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EUROPEAN COMMISSION

Brussels, 3.6.2010
COM(2010)282 final

REPORT FROM THE COMMISSION

Report on Competition Policy 2009

SEC(2010)666

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Introduction

1. The first section of this report provides an overview of how the instruments of competition policy, namely the State aid, anti-trust and merger control rules, were further developed and applied. The second section discusses how these and other instruments were deployed in selected sectors. The third section gives an overview of consumer related activities developed last year. Section four focuses on cooperation within the European Competition Network (ECN) and with national courts while section five deals with international activities. In section six, a brief description of inter-institutional cooperation is given.
2. As it was the case last year, the Annual Report on Competition features a focus chapter on a topic considered of particular importance in the field of competition policy. The topic chosen for this year is "Competition policy and the financial and economic crisis".
3. On this basis, special attention is paid in this year's Report to the European Commission's assessment of national measures adopted as a response to the financial and economic crisis, be them national schemes or measures targeting individual companies of the financial sector. In a similar way, particular attention is also given to the measures implemented within the Temporary Framework, to palliate the effects of the crisis on the real economy. A request to that end is made by the European Parliament in its draft resolution on the Annual Report on Competition Policy for 2008, under discussion at the time of finalising this edition of the Annual Competition Report¹.
4. Further information can be found in a detailed Commission Staff Working Document² and on the website of the Competition Directorate-General³.
5. The Lisbon Treaty entered into force on 1 December 2009. Since then, the numbering of the articles has changed. For antitrust, Articles 81, 82 and 86 EC have respectively become Articles 101, 102 and 106 TFEU and the provisions are in substance identical. However, throughout this document, references to the old numbering have been maintained when they relate to proceedings taken before 1 December 2009. Similarly, old references to EC Treaty articles in the field of State aid (Articles 87 to 89 EC) have been maintained when the procedural steps referred to occurred before the entering into force of the Lisbon Treaty.
6. Also, since 1 December 2009, the Court of First Instance (CFI) is named the General Court. However, the term CFI has been maintained in the present Communication for those judgments taken before that date.

¹ Draft report on the Report on competition policy 2008 (2009/2173(INI)), Ms. Sophia in 't Veld (rapporteur - ALDE Group - NL).

² SEC (2010) 666.

³ http://ec.europa.eu/competition/index_en.html

FOCUS CHAPTER: COMPETITION POLICY AND THE FINANCIAL AND ECONOMIC CRISIS

What has been the role of Competition Policy in the context of the crisis?

7. During 2009 the European Union, alongside the rest of the world, has faced an exceptionally severe financial and economic crisis. It has been a challenging year for the economy and for business, and for policy makers. Governments, central banks and financial regulators, together with the European Commission, have worked hard to stabilise the financial system and make sure that a crisis of this type does not occur again in the future. Policy makers have also sought to design policies to minimise the impact of the crisis on the real economy.
8. Since the beginning of the crisis, the Commission's objectives in applying the competition rules have been two-fold. First, to support financial stability by giving, as quickly as possible, legal certainty to rescue measures taken by EU Member States. Second, to maintain a level playing field in Europe and ensure that national measures would not export problems to other Member States.
9. Indeed, early on in the crisis, the Member States decided to inject large amounts of State aid into the financial sector. The European Commission became involved, through its powers to scrutinise State aid under the Treaty provisions on competition. From the beginning of the crisis, competition policy and advocacy played an essential role in preserving one of the EU's biggest assets: the Internal Market.

What was the Commission's policy response?

10. Between October 2008 and August 2009 the Commission adopted four Communications indicating how it would apply the State aid rules to government measures to support the financial sector in the context of the current crisis. On 13 October 2008 the Commission adopted guidance on the application of State aid rules to State support schemes and individual assistance for financial institutions (Banking Communication)⁴. This guidance was issued following the collapse of Lehman Brothers on 15 September 2008, the rescue needs of important market players such as Fortis, Dexia, Bradford & Bingley and Hypo Real Estate, and the announcement of bank bail out or guarantee schemes by Member States such as Denmark and Ireland.
11. The Commission had to deal with numerous notifications of emergency aid measures by Member States. It responded within very tight time frames, reallocating highly committed staff and temporarily recruiting new resources.

Recapitalisation of banks

12. In order to face up to the crisis, Member States had identified various types of solutions, from guarantee-based schemes to recapitalisations. In-depth discussions

⁴ Communication from the Commission - [The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis](#). (OJ C 270, 25.10.2008, p. 8).

took place with the European Central Bank and the Member States and on 5 December 2008 the Commission adopted the Recapitalisation Communication⁵.

13. The Recapitalisation Communication differentiates between banks that are fundamentally sound and banks in distress. It lays down guidelines for evaluating the capital injections which constitute aid. Logically, banks in distress which risk insolvency should be required to pay higher interest rates for the received State support and would be subject to closer scrutiny. Banks in distress that have received aid must restructure so as to restore long-term viability.
14. Both the Banking and Recapitalisation Communications have made it possible to preserve financial stability and to lessen restrictions on the availability of credit whilst keeping distortions of competition to a minimum. In particular, recapitalisation measures have proven to be essential for providing banks with a sufficient capital base, so that they could continue to fulfil the role as a lender to the real economy. At the same time the level of remuneration foreseen for State capital, in combination with step-up mechanisms in schemes and individual measures, ensures that this capital is paid back as early as the economic circumstances permit.
15. Between October 2008 and 31 December 2009, the Commission has approved guarantee schemes for 12 Member States⁶. Seven Member States implemented pure recapitalisation schemes⁷, whilst seven Member States designed mixed/holistic schemes⁸. Spain, Slovenia, the United Kingdom, Hungary and Germany also implemented other forms of support schemes.
16. In terms of aid to individual entities, in 2009 the Commission approved recapitalisation and other support measures to 29 entities⁹.

In the Commerzbank (CoBa) recapitalisation case¹⁰, the Commission approved a EUR 18 billion new capital aid by the German Government, on the basis of a sound business restructuring plan. The business plan presented focuses on CoBa's core business, namely retail and corporate banking, including in Central and Eastern Europe. The bank's volatile investment banking will be reduced and commercial real state activities will be divested. The plan foresees large-scale divestments (amounting to 45% of CoBa's current balance sheet total) and the suspension of payments of dividends and interests. To limit distortions of competition, CoBa will be subject to a general 3-year ban on acquisitions of financial institutions or other potential competing businesses. In addition, the plan imposes a price leadership prohibition, in relation to CoBa's top three competitors in markets/products where its market share is above 5%. The Commission concluded that the business plan presented is likely to restore the bank's long term viability.

Impaired assets

⁵ [Commission Communication Recapitalisation of financial institutions](#) in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition. (OJ C 10, 15.1.2009, p. 2).

⁶ Cyprus, Denmark, Finland, Ireland, Italy, Latvia, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden..

⁷ Denmark, Finland, France, Italy Poland, Portugal and Sweden.

⁸ Germany, United Kingdom, Greece, Austria, Poland, Hungary and Slovakia.

⁹ ING, KBC, Parex Banka, Anglo Irish Bank, Bank of Ireland, Allied Irish BankFortis, Dexia, Nord LB, IKB, Kaupthing Bank Finland, Ethias, SdB, Banco Privado Portugues, Hypo Real Estate, WestLB, Fionia, HSH Nordbank, Hypo Tirol, LBBW, Kaupthing Luxemburg, Caisse d'Epargne/Banque Populaire, Mortgage Bank of Latvia, Northern Rock, Commerzbank, Lloyds Banking Group, BAWAG, Hypo Group Alpe Adria and RBS.

¹⁰ [IP/09/711](#).

17. Despite the fact that recapitalisation schemes had been put in place in many Member States, in early 2009 investors were not showing signs of confidence in the system. Bank guarantees and recapitalisations did not translate into credits flowing to the economy, uncertainty remained about undisclosed losses on assets having lost value. Confronted with this situation, some Member States proposed "asset protection schemes". The UK government put forward a proposal for a GBP 500 billion protection scheme, while the Dutch announced a USD 40 billion asset protection for ING.
18. On 25 February 2009, after detailed discussions with the Member States, the Commission adopted the Communication on the Treatment of Impaired Assets in the Community banking sector ("Impaired Assets Communication")¹¹. The Impaired Assets Communication responded to a growing consensus on the need to tackle the root causes of the crisis in the form of toxic assets on banks' balance sheets. In this Communication, the Commission set out how it would assess asset relief measures for financial institutions under State aid rules. To date, only Germany has a national impaired asset relief scheme approved by the Commission.
19. The Communication is based on the principles of transparency and disclosure, adequate burden sharing between the State and the beneficiary, and prudent valuation of assets based on their real economic value. Given the complexity surrounding the appropriate valuation of the assets, the Commission decided to call upon technical experts to undertake the valuation in an independent manner. Such experts were chosen under a framework contract following a tender procedure.

On 12 May, the Commission approved additional aid measures to Fortis Bank and Fortis Holding¹². The additional aid by the Belgian and Luxembourg States resulted from the amendments brought to the agreement between Fortis Holding, BNP Paribas, Fortis Bank and the Belgian and Luxembourg authorities. The package of measures included relieving Fortis Bank of certain impaired assets. In line with the Impaired Assets Communication, Fortis Bank supports a significant part of the losses, since the price paid by the Belgian State to purchase or guarantee the structured credits is considerably below their real economic value. Also, as a way to prevent potential distortions of competition, Fortis committed not to expand through acquisitions in the banking market in Belgium and Luxembourg.

A forward-looking restructuring approach

20. As time passed, the Commission started to look at the medium term, at the way beneficiaries of the aid could start paying back the money borrowed and stand on their own feet. Hence, on 14 August, the Commission adopted a Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ("Restructuring Communication")¹³.
21. The Restructuring Communication reflects the Commission's thinking for a future beyond the current crisis, with a viable banking sector. It sets out the principles

¹¹ [Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector](#) (OJ C 72, 26.3.2009, p. 1).

¹² [IP/09/743](#).

¹³ [Communication from the Commission "The return to viability and the assessment of restructuring measures](#) in the financial sector in the current crisis under the State aid rules" (OJ C 195, 19.8.2009, p. 9).

applicable to those beneficiaries that were not only in need of short-term rescue aid, but required aid to implement structural changes to their business models.

22. The Communication retains the main principles of the Community Guidelines on rescue and restructuring aid to companies in financial difficulties, but has been adapted to the extraordinary economic circumstances of the financial crisis. The Commission's restructuring approach implies compliance with several conditions. First, banks that are obliged to restructure need to demonstrate their capacity to return to long-term viability without State support. Second, they have to contribute to the restructuring costs (burden sharing). Third, they have to adopt measures to limit competition distortions, whether divestments in core markets and/or balance sheet reductions.
23. The above principles contribute to addressing the issue of moral hazard. In order not to reward the risky behaviour that has occurred in the past, the Communication clarifies that appropriate remuneration of the aid will be required, imposing temporary restrictions of coupon and dividend payments to bond- and shareholders. Tailor-made, case-specific measures to limit the distortions of competitions resulting from the aid, which are predominately determined by the relative/absolute size of the aid and the position of the beneficiary on the relevant markets, are also necessary for any aid to be compatible with the Treaty. Restructuring plans have been approved amongst others for Commerzbank, ING, RBS, Lloyds' Banking Group and KBC, whilst many others are currently being assessed, within formal investigation procedures.

On 18 November, the Commission approved the restructuring plan and illiquid asset back-up facility of Dutch bank ING¹⁴. On the basis of the notified restructuring plan, ING will pay a significant proportion of the restructuring costs, ING's long term commercial viability will be restored, and the aid will not lead to undue distortions of competition. The restructuring plan foresees that ING will reduce the risk profile and complexity of its operations and will sell its insurance activities over time. ING will also carve out, according to a detailed trustee-supervised timetable, a business unit (Westland Utrecht Hypotheekbank (WUH) / Interadvies), to step up competition in the Dutch retail banking market.

