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I – Instruments

A – ANTITRUST – ARTICLES 81, 82 AND 86 EC

1. LEGISLATIVE, INTERPRETATIVE AND PROCEDURAL RULES

1.1. Rewarding companies that report cartels: the revised Leniency Notice

1. On 6 December, the Commission took another important step towards uncovering and putting an end to hard-core cartels by adopting a revised Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the "Leniency Notice")¹. Improvements have been made in several areas to provide more guidance to applicants and to increase the transparency of the procedure. These amendments reflect more than four years of experience in applying the 2002 Leniency Notice² and are also fully in line with the European Competition Network's (ECN's) Model Leniency Programme, which was adopted on 29 September by the heads of the EU competition authorities³. The revision of the Notice also takes account of public consultations held in February and October.
2. Improvements include clarification of the thresholds for immunity and reduction of fines, the conditions that must be fulfilled by applicants and amendments to the procedure, such as introducing a discretionary marker system. The immunity threshold now sets out explicitly and clearly what type of information and evidence the applicants should submit to qualify for immunity and makes it clear that the applicants need to disclose their own participation in the cartel. The threshold is linked to information needed by the Commission to carry out a "targeted" inspection in connection with the alleged cartel, which will allow the inspections to be better focused.
3. Concerning the threshold for reduction of fines, the Notice makes it clear that evidence requiring little or no corroboration will have greater value. Such evidence will also be rewarded outside the normal bands for reduction of fines, when it is used to establish any additional facts increasing the gravity or duration of the infringement.
4. The conditions for immunity and reduction of fines have been made more explicit. The revised Notice introduces flexibility as to the point in time when applicants should terminate their participation in the alleged cartel activities. It highlights the fact that genuine cooperation requires the applicant to provide accurate and complete information that is not misleading. The obligation not to destroy, falsify or conceal information is extended to cover also the period when the applicant was contemplating making an application. The Notice now also states explicitly that the

¹ Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006).

² Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002).

³ For details see point 315.

obligation to cooperate on a continuous basis concerns also applications for a reduction of fines.

5. Another innovation in the revised Notice is the introduction of a discretionary marker system for immunity applicants. Where justified, an immunity application can be accepted on the basis of only limited information, as specified in the Notice. The applicant is then granted time to perfect the information and evidence to qualify for immunity.
6. In order to maintain the effectiveness of the leniency policy, applicants that cooperate with the Commission should not be impaired in their position in civil proceedings, as compared to companies which do not cooperate. Therefore, the Notice introduces a procedure, reflecting current Commission practice, to protect corporate statements given under the Leniency Notice from discovery in civil damage procedures, in particular in third-country jurisdictions. The special protection for corporate statements is, however, no longer justified in the event and from the moment that the applicant itself discloses the content of such statements to third parties. In order to ensure this special protection, the Commission has, in a number of cases, filed *amicus curiae* briefs with US Courts or informed the parties in its proceedings on its position, thus enabling the parties to refer to the Commission position at the Court.

1.2. Increasing the deterrent effect of sanctions: new Guidelines on the method of setting fines

7. On 28 June, the Commission adopted new Guidelines on the method of setting fines imposed on undertakings that have infringed Article 81 or Article 82 of the Treaty⁴.
8. The Commission has the power to impose fines on undertakings which, intentionally or negligently, infringe competition rules. This is one of the means employed to achieve a general policy in favour of competition and to steer the conduct of undertakings in the light of the principles laid down. To that end, the Commission must ensure that its action has the necessary deterrent effect, not only in order to sanction the undertakings concerned but also in order to deter them as well as other undertakings from engaging in, or continuing, an infringement of competition rules.
9. The new Guidelines update the guidelines of 1998⁵, thereby reflecting the latest case law and the Commission's fining practice, but also introduce the following significant changes:
 - First, for each participant in the infringement, the basic amount of the fine will be based on a percentage of its yearly sales of the product to which the infringement relates, in the geographic area concerned. The year of reference will normally be the last year of participation in the infringement. The percentage of yearly turnover will vary depending on the gravity of the infringement. It may be up to 30 % of the relevant sales; for cartels, the Commission will apply a percentage at the higher end of this range.

⁴ OJ C 210, 1.9.2006, p. 2.

⁵ OJ C 9, 14.1.1998, p. 3.

- Second, in order to fully reflect the duration of the infringement, the corresponding amount will then be multiplied by the number of years of the undertaking's participation.
- Third, in order to deter undertakings from even entering into seriously illegal conduct, the Commission will, or may, depending on the nature of the infringement, add to the amount as calculated above a sum amounting to between 15 % and 25 % of the relevant yearly sales, irrespective of the duration of the infringement.
- Fourth, the Guidelines introduce significant changes with regard to repeat offenders. Up to now, the Commission's practice has been to increase a fine by 50 % where the undertaking is found to have been previously involved in one or more similar infringements. The new Guidelines change this approach in three ways: the Commission will take into account not only its own previous decisions but also those of national competition authorities (NCAs) applying Articles 81 or 82 EC; the increase may be up to 100 %; each prior infringement will justify an increase of the fine.

10. The new Guidelines will apply in every case for which a Statement of Objections is notified to the parties after 1 September.

1.3. Facilitating the recovery of losses from the infringement of competition law: Green Paper on damages actions for breach of the EU antitrust rules

11. In December 2005, the Commission adopted the Green Paper on damages actions for breach of the EU antitrust rules as contained in Articles 81 and 82 of the EC Treaty⁶. The main objective of the Green Paper was to identify the principal obstacles to a more effective system of damages claims and to set out different options for further reflection and possible action to facilitate damages claims for breaches of EU antitrust law.

12. The Green Paper has been met with broad interest in the antitrust community and has been discussed at a number of conferences both in Europe and elsewhere. During the public consultation, which was open until 21 April, the Commission received almost 150 submissions from governments, competition authorities, industry, consumers' organisations, lawyers and academics⁷.

13. The vast majority of responses are favourable to the objective of facilitating private enforcement. Practically all the responses accept the complementary role of private actions in the overall enforcement of the EU competition rules. More particularly, there is general agreement that victims of competition law infringements are entitled to damages, and that national procedural rules should be conducive to exercising this right effectively.

⁶ The Green Paper can be found at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>

⁷ The submissions received by the Commission are available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html

14. Although the objective of the Green Paper thus meets with a broad consensus, respondents' opinions diverge with respect to the analysis of the current situation, the question of whether there are obstacles to actions for damages, and the appropriate methods to remedy any shortcomings.
15. On 26 October, the European Economic and Social Committee (EESC) adopted its opinion on the Green Paper, welcoming the Commission's initiative⁸. The European Parliament is still in the process of drafting an opinion on facilitating actions for damages. It is expected that Parliament will adopt its response to the Green Paper in the first half of 2007.

1.4. Ensuring that legislation does not lead to distortions of competition: competition advocacy

16. Competition advocacy is an increasingly important part of competition policy both within and outside the Commission. The aim is to ensure that legislation, at EU or Member State level, pursuing legitimate policy objectives, does this with the least possible harm to competition.
17. In 2006 competition advocacy had, in particular, an important role to play in the legislative process relating to the REACH Regulation (Commission proposal for a Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals)⁹. Once adopted, REACH will provide for registration of some 30 000 already existent chemicals, as well as future ones. The role of competition policy in this field has been to ensure that REACH, and in particular the information exchange provided for by the draft Regulation, does not lead to distortions of competition.
18. Similarly, the Commission continued its efforts to promote the removal of disproportionate restriction of competition in the key area of professional services as an important contribution towards meeting the Lisbon objectives. Keeping up the pressure resulted in the professional services reform becoming firmly embedded in the better regulation agendas of many Member States. The European Parliament resolution of 12 October supports the Commission in its efforts to rid the sector of overly restrictive regulation which inhibits competition. The European Parliament argues that this would be beneficial to the EU economy and consumers.

2. APPLICATION OF ARTICLES 81, 82 AND 86 EC

19. This part provides an overview of the application of Articles 81, 82 and 86 EC, illustrating how each particular instrument of competition policy was used. The application of Articles 81, 82 and 86 EC, together with other instruments of competition policy, in selected priority sectors is discussed under Sector Developments (Section II).

⁸ The opinion of the EESC can be found at http://eescopinions.eesc.europa.eu/EESCOpinionDocument.aspx?identifier=ces\int\int306\ces1349-2006_ac.doc&language=EN

⁹ COM(2003) 644 final.

2.1. Stepping up the fight against cartels

20. In 2006, the Commission continued to give a high priority to the detection and deterrence of cartels. It focused its actions on significant hard-core cartels of mainly worldwide or European scope and involving a number of economic entities. The Commission issued seven final decisions¹⁰ in which it fined 41 undertakings¹¹ a total of EUR 1 846 million (compared with 33 undertakings and a total of EUR 683 million in fines in 2005). The decisions issued show the economic significance of the sectors involved and the duration of the cartels, hence the average fine per undertaking has increased significantly.
21. In addition to the appropriate sanctions to punish and deter cartels, effective action against cartels also requires incentives to participants to report cartels. The Commission's leniency policy has offered such incentives since 1996 and it has resulted in numerous applications for immunity and/or reduction of fines. The Leniency Notice of 1996, which resulted in more than 80 applications, was replaced on 19 February 2002 by a new Notice under which the Commission received, up to the end of 2006, a total of 104 applications for immunity and 99 applications for a reduction of fines¹². In December 2006 the Commission adopted a revised Leniency Notice (see section A.1 above). In the period from 19 February 2002 until the end of 2006, the Commission granted conditional immunity in 51 cases¹³. Over the same period, the Commission rejected or decided not to deal any further with 34 applications and had 13 more recent applications under scrutiny. The Commission will close a case that originates from a leniency application if, for instance, it finds that an NCA is well placed to deal with the case or it finds that it does not have conclusive evidence on the alleged cartel. The Commission may also decide, following a Statement of Objections, to close an investigation against an individual company for lack of conclusive evidence, as it did in the *Bitumen Netherlands*, *Acrylic glass* and *Synthetic rubber* cases following a careful analysis of the facts and arguments put forward in response to the Statement of Objections.
22. In respect of the cartel decisions adopted in 2006, four were adopted whilst the 2002 Leniency Notice was in effect¹⁴ and one whilst the 1996 Leniency Notice was in effect. In these cases the Commission also granted substantial reductions of fines to a

¹⁰ Case COMP/38.620 *Hydrogen peroxide and perborate (Bleaching chemicals)* Commission decision, 3.5.2006; Case COMP/38.645 *Methacrylates (Acrylic glass)* Commission decision, 31.5.2006; Case COMP/38.456 *Bitumen Netherlands* Commission decision, 13.9.2006; Case COMP/38.121 *Fittings (Copper fittings)* Commission decision, 20.9.2006; Case COMP/38.907 *Steel beams (re-adoption)* Commission decision, 8.11.2006; Case COMP/38.638 *Synthetic rubber (BR/ESBR)* Commission decision, 29.11.2006; Case COMP/39.234 *Alloy surcharge (re-adoption)* Commission decision, 20.12.2006.

