States is gradually shifting towards support for very high speed broadband networks, the so-called "next generation" networks²⁰⁸, targeting not only under-served areas but also areas where basic broadband services are already available, with the aim of accelerating the deployment of such networks

²⁰⁷ See Cases [N 412/2007](#) *Aid to reduce digital divide in Piedmont* (OJ C 113, 8.5.2008, p. 1), [N 14/2008](#) *Broadband in Scotland - Extending broadband reach* (OJ C 150, 17.6.2008, p. 3), [N 73/2008](#) *Public support to broadband* (OJ C 290, 13.11.2008, p. 1), [N 250/2008](#) *Broadband connections for Alto Adige II* (OJ C 289, 12.11.2008, p. 2), [N 115/2008](#) *Broadband in rural areas of Germany* (OJ C 194, 31.7.2008, p. 3), [N 497/2007](#) *Broadband infrastructure in Lazdijai and Alytus* (OJ C 290, 13.11.2008, p. 3), [N 150/2008](#) *Broadband in rural areas of Freistaat Sachsen* (OJ C 12, 17.1.2009, p. 2), [N 237/2008](#) *Broadband support in Niedersachsen* (OJ C 18, 24.1.2009, p. 1), [N 266/2008](#) *Broadband in rural areas of Bayern* (OJ C 12, 17.1.2009, p. 2), [N 508/2008](#) *Provision of Remote Broadband Services in Northern Ireland* (OJ C 18, 24.1.2009, p. 2).

²⁰⁸ Next generation access networks is a broad term to describe the new, typically fibre-based, broadband networks that will provide much faster and more symmetrical broadband connection for the end-users than the current ones (for instance, ADSL).

in the absence of private initiatives. In 2008, the Commission did not endorse such measure under the State aid rules and it is currently examining these issues.

D – INFORMATION TECHNOLOGY

1. OVERVIEW OF THE SECTOR

214. The information and communication technology (ICT) sector is characterised by digital convergence and the concomitant growing importance of interoperability and standards. The sector accounts for around 5-6% of the GDP in the EU. Because of the economic downturn, ICT spending has been reduced, but growth in OECD countries for 2008 is still expected to be around 4%²⁰⁹.
215. Given the network effects that prevail in the ICT sector, interoperability is an important market feature. Although personal computers (PC) 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.
216. Standards can play a key role in this context by facilitating interoperability. It is important that standard-setting organisations establish rules which ensure fair, transparent procedures and early disclosure of relevant intellectual property. The Commission will continue to monitor the operation of standard-setting organisations in this regard.
217. On a parallel track, business models are moving towards convergent services and vertical and horizontal integration. The sale of software applications and the provision of content are becoming increasingly interwoven. There is an increasing trend for companies to try to control digital as well as physical networks and to aim to set and control the standard platforms.
218. Intellectual Property Rights (IPR) have become a key element of the digital environment. Use and control of IPR, in the form of content or applications, has become central in business models and strategies. Their use has thereby become a horizontal issue.
219. Open source software has become an established feature of the mainstream software market. In many software markets, open source software has become a strong competitor.

²⁰⁹

See [OECD Information Technology Outlook 2008 Highlights](#).

2. POLICY DEVELOPMENTS

2.1. Anti-trust

220. On 22 October 2007, Microsoft announced a significant reduction in its licence fees for interoperability information. On 21 February 2008, Microsoft voluntarily launched its "interoperability principles" and disclosed a wide range of information relating to interoperability on its website. At this stage the Commission does not know with certainty whether this information is indeed complete and accurate.
221. In the Intel case, a SSO was issued on 17 June, reinforcing the Commission's preliminary view outlined in a SO of 26 July 2007 that Intel infringed EC Treaty rules on abuse of a dominant position (Article 82) with the aim of excluding its main rival, AMD, from the x86 Central Processing Units (CPU) market.
222. In June, Google and Yahoo announced they would enter into an agreement under the terms of which Google would provide some of the advertisements to be displayed on Yahoo's properties. The Commission examined the agreement in close cooperation with the US Department of Justice (DoJ). The parties finally announced on 5 November that the deal was not being pursued.

2.2. Merger control

223. In 2008 the Commission issued decisions in two vertical merger cases in the satellite navigation industry. Both transactions were cleared without conditions. On 14 May the Commission approved the acquisition by TomTom, a manufacturer of Portable Navigation Devices (PND) and navigation software, of Tele Atlas, one of two suppliers of navigable digital map databases with EEA-wide coverage. On 26 June the Commission approved the acquisition by Nokia, a manufacturer of mobile handsets, of NAVTEQ, the only credible competitor to Tele Atlas. Both *TomTom/Tele Atlas*²¹⁰ and *Nokia/NAVTEQ*²¹¹ were vertical transactions and were examined strictly in the light of the recently adopted non-horizontal merger guidelines²¹².
224. Navigable digital map databases, such as those supplied by Tele Atlas and NAVTEQ, are one of the key structural components of dedicated navigation devices and other navigation applications. The digital map databases include geographic information containing the position and shape of each feature on a map, additional attributes (street names, addresses, turn restrictions, etc.) and display information. Digital map databases are said to be navigable when they include sufficient functionalities to provide real-time turn-by-turn navigation.
225. Over the past several years satellite navigation capabilities and navigable digital map databases have been included in a growing number of mobile devices, such as mobile phones, handheld computers and PND. Both purchasers, i.e. TomTom and Nokia, embed digital maps in the devices they manufacture. Due to the high costs of entry

²¹⁰ Case [COMP/M.4854](#) *TomTom/Tele Atlas*.

²¹¹ Case [COMP/M.4942](#) *Nokia/NAVTEQ*.

²¹² Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, pp. 6-25).

and the significant time required to create a navigable digital map with sufficient coverage and accuracy, the Commission found that the market for navigable digital maps with EEA-wide coverage was essentially a duopoly, where the two main companies had market shares of approximately 50% each. The Commission found that the product lines of other digital map suppliers were unlikely to be comparable with Tele Atlas or NAVTEQ in the short-to-medium term.

226. Although the satellite navigation industry has expanded very rapidly, it still remains a nascent market in which different technologies and business models compete. It was therefore crucial to properly assess the competitive impact of these transactions on the further development of the satellite navigation industry.
227. The theory of harm at the heart of both TomTom/Tele Atlas and Nokia/NAVTEQ concentrated on input foreclosure. In both cases, the merger led to the vertical integration of one of the two companies supplying navigable digital maps to the downstream competitors of the purchaser. The two transactions had only a limited impact on each other in terms of competitive assessment, as TomTom and Nokia are active on what the Commission found to be different downstream markets.
228. The concerns were that the merged entities could block the access of downstream competitors to navigable digital map databases, degrade the quality of map databases supplied to competitors or use sensitive information passed by competing device manufacturers to Tele Atlas and NAVTEQ. The merged entities would have had an incentive to engage in input foreclosure if an increase in sales on the downstream market, at the expense of competitors, had allowed them to compensate for lost sales of digital map databases.
229. The Commission conducted an in-depth qualitative and quantitative analysis to assess the incentive of TomTom and Tele Atlas, and of Nokia and NAVTEQ, to foreclose their competitors in their respective downstream markets or to degrade the quality of digital map databases offered to competitors.
230. In both cases the economic analysis conducted by the Commission concluded that, under a foreclosure strategy, the merged entity would capture only relatively limited sales downstream by increasing map database pricing or lowering quality for their competitors, and that the loss of revenue due to decreasing sales of map databases would not be replaced by additional sales of mobile handsets by Nokia or PND by TomTom.
231. The Commission finally concluded that the merging parties had no incentive to foreclose their competitors and that they would continue to sell digital map databases to other manufacturers of mobile navigation devices, including PND and mobile phones.

E – MEDIA

1. OVERVIEW OF THE SECTOR

232. As new technology increases the number of ways people can access entertainment and information, there is tough competition in the media sector to attract audiences. Traditional distribution channels such as newspapers, television and compact discs are facing competition from new distribution platforms such as the internet or mobile devices. The increase in the overall number of distribution channels is fuelling the demand for content. User-generated content is another nascent market that puts pressure on traditional content providers. As a result, there is a trend towards consolidation between the more established media players and new media businesses, as well as between the owners of infrastructure and content producers.
233. Technological developments are also affecting the way copyright is administered, especially for works distributed over the internet. The tradition of managing rights on a territorial basis is not suited to the on-line environment. EEA-wide distribution of media content could bring benefits to artists and consumers.
234. Ongoing technological development and changing consumption patterns are breaking down barriers between broadcasters and other media operators. 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.
235. The switch from analogue to digital broadcasting, which Member States are due to complete by the beginning of 2012²¹³, 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 transmission platforms such as satellite, cable and terrestrial, obliging broadcasters and network operators to update their transmission equipment and viewers to install digital decoders. The Commission is committed to 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.

²¹³ Commission Communication on accelerating the transition from analogue to digital broadcasting ([COM \(2005\) 204 final, 24.5.2005](#)).

236. Across Europe, an estimated EUR 1.6 billion²¹⁴ is spent on national film support each year, most of which is for film production. This mainly takes the form of direct grants or tax incentives. Films produced or part-financed by the major US film studios accounted for 70% of total EU box office data in 2008²¹⁵.

2. POLICY DEVELOPMENTS

237. 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 for and barriers to on-line retailing and the European Single Market

238. On 17 September, Competition Commissioner Neelie Kroes discussed with senior consumer and industry representatives the business opportunities created by the Internet and the existing barriers to increased online retailing of music and goods in Europe. The aim was to explore how to increase the business opportunities and how to ensure that European consumers have access to the widest possible range of goods and services online. The services of DG Competition published an issues paper for the group and invited all interested parties to submit their own comments on this paper (more than 30 contributions were received)²¹⁶.

239. On 16 December a follow-up meeting took place which focused on the online distribution of music. The participants discussed in particular how the practices of licensing music rights can be improved in order to facilitate Europe-wide online music offers. The possibility of EEA-wide licensing of all rights concerned and competition between several rights managers was addressed. Further, the conditions for setting up and maintaining a database which contains comprehensive information about the ownership of rights were explored.

2.2. Rights management and on-line distribution

240. As regards the management of music rights, the Commission issued a decision against 24 EEA collecting societies on 16 July²¹⁷. Collecting societies manage the music rights of authors (both composers and lyricists) on their behalf. The *CISAC* decision prohibits membership and exclusivity clauses in the reciprocal representation agreements between collecting societies and a concerted practice concerning the territorial delineation of these representation agreements.

241. According to the membership clause, neither of the contracting collecting societies may, without the consent of the other, accept as a member an author who is either already a member of another collecting society or who is a national of the country

²¹⁴ Based on the survey of 2002-2005 EU film subsidy data prepared for the Copenhagen Think Tank on European Film and Film Policy.

²¹⁵ European Audiovisual Observatory, Focus 2009: World film market trends, p. 14.

²¹⁶ Further information is available in the [On-line Commerce section](#) of the Europa Competition website.

²¹⁷ Case [COMP/38.698 CISAC Agreement](#) (summary decision published in OJ C 323, 18.12.2008, p. 12).

where the other collecting society operates. The membership clause thereby prevents authors from choosing or moving to another collecting society. Under the exclusivity clause, a collecting society authorises another collecting society to administer its repertoire on a given territory on an exclusive basis. This prevents the collecting society from licensing its repertoire itself in the territory of the domestic collecting society or from allowing an additional collecting society to do so.

242. The decision also prohibits a concerted practice between collecting societies according to which the collecting societies limit their mandates to the domestic territory of the other collecting societies. The result is a *de facto* exclusivity for the granting of licences which cover the repertoire of more than one collecting society and a strict segmentation of the market on a national basis. The systematic delineation of the domestic territory amounts to a concerted practice, because it cannot be explained by individual market behaviour or by an objective need for geographic proximity between the collecting society and the commercial user. The modes of transmission covered by the decision concerning this specific infringement are internet, cable retransmission and satellite exploitation. Twenty-two parties appealed against the decision and eight requested interim measures²¹⁸. The President of the CFI rejected the requests for interim measures.

2.3. Digital broadcasting

243. In 2008, the Commission continued to monitor the transition (switch-over) from analogue to digital terrestrial broadcasting in the EU Member States. In the context of the ongoing infringement procedure under Article 226 EC against Italy, following a complaint by the Italian consumers' association Altroconsumo²¹⁹, the Commission services reviewed the new amendments to the Italian broadcasting regime²²⁰ and had various contacts with the Italian authorities on the scope of the new legislation and criteria for the digitalization of terrestrial television networks. The amendments to the regime should lead to more frequencies being available to new entrants and smaller existing broadcasters. In parallel, the Italian authorities adopted a timetable for the implementation of the national "switch-off" plan by 2012 (which is the current "switch-off" date) and completed the process of "digitisation" of the Sardinia Region.

2.4. Public service broadcasting

244. In line with the interpretative Protocol to the Treaty of Amsterdam on the system of public service broadcasting (the Amsterdam Protocol), the Commission recognises that it is the prerogative of Member States to organise and fund public service broadcasting. The objective of the Commission's policy towards State aid for public

²¹⁸ Cases T-392/08 R *AEPI v Commission*, T-398/08 R *Stowarzyszenie Autorów ZAiKS v Commission*, T-401/08 R *Säveltäjien Tekijänoikeustoimisto Teosto v Commission*, T-410/08 R *GEMA v Commission*, T-411/08 R *Artisjus v Commission*, T-422/08 R *Sacem v Commission*, T-425/08 R *KODA v Commission* and T-433/08 R *SIAE v Commission*.

²¹⁹ See Press Release [IP/07/1114](#), 18.8.2007.

²²⁰ Article 8-novies of Law n. 101/08 (Legge 06/06/2008, n. 101 – Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee), published in Gazzetta Ufficiale della Repubblica Italiana – Serie Generale, numero 132, 7 giugno 2008.

service broadcasters is to ensure that public funding does not exceed what is necessary to fulfil their public service mission and does not lead to unnecessary distortions of competition.

