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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Report on Competition Policy 2011**

{SWD(2012) 141 final}

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**Introduction**

2011 was a year of turbulence. The financial crisis turned into a sovereign debt crisis in parts of the euro area, threatening the banking sector and the fiscal sustainability of many European governments. It also severely impaired credit flows towards the real economy.

In that economic context, fair competition continues to be an essential condition for the full realisation of the Internal Market and a key component of a common strategy to contribute to the recovery of the European economy and thrive at the global level.

This Communication presents how in 2011 the Commission used competition policy as an instrument in the resolution of the financial and sovereign debt crises and how, generally, competition policy and enforcement actions taken during the year contributed to the wider policy objectives of the Europe 2020 strategy and supported growth, jobs and the competitiveness of the EU economy.

Using a new format, this Communication gives a non-exhaustive overview of Commission activities in the field of competition policy in 2011, with a particular focus on the financial services, food and airline sectors. The new structure aims at better explaining how the Commission implements competition policy and how the policy contributes to the European economy and to increasing the welfare of EU citizens.

A dedicated section on interinstitutional relations reports on the continuous dialogue with the European Parliament and how the Commission responds to its requests. Further information can be found in a more detailed Commission Staff Working Document (SWD) and on the website of the Competition Directorate-General.

**1. COMPETITION POLICY IN THE CURRENT ECONOMIC CONTEXT**

The fragile signs of economic recovery in 2010 and early 2011 were not sustained throughout the year. In fact, the last months were marked by increasing instability and difficulties in the public sector. Member States continued to assist financial institutions, many of which had to receive liquidity support from central banks. Public deficits have become a source of concern regarding sovereign risk, which has led to disturbances on financial markets.

The financial crisis has had a dramatic effect on the real economy, through reduced lending to households and businesses, with serious knock-on effects on investment and employment. Several Member States had to implement austerity measures and cuts in their public spending, instead of further investing in measures aiming at re-launching the economy.

As soon as the crisis broke out, the EU coordinated the European economic stimulus package to promote recovery. It applied the State aid regime firmly but flexibly to avoid distortions of competition while requiring banks to restructure and address the weaknesses of their business models. Following that first wave of “emergency” measures, the Commission launched a programme of reforms to tackle more structural issues in the financial sector through a clear, comprehensive and consistent scheme of measures with a timetable and end date<sup>1</sup>. That programme is linked with the Commission's overall strategy for growth and jobs, as the stability of the financial sector is clearly one of the key objectives in the Annual Growth Survey<sup>2</sup>. In addition, the Commission subsequently launched regulatory initiatives for changing the financial industry's regulatory landscape. Their focus lies on re-orienting the sector towards its core function: meeting the financing needs of companies and households.

## **How State aid policy contributes to financial stability**

*The EU State aid framework remains a unique coordination tool at EU level*

The worsening of the sovereign debt crisis during the summer led the Member States and the Commission to agree on a package of measures to strengthen banks' capital and provide guarantees on their liabilities (the banking package)<sup>3</sup>. On 1 December, the Commission prolonged the State aid crisis measures for the financial sector, clarifying and updating the rules on pricing and other conditions<sup>4</sup>. Once the situation stabilises, a more permanent set of State aid rules will be established for banks.

Since the beginning of the crisis, and until 31 December 2011, EUR 1.6 trillion of State aid have been used to rescue and restructure European banks. The Commission has taken 39 decisions on restructuring, for which the Commission monitors the effective implementation of the restructuring plans. 24 banks are still undergoing restructuring. The Commission has also approved national schemes in 20 Member States that use an array of tools provided under the crisis regime. They include capital injections, support for the divestment of impaired assets, and guarantees.

In October, the ECOFIN Council concluded that the EU State Aid Framework should continue as the sole EU level coordination tool and that – in the short-/medium-term – no further frameworks are required. The Commission has used the State aid instrument in a manner that has fostered bank restructuring while maintaining a level playing field in the market. Conditions for crisis State aid rules for banks were set down with a triple objective: safeguarding financial stability, preserving the internal market, and restructuring aid beneficiaries for long-term viability. Banks were required to move away from unsustainable business models based on excessive leverage and overreliance on short-term wholesale funding and encouraged to focus again on their core business. The Commission is the only institution that explicitly imposes burden-sharing conditions on bailouts, helping to curtail moral hazard in the future.

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<sup>1</sup> The roadmap for this programme was first laid out in the Commission Communication of 4 March 2009, “Driving European Recovery”, and the plans were described in detail in its Communication of 2 June 2010 “Regulating financial services for sustainable growth”.

<sup>2</sup> Commission Communication of 23 November 2011 “Annual Growth Survey 2012”.

<sup>3</sup> [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/125621.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125621.pdf)

<sup>4</sup> Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 6.12.2011, p. 7-10; IP/11/1488.

Responding to a call from the European Parliament<sup>5</sup>, the Commission prepared a Staff Working Document which explains how the Commission's State aid policy responded to the financial and economic crisis<sup>6</sup>.

In 2011, the Commission continued its approach to failing banks through a number of important State aid decisions. The troubled Irish lender *Anglo Irish Bank*<sup>7</sup> is a good example. The Commission approved the plan submitted by the Irish authorities, which foresees a joint wind-down of Anglo Irish Bank together with Irish Nationwide Building Society over a period of ten years. The case of long-time ailing German Landesbank *WestLB*<sup>8</sup> is another prominent example. WestLB will ultimately be split up; the remaining assets and liabilities will be transferred to a bad bank in order to be wound down. By 30 June 2012 WestLB will stop its banking activities and henceforth only provide asset management services. Only the small part of WestLB's most conservative business activities - the services it provides to small local savings banks - will stay in the market, but they will be taken over by Landesbank Hessen-Thüringen (Helaba).

Banks which relied heavily on State aid can be allowed to stay on the market where parts of their activities have a realistic prospect to return to viability, provided that they considerably reduce their size and substantially change their business model to focus only on the viable activities. That approach is well illustrated by the approval of the restructuring of the German bank, *Hypo Real Estate*<sup>9</sup>. The bank will shrink to 15% of its pre-crisis balance sheet and phase out a number of business fields. Similarly, the Commission approved restructuring aid to another German bank *HSH Nordbank*<sup>10</sup> in light of a commitment to reduce its balance sheet size by 61% compared to pre-crisis levels by exiting certain business lines. The Commission also applied that approach in the context of smaller banks. For instance *Eik bank*<sup>11</sup> in Denmark was split into a bad bank put in liquidation, while the good part of the bank was subject to a sale via a bidding process. A similar line was taken for Austrian *Kommunalkredit*<sup>12</sup> which had to be nationalised in a rescue operation. The bank's business was split into non-strategic activities (to be wound down) and strategic activities (corresponding to approximately 40% of the balance sheet) which will be re-privatized.

In the case of *ABN Amro Bank*<sup>13</sup>, the need for State aid stemmed primarily from the specific separation context: separation of the Dutch bank activities from the ailing Fortis group and from the previously existing ABN Amro Group. The two businesses were left with insufficient capital to face the crisis and finance their merger. The Commission took into account that the bank did not need aid primarily because of mismanagement or excessive risk

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<sup>5</sup> Texts adopted, P7\_TA(2011)0023.

<sup>6</sup> Commission Staff Working Paper, The effects of temporary State aid rules adopted in the context of the financial and economic crisis. Available at: [http://ec.europa.eu/competition/publications/reports/temporary\\_stateaid\\_rules\\_en.html](http://ec.europa.eu/competition/publications/reports/temporary_stateaid_rules_en.html)

<sup>7</sup> Case SA.32504 *Joint restructuring plan for Anglo Irish Bank and Irish Nationwide Building Society*, decision of 29 June 2011; IP/11/801.

<sup>8</sup> Case SA.29590, *WestLB*, decision of 20 December 2011.

<sup>9</sup> Case SA.28264 *Restructuring aid for Hypo Real Estate*, decision of 18 July 2011, OJ L 60/2012; IP/11/898.

<sup>10</sup> Case SA.29338 *Restructuring of HSH Nordbank AG*, decision of 20 September 2011.

<sup>11</sup> Case SA.31945 *Aid for the liquidation of Eik Banki P/F and Eik Bank Denmark A/S*, decision of 6 June 2011, OJ C 274 17.9.2011, p. 3-6; IP/11/677.

<sup>12</sup> Case SA.32745 *Restructuring of Kommunalkredit Austria AG*, decision of 23 June 2011, OJ C 239, 17.8.2011, p. 1-3; IP/11/389

<sup>13</sup> Case SA.26674 *Restructuring aid to ABN AMRO*, decision of 5 April 2011, OJ L 333, 15.12.2011, p.1-46; IP/11/406.

taking at its level and therefore only requested behavioural safeguards (*i.e.* it did not seek divestment of businesses by the bank).

