



EUROPEAN COMMISSION

Brussels, 10.6.2011
ELECTRONIC VERSION ONLY
SEC(2011) 690 final

Part I

COMMISSION STAFF WORKING PAPER

Accompanying the

REPORT FROM THE COMMISSION

on Competition Policy 2010

{COM(2011) 328 final}

TABLE OF CONTENTS

I – Instruments.....	7
A – Follow-up to the implementation of the crisis framework for state-aid.....	7
1. Crisis-related support for the financial sector	7
2. Application of the Temporary Framework	8
3. Exit strategy	9
4. Contribution of competition policy to the economic adjustment programmes of Greece and Ireland	11
4.1. Greek economic adjustment programme	11
4.2. Irish economic adjustment programme.....	12
B – Antitrust – Articles 101 and 102 TFEU.....	13
1. Shaping and applying the rules	13
1.1. Shaping the rules: review of Block Exemption Regulations	13
1.1.1. Block Exemption Regulation on vertical agreements.....	13
1.1.2. Block Exemption Regulations on horizontal cooperation agreements	15
1.1.3. Sectoral Block Exemption Regulations	17
1.2. Private enforcement of the EU antitrust rules	18
1.3. Applying Article 101: Cartels and other agreements and concerted practices	19
1.3.1. Cartels	19
1.3.2. Other agreements and concerted practices.....	21
1.4. Applying Article 102 TFEU: Abuse of dominant positions	21
2. Selected Court cases.....	22
2.1. Exclusivity agreements	22
2.2. Margin squeeze	23
2.3. Level of fines.....	24
2.4. Legal professional privilege and in-house lawyers.....	24
2.5. Misuse of intellectual property rights and regulatory procedures.....	25
2.6. Lack of sufficient Union interest.....	26
2.7. Commitments	26
C – Merger control	27

1.	Shaping and applying the rules	27
2.	Selected Court cases.....	29
2.1.	Quantitative evidence and econometric studies	29
2.2.	Minority shareholdings	30
D – State aid control.....		31
1.	Shaping and applying the rules	31
1.1.	Horizontal aid.....	33
1.1.1.	Regional aid	33
1.1.2.	Environmental aid and security of electricity supply.....	34
1.1.3.	Research & Development & Innovation (R&D&I) aid	34
1.1.4.	Aid to promote risk capital and urban development	35
1.2.	Sectoral and individual State aid.....	35
1.2.1.	Rescuing and restructuring aid for industry	35
1.2.2.	Aid to the transport sector	36
1.2.3.	State aid for Broadband networks	37
1.2.4.	Aid to the coal sector.....	37
1.2.5.	Aid to the agricultural sector.....	38
1.2.6.	Aid for compensating provision of Services of General Economic Interest: Social Housing undertakings.....	38
1.3.	State aid enforcement by national courts	39
1.4.	<i>Ex-post</i> monitoring of State aid measures.....	40
1.5.	Recovery policy	40
2.	Selected Court cases.....	41
2.1.	Notion of aid	41
2.2.	Compatibility assessment.....	43
2.3.	Recovery of aid	44
II – Sector Developments		45
A – Financial services		45
1.	Overview of sector	45
2.	Policy developments	47

2.1.	Antitrust enforcement.....	47
2.1.1.	Antitrust enforcement in the payments services sector.....	47
2.1.2.	Securities Trading, Clearing and Settlement (C&S).....	49
2.1.3.	Insurance sector.....	50
2.2.	Merger control.....	51
2.3.	State aid control: restructuring of financial institutions.....	52
B – Energy & Environment.....		58
1.	Overview of sector.....	58
2.	Policy developments.....	59
2.1.	Antitrust enforcement.....	59
2.2.	State aid control.....	61
C – Information, Communication and Media.....		64
1.	Overview of sector.....	64
1.1.	Telecommunications.....	64
1.2.	Information and Communication Technology (ICT).....	66
1.3.	Media.....	66
2.	Policy developments.....	67
2.1.	Policy developments in telecommunications sector.....	67
2.1.1.	Antitrust enforcement.....	68
2.1.2.	Merger control.....	68
2.1.3.	State aid control.....	68
2.2.	Policy developments in ICT sector.....	69
2.2.1	Antitrust enforcement.....	69
2.2.2.	Merger control.....	71
2.3.	Policy developments in the Media and Sport sector.....	72
2.3.1.	Antitrust and regulatory enforcement.....	72
2.3.2	Merger control.....	73
2.3.3.	State aid control.....	73
D – Pharmaceutical industry & Health.....		74
1.	Overview of sector.....	74

1.1.	Overview of the pharmaceutical sector.....	75
1.2.	Overview of the health services sector.....	75
2.	Policy developments	76
2.1.	Policy developments in the pharmaceutical sector	76
2.1.1.	Antitrust enforcement.....	77
2.1.2.	Merger control.....	79
2.2.	Policy developments in the health services sector	80
2.2.1	Antitrust enforcement.....	80
2.2.2	Merger control.....	80
2.2.3	State aid control.....	80
E –	Transport.....	82
1.	Overview of sector	82
2.	Policy developments	83
2.1.	Air transport	83
2.1.1.	Antitrust enforcement.....	83
2.1.2.	Merger control.....	85
2.1.3.	State aid control.....	85
2.2.	Rail and inland transport	87
2.2.1.	Merger control.....	87
2.2.2.	State aid control.....	88
2.3.	Maritime transport.....	89
2.3.1.	Antitrust enforcement.....	89
2.3.2.	Merger control.....	89
2.3.3.	State aid control.....	90
F –	Postal Services	91
1.	Overview of sector	91
2.	Policy developments	92
2.1.	Merger control.....	92
2.2.	State aid control.....	92
G –	Automotive industries	95

1.	Overview of the automotive sector	95
2.	Policy developments	97
2.1.	Antitrust enforcement.....	97
2.1.1.	Vertical agreements in the vehicle sales markets.....	97
2.1.2.	Vertical agreements in the repair and spare parts markets.....	98
2.2.	Merger control.....	99
2.3.	State aid control.....	99
H – Food supply chain		100
1.	Overview of sector	100
2.	Policy developments	101
2.1.	Food supply chain	101
2.2.	Dairy sector	102
2.3.	State aid to the agricultural sector	103
III – The European Competition Network and cooperation with National Courts		105
1.	Cooperation on policy issues	105
1.1.	The ECN Brief	106
1.2.	Cooperation in individual cases	106
1.2.1.	Case allocation	106
1.2.2.	Coherent application of the rules	107
2.	Application of EU Competition rules by National Courts in the EU.....	107
2.1.	Assistance in the form of providing information or in the form of issuing an opinion	107
2.2.	<i>Amicus curiae</i> interventions under Article 15(3) of Regulation 1/2003	108
2.3.	Financing the training of national judges in EU competition law	109
IV – International activities.....		109
1.	Multilateral cooperation	109
1.1.	International Competition Network (ICN).....	109
1.2.	OECD.....	110
1.3.	UNCTAD	110
2.	Bilateral cooperation	111

2.1.	Agreements with the USA, Canada, Japan, South Korea and Switzerland	111
2.2.	Cooperation with other countries and regions	112
3.	Enlargement and Neighbourhood Policy	113
V – Dialogue with Consumer organisations and other stakeholders		114
1.	Dialogue with consumer organisations	114
1.1	The European Consumer Consultative Group (ECCG).....	114
1.2.	Training of European consumers' representatives – the TRACE programme	115
1.3.	Interactive consumer corner on Competition website and point of contact with consumers.....	115
2.	Dialogue with stakeholders	115
VI – Inter-institutional cooperation.....		116
1.	Cooperation with the European Parliament	116
2.	Cooperation with the Council	117
3.	Cooperation with the European Economic and Social Committee.....	118

I – Instruments

A – FOLLOW-UP TO THE IMPLEMENTATION OF THE CRISIS FRAMEWORK FOR STATE-AID

1. CRISIS-RELATED SUPPORT FOR THE FINANCIAL SECTOR

1. Since the beginning of the global financial crisis in the autumn of 2008, the Commission has issued four Communications which provided detailed guidance on the criteria for the compatibility with the Treaty on the Functioning of the European Union (TFEU) of temporary crisis-related support for financial institutions¹. The first three of these Communications set out the criteria for compatibility of State support in the form of State guarantees, recapitalisations and asset relief measures. The fourth addressed the follow-up to such support measures. Through the application of State aid rules, the Commission ensured that distortions of competition within the internal market were limited to a minimum despite the important amounts of State aid and that beneficiary banks were restructured when necessary.
2. As a result of policy intervention, the severe shortage of bank funding that occurred in autumn 2008 was overcome relatively quickly. However, the sovereign crisis which struck in the first half of 2010 clearly showed that, although the level of stress in financial markets had fallen significantly from its peak in late 2008, there was still a need for crisis-related support in 2010.
3. During the crisis, the availability of government guarantees proved to be an appropriate and effective tool to improve access to funding for banks and to restore market confidence. However, a review by the Commission of the use of guarantees showed that by the early months of 2010, the more solid financial institutions were no longer significant issuers of guaranteed debt. The conditions of compatibility of guarantee schemes were therefore reviewed and tightened with effect from 1 July 2010².
4. Twelve Member States extended their guarantee schemes, on these new conditions, until 31 December 2010³. A further seven Member States which previously had

¹ Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8) ("Banking Communication"), Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2) ("Recapitalisation Communication"); Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1) ("Impaired Assets Communication"); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rule (OJ C 195, 19.8.2009, p. 9) ("Restructuring Communication")

² The application of state aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010, DG Competition Staff Working Document, 20.4.2010

³ Austria, Denmark, Germany, Greece, Ireland, Latvia, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden. In addition, Lithuania's guarantee scheme, which was approved after 1 July 2010, was subject to the revised conditions.

guarantee schemes in place terminated these schemes or allowed them to expire⁴. Despite the continuance of a significant number of guarantee schemes, their use has been diminishing. The monthly average volume of guaranteed bond issuance under schemes, which in 2009 was EUR 37.2 billion, was EUR 2.8 billion for the first eight months of 2010.

5. Of the 15 Member States which have at some time introduced a recapitalisation scheme, six still had such a scheme in force as of 31 December 2010⁵. However, the use of such schemes during 2010 was limited; as for *ad hoc* interventions, these continued to take place during 2010. However, the overall situation showed a reduction in the use of State capital injections in 2010 compared to 2009.
6. The restructuring of a number of European banks was among the main challenges of 2010. The restructuring process of banks is based on the crisis-related State aid rules as laid down in the Restructuring Communication of 22 July 2009. The Communication provides guidance on the conditions under which restructuring aid for banks in need of financial assistance beyond an emergency rescue can be authorised. It is based on the three principles of return to long-term viability without State aid, burden sharing between the bank and its stakeholders and the State and limitation of competition distortions, usually through structural (divestment) and behavioural measures (acquisition bans or limitations on aggressive commercial behaviour). The Commission approved in 2010 restructuring or liquidation plans for 14 banks and adopted one negative decision (see Section II.A.2.3., points 176 to 206 for detailed description of restructuring cases).
7. Between 1 October 2008 and 1 October 2010, the Commission took more than 200 decisions on State aid measures to the financial sector aiming to remedy a serious disturbance in Member States' economies. These decisions authorised, amended or prolonged more than 40 schemes and addressed with individual decisions the situation of more than 40 financial institutions in 22 Member States⁶. The maximum volume of Commission-approved measures until 1 October 2010 amounted to EUR 4 588.9 billion, of which the greatest bulk was approved as guarantees (76% of the maximum volume). Not all the approved aid was used by Member States. In 2009, the nominal amount of aid used by Member States constituted EUR 1 106.65 billion or 9.3% of EU Gross Domestic Product (GDP), whereas the figure for 2008 was EUR 1 236 billion⁷.

2. APPLICATION OF THE TEMPORARY FRAMEWORK

8. In 2008, the Commission adopted the Temporary Framework (TF)⁸ which was due to expire on 31 December 2010 and had as its main objective to facilitate companies'

⁴ Cyprus, Finland, France, Hungary, Italy, Slovakia and the United Kingdom

⁵ Austria, Greece, Hungary, Lithuania, Poland and Portugal; the schemes adopted in Denmark, Germany, France, Finland, Italy, Slovakia, Spain, Sweden and the United Kingdom expired.

⁶ Member States that did not grant aid to financial institutions are: Bulgaria, the Czech Republic, Estonia, Malta and Romania.

⁷ State aid scoreboard – Autumn 2010 Update (COM(2010)701)

⁸ Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (consolidated version) (OJ C 83, 7.4.2009, p. 1)

access to finance. The Commission collected information on the use and impact of the Framework via a questionnaire sent to the Member States on 17 March 2010. Third parties had also the opportunity to submit comments. The additional possibilities to grant State aid provided by the TF were generally very well received by the Member States and stakeholders.

9. Between its introduction and 1 October 2010, the Commission approved 73 schemes and four ad-hoc aid measures under the TF. The volume of aid approved in 2009 was EUR 82.5 billion (0.7% of EU GDP). Member States tried to fix aid envelopes of a sufficient size to reassure the markets; however, the amount taken up was much lower. Both the availability of market funding for some companies on one hand, and budgetary constraints on the other, contributed to smaller actual use of the TF measures.
10. The main measures used were the compatible limited amount of aid (the so called "500k" – EUR 500 000 – measure), the subsidised guarantees and the subsidised loans. The relaxation of the conditions for exceptional acceptance of government export credit insurance within the Community were also largely used and contributed to effectively sustain trade.
11. The risk capital adaptation was positively perceived by the Member States as an important signal for private investors. Austria, Belgium, France, Germany, Italy, Spain and the United Kingdom made use of this possibility.
12. The fact that Member States originally planned higher budgets than the amount effectively granted is evidence of a cautious budgetary approach given the uncertainties as to the depth and duration of the crisis and the need to send the markets a clear signal of public authorities' availability to meet potential demand. Moreover, Member States appear to have applied the conditions for granting the aid strictly, largely in view of budgetary constraints, which in turn is likely to have kept the number of beneficiaries small.

3. EXIT STRATEGY

13. An appropriate and timely "exit strategy" from the exceptional crisis measures constitutes a key element of the European recovery. The exit process should, for the financial sector as well as for the real economy, lead to viable solutions that do not discriminate between Member States while promoting a return to normal market functioning.
14. The Commission collected information on the use of the TF as well as on the state of credit supply to creditworthy companies and the use of exceptional crisis-related support by banks in order to adopt an informed decision on the exit process for both the financial sector and the real economy. On the one hand, there were encouraging signs of stabilisation in financial markets and of a recovery in Member States' economies. On the other hand, the recent sovereign crisis and the perception of the risk of a double-dip recession illustrated the fragility of the recovery process and the risk of serious setbacks.

15. In view of this objective, the main elements that the Commission took into account when deciding on the phasing-out of the TF was the evolution of access to finance to creditworthy companies and its usefulness as a credit support tool beyond 2010. It was considered premature to let it expire in its entirety at the end of 2010 because of the fragility of the recovery. However, considering that the market situation was far from being as dramatic as it was at the turn of 2008/2009, a full prolongation was not an option either. In a forward-looking perspective, it was necessary to be mindful of the usefulness of the TF as an instrument to promote the economic recovery in the longer term as well as a progressive return to normal State aid rules while sustaining Member States' efforts towards fiscal consolidation and higher effectiveness of public spending.
16. A progressive phasing-out of the TF was thus considered the most suitable response to the current market situation. On this basis, the Commission approved a limited prolongation of the TF⁹ until the end of 2011 with a special focus on SMEs and a limited spectrum of measures:
- Maintenance of measures that address outstanding market failures: in particular the remaining problems on access to finance, notably for SMEs;
 - Tightening of conditions: the measures prolonged during 2011 would be subject to tighter conditions to reflect a gradual transition into the normal State aid regime;
 - Encouraging long term recovery in line with the Europe 2020 priorities¹⁰: measures that contribute to the Europe 2020 objectives should be encouraged (*e.g.* prolongation of subsidised loans for the production of green products).
17. This approach was also in line with the initiatives adopted for the financial sector. The first step in the exit process for financial institutions was the modification of the regime applying to guarantee schemes, which took place with effect from 1 July 2010¹¹. A review by the Commission of the use of government guarantees concluded that the more solid and unquestionably sound institutions were no longer significant issuers of guaranteed debt. On this basis, the conditions for use of government guarantees were tightened by applying an increased guarantee fee and requiring a viability plan for beneficiaries having recourse to new guarantees and exceeding certain thresholds. These criteria were aimed at sending a clear signal that financial institutions need to prepare to secure their financing without State support.
18. A similar approach, of extending the validity of crisis-related rules while bringing those rules closer to the normal State aid regime, was also adopted for other support to financial institutions. On 1 December 2010, the Commission adopted a Communication extending the validity of the crisis-related measures for the financial

⁹ Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 6, 11.1.2011, p. 5)

¹⁰ Europe 2020: A strategy for smart, sustainable and inclusive growth (COM(2010)2020 final)

¹¹ The application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010, DG Competition Staff Working Document, 20.4.2010

sector until the end of 2011¹². However, given the evidence that banks were facing fewer difficulties in raising capital on the markets at the time of adoption of the Communication, the Commission no longer considered it appropriate to distinguish between distressed banks, from which a restructuring plan had previously been required in connection with any recapitalisation, and their fundamentally sound counterparts, from which only a viability review had been needed. Instead, from 1 January 2011, a restructuring plan will be required from every beneficiary of a recapitalisation or an impaired asset measure.

4. CONTRIBUTION OF COMPETITION POLICY TO THE ECONOMIC ADJUSTMENT PROGRAMMES OF GREECE AND IRELAND

4.1. Greek economic adjustment programme

19. In 2009, already before the sovereign crisis, Greece had put together a banking rescue package, including a Guarantee Scheme, a Bond Loan Scheme and a Recapitalisation Scheme, which provided for liquidity and capital support to banks in Greece. This support package was used by all major Greek banks; ten banks were recapitalised in May and July 2009 and had to present restructuring plans to the Commission.
20. In the course of 2010, Greece found itself in a weak fiscal position. To support the Greek government's efforts to get its economy back on track, the Commission, the European Central Bank and the International Monetary Fund (IMF) pledged on 2 May 2010 a three-year economic adjustment programme¹³ financed by Euro Area Member States in bilateral loans totalling EUR 80 billion and supported by the IMF with a stand-by arrangement of about EUR 30 billion, bringing the joint commitment to a total financing of EUR 110 billion.
21. The Greek authorities agreed to a multi-annual programme of fiscal consolidation and structural reforms in order to put the Greek economy on a sustainable path, to restore confidence on sovereign debt markets and to preserve the stability of the Euro area. The programme includes a sustainability-enhancing fiscal consolidation through measures that generate savings in public sector expenditure and improve the government's revenue-raising capacity as well as financial sector policies aiming at stabilising the Greek financial system. The programme also includes medium-term structural reforms in order to improve the Greek economy's competitiveness through the modernization of the public sector, the increase in efficiency and flexibility of product and labour markets and the creation of a more open and accessible business environment for domestic and foreign investors, including a reduction of the State's direct participation in domestic industries.
22. In order to strengthen the Greek financial system, two important support instruments were put into place:

¹² Communication on the application, after 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 329, 7.12.2010, p. 7)

¹³ The Economic Adjustment Programme for Greece, European Economy, Occasional Papers 61, May 2010

- Issuance of additional Government guarantees: the main purpose of these guarantees is to use them as collateral in order to obtain funding from the ECB. An additional amount of EUR 25 billion was authorised by the Commission in the summer of 2010¹⁴. Another extension of the scheme, by EUR 30 billion, is planned for the first half of 2011.
 - The establishment of an independent Financial Stability Fund (FSF) as a safety net to preserve the solvency of the financial sector, by providing capital support to banks. EUR 10 billion were earmarked which have not been used so far. The granting of aid was subject to a scheme which was also authorised by the Commission in the summer of 2010¹⁵.
23. In line with EU State aid rules, on 1 October 2010 Greece submitted to the Commission the restructuring plans for six of the recapitalised banks. The Commission entered into discussion with Greece in particular regarding the banks in which the State holds significant stake such as Agricultural Bank of Greece (ATE), Hellenic Postbank (TT), Attica Bank and the Consignment Deposit and Loan Fund (CDLF). A need for in-depth restructuring of ATE and CDLF was identified and restructuring plans are to indicate measures that lead to the restoration of viability of the bank in the long-term without State aid, and be accompanied by adequate burden-sharing and measures to minimise distortions of competition.
24. As regards structural reforms, competition policy was identified as an important pillar to support the increase in efficiency of product markets. Greece thus cooperated with the Commission on drafting a new investment law, on reforming the Hellenic Competition Authority and on liberalising closed professions.

4.2. Irish economic adjustment programme

25. As regards Ireland, the situation became very stressed for both the banks and the Sovereign debt in the last quarter of the year. The combination of a severe economic crisis and of the huge losses taken by a banking sector several times bigger than the Irish economy led to great pressure on the Irish sovereign debt. Ireland and the Irish banks faced the drying up of access to wholesale funding, severe deposit outflows, the collapse of the Irish property market and a considerable down-turn of the economy with a severe fall in GDP in the last years and rising unemployment.
26. The Irish authorities therefore made an application to the EU/IMF financial stability facilities in place on 22 November 2010. On 28 November 2010, a Programme was agreed between the Commission, the European Central Bank (ECB), the IMF and the Irish authorities¹⁶. The Programme foresees a loan of EUR 85 billion to Ireland, of which EUR 35 billion are available to restore banks' viability.
27. As part of the Programme, two domestic banks will be wound down (Anglo Irish Bank & INBS), while others will be capitalised and restructured in compliance with EU State aid rules. This means that all the Irish banks currently under restructuring

¹⁴ Case N260/2010 *Third prolongation of Greek bank support scheme* (OJ C 238, 3.9.2010, p. 3)

¹⁵ Case N328/2010 *Recapitalisation of credit institutions in Greece under the Financial Stability Fund (FSF)* (OJ C 316, 20.11.2010, p. 7)

¹⁶ MEMO/10/624

will receive extra aid, currently estimated at a total of EUR 10 billion. A new capital adequacy review will be undertaken early 2011 by the Financial Regulator together with the Commission, ECB and IMF in order to determine whether further capital injections would be needed. At the end of 2010, bank recapitalisations totalled more the 30% of Irish GDP.

28. Furthermore, deleveraging targets will be set for each of the viable banks. The Programme foresees that the viable banks will submit to the Commission, under EU State aid rules, a restructuring plan in the second quarter of 2011 that shows: (i) how they will reach these targets, (ii) how they intend to fulfil the other requirements of the Commission's Restructuring Communication (return to viability, burden-sharing, measures limiting the distortion of competition). EU State aid rules are therefore not lifted by the Programme and continue to apply to the rescue and restructuring of the Irish banks.
29. As regards competition-related structural reforms, a number of policy measures will be taken to bolster competition in product and energy markets and other network industries. This includes introducing legislative changes to remove restrictions to trade and competition in sheltered sectors, addressing the current exclusion of certain sectors from the scope of the national competition law and improving deterrence of anticompetitive behaviour.

B – ANTITRUST – ARTICLES 101 AND 102 TFEU

1. SHAPING AND APPLYING THE RULES

1.1. Shaping the rules: review of Block Exemption Regulations

1.1.1. Block Exemption Regulation on vertical agreements

30. On 20 April 2010, the Commission adopted a revised Block Exemption Regulation¹⁷ (BER) and Guidelines¹⁸ regarding vertical agreements, i.e. agreements between suppliers and buyers operating at different levels of the production and distribution chain for the supply and distribution of products and services. The revision was carried out in view of the expiry, on 31 May 2010, of the Block Exemption Regulation adopted in 1999¹⁹ and which marked the evolution from an approach mainly centred on the form of an agreement to one consisting in assessing its likely effects on the market. The basic principle formulated in 1999 was that, absent any hardcore restriction of competition, if a supplier only has limited market power, its vertical agreements are either unlikely to restrict competition, or that the efficiencies that they bring about are likely to prevail over any restrictive effects so that on balance the agreements are either neutral or beneficial to the consumers. For that

¹⁷ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1-7)

¹⁸ Commission notice – Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1-46)

¹⁹ Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices (OJ L 148, 15.6.1999, p. 1-4)

reason, under the 1999 Regulation vertical agreements concluded by suppliers with a market share not exceeding 30% were exempted "as a block" from the prohibition set out in Article 101(1) TFEU.

31. The basic principle set out in the revised rules remains that, in the presence of limited market power, companies are free to decide how their products are distributed, provided their agreements do not contain price-fixing or other hardcore restrictions. However, the rules were revised to the effect that in order to be block exempted all parties to the agreement, i.e. not just the supplier but also the buyer, must have a market share not exceeding 30%. This change was motivated by the fact that in the light of the increasing concentration of distribution, it cannot be assumed that agreements involving powerful buyers are neutral or beneficial for consumers as a general rule and that they should therefore be block exempted whenever the supplier's market share does not exceed 30%. Cases tackled in particular by some National Competition Authorities in the last years have shown that such an assumption is indeed not justified. The introduction of a market share threshold that takes into account the buyers' potential market power means that a case-by-case approach will be applied to vertical agreements where the buyer has a market share exceeding 30%, similarly to what is already being applied to agreements involving suppliers' market power. There is no presumption of illegality outside the block exemption. This revision will allow for instance to tackle more effectively than under the previously applicable rules vertical restraints led by powerful distributors that may cause prejudice to SMEs and to the final consumers.
32. The Regulation and accompanying Guidelines were also revised in order to take into account the rapid development since the adoption of the previous BER in 1999 of the internet as a force for online sales and for cross-border commerce, which increases consumer choice and price competition. This part of the revision did not entail any change of policy or of the scope of the rules, but rather responded to calls made to the Commission to provide more explicit guidance to firms regarding the restrictions that may and may not be agreed regarding on-line distribution.
33. The revised Guidelines make it clear that under the BER, approved distributors must be free to sell on the internet without limitation on quantities, customers' location and restrictions on prices. At the same time, a supplier and buyer can agree that the latter must have a physical point of sales ("brick and mortar shop") and that its on-line distribution must comply with certain quality and other requirements that are equivalent with the conditions governing the sales from brick and mortar shops. The Guidelines also provide examples of restrictions (such as an agreement between the supplier and the distributor where the latter limits the proportion of sales made over the internet) that are not exempted under the BER and are considered hardcore resale restrictions. Through the added clarity and thereby greater predictability of the new rules, distributors have a clear basis and incentives to develop online activities to reach and be reached by customers throughout the EU and fully take advantage of the internal market. This can be expected to contribute to the development of online commerce and the digital internal market.
34. Finally, the third major strand of the revision consisted in clarifying the notion of hardcore restriction of competition, whose inclusion in a vertical agreement entails that the agreement as a whole cannot benefit from the block exemption. Based on case experience, it is presumed that agreements containing one or more hardcore

restrictions restrict competition and are unlikely to fulfil the four conditions of Article 101(3), i.e. are unlikely to produce outweighing positive effects. The Guidelines clarify that this double presumption does not, contrary to a widespread perception, amount to considering hardcore restrictions as illegal per se. In line with case law, the Guidelines specify that undertakings may demonstrate pro-competitive effects, in an individual case, and that the agreement meets all the conditions set out in Article 101(3), not least that there is an eventual net benefit for the consumers. The Guidelines further provide examples of pro-competitive effects that could, in certain circumstances, be associated with hardcore restrictions such as resale price maintenance.

1.1.2. *Block Exemption Regulations on horizontal cooperation agreements*

35. On 14 December 2010, the Commission adopted new rules and guidelines for the assessment of horizontal cooperation agreements, i.e., agreements concluded between companies operating at the same level of the supply chain, such as agreements to cooperate on research and development, production, purchasing, commercialisation, standardisation, and exchange of information. This new regime consists of a set of guidelines, the so-called "Horizontal Guidelines", and two Block Exemption Regulations²⁰ (BER) regarding research and development agreements on one hand and specialisation and joint production agreements on the other hand.
36. Horizontal cooperation can lead to substantial economic benefits and allow companies to respond to increasing competitive pressures and a changing market environment driven by globalisation. However, they can also lead to serious competition problems, in particular where they increase the market power of the parties to an extent that enables them to increase prices, limit output or reduce innovation efforts. The Commission's approach enshrined in the new rules is to leave companies maximum freedom to cooperate while at the same time protecting competition from such cooperations which are contrary to Article 101 TFEU, e.g. by being harmful to consumers.
37. The Commission published drafts of the revised Guidelines and BERs for public consultation in May and June 2010. Almost 120 stakeholders submitted contributions during the public consultation. This allowed the Commission to further improve and refine the texts prior to adopting the final versions.
38. The new rules should be seen as an evolution, not a revolution. They aim at giving comprehensive guidance and adequate legal certainty for companies wishing to cooperate with competitors. Whilst the Commission's view on how competitors can cooperate has not fundamentally changed since the previous rules were put in place in 2000, the new Horizontal Guidelines²¹ are more detailed and user-friendly than the previous ones. Two key features of the reform include the insertion of a new chapter

²⁰ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements (OJ L 335, 18.12.2010, p. 36) and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43)

²¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1) (Horizontal Guidelines)

on information exchange and a substantial revision of the chapter on standardisation agreements.

39. A well functioning system for standard-setting is vital for the European economy as a whole and in particular for the information, communication and telecoms (ICT) sector. The objective of improving the efficiency and effectiveness of the European standardisation has been set out as a priority of the Flagship Initiative of the Europe 2020 Strategy on "An Integrated Industrial Policy for the Globalisation Era"²². The revision of standardisation chapter of the Horizontal Guidelines fits into this context by promoting a standard-setting system that is open and transparent and thereby increases the visibility of licensing costs for Intellectual Property Rights (IPRs) used in standards. In doing so it attempts to find a balance between the sometimes contradictory interests of companies with different business models (from the pure innovator to the pure manufacturer) involved in the standard-setting process. The system will thus provide sufficient incentives for further innovation and at the same time ensure that the traditional benefits from standardisation are passed on to consumers.
40. Concretely, the chapter on standardisation agreements contains certain criteria, which, if fulfilled by standard-setting organisations, provide comfort that the Commission will not take issue with a standard-setting agreement (safe harbour). These criteria include: (i) that the procedure for adopting the standard is unrestricted with participation open to all relevant competitors on the market; (ii) transparency to ensure that stakeholders are able to inform themselves of upcoming, on-going and finalised work on standards, also for those involving IPR; and (iii) a balanced IPR policy with good faith disclosure of those IPRs which are essential for the implementation of a standard, and a requirement for all IPR holders that wish to have their technology included in the standard to provide an irrevocable commitment to license their IPR on fair, reasonable, and non-discriminatory terms ("FRAND commitment"). However, these criteria are not a "straight jacket": not fulfilling them does not mean that a standardisation agreement infringes EU competition rules. Consequently, the Commission gives detailed guidance for those standard-setting organisations whose rules do not meet the safe harbour criteria, in order to allow them to assess whether their agreements are in line with EU competition law.
41. Certain standard-setting organisations may wish to provide for their members to unilaterally disclose, prior to setting a standard, the most restrictive licensing terms that they would charge for their IPRs if those were to be included in the standard. Such a system could enable a standard-setting organisation and the industry to take an informed choice not only on quality but also on price when selecting which technology should be included in the standard. The Commission gives comfort to standard-setting organisations that such a system would normally not infringe EU competition rules.
42. Information exchange can be pro-competitive when it enables companies to gather general market data that allow them to become more efficient and better serve customers. It also enables consumers to make better informed choices when deciding

²² An Integrated Industrial Policy for the Globalisation Era: Putting Competitiveness and Sustainability at Centre Stage (COM(2010) 614)

which product to purchase. However, there are also situations where the exchange of market information can be harmful for competition, for instance when companies use sensitive information to coordinate their pricing. The new chapter on information exchange in the Horizontal Guidelines is the first Commission document to give clear and comprehensive guidance on how to assess the compatibility of information exchanges with EU competition law and will therefore play a significant practical role for businesses and their legal advisors. The chapter sets out the various factors relevant for the assessment and their interplay and contains a number of practical examples to help businesses assess typical information exchange scenarios.

43. With a view to facilitating innovation in Europe, the Commission has considerably extended the scope of the R&D Block Exemption Regulation, which now not only covers R&D activities carried out jointly but also so-called "paid-for research" agreements where one party merely finances the R&D activities carried out by the other party. In addition, the new Regulation gives parties more scope to jointly exploit the R&D results. Moreover, the list of "hardcore restrictions" has been streamlined and it has been clarified that restrictions on active sales to territories not exclusively allocated to one party are considered hardcore and can therefore not benefit from the BER. It has furthermore been clarified that passive sales restrictions with regard to customers, and not only those with regard to territories, are also considered hardcore restrictions.
44. The scope of the Specialisation BER has been slightly extended so that its benefit applies to specialisation agreements, even where one of the parties to the agreement only partly ceases production. This enables a company that has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still avail of the Specialisation BER. The Specialisation BER also provides that, where the products concerned by a specialisation or joint production agreement are intermediary products which one or more of the parties use captively for the production of certain downstream products which they also sell, the exemption is also conditional upon a 20% market share threshold downstream. In such a case, merely looking at the parties' market position at the level of the intermediary product would ignore the potential risk of closing off inputs for competitors at the level of the downstream products. Consequently, such a specialisation or joint production agreement will not benefit from the Specialisation BER but will be subject to an individual assessment.

1.1.3. Sectoral Block Exemption Regulations

45. In the field of insurance, the new Insurance Block Exemption Regulation²³ (BER) was adopted on 24 March 2010. The previous BER was due to expire on 31st March 2010. Following a two and a half years review, involving all interested market players and National Competition Authorities, the Commission decided not to renew two of the four types of cooperation that the previous BER covered, namely agreements concerning (i) standard policy conditions (SPCs) and (ii) security devices (see Section II.A.2.1.3., points 167 to 172).

²³ Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 83, 30.3.2010, p. 1)

46. On 27 May 2010, the Commission adopted new competition rules for agreements between vehicle manufacturers and their authorised dealers, repairers and spare parts distributors. Agreements regarding the aftermarkets are subject to the general vertical BER of 20 April from 2010 onwards. Agreements regarding the markets for the sale of new vehicles will be subject to the same general vertical BER from 2013. In addition, the Commission adopted Regulation 461/2010²⁴, which sets out three supplementary hardcore clauses relating to spare parts distribution, and a detailed set of supplementary Guidelines²⁵ for assessing vertical agreements in the sector. The new rules broadly align competition policy in the car market to the general regime applicable to other sectors (see Section II.G.2.1., points 362 to 370).

1.2. Private enforcement of the EU antitrust rules

47. Private enforcement of the EU antitrust rules is an essential complement to a strong public enforcement by the Commission and National Competition Authorities (NCAs). In its 2008 White Paper on antitrust damages actions²⁶, the Commission suggested a number of measures to improve the possibilities for consumers and businesses to obtain compensation for harm caused to them by antitrust infringements. Collective redress and quantification of damages were among the issues addressed in the White Paper.
48. The Commission's suggestions on collective redress have triggered a broad public debate that goes beyond the boundaries of the antitrust field and focuses on the role to be played by collective redress more generally in any circumstances where a single infringement of EU rules harms large groups of victims. Indeed, collective redress may be necessary to ensure effective and efficient access to justice also in other areas of EU law. On 12 October 2010, Vice-Presidents Reding and Almunia and Commissioner Dalli jointly presented to the College an information note "Towards a Coherent European Approach to Collective Redress: Next Steps"²⁷, discussing horizontal issues such as effective compensation, safeguards against abusive litigation, the role of alternative dispute resolution, jurisdictional rules and funding. On the basis of the note, the Commission decided to prepare a public consultation which should contribute to identify a set of common principles that shall guide any future legislative proposals concerning collective redress, including in the antitrust field. A Communication presenting such principles has been scheduled for adoption in 2011²⁸.
49. As regards quantification of antitrust damages in civil proceedings, the Commission announced in the White Paper that it intended to draw up a non-binding Communication providing a succinct and easily accessible overview of the methods and techniques that can be used by courts and parties to antitrust damages actions

²⁴ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 129, 28.5.2010, p. 52)

²⁵ Commission notice – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (OJ C 138, 28.5.2010, p. 16-27)

²⁶ White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final)

²⁷ SEC(2010)1192

²⁸ Commission Work Programme 2011 (COM(2010) 623 final): Annex I, strategic initiative 25

when faced with the often complex task of quantifying damages. As part of the expertise sought in the preparation of the Communication on quantification of harm, a group of economic consultants and lawyers produced for the Commission an external study on quantifying antitrust damages²⁹. The Directorate-General for Competition also organised on 26 January 2010 a workshop with external economists to discuss a range of issues concerning this topic³⁰. A Communication on quantification of harm in antitrust damages actions has been scheduled for adoption in 2011³¹.