245. The Commission considers that State aid to public service broadcasters may be declared compatible where the requirements laid down in the Commission's Broadcasting Communication²²¹ are fulfilled. The Commission has assessed the numerous notifications and complaints concerning the financing of public service broadcasters on the basis of the Broadcasting Communication and has further clarified and developed the requirements in its decisions.
246. The Commission accepts a broadly defined public service mission to offer balanced and varied programmes, including information as well as entertainment and sports. The Commission also recognises that the public service remit may include new media activities, provided that they serve the same democratic, social and cultural needs of society as traditional broadcasting and are properly defined and entrusted.
247. 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 2008 the Commission adopted two decisions concerning the financing of public service broadcasters pursuant to Article 86(2) EC in combination with the Broadcasting Communication. The first concerned the general financing system of the Belgian (Flemish) public service broadcaster VRT²²². The second decision concerned the financing regime in favour of the Irish public service broadcasters RTÉ and TG4²²³. In both cases, the Commission closed the investigation, having received commitments from Belgium and Ireland. These commitments ensure a more precise definition and a proper entrustment of the public service mission as regards new media activities, adequate safeguards against overcompensation and cross-subsidisation, and respect for market principles in terms of the public service broadcasters' commercial activities. In particular as regards the possible offer of new media activities, prior evaluation procedures allow for new offers to be evaluated taking into account their public service character, as well as their impact on the market. Moreover, in 2008, the Commission also cleared urgent State support to remedy the tight financial situation of two public broadcasters, France Télévisions²²⁴ under Article 86(2) EC, and TV2 Danmark²²⁵ under Article 87(3)(c) EC and the provisions on aid to rescue and restructuring.
248. Based on recent decision-making practice and the results of the public consultation held between January and March, the Commission has launched a review of the Broadcasting Communication²²⁶. The main aims of the review are to provide more clarity to all market participants and to secure a future-proof framework, properly

²²¹ Communication from the Commission on the application of State aid rules to public service broadcasting ([OJ C 320, 15.11.2001, p. 5](#)).

²²² Case [E 8/2006](#) *State funding for Flemish public broadcaster VRT* (OJ C 143, 10.6.2008, p. 7).

²²³ Case [E 4/2005](#) *State aid financing of RTE and TNAG (TG4)* (OJ C 121, 17.5.2008, p. 5).

²²⁴ Case [N 279/2008](#) *Capital injection for France Télévisions* (not yet published in the OJ).

²²⁵ Case [N 287/2008](#) *Rescue Aid to TV2/Danmark A/S* (OJ C 9, 14.1.2009, p. 3).

²²⁶ IP/08/1626.

adapted to the new technological environment. The Commission presented a draft new Communication for further public consultation in November.

249. Under the Commission's rules concerning SGEI, compensation paid to small local or regional public service broadcasters may be compatible with Article 86(2) EC and not subject to prior notification under certain conditions²²⁷.

2.5. State aid for films

250. As part of its proposal to extend the validity of the State aid assessment criteria in the 2001 Cinema Communication²²⁸, the Commission identified a number of trends it had detected in State aid notifications for film support schemes by mid-2008. These included support for a wider range of film-related activities beyond the film and audiovisual production referred to in the 2001 Cinema Communication, such as aid for film distribution and for digitisation of cinemas. At the same time, the Commission has been receiving a growing number of notifications of regional film support schemes and is increasingly aware of the competition among some Member States to use State aid to attract inward investment from large-scale, mainly US, film production companies. During 2008, the Commission continued to closely monitor these developments when deciding on its approach towards notified film support schemes.

251. As in previous years, there were several State aid decisions approving film support schemes. The most notable of these in 2008 were the Hungarian film support scheme²²⁹, the Italian film production tax incentives²³⁰, the Finnish film support scheme²³¹ and the German film support scheme²³².

2.6. Application of merger control

252. On 11 March, the Commission cleared the proposed acquisition by Google of the online advertising technology company DoubleClick²³³. This merger generated considerable public interest as it concerned the ubiquitous search engine that most Europeans use in their daily lives. Google offers search capabilities for end-users free of charge and provides on-line advertising space on its own websites and on partner websites through its intermediation network called "AdSense". DoubleClick mainly sells ad serving, management and reporting technology worldwide to website publishers and to advertisers and agencies.

253. From a competition policy perspective, it was the first major concentration for which the Commission had to assess non-horizontal effects following its adoption of the Non-Horizontal Merger Guidelines. The investigation concerned a relatively new industry, which is constantly and rapidly evolving and in which reliable market data

²²⁷ Commission decision, 28.11.2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ([OJ L 312, 29.11.2005, p. 67](#)).

²²⁸ IP//08/1580.

²²⁹ Case [N 202/2008](#) *Hungarian film support scheme* (OJ C 237, 28.10.2008, p. 1).

²³⁰ Case [N 595/2008](#) Tax incentives for film production (not yet published in the OJ).

²³¹ Case [NN 70/2006](#) *Aid Scheme to cinema in Finland* (not yet published in the OJ).

²³² Case [N 477/2008](#) *German film support scheme* (not yet published in the OJ).

²³³ Case [COMP/M.4731](#) *Google/ DoubleClick*.

are extremely difficult to obtain. The Commission found that Google and DoubleClick were not exerting major competitive constraints on each other's activities and therefore could not be considered as competitors. Furthermore, the elimination of DoubleClick as a potential competitor in the on-line intermediation advertising services market would not have an adverse impact on competition, since other players would continue to exert sufficient competitive pressure.

254. The Commission also analysed the potential effects of non-horizontal relationships between Google and DoubleClick following concerns raised by third parties during the market investigation. The Commission found that the merged entity would not have the ability to engage in strategies aimed at marginalising Google's competitors, mainly because of the presence of credible ad serving alternatives to which customers (publishers, advertisers and ad networks) can switch, in particular vertically integrated companies such as Microsoft, Yahoo! and AOL. The market investigation also found that the merged entity would not have an incentive to close off access for competitors in the ad serving market, mainly because such strategies would be unlikely to be profitable.
255. On 14 February, the Commission cleared the proposed acquisition of the UK-based Reuters Group by the Canadian Thomson Corporation, subject to conditions and obligations²³⁴. Both Thomson and Reuters are leading providers of financial information. These companies source, aggregate and disseminate financial data to respond to the needs of various financial professionals such as traders, financial analysts, fund managers and corporations. Reuters is best known as one of the largest international news agencies. The Commission's market investigation showed that the concentration would give rise to competition concerns in the supply and access of financial information, such as databases of aftermarket research (broker reports), earning estimates and fundamental financial data of enterprises and time series of economic data. The proposed transaction would have eliminated the rivalry between the two main and closest suppliers of such products, leaving financial customers with a reduced choice and with a severe risk of discontinuation of overlapping products and of price increases. The merging parties undertook to divest the databases containing the content sets of these financial information products, together with relevant assets, personnel and customer base as appropriate. These commitments should allow third party purchasers of such assets to quickly establish themselves as a credible competitive force in the marketplace in competition with the merged entity in the respective fields where rivalry was warranted pre-merger. On this basis, the Commission concluded that the proposed concentration was compatible with the common market.

F – TRANSPORT

1. OVERVIEW OF THE SECTOR

256. The transport industry accounts for about 7% of European GDP and for around 5% of employment in the EU.

²³⁴ Case [COMP/M.4726 Thomson Corporation/Reuters Group](#).

257. Competition policy in the transport sector seeks to ensure the efficient functioning of markets which have been recently liberalised or which are in the process of liberalisation. Making liberalisation a success requires action on two fronts. First, ensuring that the existing regulatory framework continues to be modernised where this has not been done to a sufficient extent. For decades, sector-specific rules governed the application of the competition rules (both substantive and procedural) in the field of transport. Bringing transport within the generally applicable competition law framework remains a general objective of competition policy. Second, since it is essential that regulatory efforts are not hindered by anticompetitive conduct, vigilant monitoring of market developments and targeted enforcement actions are another objective of competition policy in this sector. This is particularly true for markets where incumbents retain significant market power or where market players are now subject to the full force of competition law.
258. 2008 has been a challenging year in the transport sector in general, as it was hit by the steady increase of fuel prices in the first half of the year and by the economic crisis in the second half. The slowdown of the economy has significantly affected both freight and passenger services for all sorts of transport services. This situation has led to a number of problems, in particular in the air transport sector where several flag carriers have been severely affected (see for instance, Alitalia's liquidation). Against this general background of economic crisis, further consolidation has taken place in the transport sector and is likely to continue in 2009.

2. POLICY DEVELOPMENTS

2.1. Road Transport

259. While the revised Regulation for public services in the field of land transport²³⁵ is not in force, the Commission continues to apply the existing State aid rules to public service contracts and public service obligations. In its *Altmark* ruling²³⁶, the ECJ clarified the circumstances under which public service subsidies will not be regarded as constituting State aid. Since announcing this clarification of the applicable rules, the Commission has received a large number of complaints as well as some notifications of subsidised local and regional bus services. Such complaints focus in the main on contracts that have been awarded without prior public tender. Indeed, without such a prior tender procedure, it is difficult to prove that the so-called "Altmark criteria" are satisfied and, hence, that the compensation does not involve State aid.
260. Following these complaints, the Commission started investigations in several Member States. In 2008, it took a final positive decision concerning a public service contract for public passenger transport by bus in the district of Linz in Austria²³⁷. The contract was awarded to Postbus AG without a public procurement procedure. The

²³⁵ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) no. 1191/69 and no. 1107/70 ([OJ L 315, 3.12.2007, p. 1](#)).

²³⁶ Case [C-280/00](#) *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ("*Altmark*") [2003] ECR I-7747.

²³⁷ Case [C 16/2007](#) (not yet published in the OJ).

Commission came to the conclusion that the compensation that was extended to Postbus AG under the terms of the contract constituted State aid, but that such compensation did not exceed the costs incurred in discharging the public service obligations. The Commission also closed its formal investigation procedure on compensation granted to five companies operating public passenger transport by bus in the South Moravia region of the Czech Republic²³⁸. Unlike the Austrian case, however, the Czech authorities had conducted a public tender procedure before awarding the public service contract. Other investigations concerning similar complaints are ongoing. The Commission also initiated the formal investigation procedure concerning compensation granted by the Czech Republic to various municipal transport operators for discharging public service obligations in the Ustecký Region²³⁹. Lastly, the Commission approved an aid scheme to modernise the outdated Czech passenger bus fleet operating under public service contracts²⁴⁰. In connection with the improvement of the public transport infrastructure, and in order to facilitate an integrated passenger transport system, the Commission approved two Czech aid schemes supporting the provision of 'park and ride' facilities²⁴¹ and alternative refuelling stations²⁴² in the region of Střední Čechy.

261. In the area of the environment, the Commission maintained its policy of approving aid to favour the uptake of cleaner technology, in particular on old vehicles. In 2008 the Commission continued approving State aid for the acquisition of lorries satisfying the Euro V pollution standard²⁴³ in anticipation of the compulsory application of the standard from October 2009 onwards. Favourable decisions were taken concerning an Italian scheme²⁴⁴ and the prolongation of the German scheme²⁴⁵. The Commission also approved a French scheme²⁴⁶ giving incentives to private individuals, undertakings and associations to buy vehicles which consume less energy and are less polluting. The measure also aims to reduce traffic volumes and to transfer road traffic to less energy-hungry and less polluting means of transport, such as rail and inland waterways.
262. As regards public infrastructures, the Commission took the view that measures to assist the construction and operation of a number of motorways and national roads in Greece²⁴⁷ did not constitute State aid, because the respective concession agreements had been concluded following tendering procedures conducted on an open and non-discriminatory basis, ensuring the selection of the bids that were the least costly for the State and which incorporated the strictest profit-capping arrangements.
263. The Commission approved one restructuring aid measure and opened an investigation procedure on another restructuring aid measure concerning two Polish undertakings involved in transport and freight forwarding services, respectively

²³⁸ Case [C 3/2008](#) (not yet published in the OJ).

²³⁹ Case [NN 1/2006](#) (OJ C 187, 24.7.2008, p. 14).

²⁴⁰ Case [N 350/2007](#) (OJ C 140, 6.6.2008, p. 2).

²⁴¹ Case [N 370/2008](#) (not yet published in the OJ).

²⁴² Case [N 371/2008](#) (not yet published in the OJ).

²⁴³ See Press Release [IP/06/1800](#), 13.12.2006.

²⁴⁴ Case [N 463/2007](#) (OJ C 70, 15.3.2008, p. 4).

²⁴⁵ Case [N 106/2008](#) (OJ C 137, 4.6.2008, p. 4).

²⁴⁶ Case [N 387/2008](#) (not yet published in the OJ).

²⁴⁷ Cases [N 565/2007](#), [N566/2007](#) and [N 633/2007](#) (OJ C 70, 15.3.2008, p. 3-6) and Case [N 45/2008](#) (OJ C 177, 12.7.2008, p. 1).

Hartwig-Warszawa²⁴⁸ and Hartwig-Katowice²⁴⁹. While, in the first case, the Commission considered the restructuring plan to be in line with State aid rules, in the second case it had doubts about whether the plan would be such as to restore long-term viability and about the adequacy of the planned compensatory measures and the contribution of the beneficiary to the restructuring.

264. The Commission opened a formal investigation procedure on measures in favour of the French company, Sernam, which is the road transport subsidiary of the Société nationale des chemins de fer français (SNCF). The Commission has doubts about whether the conditions laid down in its decision of 20 October 2004 have been complied with. The 2004 decision declared part of the aid in favour of Sernam to be incompatible with State aid rules and ordered the recovery thereof. It also laid down certain measures to be implemented by France to ensure the compatibility of the activities of Sernam.

2.2. Rail Transport and Combined Transport

265. As from 1 January 2007, rail transport services for freight were fully opened to competition in the EU. As regards passenger transport, the third railway package adopted by the Council and the Parliament in 2007 provides that international passenger rail services will be opened to competition from 1 January 2010. The Regulation on public passenger transport services by rail and by road adopted in 2007 also introduced some degree of liberalisation into local transport. On 22 July, the Community guidelines on State aid for railway undertakings²⁵⁰ came into effect. These guidelines lay down the Commission's approach to State aid to railway undertakings as defined in Directive 91/440/EEC²⁵¹ and to urban, suburban and regional passenger transport undertakings. The guidelines are based in particular on the principles established in the three successive railway packages. Their aim is to improve the transparency of public financing and legal certainty with regard to the Treaty rules in the context of the opening-up of the markets. They deal with the following aspects: (i) public financing of railway undertakings by means of infrastructure funding, (ii) aid for the purchase and renewal of rolling stock, (iii) debt cancellation by States with a view to the financial rejuvenation of railway undertakings, (iv) aid for restructuring railway undertakings, (v) aid for the needs of transport coordination and (vi) State guarantees for railway undertakings.
266. The Commission adopted several decisions to promote rail transport and combined transport. It authorised the renewal of a Czech aid measure which guarantees a loan to Czech Railways (Česke ráhy)²⁵² to facilitate the purchase of new passenger rolling stock and an aid scheme for the acquisition and modernisation of rolling stock in the Czech Republic intended to improve the provision of a service of general economic interest²⁵³. The Commission also approved the prolongation²⁵⁴, for the period 2007-

²⁴⁸ Case [N 506/2007](#) (OJ C 140, 6.6.2008, p. 1).

²⁴⁹ Case [N 909/2006](#) (OJ C 288, 11.11.2008, p. 3).

²⁵⁰ [OJ C 184, 22.7.2008, p. 13.](#)

²⁵¹ Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways ([OJ L 237, 24.8.1991, p. 25](#)).

²⁵² Case [N 685/2007](#) (OJ C 140, 6.6.2008, p. 1).

²⁵³ Case [N 495/2007](#) (OJ C 152, 18.6.2008, p. 21).

²⁵⁴ Cases [N 11/2008](#) and [NN 34/2008](#) (OJ C 38, 17.2.2009, p. 3).