### **The specific situation of Programme Countries**

*Competition policy contributes to financial stability and structural reforms related to the adjustment programmes*

The crisis has led to major economic imbalances in most Member States and as from 2010 some had no option but to request external help from the European Commission and the International Monetary Fund (IMF). Financial stability is indeed of the utmost importance for the European Union, as three of those Member States (Greece, Ireland and Portugal) are also members of the wider Eurozone. Those so-called “Programme countries” are subject to economic adjustment programmes. Those programmes impose a wide range of conditions, which may include restructuring of the financial sector and the need to introduce structural reforms for other sectors of the economy, the administration and the judiciary<sup>14</sup>. On the economic structural side, the programmes may include, *inter alia*, the privatisation and/or restructuring of State-owned enterprises (SOEs). Such steps may entail State aid issues that the Commission will need to address promptly so that the programmes can be successfully implemented. Privatisation objectives are particularly important for Greece, Portugal and Romania. The programmes for those Member States also aim at making the competition law enforcement regime as effective and efficient as possible, with National Competition Authorities (NCAs) asking for increased powers and (human) resources.

The Commission, together with the IMF and the European Central Bank (ECB), has been closely associated with the restructuring of the financial sector in Programme countries, to ensure that the massive support necessary to keep those institutions alive in a difficult macro-economic environment does not result in undue distortions of competition. The Commission has authorized the prolongation of the existing bank guarantee and recapitalisation schemes for the three Eurozone countries. The Commission verifies that the State aid is limited to the minimum necessary and that moral hazard is properly addressed, notably by requiring not only that banks remunerate and eventually repay the aid they received, but also that they share the burden of the restructuring and take measures to address the competition distortions brought by the aid.

In Greece, the situation is very complex. The banking sector suffers both from deep recession and from its large holding of sovereign bonds. The restructuring of the banks which received State aid as of 2009 onwards continues in that very difficult context. Agricultural Bank of Greece's (ATE) restructuring plan was approved on 23 May. Following the write-downs in September due to the participation of ATE in the Private Sector Involvement (PSI) which was decided in July 2011, ATE needed a further capital injection by the State. That recapitalisation requires the submission of an updated restructuring plan to the Commission. The decision of the European Council of 27 October to increase private sector contribution to Greece's rescue by increasing the cut on Greek bonds from 21% to 50% will significantly affect the Greek banks, in proportion to their holding of sovereign bonds. To fill the resulting capital needs, the second programme for Greece which was decided on the same day provides a significantly increased budget for aiding banks, the use of which the Commission will scrutinize.

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<sup>14</sup> In addition to these Eurozone members, Romania and Latvia are also concerned.

Unlike Greece, Ireland's debt crisis originates from the banks yielding massive losses after the property bubble burst. The EC/IMF/ECB Programme of 28 November 2010 has a budget of EUR 85 billion, of which EUR 35 billion are earmarked for the financial sector. Major steps have been taken towards the recapitalisation, restructuring and deleveraging objectives of the Programme. In terms of recapitalisation, the authorities have carried out an extensive analysis of the capital requirements of the four remaining Irish banks (BOI, AIB/EBS and IL&P) through the Prudential Capital Adequacy Review (PCAR) 2011. That review included an analysis of the expected loan losses by external independent advisors. It covers the expected losses on the loan book and the costs of the deleveraging process necessary to shrink the banks to a sustainable size and reduce their reliance on Central Bank funding. The Irish authorities recapitalised the banks by the Programme deadline of 31 July. They spent considerably less than initially earmarked, due to liability management exercises carried out by the banks and private participation in the capital raising of BOI. In July, the Irish authorities presented restructuring plans for the banks, containing their deleveraging targets and other actions. The plan for BOI was approved under State aid rules on 20 December, while the others are currently being assessed.

In May, the ECOFIN Council and the IMF Executive Board agreed on a EUR 78 billion support package for Portugal. In order to strengthen confidence in the financial sector, the Programme requires banks to deleverage in an orderly manner and achieve higher levels of capital. So, a new recapitalisation scheme was put in place with an increased budget of EUR 12 billion (from EUR 3 billion). The banks benefitting from that capital support will have to submit a restructuring plan to the European Commission in line with State aid rules. A formal State aid procedure was opened for the aid granted to BPN (Banco Português de Negócios), which was nationalised in November 2008; a formal decision was to be taken in the spring 2012.

## **How antitrust enforcement fosters fair competition and transparent financial markets**

### *Europe needs transparent, open and innovative financial markets*

Financial markets, as any other market, provide more efficient service when they are open and competitive. This is exactly what the Commission is striving to accomplish through its antitrust investigations in the Over-the-Counter (OTC) derivatives market, the payments services sector, and the distribution of trading data and financial information to the market.

### Over-the-Counter Derivatives and Credit Default Swaps

The lack of transparency in relation to the trading of OTC derivatives and financial instruments became apparent during the recent financial crisis. Drawing lessons from that crisis, the G20 agreed at the 2009 Pittsburgh summit on the need to improve the transparency and oversight of less regulated markets, with specific focus on OTC derivatives. In 2010, the Commission therefore proposed to improve the regulation of Credit Default Swaps (CDS<sup>15</sup>) and other OTC derivatives through the European market infrastructure regulation (EMIR<sup>16</sup>).

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<sup>15</sup> CDS are traded between financial institutions or investors. They are derivatives originally created to provide protection to investors in the event a company or State they have invested in default on their payments. They are also used as speculative tools.

<sup>16</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, 15 September 2010, COM/2010/0484 final – COD 2010/0250\*; IP/10/1125.

Moreover, in October 2011 the Commission also tabled proposals to revise the Markets in Financial Instruments Directive (MiFID) to further enhance transparency of OTC markets<sup>17</sup>.

#### **Ongoing antitrust investigations in relation to CDS and the EURIBOR**

Competition policy supports these legislative initiatives. Lack of transparency on the market can work to the benefit of certain market players, which therefore have an incentive in maintaining it, to the detriment of new entrants into the market and of final consumers. More generally, financial information is of central importance for the financial markets and prone to the risk of collusion or abuse, so particular vigilance on the part of competition authorities is justified.

In 2011 the Commission opened two antitrust investigations regarding possible collusion and/or abuses of dominance by investment banks in the markets for CDS trade data and for CDS clearing services<sup>18</sup>. The first antitrust case concerns 16 investment banks and Markit, the leading provider of financial information on the CDS market, where the Commission is investigating whether the parties have colluded and/or may have abused a dominant position in order to control financial information on CDS. The second case concerns nine of the dealer banks and ICE Clear Europe, the leading clearing house for CDS. The Commission will investigate in particular whether the preferential tariffs granted by ICE to the nine banks have the effect of locking them into the ICE system, to the detriment of other competing clearing systems.

In addition, in October the Commission undertook unannounced inspections at the premises of a number of companies active in the sector of financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR) in a number of Member States, as it has concerns these companies may have violated EU antitrust rules.

Both the Commission's antitrust action and the regulatory measures are complementary, as they seek to ensure safe, sound and efficient financial markets.

#### Single Euro Payments Area (SEPA)

Seamless, efficient and innovative payment markets are key to a well-functioning single market and to economic integration. SEPA is an excellent example of how self-regulation, regulation and competition law enforcement can and should work together to create open, efficient and innovative market structures. This multipronged approach has proven very successful when adopting in 2010 a Commission proposal for a Regulation to promote the transition from the current domestic to new, pan-European SEPA credit transfer and direct debit schemes.

The proposed regulation also addresses the issue of interchange fees for financing the SEPA Direct Debit (SDD) model as the industry requires greater clarity and predictability on the lawfulness of such collective agreements. The main objectives of the Commission proposal on interchange fees include establishing a level playing field between payment service providers, establishing a single market for credit transfer and direct debit payments, fostering migration to SDD and achieving efficient direct debit services. The regulation was adopted by the Parliament in plenary session on 14 February 2012 (following the adoption of a report by the Economic and Monetary Affairs (ECON) Committee<sup>19</sup>) and by the Council on 28 February. It will enter into force upon publication in the second quarter of 2012.

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<sup>17</sup> IP/11/1219, 20.10.2011.

<sup>18</sup> CaseCOMP/39730 *CDS (Credit Default Swaps) – Clearing* and Case COMP/39745 *CDS – Information market*; IP/11/509.

