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on Competition Policy 2011  
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## I. LEGISLATION AND POLICY DEVELOPMENTS

### The wider context of competition policy and enforcement

EU competition policy aims at achieving three main objectives: i) protecting competition on the market as a means of enhancing consumer welfare, ii) supporting growth, jobs and the competitiveness of the EU economy and iii) fostering a competition culture.

Those objectives are an important part of the wider general objectives of the Europe 2020 Strategy for smart, sustainable and inclusive growth. The Strategy sets out concrete targets to be achieved within the next decade in areas such as employment, education, energy use and innovation, in order to overcome the impact of the financial crisis and put Europe back on track for economic growth. Enforcement actions and advocacy efforts by the Commission and the Member States have to be considered together for the overall achievement of those objectives.

A weaker competition framework would have a negative impact on growth. Strong competition policy and enforcement through all instruments – the control of State aid, antitrust and merger control – are essential to rebuilding the economy. In times of economic hardship, there may be calls to relax the competition rules to accommodate short-term concerns encountered by businesses. Such relaxation would have prevented healthy recovery. So it is essential that competition rules be fully maintained, even in the current economic context.

Competition stimulates entrepreneurship, improves efficiency and creates the best conditions for innovation. In other words, everyone is better off when markets are competitive – consumers, taxpayers, citizens and businesses. To increase awareness, the Commission has undertaken various communication initiatives explaining the benefits of competition policy to European citizens<sup>1</sup>.

### STATE AID

#### 1. Developments in State aid in times of crisis

Prevailing uncertainties in financial markets required prolongation of the extraordinary State aid crisis rules 2011. On 1 December, the Commission decided to prolong the special rules applicable to financial institutions in the context of the crisis<sup>2</sup>. The prolongation included some modifications on the remuneration requirements for guarantees and recapitalisation. The rules will apply as long as required by market conditions.

Through those rules, State aid control continued to ensure a consistent policy response to the financial crisis throughout the EU, and contributed significantly to limiting distortions of competition between beneficiary financial institutions within the Single Market. A detailed assessment of State aid control during the financial crisis can be found in the Commission Staff Working Paper "The effects of temporary State aid rules adopted in the context of the

<sup>1</sup> Available at [http://ec.europa.eu/competition/consumers/why\\_en.html](http://ec.europa.eu/competition/consumers/why_en.html)

<sup>2</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.

financial and economic crisis"<sup>3</sup>, published by the Commission as a response to the Parliament's request.

The Commission confirmed its approach to failing banks in a number of important decisions throughout the year. Institutions which have no realistic prospect of returning to viability must exit the market and not be kept artificially afloat by repeated state support. The troubled Irish lender Anglo Irish Bank 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. Another prominent example is the case of long-time ailing German Landesbank WestLB, which will ultimately be split up. Remaining assets and liabilities will be transferred to a bad bank in order to be wound down. By 30 June 2012 WestLB is to 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 taken over by Helaba.

On the other hand, some banks relied heavily on State aid but parts of their activities have a realistic prospect to return to viability. Those institutions can be allowed to stay on the market provided that they considerably reduce their size and substantially change their business model to focus only on these viable activities. That approach is well illustrated by the approval of the restructuring of the German bank Hypo Real Estate, which is to reduce to 15% of its pre-crisis balance sheet and phase out a number of business fields. Similarly, the Commission approached restructuring aid to another German bank HSH Nordbank in the light of a commitment to reduce its balance sheet size by 61% compared to pre-crisis levels by exiting certain business lines. Such deep restructuring tackling the root of past failure and avoiding aid being used to undercut competitors ensure that distortions of competition created by massive State support is minimised. The Commission also applied this approach in the context of smaller banks. For instance *Eik bank*<sup>4</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 the Austrian bank *Kommunalkredit*<sup>5</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>6</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 taking at its level and therefore only requested behavioural safeguards (i.e. it did not seek any divestment of businesses).

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<sup>3</sup> See [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>4</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>5</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>6</sup> Case SA.26674 *Restructuring aid to ABN AMRO*, decision of 5 April 2011, OJ L 133, 20.5.2011, p.1-46; IP/11/406.

In October, the ECOFIN Council concluded that the EU State Aid Framework should continue as the sole EU level co-ordination tool and that – in the short-/medium-term – no further frameworks are required.

The Competition DG started work developing new guidelines for the rescue and restructuring of financial institutions in a post-crisis regime, as well as on the new rescue and restructuring rules for the real economy. Work on those rules will continue in 2012.

## 2. SGEI – a main policy project

Beyond the actions taken in the context of the financial and economic turmoil, the revision of the State aid rules for services of general economic interest (SGEI) constituted the main policy project in the area of State aid.

After extensive public consultations and valuable contributions received from Member States, European institutions and stakeholders, the Commission adopted on 20 December a revised package of EU State aid rules for the assessment of public compensation SGEI. The new package clarifies key State aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while better taking account of competition considerations for large cases.

The new SGEI package<sup>7</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 internal market.

All social services are now exempt from the obligation of notification to the Commission, regardless of the amount of the compensation received. The services must meet "*social needs as regards health and long term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups*". Previously only hospitals and social housing were exempted. Other SGEIs are exempted provided the compensation is less than €15 million a year.

On the other hand, there will be a greater scrutiny of other SGEIs involving compensation of more than €15 million a year and where the potential for distortions of competition within the single market is higher. In its assessment the Commission will also check whether public procurement rules have been complied with, thereby ensuring more convergence between the two sets of rules.

The new rules, which replace the so-called "Monti-Kroes" Package of July 2005, clarify basic notions such as "economic activity" to help national and also regional or local governments apply the rules. The new package consists of four instruments: (i) a Communication clarifying basic concepts of State aid relevant to SGEI; (ii) a revised Decision, exempting Member States from the obligation to notify public service compensation for certain SGEI-categories to the Commission; (iii) a revised Framework for assessing large compensation amounts

<sup>7</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)

granted to operators outside the social services field and (iv) a proposal for a *de minimis* Regulation, providing that compensation below a certain threshold (EUR 500,000 over three years) does not fall under State aid scrutiny, thus cutting red tape for small SGEIs. The proposal is scheduled for adoption in the spring 2012.

In its reform of the State aid rules for SGEI, the Commission involved the European Parliament at an early stage. Vice-President Almunia and his services participated in meetings of the Public Services Intergroup on SGEI in the months preceding the launch of the public consultation. Following the adoption of the Communication, the Vice-President presented the Commission's initial thinking to the Economic Affairs (ECON) Committee of the European Parliament on 22 March, and reported back to the committee in July and again in November, when he stated that he would be able to take into account a number of the concerns raised by Parliament in its Resolution on the SIMON report<sup>8</sup>.

The final adopted version of the SGEI Package takes into account comments received in the consultation process, including from the Parliament. For example, the initial proposal was amended so as to cut red tape for compensation for social services, thus making it easier to provide those services in particular for the elderly and for people with disabilities, as also requested by the Parliament. The Communication was also modified to provide further clarification on the so-called fourth Altmark criterion<sup>9</sup> (either the beneficiary is chosen in a public tender or compensation does not exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service). In addition, the proposal for a *de minimis* regulation for SGEI was amended substantially to provide further simplification: the condition on the number of inhabitants represented by the public authority granting the aid was removed and a three-year threshold was set.

### **3. State aid contributing to Europe 2020 objectives**

The Commission's Europe 2020 strategy aims at enhancing economic growth, sustainability and competitiveness in the European Union. State aid control has an important role to play in that process.

In line with the objective of supporting sustainable growth and achieving the 20/20/20 climate/energy target, the Commission services have started to prepare guidelines for the treatment of State aid connected to the Emissions Trading System (ETS) and have launched a public consultation on the draft Commission Communication (State aid Guidelines). That draft Communication defines the compatibility criteria of four new State aid measures with the internal market (i.e. aid to compensate increases in electricity prices resulting from the inclusion of the costs of greenhouse gas emissions due to EU ETS; investment aid to highly efficient power plants; optional transitional free allocation in the electricity sector in some Member States; and the exclusion of certain small installations from the EU ETS, subject to certain conditions).

The ETS was introduced to reduce CO<sub>2</sub> emissions and moderate climate change. Directive 2003/87/EC established a scheme for greenhouse gas emission allowance trading within the Union (the EU ETS), which was improved and extended as from 1 January 2013 by Directive

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<sup>8</sup> Texts adopted: P7\_TA(2011)0494 Available at

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0371&language=EN>

<sup>9</sup> Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, judgment of 24 July 2003, [2003] ECR I-7747.

2009/29/EC (the ETS Directive). The ETS Directive is part of a legislative package containing measures to fight climate change and promote renewable and low-carbon energy. That package was mainly designed to achieve the Union's overall environmental target of a 20% reduction in greenhouse gas emissions compared to 1990 and a 20% share of renewable energy in the Union's total energy consumption by 2020. The new rules are expected to be adopted by the Commission in the course of 2012.

The Europe 2020 Strategy also underlined the importance of broadband deployment to create a true single digital market and foster cohesion and competitiveness in the EU and set ambitious targets for broadband development. One of its flagship initiatives, the Digital Agenda for Europe (DAE)<sup>10</sup>, aims to deliver sustainable economic and social benefits from a digital single market based on broadband networks and sets out ambitious coverage targets<sup>11</sup>. Investments in that sector will come primarily from commercial operators; however, public intervention is essential to achieve the DAE objectives in areas where the business case for broadband is weak.

The Commission's approach to State aid in this sector is represented by the Broadband Guidelines<sup>12</sup>, which are due for review by September 2012. In 2011 the Commission started the revision by launching a fact-finding exercise, including a public consultation of Member States and other stakeholders in the sector and drafting an expert report to highlight the main technological, market and regulatory developments.

Sustainability and competitiveness of the European economy can be further enhanced by innovative financial instruments, as they enable Member States to deliver policy objectives with less and better targeted State aid. State aid control focuses on enhanced financial leverage, investment risk mitigation and the involvement of professional intermediaries. Potential risks include, in particular, the risk of crowding out other potential sources of funding and transferring all the financial risks to the public investor, rather than mitigating them. Such developments would create inefficient market structures and potential market distortions, which need to be addressed by competition policy.

Innovative financial instruments refer to public interventions other than grant funding. They cover a broad range of repayable instruments, such as loans, equity and guarantees. There has been an increasing use of financial instruments by Member States and the Commission, which reflects a policy shift from a traditional grant approach to repayable investments, with an emphasis on financial sustainability and leverage funding, as well as the involvement of professional investment intermediaries. That trend is expected to continue in the current environment of budgetary constraints.

In 2011, Member States continued to develop a variety of innovative financial instruments, often financed from Structural Funds. There are two notable examples: (i) JEREMIE, which focuses on improving access to finance for SMEs, and (ii) JESSICA, which promotes sustainable urban development<sup>13</sup>. The Commission, building on its recent experience, has placed innovative financial instruments at the heart of the Europe 2020 Strategy. To ensure a coherent approach and sound financial management, the Commission has proposed common rules and

<sup>10</sup> A Digital Agenda for Europe, COM(2010) 245 final/2, 26.8.2010.

<sup>11</sup> (i) To bring basic broadband to all Europeans by 2013 and (ii) ensure that by 2020 all Europeans have access to much higher internet speeds of above 30 Mbps and 50% or more of European households should subscribe to internet connections above 100 Mbps.

<sup>12</sup> *Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p. 7.

<sup>13</sup> Available at [http://ec.europa.eu/regional\\_policy/thefunds/instruments/index\\_en.cfm](http://ec.europa.eu/regional_policy/thefunds/instruments/index_en.cfm)

guidance for innovative financial instruments which make use of equity or debt, the so-called equity and debt platforms<sup>14</sup> implemented in cooperation with the EIB (European Investment Bank).

In that context, the Commission continued its competition advocacy efforts vis-à-vis Member States and other external stakeholders by shaping the design of financial instruments in order to ensure their alignment with State aid policy. Moreover, recognising the limitations of existing State aid instruments, the Commission has developed a coherent compatibility approach to innovative financial instruments through its decision-making practice. In 2011 the Commission also took two important decisions on JESSICA funds established in the United Kingdom and Spain, approved directly under Art 107(3)(c) TFEU<sup>15</sup>.

Under that new approach, the decisions approving the funding set out detailed compatibility principles. To avoid crowding out and ensure an incentive effect, financial instruments must aim at addressing market failures and/or enhancing socio-economic cohesion in pursuit of objectives of common interest. To avoid over-compensation and limit potential distortions of competition, any form of asymmetric risk sharing between public and private investor must not exceed what is necessary to generate a fair rate of return on investment in favour of the latter. That approach avoids the need to assess separately each individual project under a JESSICA measure, possibly under different guidelines, and hence considerably reduces red tape.

The decisions provide detailed guidance to Member States on operating conditions and governance principles for investment intermediaries operating under the JESSICA framework. Moreover, the experience in the context of JESSICA provides important input for future State aid policy developments in the field of financial instruments, including the next generation of innovative financial instruments under the new financial framework 2014-2020.