2009, of the financial support by the Italian and French governments for the experimental transalpine railway motorway service previously approved for the period 2003-2006. The project has been developed in parallel with the re-opening of the Mont Blanc road tunnel in order to test an efficient, safe and environmentally friendly way to cross the Alps, one of the biggest bottlenecks for terrestrial traffic in the EU.

267. During the year, the Commission approved several measures in favour of alternatives to road transport, including combined transport, in France²⁵⁵, Poland²⁵⁶ and Belgium²⁵⁷.
268. In 2008, the Commission opened the formal investigation procedure concerning the compensation for the provision of SGEI by Danske Statsbaner (DSB), which has historically been the railway operator in Denmark. The transport services in question are provided on the basis of two public service contracts, concerning the periods 2000-2004 and 2005-2014, between the Danish Ministry of Transport and DSB, which were concluded without a prior tendering procedure. The Commission has doubts about the absence of overcompensation in this case.
269. In the area of mergers, on 19 March the Commission cleared the acquisition of the Spanish logistics provider, Transfesa, by the German state-owned railway company, Deutsche Bahn (DB)²⁵⁸. DB's and Transfesa's activities mainly overlapped with regard to rail logistics services for car components and finished vehicles. In these areas the merged entity might have had a competitive advantage due to the ownership of certain transport equipment which would be particularly suitable for the transport of cars and component parts. However, the Commission's investigation found the market characterised by the existence of current and potential competitors, by competitive constraints from road and sea and by a limited number of large customers with very specific needs and considerable know-how in logistics. The Commission therefore concluded that the proposed transaction did not give rise to competition concerns.
270. On 25 November the Commission approved²⁵⁹ the acquisition of Hungarian MÁV Cargo by the Austrian company RCA, subject to conditions. Both MÁV Cargo and RCA are active in the provision of rail freight transport and freight forwarding services, and each is a subsidiary of the respective incumbent State-owned railway companies. The rail freight transport markets, notwithstanding their full liberalisation in 2007, are still characterised by limited competition and strong incumbents co-operating in the area of cross-border rail freight transport.
271. According to the initial notification, MÁV Cargo should have been acquired by RCA in a consortium together with GySEV, an integrated rail and infrastructure company with its own rail network located both in Austria and in Hungary, and active in rail passenger and freight transport in Austria and Hungary with a focus on rail freight cross-border transport. After the notification, new facts relating to the transaction

²⁵⁵ Case [N 159/2008](#) (OJ C 202, 8.8.2008, p. 1).

²⁵⁶ Case [N 195/2008](#) (OJ C 329, 24.12.2008, p. 3).

²⁵⁷ Case [N 352/2008](#) (OJ C 7, 13.1.2008, p. 1).

²⁵⁸ Case COMP/M.4786 *Deutsche Bahn/Transfesa*.

²⁵⁹ Case COMP/M.5096 *RCA/MÁV Cargo*.

were communicated to the Commission by RCA and by the Republic of Hungary. The Commission considered that these facts constituted material changes to the facts contained in the notification and which came to light after the notification. As these changes in the factual record could have a significant effect on the appraisal of the concentration, the Commission considered the notification pursuant to Article 5(3) of Commission Regulation (EC) No 802/2004²⁶⁰ as becoming effective on the date when it had received all the relevant information.

272. In the assessment of the transaction, the Commission identified serious competition concerns that would have arisen from the implementation of the proposed transaction, as initially notified, because it would have resulted in removing the closest potential competitor of RCA on the Austrian rail freight transport market and for MÁV Cargo on the Hungarian market. To remedy these concerns, the Commission accepted a commitment package proposed by RCA, which consisted of cutting all its structural links and reviewing its contractual links to GySEV. The commitments are supported by the Austrian and Hungarian Governments who, as the main shareholders of GySEV, will ensure that the structural links to the merged entity are cut and that the influence of the Republic of Austria over GySEV's rail freight activities is limited. After market testing of the proposed commitments, the Commission concluded that they were viable measures, suitable to address the competition concerns identified in its investigation, namely by strengthening GySEV as an independent player and a competitor of the new entity created by the merger.

2.3. Inland Navigation

273. As in previous years, several decisions were adopted in 2008 to promote this environmentally friendly mode of transport in the Czech Republic²⁶¹, France²⁶² and Austria²⁶³. The main objective of these measures is to encourage the shift of freight transport from road to inland waterways. This is achieved by supporting the modernisation of inland waterway transport infrastructures and vessels which, besides increasing the competitiveness of the sector, also raises the transport safety level and reduces the environmental impact of this mode of transport.

2.4. Maritime Transport

274. On 1 July, the Commission adopted Guidelines on the application of Article 81 EC to maritime transport services²⁶⁴. The Guidelines set out the principles that the Commission will follow when defining markets and assessing information exchange schemes in liner shipping, as well as cooperation agreements involving maritime cabotage, liner and/or international tramp vessel services. This follows the repeal of Regulation 4056/86 containing the liner conference block exemption, which became fully effective on 18 October, and the resulting extension of the scope of Regulation 1/2003 to include cabotage and tramp vessel services. The Guidelines have been adopted following a consultation on a draft published at the end of 2007.

²⁶⁰ OJ L 133, 30.4.2004, p. 1.

²⁶¹ Case [N 358/2007](#) (OJ C 177, 12.7.2008, p. 1).

²⁶² Case [N 651/2007](#) (OJ C 216, 23.8.2008, p. 12).

²⁶³ Case [N 31/2008](#) (OJ C 253, 4.10.2008, p. 1).

²⁶⁴ [OJ C 245, 26.9.2008, p. 2](#). See also Press Release [IP/08/1063](#), 1.7.2008.

275. On 21 October, the Commission published a draft block exemption Regulation on the application of Article 81(3) EC to certain categories of agreements, decisions and concerted practices between liner shipping companies ("consortia")²⁶⁵, looking ahead to the expiry of the current block exemption Regulation in 2010. The proposed changes take into account the necessary amendments due to the repeal of Regulation 4056/86 and seek to better reflect the current market situation. The review of the BER on consortia will complete the reform of the competition rules that apply to maritime transport services which was initiated in 2003.
276. On 12 December, the Commission issued guidance on the treatment of State aid measures complementing Community funding for the launching of the motorways of the sea²⁶⁶.
277. This guidance is intended to align the maximum aid intensity and duration provided for in the Community guidelines on State aid to maritime transport²⁶⁷ to the more favourable conditions allowed for projects covered by the second "Marco Polo" programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system ("Marco Polo II")²⁶⁸ and by Decision No. 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network (TEN-T)²⁶⁹.
278. In the area of port infrastructure, the Commission approved a measure to support the construction of a new port in Wilhelmshaven, Germany²⁷⁰ (*Jade Weser Port project*). The Commission concluded that the public financing of the planned infrastructure does not constitute State aid in favour of the shipping companies using the Jade Weser Port, as long as access to this infrastructure is allowed on equal and non-discriminatory terms. As regards the concession agreement for the construction and operation of the terminal, the Commission found that it did not contain any State aid element, since it had been awarded on the basis of a Europe-wide, open, transparent and non-discriminatory public tender.
279. This decision is in line with previous case practice and confirms the Commission's view that, in general, no form of State aid is present at the users' level if transport infrastructure is open to all potential users on equal and non-discriminatory terms. On the other hand, when the construction of public infrastructure is directed at a particular user, giving it an unfair advantage over its competitors, the respective financing normally falls within the scope of Article 87(1) EC.
280. In 2008, as in previous years, the Commission adopted favourable decisions with regard to social aid for seafarers in France²⁷¹, Sweden²⁷² and Italy²⁷³. A positive

²⁶⁵ [OJ C 266, 21.10.2008, p. 2](#). See also Press release [IP/08/1566](#), 22.10.2008.

²⁶⁶ Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea ([OJ C 317, 12.12.2008, p. 10](#)).

²⁶⁷ [OJ C 13, 17.1.2004, p. 3](#).

²⁶⁸ Established by Regulation (EC) no. 1692/2006 of the European Parliament and of the Council of 24 October 2006 ([OJ L 328, 24.11.2006, p. 1](#)).

²⁶⁹ [OJ L 228, 9.9.1996, p. 1](#).

²⁷⁰ Case [N 110/2008](#) (not yet published in the OJ).

²⁷¹ Cases [N 538/2005](#) (OJ C 202, 8.8.2008, p. 1) and [NN 40/2008](#) (OJ C 23, 29.1.2009, p. 1).

²⁷² Case [N 442/2008](#) (OJ C 329, 24.12.2008, p. 3).

decision was also adopted concerning a reduction in the excise duty imposed on mineral oil used by stevedoring companies in German maritime ports²⁷⁴. The Commission also approved a regional aid scheme aimed at compensating the additional costs of the operation of the inter-island carriage of goods and passengers in the autonomous region of Azores in Portugal²⁷⁵.

281. The Commission initiated a formal investigation procedure regarding a planned change of the Irish tonnage tax scheme. The scheme, which had previously been approved by the Commission, imposed a limit of 75% on the net tonnage of the qualifying ships of a beneficiary that could be rented with a crew provided by the charterer ("chartered in" ships). The Irish authorities intend to abolish this charter limit. The Commission took the view that such abolition may trigger fiscal competition between different tonnage tax schemes across the EU and therefore decided to undertake an in-depth investigation.
282. In the field of SGEI, following an in-depth investigation the Commission considered that the compensation paid by the French State to Société Nationale Maritime Corse-Méditerranée (SNCM) for discharging public service obligations in the period 1991-2001 was compatible with the common market²⁷⁶. In the same decision, it was considered that certain measures in favour of SNCM in the context of its partial privatisation did not constitute State aid. Finally, as regards the support given by the State for the restructuring of SNCM, the Commission considered that it was compatible with State aid rules. However, the Commission decided to start the formal investigation procedure regarding a compensation system for CalMac and Northlink to discharge public service obligations related to the operation of ferry boats for passenger traffic between the Scottish islands²⁷⁷. The Commission has doubts about whether the public service obligations have been sufficiently well defined and entrusted. In the absence of a clear definition of the public service missions, it is not possible, at this stage, to determine whether the beneficiaries have been overcompensated for fulfilling those missions.

2.5. Aviation

283. On 1 November, the Air Service Regulation entered into force²⁷⁸. This Regulation, by simplifying and updating the text of the so-called "Third Package", now provides the legal framework for air transport in the EU, setting out the rules on the grant and oversight of operating licences of Community air carriers, market access, aircraft registration and leasing, public service obligations, traffic distribution between airports and pricing.
284. At the end of 2007, the Commission adopted a proposal aiming at simplifying and modernising the rules relating to computer reservation systems (CRS), which were

²⁷³ Case [N 80/2008](#) (OJ C 113, 8.5.2008, p. 1).

²⁷⁴ Case [N 643/2006](#) (OJ C 108, 29.4.2008, p. 3).

²⁷⁵ Case [N 503/2007](#) (OJ C 229, 6.9.2008, p. 1).

²⁷⁶ Case [C 58/2002](#) (not yet published in the OJ).

²⁷⁷ Case C 16/2008 (OJ C 126, 23.05.2008, p.16)

²⁷⁸ Regulation (EC) No 1008/2008 on the common rules for the air services in the Community replacing regulations 2407/92, 2408/92 and 2409/92 (the "so-called Third Package") ([OJ L 293, 31.10.2008, p. 3](#)).

defined 20 years ago²⁷⁹. The proposed new Regulation is expected to enter into force in 2009. The new rules will partially liberalise the market, provide margins of negotiation for airlines and CRS and will allow CRS providers and the travel agents who are subscribed to a CRS to broaden their offer, thereby improving competition in the air tickets distribution market. Competition will be further strengthened by new safeguard measures designed to protect consumers and to prevent competitive abuses.

285. This was a difficult year for air transport companies, which were faced with consistently high crude prices in the first half of the year followed by falling demand towards the end of the year as a side-effect of the financial and economic crisis. In this market context, the Commission was called upon to take decisions on several rescue and restructuring measures.
286. In relation to the long-running cases of Olympic Airways / Olympic Airlines, the Commission found that a privatisation plan submitted by the Greek authorities involving the sale of certain assets of the two companies in bundled form did not involve State aid, provided that the undertakings given by the Greek authorities were fully met²⁸⁰. The privatisation process must be overseen by an independent monitoring trustee who will ensure compliance with the decision and the commitments made. In a separate but related decision²⁸¹, after having carried out an in-depth study of the finances of Olympic Airways Services and of Olympic Airlines, the Commission found that, since its last decision in 2005, Greece had granted further State aid to the flagship carrier. This aid was considered to be illegal and incompatible with the Treaty, and the Commission ordered the recovery thereof. Since part of the investigation into the payment by the State to Olympic Airways Services of "damages" following a series of arbitration panel awards required further detailed investigation, this part of the investigation remains open. In addition, the Court of Justice declared that Greece had failed to fulfil its obligation to recover the aid which the Commission had deemed incompatible in 2005, from Olympic Airlines²⁸².
287. In June, the Commission opened the formal investigation procedure on a EUR 300 million loan by the Italian State to Alitalia²⁸³. The loan did not appear to be in line with the State aid guidelines concerning the aviation sector, nor with the guidelines on rescue and restructuring operations. In particular, there were no guarantees that the loan would be repaid or that a restructuring or liquidation plan would be submitted within a period of six months. Moreover, the "one time, last time" requirement for approving rescue and restructuring aid was not met; since Alitalia had previously benefited from both rescue and restructuring aid. In November the Commission confirmed this preliminary assessment with a final negative decision ordering recovery of the incompatible aid²⁸⁴. At the same time, the

²⁷⁹ The proposed Regulation will replace Regulation (EC) n° 2299/89 (OJ L 220, 29.7.1989, p. 1).

²⁸⁰ Cases [N 321/2008](#), [N 322/2008](#) and [N 323/2008](#) (not yet published in the OJ).

²⁸¹ Case [C 61/2007](#) (not yet published in the OJ).

²⁸² Case [C 419/06](#) *Application by the Commission against Olympic Airlines for non-compliance with Commission decision C(2005) 2706 of 14 September 2005 ordering the Greek authorities to recover incompatible aid extended to Olympic Airlines* [2008] ECR I-00027.

²⁸³ Case [NN 31/2008](#) (OJ C 184, 22.7.2008, p. 34).

²⁸⁴ Case [C 26/2008](#) (not yet published in the OJ).

Commission approved Alitalia's liquidation plan²⁸⁵. It came to the conclusion that the sale of certain of Alitalia's assets did not constitute State aid, provided that it took place on market terms in accordance with the commitments of the Italian authorities. In order to ensure compliance with the decision, the procedure for the sale of the assets provides for different levels of monitoring, in particular through the appointment of a trustee. The solution found for the privatisation of Alitalia is similar to the process for the liquidation of Sabena and Olympic Airways / Olympic Airlines. In addition, the CFI confirmed a Commission decision of 2001 declaring that restructuring aid granted by the Italian State to Alitalia was compatible with the common market subject to compliance with certain obligations and conditions²⁸⁶.