¹¹ This figure does not include the companies that received immunity from fines for cooperation under the Leniency Notice.

¹² Where several immunity applications have been received for the same alleged infringement, the first application is counted as an immunity application and the subsequent ones as applications for a reduction of fines unless the first application for immunity is rejected.

¹³ In cases where a final prohibition decision has been adopted by the Commission, and thus a final decision on immunity, conditional immunity is no longer counted in order to avoid double counting. The total number of conditional immunity decisions and final prohibition decisions amounts to 56.

¹⁴ The 2002 Notice is applicable when a first application for leniency in a case reached the Commission after 19 February 2002.

total of 10 companies in return for evidence provided to the Commission. In both the *Acrylic glass* and *Bleaching chemicals* cases a company had provided evidence under the Leniency Notice relating to facts previously unknown to the Commission and having a direct bearing on the duration of the cartel. In accordance with the last paragraph of point 23 of the 2002 Leniency Notice, the extra duration brought to light by this evidence was not taken into account in setting the fine imposed on those undertakings. The Commission considers that a company providing this level of evidence should be certain that the effects of such an extension in duration, or in gravity, of the infringement, which is directly linked to its contribution, will not increase its own fine.

23. It should be noted that, while the leniency policy has been a successful tool for detecting and terminating cartels, the leniency applications do not reflect the total number of cartel investigations. The Commission continues to gather information from complaints, market monitoring and via NCAs in the ECN.
24. Recent cartel decisions show the determination of the Commission to take strong action when it finds that the undertakings are obstructing its investigation. In the *Bitumen Netherland* case, the Commission increased the fine imposed on KWS by 10 % for obstructing its investigation. During the Commission inspection in October 2002, KWS twice refused the Commission inspectors access to premises, forcing the Commission to invoke the aid of the Netherlands Competition Authority and the Netherlands police. In the *Copper fittings* case, the Commission increased the fines of four companies – Aalberts, Delta, Advanced Fluid Connections and Legris – by 60 % because they had continued their illegal arrangements after the Commission's inspection. Advance Fluid Connections' fine was increased by a further 50 % for providing the Commission with misleading information. These examples send a strong signal to companies that the Commission will not only punish firms severely for cartel behaviour, but it is also ready to increase the fines considerably if the companies hinder its investigation.
25. Repeat offenders can also expect more severe sanctions. In 2006, the Commission increased by 50 % the fines imposed on a total of nine addressees in the *Acrylic glass*, *Bleaching chemicals*, *Bitumen Netherlands* and *Synthetic Rubber* decisions, as they were found to have been repeat offenders. The directors and shareholders of such companies should ask why the cartel practices were allowed to continue after the companies had already been condemned by the Commission for cartel infringements. The seriousness with which the Commission views repeated offences is also reflected by the fact that, under the new Guidelines on Fines, the increase of fines in such situations could be up to 100 %.
26. The Commission's cartel enforcement activity also shows that in the case of a company acquisition, the acquiring parties should pay particular attention to possible involvement of the target company in cartel activity. Often during the lifetime of the cartel or during the Commission investigation, companies directly involved in the infringement are sold to or taken over by other companies that have not been involved in the infringement. A new owner may, however, become liable for the conduct of the newly acquired business.
27. The Commission may also reopen proceedings if the Community Courts annul a decision due to a procedural mistake. The decisions adopted in 2006 concerning hot-

rolled steel beams used in the construction industry (*Steel beams* case) and stainless steel products (*Alloy Surcharge* case) were issued in cases where the Community Courts had partially annulled previous Commission decisions in those cases because of procedural errors. These errors, which were due to complex intra-group liability issues, were corrected by reopening the proceedings and addressing new Statements of Objections to companies that had not been fully heard on the original Statements of Objections. Final decisions were thereafter addressed in the *Steel beams* case to Arcelor Luxembourg SA (formerly Arbed SA), Arcelor International SA (formerly TradeArbed SA) and Arcelor Profil Luxembourg SA (formerly ProfilArbed SA), imposing a total fine of EUR 10 million, and in the *Alloy Surcharge* case to ThyssenKrupp Stainless AG, imposing a fine of EUR 3 168 000.

2.2. Sanctioning anti-competitive behaviour: abuse of dominant positions (Article 82 EC)

28. On 19 December 2005, the Competition DG published a Discussion Paper on the application of Article 82 EC to exclusionary abuses. The Discussion Paper was in public consultation until 31 March. More than 100 submissions were received and published on the Competition DG's website. The most important topics raised by the submissions were discussed at a public hearing held in Brussels on 14 June. The event attracted about 350 participants from Europe, the United States, Japan and Korea.
29. On the basis of the reactions to the Discussion Paper, the Commission continued its internal reflections and discussions on the application of Article 82 EC.
30. In 2006, the Commission continued its efforts to sanction abuses of dominance that had an anti-competitive effect on the market. It adopted one final decision and sent two Statements of Objections¹⁵.

2.2.1. Exclusionary abuses – Case COMP/38.113 – Prokent/Tomra

31. On 29 March, the Commission adopted a decision imposing a fine on the Norwegian group Tomra, a supplier of so-called reverse-vending machines used by retail outlets to collect empty drink containers. The Commission found that the dominant company violated Article 82 EC by operating a system of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, which restricted or at least delayed the market entry of other machine manufacturers.
32. The decision establishes, in line with the case law of the Community Courts, that Tomra's practices tended to restrict competition and thus were likely and capable of having anticompetitive effects. In addition, the Commission also performed a quantitative analysis of the actual effects of such conduct on the market. The decision examines in particular several developments on the market which tend to confirm that Tomra's exclusionary strategy did have the likely effect, such as (i) the comparatively strong market position of the dominant company in relation to its rivals despite the non-recurring nature of the demand, (ii) the absence of successful entry in spite of the fact that the market was characterised by demand shocks and low

¹⁵ Case COMP/38.784 *Telefónica* (for details of the case see point 205) and case COMP/37.966 *Distrigaz*.

entry barriers, and (iii) increases in Tomra's sales following increased intensity of its anti-competitive practices.

2.3. Commitments

33. Article 9 of Regulation 1/2003 allows the Commission to make commitments binding on undertakings, when the latter offer them to meet the concerns expressed by the Commission in antitrust proceedings. Commitments continue to be an effective means of addressing competition problems. In 2006, the Commission adopted four commitment decisions¹⁶.

2.4. Compelling undertakings to bring infringements to an end: periodic penalty payments

34. The *Microsoft* case marks the first time the Commission has had to use its powers to fix a periodic penalty payment under Article 24(2) of Regulation (EC) No 1/2003 in order to compel an undertaking to bring an infringement of Article 81 or 82 EC to an end, in accordance with a decision previously taken pursuant to Article 7.
35. On 10 November 2005, the Commission had already issued a decision pursuant to Article 24(1) of Regulation 1/2003 ("the Article 24(1) Decision") according to which Microsoft was still not complying with certain of its obligations under the original Commission decision of 24 March 2004 ("the Decision"), which found an infringement of Article 82, namely the obligations to (i) supply complete and accurate interoperability information, and (ii) make that information available on reasonable terms. The Article 24(1) Decision imposed a periodic penalty payment of EUR 2 million per day from 15 December 2005, if Microsoft did not comply with the specified obligations by that date. On 21 December 2005, the Commission duly issued a Statement of Objections based on its preliminary assessment that Microsoft had still not provided the required complete and accurate interoperability information.
36. Having taken into account Microsoft's response to the Statement of Objections, and following an Oral Hearing held on 30 and 31 March 2006, the Commission adopted on 12 July 2006 a decision pursuant to Article 24(2) of Regulation 1/2003 fixing for Microsoft a definitive penalty payment of EUR 280.5 million for non-compliance with its obligations for the period from 16 December 2005 to 20 June 2006 (calculated at EUR 1.5 million per day).
37. In its decision of 12 July 2006, the Commission also increased the level of the periodic penalty payment under Article 24(1) from EUR 2 million to EUR 3 million per day as from 31 July 2006. This increase was imposed in the light of the urgent need to establish compliance on Microsoft's part. This increased sum applies not only to the disclosure of interoperability information but also to the need to make that

¹⁶ Case COMP/38.381 *De Beers* Commission decision, 22.2.2006; Case COMP/38.173 *FA Premier League* Commission decision, 22.3.2006 (for details of the case see point 246); Case COMP/38.348 *Repsol CPP* Commission decision, 12.4.2006 (for details of the case see point 167); Case COMP/38.681 *Cannes Extension Agreement* Commission decision, 4.10.2006 (for details of the case see point 253).

information available on reasonable terms, because a failure to do either is capable of depriving the decision of its effectiveness.