<sup>19</sup> Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing technical requirements for credit transfers and direct debits in euros and amending Regulation (EC) No 924/2009 (COM(2010)0775 – C7-0434/2010 – 2010/0373(COD)) – The Essayah

### **Standardisation of e-payments**

Along with these regulatory initiatives, the Commission is seeking to tackle barriers to new entrants and innovation through antitrust scrutiny in order to promote efficient pan-European payment systems that would lower the costs of payments, produce innovative payment methods, and ultimately facilitate trade across the EU. In September 2011, it opened an antitrust investigation into the standardisation process for payments over the internet ('e-payments') undertaken by the European Payments Council (EPC)<sup>20</sup>. The investigation will focus in particular on whether the standardisation process limits market entry or innovation, for example through the exclusion of new entrants and payment providers who are not controlled by a bank.

### Financial services data sector

Well-functioning financial markets rely on access to information and the availability of high quality and timely market data on the price and structure of financial instruments. The markets for the provision of financial information are often characterised by a high degree of concentration. This means that the major global financial institutions and information services providers enjoy significant market power. Industry standardisation in such markets can also lead to the development of de facto market standard products, services, financial identifiers and indices. The Commission is currently investigating a number of issues in this sector, (including access to information or services, standard setting, IP rights and interoperability between different products or services).

### **Legally binding commitments for ISIN**

International Securities Identifier Numbers (ISIN) codes are 12-character alpha-numerical codes that serve for uniform identification of a security at trading and settlement, but do not contain information characterizing financial instruments. The Commission initiated an investigation because the use of ISIN records was subject to a licensing fee charged by Standard & Poor's (S&P) and on 15 November made binding for five years commitments offered by S&P. These commitments are two-fold: first, indirect end users will no longer have to pay licensing fees to S&P for the use of ISIN records; second, S&P will also offer a new service consisting only of ISIN records, at a price of USD 15 000 per annum for the provision of the new service to Information Service Providers and direct end users.

### Credit Rating Agencies (CRA)

CRAs are companies that assign credit ratings for issuers of certain types of debt obligations (such as governments), as well as for the debt instruments themselves (*i.e.* sovereign debt). Those ratings are then used by investors, issuers, investment banks, broker-dealers, and governments. Ratings have become important parameters to assess the risks related to financial investments.

In the turmoil of the financial crisis, concerns have been raised about the market for CRAs and the *modus operandi* of certain companies active in this field. In November, the Commission proposed amendments to the existing regulation on CRA<sup>21</sup> to address certain issues of overreliance on ratings and relating to conflicts of interest, market structure and accountability of CRA. The Commission also continues to monitor the competitive situation in the CRA market, which has an oligopolistic structure with high barriers to entry. No indication of anti-competitive practices in this market has been found so far.

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Report, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0292&language=EN>

<sup>20</sup> Case COMP/39876 *EPC online payments*, Opening of Proceedings 5 October 2011; IP/11/1076.

<sup>21</sup> Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1-31.

## How the application of the EU merger rules contributes to maintaining fair competition in financial markets

Trading and post-trading infrastructures, for cash and derivatives, operating in a safe, efficient and competitive manner are essential components of modern and dynamic capital markets which ultimately allow companies and investors to remain competitive at a European and global level. Since stock exchanges are crucial actors in capital markets, competition between them is of utmost importance.

### Competition for exchanges in European financial derivatives

On 29 June, Deutsche Börse (the owner *inter alia* of the Frankfurt Stock exchange) and NYSE Euronext (the owner *inter alia* of the New York, Paris, Brussels, Amsterdam and Lisbon Stock exchanges) formally notified their proposed merger to the Commission under the EU Merger Regulation (EUMR)<sup>22</sup>. The operation would have combined the two leading European stock exchanges active over the entire life chain of trading, clearing and settlement of financial instruments (both cash instruments and derivatives). Following an initial market investigation, the Commission initiated an in-depth investigation with a particular focus on derivatives trading, as the transaction would have brought together the two largest derivatives<sup>23</sup> exchanges in European financial derivatives. The Commission concluded that the merger would have led to a near-monopoly in the area of exchange-traded European financial derivatives resulting in fewer possibilities for free competition and less innovation. Customers who would have been affected by this include pension funds, mutual funds and retail banks, as well as professional brokers and investment banks. In the absence of access to the merged company's enlarged post-trade clearing facilities (*i.e.* in the presence of a closed “vertical silo”), entry by rival derivatives platforms would be made more difficult in a market already characterised by high barriers to entry. The Notifying Parties claimed that the merger would result in significant efficiencies. However, any such benefits would be significantly less than argued by the Notifying Parties and they could in part be achieved without the merger. In any case, any efficiencies would not be substantial enough to outweigh the harm to customers caused by the merger and because of the creation of a near monopoly, any benefits would also be unlikely to be fully passed on to customers. The Notifying Parties submitted proposed remedies to address the Commission's concerns, but these were ultimately deemed insufficient.

## 2. COMPETITION POLICY IN THE BROADER CONTEXT

Against that background, a major part of the Commission's actions in the field of competition policy and enforcement in 2011 addressed the effects of the crisis in the financial markets.

Nevertheless, competition enforcement and advocacy also serve other wider longer-term objectives such as enhancing consumer welfare, supporting the EU's growth, jobs and competitiveness in line with the Europe 2020 Strategy for smart, sustainable and inclusive growth<sup>24</sup>.

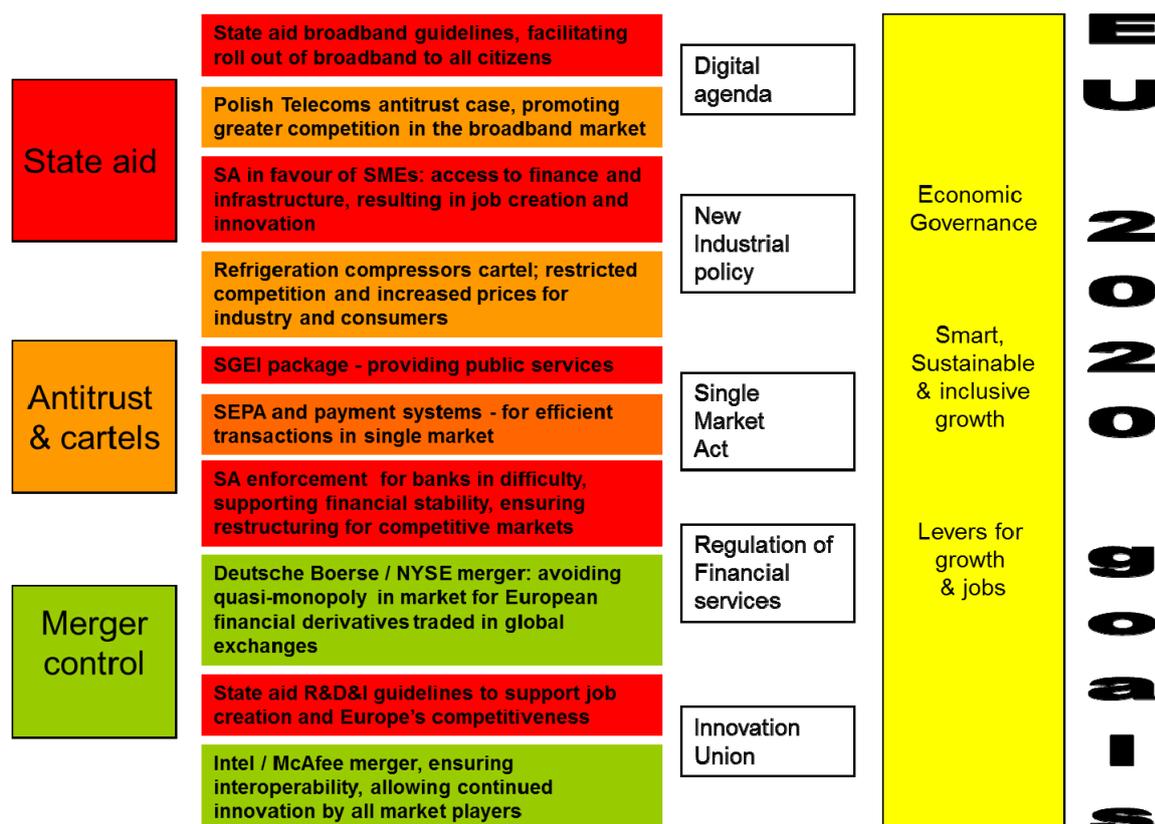
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<sup>22</sup> Case COMP/M.6166 *Deutsche Börse / NYSE Euronext*, OJ C 199, 7.7.2011, p. 9.

<sup>23</sup> Derivatives are financial contracts whose value is derived from an underlying asset or variable, such as stocks, interest rates or currencies. Derivatives are generally used for hedging, investment purposes, and overall risk management in financial markets. Clearing plays an important role in derivatives trading. The purpose of clearing is to manage the risk of the trading parties in the interim period between trading and settlement.