288. In November, the Commission approved a rescue aid in favour of Alpi eagles SpA, a regional air carrier based in the Veneto region of Italy²⁸⁷. It was found that the aid, in the form of a loan guarantee, met the conditions of the State aid guidelines on rescue and restructuring aid.
289. In the field of airport infrastructure, the Commission closed the formal investigation procedure concerning State measures involving the DHL Group and the Leipzig-Halle Airport²⁸⁸. The three measures under investigation were: capital contributions to Leipzig Airport for financing the construction of the new southern runway; an agreement between Leipzig Airport, its parent company and DHL, which provides several assurances to DHL; and a comfort letter issued by the Land Sachsen in favour of Leipzig Airport and DHL which guarantees that Land Sachsen will compensate DHL for damages in the event that DHL is no longer able to operate as planned at the airport, for example if night flights are banned by the regulatory authorities. The Commission concluded that the capital injections into Leipzig Airport were compatible with the Treaty rules. On the other hand, the Commission found that the assurances granted to DHL under the terms of the agreement and the comfort letter in favour of DHL channelled through Leipzig Airport were incompatible. The Commission consequently ordered recovery of the incompatible aid linked to the assurances and prohibited the granting of the comfort letter.
290. The Commission started a formal investigation procedure concerning the loan financing of Terminal 2 at Munich Airport²⁸⁹. The Commission has doubts about whether certain loans provided by the public banks to the two companies responsible for the construction and operation of Terminal 2 have been granted on terms which could have been obtained under normal market conditions. In addition, the Commission has doubts as to whether the price paid by one of these undertakings to the company operating Munich Airport for renting the land on which Terminal 2 is constructed is a market price. In the same decision, the Commission came to the conclusion that the capital contribution of the operator of Munich Airport and the exclusive use of Terminal 2 by Deutsche Lufthansa AG do not involve State aid.

²⁸⁵ Case [N 510/2008](#) (OJ C 46, 25.2.2009, p. 6).

²⁸⁶ Case [T-301/01](#) *Application by Alitalia for the annulment of Commission Decision 2001/723/EC of 18 July 2001 concerning the recapitalisation of Alitalia*, not yet reported in the ECR.

²⁸⁷ Case [N 388/2008](#) (OJ C 53, 6.3.2009, p. 1).

²⁸⁸ Case [C 48/2006](#) (OJ C 346, 23.12.2008, p. 1).

²⁸⁹ Case [NN 53/2007](#) (OJ C 5, 10.1.2009, p. 4) as amended by Commission decision of 12.11.2008 (not yet published in the OJ).

291. Several State aids for investments in airport infrastructure were approved at airports in Poland (Lublin-Świdnik Airport²⁹⁰, Gdańsk Rębiechowo Airport²⁹¹ and Port Lotniczy Łódź Sp. z o.o.²⁹²).
292. Another category of recurring support measures assessed by the Commission relates to start-up aid for airlines departing from smaller regional airports, where such temporary support is earmarked to contribute to the development of the airport and of the whole region. The Commission approved measures in Cyprus²⁹³ and Italy (Grosseto airport²⁹⁴).
293. With regard to the contractual arrangements between public authorities, airport operators and air transport companies, the Commission initiated a formal investigation concerning alleged favourable treatment offered to Ryanair by Aarhus airport in Denmark²⁹⁵, by Bratislava airport in Slovakia²⁹⁶ and by Frankfurt Hahn airport in Germany²⁹⁷. In addition, the CFI annulled a Commission decision of 2004 ordering Belgium to recover incompatible aid extended to Ryanair linked to its establishment at Charleroi airport²⁹⁸. The Court considered that the Commission should have examined the measures granted by the Walloon Region and by Brussels South Charleroi Airport together and should have applied the private investor principle to the measures adopted by the Walloon Region, since there are close economic links binding these two entities.
294. In the social aid field, the Commission approved changes to a scheme aimed at lowering the price of air transport between Guadeloupe and metropolitan France for certain categories of Guadeloupe residents²⁹⁹. It also approved the extension of a discount scheme for air services available to people whose main residence is in one of the most peripheral parts of the Highlands and Islands of Scotland³⁰⁰.
295. In the merger field, on 6 August, the Commission cleared the proposed acquisition of Northwest Airline Corporation ("NWA") by Delta Air Lines, Inc. ("Delta")³⁰¹, both U.S. carriers, under the EU Merger Regulation. The Commission assessed the impact of the proposed merger on transatlantic scheduled air passenger transport between the U.S. and the EEA, taking into account the fact that Delta and Northwest are both SkyTeam members and already cooperate extensively on transatlantic routes with the European SkyTeam member airlines. To the extent that the Commission had previously found that the members of the SkyTeam alliance could not be considered as actual competitors on transatlantic routes as a result of their membership of

²⁹⁰ Case [N 158/2008](#) (OJ C 309, 4.12.2008, p. 5).

²⁹¹ Case [N 153/2008](#) (OJ C 46, 25.2.2009, p. 7).

²⁹² Case [N 638/2007](#) (OJ C 140, 6.6.2008, p. 1).

²⁹³ Case [N 52/2008](#) (OJ C 134, 31.5.2008, p. 1).

²⁹⁴ Case [N 754/2007](#) (OJ C 70, 15.3.2008, p. 7).

²⁹⁵ Case [NN 58/2007](#) (OJ C 109, 30.4.2008, p. 15).

²⁹⁶ Case [NN 74/2007](#) (OJ C 173, 8.7.2008, p. 9).

²⁹⁷ Case [NN 54/2007](#) (OJ C 12, 17.1.2009, p. 6).

²⁹⁸ Case [T-196/04](#) *Application by Ryanair for the annulment of Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to Ryanair in connection with its establishment at Charleroi*, not yet reported in the ECR.

²⁹⁹ Case [N 421/2008](#) (OJ C 7, 13.1.2009, p. 1).

³⁰⁰ Case [N 27/2008](#) (OJ C 80, 1.4.2008, p. 5).

³⁰¹ Case COMP/M.5181.

SkyTeam, its assessment focused on the possible impact of the creation of a permanent structural link between Delta and Northwest as a result of the proposed merger. The Commission concluded that the present transaction would not raise competition concerns, particularly in the light of the SkyTeam members' extensive cooperation on transatlantic routes independently of this merger, the mainly complementary nature of Delta's and Northwest's respective networks as regards transatlantic routes, and the generally limited increment on the transatlantic routes where both parties are present.

296. On 17 December, after an in-depth investigation, the Commission declared the concentration between KLM and Martinair³⁰² to be compatible with the common market. The Commission established that the effects of the proposed transaction would be limited, not only because KLM already jointly controls Martinair, but also because Martinair's competitive strength has been falling steadily and, in order to regain its strength, Martinair depends on KLM's agreement to a renewal of its long-haul passenger fleet.

2.5.1. *International aviation policy – EU-US cooperation*

297. Under the EU-US open aviation agreement signed in April 2007, which includes provisions for the strengthening of cooperation between the Commission and the US Department of Transportation (DoT) in the field of competition, the Commission and the US DoT launched a joint research project on airline alliances³⁰³. This project aims to deepen their understanding of transatlantic air services, the effects of alliances on airline competition and possible changes in the role of alliances following the EU-US open aviation agreement.

G – PHARMACEUTICAL INDUSTRY

1. OVERVIEW OF THE SECTOR

298. A properly functioning pharmaceutical sector is of key importance for the health of Europe's citizens who need access to innovative, safe and affordable medicines. Each European consumer paid almost EUR 430 for medicines in 2007. This amount will increase in the light of the ageing population in Europe.
299. The pharmaceutical sector is also still a strategic sector for Europe in terms of economic growth and sustainable employment. The market for prescription and non-prescription medicines is worth over EUR 138 billion ex factory and EUR 214 billion at retail prices. The pharmaceutical sector employs more than 634 000 persons and spends on average 17% of its turnover on research and development. Most importantly, innovation in human medicines has enabled patients to benefit from treatments considered unimaginable a few decades ago.
300. The pharmaceutical sector is highly regulated. On the supply side, there are two types of companies. So-called "originator" companies are active in research,

³⁰² Case COMP./M.5141.

³⁰³ See Press Release [IP/08/459](#), 18.3.2008.

development, manufacturing, marketing and supply of innovative medicines. Their products are usually subject to patent protection, which is necessary in order to provide a reward for innovation and incentives for future research. When patent protection expires, the originator companies lose their exclusive rights to manufacture and market these medicines. The second category of companies, namely manufacturers of generic products, can enter the market with medicines that are equivalent to the original medicines, but typically at lower prices. This helps contain public health budgets, contributes to an increase in consumer welfare and creates incentives for further innovation.

301. Several "blockbuster" medicines (i.e. where annual global turnover for that medicine exceeds USD 1 billion) account for a substantial part of the sales and profits of large originator companies. Many of these blockbusters have lost patent protection in recent years and more will do so in the years to come. Combined with other factors, this has given originator companies an incentive to aim at maximising their revenues from these products for as long as possible.
302. On the demand side, the pharmaceutical sector is unusual in that, for prescription medicines, the ultimate consumer (the patient) is not the decision maker (generally the prescribing doctor and, in certain Member States, the pharmacist also play a role). Nor does the ultimate consumer usually directly bear most of the costs, as these are generally covered and/or reimbursed largely, or even entirely, by a national health scheme. Because of this unique structure, there is usually limited price sensitivity for prescription medicines on the part of decision makers and patients, although various mechanisms to control prescription drug budgets do exist. Price sensitivity is greater for over-the-counter medicines and medicines used in a hospital context.

2. POLICY DEVELOPMENTS

2.1. Pharmaceutical Sector Inquiry

303. One of the main pillars of the Lisbon strategy is the promotion of economic growth and boosting innovation. In this context, sector inquiries allow the Commission to proactively screen economic sectors in the EU in order to detect potential barriers to competition and to ensure that markets function properly, also with the aim of promoting innovation. As regards the application of the EU anti-trust rules in the pharmaceutical sector, the most important action taken by the Commission in 2008 was to launch, on 15 January, the sector inquiry into pharmaceuticals³⁰⁴. On the same date, the Commission carried out unannounced inspections at the premises of a number of originator and generic companies in the EU. This was the first time that the Commission launched a sector inquiry with upfront inspections.
304. The sector inquiry was opened in response to information that competition in the pharmaceutical market in the EU may not be working properly. This was indicated by a decline in innovation, measured by the decreasing number of novel medicines

³⁰⁴ [Case COMP/39.514](http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html) Commission Decision of the 15 January 2008 initiating an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003. More information is available at: <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>

reaching the market each year and by instances of delayed market entry of generic medicines. The inquiry sought to examine whether certain practices of pharmaceutical companies may be among the reasons for the generic delay and the decline in innovation. The inquiry focused in particular on the practices which originator companies may use to block or delay competition by generic companies, as well as to delay or block the development of competing originator products. It also summarised the shortcomings in the regulatory framework applicable to the pharmaceutical sector as reported by respondent companies and public authorities.

305. In the course of the inquiry, the Commission consulted all interested stakeholders, such as originator and generic companies, industry associations, consumer and patients' associations, insurance companies, associations of doctors, pharmacists and hospitals, health authorities, the European Patent Office (EPO), parallel traders, and NCAs. The Commission gathered data on the basis of requests for information sent to over 100 pharmaceutical companies active in the EU, as well as to various other stakeholders. The data concern a sample of 219 chemical molecules relating to prescription medicines for human use, which were sold in the EU in the period from 2000 to 2007.
306. On 28 November, the Commission published its preliminary report on the pharmaceutical sector inquiry³⁰⁵. The report confirmed that there is indeed a delay of generic entry and a decline in innovation, and it examined some of the possible causes, most prominently those stemming from company behaviour. The preliminary report underlines the key role of patent rights for the pharmaceutical sector. It does not identify individual cases of wrongdoing or provide any guidance on the compatibility of the practices examined with EC competition rules.

2.1.1. Competition between originator companies and generic companies

307. The findings of the sector inquiry indicate that originator companies design and implement a variety of strategies (referred to as a "tool-box") in order to ensure continued revenue streams from their medicines. The successful implementation of these strategies may have the effect of delaying or blocking entry, but the report stresses that company behaviour might not be the only cause of the delays faced by generic companies as regards the market entry of their products.
308. A strategy commonly applied by originator companies is to extend the breadth and duration of patent protection by filing numerous patents for the same molecule, forming so-called "patent clusters". In some cases, individual blockbuster medicines were protected by up to 1 300 patents and pending patent applications EU-wide, causing uncertainty for generic companies seeking to enter the market without infringing an originator company's patents or patent applications. Originator companies also engaged in close to 700 cases of patent litigation with generic companies in relation to the sample under investigation in the period 2000 to 2007. Generic companies won 62% of all cases where a final judgment was given, but a final judgment in court took on average 2.8 years.

³⁰⁵ [Pharmaceutical Sector Inquiry, Preliminary Report, DG Competition Staff Working Paper](#), 28.10.2008.

309. The sector inquiry also found that, between 2000 and 2008, more than 200 patent settlement agreements were concluded between originator and generic companies in the EU, with nearly half of these (48%) restricting the ability of the generic company to market its medicine. 45 settlements contained – in addition to the restriction – a value transfer from the originator company to the generic company, with direct payments to generic companies alone amounting to more than EUR 200 million.
310. Originator companies also took issue with national marketing authorisation and pricing and reimbursement authorities regarding the quality or safety of generic products and claiming that the marketing of these products would violate their patent rights. However, originator companies were rarely successful in challenging the decisions of national authorities in court. Nevertheless, such interventions can lead to substantial delays for generic companies when bringing their products on to the market.
311. Originator companies launched second generation products (known as “follow-on” products) for 40% of the medicines in the sample under investigation that faced a loss of exclusivity between 2000 and 2007, and they undertook intensive marketing efforts with the aim of switching patients to the new medicines prior to the market entry of a generic version of their first generation product. Other stakeholders sometimes criticise patents on second generation products as weak because they show only a marginal – if any – improvement for the patient. Originator companies argue that incremental innovation deserves adequate protection.
312. In many instances, originator companies used two or more instruments from the "tool-box" in parallel and/or successively in order to protect the revenue streams generated from their (best-selling) medicines.
313. The sector inquiry also 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 about seven months on a weighted average basis, and still around four months for the most valuable medicines. On average, price levels for medicines (originator and generic together) in the sample facing loss of exclusivity in the period 2000 to 2007 fell by nearly 20% one year after the first generic entry, and by about 25% after two years. Generic prices decreased at a significantly greater rate than these price levels.
314. On the basis of a sample of medicines that lost exclusivity in the period 2000 to 2007, representing an aggregate post-expiry expenditure of about EUR 50 billion over the period in 17 Member States, the preliminary report estimates that generic entry resulted in savings of EUR 14 billion. However, the savings from generic entry could have been increased by around EUR 3 billion, or over 5% more, on the basis of that sample alone if generic entry had taken place immediately after loss of exclusivity.