3. SELECTED COURT CASES

38. In 2006, the Court of First Instance (CFI) and the Court of Justice (ECJ) rendered several judgments that have important implications for the application of Articles 81 and 82 EC. A short summary of these is set out below.

3.1. The notion of undertaking

39. The judgment of the ECJ on 11 July in the case *FENIN v Commission* (C-205/03 P) concerns the application of EU competition rules to public bodies entrusted with the task of managing the Spanish social security system. Since it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, the CFI rightly deduced, in the judgment under appeal, that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.
40. Similarly, the judgment of the CFI on 12 December in the case *Selex (formerly Alenia) v Commission* (T-155/04) concerns the application of EU competition rules to a public body entrusted with the tasks of air space management and air navigation safety (Eurocontrol). The CFI further clarified the notion of undertaking, confirming that the various activities of an entity entrusted with public authority must be considered individually insofar as they are separable, and that the powers of public authority do not exclude the qualification of certain of its activities as economic in character. The CFI also found that the purchase of goods cannot be dissociated from the subsequent use to which the goods are put. The CFI confirmed the Commission's findings that the activities of technical standardisation and research and development are not economic, but did qualify the assistance to national administrations as economic.

3.2. The notion of agreement

41. On 13 July, the ECJ rejected the Commission's appeal against the judgment of the CFI by which it annulled the Commission decision imposing a EUR 30.96 million fine on Volkswagen AG for retail price maintenance on the German car market¹⁷.
42. The judgment primarily concerned the notion of "agreement" within the meaning of Article 81(1) EC, specifically in the context of selective distribution networks. The judgment rejected the Commission's appeal, but brought an important clarification to the notion of "agreement", rectifying one aspect of the CFI's reasoning which the Commission had attacked in its appeal. In particular, the ECJ held that the CFI made an error of law in its reasoning in finding that clauses of a dealership agreement

¹⁷ Case C-74/04 P *Commission v Volkswagen AG* ("*Volkswagen II*" or "*Passat*").

which comply with the competition rules may not be regarded as authorising calls by the supplier which are contrary to those rules.

43. This judgment follows a series of cases before the ECJ and the CFI concerning the notion of "agreement" within the meaning of Article 81(1) in the presence of seemingly "unilateral" measures by a supplier. The ECJ has confirmed the analytical approach taken in its previous judgments (especially in the *Adalat* and *Volkswagen I* cases) and has shed additional light on the scope of the notion of agreements in the context of distribution networks with many members.

3.3. Market partitioning

44. On 6 April, the ECJ rejected General Motor's appeal and upheld the previous ruling of the CFI, which essentially confirmed the Commission's decision finding that General Motors (through its subsidiary Opel Nederland) had imposed restrictions on export sales by its dealer network in the Netherlands, contrary to Article 81 EC. The Commission found that there was a systematically restrictive strategy in relation to supply and bonuses, resulting in an indirect prohibition on exports to final consumers and to Opel dealers established in other Member States. In particular, Opel Nederland refused to grant a bonus to authorised dealers for cars sold and registered outside the Netherlands. This restriction discriminated between domestic and export sales in a way that reduced dealers' margin of manoeuvre to sell to end-users resident in other Member States. It was therefore restrictive of competition by object, contrary to Article 81 EC.

45. The judgment of the ECJ on 21 September in the case C-167/04 P *JCB Service v Commission*, brought by JCB Service against the Commission decision of December 2000, concerned the market partitioning policy implemented by JCB Service in its distribution system for no less than 10 years in five different Member States. The products concerned were earthmoving machines (e.g. loaders). JCB was the EU market leader for specific categories of products, i.e. backhoe loaders, with market share around 45 %. The ECJ reiterated that geographic market partitioning agreements which jeopardise the benefits accruing to EU citizens and companies from healthy competition in the internal market are inadmissible under EU competition rules, where they provide for export bans in the distribution network in the sector concerned.

3.4. The application of Article 81(1) and 81(3) to parallel trade

46. On 27 September, the CFI annulled the Commission's decision adopted in 2001 under Article 81 EC against Glaxo Smith Kline (GSK) regarding the dual pricing system GSK had implemented in Spain.

47. GSK charged a different price to Spanish wholesalers depending on the final destination of the product, i.e. if the product was consumed in Spain a lower price would apply, and if it was exported a higher price would apply. The Commission found in the decision that dual pricing systems create a clear distinction between domestic markets and export markets, and are an obvious tool to impede parallel trade and therefore infringe Article 81(1) EC by object. The Commission also concluded that the agreement had restrictive effects on competition and the conditions for an exemption under Article 81(3) EC were not fulfilled.

48. GSK appealed the decision to the CFI. In its judgment, the CFI confirmed that GSK's dual pricing scheme constituted an "agreement between undertakings" in the sense of Article 81(1) EC. The CFI did not agree with the Commission that GSK's dual pricing scheme had as its object to restrict competition in the sense of Article 81(1) EC. The CFI stresses that the Commission failed to examine the "specific and essential characteristic of the sector". According to the Court, the prices of medicines are to a large extent shielded from the free play of supply and demand owing to the applicable regulations and are set or controlled by the public authorities. In such a context, the CFI considers that it could not automatically be presumed that parallel trade would lead to lower prices in the import country. Nevertheless, the CFI agreed with the Commission that GSK's dual pricing scheme had the anti-competitive effect of depriving final consumers of the advantage which they would have derived, in terms of price and costs, from the participation of the Spanish wholesalers in intrabrand competition on the national markets of destination of the parallel trade originating in Spain. By conclusion, the CFI approved the Commission's conclusion that the dual-pricing scheme infringed Article 81(1) EC.
49. However, the CFI also found that the Commission did not conduct an appropriate examination of the factual arguments and evidence put forward by GSK when evaluating whether the agreement could have received an individual exemption under Article 81(3). In particular, the CFI found that the Commission's decision had not undertaken a sufficiently serious examination of the arguments put forward in support of the claim that dual pricing entailed a gain in efficiency by contributing to innovation in the pharmaceutical sector. The CFI therefore annulled Article 2 of the decision.
50. The Commission has decided to appeal the judgment to the ECJ.

3.5. Duration of proceedings

51. By its judgments of 21 September in the cases C-105/04P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG)/Commission* and C-113/04P *Technische Unie BV (TU)/Commission*, the ECJ confirmed definitively and in its entirety the decision of the Commission of 26 October 1999 (IV/33.884), under which fines had been imposed on the Dutch association of wholesalers of electro-technical equipment FEG and its main member TU for a violation of Article 81 (a collective exclusive dealing arrangement with suppliers and a price-fixing arrangement). The most delicate point in the proceedings before the CFI and ECJ concerned the duration of the Commission proceedings leading up to the adoption of its decision. Although the Commission itself had recognised in its decision that the duration of its proceedings had been significant and for that reason, on its own initiative, had decided to reduce the amount of the fine by EUR 100 000, FEG and TU asked for annulment of the entire decision. Both the CFI and the ECJ found that FEG and TU had been unable to demonstrate in any concrete manner that the duration of the Commission's proceedings had breached their rights of defence.

3.6. Procedural rights of third parties

52. On 7 June, in the *Österreichische Postsparkasse*¹⁸ case, the CFI delivered a judgment upholding a decision by the Hearing Officer that the political party FPÖ should be provided¹⁹ with the non-confidential versions of the SOs in the Austrian banks' price cartel case, commonly referred to as the "*Lombard Club*"²⁰. The Hearing Officer based its decision on the fact that FPÖ was recognised as a formal complainant by the Commission²¹.
53. Following an appeal brought by two banks, the CFI confirmed that third parties have certain procedural rights in the Commission's antitrust proceedings depending on their status as complainant, third party with a sufficient interest to be heard or other third party. Complainants enjoy more extensive procedural rights than any other category of third party.

3.7. Publication and protection of confidential information

54. In its judgment of 30 May, in the *Bank Austria*²² case, the CFI upheld the decision by the Hearing Officer to reject the objection of several banks to the publication of a non-confidential version of the Commission's final decision in the above-mentioned "*Lombard Club*" case. The Hearing Officer considered that the non-confidential version, which partially took account of the banks' request for confidentiality, did not contain information for which confidential treatment was guaranteed by Community law.
55. Following an appeal by one of the banks, the CFI clarified that the protection to be afforded to information acquired in the course of antitrust proceedings depends on the degree of confidentiality (special protection is to be afforded to business secrets, whilst professional secrets require only less extensive protection) and on a balancing of interests for and against disclosure. Furthermore, the CFI held that the concept of professional secrecy cannot be detached from secondary Community legislation in fields other than EU competition law (in particular Regulation 45/2001 on the protection of personal data and Regulation 1049/2001 regarding public access to documents).

3.8. The application of competition law to sporting rules

56. In the *Meca Medina* case, the ECJ decided on 18 July²³ that the anti-doping rules of the International Olympic Committee (IOC) do not constitute an infringement of Article 81(1) EC and dismissed the action for annulment of the decision of 1 August

¹⁸ Cases T-213 and T-214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission* [2006] (not yet reported).

¹⁹ According to Article 7 of Regulation 2842/98.

²⁰ On 11 June 2002 the Commission imposed fines totalling over EUR 124 million on eight banks for their participation in a wide-ranging price cartel in Austria. See press release IP/02/844, 11.6.2002, and the XXXIInd Report on Competition Policy (2002), point 39. An appeal against the decision imposing fines is still pending at the CFI.

²¹ Within the meaning of Article 3(2) of Regulation 17/62.

²² Case T-198/03 *Bank Austria Creditanstalt AG v Commission* [2006] (not yet reported).