<sup>24</sup> [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

## Competition policy and enforcement contributing to EU2020



The Strategy sets out concrete targets to be achieved within the next decade in areas such as employment, education, migration, energy use and innovation as well as milestones for resource efficiency, in order to overcome the impact of the financial crisis and place the EU back on track for economic growth. Competition and a strong competition policy, designed and implemented by the European Commission and the Member States in the European Competition Network (ECN), play a major role in ensuring that the Europe 2020 objectives can be reached, as competition has a direct impact on the key drivers for productivity growth.

### Sound framework for enforcement of competition rules

2011 was also an important year for issues of due process concerning the EU's institutional framework for the enforcement of competition law. Both the European Court of Human Rights (ECtHR)<sup>25</sup> and the Court of Justice<sup>26</sup> confirmed that the institutional framework for the enforcement of competition law, by which and administrative organ as the Commission takes decisions which are subject to full judicial review, ensures an adequate protection of the fundamental rights of the persons concerned by those decisions. The Commission is committed to further improving its investigative procedures and increasing transparency. This

<sup>25</sup> Judgment of the ECtHR of 27 September 2011 in case *A. Menarini Diagnostics S.R.L. v Italy* (Application No 43509/08), paras 57-67.

<sup>26</sup> Cases C-272/09 P *KME Germany AG and Others v Commission*, C-386/10 P *Chalkor AE Epexergasias Metallon v Commission* and C-389/10 P *KME Germany AG and Others v Commission*, judgments of 8 December 2011.

is demonstrated by the adoption of a package of measures in 2011<sup>27</sup>, consisting of Best practices for proceedings under Article 101 and 102<sup>28</sup> (similar best practices are already available in merger control and State aid), revised Terms of Reference of the Hearing Officer<sup>29</sup> (extending the role of the Hearing Officer to the investigative phase), as well as a Staff Paper on the submission of economic evidence<sup>30</sup>. The purpose of this package is to enhance transparency and help parties in their interaction with the Commission and the Hearing Officers in antitrust and merger investigations.

## **Better rules for compensation of public service obligations**

The new Services of General Economic Interest (SGEI) package<sup>31</sup> provides Member States with a simpler, clearer and more flexible framework for supporting the delivery of high-quality public services to citizens. Member States are largely free to define which services are of general interest, but the Commission must ensure that public funding granted to provide such services does not unduly distort competition in the single market. Previously only hospitals and social housing were exempted, but with the new package many more social services are exempt from the obligation to notify to the Commission, regardless of the amount of the compensation received. The services must meet social needs (*i.e.* health and long term care, childcare, access to/reintegration in the labour market, social housing, care and social inclusion of vulnerable groups). Conversely, the Commission will undertake greater scrutiny of other SGEIs for which the compensation exceeds EUR 15 million a year.

### **2.1. How competition enhances consumer welfare**

In difficult times, there may be calls to set up protectionist lines of defence. However, as history has confirmed, competition enforcement and advocacy cannot be reduced in times of economic crisis, as any weakening of the competition framework would worsen the medium- to long-term growth trend.

*Consumers are better off when they have access to open and competitive markets*

The fight against collusive agreements and abuses of dominance is an on-going priority for the Commission. In 2011, the Commission adopted four cartel decisions, including two relating to consumer products (consumer detergents and exotic fruit) imposing fines

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<sup>27</sup> Press release and Frequently Asked Questions available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>

<sup>28</sup> [Best Practices in proceedings concerning articles 101 and 102 TFEU](#), OJ C 308, 20.10.2011, p. 6-32, available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>

<sup>29</sup> [Terms of Reference of the Hearing Officer](#), OJ L 275, 20.10.2011, p. 29.

<sup>30</sup> Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases, available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>

<sup>31</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4-14.

Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), OJ L 7, 11.1.2012, p. 3-10. Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15-22. Available at [http://ec.europa.eu/competition/state\\_aid/legislation/sgei.html](http://ec.europa.eu/competition/state_aid/legislation/sgei.html)

exceeding EUR 614 million on 14 undertakings<sup>32</sup>. Three out of these four decisions were settlements. Settlements are important, as they allow the Commission to proceed more swiftly, bringing benefits as regards both time and resources. They also contribute to increasing the deterrent effect of the Commission's fight against cartels.

Consumers are also the main beneficiaries of the decision adopted against the Polish telecoms incumbent in June, for stifling the development of competition on Polish broadband markets for over four years<sup>33</sup>. The Commission opened the case on its own initiative in 2009, after having observed that Poland had one of the lowest broadband penetration rates in Europe, that consumers suffered from lower connection speeds and that monthly prices per advertised Mbit/s were much higher than the prices in other Member States (and among the highest in the OECD).

The Commission also protects competition and enhances consumer welfare when applying its merger policy, striking a balance between the economic benefits of the merger and other parameters such as price, choice, quality or innovation. This approach has proven effective in the IT sector, where the Commission has reviewed and approved mergers amongst competitors in already concentrated markets, such as the hard disk industry<sup>34</sup> and the plans by some companies to modify their business model (such as the acquisition by chip producer Intel of IT security producer McAfee, subject to commitments to ensure interoperability)<sup>35</sup> or diversify their portfolio of activities (such as the acquisition by Microsoft, producer of operating systems, of Internet voice and video communication provider Skype)<sup>36</sup>. Consumers are also expected to benefit from wider choice and better prices when travelling by rail on certain European routes, following the approved joint ventures paving the way for the introduction of new high speed services on the Paris-Milan<sup>37</sup> and Vienna-Salzburg routes<sup>38</sup>, in competition with existing rail services provided by incumbent operators.

## **Improving consumer welfare: the practical example of the food sector**

### *Rising and volatile food prices might adversely impact the European economy*

The way competition enforcement and advocacy can effectively contribute to improving consumer welfare is well illustrated in relation to the food sector, where citizens are confronted with the reality of the market on a daily basis. Food represents a large part of

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<sup>32</sup> Cases COMP/39579 *Consumer Detergents*, decision of 13 April 2011, OJ C 193, 02.07.2011, p 14-16, COMP/39482 *Exotic Fruit*, decision of 12 October 2011, COMP/39605 *CRT Glass*, decision of 19 October 2011; IP/11/1214 and COMP/39600 *Refrigeration compressors*, decision of 7 December 2011.

<sup>33</sup> Case COMP/39525 *Telekomunikacja Polska*, decision of 22 June 2011, OJ C 324, 9.11.2011, p. 7-10; IP/11/771.

<sup>34</sup> Cases COMP/M.6214 *Seagate Technology / the HDD business of Samsung Electronics*, decision of 19 October 2011; IP/11/1213 and COMP/M.6203 *Western Digital Ireland / Viviti Technologies*, decision of 23 November 2011; IP/11/1395.

<sup>35</sup> Case COMP/M.5984, *Intel / McAfee*, decision of 26 January 2011, OJ C 98, 30.3.2011, p. 1; IP/11/70.

<sup>36</sup> Case COMP/M.6281, *Microsoft / Skype*, decision of 7 October 2011, OJ C 341, 22.11.2011, p. 2; IP/11/1164.

<sup>37</sup> Case COMP/M.6150 *Veolia Transport/Trenitalia/JV*, decision of 20 July 2011, OJ C 249, 26.8.2011, p.3; IP/11/917.

<sup>38</sup> Case COMP/M.6269 *SNCF/HFPS/Wehinger GmbH/Rail Holding*, decision of 20 July 2011, OJ C 222, 28.7.2011, p. 1.

citizens' budgets, accounting on average for about 14.1% of total household expenditure in the EU in 2011<sup>39</sup>.

The food supply chain connects three important sectors of the European economy: (1) agricultural production; (2) food processing; and (3) distribution (wholesale and retail). They play a significant role in Europe's economic, social, and political life and are considerable contributors to EU added value, trade and employment, especially in rural areas<sup>40</sup>. From about mid-2007 onwards, food prices increased significantly at all levels of the supply chain, and consumer food prices have become a major contributor to overall inflation<sup>41</sup>. At the same time, volatility of prices, notably producer prices for food commodities, has also increased.

*The Commission has responded on several fronts*

Rising and volatile food prices have raised the awareness of policymakers and regulators about potential problems in the food supply chain, for which actions have been taken. At EU level, the Commission established in 2010 a High Level Forum for a Better Functioning Food Supply Chain (HLF), with a mandate until the end of 2012<sup>42</sup>. The HLF brings together a number of Commission initiatives in different policy fields. It has established a number of expert platforms to focus on different aspects of the food chain. Among these platforms, three are of particular interest from a competition policy perspective: (i) a platform on business-to-business (B2B) contractual relations; (ii) an expert group developing a food price monitoring tool; and (iii) a platform on competitiveness in the agro-food industry.

For instance, the work of the platform on B2B contractual practices deals with concerns about uneven bargaining power in the food supply chain, which is an issue often raised in relation to competition law enforcement. Within this platform, stakeholders have agreed on common principles of fairness guiding commercial relationships in the food sector as well as on examples of fair and unfair trading practices, which are however not captured by EU competition law. The work of this platform is ongoing.