2.1.2. *Competition between originator companies*

315. As regards the competition between originator companies, the preliminary findings of the inquiry show that originator companies had engaged in so-called "defensive patent strategies". Patents falling into this category were primarily used in order to block the development of a new competing medicine. The sector inquiry also shows

that, in such cases, it is not the intention of the originator companies to pursue these patents in order to bring a new/improved medicine to the market.

316. When considering patent-related exchanges overall, the inquiry reveals at least 1 100 instances across EU Member States where patents held by an originator company relating to a medicine in the sample investigated might overlap with the R&D programme and/or patents held by another originator company for their medicine. Such an overlap creates a significant likelihood that originator companies will find their research activities blocked, with detrimental effects on the innovation process. In many cases, originator companies tried to settle potential disputes, for instance through licensing. However, in approximately 20% of the cases where a licence was requested, the patent holder refused to grant it.
317. Originator companies also engage in litigation against other originator companies. In relation to the sample under investigation, these companies reported, for the period 2000-2007, a total of 66 cases of patent-related litigation which concerned 18 different medicines. Litigation was initiated in equal measure by the patent holder and by the originator company allegedly violating the patent. In 64% of the cases, litigation was concluded by means of settlement agreements. The number of cases where a final judgment was reported was relatively low (13 of the 66 cases). The patent holders lost the majority (77%) of cases where final judgments were handed down.
318. The analysis of the sample of medicines under investigation also reveals that, between 2000 and 2007, originator companies mainly opposed each other's secondary patents. The opposing originator companies were very successful in challenging the patents of other originator companies. During that period, they prevailed in approximately 89% of final decisions handed down by the EPO (including the Boards of Appeal).
319. The inquiry confirmed that originator companies concluded settlement agreements with other originator companies in the EU in order to resolve claims in patent disputes, oppositions or litigation. In the period 2000-2007, some 27 settlement agreements relating to the sample under investigation were reported. Approximately 67% of these settlement agreements concerned a licence agreement (including cross licensing).
320. Besides settlement agreements, the preliminary findings of the inquiry also reveal that originator companies concluded many other agreements with each other. In total, some 1 450 originator-originator agreements were reported during the sector inquiry. For certain medicines, a wide range of agreements were reported, of which the majority concerned the commercialisation phase rather than the R&D phase.

2.1.3. *Comments on the regulatory framework*

321. Stakeholders also submitted comments on the regulatory framework applicable to the pharmaceutical sector, highlighting perceived difficulties and shortcomings in relation to market entry and competition. Generic companies and originator companies agree on the need for a single Community patent and a unified and specialised patent judiciary in Europe. The preliminary findings of the sector inquiry likewise support these views. Stakeholders also highlight what they perceive as

bottlenecks in the marketing authorisation and pricing and reimbursement procedures, which can contribute to delays in bringing pharmaceutical products to market.

2.1.4. *Next steps*

322. The final report, expected in the summer of 2009, will take into account the comments received during the public consultation. As a follow-up, the Commission can launch investigations aimed at enforcing the competition rules in the sector. The Commission may also make recommendations for improving the regulatory framework.

H – FOOD INDUSTRY

1. OVERVIEW OF THE SECTOR

323. The food supply chain combines 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.
324. Reversing the three decades-long trend of declining agricultural prices, the prices of a number of commodities began to chart a steady upward course in 2006. Prices increased dramatically in the second half of 2007 and reached peak levels in the early part 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 led to wide differences between Member States and to reduced household purchasing power.
325. The soaring food prices in the latter part of 2007 and the first half of 2008 were the result of the coincidence of several global factors and trends, some structural and others temporary. Although in 2008 the prices of most major agricultural commodities have dropped dramatically to levels comparable to or even lower than those recorded before the start of the price surge, EU consumer prices for retail food have not fallen substantially until now. The observed (unprecedented) retail price hikes have raised concerns regarding the possible malfunctions of the food supply chain, the competitive structure of food retail markets generally and certain regulatory hurdles which existing and new market entrants face. Such malfunctions and regulatory hurdles have been identified as having a potentially negative impact on the transmission mechanisms linking agricultural commodity prices with producer and consumer prices. In response to these concerns, 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 that this trend has on final consumers.
326. The Communication on "Tackling the challenge of rising food prices - Directions for EU action" of May 2008³⁰⁶, set up a Task Force to examine the functioning of the

³⁰⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Tackling the challenge of rising food prices Directions for EU action ([COM\(2008\) 321 final, 20.5.2008](#)). The Communication analyses

food supply chain, including concentration and market segmentation of the food retail and distribution sectors in the EU. The Task Force successfully produced a first Report on the situation before the end of 2008. The findings of this Report fed into a second Communication on "Food Prices in Europe" that was adopted in December 2008³⁰⁷.

2. POLICY DEVELOPMENTS

327. The Communication of December 2008 proposes a roadmap to improve the functioning of the food supply chain. In terms of competition policy, the Communication calls for action by the Commission and NCA to ensure a vigorous and consistent enforcement of competition rules in the food supply markets, whilst emphasising the importance of competition anti-trust and merger instruments.

2.1. Anti-trust

328. Through this Communication, the Commission has undertaken to pay particular attention to a number of specific practices. Apart from hard-core restrictions on competition, such as cartels and resale price maintenance, the following practices are singled out in the Communication as potentially harmful for competition and such as to merit closer scrutiny, on a case-by-case basis:

- Buying alliances which, under certain circumstances, can be used as a tool for foreclosing rivals' access to essential inputs or can relate to collusive behaviour on downstream markets,
- Exclusive supply agreements which can lead to foreclosure of competing buyers,
- Single branding obligations possibly restricting in-store inter-brand competition and/or foreclosing competing suppliers,
- Use of private labels possibly foreclosing competing brands.

329. On this basis, the Commission will endeavour to develop a consistent orientation in terms of its forthcoming advocacy, monitoring and enforcement efforts so as to ensure that the food supply chain works optimally for the benefit of consumers.

330. In 2008, the Commission has continued enforcing competition rules in food-related markets. In particular, it has ensured compliance by *Coca-Cola* with the commitments it undertook in 2005 and has fined a cartel of *banana traders* under Article 81 EC. It has also launched investigations into an alleged cartel in the *exotic fruit* market and has raided *cereal traders* on suspicion of another cartel. At national

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.

³⁰⁷

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Food Prices in Europe ([COM\(2008\)821 final, 9.12.2008](#)).

level, Competition Authorities have closely scrutinised food-related sectors and have initiated a number of investigations (e.g. *bakery sector in Italy*, *olive oil sector in Spain*) and inquiries (e.g. the *Grocery Monitor in Ireland*), to name but a few.

331. Given that retail markets are often defined at most as national in scope, it is crucial that Competition Authorities should address potential malfunctioning within the food supply chain by adopting a consistent and coordinated approach. To this end, in 2008, the ECN has served as a forum for discussion and exchange of best practice on issues related to food retail markets. In this context, DG Competition held two meetings of the ECN Food Subgroup in July and November.

2.2. Mergers

332. Consolidation in the food sector is taking place along the supply chain. The degree of concentration varies along the chain, by product category, and in the different national markets. Downstream, the increased concentration of the retail sector, which affects consumer goods generally, has often been identified as a potential cause of high food prices. Several NCAs have investigated the functioning of the retail sector and are continuing to monitor developments.
333. The consolidation of the food sector is reflected in several merger cases notified to the Commission. In 2008 a number of these were subject to in-depth investigations or cleared in the first phase only following important divestitures.
334. In the *Friesland/Campina* case³⁰⁸ the Commission undertook an in-depth investigation of the proposed merger between two Dutch dairy cooperatives, active in a range of dairy markets. This concentration was cleared following commitments by the parties to divest Friesland Food's fresh dairy business and a part of Campina's cheese business, as well as two Campina brands for long-life dairy drinks. The remedy package included important remedies to ensure access to raw milk in the Netherlands.
335. In *ABF/GBI*³⁰⁹, the Commission carried out an in-depth investigation of the acquisition of parts of GBI by Associated British Foods (ABF), who are major producers of baker's yeast. The acquisition, as originally notified, would have raised competition concerns in the markets for compressed baker's yeast in Spain and Portugal. ABF thus undertook to divest GBI's distribution business in Portugal and Spain to a suitable buyer with sufficient production capacities to supply those businesses.
336. Also in 2008 the Commission has dealt with mergers in the retail sector. The proposed takeover of ADEG of Austria by the German REWE Group³¹⁰, both of which are active on the Austrian retail and wholesale markets for everyday consumer goods, was approved subject to conditions, namely the divestiture of outlets in those regions where the Commission was concerned that the strength of the combined company could result in higher prices for consumer goods.

³⁰⁸ [Case COMP/M.5046 Friesland Foods/Campina.](#)

³⁰⁹ [Case COMP/M.4980 ABF/GBI BUSINESS.](#)

³¹⁰ [Case COMP/M.5047 REWE/ADEG.](#)

2.3. State aid

337. The framework of analysis of State aid to the food sector may vary depending on the type of products concerned. As a general rule, food products included in Annex I of the EC Treaty fall in the first place within the remit of the State aid guidelines applicable to the agriculture³¹¹ and fisheries³¹² sectors. These guidelines set out special rules for the agricultural and fisheries sector in order to ensure, *inter alia*, consistency with the Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP), but refer to horizontal rules in areas such as R&D or Rescue and Restructuring (R&R). The cases concerning food products falling within Annex I of the EC Treaty are dealt with in the Agriculture section of this report (see I.C.2.5.above).
338. Food products that do not fall within Annex I of the EC treaty are not subject to any specific rules and, therefore, fall within the existing horizontal frameworks. In addition, because of the similarities between food processing and marketing companies that fall within the scope of Annex I products and those which do not, State aid rules applying to food processing and marketing companies that concern Annex I products (except for the fisheries sector) have been harmonised with those applying to non-Annex I products.
339. In 2008, the number of State aid cases relating to the food sector (non-Annex I products) was fairly limited, with only two small R&R aid cases being notified. The first case concerned a restructuring aid package of EUR 580 000 in favour of *Bäcker Legat GmbH*, a medium-sized Austrian industrial baker, and was approved by the Commission on 2 July³¹³. The second case concerned a six-month rescue loan in favour of *Delitzscher Schokoladen GmbH*, a German chocolate manufacturer which was facing difficulties following its decision to sell part of its own brand chocolate production and focus on private labels for major retail chains, where margins are lower. The Commission approved the aid on 11 December³¹⁴ since all the conditions of the Community guidelines on rescue and restructuring of firms in difficulty³¹⁵ were fulfilled.

I – POSTAL SERVICES

1. OVERVIEW OF THE SECTOR

340. Postal services in the EU generate about 0.9% of GDP. The postal sector is thus of great significance for the economy of the EU. Virtually all Universal Service Providers (USP) in the EU are public undertakings controlled by the Member States, with Germany and the Netherlands being the notable exceptions.

³¹¹ Community guidelines for State aid in the agriculture and forestry sector 2007-2013 ([OJ C 319, 27.12.2006, p. 1](#)).

³¹² Guidelines for the examination of State aid to fisheries and aquaculture ([OJ C 84, 3.4.2008, p. 10](#)).

³¹³ [N 92/2008 Restructuring aid to "Der Bäcker Legat"](#) (OJ C 203, 9.8.2008, p. 3).

³¹⁴ [NN55/2008 Rescue aid to "Delitzscher Schokolade"](#) (OJ C 12, 17.1.2009, p. 4).

³¹⁵ [OJ C 244, 1.10.2004, p. 2](#).

341. 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 1.71 million persons employed³¹⁶. In total, roughly 5 million jobs are related to postal activities, i.e. are directly dependent on, or result from, the postal sector³¹⁷.
342. Postal services are changing rapidly. The sector is at the crossroads of three dynamic business areas which are vital to the European economy: communications, advertising and transportation/logistics. There are a number of drivers for change within the postal sector. The five most important ones are: demand and changing customer needs; organisational change; market opening; automation/new technologies; and electronic substitution.
343. Most EU USP are active in at least five separate service markets in addition to the monopoly. All USP provide express and unaddressed mail services. Similarly, most USP offer mail preparation services, hybrid mail services, e-mail services and financial services. Eight public postal operators (PPOs), mainly active in Member States with high volume markets, are active in ten or more different mail related markets. These activities share, to varying extents, the same commercial and logistic infrastructure which is also used for the provision of services under monopoly and/or universal service obligations.
344. Objective analysis of market shares of competitors plus the subjective perception of key players confirm that, even in cases where the monopoly has been completely abolished or substantially reduced, genuine competition is only just beginning to emerge. Meaningful competition in the letter post market has yet to develop. 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 2007. In the majority of the other Member States, market shares of competitors were, with some exceptions, below 2%³¹⁸.

2. POLICY DEVELOPMENTS

345. On 20 February, the Parliament and the Council adopted the third postal Directive³¹⁹. Under this Directive, full market opening will have to be accomplished by 31 December 2010 by most Member States, with a further two years allowed for eleven Member States. This constitutes a major new phase for postal services. The

³¹⁶ [Main Developments in the Postal Sector \(2002-2004\)](#), Final Report, WIK Consult, 2006.

³¹⁷ [Employment trends in the EU postal sector](#), Final Report, Pls Rambøll, October 2002.

³¹⁸ See Section 4.4 of Annex to Commission Report on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC) ([SEC\(2006\) 1293, 18.10.2006](#)).

³¹⁹ 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](#)).

Directive provides in particular for the abolition of the 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.

346. Regarding the application of State aid rules to the postal sector in 2008, the Commission adopted several decisions with a view to ensuring that postal operators entrusted with SGEI and their subsidiaries do not enjoy unduly granted advantages. In particular, the Commission looked at 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 for discharging those obligations, and that commercial activities outside the SGEI are not cross-subsidised.
347. Among the State aid decisions, one authorisation in favour of the Italian Post Office should be mentioned. The Commission decided not to raise objections under EC Treaty State aid rules to a sum of EUR 1.1 billion compensation granted by Italy to *Poste Italiane* from 2006 to 2008 to meet the costs of fulfilling its universal postal service obligations. The State support was found to be in line with EU rules on public service compensation, because it did not over-compensate *Poste Italiane* for providing these services, and did not allow cross-subsidies to other activities.
348. On 12 November, the Commission found that *La Banque Postale*³²⁰ had not gained any advantage from the breakdown between La Poste and itself of the EUR 2 billion paid by La Poste in 2006 to the national public body responsible for financing retirement pensions. La Banque Postale did not, therefore, receive State aid. The Commission was particularly concerned to ensure that the calculation of the contribution by La Banque Postale took account of the share relating to the general purpose staff actually working for it.
349. The Commission continued its investigation into the alleged overcompensation of *Deutsche Post AG*³²¹ for carrying out its universal service obligations. Due to the refusal by Germany to supply the requested information, the Commission enacted an information injunction against Germany on 30 October.
350. Furthermore, the CFI annulled³²² the 2002 Commission decision which had already found certain aid measures for Deutsche Post AG to be incompatible. The Commission has appealed against the judgment³²³.