But the financial crisis was not only about State aid

24. The financial and economic crisis also gave rise to challenges under the EU mergers and antitrust rules. From a substantive point of view it was important to maintain a rigorous enforcement of the merger and antitrust rules in order to preserve the competitiveness of European business and facilitate its emergence from the crisis.
25. In the wake of the financial crisis, the Commission was confronted with complex jurisdictional issues under the EC Merger Regulation. Indeed, questions arose as to whether nationalisations of financial institutions needed to be notified to the Commission under the Merger Regulation. This depended on whether or not the nationalised entity would remain an economic unit with an independent power of decision, or whether such nationalised entity could be considered to form part of a single economic entity with other State controlled undertakings.

¹⁴ [IP/09/1729](http://ec.europa.eu/competition/mergers/cases/ing.htm).

26. In most cases, the Commission was satisfied that the holding arrangements ensured independence and thus that no concentration was taking place. However, in the German Hypo Real Estate bank case¹⁵ a concentration had to be notified.
27. The economic crisis did not have a substantial impact on the Commission's policy and practice regarding commitments in merger cases. Structural commitments, and notably divestitures, remained the most appropriate type of remedies in order to prevent, durably, the competition concerns which would have been raised by a merger. In some cases, the Commission, when evaluating a request for the extension of a deadline for the implementation of a remedy, took into account the difficulty of finding buyers in the prevailing economic climate. Similarly, the Commission's merger procedures have proven well suited to their end, also under difficult economic conditions. Notably, the Commission granted six derogations from the stand still obligation in a number of urgent cases having regard to the prevailing economic climate, albeit in full conformity with a well established and strict practice.
28. In antitrust, the Commission was called upon to consider arguments relating to difficulties faced by companies in paying fines imposed by the Commission under the antitrust rules. The Commission carefully reviewed the conditions for "inability to pay". These conditions are only fulfilled if payment of the full amount of the fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value. In line with this principle the Commission assessed requests on a case-by-case basis. An inability to pay claim was accepted in the Heat Stabilisers case, which led to a substantial reduction of the fine.

And the crisis also hit the real economy

29. As banks were deleveraging and becoming much more risk-averse than in previous years, companies started to experience difficulties with access to credit. As part of its response, the Commission adopted in January 2009 the "Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis"¹⁶. This Temporary Framework (applicable until end-2010) gives Member States additional possibilities to tackle the effects of the credit squeeze on the real economy.
30. The Temporary Framework formed part of a wider Commission response to the economic crisis: the European Economic Recovery Plan adopted in November 2008, which was endorsed by the European Council. In the context of the financial crisis, the Commission amended the temporary framework in February 2009¹⁷ to provide Member States with additional possibilities to tackle the effects of the credit squeeze on the real economy. The amended framework takes into account different level of collateralisation (in particular for low rating categories) when calculating the permissible guarantee premium). In October, the Commission adopted an amendment to the framework, in order to allow for a separate compatible limited

¹⁵ Case COMP/M.5508 SOFFIN/Hypo Real Estate.

¹⁶ OJ C 83, 7.4.2009, p. 1. The Commission applies the Temporary Framework from 17 December 2008, the date on which it agreed in principle its content.

¹⁷ Communication from the Commission –Amendment of the Temporary framework for State aid measures to support access to finance in the current financial and economic crisis - adopted on 25 February 2009.

amount of aid of EUR 15.000 for farmers¹⁸. Lastly, in December, the framework was modified so as to further facilitate access to finance especially in Member States with low labour costs¹⁹.

31. The Temporary Framework focuses on two objectives: first, maintaining continuity in companies' access to finance (e.g. by allowing Member States to grant State guarantees for loans at reduced premia or subsidised interest rates for loans and the granting of up to EUR 500 000 per company); and second, encouraging companies to continue investing in a sustainable future (e.g. by allowing subsidised loans for the development of green products). In addition to the above mentioned new aid measures, the Temporary Framework includes temporary adaptations of existing guidelines as a simplification of the rules on short term export credit insurance and an increase in the ceilings for risk capital investments.
32. By 31 December 2009, the Commission had approved 79 measures in 25 Member States aimed at stabilising companies and jobs in the real economy²⁰.
33. The temporary framework is a horizontal instrument, which has allowed Member States to support all sectors of the economy hit by the crisis, including the car industry. The Temporary Framework was widely used to support the car industry. As any other sector, the car industry can benefit from aid up to EUR 500 000 per company for the next two years (small amounts of aid), State guarantees on loans, subsidies loans (including specifically for green cars) and facilitated access risk capital for SMEs. Some of the measures the temporary framework provides for, are of particular relevance for the car industry since they allow the financing of projects for the development of low emission vehicles.
34. The Commission approved aid for green products, notified by France, United Kingdom, Spain, Germany and Italy²¹. Furthermore, a number of Member States including France, United Kingdom, Germany, Belgium (Flemish region), and Romania have installed guarantee and/or subsidised loan schemes from which the car industry (as well as other industries) can benefit²². For instance, a subsidised loan of EUR 1.5 billion was granted by Germany to Opel following the bankruptcy proceedings of its mother company General Motors²³, while France granted both Renault and PSA subsidised loans of EUR 3 billion²⁴. In addition in June, the

¹⁸ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 261, 31.10.2009, p. 2).

¹⁹ Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 303, 15.12.2009, p. 6).

²⁰ Excluding temporary measures in the agricultural sector.

²¹ N11/2009 (France), N72/2009 (United Kingdom), N140/2009 (Spain), N426/2009 (Germany), N542/2009 (Italy).

²² See for instance N23/2009 (France), N71/2009 (United Kingdom), N27/2009 (Germany), N117/2009 (Flemish region/Belgium), N286/2009 (Romania) for the guarantee schemes, N38/2009 (Germany), N15/2009 (France), N257/2009 (United Kingdom) for the subsidised loan schemes.

²³ See http://www.bundesregierung.de/nn_774/Content/DE/Artikel/2009/11/2009-11-26-opel.html

²⁴ See <http://www.gouvernement.fr/gouvernement/automobile-le-plan-d-aide-en-chiffres>

Commission approved a State guarantee on an EIB loan notified by Sweden for Volvo Cars²⁵.

35. Finally, according to the temporary framework, Member States had to give feedback to the Commission by 31 October, on its implementation and effectiveness in the reactivation of the bank lending and in supporting companies²⁶. The Commission prepared a questionnaire which was published on DG Competition's webpage, so as to also obtain comments from interested parties. In general, Member States considered the Temporary Framework as a useful tool which has provided an important support for companies. They confirmed that companies were still facing difficulties in access to finance and, therefore, the continuity of the Temporary Framework during 2010 was justified. Member States mainly implemented the 500k measure (the granting of EUR 500 000 per company) and the subsidised guarantees.

Deliveries and costs involved

36. Between October 2008 and 31 December 2009, the Commission had adopted 73 decisions in relation to 33 schemes and 68 decisions on individual measures to 38 banks. These 141 decisions encompass 21 Member States. Because of the urgency, some of those decisions were taken overnight, to avoid a domino effect and the major collapse of the EU's financial system.
37. Between October 2008 and the end of 2009, the Commission approved around EUR 3.63 trillion (equivalent to 29% of the EU-27 GDP) of State aid measures to financial institutions.
38. As far as the real economy is concerned, by 31 December 2009, the Commission had approved 79 State aid measures in 25 Member States. Out of these measures, 18 related to guarantees, 11 to short-term export credit measures, nine to reduced interest rate loans, six to risk capital measures and five to reduced interest rate loans for green products. A large number of the measures approved (30) related to the granting of up to EUR 500 000 per undertaking.
39. The autumn 2009 State aid Scoreboard shows that the overall aid volume rose in 2008 from around 0.5% of GDP to 2.2% of GDP or EUR 279.6 billion due to the financial and economic crisis. Crisis-related aid represented roughly 1.7% or EUR 212.2 billion and related to aid to financial institutions only²⁷. Aid to the real economy under the Temporary Framework started to be implemented by Member States only in 2009. Crisis measures aside, total aid amounted in 2008 to 0.5% of

²⁵ Case N 80/2009 Volvo Cars, a subsidiary of Ford, applied for a EUR 200 million loan from EIB for a EUR 2 billion project for R&D into green technologies. The EIB approval was conditional upon receiving State guarantee on the loan. On 5 June 2009 the Commission approved the notified guarantee, out of which 90% under the Temporary Framework and 10% as aid free as the fee for it was market conform.

²⁶ See point 6 of the Communication from the Commission – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 16, 21.1.2009, p. 1).

²⁷ The maximum volume of Commission approved measures set up by Member States in 2008 to stabilise the financial markets amounted to € 3361 billion. According to the annual reports submitted by Member States, Member States implemented measures amounting to a nominal value of € 958 billion. According to first estimates, the aid element of the support measures put in place in 2008 – as proxy for the benefits passed by the State to the benefitting financial institutions – amounted to € 212.2 billion.

GDP or EUR 67.4 billion, a level similar to 2007 and the years before. Aid was mainly directed towards horizontal objectives of common interest (on average 88%), of which regional aid, research and development and environmental aid represented around two third whereas rescue and restructuring aid fell. Although figures for 2009 are not yet available, the volume and share of non-financial aid in 2009 is not expected to change dramatically.

Conclusion

40. There is no doubt about the benefits of the State aid granted to the banking and insurance sector. The liquidity injected has prevented the meltdown of the financial system and has contributed to re-opening markets, provided more funds to the real economy and helped financial markets reach a more normal market functioning. In this crisis context, competition policy helped support financial stability and created the right conditions for stable financial markets in the short and longer terms. The timely intervention of the Commission has also limited the consequences of the credit crunch for the real economy. Equally important, the use of competition rules has helped protect taxpayers' money.
41. Competition policy is not a static and rigid policy; it takes account of changing economic realities. This combination of firm principles with flexible processes has allowed competition policy and State aid in particular, to play a constructive and stabilising role in the EU's financial system and the real economy.

1 INSTRUMENTS

1.1 State aid control

1.1.1. Shaping and applying the rules

42. The implementation of the State Aid Action Plan (SAAP)²⁸ continued in 2009, with the adoption of guidance papers on training aid²⁹ and aid to disabled and disadvantaged workers³⁰. Guidance on the in-depth assessment of regional aid to large investment projects³¹ was also adopted. The principles detailed in these guidelines were applied for the first time in the Dell Poland case³², where the Commission concluded that the investment project by Dell to set-up a manufacturing plant in Łódź would significantly contribute to regional development and that these benefits outweigh any potential negative effects on competition.

²⁸ State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009 (COM(2005)107 final, 7.6.2005).

²⁹ Communication from the Commission - Criteria for the compatibility analysis of training State aid cases subject to individual notification (OJ C 188, 11.8.2009, p. 1).

³⁰ Communication from the Commission - Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification (OJ C 188, 11.8.2009, p. 6).

³¹ Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects (OJ C 223, 16.9.2009, p. 3).

³² C 46/2008.

43. The Commission also clarified several aspects of the application of the SGEI (Services of General Economic Interest) Package through answers to 16 questions asked in the framework of the Interactive Information Service³³.
44. The Commission extended the validity of the State aid assessment criteria of the 2001 Cinema Communication³⁴ until 31 December 2012³⁵.
45. The Commission prolonged until October 2012 the validity of the current Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty³⁶. Under these guidelines, the Commission authorised the aid granted and planned by Poland to the Gdansk Shipyard and finalised the in-depth investigation started in June 2005.
46. Also in July, a revised Broadcasting Communication was adopted, so as to provide more clarity on the Commission's assessment of publicly funded new media services³⁷.
47. In September, the Commission adopted Guidelines on the application of State aid rules to public funding for the rapid deployment of broadband networks, and also addressed public funding to the deployment of so-called next generation access broadband networks³⁸. These measures are aimed at providing equitable broadband coverage at affordable prices for European citizens.