1.3. Applying Article 101: Cartels and other agreements and concerted practices

1.3.1. Cartels

50. In 2010 the Commission adopted seven cartel decisions³² imposing fines totalling over EUR 3 billion on 70 undertakings. As the fight against cartels continued to be one of its main priorities, the Commission focused on making the process more efficient through the application of the settlement procedure, which was applied in 2010 for the first time in two cases. Moreover, against the background of difficult economic conditions, a number of mainly small and medium-sized enterprises were granted a fine reduction in application of point 35 of the Fines Guidelines³³ (inability to pay).
51. In the Airfreight case³⁴ the Commission fined 11 air cargo carriers almost EUR 800 million for coordinating surcharges for fuel and security from December 1999 to February 2006. Airlines providing airfreight services primarily supply air transport services to freight forwarders, who arrange "door to door" carriage of goods including associated services and formalities on behalf of shippers. All carriers were granted a 50% reduction on sales between the EEA and third countries in order to take into account the fact that on these routes part of the harm of the cartel fell outside the EEA. All carriers received a reduction of 15% on fines on account of the general regulatory environment in the sector which can be seen as encouraging price coordination. One carrier received immunity from fines, and ten others fines reductions, under the Commission's Leniency policy³⁵ for undertakings that cooperate with its investigations.
52. An important issue in the area of cartels was settled by the Court of Justice in 2010, namely the question of scope of Legal Professional Privilege (LPP) protection, raised by Akzo Nobel Chemicals Ltd, one of the parties in the Heat Stabilizers case³⁶. In its

²⁹ Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf

³⁰ Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/economist_workshop.html

³¹ Commission Work Programme 2011 (COM(2010) 623 final): Annex II, initiatives under consideration
³² Cases COMP/38511 *DRAMs*, COMP/39092 *Bathroom fittings & fixtures*, COMP/38344 *Pre-stressing steel*, COMP/38866 *Animal Feed Phosphates*, COMP/36212 *Carbonless paper* (re-adoption for Bolloré), COMP/39258 *Airfreight* and COMP/39309 *LCD*

³³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006, p. 2-5)

³⁴ Case COMP/39258 *Airfreight*. See IP/10/1487, 9.11.2010.

³⁵ Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17-22)

³⁶ Case COMP/38589 *Heat stabilisers* (OJ C 307, 12.11.2010, p. 9-12)

judgment of 14 September 2010³⁷, the Court of Justice upheld the position of the Commission, confirming that correspondence with an in-house lawyer is not covered by LPP (see Section I.B.2.4., points 69 and 70).

Settlements procedure

53. In 2010 the Commission adopted its two first settlement decisions: a full settlement decision in DRAMs case³⁸ and a hybrid settlement decision in Animal Feed Phosphates case³⁹.
54. The DRAMs case constituted a milestone in EU cartel practice, not only because it brought the first settlement decision but also because of the characteristics of the DRAMs cartel. Ten producers in a high technology setting were involved in a network of anticompetitive contacts and secret information sharing, mostly on a bilateral basis, through which they coordinated the price levels and price quotations for DRAMs (a form of memory chips, the so-called Dynamic Random Access Memories – DRAM) sold to major PC and server equipment manufacturers in Europe. The settlement of this highly complex cartel comprised all ten undertakings; the Commission imposed an almost EUR 330 million fine. The decision was not appealed, entailing large cost savings for all concerned.
55. In the other settlement case, Animal Feed Phosphates, which concerned a cartel lasting over 30 years in the animal nutrition sector, one group of undertakings discontinued the settlement proceedings (hybrid case). The finalization of this first hybrid case proved that the Commission can successfully conclude settlement even when one party withdraws from the settlement process.

Inability to pay

56. Against the background of the economic crisis, the seven cartel decisions adopted in 2010 dealt with 32 applications for a fine reduction on grounds of inability to pay, nine of which were granted. Point 35 of the Fines Guidelines states that "in exceptional cases, the Commission may, upon request, take account of [an] undertaking's inability to pay in a specific social and economic context". The purpose of this provision is to avoid that the Commission's fines drive financially distressed undertakings out of the market and cause adverse social and economic consequences. After an intense scrutiny of their individual financial situation, fines were reduced because of inability to pay for a total number of nine undertakings in the Bathroom Fittings, Pre-stressing Steel and Animal Feed Phosphates cases.
57. The Bathroom fittings and fixtures cartel case⁴⁰ concerned an important number of relatively small companies. In this case, the Commission received ten applications for inability to pay. The Commission carried out a thorough analysis of the financial situation of each of the undertakings and assessed the specific social and economic context for those undertakings whose financial situation was found to be sufficiently

³⁷ Case C-550/07 *P Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR

³⁸ Case COMP/38511 *DRAMs*. See IP/10/586 and MEMO/10/201, 19.5.2010.

³⁹ Case COMP/38866 *Animal Feed Phosphates*. See IP/10/985, 20.7.2010.

⁴⁰ Case COMP/39092 *Bathroom fittings & fixtures*. See IP/10/790, 23.6.2010.

critical. In this context, the impact of the global economic and financial crisis on the bathroom fitting sector was taken into account. The Commission concluded for five undertakings concerned that the fine would cause their assets to lose significant value and reduced their fines. The final decision adopted on 23 June 2010 imposed a fine of over EUR 622 million on 17 undertakings.

1.3.2. *Other agreements and concerted practices*

58. In 2010, the Commission took three major decisions regarding agreements and concerted practices in addition to the fight against cartels. The Commission put an end to a major investigation under Article 101 in the air transport sector by making legally binding commitments offered by British Airways, American Airlines and Iberia⁴¹. This decision will entail significant benefits for European consumers by ensuring that sufficient competition on the transatlantic flights, in particular from London, is maintained (see Section II.E.2.1.1., points 309 to 312). In the financial sector, the Commission made binding Visa Europe's commitments⁴² on Multilateral Interchange Fees for immediate debit cards transactions applicable to cross-border transactions in the EEA and to domestic transactions in nine EEA countries⁴³. The decisions brings Visa Europe's MIFs for consumer immediate debit cards transactions in line with MasterCard's unilateral undertakings of 1 April 2009⁴⁴ and the "merchant-indifference methodology" to modes of payment (see Section II.A.2.1.1., points 157 to 160). The Commission also adopted its first antitrust decision in the health services market. It imposed a fine of EUR 5 million on the French Association of Pharmacists⁴⁵ condemning its market behaviour in the French market for clinical laboratory testing (see Section II.D.2.2.1., points 294 and 295).

1.4. **Applying Article 102 TFEU: Abuse of dominant positions**

59. The Commission continued its enforcement activities of Article 102 TFEU, notably in the energy sector, where it took four decisions and in the Information and Communication Technology (ICT) sector, where it opened several proceedings.

60. In the energy sector, the Commission continued in 2010 its work following its 2007 energy sector inquiry, adopting four major antitrust decisions under Article 9 of Regulation 1/2003⁴⁶, whereby the Commission makes binding the commitments proposed by undertakings to put an end to a potential infringement. They relate to incumbents of France, Germany, Italy and Sweden foreclosing access to their domestic markets through various means, such as long-term supply contracts with resale restrictions or limiting available transport or export capacities on energy networks (see Section II.B.2.1., points 211 to 215).

⁴¹ Case COMP/39596 *BA/AA/IB*. See IP/10/936 and MEMO/10/330, 14.7.2010.

⁴² Case COMP/39398 *Visa MIF*. See IP/10/1684, 8.12.2010.

⁴³ In those where the domestic MIF rates apply in the absence of other MIFs or are set directly by Visa Europe.

⁴⁴ Case COMP/34579 *MasterCard*. See IP/09/515, 1.4.2009.

⁴⁵ Case COMP/39510 *ONP*. See IP/10/1683, 8.12.2010.

⁴⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1-25)

61. The Commission was also active in the field of ICT markets to monitor potential abuse of dominant position. In spring, the Commission launched two preliminary investigations into Apple's business practices relating to the iPhone (the limitation of warranty rights to the country of purchase and the imposition of restrictions on independent developer tools for iPhone applications), which were both subsequently closed after Apple proposed to change these practices⁴⁷. The Commission opened in July proceedings against IBM concerning potential abuses of a dominant position: IBM is alleged *inter alia* to have engaged in illegal tying of its mainframe hardware products to its allegedly dominant mainframe operating system⁴⁸. In November 2010, the Commission initiated formal proceedings against Google with a view to further investigating allegations that Google has abused a dominant market position in online search, online advertising and online advertising intermediation, following complaints from several search service providers⁴⁹ (see Section II.C.2.2.1., points 253 to 255).

2. SELECTED COURT CASES

2.1. Exclusivity agreements

62. The *Tomra Systems and Others v European Commission*⁵⁰ judgment of the General Court of 9 September 2010 relates to a Commission decision of 2006 prohibiting Tomra's practices consisting of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes in the markets for reverse vending machines in a series of national markets. The judgment of the General Court re-affirms long-standing case law on exclusivity agreements. The Court paid particular attention to the fact that the Commission analysed the structure and characteristics of the market, the position held by Tomra and its competitors, the size of the customers, the terms of the agreement, the development of demand, the coverage and duration of the contracts, and the "suction effect" of the rebate schemes. The General Court established that the potential foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors, because the customers on the potentially foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it, and because it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.

⁴⁷ See IP/10/1175, 25.9.2010.

⁴⁸ Cases COMP/39511 *IBM Corporation*, COMP/39790 *TurboHercules/IBM* and COMP/39692 *IBM Maintenance Services*. See IP/10/1006, 26.7.2010.

⁴⁹ Cases COMP/39740 *Foundem/Google*, COMP/39775 *Ejustice/Google* and COMP/39768 *Ciao/Google*. See IP/10/1624, 30.11.2010.

⁵⁰ Case T-155/06 *Tomra Systems and Others v European Commission* [2010] ECR

2.2. Margin squeeze

63. The *Deutsche Telekom AG v Commission of the European Communities*⁵¹ judgment of the Court of Justice of 14 October 2010 dismissed Deutsche Telekom's appeal against the General Court's judgment of 2009⁵² which upheld the Commission's decision of 2003 finding that Deutsche Telekom (DT) had squeezed its competitors out of the market by charging abusive prices to access the local loop (the "last mile" connecting the network to end-users). This landmark judgment re-confirms the principles for assessing an abuse of a dominant position in the form of a margin squeeze under Article 102 that had been set out by the General Court in its judgment of 2008. The Court established that margin squeeze is a stand alone abuse in the sense that there is no need to demonstrate that wholesale prices or retail prices are, in themselves, abusive since the abusive nature of the incumbent's conduct is connected with the unfairness of the spread between its prices for wholesale access and its retail prices.
64. The Court upheld the lawfulness of the method used by the Commission to establish a margin squeeze, namely the use of the equally efficient competitor test. This test establishes whether DT would have been able to offer its retail services to end-users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for local loop access services. The Court required that in order for a margin squeeze to be considered abusive, it must be shown that it is capable of making market entry or market penetration of competitors, who are at least as efficient as the dominant undertaking, more difficult or impossible. In this regard, the Court noted that since the wholesale local loop access services provided by DT are indispensable to its competitors' effective penetration of the retail markets for the provision of services to end-users, a margin squeeze resulting from the spread between wholesale prices for local loop access services and retail prices for end-user access services, in principle, hinders the growth of competition in the retail markets in services to end-users, since a competitor who is as efficient as the incumbent cannot carry on his business in the retail market for end-user access services without incurring losses. The Court of Justice underlined that where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them out of the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Art. 102 TFEU.
65. Finally, the margin squeeze at issue was attributable to DT, since the latter had sufficient scope to adjust the retail prices charged to its end-users, notwithstanding the presence of price regulation. It thus confirms that decisions of national regulators (in this case, the approval by the German telecommunications Regulator RegTP of DT's wholesale prices) do not shield a dominant company from respecting competition rules. The Court held that regardless of the national price regulation, DT had sufficient scope to adjust its prices to end the margin squeeze and fulfil its obligations under competition law. In other words, decisions of national authorities under EU telecommunications law do not in any way affect the Commission's power to find infringements of EU competition law.

⁵¹ Case C-280/08 P *Deutsche Telekom AG v Commission of the European Communities* [2010] ECR
⁵² Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477

2.3. Level of fines

66. On 19 May 2010, the General Court delivered six judgments⁵³ on the appeals launched by several undertakings against the Copper Plumbing Tubes⁵⁴ Commission's decision of 3 September 2004, punishing a cartel in the market for copper tube manufacturing. The General Court clarified a number of questions related to the level of fines.
67. In *KME Germany AG, KME France SAS, KME Italy SpA v Commission*, the General Court dismissed the appeal of the applicants. On the assessment of the gravity of the infringement, the General Court confirmed that the actual impact on the market of cartels is irrelevant for their classification as "very serious" infringements under the 1998 Fines Guidelines. Therefore, the question to what extent a cartel resulted in a market price higher than without the cartel is not a decisive factor for determining the level of fines. The assessment of the size of the sector affected by the cartel is relevant to determine the basic amount of the fine. The applicants claimed that, when assessing the size of the sector affected by the cartel, the Commission was wrong in including the price of raw materials (metal) in market turnover, since that price is set by daily listings on the London Metal Exchange and is therefore outside their control. The General Court rejected that argument, stating that despite its approximate nature, turnover is currently considered as an adequate criterion in the context of competition law for assessing the size and economic power of the undertakings concerned. The General Court also stated that when the Commission increases the amount of the fine to take into account the duration of the infringement, it is not bound to fix the increase for each year of participation by reference to the intensity of the infringement (*i.e.* frequency of collusive meetings).
68. In the *IMI plc, IMI Kynoch Ltd, Yorkshire Copper Tube* case, the General Court partially annulled the Commission's decision and reduced the starting amount of the fine paid by the applicant because, unlike the other cartelists, the applicant participated in only one branch of the cartel. The applicants claimed that they suspended their involvement in the cartel for more than 16 months before being involved again in the cartel arrangements. Other cartelists were meeting regularly during that time. The Commission was not able to provide any evidence that the applicants were attending those collusive meetings during the 16 month "break". Although the applicants were not disputing that the cartel was a single and continuous infringement, the General Court decided to reduce the amount of the fine imposed on the applicants in order to take account of their sequential participation in the cartel.

2.4. Legal professional privilege and in-house lawyers

69. In its judgment of 14 September 2010⁵⁵, dismissing in its entirety the appeal brought by *Akzo Nobel Chemicals Limited and Akcros Chemicals Limited* against the

⁵³ Cases T-11/05, T-18/05, T-19/05, T-20/05, T-21/05 and T-25/05 *Wieland-Werke AG and Others, IMI plc and Others, Boliden AB and Others, Outokumpu Oyj and Others, Chalkor AE, KME Germany AG and Others v Commission*

⁵⁴ Case COMP/38069 *PO/Copper plumbing tubes* (OJ L 192, 13.7.2006, p. 21-29)

⁵⁵ Case C-550/07 *P Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR

Commission, the Court of Justice confirmed the position in the previous case of *AM&S Europe v Commission*⁵⁶ that internal company communications with in-house lawyers do not attract legal professional privilege (LPP) in the context of EU competition investigations.

70. The Court of Justice considered that in-house lawyers are in a different position to external lawyers, due to the in-house lawyer's relationship of employment with his client. In-house lawyers fail to fulfil the two cumulative conditions for legal privilege, first set down by the Court in the case of *AM & S Europe v Commission*. These conditions require that: (i) the advice is requested and given for the purposes of the client's rights of defence, and (ii) that the advice must emanate from "independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment". The in-house lawyer is economically dependent on and has "close ties" with his employer, resulting in a different level of professional independence from that which is enjoyed by an external lawyer. This is despite any professional ethical obligations to which in-house lawyers are subject. Legal privilege will only extend to advice from independent external lawyers. Accordingly, any communication from in-house lawyers with, or advice they provide to, their commercial colleagues on matters that may give rise to competition issues may be subject to full review by the Commission in the context of an investigation. This is what happened in the present case, which concerned e-mails and notes exchanged between the General Manager of Akcros, and a member of the Dutch bar, employed as the competition coordinator for Akzo Nobel seized by the Commission in the context of a cartel investigation.

2.5. Misuse of intellectual property rights and regulatory procedures

71. The judgment of the General Court in *AstraZeneca plc v. European Commission*⁵⁷ is of particular importance as it largely upheld the first Commission decision on abuse of dominance in the pharmaceutical sector and made it clear that misuse of regulatory procedure, including the patent system, may constitute an infringement of the EU competition rules. The General Court confirmed the Commission's finding that AstraZeneca's submission of misleading information to patent authorities for the purpose of obtaining the issue of Supplementary Protection Certificates (SPC), to which it was not entitled or to which it was entitled for a shorter period, was a practice based exclusively on methods falling outside the scope of competition on the merits and was inconsistent with the special responsibility of an undertaking in a dominant position. The General Court emphasised that it followed from the objective nature of the concept of abuse that the misleading representations made to public authorities must be assessed on the basis of objective factors and that the proof of the deliberate nature of the conduct and of the bad faith of the dominant undertaking is not required for the purpose of identifying an abuse of a dominant position. The intention of the dominant undertaking nonetheless can constitute a relevant factor which may, should the case arise, be taken into consideration by the Commission.
72. The General Court also upheld the Commission's conclusion that a key purpose underlying AstraZeneca's deregistration of market authorisations for Losec capsules

⁵⁶ Case 155/79 *AM&S Europe v Commission* [1982] ECR 1575

⁵⁷ Case T-321/05 *AstraZeneca AB, AstraZeneca plc v European Commission* [2010] ECR

in selected EEA countries was to exclude competition from generic firms and parallel traders. The General Court ruled that the purpose of a market authorisation is to confer the right to market a pharmaceutical product and not to exclude competitors from the market. However, according to the General Court, the Commission failed to establish that the deregistration of Losec capsules in two of the three countries was capable of restricting parallel imports in those countries and thus annulled the Commission decision in this part.

2.6. Lack of sufficient Union interest

73. The ruling of the General Court in *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission*⁵⁸ provides a rare example of annulment of a Commission rejection decision grounded on insufficient Union interest. The Commission rejected the complaint of CEAHR alleging that the refusal by several Swiss watch manufacturers to supply spare parts to independent watch repairers constituted infringements of Articles 101 and 102 TFEU. The Commission's finding of insufficient Union interest was based essentially on the limited impact of the conduct on the functioning of the internal market, the limited likelihood of establishing infringement and the fact that national competition authorities and courts appeared well placed to address the alleged infringement. None of these considerations persuaded the Court.

74. First, the General Court was not convinced by the Commission's finding that the market concerned was of limited size, given that the Commission decision did not take into account the territory affected and did not rely on figures or estimates to support its finding. The judgment makes it clear that, while there is no rule of law obliging the Commission to determine the size of the market in assessing the Union interest, it has the duty to give sufficient reason if it decides to rely on the argument of limited market size. Secondly, the General Court found flaws in the Commission's *prima facie* assessment of the relevant market, in particular in the fact that the primary market was examined together with the aftermarket for spare parts and repair services. Those errors undermined the rest of the Commission's analysis and its conclusion that there was a low probability of there being infringements. As regards the argument that national competition authorities and courts were well placed to address the infringement, the Court noted that the practice at stake existed in at least five Member States and was attributable to undertakings having their head offices and place of production outside the European Union. In the General Court's view these factors suggested that action at the European level could be more effective than various actions at national level. The judgment provides useful clarifications on the Commission's duties in relation to the assessment and the rejection of complaints for lack of sufficient Union interest.

2.7. Commitments

75. In *European Commission v Alrosa Company Ltd*⁵⁹, the Court of Justice set aside the judgment of the General Court annulling the Commission's commitment decision

⁵⁸ Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission* [2010] ECR

⁵⁹ C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR

which had made binding De Beers' commitments to phase out its purchases of rough diamonds from Alrosa. The Court of Justice gave a final judgment in the matter, upholding the Commission decision. The ruling establishes that the Commission enjoys considerable latitude in deciding whether to accept commitments under Article 9 of Regulation 1/2003 to conclude investigation. It emphasised the specific characteristics of the mechanisms provided for in Articles 7 and 9 of Regulation No 1/2003 and that the means of action available under each of those provisions are different. This implies that the obligation on the Commission to ensure that the principle of proportionality is observed has a different extent and content, depending on whether it is considered in relation to the former or the latter article. The Court of Justice pointed out that undertakings which offer commitments on the basis of Article 9 of Regulation 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of that Regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine. The Court of Justice disagreed with the General Court's interpretation of Alrosa's right to be heard in the Commission proceedings. Alrosa could not be considered an "undertaking concerned" in proceedings under Article 102 TFEU as it was not the dominant undertaking. The Commission was thus right in considering Alrosa an interested third party which enjoyed less extensive rights.

C – MERGER CONTROL

1. SHAPING AND APPLYING THE RULES

76. In 2010 the number of mergers notified remained low due to the economic crisis. In total, 274 transactions were notified to the Commission (compared to 259 in 2009 and 347 in 2008), 16 decisions were submitted to conditions and no prohibition was decided. The large majority of the mergers notified were approved without conditions both under the normal procedure and the simplified procedure, which represented 55% of notifications.
77. In 2010 the Commission took three decisions following an in-depth analysis in second phase investigation for the Oracle / Sun Microsystems⁶⁰, Monsanto / Syngenta⁶¹ and Unilever / Sara Lee Body⁶² mergers.
78. On 21 January 2010, the Commission cleared the planned acquisition of Sun Microsystems, by Oracle Corporation, the leading proprietary database software vendor. Following a second phase investigation into the database software market, the Commission concluded that the transaction would not lead to a significant impediment to effective competition (see Section II.B.2.2.2., point 257).
79. On 17 November 2010, after an in-depth investigation, the Commission cleared the acquisition of the global sunflower seed business of the US company Monsanto by

⁶⁰ Case COMP/M.5529 *Oracle / Sun Microsystems* (OJ C 91, 9.4.2010, p. 7)

⁶¹ Case COMP/M.5675 *Syngenta / Monsanto's sunflower seed business*. See IP/10/1515, 17.11.2010.

⁶² Case COMP/M.5658 *Unilever / Sara Lee Bodycare*. See IP/10/1514, 17.11.2010.

Syngenta of Switzerland conditional upon the divestment of Monsanto's sunflower hybrids, commercialised or under official trial in Spain and Hungary, as well as the parental lines used in the creation of those hybrids or currently under development for the creation of hybrids for Spain and Hungary. The Commission's investigation showed that the transaction, as initially notified, would have resulted in high market shares combined with limited prospects of entry and expansion in both the Spanish and the Hungarian markets for the commercialisation of sunflower hybrids. It would also have increased the ability and incentives for the merged entity to significantly reduce its activities of exchange and licensing of sunflower varieties in the EU, leading notably to a reduction in innovation, a foreclosure of competitors in the markets for the commercialisation of sunflower seeds and ultimately to a reduction of choice of sunflower seed hybrids for customers. The scope of the remedy package ensures that the businesses to be divested can be run in a viable and sustainable manner and that the purchaser will be able to take over the competitive role exercised by Monsanto in the markets for the trading of sunflower varieties in the EU and for sunflower seed commercialisation in Spain and Hungary. In light of the commitments, the Commission concluded that the transaction would not significantly impede effective competition in the internal market or any substantial part of it.

80. On 17 November 2010, the Commission also cleared the planned acquisition by the Anglo-Dutch consumer goods company Unilever of the body and laundry care businesses of Sara Lee Corp of the US, subject to conditions. The Commission's in-depth investigation had shown that the merger would give Unilever a very strong leadership position in a number of deodorants markets by combining the parties' brands, most notably Sanex with Dove and with Rexona which presently compete against each other. The Commission found that the merger, as initially notified, would raise competition concerns in Belgium, the Netherlands, Denmark, the United Kingdom, Ireland, Spain and Portugal where it would remove an important competitive force and would likely have led to price increases. To remedy these concerns, the merging parties offered to divest Sara Lee's Sanex brand and related business in Europe. In light of these commitments, the Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.
81. Air transport witnessed significant consolidation activity in 2010. The Commission examined the effects of the British Airways / Iberia and United Airlines / Continental Airlines mergers notably on competition on transatlantic routes⁶³. The Commission's investigation showed that the merged entities will continue to face sufficient competition from other carriers active on these routes as well as on other long-haul routes. In terms of short-haul routes, the Commission examined notably the impact of the merger between British Airways and Iberia on the London-Madrid and London-Barcelona routes, where it appeared that passengers have adequate alternative options on these and other short-haul routes. The Commission continues to ensure that consolidation in the airline industry does not take place at the expense of certain categories of consumers (see Section II.E.2.1.2., points 315 to 316).

⁶³ Cases COMP/M.5747 *British Airways / Iberia* (OJ C 241, 8.9.2010, p. 2) and COMP/M.5889 *United Airlines / Continental Airlines* (OJ C 225, 20.8.2010, p. 2)

82. Merger activity also took place in relatively new markets during 2010, which led to assessing potential competition issues relating to market foreclosure, standardisation and open source products. The merger between UK subsidiaries of T-Mobile and Orange⁶⁴ led to analyse whether the important share of combined radio spectrum of the two entities would not block future access of competitors to fourth generation telephony markets (see Section II.C.2.1.2., point 246). The acquisition by Microsoft of Yahoo's internet search and search advertising businesses led the Commission to analyse the dynamic online search market⁶⁵ (see Section II.C.2.2.2., point 258). Some mergers in the pharmaceutical sector also concerned the dynamic market of biotech products, such as in the Teva /Ratiopharm and the Abbot / Solvay cases⁶⁶ (see Section II.D.2.1.2., points 291 and 292).
83. Merger control activity in 2010 was also related to a number of cases stemming directly from decisions taken by the Commission in the application of the temporary rules for the State aid in the context of the economic and financial crisis. Restructuring plans in the financial sector involved divestments of activities by restructuring entities; these divestments were, where relevant, examined under the EU merger control rules (see Section II.A.2.2., points 174 to 175).
84. Finally, the Merger Working Group established on 13 October 2009 in common agreement between the National Competition Authorities of the EU Member States and the Commission (observer status was given to the EEA Member States) met three times in 2010. The purpose of this group is to exchange best practices and to contribute to foster consistency, convergence and cooperation among the EU merger jurisdictions. The discussions this year dealt with the review at the national level of mergers with potential cross-border effects and the assessment of merger remedies.

2. SELECTED COURT CASES

2.1. Quantitative evidence and econometric studies

85. In *Ryanair v Commission*⁶⁷, Ryanair appealed a Commission decision of June 2007 prohibiting Ryanair's acquisition of its Irish competitor Aer Lingus. The General Court upheld the Commission's prohibition decision, acknowledging in particular the Commission's very detailed and careful analysis of the competitive effects of the merger and the remedies proposed by Ryanair. The Court thereby again⁶⁸ endorsed the Commission's approach to analyse horizontal mergers on the basis of the analytical framework set out in *Horizontal Merger Guidelines*⁶⁹.
86. The ruling also clarified important aspects of the Commission's investigative powers, notably concerning the Commission's extensive use of quantitative evidence and

⁶⁴ Case COMP/M.5650 *T-Mobile / Orange* (OJ C 108, 28.4.2010, p. 4)

⁶⁵ Case COMP/M.5727 *Microsoft / Yahoo! Search Business*. See IP/10/167, 18.5.2010.

⁶⁶ Cases COMP/M.5865 *Teva / Ratiopharm* (OJ C 7, 12.1.2011, p. 5) and COMP/M.5661 *Abbott / Solvay Pharmaceuticals* (OJ C 89, 7.4.2010, p. 1)

⁶⁷ Case T-342/07 *Ryanair v Commission* [2010] ECR

⁶⁸ See also cases T-282/06 *Sun Chemical Group and Others v Commission* [2007] ECR II-2149 and T-151/05 *NVV and Others v Commission* [2009] ECR II-1219

⁶⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5-18)

econometric studies in the decision. The Court noted that the Commission was fully entitled to use this type of evidence for the assessment of the effects of the merger, in particular since quantitative evidence and economic studies were used by the Commission to complement and not to substitute the Commission's findings in the market investigation.

87. It further confirmed the Commission's analytical approach to airline mergers, notably concerning market definition and acceptable remedies. It endorsed the Commission's practice to analyse the effects of airline mergers on the basis of individual routes on which both companies' activities overlap, and not on bundles of routes or by countries. The Court also followed the Commission in that it distinguishes in its assessment between mergers involving players active from different airports and mergers of companies operating from the same airport.
88. Finally, the Court confirmed that the Commission was right to reject the remedies proposed by Ryanair at different stages of the procedure because of their formal shortcomings (*inter alia* unclear and contradictory formulations of some key parts of the remedies offer), thereby setting clear limits to the parties' freedom to disregard procedural rules set out in the Merger Regulation⁷⁰ and the Merger Remedies Notice⁷¹.

2.2. Minority shareholdings

89. In a separate ruling on *Aer Lingus v Commission*⁷², the Court provided some important clarifications with regard to the Commission's powers under the Merger Regulation in cases of minority shareholdings. Prior to the merger notification, Ryanair had acquired a non-controlling minority share in Aer Lingus (currently 29.4%) which it maintained after the Commission's prohibition decision. Aer Lingus asked the Commission to order Ryanair to fully divest its remaining minority shareholding, but the Commission's rejected this request by way of a decision, which was subsequently appealed by Aer Lingus.
90. The General Court confirmed that the Commission was right to reject Aer Lingus' claim to divest Ryanair's non-controlling shareholding in Aer Lingus. According to the Court, Ryanair's acquisition of a minority share could, in the absence of a controlling minority shareholding, neither be regarded as "full" nor as "partial" implementation of a concentration. The Commission therefore had no power under the rules of the Merger Regulation to order Ryanair to divest its minority share.

⁷⁰ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1-22)

⁷¹ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1-27)

⁷² Case T-411/07 *Aer Lingus v Commission* [2010] ECR

D – STATE AID CONTROL

1. SHAPING AND APPLYING THE RULES

Overview of the Commission's activities in the field of State aid control in 2010

91. In addition to work conducted on State aid related to the economic and financial crisis, the Commission adopted in 2010 around 450 decisions in other State aid cases in the industry and services sectors.
92. The majority of aid approved in the industry and services sectors related to horizontal objectives of common interest. It included among others: culture and heritage conservation aid (49 cases), regional aid (48), aid in support of environment protection (26), aid in support of research, development and innovation (29) and compensations of damages caused by natural disaster (10). The Commission also authorised aid for rescuing and restructuring firms in difficulty (25 cases) and for development of a specific sector such as coal or broadband networks (42 cases). The Commission also approved 39 cases in the transport sector, which focused mainly on the following objectives: sectoral aid (19 cases), regional development aid (7 cases) and rescuing firms in difficulty aid (5 cases).
93. Member States have made wide use of the possibilities offered by the General Block Exemption Regulation (GBER)⁷³, whereby measures which fulfil its criteria may be granted without prior notification to the Commission. In 2010, the Commission was informed about the introduction of 414 such new measures by Member States. The Commission also authorised 321 schemes and approved 114 individual measures. Over the year, the Commission took 14 fully or partly negative decisions related to State aid cases.

Overview of aid amount authorised by the Commission, excluding crisis measures (2009)

94. In terms of amount of aid authorised, figures are compiled with one year delay in the bi-yearly State aid Scoreboard. The latest Autumn update⁷⁴ shows that the overall aid volume increased in 2009 compared to 2008, almost exclusively due to crisis measures. Disregarding the exceptional crisis measures, it is still higher but within the average of the past ten years.
95. Total aid excluding crisis-related measures amounted in 2009 to 0.62% of GDP or EUR 73.2 billion, at a slightly higher level than 2008 (0.58% of GDP). State aid for industry and services amounted to EUR 58.1 billion (79% of total), while aid to agriculture, fisheries and transport amounted to EUR 15.1 billion (21%).
96. On average, 84% of aid to industry and services was directed towards horizontal objectives of common interest while sectoral aid stood at 16%. The largest

⁷³ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General Block Exemption Regulation) (OJ L 214, 9.8.2008, p. 3)

⁷⁴ State aid scoreboard – Autumn 2010 Update (COM(2010) 701)

proportion of aid was earmarked for regional development (around EUR 14 billion, 24% of total State aid for industry and services), followed by environmental aid (EUR 13 billion, 23%) and aid earmarked to Research & Development & Innovation activities (around EUR 10.6 billion, 19%). Together, these three objectives represented around two thirds of total aid to industry and services. All other horizontal objectives taken together account for roughly 18% of total aid to industry and services: SMEs (7% of total aid), employment (4%), culture and heritage conservation (3%), training (2%), social support for individual consumers (2%), risk capital and other horizontal objectives (roughly 1%). Although figures for 2010 are not yet available, the volume and share of non-financial aid should not change dramatically in 2010 compared to 2009.

97. Aid granted through block exemption, in particular the GBER, represented an increasingly important share of aid volumes at 19% of total aid to industry and services in 2009 (EUR 10.8 billion), compared to 16% in 2008 and 12% in 2007. The vast majority of aid (69%) was granted through schemes; individual aid accounted for the last 12%.

State aid control – the Simplification Package

98. 2010 was the first year of functioning with the Simplification Package in place. This Package, in force since 1 September 2009, comprises a Best Practice Code⁷⁵ and a Notice on a Simplified Procedure⁷⁶, both of which aim at improving the effectiveness, transparency and predictability of State aid procedures.
99. The Best Practices Code details how State aid procedures should be carried out in practice. It includes a certain number of voluntary arrangements between the Commission and Member States to achieve more streamlined and predictable procedures at each step of a State aid investigation. One year after its entry into force, the first results of the Code were encouraging: in particular, it had a significant impact on complaints-handling, with an increasing number of complainants informed of the status of their complaints. The Commission is committed to further enhancing cooperation with the Member States, especially as regards the quality of notifications and exchange of information during the proceedings.
100. The Simplified Procedure aims at improving the Commission's treatment of straightforward cases, such as those clearly in line with existing Guidelines or established Commission decision-making practice. The Commission wants to ensure that clearly compatible aid measures are approved within one month from a complete notification by a Member State. A transparency provision also ensures that third parties can provide their input. It thus took less time for the Commission to approve decisions in 2010 under the Simplified Procedure compared to the normal procedure.