²³ Case C-519/04 P *Meca-Medina and Majcen* (not yet reported).

2002²⁴ by which the Commission rejected a complaint. This is one of the first rulings of the ECJ on whether sporting rules are subject to the Treaty provisions on competition. It confirms the Commission's policy in the field of sports.

57. The ECJ held that the qualification of a rule as being of a "purely sporting nature" unrelated to an economic activity is not sufficient in itself to remove the rule in question from the scope of EU competition provisions. It found that the specific requirements of Articles 81 and 82 EC must be examined irrespective of the nature of the rule.
58. The ECJ concluded that the anti-doping rules in question did not infringe Article 81(1) EC on the basis of the application of the principles established in its *Wouters* judgment²⁵. It reiterated that account must be taken of (i) the overall context in which the rules were adopted or produce their effects and of their objectives and (ii) whether the restrictive effects are inherent in the pursuit of the objectives and are proportionate to them. The ECJ found that the objective of the anti-doping rules was to ensure fair sporting competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The restrictions caused by the anti-doping rules were considered by the ECJ to be inherent in the organisation and proper conduct of competitive sport and proportionate.

²⁴ Case COMP/38.158 *Meca-Medina and Majcen against the International Olympic Committee*, http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_76.html#i38_158

²⁵ Case C-309/99 *Wouters* [2002] ECR I-1577.

B – MERGER CONTROL

1. LEGISLATIVE, INTERPRETATIVE AND PROCEDURAL RULES

1.1. Giving guidance on jurisdiction in merger control: draft Commission Consolidated Notice on Jurisdiction

59. On 28 September, the Commission published a new draft Commission Consolidated Jurisdictional Notice under the Merger Regulation²⁶ for public consultation. This Notice will replace the current four Jurisdictional Notices, all adopted by the Commission in 1998 under the previous Merger Regulation 4064/89²⁷. These are (i) the Notice on the concept of concentration²⁸, (ii) the Notice on the concept of full-function joint ventures²⁹, (iii) the Notice on the concept of undertakings concerned³⁰, and (iv) the Notice on calculation of turnover³¹. The new Notice will therefore cover, in one document, all issues of jurisdiction which are relevant for establishing the Commission's competence under the Merger Regulation (except for referrals).
60. The new draft Notice draws upon three general sources for making amendments to the existing Notices. Firstly, the draft Notice takes into account the changes introduced by the new Merger Regulation in relation to jurisdictional issues. Secondly, the draft Notice incorporates recent case law. A number of issues arising from the judgments of the CFI in the cases *Cementbouw v Commission*³² and *Endesa v Commission*³³ are, for instance, included in the draft Notice. Thirdly, the experience gained in the Commission's decisional practice in recent years is also reflected in the new draft Notice.
61. The draft Notice explains a number of issues not previously covered in the existing Notices concerning the concept of control. In particular, the draft Notice extends the discussion of the acquisition of control on a contractual basis, clarifies the circumstances under which the turnover of all the portfolio companies held by several investment funds – all set up by the same investment company – is to be taken into account when one of the funds is involved in an acquisition, and explains the circumstances under which a concentration arises if a company out-sources the provision of services or the production of goods, previously performed in-house, to a third party. The Notice also explains how the Commission deals with operations where a target company is acquired in order to immediately divide the assets between several ultimate acquirers. Under the heading "interrelated transactions", the draft

²⁶ 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).

²⁷ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

²⁸ OJ C 66, 2.3.1998, p. 5.

²⁹ OJ C 66, 2.3.1998, p. 1.

³⁰ OJ C 66, 2.3.1998, p. 14.

³¹ OJ C 66, 2.3.1998, p. 25.

³² Case T-282/02 *Cementbouw v Commission* (not yet reported), judgment of 23.2.2006.

³³ Case T-417/05, *Endesa v Commission* (not yet reported), judgment of 14.7.2006.

Notice clarifies the circumstances in which several transactions are to be considered a single concentration under Article 3.

62. In other areas, the new Notice clarifies the treatment of joint ventures under the Merger Regulation, particularly as regards the requirements for considering joint ventures as full-function undertakings. It also includes a section on the requirements to be met by parties demonstrating abandonment of a concentration. If the transaction is abandoned in line with those requirements, the concentration ceases to exist and the Commission is no longer competent to take a decision under the Merger Regulation. The draft also includes a revised section on the calculation of turnover. In this context, the new Notice determines the relevant date for establishing the jurisdiction of the Commission or of NCAs over a given concentration.
63. In the framework of the public consultation, the Commission received a significant number of comments which can be accessed via the Competition DG's website. It is expected that the Commission Jurisdictional Notice under the Merger Regulation will be finally adopted by summer 2007.

2. APPLICATION OF THE MERGER CONTROL RULES

2.1. Overview

64. The number of mergers notified to the Commission in 2006 reached record levels, surpassing the previous record number reached during the last merger wave in 2001. This record level of 356 notifications continued a trend towards increased merger activity already noted in 2005 and is consistent with the widely reported increase in merger activity in Europe and worldwide.
65. In total the Commission adopted 352 final decisions during the year. Of these final decisions, 323 transactions were cleared without conditions during Phase I. A further 13 transactions were cleared in Phase I subject to conditions. Finally, 207 decisions (or 64 % of all Phase I clearance decisions) were taken in accordance with the simplified procedure.
66. As regards referrals, the Commission received 13 requests pursuant to Article 4(4) of the Merger Regulation (for referral from the Commission to an NCA), representing a slight decline compared to the previous year. However, the number of Article 4(5) requests (for referral from the NCAs to the Commission) increased considerably from 28 in 2005 to 38 in 2006. In addition, the Commission referred six cases to NCAs pursuant to Article 9 of the Merger Regulation during the year and received four requests for referral from Member States pursuant to Article 22.
67. There was a slight increase in the number of Phase II proceedings, with 13 such cases being opened during the year as against 10 in 2005. Ten decisions were adopted pursuant to Article 8 during the year. This represents a doubling in the number of such decisions compared to the previous year, with four decisions being adopted pursuant to Article 8(1)³⁴ and six decisions being adopted pursuant to Article

³⁴ Case COMP/M.3975 *Cargill/Degussa Food Ingredients* Commission decision, 29.3.2006, Case COMP/M.4094 *Ineos/BP Dormagen* Commission decision, 10.8.2006, Case COMP/M.3848 *Sea-*

8(2)³⁵. In addition, two notifications were withdrawn by the notifying parties during Phase II. No outright prohibition decisions were taken during the year. In general, there is little change in the percentage of notified concentrations resulting in a prohibition decision, averaging around 1.25 % (including Phase II withdrawals), as the chart below indicates.

Chart 1 – Prohibitions and Phase II withdrawals, 1997-2006

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Notifications	168	224	276	330	335	277	211	247	313	356	2737
Prohibitions	1	2	1	2	5	0	0	1	0	0	12
Phase II withdrawals	0	4	5	5	4	1	0	2	3	2	26
Regulatory risk	0.6 %	2.7 %	2.2 %	2.1 %	2.6 %	0.4 %	0.0 %	1.2 %	1.0 %	0.6 %	1.4 %

2.2. Applying the new substantive test

68. The Commission has applied the new test introduced in Article 2(2) and (3) of the EU Merger Regulation in 2004, in a number of cases in order to verify whether the concentration would give rise to "non-coordinated" (or "unilateral") effects. In the cases *Linde/BOC*³⁶ and *T-Mobile Austria/tele.ring*³⁷, the Commission found that the merger would significantly impede competition although the merged entity would not become the market leader in the relevant market.

2.2.1. *T-Mobile Austria/tele.ring*

69. On 26 April the Commission adopted a conditional clearance decision in the case *T-Mobile Austria/tele.ring* after Phase II proceedings. The case focused on the Austrian retail market for the provision of mobile telephony services to end customers. After the merger, the combined *T-Mobile/tele.ring* would be second in the market, with a market share of 30-40 %, behind the market leader *Mobilkom* with a market share of 35-45 %, and ahead of the third player *ONE* with a share of 15-25 % as well as the latest entrant *H3G*, a 3G player only, with a share below 5 %.

70. For the competitive assessment, the Commission focused on the analysis of non-coordinated effects and assessed *tele.ring's* past competitive impact in the market on the basis of three elements: (1) market share, (2) switching rates and (3) pricing behaviour. The Commission concluded from the assessment of *tele.ring's* past competitive behaviour that, during the period 2002 to 2005, *tele.ring* was the most

invest/EMO-EKOM Commission decision, 18.8.2006, Case COMP/M.4215 *Glatfelter/Crompton assets* Commission decision, 20.12.2006.

³⁵ Case COMP/M.3868 *DONG/Elsam/Energi E2* Commission decision, 14.3.2006, Case COMP/M.3916 *T-Mobile Austria/tele.ring* Commission decision, 26.4.2006, Case COMP/M.4000 *Inco/Falconbridge* Commission decision, 4.7.2006, Case COMP/M.3796 *Omya/J. M. Huber PCC* Commission decision, 19.7.2006, Case COMP/M.4180 *Gaz de France/Suez* Commission decision, 14.11.2006, Case COMP/M.4187 *Metso/Aker Kvaerner* Commission decision, 12.12.2006.

³⁶ Case COMP/M.4141 *Linde/BOC* Commission decision, 6.6.2006.

³⁷ Case COMP/M.3916 *T-Mobile Austria/tele.ring* Commission decision, 26.4.2006.

active player in the market, exerted considerable competitive pressure in particular on T-Mobile and Mobilkom, and played a crucial role in restricting their pricing behaviour. The analysis therefore suggested that tele.ring performed the role of a maverick in the market. This was in line with the Commission's findings as to the incentives of mobile telephony operators. As tele.ring was a smaller network operator, it had the incentive to attract new customers by pricing aggressively in order to use the capacity of its network as fully as possible via a large customer base. The Commission concluded that, due to the elimination of the maverick in the market, the transaction would be likely to produce non-coordinated effects and significantly impede effective competition.