The reforms of the Common Fisheries (CFP) and Agricultural Policies (CAP) put forward by the Commission in 2011 also have important repercussions for competition in these sectors<sup>43</sup>. In particular the CAP rules play a significant role in competition in the upstream food supply chain. Although Articles 101 and 102 TFEU apply to agricultural products, the CAP proposal maintains certain derogations from Article 101 TFEU, despite the general objective to increase the market orientation of the CAP.

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<sup>39</sup> See the provisional figures by DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, page 6, Graph 5, available at [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf)

<sup>40</sup> For an overview, see the Report on the Competitiveness of the European Agro-Food Industry of 17 March 2009 ("Competitiveness Report"), page 59, available at [http://ec.europa.eu/enterprise/sectors/food/files/high\\_level\\_group\\_2008/documents/hlg/final\\_report\\_hlg\\_17\\_03\\_09\\_en.pdf](http://ec.europa.eu/enterprise/sectors/food/files/high_level_group_2008/documents/hlg/final_report_hlg_17_03_09_en.pdf)

<sup>41</sup> When looking at aggregate figures for the EU, it is important to keep in mind that food price developments often vary strongly not only from Member State to Member State but also from product to product, see e.g. DG Agriculture, January 2012 update on recent agricultural commodity and food price developments in the EU, page 3, Table 4, available at [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food01\\_2012\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food01_2012_en.pdf)

<sup>42</sup> [http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum\\_food/index\\_en.htm](http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum_food/index_en.htm)

<sup>43</sup> [http://ec.europa.eu/fisheries/reform/index\\_en.htm](http://ec.europa.eu/fisheries/reform/index_en.htm) and [http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index\\_en.htm](http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index_en.htm)

Uneven bargaining power has also been an issue in discussions regarding CAP reform, as many stakeholders have stressed that primary food producers lack bargaining power because of the high fragmentation of the agricultural sector compared to the other levels of the food supply chain. This view is also expressed in recent reports by the European Parliament on CAP reform<sup>44</sup>. To remedy the lack of bargaining power, the CAP proposal seeks to strengthen the role of Producer Organisations (POs) in all sectors of agricultural production. As the members of POs are independent agricultural producers and their production is integrated to varying degrees in the POs, it is however essential to ensure that the POs function in a pro-competitive way.

*Competition authorities ensure that food markets work well for consumers ...*

High food prices result from a number of factors beyond the scope of competition policy. Recent price increases can mainly be explained by rising commodity prices, which are passed along the food chain resulting in higher consumer prices. Nevertheless, competition law plays an important role in ensuring that food markets work well for the consumer. In this vein, many NCAs in the EU have conducted inquiries into the food sector in recent years with the aim of clarifying how these markets work, of identifying potential problems and proposing solutions.

At the retail level, food markets are often national or regional in scope. NCAs play a key role in applying competition law in this sector. The Competition DG has cooperated closely with NCAs within the framework of the ECN to further develop a coherent and common approach and to ensure that food markets remain competitive and work efficiently. One of the results of this cooperation is the preparation of an ECN Report on the most significant enforcement, advocacy and monitoring actions undertaken by European Competition Authorities in the last eight years<sup>45</sup>. The draft report illustrates the impressive work of NCAs in this field, with about 170 antitrust enforcement cases, 1300 merger control cases and around 100 market monitoring actions (including sector inquiries, market studies and advocacy opinions). The cases and monitoring actions covered a wide range of products and sectors, across all levels of the supply chain.

As the Report outlines, cereals, dairy and a category of multi-products are the most investigated sectors in antitrust cases. The main competition concerns related to cartel behaviour, but also included vertical restraints and abuses of dominance. The main purpose of market monitoring actions has been to better understand the functioning of food markets, such as the way prices are passed along the different supply chain levels. NCAs have, as a result of these actions, put forward a number of recommendations to improve competition in the relevant markets. Some of them have also established principles for contractual relations between retailers and suppliers.

Alongside NCAs, the Commission has also enforced competition rules in the food sector, notably by investigating and fining illegal cartels as well as through merger control. For

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<sup>44</sup> See, e.g. European Parliament resolution of 7 September 2010 on fair revenues for farmers: A better functioning food supply chain in Europe (2009/2237(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0302&language=EN&ring=A7-2010-0225>; The CAP towards 2020: meeting the food, natural resources and territorial challenges of the future (2011/2051(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0202+0+DOC+XML+V0//EN&language=EN>

<sup>45</sup> To be published in the second quarter 2012.

example, in October, the Commission adopted a decision in which it found that the Chiquita and Pacific Fruit groups had operated a price fixing cartel for their banana sales in Southern Europe<sup>46</sup>. The companies had fixed weekly sale prices and exchanged price information in relation to their brands.

*... and that consolidation does not harm the competitive process*

The food sector is subject to ongoing globalisation and consolidation, as reflected in the number of merger notifications the Commission dealt with in 2011<sup>47</sup>. In particular, consolidation can be observed in the dairy sector, where the Commission approved three proposed concentrations<sup>48</sup>. In the case of Arla taking over Allgäuland, the Commission opened an in-depth investigation but ultimately decided that the commitment offered by the notifying party was not necessary; the proposed transaction was thus approved without conditions. The orange juice<sup>49</sup> and sugar industries also were subject to merger review in 2011.

#### **Ongoing consolidation in the sugar sector**

The sugar sector is a concentrated market, with high entry barriers. The regulatory reform of the sugar sector has accelerated market dynamics, resulting in a smaller number of players active in several Member States. The Commission decided to deepen its probe into the acquisition of control by Südzucker over sugar trader ED&F MAN<sup>50</sup> as the preliminary investigation had indicated potential competition concerns on the markets for white sugar, in particular in Southern Europe; for imports of raw cane sugar for refining for the whole of the European Economic Area (EEA)<sup>51</sup>; and for molasses, especially in Central Europe. The Commission's decision is expected in April 2012.

## **2.2. How competition policy supports growth, jobs and competitiveness**

In advanced economies, total factor productivity is the main source of growth. In recent years a broad consensus has emerged as to the main drivers of total factor productivity: knowledge-based innovation and an economy that facilitates dynamic reallocation of production factors across different sectors and industries. Competitive markets are best placed to deliver firms that are equipped for long-term success. A strong competition policy is a key element of a coherent and integrated policy to foster the competitiveness of Europe's industries.

### **Research, Development and Innovation**

*Competition is a fundamental driver of innovation and total factor productivity*

By stimulating innovation of technologies and methods of production – either incrementally or in breakthrough fashion – competition policy can make a significant contribution to productivity and growth. Cartels prevent industries from reinventing themselves and turn the

<sup>46</sup> Case COMP/39482 *Exotic fruit*, decision of 12 October 2011.

<sup>47</sup> In 2011 the Commission received 16 notifications in relation to proposed concentrations in the agro-food sector.

<sup>48</sup> Cases COMP/M.6119 *Arla/Hansa*, decision of 1 April 2011, OJ C 122, 20.4.2011, p. 6; IP/11/397, M.6242 *Lactalis/Parmalat*, decision of 14 June 2011, OJ C 209, 15.07.2011, p. 14; IP/11/701 and M.6348 *Arla Foods/Allgäuland*, decision of 7 November 2011, OJ C 343, 23.11.2011, p. 14; IP/11/2011.

<sup>49</sup> Case COMP/M.5907 *Votorantim/Fischer/JV*, decision of 4 May 2011; IP/11/531.

<sup>50</sup> Case COMP/M.6286 *Südzucker/ED&F Man*, decision of 9 November 2011, OJ C 335, 16.11.2011, p. 2; IP/11/1327.

<sup>51</sup> The EU, Iceland, Liechtenstein and Norway.

focus of activity to the maximisation of rent extraction rather than on innovation. The Commission's investigation of alleged practices by some publishing houses to exert collective control over the development of e-books, possibly hurting the prospect of development of a competitive and digital single market in this area, is one example of the Commission's actions in this field<sup>52</sup>.

In highly innovative environments, established firms may also be tempted to control the process of innovation to their own advantage and to the detriment of new entrants. Antitrust enforcement must ensure that dominant firms are not able to use their dominance to thwart the entry of smaller challengers with viable new ideas. The Commission's ongoing investigations against Google with regard to its activities in online search, online search advertising and online search advertising intermediation<sup>53</sup> demonstrates the Commission's commitment to enforcing the competition rules in fast-moving digital sectors with a view to ensuring their proper functioning as part of the broader Digital Agenda goals. The Commission is considering in particular allegations that Google is lowering the ranking of the unpaid search results of competing search service providers, while according preferential treatment to the results of its own vertical search services as well as allegations that it imposes exclusivity obligations on advertising partners and restricts the portability of online advertising campaign data to competing online advertising platforms.