⁷⁵ Code of Best Practice for the conduct of State aid control procedures (OJ C 136, 16.6.2009, p. 13-20)

⁷⁶ Notice from the Commission on a simplified procedure for treatment of certain types of State aid (OJ C 136, 16.6.2009, p. 3-12)

1.1. Horizontal aid

1.1.1. Regional aid

101. In accordance with the Guidelines on national regional aid for 2007-2013⁷⁷ (RAG 2007), the Commission carried out the review of the State aid status and the aid ceiling of the statistical effect regions⁷⁸ that benefited transitionally from a status as an assisted area pursuant to Article 107(3)(a)⁷⁹ until the end of 2010. As from 1 January 2011, those regions will benefit from eligibility to regional aid on the basis of Article 107(3)(c)⁸⁰, with the exception of four regions (Hainaut, Kentriki Makedonia, Dytiki Makedonia and Basilicata) that maintain their status as Article 107(3)(a) assisted areas with an aid intensity of 30% as their GDP per inhabitant over the period 2005-2007 was below 75% of the EU25 average⁸¹.
102. Similarly, in the framework of the mid-term review of 2010 foreseen in the same Guidelines, the Commission accepted changes to national regional State aid maps notified by three Member States (France, Ireland and Italy) for certain areas eligible to regional aid on the basis of Article 107(3)(c).
103. On the basis of the RAG 2007, the Commission approved in 2010 regional aid to six large investment projects. Four of these projects are in the photovoltaic sector, three in Germany (Solibro, Wacker Chemie and Sovello3)⁸² and one in Spain (Silicio Solar)⁸³, while the other investment projects are in the mechanics industry (Liebherr in Germany and Fiat Powertrain in Italy)⁸⁴. Furthermore, five *ad hoc* aid measures in favour of single enterprises for investments in areas under the Regional Aid maps 2007-2013 were approved, as well as ten regional aid schemes, five of which regarding outermost regions.
104. The Commission closed in 2010 three formal investigations (Deutsche Solar, Sovello and Fri-el Acerra)⁸⁵, with one positive and two negative decisions. The negative decisions concerned an illegitimate SME bonus in favour of Sovello AG, to be

⁷⁷ Guidelines on national regional aid 2007-2013 (OJ C 54, 4.3.2006, p. 13-44)

⁷⁸ Statistical effects regions are regions (at NUTS II-level) which had a GDP per capita of more than 75% of the EU25 average, but less than 75% of the EU15 average at the moment of entry into force of the RAG 2007.

⁷⁹ Article 107(3)(a) TFEU provides that aid to promote economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the internal market. The conditions for an area to be eligible for aid under Article 107(3)(a) or Article 107(3)(c) (see footnote below) during the period 2007-2013 are defined in the RAG 2007.

⁸⁰ Article 107(3)(c) provides that aid to facilitate the development of certain economic areas may be considered compatible with the internal market. Only small parts of national territories of Member States may normally qualify for aid under Article 107(3)(c), and benefit of lower aid intensities than Article 107(3)(a) regions.

⁸¹ Review of the State aid status and the aid ceiling of the statistical effect regions in the following National regional State aid maps for the period 1.1.2011- 31.12.2013 (OJ C 222, 17.8.2010, p. 2-3).

⁸² Cases N641/2009 *Solibro GmbH* (OJ C 269, 5.10.2010, p. 2), N221/2009 *Wacker Chemie AG* (OJ C 312, 17.11.2010, p. 5) and N237/2010 *Sovello3*

⁸³ Case N285/2009 *Silicio Solar* (OJ C 311, 16.11.2010, p. 1)

⁸⁴ Cases N261/2009 *Liebherr MCCtec Rostock GmbH* and N27/2010 *Fiat Powertrain Technologies in Verrone* (OJ C 333, 10.12.2010, p. 2-3)

⁸⁵ Cases C34/2008 *Deutsche Solar AG* (OJ L 7, 11.1.2010, p. 40-47), C27/2008 *Sovello AG (formerly EverQ) SME bonus* (OJ L 167, 1.7.2010, p. 21-38) and C8/2009 *Fri-el Acerra s.r.l*

recovered by Germany as the beneficiary of the aid did not qualify for the SME status, and an incompatible aid measure in favour of Fri-el Acerra because of the absence of incentive effect and insufficient regional contribution of the investment in Region Campania in Italy.

1.1.2. *Environmental aid and security of electricity supply*

105. In 2010, the Commission approved 36 State aid measures under the Environmental Aid Guidelines⁸⁶ or directly based on Article 107(3)(c) TFEU. 20 concerned aid schemes and 16 individual applications. The Commission took no negative decisions and opened two formal investigations. Eight decisions not to raise objections were taken on individual applications after a detailed economic assessment under the Environmental Aid Guidelines.
106. The approved schemes included *inter alia* aid to secure supply of electricity, aid for renewable energy and to carbon capture and storage project. Investigations concerned a German measure to compensate non-ferrous metal producers for CO₂ costs contained in electricity costs⁸⁷ and aid to the energy incumbent in Malta intended to bring the Delimara Power Station in early compliance with emission standards laid down by EU environmental law⁸⁸. The Commission also authorised aid to remediate two contaminated sites in Austria⁸⁹. (see Section II.B.2.2., point 222).

1.1.3. *Research & Development & Innovation (R&D&I) aid*

107. Innovation has been placed at the heart of the Europe 2020 Strategy and the Flagship Initiative on an Innovation Union⁹⁰ outlines the necessity to improve the financing of innovation in Europe to boost its performance. The Community Framework for research and development and innovation⁹¹ supports this objective by making it easier for Member States to better target State aid to the relevant market failures. In 2010, the Commission approved twelve aid schemes, with an overall budget of more than EUR 5 billion, on the basis of this Framework, and decided to initiate the formal investigation procedure regarding one further case which was subsequently withdrawn. Out of those measures, five were pure R&D schemes, four were innovation-oriented schemes and four were mixed, pursuing both R&D and innovation objectives.
108. In addition, and following an in-depth economic assessment, the Commission decided not to raise objections to ten individually notifiable aids to large R&D projects referring to new processes for bio-methane production, use of composite materials for the fabrication of specific components of aero-structures, and lithography for semiconductor devices. Furthermore, it monitored information

⁸⁶ Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1)

⁸⁷ Case C33/2010 (ex N700/2009) *Aid to non-ferrous metals producers for CO₂ costs of electricity*

⁸⁸ Case C32/2010 (ex N520/2009) *Environmental Project for Delimara Power Station*

⁸⁹ Cases N135/2000 *Aid for the Remediation of a Contaminated Site in Linz* (OJ C 312, 17.11.2010, p. 5-6) and N197/2010 *Individual Aid for the Remediation of the Contaminated Site in Unterkärnten* (OJ C 265, 30.9.2010, p. 1)

⁹⁰ See the Communication on an "Innovation Union" (COM(2010) 546 final)

⁹¹ Community framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1-26)

submitted on aids to 52 other R&D projects, which exceeded EUR 3 million although without falling under the obligation of individual notification.

109. As to State aid granted in favour of R&D projects under the GBER, there were 40 schemes providing aid for fundamental research, 91 for industrial research and 86 for experimental development. At the same time, the GBER was also used by Member States for measures relating to innovation, 42 of which related to industrial property rights for SMEs, 21 to young innovative enterprises, 24 to innovation advisory and support services, and eleven to the loan of highly qualified personnel.

1.1.4. Aid to promote risk capital and urban development

110. In the area of risk capital financing for SMEs, the Commission approved seven measures under the Risk capital guidelines⁹², with an overall budget of EUR 380 million. Out of those measures, three did not comply with the safe harbour provisions and were therefore subject to a detailed assessment. Furthermore, eleven additional aid schemes were implemented in 2010 under the GBER, which some Member States increasingly used for risk capital purposes.

111. In the view of the progressive deployment of the JESSICA initiative⁹³, the Commission started to reflect on the development of general economic principles on the basis of which its funding mechanism, to the extent that it contains elements of State aid, could be assessed. The approach would build on the Commission's practice in the urban regeneration area and apply by analogy the relevant criteria from existing rules, notably the Risk capital guidelines. In particular, it would aim at ensuring that the envisaged measures address clearly identifiable market failures or equity objectives and have an incentive effect, and that any aid granted through JESSICA investments is limited to the minimum necessary to make urban projects commercially attractive for private sector investors.

1.2. Sectoral and individual State aid

1.2.1. Rescuing and restructuring aid for industry

112. In 2010, the Commission adopted 21 decisions concerning rescuing and restructuring of firms in difficulty in the industrial sector. The Commission decided to open five formal investigation procedures⁹⁴. Three formal investigation procedures were closed in 2010 with a no aid decision for Hydral⁹⁵, a no-competence decision in the case of Mittal Steel Roman⁹⁶ and a positive conditional decision in case of Varvaressos⁹⁷.

⁹² Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2)

⁹³ Joint European Support for Sustainable Investment in City Areas (JESSICA) is a policy initiative of the Commission developed with the European Investment Bank and in collaboration with the Council of Europe Development Bank, with the objective of supporting sustainable urban development using financial engineering instruments in the context of EU Cohesion Policy for 2007-2013.

⁹⁴ Cases C12/2010 *Deferral and rescheduling of liabilities of Ruse Industry* (OJ C 187, 10.7.2010, p. 7), C4/2010 *Intervention du FMEA en faveur de Trèves* (OJ C 132, 22.5.2010, p. 12), C8/2010 *Restructuring aid to Varvaressos*, C13/2010 *Alleged aid to ELAN* (OJ C 223, 18.8.2010, p. 8) and C27/2010 *Potential aid to United Textiles* (OJ C 357, 30.12.2010, p. 18)

⁹⁵ Case C40/2008 *Restructuring aid to PZL Hydral SA* (OJ L 298, 16.11.2010, p. 51)

⁹⁶ Case C40/2007 *Privatisation Mittal Steel Roman*

113. In February 2010, the Commission launched an in-depth investigation on the EUR 55 million capital injection of the FMEA (Fonds de Modernisation des Equipementiers Automobiles) to the automotive supplier Trèves⁹⁸. That investigation will allow it to be determined if the FMEA's investment is imputable to the French State and if it took place under market conditions.
114. In July 2008 the Commission approved a rescue aid for fibre producer Varvaressos, a large company in difficulty, in the form of a State guarantee for a EUR 2.4 million loan. In January 2009, Greece notified a restructuring aid of EUR 14 million for the company. In the process of the restructuring plan's assessment, the Commission discovered that the company had already been granted a State guarantee for existing loans of EUR 23.4 million in May 2007, contrary to what Greece had declared (in November 2007) when it notified the rescue aid measure. On the basis of that new information as well as of the notified measure, the Commission opened the formal investigation procedure in March 2010 on a EUR 16.7 million restructuring package, raising doubts on the company's eligibility for restructuring aid, its contribution to the restructuring costs and the proposed compensatory measures. In December 2010, following clarifications from the Greek authorities and additional compensatory measures, the Commission closed the formal investigation procedure with a positive conditional decision.
115. In August 2010, the Commission closed a formal investigation procedure into the restructuring plan of the Polish company PZL Hydral, a State-owned aeronautics civil and military parts supplier, with a no aid decision. Initially, the Polish authorities intended to grant as much as EUR 30 million of State aid to finance the restructuring of the company. Following the emergence of a potential private buyer of part of the assets of the company, the Polish authorities abandoned their plan to grant State aid and limited their interventions to debts waivers and debt to equity swaps in line with what private creditors already accepted. Thus those measures were considered as free of aid by the Commission since they merely reflected the behavior of any market operator in similar circumstances.

1.2.2. *Aid to the transport sector*

116. In 2010, the Commission adopted 53 decisions in the transport sector, including 14 decisions in the railway sector, most of them on the basis of the 2008 Community guidelines on State aid for railway undertakings⁹⁹, 13 decisions in the aviation sector, mainly on the basis of the 2005 Community Guidelines on financing of airports and start-up aid to airlines departing from regional airport¹⁰⁰ and eleven in the maritime sector. As regards the latter, the decisions are mainly based on the Community guidelines on State aid to maritime transport¹⁰¹. The Commission also adopted its first decision applying Regulation No 1370/2007 on public passenger transport

⁹⁷ Case C8/2010 *Restructuring aid to Varvaressos*

⁹⁸ Case C4/2010 *Intervention du FMEA en faveur de Trèves* (OJ C 132, 22.5.2010, p. 12)

⁹⁹ Community guidelines on State aid for railway undertakings (OJ C 184, 22.7.2008, p. 13)

¹⁰⁰ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1)

¹⁰¹ Community guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3)

services¹⁰², which entered into force on 3 December 2009 and broadly follows the Commission's previous practice in the field. It is also worth noting that in 2010 more than 40 notifications were introduced by Member States and close to 50 complaints were lodged in the field of transport. That activity demonstrates the importance of this field in applying State aid rules (see Section II.E.2., points 317 to 321, 328 to 330 and 335 to 339).

1.2.3. *State aid for Broadband networks*

117. In 2010, the Commission continued to support the development of broadband networks on the basis of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband network¹⁰³, adopted in 2009. It authorised 20 schemes for public support to the development of broadband network, approving approximately EUR 1.8 billion of public funding which could generate up to EUR 3.5 billion in investment (see Section II.C.2.1.3., points 247 and 248).
118. State aid policy authorises properly justified and proportionate broadband schemes if the distortion of competition and the effect on trade are limited and thus significantly contributes to the realisation of the objectives stated under the Digital Agenda for Europe¹⁰⁴ of reaching fast broadband coverage (at least 30 Mbps) for all European citizens and ultra-fast broadband (above 100 Mbps) subscriptions for at least 50% of European households by 2020.

1.2.4. *Aid to the coal sector*

119. Following a proposition from the Commission in July 2010, the Council adopted a decision on State aid to facilitate the closure of uncompetitive coal mines¹⁰⁵ on 10 December 2010 in light of the expiry of the previous Regulation in December 2010¹⁰⁶. It provides that Member States might grant aid in two circumstances. First, aid may be given to cover coal production if there is a closure plan whose deadline does not extend beyond 31 October 2018. While the Commission favoured a shorter closure period, it took into account the strong political message from the Member States and the European Parliament and agreed to the compromise. Second, aid may be granted until 2027 to cover exceptional costs (such as social welfare, rehabilitation of sites or removal of waste water) associated with the closure of mines. Any closure aid must be decreasing over time with a specified rate and accompanied by measures to mitigate the negative environmental impact of coal production. No investment aid to hard coal mining may be granted under this decision. During 2010 the Commission approved aid schemes to the coal sector in

¹⁰² Regulation (EC) No 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger services by rail and road repealing Council regulations (EEC) No 1191/69 and No 1107/70 (OJ L 315, 3.12.2007).

¹⁰³ Community guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ C 235, 30.9.2009, p. 7-25)

¹⁰⁴ A Digital Agenda for Europe (COM(2010) 245 final/2)

¹⁰⁵ Council decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines (OJ L 336, 21.12.2010, p. 24-29)

¹⁰⁶ Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry (OJ L 205, 2.8.2002, p. 1-8)

Germany¹⁰⁷ and Poland¹⁰⁸ intended to support access to coal reserves and cover exceptional costs.

1.2.5. *Aid to the agricultural sector*

120. 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 2013¹⁰⁹. In 2010, 214 new State aid cases were registered and 161 decisions were adopted (see Section II.H.2.3., points 387 to 391).
121. Since the introduction of the possibility for Member States to approve EUR 15 000 in limited amounts of aid to primary producers under the Temporary Framework, 14 Member States submitted schemes which were approved by the Commission.

1.2.6. *Aid for compensating provision of Services of General Economic Interest: Social Housing undertakings*

122. During 2010, the Commission continued to examine a number of complaints lodged by private building companies and real estate developers acting on the housing market in competition with public operators. In analysing the various elements pertaining to the alleged presence of State aid granted in favour of social housing undertakings, the Commission found that public support often constitutes public service compensation granted to social housing undertakings carrying out activities qualified as services of general economic interest (SGEI) by the Member State concerned. In the field of State aid control regarding social housing, such compensations for SGEI are in principle covered by the 2005 Commission decision¹¹⁰, exempting them from notification regardless of the turnover of the beneficiaries and the level of the compensation they receive.
123. In that context, in December 2009, the Commission had adopted a decision (published in 2010) declaring the Dutch Social Housing system compatible with EU State aid rules on SGEI¹¹¹. The State support given to social housing corporations takes the form mainly of loan guarantees and grants. Following an in-depth investigation, the Commission endorsed commitments from the Dutch authorities to change the existing social housing system in order to bring it in line with EU State aid rules. In particular, the Dutch authorities will ensure that State funding is not used for commercial activities and that housing is attributed in a transparent manner according to objective criteria, focusing on a clearly defined target group of socially less advantaged persons. In addition, the Commission in that decision approved for the next ten years new aid amounting to EUR 750 million for social housing projects

¹⁰⁷ Case N592/2009 *Aid for German hard coal in 2010* (OJ C 94, 14.4.2010, p. 7)

¹⁰⁸ Case N653/2009 *Investment aid for hard coal mining sector*

¹⁰⁹ Community guidelines for State aid in the agriculture and forestry sector 2007-2013 (OJ C 319, 27.12.2006, p. 1).

¹¹⁰ In particular, the Commission explained the manner in which it intends to apply Article 106(2) TFEU within the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4-7) and the Commission decision of 28 November 2005 on the application of Article 86(2) EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67-73).

¹¹¹ Cases E2/2005 and N642/2009 *Existing and special project aid to housing corporations (Dutch Social housing)* (OJ C 31, 9.2. 2010, p. 6)

in declining urban areas. In April 2010, the Commission's decision was challenged by private developers and the social housing undertakings in front of the General Court, and those annulment proceedings are currently pending¹¹².

1.3. State aid enforcement by national courts

124. The Commission has exclusive competence for approving State aid. National courts nevertheless play an important role in the State aid field, since they can offer possible complainants effective legal protection "close to home" by ordering suspension and recovery of State aid granted in violation of the notification obligation of Article 108(3) TFEU. According to a recent study¹¹³, more and more cases are brought before national courts, covering an increasing variety of issues.
125. The potential of the private enforcement of the stand-still obligation¹¹⁴ in national courts was underlined in the Notice on State aid enforcement by national courts¹¹⁵ issued by the Commission in April 2009. A year after its adoption, the first responses have been encouraging, with increasing numbers of requests for information and opinions being received by the Commission.
126. In 2010, the Commission continued its efforts to improve the system of private enforcement of the stand-still obligation in national courts, focusing on enhancing communication with national judges. In October, it published a handbook on the "Enforcement of EU State aid law by national courts"¹¹⁶ in order to assist national judges in dealing with State aid cases. The handbook gathers the most important EU rules and relevant guidance material. It explains the role of national courts in the State aid field as defined by the European Courts and offers national courts practical and user-friendly support in individual cases.
127. Given the importance of public awareness for effective and successful private enforcement of the stand-still obligation in national courts, the Commission continued its advocacy on the issue through dedicated web pages, publications, participation in conferences and trainings for national judges. In particular, eight out of the 14 sessions organised in 2010 under the national judges' training programme dealt with State aid.

¹¹² Cases T-201/10 *IVBN v Commission* (OJ C 179, 3.7.2010, p. 49), T-202/10 *Stichting Woonlinie and others v Commission* (OJ C 179, 3.7.2010, p. 50), T-203/10 *Stichting Woonpunt and Others v Commission* (OJ C 179, 3.7.2010, p. 51) and T-206/10 *Vesteda v Commission* (OJ C 179, 3.7.2010, p. 53). A further case, T-151/10 *BNG v Commission* (OJ C 148, 5.6.2010, p. 43), has been withdrawn from the register of the General Court following the Commission's amending decision of 30 August 2010.

¹¹³ 2009 Study on the enforcement of State aid law at national level available at: http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf

¹¹⁴ Under EU State aid law, Member States are required to inform ("ex ante notification") the Commission of any plan to grant or alter State aid and they are not allowed to put such aid into effect before it has been authorised by the Commission ("stand-still obligation").

¹¹⁵ Commission notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1)

¹¹⁶ Available at: http://ec.europa.eu/competition/publications/state_aid/national_courts_booklet_en.pdf

1.4. *Ex-post* monitoring of State aid measures

128. The Commission has launched regular *ex-post* monitoring exercises since 2006 in order to ensure effective enforcement of the State aid rules, since an increasing number of aid measures are no longer subject to the notification obligation because they are granted through general schemes allowing for subsequent individual application or through Block Exemptions (BER)¹¹⁷.
129. Monitoring implies a check at two levels: first, at the level of the general legislation in order to determine whether the national legislation is in line with the requirements of EU State aid rules (approved scheme or BER). In a second stage a few significant individual applications of the national aid measure are examined in detail in order to determine whether in practice EU State aid rules are also respected (typically cases above EUR 500 000). Respect of conditions such as the maximum aid intensity, maximum aid amount and the correct qualification of the eligible costs will typically be scrutinised at that level.
130. Since 2006, the Commission has covered an important part of the main substantive types of aid: aid to SMEs, training aid, employment aid, regional aid, R&D aid, environmental aid, as well as rescuing and restructuring aid. In 2010, *ex-post* monitoring also included measures covered by the GBER, as well as, for the first time, aid in the form of risk capital, aid in the transport sector, aid in the broadband area, cultural aid and aid to the shipbuilding sector. The Commission also addressed aid measures adopted by 25 of the 27 Member States, thereby ensuring a balanced geographical coverage. The measures reviewed under the ongoing exercise concern primarily environmental and regional aid (20% each), R&D&I (17%), aid to SMEs and for the promotion of risk capital (17%).
131. The results of the first exercises show that this part of the existing State aid architecture (schemes and BERs) functions in a satisfactory manner. In a minority of cases substantive problems or procedural issues (such as transparency, reporting, speed and quality of answers) were identified. The cases in which no appropriate solution was identified are still being investigated (one from 2006, and three from 2008). Finally, all Member States cooperated with the Commission, although many submitted the requested information with considerable delay.

1.5. Recovery policy

132. When a negative decision is taken in cases of unlawful State aid, the Commission shall decide that the Member State must take all necessary measures to recover the aid from the beneficiary. Recovery is not a penalty, but a means to restore the situation previous to the granting of the unlawful aid. This objective is obtained once the aid (plus compound interest) is repaid by the recipient who enjoyed an advantage over its competitors in the market.
133. A Member State is deemed to comply with the recovery decision when the aid (plus compound interest) has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market

¹¹⁷ Facts and figures on State aid in the EU Member States (SEC(2010) 1462)

conditions. Where the Member State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Commission may initiate infringement proceedings under Article 108(2) TFEU¹¹⁸ or Article 260(2) TFEU¹¹⁹. The applicable rules regarding recovery, as well as detailed and concrete guidance to Member States, are provided in the Notice on the implementation of decisions ordering Member States to recover unlawful and incompatible State aid (Recovery Notice)¹²⁰.

134. By 31 December 2010, the amount of illegal and incompatible aid recovered had increased from EUR 2.3 billion in December 2004 to EUR 10.9 billion¹²¹. The percentage of illegal and incompatible aid still to be recovered has evolved accordingly from 75% at the end of 2004 to 14% at the end of 2010. The share of the total amount recovered has slightly decreased between December 2009 and December 2010 (from 88.0% to 86%) due to high amount of aid identified in several pending cases¹²². Over the year 2010, the Commission adopted six decisions regarding recovery and ensured the recovery of over EUR 500 million by Member States.
135. In order to ensure better enforcement of its decisions, the Commission brought proceedings under Article 108(2) in three cases and under Article 260(2) in one case, thus leading to 26 cases under litigation. 41 recovery cases are currently pending.

2. SELECTED COURT CASES

2.1. Notion of aid

136. In *Hellenic Republic, Olympic Airways and Olympic Airlines v European Commission*¹²³ the General Court partially annulled the Commission decision finding that certain measures granted to Olympic Airways (OA) and Olympic Airlines (NOA), the new airline formed by the Greek State and which had taken over the flying activities of OA, constituted incompatible State aid. The General Court recalled first of all that, if there is economic continuity, NOA could be considered as the beneficiary of the aid granted to OA before NOA took over its flying activities. The Court confirmed that the economic continuity was sufficiently demonstrated in this case and that aid granted to OA before the creation of NOA could thus be recovered from NOA. However, the Court found that the unlawful aid granted to OA after NOA took over its flying activities, could not be recovered from the latter on

¹¹⁸ Actions under Article 108(2) TFEU are aimed at condemning a Member State for non-implementation of a State aid recovery decision.

¹¹⁹ Actions under Article 260(2) TFEU are infringement actions aimed at condemning a Member State for non-implementation of a Court judgment, and may include the payment of fines (periodic penalties and/or lump sums).

¹²⁰ Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4-17).

¹²¹ These figures do not include State aid granted to the agricultural, fishery and transport sectors.

¹²² At the time of the decision, the Commission cannot always identify the aid amount to be recovered: in such cases, Commission decisions include information enabling the Member State to determine the aid amount.

¹²³ Joined cases T-415/05, T-416/05 and T-423/05 *Hellenic Republic, Olympic Airways and Olympic Airlines v European Commission* [2010] ECR

the mere ground that it derived an indirect benefit. This factor does not suffice to conclude that NOA was the effective recipient of that aid, as the finding of economic continuity is irrelevant for the measures granted after the take-over. The Commission should have clearly identified the alleged advantage granted by OA to NOA and assessed separately whether, having regard to the market economy investor principle, it constituted State aid.

137. Furthermore, as regards the application of the market economy investor principle, the Court recalled the Commission's obligation to examine the difference between the rents for the sub-leasing of aircraft paid by NOA and those available in normal competitive conditions on the market. From a procedural perspective, the Court recalled that the Commission had to prove that the rents were not in line with market conditions and that it can only adopt a decision based on the information available if the Member State does not provide the required information in spite of an information injunction.
138. In *Bundesverband Banken v Commission*¹²⁴ the General Court upheld the Commission's decision and confirmed that the Commission had correctly applied the market economy investor principle in its assessment of a silent partnership contribution of capital of unlimited duration by the Land of Hessen to one of Germany's largest banks Landesbank Hessen-Thüringen Girozentrale (Helaba).
139. As regards the notion of advantage in the context of compensation for public service obligations, in *Commission v Deutsche Post*¹²⁵ the Court of Justice, basing its reasoning on the Altmark jurisprudence¹²⁶, upheld the General Court's annulment of the Commission's decision of 2002. The Court rejected the partial approach of the Commission which, instead of carrying out a comprehensive analysis of whether Deutsche Post had been overcompensated for its public service obligations in the postal sector, had focused exclusively on Deutsche Post's allegedly below-cost pricing strategy for door-to-door parcels. The Court emphasized the necessity to conduct a comprehensive analysis of all universal service revenues and costs to determine whether Deutsche Post was under- or over-compensated for its public services obligations.
140. As further regards the notion of advantage, the General Court ruled in *Mediaset SpA v Commission*¹²⁷ that a State subsidy granted to every user who purchased or rented equipment for the reception of TV signals transmitted using digital terrestrial technology was not technologically neutral and enabled cable operators and digital terrestrial broadcasters, such as Mediaset, to benefit, as compared with satellite broadcasters, from an advantage. The Court held that the measure, of which the direct beneficiaries were the final consumers, constituted an indirect advantage for operators on the digital TV market.

¹²⁴ Case T-163/05 *Bundesverband deutscher Banken eV v Commission* [2010] ECR

¹²⁵ Case C-399/08 *Commission v Deutsche Post* [2010] ECR

¹²⁶ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747

¹²⁷ Case T-177/07 *Mediaset SpA v Commission* [2010] ECR

141. In case *ACEA Electrabel*¹²⁸, the Court upheld the judgment of the General Court and confirmed that the Commission is not obliged to carry out a detailed assessment of the potential advantages of a measure, in particular in relation to its impact on competitors, in order to state the presence of aid. It furthermore confirmed that the notion of economic entity in the context of State aid may differ from that in other areas of competition law and endorsed the Commission's application of the Deggendorf jurisprudence.
142. In *France and others v. Commission*¹²⁹ the General Court annulled the Commission's decision regarding the credit line offered by the French authorities to France Télécom. The Commission's decision had declared this measure incompatible State aid. The judgment established that for each State measure involved, advantage, State resources and the link between these two elements (*connexité*) set out in Article 107(1) have to be established for finding State aid. The Court dismissed the global approach by the Commission to consider the credit line in the context of the declarations made by the French authorities and to base its finding of State aid on that link. The Court reasoned that earlier oral and written statements of a French Minister and the French authorities to support France Télécom, which were not themselves classified as State aid by the Commission and which took place in July, September and October 2002, could not be taken into account by the Commission to demonstrate that the credit line proposal of December contained an advantage granted by State resources. It dismissed the Commission's reasoning that the credit line was a "realisation of the earlier statements" by the French authorities to support France Télécom. The General Court found there was a rupture between those earlier and the notified events and that they were not sufficiently linked. Given this rupture, the Court found that, even if there were State resources involved in the credit line, it was not sufficiently demonstrated they were resulting from the advantage granted through the earlier statements. The judgment has been appealed by France Télécom's competitors and by the Commission¹³⁰.
143. In case *The Netherlands and Nederlandse Omroep Stichting v Commission*¹³¹, the General Court confirmed the Commission decision and deals with the notion of "undertaking". Its reference to the notion of "undertaking" in competition cases appears to confirm that the same notion is also applicable in a State aid context.

2.2. Compatibility assessment

144. In *British Aggregates and Others v Commission*¹³² the General Court annulled the Commission's decision because the Commission was not entitled to adopt lawfully the decision not to raise objection by failing to examine the question of possible tax discrimination between domestic products and imported products originating in Ireland. The judgment recalled the obligation on the part of the Commission to ensure that Articles 107 and 108 are applied consistently with other provisions of the

¹²⁸ Case C-480/09P *ACEA Electrabel* [2010] ECR

¹²⁹ Joined cases T-425/04, T-444/04, T-450/04, T-456/04 *France and others v Commission* [2010] ECR

¹³⁰ Cases C-399/10 P *Bouygues SA and Bouygues Télécom SA v Commission* and C-401/10 P *Commission v France and others*

¹³¹ Case T-231/06 and T-237/06 *The Netherlands and Nederlandse Omroep Stichting v Commission* [2010] ECR

¹³² Case T-359/04 *British Aggregates and Others v Commission* [2010] ECR

Treaty, especially where those other provisions also pursue the objective of undistorted competition in the internal market, as Articles 28 and 30 or Article 110 do in seeking to safeguard the free movement of goods and competition between domestic and imported products.

145. In *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*¹³³ the General Court upheld the Commission's decision, in which the latter had found that part of the notified training aid lacked incentive effect. That part of the aid covered costs of training which the company was anyway required by law to provide. The Court indicated that training aid which produces positive external effects cannot be considered compatible with the internal market where it does not fulfill the criterion of necessity.
146. The case *Métropole télévision (M6) and Télévision française 1 SA v Commission*¹³⁴ concerned the capital injection by the French State into France Télévisions due to the critical financial situation of France Télévisions which experienced a sharp decline in advertising revenues. The Commission found in a no objections decision that the injection was necessary for the fulfillment of France Télévisions' public service obligation and thus compatible under Article 106(2) TFEU. In particular, in the Commission's assessment, there was no overcompensation as the injection was substantially lower than the public service costs. The General Court upheld the Commission's decision on all points and confirmed that the broadcaster's efficiency is not an element of the assessment whether public service compensation is compatible with Article 106(2).
147. The Court of Justice dismissed on 2 December 2010¹³⁵ the appeal lodged by Holland Malt against a judgment¹³⁶ of the General Court relating to the application of the Agricultural Guidelines¹³⁷. According to the General Court, the Commission was right in deciding that an aid which does not fulfil a certain condition of the Agricultural Guidelines (namely the presence of normal outlets on the relevant market) is not compatible with the internal market, without taking into consideration the beneficial effects of that aid. The Commission is bound by the guidelines it issues, to the extent that they do not depart from the rules in the Treaty.

2.3. Recovery of aid

148. In *CELF and Ministère de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*¹³⁸, the Court of Justice confirmed that national courts must freeze illegal aid until a final binding authorisation is given by the Commission. It is for the national courts to take appropriate actions in order to remedy the unlawfulness of the implementation of the aid, so that the aid does not remain at the

¹³³ Case T-396/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission* [2010] ECR; the judgment was appealed.

¹³⁴ Cases T-568/08 and T-573/08 *Métropole télévision (M6) and Télévision française 1 SA v Commission* [2010] ECR

¹³⁵ Case C-464/09 P *Holland Malt BV v European Commission, Kingdom of the Netherlands* [2010] ECR

¹³⁶ Case T-369/06 *Holland Malt v Commission* [2009] ECR II-3313

¹³⁷ Community guidelines for State aid in the agriculture and forestry sector 2007-2013 (OJ C 319, 27.12.2006, p. 1)

¹³⁸ Case C-1/09 *CELF and Ministère de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* [2010] ECR

disposal of the recipient pending a final decision of the Commission. The Court also clarified that the adoption by the Commission of three successive decisions declaring aid to be compatible with the common market, which were subsequently annulled by the Community judicature, is not, in itself, capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid, in the case where that aid was implemented contrary to Article 108(3).

149. In *Scott SA, Kimberly Clark SAS, v Ville d'Orléans*¹³⁹, the Court of Justice clarified that a national court may annul a recovery order issued by a national authority on grounds of there being a procedural defect as long as the annulment of the recovery order would not lead, even provisionally, to a new payment of the aid, where it had already been reimbursed. Otherwise, the annulment of the recovery order would prevent the immediate and effective execution of the recovery decision and thus be incompatible with the Member State's recovery obligations.
150. Finally, the Court confirmed the non execution of the recovery decisions in cases *Commission/Italy* and *Commission/Slovakia*¹⁴⁰ and clarified how Member States should implement their obligation to "adopt all the necessary measures" to implement a recovery decision.

II – Sector Developments

A – FINANCIAL SERVICES

1. OVERVIEW OF SECTOR

151. The economic and financial crisis highlighted the key role financial markets play in the functioning of modern economies. They provide access to finance for businesses and consumers and are an essential instrument of economic activity. Their level of integration and competitiveness goes hand in hand with the efficiency level of allocation of capital and with long-term economic performance. Financial services include retail banking, wholesale banking, payment services, financial information services and insurance services.
152. With the financial and economic crisis continuing into 2010, the year has been another difficult one for the financial sector in the EU and Member States have continued to be active in granting support measures.
153. State aid was one of the main pillars of action in helping to counter the effects of the financial crisis from its beginning. The regulatory framework was established in 2008 and 2009 through the Communications on Banking, Recapitalisation, Impaired Assets and Restructuring¹⁴¹, which seek to preserve financial stability and to ensure

¹³⁹ Case C-210/09 *Scott SA, Kimberly Clark SAS, formerly Kimberly Clark SNC v Ville d'Orléans* [2010] ECR

¹⁴⁰ Cases C-304/09 *Commission/Italy* and C-507/08 *Commission/Slovakia*

¹⁴¹ Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8) ("Banking

legal certainty continued to play a central role. The temporary State aid rules for financial institutions defined and implemented by the Commission provided a coordination mechanism from the early stages of the crisis, which ensured that national support programmes were established in a way which avoided undue distortions of competition and ensured that financial institutions and their shareholders bear a fair part of the burden of rescuing them. Their implementation was the main focus of competition enforcement over the year, in particular in the field of restructuring of State supported financial institutions (see Section I.A.1., points 1 to 7).

154. This year, the Commission set out its roadmap for financial reform¹⁴² and made a number of key legislative proposals which are designed to increase transparency, foster a responsible attitude to risk taking, improve supervision of market participants and help mitigate the impact of any future crises. Key proposals include the AIFM Directive, the revision of the Capital Requirements Directive and the Communication on Crisis Management and Bank Resolution Funds together with the OTC derivatives and short selling initiative, the establishment of the new European supervisory authorities and the adoption of measures to strengthen the supervision of credit ratings agencies. The Commission has also started the review of the Markets in Financial Instruments Directive¹⁴³ (MiFID) which will enhance competition in financial markets, in particular through: (i) targeted improvements to ensure that market data is made available to participants on an equitable basis; (ii) reduction of information asymmetries in less transparent markets such as those for bonds and derivatives, while trading in more standardised derivatives is foreseen to move to exchanges and electronic trading platforms where trading conditions are most conducive to open competition and (iii) more equitable conditions between organised trading venues such as regulated markets and Multilateral Trading Facilities. Regarding credit rating agencies (CRAs), currently regulated under the Credit Rating Agencies Regulation of 2009¹⁴⁴, the Commission is exploring further measures to enhance competition in this industry such as for instance the creation of a network of small and medium CRAs.
155. However, other competition policy challenges affecting the financial sector also drew the attention of the Commission. The Single Euro Payments Area (SEPA) continued to be 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 to move to an integrated Euro payments area, so that

Communication"), Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2) ("Recapitalisation Communication"); Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1) ("Impaired Assets Communication"); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rule (OJ C 195, 19.8.2009, p. 9) ("Restructuring Communication")

¹⁴² Available at: http://ec.europa.eu/internal_market/finances/docs/roadmap/financial_reform_en.pdf

¹⁴³ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1-44)

¹⁴⁴ Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1)

cross border payments are as easy and efficient as domestic payments. Once fully implemented, SEPA will cover credit transfers, payment cards and direct debits. SEPA, whilst primarily devised by the industry itself, is strongly supported by the European Central Bank and the Commission. Since it is based on decisions of and agreements between undertakings that are (potential) competitors it is subject to close competition scrutiny. Reinforcing and strengthening the competition dimension of SEPA will in turn help to achieve better services at a better price for retailers and consumers. SEPA should also help to remove the problem of cross border payments on the Internet which remains one of the barriers to a greater use of e-commerce.