1.1.2. State aid control – the Simplification Package

48. The Simplification Package entered into force on 1 September. The Package is composed of a Best Practice Code³⁹ and a Notice on a Simplified Procedure⁴⁰, both aiming at improving the effectiveness, transparency and predictability of the Commission's State aid procedures.

1.1.3. Recovery policy

49. Recovery of unlawful State aid has not been conceived as a penalty, but as a means to restore the situation previous to the granting of the illegal and unlawful aid. By 31 December, the amount of illegal and incompatible aid recovered increased from EUR 2.3 billion in December 2004 to EUR 10.4 billion. The percentage of illegal and incompatible aid still to be recovered has evolved accordingly (from 75% at the end

³³ http://ec.europa.eu/services_general_interest/registration/form_en.html

³⁴ Communication on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 43, 16.2.2002, p. 6.

³⁵ Communication concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001, OJ C 31, 7.2.2009, p. 1.

³⁶ Prolongation of Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 156, 9.7.2009, p. 3).

³⁷ Communication on the application of State aid rules to public service broadcasting of 2 July 2009, OJ C 257, 27.10.2009.

³⁸ 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.

³⁹ Code of Best Practice for the conduct of State aid control procedures (OJ C 136, 16.6.2009, pp. 13-20).

⁴⁰ Notice from the Commission on a simplified procedure for treatment of certain types of State aid (OJ C 136, 16.6.2009, pp. 3-12).

of 2004 to 12% at 31 December 2009). The share of the total amount recovered has however slightly decreased between 2008 and 2009 (from 90.9% to 88%), due to seven new recovery decisions adopted in 2009 and high amounts of aid identified⁴¹ in several 2008 decisions.

1.1.4. State aid enforcement by national courts

50. In April, the Commission issued a new Notice on State aid Enforcement by National Courts⁴². This Notice seeks to provide more detailed guidance on all aspects of private State aid enforcement. It offers national courts more practical and user friendly Commission support in their daily work, as National judges would be able to ask the Commission for information in its possession and/or for its opinion on the application of the State aid rules.

1.1.5. Monitoring of State aid measures

51. Since 2006, the Commission has been stepping up the "ex post monitoring" of the main types of aid covered by Block Exemption Regulations (BER) and therefore no longer subject to the notification obligation. The analysis of the results of the first three years monitoring exercises shows that, overall, the part of the existing State aid architecture (schemes and BERs) functions in a satisfactory manner. All Member States are cooperating with the Commission, albeit many have submitted the information requested with considerable delay. The CFI also handed down a judgment⁴³ which confirmed the legality of the monitoring exercises.

1.1.6. Horizontal State aid

52. In 2009, the Commission approved 29 aid schemes and adopted four non aid decisions on the basis of the Community Framework for research and development and innovation⁴⁴; 19 out of these measures were pure R&D schemes, two were innovation-oriented schemes and 12 were mixed, pursuing both R&D and innovation objectives. In addition, and following an in-depth economic assessment, the Commission decided not to raise objections on nine individually notifiable aids to large R&D projects. Furthermore, it monitored information submitted on aids to 73 other R&D projects, which exceeded EUR 3 million although without falling under the duty for individual notification.

53. As to State aid granted in favour of R&D projects under the GBER⁴⁵, there were 51 schemes providing aid for fundamental research, 186 for industrial research and 181 for experimental development. At the same time, the GBER was also used by Member States for measures relating to innovation, 57 of which referred to industrial property rights for SMEs, 26 to young innovative enterprises, 47 to innovation advisory and support services, and 23 to the loan of highly qualified personnel.

⁴¹ This is due to the fact that the Commission cannot always quantify the aid amount to be recovered (in such cases, Commission Decisions include information enabling the Member State to determine the aid amount).

⁴² OJ C 85, 9.4.2009, p. 1.

⁴³ Judgment in Case T-376/07, *Germany v. Commission*, 25.11.2009.

⁴⁴ OJ C 323, 30.12.2006, p. 1.

⁴⁵ OJ L 214, 9.8.2008, p. 3.

54. As far as environmental aid is concerned, the Commission approved 34 aid schemes and four individual applications, most of them under the Environmental Aid Guidelines⁴⁶. Furthermore, the Commission cleared one case as not constituting State aid. Moreover, following a formal investigation procedure, the Commission took two negative decisions, one conditional decision as well as a positive decision. At the same time the Commission decided to open formal investigations in four other cases related to environmental aid.
55. In the area of risk capital financing for SMEs, and further to the six aid schemes authorised under the Temporary Framework, the Commission approved 25 measures under the Risk capital guidelines⁴⁷; 16 of which complied with the safe harbour provisions allowing for a light assessment. The Commission conducted a detailed assessment of the compatibility of the measures in seven other cases, and considered that they did not involve State aid in the remaining two cases. Furthermore, 13 additional aid schemes were implemented in 2009 under the GBER, which also started to be used by Member States for risk capital purposes.
56. In total the Commission was informed of 971 aid measures which were implemented in 2009 under the GBER. Apart from the above mentioned objectives, these exempted aid measures also covered the fields of employment aid, training aid, aid for environmental purposes⁴⁸ and regional aid.
57. In the field of regional aid, in 2009 the Commission approved 45 schemes, mostly on the basis of the Guidelines on national regional aid for 2007-2013⁴⁹. It also approved 12 ad hoc aid measures in favour of single enterprises for investments in areas under the Regional Aid maps 2007-2013⁵⁰. On the basis of the same Guidelines on national regional aid for 2007-2013, State aid to nine large investment projects⁵¹ were approved and a formal investigation procedure was initiated regarding two other such projects⁵² as well as one *ad hoc* regional aid case⁵³. The Commission finally closed the formal investigation procedure for two other large investment projects with a positive decision⁵⁴.
58. Under the Temporary Framework, in 2009 the Commission adopted 30 decisions approving limited amounts of compatible aid schemes, 15 decisions approving measures for State aid in the form of guarantee and nine decisions approving measures in the form of subsidized interest rates.

⁴⁶ OJ C 82, 1.4.2008, p. 1.

⁴⁷ OJ C 194, 18.8.2006, p. 2.

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

⁴⁹ OJ C 54, 4.3.2006.

⁵⁰ Decisions to be found at: http://ec.europa.eu/competition/state_aid/regional_aid/regional_aid.html

⁵¹ In the energy sector: Case N538/2008 Ersol Thin Film, Case N453/2008 Sunfilm AG, Case N539/2008 ASI Industries/Ersol Solar Energy, Case N180/2009 EnPlus Centrale Termoelettrica di San Severo. In the automotive sector: Case N473/2008 Ford España, Case N671/2008 Aid to Mercedes Benz Manufacturing Hungary, Case N635/2008 Fiat Sicily, Case N674/2008 Volkswagen Slovakia. In the paper industry: Case N203/2008 Hamburger Spremberg GmbH.

⁵² Case N113/2009 Aid to Audi Hungaria Motor Ltd, Case N588/2008 Petróleos de Portugal – Petrogal S.A.

⁵³ Case N357/2008 Fri-el Acerra s.r.l.

⁵⁴ Case C21/2008 Sovello Ag (formerly EverQ) and Case N46/2008 Aid to Dell Poland.

1.1.7. *State aid for Coal*

59. During 2009 the Commission approved aid to the coal sector in Germany⁵⁵, Slovakia⁵⁶ and Spain⁵⁷. These aid schemes are intended to support access to coal reserves and to restructure the coal sector in these countries.
60. In view of the forthcoming expiry of Regulation 1407/2002⁵⁸ (on 31 December 2010), the Commission carried out a public consultation on the future policy options with respect to aid to the coal industry⁵⁹.

1.1.8. *State aid in the agricultural sector*

61. The Commission assesses State aid granted to the agriculture and to the forestry sector on the basis of the Guidelines for State aid in the agriculture and forestry sector 2007 to 2013⁶⁰. In 2009, the Commission registered 139 new State aid cases and adopted 146 decisions.
62. In the context of the amendment to the Temporary Framework, the maximum amount of aid to agricultural undertakings can only be granted once until 31 December 2010. Any agricultural *de-minimis* aid received since the beginning of 2008 by individual undertakings in compliance with Commission Regulation (EC) No 1535/2007⁶¹ has to be deducted from this amount.

1.2 **Antitrust – Articles 101, 102 and 106 TFEU**

1.2.1. *Shaping and applying the rules*

Report on the functioning of Regulation 1/2003

63. On 29 April, the Commission adopted its Report on the functioning of Council Regulation 1/2003⁶². The Report takes stock of how the modernisation of EU antitrust enforcement rules has worked since the entry into force of the Regulation on 1 May 2004. It describes the experience in all major areas covered by the Regulation and evaluates the progress made by introducing new instruments and working methods. The Report also highlights a number of aspects which merit further evaluation.

Private enforcement of the EU antitrust rules

64. The EU antitrust rules have direct effect; as such, they confer rights on individuals, including the right to damages, which can be enforced before national courts (private enforcement). The Commission launched a policy project aimed at ensuring the

⁵⁵ Case N563/2008 *Aid for German hard coal in 2008* (OJ C 199, 25.8.2009, p. 1).

⁵⁶ Case N347/2009 – Slovak Republic, Baňa Dolina a.s.

⁵⁷ Case NN20/2009, ex N647/2008 *Aid for the coal sector in 2008-2010* (OJ C 234, 29.9.2009, p. 5).

⁵⁸ OJ L 205, 2.8.2002, p.1.

⁵⁹ http://ec.europa.eu/energy/coal/consultations/2009_07_15_en.htm

⁶⁰ Community guidelines for State aid in the agriculture and forestry sector 2007-2013 (OJ C 319, 27.12.2006, p. 1).

⁶¹ Commission Regulation (EC) No 1535/2007 of 21 December 2007 on the application of Articles 87 and 88 to *de minimis* aid in the sector of agricultural production (OJ L 337, 21.12.2007, p. 35).

⁶² COM(2009)206 final, accompanied by a Staff Working Paper, SEC(2009)574 final.

effectiveness of EU antitrust damages actions and in 2008 adopted a White Paper on damages actions for breach of the EC antitrust rules⁶³ putting forward concrete suggestions. The White Paper's suggestions include: (i) clarifying what type of damages can be claimed by whom; (ii) facilitating the position of consumers and other indirect victims in situations where an illegal overcharge has been passed on to them; (iii) improving the efficiency of follow-on actions for damages by providing that final infringement decisions of national competition authorities constitute sufficient proof of an infringement; (iv) ensuring that claimants can obtain fair access to evidence through disclosure in court; (v) providing for effective collective redress; and (vi) suggesting rules to ensure a smooth interplay between private and public enforcement, including protection of leniency programmes.

65. In March 2009, both the European Parliament and the European Economic and Social Committee adopted opinions supporting the approach of the White Paper. The Commission services have started to work on the technical instruments designed to achieve the objectives of the White Paper, while taking due account of the opinions and comments received within the public consultation. Further, the Commission services have started work on a non-binding guidance on quantification of damages.

Cartels

66. In 2009, the Commission adopted six cartel decisions⁶⁴ imposing fines amounting to EUR 1.62 billion on 43 undertakings⁶⁵. It continued to attach high priority to the detection, investigation and sanctioning of cartels. For the first time it issued cartel decisions to undertakings in Slovakia and Slovenia (*Calcium Carbide* case – regarding calcium carbide powder and granulates for the gas and metallurgic industry). The fight against cartels with an international dimension proved to be very successful, epitomized by the decisions in *Marine Hoses*⁶⁶ (a market sharing and price fixing cartel concerning marine hoses, used to load oil and other petroleum products from offshore facilities onto vessels and offload them back to offshore facilities, for which the EU co-operated with the US, UK and Japan), *Power Transformers*⁶⁷ (a market sharing agreement between European and Japanese producers relating to power transformers, auto transformers and shunt reactors with a voltage range of 380 kV and above) and *Heat Stabilisers* (a market sharing and price fixing cartel relating to plastic additives, involving EU, US and Swiss companies).
67. Following the annulment by CFI of the Decision on *Concrete Reinforcing Bars* in 2007⁶⁸, on 30 September the Commission readopted its initial decision from 2002 and retained all eight undertakings, confirming an almost identical fine on them⁶⁹.