³²⁰ Case [NN 41/2006](#) *Contribution de la Banque postale à la réforme du financement des retraites des fonctionnaires rattachés à La Poste* (OJ C 46, 25.2.2009, p. 1). 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. See Press release [IP/08/1686](#), 12.11.2008.

³²¹ Case [C 36/2007](#) *Complaint against the German State for unlawful State aid to Deutsche Post* (OJ C 245, 19.10.2007 p. 21).

³²² Case [T-266/02](#) *Deutsche Post AG v Commission*, not yet reported in the ECR.

³²³ Case [C-399/08](#) *Commission v Deutsche Post AG* (OJ C 301, 22.11.2008, p. 18).

351. During the year, as well as verifying the compatibility of the level of compensation granted to postal operators for providing SGEI, the Commission also examined whether postal operators were receiving other forms of aid from the State.
352. The Commission closed its investigations into aid granted to *Leipzig Airport and DHL*³²⁴. While it cleared the aid granted to Leipzig airport for the construction of the southern runway, the Commission prohibited the letter of comfort and certain other warranties which DHL received as aid for moving its European hub to Leipzig. The aid which had already been made available to DHL will have to be returned.
353. The adoption of the third Postal Directive will mean that it is no longer possible to use the State monopoly in respect of certain services (the so-called "reserved area") to finance the various public services carried out by postal operators. The role of State aid and, hence, the Commission's control thereof will consequently increase in importance. The Commission will pay particular attention to ensuring that State aid is only used to finance public services and is not abused so as to prevent the development of competition, or to block the entry of or crowd out new market players.

III – Consumer activities

354. It is as consumers that citizens interact most directly with the marketplace, through the products and services they buy. It is also as consumers that citizens are most vulnerable to behaviour intended to prevent the market operating fairly. Ultimately it is choice and purchasing decisions at the end of a market that drive its requirements and needs upstream, and it is these choices made by consumers that enable businesses to decide where to focus investment and innovation in order to be successful. Where the benefits of this investment, innovation and efficiency are passed on to end consumers, it further empowers them to make an informed choice, thereby building a virtuous circle and a strong economy.
355. It is for these reasons that it is vital that markets do not act to exclude or cause detriment to consumers, and - in response to this - it is essential that the impact of an effective competition policy is focused on maximising consumer welfare. Put simply, this means ensuring that the benefits of a functioning competition regime accrue to the end consumer in a given product market. To achieve these objectives, the Commission places consumer concerns and issues at the heart of all its competition actions, and ensures that the results of this work are presented clearly and transparently.
356. The Commission can undertake this work by analysing how markets are currently working when following up a suspicion or allegation of an infringement of competition rules, with a view to remedying and/or imposing a fine if the infringement is substantiated. Furthermore, the Commission can measure the likely impact on consumers and competition of a change to the structure in a market, either through concentration as a result of a merger or acquisition or through the input of

³²⁴ [Case C 48/2006](#) *Measures by Germany to assist DHL and Leipzig Halle Airport* (OJ L 346, 23.12.2008, p. 1).

additional funding through State aid. In performing this second type of analysis the Commission can establish whether the change is going to have a small impact on consumers and competition, or whether it needs to be modified or rejected.

357. In anti-trust actions and cartels, the vast majority of cases pursued by the Commission in 2008 concerned markets that impacted on consumers of a product. In such cases there may have been higher prices, lower quality or less choice than there would otherwise have been.
358. In cases such as the *Bananas cartel*³²⁵, the potential effect on consumers can occur when consumers are a direct purchaser or user of a product or service. In other cases, such as the *Car Glass cartel*³²⁶, the product subject to a cartel may cause consumer detriment because either it is a raw material or component of the end product or it is a service, process or piece of machinery used in the manufacture, transport or distribution of a product. For instance, most consumers purchase cars rather than windows as components (except in a small number of repair cases – although even here consumers are likely to choose the repairer rather than the glass manufacturer). It is important to note that in these types of cases, the purpose or intent of reducing competition in the market – which thus creates a consumer detriment – is a key driver for Commission actions, and fines are set so as to take this into account.
359. This approach to considering whether consumers are likely to have suffered past harm as a result of an infringement of competition law also informs the thinking behind the proposals contained in the White Paper on Damages Actions, published in April 2008³²⁷. In many cases, individual consumers may only suffer a small amount of detriment. However, on aggregate, the total loss suffered by all consumers can be high. Consumers who suffered as a result of a cartel or any breach of competition law therefore need a collective redress mechanism: it is not just a matter of justice for them; it is also a matter of overall confidence in the market economy.
360. The Commission also uses an analysis of how markets are operating when looking at the effect of the wider market and regulatory framework, for instance when considering the markets for telecommunications or professional services. The study into the conveyancing services market, published in January 2008³²⁸, looked at a particular market served by professional services in 21 Member States that had a significant economic impact on consumers. The study highlighted the interaction between the level of regulation of the market in various Member States, the price of services and the outcomes in terms of quality. It concluded that high levels of regulation generally go hand in hand with high prices, although they do not necessarily result in higher levels of quality. The Commission takes the view that regulation should be proportional to benefit – that is to say, where there are clear

³²⁵ On 15 October 2008 the Commission fined banana suppliers EUR 60.3 million for running a price cartel between 2000 and 2002. See Press Release [IP/08/1509](#), 15.10.2008.

³²⁶ On 12 November 2008 the European Commission imposed fines totalling EUR 1 383 896 000 on Asahi, Pilkington, Saint-Gobain and Soliver for illegal market sharing, and exchange of commercially sensitive information regarding deliveries of car glass in the EEA. See Press Release [IP/08/1685](#), 12.11.2008.

³²⁷ See Press Release [IP/08/515](#), 3.4.2008.

³²⁸ [Conveyancing Services Market: Study for the European Commission](#), DG Competition led by the Centre of European Law and Politics (ZERP) at Bremen University, December 2007.

benefits to consumers, regulation may be appropriate; but this should be done in a manner that is proportionate to its intended effect.

361. Competition policy is, by its very nature, forward-looking: anti-trust policy itself is not only about punishing past misdeeds, but also explicitly about deterrence for the future, through an appropriate fining policy. Even when no fine is imposed, the Commission can approve commitments from businesses to stop certain practices or it can undertake certain actions in order to facilitate competition and ultimately improve the market for consumers. As regards collecting societies (who represent music authors and collect royalties on their behalf), the Commission decision in the *CISAC* case³²⁹ prohibited the use of territorial exclusivity clauses in contracts. This will make it easier, for instance, for a music website to offer online content to consumers outside its own territory. However, while anti-trust enforcement puts an end to anticompetitive behaviour, other tools available to the Commission are directly shaping the future for the benefit of consumers, on markets that concern their everyday life.
362. In the context of merger control, the Commission assesses the likely consequences of a proposal by companies to merge. It can prohibit the transaction if it is likely to have negative consequences for consumers or approve such a transaction subject to conditions. Even where a merger is cleared without any conditions, it is still important to ascertain that there will be no negative impact on consumers. In practice, conditions or remedies often form part of a merger clearance. For instance, the purchase of Austrian retailer, *ADEG*, by the German supermarket chain *REWE*³³⁰ raised concerns regarding the potential for increased price levels, because *REWE* would not face enough competition in several Austrian districts. Therefore, the acquisition was only approved subject to *REWE* selling all *ADEG*-owned shops in the relevant districts and encouraging *ADEG* merchants to leave the *ADEG* network.
363. Similarly, and given the importance of food prices for consumers, the Dutch dairy cooperatives *Friesland Foods and Campina*³³¹ were only allowed to merge after the former undertook to sell its fresh dairy product business (on which it would have become dominant) while the latter divested one cheese plant as well as two brands of long-life dairy drinks. However, even then, consumers buying these products would not enjoy the full benefits of competition if the merged entity continued to control most of the raw material needed for these products, i.e. raw milk. Hence, additional commitments were made to ensure that competitors in the fresh dairy and cheese markets would have access to raw milk, and to ensure lower exit barriers for dairy farmers wishing to leave the merged cooperative.
364. The same concern was identified for motor fuel and fuel stations with the takeover by *StatoilHydro* of *Jet Scandinavia*³³², which is the most efficient low-cost operator in both Norway and Sweden with a strong brand and a proven track record of undercutting competitors' prices in markets with high entry barriers. Since fuel prices are a major concern for consumers and since the transaction would have strengthened

³²⁹ Case COMP/38.698 *CISAC Agreement* (not yet published in the OJ). See Press Release [IP/08/1165](#) and [MEMO/08/511](#), 16.7.2008.

³³⁰ See Press Release [IP/08/995](#), 23.6.2008.

³³¹ See Press Release [IP/08/1994](#), 17.12.2008.

³³² See Press Release [IP/08/1556](#), 21.10.2008.

the acquirer's position as the largest provider of motor fuels, the Commission cleared Statoil's bid only after it offered to divest the entire Jet network in Norway, as well as 158 stations in Sweden.

365. It should be stressed that remedies are voluntary in that they are offered by the parties, but the Commission will only accept them if they really make a difference for consumers. If that is not the case, the parties will have to modify these remedies until they resolve the competition concerns identified by the Commission in its investigation.
366. The acquisition of *British Energy (BE)* by *Électricité de France (EdF)*³³³ was a case in point; it had to be watched closely, especially given the proportion of household incomes spent on energy. After a first set of remedies offered by EdF and BE were deemed insufficient in relation to the potential problems that arose, the parties submitted an improved remedy package ensuring a diversified ownership of power generation plants and more open access to electricity for competitors. These commitments were seen as essential to maintaining consumer choice in the market by avoiding a situation where one dominant player is able to raise prices without a sufficient alternative electricity supply being available.
367. The Commission follows the same preventive or proactive approach when authorising – or blocking – State aid schemes. Public subsidies can be fully justified when the market itself does not provide adequate solutions, as has obviously been the case in the financial sector during the recent financial crisis. Rescuing banks was required in this case in order to protect citizens' deposits and their ability to borrow money, but it was also tempting for Member States to give priority support to national banks. However, uncoordinated reactions could only make the crisis worse by exporting problems to other Member States and distorting the Internal Market with money flowing to banks that were benefiting from guarantees, while leaving other banks in trouble. The latter would rapidly become bankrupt and their remaining clients would lose their deposits. Such a situation would then push each government into a subsidy race, thereby reinforcing the market positions of national banks on their respective territory. Reduced competition from foreign banks would then enable them to impose less favourable conditions on consumers.
368. Dialogue and consultation are essential to any properly functioning policy, and the Commission is committed to conduct a proper dialogue with consumers also on competition issues. Therefore, a dedicated Consumer Liaison Unit was created in DG Competition in 2008. Consumers and their representatives are able to present helpful information to the Commission about potential market failures. Consumer input is also an important asset in understanding markets, as consumers and their representatives are best placed to explain directly how they perceive the impact of a particular action. During 2008, DG Competition received approximately 2 500 letters from citizens on the subject of mergers, State aid and anti-trust. The Commission asked for specific input in 2008 during the Pharmaceutical Sector Inquiry³³⁴ and, on a regular basis, in a number of merger cases. By understanding this consumer

³³³ See Press Release [IP/08/2048](#), 22.12.2008.

³³⁴ See Press Release [IP/08/1829](#), 28.11.2008.

perception, the Commission is better able to place all aspects of the market in context when identifying issues and remedies.

369. In developing policy, it is also important to understand the concerns and impacts on our major stakeholders, and consumers are no exception. Both the Roundtable on opportunities and barriers to online retailing and the European Single Market³³⁵ and the White Paper on Private Damages included extensive consultation through which the views of consumers and their representatives were actively sought. Using their input, the Commission was better able to understand how these policies would operate in practice and to ensure that their objectives are fully realised.
370. Developing the linkages between competition and consumer welfare remains an area of ongoing importance for the Commission. The guidelines on Article 82 EC³³⁶ reaffirmed the importance of this approach, and these will be rolled out during 2009 and beyond.

IV – The European Competition Network and cooperation with National Courts

A – GENERAL OVERVIEW

371. The ECN is the network for cooperation between the EU Member States' NCAs and the Commission. In 2008 the ECN continued to be a very active forum for discussion and exchange on good practices. As in previous years, it also performed well under the mechanisms laid down in Regulation 1/2003, with a view to ensuring the efficient and consistent enforcement of Articles 81 and 82 EC.

1. COOPERATION ON POLICY ISSUES

372. The ECN provides a platform for EU competition authorities to constructively coordinate enforcement action, ensure upstream consistency and discuss policy issues of common interest. During 2008 the ECN met in the following *fora*
- The annual meeting of the Director General of DG Competition and the heads of all NCAs in the ECN context, which was devoted to discussion about recent developments in competition policy.
 - The so-called "plenary meetings", where the NCAs and the Commission met on three occasions and which served as an important tool for debates about general issues of common interest relating to anti-trust policy and exchange of experiences and know-how. In this regard, the plenary engaged in discussions on the experience of the NCAs with the enforcement instruments of Regulation 1/2003, as part of the preparatory fact-finding for the Report on the functioning of

³³⁵ For further details see http://ec.europa.eu/competition/sectors/media/online_commerce.html
³³⁶ See Press Release [IP/08/1877](http://ec.europa.eu/competition/press/081203_1877.htm), 3.12.2008.

Regulation 1/2003 which the Commission is called upon to present to the European Council and Parliament in 2009³³⁷.

- Three working groups dealt with specific issues, such as enhancing communication within the ECN, and examined the application of the 'effect on trade' criterion in practice. These working groups provided an excellent forum for sharing experiences on concrete issues and exchanging good practices. Two new working groups were created as part of the review of the Commission's policy on horizontal agreements and vertical restraints. These new working groups will explore the case experience of enforcers in these fields and will feed into the Commission's review of the existing BER, and accompanying Guidelines, which are due to expire in 2010.
- Moreover, fifteen ECN sectoral subgroups³³⁸, dedicated to particular sectors, addressed specific issues and engaged in a useful exchange of experience and best practices. For example, the energy and food subgroups were very productive, most notably with regard to the analysis of "sticky retail prices". The banking subgroup engaged in lively and wide-ranging discussions on the concepts and follow-up to the MasterCard decision, MIF and the SEPA file. Lastly, the pharmaceuticals subgroup focused primarily on the pharmaceutical sector inquiry.

1.1. Convergence of national laws and instruments

373. 2008 saw the continuation of the "convergence" process observed in the context of Regulation 1/2003³³⁹. Over and above the legal obligations arising from the implementation of the Regulation, there is a trend towards greater approximation of national procedural laws and policies.