2. POLICY DEVELOPMENTS

2.1. Antitrust enforcement

156. Antitrust investigations focused on the payments services sector but also on the use of standard identifiers for financial instruments, and the distribution of trading data and financial information. Two meetings of the European Competition Network were held regarding wholesale financial services markets and retail financial services markets to better understand the issues being faced by National Competition Authorities and to maintain close cooperation within the Network.

2.1.1. Antitrust enforcement in the payments services sector

The Visa case

157. Following the adoption of a Statement of Objections against Visa Europe, Visa Inc. and Visa International Service Association in 2009¹⁴⁵, Visa Europe offered commitments in April 2010 concerning in particular its Multilateral Interchange Fees (MIFs) for immediate debit cards transactions applicable to cross-border transactions in the EEA and to domestic transactions in those EEA countries where the domestic MIF rates apply in the absence of other MIFs or are set directly by Visa Europe. MIFs are fees agreed upon by Visa's member banks and charged by a cardholder's bank (the issuing bank) to a merchant's bank (the acquiring bank) for each sales transaction made at a merchant outlet with Visa card. MIFs form a large part of the merchant service charge, the fee a merchant must pay to his bank for accepting the card as means of payment. On 8 December 2010, the commitments were made legally binding for four years by virtue of a decision pursuant to Article 9(1) of Council Regulation (EC) No 1/2003 ("the commitments decision").

158. Following the entry into force of the commitments decision, Visa Europe's maximum weighted average MIF for cross-border immediate debit cards transactions in the EEA will be reduced to 0.2%. This cap will also apply separately in each of those EEA countries for which Visa Europe directly sets specific domestic consumer immediate debit MIF rates and in each of those EEA countries where the cross-border consumer immediate debit MIF rates apply in the absence of other MIFs. In addition, Visa Europe will modify its network rules which should increase transparency and competition in the payment cards market. The MIF reduction and

¹⁴⁵ Case COMP/39398 *Visa MIF*. See IP/10/1684, 8.12.2010.

the transparency measures are expected to generate direct benefits to merchants and consumers and contribute to the promotion of efficient payment instruments.

159. The MIF reduction to 0.2% is in line with the unilateral undertakings given by MasterCard in April 2009¹⁴⁶. The reduction reflects the application of the "merchant-indifference methodology", which seeks to establish the MIF at a level at which merchants will be indifferent as to whether a payment is made by immediate debit card or by cash. The cap of 0.2% is based on four studies published by the central banks of the Netherlands, Belgium and Sweden comparing the costs of cards with those of cash. This cap can be reviewed if new information regarding the costs of cards compared to the costs of cash become available, in particular as a result of the study aimed at comparing the costs of different means of payment, which is currently being carried out by the Commission.
160. The commitments do not apply to Visa Europe's MIFs for consumer credit and deferred debit cards or for commercial cards. The Commission's investigation of Visa's consumer credit and deferred debit card MIFs is still ongoing. Investigations into the domestic MIFs set by local banks for transactions with payment cards were also launched by eight European NCAs, four of which have already adopted decisions on this issue.

Single Euro Payments Area (SEPA)

161. SEPA continued to be an important focus of antitrust advocacy in the field of financial services in 2010. As a result of an informal dialogue with the European Payments Council (EPC), a number of competition concerns were addressed. For instance it was clarified that SEPA compliant card schemes do not need to cover all 32 States of the SEPA territory, giving new schemes a real chance of entering the market.
162. As regards SEPA Direct Debit (SDD), the Commission working document on the "Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit" was published on 3 November 2009. It sets out principles for the assessment of collective financing mechanisms under European competition rules. A public consultation was launched to collect the substantive input from the market actors and other interested stakeholders. On 16 December 2010, the Commission adopted a proposal to the Council and Parliament on establishing technical requirements for credit transfers and direct debits in euros¹⁴⁷. This proposal includes provisions to forbid MIFs per transaction for SEPA Direct Debit after a transitional period but to allow MIFs for rejected transactions under certain conditions.

Financial services information

163. Access to financial services information and the availability of high quality and timely market data in relation to prices and structures of financial instruments is crucial for the functioning of financial markets. The markets for the provision of

¹⁴⁶ Case COMP/34579 *MasterCard*. See IP/09/515 and MEMO/09/143, 1.4.2009.

¹⁴⁷ Proposal for a Regulation of the European Parliament and of the Council establishing technical requirements for credit transfers and direct debits in euros and amending Regulation (EC) No 924/2009 (COM(2010) 775 final, 2010/373 COD)

financial information are often characterised by a high degree of concentration and the major global financial institutions and information services providers enjoy significant market power. Industry standardisation in such markets can lead to the development of quasi monopolistic providers of *de facto* market standard products, services, financial identifiers and indices. The Commission is investigating a number of issues arising in this sector such as access to information or services, standard setting, IP rights and interoperability between different products or services¹⁴⁸.

2.1.2. *Securities Trading, Clearing and Settlement (C&S)*

164. Clearing and settlement¹⁴⁹ are financial activities which are carried out by so-called post trade infrastructure providers (in particular Clearing Houses and Central Securities Depositories) after a financial transaction has taken place. Whereas the industry-led Code of Conduct on clearing and settlement¹⁵⁰ signed on 7 November 2006 achieved some positive developments as regards unbundling of services and price transparency, progress on access and interoperability between different post trade infrastructure providers remained limited, partially because of the opposing commercial interests of incumbent providers. The post-trade sector thus remains fragmented along national lines, making cross-border trades more complex and costly.
165. Future regulation will aim at increasing competition between post trade infrastructure providers. On 15 September 2010, the Commission presented a proposal for a Regulation of the European Parliament and of the Council on over-the-counter (OTC) derivatives, central counterparties and trade repositories¹⁵¹. The draft Regulation foresees a common framework for central counterparties (CCPs) in the EU and lays down the conditions for the establishment of interoperability arrangements between CCPs for cash equities while ensuring that potential risks arising out of such interoperability arrangements are appropriately managed. Interoperability arrangements increase competition between different CCPs. They give customers a choice and allow them to consolidate clearing volume at a single entity. Irrespective of ongoing regulatory initiatives to increase competition in post trading markets, it remains the responsibility of (incumbent) market infrastructure owners to respect competition rules when facing access requests from other infrastructures wishing to compete¹⁵².

¹⁴⁸ Cases COMP/39592 *European Fund and Asset Management Association (EFAMA) and others v Standard and Poor's* and COMP/39654 *Reuters Instrument Codes*

¹⁴⁹ Clearing refers to a number of activities from the time a commitment is made for a financial transaction (the trading) until the obligations related to the transaction are discharged. Clearing may involve a variety of different activities depending on the financial instrument in question (such as trade verification and matching, legal confirmation, position and payment netting, collateral management). Settlement refers to the final transfer of the ownership of the securities from seller to buyer and the final transfer of the funds from buyer to seller. In more recent years, a new type of clearing called Central Counterparty (CCP) clearing has become more prominent. In CCP clearing, an entity, the CCP, puts itself between the parties to the contracts traded in one or more financial markets, becoming the buyer to every seller and the seller to every buyer.

¹⁵⁰ Available at: http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf

¹⁵¹ Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (COM(2010) 484/5, 2010/0250 COD)

¹⁵² See case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-3155.

166. The proposed Regulation on OTC derivatives, central counterparties and trade repositories also includes several measures aiming at making OTC derivatives markets safer and at enhancing financial supervision. It also requires market participants to clear eligible OTC derivative contracts via CCPs, which reduces counterparty risk and should be welcomed from a financial stability point of view. As a result of this requirement, some CCPs may attract all or a large part of existing clearing volumes for specific financial instruments. Such providers need to ensure that their conduct is in compliance with competition law principles. The high degree of concentration in individual OTC derivatives markets (such as Credit Default Swaps) requires close market monitoring from a competition policy point of view.

2.1.3. Insurance sector

Insurance Block Exemption Regulation

167. In November 2007, the Commission began the review of the functioning of the insurance Block Exemption Regulation (BER) which expired on 31st March 2010¹⁵³. In the context of a great number of individual notifications, the insurance sector has been covered by consecutive sector-specific BERs since 1992. A BER allows market players the benefit of a safe harbour from competition rules provided they comply with the BER's conditions. Agreements not covered by a BER are not presumed to be illegal, but instead must be assessed under Article 101(1) of the Treaty and if appropriate, Article 101(3). The previous BER applied Article 101(3) of the Treaty to four categories of agreements, decisions and concerted practices in the insurance sector, namely agreements in relation to (i) joint calculations, tables and studies; (ii) standard policy conditions (SPCs) and models on profits; (iii) the common coverage of certain types of risks (pools); and (iv) security devices.
168. On the basis of the evidence gathered, the Commission adopted, on 24 March 2009, a report to the European Parliament and Council, which was published on the same day with a detailed accompanying working document¹⁵⁴. The Report examined the functioning of the previous BER and made initial proposals for its amendment.
169. Following a two and a half years review, involving all interested market players and National Competition Authorities, the Commission adopted on 24 March 2010 Commission Regulation (EU) No 267/2010, the new insurance BER¹⁵⁵, applying Article 101(3) to two categories of agreements, decisions and concerted practices in the insurance sector, namely agreements in relation to (i) joint compilations, tables and studies and (ii) the common coverage of certain types of risks (pools).
170. As a result of its findings following the review process, the Commission decided not to renew two of the four types of cooperation covered under the previous BER, namely agreements concerning (i) standard policy conditions (SPCs) and (ii) security

¹⁵³ 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 (O J L 53, 28.2.2003, p. 8)

¹⁵⁴ Available at: http://ec.europa.eu/competition/sectors/financial_services/insurance.html#review

¹⁵⁵ Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector (O J L 83, 30.3.2010, p. 1-7)

devices. The decision was primarily taken because the evidence gathered during the review indicated that such agreements are not specific to the insurance sector and therefore their inclusion in such an exceptional legal instrument would have resulted in unjustified discrimination in relation to other sectors which do not benefit from a BER in this respect, such as the banking sector. In addition, although these two forms of cooperation may generate some benefits to consumers, the Review showed that they can also give rise to certain competition concerns.

171. In this context, the Commission considered it more appropriate that a compliance analysis for these types of agreements be conducted on a case-by-case basis under Article 101(1) and if appropriate 101(3). The issue of SPCs is now addressed in the standardisation chapter of the Horizontal Guidelines adopted in 2010 (see Section I.B.1.1.2., points 35 to 44). As presented through the insurance specific example given in those Guidelines, SPCs do not generally raise competition problems. Indeed, as long as there is no standardisation of the insurance products and as long as SPCs are not binding, the conditions provided in Article 101(3) are likely to be fulfilled.
172. Similarly, agreements on security devices are now to be assessed on the basis of the new standardisation chapter of the new Horizontal Guidelines and an example specific to the insurance sector was also introduced in these Guidelines. In accordance with this example, agreements on security devices could be pro-competitive as long as they do not have effects on the downstream market by excluding manufacturers through very specific and unjustified requests.

Maritime insurance

173. As regards the maritime insurance sector, the Commission opened formal proceedings against 13 Protection and Indemnity (P&I) Clubs that are part of the International Group of P&I Clubs (IG) on 26 August 2010. In the framework of the IG, the clubs have concluded two separate agreements: (i) the International Group Agreement and (ii) the Pooling Agreement that contain rules on the sharing of insurance claims and joint reinsurance as well as rules on the contractual relationships between the P&I Clubs and their members. The Commission is concerned that such provisions could restrict competition between the P&I Clubs and exclude, to some extent, commercial insurers and other mutual P&I insurers from the relevant markets.

2.2. Merger control

174. The trend of reduced merger activity continued in 2010 in the financial sector. The Commission examined cases in the sectors of retail banking services¹⁵⁶, asset management¹⁵⁷ and distribution of mutual funds services¹⁵⁸, further consolidating its practice in these areas.

¹⁵⁶ Cases COMP/M.5948 *Santander / Rainbow* (OJ C 320, 25.11.2010, p. 1) and COMP/M.5960 *Crédit Agricole / Cassa di Risparmio della Spezia / Agences Intesa Sanpaolo*

¹⁵⁷ Case COMP/M.5580 *Blackrock / Barclays Global Investors UK Holdings* (OJ C 259, 29.10.2009, p. 2)

¹⁵⁸ Cases COMP/M.5728 *Credit Agricole / Société Générale Asset Management* (OJ C 107, 27.4.2010, p. 1) and COMP/M.5726 *Deutsche Bank / Sal. Oppenheim* (OJ C 48, 26.2.2010, p. 2)

175. A number of cases resulted directly from State aid decisions taken by the Commission during the financial crisis and were examined under the EU merger control rules. In particular the decision in the State aid case approving State measures to Royal Bank of Scotland¹⁵⁹ led to three notified cases, regarding three businesses that had been committed to be divested, including certain retail and commercial banking assets¹⁶⁰, its merchant payment services¹⁶¹ and its commodities trading arm¹⁶². This involved close cooperation with the relevant National Competition Authorities. All cases were cleared in first phase without remedies.

2.3. State aid control: restructuring of financial institutions

176. Restoring viability of individual financial institutions is a prerequisite for restoring the viability of the EU banking sector as a whole. Lending to the real economy, re-establishing a level playing field across financial institutions, and the smooth functioning of the European internal market can be ensured only through viable financial institutions. In 2010, the Commission approved, subject to applicable conditions, a number of restructuring measures in respect of banks that received State support. Over the year, the Commission approved for 14 banks restructuring or liquidation plans and adopted one negative decision in applying the Restructuring Communication. Some examples are detailed in this section, which aim at providing a view across the diversity of restructuring decisions, in terms of Member States concerned, type of financial institutions restructured and of conditions of restructuring.
177. The restructuring process of banks is based on the crisis-related State aid rules as laid down in the Restructuring Communication of 22 July 2009¹⁶³. The Communication provides guidance on the conditions under which restructuring aid for banks in need of financial assistance beyond an emergency rescue can be authorised. The first principle is the return to long-term viability without State aid, based on a sound restructuring plan (including stress-testing of the bank's financial projections). The second principle is burden-sharing between the bank/its stakeholders and the State. Shareholders and other capital holders must adequately contribute to bearing the costs of financial, organisational and other necessary restructuring measures. Finally, the third principle requires measures to limit competition distortions. They usually comprise structural measures (divestitures) and behavioural measures (e.g. acquisition bans or limitations on aggressive commercial behaviour financed by State aid). The measures are decided on a case-by-case basis.
178. The Commission requests and analyses detailed regular reports on the implementation of the restructuring plans. Moreover, separate managers, so-called monitoring trustees and divestiture trustees, are being appointed to assist the Commission in determining that the approved restructuring plans are being implemented properly.

¹⁵⁹ Case N422/2009 *RBS restructuring plan* (OJ C 119, 7.5.2010, p. 1)

¹⁶⁰ Case COMP/ M.5948 *Santander / Rainbow* (OJ C 320, 25.11.2010, p. 1)

¹⁶¹ Case COMP/M.5968 *Advent / Bain Capital / RBS Worldpay*

¹⁶² Case COMP/ M.5844 *JP Morgan / RBS Semptra* (OJ C 225, 20.8.2010)

¹⁶³ Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rule (OJ C 195, 19.8.2009, p. 9) (the "Restructuring Communication")

Aegon

179. Aegon is a Dutch company providing life insurance, asset management and retirement products. It has a total balance sheet of EUR 298.6 billion. In November 2008, the Dutch State made available EUR 3 billion in new capital for Aegon, in the form of convertible core capital securities. The coupon of those instruments is set to be the highest of either 8.5% or an increasing percentage of the dividend paid on ordinary shares. The repurchase price of the securities is fixed at 150% of the issue price. One third of the securities could be repaid within 12 months at more favourable terms. Alternatively the securities can be converted into ordinary shares after three years from issuance.
180. The Commission temporarily approved the rescue measure on 27 November 2008, subject to the submission of a restructuring plan¹⁶⁴. The Dutch authorities submitted the preliminary plan on 19 November 2009 and the final plan was submitted on 26 July 2010 and approved on 17 August 2010¹⁶⁵. Under that plan Aegon is supposed to implement further changes to its activities to rebalance its business model.
181. The businesses affected by the plan are mainly those that were at the origin of difficulties of Aegon: the institutional spread-based business is going to be closed down and exposure to equity risk stemming from variable annuities is being hedged. The overall size of general account of Aegon USA is going to be reduced by USD 25 billion (EUR 19 billion). The plan includes financial projections in a stress scenario and a sensitivity analysis demonstrating capacity of Aegon to withstand adverse developments in the future.
182. In November 2009 Aegon paid back EUR 1 billion while the plan provides for a repayment schedule for the remaining State capital. On 30 August 2010 Aegon repaid EUR 500 million of the State capital securities. The repayment was made under more favourable conditions than initially agreed, ensuring an internal rate of return for half of the State capital securities of 15%. Such an amendment of the initially agreed repayment conditions resulting in additional State aid was considered acceptable for the Commission in view of the incentive for early repayment, the high level of overall return achieved by the State and the in-depth restructuring measures committed to by Aegon. The remaining EUR 1.5 billion of State capital securities will be repaid before the end of June 2011 at the initially agreed repurchase price of 150%. Depending on the repayment date, the rate of return will be between 17.8% and 21%.
183. Until full repayment of the aid, Aegon will be subject to a price leadership ban in specific segments of the Dutch market and to a rating withdrawal of its main life subsidiary in the Netherlands, in order to limit competitive distortions in the Dutch mortgage and savings and pensions markets. Furthermore, Aegon is subject to an acquisition ban during the same period.

¹⁶⁴ Case N569/2008 *Investment in the capital of AEGON N.V.* (OJ C 9, 14.1.2009, p. 3)

¹⁶⁵ Case N372/2009 *Viability plan for AEGON* (OJ C 290, 27.10.2010, p. 1)

Bank of Ireland

184. Bank of Ireland is one of the two largest banks in Ireland, with operations mainly focused on its domestic market, but also with significant activity in the UK and some niche lending operations in the US, France and Germany. It operates mainly in retail and corporate banking, but is also active in areas such as investment banking, insurance and pension products.
185. In March 2009, the Irish State provided EUR 3.5 billion in preference shares to ensure the bank was adequately capitalised¹⁶⁶. The bank also participates in Ireland's National Asset Management Agency (NAMA), an impaired asset relief scheme for financial institutions, approved by the Commission in February 2010¹⁶⁷. The transfer of loans with a book value of EUR 12.2 billion is expected to include an aid element of about EUR 1.0 billion. The bank also used State guarantees under the Irish guarantee scheme for financial institutions' access to finance, approved by the Commission in October 2008, and the eligible liabilities guarantee scheme, also approved by the Commission in January 2010 and subsequently prolonged by the Commission in May and June 2010¹⁶⁸.
186. The Commission, by its decision of 15 July 2010, approved Bank of Ireland's restructuring plan¹⁶⁹. The Commission concluded that the restructuring plan fulfilled the criteria of the Restructuring Communication, as it is supposed to lead to a restoration of viability of the bank, and there seemed to be sufficient own contribution and burden-sharing by the bank as well as sufficient measures limiting the distortion of competition.
187. The proposed measures are supposed to ensure the viability of the bank by exiting risky portfolios and by implementing more prudent risk management practices. In particular, in order to contribute to the costs of its own restructuring and to limit the distortions of competition created by the aid, Bank of Ireland will reduce its presence in certain market segments through the transfer or winding down of assets and through divestitures.
188. In addition, Bank of Ireland will also implement other measures aimed at enhancing competition on the Irish banking market. Specifically, the bank is supposed to offer certain services to new entrants or to small banks already active in Ireland to reduce the cost for competitors to develop business in Ireland. That action comprises a "Service Package", which enables competitors to access certain back-up services, for example access to its ATM network, and a "Customer Package" to help reduce the costs of acquiring new customers that involves Bank of Ireland presenting customers with alternative services for their current account and credit card products.
189. Finally, the Irish authorities committed to a number of market opening measures in order to enhance competition in the Irish banking market by facilitating the entry and

¹⁶⁶ Case N149/2009 *Recapitalisation of Bank of Ireland* (OJ C 234, 29.9.2009, p. 4)

¹⁶⁷ Case N725/2009 *Irish asset relief – NAMA* (OJ C 94, 14.4.2010, p. 10-11)

¹⁶⁸ Cases N349/2009 *Eligible Liability Guarantee Scheme – Ireland* (OJ C 72, 20.3.2010, p. 6), N198/2010 *Prolongation of the Eligible Liabilities Guarantee Scheme – Ireland* (OJ C 191, 15.7.2010, p. 1) and N254/2010 *Extension of the ELG scheme until December 2010 – Ireland* (OJ C 238, 3.9.2010, p. 2-3)

¹⁶⁹ Case N546/2009 *Restructuring of Bank of Ireland*. See IP/10/954, 15.7.2010.

expansion of competitors and by increasing consumer protection in the financial sector. They include for example measures enhancing customer mobility between banks and furthering electronic banking.

190. After the 15 July approval of Bank of Ireland's restructuring plan, the economic and financial situation in Ireland deteriorated further; that development led to the country's economic adjustment programme in November 2010. While confirming that all commitments undertaken in the restructuring plan will be honoured, the Irish authorities committed to notify any further State aid in favour of Bank of Ireland for approval under EU competition rules (see Section I.A.4.2., points 25 to 29).

Dexia

191. Dexia is a bank active in financing to local authorities in a number of countries worldwide and in retail banking, mainly in Belgium, Luxembourg and Turkey. The capital of Dexia is held mainly by the Caisse des dépôts et consignations, Holding communal SA, Arcofin SA, and, since the capital injection undertaken in September 2008, by the Belgian and French Governments. The balance sheet of Dexia totalled EUR 578 billion on 31 December 2009.
192. On 26 February 2010 the Commission approved aid granted by Belgium, France and Luxembourg for the restructuring of Dexia¹⁷⁰, subject to its meeting a number of conditions, including liquidity ratios, and implementing the structural and behavioural measures notified to the Commission.
193. In response to the difficulties threatening the survival of the bank, Belgium, France and Luxembourg had granted four aid measures that consisted of: (i) a capital injection of EUR 6 billion, of which the Commission regards EUR 5.2 billion as State aid¹⁷¹; (ii) a guarantee by the Belgian, French and Luxembourg Governments in respect of certain of Dexia's liabilities up to a maximum of EUR 150 billion, reduced to EUR 100 billion since 1 November 2009; (iii) an emergency liquidity support from the Belgian National Bank, guaranteed by the Belgian State, and (iv) a guarantee by the Belgian and French Governments in respect of a portfolio of impaired assets held by Financial Security Assurance Asset Management (FSAM) for a nominal amount of USD 16.6 billion (EUR 12.9 billion) at 30 January 2009. Some of these aid measures were subject to an earlier temporary Commission rescue approval of 19 November 2008.
194. Under the restructuring plan, the group will focus on its core banking activities and its traditional markets in Belgium, France and Luxembourg. In order to decrease its funding needs, Dexia must reduce its public-sector lending activity outside those markets and its bond portfolio, which will be isolated in a specific division in the bank, and progressively amortised according to a predefined plan. In addition, Dexia has to continue to reduce its market activities and to cease proprietary trading. Dexia will also have to improve the stability, quality and maturity of its sources of financing by respecting a number of target ratios.

¹⁷⁰ Case C9/2010 *Restructuring of Dexia* (OJ L 274, 19.10.2010, p. 54-102)

¹⁷¹ The EUR 0.8 billion difference has been subscribed by historical shareholders of the bank, which are considered independent from the Member States concerned.

195. The Commission concluded that the restructuring measures should allow Dexia to restore its long-term viability, in particular by reducing its dependence on the money and bond markets. In this respect, compliance by Dexia with quantitative targets for improving its financing is expected to improve the stability, quality and maturity of its sources of funding. Dexia will also make a sufficient own contribution to the restructuring costs by suspending, for two years, any cash dividend payments and interest payments on instruments constituting own funds. Finally, the Commission takes the view that the gradual cessation of certain activities provided for in the restructuring plan will be enough to offset the distortions of competition caused by the aid.

Parex

196. Before the crisis, Parex was the second largest bank in Latvia in terms of assets. It was partly nationalised in November 2008 as the financial and economic crisis exposed serious weaknesses in its business model. The bank benefitted from State guarantees, recapitalisation and liquidity support for a total of around LVL 1.1 billion (EUR 1.6 billion). The measures were cleared temporarily as emergency aid in 2008 and 2009. On 29 July 2009, the Commission opened an in-depth investigation on the restructuring¹⁷².
197. Under the restructuring plan submitted by the Latvian authorities, the core assets and operations of Parex were transferred into a new viable bank called Citadele banka on 1 August 2010. The Latvian State (75%) and the European Bank for Reconstruction and Development (25%) are the shareholders of this new bank. The business model of Citadele banka focuses on business in the Baltic countries, whilst discontinuing lending and leasing in the Commonwealth of Independent States, which is considered riskier. By refocusing on its core activities and by materially reducing the size of its total assets, Citadele banka is expected to return to profitability in 2011 and repay the State liquidity support received.
198. Until the full repayment of the State liquidity measures, Citadele banka is subject to market presence caps in deposits and lending markets and to an acquisition ban, aiming at limiting competition distortions caused by the aid. The plan also includes an adequate contribution of the (former) shareholders and holders of subordinated debt to the restructuring costs. In fact the main shareholders lost their ownership rights and the remaining legacy minority shareholders and the subordinated debt holders have a claim only against "old Parex", which keeps the remaining impaired and non-strategic assets.

Sparkasse KölnBonn

199. Sparkasse KölnBonn is the second-largest savings bank in Germany with a balance sheet of EUR 30 billion. In the wake of the financial crisis, the capital of Sparkasse KölnBonn was strengthened by a total of EUR 650 million, through the issue of certificates of participation with a coupon of 8% and a "silent participation" whereby investors receive remuneration (12-month Euribor plus 7.25%) but do not have voting rights.

¹⁷² Case C26/2009 *Restructuring aid for Parex*. See IP/10/1127, 15.9.2010.

200. In November 2009, the Commission opened an in-depth investigation to examine the compatibility of the measures with EU State aid rules as it had doubts whether the remuneration on both instruments was still sufficient after the market for hybrid instruments had completely dried up as of the end of 2008.
201. The Commission approved the restructuring plan the bank submitted following the opening decision on 29 September 2010¹⁷³. According to the plan, Sparkasse KölnBonn will focus on its statutory core business model of a regional savings bank and will thus concentrate on providing retail banking services to its traditional customer segments, *i.e.* private customers and SMEs. It will withdraw from proprietary trading and investments in structured products and will furthermore divest non-core subsidiaries which were a major source for the losses Sparkasse KölnBonn incurred. Overall, the restructuring measures will result in a balance sheet reduction of 17% (not including growth in the traditional local customer segments) by the end of 2014 as compared to the end of 2008.
202. Following the in-depth investigation, the Commission found, in particular, that the restructuring plan ensures the long-term viability of Sparkasse KölnBonn, as the main causes of its difficulties, the subsidiaries related to the regional development and the exposure to volatile investments, are addressed through the divestments of the respective investments and subsidiaries and a gradual withdrawal from those activities. The holders of hybrid instruments bear to the extent possible the losses incurred, as both coupon payments and the principal of the hybrid capital were suspended or participated in the absorption of Sparkasse KölnBonn's losses. The Commission further found that Sparkasse KölnBonn adequately contributed to the restructuring through divestments of profitable non-core subsidiaries and cost-cutting measures which will result in a cost reduction of EUR 28 million per year by the end of the restructuring period, representing 6% of its total costs. The divestments of non-core subsidiaries and the behavioural commitments provided by the German authorities sufficiently limit the distortions of competition brought about by the aid.

Banco Privado Português

203. Banco Privado Português (BPP) was a Portuguese bank that provided private banking, corporate advice and private equity services. The bank ran into severe financing difficulties after the collapse of Lehman Brothers and the ensuing severe crisis in the financial markets.
204. A guarantee was granted by the Portuguese State to six banks in Portugal to lend EUR 450 million to BPP at the height of the financial crisis, on 5 December 2008. The State guarantee was prolonged, without prior Commission approval, on 5 June and on 5 December 2009.
205. The Commission, in early 2009, temporarily approved the loan guarantee as emergency support on the condition that Portugal would submit a restructuring plan within six months. As the Commission did not receive the plan despite several reminders, in November 2009 it opened a formal investigation procedure. The main reason was that it had concerns that the bank was being kept alive artificially.

¹⁷³ Case C32/2009 *Restructuring of Sparkasse Köln/Bonn*. See IP/10/1192, 20.9.2010.

Moreover, it had concerns that the pricing of the guarantee was below the level required under the Communication on the application of the State aid rules to public support to banks during the crisis. On 15 April 2010, the Bank of Portugal revoked the banking licence of BPP and initiated the process of its liquidation. Consequently, the six Portuguese banks called the State guarantee and were re-paid the loan by the Portuguese government on 7 May 2010.

206. The Commission took a decision on 20 July 2010 that the guarantee granted by the Portuguese State on 5 December 2008 and its prolongations, constituted illegal and incompatible State aid for the period from 5 December 2008 until 15 April 2010, given the non-compliance with the obligation to present a restructuring plan and the low fee paid for the guarantee¹⁷⁴. While the liquidation of the bank addresses the competition distortion stemming from the aid, the Portuguese government must file its claim as a creditor in the liquidation procedure and recover from BPP the difference between the price the bank should have paid for the guarantee and the lower fee actually paid, including accrued interest. Portugal stated that it has already filed the necessary claims to enforce its privileged and priority rights over the collateral it holds over BPP and that it would continue to do so until it has recovered the full loan which it had to pay to the creditor banks in execution of the guarantee.

B – ENERGY & ENVIRONMENT

1. OVERVIEW OF SECTOR

207. The energy sector is of significant importance in Europe. In 2009, total retail sales of gas and electricity were over EUR 500 billion while crude oil sales were more than EUR 390 billion. Environmental services will become an increasingly important part of the European economy and will be one of the drivers of the economic recovery (turnover in this sector was over EUR 300 billion in 2009¹⁷⁵).
208. Article 194 TFEU spells out the three central goals for European energy policy: sustainability, security of supply and competitiveness. While some progress has been made towards these goals, of which an open and undistorted energy market is a fundamental instrument, the remodelling of Europe's energy systems is not proceeding as swiftly as could be hoped. Improving the functioning of the markets to provide secure energy supplies at competitive prices while limiting the environmental impact of energy production and use is thus one of the priorities set out in the Europe 2020 Strategy¹⁷⁶.
209. An open and competitive single EU market should contribute to the energy and climate change objectives for 2020, ensuring a secure and sustainable supply of energy at competitive prices by encouraging the rapid development of renewable energies and promoting the development of new environmentally friendly technologies. To meet these objectives, the Commission has defined a new energy

¹⁷⁴ Case C33/2009 *Restructuring of BPP*

¹⁷⁵ 2008 Commission estimates

¹⁷⁶ Europe 2020: A strategy for smart, sustainable and inclusive growth (COM(2010) 2020 final)

strategy for the next ten years in the framework of the Flagship Initiative of the Europe 2020 strategy on a "Resource Efficient Europe"¹⁷⁷.

210. The remaining anti-competitive practices in the energy sector will need to be tackled effectively, not only by the Commission but also by Member States. The Commission will seek to promote the further liberalisation of the energy markets and unbundling. It will continue to act against abuses of a dominant position in the energy and environment sectors. Through its State aid policy it will seek to ensure the development of sustainable energy sources and act against Member States' policies that distort competition.

2. POLICY DEVELOPMENTS

2.1. Antitrust enforcement

211. In 2010 the Commission continued to follow up its 2007 energy sector inquiry, adopting four major antitrust decisions under Article 9 of Regulation 1/2003¹⁷⁸, in which the Commission makes binding the commitments proposed by undertakings to put an end to potential infringements. The Commission also initiated proceedings relating to procedural infringements under Article 23 of Regulation 1/2003 against certain undertakings which had been the target of surprise inspections by the Commission.
212. In the EDF Customer Foreclosure¹⁷⁹ case, the Commission had concerns that EDF may have abused its dominant position in France by (i) concluding supply contracts which foreclosed the market given their scope, duration and exclusive nature and by (ii) including resale restrictions in its supply contracts. In reaction to the Commission's concerns, EDF offered, for a period of ten years, to ensure that other suppliers could compete for on average 65% of the electricity EDF contracts with large French industrial users each year and to limit the duration of any new contract concluded with large industrial users to five years. In addition, EDF committed to remove all resale restrictions in its supply contracts and to assist customers wishing to resell electricity. These commitments were planned to come into effect on 1 July 2010, but were postponed to 1 January 2011.
213. In the Svenska Kraftnät (SvK)¹⁸⁰ case the Commission had concerns that SvK may have abused its dominant position in the Swedish electricity transmission market by limiting the export capacity available on interconnectors. Its objective was to relieve internal congestion on its network and to reserve domestic electricity for domestic consumption, thus favouring Swedish consumers. To address the Commission's concerns, SvK offered, from 1 November 2011, to operate the Swedish electricity market on the basis of several flexible bidding zones. This will allow electricity trading to adjust to available transmission capacity through market prices, rather than

¹⁷⁷ See the Commission's Communications on "A resource-efficient Europe" (COM(2011) 21 final) and on "Energy 2020: A strategy for competitive, sustainable and secure energy" (COM(2010) 639 final)

¹⁷⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1-25)

¹⁷⁹ Case COMP/39386 *Long term electricity contracts in France* (OJ C 133, 22.5.2010, p. 5-6)

¹⁸⁰ Case COMP/39351 *Swedish Interconnectors* (OJ C 142, 1.6.2010, p. 28-29)

through arbitrary measures. In the transition period, SvK has committed to manage congestion in its network by using counter trade which involves paying generators and consumers to adjust respectively their production and consumption schedules. Once the zones are operative, SvK will manage congestion in the Swedish transmission system without limiting trading capacity on interconnectors. The only exception is the West-Coast-Corridor where SvK will build and operate a new 400 kV transmission line by 30 November 2011 at the latest.

214. In E.ON Gas¹⁸¹, the Commission's investigation showed that E.ON had reserved, on a long-term basis, the largest part of the available transport capacity at the entry points to its gas transmission networks. This may have prevented other gas suppliers from accessing the German gas market. The Commission reached the preliminary view that the long-term reservations might have infringed EU rules on the abuse of a dominant market position¹⁸². E.ON undertook to release capacity, corresponding to about 15% of pipeline capacity, at the entry points to its gas networks by October 2010. From October 2015, E.ON will further reduce its bookings of entry capacity in the NetConnect Germany grid to 50% and in E.ON's grid for low-calorific gas to 64% of the pipeline capacity. The commitments are expected to have a major structural impact, allowing other companies to compete on the German market.
215. In the ENI¹⁸³ case, the Commission had concerns that ENI may have abused its dominant position in the gas transport markets by refusing to grant competitors access to capacity available on the transport network (capacity hoarding), by granting access in an impractical manner (capacity degradation) and by strategically limiting investment (strategic underinvestment) in ENI's international transmission pipeline system. ENI may also have had the incentive to foreclose rivals to protect its margins in the downstream gas supply markets. ENI has committed to the structural divestment of its international transport activities for the import of gas into Italy, from Russia (TAG) and from Northern Europe (the system TENP/Transitgas). In the case of TAG, ENI will divest its share to a public entity controlled by the Italian Government. The sale of ENI's shares in the international transport pipelines will be carried out under the supervision of a trustee and the buyers will need to be approved by the Commission. These commitments are expected to increase the opportunity for other companies to transport gas into Italy and to compete on the Italian market to the benefit of gas consumers as the gas transport networks will be owned and managed independently of ENI.
216. In two of the inspections carried out in the energy and environment sectors the Commission encountered difficulties. In April, the Commission carried out surprise inspections in France in the water and waste water sectors¹⁸⁴. During the inspection at the premises of Lyonnaise des Eaux (a wholly owned subsidiary of Suez Environnement), a seal affixed upon an office door was broken, in serious breach of the rules governing the Commission's powers of investigation. On the basis of these facts the Commission sent a Statement of Objections to Lyonnaise des Eaux and to Suez Environnement. On 17 May, the Commission initiated proceedings against the

¹⁸¹ Case COMP/39317 *E.ON Gas Foreclosure*. See IP/10/494 and MEMO/10/164, 4.5.2010.