#### **4. The Commission's monitoring and recovery efforts in relation to State aid**

To ensure the effective enforcement of the State aid rules as regards approved aid, the Commission has, since 2006, launched regular ex post monitoring exercises for non-notified aid measures granted under the GBER<sup>16</sup> or under approved schemes.

The 2010-2011 exercise included the ex post monitoring of 30 approved aid schemes or measures exempted of notification in 18 Member States. It targeted measures where the biggest budgets are spent overall (regional aid, environmental aid and R&D&I aid), but also sectoral schemes, aid in the form of risk capital, and aid in the broadband area. The results showed that generally the part of the existing State aid architecture allowing the approval of aid schemes and enabling Member States to implement aid measures under the General Block Exemption Regulation (GBER) and Block Exemption Regulations (BERs) functions reasonably well. In fact, out of the 30 cases in the 2011 sample, 20 did not raise specific concerns. However, compared to previous years' samples, substantive problems or procedural issues (such as transparency, reporting, speed and quality of answers) were identified in a

<sup>14</sup> The Communication of 19 October 2011 on "A new framework for the next generation of innovative financial instruments – the EU equity and debt platforms" (COM(2011)622 final).

<sup>15</sup> Case SA.32835 *Northwest Urban Investment Fund (JESSICA)*, decision of 13 July 2011, OJ C 281 24.9.2011, p. 6-8; IP/11/876 and Case SA.32147 *Andalucía Jessica Holding Fund*, decision of 19 October 2011, OJ C 79, 17.3.2012, p. 1.

<sup>16</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General Block Exemption Regulation), OJ L 214, 9.8.2008, p. 3.

growing minority of cases. That indicator may point to issues of administrative capacity or lack of knowledge of the State aid rules at Member State level. The cases in which no appropriate solution was identified are still being investigated.

The volume of aid granted through approved or block-exempted schemes has increased over time, and now represents more than 80% of the total volume of aid<sup>17</sup>. To ensure effective enforcement of the State aid rules, the Commission decided that the 2011-2012 exercise, launched in October, would include a significantly larger number of cases (i.e. 52 in total) covering all Member States. They would cover 33% of the aid amount granted in the EU, through approved aid schemes or block exempted measures.

Fostering a competition culture at national level includes the Commission's powers to ask the granting Member State to recover unlawful aid which has been declared incompatible. In 2011, further progress was made to ensure that those recovery decisions are enforced effectively and immediately. By 31 December 2011, the amount of illegal and incompatible aid recovered had increased from EUR 2.3 billion in December 2004 to EUR 12.3 billion (resulting in a decrease from 75% to around 13.6% of the percentage of illegal and incompatible aid still to be recovered as of 31 December 2011).

|   |     |
|---|-----|
| Recovery decisions adopted in 2011          | 6   |
| Amount recovered in 2011 (in € million)     | 230 |
| Pending active recovery cases on 31.12.2011 | 43  |

When a Member State does not comply with a recovery decision and has not been able to demonstrate the existence of absolute impossibility, the Commission has, over the past few years, strengthened its practice of launching infringement procedures<sup>18</sup> in accordance with Article 108(2) TFEU<sup>19</sup> or Article 260(2) TFEU<sup>20</sup>.

|   |   |
|---|---|
| Court rulings in 2011 for failure to implement a recovery decision        | 4 |
| Court rulings in 2011 for failure to implement a previous ruling          | 1 |
| Commission's launching of judicial actions for failure to recover in 2011 | 6 |

Infringement procedures have indeed proved to be efficient in ensuring better enforcement of recovery decisions. This year, five cases were closed after judicial actions before the Court of Justice, while 29 out the 45 open cases are still subject to litigation.

In addition, in the follow-up to the Notice on the Enforcement of State Aid Law by National Courts<sup>21</sup>, advocacy efforts have intensified. An information package was published on the Competition DG's website<sup>22</sup> and a booklet<sup>23</sup> to assist judges in their daily work was widely distributed. Specific training for national judges was also organised<sup>24</sup>.

<sup>17</sup> Available at [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/2011\\_autumn\\_en.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/2011_autumn_en.pdf)

<sup>18</sup> Section 4, Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4.

<sup>19</sup> Actions under Article 108(2) are aimed at condemning a Member State for non-implementation of a State aid recovery decision.

<sup>20</sup> Actions under Article 260(2) are infringement actions aimed at condemning a Member State for non-implementation of a Court judgment, and may include the payment of fines.

<sup>21</sup> Commission Notice on the enforcement of State aid law by National courts, OJ 85, 9.4.2009, p. 1.

<sup>22</sup> [http://ec.europa.eu/competition/court/state\\_aid.html](http://ec.europa.eu/competition/court/state_aid.html)

Finally, in 2011, some Member States notified a general framework for aid (also called ex ante scheme) in the interest of the efficiency of the procedure. Such schemes make good the damages in future occurrences of one or more specific types of natural disasters, without the need for separate notification of the aid granted for each occurrence. The Commission has accepted ex ante schemes for four categories of natural disasters<sup>25</sup>: earthquakes, avalanches, landslides and floods (four types of disasters which are also explicitly recognized as constituting natural disasters in the State aid guidelines for the agriculture sector<sup>26</sup>). That approach allows swifter implementation of the aid measures. It still gives the Commission sufficient information to check compliance with the scheme and, in case of non-compliance, to start an investigation of possible unlawful aid measures and order recovery of incompatible aid.

## ANTITRUST & CARTEL ENFORCEMENT

### 1. A sound framework for enforcement of competition rules

The year 2011 was an important year for issues of due process concerning the EU's institutional framework for the enforcement of competition law. Indeed, the past years witnessed a debate surrounding the set-up of the Commission's enforcement system in view of the right to a fair trial under the ECHR and the respect of due process principles. Rulings in 2011 by the European Court of Human Rights (ECtHR) in *Menarini*,<sup>27</sup> and the Court of Justice in its Copper Industrial Tubes<sup>28</sup> and Copper Plumbing Tubes judgments,<sup>29</sup> confirmed that the institutional framework for the enforcement of competition law, by which an 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.

In *Menarini*, the ECtHR confirmed its case law in respect of the right to a fair trial<sup>30</sup>. The judgment concerned a case in which the Italian competition authority imposed a fine in relation to an antitrust infringement regarding medical equipment. The Italian competition authority (like the European Commission) has the power both to investigate and to find infringements by imposing fines, subject to two-tier judicial review. While every institutional set-up has its particularities, the system in Italy is similar to the EU system for the enforcement of competition law. The ECtHR ruled that the system respects the guarantees flowing from the right to a fair trial laid down in Article 6 ECHR in particular because (i) decisions of the competition authority are subject to judicial review on questions of fact and law (ii) the courts can verify the proportionality of the sanction imposed and have the power to change that sanction.

<sup>23</sup> [http://ec.europa.eu/competition/publications/state\\_aid/national\\_courts\\_booklet\\_en.pdf](http://ec.europa.eu/competition/publications/state_aid/national_courts_booklet_en.pdf)

<sup>24</sup> Through the contact point, [ec-amicus-state-aid@ec.europa.eu](mailto:ec-amicus-state-aid@ec.europa.eu) several requests for information and opinions by national judges have been dealt with.

<sup>25</sup> Cases SA.31151 (N 274b/2010) *Germany Disaster Aid Scheme "Bayerischer Härtefonds Finanzhilfen"* (beneficiaries in manufacturing and other sectors); Commission decision of 23 November 2011 on State aid case SA.33425 *Framework Scheme Disaster Aid Saxony (manufacturing and other sectors)* decision of 23 November 2011, OJ C 2, 5.1.2012, p. 7-9.

<sup>26</sup> Commission Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013, OJ C 319, 27.12.2006, p. 1-33.

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

<sup>28</sup> Case C-272/09 P *KME Germany AG v Commission*, judgment of 8 December 2011.

<sup>29</sup> Cases 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.

<sup>30</sup> Judgment of 21 May 2003, *Janosevic v Sweden*, Application No 34619/97, para. 81.

The Court of Justice has come to a similar conclusion in its Copper Industrial Tubes and Copper Plumbing Tubes judgments where it considered that the judicial review carried out by the General Court in respect of Commission decisions imposing fines in competition matters fulfils the guarantees flowing from the principle of effective judicial protection as laid down in the Charter of Fundamental Rights of the European Union.

## **2. Improving procedures, enhancing transparency, safeguarding efficiency**

The Commission has taken measures to reform and to increase transparency of its antitrust and merger procedures. These measures were based on an initiative launched in 2010, and followed extensive dialogue with stakeholders, of which the European Parliament was kept informed. With these measures the Commission has given a comprehensive response to the concerns and suggestions by stakeholders with regard to the conduct of antitrust and merger procedures.

The package, adopted in October, consists of the following documents:

- a Commission Notice on Best Practices for the Conduct of Proceedings under Article 101 and 102 TFEU<sup>31</sup> and
- a Staff Paper on Best Practices for the Submission of Economic Evidence in antitrust and merger cases<sup>32</sup>.

As part of this package, the President of the Commission also adopted new Terms of Reference for the Hearing Officers<sup>33</sup>. The new terms of reference include extended possibilities for the parties to call on the hearing officers in order to safeguard the effective exercise of their procedural rights, not only after a Statement of Objections is issued, but throughout the investigative phase as well.

In order to further safeguard the efficiency of its antitrust investigations, the Commission is also pursuing a number of cases for violation of rules concerning the Commission's investigations. In that regard, on 24 May, a fine of EUR 8 million was imposed on Suez Environment for breach of a seal affixed by the Commission during an inspection in April 2010<sup>34</sup>.

## **3. Private enforcement of EU competition law**

In 2011, the Commission continued its initiatives to ensure that those who have been harmed by infringements of the EU competition rules have effective remedies in order to obtain the compensation to which they are entitled under EU law. Following on from its 2008 White Paper on Damages Actions<sup>35</sup>, the main initiatives in this field in 2011 concerned the quantification of harm and collective civil redress. The Competition DG launched a public

<sup>31</sup> Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p.6-32.

<sup>32</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>33</sup> Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in certain competition proceedings, OJ L275, 20.10.2011, p.69.

<sup>34</sup> Case COMP/39796 *Suez Environnement breach of seal*, decision on procedural fines of 27 August 2011; IP/11/632.

<sup>35</sup> White Paper on Damages actions for breach of the EC antitrust rules of 2.4.2008 (COM(2008)165 final), together with Commission Staff Working Paper (SEC(2008) 404).

consultation on a draft Guidance Paper on the quantification of harm in antitrust damages actions<sup>36</sup>, aiming at providing guidance to courts to overcome difficulties associated with quantifying harm in antitrust damages cases. A final version of the Guidance Paper will be published in 2012.

Following a request by the European Parliament<sup>37</sup>, the Commission also launched a public consultation 'Towards a coherent European approach to collective redress'<sup>38</sup>. As a follow-up, the Commission intends to define general principles of collective redress at EU level, with a view to possibly proposing legislation. Such legislation would aim at ensuring that victims of EU antitrust law infringements have access in all Member States to truly effective mechanisms for obtaining full compensation for the harm they suffered, while taking into account confidentiality and the protection of leniency programs.

Private enforcement of the EU antitrust rules before national courts is also an essential complement to strong public enforcement by the Commission and National Competition Authorities (NCAs). As regards the interaction of public and private enforcement, the question arises whether and under which conditions information voluntary submitted to a competition authority by undertakings in the framework of a leniency programme be disclosed to claimants in actions for damages that relate to a previous finding of a competition law infringement by a competition authority.

In its judgment in *Pfleiderer*<sup>39</sup>, the Court of Justice held that it is for the national courts to determine, according to national law and on a case-by case basis, the conditions under which access to documents relating to a leniency programme must be permitted or refused by weighing *the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency*". Against this background, the Commission submitted observations as *amicus curiae* under Article 15(3) of Regulation 1/2003 to the High Court of England and Wales in the *National Grid* case.

#### **4. Technology Transfer Agreements: forthcoming policy review in light of Europe 2020 objectives**

The Europe 2020 Agenda of the Commission has identified innovation policy as one of its major pillars requiring further development. Innovation, i.e. improved or new technologies or organisational innovation, results in productivity increases. It is acknowledged that competition is one of the main drivers of innovation and therefore of productivity as a source of growth. By improving – either incrementally or in breakthrough fashion – on existing technologies and methods of production, competition policy can make a significant contribution to innovation, efficiency and be a driver for growth.

Licensing is an important part of the innovation process, as it facilitates dissemination of new products and technologies and allows companies to integrate and use complementary

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<sup>36</sup> The text of this document, together with the written responses received and material from a workshop with economists can be accessed at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

<sup>37</sup> European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)). Texts adopted: P6\_TA(2009)0187.