Similarly, the pharmaceutical sector is Research and Development driven and highly regulated. As the Commission's report on the Pharmaceutical Sector Inquiry shows, some of the main competition concerns in the sector relate to the potential undue delay or blocking of entry of generic medicines and the development and launch of innovative medicines<sup>54</sup>. In view of the global nature of the pharmaceutical industry, preserving a sound competition in this sector is not only necessary for domestic reasons, but also to enhance the provision of affordable and innovative medicines to those in need in developing countries. Agreements and contractual arrangements to delay market entry for generic products have hence been under the spotlight in 2011, as the Commission opened two cases<sup>55</sup> in this context.

The amount of State aid to support expenditure in research, development and innovation has increased from EUR 6.2 million in 2005 to EUR 10.9 million in 2010 (+75%) to support job creation and increase Europe's competitiveness, through individual cases and regimes. In 2011, the Commission cleared Member States' support for such objectives in at least 33 instances relating to environmental protection, 43 relating to regional development, 20 relating to research and development, and at least 11 relating to support to SMEs<sup>56</sup>.

## Greener growth

*Europe needs competitive energy prices, security of supply, investments in infrastructure and energy sources that respect environmental targets*

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<sup>52</sup> Case COMP/39847 *Ebooks*; IP/11/1509.

<sup>53</sup> Case COMP/39740 *Foundem/Google* and related cases; IP/10/1624.

<sup>54</sup> For more details on those issues see the Final Report of the Sector Inquiry from 2009, available at <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>; IP/09/1098, 8.7.2009.

<sup>55</sup> Case COMP/39686 *Cephalon*; IP/11/511, 28.4.2011; Case COMP/39685 *Fentanyl*; IP/11/1228, 21.10.2011.

<sup>56</sup> Those figures relate to cases where the stated objective was the primary objective of the aid. The figure on support to SMEs also includes aid to risk capital injections in SMEs. The figures refer to decisions where the aid was found compatible with the internal market and also six decisions where the Commission found that the State support concerned did not constitute aid in the first place.

In line with the objective of supporting sustainable growth, the Commission has started to prepare guidelines for the treatment of State aid in relation to the Emissions Trading System (ETS). They will aim at balancing three objectives: to prevent a significant risk of carbon leakage due to the increase of CO<sub>2</sub> costs in electricity prices; to preserve the price signals created by the EU ETS to achieve cost-effective decarbonisation; and to minimise competition distortions in the internal market by avoiding subsidy races within the EU at a time of economic uncertainty and budgetary discipline.

*Competition policy encourages the most efficient use of existing technologies and resources*

Figures show a growing demand for meeting energy requirements from sustainable sources. The Commission has authorised joint ventures in the solar (both thermal and photo-voltaic)<sup>57</sup> and wind power<sup>58</sup> sectors. Member States have provided funding to measures in support of energy from renewable sources under the horizontal Environmental Aid Guidelines<sup>59</sup>, while at the same time several Member States aimed at promoting environmental friendly cars and green products.

### **Network industries**

The Commission's work in the antitrust field has focused on improving the market functioning of key sectors of the economy such as network industries.

*Competition policy promotes efficient and integrated services and prevents market segmentation*

The completion of the single market cannot become a reality if companies conclude agreements to share the market along national borders. Agreements which include non-compete clauses put the integration of the single market at risk. The Commission thus sent a Statement of Objections to Telefónica and to Portugal Telecom, as the companies had agreed not to compete on their respective telecommunications markets within the Iberian Peninsula<sup>60</sup>.

Growth is also at the heart of State aid policy in the telecommunication sector. In 2011 the Commission scrutinised almost EUR 2 billion of State funds to finance the rollout of broadband and next generation networks in various European countries. As a result, 18 aid schemes were approved to build new telecommunication infrastructure in underserved areas of Europe. They contribute to reducing the gap with more advanced countries worldwide, increase competitiveness of the markets and ultimately brings new services to consumers.

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<sup>57</sup> Cases COMP/M.6112 *Good Energies/NEIF/Newco*, decision of 13 April 2011, OJ C 122, 20.04.2011, p. 6, COMP/M.6238 *RREEF/SMAG/OHL/Arenales*, decision of 10 August 2011, OJ C 255, 31.08.2011, p. 1, COMP/M.6303 *Antin/RREEF/Andasol I&2*, decision of 22 August 2011, OJ C 253, 30.08.2011, p. 1 and COMP/M.6273 *Samsung/Korea Development Bank/KNS Solr*, decision of 3 August 2011, OJ C 236, 12.08.2011, p. 6.

<sup>58</sup> Cases COMP/M.6233 *FOEW/Dong Energy/Novasion/Aalborg Universitet/Universal Foundation*, decision of 27 July 2011, OJ C 228, 03.08.2011, p. 4, COMP/M.6176 *Mitsubishi Corp/Barclays Bank/Walney Topco I&II/SheringhamsShoal Topco*, decision of 29 August 2011, OJ C 261, 03.09.2011, p. 1, COMP/M.6155 *GEM/DEME/Electrawinds Offshore/SRIWE/Z-Kracht/Power@sea/Rent a Port Energy*, decision of 6 June 2011 and COMP/M.6206 *Iberdrola/Caja Rural de Navarra/Renovables de la Ribera*, decision of 30 June 2011, OJ C 198, 06.07.2011, p. 1.

<sup>59</sup> Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1-33.

<sup>60</sup> Case COMP/39839 *Telefónica and Portugal Telecom*; IP/11/1241, 25.10.2011.

### *Competition policy facilitates a dynamic reallocation of resources (entry and exit)*

In the energy sector, competition enforcement can contribute to resolving security of supply issues, by facilitating access to the market and encouraging investment. In 2011, the Commission initiated a formal investigation against electricity provider ČEZ, upon suspicion that it may have had abused a dominant position by, hindering the entry of competitors, on the Czech electricity market<sup>61</sup>. The Commission also carried out unannounced inspections at the premises of gas companies in Central and Eastern Europe, regarding the existence of behaviour that might potentially exclude competitors from providing alternative sources of gas, or that might involve the abuse of a dominant position in the supply of gas, for instance by the charging of excessive prices.

### **Improving the functioning of the air transport sector: the role of competition policy**

#### *Air passenger transport has been less affected by financial crisis than air transport of goods*

Today air travel is taken for granted. The number of air passengers tripled between 1980 and 2000 and is expected to further double by 2020. In 2010 the number of air passengers carried on routes involving EU airports reached 777 million, a 3% increase in comparison with 2009. Around two-thirds of that travel was within the EU. That steady growth illustrates the benefits of market liberalisation supported by competition policy enforcement. Forecasts indicate that over the next decade air traffic will continue to grow by around 4% annually<sup>62</sup>. Civil aviation greatly contributes to the European economy as it involves more than 150 scheduled passenger carriers, a network of over 450 airports and some 4.5 million employees<sup>63</sup>. Its activities contribute 1.5% to the EU GDP. The fact that the civil aviation sector has grown significantly since the early nineties is mainly a result of the liberalisation of the sector, which led to price decreases and the entry of numerous new companies. The number of intra-Union routes increased by 140% between 1992 and 2010.

In 2010, 13.1 million tons of cargo was transported by air, 20% being intra-EU freight. This represents a 16% increase as compared to 2009, when the European air freight transport sector was hard hit by the collapse in trade resulting from the financial crisis.

#### *Liberalisation has fostered competition and increased choice for passengers, but ...*

The process of liberalisation in air transport is at a relatively advanced stage. Following the completion of the single market in air transport in 1997, a number of new airlines have entered the market and developed swiftly, increasing competition and providing a wider choice to passengers. This has also been reflected in the relatively sharp increase in passenger numbers at regional airports. However, over the past couple of years the competitive position of regional airports appears to have weakened: airports with less than five million passengers per year now have growth rates that are similar to those of larger airports.

#### *... consolidation has raised concerns about various forms of cooperation between airlines*

At the same time, there has been substantial consolidation amongst airlines, notably because the previous market structure, based on the existence of national flag carriers, proved to be

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<sup>61</sup> Case COMP/39727 CEZ; IP/11/891, 15.7.2011.

<sup>62</sup> Facts and Key developments on Air Transport, European Commission – DG Mobility and Transport available at [http://ec.europa.eu/transport/air/doc/03\\_2009\\_facts\\_figures.pdf](http://ec.europa.eu/transport/air/doc/03_2009_facts_figures.pdf)

<sup>63</sup> 'Flightpath 2050': Europe's visions for aviation. Report of the High Level Group on Aviation Research.

inefficient in an open European market. A number of mergers have taken place, notably involving some of the smaller and/or less efficient flag carriers – which used to be protected by legal monopolies. Looser and various forms of cooperation have also developed, which range from bilateral code share arrangements to alliances (a large number of airlines within Europe and beyond are part of the big three alliances, Oneworld, Star Alliance and SkyTeam) or joint ventures. Restrictions on foreign investment across different jurisdictions (such as the EU and the US) are a major reason for the popularity of such looser forms of cooperation between international carriers.