¹⁸² See also case COMP/39316 *Gaz de France Foreclosure* (OJ C 57, 9.3.2010, p. 13-14)

¹⁸³ Case COMP/39315 *ENI*. See IP/10/1197, 29.9.2010.

¹⁸⁴ Case COMP/39796 *Suez environnement - breach of seal*. See MEMO/10/134, 16.4.2010.

J&T Group and Energetický a průmyslový holding, active in the electricity sector in the Czech Republic¹⁸⁵, for a possible obstruction of the Commission inspectors during site inspections in November 2009. A number of incidents relating to the handling of e-mail accounts and access to electronic records occurred. In both cases a fine of up to 1% of the previous business year's turnover of the company concerned may be imposed if the allegations are proven.

2.2. State aid control

Regulated electricity tariffs

217. In the context of the open investigations, the Commission is still examining aid granted in the form of regulated electricity tariffs in France and Spain. Regulated tariffs may result in undue price advantages for electricity end-users and create market foreclosure. In the majority of Member States, regulated tariffs in favour of medium and large undertakings have been abolished or are being phased-out. France will phase-out regulated tariffs for medium and large undertakings in 2015, in the framework of a reform of the electricity market (loi NOME) which is set to be implemented as of 2011. Spain abolished such tariffs in 2009.

Partial exemptions from feed-in tariffs for energy intensive industries

218. After partially clearing an Austrian scheme subsidising feed-in tariffs in favour of producers of renewable energies, the Commission continued to investigate certain provisions of the scheme which seemed to favour large energy consumers¹⁸⁶. Feed-in tariffs are the higher tariffs available to producers of sustainable energy to compensate them for their higher costs. The Commission expressed doubts as to the compatibility of the scheme with State aid rules since the partial exemption of energy intensive industries from the feed-in tariffs may provide these industries with an unfair competitive advantage that does not seem justified. These costs are then passed on to consumers. The partial exemption granted by the Austrian scheme would lower the costs of the companies benefitting from it. The Commission also opened an investigation into a German scheme granting operating aid to energy intensive large non-ferrous metal producers (*i.e.* aluminium, zinc, and copper) in the form of compensation for the CO₂ costs included in their electricity prices¹⁸⁷, thus putting them in a more favourable position than competitors in other Member States who have to pay the full CO₂ costs.

Support for energy saving and renewable energy production

219. The Commission cleared a number of measures in support of energy saving and renewable energy production under the horizontal Environmental Aid Guidelines¹⁸⁸. An increasing number of these notifications concerned relatively large individual aid measures (*i.e.* above EUR 7.5 million investment aid per undertaking), which were

¹⁸⁵ Case COMP/39793 *J&T and others*. See IP/10/627, 28.5.2010.

¹⁸⁶ Case C24/2009 (ex N446/2008) *Second amendment of the Green Electricity Act 2008* (OJ C 217, 11.9.2009, p. 12)

¹⁸⁷ Case C33/2010 (ex N700/2009) *Aid to non-ferrous metals producers for CO₂ costs of electricity*

¹⁸⁸ Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1)

subject to a detailed economic assessment¹⁸⁹ as part of the more economic approach to State aid analysis. The Commission analysed in detail the possible negative effects of a State aid measure on competition and balanced these effects against the positive effects of the aid for the environment.

220. The Commission authorised investment aid for the implementation of an innovative production process to one German steel producer and investment aid to another German steel producer for the implementation of a process recycling the gas emitted in the steelmaking process¹⁹⁰. In France, the Commission cleared investment aid for the construction of a biomass boiler¹⁹¹. Investment aid was also approved for the construction of a high-efficiency combined heat and power plant in Austria¹⁹².

Aid related to carbon capture and storage

221. The Commission also dealt with two individual support measures for industrial-scale carbon capture and storage (CCS) demonstration projects. The Commission authorised investment aid for a CCS demonstration project in Rotterdam covering the whole cycle where the CO₂ from power generation is captured and stored in a depleted gas field¹⁹³. The project was granted funds from the European Energy Programme for Recovery (EPR)¹⁹⁴. The Commission also approved investment aid to a Dutch power generator for a project in which the CCS technology is tested on a coal gasification process¹⁹⁵.

Remediation of contaminated sites

222. The Commission authorised a grant of more than EUR 145 million to Voestalpine Stahl for the remediation of a site owned by the company in Linz (region of Upper Austria) and whose contamination dates back to World War II¹⁹⁶. The Commission found the state support to be in line with EU rules on State aid for environmental protection. In particular, it respected the "polluter pays" principle and did not result in overcompensation. This measure was preceded by a similar case involving the remediation of an Austrian landfill site in Brückl, which was contaminated with chlorinated hydrocarbons from the production of chlorides¹⁹⁷.

¹⁸⁹ The first detailed assessment decisions under Chapter 5 of the Environmental Aid Guidelines were taken in 2010; as of 1.11.2010, seven such decisions have been adopted (see cases N295/2008, N190/2009, N450/2009, N451/2009, N135/2010, N197/2010, N381/2010 mentioned further below).

¹⁹⁰ Case N450/2009 *Top Gas Recycling (TGR) Project - Aid to Arcelor Mittal Eisenhüttenstadt GmbH* (OJ C 94, 14.4.2010, p. 9)

¹⁹¹ Case N650/2009 *Aid for the realisation of a biomass (wood) fueled thermo boiler*

¹⁹² Case N295/2008 *Investment aid to Mellach power plant* (OJ C 154, 12.6.2010, p. 1)

¹⁹³ Case N381/2010 *CCS project in Rotterdam harbour area*

¹⁹⁴ Regulation (EC) No 663/2009 of the European Parliament and of the Council of 13 July 2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy (OJ L 200, 31.7.2009, p. 31)

¹⁹⁵ Case N190/2009 *CO₂ Catch-up pilot project at Nuon Buggenum plant* (OJ C 238, 3.9.2010, p. 1)

¹⁹⁶ Case N135/2000 *Aid for the Remediation of a Contaminated Site in Linz* (OJ C 312, 17.11.2010, p. 5-6)

¹⁹⁷ Case N197/2010 *Individual Aid for the Remediation of the Contaminated Site in Unterkärnten* (OJ C 265, 30.9.2010, p. 1)

Security of energy supply

223. The Commission dealt with a number of cases in the area of security of electricity supply. It authorised a Spanish aid scheme intended to compensate electricity generators for using indigenous coal for some of their production as a public service obligation¹⁹⁸. The Electricity Market Directive¹⁹⁹ allows Member States to take such measures for security of supply reasons. However, such measures are also subject to the State aid provisions in the Treaty and hence, the Commission verified that the scheme met all the requirements of the Community framework for State aid in the form of public service compensation²⁰⁰. This framework takes into account the wide margin of discretion given by EU case law to Member States in defining their public service obligations. Besides, it contains precise rules concerning the level of financial compensations granted to companies on which such obligations are imposed. In its assessment, the Commission found no manifest error of assessment in the justifications made by Spain as regards the definition of the public service obligation and verified that all the requirements of the framework were satisfied. Furthermore, the scheme being of a transitional nature, Spain undertook not to extend it beyond 2014. Finally, the Commission obtained from Spain commitments ensuring consistency between this measure and current and future EU rules on State aid to the coal industry.
224. The Commission also approved aid for the construction of a 400 MW thermal power plant in Latvia²⁰¹ on the basis of a number of special factors including the effective isolation of the Latvian energy market, Latvia's increasing dependence on gas and the closure of the Lithuanian Ignalina nuclear power plant at the end of 2009. In addition the competitive selection process would minimise the aid and limit distortions of competition.
225. Similarly, the Commission authorised a Dutch scheme using tax deductions to encourage investment in the exploration and exploitation of small, marginal gas fields on the Dutch continental shelf in the North Sea²⁰². The Commission found that the measure increases the supply of natural gas and as such enhances the delivery security in the Netherlands and, on a wider scale, for a number of countries within the EU which import Dutch gas. The Commission also approved State aid amounting to EUR 390 million for the construction or capacity increase of four underground gas storage sites in Poland as a project of common European interest²⁰³, these projects positively contributing to the security of supply in Poland and in the EU.
226. The Commission cleared EPR support combined with a government guarantee for the construction of an undersea electricity interconnection between Malta and Sicily

¹⁹⁸ Case N178/2010 *Preferential dispatch of indigenous coal plants* (OJ C 312, 17.11.2010, p. 6)

¹⁹⁹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37)

²⁰⁰ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4)

²⁰¹ Case N675/2009 *Tender for Aid for New Electricity Generation Capacity* (OJ C 213, 6.8.2010, p. 1)

²⁰² Case N718/2009 *Development of marginal offshore gas fields* (OJ C 270, 6.10.2010, p. 1)

²⁰³ Case N660/2009 *Aid to PGNiG for underground gas storage in Poland* (OJ C 213, 6.8.2010, p. 10)

and an extension of its 132 kV network to integrate the interconnection²⁰⁴. The Commission found that the measure did not constitute State aid since the European funds from the EEPF do not constitute State aid and the guarantee was priced at market terms.

227. The Commission opened an in-depth investigation into Maltese aid to the energy incumbent intended to bring the Delimara Power Station in early compliance with emission standards laid down by EU environmental law²⁰⁵. The Commission raised doubts on the security of supply arguments brought forward by Malta and, moreover, the planned aid does not seem in line with the rules of the environmental aid guidelines.
228. An Italian scheme designed to remunerate industrial companies for the provision of instant interruptibility services (*i.e.* the acceptance of power cuts to avoid black outs for other consumers) in Sardinia and Sicily²⁰⁶ was considered not to involve State aid because the remuneration will be established through public tenders open to a wide range of companies. The scheme aims to provide a transitory solution to continuity of supply problems identified by the network operator linked to the inadequate interconnection with the mainland, obsolete power plants which are prone to outages and a high proportion of wind-power generation.
229. Furthermore, the Commission cleared a State aid scheme aimed at compensating power generators for certain costs resulting from the termination of long-term power purchase agreements in Hungary (so-called stranded costs)²⁰⁷.

C – INFORMATION, COMMUNICATION AND MEDIA

1. OVERVIEW OF SECTOR

1.1. Telecommunications

230. Communication technologies ranging from the basic telephone service to the latest satellite systems and personal area networks are converging, allowing the delivery of increasingly powerful Information Society services. This convergence stimulates growth – electronic communications services account for about 2.5-3% of European GDP. The social impact of telecommunications has concurrently become significant – for example, the facts that there are more than 250 million daily internet users in Europe and that virtually all Europeans own mobile phones has changed the European life style.
231. As a part of the Europe 2020 Strategy²⁰⁸, the Commission launched on 26 August a Flagship Initiative on a Digital Agenda for Europe²⁰⁹. The European Digital Agenda

²⁰⁴ Case N419/2009 *Investments in electricity transmission and interconnector infrastructure* (OJ C 57, 9.3.2010, p. 4)

²⁰⁵ Case C32/2010 (ex N520/2009) *Environmental Project for Delimara Power Station*

²⁰⁶ Case NN24/2010 *Decree-law 3/10 on interruptibility* (OJ C 205, 29.7.2010, p. 2)

²⁰⁷ Case N691/2009 *Hungarian stranded cost compensation scheme* (OJ C 213, 6.8.2010, p. 2)

²⁰⁸ Europe 2020: A strategy for smart, sustainable and inclusive growth (COM(2010) 2020 final)

²⁰⁹ A Digital Agenda for Europe (COM(2010) 245 final/2)

notes, among other things, that the current economic crisis wiped out years of economic and social progress in the digital market. It sets out the Commission's priorities in the field of the digital economy and highlights the creation of a single market for content and telecom services as a vital tool to turn this development around. In particular, it puts forward the Commission's objective to bring to near zero the difference between roaming and national tariffs by 2015. It also sets ambitious target for fast and ultra-fast internet access in Europe.

232. In 2010, more effective competition due to competition law enforcement, sector regulation, technological developments and new business models resulted in lower prices for electronic communication services and innovative service offers. A Commission report released on 1 June 2010²¹⁰ shows that EU telecom markets have become more competitive thanks to the Commission's guidance in the consultation and review process under the EU Regulatory Framework for Electronic Communications²¹¹ (known as the "Article 7 procedure").
233. Providers of electronic communications services are bound to operate within this framework which is designed to facilitate access to legacy infrastructure, foster investment in alternative network infrastructure and bring choice and lower prices for consumers. Article 7 of the Framework Directive gives the Commission power to oversee draft national regulatory measures through a consultation at EU level. This ensures consistent regulation and brings more transparency into the regulatory process. *Ex ante* regulation under the Regulatory Framework builds on competition law principles.
234. As regards retail competition, the trend towards lower prices for electronic communications services persisted and the market for traditional fixed voice telephony continued to decline. In the mobile voice markets, penetration increased again, while growth of revenues slowed down.
235. There has been an increase in the deployment of optical fibre networks to provide very high bandwidth broadband internet services in many Member States. Gradual availability of very high bandwidth will allow content providers to market new broadband applications and services. The emergence of new contents and services creates a desire for further increase in bandwidth, even where it is not profitable for market operators to offer access, e.g. in remote and sparsely populated areas. This

²¹⁰ Market Reviews under the EU Regulatory Framework – Further steps towards the consolidation of the internal market for electronic communications (COM(2010) 271 final)

²¹¹ 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).

often triggers use of public funding; therefore numerous aid schemes have been motivated in the past by the need to follow the above evolution. Public intervention in some Member States is now gradually shifting towards support for very high speed broadband networks, the so-called "next generation access" (NGA) networks.

1.2. Information and Communication Technology (ICT)

236. The ICT sector accounts for 5-6% of EU GDP. It is characterised by digital convergence and the concomitant growing importance of interoperability and standards. Efficient ICT products and services are a key contributor to the smart growth put forward as a major objective of the Europe 2020 Strategy. In order for the EU to fully take advantage of the potential of the digital economy, it is essential to preserve the opportunity of new firms to enter the market and challenge established players. The Commission therefore carefully scrutinised in 2010 allegedly anti-competitive business practices of dominant market players highlighted by its ongoing investigation of IBM practices²¹². In the context of its investigation of Google practices²¹³, the Commission has also started to look into new web based services such as search services which have experienced a considerable increase in popularity during the last years and are of crucial importance to a competitive online marketplace.
237. Due to the fast evolution of digital markets the Commission's regulatory activities in the ICT sector are increasingly challenged by the emergence of new business environments such as "cloud computing", which is aimed at integrating communication, data storage, data management and application services for businesses, or mobile eco-systems providing users with all the services they need in one device. To ensure that multi-sided digital platforms such as application stores yield the positive network externalities that they are capable of bringing about, it is crucial for them to remain as open as possible, as illustrated by the Commission's preliminary investigation into Apple's iPhone related business practices.
238. Also with regard to increasingly networked services, interoperability and standards remain the key issues for competition since they typically favour entry by a greater number of players and drive down the costs of innovation. Limiting the availability of interoperability information can be used as a technical means to stifle competition and therefore warrants careful scrutiny. It is also essential to ensure that standard-setting procedures work well and that access to standards is available on fair, reasonable and non-discriminatory (FRAND) terms.

1.3. Media

239. Media is vital for the development of information and communication technologies as well as for the development and preservation of culture, information, education and democracy. The European media industry generated total revenues of over EUR 180 billion in 2009²¹⁴.

²¹² Cases COMP/39511 *IBM Corporation*, COMP/39790 *TurboHercules/IBM* and COMP/39692 *IBM Maintenance Services*. See IP/10/1006, 26.7.2010.

²¹³ Cases COMP/39740 *Foundem/Google*, COMP/39775, *Ejustice/Google* and COMP/39768 *Ciao/Google*. See IP/10/1624, 30.11.2010.

²¹⁴ Datamonitor 2010

240. Access to attractive content is a key for media development and innovation. As highlighted in the Commission's Digital Agenda for Europe, access to attractive content is restricted by the fact that Europe is still a patchwork of national markets which results in the complex licensing of content. A key priority of the Digital Single Market pillar of the Digital Agenda set by the Commission is to simplify copyright clearance and cross-border licensing of content.
241. The two general trends in the media sector which were identified in the Report on Competition Policy 2009²¹⁵ continued in 2010. First, the multiplication of distribution platforms, ongoing technological development, and changing consumption patterns are transforming the traditional market roles and power structures between market players in the television, music and book sectors. This transformation of the marketplace will lead to increased competition and business uncertainty, which in turn will lead to pressure upon these players to secure their positions in the new digital marketplace.
242. Second, media convergence²¹⁶ will create conditions conducive to entry by more efficient market players with new business models seeking to offer new products and services at competitive prices. These efficient market players will seek to maximize efficiencies resulting from online technological advances enabling offerings on a multi-language, multi-country basis and will no longer be constrained by technologies tied to physical presence on national territories. Potential competition issues resulting from these trends will generally fall into three categories: (i) availability of attractive content, (ii) access and digitisation issues (including copyright bottlenecks) and (iii) challenges posed by new revenue-generating models (monetisation issue).
243. The switch from analogue to digital broadcasting, which Member States are due to complete by the beginning of 2012²¹⁷, concerns all commonly available broadcasting transmission platforms. A number of Member States are providing public funding to encourage broadcasters and consumers to facilitate the switchover. The Commission has no general objection to the granting of State aid in this area. However, the General Court confirmed in a judgment of 10 June 2010 that Member States have to demonstrate in particular that the aid is neutral regarding the technology employed²¹⁸.

2. POLICY DEVELOPMENTS

2.1. Policy developments in telecommunications sector

244. In 2010, the Commission received 136 notifications from National Regulatory Authorities and adopted 91 comments letters and 32 no-comments letters within the Community consultation mechanism under Article 7 of the Framework Directive. Eight notifications were withdrawn by the notifying NRA, whereas four cases were

²¹⁵ 2009 Report on Competition Policy, point 315

²¹⁶ The term media convergence relates to the consumer's ability to receive multiple services on a single device.

²¹⁷ Accelerating the transition from analogue to digital broadcasting (COM(2005) 204 final)

²¹⁸ Case T-177/07 *Mediaset SpA v Commission* [2010] ECR

still open at the end of 2010. In one of these notifications, the Commission raised serious doubts as to the compatibility of the notified measures with EU law and opened a second phase investigation under Article 7(4) of the Framework Directive. The measures were later on withdrawn by NRA in phase II. Two cases notified in 2009 were closed in 2010 by veto (PL/2009/1019-1020).

2.1.1. *Antitrust enforcement*

245. In the *Telekomunikacja Polska* case²¹⁹, the Commission sent a Statement of Objections to the Polish telecoms incumbent operator on 1 March 2010, in which it came to the preliminary conclusion that *Telekomunikacja Polska* had infringed Article 102 by abusing its dominant position in refusing to supply remunerated access to its wholesale broadband services.

2.1.2. *Merger control*

246. The *T-Mobile / Orange* case²²⁰ concerning the merger of France Télécom's and Deutsche Telekom's UK subsidiaries highlighted the importance of spectrum ownership in the development of 4G networks. The investigation showed that the parties' combined contiguous spectrum could result in the new entity being the only mobile network operator (MNO) in the UK able to offer next-generation mobile data services through long term evolution technology at the best possible speeds in the medium term. The clearance decision of 1 March 2010 was conditional upon divestiture of a quarter of the parties' combined spectrum in the 1800 MHz band and the amendment of the Radio Access Network²²¹ sharing agreement with 3UK, another MNO, to ensure that the competitive constraint exercised by the latter would not be eliminated as a result of the proposed transaction.

2.1.3. *State aid control*

247. The Commission stated in the European Digital Agenda its objective to reach fast broadband coverage (at least 30 Mbps) for all European citizens and ultra-fast broadband (above 100 Mbps) subscriptions for at least 50% of European households by 2020. The Commission thus takes a favourable view as regards aid measures having the objective to provide adequate broadband coverage at affordable prices for all European citizens. In its assessment of public funding schemes under the State aid rules, the Commission acknowledges that private operators may not have sufficient market incentives to provide adequate broadband services, typically in rural and remote areas. The Commission has built up a clear and consistent State aid policy in the last years and authorises properly justified and proportionate broadband schemes if the distortion of competition and the effect on trade is limited, on the basis of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (Broadband Guidelines)²²².

²¹⁹ Case COMP/39525 *Telekomunikacja Polska*. See IP/10/213, 1.3.2010.

²²⁰ Case COMP/M.5650 *T-Mobile / Orange* (OJ C 108, 28.4.2010, p. 4)

²²¹ The Radio Access Network is one of the main infrastructure elements of a mobile network.

²²² 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)

248. In 2010, the Commission assessed and approved the use of State aid and other types of public funding of approximately EUR 1.8 billion in Europe which could generate total investments in broadband networks of up to EUR 3.5 billion. The schemes increasingly address the rollout of, and the upgrade of existing broadband infrastructure to very high speed broadband networks.
249. Member States may also qualify and design the operation of a broadband network as a service of general economic interest (SGEI). In this regard, the Commission approved the public financing of the rollout of a NGA network in Estonia²²³. The Commission concluded that the public funding constituted State aid, but in the form of a compensation for performing a SGEI.

2.2. Policy developments in ICT sector

2.2.1 Antitrust enforcement

Guidelines on horizontal cooperation agreements and standardisation

250. Standards are of particular importance for the ICT sector. In the fast evolving digital economy, the swift establishment of technical specifications for ICT products and services is critical to satisfy the constantly decreasing time-to-market. Given that the ICT sector is prone to network effects, successful products and services can easily become the platform for further product development and innovation. Against this background, the Commission sought to provide more guidance on standardisation agreements in the framework of its review of the regime for the assessment of horizontal cooperation agreements under the EU competition rules (see Section I.B.1.1.2., points 39 to 41).
251. A public consultation on these revised rules was held between 4 May and 25 June 2010²²⁴. The chapter on standardisation agreements turned out to be of utmost interest to the participating stakeholders of which about two thirds provided comments. While the majority of stakeholders welcomed the additional guidance on standardisation, further clarification was required in particular with regard to the IPR policy standard setting organisations could implement in line with competition rules.
252. To this end, the new Horizontal Guidelines²²⁵ identify some minimum requirements that must be met to ensure that the positive effects of standardisation can fully materialise. The standard-setting process should be transparent and accessible to all interested market players. In addition, holders of intellectual property rights are encouraged to commit to license on fair, reasonable and non-discriminatory terms (FRAND commitment) and effectively adhere thereto to ensure accessibility of the standard.

²²³ Case N196/2010 *Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection (EstWin project)*. See IP/10/975, 20.7.2010.

²²⁴ Available at: http://ec.europa.eu/competition/consultations/2010_horizontals/consultation_summary.pdf

²²⁵ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1)

Cases developments

253. On 26 July 2010, the Commission initiated formal antitrust investigations against IBM Corporation based on two different alleged infringements of EU antitrust rules related to the abuse of a dominant position²²⁶. Both potential infringements are related to IBM's conduct on the market for mainframe computers. Mainframes are powerful computers which are used by many large companies and government institutions worldwide to store and process critical business information. It is estimated that the vast majority of corporate data worldwide resides on mainframes. The first part of the Commission's investigation follows complaints by emulator software vendors T3 and TurboHercules, and focuses on IBM's alleged tying of mainframe hardware to its mainframe operating system. The complaints contend that the tying shuts out providers of emulation technology which could enable the users to run critical applications on non-IBM hardware. The second part of the investigation was initiated on the Commission's own initiative and focuses on IBM's alleged exclusionary practices towards competing suppliers of mainframe maintenance services.
254. In spring 2010, the Commission launched two parallel preliminary investigations into Apple's business practices relating to the iPhone²²⁷. Apple had made warranty repairs service available only in the country where the iPhone was bought, which made the exercise of warranty rights throughout the EU/EEA difficult and could have potentially led to a partitioning of the EU/EEA market. At the same time, Apple had restricted the terms and conditions of its licence agreement with independent developers of iPhone applications (apps) requiring the use of Apple's native programming tools and approved software languages to the detriment of third-party software. This could have ultimately resulted in shutting out competition from applications developed for running on other than Apple's mobile platforms. In September, Apple decided to introduce cross-border iPhone warranty repair services within the EU/EEA and to relax the restrictions on the development tools for iPhone apps giving developers more flexibility. The Commission therefore decided to close both investigations without opening formal proceedings.
255. On 30 November 2010, the Commission initiated formal proceedings against Google²²⁸ with a view to further investigating allegations that Google has abused a dominant market position in online search, online advertising and online advertising intermediation. The Commission's probe focuses in essence on the following allegations. First, the Commission is investigating whether Google has lowered the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as price comparisons (so-called vertical search services). Second, whether Google has accorded preferential placement to the results of its own vertical search services in order to shut out competing services. Third, the Commission is looking into allegations that Google has lowered the "Quality Score", one of the factors that determine the price paid to Google by advertisers, for sponsored links of competing vertical search services.

²²⁶ Cases COMP/39511 *IBM Corporation* and COMP/39790 *TurboHercules/IBM* on the one hand and COMP/39692 *IBM Maintenance Services* on the other hand. See IP/10/1006, 26.7.2010.

²²⁷ See IP/10/1175, 25.9.2010.

²²⁸ Cases COMP/39740 *Foundem/Google*, COMP/39775 *Ejustice/Google* and COMP/39768 *Ciao/Google*. See IP/10/1624, 30.11.2010.

Fourth, the Commission's investigation focuses on allegations that Google has imposed exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites, as well as on distribution partners such as computer and software vendors, with the aim of shutting out competing search tools. Finally, the Commission's probe also covers alleged restrictions on the portability of online advertising campaign data to competing online advertising platforms.

256. On 16 December 2009, the Commission made legally binding Microsoft's commitments to address the competition concerns raised in a Statement of Objections in January 2009 relating to the tying of Microsoft's Internet Explorer web browser to its dominant client PC operating system, Windows²²⁹. Microsoft committed (i) to distribute a Choice Screen software update to users of Windows client PC operating systems within the EEA that offers users an unbiased choice between the most widely used web browsers, and (ii) 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. In 2010, as foreseen in the Commitment decision, Microsoft sent to the Commission the first two reports on the implementation of the Choice Screen. By the end of November 2010, the Choice Screen had been seen more than 270 million times, and more than 84 million web browsers had been downloaded through it.

2.2.2. *Merger control*

257. On 21 January, the Commission cleared the planned acquisition of Sun Microsystems by Oracle Corporation, the leading proprietary database software vendor²³⁰. One of the complex issues raised by the case was how to assess the competitive effect of open source software products, such as Sun's database MySQL. Following a second phase investigation into the database software market, the Commission concluded that the transaction would not lead to a significant impediment to effective competition. The Commission's investigation showed that although MySQL and Oracle compete in some segments of the database market, they are not close competitors in others, such as the high-end segment. Furthermore, another open source database, PostgreSQL, was considered by many users as a credible alternative to MySQL, and could be expected to replace to some extent the competitive force exerted by MySQL. Given the specificities of the open source software industry, the Commission also took into account the open source nature of MySQL, as well as certain public announcements made by Oracle concerning issues such as the continued release of future versions of MySQL under the General Public License (open source license).
258. In the Microsoft / Yahoo! Search Business case²³¹ cleared on 18 February 2010, the Commission analysed the dynamic online search market. The case concerned the acquisition by Microsoft of Yahoo's internet search and the search advertising businesses. The investigation revealed that market participants expected the

²²⁹ Case COMP/39530 *Microsoft (tying)* (OJ C 36, 13.2.2010, p. 7)

²³⁰ Case COMP/M.5529 *Oracle / Sun Microsystems* (OJ C 91, 9.4.2010, p. 7)

²³¹ Case COMP/M.5727 *Microsoft / Yahoo! Search Business*. See IP/10/167, 18.5.2010.

transaction to increase competition in internet search and search advertising. The Commission cleared the concentration unconditionally.

259. On 29 March 2010, the Commission conditionally approved the acquisition of Tandberg by Cisco²³². The investigation revealed concerns regarding the market for high-end videoconference products due to interoperability issues between the merged entity's solutions and those of its competitors. The decision was conditional notably upon the divestment of the telepresence interoperability protocol developed by Cisco for its videoconference solutions to an independent industry body to ensure interoperability and allow other vendors to participate in the development of the protocol. The Commission actively cooperated with the US Department of Justice on this case to identify suitable remedies.

2.3. Policy developments in the Media and Sport sector

2.3.1. Antitrust and regulatory enforcement

260. The Commission's main objective from a competition perspective is to ensure a level playing field in the media sector, and that the opportunities created by digitization for firms seeking to offer new and more efficient products and services to European consumers at competitive prices are not artificially blocked.
261. The Commission continued to closely monitor the transition from analogue to digital broadcasting in the EU Member States. In September 2010, in the context of the ongoing infringement procedure concerning the Italian broadcasting legislation, the Italian Authority for Communications (AGCom) adopted criteria and rules aimed at ensuring that more frequencies resulting from the "digital dividend" are assigned to newcomers and smaller existing companies. The tender for such frequencies will likely be launched in 2011 through a beauty contest procedure meant to take into account both quantitative and qualitative criteria.
262. Moreover, on 24 November 2010, the Commission sent a letter of formal notice to the French authorities regarding the 2007 French law which had granted to the existing analogue TV broadcasters the possibility to obtain an additional national TV channel at the date of the digital switchover. The Commission considered that, in the absence of convincing evidence that such TV broadcasters obtained the additional channels based on objective, transparent, non-discriminatory and proportionate criteria required by Directive 2002/77²³³, the French law appeared to be in breach of EU law.
263. In the area of sport, the Commission closed a preliminary investigation in June 2010 into two cases related to rules of handball federations²³⁴ and based on complaints by the Spanish handball league and a group of handball clubs. The complainants alleged, among others, that the rules of the European Handball Federation and the International Handball Federations on the release of players for matches of the

²³² Case COMP/M.5669 *Cisco / Tandberg*. See IP/10/377, 29.3.2010.

²³³ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ L 249, 17.9.2002, p. 21-26)

²³⁴ Cases COMP/39659 *ASOBAL v handball federations* and COMP/39669 *Group Club Handball v handball federations*

national teams playing in international competitions were in breach of Article 101 and 102. Prompted by the Commission's preliminary investigation, the European handball stakeholders sought an amicable solution, eventually agreed in May 2010.

2.3.2 *Merger control*

264. The ProSiebenSat.1 / RTL interactive / JV case²³⁵ dealt with the increasing convergence between TV and the Internet. ProSiebenSat.1 and RTL planned to create an Internet catch-up-TV platform allowing consumers to watch repeats of TV programmes free-of-charge. On 24 September 2010, the Commission referred the case to the Austrian and German competition authorities at their request.
265. In December 2010, the Commission cleared the acquisition by News Corporation of the UK pay-TV operator British Sky Broadcasting (BSkyB)²³⁶. The Commission assessed in particular whether the transaction could lead to anticompetitive effects of a vertical and conglomerate nature (such as input or customer foreclosure, bundling or tying) in the audiovisual sector, in newspaper publishing and in advertising. The Commission concluded that the transaction would not lead to a significant impediment to effective competition. The Commission's findings concern solely the competition aspects of the transaction. They are without prejudice to the investigation by the competent UK authorities of whether the proposed transaction is compatible with the UK interest in media plurality.

2.3.3 *State aid control*

Public Service Broadcasting

266. In line with the interpretative Protocol No 29 on the system of public service broadcasting in the Member States, annexed to the TEU and the TFEU, the Commission recognises that it is the prerogative of Member States to organise the functioning and funding of public service broadcasting. The objective of the Commission's policy is to ensure that public funding does not exceed what is necessary for public broadcasters to fulfil their public service mission and does not lead to unnecessary distortions of competition.
267. The Commission continued to approve State financing for public service broadcasters where both the public service remit and the financing are determined in full transparency and where the State funding does not exceed what is necessary to fulfil the public service mission. On 26 January 2010, the Commission closed the investigation into the existing financing regime for the Dutch public service broadcasters, following amendments made to this regime and formal commitments by the Netherlands regarding the definition of the public service remit and in particular the entrustment of the broadcasters with new audiovisual services in line with the Amsterdam Protocol²³⁷. On 20 July 2010, the Commission closed with a positive decision the formal investigations into the new system of financing public service broadcasters in France and Spain in view of the phasing out of advertising by these chains. The Commission assessed concerns regarding a potential over-

²³⁵ Case COMP/M.5881 *ProSiebenSat.1 / RTL interactive / JV*. See IP/10/1174, 24.9.2010.

²³⁶ Case COMP/M.5932 *News Corp / BSkyB*. See IP/10/1767, 21.12.2010.

²³⁷ Case E5/2005 *Yearly financing of Dutch public broadcasters* (OJ C 74, 24.3.2010, p. 4)

compensation by the envisaged measures and the way the public broadcasters will in the future be financed from taxes on telecom operators and on commercial television companies²³⁸.

State aid for films

268. As in previous years, there were several State aid decisions approving film support schemes. Some of the schemes were designed to attract major film productions. The Commission also authorized aid for various audiovisual productions of Austrian commercial and non-commercial broadcasters other than the public service broadcasters, under condition that these productions qualify as a cultural product²³⁹.

D – PHARMACEUTICAL INDUSTRY & HEALTH

1. OVERVIEW OF SECTOR

269. Health care is an important economic sector representing about 9% of EU GDP, comprising the pharmaceutical sector for prescription and non prescription medicines (close to 2% of EU GDP) and the health services (6.5%)²⁴⁰. Other expenses, e.g. for medical devices and other health products, account for the remaining 0.5% of EU GDP. The health care sector is essential for the welfare of European citizens who need access to innovative, safe and affordable health products and services.
270. Member States bear directly or indirectly the largest share of the costs for the provision of health care whereas patients pay directly out of their pockets over 11% of the costs, equivalent to EUR 122 billion per year. Total expenditures on healthcare are rising faster than economic growth in EU Member States, leading to an increasing ratio of health spending to GDP. Moreover, several structural factors contribute to the further increase of health care costs in the future: increased costs of medical services through technological change, higher expectations of patients regarding quality of treatment and ageing of the European population.
271. The recent economic downturn further accentuated the increase in the ratio of health spending to GDP while public budgets underwent significant constraints. A number of Member States therefore took measures to reduce health care costs, in particular in the pharmaceutical sector, such as unilateral price cuts of up to 27% in Greece. Moreover, price increases for health services have been increasingly charged for directly to patients *inter alia* through higher co-payments. This has potentially negative effects on consumer welfare and even possibly on health status, an issue which triggered a number of NCA-led initiatives²⁴¹.

²³⁸ Cases C27/2009 *Subvention pluriannuelle pour France Télévisions* and C38/2009 *New tax-based funding system for public broadcasting in Spain* (OJ L 1, 4.1.2011, p. 9-19)

²³⁹ Cases N631/2009 *Fonds zur Förderung des privaten Rundfunks* and N632/2009 *Fonds zur Förderung des nichtkommerziellen Rundfunks*

²⁴⁰ Data exclude medicines, government investment on education, health prevention and other therapeutical appliances. All figures in this section are estimates based on data from the OECD 2008 Health database.

²⁴¹ Recent initiatives include: the Italian NCA ongoing inquiry in hospital markets, Dutch NCA report on health insurance (2007) and ongoing inquiry on hospital service prices, Irish NCA inquiry on dentists

272. In order to adjust to the challenges raised by the health care sector, DG Competition has integrated its antitrust activities regarding all health care sectors in a new unit operating under the title "Antitrust: Pharma and Health services", responsible for the enforcement of competition law for all health products and services. The mandate of the European Competition Network Pharma subgroup was also extended to cover health services and health products others than pharmaceuticals.