71. It was possible for the Commission to clear the case as the parties proposed remedies that would enable H3G to acquire the essential parts of tele.ring's network infrastructure and consequently to build up a country-wide network and quickly become a full network operator. As H3G and tele.ring have similar incentives to compete, the Commission concluded that the significant impediment to effective competition would be prevented by the remedies.

2.2.2. *Linde/BOC*

72. On 6 June the Commission approved, subject to conditions, the acquisition by Linde of BOC after a first phase procedure. The Commission found that the merger would have led to non-coordinated effects in the worldwide wholesale market for helium.
73. In this market, Air Products, Praxair and BOC traditionally had relatively symmetric leading positions, with a market share of between 25 % and 40 % each. Air Liquide is a smaller player with an estimated helium wholesale market share of below 10 % on a global scale. Capacity shares based on access to helium sources lead to a similar market structure, which has shown significant stability in the past due to the difficulties in getting access to helium sources. Linde had recently acquired its own access to helium sources and thereby entered the helium wholesale market. The market investigation confirmed that Linde had already started and was expected to continue to exert considerable competitive pressure in the helium wholesale market with the new quantities acquired.
74. The Commission considered that Linde's incentives to compete on this market would decrease post-merger because Linde would then be part of the group of three established leading companies and no longer an aggressive entrant competing to ensure its position on the market and gain market share. The Commission therefore concluded that the elimination of Linde as an aggressive new entrant was likely to lead to non-coordinated effects and a subsequent increase in prices on the helium wholesale market.
75. The case was cleared because the parties proposed sufficient remedies consisting of the divestiture of a number of helium contracts and related assets and customer contracts. With the remedy, the Commission concluded that Linde's role in the market would be taken over by another undertaking.

2.3. Assessing efficiencies

76. In three merger control decisions taken in 2006, the Commission gave careful consideration to substantiated claims that efficiencies would be likely to result from the notified transactions. The Commission assessed the extent to which these efficiencies would impact on an overall appraisal of the competitive effects of the transactions in question, in line with the approach set out in the Horizontal Merger Guidelines (paragraphs 76-88)³⁸.
77. In *Korsnas/AD Cartonboard*³⁹, the Commission cleared a merger of the second and third-largest producers of liquid packaging board in the EEA. Although the resulting entity would be the second-largest player in the market behind the market leader Stora/Enso, the Commission concluded, on the basis of a number of considerations, that the merger would be unlikely to give rise to non-coordinated effects: the merging parties were not each other's closest competitors; liquid packaging board production is not capacity constrained, as producers of other types of packaging board can easily re-configure their machines to produce the product; customers, notably Tetra-Pak, enjoy considerable buying power; there is growing competition from outside the EEA; and the transaction was likely to generate merger-specific efficiencies that would probably be passed on to consumers. The merging parties forecast substantial synergies - savings in input, production, R&D and personnel costs; these were quantified and supported by a detailed report prepared for the Korsnas board. A term sheet agreement had also been drawn up between Korsnas and Tetra-Pak passing on many of the efficiencies to the merged entity's main customer. Moreover, there was a consensus among market participants that the merger would result in efficiencies, and most felt that these would enable the merged entity to compete better with Stora/Enso.
78. However, the Commission noted the complexity involved in fully assessing the likely impact of efficiencies, pointing out that "the submission by the parties raises a lot of issues, which cannot be fully assessed within the context of a first phase investigation". The Commission concluded that it was "realistic to assume that the allocation of production among the increased portfolio of machines will indeed allow the merged entity to increase overall production on the machines", and that "in light of the ... term sheet agreement with Tetra Pak and the general absence of concern about the transaction among customers, the Commission considers that the parties have sufficiently established that this category of efficiencies is likely to occur and be passed on to consumers. These efficiencies are thus likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, and therefore strengthen the conclusion that the proposed transaction will not significantly impede effective competition as a result of non-coordinated effects."
79. In *Inco/Falconbridge*⁴⁰, in spite of the very significant market position the merged entity would enjoy in a number of nickel and cobalt markets post-merger, the merging parties claimed that any possible adverse impact on competition would be

³⁸ Guidelines on the assessment of horizontal mergers under Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5-18.

³⁹ Case COMP/M.4057 *Korsnäs/Assidomän Cartonboard* Commission decision, 12.5.2006.

⁴⁰ Case COMP/M.4000 *Inco/Falconbridge* Commission decision, 4.7.2006.

offset by the substantial efficiencies resulting from the transaction. The proposed merger was between two mining companies with assets based in close proximity (in Sudbury Basin, Canada) and it was claimed that integration of the parties' mines, mills, smelters and refineries would allow for optimisation of the capabilities of these assets, thereby increasing production and lowering costs on a sustainable basis over the longer term. The Commission assessed these claims in a Phase II investigation and found that they were "quantified and well-supported by several studies ... and ... likely to effectively materialise". However, the Commission concluded that "the parties did not demonstrate to the requisite standards that the efficiencies could not have been achieved by other means and would directly benefit end customers in the markets where competition concerns have been identified so as to offset the identified competition concerns".

80. As regards the question of whether the efficiencies could have been achieved by other means, the parties claimed that they were merger-specific and that other alternatives were not realistic. However, the Commission noted that joint ventures confined to a pooling of the parties' production resources (where the bulk of the claimed efficiencies would be realised) would have been a viable alternative, pointing out that such ventures are not unknown in the industry, and that such a venture "would allow the parties to capture much of the potential for synergies while being a less anti-competitive outcome than a full merger between Inco and Falconbridge". As regards the question whether the benefit of the efficiencies would be passed on to end consumers, the Commission pointed out that the efficiencies would be spread over all of the nickel and cobalt production of the merging parties, and not just in the relevant markets where competition concerns were identified. Indeed, given the very considerable market power which the merged entity would enjoy post-merger (a near-monopoly position in some markets), the Commission concluded that it was unlikely that the merged entity would have "sufficient incentives to pass on these efficiency gains to the relevant end customers due to the characteristics of the three relevant markets where competition concerns arise". Nevertheless, the Commission cleared the transaction subject to the condition that the merging parties divest Falconbridge's sole nickel refinery and related assets.
81. In *Metso/Aker Kvaerner*⁴¹, a merger between the two leading players in the highly concentrated market for pulp mill equipment, the Commission's market investigation showed that the transaction might substantially reduce competition in those markets for pulp mill equipment in which both companies are active, namely equipment for the so-called "cooking", "brown-stock washing", "oxygen delignification" and "bleaching" stages of pulp production. The Commission's in-depth investigation has not only carefully analysed the structure of the bidding markets affected and their development over time (*inter alia* by way of a detailed tender analysis), but also assessed to what extent possible anti-competitive effects might be outweighed by potential positive effects of the merger, notably the parties' ability to offer a larger product portfolio. Indeed, some customers indicated that the merger might to a certain extent be beneficial for their business, since the merging parties' larger portfolio of pulp mill equipment would facilitate the purchase of "packages" of more than one process stage from one single supplier. Buying packages of pulp mill equipment would help customers to save "interface costs" which could result from

⁴¹ Case COMP/M.4187 *Metso/Aker Kvaerner* Commission decision, 12.12.2006.

the need to adjust the various process stages supplied by different suppliers. Before the merger only the parties' main competitor, Andritz, was able to supply an almost complete pulp mill.

82. However, the in-depth investigation has shown that most customers do not buy a "full mill" from one supplier and are not likely to do so in future. They indicated that they prefer combining smaller or larger packages of different process stages from those suppliers whom they regard as particularly qualified for the respective stage. While the enlarged product portfolio the merged entity could offer might therefore mitigate the negative impact of the transaction to some extent, the in-depth investigation confirmed that the merger would nevertheless significantly impede effective competition on the affected pulp mill equipment markets in the EEA. The Commission ultimately found that the remedies package offered by Metso removed all overlaps between Metso's and Kvaerner's activities in the supply of pulp mill equipment and that the divestiture offered by Metso enabled the purchaser, GL&V, to fully replace the competition lost due to the disappearance of Kvaerner as an independent supplier. Therefore, the Commission concluded that in the light of the commitments, the merger will not significantly impede effective competition in the EEA or any substantial part of it.

3. SELECTED COURT CASES

83. The Community Courts delivered several judgments in the area of merger control. Those with the most important implications for the application of the merger control rules are summarised below.

3.1. Jurisdiction

84. With regard to jurisdictional issues under the Merger Regulation, the judgments of the CFI in the cases *Cementbouw v Commission* and *Endesa v Commission* are relevant.

3.1.1. Cementbouw v Commission

85. The judgment in the *Cementbouw case*⁴², delivered on 23 February, dismissed an action for annulment against the Commission's conditional clearance decision of 26 November 2002, by which the Commission had cleared the concentration consisting of Haniel and Cementbouw acquiring joint control of the Dutch undertaking CVK and its 11 member undertakings.
86. As to jurisdiction, the key question was whether the acquisition of joint control by Haniel and Cementbouw over CVK by purchase of shares and the simultaneous acquisition of control by CVK over its 11 member undertakings by agreement constituted a single concentration, although consisting of different legal transactions. The CFI pointed out that, for an acquisition of control, it makes no difference whether control is acquired in one, two or more stages by means of one, two or more transactions, provided that the end result constitutes a single concentration. This requires the Commission to identify the economic reality underlying the transactions

⁴² Case T-282/02 *Cementbouw v Commission* (not yet reported), judgment of 23.2.2006.

by examining whether each transaction constitutes only an element of a more complex operation, without which it would not have been concluded by the parties. The CFI concludes that a single concentration may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. In applying these principles to the case at issue, the CFI held that the fact that a number of transactions are concluded simultaneously does not necessarily prove conclusively that they are interdependent, but it may be a significant factor to show that the transactions are interdependent in the view of the parties. The decisive point for the CFI was that two transactions were interdependent according to the economic logic and purpose pursued by the parties.