The Commission's merger and antitrust investigations in 2011 have considered both the competitive effects of the increased concentration of supply on certain routes and the competitive impact of coordination between airlines.

*The Commission proposes a new Slot Regulation aimed at increasing competition*

In March, the Commission adopted a comprehensive strategy setting out a roadmap towards a competitive and resource efficient transport system<sup>64</sup>. The roadmap contains 40 concrete initiatives aimed at increasing mobility while reducing carbon emissions in transport by 60% by 2050. Adopted in December 2011, the Better Airports Package insists on the capacity challenge. In the context of growing airport congestion and the limited development of major new airport infrastructure, access to airport slots, a rare resource, limits competition. One of these initiatives is a proposal for a new Slot Regulation<sup>65</sup> adopted on 1 December, which aims at facilitating market entry and encourages more efficient use of airport capacity. The proposed regulation strengthens the independence of slot coordinators, foresees increases in the required slot utilisation rates, and expressly allows secondary trading of slots, which would favour entry of competitors, to the detriment of incumbents. At the same time, competition authorities will need to ensure that the increased ease of secondary trading will not be used by incumbent airlines to further strengthen their positions.

The Better Airports Package contains also a new Groundhandling Regulation<sup>66</sup> aiming to enhance efficiency and overall quality of groundhandling services, by ensuring an increased competition within the sector.

*Slot commitments have been offered as remedies in merger and antitrust cases*

In a number of merger and antitrust cases, parties have offered slots as a way to facilitate entry of competitors, thereby aiming to address the concerns raised by competition authorities. Slot commitments are particularly effective at congested airports, where access to slots is essential for airlines to be able to compete.

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<sup>64</sup> *Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, European Commission White Paper, COM (2011) 144 final, 28.3.2011.

<sup>65</sup> *Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (Recast)*, European Commission, COM(2011) 827 final, 1.12.2011.

<sup>66</sup> *Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC*, European Commission, COM(2011) 824 final, 1.12.2011.

*Slot commitments were implemented by a transatlantic airline joint venture, but ...*

In 2010, British Airways, American Airlines and Iberia, members of the Oneworld alliance, agreed to coordinate flight schedules, fares and capacity on routes between Europe and North America. The Commission's investigation of this joint venture led to a decision that made binding the commitments by the three carriers<sup>67</sup>. Subsequently, several competitors applied for slots or other special arrangements offered by the joint venture partners. Following review, the Commission approved on 20 December 2010 Delta Airlines' application for slots, allowing it to start new services from London Heathrow to Boston and Miami. The Commission continued in 2011 to investigate arrangements under the Star<sup>68</sup> and SkyTeam<sup>69</sup> alliances and opened two investigations<sup>70</sup> to verify the legality of code-share agreements implemented, in one case, between Lufthansa and Turkish Airlines and, in the second case, between TAP Air Portugal and Brussels Airlines.

*... were considered insufficient in the proposed Aegean Olympic merger*

#### **Preserving consumer choice and price competition on Greek routes**

On 26 January, the Commission prohibited the proposed merger between Aegean Airlines and Olympic Air, the two largest airlines in Greece, which had been notified in June 2010. As with previous airline mergers the Commission analysed the combined effects of the proposed merger on the individual routes on which both companies operate. The Commission found that the proposed merger would have resulted in a quasi-monopoly for the merged entity on nine routes, including between Athens and Thessaloniki, Herakleion or Rhodes, to the detriment of the over four million passengers who travel on those routes each year. As part of a remedy package Olympic and Aegean offered to make available to any potential new entrant certain take-off and landing slots at Athens and other Greek airports. However, the Commission considered that these remedies were insufficient because neither Athens nor any of the other Greek airports are congested.

Indeed, unlike in previous airline cases, the problem was not the availability of slots. The problem was that even with slots available, there was no company that would credibly enter the market. Therefore, the release of slots would not have improved the likelihood of, or made it easier for, a new entrant to emerge on these routes. In the absence of any suitable remedy the Commission had no choice but to prohibit the proposed merger<sup>71</sup>.

*Emergence of low-cost carriers and their attractiveness for regional airports...*

The air transport sector has changed dramatically in recent years, especially because of the spectacular rise of low-cost carriers since 2005. Those carriers have gained substantial market shares but have also benefitted from considerable public support. For example, in a number of cases the public authorities have offered discount schemes to low cost carriers for the use of regional airports, which have also benefitted from public money. In addition, some former flag carriers may not survive the current economic crisis and have requested public support. So it should not come as a surprise that the Commission has received complaints from competitors.

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<sup>67</sup> Case COMP/39596 *BA/AA/IB*, Commitments Decision of 14 July 2010, OJ C 278, 15.10.2010, p. 14-15.

<sup>68</sup> Case COMP/39595 *Continental/United/Lufthansa/Air Canada*. See MEMO/09/168, 20.4.2009.

<sup>69</sup> Case COMP/37984 *SkyTeam*

<sup>70</sup> Cases COMP/39794 *Lufthansa/Turkish Airlines* and COMP/39860 *Brussels Airlines/TAP Air Portugal*. IP/11/147, 11.2.2011.

<sup>71</sup> Case COMP/M.5830 *Olympic/Aegean Airlines*; IP/11/68, 26.1.2011.

*... feed reflection on the Aviation Guidelines.*

The current legal framework, which consists of the 1994<sup>72</sup> and 2005<sup>73</sup> Aviation Guidelines, addresses such concerns mainly by providing compatibility criteria for the assessment of investment aid for airport infrastructure and start-up aid to airlines from regional airports. In 2011, the Commission launched a public consultation on the application and possible revision of these guidelines. The Commission is considering adopting new guidelines in 2012, which would take into account the positive regional development impact of airports and airlines while avoiding distortions in competition conditions and duplication of non-profitable airports.

*Commission increases scrutiny of aid to regional airports and low cost carriers, and ...*

Currently, the majority of regional airports in Europe are not profitable and can only survive thanks to the subsidies they receive from local authorities. Only 8% of the airports in the EU-27 are privately owned, while 77% are public and another 14% have mixed ownership. However, airport closure may not be an option, because of the important role regional airports play in local/regional development. Nevertheless, State aid scrutiny needs to ensure that such public ownership does not unfairly benefit some airports and airlines to the detriment of others, thereby contributing to correct allocation of public resources. Importantly, a number of judgments in the sector have upheld that more stringent role for State aid review. In its recent judgment on the Leipzig-Halle airport case, the General Court confirmed that airport infrastructure construction is subject to State aid scrutiny, because it is intrinsically linked to the operation of an airport as an economic activity<sup>74</sup>.

In 2011, the Commission opened formal State aid investigation procedures in six cases<sup>75</sup> of investment and start-up aid to airlines or regional airports. Most of those cases involve discount schemes on airport charges given to low cost carriers, often in combination with marketing agreements of doubtful value to the airports.

*... continues investigating restructuring aid to flag carriers*

At the same time, incumbent carriers have been consolidated and restructured, giving rise to important State aid cases. The opening of the formal investigation procedure on the

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<sup>72</sup> Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

<sup>73</sup> Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ C 312, 9.12.2005, p. 1-14.

<sup>74</sup> Joined Cases T-443/08 and T-455/08, Freistaat Sachsen and Others v Commission, Judgment of the General Court of 24 March 2011

<sup>75</sup> Cases SA.31662 *Alleged State aid to Timisoara airport, airlines operating from the airport and WIZZ AIR*, decision of 22 July 2011, OJ C 270, 13.09.2011, p. 11-31, SA.29064 *Unlawful State aid by Ireland to Aer Lingus, Aer Arann and Dublin Airport Authority*, decision of 13 July 2011, OJ C 306, 18.10.2011, p. 10-16; IP/11/874, SA.30743 *Leipzig-Halle airport – further infrastructure measures*, decision of 15 June 2011, OJ C 284, 28.09.2011, p. 6-23, SA.32833 *Frankfurt-Hahn - Alleged State aid to the airport and Ryanair*, Decision of 13 July 2011; IP/11/874, SA.22932 *Air France complaint against aid granted to Ryanair by Marseille*, decision of 13 July 2011, OJ C 334, 15.11.2011, p. 8-61; IP/11/874 and SA.30931 *Scheme investment aid to airports in Romania*, decision of 23 June 2011, OJ C 207, 13.07.2011, p. 3-15.

restructuring aid for the Czech and Maltese national flag carriers (Czech Airlines (ČSA)<sup>76</sup> and Air Malta<sup>77</sup>) are two good examples.