1.1. Overview of the pharmaceutical sector

273. The pharmaceutical sector is highly regulated and R&D driven. On the supply side, originator companies aim to bring innovative products to the market. The patent system provides the legislative framework allowing the companies to reap the benefits of their successful R&D activities. Upon loss of patent exclusivity, generic companies enter the market with bio-equivalent versions of the originator products, however at much lower prices. This contributes to keep public budgets under control and gives originator companies incentives to develop new proprietary drugs.

274. Price setting for pharmaceuticals falls into national competences under EU law. Many Member States introduced, or reflected upon, measures reducing the prices and encouraging the use of generic medicines. Within this context, the Court of Justice confirmed by its judgment of 22 April 2010²⁴² a UK scheme that provides incentives for doctors to prescribe with preference similar medicines within the same therapeutic class (*e.g.* generic products). The Court of Justice rejected the argument that the UK scheme would be illegal under the EU law, as it would amount to a commercial promotion of medicines²⁴³. Moreover, no danger to public health was established, since all medicines are constantly reviewed by health authorities. However, the Court required that national schemes must not discriminate between national medicines and those of other Member States and that Member States make public, *inter alia*, the therapeutic evaluations relating to such schemes.

275. Many patent protected blockbuster (*i.e.* with high sales volumes) drugs will lose exclusivity in the years to come, which will be a challenge for the originator industry, in particular if they are not able to find and develop new innovative products. This gives originator companies incentives to defend the revenue of existing blockbusters against approaching generic entry and contributes to the overall trend of industry consolidation. Consolidation has been taking place in all forms: acquisition of generic and originator (including biotech) companies by other originator companies, as well as mergers between generic companies.

1.2. Overview of the health services sector

276. The organisation of the health care sector is primarily the responsibility of Member States under Article 168 TFEU. However, to the extent that the activities in question

(2007), health insurance (2007) and physician services (2008) and the Swedish NCA report on consumer welfare in health (2008).

²⁴² Case C-62/2009 *Association of the British Pharmaceutical Industry v Medicines and Healthcare Products Regulatory Agency* [2010] ECR

²⁴³ Article 94(1) of Directive 2001/83 of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal product for human use (OJ L 311, 28.11.2004, p. 67-128)

involve offering goods or services on the market²⁴⁴, the provision of health care services is generally subject to EU competition rules.

277. Health services are mainly provided on a national or even local scale. The service providers are very often small or medium-sized undertakings such as physicians, pharmacists and hospitals. They are usually organised in professional associations with mandatory membership (*i.e.* being a member of such association is a precondition for entering the market). As a consequence of different regulations in Member States, the competitive environment may vary across Member States. Generally, a market entry of a health services provider in another Member State seems more burdensome than in many other services sectors, possibly due to the high degree of regulation and control on the basis of national public policy.
278. The Council of Ministers adopted on 13 September 2010 its first-reading position on a draft Directive concerning the application of patients' rights in cross-border health care²⁴⁵. The proposed Directive would provide more clarity about possibilities to seek and be reimbursed for healthcare in another Member State and also foster cooperation in areas such as health technology assessment or cross-border recognition of medical prescriptions. The Directive can increase the intra-community competition between health service providers in certain areas. Although the vast majority of EU patients receive healthcare in their own country, they may prefer to seek certain types of healthcare abroad (for example for highly specialized care where access, quality and price are of importance for the patient concerned).
279. The main antitrust issues identified so far include practices of national associations of healthcare professionals, such as recommendations of minimum prices, influencing market behaviour of their members or certain exclusionary practices. The fact that professional associations are often entrusted with tasks in the public interest does not exclude them from scrutiny under competition rules. As for the effect of such practices on trade between Member States, the jurisprudence of the Court of Justice confirms that practices extending over the whole of the territory of a Member State have, by their very nature, the effect of reinforcing the partitioning of markets on a national basis and may therefore affect intra-Union trade²⁴⁶.

2. POLICY DEVELOPMENTS

2.1. Policy developments in the pharmaceutical sector

280. Following the conclusion of the inquiry into the pharmaceutical sector in 2009²⁴⁷, the Commission's focus shifted in 2010 to the implementation of the policy recommendations. Apart from enforcement action under EU competition law, the Commission announced that it would examine a possible revision of Council

²⁴⁴ Cases C-118/85 *Commission v Italy* [1987] ECR 2599, C-35/96 *Commission v Italy* [1998] ECR I-3851 and C-180/98 to C-184/98, *Pavlov* [2000] ECR I-6451

²⁴⁵ Proposal for a directive of the European Parliament and of the Council on the application of patient's rights in cross-border healthcare, (COM(2008) 414 final, 2008/0142 (COD))

²⁴⁶ Case C-309/99, *Wouters v Commission* [2002] ECR I-1577

²⁴⁷ Executive Summary of the Pharmaceutical Sector Inquiry, 8.7.2009

Directive 89/105/EEC²⁴⁸ (the so-called Transparency Directive) setting minimum rules for pricing and reimbursement procedures. The review will examine ways to improve the transparency of such measures and to avoid market access delays linked to pricing and reimbursement procedures, in particular for generic medicines. Commission proposals will be based on an extensive impact assessment and are foreseen by end 2011.

281. The sector inquiry also contributed to the momentum towards the adoption of the Community patent and the specialised patent litigation system in Europe as advocated and proposed by the Commission. On 10 December 2010 the Council indicated that an enhanced cooperation, as provided for in the EU treaty, is the only option for moving ahead on the creation of a unified EU patent system. The Commission submitted such a proposal on 14 December 2010²⁴⁹. The advantage of this approach is that those Member States willing to go ahead with the patent reform can do so, whilst the others can join in at a later stage if they wish.
282. The discussions in Council and Parliament on other legislative proposals concerning the pharmaceutical sector are ongoing, in particular regarding the pharmaceutical package consisting of the fight against counterfeits, pharmacovigilance (the process and science of monitoring the safety of medicines and taking action to reduce their risks and increase their benefits) and information to patients.
283. Finally, a number of Member States have taken up recommendations from the sector inquiry on improving market access for generic medicines, for instance through accelerated approval procedure or through prohibition for national bodies to link market approval or pricing and reimbursement status for generic medicines to the patent status of the originator reference product – the so-called patent linkage. This shows that the sector inquiry also produced important results at national level.

2.1.1. Antitrust enforcement

Monitoring of patent settlements

284. As a follow up to the sector inquiry, the Commission started the monitoring of patent settlements in the EU²⁵⁰. The first monitoring report identified three types of patent settlements potentially raising competition concerns: (i) those based on a sham or unmeritorious patent, (ii) those containing restrictions going beyond the exclusionary zone of the patent ("out of scope settlements") and (iii) those limiting generic entry and containing a net value transfer from the originator to the generic company. The monitoring exercise showed that the number of patent settlements in the pharmaceutical sector that are potentially problematic fell to 10% of total patent settlements in the sector in the period from July 2008 to December 2009 compared with 22% in the period covered by the sector inquiry (January 2000 – June 2008). Also the level of direct value transfers foreseen in the settlements decreased from

²⁴⁸ Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems (OJ L 40, 11.2.1989, p. 8-11)

²⁴⁹ Proposal for a Council decision authorising enhanced cooperation in the area of the creation of unitary patent protection (COM(2010)790 final, 2010/0384 NLE)

²⁵⁰ Available at: <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry>

more than EUR 200 million recorded in the sector inquiry period to less than EUR 1 million in total in the period covered by the first monitoring. The overall number of patent settlements nonetheless increased, showing that companies are not prevented from concluding settlements by the Commission's ongoing enforcement action. The Commission will continue monitoring patent settlements in 2011.

Cases developments

285. As a follow up to the sector inquiry, different enforcement actions under EU competition law are under way. Amongst others, the Commission is investigating patent settlement agreements concluded by Servier and a number of generic operators for the hypertension drug perindopril²⁵¹. Unrelated to this investigation, the Commission issued a Statement of Objections against Servier in July 2010, stating its preliminary view that Servier had submitted incorrect and misleading information in reply to a simple request for information in the context of the sector inquiry²⁵².
286. The Commission also opened formal proceeding against the Danish pharmaceutical undertaking Lundbeck²⁵³ to examine potential breaches of Articles 101 and 102. This investigation relates to its antidepressant drug citalopram and concerns among others potentially anticompetitive patent settlements.
287. In 2010, the Commission also carried out surprise inspections at the premises of a number of pharmaceutical companies and continued investigations on inspections which had been carried out in 2009.
288. On 1 July 2010, the General Court largely confirmed the decision of the Commission taken in the AstraZeneca case in 2005²⁵⁴. In this decision, the Commission had imposed a fine of EUR 60 million on the pharmaceutical company AstraZeneca for having abused its dominant position in the market of proton pump inhibitors by (i) misusing the patent system and (ii) by selectively withdrawing marketing authorisations for its product Losec in certain Member States with the sole purpose of preventing or delaying generic market entry. The Court confirmed the assessment of the market and AstraZeneca's dominance by the Commission. The judgment also contains very important clarifications on the relationship between exclusive rights (such as intellectual property rights) and EU competition law. The General Court declared that the submission to public authorities of misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled, or to which it is entitled for a shorter period, constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition. Moreover, the Court found that, in so far as an undertaking in a dominant position is granted an unlawful exclusive right as a result of an error, it is required, at the very least, to inform the public authorities of this so as to enable them to rectify those irregularities. However, the Court reduced the fine to EUR 52.5 million in view of limited effects on parallel trade. The judgment is under appeal.

²⁵¹ Case COMP/39612 *Servier (perindopril)*

²⁵² IP/10/1009, 26.7.2010

²⁵³ Case COMP/39226 *Lundbeck*

²⁵⁴ Case T-321/05 [AstraZeneca v Commission \[2010\] ECR](#)

289. For a number of National Competition Authorities (NCAs) the pharmaceutical sector has also become a priority sector. For instance, in the UK, the Office of Fair Trading (OFT) issued a Statement of Objections to Reckitt Benckiser in February 2010 which admitted the infringement and agreed to pay a fine of GBP 10.2 million²⁵⁵. According to the OFT, the pharmaceutical company withdrew one of its products (Gaviscon Original Liquid) from the National Health Service (NHS) list of prescription drugs after the patent had expired, but before the publication of the generic name for it so that more prescriptions would be issued for its alternative product Gaviscon Advance Liquid. Pharmacies that receive prescriptions for Gaviscon Advance Liquid must dispense it, as it is patent protected and there are no generic equivalent medicines. The company received a GBP 1.8 million reduction for agreeing to cooperate with the OFT during the investigation, admitting the infringement of UK and EU competition law.
290. The Italian NCA recently opened a formal investigation against the originator company Pfizer over a potential abuse of the patent system by artificially prolonging patent protection for the drug latanoprost aimed at delaying generic entry.
- 2.1.2. *Merger control*
291. The trend of consolidation in the pharmaceutical sector continued in both the originator and the generic segment of the market. The main cases that were examined were Abbott / Solvay Pharmaceuticals²⁵⁶, Teva / Ratiopharm²⁵⁷ and Novartis / Alcon²⁵⁸. These cases were cleared in the first phase with commitments.
292. The Abbott / Solvay Pharmaceuticals case involved two originator companies active in pharmaceutical and *in vitro* diagnostics markets. In light of concerns arising in cystic fibrosis diagnostics products, parties committed to the divestment of Solvay's entire EEA cystic fibrosis diagnostics business. The Teva / Ratiopharm case involved the acquisition by the largest generic company in the world of a strong European generic company. Despite both companies having a wide portfolio of products, concerns arose only in a limited number of areas, primarily in the Netherlands. In light of these concerns, the commitment entailed, in the first place, the divestment of Ratiopharm's respective products. As an alternative divestment in the Netherlands, the commitment also included the entire Ratiopharm business in case a suitable buyer was not found for the initial divestment products. The Novartis / Alcon case involved the acquisition by a global pharmaceutical company of a global medical specialty company focused on eye care. Although the acquisition was largely complementary, it raised competition concerns in a broad range of national markets for ophthalmic pharmaceuticals and consumer vision care products. In light of these concerns, the commitment primarily entailed the divestment of a number of Novartis' products on an EEA wide or national basis.
293. Given that pharmaceutical companies are often active worldwide, the procedures involved cooperation with other competition authorities around the world. In particular, the Commission coordinated with the US federal Trade Commission work

²⁵⁵ Available at: <http://www.offt.gov.uk/news-and-updates/press/today?prid=749499>

²⁵⁶ Case COMP/M.5661 *Abbott / Solvay Pharmaceuticals* (OJ C 89, 7.4.2010, p. 1)

²⁵⁷ Case COMP/M.5865 *Teva / Ratiopharm* (OJ C 7, 12.1.2011, p. 5)

²⁵⁸ Case COMP/M.5778 *Novartis / Alcon*. See IP/10/1042, 9.8.2010.

on the Novartis / Alcon case since both US and EU markets were significantly impacted by the merger.

2.2. Policy developments in the health services sector

2.2.1 Antitrust enforcement

294. The Commission adopted its first antitrust decision in the health services market imposing a fine of EUR 5 million on the French Association of Pharmacists (ONP)²⁵⁹. In its decision, the Commission condemned the market behaviour of ONP in the French market for clinical laboratory testing. The Commission established that ONP limited possible price reductions (through rebates) for clinical testing and restricted the development and growth of certain (larger) groups of laboratories with a view to protecting the economic interests of the majority of its members. The Commission established in particular that the prices for comparable services in other Member States were considerably lower.

295. On 26 October 2010, the General Court confirmed that the inspections carried out by the Commission in the ONP case were fully compatible with EU law²⁶⁰. ONP had claimed that it could not be a rightful addressee of a Commission's inspection decision because it lacked legal personality. Furthermore, it was argued by ONP that the inspection mandate was drafted too broadly so that the applicants' rights of defence were violated. Finally, ONP and its sections would not be bounded by EU competition rules as ONP is entrusted with a public mission and a part of its members are not undertakings. The court rejected those arguments and declared the inspection decision of the Commission as legal.

2.2.2 Merger control

296. Over the course of 2010, the Commission examined a limited number of mergers in the health care services sector. Most of them were cleared through simplified procedure since they did not raise competition concerns. On 21 May 2010, the proposed acquisition by the British investment group 3i of the French Vedici group of health care facilities was cleared²⁶¹ because the vertical relationship between Vedici's activities in the hospital care sector and the provision of bio-medical tests by the laboratories of Labco SAS, a subsidiary of 3i, was found not to pose a significant impediment to effective competition.

2.2.3 State aid control

297. The public support granted to the provision of health care services may not be considered State aid provided that the strict conditions defined by the Court of Justice case law are rigorously complied with²⁶². Should such financial support measures constitute State aid, they can nevertheless be declared compatible with the internal market pursuant to Article 106(2) if they are necessary and proportionate to

²⁵⁹ Case COMP/39510 *ONP*. See IP/10/1683, 8.12.2010.

²⁶⁰ T-23/09, *CNOP v Commission*, 26/10/2010 [2010] ECR

²⁶¹ Case COMP/M.5805 *3i / Vedici Groupe* (OJ C 171, 30.6.2010, p. 1)

²⁶² Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747

fulfil an appropriately entrusted mission of Services of General Economic Interest (SGEI), under certain conditions set out in the Commission framework on public service compensation²⁶³. Furthermore, State aid granted to hospitals providing medical care to be qualified as SGEI is covered by the block exemption contained in the 2005 Commission decision on public service compensation²⁶⁴, regardless of the turnover made by such hospitals and the level of the compensation they receive. Pursuant to case law²⁶⁵, Member States enjoy a wide margin of discretion regarding the definition and entrustment of SGEI, and also the determination of the cost compensation. The control exercised by the Commission and other EU institutions in this regard is therefore limited to verifying the existence of a manifest error in the way the Member State uses its wide margin of discretion.

298. During 2010, the Commission examined a number of complaints lodged by private health service providers acting on the relevant markets in competition with public operators, in particular concerning hospital and home care. Most of the complaints on subsidies for hospitals and home care providers came from operators in Member States with health care markets more open to competition (*e.g.* Belgium, France, Germany and the Netherlands). Many such complaints were filed by private hospitals or private health care associations against their allegedly unfair treatment or against allegedly excessive compensation of publicly-owned hospitals in various Member States, the latter often being subject to allegations of cross-subsidising commercial activities from public financing they received.
299. The Commission assessed whether the corresponding activities qualified as economic or non-economic activities, and examined the definition and entrustment of the respective public service missions and the necessity and proportionality of the compensation received by the beneficiaries (such as public hospitals), as well as the absence of cross-subsidisation and compliance with EU transparency requirements²⁶⁶. Practice again highlighted that the main challenges for national authorities continued to be the establishment of transparent entrustment acts which precisely define public services and their public funding and the accurate separation of accounts between public and commercial services. The Commission thus required appropriate amendments where necessary.
300. At the end of 2009, the Commission adopted a decision concerning the public financing granted in favour of the public hospitals in the Brussels Region (Belgium)²⁶⁷ following a State aid complaint by two Belgian associations representing the leading private hospitals operating in the same region. The Commission's positive decision found that these public funds were granted for the provision of the health and social public service missions entrusted to the public

²⁶³ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4-7)

²⁶⁴ Commission decision of 28 November 2005 on the application of Article 86(2) EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67-73)

²⁶⁵ Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81

²⁶⁶ Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version) (OJ L 318, 17.11.2006, p. 17-25)

²⁶⁷ Case NN54/2009 *Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) v Belgique* (OJ C 74, 24.3.2010, p. 1)

hospitals concerned and were in line with the requirements set out under Article 106(2). In March 2010, the Commission's decision was challenged by one of the original complainants in front of the General Court, and the Court case is currently pending²⁶⁸.

301. The Commission also continued to examine cases involving possible State aid in the field of health insurance, in particular in countries with competitive health insurance markets. In this context, in July 2010 the Commission approved an extension of the risk equalisation scheme applicable to health insurance in the Netherlands²⁶⁹, which had been approved by the Commission in 2005.

E – TRANSPORT

1. OVERVIEW OF SECTOR

302. Transport is an essential component of the European economy. The provision of transport services (including storage, warehousing and other auxiliary activities) account for about 4-5% of EU GDP and for some 4.4% of the total workforce, more than 9.2 million persons²⁷⁰. The transport sector includes passenger transport (~30% of value-added from transport and storage), freight transport (~35%) and logistics services (~35%). The efficient functioning of the transport sector in Europe contributes to the productivity of all economic sectors and is an essential part of the strategy towards a more sustainable growth in Europe.
303. The economic downturn in 2009 had a significant impact on almost all transport sectors while 2010 proved to be a year of progressive recovery. By the end of 2010, prices in air and maritime transport had largely come back to pre-crisis levels.
304. Within the EU, the airline liberalisation package of 1992 removed all barriers to intra-EU airline mergers. Outside of the EU, the aviation sector is still governed by bilateral treaties that prevent or restrict cross-border airline mergers. Because of this regulatory landscape, EU airlines tend to consolidate among themselves via mergers and acquisitions – which are assessed under the EU Merger Regulation²⁷¹ – while they integrate operations with non-EU airlines via alliances, joint ventures or other forms of looser cooperation, which are assessed under Article 101. Airport congestion remained a critical issue. In this context, the Commission worked in 2010 on the revision of the Slot Regulation planned for 2011²⁷².
305. The inter-EU passenger rail transport market started being liberalised as of 2010, with gradual opening up of Member States' markets planned by 2012. Competitors

²⁶⁸ Case T-137/10 *Coordination bruxelloise d'Institutions sociales et de santé (CBI) v European Commission* (OJ C 148, 5.6.2010, p. 38)

²⁶⁹ Case N214/2010 *Introduction of a risk equalisation system in the Dutch health insurance* (OJ C 333, 10.12.2010, p. 3-4)

²⁷⁰ Figures for 2007, Transport Statistical Pocket Book 2010

²⁷¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1-22)

²⁷² Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1)

have entered the rail freight market but monopolies still exist both for freight and for passenger transport services in many Member States. For new entrants, access to the infrastructure and rail-related services, which are often owned and operated by the incumbent rail undertaking, is of critical importance²⁷³.

306. As for maritime transport, it has now undergone a full modernisation of its competition law framework, bringing it within the generally applicable competition rules. This regulatory work was complemented by investigation and enforcement actions.
307. As described above, competition policy challenges in the field of transport differ significantly from one modal market to the other. On a general basis, the Commission remained vigilant to any signs of crisis cartels, protectionist measures or other forms of anticompetitive behaviour. In 2010, the Commission also examined proposed mergers – pertaining to a broad spectrum of passenger and freight/cargo transport activities, including air, rail, road and maritime transport and logistics, and assessed a number of cooperative agreements, with a view to ensuring that such market consolidation was not to the detriment of consumers.
308. As regards State aid, a significant number of rescuing and restructuring measures were notified and authorised by the Commission in 2010, in particular in aviation, maritime and railway sectors. This increased number of notifications is *inter alia* linked to the consequences of the economic downturn, which worsened the structural difficulties encountered by the undertakings concerned. Despite the progressive recovery of the sector, this trend is expected to continue in 2011, especially as regards airlines.

2. POLICY DEVELOPMENTS

2.1. Air transport

2.1.1. Antitrust enforcement

309. On 14 July 2010, the Commission made legally binding the commitments²⁷⁴ offered by three members of the Oneworld airline alliance, British Airways (BA), American Airlines (AA) and Iberia (IB). The commitments were offered in response to the Commission's concerns that the planned joint venture between the parties could violate EU antitrust rules and harm consumers on transatlantic routes. After a market test, the Commission concluded that the commitments offered were suitable to remedy the competition concerns. The decision, based on Article 9 of Regulation 1/2003²⁷⁵, does not conclude on whether there was any infringement of EU competition rules. It legally binds BA, AA and IB to the commitments offered and ends the Commission's investigation. In the event that BA, AA and IB should break their commitments, the Commission can impose a fine of up to 10% of each

²⁷³ Communication from the Commission concerning the development of a Single European Railway Area (COM(2010) 474 final)

²⁷⁴ Case COMP/39596 BA/AA/IB. See IP/10/936 and MEMO/10/330, 14.7.2010.

²⁷⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1-25)

company's total annual turnover without having to prove a violation of the EU competition rules. These commitments will be binding on BA, AA and IB for ten years. A trustee was appointed to monitor their implementation. Throughout its investigation, the Commission has been in close contact with US authorities, in particular the US Department of Transportation, which is conducting a parallel review under US rules.

310. The three airlines BA, AA and IB, concluded agreements to involve in extensive cooperation in their air passenger services on transatlantic routes between Europe and North America. In particular, the parties agreed to coordinate prices, capacity, schedules, marketing and sales, as well as to share revenues. The Commission's investigation identified competition concerns on five routes from London to the US (Boston, Chicago, Dallas, Miami and New-York) and on one route from Madrid to Miami. The investigation of the Commission showed that on these routes of concern the parties provided overlapping non-stop services and held a strong market position protected by high barriers to entry, notably the lack of landing and take-off slots at London Heathrow airport. The Commission's concerns related to restriction of competition between the parties and between them and third party airlines. The latter restriction was likely because of the potential of the parties to limit their competitors' access to connecting traffic, which was important for viable operations on the routes of concern.
311. To address the identified competition issues, BA, AA and IB offered the following commitments on the routes of concern (i) to release seven daily slot pairs at London Heathrow or London Gatwick airports – at the competitor's choice – on four routes of concern; (ii) to offer fare combinability agreements (which would enable competitors to offer services on the parties' flights); (iii) to offer special pro-rate agreements (which would enable competitors to obtain connecting traffic from the parties on favourable terms); and (iv) to provide competitors access to the parties' frequent flyer programmes. The Commission found these commitments sufficient to enable competitors to start new or maintain existing services on the routes of concern.
312. The close cooperation between the Commission and the US authorities, in particular the US Department of Transportation resulted in compatible sets of remedies adopted on both sides of the Atlantic. The investigation was particularly important since the commitments adopted facilitate additional competition on some of the largest extra-EU routes to the benefit of air passengers and the European economy. This case constitutes a useful precedent for future assessments of cooperation between airlines.
313. On 16 November 2010, the Commission published a report on the role of alliances in the market for transatlantic air services²⁷⁶. This report was the outcome of the qualitative phase of the research project jointly launched by the Commission and US Department of Transportation (DoT) in 2008. The report examined the competitive structures of the airline industries in Europe and the United States and compared the respective legal regimes and analytical frameworks applied by the Commission and DoT. The report concluded that the competitive structures of the airline industries are

²⁷⁶ Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches, A report by the European Commission and the United States Department of Transportation, 16 November 2010: http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf

similar. Despite important differences in legal regimes, the report found that there is scope for the Commission and DoT to work towards the promotion of compatible regulatory approaches, as specified in Annex 2 to the EU-US Air Transport Agreement, to achieve pro-competitive outcomes for consumers and the airline industry. This project marked a step forward in the regulatory cooperation between the Commission and DoT.

2.1.2. *Merger control*

314. In 2010, air transport concentrations constituted an important focal point in merger control, especially in light of the ongoing industry consolidation. The economic and financial crisis caused a sudden and sharp drop in both cargo and passenger traffic, and this accelerated the trend towards consolidation in the airline industry, either through mergers or the exit of loss-making airlines from the market. These mergers allowed some of the larger flag-carriers to consolidate their position as market leaders. This development was reflected in an increase in the number of airline merger cases that the Commission has had to deal with over the past couple of years.
315. On 14 July 2010, the Commission cleared the merger between BA and IB following a market investigation, which showed that the merged entity will continue to face sufficient competition in passenger and air cargo transport as well as ground handling²⁷⁷. On 27 July 2010, the Commission approved the merger of United Airlines and Continental Airlines, which are both U.S. carriers providing scheduled air passenger and cargo transport between the EEA and the US²⁷⁸. The market investigation confirmed the complementary nature of United's and Continental's transatlantic networks. On 30 July 2010, the Commission opened an in-depth investigation of the planned merger between Olympic Air and Aegean Airlines following initial indications that the proposed concentration would lead to very high market shares on a number of routes²⁷⁹.
316. On 14 September 2010, the Commission cleared the proposed acquisition of the German tour operator Öger Tours GmbH by Thomas Cook Group plc of the UK, as the combined market position of the two parties on the wholesale markets for hotel accommodation and airlines seats would not be sufficient to foreclose other tour operators from accessing these capacities²⁸⁰.

2.1.3. *State aid control*

317. The Eyjafjallajökull volcano eruption in Iceland in April 2010 created a cloud of volcanic ash which covered most of Europe, except the Mediterranean region airspace. In its information note of 27 April 2010²⁸¹, the Commission acknowledged the impact on the air transport industry of the closing of the affected airspace. In that context, the Commission proposed a series of short-term emergency measures and of structural measures to respond to the situation created by the flight restrictions. With

²⁷⁷ Case COMP/M.5747 *British Airways / Iberia* (OJ C 241, 8.9.2010, p. 1)

²⁷⁸ Case COMP/M.5889 *United Airlines / Continental Airlines* (OJ C 225, 20.8.2010, p. 1)

²⁷⁹ Case COMP/M.5830 *Olympic Air / Aegean Airlines*, (OJ C 174, 1.7.2010, p. 16)

²⁸⁰ Case COMP/M.5867 *Thomas Cook Group Plc / Öger Tours GmbH*. (OJ C 222, 17.8.2010, p. 5)

²⁸¹ This information note was presented by Vice-president Kallas in association with Vice-president Almunia and Commissioner Rehn and was endorsed by the Commission on 27 April 2010.

regard to possible compensation for the air transport industry, this note indicated that the Commission "could prepare a communication clarifying the requirements to be fulfilled" to provide State aid in the relevant context. In the conclusions on the EU response to the consequences of the volcanic ash cloud on air transport adopted by the Extraordinary TTE (Transport) Council of 4 May 2010²⁸², the Council agreed to "recall the existing legal framework²⁸³ applicable to potential support measures by Member States". However, as no Member State expressed in 2010 its intention to grant State aid to the air transport industry in the above mentioned context, the adoption of a communication did not appear appropriate.

318. As in previous years, several State aids for investments in airport infrastructure were approved as compatible with the internal market for airports in the United Kingdom (Derry Airport)²⁸⁴, in Finland (Vaasa airport and Oulu airport)²⁸⁵ and in Latvia (Riga Airport)²⁸⁶. The Commission also approved in June 2010 a guarantee granted by the Region of Murcia (Spain) to the consortium awarded to build, exploit and manage the new airport²⁸⁷.
319. The Commission closed the formal investigation procedure into the agreement concluded until 2016 between Bratislava Airport and Ryanair concerning Ryanair's operations at this airport. Having carried out a cost-benefit-analysis of this agreement, the Commission concluded that in similar circumstances a private investor operating under normal market conditions would have entered into the same or similar commercial arrangement as the operator of Bratislava Airport. Therefore, no advantage was being granted to Ryanair²⁸⁸. As regards start-up aid²⁸⁹, the Commission authorised in May and September 2010 two schemes intended, through airport fees reduction, at the creation of new air routes and additional frequencies from Dijon-Longvic²⁹⁰ and Antwerp²⁹¹ to other EU airports.
320. The Commission opened in February 2010 a formal investigation procedure on the State aid aspects of a loan granted to ČSA-Czech Airlines by a State-owned entity (Osinek) as well as a subsequent liberation of the collaterals of the loan²⁹². In December, the Commission initiated an in-depth investigation into several measures granted by the Hungarian authorities to support Malév, the national air carrier in the context of its privatisation and subsequent re-nationalisation²⁹³. Two formal investigation procedures were also opened into compensation for losses incurred by

²⁸² MEMO/10/161

²⁸³ Article 107(2)(b) TFEU states that "shall be compatible with the internal market (...) aid to make good the damage caused by natural disasters or exceptional circumstances".

²⁸⁴ Case NN65/2009 *City of Derry airport* (OJ C 144, 3.6.2010, p. 27)

²⁸⁵ Cases N397/2009 *Kiinteistö Oy Cargo Apron Vaasa* (OJ C 29, 5.2.2010) and N286/2010 *Public financing for the infrastructure investments and expansion at Oulu Airport*

²⁸⁶ Case N41/2010 *Development of Airport Infrastructure of Airport "Riga"* (OJ C 143, 2.6.2010, p. 23-24)

²⁸⁷ Case N63/2010 *State guarantee for the construction of Murcia Airport* (OJ C 217, 11.8.2010, p. 1)

²⁸⁸ Case C12/2008 *Agreement between Bratislava Airport and Ryanair*. See IP/10/56, 27.1.2010.

²⁸⁹ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1)

²⁹⁰ Case N709/2009 *Aide à la compagnie Eastern Airways pour le démarrage de nouvelles liaisons aériennes au départ de l'aéroport de Dijon-Longvic* (OJ C 125, 13.5.2010, p. 1)

²⁹¹ Case N114/2010 *Aide au démarrage en faveur de programmes importants qui améliorent la promotion et le développement de l'aéroport d'Anvers* (OJ C 250, 17.9.2010, p. 1)

²⁹² Case C6/2010 *State aid implications of a loan provided by Osinek a.s.* See IP/10/179, 24.2.2010.

²⁹³ Case C38/2010 *Malév Hungarian Airlines*. See IP/10/1753, 21.12.2010.

SEA Handling, an Italian ground handling company operating at airports in Milan²⁹⁴, and concerning the public financing to cover losses incurred by the Reggio Calabria airport in Italy²⁹⁵.

321. Finally, the Commission authorised in November 2010 a loan facility worth EUR 52 million for the Maltese flag carrier²⁹⁶. Air Malta is a small carrier operating 12 aircrafts mainly in Europe. It is of key importance for Malta's economy that heavily depends on tourism. This rescue aid is a short-term measure to tackle liquidity problems faced by Air Malta and a sound restructuring plan of the company should be submitted to the Commission within six months.

2.2. Rail and inland transport

322. The Commission adopted a proposal to recast the first railway package on 17 September 2010²⁹⁷. The proposal aims at increasing competition on rail market. In particular, it seeks to improve access to rail-related services such as terminals and maintenance facilities. The proposal strengthens the powers of the national rail regulators, notably by extending their competence to rail-related services, and enhances their independence vis-à-vis other public authorities.

2.2.1. Merger control

323. On 22 January 2010, the Commission approved the proposed acquisition of Financière Ermewa, a Swiss company involved in rail freight wagon and tank container hire in several EU Member States, by TLP, a subsidiary of the French rail transport company SNCF²⁹⁸. This approval was conditional upon the divestment of Ermewa's activities related to the transport of cereals.
324. On 17 June 2010, the Commission decided to give the go-ahead to the proposed creation of the "New Eurostar" joint venture by the SNCF and London Continental Railways²⁹⁹. This decision was conditional upon commitments ensuring an effective access for new entrants to international stations served by Eurostar.
325. On 14 July 2010, the Commission cleared the acquisition of Giraud, an international road freight group by Geodis, which belongs to the SNCF group as well³⁰⁰. The Commission considered that there would be no incentive for SNCF to restrict access to its rail transport services following the acquisition.
326. On 11 August 2010, the Commission approved the proposed acquisition of rail and bus operator Arriva plc of the UK by Deutsche Bahn³⁰¹. This decision was

²⁹⁴ Case C14/2010 *Aide présumée octroyée à la société SEA Handling S.p.A.* See IP/10/787, 23.6.2010.

²⁹⁵ Cases C20/2010 (ex N536/2008 and NN32/2010) *Italy – Calabria Region - SO.G.A.S. - Società per la gestione dell'aeroporto dello Stretto* (OJ C 92, 28.10.2010, p. 30)

²⁹⁶ Case N504/2010 *Air Malta plc.* See IP/10/1509, 15.11.2010.

²⁹⁷ Proposal for a Directive of the European Parliament and of the Council establishing a single European railway area (COM(2010) 475 final, COD 2010/253)

²⁹⁸ Case COMP/M.5579 *TLP / Financière Ermewa* (OJ C 60, 11.3.2010, p. 1)

²⁹⁹ Case COMP/M.5655 *SNCF / LCR / Eurostar* (OJ C 272, 8.10.2010, p. 2)

³⁰⁰ Case COMP/M.5877 *Geodis / Giraud* (OJ C 213, 6.8.2010, p. 6)

³⁰¹ Case COMP/M.5855 *Deutsche Bahn / Arriva plc* (OJ C 276, 13.10.2010, p. 1)

conditional upon Deutsche Bahn's commitment to divest Arriva Deutschland, which includes the entire rail and bus business of Arriva in Germany.

327. On 12 August 2010, the Commission approved the merger of Veolia Transport's and Transdev's activities in the area of scheduled international transport by coach³⁰², but it referred the examination of the merger's impact in France and the Netherlands to the respective National Competition Authorities.

2.2.2. *State aid control*

328. In February 2010, the Commission adopted its first decision applying the new regulation on public passenger transport services which entered into force on 3 December 2009³⁰³. By this decision, the Commission concluded the formal investigation procedure initiated in 2008 regarding the public-service contracts concluded with the Danish railway company Danske Statsbaner (DSB)³⁰⁴. The Commission found that the compensation paid by the government every year to DSB for the costs incurred in meeting its public-service obligations was limited to what was strictly necessary to cover those costs.

329. As regards the rail freight transport sector which has been fully liberalised since 2007, the Commission authorised on 26 May 2010 the plan of Société nationale des chemins de fer belges (SNCB) to restructure its freight activities³⁰⁵. The Commission considered that the restructuring plan would address the problems affecting SNCB's freight activities and ensure the viability of those activities without unduly distorting competition in the internal market. In accordance with the 2008 Community guidelines on State aid for railway undertakings³⁰⁶, the SNCB's freight division shall be legally separated and transformed into a commercial company under ordinary commercial law. The creation of an independent operator is designed to ensure that there will be no cross-subsidisation between freight and passenger transport activities. The restructuring plan also includes a substantial reduction in the capacity of SNCB's freight activities to contribute to healthy competition in the market concerned. Generally, a division of an undertaking, namely an economic entity without legal personality, is not eligible for restructuring aid on the basis of the 2004 Guidelines on State aid for restructuring³⁰⁷. Due to the very specific situation of the European rail freight sector, a specific approach for restructuring of freight divisions of railway undertakings was maintained for a transitional period, namely for restructurings notified before 1 January 2010. This case will thus be the only case of application of those provisions.