87. These considerations are in line with recital 20 of the Merger Regulation 139/2004. The recital explains that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition.

3.1.2. *Endesa v Commission*

88. The judgment of the CFI in the *Endesa* case⁴³, delivered on 14 July, confirmed the Commission decision of 15 November 2005, declaring the lack of Community dimension of the proposed acquisition of control by Gas Natural of Endesa.

89. The judgment firstly clarifies the burden of proof regarding complaints by third parties concerning the Commission's competence under the Merger Regulation. The CFI explains that, in principle, the Commission is not obliged to demonstrate that it is not competent for a proposed concentration which has not been notified to the Commission. If a complaint has been lodged by a third party in this respect, it is up to the complainant to demonstrate that the complaint is well-founded.

90. Secondly the judgment clarifies essential aspects for the calculation of turnover. The CFI emphasises in this regard that, in principle, the turnover should be calculated on the basis of the audited accounts of the undertakings concerned of the preceding year. Those accounts have to be audited in accordance with the accounting principles legally applicable at the time. A subsequent change of the accounting rules (applicable to subsequent years) does not lead to a different conclusion, even if it enters into force before the notification. Rather, for the purposes of calculating turnover under the Merger Regulation, the accounts of the preceding year are relevant, as audited according to the then applicable accounting principles. Given the requirements of legal certainty and speed, which are predominant in merger control proceedings, the audited accounts may be adapted or the Commission may use non-audited accounts only in exceptional circumstances. Those requirements make sure that undertakings as well as competition authorities can rely on predictable and immediately accessible criteria. Such exceptional circumstances exist where adaptations of the accounts are required to take into account important and permanent changes in the economic situation of the undertakings concerned, such as

⁴³ Case T-417/05 *Endesa v Commission* (not yet reported), judgment of 14.7.2006.

acquisitions or divestitures, and where the adaptations are therefore necessary to better reflect the economic situation of the undertakings concerned.

3.2. Standard of remedies

3.2.1. *easyJet v Commission*⁴⁴

91. By decision of 11 February 2004, the Commission authorised the concentration between Air France and KLM subject to conditions, at the end of phase 1 under the EU Merger Regulation (Case COMP/M.3280). The Commission identified serious doubts on 14 "point-to-point" markets within the EEA and certain "long-haul" routes, which were not at issue in this appeal. The Commission accepted commitments by the merging parties, which in particular concerned the release of slots for certain daily frequencies at the more congested airports on these routes, accompanied by a series of flanking measures to make the routes more attractive to new entrants.
92. easyJet Airline Co. Ltd (easyJet), a low-cost airline, sought annulment of that decision before the CFI.
93. The CFI rejected easyJet's pleas in their entirety. First, the CFI found that the market definition adopted by the Commission is the correct one failing evidence to the contrary by easyJet. It further found that easyJet had failed to demonstrate to the requisite legal standard that the Commission had committed a manifest error of assessment by not taking into account the markets in which there is no overlap between the operations of Air France and those of KLM, because easyJet did not clearly identify them. Second, the CFI found that easyJet had not shown that the Commission had committed a manifest error of assessment in failing to analyse the strengthening of the merged entity's position on the market for the purchase of commercial airport services at its hub airports or that it would wield undue influence on the administrative bodies responsible for slot allocation. Third, the CFI upheld the Commission's finding that the Charles-de-Gaulle and Paris-Orly airports are substitutable as they are located in the same catchment area.
94. The CFI held further that there was insufficient evidence that, in the absence of a merger, KLM would have had an incentive to develop a series of routes out of Paris and hence be the closest potential competitor to Air France for services commencing in France.
95. Finally, the CFI found that there was a lack of evidence that the commitments given were not adequate to dispel the serious doubts identified by the Commission in its decision. In particular, it found that it was not necessary to require the divestiture of "a viable business", as slot access was the chief barrier to entry. It also found that the Commission was entitled to rely, at the time of its decision, on the expression of "concrete interest" by certain airlines in a number of routes, and it was therefore not necessary to require an "up-front buyer" at the time.

⁴⁴ Case T-177/04 *easyJet v Commission* (not yet reported), judgment of 4.7.2006.

C – STATE AID CONTROL

1. LEGISLATIVE, INTERPRETATIVE AND PROCEDURAL RULES

1.1. State aid reform – Modernising the current framework

96. In 2005, the Commission launched its State Aid Action Plan (SAAP), a comprehensive reform programme that aims to transform State aid into an effective EU policy tool for growth and jobs. There are four guiding principles underpinning the reform programme: less and better targeted State aid; greater emphasis on economic analysis; more effective procedures, including better enforcement, higher predictability and enhanced transparency; and a shared responsibility between the Commission and the Member States. The reform programme can be seen as part of the Commission's strategy to boost growth and jobs.
97. The consultation process showed clear support for these principles and they were at the heart of the policy developments in 2006. First, the reform is guided by the objective set by the European Council: less and better targeted aid. The idea is to concentrate aid where it adds greatest value, namely where it contributes to social or regional cohesion and where it makes up for market failures such as in innovation, risk capital, and research and development. In this context, the Commission has only a supporting role to play. The design of State aid measures and allocation of national budgets is clearly the responsibility of Member States. However, through better rules and scrutiny, the Commission has also tried to contribute to this objective, for example by focusing regional aid more closely on regions most in need, and authorising aid measures that better tackle the market failures. Aid in favour of SMEs, R&D, innovation and risk capital has begun to benefit from new and better targeted rules which, in turn, should support a re-directing of State aid.
98. In addition, the Commission is improving its scrutiny. On the one hand, the Commission is reducing the need to notify cases that are not problematic for competition and trade while, on the other, it is intensifying its analysis of cases that at first sight seem more distortive, through more comprehensive economic assessments.
99. Although it is too early to measure the net impact of these improvements, the expectation is that this will reinforce a general trend. The most recent State aid Scoreboard⁴⁵ shows further progress in re-directing aid towards horizontal objectives, although the underlying trend in the overall volume of aid remains fairly stable.
100. State aid reform has been guided by the idea of a refined economic approach. Assessing the compatibility of State aid is fundamentally about balancing the negative effects of aid on competition with its positive effects in terms of common interest. Economics can be used to increase transparency in the process and to better assess and evaluate these positive and negative effects, not only to design State aid rules but also to decide on specific cases. The Commission has now established a

⁴⁵ COM(2006) 761 final, 11.12.2006, State Aid Scoreboard, autumn 2006 update.

clear general framework, with a methodology enshrined in the so-called 'balancing test'. Furthermore, as is clear from the new rules on risk capital and R&D&I, the refined economic approach is now a reality and is becoming a cornerstone of the Commission's State aid policy.

101. Regarding enforcement, the Commission is now consistently pursuing Member States which fail to comply with State aid law and has brought a number of them to Court. The Commission is also actively pursuing the so-called Deggendorf jurisprudence, which essentially provides that a Member State cannot grant new aid to a company unless it has recovered from that company all remaining illegal and incompatible aid. As a result, more aid is being recovered by Member States.
102. In 2006, the Commission delivered on a number of the reforms announced in the SAAP. In July, new risk capital guidelines for SMEs were adopted, increasing the safe harbours and implementing the refined economic approach. In October, the Commission adopted a block exemption Regulation for regional investment aid. A new framework on R&D&I was adopted in November, with new provisions to support innovation. The new *de minimis* Regulation was adopted in December, at a level of EUR 200 000 over a three-year period.

1.2. Simplifying the approval of regional aid - new block exemption Regulation

103. The Commission adopted new Regional Aid Guidelines (RAG) for the period 2007-2013 in December 2005⁴⁶. All Member States accepted the Commission proposals for appropriate measures⁴⁷ to apply the new guidelines, although in the case of Germany only after the opening of the formal investigation procedure⁴⁸. In practice, this means that all regional aid granted from 1 January 2007 complies with the new RAG 2007-2013.
104. In order to implement the new RAG, the Commission approves a regional aid map for each Member State for the period 2007-2013, which identifies the disadvantaged regions eligible for aid under Article 87(3)(a) or (c) and the maximum aid intensities allowed therein. In 2006, regional aid maps were approved for 18 Member States⁴⁹.
105. Moreover, in October the Commission adopted a block exemption Regulation for regional investment aid⁵⁰. This means that Member States no longer have to notify regional investment aid schemes to the Commission if those schemes comply with the new RAG and the approved map for 2007-2013. Ad hoc aid granted under certain conditions to top up aid granted under such schemes is also exempted from prior notification. This considerably reduces the administrative burden of notification for Member States.
106. In order to ensure transparency and effective monitoring, the Regulation only block exempts transparent forms of regional investment aid, meaning aid for which it is

⁴⁶ OJ C 54, 4.3.2006, p. 13. See also Annual Competition Report 2005, points 404-409.

⁴⁷ OJ C 153, 1.7.2006, p. 13.

⁴⁸ Case C 25/2006, OJ C 320, 28.12.2006, p. 16.

⁴⁹ http://ec.europa.eu/comm/competition/state_aid/regional_aid/regional_aid.html

⁵⁰ Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29).

possible to calculate precisely the aid intensity as a percentage of the investment costs *ex ante* without the need for a risk assessment. Regional aid schemes involving public shareholdings, risk capital and state guarantees are presumed not to fulfil this criterion and thus remain subject to prior notification. However, as regards state guarantees, the Regulation allows Member States to notify the methodology by which they propose to calculate the aid intensity of state guarantees. Once the Commission has approved this methodology, the Member States are able to apply the Regulation also for regional guarantee schemes. In view of the potentially higher risk of serious distortions of competition, all aid for very large investment projects must continue to be individually notified to the Commission.