<sup>38</sup> Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, 4 February 2011, SEC(2011)173 final; IP/11/132. Available at:

[http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html)

<sup>39</sup> Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011.

technologies. Licensing is therefore vital for economic development and consumer welfare. However, in some circumstances licensing agreements can also have a stifling effect on competition. This can be the case, for instance, when two competitors use a licensing agreement with the aim of dividing markets between them or when an important licensor excludes competing technologies from the market through conditions in its licensing agreements. How intellectual property right holders license their rights to other market participants is crucial for achieving the right balance between stimulating innovation and preserving a level playing field in the internal market.

In this context the Commission announced, on 6 December, a review of the existing guidelines and the block exemption regulation for technology transfer agreements (TTBER)<sup>40</sup>. The purpose of the revision is to prepare the regime to be applied to technology transfer (i.e. patent, know-how and software licensing) after 30 April 2014. It should ensure that it both reflects current market realities and provides for the possibility of non-competitors and competitors to enter into technology transfer agreements where these contribute to economic welfare, without posing a risk to competition. Through a questionnaire, the Commission has invited stakeholders to present their views on their practical experience in applying the TTBER and the accompanying Guidelines. Feedback from stakeholders, received in early 2012, is a key element of the review.

## 5. An on-going firm stance against cartels

Cartels are known for their harmful effects on consumers and the economy in general as they result in higher prices and less choice, as compared to a situation where companies compete fairly and on the merits. Therefore, the Commission continued its vigorous and relentless fight against cartels throughout 2011. It adopted four cartel decisions imposing fines totalling over EUR 614 million on 14 undertakings<sup>41</sup> and concerning products of importance for consumers. It also launched a number of new investigations into different sectors, including financial services (derivatives) and car parts.

Despite the unfavourable economic context, there was a decrease in the number of requests for fine reduction due to inability to pay (ITP). Under this concept, in exceptional cases, the Commission may, upon request, take account of an undertaking's inability to pay in a specific social and economic context. The purpose of this provision is to prevent the Commission's fines from driving financially distressed undertakings out of the market and causing adverse social and economic consequences. In 2011 the Commission granted a reduction of the fine for inability to pay to one undertaking in the refrigeration compressors case.

Furthermore, the Commission's efforts focused on improving the efficiency of the cartel proceedings through use of the settlement procedure. Once the investigation is at a sufficiently advanced stage, cartel cases are routinely screened as to their suitability for a settlement. In 2011, three out of the four cartel decisions adopted were settlement decisions. This brings to five the total number of settlement cases adopted since the procedure was introduced in 2008. In the three 2011 cases, settlement allowed the Commission to proceed more swiftly and efficiently compared to a normal cartel case. Settlements also bring benefits in terms of savings of both time and resources, but as experience has shown, a smooth

<sup>40</sup> Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ L 123, 27.4.2004, p. 11-17 and Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to technology transfer agreements., OJ C 101, 27.4.2004, p. 2-42.

<sup>41</sup> Cases COMP/39579 Consumer Detergents, decision of 13 April 2011, OJ C 193, 2.7.2011, 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.

settlement process also requires the trust and the cooperation of the parties and their legal advisors. In addition to the procedural benefits, settlements also contribute to increasing the deterrent effect of the Commission's enforcement actions in cartels, as it frees up resources more quickly for other cartel cases. Such efficiency-enhancing measures have been welcomed by many stakeholders, including the European Parliament.

For example, the efficiencies produced by the settlement procedure in the Consumer Detergents case are particularly significant, as it took only 10 months from the first settlement meeting to the adoption of the Commission's Decision in which it fined the three producers of washing powder a total of EUR 315.2 million for participating in a cartel aimed at stabilising market positions and coordinating prices in the period from 7 January 2002 until 8 March 2005, in eight Member States (Belgium, France, Germany, Greece, Italy, Portugal, Spain and the Netherlands). One supplier of washing powder received immunity from fines and two others reduction of fines under the Commission's Leniency policy.

| Cartel Decisions 2011                  | €million     | Settlement |
|--|--------------|------------|
| Consumer Detergents                    | 315,2        | 1          |
| Exotic fruit (Bananas Southern Europe) | 9,9          | 0          |
| CRT Glass                              | 128          | 1          |
| Refrigeration compressors              | 161          | 1          |
| <b>Total</b>                           | <b>614,1</b> | <b>3</b>   |

Furthermore, in 2011 the European Courts have confirmed and clarified a number of important policy issues through an unusually high number of judgments in cartel cases<sup>42</sup>. The General Court has confirmed the legality and the main novel principles of the current 2006 Fining Guidelines<sup>43</sup> and has reiterated that the Commission must be able to adapt the level of fines to the needs of its enforcement policy, at any time. In another landmark case, the Court confirmed that the Commission is entitled to ensure that only genuine, sincere and continuous cooperation is rewarded under its leniency program<sup>44</sup>. The Court of Justice has also fully upheld the existence of a rebuttable presumption that anti-competitive conduct by a wholly-owned or virtually wholly-owned subsidiary can be attributed to a parent company albeit that the Commission must provide sufficient reasoning, which will depend on the nature and content of the situation, to justify the rejection of rebuttal attempts by companies<sup>45</sup>.

The Court also held that since there is no provision of EU law that would justify a refusal to grant access to leniency material to victims of competition law violations, it is for the national courts to weigh the interest of protecting leniency programmes against the interest of victims to obtain compensation for damages, in deciding whether to grant access or not<sup>46</sup>. While observant of this judgment, the Commission remains fully determined to protect its leniency

<sup>42</sup> The European Court of Justice and the General Court during 2011 rendered more than 80 judgments concerning almost 20 different cartel decisions.

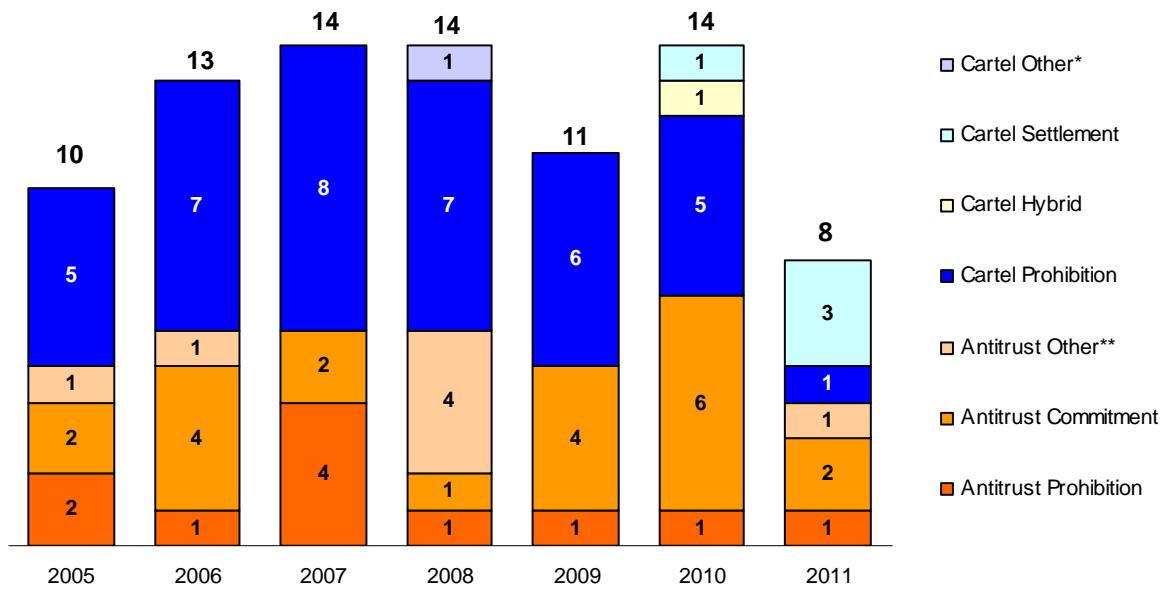
<sup>43</sup> Cases T-343/08 *Arkema France v European Commission* and T-299/08 *Elf Aquitaine v European Commission*, judgments of 17 May 2011, Case T-348/08 *Aragonesas Industrias y Energia v European Commission*, judgment of 25 October 2011 and Cases T-211/08 *Putters International NV v European Commission*, joined cases T-208/08 *Gosselin Group NV* and T-209/08 *Stichting Administratiekantoor Portielje v European Commission*, T-204/08 *Team Relocations NV* and T-212/08 *Amertranseuro International Holdings Ltd, Trans Euro Ltd et Team Relocations Ltd v European Commission*, judgments of 16 June 2011.

<sup>44</sup> T-12/06 *Deltafina v European Commission*, judgment of 9 September 2011.

<sup>45</sup> Case C-404/11 P *Elf Aquitaine v European Commission*, order of the Court of 2 February 2012,; Cases T-185/06 *Air Liquide v European Commission*, judgment of 16 June 2011 and T-196/06 *Edison v European Commission*, judgment of 16 June 2011.

<sup>46</sup> Case C-360/09 P *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011.

programme. This may include legislating on the interaction between private and public enforcement of the EU competition law, in order to clarify the status of information voluntarily submitted by undertakings in the framework of a leniency programme.



\* Rejection of complaint \*\* Rejection of complaint, procedural infringement, penalty payment

Source: Directorate-General for Competition

## 6. Effective cooperation within the European Competition Network and with National Courts

Both the Commission and the Member States contribute to ensuring well-functioning markets through the enforcement of European and national competition law. All 27 Member States have functioning competition agencies, with which the Commission has coordinated its actions in numerous cases. In 2011, no fewer than 88 cases were submitted by the Member States to the Commission for consultation, increasing the total number of cases brought since May 2004 to 555.

Informal means of cooperation exist for policy development, both regarding industry sectors and common horizontal issues in competition enforcement. Topics are discussed in different fora within the European Competition Network (ECN), ranging from Director-General meetings to working groups and subgroups. Horizontal ECN working groups discuss policy aspects of competition enforcement, such as the operation of the ECN Model Leniency programme or common (technical) standards for optimising the investigative capacity of competition authorities. In addition, industry sector subgroups serve as active platforms of discussion for enforcement practices. Subgroups active in 2011 included sectors such as food, financial services and pharmaceuticals.

In the framework of its support to national courts applying EU competition law, the Commission submitted three further *amicus curiae* observations on different matters to courts in Austria<sup>47</sup>, France<sup>48</sup> and England and Wales<sup>49</sup>, bringing to nine the number of this type of

<sup>47</sup> In its observations, the Commission argued that the effective enforcement of Article 101 TFEU would be hindered if a judgment would have as its subject matter solely national law and be entirely silent on the (non)-applicability of EU law, as this could be deemed as an assurance for undertakings that a cartel does not infringe Article 101(1) TFEU.

intervention since the entry into force of Regulation 1/2003. Cooperation with national courts has been further supported by continued funding by the Commission of a specific training program for national judges, in the area of competition law<sup>50</sup>.

## 7. The international dimension

The globalisation of the economy calls for closer cooperation among competition authorities not only in Europe, but also across the globe. Such cooperation is essential to ensure consistency in the outcome of enforcement activities of different authorities, to enhance the effectiveness of their investigations, and to secure a level playing field for EU businesses in world markets. As in the past, and as encouraged by the European Parliament, the Commission has engaged in a policy dialogue with the authorities in other jurisdictions at both multilateral and bilateral level to promote convergence on both substantive and procedural competition rules. The Commission has also continued to cooperate closely with many competition agencies in concrete enforcement activities.

In 2011, the Commission hosted the International Competition Network (ICN) Cartel Workshop, held in Bruges (BE) from 10 to 13 October. Attendees from around 70 jurisdictions explored possibilities to coordinate investigations and evidence gathering and exchanged views on leniency policy and settlements, with a view to making the fight against cartels more effective and efficient.

The EU has concluded agreements with the United States, Canada, Japan and Korea on cooperation between their respective competition agencies. These agreements include provisions on the notification of enforcement activities to the other side, coordination of investigations (for example coordinating the timing of dawn raids), positive and negative comity, and the establishment of a dialogue on policy issues. These agreements also specify that the competition agencies cannot exchange confidential information which is protected under their respective laws. The inability to exchange confidential information severely limits the scope of cooperation between the European Commission and foreign competition agencies. This limitation can undermine the effectiveness of the Commission's competition enforcement activities, especially in investigations of competition cases that have an international dimension, such as international cartels. This is why the Commission is trying to move beyond these "first generation" agreements and negotiate cooperation agreements which would also include provisions allowing the parties' competition agencies to exchange, under certain conditions, information which is protected under their respective rules on confidentiality. It is currently negotiating two such "second generation" agreements, one with Switzerland and one with Canada. If these negotiations were concluded successfully, these agreements would enhance further the efficiency and effectiveness of enforcement cooperation activities.

To mark the 20<sup>th</sup> anniversary of its first cooperation agreement with the US, the Commission, the US Federal Trade Commission and the US Department of Justice adopted revised Best Practices on cooperation in merger investigations to further optimise cooperation in merger investigations.