⁶³ COM(2008)165 final, see <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

⁶⁴ Cases COMP/39406 *Marine Hoses*; COMP/39401 *E.on/GDF*; COMP/39396 *Calcium Carbide*; COMP/37956 *Concrete reinforcing bars (re-adoption)*; COMP/39129 *Power Transformers* and COMP/38589 *Heat Stabilisers*.

⁶⁵ Includes entities not fined such as immunity applicants. If more than one legal entity of the same group were subject to the decision, they are counted as one.

⁶⁶ See Annual Competition Report 2007, p. 43.

⁶⁷ See IP/09/1432.

⁶⁸ T-77/03 *Feralpi Siderurgica SpA/Commission* [2007] ECR II-139 Summ.pub.

⁶⁹ With the re-adoption decision the Commission imposed a fine of EUR 83 250 million, reducing the fine for one of the undertakings from EUR 16 140 million to EUR 14 350 million because of a shift in the latter's relative size. See IP/09/1389.

Other agreements and concerted practices

68. On the application of the antitrust rules to non-cartel cases, the Commission adopted on 14 October a commitment decision⁷⁰ rendering legally binding commitments offered by the International Association of Classification Societies (IACS) to address concerns raised in the course of an investigation pursuant to Article 81 EC and Article 53 of the EEA Agreement in the worldwide ship classification market.
69. A number of BERs and, when relevant, accompanying guidelines relating to the application of Article 101 TFEU, due to expire in the near future were reviewed in 2009. These reviews concern in particular the BERs for Vertical and for Horizontal Agreements, the "Insurance" BER⁷¹ (see section 2.1) and the "Motor vehicle" BER (see section 2.9).
70. The Commission issued draft BER and Guidelines for public consultation on Vertical Agreements in July. It is proposed to maintain, in essence, the current rules, while at the same time adapting and refining them to take account of developments in the marketplace, in particular the market power of buyers, and the continuous increase of online sales.
71. As regards Horizontal Agreements, the revision of the guidelines⁷² is linked to the revision of the "Specialisation agreements BER"⁷³ and the "Research and Development agreements BER"⁷⁴. The horizontal guidelines cover not only specialisation and R&D agreements but also other types of agreements such as production, commercialisation and joint purchasing agreements.
72. A Regulation (EC) No 906/2009 on the application of Article 81(3) EC to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)⁷⁵ was also adopted. This Regulation allows operational cooperation to provide a joint liner shipping service between liner shipping carriers subject to certain conditions. Such type of cooperation has been exempted from the EU competition rules since 1995. The new Regulation enters into force on 25 April 2010 for five years.

Abuse of dominant positions (Article 102 TFEU)

73. The Commission's Guidance on its enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings was published in the Official Journal (OJ) on 24 February⁷⁶.

⁷⁰ Case [COMP/39416 Ship Classification](#).

⁷¹ Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector ([OJ L 53, 28.2.2003, p. 8](#)).

⁷² Commission Notice – Guidelines on the applicability of Article 81 to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2.

⁷³ Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) to categories of specialisation agreements, OJ L 304, 5.12.2000, p. 3.

⁷⁴ Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) to categories of research and development agreements, OJ L 304, 5.12.2000, p. 7.

⁷⁵ OJ L 256, 29.9.2009, p. 31.

⁷⁶ OJ C 45, 24.2.2009, p. 7.

74. The Commission adopted final decisions in the energy (RWE and GdF) and IT (Intel, Microsoft and Rambus) sectors. It also decided to open proceedings in the sectors for electronic communications (Polish and Slovakian incumbents in the broadband market) and financial services (Standard & Poor's and Thomson Reuters). More detailed information is to be found in the respective sectorial sections of this Report.

13. State measures (Public undertakings/Undertakings with exclusive and special rights – Article 106 TFEU)

75. On 2 February, the Commission sent a Reasoned Opinion⁷⁷ (RO) to the Slovak Republic requesting it to bring its Competition Act in conformity with EU law. On 25 June it closed the infringement procedure⁷⁸, following the repeal of the contested provision in its entirety with effect from 1 June. An infringement procedure against the Slovak Republic is still on-going for the non-implementation of the 2008 Commission decision on the Slovakian postal Law⁷⁹.

76. In August, the Commission adopted a decision accepting commitments made by Greece to ensure fair access to Greek lignite deposits⁸⁰.

77. In October, following the opening up of the distribution of "Livret A" by banks, the infringement procedure which had been opened against France in 2007, was closed.

1.4 Merger control

1.4.1. Shaping and applying the rules

78. In 2009 the number of mergers notified was below the record levels of previous years. In total, 259 transactions were notified to the Commission and 243 final decisions were adopted. Of these final decisions, 225 transactions were approved without conditions during Phase I, 82 decisions were approved without conditions under the normal procedure and 143 (or 63.6%) were cleared using the simplified procedure. 13 transactions were cleared in Phase I subject to conditions. Furthermore, the Commission initiated five Phase II proceedings, with three decisions adopted subject to conditions. Two cases were withdrawn in Phase II and six cases in Phase I. No prohibition decisions were taken during the year.

1.4.2. Article 21

79. The legal powers provided for in Article 21(4) of the EC Merger Regulation allow the Commission to intervene in order to deter and ultimately prevent Member States from preventing or restricting the takeover of domestic companies by companies from other Member States on unjustified grounds. This provision also provides a procedural framework for the exchange of views in a timely manner with Member States to distinguish interventions with a protectionist motivation from a genuine

⁷⁷ See [Press Release IP/09/200](#), 2.2.2009.

⁷⁸ See [Press Release IP/09/1182](#), 23.7.2009. The successful resolution of this case follows a previous infringement procedure against the Czech Republic where similar problematic legislation was also repealed in 2007.

⁷⁹ Case COMP/39562 *Slovakian postal Law* ([OJ C 322](#), 17.12.2008, p. 10). See also [Press Release IP/08/1467](#), 7.10.2008.

⁸⁰ OJ C 243, 10.10.2009, p. 5.

pursuit of legitimate public interests (other than competition). From its inception, there have been fewer than 20 cases where Article 21 was applied. After a period of more frequent application of Article 21, in 2009 no new proceedings were opened under this provision.

1.4.3 *The Merger Report*

80. The Commission presented a report to the Council on the application of the Merger Regulation⁸¹ (ECMR), five years after its entry into force. The report concludes that overall, the jurisdictional thresholds and the referral mechanisms have provided the appropriate legal framework for a flexible allocation and re-allocation of cases between the Commission and the National Competition Authorities (NCAs). The report also finds that the post-notification mechanisms have proven to continue to be useful in re-allocating cases notwithstanding the introduction of the pre-notification referral mechanisms.
81. Finally, the report highlights areas where there may be potential room for improvement, such as the operation of the "two-thirds rule", the way to handle cases which are notified to three or more NCAs ("one stop shop" concept) and the issue of further convergence of the applicable national rules in their relation to Community rules.

2 **SECTOR DEVELOPMENTS**

2.1. **Financial services**

82. Financial markets are crucial to the functioning of modern economies. The year has been extremely difficult for the financial sector and the Commission has played a leading role by providing legal certainty in the field of State aid and merger control⁸².
83. In the area of financial market data distribution, formal proceedings were opened against Standard & Poor's for allegedly abusing its dominant position related to the issuance and licensing of securities identifier codes called ISINs⁸³. The Commission also opened formal proceedings against Thomson Reuters concerning the use of RICs⁸⁴.
84. Further to the Commission's opening of investigations in 2008 regarding VISA Europe's cross-border MIFs, an SO was sent in April. In May the Commission commissioned an external study comparing the costs of payments by cash and by cards.

⁸¹ Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, and the accompanying Commission staff working paper, 18 June 2009 (COM(2009)281 final).

⁸² For more detail, see the Focus Chapter within this Report.

⁸³ ISIN are the global identifiers for securities and are governed by the International Standardisation Organisation (ISO) standard 6166. They are indispensable for a number of operations that financial institutions carry out (for instance, reporting to authorities or clearing and settlement) and cannot be substituted by other identifiers for securities. See also [MEMO/09/508](#).

⁸⁴ RICs are short, alphanumerical codes that identify securities and their trading locations. They are used to retrieve information from Thomson Reuters' real-time datafeeds, for example real-time information on stock prices at a certain exchange. See also [IP/09/1692](#) of 10.11.2009.

85. The Commission continued to closely monitor the implementation of the 2007 prohibition decision on MasterCard's cross-border Multilateral Interchange Fees (MIFs). In April MasterCard committed to reintroduce substantially lower cross-border MIFs⁸⁵ to repeal scheme fee increases, and to change its system rules in order to increase transparency and competition in the payment cards market⁸⁶. The implementation of these undertakings is closely monitored by an independent trustee.
86. The Commission carried out a review of the functioning of the current Insurance BER⁸⁷ before it expires on 31 March 2010. On the basis of the evidence found during the Review, the draft BER renews the exemption for two categories of agreement: joint compilations, tables and studies; and agreements on co-insurance and co-reinsurance pools. The draft was published for consultation on 5 October for eight weeks.
87. SEPA (Single Euro Payments Area) was an important focus of antitrust advocacy in the field of financial services. SEPA is a self-regulatory initiative launched by the European Banking Industry and led by the European Payments Council (EPC) to move to an integrated Euro payments area, ensuring that cross border payments become as easy and efficient as domestic payments.
88. In the course of 2009, informal discussions were held with potential new entrants – Payfair and Monnet in particular – notably to clarify the compatibility of their envisaged financing mechanisms with competition rules and to encourage effective SEPA-compliant competition in payment cards market.
89. The dialogue launched with the EPC in 2007 continued in 2009, with a focus on interchange fees for SEPA Direct Debit (SDD), governance of the EPC and of the schemes as well as standardisation. In March, the Commission and the ECB issued a joint statement clarifying financing principles for SDD, including the possibility to charge multilateral interchange fees in some Member States on a transitional basis⁸⁸. On 2 November, Regulation 924/2009⁸⁹ on cross-border payments entered into force and the Commission and the ECB published guidance on the long-term financing of SDD⁹⁰. The guidance concerns the period when the transitional MIF arrangements no longer apply.
90. Between 3 November and 14 December the Commission launched a public consultation on further guidance to participants in the SDD scheme as regards the assessment of collective financing mechanisms under European competition rules. Following the consultation, the Commission may, if appropriate, decide to adopt

⁸⁵ Following the new methodology, the maximum weighted average MIF per transaction is now reduced to 0.30% for consumer credit cards and to 0.20% for consumer debit cards.

⁸⁶ See [IP/09/515](#) and MEMO/09/143.

⁸⁷ Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector ([OJ L 53, 28.2.2003, p. 8](#)).

⁸⁸ [Joint statement by the European Commission and the European Central Bank clarifying certain principles underlying a future SEPA direct debit \(SDD\) business model](#), SEC(2009)397.

⁸⁹ OJ L 266, 9.10.2009, p. 11.

⁹⁰ [Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit SEC \(2009\)1472](#).

further guidance to provide greater clarity and predictability on the general framework of analysis.