1.3. Facilitating the use of State aid to boost private-sector R&D&I projects - New framework for Research, Development and Innovation

107. On 22 November, the Commission adopted the new State aid framework for Research, Development and Innovation (R&D&I)⁵¹, which entered into force on 1 January 2007. The Commission has proposed that Member States adapt their existing aid programmes to the new rules within one year.
108. It is widely accepted that EU companies must invest more in R&D&I if they are to compete globally. While State aid can only be a complementary instrument to boost R&D&I, the objective of the framework is to help Member States channel a larger share of their total State aid budgets towards R&D&I and to help them target R&D&I State aid on the best projects, on the basis of economic analysis, so that distortions of competition and trade are minimised and public spending efficiency is maximised.
109. The new framework for R&D&I is based on the refined economic approach developed in the SAAP. Whereas the 1996 framework was limited to aid for R&D, the new one also covers aid for innovation projects. It provides that a State aid measure for R&D&I will be authorised on the basis of a three-part test:
- the aid must address a well-defined market failure;
 - the aid must be well targeted: State aid must be an appropriate instrument, the aid measure must have an incentive effect and must be proportionate to the problem tackled;
 - the distortions of competition and trade resulting from the aid measure must be limited, so that, on balance, it can be declared compatible.
110. The framework outlines the main market failures hampering R&D and innovation: knowledge spillover, imperfect and asymmetric information, coordination and network failures. It then gives guidance on various types of State aid measures that can address these market failures without excessively distorting competition and trade. This includes a series of new measures on innovation: aid for young innovative enterprises; aid for process and organisational innovation in services; aid for

⁵¹ OJ C 323, 30.12.2006, p. 1.

innovation advisory services and support services; aid for the loan of highly qualified personnel for SMEs; aid for innovation clusters.

111. While the measures on innovation are new, the measures for R&D are a continuation of the previous framework, the major changes being modernisation of the definitions of R&D&I categories (including enlargement of the scope of what is now called experimental development), simplification of the bonus system (including increase of the bonus for SMEs from 10 to 20 percentage points for small companies and of the bonus for collaboration from 10 to 15 percentage points) and adjustment of the aid intensities.
112. For large aid amounts exceeding the ceiling for individual notification, the framework introduces a detailed assessment method in order to allow for deeper scrutiny of the cases which have the greatest potential to distort competition and trade. Another important feature of the new framework is that it attempts to provide more transparency and legal certainty on the application of the definition of State aid in situations concerning R&D&I, in particular for universities and research organisations as well as for industry when entering into collaboration projects with such entities.

1.4. Assessing risk capital financing for SMEs - new set of risk capital guidelines

113. A set of new risk capital guidelines⁵², in force since 18 August, cover risk capital measures for investment in SMEs in their early (seed, start-up) and expansion stages. The guidelines replace the 2001 Communication on State aid and risk capital.
114. The new guidelines allow Member States to improve the access to finance for SMEs. Without sufficient risk capital, enterprises may never be founded or their growth may be restricted. Given the importance of SMEs in terms of spurring economic growth and creating lasting employment, the guidelines form an important part of the Commission's competitiveness strategy⁵³.
115. One of the main innovations in the guidelines is the introduction of two types of assessment: an ordinary assessment and a detailed assessment. The ordinary assessment applies to cases fulfilling a number of conditions on the basis of which the Commission is confident that, on balance, the effects of the aid measure will be in the common interest. Measures that do not meet these conditions may still be authorised but only after a detailed assessment balancing the positive and negative effects. The distinction between these two types ensures that the assessment will be more proportional to the potential distortion of the measure. For instance, a detailed assessment will be made of measures providing investment amounts above EUR 1.5 million in an SME over a period of 12 months and measures providing finance for the expansion stage of medium-sized enterprises in non-assisted areas.

⁵² OJ C 194, 18.8.2006, p. 2.

⁵³ See Communication "Working together for growth and jobs – A new start for the Lisbon strategy". COM(2005) 24 final, 2.2.2005.

1.5. Evaluating Block Exemption Regulations

116. In December, the Commission adopted an evaluation report⁵⁴ on Council Regulation 994/98 (also known as the Enabling Regulation), which has enabled the Commission to adopt Block Exemption Regulations (BER)⁵⁵ for State aid as well as de minimis regulations. The report, which focuses on the first five years of operation of the BERs, concludes that the experience has been largely successful. By the end of 2006, Member States had been able to take more than 1 600 State aid measures without giving prior notification to the Commission, as well as to support investment and R&D activities of SMEs and boost employment and training. The introduction of the BERs has led to a reduction in the number of notified cases, which should in principle have enabled the Commission to concentrate more resources on the most distortive cases. However, this has been largely offset by an increase in the overall number of State aid cases resulting from the recent enlargement in 2004.
117. The use made of the BERs has varied considerably from one objective to another and from one Member State to another. The take-up rate for aid to SMEs has been relatively high (more than half of all measures). Training accounted for around one quarter, whereas the number of schemes put into effect under the employment BER has been relatively low. Over the period 2001 to 2005, four Member States, Italy, the UK, Germany and Spain, accounted for 75 % of all measures.
118. In December, the Commission decided to extend until 30 June 2008 the period of application of the Regulations on State aid for employment, State aid for SMEs and training aid⁵⁶.

1.6. Exempting small subsidies from the notification obligation – the new de minimis Regulation

119. In December, the Commission adopted a new de minimis Regulation⁵⁷ exempting small subsidies from the obligation to be notified in advance for clearance by the Commission under EC Treaty State aid rules. Under the new Regulation, aid of up to EUR 200 000 granted over any period of three fiscal years will not be considered as State aid. Loan guarantees will also be covered to the extent that the guaranteed part of the loan does not exceed EUR 1.5 million. In order to avoid abuses, forms of aid for which the inherent aid amount cannot be calculated precisely in advance (so-called 'non-transparent' aid) and aid to firms in difficulty have been excluded from the Regulation. The Regulation reflects comments received from a series of public consultations in the course of 2006. The Regulation entered into force on 1 January 2007.

⁵⁴ On the application of Council Regulation (EEC) No 994/98 of 7 May 1998 regarding the application of Articles 87 (ex-Article 92) and 88 (ex-Article 93) of the EC Treaty to certain categories of horizontal State aid.

⁵⁵ "Legislative texts refer to the Group exemption Regulations (GER) but the term Block exemption Regulation (BER) is more commonly used".

⁵⁶ OJ L 368, 23.12.2006, p. 85.

⁵⁷ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (OJ L 379, 28.12.2006).

2. APPLICATION OF THE STATE AID RULES

2.1. Overview

120. State aid control saw a significant increase of workload in case-handling activities, with 921 new cases registered in 2006 (a 36 % increase compared with the previous year). Of these cases, 54 % concern largely the manufacturing and service sectors, 34 % agriculture, 9 % transport and 3 % fisheries.
121. The Commission took 710 final decisions⁵⁸ in 2006, a 12 % increase compared with the previous year. In the vast majority of cases, the Commission approved the measures, concluding that the examined aid was compatible with the State aid rules (91 % of all decisions in 2006) or did not constitute State aid (4 % of all decisions). Where the Commission has doubts whether certain aid measures comply with the rules, it carries out a formal investigation during which third parties and all Member States are invited to provide observations. At the end of this investigation procedure, the Commission either takes a positive, conditional or no aid decision (3 % of all decisions) or finds that the measure does not comply with State aid rules and hence is not compatible with the common market and takes a negative decision (2 % of all decisions).
122. The Commission published two editions of the State aid Scoreboard⁵⁹ in 2006. The autumn 2006 update⁶⁰ looked at the extent to which Member States have responded to the Lisbon targets of less and better-targeted aid, and also included a special focus on aid for rescue and restructuring. The spring 2006 update⁶¹ included a focus on Accessing and Candidate countries.
123. In January, the Commission launched a new electronic newsletter, the "State Aid Weekly e-News"⁶². This newsletter, which is distributed free of charge, sets out the activities of the Commission in the area of State aid, including the latest legislative developments, Commission decisions, news, upcoming events, reports and studies.
124. In May, the Competition DG launched its revamped website for State aid⁶³. The section on *Cases* provides users with information on and, where published, access to every State aid decision taken since 1 January 2000. This includes all block exemption measures that have been submitted to the Commission.

2.2. Applying regional aid rules

125. The main regional aid cases decided in 2006 concern very large investment projects covered by the 2002 multisectoral framework on regional aid for large investment

⁵⁸ Excluding decisions to open the formal investigation procedure, corrigenda, injunctions, proposals for appropriate measures.

⁵⁹ http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.html An online Scoreboard contains electronic versions of all Scoreboards, as well as a set of key indicators and a wide array of statistical tables.

⁶⁰ COM(2006) 761 final, 11.12.2006, State Aid Scoreboard, autumn 2006 update.

⁶¹ COM(2006) 130 final, 27.3.2006, State Aid Scoreboard, spring 2006 update.

⁶² http://ec.europa.eu/comm/competition/state_aid/overview/newsletter.html

⁶³ http://ec.europa.eu/comm/competition/state_aid/overview/index_en.html

projects⁶⁴. The Commission took an important decision concerning a cluster of nine Polish cases revolving around investment for the production of flat screen TV modules by *LG Philips LCD Poland Sp. z o.o.*⁶⁵. It was decided that the nine investments did not constitute a single investment project as these projects were not considered to have been artificially subdivided for the sole purpose of receiving (more) aid. In reaching its decision, the Commission took account, in particular, of the development of similar clusters in Asia, where the State aid rules do not apply.