### **2.3. How the Commission fosters a competition culture**

*Enforcement and advocacy are the two arms of an effective competition policy*

Knowledge of the benefits of competition is essential for citizens to exploit their opportunities as consumers, for businesses to compete on the merits and for policy makers at EU, national, regional and local level, to bring initiatives that support sustainable growth.

*Companies and Member States need to be aware and comply with the rules ...*

Markets work better where consumers make informed choices between products and services offered, businesses refrain from anti-competitive agreements and practices and public administrations realise how competition can contribute to addressing wider economic problems. In times of economic slowdown, it is particularly important that policy makers understand the beneficial effects competition has on growth and the harm that could result from a relaxation of the rules. To foster awareness of the rules and promote compliance efforts by companies the Commission issued a brochure entitled 'Compliance Matters' and opened on its website an area guiding readers to available materials on effective compliance strategies<sup>78</sup>.

In 2011, further progress was made to ensure that the Commission's state aid recovery decisions are enforced effectively and immediately by the Member State concerned. The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid, in order to ensure that the level playing field in the internal market is maintained. The percentage of illegal and incompatible aid still to be recovered has fallen from 75% at the end of 2004 to around 12.3% on 31 December 2011, while the amount of illegal and incompatible aid recovered increased from EUR 2.3 billion in December 2004 to EUR 12.3 billion. Infringement procedures and judicial actions against Member States that do not comply with a state aid recovery decision have proven effective. In 2011, five cases were closed after judicial actions before the Court of Justice; 29 out of the 45 open cases are still subject to litigation.

*... while Competition authorities increase their cooperation within the EU and internationally*

Both the Commission and NCAs play important roles in fostering a competition culture. They cooperate not only on cases but also on policy developments through various fora within the ECN. Subgroups active in 2011 covered sectors such as food, financial services and pharmaceuticals.

Globalised markets need a competition culture fostered internationally, and the Commission is promoting convergence on substantive and procedural rules. Cooperation agreements have been concluded with the competition authorities of the US, Canada, Japan and Korea. Farther reaching agreements are currently being discussed with the Swiss and Canadian authorities, to enhance the efficiency and effectiveness of case cooperation.

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<sup>76</sup> Case SA.30908 CSA - Czech Airlines – Restructuring Plan, decision of 23 February 2011, OJ C 182, 23.06.2011, p. 13-28; IP/11/214.

<sup>77</sup> Case SA.33015 Air Malta plc.

<sup>78</sup> See at: <http://ec.europa.eu/competition/antitrust/compliance>

### **3. COMPETITION DIALOGUE WITH OTHER INSTITUTIONS**

#### **3.1. Structured dialogue with the European Parliament**

While the Commission has full competence for the enforcement of EU competition law, subject to the control of the European Courts, the Commissioner for Competition and his services take part in a continuous structured dialogue on competition issues with the European Parliament, in particular its committee on Economic Affairs (ECON).

##### **Structured dialogue with the ECON Committee**

In 2011, the Commissioner for Competition visited the ECON committee three times in order to take part in the structured dialogue, to present the Commission Work Programme for 2011 (March), the Annual Report on Competition Policy (July) and the Commission Work Programme for 2012 (November). He also attended a hearing on collective redress and a meeting with the competition working group.

#### **3.2. Follow-up to Parliament's Resolution on the 2009 Report on Competition Policy**

In January 2011, the Parliament adopted its Resolution on the Commission's 2009 Report on Competition Policy<sup>79</sup>. In that Resolution, it made a series of requests to the Commission. In addition to its official response to the Resolution, the Commissioner for Competition responded with a letter to the Chair of the ECON Committee in March, and his services also submitted a detailed response to all of the points made by Parliament in its Resolution.

##### **Topics covered by the European Parliament's Resolution**

Parliament was particularly interested in the Commission's activities linked to the financial and economic crisis, and asked the Commission to conduct an evaluation of the temporary State aid measures introduced during the crisis. In response, the Competition DG prepared an extensive Staff Working Document on the temporary State aid rules during the financial and economic crisis<sup>80</sup>, submitted by the Commissioner for Competition to the Chair of ECON in September.

In its Resolution, Parliament also recalled its earlier requests for the Commission to bring forward legislation to facilitate individual and collective claims for effective compensation for damages resulting from breaches of antitrust law. In response to Parliament's call for a coherent approach across sectors, the Commission launched a public consultation on collective redress in March. The Commission Work Programme for 2012 also includes a proposal on antitrust damages actions, which the Commissioner for Competition intends to present to the College in 2012.

#### **3.3. DG Competition engagement with Parliament's ECON committee**

The Competition DG organised two seminars for assistants and political advisers of the members of the ECON committee in 2011. The first (February) covered the main themes in the 2011 Competition Work Programme<sup>81</sup>. The second (July) was organised to coincide with the presentation by the Commissioner for Competition of the 2010 Annual Competition Report. In addition, the Director General of the Competition DG spoke at an Open Coordinators meeting of the ECON Committee in May.

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<sup>79</sup> Texts adopted, P7\_TA(2011)0023.

<sup>80</sup> Commission Staff Working Document on the effects of temporary State aid rules adopted in the context of the financial and economic crisis economic crisis SEC(2011) 1126 final (5.10.2011).

<sup>81</sup> Issues covered included Services of General Economic Interest, the Rescue and Restructuring Guidelines, the Commission's public consultation on Collective Redress and fines.

### **Public consultations and Impact assessments**

The Competition DG provides information on the launch of public consultations to the secretariat of the ECON committee and, more generally, welcomes timely contributions by Parliament. The services of the Competition DG are available to brief MEPs on aspects of particular interest. Responses to public consultations, background studies commissioned, the Commission's Impact Assessments, and any related Staff Working Papers are published on the internet. All information on current and previous public consultations and Impact Assessments are also available on the Competition DG website<sup>82</sup>.

The Commissioner for Competition and his staff participated in meetings of the Public Services Intergroup on SGEI before the launch of the public consultation in March. The Commissioner presented the Commission's initial thinking to ECON in March, reported back to the committee in July and subsequently in November. During the process the Commission amended its initial proposal to accommodate some of Parliament's suggestions.

The members of the ECON Committee have also expressed concerns about the Commission's fining policy and in response the services of the Competition DG have explained the fining methodology in seminars and through a detailed reply to an MEP's letter.

### **The Commission's fining policy**

In 2011, the Competition DG published a factsheet on fines<sup>83</sup>, which seeks to explain the reasons for fines and how they are calculated. It also published a brochure on compliance for companies, which addresses the importance of encouraging compliance, as well as ensuring effective deterrence. The Commission also published its revised Best Practices package in October. It outlines measures to increase the transparency of antitrust investigations. In particular, all Statements of Objections, which set out the Commission's arguments at an early stage in the case, and to which parties can respond in detail, now include an indication of the parameters of possible fines.

MEPs frequently ask the Commission questions about individual ongoing competition cases, to which the Commission is unable to reply due to the confidentiality requirement of the investigative procedures.

### **Ongoing investigations and sector inquiries**

Competition DG staff regularly meet MEPs at their request, to explain the procedural steps in an investigation, and to have a general discussion on a particular sector, as far as is possible within the confines of the confidentiality obligation to parties. Parliament has also repeatedly called for sector inquiries in a number of areas, which the Commission has noted. The Commission has a range of tools at its disposal for the enforcement of EU competition law, such as investigations in individual cases, sector inquiries, and working with other Directorates-General on regulatory measures. Sector inquiries are very resource-intensive, and sometimes the same objectives can be achieved as effectively through other types of investigation.

## **3.4. Competition DG engagement with the EESC**

The Commission also keeps the European Economic and Social Committee (EESC) informed about major policy initiatives, and participates in study group and section meetings. Moreover, on 4 October the Commissioner for Competition attended the Section for the Single Market, Production and Consumption, where he presented the Staff Working

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<sup>82</sup> [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

<sup>83</sup> Available at [http://ec.europa.eu/competition/antitrust/compliance/factsheet\\_fines\\_nov\\_2011\\_en.pdf](http://ec.europa.eu/competition/antitrust/compliance/factsheet_fines_nov_2011_en.pdf)

Document on the temporary State aid rules during the financial and economic crisis. On 7 December, the EESC adopted an opinion on the Report on Competition Policy 2010<sup>84</sup>.

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<sup>84</sup> Opinion of the European Economic and Social Committee on the 'Report from the Commission – Report on Competition Policy 2010', 7 December 2011, OJ C 43, 15.2.2012, p. 25 – 29. Available at <http://www.eesc.europa.eu/?i=portal.en.int-opinions.19680>