2.2. Energy and Environment

91. On 6 April the European Parliament and the Council adopted the climate-energy legislative package containing measures to fight climate change and promote renewable energy that had been proposed by the Commission in January 2008. The package contains a directive on renewable energy establishing sustainability criteria for biofuels and bioliquids⁹¹ which are also relevant for the assessment of State aid in that area. Moreover, the European Parliament and the Council adopted a Directive revising the EU Emissions Trading System (ETS) for greenhouse gases⁹².
92. On 13 July the European Parliament and the Council adopted the Internal Energy Market package⁹³ and on 16 July the Commission adopted a proposal for a Regulation concerning measures to safeguard security of gas supply.
93. The Commission has been very active in enforcing competition policy in the energy sector, on the basis of the knowledge acquired through the Energy Sector Inquiry⁹⁴. The development of effective competition in these markets should result in increased security of supply, reduced environmental impact, greater innovation and the supply of energy at competitive prices to the EU's households and businesses.
94. On 18 March, a decision⁹⁵ was adopted in the RWE Gas Foreclosure case rendering divestiture commitments previously proposed by RWE legally binding and closed its investigation. In the same vein, commitments offered by GDF Suez⁹⁶ were made legally binding through the adoption on 2 December of a decision under Article 9 of Regulation 1/2003. The commitments will make it easier for competitors to enter the French gas market. In addition, on 4 November, the Commission launched a market test on commitments offered by the French energy company EDF, in the framework of the *EDF Customer Foreclosure* case⁹⁷. Together with the reform of the regulated electricity market being implemented by the French government⁹⁸, the commitments in this case have the potential to constitute an important step towards a fully competitive electricity market in France. On 22 December 2009, a preliminary assessment within the meaning of Article 9 of Regulation 1/2003 was sent to E.ON AG and its subsidiaries, including E.ON Ruhrgas AG and E.ON Gastransport GmbH, expressing concerns as to a violation of Article 102 TFEU (ex-Article 82 EC). In

⁹¹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16).

⁹² Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140, 5.6.2009, p. 63).

⁹³ OJ L 211, 14.8.2009.

⁹⁴ Communication from the Commission: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final report) (COM(2006)851 final, 10.1.2007), and DG Competition report on energy sector inquiry (SEC(2006)1724, 10.1.2007).

⁹⁵ [See IP/09/410](#), 18.3.2009.

⁹⁶ Case COMP/39316.

⁹⁷ Case COMP/39386 *Long term electricity contracts in France*.

⁹⁸ [See MEMO/09/394](#).

parallel, the Commission prepared a market test notice within the meaning of Article 27(4) of Regulation 1/2003.

95. As far as other energy cases are concerned, on 8 July the Commission adopted a decision under Article 7 of Regulation 1/2003, imposing total fines of EUR 1 106 million on E.ON and GDF Suez for market sharing⁹⁹. These are the first fines the Commission has imposed for an antitrust infringement in the energy sector and represent the highest fine imposed in 2009. On 6 March a SO was addressed to *ENI S.p.A.*¹⁰⁰ in relation to the company's management and operation of natural gas transmission pipelines. On 23 April, proceedings were opened in the *Svenska Kraftnät*¹⁰¹ case. On 6 October, the Commission launched a market test¹⁰² inviting comments from interested parties on the commitments offered by Svenska Kraftnät (SvK), the Swedish transmission system operator.
96. In the field of mergers, the Commission cleared with remedies three transactions concerning the supply of gas and electricity: Vattenfall's acquisition of Nuon Energy¹⁰³, RWE's purchase of Essent¹⁰⁴ and Segebel's acquisition by EDF¹⁰⁵. Two cases¹⁰⁶ arising from the remedies given by E.ON antitrust proceedings¹⁰⁷ were cleared unconditionally.
97. In the area of State aid control progress was made with regard to French regulated electricity tariffs¹⁰⁸. On 19 September, the French government announced a reform plan providing for a phasing-out of the tariffs and a mechanism aimed at stimulating competition on the electricity market by ensuring access to competitors to a certain percentage of EDF nuclear generation capacity at a regulated price. The adoption of the French legislation is required before the Commission can take a final decision¹⁰⁹.
98. On 18 November, a negative decision with recovery was adopted in the preferential tariffs case for Alcoa plants in Veneto and Sardinia¹¹⁰.
99. In the area of renewable energies the Commission authorised a Cypriot scheme¹¹¹, three Danish schemes¹¹² and an Austrian scheme subsidising feed-in tariffs in favour of producers of renewable energies¹¹³. Concurrently an in-depth investigation is

⁹⁹ Case COMP/39401. [See IP/09/1099](#), 8.7.2009.

¹⁰⁰ Case COMP/39315. [See MEMO/09/120](#), 19.3.2009.

¹⁰¹ Case COMP/39351. [See MEMO/09/191](#), 23.4.2009.

¹⁰² See [IP/09/1425](#), 6.10.2009.

¹⁰³ Case COMP/M.5496 Vattenfall/Nuon decision.

¹⁰⁴ Case COMP/M.5467 RWE/Essent.

¹⁰⁵ Case COMP/M.5549 EDF/Segebel.

¹⁰⁶ Case COMP/M.5512 Electrabel/E.ON (certain assets) and M.5519 E.ON/Electrabel acquired assets.

¹⁰⁷ Cases COMP/39388 and COMP/39389 E.ON electricity.

¹⁰⁸ Case C17/2007 (ex NN19/07) *Regulated electricity tariffs in France* (OJ C 96, 25.4.2009, p. 18).

¹⁰⁹ MEMO/09/394, 15.9.2009.

¹¹⁰ Case C36b/2006 *Preferential electricity tariff – Alcoa* (not yet published).

¹¹¹ Case N143/2009 *Aid scheme to encourage electricity generation from large commercial wind, solar, photovoltaic systems and biomass* (OJ C 247, 15.10.2009, p. 2).

¹¹² Case N359/2008 *Supplement for electricity generated by incinerating biomass* (OJ C 179, 1.8.2009, p. 1); Case N354/2008 *Supplement for electricity from new wind turbines* (OJ C 143, 24.6.2009, p. 6);

Case N356/2008 *Supplement for electricity generated with bio gas* (OJ C 151, 3.7.2009, p. 16).

¹¹³ Case N446/2008 *Second amendment of the Green Electricity Act 2008* (OJ C 217, 11.9.2009, p. 12).

initiated concerning certain provisions of the Austrian scheme which seem to favour large energy consumers¹¹⁴.

100. Subject to conditions, a Danish project to grant CO₂ tax exemptions to companies covered by the EU's ETS¹¹⁵ was cleared. Furthermore the Commission approved tax reductions for the Danish cement industry, the first of such cases to be approved under the new rules for aid in the form of reductions of environmental taxes in the Environmental Aid Guidelines¹¹⁶. On the other hand, the Commission concluded that a similar tax exemption concerning the Dutch ceramic industry was not compatible¹¹⁷, since the tax exemption could not be found necessary or proportional.
101. The Commission authorised a UK scheme introducing a trading system for CO₂ emissions related to energy consumption¹¹⁸. Furthermore, Polish¹¹⁹, Lithuanian¹²⁰ Bulgarian¹²¹ schemes providing for tax reduction to stimulate the production of certain forms of biofuels were also adopted.
102. The Commission dealt with a number of Austrian measures promoting electricity and heat generation¹²² and distribution infrastructure¹²³; it authorised three Polish schemes on heating distribution networks¹²⁴, on electricity connection networks for renewable energies¹²⁵ and on modernisation of electricity distribution networks¹²⁶. The Commission also cleared a scheme for a tender to conduct two front end engineering and feasibility studies (FEED studies) on two industrial-scale carbon capture and storage (CCS) demonstration projects in the UK¹²⁷.
103. Finally, on the basis of the Temporary Framework¹²⁸ the Commission approved national aid schemes from France¹²⁹, Germany¹³⁰, Spain¹³¹, Italy¹³² and the United

¹¹⁴ C24/2009 (ex N446/2008) *Second amendment of the Green Electricity Act 2008* (OJ C 217, 11.9.2009, p. 12).

¹¹⁵ Case C41/2006 *Modification of the CO₂ tax for quota-regulated fuel consumption in the industry* (the public version is not yet available).

¹¹⁶ Case N327/2008 *NOx tax reductions for large polluters and companies reducing pollution, and tax reductions for biogas and biomass*.

¹¹⁷ Case C5/2009 (ex N210/2008) *Exemption from environmental taxes for ceramic producers*.

¹¹⁸ Case N629/2008 *Carbon Reduction Commitment (CRC)*.

¹¹⁹ Case N57/2008 *Operating aid for biofuels – Poland* (OJ C 247, 15.10.2009, p. 1).

¹²⁰ Case N372/2007 *Support for biofuel* (OJ C 106, 8.5.2009, p. 14).

¹²¹ Case N607/2008 *Tax reductions for biofuels (Bulgaria)*.

¹²² Case N461/2008 *Law on Combined Heat and Power Stations (CHP)* (OJ C 109, 13.5.2009, p. 1).

¹²³ Case N485/2008 *Aid Scheme for District Heating and Cooling Infrastructure and Cooling Installations (AT)* (OJ C 191, 14.8.2009, p. 1).

¹²⁴ Case N54/2009 *Aid for modernisation of heating distribution networks in Poland* (OJ C 204, 29.8.2009, p. 2).

¹²⁵ Case N55/2009 *Aid for constructing and modernisation of electricity connection networks for renewable energies in Poland* (OJ C 206, 1.9.2009, p. 3).

¹²⁶ Case N56/2009 *Aid for modernisation and replacement of electricity distribution networks in Poland* (OJ C 206, 1.9.2009, p. 4).

¹²⁷ Case N74/2009 *CCS Demonstration Competition – FEED* (OJ C 203, 28.8.2009, p. 2).

¹²⁸ Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

¹²⁹ Case N11/2009 *Régime temporaire de prêts bonifiés pour les entreprises fabriquant des produits verts* (OJ C 106, 8.5.2009, p. 22).

¹³⁰ Case N426/2009 *Federal Framework for low interest loans for the production of green products* (OJ C 225, 18.9.2009, p. 2).

Kingdom¹³³, to preserve investments in products with an environmental benefit (i.e. green products). The schemes were dealt with in an accelerated procedure.

2.3. Electronic communications

104. Providers of electronic communications services continued to operate within the confines of the EU regulatory framework for electronic communications¹³⁴. Ex ante regulation under the Regulatory Framework builds on competition law principles. This approach has been adopted by National Regulatory Authorities (NRAs) in their assessment of electronic communication markets.
105. In 2009 the Commission received 161 notifications from NRAs and adopted 87 comments letters and 59 no-comments letters within the Community consultation mechanism under Article 7 of the Framework Directive whereas 9 cases were still open at the end of the year. In one case¹³⁵, the Commission raised serious doubts as to the compatibility of the notified measures with EU law and opened a second phase investigation.
106. On 7 May the Commission issued a Recommendation on termination rates¹³⁶ setting out a methodology for regulating termination rates, aiming at ensuring consistency of regulatory approaches. On 1 July a new EU Regulation on intra-community roaming became applicable. The new rules will apply until the summer of 2012 and, by the summer of 2010, the Commission will report on their functioning to the European Parliament and Council.
107. The Commission encourages aid measures having the objective to provide adequate broadband coverage at affordable prices for all European citizens. Until 2009, the Commission has assessed and approved the use of State aid and other types of public

¹³¹ Case N140/2009 *Competitiveness plan of the automotive sector – Realisation of investments Aimed at the manufacture of more environmental friendly products* (OJ C 146, 26.6.2009, p. 2).

¹³² Case N542/2009 Aid for the production of green products.

¹³³ Case N72/2009 Temporary Aid for the production of green products (OJ C 145, 25.6.2009, p. 7).

¹³⁴ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ([OJ L 108, 24.4.2002, p. 33](#)), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ([OJ L 108, 24.4.2002, p. 7](#)), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ([OJ L 108, 24.4.2002 p. 21](#)), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ([OJ L 108, 24.4.2002, p. 51](#)), Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ([OJ L 201, 31.7.2002, p. 37](#)). These Directives have recently been amended by Directives 2009/140/EC and 2009/136/EC (OJ L 337, 18.12.2009, p. 37 and 11).