³⁰² Case COMP/M.5741 *CDC / Veolia Environment / Transdev / Veolia Transport* (OJ C 266, 1.10.2010, p. 2)

³⁰³ Regulation (EC) No 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger services by rail and road repealing Council regulations (EEC) No 1191/69 and No 1107/70 (OJ L 315, 3.12.2007, p. 1-13)

³⁰⁴ Case C41/2008 *Public service contracts between the Danish Government and Danske Statsbaner*. See IP/10/178, 24.2.2010.

³⁰⁵ Case N726/2009 *Aide à la restructuration des activités "fret" de la SA de droit public SNCB*. See IP/10/615, 26.5.2010.

³⁰⁶ Community guidelines on State aid for railway undertakings (OJ C 184, 22.7.2008, p. 13)

³⁰⁷ Community guidelines on State aid for restructuring (OJ C 244, 1.10.2004, p. 2)

330. Finally, the Commission authorised in December 2010 a rescue aid of approximately EUR 128 million for BDZ EAD, the 100% State-owned Bulgarian railway which operates on both freight and passenger railway markets³⁰⁸. This short-term measure is intended to tackle BDZ EAD's liquidity problems and enable the company to pay creditors and properly maintain its rolling stock pending the implementation of a restructuring plan to be submitted to the Commission within six months.

2.3. Maritime transport

2.3.1. Antitrust enforcement

331. On 26 April 2010, the Commission's new Block Exemption Regulation for Consortia entered into force³⁰⁹. It will apply for five years. A consortium is an operational cooperation between liner shipping carriers to provide a joint service for the carriage of cargo on a route. In substance the new regulation notably reviewed the list of exempted activities and the applicable market share threshold. .

332. Moreover, in 2010 the Commission continued to pursue advocacy efforts in the area of maritime antitrust *vis-à-vis* third countries. Regulation 1419/2006³¹⁰ – the regulation that repealed the block exemption regulation for liner shipping conferences, which are a type of price-fixing cartel – contains a recital that calls on the Commission to take "appropriate steps to advance the removal of the price fixing exemption for liner conferences that exist elsewhere". The Commission's consistent message towards third countries is to advocate the exemption of certain consortia to some extent, whilst prohibiting all forms of anti-competitive price-fixing and capacity-fixing agreement. To this end, DG Competition officials held face-to-face meetings or conference calls with Australian, Canadian, Chinese, Hong Kong, Japanese, Korean, and US transport ministries and competition authorities.

333. In January 2010, the Commission initiated proceedings against the "Baltic Max Feeder" scheme whereby owners of container vessels intended to jointly cover the costs of removing vessels from service. The investigation aimed to establish whether the scheme's purpose was to reduce capacity and, therefore, push up the charter rates the owners charged for such vessels. In response to the initiation of proceedings by the Commission the planned scheme was abandoned and the case was closed³¹¹.

2.3.2. Merger control

334. The Commission cleared on 17 June 2010 the acquisition of Norfolk, which provides ferry and cargo shipping services in the North Sea area, by DFDS of Denmark³¹².

³⁰⁸ Case N402/2010 *Rescue aid for the Bulgarian State railways EAD (BDZ)*. See IP/10/1733, 16.12.2010.

³⁰⁹ Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (OJ L 256, 29.9.2009, p. 31)

³¹⁰ Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (OJ L 269, 28.9.2006, p. 1)

³¹¹ Case COMP/39699 *Baltic Max Feeder*. See IP/10/374, 26.3.2010.

³¹² Case COMP/M.5756 *DFDS / Norfolk* (OJ C 241, 8.9.2010, p. 1)

Clearance was conditional on the conclusion by DFDS of a space charter agreement with a new entrant on routes between the UK and Denmark.

2.3.3. *State aid control*

335. In January 2010 the Commission approved for the first time State aid for launching a "Motorways of the Sea" project on the basis of both the Maritime Guidelines and the Complementary aid Guidelines³¹³. The aid is complementary to Union financing granted under Marco Polo II Programme. The project concerns the establishment of a maritime link operated by GLD Atlantique between the French port of Nantes-Saint Nazaire and the Spanish port of Gijón³¹⁴. The aim is to capture between 3% and 5% of the road traffic which currently passes through the west of the Pyrénées. The overall financing of the project (State aid and Marco Polo grant) is limited to 35% of the eligible costs within the first four years of its operation.
336. In April 2010, the Commission authorised the extension of the Dutch tonnage tax scheme to cable layers, pipeline layers, research vessels and crane vessels³¹⁵. This decision was based on the approach adopted in 2009³¹⁶, when the activities of cable-layers were considered to be eligible for State aid by applying by analogy the Maritime Guidelines³¹⁷. Similarly, the Commission authorised the Cypriot tonnage tax scheme³¹⁸ as well as reduced social contributions rates for seafarers in Germany³¹⁹.
337. In August 2010 the Commission approved a rescue aid for the company SeaFrance³²⁰. The company is a 100% subsidiary of French SNCF. It operates exclusively on the route between Calais and Dover and transports both passengers and freight. The company was placed in insolvency by the Tribunal de Commerce of Paris on 30 June 2010. The aid was intended to allow the company to weather its financial difficulties until it is either restructured or taken over by new investors and to finance the social cost of the severe employment cuts made necessary to ensure SeaFrance is brought back to profitability.
338. In November 2010 the Commission authorised rescue aid for Tirrenia di Navigazione S.p.A.³²¹ and through Tirrenia, its regional subsidiary, Siremar – Sicilia regionale Marittima S.p.A. The companies faced severe difficulties and were admitted to the collective insolvency procedure foreseen under Italian law for large companies, "*amministrazione straordinaria*".

³¹³ Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea (OJ C 317, 12.12.2008, p. 10)

³¹⁴ Cases N573/2009 and N647/2009 *Aide à la mise en œuvre et à l'exploitation de l'autoroute de la mer entre le port de Nantes-Saint-Nazaire (France) et le port de Gijón (Espagne) opérée par GLD Atlantique* (OJ C 74, 24.3.2010, p. 5). See IP/10/55, 27.1.2010.

³¹⁵ Case N714/2009 *Extension of the tonnage tax scheme to cable layers, pipeline layers, research vessels and crane vessels* (OJ C 158, 18.6.2010, p. 2)

³¹⁶ Case C22/2007 (ex N43/07) *Danish Tonnage Tax - Cable Laying Vessels* (OJ L 119, 14.5.2009, p. 23)

³¹⁷ Community guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3)

³¹⁸ Case N37/2010 *Cyprus Tonnage Tax Scheme* (OJ C 144, 3.6.2010, p. 28). See IP/10/352, 24.3.2010.

³¹⁹ Case N358/2010 *Reduced rates of social contributions for seafarers*

³²⁰ Case N309/2010 *Aide au sauvetage en faveur de SeaFrance*

³²¹ Case N418/2010 *Aid for rescuing Tirrenia di Navigazione S.p.A. in A.S*

339. As regards State aid to finance ports infrastructure, the Commission decided to launch a study to collect information to better understand the functioning of ports and the public financing of their infrastructure. On the basis of its results, the Commission will be able to define a reliable approach for moving forward in that field.

F – POSTAL SERVICES

1. OVERVIEW OF SECTOR

340. Postal services generate about 1% of EU GDP and an annual corresponding turnover of EUR 94 billion. Sectors such as e-commerce, publishing, mail order, insurance, banking and advertising heavily depend on the postal infrastructure. Postal services also bring social benefits which cannot always be qualified in economic terms. Postal services are labour intensive and are one of the principal public employers in Europe. Employment in the sector is principally provided by Universal Service Providers (USP) and has been stable over time, with about 1.8 million persons employed³²². As defined in the Postal Directive³²³, USP are public or private companies, usually the former public monopolistic incumbent, which are required to provide universal postal services or parts thereof to all residents of a Member State. In accordance with the provisions of the Postal Directive, Member States are required to notify the Commission the identity of the USP they designate. Since providing services to all residents may not be an economically profitable activity, USP may receive compensation from the Member States. Virtually all USP in the EU are public undertakings, *i.e.* owned by the Member States, with the notable exceptions of Germany and Netherlands.
341. Postal services continue to evolve substantially. Postal operators are facing increasingly fierce pressure from electronic means of communication. This is in turn forcing them to adapt their businesses to better respond to customers' needs and to improve efficiency. The market entry of new and more efficient postal operators is also increasing the pressure on USP to realise significant efficiency gains. In addition, physical mail is being supplemented by multi-channel delivery and tailor-made solutions for customers, for example *via* hybrid mail services (e-mail and physical letter). Moreover, many postal operators are entering adjacent markets by developing IT services for their customers or other new and value-added services.
342. Under the third revision of the Postal Directive, most Member States will have to accomplish full market opening by eliminating any remaining reserved area by 31 December 2010, with a further two years to accomplish this being allowed for

³²² Economic statistics in this section on the postal sector are from: "The evolution of the European postal market since 1997", Final Report, ITA Consulting GmbH and WIK Consult GmbH, August 2009 and from the Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (SEC(2008) 3076).

³²³ Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3). In particular, Article 3(1) states that "Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users".

eleven Member States, most of which recently joined the Union³²⁴. The liberalisation process is progressing swiftly and certain Member States (Estonia, Finland, Germany, the Netherlands, Sweden and the United Kingdom) already fully opened their postal markets ahead of the EU deadline. Moreover, the 2008 Directive confirms the minimum scope and standard of the postal universal service and reinforces the role of national regulatory authorities. The Directive also offers a variety of measures that Member States may take to safeguard and finance the universal service, if this proves to be necessary.

343. Despite the progress to-date, genuine competition, notably in the letter mail segment, is only just beginning to emerge even in cases where the monopoly has been completely abolished or substantially reduced. In the letter post segment, market shares of competitors, although increasing, remain at a low level even in Member States that have fully liberalised their postal markets. Estimated market shares of competitors in these Member States ranged from around 8% to 12% in 2007. Thus, whereas the parcels/express market is increasingly open to competition across Member States, the letters market remains traditionally subject to monopoly and dominated by incumbents, holding over 95% market share. It is declining in the old Member States, whereas still growing (though from much lower levels) in the new Member States. Some Member States have already partly or fully privatised their incumbent operator (Belgium, Denmark, Germany, the Netherlands) whereas others have indicated similar reforms (UK).
344. Major competition policy challenges in the postal sector services relate to avoiding distortion of competition linked to the status of universal service provider. In particular, ensuring that the compensation received by a USP for its delivery of public service is consistent with the actual costs of the services and does not constitute an indirect advantage (through cross-subsidisation of other services for example) is essential to ensure a level playing field and the market entry of new competitors. Another challenge in the years to come will be to ensure the development of competition in former reserved areas, where barriers to entry, such as the VAT exemption or excessive licensing requirements, still remain. Market behaviours of incumbents will have to be monitored closely.

2. POLICY DEVELOPMENTS

2.1. Merger control

345. On 30 November 2010 the Commission cleared the proposed creation of a joint venture between the Österreichische Post and the Schweizerische Post in the area of direct mailing³²⁵.

2.2. State aid control

346. Within the postal sector, the State aid assessment carried out by the Commission includes a verification of any compensation granted to postal operators for

³²⁴ Czech Republic, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Poland, Romania and Slovakia

³²⁵ Case COMP/M.6023 *Österreichische Post / Schweizerische Post / JV* (OJ C 357, 30.12.2010, p. 16)

discharging public service obligations in order to ensure that it does not exceed what is necessary to cover the costs incurred in doing so (taking into account the relevant receipts and a reasonable profit) and that commercial activities outside the Services of General Economic Interest (SGEI) are not cross-subsidised. The compatibility principles the Commission applies in its assessment are contained in the Community framework for State aid in the form of public service compensation (the Framework)³²⁶. However, the third Postal Directive provides for a new way of calculating the net costs of postal universal services, based on the net avoided cost methodology which departs from the mere accounting approach of actual loss compensation embodied in the Framework. In the new methodology, the cost for providing the universal service is calculated as the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without those universal service obligations.

Deutsche Post

347. In 2010 the Commission continued its investigation, opened in 2007, into the alleged overcompensation of Deutsche Post AG³²⁷ for carrying out its universal service obligations from 1989 to 2007. The main focus is on two public measures concerning the subsidy which Deutsche Post received from its affiliate Deutsche Telekom between 1990 and 1995 to cover its losses and the public financing which Deutsche Post has received since 1995 in order to finance the pensions of its civil servants.
348. At the end of 2009, the Commission received an expert's final report aiming to quantify the possible amount of overcompensation. Germany submitted several comments and counter-expertise in 2010 which were analysed by the Commission. In September 2010 the Court of Justice upheld³²⁸ the Court of First Instance's annulment³²⁹ of the 2002 Commission decision which had found certain aid measures for Deutsche Post AG to be incompatible with the internal market, because the Commission did not take into account all income and costs related to the universal services. The ongoing investigation follows the comprehensive approach as demanded by the Court of Justice. In separate proceedings, the General Court confirmed the validity of the Commission's information injunction of 30 October 2008 (which had requested from Germany the information necessary for the expert's report), ruling that the actions for annulment brought by Germany and Deutsche Post against that information injunction were inadmissible³³⁰.

³²⁶ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4-7)

³²⁷ Case C36/2007 *Complaint against the German State for unlawful State aid to Deutsche Post* (OJ C 245, 19.10.2007, p. 21)

³²⁸ Case C-399/08 P *European Commission v Deutsche Post AG, Bundesverband Internationaler Express- und Kurierdienste eV, UPS Europe SA, Federal Republic of Germany* [2010] ECR

³²⁹ Case T-266/02 *Deutsche Post AG v Commission*, [2008] ECR II-01233 (OJ C 209, 15.8.2008, p. 39)

³³⁰ Cases T-570/08 *Deutsche Post v Commission* and T-571/08 *Germany v Commission* (OJ C 234, 28.8.2010, p. 35-36) appealed by Germany and Deutsche Post in cases C-463/10 P and C-475/10 P.

Belgian Post

349. In 2010, the Commission continued its formal investigation procedure opened in 2009 in order to examine whether certain measures in favour of the Belgian postal operator De Post - La Poste are in line with EU State aid rules³³¹.
350. The Commission's initial approval of a series of measures in favour of De Post - La Poste in 2003 was overturned by the Court of First Instance on 10 February 2009³³², which found that a formal investigation procedure was required in order to guarantee the possibility for competitors to submit their views to the Commission. The Court of First Instance's annulment of the Commission decision has been challenged by Belgium before the Court of Justice. The court case is currently pending. The Commission's current investigation, opened on 13 July 2009, aims to establish in a comprehensive way whether the totality of the measures in favour of De Post - La Poste since its incorporation in 1992 can be considered compatible with the internal market. The investigation concerns a large number of measures, including the yearly compensation granted by Belgium for public service tasks, capital injections, relief of pension liabilities, transfer of buildings and tax exemptions. The investigation is progressing swiftly with active cooperation of the Belgian authorities.

Unlimited guarantee to the French La Poste

351. With its final decision of 26 January 2010³³³, the Commission closed the formal investigation procedure opened in 2007 in which it had examined an alleged State aid granted in favour of La Poste in the form of an unlimited State guarantee resulting from its public-law status. The closure of the formal investigation procedure followed the adoption by the French Parliament on 12 January 2010 of the Law on the public company La Poste and on postal activities³³⁴.
352. The Commission considered that due to its public law status, an implicit government guarantee had been set on all the liabilities of La Poste, under which individual creditors were assured of having their debt repaid. This status also provided La Poste with an institutional guarantee of its continued existence and/or its obligations. The double guarantee would thus enable La Poste to access financing at rates lower than its competitors. The guarantee was considered unlimited in time, un-remunerated and not limited to activities of the universal postal service but also covering commercial activities exercised by La Poste, granting it an economic advantage over its competitors, who operate without such a guarantee. The guarantee was therefore deemed to distort competition in postal markets and considered to constitute incompatible State aid. Considering that the legal provisions concerned had been in force since before 1 January 1958, the Commission applied the rules concerning existing aid. Consequently, France was not obliged to recover the alleged aid from La Poste but was required to put an end to the State guarantee.
353. The Commission concluded that the incorporation of La Poste into a limited liability company ("société anonyme") on 1 March 2010, as provided for under the mentioned

³³¹ Case C20/2009 (ex N763/2002) *Mesures en faveur de La Poste* (OJ C 176, 29.7.2009, p. 17)

³³² Case T-388/03, *Deutsche Post and DHL International v Commission*, [2009] ECR II-199

³³³ Case C56/2007 *Garantie d'Etat illimitée - La Poste (France)* (OJ L 274, 19.10.2010, p. 1)

³³⁴ Loi n° 2010-123 du 9 février 2010 relative à l'entreprise publique La Poste et aux activités postales

Law, would effectively put an end to the *de facto* unlimited State guarantee it enjoyed. It was therefore an appropriate measure to eliminate the State aid element involved in its previous legal status. France sought the annulment of the Commission decision on 2 April, mainly disputing the existence of the State guarantee and the economic advantage that the guarantee would grant to La Poste.

354. By its final decision, the Commission did not challenge the public service mission of La Poste, nor its public ownership and control, particularly in light of the neutrality of European rules as concerns the various property regimes applicable in Member States. Only the State guarantee that resulted from the special status of La Poste, and not its ownership, was considered to represent incompatible State aid. Therefore, only that State guarantee was required to be removed, which reflects the fact that the relevant European competition rules apply equally to private and public undertakings.

Polish Post (Poczta Polska)

355. At the end of 2009, the Commission had authorised under EU State aid rules the scheme intended to compensate Poczta Polska as the universal postal service provider in Poland for net losses incurred in discharging its public service obligations until 31 December 2011³³⁵. During 2010, the Commission actively monitored the fulfilment of the conditions which had been attached to this decision.
356. Further to a 2004 notification from the Polish authorities of the aid scheme "Compensation to Poczta Polska for carrying out universal postal services", the Commission opened a formal investigation on 29 June 2005 in this case. In its 2009 decision, the Commission found the compensation mechanism to be compatible with Article 106(2), in accordance with the Commission's framework on public service compensation. The measure was thus authorised, subject to the fulfilment of certain conditions. In particular, Poland was required to improve the entrustment act and to ensure that any significant changes to the cost allocation method for compensatory payments remain compatible with the cost accounting rules of Article 14 of the first Postal Directive.

G – AUTOMOTIVE INDUSTRIES

1. OVERVIEW OF THE AUTOMOTIVE SECTOR

357. The EU is the world's largest producer of motor vehicles with around 18 million vehicles a year and 33% of the world's passenger cars. The automotive industry's direct weight in the EU GDP is less than 1% but reaches almost 3.5% in countries such as Germany or the Czech Republic. More than 5 million people in the EU are directly employed in the industry, 2.3 million by original equipment manufacturers (OEM) and another 3 million by their suppliers. In total, the European automotive industry directly and indirectly supports 13 million jobs in the EU, accounting for one third of the manufacturing employment, is the largest investing sector in

³³⁵ Case C21/2005 *Compensation to Poczta Polska for carrying out universal postal services*. See IP/09/1931, 15.12.2009.

Research and Development with EUR 28 billion and is an important contributor to net external EU trade³³⁶.

358. In 2010, the motor vehicle sector began to emerge from the economic crisis that hit it particularly hard in 2008 and 2009. However, although the total production of motor vehicles in the EU increased by 34% in the first quarter of 2010 from the corresponding period of 2009, it was still 17% down compared with 2008³³⁷. The negative effects on vehicle registrations of the expiry of car scrapping schemes in late 2009 and during 2010 in many Member States was more than outweighed by a surge in export activity, particularly in the premium segment.
359. The effects of the economic and financial crisis on US car manufacturers also had significant consequences on the car sector in Europe. The re-launched General Motors returned to profit in May 2010 after emerging from bankruptcy and eventually undertook to restructure its Opel/Vauxhall subsidiary without further government support. Meanwhile, Fiat entered into a broad partnership with Chrysler, which also came out of bankruptcy after being reorganised within the framework of Chapter 11 of the United States Bankruptcy Code³³⁸.
360. In May 2010, the Commission revised the competition framework for vertical agreements in the motor vehicle sector, comprising a set of supplementary guidelines and three additional hard core clauses. This framework applies to agreements for the repair of motor vehicles and for the distribution of spare parts as of 1 June 2010, and will apply to vehicle sales agreements from 1 June 2013. The new rules represent a major alignment with the general regime for vertical restraints (see section I.B.1.1.1., points 30 to 34) and a more proportionate approach to the differing intensities of competition in the various markets.
361. Future challenges for the industry will involve the launch of more resource-efficient and "greener" cars, in particular new electric and hybrid models, the need to tailor existing distribution networks to demand levels and the increasing competition from emerging countries' car manufacturers, including in the "green car" markets. Competition issues relating to market developments include managing the necessary restructuring of the sector, fostering the development of "greener" cars while maintaining a level playing field. The after-sales market, which represents a significant part of consumer expenditures linked to car ownership, experiences specific competition issues, relating to misuse of vehicle warranties or independent operators' access to technical information.

³³⁶ Data on the importance of the automotive sector in the European economy are from: "Product Market Review 2009: micro-economic consequences of the crisis and implications for recovery", European Economy 11, 2009.

³³⁷ http://www.acea.be/index.php/files/acea_economic_report_first_quarter_2010

³³⁸ Chapter 11 enables a firm to be sold off as a working concern after reorganisation, rather than having its assets sold piecemeal. It is therefore considered to be more economically efficient, and to bring greater returns for shareholders, as well as to better protect employees.

2. POLICY DEVELOPMENTS

2.1. Antitrust enforcement

362. On 27 May 2010, the Commission adopted new competition rules for agreements between vehicle manufacturers and their authorised dealers, repairers and spare parts distributors. The new framework applies the general Vertical Block Exemption Regulation³³⁹ of 20 April to such agreements from 2010 as regards the aftermarkets, and 2013 as regards the markets for the sale of new vehicles. In addition, the Commission adopted Regulation 461/2010³⁴⁰, which sets out three supplementary hardcore clauses relating to spare parts distribution, and a detailed set of supplementary guidelines for assessing vertical agreements in the sector³⁴¹. The new rules represent a flexible and proportionate response to the differing intensities of competition on the primary and aftermarkets and broadly align the rules applicable to agreements between car manufacturers and their authorised dealers, repairers and spare part distributors with the general regime applicable to other sectors.

2.1.1. Vertical agreements in the vehicle sales markets

363. The Commission's analysis showed that on the vehicle sales markets, the restrictive nature of the legal framework laid down by Regulation 1400/2002³⁴² was out of place given the intensity of competition manifested by low profit margins, falling real prices and increased choice brought about by new entries and expanding brand ranges. Many of the sector-specific clauses in the Regulation, such as those relating to contractual protection, to dealers selling vehicles from different manufacturers (multi-branding) and to the use of location clauses³⁴³ had not achieved their aims, and in some cases had led to unsatisfactory results. For example, with a view to protecting intra-brand competition, the Regulation aimed to promote multi-brand sales by allowing dealers to sell the brands of different manufacturers within the same showroom. In the face of this provision, vehicle manufacturers pushed up investments required of dealers in order to protect brand image and corporate identity. This in turn increased distribution costs, to the detriment of consumers.

364. The new regime adopted on 27 May 2010 therefore provides that the sector will be subject to the same rules that apply to vertical agreements in other areas from 2013. The three-year transition was decided upon in order to allow dealers to amortise investments that they may have made pursuant to the old regime, in particular in multi-brand premises.

³³⁹ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1-7)

³⁴⁰ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 129, 28.5.2010, p. 52-57)

³⁴¹ Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (OJ C 138, 28.5.2010, p. 16-27)

³⁴² Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

³⁴³ Location clauses specify that a dealer must carry on his business from a given location, and may not open other outlets elsewhere.

365. As well as doing away with the conditions and hardcore clauses relating specifically to the sale of new vehicles, the alignment with the general regime will also imply a reduction in the market share threshold for exemption from 40% to 30% market share of manufacturers for the quantitative selective distribution agreements that are the norm in this sector³⁴⁴. This in turn implies that there will be more national markets on which those agreements will need to be self-assessed. The supplementary Guidelines give extensive clarifications on the treatment of particular clauses both above and below the exemption threshold, and also explain the advantages in terms of compliance brought about by transparency in contractual relations.

2.1.2. *Vertical agreements in the repair and spare parts markets*

366. The competitive conditions on the vehicle sales markets are in stark contrast to those on the repair and spare parts distribution, where the authorised networks commonly have market shares in excess of 50%. Their competitors, the independent repairers, have to rely on the vehicle manufacturers for essential inputs in the form of technical information and spare parts. There is therefore a clear risk that carmakers may seek to give an advantage to their contractual partners by withholding these inputs. The repair and maintenance markets are of great importance to consumers since these services make up 40% of the total cost of vehicle ownership. Prices have moreover been rising in real terms. The spare parts markets are also potentially problematic since many spare parts are captive to the vehicle manufacturers, mainly because of design rights protection in several Member States. This implies that the complete range is only available from the authorised repair networks, implying in turn a situation of dependence of the independent repairers on their authorised competitors.

367. In these circumstances, the sector-specific regime set out in Regulation 1400/2002 appeared incongruous since it was more favourable than the general rules, in particular because it granted an exemption up to a 100% market share for the qualitative selective agreements that are the norm in the motor vehicle repair and spare parts distribution sectors. This created two difficulties:

- Firstly, when faced with anti-competitive behaviour in the context of an agreement, the Commission was forced to check whether the behaviour related to one of the hardcore clauses, since if it did not, the agreement would be protected by the safe harbour and the only option open to the Commission would be to disapply the block exemption. This made it more difficult for the Commission to act in respect of new types of anti-competitive behaviour that had not been foreseen when Regulation 1400/2002 was adopted, and had not therefore been included in the hardcore list. One such issue may arise when carmakers make warranties conditional on all repairs being carried out in the authorised networks.
- The second problem related to a particular hardcore clause – Article 4(2) on the provision of technical information to independent operators. The scope of this clause was defined in Recital 26 of the Regulation so as to exclude information

³⁴⁴ In order for an agreement to be exempted, neither the dealer nor the vehicle manufacturer may have a market share exceeding 30%. A quantitative selective distribution system is generally defined as a system in which the supplier uses criteria for the selection of distributors or repairers which directly limit their number.

relating to safety and security, and proved to be a particular problem since today's vehicles contain complex systems in which it is difficult to disentangle security and safety functions from features such as engine management and ride control.

368. Aligning the rules applicable to agreements between car manufacturers and authorised repairers with the general regime applicable to other sectors means that a 30% exemption threshold will apply to such agreements. Because of the prevailing high market shares noted above, the majority of these agreements will no longer be block exempted, and it will therefore be easier for the Commission and National Competition Authorities to tackle possible abuses that threaten to foreclose independent repairers from the market to the detriment of consumers. In view of stakeholders' desire for clarity, the Commission included detailed explanation in the Guidelines on issues such as access to the authorised repair networks, the release of technical information and the abuse of warranties.
369. As regards spare parts distribution, the Commission responded to stakeholders' views and maintained three additional hardcore clauses in the new Regulation 461/2010 concerning the supply of spare parts by component manufacturers, and the ability of independent repairers to access "captive" parts that are only available from the vehicle manufacturers and the members of their authorised networks. A block exemption was felt to be an effective instrument given the difficulty of defining product markets in this field.
370. The rules adopted on 27 May 2010 therefore implied a major alignment with the general regime for vertical restraints set out in Regulation 330/2010. There will be fewer constraints on relationships between vehicle manufacturers and dealers; on the aftermarket, it will be easier for the Commission to act against anti-competitive agreements. The commonality of rules will also make life simpler for firms in the sector and for legal practitioners.

2.2. Merger control

371. In 2010, 15 mergers in the automotive industry were notified to the Commission. Most of these transactions involved automotive suppliers establishing joint ventures³⁴⁵. Only one case – the acquisition of Volvo Cars by the Chinese companies Geely and Daqing³⁴⁶ – dealt with car manufacturers. All cases were cleared in the first phase without commitments.

2.3. State aid control

372. The automotive sector had the possibility to make use of the exceptional support measures contained in the State aid Temporary Framework as long as the approved schemes were not restricted to this activity but open to all the sectors of the economy. In particular, the Commission authorised on 8 February 2010 plans notified by Sweden to provide a guarantee that would enable Saab Automobile AB to

³⁴⁵ Cases COMP/M.5784 *Magna / Semikron / JV* (OJ C 254, 22.9.2010, p. 1), COMP/M.5792 *Robert Bosch / Deutz / Eberspächer* (OJ C 169, 29.6.2010, p. 1) or COMP/M.5862 *Mahle / Behr / Behr Industry* (OJ C 277, 14.10.2010, p. 1)

³⁴⁶ Case COMP/M.5789 *Geely / Daqing / Volvo Cars* (OJ C 187, 10.7.2010, p. 3)

access a loan from the European Investment Bank³⁴⁷. The EUR 400 million loan aimed at co-financing Saab's business plan in the light of its sale by General Motors to Dutch carmaker Spyker Cars N.V. According to the business plan, Saab intended to use the EIB loan for an investment project worth EUR 1 billion related *inter alia* to fuel efficiency and car safety. The Commission found that 82.8% of the guarantee to be provided by Sweden was in line with the Temporary Framework. In particular, Saab paid an adequate remuneration for the guarantee and provided sufficient securities in case the guarantee would be drawn. On 16 December 2010, the Commission authorised a comparable guarantee by Sweden to enable Volvo Cars Corporation to access a EUR 500 million loan from the EIB to finance research and engineering activities related to fuel efficiency and road safety³⁴⁸. This decision modified the terms of the guarantee authorised by the Commission on 5 June 2009³⁴⁹, which Volvo Cars had never used.

373. In July 2010, the Commission extended its formal investigation initiated in October 2009 under State aid rules regarding Hungarian aid for an investment project of Audi Hungaria Motor Kft. in its existing plant in Győr³⁵⁰. This extension became necessary to take into account the change in the initial investment project and concentrated on the question of the appropriate definition of the relevant geographic market. The Commission doubted the argument put forward by Hungary that not the EEA but the global market is the relevant geographic market for passenger cars. The extension decision gave interested third parties the possibility to comment on the issue at stake.
374. In June 2010, the Commission authorized State aid measure in favor of Fiat Powertrain³⁵¹, a subsidiary of the Fiat Group, for the production of car transmissions in Verrone, Piedmont, Italy, an area eligible for regional investment aid under Article 107(3)(c). An existing plant is to be equipped with new machining and assembly lines to produce an innovative transmission unit intended for mid-range vehicles. The investment is expected to reach full production in 2013. In order to approve this State aid, the Commission had to assess the company's (and the Fiat Group's) position in the relevant transmission and car market segments.

H – FOOD SUPPLY CHAIN

1. OVERVIEW OF SECTOR

375. The food supply chain connects three important sectors of the European economy – agriculture, the food processing industry and the distribution sectors – that together make more than 5% of European value-added and 7% of employment. Moreover, its performance has direct consequences for all European citizens, since food represents 16% of European households' expenditures.

³⁴⁷ Case N541/2009 *State guarantee in favour of SAAB*. See IP/10/139, 8.2.2010.

³⁴⁸ Case N520/2010 *State guarantees in favour of Volvo Personvagnar AB (Volvo Cars Corporation)*

³⁴⁹ Case N80/2009 *State guarantees in favour of Volvo Cars*. See IP/09/879, 5.6.2009.

³⁵⁰ Case C31/2009 *Audi Hungaria Motor Kft.* (OJ C 64, 16.3.2010, p. 15)

³⁵¹ Case N27/10 *Fiat Powertrain* (OJ C 333, 10.12.2010, p. 3)

376. The food sector continued to draw much political and public attention in the context of the economic downturn and global developments in agricultural commodity prices. A decrease in prices paid to farmers whilst food prices remained relatively high at consumer level in many Member States raised concerns regarding the functioning of the food supply chain. The situation in the dairy sector, where the price drop was the sharpest, has been in particular in the spotlight.
377. In July 2010, the Commission set up a High Level Forum for a Better Functioning Food Supply Chain³⁵² to discuss and follow-up the implementation of the policy initiatives laid down in the Communication of October 2009 on "A better functioning food supply chain in Europe"³⁵³. The policy initiatives proposed by the Commission aimed at three main objectives: promoting sustainable and market-based relationships between stakeholders in the food supply chain, increasing transparency along the food supply chain to encourage competition and improve its resilience to price volatility and foster the integration and competitiveness of the European food supply chain across Member States.
378. One of the main priorities of the High Level Forum will be to tackle unfair trading practices resulting from contractual imbalances and differences in bargaining power between suppliers and buyers in the food supply chain. These practices, which must be distinguished from anticompetitive practices which may be caught by Articles 101 and 102 TFEU, have been addressed at national level through different policy tools other than competition law instruments such as, for example, contract law or unfair commercial practices laws. An *ad hoc* Expert Platform on Business-to-Business Contractual Practices in the Food Supply Chain was set up as a working group of the High Level Forum to address this issue.
379. The functioning of the food supply chain in Europe also raises challenges directly relating to competition policy and enforcement. A coherent application of competition rules across Member States requires attention, as the food supply chains are mostly national and even local. The concentration of retail markets has been a source of concern in some Member States. New and increasingly prevalent business practices, stemming either from the food industry or the distribution sector, also require detailed analysis to assess their potential impact on competition.

2. POLICY DEVELOPMENTS

2.1. Food supply chain

380. In its Communication on "A better functioning food supply chain in Europe", the Commission set as a priority the strengthening of the application of competition rules in food markets through a coordinated approach between National Competition Authorities (NCAs) within the framework of the European Competition Network (ECN).
381. The ECN Food Subgroup continued to serve as an operational framework for discussion and coordination among NCAs on specific competition issues related to

³⁵² Commission decision of 30.7.2010 (OJ C 210, 3.8.2010, p. 4)

³⁵³ A better functioning food supply chain in Europe (COM(2009) 591 final)

food markets. Indeed, NCAs are often well placed to investigate any possible anticompetitive behaviour affecting these markets in their respective Member States given the national or regional scope of food markets. In line with the experience of past years, NCAs gave due priority in 2010 to the pursuit of anticompetitive practices on food markets by applying the legal instruments at their disposal to investigate and sanction numerous infringements of competition rules affecting consumer welfare.

382. A significant number of NCAs also actively undertook sector inquiries so as to identify potential malfunctionings of food and retail markets. The different enforcement, advocacy and monitoring actions taken by the NCAs over the last years in the food sector are due to be reported by the Commission to the Forum.

2.2. Dairy sector

383. Special attention was devoted to the dairy sector in light of the difficulties faced by dairy farmers during the recent milk crisis. In this context, the High Level Group on Milk, established by the Commission in October 2009, continued its works aimed at identifying medium and long-term solutions for the dairy sector taking into account the phasing out of the milk quota system by 2015. The issues under discussion included in particular the contractual relationships between farmers and processors, the possibility of strengthening farmers' bargaining power and the role of producer organisations and inter-branch organisations in the dairy sector.
384. The Directorate-General for Competition, together with the French *Autorité de la Concurrence* and the German *Bundeskartellamt*, actively participated in these discussions and, in coordination with the ECN Joint Working Team on Milk, presented at the meeting of the High Level Group of 23 February 2010 the state of play of the existing EU legal framework governing cooperation agreements between farmers in the dairy sector. For this purpose, DG Competition published an explanatory Brochure on "How EU competition policy helps dairy farmers in Europe" and a Working Paper on "The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector"³⁵⁴.
385. Both documents, elaborated in cooperation with NCAs in the framework of the ECN Joint Working Team on Milk, reflect the common understanding of Competition Authorities about the role that competition policy should play in the dairy sector in the context of the recent milk crisis. They also represent a joint advocacy initiative on how EU competition policy can contribute to encourage the creation of efficiency-enhancing forms of cooperation whilst ensuring an effective level playing field in dairy markets. In particular, they clarify the various forms of cooperation that milk farmers can develop in order to adopt more market-oriented business models and strengthen their bargaining position *vis-à-vis* their buyers without infringing EU competition law. Such forms, which must be assessed under the rules applicable to horizontal agreements between competitors, can range from joint commercialisation (*e.g.* use of a common broker) to joint production agreements (*e.g.* use of common facilities for milk collection or the development of cooperatives active at the processing stage).