A second priority for the Commission's bilateral relations is to foster closer relations with competition authorities in the major emerging economies. Apart from its extensive technical cooperation programme with the Chinese competition authorities, the Commission signed a Memorandum of Understanding with FAS, the competition authority of Russia. Furthermore,

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<sup>48</sup> The Commission's observations relate to the interpretation of the Guidelines on the effect on trade concept and the way in which the appreciable effect on trade between Member States principle is applied when conduct affects trade only in part of a Member State.

<sup>49</sup> In its observations the Commission outlined its policy for securing both the integrity of leniency programs and the effectiveness of damages actions.

<sup>50</sup> In 2011, the Commission funded 24 training programs.

the Commission concluded negotiations on the competition chapter with Croatia, which is scheduled to join the EU in 2013.

## **MERGER CONTROL**

### **1. Increased cooperation among Member States and internationally**

Merger control is essential in protecting consumer welfare by preventing market structures that could lead to unjustified price increases or reduction of choice, quality or innovation. EU merger control continues to be a key instrument for keeping (European) markets open and competitive, also in times of economic and financial crisis.

Enforcement under the EU Merger Regulation (EUMR) has reached a high degree of maturity and procedural stability. The Commission and NCAs form the two pillars of EU merger enforcement. The difference from antitrust is that there is no single set of substantive rules being applied. While NCAs deal with national cases, mergers reaching the turnover thresholds of the EUMR are examined by the Commission, ensuring a "one-stop-shop" for such cases<sup>51</sup>.

The creation of an EU Merger Working Group in 2010 was an important step forward towards more EU cooperation and further "soft" convergence. Drawing on agency practices and experience, the group explores possible solutions to common problems, focusing on what is feasible within the existing legal framework. In 2011, the group made a major contribution to this objective, adopting a set of Best Practices on Cooperation between EU National Competition Authorities in Merger Review. The Best Practices are intended to facilitate cooperation among NCAs regarding those mergers that do not benefit from the Commission's "one-stop shop review" and require clearance in several Member States.

Cooperation also proved important with non-EU countries. Two merger cases<sup>52</sup> involved intense cooperation with various competition authorities around the world. In both cases cooperation was particularly close with the authorities in the United States, while for one of them the Commission also, for the first time, worked together with China's merger control authorities.

Going forward, the Commission will continue to promote international cooperation in merger control, which is becoming increasingly relevant in the context of globalised markets and mergers that are reviewed by several authorities. Ultimately, international cooperation should help to reduce the burden for merging companies by harmonising the review of international mergers, while maintaining effective merger control in the participating countries.

### **2. Rebound of merger notifications and increase in complexity of the cases**

In 2011, mergers and acquisitions were on the rise again and with it the Commission's activity of reviewing mergers under the EUMR. 309 cases were notified to the Commission in 2011,

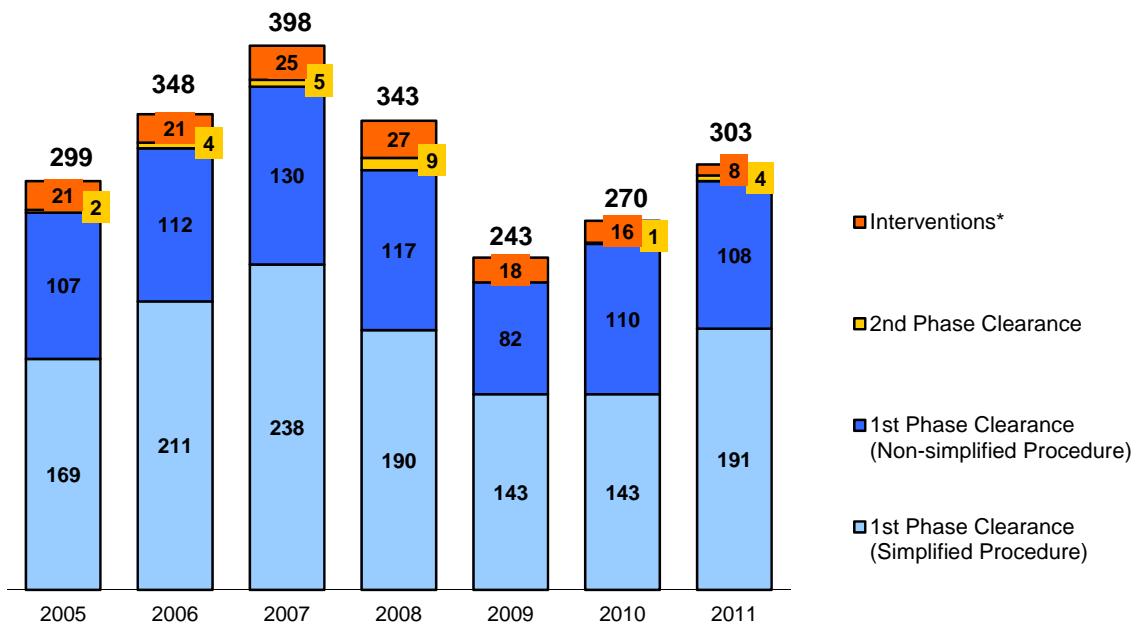
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<sup>51</sup> A comprehensive review of this aspect was carried out by the Commission in 2009. See Communication from the Commission to the Council, [Report from the Commission to the Council on the operation of Regulation No 139/2004](#), 18 June 2009, COM(2009)281 final.

<sup>52</sup> Cases COMP/M.6203 *Western Digital Ireland, Ltd/Viviti Technologies*, decision of 23 November 2011; IP/11/1395 and COMP/M.5984 *INTEL / McAfee*, decision of 26 January 2011, OJ C 98, 30.3.2011, p. 1; IP/11/70.

representing an increase of 13% as compared to 2010, slightly above the 10 year average of 305 mergers per year.

An important feature is that - in practice - notified mergers appeared to be more complex, as in 2011 the Commission opened in-depth investigations in eight cases in several sectors such as air transport, food, consumer goods, basic industries, IT, financial services and pharmaceuticals. It also concluded a prohibition in a case that had been notified in 2010<sup>53</sup>.



\* Includes one prohibition in 2007

Source: Directorate-General for Competition

## II. SECTORAL OVERVIEW

This section provides an overview of policy developments and enforcement actions in a number of selected sectors where the Commission's work in the field of competition has been relevant throughout 2011. The actions undertaken in the energy and environment, ICT and media, rail transport and pharmaceutical industry sectors are presented here.

An overview of the Commission's actions in relation to competition in three sectors where it has been particularly active in 2011, namely the financial services, airline and food sectors is set out in the Commission Communication to which this Staff Working Document is annexed.

### 1. Energy & Environment

The European Energy policy is built around three pillars: sustainability, security of supply and competitiveness. Reducing green house gas emissions is vital to combating climate change. European consumers depend heavily on the secure and reliable provision of energy at competitive prices. Interconnections between European gas and electricity grids need to be substantially improved. The "[Energy 2020 - A strategy for competitive, sustainable and secure energy](#)" Commission Communication calls for action in areas where new challenges are emerging. These areas are energy efficiency, infrastructure, choice and security for consumers, energy technology and the external dimension of the internal energy market. Competition enforcement and advocacy, along with sector-

<sup>53</sup> Case COMP/M.5830 Olympic/Aegean Airlines, decision of 26 January 2011; IP/11/68.

specific legislative proposals, constitute the main tools the Commission has at its disposal in order to achieve these goals and creating a single European energy market by the 2020 target date. Given the strategic importance of the energy sector, the European Parliament, in its Resolution on the 2010 report on competition policy (the Schwab report)<sup>54</sup> requested that the Commission actively monitors the degree of competition on the market.

Competition policy in the energy field aims to ensure a secure flow of energy, in particular electricity and gas, at competitive prices to EU households and businesses. An open and competitive single EU market will also guarantee 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 should also be open to new energy mixes and play a major role in developing and deploying new environmentally friendly technologies. Prices that reflect costs will help encourage energy efficiency, whilst supporting sustainability and security of supply.

2011 has seen world events affecting the energy and environment sector such as the Fukushima nuclear incident in Japan. Coupled with the long-term trend of rising fuel prices and the high cost of renewable energy, these have added to the challenges faced by Member States to meet the Europe 2020 Strategy and EU energy policy objectives. Strengthening and building partnerships with key partners to the EU is also in strategic interest for secure, safe, sustainable and competitive energy. International cooperation with industrialised and fast growing economies is necessary to maintain Europe's position in energy research and innovation.

## Competitiveness

Competition enforcement and advocacy contribute to competitiveness by opening markets, preventing incumbents from reinforcing their dominant positions, and creating a framework for investment that avoids distortions and ensures the efficient allocation of public resources.

With the aim of opening up national markets and preventing incumbents from abusing their dominant position in several Member States, 2011 saw the implementation of remedies in several of the antitrust cases that arose from the 2007 Energy sector inquiry. The competition concerns that were remedied in 2011 include foreclosure (ENI<sup>55</sup>, E.ON gas<sup>56</sup>, GDF<sup>57</sup> and RWE<sup>58</sup> gas), customer tying through long-term contracts for large electricity customers (EDF in France<sup>59</sup>), and restrictions on export capacity (SVK<sup>60</sup> in Sweden). The Commission also market tested measures proposed by Greece to remedy the advantage enjoyed by the State-owned electricity company Public Power Corporation by reason of its access to lignite, which is the cheapest source of electricity generation in Greece<sup>61</sup>.

Consolidation appeared to be the major feature in energy and environment-related industry. The Commission received an increasing number of notifications for mergers in the sector, out of which six<sup>62</sup> related to the manufacture of equipment to produce electricity (from small

<sup>54</sup> Texts adopted: P7\_TA(2012)0031 available at

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0424&language=EN>

<sup>55</sup> Case COMP/39315 ENI, decision of 29 September 2010, OJ C 352, 23.12.2010, p. 8-10; IP/10/1197.

<sup>56</sup> Case COMP/39317 E.ON gas foreclosure, decision of 4 May 2010, OJ C 278, 15.10.2010, p. 9-10; IP/10/494.

<sup>57</sup> Case COMP/39316 GDF foreclosure, decision of 3 December 2009, OJ C 57, 9.3.2010, p. 13-14; IP/09/1872.

<sup>58</sup> Case COMP/39402 RWE gas foreclosure, decision of 18 March 2009, OJ C 133, 12.6.2009, p. 10-11; IP/09/410.

<sup>59</sup> Case COMP/39386 Long term electricity contracts in France, decision of 17 March 2010, OJ C 133, 22.5.2010, p. 5-6; IP/10/290.

<sup>60</sup> Case COMP/39351 Swedish Interconnectors, decision of 14 April 2010, OJ C 142, 1.6.2010, p. 28-29.

<sup>61</sup> Case COMP/38700 Greek lignite and electricity markets; IP/11/34, 14.1.2011.

<sup>62</sup> Cases COMP/M.6039 GE/Dresser, decision of 4 January 2011, OJ C 29, 29.1.2011, p. 7; IP/11/5, COMP/M.6106 Caterpillar/MWM, decision of 19 October 2011; IP/11/1212, COMP/M.6172 Daimler/Rolls Royce/Tognum/Bergen, decision of 25 July 2011, OJ C 275, 20.9.2011, p. 2; IP/11/924, COMP/M.6222 GE

mobile generating sets<sup>63</sup> to the construction of complete combined cycle power plants<sup>64</sup> or major components of such plants<sup>65</sup>).

In its role of preserving the internal market and controlling whether Member States use their public resources in a non-distortionary manner, the Commission opened a formal investigation in the field of environmental taxation<sup>66</sup> and approved reduction of the UK Climate Change Levy (an energy tax, for aluminium and steel recycling processes) as being compatible with the 2008 Environmental Aid Guidelines<sup>67</sup>.

## Sustainability

Sustainable development is the long term use of resources which aims to meet human needs for energy, while preserving the environment. Sustainability was at the heart of the measures reviewed under State aid control rules, authorising aid that supports renewable energy sources and environmentally friendly businesses. State aid can indeed correct market failures caused by negative external factors where environmental costs for society cannot yet be reflected in the production costs borne by companies.

According to the latest available figures<sup>68</sup>, only 18% of electricity was generated by renewable energy sources in the EU, with different values across Member States, varying from approximately 5% in Latvia to 68% in Austria. Within that context, special attention was given to State measures in support of energy from renewable sources under the horizontal Environmental Aid Guidelines<sup>69</sup> (such as in Finland<sup>70</sup>, Romania<sup>71</sup> and France<sup>72</sup>) while at the same time several Member States aimed at promoting environmentally friendly cars and green products (Denmark<sup>73</sup>, United Kingdom<sup>74</sup>, France and Germany<sup>75</sup>). Reflecting the growing demand for meeting energy requirements from sustainable sources, the Commission

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*Energy/Converteam*, decision of 25 July 2011, OJ C 255, 31.8.2011, p. 2; IP/11/922, COMP/M.6350  
*Siemens/NEM Holding*, decision of 28 October 2011, OJ C 23, 28.01.2012, p. 10; IP/11/1300 and

COMP/M.6356 *GE/IR/UEC/JV*, decision of 27 October 2011, OJ C 321, 4.11.2011, p. 1.