¹³⁵ Case AT/2009/970 concerning the Austrian Wholesale broadband access market

¹³⁶ Termination rates are wholesale tariffs charged by the operator of a called party to the operator of the calling party's network. The tariffs have a considerable impact on consumers' phone bills and are therefore subject to price regulation by the national regulatory authorities. Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU (OJ L 124, 20.5.2009).

funding of approximately EUR 2 billion¹³⁷ in Europe that generated investments to broadband networks of more than EUR 3 billion.

108. The Broadband Guidelines adopted in September address not only aid to basic broadband networks (ADSL, cable, mobile, wireless or satellite broadband services) but also support to very high speed NGA networks (fibre-based or advanced upgraded cable networks at the current stage). The guidelines also provide additional explanation about the way the existing case law applies in the broadband sector, for those cases in which a Member State qualifies the operation of a broadband network as a service of general economic interest (SGEI). In this context, the Commission approved public financing worth EUR 59 million for an NGA project in the French department of Hauts-de-Seine¹³⁸.
109. In the antitrust field, the Commission initiated proceedings against the Polish and Slovakian incumbents in the broadband market¹³⁹.

2.4. Information technology

110. The information and communication technology sector is of particular importance for driving innovation and realizing the potential of the digital economy. Information technology markets are frequently prone to network effects, as illustrated by the Commission's 2004 *Microsoft* case.¹⁴⁰ These effects may result in customer lock-in as well as in the emergence of dominant market positions, which are not in and of themselves problematic, but may necessitate timely competition law enforcement to ensure competition on the merits in the markets concerned or in related markets. In this context, interoperability and standards are key recurring issues in an increasingly inter-connected world.
111. In the *Intel* case¹⁴¹ a prohibition decision was issued on 13 May, finding that Intel had infringed Article 82 EC by engaging in anticompetitive practices aimed at excluding competitors from the market for x86 Central Processing Units (CPU). These practices harmed consumers throughout the EEA. By undermining its competitors' ability to compete on the merits of their products, Intel's actions undermined competition, reduced consumer choice and hindered innovation. The decision imposes a fine of EUR 1.06 billion on Intel, which is the highest fine ever imposed on a single company by the Commission. Intel lodged an appeal against the decision with the CFI on 22 July¹⁴².
112. On 16 December 2009, the Commission made legally binding on *Microsoft* commitments it had offered to address the competition concerns raised by the Commission in a Statement of Objections in January 2009 relating to the tying of Microsoft's web browser, Internet Explorer, to its dominant client PC operating system, Windows. These commitments should result in greater and more informed

¹³⁷ Out of which EUR 1.5 billion constituted as State aid within the meaning of Article 107 TFEU.

¹³⁸ Commission decision of 30 September 2009 on N331/2008 "*Réseau à très haut débit en Hauts-de-Seine*". Not yet published.

¹³⁹ [MEMO/09/203, 27.4.2009](#).

¹⁴⁰ Case COMP/37.792 *Microsoft* (OJ L 32, 6.2.2007, p. 23).

¹⁴¹ Case COMP/37990 *Intel* (OJ C 227, 22.9.2009, p. 13).

¹⁴² T-286/09 *Intel v Commission* (OJ C 220, 12.9.2009, p. 41).

choice of web browsers for consumers in the EEA, and in more freedom for computer manufacturers. Microsoft committed (a) to distribute a Choice Screen software update to users of Windows client PC operating systems within the EEA by means of Windows Update that will offer users an unbiased choice between the most widely used web browsers in the EEA, and (b) to make available a mechanism in Windows 7 and subsequent versions of Windows in the EEA enabling PC manufacturers and end users to turn Internet Explorer on and off.¹⁴³

113. In the *Rambus* case, the Commission had expressed concerns that Rambus was imposing unreasonable royalties for the use of certain patents for DRAM chips used in virtually all PCs. The Commission adopted a decision on 9 December 2009 that renders legally binding commitments offered by Rambus that in particular put a cap on its royalty rates.¹⁴⁴ In 2008, worldwide DRAM sales exceeded US\$ 34 billion (more than EUR 23 billion). Rambus committed to put a worldwide cap on its royalty rates for five years. Rambus agreed to charge zero royalties for the earlier generations of chips concerned in combination with a maximum royalty rate of 1.5% for the later generations of chips concerned. This is substantially lower than the 3.5% Rambus was previously charging.
114. The case shows once more that an effective standard-setting process should take place in a non-discriminatory, open and transparent way to ensure competition on the merits and to allow consumers to benefit from technical development and innovation¹⁴⁵. The Commission is currently revising the antitrust guidelines for horizontal agreements and intends to consolidate the existing chapter on standardisation to provide more guidance on standard-setting. The draft will be ready for public consultation in early 2010. The Commission will also continue to investigate and intervene as appropriate in specific cases where there are competition concerns.

2.5. Media

115. The Commission continued discussions with senior consumer and industry representatives about the business opportunities created by the Internet and the existing barriers to increased online retailing of music and goods in Europe, through the Online Commerce Roundtable. A report on opportunities and barriers to online retailing was published in May 2009 and two meetings of the Roundtable under the aegis of the Commissioner for Competition were held in September and October 2009, focusing on online music. The Roundtable initiative resulted in two joint statements: on online distribution of music and on rights ownership information. A number of the Roundtable participants also announced concrete steps and commitments that should result in improved access of European consumers to music online¹⁴⁶.

¹⁴³ The Decision is published on the website of the Directorate-General for Competition under "*Antitrust cases*".

¹⁴⁴ A non-confidential version of the Decision and the commitments is available on the Commission's website at: <http://ec.europa.eu/comm/competition/antitrust/cases>.

¹⁴⁵ The decision and the commitments are published on the website of the Directorate-General for Competition under "*Antitrust cases*".

¹⁴⁶ All the documents are available at http://ec.europa.eu/competition/sectors/media/online_commerce.html

116. In 2009, the Commission continued to closely monitor the transition from analogue to digital terrestrial broadcasting in Italy in the context of the infringement procedure that it launched in 2006 concerning the Italian broadcasting legislation. Following close contacts with the Commissioners for Competition and Information Society, the Italian authorities adopted new criteria for the "digitization" of terrestrial television networks in Italy aimed at ensuring that more frequencies would be available to newcomers and to smaller existing broadcasters. The tender for the allocation of the frequencies is expected to be launched in early 2010¹⁴⁷.
117. As regards State aid, the Commission continued to monitor the transition (switch-over) from analogue to digital terrestrial broadcasting in the EU Member States. The CFI confirmed on 6 October a negative decision concerning Germany¹⁴⁸, also based on a lack of technology neutrality of the scheme¹⁴⁹.
118. On 2 July, the Commission adopted a revised Broadcasting Communication which aims at providing more clarity on the Commission's assessment of publicly funded new media services¹⁵⁰. Throughout the year, the Commission adopted a number of positive individual decisions concerning the financing of public service broadcasting systems in France, Spain, Austria and Denmark. In June, it adopted a proposal for making the Swedish press aid to high circulation metropolitan newspapers compatible with the State aid rules¹⁵¹.

2.6. Pharmaceutical industry & Health

Pharmaceutical Industry

119. In 2009 the Commission concluded its inquiry into the EU pharmaceutical sector. The inquiry sought to examine the reasons for the observed delays in the entry of generic medicines onto the market and the apparent decline in innovation as measured by the number of novel medicines reaching the market. The inquiry dealt with the competitive relationship (i) between originator and generic companies and (ii) amongst originator companies and made important policy recommendations on how to improve the functioning of the sector. The Commission published its Final Report on 8 July¹⁵².
120. In the final report of the sector inquiry, the Commission invited all interested stakeholders to bring potential competition concerns to the attention of the competition authorities.
121. The Commission also opened proceedings against Servier, investigating among other things patent settlement agreements, concluded by Servier and a number of generic operators, which might be anti-competitive. This investigation does not form part of

¹⁴⁷ The Commission had sent to Italy a Reasoned Opinion in this case on 18.7.2007.

¹⁴⁸ Case C-25/2004 *DVB-T Berlin Brandenburg*. This judgment was appealed by Germany in December. The appeal also concerned the issue of technology neutrality

¹⁴⁹ Cases T-8/06, T-21/06, T-24/06.

¹⁵⁰ Communication on the application of State aid rules to public service broadcasting of 2 July 2009, OJ C 257, 27.10.2009.

¹⁵¹ Case E4/2008.

¹⁵² Commission Communication of 8 July 2009 on the Executive Summary of the Pharmaceutical Sector Inquiry Report, press release [IP/09/1098](#).

the sector inquiry, but the knowledge acquired during the sector inquiry has allowed the Commission to draw conclusions on the areas where Commission action based on competition law could be appropriate and effective.

122. With regard to the regulatory framework, the Final Report highlights three main areas of concerns: patents, marketing authorisations and pricing and reimbursement. With respect to patents the Commission has reaffirmed the urgent need for the establishment of a Community patent and for a unified and specialised patent litigation system in Europe.
123. In relation to the issue of parallel trade in medicines the judgement of the European Court of Justice (ECJ) of 6 October provided important clarifications on restrictions of parallel trade in the pharmaceutical sector, in particular regarding so-called dual pricing systems¹⁵³.
124. In the field of merger control, several large mergers of pharmaceutical companies took place in 2009, confirming the trend of consolidation in the industry. All cases were cleared in the first phase either with or without commitments. The assessment of pharmaceutical mergers has shown that animal health markets have generally become quite concentrated. In order to allow the new entry of a purchaser into the field of animal health vaccines, the divestiture package in the Pfizer/Wyeth¹⁵⁴ case included for the first time a production facility.

Health Care Services

125. The Commission's actions in this field geared towards State aid, where it received a number of complaints from private hospitals against allegedly unfair treatment or excessive compensation towards publicly-owned hospitals in various Member States, the latter being often subject to allegations of cross-subsidizing commercial activities from public financing. Most of the complaints came from Member States who already opened up their markets to competition (e.g. Germany and Belgium).
126. On 28 October, the Commission adopted a positive decision finding that the public financing granted by the Belgian authorities in favour of public hospitals in the Brussels region was in line with the requirements set out in the Treaty¹⁵⁵. It also approved in June the new Irish scheme of levies and tax relief in the health insurance sector¹⁵⁶.

¹⁵³ See Case C-501/06 *GlaxoSmithKline v. Commission* (2009), available at: <http://eur-lex.europa.eu>. In March 1998, GSK notified to the Commission its pricing policy for 82 medicines in Spain applicable to Spanish wholesalers. According to the notified policy GSK charged a different price to wholesalers depending on the final destination of the product, i.e. if the product was intended for consumption in Spain a lower price would apply, and if exported, a higher price was charged. A number of wholesalers and wholesaler associations lodged complaints against this policy with the Commission, which in May 2001, adopted a decision declaring that GSK had infringed Article 81(1) EC.

¹⁵⁴ See Case COMP/M.5476 *Pfizer / Wyeth*.

¹⁵⁵ Case NN54/2009 *Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique*. The public version of this decision is not yet available. It will be displayed as soon as it has been cleansed of any confidential information.

¹⁵⁶ Case N582/08 *Health Insurance intergenerational solidarity relief* (Ireland). Final decision C(2009)3572 final (OJ C 186, 8.8.2009).

127. In the area of antitrust, in October the Commission adopted a SO for a suspected infringement of Article 81 EC by the French Association of Pharmacists (i.e., *Ordre National des Pharmaciens, Conseil National de l'Ordre des Pharmaciens, Section G de l'Ordre National des Pharmaciens and Conseil Central de la Section G de l'Ordre des Pharmaciens*)¹⁵⁷. The Commission was concerned that ONP may be imposing minimum prices for clinical analysis and restricting the development of some market players with a view to protecting the economic interests of its members, the French pharmacists.