³⁵⁴ Available at: http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf

386. The High Level Group on Milk concluded its work in June and submitted to the Commission a Report including several recommendations aimed at addressing the future challenges of the EU dairy sector³⁵⁵. Further to these recommendations, the Commission adopted a legislative proposal in December 2010 on contractual relationships in the milk sector³⁵⁶. The proposal allows collective bargaining negotiations by producer organisations of milk farmers subject to certain limits based on their share of EU-wide and national milk production volumes, so as to reduce the risk of undue restrictions of competition on raw milk procurement markets within the EU. The proposal also provides for a "safety clause" that allows the competent NCA or the Commission to decide that the negotiations by a producer organisation may not take place where they would limit competition severely or where they would inflict a serious prejudice to dairy processors, in particular SMEs.

2.3. State aid to the agricultural sector

387. 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 2013³⁵⁷. In 2010, 214 new State aid cases were registered and 161 decisions were adopted.

388. On 20 July 2010, the Commission adopted a final conditional decision on the parafiscal charge for the promotion of wine applied by Portugal³⁵⁸. The Commission concluded that the parafiscal charges, levied by Portugal in favour of the IVV (Vine and Wine Institute) in view of promoting wine, were illegal. The decision considered the aid to be compatible provided that Portugal repaid to the contributors of the parafiscal charge the part of the charge imposed on products from other Member States. This condition aimed at remedying the violation of Article 110 TFEU, since charges had been imposed on imported products which did not benefit from the aid in the same measure as the domestic products. Portugal has brought annulment proceedings which are now pending before the General Court³⁵⁹.

389. The Court of Justice dismissed in a judgment of 2 December 2010³⁶⁰ the appeal by Holland Malt against a judgment of the General Court³⁶¹ relating to the application of the Agricultural Guidelines. According to the General Court, the Commission was right in deciding that an aid which does not fulfil a certain condition of the Agricultural Guidelines (namely the presence of normal outlets on the relevant market) is not compatible with the internal market, without taking into consideration the beneficial effects of this aid. The Commission is bound by the guidelines it issues, to the extent that they do not depart from the rules in the Treaty.

³⁵⁵ Available at: <http://ec.europa.eu/agriculture/markets/milk/hlg>

³⁵⁶ Proposal of 9 December 2010 for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector (COM(2010) 728)

³⁵⁷ Community guidelines for State aid in the agriculture and forestry sector 2007-2013 (OJ C 319, 27.12.2006, p. 1).

³⁵⁸ Case C43/2004 *Taxe parafiscale à la promotion du vin*

³⁵⁹ Case T-475/10 *Portugal v Commission*

³⁶⁰ Case C-464/09 P *Holland Malt BV v European Commission* [2010] ECR

³⁶¹ Case T-369/06 *Holland Malt v Commission* [2009] ECR 2009 p. II-3313

390. The Commission requested, pursuant to Article 263 TFEU, that the Court of Justice should annul four Council decisions on the granting of State aid by Poland, Lithuania, Latvia and Hungary for the purchase of agricultural land between 1 January 2010 and 31 December 2013³⁶². The Council, by adopting the contested decisions, overturned the Commission's decision resulting from the proposal for appropriate measures in Point 196 of the 2007 Agricultural Guidelines and from its unconditional acceptance by Poland, Lithuania, Latvia and Hungary, obliging them to bring to an end existing aid schemes for the purchase of agricultural land by 31 December 2009 at the latest. Under the guise of exceptional circumstances, the Council in fact allowed the Member States mentioned above to maintain their schemes for the purchase of agricultural land until the expiry of the 2007 Agricultural Guidelines on 31 December 2013. The Commission has argued that the Council lacked competence to take such a decision and that the circumstances put forward by the Council as the grounds for its decisions are self evidently not exceptional circumstances of such a nature as to justify the decisions taken and make no allowance for the Commission's decision on these schemes.
391. Since the introduction of the possibility for Member States to approve EUR 15 000 in limited amounts of aid to primary producers under the Temporary Framework, 14 Member States submitted schemes which were approved by the Commission for a total aid volume of EUR 1 210 million. The Italian scheme was prolonged until end 2011 and France, Germany, Hungary and the Netherlands notified prolongations of their respective schemes until the same date (apart from France until end of March 2011). In addition, Romania notified such a new scheme.

³⁶² Cases C-111/10 *Commission v Council* [2010] (OJ C 113, 1.5.2010, p. 32), C-117/10 *Commission v Council* [2010] (OJ C 113, 1.5.2010, p. 34), C-118/10 *Commission v Council* [2010] (OJ C 113, 1.5.2010, p. 35) and C-121/10 *Commission v Council* [2010] (OJ C 134, 22.5.2010, p. 24)

III – The European Competition Network and cooperation with National Courts

392. In 2010, the European Competition Network (ECN), the network for cooperation between National Competition Authorities (NCAs) of Member States and the Commission for the enforcement of EU antitrust rules, continued to be a very active forum for discussion and exchange of good practices. As in previous years, the network functioned efficiently under the mechanisms laid down in Regulation 1/2003³⁶³, with a view to ensure the efficient and consistent enforcement of Articles 101 and 102 TFEU.

1. COOPERATION ON POLICY ISSUES

393. The ECN provides a platform for EU competition authorities to constructively coordinate enforcement action, ensure consistency and discuss policy issues of common interest. During 2010, the ECN met in the following fora:

- The new Director-General of DG Competition met the Heads of NCAs in the ECN context for the first time on the occasion of an *ad hoc* Meeting on 1 June 2010. The regular annual meeting at Director-General level took place on 16-17 November 2010.
- Two ECN Plenary meetings served as an important tool for debates about general issues of common interest and exchange of experiences and know-how.
- Various working groups dealt with non-sector-specific issues. The long-standing Working Group on Cooperation Issues and Due Process pursued its work on enhancing cooperation within the ECN. The Cartels Working Group, following on from the earlier Leniency Group, met three times during 2010 to discuss questions of practice and policy within its remit. The Working Groups on horizontal agreements and on vertical restraints were particularly active this year by reviewing national case experiences and providing input to the Commission in the context of the review of the vertical and horizontal Block Exemption Regulation and accompanying Guidelines. These groups suspended their discussions with the adoption of the relevant block exemptions and guidelines (see Section I.B.1.1., points 30 to 44). Finally, the Merger Working Group met three times in 2010 and discussed the review at national level of mergers with potential cross-border effects and the assessment of merger remedies.
- The ECN also gathered several sector-specific Working Groups, relating to the energy, environment, financial services, food, pharmaceuticals, telecommunications and transport sectors.

³⁶³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1-25)

1.1. The ECN Brief

394. In 2010, the ECN launched the ECN Brief, a publication by NCAs and the Commission, for the attention of the legal and business communities as well as of consumer organisations and academics. The ECN Brief provides news on the activities of both NCAs and the Commission in the area of competition law enforcement and advocacy. It includes information on cases based on Articles 101 and 102 TFEU, on legislation and policy developments as well as on events and key actors of competition policy in Europe. It aims at increasing public awareness of the activities conducted by the ECN.
395. In 2010, the ECN Brief was published five times (January, March, June, October and December). In addition to the regular ECN Brief, a "Special Issue" was published on 16 December 2010 compiling contributions on common activities of the ECN as well as presentation pages of each National Competition Authority³⁶⁴.

1.2. Cooperation in individual cases

396. Cooperation between the ECN members in individual cases is organised around two obligations on the NCAs under Regulation 1/2003, namely to inform the Commission when new cases are opened (Article 11(3)) and before the final enforcement decision is taken (Article 11(4)). Informing the Commission and the Network about new cases facilitates swift reallocation of cases if necessary and promotes enhanced and effective enforcement. The second requirement contributes to the consistent application of EU law.

1.2.1. Case allocation

397. The Commission was informed under Article 11(3) of Regulation 1/2003 of 158 new case investigations launched by NCAs in 2010. Amongst the new cases, 47% concerned the application of Article 101 TFEU, 42% concerned the application of Article 102 TFEU and the remainder concerned the application of both. The figure for Article 101 cases includes notably the enforcement action of the NCAs in the area of cartels. Large numbers of cases could be observed *inter alia* in the transport, energy, manufacturing, media and telecom sectors.
398. With regard to work-sharing within the Network, the flexible and pragmatic approach introduced by Regulation 1/2003 and by the Network Notice³⁶⁵ continued to function well in practice. Work-sharing may occur when a complainant or a leniency applicant chooses to contact both the Commission and one or more NCAs. In 2010, there were once more very few instances where discussions on allocation of cases took place, and even fewer occasions where a case changed hands after initial allocation. A small number of complaints were re-allocated from the Commission to NCAs that were willing to follow up the matters raised. Collaboration on cases also took place through assistance by NCAs in respective national investigations under Article 22 of Regulation 1/2003, underscoring the ability of NCAs to deal with investigations involving cross-border aspects.

³⁶⁴ Available at: <http://ec.europa.eu/competition/ecn/brief/index.html>

³⁶⁵ Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43-53)

1.2.2. Coherent application of the rules

399. In 2010, there was a significant increase in the number of enforcement decisions reported by NCAs in the field of the application of Articles 101 and 102 TFEU. The Commission services reviewed a record 94 envisaged decisions under Article 11(4) of Regulation 1/2003, as well as advised on a number of informal requests and queries from NCAs. The number of envisaged decisions went up by 36% compared with 2009. The envisaged decisions submitted to the Commission related to a broad range of infringements in different sectors of the economy.
400. As in previous years since the implementation of Regulation 1/2003, the Commission did not initiate in 2010 any proceedings with the view to ensuring coherency in decision-making, as foreseen by Article 11(6) of Regulation 1/2003.

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

2.1. Assistance in the form of providing information or in the form of issuing an opinion

401. Article 15(1) of Regulation 1/2003 allows national judges to ask the Commission for information in its possession or for an opinion on questions concerning the application of the EU competition rules. In 2010, the Commission responded to two requests from national courts (Spain and Belgium).
402. On 17 December 2009, the Commission submitted an opinion upon request by a Belgian court. The Tribunal de Commerce de Bruxelles/Rechtbank van koophandel Brussel asked the Commission a number of questions concerning *inter alia* the definition of the relevant market, the assessment of a dominant position and a possible abuse of dominant position. The questions were raised in the context of the assessment of a vertical distribution agreement and unilateral practices related to sales of smart mobile phones. As for the assessment of the relevant market, the Commission underlined that there is a need to assess whether products exist which are interchangeable or substitutable with the product assessed in the case. As for the assessment of a dominant position in the market, the Commission referred to the case-law of the EU courts. In this opinion, the Commission addressed elements which are relevant for the assessment of an abusive practice in a form of "refusal to supply". Finally, as for an abuse of dominance in a form of discrimination, the Commission suggested that in this case the court should examine whether different treatment by a dominant undertaking of certain partners distorts competition in the retail market and harms consumers.
403. The Commission also replied on 29 March 2010 to a request for an opinion by the Juzgado de lo Mercantil nº4 of Madrid in the context of litigation following the acquisition of Dalphi Metal España's (DME) car airbag and steering wheel business by TRW Automotive (TRW), a US automotive component manufacturer. The questions raised were the same as those raised in the framework of litigation in 2009 before the Juzgado de lo Mercantil nº1 de Madrid and which were already responded to, as summarised in paragraphs 504 and 505 of the Annual Competition Report 2009. The Commission received confirmation that the Juzgado nº4 obtained the

Opinion issued on that occasion from the Juzgado nº1, and that it accordingly closed the matter.

2.2. *Amicus curiae* interventions under Article 15(3) of Regulation 1/2003

404. Article 15(3) of Regulation 1/2003 provides that where the coherent application of Articles 101 or 102 TFEU so requires, the Commission, on its own initiative, may submit written observations to courts of the Member States, and may also make oral observations with the permission of the court in question. In 2010, the Commission submitted such written observations in three cases: before the High Court of Ireland, before the Supreme Court of the Slovak Republic and before the Dutch Supreme Court.
405. In its written observations lodged before the High Court of Ireland³⁶⁶ on 30 March 2010, the Commission discussed the conditions of Article 101(3) TFEU with a particular focus on capacity-reducing restructuring agreements relying on both the jurisprudence of the EU Courts and the principles underlying the Commission's 2004 Guidelines on the application of Article 101(3) TFEU³⁶⁷. In January 2011, the Beef Industry Development Society (BIDS) withdrew its claims that the agreement by its members that some would leave the beef processing industry in return for payment could be justified on efficiency grounds under Article 101(3) TFEU.
406. The Commission submitted written observations before the Slovak Supreme Court relating to the application of the concepts of economic continuity of undertakings and the effectiveness of fines. The case involved the review of a judgment by the Regional Court of Bratislava annulling a decision by the Slovak NCA.
407. The Commission observed that economic continuity is a concept of EU competition law which should be applied in a consistent manner throughout the EU. The application of economic continuity must guarantee that a successor company can be held liable for the behaviour of its predecessor. The aim is to avoid the effectiveness of EU competition rules being compromised by changes in the legal structure of undertakings. Its application must guarantee that the successor company can be held fully liable for the conduct of its predecessor and, thus, bear all the consequences resulting from such liability, including the fines. Moreover, the fact that the successor has to bear a fine for the infringement committed by the predecessor is not a factor that can be regarded as a mitigating circumstance *per se*. Therefore, any reduction of the fine imposed on the successor company solely on the ground that the infringement was committed by its predecessor can be contrary to the concept of economic continuity under EU law. The Commission furthermore stressed that the aim of the fine consists of both punishment and prevention and that these two functions cannot be separated. The effectiveness of a fine imposed for breach of the competition rules would be reduced if this dual function is disconnected by focusing only on the punitive function (specific deterrence) of the fine.
408. The Slovak Supreme Court rendered its judgment on 26 October 2010 annulling the decision of the Regional Court and confirming the decision of the Slovak NCA

³⁶⁶ Case *the Competition Authority v the Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited*, 2003 No. 7764P.

³⁶⁷ Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97-118)

which held that the economic successor was to be held liable. In its judgment the Supreme Court largely took over the arguments presented by the Commission.

409. In a case concerning the tax deductibility of Commission competition fines, the Commission also decided to follow up its first written observations in 2007 before the Amsterdam Court of Appeals with new written observations before the Dutch Supreme Court. The Dutch Supreme Court is dealing in last instance with the appeal against the judgment of the Amsterdam Court of Appeals which had decided that the Commission's fines are not deductible from taxes, in line with the essence of the Commission's first written observations.

Other matters before national courts

410. In one case, the Commission appeared as a defendant in proceedings where an undertaking seeks declaratory relief from the High Court of England and Wales that it is not liable for an infringement as the economic successor of the undertaking that originally participated in the infringement³⁶⁸. The proceedings have been brought as a reaction to requests for information to the undertaking for the purpose of investigating its possible liability as an economic successor of an addressee of the Commission's decision in the *Fittings* case³⁶⁹, it apparently being the intention of the applicant undertaking to pre-empt the outcome of the Commission's investigation by seeking a ruling from the Court of Justice on the issue of whether it can be liable as an economic successor, before the outcome of the Commission's investigation. Although it is clear that a ruling by a national court cannot bind the Commission in taking a decision applying the competition rules, the Commission has appeared in the case in order to assist the national court in relation to the jurisdictional questions raised by the proceedings.

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

411. Continuous availability of training programmes for national judges in EU competition law contributes to the effective and coherent application of those rules. In 2010, 14 grant agreements were concluded for training of judges' programmes in various Member States.

IV – International activities

1. MULTILATERAL COOPERATION

1.1. International Competition Network (ICN)

412. The Commission continued to play a leading role in the ICN. More specifically, DG Competition is a member of the Steering Group, the co-chair of the Cartels Working Group and an active member of the other Working Groups on unilateral conduct, merger, agency effectiveness and advocacy. The 2010 ICN Annual

³⁶⁸ *Conex Banninger v European Commission* [2010] EWHC 1978 (Ch)

³⁶⁹ Commission decision of 20 September 2006 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38121 *Fittings*)

Conference took place in Istanbul (Turkey) from 26 to 29 April 2010. DG Competition has also been closely involved in the ICN Steering Group's so-called "Second Decade Project" reflecting on the ICN's future and making sure that it can remain as successful as it has been over the past ten years.

413. The Cartels Working Group continued its work on the Anti-Cartel Enforcement Manual, in particular on digital evidence gathering and case initiation. The 2010 ICN Cartels workshop was held in Yokohama (Japan) from 5 to 7 October 2010.
414. The Unilateral Conduct Working Group presented a report on refusal to deal at the conference. It also started preparations for a work book on unilateral conduct (abuse of dominance) issues and organised webinars on remedies and the pharmaceutical sector. On 2-3 December 2010, DG Competition hosted the ICN "Workshop on Unilateral Conduct" in Brussels. 162 participants from 50 different countries participated, most of them senior case handlers and policy officers responsible for conducting investigations and developing policy.
415. The Merger Working Group presented Recommended Practices on market definition and failing firms at the ICN Annual Conference. The Agency Effectiveness Working Group continued its work on the Competition Agency Practice Manual and organized a workshop for heads of agencies in London on 12-13 July 2010 where issues of organisational culture, people and knowledge management, and leadership and succession were discussed in more depth. The Advocacy Working Group for its part continued its work on the Competition Advocacy Toolkit.

1.2. OECD

416. The Commission contributed actively to the work of the OECD Competition Committee and participated in each of the three sessions held in 2010. It submitted contributions to most roundtables on competition policy, including on procedural fairness, standard setting, credit rating agencies, exit strategies, exchange of information between competitors, emission trading schemes, horizontal agreements in the environmental sector, green growth and competition and sports³⁷⁰. The Vice-President for Competition made a speech on state aid issues during the February 2010 session of the OECD Global Forum on Competition³⁷¹.

1.3. UNCTAD

417. The Commission participated to the Sixth Review Conference of the United Nations Conference on Trade and Development. It submitted contributions to most roundtable discussions, such as on the role of competition policy in promoting economic development and on the sanctions and remedies available under EU competition law.

³⁷⁰ Available at: http://ec.europa.eu/competition/international/multilateral/oecd_submissions.html
³⁷¹ SPEECH/10/29, 18.2.2010

2. BILATERAL COOPERATION

418. The Commission cooperates with numerous competition authorities on a bilateral basis, in particular with the authorities of the EU major trading partners. The EU has already entered into dedicated cooperation agreements in competition matters with the United States, Canada, Japan and South Korea.

2.1. Agreements with the USA, Canada, Japan, South Korea and Switzerland

419. As in previous years, cooperation with the US was intensive. Based on two dedicated competition cooperation agreements³⁷², contacts between DG Competition and the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC) were frequent. These contacts ranged from cooperation in individual cases to more general matters related to competition policy. The Vice-President for Competition met his US counterparts, Chairman Jon Leibowitz of the FTC and Christine Varney, the Assistant Attorney General, at several occasions. The annual bilateral EU/US meeting in which the heads of the three agencies participated took place on 12 July 2010 in Washington. Numerous other meetings and exchanges took place to coordinate enforcement activities on investigations into cartels, abuse of dominance cases, merger cases or on the application of the competition rules in particular sectors, such as pharmaceuticals.

420. In case-related contacts, case teams regularly updated each other on the state of investigations within the limits of the above-mentioned agreements. A number of important merger cases investigated in 2010 affected both the EU and US markets. Such investigations required good coordination with the DoJ and the FTC, such as in the Cisco / Tandberg case³⁷³ where the Commission cooperated closely with the DoJ in finding a suitable remedy (see Section II.C.2.2.2., point 259) and the Novartis / Alcon case³⁷⁴ where the Commission cooperated closely with the FTC (see Section II.D.2.1.2., point 292). The 2002 EU-US Best Practices on cooperation in reviewing mergers proved to be a useful framework for cooperation on these cases. The Commission also collaborated closely with the US Department of Transportation in identifying suitable remedies in the Oneworld case³⁷⁵ (see Section II.E.2.1.1., points 309 to 312).

421. Cooperation with the Canadian Competition Bureau (CCB) is based on the EU/Canada Competition Cooperation Agreement which was signed in 1999³⁷⁶. Contacts between the Commission and the Bureau have been frequent and fruitful. Case-related contact concerned mainly cartels, including the coordination of investigative measures and merger, including the discussion of possible remedies.

³⁷² Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ L 95, 27.4.1995, p. 47) and Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998, p. 26).

³⁷³ Case COMP/M.5669 *Cisco / Tandberg*. See IP/10/377, 29.3.2010.

³⁷⁴ Case COMP/M.5778 *Novartis / Alcon*. See IP/10/1042, 9.8.2010.

³⁷⁵ Case COMP/39596 *BA/AA/IB*. See IP/10/936 and MEMO/10/330, 14.7.2010.

³⁷⁶ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1999, p. 50)

422. Cooperation with the Japan Fair Trade Commission (JFTC) is based on the 2003 Cooperation Agreement³⁷⁷. In addition to contacts on individual cases, the Commission and the JFTC continued their ongoing dialogue on general competition issues of common concern.
423. Cooperation with the Korea Fair Trade Commission (KFTC) is based on the bilateral Cooperation Agreement which entered into force on 1 July 2009³⁷⁸. The agreement contains provisions on enforcement cooperation, notification, consultation and exchange of non-confidential information. The 7th EU-Korea bilateral meeting on competition policy, to which the Director-General of DG Competition participated, took place on 14 September 2010.
424. In December 2010, the Council gave a mandate to the Commission to negotiate an agreement on cooperation in competition matters with the Swiss Confederation. This agreement should be based on the agreements concluded so far with the United States, Canada, Japan and Korea. It is also intended that this agreement would include provisions on the exchange of confidential information (so called "second generation" agreement).

2.2. Cooperation with other countries and regions

425. Early 2010, the EU concluded negotiations for Free Trade Agreements (FTAs) with the Andean Countries (Colombia and Peru) as well as with Central America. In both cases, the FTAs contain a competition chapter which includes a commitment to establish or maintain comprehensive competition legislation and effective authority as well as provisions on State enterprises and enterprises with special rights. In addition, both FTAs include provisions on subsidies in the transparency chapter: notification rules for subsidies to goods in line with existing WTO obligations and, for the first time, a provision allowing for information to be exchanged upon request on subsidies to services.
426. Cooperation with China remained a priority in 2010 with several contacts between DG Competition and the Chinese administration. In addition to discussions concerning the anti-monopoly law and the implementing legislation which is being elaborated, issues relating to concrete cases were discussed during high-level visits in Beijing and Brussels respectively. The Commission approved a follow-up programme to the EU-China Trade Programme (EU-China Trade Project 2004-2009). The new EUCTP II programme (2010-2015) will provide the necessary funding for the continuation of cooperation activities between DG Competition and the Chinese competition authorities in the years ahead. DG Competition is furthermore actively negotiating a competition chapter to be part of the 1985 upgrade agreement/Partnership and Cooperation Agreement.
427. After India's appointment of seven Commissioners for the Competition Commission of India (CCI) and the notification of the operative parts of the 2002 Competition Act in 2009, close technical cooperation between DG Competition and the CCI continued

³⁷⁷ Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (OJ L 183, 22.7.2003, p. 12)

³⁷⁸ 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)

in 2010. To assist the CCI when it will start enforcing the Competition Act in the fields of restrictive agreements, abuse of dominance and merger control, DG Competition organised a five-day course in cartel enforcement in Brussels in May-June 2010 and a four-day workshop for CCI staff in New Delhi in July 2010.

428. DG Competition played an active role in the ongoing negotiations on Free Trade Agreements (FTA) and other bilateral agreements with a large number of individual third countries or third country groupings, such as India, Ukraine, Singapore, Malaysia, Mercosur, Canada and five groupings of former ACP countries (four in Africa and one in the Pacific). DG Competition's main objective in these negotiations is to ensure that anti-competitive practices (including State aid) do not erode the trade and other economic benefits sought through those agreements. The Foreign Affairs Council authorised on 16 September 2010 the signature of the EU-Korea Free Trade Agreement which is a key step towards its provisional application by 1 July 2011. It is the first time that an FTA contains a prohibition on certain types of subsidies.

3. ENLARGEMENT AND NEIGHBOURHOOD POLICY

429. In the context of enlargement, candidate countries must fulfil a number of requirements in the field of competition policy as a condition for joining the EU. Candidate countries must adopt national legislation compatible with the EU *acquis*. They must also put in place the necessary administrative capacity and demonstrate a credible enforcement record. The Commission provides technical assistance and support to help the candidate countries fulfil these requirements in the field of competition policy and enforcement and is continuously monitoring the extent to which the candidate countries are prepared for accession.
430. During 2010, significant progress was made by both Croatia and Turkey. In June 2010, the Council decided to open the accession negotiations on the competition chapter with Croatia after it concluded that this candidate country fulfilled all the opening benchmarks. The Turkish Parliament adopted a State aid law in October 2010, which is one of the key opening benchmarks of the competition chapter. Further progress on the other opening benchmarks (all related to State aid control) is needed before the Commission would be able to recommend the opening of the competition chapter with Turkey.
431. In November 2010, the Commission submitted to the Council its opinions on Albania's and Montenegro's respective capabilities to assume the responsibilities of EU membership. For competition policy, the Commission's opinions for both countries were cautiously positive, noting that all legal and administrative structures were in place but concluding that Albania as well as Montenegro would have to undertake additional efforts in the medium term to align further with the EU *acquis*. After the Council decided to refer Serbia's application for EU membership to the Council in October 2010, the Commission started preparing its opinion by sending a questionnaire to the Serbian government, including a comprehensive set of questions on Serbian competition policy. In addition, the Commission assisted other Western Balkan countries in further aligning their competition rules with EU law. This included, among others, help in reviewing draft laws on competition and State aid and advice on setting up the necessary institutions to enforce these rules. The

Commission continued the preliminary discussions on Iceland's EU membership prospects and completed the screening exercise on the competition chapter in December 2010.

432. In the framework of the European Neighbourhood Policy (ENP), the Commission monitored the implementation of the competition-related priorities in the bilateral action plans agreed between the EU and ENP countries, which set out an agenda of political and economic reforms in the short- and medium-term. It also organised a certain number of seminars financed by the Technical Assistance and Information Exchange programme on competition-related issues for these countries.

V – Dialogue with Consumer organisations and other stakeholders

1. DIALOGUE WITH CONSUMER ORGANISATIONS

433. The DG Competition's Consumer Liaison Unit's goals are to improve dialogue with consumers and consumer organisations, to consult them on policy initiatives, to reflect consumer interests more clearly in case handling, to help consumers better understand EU competition policy and its outcomes and to become a point of contact with the Commission for consumers regarding competition issues. Consumers and their representatives are indeed able to bring helpful information to the Commission about potential market failure.

1.1 The European Consumer Consultative Group (ECCG)

434. The ECCG³⁷⁹ competition subgroup consists of one representative per Member States' national consumer organisations and one representative from BEUC, the European consumer association. It constitutes a discussion forum of competition policy issues from the consumer viewpoint and meets biannually in Brussels.
435. In 2010, the ECCG competition subgroup proved to be a very useful tool for the Commission in its effort to inform consumers, to receive valuable feedback from them on cases and legislative projects and to establish contacts with the consumers throughout the EU in order to facilitate a more effective enforcement of competition policy. This year the ECCG subgroup of competition addressed important issues such as vertical restraints and remedies. On the basis of a questionnaire prepared by DG Competition, the Subgroup also adopted a formal opinion³⁸⁰, endorsed by the plenary ECCG, on private enforcement in the EU, describing the legal situation in each Member State and the existing obstacles to a genuine mechanism of collective damages action for breach of antitrust rules.

³⁷⁹ The ECCG, which was created by the Commission's decision 2003/709/EC of 9 October 2003, constitutes a forum for general discussions on problems relating to consumer interest and also advises and guides the Commission when it outlines policies and activities having an effect on consumers.

³⁸⁰ Available at: http://ec.europa.eu/consumers/empowerment/eccg_en.htm

1.2. Training of European consumers' representatives – the TRACE programme

436. At DG Competition's initiative, a three-day course on competition policy took place between the 18 and 20 October 2010 in the framework of the "Training for Consumer Empowerment" initiative³⁸¹. The course, designed by DG Competition, provided an opportunity to present Commission decisions and policy actions in the field of competition from a consumer point of view, to promote competition culture amongst consumer organisations and to establish links between DG Competition and consumer organisations. The course covered a broad area of topics on competition policy including the explanation of its different branches, the consumer orientation of competition policy, the decision making and the complaint procedure, vertical restraints, private damages actions and sector inquiries. 21 participants from 18 countries took part in the training course, the majority of which with experience of competition policy issues, in particular with handling or preparing consumer complaints.

1.3. Interactive consumer corner on Competition website and point of contact with consumers

437. A special consumer corner on DG Competition website has been further developed, available in every official language since mid-2010³⁸². The website intends to present in a simple language the role of competition policy and the main competition cases.

2. DIALOGUE WITH STAKEHOLDERS

438. In 2010, DG Competition conducted a comprehensive stakeholder survey on perceptions about competition policy and the perceived quality of actions by DG Competition³⁸³. The survey was carried out in two parts by two independent market research organisations among professional stakeholders and citizens in all EU Member States.

439. According to the results of the quantitative survey³⁸⁴ EU citizens largely shared the objectives and values of competition policy. From DG Competition's present priority sectors, citizens identified energy with 44%, the pharmaceutical products with 25% and telecommunication with 21% as those main sectors where they perceive competition problems. The major indication for the lack of competition was that prices were felt to be too high. The survey revealed interesting differences across the Member States in the level of existing knowledge and general interest towards competition policy and across socio-economic groups. This information as well as feedback from citizens about what competition policy topics they prefer to be further informed, will allow DG Competition together with the EU Member States' national competition authorities a better targeted communication policy.

³⁸¹ This initiative is 100% funded by the Commission, and is operated by BEUC under the supervision of DG Health and Consumers. It comprises of trainings designed to build up the capabilities of European consumer organisations.

³⁸² The Consumer corner of DG Competition is available at: <http://ec.europa.eu/competition/consumers/>

³⁸³ The results of DG COMP Stakeholder Survey were published on 18 October 2010 at DG COMP website: http://ec.europa.eu/competition/publications/reports/surveys_en.html

³⁸⁴ Flash Eurobarometer Survey "EU citizens' perceptions about competition policy" by Gallup Hungary

440. In the qualitative study among professional stakeholders³⁸⁵, feedback was asked on the perceived quality of DG Competition's actions in the following fields: (i) the soundness of the legal and economic analysis, (ii) the integrity and transparency in interrelations with stakeholders, (iii) the economic effectiveness and (iv) external communication. The qualitative study highlighted significant praise for the effectiveness of DG Competition's work and the integrity of its staff. The study also provided constructive criticism together with suggestions for improvement³⁸⁶. DG Competition will use the results of this survey as an input into its antitrust best practices discussions, as well as a basis for internal discussions and for follow-up consultations with stakeholders on improving cooperation.

VI – Inter-institutional cooperation

441. Following the European Parliament elections in 2009, and the start of the new Commission mandate in 2010, the new Framework Agreement between the Commission and the European Parliament was adopted in October 2010. The other inter-institutional agreements remained unchanged³⁸⁷.
442. Following the hearings of the Commissioners elect in January 2010, Vice-President Almunia took up his duties as Commissioner for Competition in February.

1. COOPERATION WITH THE EUROPEAN PARLIAMENT

443. In 2010, the Parliament adopted Resolutions on the Report on Competition Policy 2008, on the Motor Vehicle Block Exemption Regulation, on Horizontal Agreements, and on the Council decision for State aid for the closure of uncompetitive coal mines³⁸⁸. There was also a Plenary debate on the Commission's fining policy in October.
444. The Parliament adopted its Resolution on the Report on Competition Policy 2009 in January 2011. This marks the first year of the new timing for adoption of both the Commission's Report (in June) and the Parliament's Resolution (the following January). This new timing should facilitate inter-institutional discussion, by giving the Commission time to reflect on the Parliament's report of the previous year when drafting the next Annual Competition Report.

³⁸⁵ Stakeholders were identified as companies, law firms, economic consultants, business and consumer associations, national competition authorities and ministries.

³⁸⁶ Eurobarometer Qualitative Study "DG Competition stakeholder Study" by TNS qual+

³⁸⁷ Framework Agreement of 20 October 2010 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.

³⁸⁸ P7_TA(2010)0050 European Parliament resolution of 9 March 2010 on the Report on Competition Policy 2008; P7_TA(2010)0151 European Parliament resolution of 6 May 2010 on the Motor Vehicle Block Exemption Regulation; P7_TA-PROV(2010)0447 European Parliament resolution of 25 November 2010 on the review of the competition horizontal cooperation rules; P7_TA-PROV(2010)0424 European Parliament legislative resolution of 23 November 2010 on the proposal for a Council regulation on State aid to facilitate the closure of uncompetitive coal mines

445. In addition to the regular dialogue between the Commissioner and the Economic and Monetary Affairs Committee (ECON) in June and November 2010, Vice-President Almunia took part in ECON Open coordinators meetings on vertical agreements (March), on horizontal agreements and on Inability to pay (July). The Vice-President also announced the prolongation of the temporary State aid rules adopted in response to the financial and economic crisis to Members of the ECON committee at a Hearing on that subject in October.
446. Vice President Almunia attended the Financial, Economic and Social Crisis Committee Open Coordinators meeting in April 2010 where he clarified the role of DG Competition in tackling the crisis. He spoke to the Public Services Intergroup on SGEI in June.
447. At the beginning of 2010, the Director-General of DG Competition, and senior officials, participated in a cartels workshop in the Parliament (11 January). Senior DG Competition officials also participated in debates and seminars organised in Parliament on subjects including Services of General Economic Interest (SGEI), temporary State aid adopted in response to the crisis, cartels and collective redress. DG Competition also participated in meetings of other Parliamentary committees: the Petitions committee, Internal Market and Consumer Affairs, Industry, Transport, Regional Policy and Legal Affairs. Informal bilateral meetings were held with a number of Members of the European Parliament (MEPs) on a range of subjects throughout the year, including on damages actions, motor vehicle BER, financial crisis, SGEI, exit strategy, vertical and horizontal agreements.
448. The Commission also cooperated closely with both the European Ombudsman and MEPs by replying to Parliamentary Questions and Petitions. In 2010, the Commission responded to 552 written questions, 50 oral questions and 40 petitions involving matters of competition policy. Of these the Commissioner in charge of Competition directly responded to 200 written questions, 20 oral questions and 11 petitions, as chef de file.

2. COOPERATION WITH THE COUNCIL

449. The Commission cooperated closely with the Council by informing it of important policy initiatives in the field of competition, in particular on the temporary State aid measures in the context of the financial and economic crisis. The Commission also made contributions regarding competition policy in respect of conclusions adopted in the ECOFIN and European Councils (exit strategies for the financial sector) and the Competitiveness Council (innovation, industrial policy).
450. An important file in 2010 was the Council decision on State aid for the closure of uncompetitive coal mines. The Commission made a proposal on 20 July 2010. On 8 December 2010, the Commission discussed the state of play in light of the extensive debate in both Parliament and Council, and gave Vice-President Almunia a mandate to present a revised position to the Council with a view to reaching an agreement. The Council adopted its decision on 10 December 2010.

3. COOPERATION WITH THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

451. The Commission informed the European Economic and Social Committee (EESC) about major policy initiatives, and participated in study group and section meetings. The EESC adopted an opinion on the Report on Competition Policy 2008³⁸⁹ in July 2010 and contributed to the debates on State aid to coal, and the Motor Vehicle Block Exemption Regulation by adopting opinions on these matters.

³⁸⁹ INT/505 Report on competition policy 2008