<sup>63</sup> COMP/M.6039 *GE/Dresser*, decision of 4 January 2011, OJ C 29, 29.1.2011, p. 7; IP/11/5.

<sup>64</sup> COMP/M.6356 *GE/IR/UEC/JV*, decision of 27 October 2011, OJ C 321, 4.11.2011, p. 1.

<sup>65</sup> COMP/M.6350 *Siemens/NEM Holding*, decision of 28 October 2011, OJ C 23, 28.01.2012, p. 10; IP/11/1300.

<sup>66</sup> Case SA.18859 — 11/C (ex NN 65/10) *Relief from aggregates levy in Northern Ireland* (ex N 2/04), OJ C 245, 24.8.2011, p. 10 with corrigendum published in OJ C 328, 11.11.2011, p. 11.

<sup>67</sup> Case SA.31349 (N1/2011) *Climate Change Levy reduction for metal recycling activities*, decision of 23 November 2011.

<sup>68</sup> Market Observatory for Energy, June 2011.

<sup>69</sup> Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p.1-33.

<sup>70</sup> Cases SA.31204 *Operating aid for small wood fired CHP-plants and forest chips fired power plants*, decision of 22 March 2011, OJ C153, 24.05.2011, p.1, SA.31107 *Operating aid for wind power and bio gas electricity*, decision of 15 March 2011, OJ C 180, 21.6.2011, p. 1-4, SA.32470 *Forest chips, wind power, hydro power and bio gas electricity*, decision of 22 March 2011, OJ C 180, 21.06.2011, p. 1 and SA.32470 *Fixed operating aid for power plants using renewable energy sources*, decision of 22 March 2011, OJ C 189, 29.06.2011, p.1.

<sup>71</sup> Case SA 33134 *Romania's green certificates scheme*, OJ C 244, 23.08.2011, p. 2.

<sup>72</sup> Case SA 30113 *Geothermal heat boiler for the industrial site of Beinheim*.

<sup>73</sup> Case SA.31527 (N 386/2010) *Pilot schemes for the purchase of electric vehicles*, decision of 8 March 2011, OJ C 149, 20.05.2011, p. 3; IP/11/266.

<sup>74</sup> Case SA.30741 *Aid to purchase of ultra low-emission vehicles*, decision of 19 October 2011.

<sup>75</sup> Cases SA.32206 *Prolongation du régime temporaire de prêts bonifiés pour les entreprises fabriquant des produits verts*, decision of 12 October 2011, OJ C 330, 12.11.2011, p. 1 and SA.32029 *Extension for 2011 of the French and German aid schemes providing support for green products*, decision of 3 October 2011, OJ C 361, 10.12.2011, p. 1-5.

authorised, under the EUMR, four cases<sup>76</sup> involving joint ventures in the solar power sector (both thermal and photo-voltaic) and a further four cases<sup>77</sup> for the development of wind power.

With the aim of better preserving the environment and available resources, and within the broader objective of achieving the shift to a low-carbon economy, the Commission ordered both Italy<sup>78</sup> and Austria<sup>79</sup> not to implement aid earmarked for energy-intensive businesses. The Commission also adopted a number of decisions to facilitate the closure of uncompetitive coal mines<sup>80</sup>, some solely concerning aid for exceptional costs (Slovenia<sup>81</sup> and Poland<sup>82</sup>). The Commission adopted also other decisions for the closure of uncompetitive coal mines relating to aid covering production costs<sup>83</sup>. In the latter case, a mitigation plan addressing the environmental and climate impact had to be provided.

Waste treatment and recycling also remain important areas of activity, as reflected in the number of cases concerned with water and waste management<sup>84</sup>. A similar trend can be observed in the antitrust field, where the Commission is looking into conduct in sectors such as waste collection, and the supply of water and waste water services<sup>85</sup>.

## Security of supply

The EU energy sector is characterised by a high dependency on imports, as the EU produces only 48% of its energy needs<sup>86</sup>. Energy dependency differs greatly among Member States; Denmark appears to be the only net energy exporter within the EU27, while the Baltic countries rely on a single source for their gas imports. The EU energy sector is also characterized by a significant need for investments – for instance in electricity generation,

<sup>76</sup> COMP/M.6112 *Good Energies/NEIF/Newco*, decision of 13 April 2011, OJ C 122, 20.4.2011, p.6 , COMP/M.6238 *RREEF/SMAG/OHL/Arenales*, decision of 10 August 2011, OJ C 255, 31.8.2011, p. 1, COMP/M.6303 *Antin/RREEF/Andasol 1&2*, decision of 22 August 2011, OJ C 253, 30.8.2011, p.1, COMP/M.6273 *Samsung/Korea Development Bank/KNS Solar*, decision of 3 August 2011, OJ C 236, 12.8.2011, p. 6.

<sup>77</sup> COMP/M.6233 *FOEW/Dong Energy/Novation/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/Sheringham Shoal 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, 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>78</sup> Cases C38/B/2004 (ex NN58/2004) *Preferential electricity tariffs for the benefit of three energy-intensive businesses located in Sardinia* and C13/2006 (ex N587/2005) and *Green Electricity Act*, OJ L 309, 24.11.2011, p.1.

<sup>79</sup> Case C24/2009 (ex N446/2008) *State aid for energy-intensive businesses under the Green Electricity Act in Austria*, OJ L 235, 10.09.2011, p. 42.

<sup>80</sup> As provided for by Council Decision No 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines, OJ L 336, 21.12.2010, p. 24.

<sup>81</sup> Case SA.30907 (N175/2010) *Closure of mine Trbovlje Hrastnik Ltd until 2015*, OJ C 294, 6.10.2011, p. 3.

<sup>82</sup> Case SA.33013 *Coal plan for the period 2011-2015*, decision of 23 November 2011.

<sup>83</sup> See German case SA.24642 (N708/2007) *Coal mine closure plan 2008-2018*, decision of 7 December 2011 and Romanian case SA.33033 *National Hard Coal Company Petroşan*, decision of 22 February 2012; IP/12/157.

<sup>84</sup> Cases COMP/M.6088 *HIG Capital/Der Grüne Punkt-Duales System Deutschland*, decision of 7 February 2011, OJ C 43, 11.2.2011, p. 2, COMP/M.6105 *Veolia/EDF:SEEG*, decision of 24 January 2011, OJ C 26, 28.1.2011, p. 1, Case COMP/M.6345 *Cheung Kong/Northumbrian Water Group*, decision of 22 September 2011, OJ C 285, 29.9.2011, p. 1, COMP/M.6253 *Talis International Holdings/ Raphael Valves Industries*, decision of 12 July 2011, OJ C 209, 15.7.2011, p. 16.

<sup>85</sup> For example, proceedings were opened against ARA in Austria and an investigation into conduct by French water companies continued throughout 2011.

<sup>86</sup> Market Observatory for Energy, June 2011.

where there is a trend for gas and renewables to contribute more to electricity generation in the EU.

The Commission's antitrust enforcement action in the energy sector can contribute to resolving security of supply issues by facilitating access to the market and encouraging investment. In 2011, the Commission opened proceedings against ČEZ in relation to possible abuses of dominance on the Czech electricity market through the hindrance of the entry of competitors. The Commission also carried out unannounced inspections at the premises of gas companies in Central and Eastern Europe, investigating the existence of behaviour that might potentially exclude competitors from providing alternative sources of gas, or that might involve the exploitation of a dominant position in the supply of gas, for instance by charging excessive prices.

Other tools of competition policy, such as State aid control, can also contribute to the completion of the EU internal market for gas. Authorisation of measures aiming at increasing security of gas supply in Poland and construction of an interconnection and cross-border power line between Poland and Lithuania<sup>87</sup> are two good examples.

## 2. Information and Communication Technologies (ICT) and Media

As recognized in the Digital Agenda for Europe (DAE)<sup>88</sup>, Information and Communication Technologies (ICT) play a key enabling role for Europe to achieve its competitiveness ambitions for 2020. The ICT industry is directly responsible for 5% of European GDP, with a market value of EUR 660 billion annually. It also employs over eight million people representing 3.7% of total employment in the EU<sup>89</sup>. At the same time, ICT contributes far more to overall productivity growth, because of the dynamism and innovation inherent to the sector, and the enabling role it plays in changing the way other sectors do business. The roll-out of high speed broadband is a particularly important factor in this regard.

Latest available figures indicate that the cultural and creative industries encompassing media accounted for 4.5% of the EU's GDP in 2008, employing some 3.8% of its workforce<sup>90</sup>. Europe's cultural and creative industries are one of the most dynamic economic sectors making a real contribution to the Europe 2020 strategy and some of its flagship initiatives such as the Innovation Union, the Digital Agenda, the Agenda for new skills and new jobs or an industrial policy for the globalisation era<sup>91</sup>. Creative content is also an essential input into the digital economy and a key driver of consumer demand for digital services.

The ICT and media sectors are characterised by rapid technological developments. The expansion of high-speed networks and the shift from the physical to the digital are having a revolutionary impact on ways of doing business.

<sup>87</sup> Cases SA.31953 *Construction of a LNG Terminal in Swinoujsci*, decision of 5 October 2011, OJ C 361, 10.12.2011, p. 1-5 and SA.30980 (N 542/2010) *Construction of interconnection and cross-border power line between Poland and Lithuania*, decision of 6 January 2011, OJ C 79, 12.03.2011, p.1 with corrigendum in OJ C 92, 24.03.2011, p.22.

<sup>88</sup> *A Digital Agenda for Europe*, COM(2010) 245 final/2.

<sup>89</sup> *The 2011 Report on R&D in ICT in the European Union*, European Commission's Joint Research Centre - Institute for Prospective Technological Studies (JRC 65175 EUR 24842 EN).

<sup>90</sup> *Building a Digital Economy: The importance of saving jobs in the EU's creative industries*, TERA Consultants, March 2010.

<sup>91</sup> *Commission Green Paper Unlocking the potential of cultural and creative industries*. 27 April 2010, COM(2010)183.

Increasing use of cloud computing is creating the need to connect different products and applications throughout the industry. Services offered in this sector will become ever more networked and inter-dependent. The ICT sector is also characterized by network and scale effects which tend to enforce the market positions of leading players. The Commission considers that ensuring interoperability in order to avoid anti-competitive customer lock-in and to preserve the opportunity for innovative firms to compete is critical for competition in the sector<sup>92</sup>. Intellectual Property Rights (IPRs) and standards are also likely to remain key issues for competition going forward. In this context, the competitive impact of the growing strategic use of IPRs, especially patents, is an area the Commission intends to focus on. Open standards remain an important way to support interoperability. With the rise of cloud computing questions of interoperability, data portability and standards will again be at the forefront of the regulatory issues to be tackled.

The ongoing transition to next generation access networks (NGAs) with much faster access speeds has the potential to drive growth and stimulate prosperity. The move from traditional copper networks to NGAs should not however be exploited to re-monopolize markets and reverse the competitive dynamics achieved as a result of liberalisation of the e-communications sector. Companies must therefore ensure that co-investment and cooperation agreements for the deployment of NGAs respect both sector regulation and competition law. The same has to be said as regards the practices of companies in a dominant position, which should not result in the anti-competitive foreclosure of competitors.

Too many barriers still block the free flow of online services and entertainment across national borders. Protecting the Single Market remains one of the Commission's top priorities when applying competition law within the context of the digital economy. In 2011, the European Court of Justice took a strong stance against the artificial partitioning of the Single Market in relation to media content. In its judgment in the *Premier League/Murphy* case<sup>93</sup>, the Court ruled that the contractual restrictions which deprived consumers from access to cross-border broadcasts of Premier League football matches are restrictions of competition by object, contrary to Article 101 TFEU. Such absolute territorial protection enjoyed by broadcasters cannot be justified where right holders could have obtained appropriate remuneration without prohibiting or limiting cross-border access to their content.

The Commission has continued to use its enforcement tools to ensure unrestricted competition and growth in the ICT and media sectors, to the benefit of consumers and to support the objectives of the DAE.

State aid policy is growing in importance for the ICT and media sectors. On 20 June, the Commission launched a public consultation on new rules on the State aid assessment of support for producing films and audiovisual works<sup>94</sup>. In May, an issues paper was published to initiate a first round of public consultation, where 110 comments were received and published in October. The publication of a draft Communication for public consultation is foreseen for the first quarter of 2012.

The Commission is also reviewing the Broadband Guidelines<sup>95</sup> in the field of State aid for broadband networks. A public consultation was launched in April 2011, and more than 100 comments received from stakeholders were published in October. A further public consultation on new draft guidelines is expected to take place in the first quarter of 2012.

<sup>92</sup> Cf. Case COMP/37792 *Microsoft* (OJ L 32, 6.2.2007, p. 23); see judgment T-201/04, *Microsoft Corp. v. Commission* [2007] E.C.R. II-3601.

<sup>93</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd.*, judgment of 4 October 2011.