2.7. Transport

128. Competition policy in the transport sector aims to ensure an efficient functioning of markets which have recently been liberalised or which are in the process of liberalisation. To this end, the regulatory framework continued to be modernised, bringing transport sector within the generally applicable competition rules. The regulatory work was complemented by investigation and enforcement actions.
129. In the road transport sector, the new Regulation on public passenger transport services¹⁵⁸ entered into force on 3 December. The regulation lays down the rules applicable to the compensation of public service obligations in inland traffic.
130. The Commission examined a number of State aid cases relating to bus services in Denmark and Germany. In the field of urban transport, a formal investigation procedure was closed regarding the reform of the financing method for the special pension scheme for the staff of RATP, the French public transport company¹⁵⁹.
131. In line with the wider Community objectives of the common transport policy and environmental protection, the Commission authorised a regime promoting the purchase of more environmentally-friendly heavy goods vehicles in Slovenia¹⁶⁰. The Commission also authorised a German aid scheme aiming at supporting market acceptance of available highly efficient vehicle technologies¹⁶¹ and an aid scheme supporting the purchase of low-carbon buses in England¹⁶².
132. Regarding the improvement of public transport infrastructure, several major projects were authorised, among which the construction and maintenance of the motorways A1¹⁶³ and A2¹⁶⁴ in Poland.
133. In the area of rail transport, the Commission approved the acquisition of the Polish railway company PCC Logistics by Deutsche Bahn AG¹⁶⁵ on 12 June. In October,

¹⁵⁷ Case COMP/39510 *LABCO/ONP*.

¹⁵⁸ Regulation (EC) No. 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger services by rail and road and repealing Council regulations (EEC) No. 1191/69 and No. 1107/70 (OJ L 315, 3.12.2007).

¹⁵⁹ Case C42/2007 (OJ L 327, 12.12.2009).

¹⁶⁰ Case N395/2008 (OJ C 125, 5.6.2009).

¹⁶¹ N457/2009.

¹⁶² Case N517/2009.

¹⁶³ Cases N151/2009, N152/2009 (OJ C 164, 16.7.2009).

¹⁶⁴ Case N462/2009.

¹⁶⁵ Case COMP/M.5480.

the Commission referred to France a concentration by which SNCF would take joint control of Keolis, an undertaking active in passenger public transport¹⁶⁶.

134. As in previous years, the Commission adopted several State aid decisions to promote rail transport and combined transport in several Member States, including Bulgaria¹⁶⁷ the Czech Republic¹⁶⁸, Germany¹⁶⁹ and the UK (restructuring of Eurostar)¹⁷⁰.
135. In the area of maritime transport, the Commission adopted in June a Communication on State aid to ship management companies¹⁷¹. The Commission adopted positive decisions regarding State aid to seafarers in Italy¹⁷² and Finland¹⁷³. It also concluded the formal procedure opened in 2007 regarding the DIS regime in Denmark. It accepted the extension of the DIS regime to cable-laying vessels by applying by analogy the Maritime Guidelines¹⁷⁴. In addition, it concluded the investigation procedures regarding tonnage tax schemes in Ireland¹⁷⁵, Denmark¹⁷⁶, approved an amendment to the Dutch tonnage tax scheme¹⁷⁷ and the introduction of a tonnage tax scheme in Slovenia¹⁷⁸ and Poland¹⁷⁹.
136. The Commission partially authorised a Greek¹⁸⁰ and a Latvian¹⁸¹ port infrastructure development project and initiated a formal investigation procedure regarding certain fiscal measures in favour of the port sector in France¹⁸². In addition, it concluded the formal investigation procedure initiated in 2008 regarding the public financing of ferry shipping services between the Scottish mainland and the islands off the west and north coasts of Scotland¹⁸³. With the exception of one route, the Commission confirmed that the public service obligations for the western and northern islands were legitimately defined and entrusted on the operators. In the field of mergers, Maersk, the world's largest shipping conglomerate, acquired Broström¹⁸⁴.

¹⁶⁶ Case COMP/M.5557 *SNCF / CDPQ / Keolis / Effia*.

¹⁶⁷ Case N175/2009 (OJ C 246, 14.10.2009).

¹⁶⁸ Cases N409/2008, N410/2008 and N411/2008 (OJ C 106, 8.5.2009).

¹⁶⁹ Case N324/2009 (OJ C 299, 9.12.2009).

¹⁷⁰ Case N420/2008 (OJ C 183, 5.8.2009).

¹⁷¹ Communication from the Commission providing guidance on State aid to ship management companies (OJ C 132, 11.6.2009).

¹⁷² Case N219/2009 (OJ C 196, 20.8.2009).

¹⁷³ Cases N120/2009 (OJ C 232, 26.9.2009), N67/2009 (OJ C 232, 26.9.2009) and N300/2009 (OJ C 299, 9.12.2009).

¹⁷⁴ Case C22/2007 (OJ L 119, 15.5.2009).

¹⁷⁵ Case C2/2008 (OJ L 228, 1.9.2009).

¹⁷⁶ Case C5/2007 (OJ L 315, 2.12.2009).

¹⁷⁷ Case N457/2008 (OJ C 106, 8.5.2009).

¹⁷⁸ Case N325/2007 (OJ C 53, 6.3.2009).

¹⁷⁹ Case C34/2007.

¹⁸⁰ Cases N169/2008, N105/2008, N168/2008 and C21/2009.

¹⁸¹ Case N385/2009.

¹⁸² Case N614/2008 (OJ C 122, 30.5.2009).

¹⁸³ Case C16/2008, not yet published.

¹⁸⁴ Case COMP/M.5346 *APMM/Broström*.

137. In the field of aviation, the Regulation on computer reservation systems (CRS)¹⁸⁵ entered into force on 29 March. The new Directive on airport charges entered into force on 15 March¹⁸⁶.
138. On 18 June the Council and the European Parliament approved an amendment to the existing rules¹⁸⁷, aiming at bringing more flexibility in slot allocation in order to counteract the impact of the crisis on air transport. The measure temporarily freezes the "use it or lose it" rule during the 2009 summer season and allows airlines to keep their rights over slots.
139. The airline industry faced significant turbulence in 2009, with a fall in passenger and cargo demand which resulted in significant losses for many carriers and the restructuring of the sector. The restructuring took the form of intensified cooperation within global airline alliances resulting in joint venture agreements covering transatlantic routes. The European airline industry went through a process of consolidation with mergers of both network and low-cost carriers¹⁸⁸. Some large network carriers, in particular Lufthansa, seized this opportunity to expand via acquisitions of smaller regional players, namely Brussels Airlines¹⁸⁹, Bmi¹⁹⁰ and Austrian Airlines¹⁹¹.
140. On 8 April the Commission opened formal proceedings in its investigations of the airline cooperation on transatlantic flights¹⁹², the Oneworld airline alliance (British Airways, American Airlines and Iberia) and the Star Alliance (Lufthansa, United, Continental and Air Canada). On 30 September, the Commission sent a SO in the Oneworld case¹⁹³.
141. During the year, the Commission authorised the rescue aid granted to the Austrian Airlines Group in the form of a loan guarantee¹⁹⁴. It also found the restructuring plan of Austrian Airlines compatible with the common market¹⁹⁵. Also, subject to observance of several conditions¹⁹⁶, the Commission decided on certain changes that the Greek authorities intended to introduce in the sales processes of Olympic Airlines. In addition, the Commission approved the intention of the Greek authorities to cover part of the costs of the voluntary redundancy scheme to be implemented by Olympic Catering SA in respect of certain of its staff¹⁹⁷.

¹⁸⁵ Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 (OJ L 35, 4.2.2009).

¹⁸⁶ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 (OJ L 70, 14.3.2009).

¹⁸⁷ Regulation (EC) no 545/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EEC) no 95/93 on common rules for the allocation of slots at community airports (OJ L 167, 29.6.2009, p. 24).

¹⁸⁸ Case COMP/M.5364 *Iberia/Vueling/Clickair*.

¹⁸⁹ Case COMP/M.5335 *Lufthansa/Brussels Airlines*.

¹⁹⁰ Case COMP/M.5403 *Lufthansa/bmi*.

¹⁹¹ Case COMP/M.5440 *Lufthansa/Austrian Airlines*.

¹⁹² See Press Release [MEMO/09/168](#), 20.4.2009.

¹⁹³ See Press Release [MEMO/09/430](#), 2.10.2009.

¹⁹⁴ Case NN72/2008, not yet published.

¹⁹⁵ Case C6/2009.

¹⁹⁶ Case N83/2009, not yet published.

¹⁹⁷ Case N487/2009.

142. The Commission accepted the measures taken by France in view of ending the differentiation in passenger charges amongst national and EU flights, which in fact granted an advantage to airlines operating domestic flights¹⁹⁸.

2.8. Postal services

143. As regards the **application of State aid rules to the postal sector** in 2009, the Commission adopted several decisions aiming to ensure that postal operators entrusted with services of general economic interest and their subsidiaries do not enjoy unduly granted advantages. Throughout the year, the Commission continued its investigation into the alleged overcompensation of *Deutsche Post AG*¹⁹⁹ for carrying out its universal service obligations from 1989 to 2007. On 13 July, the Commission opened a formal investigation procedure to examine measures in favour of Belgian La Poste²⁰⁰. In the UK Royal Mail case, the Commission decided that four State measures granted between 2001 and 2007 were in line with EU State aid rules²⁰¹. In relation to the French La Poste case²⁰² the French government adopted a bill of law providing for the incorporation of La Poste into "société anonyme" by 1 January 2010, which would put an end to the guarantee. In consideration of the above, the Commission is currently finalising its decision.

144. As for mergers, on 21 April, the Commission cleared subject to conditions the first merger between incumbent postal operators, Posten (of Sweden) and Post Danmark²⁰³.

2.9. Automotive industry

145. The motor vehicles sector was hit particularly hard by the economic crisis. Although world demand for cars in 2009 fell only by 2.4% compared to 2008 thanks to strong demand in China²⁰⁴, car sales (passenger cars and light commercial vehicles up to 3.5t) in the EU decreased by 4.6% compared to 2008 and 12.5% compared to 2007²⁰⁵. Scrapping schemes introduced in various national markets, in particular the German scheme, had a positive impact on sales in the short term. On the basis of the information mechanism set up by Directive 98/34/EC, the national scrapping schemes containing in addition technical regulations were notified before adoption to the Commission and the Member States, which guaranteed transparency, exchange of information and the prevention of obstacles to the single market.

146. Falling demand and world overcapacity which have characterised the sector for some years resulted in bankruptcy proceedings of several major automotive suppliers, most notably the two US suppliers General Motors and Chrysler. As a consequence, two

¹⁹⁸ Case E4/2007 (OJ C 83, 7.4.2009).

¹⁹⁹ Case [C36/2007](#) *Complaint against the German State for unlawful State aid to Deutsche Post* (OJ C 245, 19.10.2007 p. 21).

²⁰⁰ Case C20/09 (ex N763/02) *La Poste* (OJ C 176, 29.7.2009, p. 17).

²⁰¹ Case C7/07 (ex NN82/06 and NN83/06) *Alleged aid in favour of Royal Mail* (OJ L 210, 14.8.2009, p. 16).

²⁰² Case C56/2007 *Garantie d'Etat illimitée - La Poste* (France).

²⁰³ Case COMP/M.5152.

²⁰⁴ Global auto report, Scotia Bank, http://www.scotiacapital.com/English/bns_econ/bns_auto.pdf

²⁰⁵ ACEA, New registrations by country
http://www.acea.be/index.php/news/news_detail/new_vehicle_registrations_by_country/

of GM's European operations, Opel/Vauxhall and Saab, where put up for sale and, in the case of Opel, required State loans to continue operations.