374. A prime example of this trend towards further convergence is the ECN Model Leniency Programme³⁴⁰. The Programme was elaborated within the ECN during 2006. The implementation of leniency programmes, in general, and of the ECN Model Programme, in particular, by the Member States and NCAs has advanced at a considerable pace. By the end of 2008, twenty-five Member States had leniency programmes and the remaining two (Malta and Slovenia) are expected to introduce them in the near future. Many ECN members have aligned their programmes with the ECN Model Programme or are in the process of doing so. The state of implementation of the ECN Model Programme at the end of 2008 is currently being assessed by the Commission and the NCAs.

³³⁷ See Article 44 of Regulation 1/2003: "Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17. On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation".

³³⁸ On banking, securities, insurance, food, pharmaceuticals, professional services, healthcare, environment, energy, railways, maritime transport, motor vehicles, telecoms, media and sports.

³³⁹ See Report on Competition Policy 2007, p. 20, available at http://ec.europa.eu/competition/annual_reports/2007/en.pdf

³⁴⁰ Further information on the ECN Model Programme is available at : http://ec.europa.eu/competition/ecn/model_leniency_en.pdf together with a list of frequently asked questions (<MEMO/06/356> of 29 September 2006).

375. During 2008, the Commission and the NCAs have also worked together on a comparative analysis of commitment procedures.

2. COOPERATION IN INDIVIDUAL CASES

376. Cooperation between the ECN members in individual cases is organised around two principal obligations on the part of the NCAs, namely to inform the Commission when new cases are opened³⁴¹ and before the final decision is taken³⁴². The first requirement of informing the Commission and the network facilitates the swift reallocation of cases on the few occasions where it appears necessary and promotes enhanced and effective enforcement, while the second plays an important role in ensuring the consistent application of EU law.

2.1. Case allocation

377. In 2008 the Commission was informed of approximately 150 new case investigations launched by NCAs. Amongst the new cases about which the Commission was informed under Article 11(3) of the Regulation, more than 55% concerned the application of Article 81 EC, 30% concerned the application of Article 82 EC and the remainder concerned the application of both Articles 81 and 82 EC. The figure for Article 81 cases includes the enforcement action of the NCAs in the area of cartels in particular. Clusters of cases were also observed *inter alia* in the energy, food, media, transport, telecommunication and postal sectors.

378. With regard to work-sharing within the network, the flexible and pragmatic approach introduced by the Regulation and the Network Notice continued to function very well in practice. In 2008, as in previous years, there were very few instances of case-allocation discussions, 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 2008, 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 the NCAs agreed on a way of dividing the work on a case-by-case basis.

³⁴¹ See Article 11(3) of Regulation 1/2003: "The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States".

³⁴² See Article 11(4) of Regulation 1/2003: "No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty".

2.2. Consistent application of the rules

379. Further to information provided under Article 11(4) of Regulation 1/2003, the Commission services reviewed or advised on 61 envisaged decisions, as well as on informal requests and queries from NCAs. The envisaged decisions submitted to the Commission related to a broad range of infringements in different sectors of the economy. The Commission noted that the trend of an increased use of commitment decisions by NCAs that was observed in 2007 continued in 2008.
380. To date, the Commission has not had to initiate proceedings with a view to ensuring consistency of decision making³⁴³.

3. APPLICATION OF EU COMPETITION RULES BY NATIONAL COURTS IN THE EU

3.1. Assistance in the form of information or in the form of an opinion

381. 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 rules³⁴⁴. In 2008, the Commission received several requests for opinions which were pending at the end of the year.

3.2. Judgments of national courts

382. Regulation 1/2003 requires the EU Member States to forward to the Commission a copy of any written judgment issued by national courts deciding on the application of Articles 81 or 82 EC³⁴⁵. The Commission received copies of some 50 judgments handed down in 2008, which were posted on DG Competition's website insofar as the transmitting authority did not class them as confidential (confidential judgments are merely listed).

3.3. *Amicus curiae* intervention

383. Regulation 1/2003 provides that, where the consistent application of Articles 81 or 82 EC so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States, and may also make oral observations with the permission of the court in question³⁴⁶. In 2008, the Commission did not intervene as *amicus curiae* pursuant to Article 15(3) of Regulation 1/2003.

³⁴³ See Article 11(6) of Regulation 1/2003: "The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority".

³⁴⁴ See Article 15(1) of Regulation 1/2003: "In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules".

³⁴⁵ See Article 15(2) of Regulation 1/2003: "Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties".

³⁴⁶ See Article 15(3) of Regulation 1/2003: "Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues

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

384. Continuous training and education of national judges in EU competition law is very important in order to ensure both effective and consistent application of those rules. In 2008, fifteen grant agreements were concluded for the training of judges. A call for new proposals was also launched in October³⁴⁷.

V – International activities

385. In an increasingly globalised world economy, competition policy must also adopt a global outlook. DG Competition is responding to this challenge by reinforcing and extending its relations with partners all over the world in both bilateral and multilateral *fora*. Commissioner Kroes attaches the highest importance to effective international cooperation in the area of competition. Her bilateral meetings with counterparts in the United States, Japan and China, as well as her participation in the International Competition Network (ICN) annual conference in Kyoto, testify to this commitment.

A – ENLARGEMENT, WESTERN BALKANS AND NEIGHBOURHOOD POLICY

386. 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.
387. During 2008, 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 has 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.
388. 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

relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the consistent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations. For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case".

³⁴⁷ Detailed information on this call for proposals is available at http://ec.europa.eu/dgs/competition/proposals2/#call_training2008

enforce these rules. DG Competition helped Macedonia to improve the compliance of its fiscal legislation with Community rules on State aid.

389. 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.

B – BILATERAL COOPERATION

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

1. AGREEMENTS WITH THE USA, CANADA AND JAPAN

391. As in previous years, cooperation with the United States of America was intense. Based on two dedicated competition cooperation agreements³⁴⁸, contacts between DG Competition and the Anti-trust 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.
392. In case-related contacts, case teams usually update 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 provide a useful framework for cooperation, especially by indicating critical points in the procedure where cooperation could be particularly useful. The cases *Thomson/Reuters* and *Google/DoubleClick* can be cited as examples of good cooperation between the EU and US agencies.
393. Commissioner Kroes met her US counterparts, Chairman William E. Kovacic of the FTC and Tom Barnett, the Assistant Attorney General, at the annual bilateral meeting which took place on 20 October in Brussels, and on several other occasions.
394. Cooperation with the Canadian Competition Bureau is based on the EU/Canada Competition Cooperation Agreement which was signed in 1999³⁴⁹. Contacts between the Commission and the Bureau have been frequent and fruitful. Case-related

³⁴⁸ [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).

³⁴⁹ [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).

contacts concerned mainly merger and cartel investigations. In the area of cartel cases this 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. High level meetings took place both in Brussels and Ottawa, and officials from both sides conducted reciprocal visits.

395. Cooperation with the Japan Fair Trade Commission (JFTC) is based on the 2003 Cooperation Agreement³⁵⁰. Commissioner Kroes met JFTC Chairman Takeshima at the occasion of the EU-Japan High Level meeting on competition policy on 13 April in Kyoto. At the centre of discussions were policy initiatives on both sides, as well as recent enforcement actions. In addition to contacts on individual cases, the Commission and the JFTC continued their ongoing dialogue on general competition issues of common concern.

2. COOPERATION WITH OTHER COUNTRIES AND REGIONS

396. 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).

397. Cooperation with China under the EU-China competition policy dialogue³⁵¹ remained a priority in 2008. Contacts between DG Competition and the Chinese administration were intense and dealt mainly with questions concerning the newly adopted anti-monopoly law, the future implementing legislation and the administrative structure of the Chinese enforcement agencies. DG Competition organised several workshops in Beijing on EU merger control and anti-trust issues for high-level representatives from the Ministry of Commerce, the State Administration of Commerce and Industry, and the National Development and Reform Commission. It also hosted a visitor from the Ministry of Commerce for a period of five months.

398. In the course of the year, DG Competition and the Korean Fair Trade Commission (KFTC) finalised their negotiations for a bilateral cooperation agreement in the field of competition. This agreement will contain provisions on enforcement cooperation, notification, consultation and exchange of non-confidential information. The adoption process is at a fairly advanced stage. The European Parliament issued a positive opinion on the proposal in December 2008. When it enters into force as scheduled, in early 2009, the agreement will replace the existing Memorandum of Understanding³⁵² between DG Competition and the KFTC.

399. Moreover, DG Competition played an active role in the ongoing negotiations on Free Trade Agreements (FTA) with Ukraine, India and South Korea, and on the trade part of the Association Agreement with Central America, with a view to ensuring that

³⁵⁰ [Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities](#) (OJ L 183, 22.7.2003, p. 12).

³⁵¹ [Terms of Reference of the EU-China competition policy dialogue](#) (May 2004).

³⁵² [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).

anti-competitive practices (including State aid) do not erode the trade and other economic benefits sought through those agreements.

C – MULTILATERAL COOPERATION

1. INTERNATIONAL COMPETITION NETWORK

400. 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, competition policy implementation, unilateral conduct and advocacy).
401. At the 2008 ICN Annual Conference, held in Kyoto (Japan) from 14 to 16 April, Commissioner Kroes and Director-General Philip Lowe delivered keynote speeches.
402. The Unilateral Conduct Working Group (UCWG), which was set up in 2006, worked on two reports on tying and bundled discounting and loyalty rebates. The reports are to be finalised at the beginning of 2009. The Working Group also started preparations for the ICN Unilateral Conduct Workshop due to be held in Washington in March 2009.
403. The Cartels Working Group, co-chaired by DG Competition, presented reports to the 2008 annual conference on negotiated settlements in cartel cases and on determining fines for cartels where DG Competition contribution was key. Progress was made on drafting a chapter for the ICN anti-cartel enforcement manual on investigative strategy and interviewing. The 2008 ICN Cartels workshop was held in Lisbon from 28 to 30 October.

2. OECD

404. DG Competition 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 2008. It submitted contributions to most round tables on competition policy, including on resale price maintenance, buyer power, market studies and bundled and loyalty discounts and rebates, and gave presentations on several topics, including its decision in the *MasterCard* case.

3. UNCTAD

405. DG Competition played a leading role at a round table discussion at the annual conference of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy of the United Nations Conference on Trade and Development (UNCTAD), which discussed the division of competence between a regional competition authority and national competition authorities in the enforcement of competition laws. The topic was particularly important, as several regional groupings of third countries are in the process of setting up a regional competition regime for which the EU system serves as an obvious model.

VI – Inter-institutional cooperation

406. In 2008, the Commission continued its cooperation with the other Community institutions in accordance with the respective agreements or protocols entered into by the relevant institutions³⁵³.

1. EUROPEAN PARLIAMENT

407. In 2008, the European Parliament (EP) adopted a resolution on the retail banking sector inquiry following an exchange of views on the issues raised by its own-initiative report on this subject. The EP also adopted, via the consultation procedure, a report on the agreement concluded between the Government of the Republic of Korea and the European Community concerning cooperation on anti-competitive activities.

408. Own initiative reports on the White Paper on Damages Actions and the Annual Competition Reports for 2006 and 2007 were also discussed at committee level during 2008 and are due for adoption in 2009.

409. The Commission also participated in discussions held in the EP on Commission policy initiatives, including the application of State aid in response to the unfolding financial and economic crisis. The Commissioner holds regular exchanges of views with the responsible Parliamentary committees on the subject of competition policy. In 2008, there were three exchanges of views with the Economic and Monetary Affairs Committee, namely in March, June and October, and one meeting with the Legal Affairs Committee in November.

410. Outside the framework of these more formal meetings, cooperation with the EP also took the form of bilateral meetings with individual Members of Parliament on specific topics of interest to them. The Commissioner and the Director-General have also had correspondence with the Chair of the Economic and Monetary Affairs Committee on topics including competition law and intellectual property rights, cooperatives, Livret A and financial services, the follow-up to the retail banking sector inquiry, liner shipping consortia and the review of the block exemption on motor vehicles.

411. The Commission also cooperates closely with both the European Ombudsman and Members of the EP by replying to Parliamentary Questions and Petitions. In 2008, the Commission responded to 549 written questions, 65 oral questions and 33 petitions involving matters of competition policy³⁵⁴. Moreover, the Commissioner also answered an oral question in Plenary on State aid to *Polish shipyards*.

³⁵³ Framework Agreement of 26 May 2005 on relations between the European Parliament and the Commission ([OJ C 117, 18.5.2006, p. E/123](#)); [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](#).

³⁵⁴ Of these the Commissioner in charge of Competition directly responded to 162 written questions, 18 oral questions and 10 petitions.

2. COUNCIL

412. 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 for the bank industry and other additional State aid measures in the context of the financial and economic crisis. The Commission also attends meetings of Council working groups dealing either directly with competition policy matters or with files that have an impact on competition policy, and it maintains close links with the respective Presidencies. Depending on the case, cooperation may also consist in the participation of the Commissioner responsible for Competition in different Council formations. The most usual ones are the Competitiveness Council or the Economic and Financial Affairs Council. In addition, the Director-General for Competition regularly attends the meetings of the Economic and Financial Committee and contributes to meetings of the European Council.
413. In 2008, the Commission made contributions on competition policy mainly in respect of conclusions adopted in the Competitiveness Council (such as on the Lisbon strategy, industrial policy and SME policy), the Transport, Telecommunications and Energy Council (Internal Energy Market Legislative Package, Energy/Climate package) and the Economic and Financial Affairs Council (Single Market Review, Single Euro Payments Area, risk capital, European Economic Recovery Plan).

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

414. 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. One example is the adoption of the EESC report on the Commission's Annual Report on Competition Policy. During 2008 the Commission attended EESC working group meetings on Competition and Democracy in the Internal Market, the Annual Competition Report 2007, and the White Paper on Damages Actions.

VII – Outlook for 2009

A – ANTI-TRUST

415. The review of the current rules on vertical agreements, which was launched in 2008, will continue in 2009³⁵⁵. The aim is to have the new regime in place early in 2010, with entry into force in May 2010. To achieve this target, the Commission will have to adopt a draft proposal of the BER and Guidelines in summer 2009. Subsequently, the draft proposal will be subject to public consultation.

³⁵⁵ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 22.

B – MERGERS

416. By 1 July 2009 the Commission will present a report to the Council on the application of the Merger Regulation³⁵⁶. The Commission has 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 Merger Regulation. The Commission's experience so far is that, overall, the Merger Regulation and related instruments work well.
417. In the context of the financial crisis, rescue mergers between banks and nationalisation of banks by Member States have thrown up new challenges to the application of EU merger control, in terms of jurisdictional, procedural and substantive issues. It is expected that these issues will continue to be a crucial part of the enforcement agenda in 2009. The ECMR is an appropriate and sufficiently flexible tool for merger control enforcement, including in such circumstances. The overall objective is to apply merger control in a manner that takes into account the requirements of financial stability for the banking system, whilst not allowing the creation of anti-competitive market structures.