<sup>94</sup> To review the assessment criteria set out in the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001, OJ C 43, 16.2.2002, p. 6. See also the Issues Paper available at

[http://ec.europa.eu/competition/consultations/2011\\_state\\_aid\\_films/issues\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_state_aid_films/issues_paper_en.pdf)

<sup>95</sup> *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p. 7.

## **Access to networks and related digital services**

As voiced by the European Parliament in the Schwab report and by other stakeholders, access to networks remains a major concern element for achieving a competitive market with effective development of the Internet and of the digital economy. In June, the Commission imposed a fine exceeding EUR 127.5 million on the Polish incumbent telecoms operator Telekomunikacja Polska S.A. (TP) for abusing its dominant position in the period of 2005-2009, by deliberately seeking to limit competition on broadband markets in Poland by placing obstacles in the way of alternative operators, even if there was a change in the approach of TP further to the Agreement signed in October 2009 with the NRA. 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).

State aid control has an important role to play in accelerating the deployment of broadband networks in Europe. Pro-competitive aid measures, which complement private investments in areas which are not profitable on commercial terms, are necessary to achieve the objectives of the DAE. The volume of State aid approved by the Commission under the State aid Broadband Guidelines<sup>96</sup> amounted to almost EUR 2 billion in 2011. The Commission authorized aid through 18 Commission decisions, covering countries such as France, Poland, Greece or Portugal. A similar amount of aid was approved in 2010.

## **An open and fully integrated internal market**

Cross-border market sharing agreements that include non-compete clauses are one of the clearest violations of competition law. They put in danger the full integration of the market, artificially compartmentalising it along national borders. On these grounds, in October the Commission sent a statement of objections to Telefónica and to Portugal Telecom, regarding their agreement not to compete on the Iberian telecommunications markets.

The development of the internet has a direct effect on the competitive development of related services, such as search engines and online advertising platforms. The Commission is currently investigating allegations that Google may be abusing a dominant position in online search, online search advertising and online search advertising intermediation. It is alleged that Google is lowering the ranking of search results of competing services (which specialise in providing users with specific online content such as price comparisons, so-called vertical search services) and accorded preferential placement to the results of its own vertical search services. In addition the Commission is investigating allegations that Google imposes exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites. Finally, the Commission is investigating suspected restrictions on the portability of online advertising campaign data to competing online advertising platforms<sup>97</sup>.

The markets for telecommunications and digital contents are not the only areas where the Commission has focused its antitrust actions in 2011. The market for computer mainframe maintenance services has also been under scrutiny. In July 2010, the Commission initiated a formal investigation against IBM with regard to an alleged abuse of a dominant position by

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<sup>96</sup> *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p. 7.

<sup>97</sup> Case COMP/39740 *Foundem/Google* and related cases.

foreclosing competing providers of mainframe maintenance services. As a result of the investigation, IBM submitted formal commitments to ensure the availability of certain spare parts and technical information on reasonable and non-discriminatory terms over five years. These commitments were made binding by the Commission in a decision adopted on 13 December.

2011 has been a year for further consolidation in the IT hardware sector, where the number of global players in the Hard Disk Drives (HDDs) sector has been reduced to three. In May, the Commission initiated in-depth investigations into two parallel transactions in this sector, namely the acquisition by Seagate of Samsung's HDD business and the acquisition by Western Digital of Viviti Technologies - formerly known as Hitachi Global Storage Technologies (HGST). On 19 October, the Commission cleared the Seagate/Samsung transaction<sup>98</sup> and on 23 November, the Commission adopted a conditional clearance decision in the Western Digital/HGST case<sup>99</sup>. The parties to the latter proceedings submitted remedies to address competition concerns in several product markets, in particular the 3.5-inch desktop market where the proposed merger would have led to a duopoly between the merged entity and Seagate. The parties committed to an upfront divestment to a suitable purchaser to be approved by the Commission of HGST's 3.5-inch business (as well as some assets of Western Digital) in order to ensure the continued presence of a third supplier on these markets.

### **The impact of digitization on content sectors**

The transition from analogue to digital broadcasting using Digital Terrestrial Television technologies by 2012 and the resulting digital dividend (i.e. the freed spectrum) should lead to new entry and broader viewer choice. EU law<sup>100</sup> requires that such dividend be allocated subject to specific criteria and procedures (e.g. open, transparent, non-discriminatory, etc.). The Commission has intervened against Italy, France and Bulgaria for failing to comply with those requirements. As a result of these interventions, Italy organised a beauty contest for new digital frequencies (multiplexes), while France and Bulgaria took legislative steps to address the breaches.

As the digital economy develops, so do the markets for digital content products, such as e-books. In December, the Commission initiated a formal investigation into possible restrictive agreements or practices affecting the sale of e-books in the EU. The Commission's investigation concerns possible restrictive agreements or practices between five international publishers (Hachette, Harper Collins, Simon & Schuster, Penguin and Georg von Holzbrinck) and Apple, as well as the character and terms of the agency agreements for the sale of e-books.

### **Ensuring interoperability**

The ICT sector is characterised by digital convergence and the concomitant growing importance of interoperability and standards. In view of network effects that often prevail in this sector, interoperability is an important feature for competition to take place in these markets. Although personal computers are considered to be the main gateway to the digital world, users are increasingly accessing data through other devices such as smart mobile

<sup>98</sup> Case COMP/M.6214 *Seagate Technology / the HDD business of Samsung Electronics*, decision of 19 October 2011; IP/11/1213.

<sup>99</sup> COMP/M.6203 *Western Digital Ireland / Viviti Technologies*, decision of 23 November 2011, IP/11/1395.,

<sup>100</sup> Including 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. 21-26.

phones, which are able to communicate with each other and with computing devices. This reinforces the need for interoperability between software products and devices.

One example of the Commission's approach was the Intel/McAfee case. The Commission was concerned that rival IT security products would be excluded from the market given Intel's strong presence in computer chips and chipsets. The merger was therefore approved subject to commitments from Intel aiming at ensuring interoperability of the merged entity's products with those of its competitors<sup>101</sup>.

Another example is the clearance of Microsoft's acquisition of Skype<sup>102</sup>. The Commission concluded that it was unlikely that Microsoft would degrade Skype's interoperability, or tie its leading Windows operating system with Skype, thereby limiting other players' ability to compete with the merged entity. The Commission also concluded that Microsoft would not have an incentive to degrade Skype's current level of interoperability as it needs Skype's services to remain available on as many platforms as possible, so as to enhance the Skype brand.

Through its review under the EUMR, the Commission ensures that the ICT and media markets remain open for new entrants and that access to key elements (whether content, technology or interconnection) is not denied. The Commission also aims at ensuring that consumers do not suffer from higher prices, less choice, poorer quality and limited innovation as a result of mergers in that sector.

### **3. Rail transport**

The transport sector is important for EU growth and employment. In 2009<sup>103</sup>, the value added by the transport sector reached EUR 437 billion or 3.7% of EU GDP. Around 11 million people were employed in the transport and storage sector, which corresponds to 5.1% of total EU employment. However, no less than 13% of household expenditure was devoted to transport services. Within transport, the largest subsectors are transport support activities (such as the operation of warehouses and terminals) and road freight transport. Rail transport represents around 6% of the value added in the transport sector as a whole. It nevertheless delivers significant inputs to many other sectors of the economy, while at the same time being close to the end consumer.

In the last 20 years the Commission has been active in supporting the restructuring of the European rail transport market and strengthening the position of railways vis-à-vis other transport modes. The Commission's efforts have concentrated on three major areas, which are crucial for developing a strong and competitive rail transport industry: (1) opening of the rail transport market to competition, (2) improving the interoperability and safety of national networks, and (3) developing rail transport infrastructure.

Opening up national freight and passenger markets to cross-border competition is a major step towards the creation of an integrated European railway area and of a genuine EU internal market for rail. Greater technical harmonization of rail systems and the development of key

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<sup>101</sup> COMP/M.5984 INTEL / MCAFEE, decision of 26 January 2011, OJ C 98, 30.3.2011, p. 1; IP/11/70.

<sup>102</sup> Case COMP/M.6281, Microsoft / Skype, decision of 7 October 2011, OJ C 341, 22.11.2011, p. 2; IP/11/1164.

<sup>103</sup> Most data at the sectoral level is available up until 2009 only. Where possible, reference is made to developments in the following years.

cross-border rail routes are also helping to break down barriers to a more competitive rail sector, along with better connections between EU and neighboring markets.

Greater competition makes for a more efficient and customer-responsive industry. EU rail legislation has consistently encouraged competitiveness and market opening, with the first major law in that direction dating back to 1991. The legislation is based on a distinction between infrastructure managers who run the network and the railway companies that use it for transporting passengers or goods. Different organizational entities must be set up for transport operations on the one hand and infrastructure management on the other. Essential functions such as allocation of rail capacity (the “train paths” that companies need to be able to operate trains on the network), infrastructure charging and licensing must be separated from the operation of transport services and performed in a neutral fashion to give new rail operators fair access to the market.

Rail freight transport has been completely liberalised in the EU since the start of 2007, for both national and international services. Therefore any licensed EU railway company with the necessary safety certification can apply for capacity and offer national and international freight services by rail throughout the EU.

The market for international rail passenger services has been liberalised in the EU from 1 January 2010. Any licensed, certified rail company established in the EU is able to offer such services, and in doing so has the right to pick up and set down passengers at any station along the international route.

### **Towards a competitive and resource efficient transport system**

In March 2011, the Commission adopted a comprehensive strategy setting out a roadmap towards a competitive and resource efficient transport system<sup>104</sup>. The roadmap contains 40 concrete initiatives aimed at increasing mobility while reducing carbon emissions in transport by 60% by 2050. Some of those initiatives are specifically targeted at increasing competition in rail transport.

As mentioned above, rail freight transport has been completely liberalised since the start of 2007, while the market for international rail passenger services has been liberalised from 1 January 2010 on. The Commission initiated court actions against several Member States that have improperly implemented EU Directives for the liberalisation of rail freight and international passenger transport. The Commission roadmap also foresees the extension of market opening to domestic rail passenger traffic. Currently, domestic rail passenger transport markets have been opened up to competition in some Member States (including Germany, Italy and the UK), but not in others.

Effective competition in the rail sector is still weak as reflected in the high market shares of incumbents and the limited penetration of new entrants. Market entry has so far mainly taken the form of acquisitions of market players in one Member State by operators in other Member States. However, it remains difficult for new entrants to provide competitive rail services, in particular because of the difficulty of gaining fair and non-discriminatory access to the rail network and rail-related services. The Commission's proposal on the recasting of the first rail package<sup>105</sup> aims to address such concerns. Discussions in 2011 in Parliament and Council focused on provisions concerning the separation of infrastructure and service facility operators from railway undertakings. In addition, the Commission has started to use its antitrust policy tools to ensure equal access to the rail infrastructure network.

Finally, the Commission is seeking to ensure that companies delivering public rail services do not receive inappropriate compensation. The Commission regularly verifies that such

<sup>104</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>105</sup> *Directive establishing a single European railway area (Recast)*, European Commission Proposal, COM(2010) 475 final, 17.9.2010.

companies are not overcompensated for services delivered and so given an unfair advantage in the market place.

### **Favouring market entry**

Increasing competition through market entry in the rail freight and passenger transport markets has been the main objective of the Commission's activities in relation to merger control and antitrust investigations in 2011.

Because of the Commission's action, there is scope for a new high-speed service in competition with the existing monopoly service on the Paris-Milan route, following the approval of the joint venture between Veolia Transport and Trenitalia<sup>106</sup>. An alternative service on the Vienna-Salzburg route may also see the light, as the Commission cleared the proposed joint venture between SNCF and two Austrian investment firms<sup>107</sup>.

In addition, the Commission has started investigations to verify whether vertically integrated incumbents (such as Deutsche Bahn<sup>108</sup> and Lietuvos gelezinkeliai<sup>109</sup>) are in a position to abuse their monopoly over essential rail infrastructure for the benefit of their own rail transport operations and to the detriment of new entrants.

Since the start of the liberalisation process for freight and passenger rail transport, the Commission has examined the incumbents' restructuring plans in several Member States. In 2011, the Commission opened formal investigation procedures on restructuring aid provided to the Greek and Bulgarian railway companies Trainose<sup>110</sup> and BDZ<sup>111</sup>. The Commission investigation of Trainose also covers the public service contract concluded with the Greek government. The BDZ restructuring plan was notified in May 2011, following the approval of rescue aid by the Commission in December 2010<sup>112</sup>.

## **4. The Pharmaceutical and health services sector**

Health care remains an important economic sector, representing about 9% of GDP in the EU, with the pharmaceutical sector for prescription and non-prescription medicines accounting for close to 2% of EU GDP and the health services<sup>113</sup> accounting for 6.5% of EU GDP<sup>114</sup>. Most health costs are borne by the Member States, with patients' direct contributions amounting to about 11% of the costs, equivalent to EUR 122 billion annually. The recent economic crisis and an ageing population have put Member States under more pressure to scrutinise public spending, including the health budget.