147. The second challenge the sector is currently facing is the transition towards greener cars. Increasing demand by customers for low emission cars and a tightening regulatory environment requires large scale investments for the development of vehicles which meet the standards of the future. The Commission authorised several State aid schemes in this respect²⁰⁶. At the same time, the sector benefited from eased access to finance through loans and guarantees.
148. In all cases of State aid to the car sector, the Commission continued to enforce a strict policy line. In particular, the Commission consistently indicated that it would not accept that State aid granted under schemes approved on the basis of the Temporary Framework would be subject – de jure or de facto – to protectionist conditions, such as unjustified non-commercial conditions concerning the geographic location of investments. The Commission carefully examined each case that raised this type of protectionist concerns, ensuring that the aid was not biased by non-commercial considerations and that it contributed to the future viability of the car industry.
149. On 13 May the Commission authorised a EUR 11 million training aid for staff at the truck maker Scania's plants in Sweden²⁰⁷. Training aid of EUR 57 million was also authorised on 2 December, to Ford Romania SA, thus closing the investigation procedure on this case²⁰⁸. On 5 June the Commission authorised State guarantees from the Swedish State to Volvo Personvagnar (Volvo PV)²⁰⁹ and on 13 November, from the Romanian State to Ford Romania SA²¹⁰. It also authorised investment aid to Mercedes-Benz Hungary²¹¹ and Ford España²¹².
150. Concerning regional aid, on 29 April investment aid for EUR 46 million was authorised to Fiat Group for a large investment project for the production of a new car model in Sicily (Italy)²¹³. However, on 29 October it opened a formal investigation against Hungarian regional aid of some EUR 50 million for a large investment project of Audi Hungaria Motor Kft. in its existing plant in Győr²¹⁴.
151. In the antitrust field, a preliminary draft of a new Motor Vehicle BER and accompanying guidelines were adopted on 28 October. The texts were published for public consultation on 21 December and follow the course set in the Commission's Communication of 22 July²¹⁵. Based on current evidence, and subject to the outcome of the public consultation, the Commission believes that car distribution agreements should not be treated differently from any similar agreements in other sectors. Thus,

²⁰⁶ For more information, see the Focus Chapter within this Report.

²⁰⁷ N98/2009 *Training aid to Scania*, OJ 147, 27.6.2009, p. 6.

²⁰⁸ Case C39/2008 (ex N148/2008) *Training Aid to Ford Craiova, Romania*.

²⁰⁹ N80/2009 *State guarantees in favour of Volvo Cars*, OJ C 172, 24.7.2009, p. 2.

²¹⁰ N478/2009 *Individual State Guarantee for Ford Romania S.A.*

²¹¹ N671/2008. [See IP/09/1147](#).

²¹² N473/2008. [See IP/09/958](#).

²¹³ Case N635/2008 *FIAT Termini Imerese*.

²¹⁴ Case C31/2009 (ex N113/2009) *Audi Hungaria Motor Kft.*

²¹⁵ Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle sector of 22 July 2009 (COM(2009) 388 final)

the draft BER therefore provides that the future general Block Exemption for vertical restraints will take the place of the current specific rules for such agreements. However, in order to protect investments made by car dealers under the old rules, for instance in multi-brand sites, it is proposed that this changeover will not occur until 31 May 2013.

152. As regards the aftermarkets (repair and maintenance and spare parts), the analysis carried out has shown that competition is more limited due to their brand-specific nature and that sector-specific provisions were needed in a number of areas. With regard to the aftermarket, the draft BER together with the draft accompanying guidelines are hence intended to replace the existing BER²¹⁶ as of 1 June 2010. This will complement the sector-specific rules concerning access to repair and maintenance information for new vehicles.

2.10. Food industry

153. The Commission has continued to enforce competition rules on food markets through the active monitoring of existent commitment decisions and pursued the assessment of cases in which inspections had been carried out in 2008. The work of the Commission Task Force on the functioning of the Food Supply Chain continued in 2009. In this context, the Commission undertook a focused fact-finding exercise so as to identify potential competition-related concerns that may affect the functioning of the food sector. The results of this fact finding exercise were shared with NCAs and incorporated into the Commission Communication on "A better functioning of the food supply chain", adopted on 28 October²¹⁷.
154. The ECN Food Subgroup met in July and November to discuss and exchange best practices on issues related to food markets. .
155. The dairy sector is one of the sectors that have faced the greatest difficulties in 2009. In view of these difficulties, the Commission adopted a "Report on the dairy market situation" in July²¹⁸. A High Level Group on Milk bringing together national agriculture experts was also set up and its work is ongoing. The Commission's dialogue with NCAs regarding the milk sector also intensified through the creation of an ECN Joint Working Team on Milk whose work will continue throughout 2010.

3. CONSUMER ACTIVITIES

156. The Consumer Liaison Unit has been in place and operational for over a year, pursuing the objectives of deepening DG Competition's engagement with consumer representatives and developing new ways of communicating directly with the broader public.
157. In 2003 the Commission created the European Consumer Consultative Group (ECCG) as the Commission's main forum for engaging with consumer

²¹⁶ Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, pp 30-41.

²¹⁷ http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf

²¹⁸ http://ec.europa.eu/agriculture/markets/milk/report2009/index_en.htm

organisations²¹⁹. The ECCG has set up a Subgroup on competition that meets twice a year in Brussels²²⁰. During the year, the ECCG Competition Subgroup held discussions on issues such as the financial crisis and related State aid measures, digital cinema, the Intel decision and the Pharmaceutical Sector Inquiry.

158. On 21 October DG Competition hosted a public event on "Competition and Consumers in the 21st century". In view of improving communication, the consumer pages of the competition website were updated to include more user-friendly information.

4. THE EUROPEAN COMPETITION NETWORK AND COOPERATION WITH NATIONAL COURTS

159. In 2009, the ECN continued to be a very active forum for discussion and exchange on good practices among the Commission and the Competition authorities in the 27 Member States.

160. The Director General of DG Competition and the heads of all NCAs met on 13 October. The discussion focussed on: priority setting, convergence/transparency of procedures, sanctions and criminalisation, cooperation in mergers. The meeting also addressed the Commission's actions in the financial crisis and endorsed unanimously the report on leniency convergence under the ECN Model Leniency Programme²²¹.

161. The Commission was informed under Article 11(3) of the Regulation of 129 new case investigations launched by NCAs in 2009. Large numbers of cases could be observed *inter alia* in the energy, media, telecom, transport and financial services sectors. The Commission was also informed of 69 envisaged decisions under Article 11(4) of Regulation 1/2003 (representing an increase of 15% as compared with 2008).

162. In 2009, the Commission issued five opinions under Article 15(1) of the Regulation on questions by national judges concerning the application of the EU competition rules: one to a Belgian court, one to a Lithuanian court and three to Spanish courts. In relation to *amicus curiae* interventions under Article 15(3) of the Regulation, the Commission submitted written observations in one case in front of the Paris Court of Appeal, relating to a restriction of online sales in selective distribution agreements²²² following up on the ruling of the ECJ in Case C-429/07, the Commission submitted written observations to the Gerechtshof Amsterdam regarding tax-deductibility of Commission fines.

²¹⁹ 2003/709/EC decision of 9 October 2003.

²²⁰ The ECCG Competition Subgroup consists of one national consumer organisation representative per EU Member State, plus one representative from the European Consumers' Organisation (BEUC) and two from EEA observers (Iceland and Norway). The Commission provides the secretariat for the Subgroup.

²²¹ The Report is available at <http://ec.europa.eu/competition/ecn/documents.html>

²²² Case at Paris Court of Appeal, No RG 2008/23812, *Pierre Fabre Dermo-Cosmétique*. The case has given rise to a request for a preliminary ruling in accordance with Article 267 TFEU; see Case C-439/09.

163. Through the year, 10 grant agreements were concluded for training programmes for judges in various Member States.

5. INTERNATIONAL ACTIVITIES

164. In an increasingly globalised world economy, competition policy must also adopt a global outlook. DG Competition continued to play a leading role in the International Competition Network (ICN). On 22 and 23 January, DG Competition hosted in Brussels a "Seminar on Competition Agency Effectiveness", the first such event of its type.
165. As in the past, DG Competition contributed actively to the work of the OECD Competition Committee and participated at the annual conference of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy of the United Nations Conference on Trade and Development (UNCTAD), submitting contributions to most roundtable discussions.
166. Cooperation with the United States of America was intense, both as regards individual cases and more general matters related to competition policy. The same applies to cooperation with the Canadian Competition Bureau and the Japan Fair Trade Commission.
167. On 23 May, the European Community and South Korea signed a bilateral cooperation agreement in the field of competition, which entered into force on 1 July²²³. The Free Trade Agreement (FTA) with South Korea was initialled on 15 October 2009 and is expected to be signed and enter into force during the course of 2010. It is the first time that an FTA contains a prohibition on certain types of subsidies.
168. On 8 October Commissioner Kroes signed a Memorandum of Understanding (MoU) with the Brazilian Ministry of Justice and the heads of the Brazilian Competition Authorities in order to ensure a closer cooperation between DG Competition and its Brazilian counterparts.
169. The annual competition dialogue with China was held in Brussels on 22-23 June. Cooperation with India intensified during 2009 as India appointed seven Commissioners to constitute the Competition Commission of India (CCI) which is entrusted with the enforcement of the 2002 Competition Act.
170. In the context of enlargement, there was particularly close cooperation with Croatia and Turkey. These two candidate countries have to fulfil "opening benchmarks" before accession negotiations on the competition chapter can start. Moreover, DG Competition further assisted the Western Balkan countries in aligning their competition rules with EU law and took part in the preliminary discussions on Iceland's EU membership prospect.

²²³ Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities (OJ L 202, 4.8.2009, p. 36).

6. INTERINSTITUTIONAL COOPERATION

171. In 2009, the Commission continued its cooperation with the other institutions of the European Union in accordance with the respective agreements or protocols entered into by the relevant institutions²²⁴.
172. In 2009, the European Parliament (EP) adopted a resolution on the White Paper on Damages Actions for breach of the EC antitrust rules and the Annual Competition Reports for 2006 and 2007. In addition to the regular dialogue between the Commissioner for Competition and the ECON committee, the Commission participated in discussions held in other Parliamentary committees and on a range of subjects including the Annual Competition Report, the White Paper on Damages Actions, the Broadcasting Communication, State aid and the financial crisis, the Pharmaceutical Sector Inquiry and the Motor Vehicle Block Exemption Regulation. Bilateral meetings with MEPs were held on these and on a range of other issues.
173. The Commission cooperates closely with the Council by informing it of important policy initiatives in the field of competition, such as on State aid measures and guidelines for the banking industry and other additional State aid measures in the context of the financial and economic crisis. The Economic and Financial Committee (EFC)²²⁵, has been consulted on the Banking, Recapitalisation, Impaired Assets and Restructuring Communications, and on a review of guarantee and recapitalisation schemes. The Commission made contributions on competition policy in respect of conclusions adopted in different Council formations such as the ECOFIN the Competitiveness the Transport, Telecommunications and Energy and the European Council.
174. The Commission informs the European Economic and Social Committee (EESC) and the Committee of the Regions about major policy initiatives, and participates in debates that may be held in the respective Committee on those initiatives. During 2009, the EESC published reports on the Annual Competition Report 2007 and the White Paper on damages actions. DG Competition services have also attended working group meetings and had bilateral meetings with EESC rapporteurs on a number of other subjects including SMEs adapting to global market changes, shipbuilding and State aid.

²²⁴ Framework Agreement of 26 May 2005 on relations between the European Parliament and the Commission; Protocol of Cooperation between the European Commission and the European Economic and Social Committee of 7 November 2005; Protocol on the Cooperation Arrangements between the European Commission and the Committee of the Regions of 17 November 2005.

²²⁵ The EFC prepares the work for the Economic and Financial Affairs Council (ECOFIN) and includes a European Central Bank representative.