C – STATE AID

418. In 2009, the Commission will continue to implement the State aid action plan³⁵⁷. The Commission will in particular adopt guidelines for the in-depth assessment of large amounts of individual aid in the fields of training, employment and regional aid. These guidelines will improve predictability and increase legal certainty for Member States and companies. The Commission will also actively implement the economic analysis in the cases notified.
419. As regards the Temporary framework, the Commission will analyse the reports to be submitted by Member States by the end of October 2009 and will assess whether an amendment of the Temporary framework is necessary.
420. In 2009, the Commission will also continue its work regarding competition advocacy in the field of State aid. Such advocacy is particularly important in order to encourage Member States to use existing possibilities, including the GBER adopted in 2008.
421. Case workload pertaining to the financial crisis and its spill-over effects in the real economy will continue to be high in 2009.
422. In the financial sector, existing aid schemes approved at the end of 2008 must continue to be monitored. The Commission is reviewing their functioning and will also feed into the work of the Economic and Financial Committee on the effectiveness of rescue measures. Also, depending on the circumstances, some

³⁵⁶ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 22.

³⁵⁷ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 22.

emergency measures approved will need to be followed up with restructuring measures, which will require Commission scrutiny. In 2009 the Commission will provide more detailed guidance on its approach to the assessment of restructuring and viability plans of individual banks under the state aid rules³⁵⁸. It will make a case-by-case assessment, taking into account the total aid received through recapitalisation, guarantees or asset relief, to ensure long-term viability and a return to normal functioning of the European banking sector.

423. Also, outside of banking, a large number of cases are expected, either under the Temporary framework for State aid measures to support access to finance in the current financial and economic crisis, or under the rescue and restructuring guidelines, particularly in certain sectors which have been seriously affected by the crisis or which were already in serious difficulty (e.g. through structural overcapacity) before the crisis erupted.

D – SECTOR DEVELOPMENTS

1. ENERGY AND ENVIRONMENT

424. In 2009, the Commission will continue to enforce the EC competition rules in the energy and environment sectors.
425. From an anti-trust point of view, DG Competition will ensure the follow-up to the sector inquiry, which has identified key obstacles along the electricity and gas supply chain to creating integrated and competitive markets³⁵⁹. In these markets, the Commission will continue to focus on abuses such as exclusionary conduct, exploitative abuses and collusion. A number of ongoing energy anti-trust investigations launched in recent years are expected to be brought forward
426. Continued attention will also be devoted to the Climate Change and Energy package as well as to the Second Strategic Energy Review package within the inter-institutional dialogue³⁶⁰. If necessary, the Commission will contribute to further refining relevant provisions, pending the final agreement between the institutions.
427. Concerning mergers, DG Competition's action will focus on identifying and addressing anti-competitive effects stemming from cross-border energy mergers.
428. From a State aid viewpoint, the Commission will continue to apply the established policy, in particular applying the new guidelines on State aid to environmental protection and the new GBER adopted in 2008³⁶¹.

³⁵⁸ Communication for the Spring European Council – *Driving European Recovery* (COM(2009)114 final, 4.3.2009, p. 4).

³⁵⁹ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 19.

³⁶⁰ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 25.

³⁶¹ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 14.

2. FINANCIAL SERVICES SECTOR

2.1. Financial crisis

429. The Commission will continue to examine national measures in favour of financial institutions and contribute to financial stability by providing legal certainty.
430. If necessary, the Commission will give further guidance to Member States on how new aid instruments should be designed in order to be compatible with EU State aid rules.
431. DG Competition will focus on reviewing the decisions taken in 2008 in order to assess whether the national schemes need to be extended and to ensure that inconsistencies between the national aid schemes are ironed out.

2.2. Economic crisis

432. Several more measures contributing to national recovery plans have been announced or notified. The Commission will continue to examine these national measures swiftly.
433. However, it should be stressed that the Temporary Framework does not apply to companies whose problems date from before the crisis, i.e. prior to 1 July 2008 or that it may not be sufficient for companies which face structural difficulties. For those companies, the R&R Guidelines constitute the most appropriate tool to restore long-term viability. In such cases, a restructuring operation which ensures long-term viability is the proper response.

2.3. Single Euro Payments Area (SEPA)

434. In addition to the financial and economic crisis, the outlook of the financial services sector for 2009 is also determined by the SEPA project.
435. Whereas the SEPA framework for payment cards and the credit transfer scheme were launched in 2008, the launch of the direct debit scheme is not scheduled until 2 November 2009.

3. ELECTRONIC COMMUNICATIONS

436. As the current economic crisis is hitting the wider economy hard, the call for national governments to take a more active role to foster broadband deployment as part of a wider stimulus initiative is becoming more vocal. President Barroso has announced that the Commission will channel an additional EUR 1 billion in 2009 and 2010 to accelerate the roll-out of broadband deployment in under-served areas where the market does not have sufficient incentives to provide affordable broadband services³⁶². Such types of well-targeted aid measures will significantly facilitate the widespread availability of affordable broadband service throughout Europe.

³⁶² Communication from the Commission to the European Council: A European Economic Recovery Plan ([COM\(2008\)800 final, 26.11.2008](#)).

437. Furthermore, DG Competition is working with DG Information Society 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. Its aims are to bring wholesale rates for termination on individual networks down to an efficient level, and to harmonize 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.
438. The Commission is also preparing State aid guidelines on the application of EU state aid rules to public funding for the deployment of broadband networks, including the deployment of so-called next generation access broadband networks.

4. INFORMATION TECHNOLOGY

439. Due to the economic crisis, growth in the ICT sector is likely to be negative in 2009, in spite of the positive growth in the IT services and software sectors³⁶³. The Commission will continue to monitor market developments closely and ensure that competition is not hindered, for example through reduced interoperability or through foreclosure by a dominant company of existing or emerging markets³⁶⁴. It will also continue to monitor developments in standard-setting bodies, particularly in relation to intellectual property rights, so as to ensure that procedures within standard-setting bodies culminate in a transparent process and contribute to the achievement of pro-competitive outcomes³⁶⁵.
440. By removing and preventing anticompetitive barriers to innovation and market entry, DG Competition will contribute to investment and growth in ICT markets and thereby to the deepening and extension of the European knowledge economy as a whole.

5. MEDIA

441. Following up on the Roundtable on opportunities and barriers to online retailing, a report will be drafted on the basis of the contributions received from the senior representatives of consumers and industry who attended the meeting with Commissioner Kroes on 17 September. The report and contributions from all interested parties on the questions raised in the issues paper of the Commission will be used as an input for the ongoing review of the rules on vertical agreements in relation to online distribution. On the subject of online music distribution, discussions with stakeholders will continue, with the aim of exploring models for the EEA-wide licensing of music rights in a competitive framework.
442. The Commission will continue to closely monitor the implementation of the CISAC Decision of 16 July. The abolition of territorial restrictions in the agreements

³⁶³ See [OECD Information Technology Outlook 2008 Highlights](#).

³⁶⁴ See Annual Policy Strategy for 2009 (COM (2008) 72 final), 13.2.2008, p. 4).

³⁶⁵ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 19.

between collecting societies is expected to lead to licensing practices which better suit the online environment and give both authors and commercial users a choice between collecting societies.

443. In the field of broadcasting, the Commission is continuing its review of the Broadcasting Communication, taking into account the comments received on the new draft Communication. After having analysed the submissions received, the Commission intends to adopt a revised Broadcasting Communication in the first half of 2009.
444. The Commission will continue to implement its established policy concerning State aid for the digital switchover in the field of broadcasting. In assessing the funding initiatives, the Commission will continue to pay particular attention to technological neutrality and to the ultimate objective of ensuring wide consumer access to digital broadcasting.
445. Following the positive reaction to its public consultation on the proposal to extend the validity of the State aid assessment criteria in its 2001 Cinema Communication, the Commission intends to adopt a decision accordingly³⁶⁶. As a result, these criteria will now continue to be applied by the Commission until 31 December 2012 at the latest. They had been due to expire on 31 December 2009.

6. TRANSPORT

446. In 2009, the Commission expects that the consolidation in the airline sector will continue, especially in light of the economic crisis. Such consolidation may take the form of either new mergers between airlines or enhanced alliance agreements, especially in relation to transatlantic flights. Such operations will have to be assessed either under the Merger Regulation or under Article 81 EC. The Commission and the US Department of Transportation also plan to publish the report on their joint project (see above, paragraph 297).
447. The severe negative effects of the financial and real economy crisis on the air transport sector in 2008 are expected to be further aggravated in 2009, with both passenger and freight traffic levels declining at unprecedented rates. It is therefore expected that the number of State aid cases in this sector will increase. The Commission will closely monitor sectoral developments in 2009 and will take the necessary steps to ensure, through State aid control, that the measures taken by Member States to support the real economy and employment are implemented in a timely, targeted and temporary manner. Such measures should respect the following guiding principles: promoting openness within the internal market and vis-à-vis third countries; ensuring non-discrimination of products and services from other Member States and ensuring consistency with long-term reform objectives.
448. Following the public consultation (see above, paragraph 275), the Commission plans to adopt the new block exemption Regulation on consortia in 2009³⁶⁷. The Commission will also monitor the market for maritime transport services,

³⁶⁶ See [IP/09/138](#)

³⁶⁷ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 22.

particularly in the light of the recent expiry of the exemption on maritime conferences.

7. PHARMACEUTICAL INDUSTRY

449. In 2009, the focus of the Commission's activities in the pharmaceutical sector will be directed at concluding the sector inquiry³⁶⁸. The final report, which is expected in summer 2009, will take into account the comments received during the public consultation. As a follow-up, the Commission and/or national competition authorities may launch investigations aimed at enforcing competition rules in the sector. The Commission may also make recommendations for improving the regulatory framework. A number of significant pharmaceutical mergers already appear to be in the pipeline for 2009, and so it is likely that there will also be a heavy merger workload.

8. FOOD INDUSTRY

450. In the context of the current economic downturn, concerns related to the food supply chain are likely to remain high on the political agenda throughout the coming months. As a follow-up to the Communication on "Food Prices in Europe" (see paragraph 326 above), the work of the Commission's Food Taskforce will continue in 2009 and focus on the actions identified in this Communication. The Commission will report to the Council on its progress in December. This work will also feed into the forthcoming Review of the Single Market, to be completed later in 2009. DG Competition will continue to actively contribute to the overall work of the Commission both in the framework of the Food Task Force and in the context of the Single Market Review.
451. Given that food retail markets are often defined, at most, as national in scope, it is crucial for Competition Authorities throughout the EU to address potential malfunctioning within the food supply chain in a consistent and coordinated manner. To this end, in 2009, the ECN will continue to be used as a forum for discussion, exchange of best practice and market intelligence-gathering on issues related to food retail markets. In parallel, DG Competition will strive to deepen its knowledge of the markets' structure and practices in order to identify and remedy any possible breaches of competition rules.

9. POSTAL SERVICES

452. From a State aid viewpoint, the Commission will continue to ensure that there is no overcompensation for the discharge of the public service obligations and no cross-subsidization of commercial activities outside the SGEI. The Commission expects to close its investigations on alleged State aid granted by the UK and Germany to Royal Mail and Deutsche Post respectively. Concerning the new Postal Directive, the Commission will closely monitor the implementation process and also provide Member States with the necessary assistance for that purpose. It will also reflect on

³⁶⁸ See DG Competition Annual Management Plan 2009, 28.11.2008, p. 20.

the possible implications of the new method of calculating the net cost of the universal service on State aid policy in the postal sector³⁶⁹.

E – INTERNATIONAL ACTIVITIES

453. DG Competition's work with the candidate countries, the Western Balkan countries and the Neighbourhood Policy countries will continue in 2009.
454. DG Competition intends to further strengthen its cooperation with the South Korean competition authority by having the dedicated intergovernmental cooperation agreement in the field of competition signed, as planned, in early 2009. It also intends to hold a first bilateral meeting with the South Korean competition authority in 2009.
455. The focus in 2009 will be on cooperation with emerging economies, such as China and India.
456. The Commission will continue to participate actively in the negotiation of Free Trade Agreements and Association Agreements with a number of countries, e.g. Ukraine, South Korea, China, India, the Andean Community and Central America. DG Competition will contribute to the negotiations on the competition provisions of these agreements aimed at guaranteeing a level playing field for European companies.
457. DG Competition will continue to participate actively in multilateral organisations that are active in the area of competition. It will play an active role in all sessions of the OECD's Competition Committee in 2009, as well as in the activities of the International Competition Network (including the annual conference, which will be held in Zürich, Switzerland from 3-5 June 2009).

³⁶⁹ See Directive 2008/6/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).

LIST OF ABBREVIATIONS

ANACOM	Autoridade Nacional De Comunicações, Portuguese NRA
BER	Block Exemption Regulation
BPC	Best Practices Code
CAP	Common Agricultural Policy
CFI	Court of First Instance
CFP	Common Fisheries Policy
CISAC	International Confederation of Societies of Authors and Composers
CPU	Central Processing Unit
CTU	Český telekomunikační úřad, Czech NRA
DoJ	US Department of Justice
EC	(Treaty of the) European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECMR	European Community Merger Regulation
ECN	European Competition Network
ECSC	European Coal and Steel Community
EEA	European Economic Area
EESC	European Economic and Social Committee
EFTA	European Free Trade Association
ENP	European Neighbourhood Policy
EP	European Parliament
EPC	European Payments Council
EPO	European Patent Office
EU	(Treaty of the) European Union
EUR	Euro

FERMA	Federation of Risk Management Associations
FTA	Free Trade Agreement
FTC	US Federal Trade Commission
GBER	General Block Exemption Regulation
GDP	Gross Domestic Product
ICN	International Competition Network
ICT	Information and Communication Technologies
IGE	Intergovernmental Group of Experts on Competition Law and Policy
IPR	Intellectual Property Rights
JFTC	Japan Fair Trade Commission
KFTC	Korean Free Trade Commission
MIF	Multilateral Interchange Fees
MVBER	Motor Vehicle Block Exemption Regulation
NCA	National Competition Authority
NRA	National Regulatory Authority
OECD	Organisation for Economic Cooperation and Development
OEM	Original Equipment Manufacturer
OFCOM	Office for Communications, British NRA
OJ	Official Journal of the European Union
PC	Personal Computer
PND	Portable Navigation Devices
PPC	Public Power Corporation
PPO	Public Postal Operators
R&D	Research and Development
R&D&I	Research, Development and Innovation
R&R	Rescue and Restructuring
RTR	Rundfunk und Telekom Regulierungs-GmbH, Austrian NRA

SAAP	State Aid Action Plan
SCF	SEPA Card Framework
SEPA	Single European Payments Area
SGEI	Services of General Economic Interest
SME	Small and Medium-sized Enterprises
SMR	Single Market Review
SO	Statement of Objections
SP	Simplified Procedure
SSO	Supplementary Statement of Objections
UCWG	Unilateral Conduct Working Group
UK	United Kingdom
UKE	Urząd Komunikacji Elektronicznej, Polish NRA
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USD	United States Dollar
USP	Universal Service Providers
VoIP	Voice over Internet Protocol