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<sup>106</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>107</sup> Case COMP/M.6269 *SNCF/HFPS/Wehinger GmbH/Rail Holding*, decision of 20 July 2011, OJ C 222, 28.7.2011, p. 1.

<sup>108</sup> See MEMO/11/208, 31.3.2011.

<sup>109</sup> See MEMO/11/152, 10.3.2011.

<sup>110</sup> Case SA.32544, *Restructuring of the Greek Railway Group - TRAINOSE S.A.*, decision of 13 July 2011;IP/11/866.

<sup>111</sup> Case SA.31250, *Restructuring aid to BDZ*, decision of 9 November 2011; IP/11/1321.

<sup>112</sup> Case N402/2010, *Rescue aid for the Bulgarian State Railways BDZ EAD (BDZ)*, decision of 15 December 2010, OJ C 187, 28.6.2011, p. 6-9; IP/10/1733.

<sup>113</sup> Excluding medicines, government investment on education, health prevention and other therapeutical appliances.

<sup>114</sup> All figures in this section are Competition DG estimates based on data from the OECD 2008 Health database.

Both the pharmaceutical and health services sectors display a number of common characteristics: those prescribing the goods or services in question (e.g. physicians) are different from the consumers (patients). The same applies to those who pay for the goods or services, which are usually sickness insurance funds in the Member States. Prescribers and consumers are therefore less price sensitive than in other markets. Furthermore, both sectors are fragmented by national regulations regarding authorisation, pricing and reimbursement status of the goods or services. In both areas similar competition issues arise, including artificial barriers to entry. Keeping prices at a competitive level is of key importance.

Looking at pharmaceuticals specifically, on average EUR 430 were spent on medicines in 2007 for each European citizen<sup>115</sup>, a figure expected to rise in the future, particularly in view of Europe's aging populations. The pharmaceutical sector is highly regulated and R&D driven. On the supply side, originator companies aim to bring innovative products to the market. The patent system provides the legislative framework allowing the companies to reap the benefits of their successful R&D activities. Upon loss of exclusivity generic companies can enter the market with bio-equivalent versions of the originator products, but at much lower prices, thereby contributing to the control of public budgets and giving originator companies incentives to continue their R&D for new and innovative proprietary medicines.

### **The competitive importance of generic products and innovative medicines**

The main issues of concern under competition law are practices which, for instance, unduly delay or block generic entry or the development and launch of innovative medicines. The existence of such practices was analysed in general terms in the sector inquiry and highlighted in the final report in 2009<sup>116</sup>. They include the potential misuse of patent rights and patent settlement agreements. The Commission particularly addressed these issues via antitrust enforcement action. These enforcement actions complement the Commission's recent work on the possible revision of Council Directive 89/10/EEC (also known as the Transparency Directive)<sup>117</sup>, which was also triggered by the results of the sector inquiry, when additional reasons for market entry delay of medicines were identified within the regulatory framework.

The organisation of the health care sector is primarily the responsibility of Member States under Article 168 TFEU. However, to the extent that the activities in question involve offering goods or services on the market<sup>118</sup>, the provision of health care goods or services is subject to EU competition rules, as emphasised by the 2010 Commission antitrust decision sanctioning the French Association of Pharmacists (ONP)<sup>119</sup>.

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<sup>115</sup> See Commission Communication on the final report on the pharmaceutical Sector Inquiry, p.1, and Final Report (technical annex), available at the website of DG Competition:

<http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>

<sup>116</sup> See the Competition DG's website:

<http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>

<sup>117</sup> Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of public health insurance systems, OJ L 40, 11.2.1989, p.8-11.

<sup>118</sup> Cases C-118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; C-35/96, *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov*, [2000] ECR I-6451.

<sup>119</sup> Case COMP/39510 *Ordre National des Pharmacien*, decision of 8 December 2010; IP/10/1683.

## **Competition-related actions taken to improve the functioning of the market**

Within the pharmaceutical sector, the delay of generic market entry (through agreements and contractual arrangements) is the focus of the two cases opened during the year, *Cephalon*<sup>120</sup> and *Fentanyl*<sup>121</sup>. In addition, the Commission is currently conducting a number of investigations into cases of generic delay where cases have not yet been formally opened<sup>122</sup>.

Further, the Commission continues to monitor the market and obstacles to generic entry with particular emphasis on patent settlements. In 2011, it undertook a second monitoring exercise which showed a significant decrease in the number of potentially problematic patent settlements. In fact the overall number of settlements decreased to 3% in the period of 2010, compared to 10% in the period between July 2008 and December 2009 (first monitoring exercise) and 22% in the period between January 2000 and June 2008 (sector inquiry)<sup>123</sup>. At the same time, the Commission saw a generalised increase in the use of unproblematic patent settlements. The Commission will continue monitoring patent settlements in 2012.

The Commission also closed an investigation into an alleged misuse of the patent system (i.e. alleged application for unmeritous patents) as regards innovative medicines in the *Boehringer* case. This case was closed, as the undertakings concerned had reached an agreement, which also addressed the Commission's competition concerns<sup>124</sup>. In the agreement, Boehringer removed its blocking positions, thereby lifting the obstacles for its competitor, Almirall, to launch its innovative medicine.

The Commission continues to monitor activities in the health care markets. The decision against the French ONP of December 2010, sanctioning ONP for its attempts to fix minimum prices in the French clinical laboratory testing services market as well as for restricting the development of groups of laboratories in the market, was appealed before the General Court in February 2011. Further, the French Parliament adopted a new statute on 13 July 2011 that would have led, *inter alia*, to limiting the creation of groups of clinical laboratories in the French market, thus going against the purpose of the Commission's Decision. The problematic sections of the statute were, however, subsequently declared invalid by the French Constitutional Council, on procedural grounds<sup>125</sup>.

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

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

While the Commission has full competence for the enforcement of the EU competition rules, subject to the control of the European courts, the Commissioner for Competition and his services hold a continuous dialogue on competition issues with the European Parliament. The Commission appreciates Parliament's timely contribution to debates on competition policy and regularly informs it about competition policy initiatives.

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<sup>120</sup> Case COMP/39686 *Cephalon*; IP/11/511, opening of proceedings on 19.04.2011.

<sup>121</sup> Case COMP/39685 *Fentanyl*; IP/11/1228. opening of proceedings on 18.10.2011.

<sup>122</sup> MEMO/10/647 of 3 December 2010; MEMO/09/435 of 6 October 2009.

<sup>123</sup> For further information on patent settlement monitoring see:

<http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>

<sup>124</sup> Case COMP/39246 *Boehringer*, closure of proceedings of 6 July 2011; IP/11/842.

<sup>125</sup> Conseil Constitutionnel – Décision n° 2011-640 DC du 04 août 2011.

In addition to the presence of Commissioner for Competition at meetings and hearings of the ECON committee, the Competition DG keeps Parliament informed about upcoming and announced public consultations, gives briefing sessions to MEPs and staff on a range of current issues, and holds numerous bilateral meetings and discussions on specific topics.

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

The Commissioner for Competition chose to launch the Commission's public consultation on SGEIs in a speech to ECON, underlining the importance he attaches to Parliament's involvement in that dossier, and specifically asking for Parliament's input.

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

Parliament adopted its Resolution on the 2009 report on competition policy on 20 January 2011. In a letter to the ECON Chair on 15 March 2011, the Commissioner for Competition responded to key points made in the Resolution. Parliament was particularly interested in the Commission's activities linked to the financial and economic crisis, and asked the Commission to carry out an evaluation of the temporary State aid measures introduced during the crisis.

In response, the Competition DG prepared a Staff Working Document on the temporary State aid rules during the financial and economic crisis<sup>126</sup> which the Commissioner for Competition sent to the Chair of ECON on 28 September 2011. The Working Document was more extensive than the Parliament's study on the same topic, although both reached similar conclusions: the aid granted to the financial sector had been justified and helped stabilise the financial markets and maintain credit flows to the real economy. One important aspect of the Commission's action, which was not mentioned in the Parliament report, was the restructuring conditions resulting from the Commission's decisions for all the major beneficiaries of State aid. That restructuring minimised the distortions of competition that the aid could have created, and ensured burden-sharing among stakeholders.

In its Resolution, Parliament recalled its 2007 and 2009 Resolutions calling for the Commission to propose legislation to facilitate individual and collective claims for effective compensation for damages resulting from breaches of antitrust law. In response to Parliament's call in the 2009 Resolution for a coherent approach across sectors, the Commission launched a public consultation on collective redress in March 2011. The 2012 Commission Work Programme lists a proposal on antitrust damages actions, which the Commissioner for Competition hopes to present to the College in 2012.

In addition to the official response by the Commission to Parliament's Resolution, in March the Competition DG also sent the ECON committee a detailed response to all of the points made in the Eppink report<sup>127</sup>. Competition DG officials also met members of the ECON

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<sup>126</sup> SEC(2011)1126 final (5.10.2011): Commission Staff Working Paper on the effects of temporary State aid rules adopted in the context of the financial and economic crisis economic crisis.

<sup>127</sup> Texts adopted: P7\_TA(2011)0023, available at

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0374&language=EN>

committee who had expressed an interest in specific areas, for example tax competition, fining policy, financial services and the investigations into the CDS market.

### **Taking Parliament's views into account**

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

The Competition DG organised two seminars for ECON assistants and political advisers of the members of the ECON committee in 2011. The first, in February, covered the main themes in the 2011 Competition Work Programme (SGEIs; the Rescue and Restructuring Guidelines; the Commission's public consultation on Collective Redress) and on fines, given Parliament's interest in this subject. The seminar gave staff the opportunity to ask detailed questions to Competition DG desk officer experts.

A second seminar was organised to coincide with the presentation by the Commissioner for Competition of the 2010 Annual Competition Report, in July 2011. A follow-up briefing for members of the ECON competition working group was offered for September by the Competition DG.

The Director-General of the Competition DG spoke at an Open Coordinators meeting of the ECON committee in May. Senior Competition DG officials also had a number of bilateral meetings with MEPs from ECON and other committees in 2011, on a range of subjects.

#### **Information on Competition DG activities**

All information on current and previous public consultations and Impact Assessments are published on the Competition DG's website<sup>128</sup>. The Competition DG also sends information on the launch of public consultations to the secretariat of the ECON committee. All timely contributions to those consultations by the European Parliament are welcomed, and Competition DG staff can brief MEPs on aspects of particular interest.

All responses to public consultations are published on the internet, as well as any background studies commissioned, together with the Commission's Impact Assessment, and any related Staff Working Papers. It is not common practice to summarise the results of public consultations.

#### **Services of General Economic Interest**

The Commissioner for Competition and Competition DG officials participated in meetings of the Public Services Intergroup on SGEI in the months before the launch of the March 2011 public consultation. The Commissioner for Competition presented the Commission's initial thinking to ECON on 22 March, and reported back to the committee in July and again in November, at which time he stated that he would be able to take into account a number of the concerns raised by Parliament in its Resolution on the SIMON report.

#### **Other subjects of interest to Parliament**

##### **Fines**

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<sup>128</sup> Available at [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

Members of the ECON committee have expressed a range of concerns about the Commission's fining policy. The services have explained the fining methodology in seminars, and in a detailed reply to an MEP letter, and was pleased to participate in a short seminar on fines in November 2011. The Competition DG also published a factsheet on fines, which seeks to explain the reasons for fines and how they are calculated.

Compliance is another theme raised by Parliament. The Schwab report on the 2010 Commission's Report on Competition mentioned the importance of encouraging compliance, as well as ensuring effective deterrence. The Competition DG published a brochure on compliance for companies in November 2011, which directly addresses both points<sup>129</sup>. It helps companies to develop a proactive compliance strategy, summarises the key competition rules companies should respect and generally sets out basic methods to help companies ensure compliance with EU competition rules, particularly small and medium-sized companies. The brochure also confirms the Commission's position that implementing a compliance programme does not have any negative implications for companies, nor will it be recognised as a mitigating factor when calculating the level of fines.

The Commission published its revised Best Practices package in October 2011. As well as strengthening the role of the Hearing Officer, and clarifying the role of economic evidence, that package outlined measures to improve the experience of parties to an antitrust investigation. In particular, statements of objection, which set out the Commission's arguments at an early stage in the case, and to which parties can respond in detail, will include an indication of the parameters of any future fine.

### **Cases and investigative work**

MEPs often 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. However, 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.

The Commission has a range of tools at its disposal for the enforcement of EU competition rules. They include investigations in individual cases, sector inquiries, and working with other Directorates-General on regulatory measures. The Parliament has repeatedly called for sector inquiries in a number of areas, which the Commission has noted. However, sector inquiries are very resource-intensive, and sometimes the same objectives can be achieved as effectively through other types of investigation.

### **Competition DG contact with Parliament in other policy areas**

A number of committees follow issues relating to competition policy. Competition DG officials at all levels have held a series of bilateral meetings with MEPs from other Parliamentary committees, including IMCO, ITRE (where the mid-term review on R&D&I was presented), TRAN, LIBE, JURI, and BUDG. Two files were of particular interest to the Competition DG in 2011.

### **Regulation 1049 – Access to documents**

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<sup>129</sup> Available at [http://ec.europa.eu/competition/antitrust/compliance/index\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/index_en.html)

The report of the committee on Civil Liberties (LIBE) on access to documents proposes to delete the Commission's proposed exemption for documents in the area of competition enforcement (investigations). The Competition DG is concerned that unrestricted access to documents could be damaging to its enforcement activity, particularly in the context of the protection of its leniency programme. The Commission will continue to follow that matter closely through Council and during trilogue discussions.

### **Competition DG engagement with the European Economic and Social Committee**

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 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>130</sup>.

## **IV. ANNEXES**

- (1) List of Competition DG initiatives adopted under CWP 2011
- (2) List of Banking cases (State aid)

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<sup>130</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>  
INT/594 – CESE 1850/2011.

## ANNEX 1: List of Competition DG initiatives adopted under CWP 2011

- Communication on the Reform of State Aid Rules on Services of General Economic Interest – COM(2011) 146 final
- Report on Competition Policy 2010 – COM(2011) 328 final\*
- State aid Scoreboard: Spring 2011 update – COM(2011) 356 final\*
- Best practices in Antitrust proceedings\*:
  - Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (2011/C 308/06)
  - Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695/EU)
  - 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 (Staff Working Paper)
- State aid Scoreboard: Autumn 2011 update – COM(2011) 848 final\*
- Communication 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 – C(2011) 8744 final
- Review of the Framework on State aid to shipbuilding – (2011/C 364/06)
- SGEI package:
  - Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest - C(2011) 9380
  - 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 - (2012/C 8/02)
  - Communication on the European Union framework for State aid in the form of public service compensation (2011) – (2012/C 8/03)

\* relates to other measures not included in the CWP 2011

## ANNEX 2: List of State aid banking cases

### State aid cases - situation – 31/12/2011

#### Decisions adopted by the Commission in 2011

##### AUSTRIA

| Type of measure / Beneficiary              | Type of Decision  | Date of adoption |
|--|---|------------------|
| SA.32745 – Restructuring of Kommunalkredit | Decision not to raise objections<br><a href="#">IP/11/389</a> | 31 March 2011    |

|   |  |                  |
|---|--|------------------|
| SA.32172 and SA.32554 – Temporary approval of aid for Hypo Group Alpe Adria [decision replaced – see below] | Decision not to raise objections<br><a href="#">IP/11/636</a>        | 24 May 2011      |
| SA.32172 and SA.32554 – Replacement decision: Temporary approval of aid for Hypo Group Alpe Adria           | Decision not to raise objections                                     | 19 July 2011     |
| SA.31883 – Restructuring of Österreichische Volksbanken AG  | Decision to open an in-depth procedure<br><a href="#">IP/11/1522</a> | 9 December 2011  |
| SA.31189 – BAWAG Amendment Decision   | Decision not to raise objections<br>-                                | 19 December 2011 |

## BELGIUM

### *Belgium*

|   |                            |                   |
|---|----------------------------|-------------------|
| SA.29833 – Monitoring of KBC: Amendment of certain measures in the Restructuring Plan   |                            | 27 July 2011      |
| SA.30962 – Monitoring of Ethias   |                            | 12 September 2011 |
| SA.33751 – Temporary approval of rescue aid for Dexia Bank Belgium  | <a href="#">IP/11/1203</a> | 17 October 2011   |
| SA.29833 – Monitoring of KBC: extension of the target date of certain divestments by KBC and amendment of restructuring commitments | -                          | 22 December 2011  |

### *Belgium/France/Luxembourg*

|   |  |                  |
|---|--|------------------|
| SA.33760, SA.33763, SA.33764 – Temporary approval of guarantees on the refinancing of Dexia and DCL and opening of in-depth investigation | Opening decision<br><a href="#">IP/11/1592</a> | 21 December 2011 |
|---|--|------------------|

## DENMARK

|   |   |                 |
|---|---|-----------------|
| SA.31867 – Amendments to liquidation aid for Roskilde bank                        | Decision not to raise objections<br><a href="#">EXME 11 / 24.05</a> | 24 May 2011     |
| SA.33001 – Prolongation   | <a href="#">EXME/11/28.06</a>                                       | 28 June 2011    |
| SA.33001 – Amendment of winding-up scheme for credit institutions in Denmark      | Decision not to raise objections<br><a href="#">EXME/11/01.08</a>   | 1 August 2011   |
| SA. 33757 – Extension of the winding-up scheme for credit institutions in Denmark | Decision not to raise objections<br><a href="#">IP/11/1523</a>      | 9 December 2011 |
| SA.32634 – Temporary approval of rescue aid for Amagerbanken                      | Decision not to raise objections<br><a href="#">IP/11/676</a>       | 6 June 2011     |
| SA.31945 – Liquidation aid for Eik Banken   | Decision not to raise objections<br><a href="#">IP/11/677</a>       | 6 June 2011     |
| SA.33117 – Aid for the liquidation of Fionia Bank - revised commitments           | -   | 18 July 2011    |
| SA.33639 – Temporary approval of rescue aid for Max Bank                          | <a href="#">IP/11/1172</a>  | 10 October 2011 |

## GERMANY

|   |                |                 |
|---|----------------|-----------------|
| MC 15/2009 – Landesbank Baden Württemberg "LBBW" – Deka divestment                                  | -              | 14 January 2011 |
| SA.31646 – Monitoring of Sparkasse Köln-Bonn - Prolongation of the deadline for certain divestments | -              | 30 March 2011   |
| SA.28264 (C15/2009) – Restructuring aid for Hypo  | Final decision | 18 July 2011    |

|   |   |                   |
|---|---|-------------------|
| Real Estate   | <a href="#">IP/11/898</a>   |                   |
| SA.29338 (C29/2009) – Restructuring of HSH Nordbank             | Final conditional decision<br><a href="#">IP/11/1047</a>          | 20 September 2011 |
| SA.29590 (C40/2009) – Approval of split-up of WestLB            | Final decision<br><a href="#">IP/11/1576</a>                      | 20 December 2011  |
| SA.33571 – Temporary approval of the recapitalisation of NordLB | Decision not to raise objections<br><a href="#">EXME/11/22.12</a> | 22 December 2011  |

## GREECE

|  |   |                  |
|--|---|------------------|
| SA.32767 – Amendment   | <a href="#">EXME 11/04.04</a>                                     | 4 April 2011     |
| SA.33153 – Prolongation  | <a href="#">EXME 11/27.06</a>                                     | 27 June 2011     |
| SA.33154 – Prolongation  | <a href="#">EXME 11/27.06</a>                                     | 27 June 2011     |
| SA.31154 – Restructuring of Agricultural Bank of Greece (ATE)  | Decision not to raise objections<br><a href="#">IP/11/626</a>     | 23 May 2011      |
| SA.34064 – Temporary approval of second rescue recapitalisation of National Bank of Greece under the Greek recapitalisation scheme | Decision not to raise objections<br><a href="#">EXME/11/22.12</a> | 22 December 2011 |

## HUNGARY

|                         |                               |              |
|-------------------------|-------------------------------|--------------|
| SA.32995 – Prolongation | <a href="#">EXME/11/23.06</a> | 23 June 2011 |
| SA.32993 – Prolongation | <a href="#">EXME 11/09.06</a> | 9 June 2011  |
| SA.32994 – Prolongation | <a href="#">EXME/11/23.06</a> | 23 June 2011 |

## IRELAND

|   |   |                  |
|---|---|------------------|
| SA.33006 – Prolongation (including guarantees on short-term liabilities)                                      | Decision not to raise objections<br><a href="#">IP/11/673</a>     | 1 June 2011      |
| SA.33740 – Prolongation (including guarantees on short-term liabilities)                                      | Decision not to raise objections<br><a href="#">EXME/11/08.12</a> | 8 December 2011  |
| SA.29907 and SA.32504 - Resolution of Anglo Irish Banks and Irish Nationwide Building Society                 | Final Decision<br><a href="#">IP/11/801</a>                       | 29 June 2011     |
| SA.33216 – Second rescue recapitalisation of Bank of Ireland  | Decision not to raise objections<br><a href="#">IP/11/854</a>     | 11 July 2011     |
| SA.33144 – Temporary approval of rescue aid for merged entity Allied Irish Banks/Educational Building Society | Decision not to raise objections<br><a href="#">IP/11/892</a>     | 15 July 2011     |
| SA.33311 – Temporary approval of rescue aid for Irish Life & Permanent Group Holdings                         | Decision not to raise objections<br><a href="#">IP/11/913</a>     | 20 July 2011     |
| SA.33023 – Restructuring of Quinn Insurance Limited   | Decision not to raise objections<br><a href="#">IP/11/1187</a>    | 12 October 2011  |
| SA.33443 – Second Restructuring Plan of Bank of Ireland   | Decision not to raise objections<br><a href="#">IP/11/1572</a>    | 20 December 2011 |
| SA.33170 – Resolution scheme for credit unions in Ireland   | Decision not to raise objections<br><a href="#">IP/11/1574</a>    | 20 December 2011 |

## ITALY

|   |                               |                  |
|---|-------------------------------|------------------|
| SA.34032 – Reintroduction of the Italian Guarantee scheme | <a href="#">EXME/11/15.12</a> | 15 December 2011 |
|---|-------------------------------|------------------|

## LATVIA

|   |  |                 |
|---|--|-----------------|
| SA.30704 – Temporary approval of support to Latvian Mortgage and Land Bank and opening of in- | Opening decision<br><a href="#">IP/12/77</a> | 26 January 2011 |
|---|--|-----------------|

|   |  |  |
|---|--|--|
| depth procedure into the measures for the bank's transformation |  |  |
|---|--|--|

## LITHUANIA

|                         |                               |                 |
|-------------------------|-------------------------------|-----------------|
| SA.32188 – Extension    | <a href="#">EXME/11/21.1</a>  | 21 January 2011 |
| SA.33135 – Prolongation | <a href="#">EXME 11/27.06</a> | 27 June 2011    |

## NETHERLANDS

|   |   |                  |
|---|---|------------------|
| SA.26674 – Restructuring of ABN Amro Group  | Final conditional decision<br><a href="#">IP/11/406</a>           | 5 April 2011     |
| SA.33303 – Additional commitments by SNS Reaal to ensure proper remuneration of a capital injection | Decision not to raise objections<br><a href="#">EXME/11/19.12</a> | 19 December 2011 |

## POLAND

|                                   |                              |              |
|-----------------------------------|------------------------------|--------------|
| SA.33008 and 32946 – Prolongation | <a href="#">EXME/11/28.6</a> | 28 June 2011 |
| SA.33007 – Prolongation           | <a href="#">EXME/11/28.6</a> | 28 June 2011 |

## PORTUGAL

|  |  |                  |
|--|--|------------------|
| SA.32158 – Third prolongation  | <a href="#">EXME/11/21.1</a>                   | 21 January 2011  |
| SA.33178 – Fourth prolongation   | <a href="#">EXME/11/30.06</a>                  | 30 June 2011     |
| SA.34034 – Amendment   | <a href="#">EXME/11/21.12</a>                  | 21 December 2011 |
| SA.32157 – Third extension   | <a href="#">EXME/11/21.1</a>                   | 21 January 2011  |
| SA.33177 – Fourth prolongation   | <a href="#">EXME/11/30.06</a>                  | 30 June 2011     |
| SA.26909 – Banco Português de Negócios – opening of in-depth procedure | Opening decision<br><a href="#">IP/11/1235</a> | 24 October 2011  |

## SLOVENIA

|  |                           |              |
|--|---------------------------|--------------|
| SA.32261 – Temporary approval of rescue recapitalisation of Nova Ljubljanska Banka | <a href="#">IP/11/264</a> | 7 March 2011 |
|--|---------------------------|--------------|

## SPAIN

|  |   |                   |
|--|---|-------------------|
| SA.32990 – Prolongation  | <a href="#">IP/11/673</a>   | 1 June 2011       |
| SA.33402 – Capital injection for Caja de Ahorros de Mediterraneo (CAM)                                     | Decision not to raise objections<br><a href="#">EXME 11/25.07</a> | 24 July 2011      |
| SA.33096 – Temporary approval of rescue aid for NCG Banco  | Decision not to raise objections<br><a href="#">IP/11/1143</a>    | 30 September 2011 |
| SA.33095 – Temporary approval of rescue aid for Unnim Banc   | Decision not to raise objections<br><a href="#">IP/11/1143</a>    | 30 September 2011 |
| SA.33103 – Temporary approval of rescue aid for Catalunya Banc   | Decision not to raise objections<br><a href="#">IP/11/1143</a>    | 30 September 2011 |
| SA.33917 (2011/N) – Temporary approval of the recapitalisation and liquidity support for Banco de Valencia | Decision not to raise objections<br><a href="#">IP/11/1388</a>    | 21 November 2011  |