126. In addition, the Commission approved aid for two German investment projects in the solar (photovoltaic) energy sector, namely *First Solar GmbH*⁶⁶ and *HighSi GmbH*⁶⁷, and investment aid to a Korean firm in Hungary for a new tyre production plant⁶⁸. At the end of 2006, a significant number of cases concerning very large investment projects were still under scrutiny, mainly involving projects planned in Portugal, Poland, Hungary, Slovakia, Czech Republic and the new German Länder.

2.3. Applying the State aid Framework for R&D&I

127. Given the process of approval of the new Framework, 2006 has been a year of transition. The only major scheme approved under the 1996 Framework concerned the French Innovation Agency⁶⁹, for which a budget of EUR 2 billion was allocated.
128. In the assessment of individual cases, prior to approval of the new Framework on R&D&I, the approach introduced by the new Framework has already been partially applied, notably concerning the impact on competition. This has been evident both in the aeronautic cases approved - concerning aid to *Rolls-Royce*⁷⁰ and to *Eurocopter*⁷¹ - and in the first large project notified by the French Agency, called *BioHub*⁷². The BioHub project concerns the development of new production clusters for chemical products produced from organic agricultural products, such as cereals.
129. The Commission expects the number of individual cases to increase in the future, partly because of the impulse given by France through its Agency, with an estimated average of 15 projects per year, but also due to an increase in the size of some R&D projects.

⁶⁴ OJ C 70, 19.3.2002, p. 8.

⁶⁵ Case N 245/2006 *LG Philips LCD Poland Sp. z o.o.* (not yet published), Case N 246/2006 *Ohsung [Dong Seo] Display Poland Sp. z o.o.* (not yet published), Case N 247/2006 *Lucky SMT Sp. z o.o.* (not yet published), Case N 248/2006 *Dong Yang Electronics Sp. z o.o.* (not yet published), Case N 249/2006 *Heesung Electronics Poland Sp. z o.o.* (not yet published), Case N 250/2006 *LG Chem Poland Sp. z o.o.* (not yet published), Case N 251/2006 *LG Innotek Poland Sp. z o.o.* (not yet published), Case N 256/2006 *LG Electronics Wroclaw Sp. z o.o. – House appliances* (not yet published), Case N 257/2006 *LG Electronics Wroclaw Sp. z o.o. – TV sets* (not yet published).

⁶⁶ Case N 17/2006 *First Solar GmbH* (OJ C 259, 27.10.2006, p. 13).

⁶⁷ Case N 409/2006 *HighSi GmbH* (not yet published).

⁶⁸ Case N 34/2006 *Hankook Tire Hungary Ltd* (OJ C 232, 27.9.2006, p. 2).

⁶⁹ N 121/2006 *Soutien de l'Agence de l'innovation industrielle en faveur des programmes mobilisateurs pour l'innovation industrielle* (not yet published).

⁷⁰ N 193/2006 *Large R&D aid to Rolls Royce et al. – Environmentally Friendly Engine (EFE)* (not yet published).

⁷¹ N 186/2006 *Soutien d'Eurocopter pour le développement d'un hélicoptère de transport moyen tonnage EC175* (not yet published).

⁷² N 708/2006 *Soutien de l'Agence de l'innovation industrielle en faveur du programme de R&D BioHub* (not yet published).

2.4. Risk capital cases

130. The Commission applied the detailed assessment for a risk capital measure involving an investment vehicle in the UK (*Investbx*)⁷³. The primary objective of the measure is to create a means for SMEs in the West Midlands region of the UK to raise equity capital. Through the setting up of *Investbx*, local SMEs will have access to a new facility for raising equity finance and to a new kind of equity marketplace based on an electronic auctioning system. The measure is intended to lower the market failure for provision of equity financing between GBP 0.5 million and GBP 2 million. The Commission concluded that the aid measure was not, on balance, contrary to the common interest.
131. The new guidelines provide the possibility, following a detailed assessment, to approve scouting costs. Prior to the entry into force of the new guidelines, the Commission gained some experience in this type of aid, having approved scouting costs in an Italian case⁷⁴. In this case, EUR 100 million of public funding was granted for risk capital funds investing in innovative SMEs in southern Italy, predominantly in their early-stage phases. Under this scheme, support from the State is granted to finance 50 % of the scouting costs, i.e. costs linked to the selection of companies by the funds (such as screening costs, consultancy on the business plan, etc.). The State compensates only part of the costs linked to unsuccessful searches, when funds do not acquire shares of the screened companies. The idea behind the compensation of scouting costs is that it encourages fund managers to scrutinise more SMEs and it increases SMEs' awareness of equity financing.

2.5. Authorising environmental aid

132. Following an increase in the number of notifications in the area of environment and energy saving, the number of Commission decisions continued to increase from 38 in 2004 to 64 in 2006. A large number of measures serve the support of renewable energy production, using different aid instruments for that purpose, mostly investment aid and operating aid in the form of tax reductions or feed-in tariffs. Feed-in tariffs do not necessarily involve state aid. However, in the case of the Austrian feed-in tariff for green electricity, the structure of the financing mechanism (involving a parafiscal levy) led the Commission to decide that the measure constituted state aid⁷⁵.
133. As regards waste management, the Commission continued its practice and assessed recycling management measures in the Czech republic (Programme for support of utilisation of waste)⁷⁶ and the UK (Extension and prolongation of Waste & Resources Action Programme)⁷⁷ on the basis of Article 87(3)(c) directly. Positive decisions

⁷³ C 36/2005 *Investbx* (not yet published).

⁷⁴ N 9/2006 *Risk capital funds in favour of innovative SME located in Mezzogiorno* (OJ C 218, 9.9.2006, p. 9).

⁷⁵ NN162/A/2003 and N317/A/2006, *Austria, support of electricity production from renewable sources under the Green Electricity Act (feed-in tariffs)* (OJ C 221, 14.9.2006, p. 9), NN162/B/2003 and NN317/B/2006, *Austria, support of CHP production under the Green Electricity Act (support tariff)* (OJ C 221, 14.9.2006, p. 9).

⁷⁶ OJ C 202, 25.8.2006, p. 9.

⁷⁷ OJ C 209, 31.8.2006, p. 8.

were taken to allow aid for recycling where the measure went beyond the state of the art and did not relieve the original polluters from a burden they would otherwise have to pay under Community legislation. The Commission intends to include such cases within the environmental aid guidelines in its review of the existing guidelines in 2007.

2.6. Assessing training aid

134. Training aid can contribute to the European common interest by increasing the pool of skilled workers and improving the competitiveness of Community industry. In 2006, there were 57 measures submitted by Member States under the block exemption Regulation for training aid⁷⁸. In addition, the Commission received a number of notifications concerning, in particular, training aid in the car industry⁷⁹. The Commission verified that the aid indeed supports training activities that would not have been undertaken in the absence of aid. Training activities which are normally undertaken by companies on the basis of market incentives alone (such as those relating to the launching of new models) were considered not to be eligible for aid.

2.7. Taxation cases

135. In the field of fiscal aids, the Commission set two important precedents in 2006 which clarify the specificity notion with respect to fiscal aid schemes for multinationals. On 22 March, the Commission proposed appropriate measures to Spain with a view to progressively repealing the existing aid scheme in the form of direct tax incentives in favour of export-related investments by 2010⁸⁰. The relevance of the case stems from the Commission's assessment that a preferential tax regime in favour of outward foreign direct investments is State aid. The Commission concluded that the scheme was State aid favouring foreign investments and improved the trading conditions of its beneficiaries in exporting goods and services from Spain to foreign markets. The case is noteworthy in that the Commission found the aid to be incompatible with the common market because it remitted internal taxes on export in breach of Article 92 EC.
136. Also on 22 March, the Commission proposed appropriate measures to repeal the existing aid schemes in favour of the International Trading Companies and the Companies with Foreign Income in Malta⁸¹. Malta agreed to suppress both schemes by converting them into a refund system unconnected to the nature of the business activities carried out by the Maltese companies distributing the profits.

⁷⁸ Commission Regulation (EC) No 68/2001 of 12 January 2001, as amended by Commission Regulation (EC) No 363/2004 of 25 February 2004 and by Commission Regulation (EC) No 1976/2006 of 20 December 2006, on the application of Articles 87 and 88 of the EC Treaty to training aid.

⁷⁹ Two cases were decided in 2006: C 40/05 *Ford Genk (Belgium)* and N 653/05 – *Webasto (Portugal)*. For three other cases, the Commission had not taken a final decision by the end of 2006.

⁸⁰ Case E22/2004 *Incentives for export related investments*.

⁸¹ Cases E5/2005 and E11/2005.

2.8. Enforcing and monitoring state aid decisions

137. During 2006, the Commission continued its efforts to achieve more effective and immediate execution of recovery decisions. In this context, the number of recovery decisions pending completion continues to decrease. At the end of 2006, there were 60 pending recovery decisions, compared to 75 at the end of 2005. During 2006, 21 pending recovery cases were closed, whilst six new recovery decisions were taken. Of the EUR 8.7 billion of aid to be recovered under decisions adopted since 2000, some EUR 7.2 billion (i.e. 83 % of the total amount) had been effectively recovered by the end of 2006.
138. The Commission continued with systematic administrative follow-up of all pending recovery decisions to ensure their effective implementation. Where the Commission considered that a particular Member State had not taken all the necessary measures available to implement the decision under the legal system of that country, it commenced legal action against the Member State under either Article 88(2) or Article 228(2) of the Treaty. It took such action in five cases involving three different Member States⁸².
139. In June, the results of a study launched by the Competition DG on the enforcement of EU State aid policy at national level were published. The study identifies the strengths and weaknesses of national recovery procedures and examines the direct application of Article 88(3) in the national courts of the EU-15 Member States.
140. In the second half of 2006, the Competition DG launched a first ex-post monitoring exercise on a sample of some 20 measures implemented by the Member States under the block exemption regulations.

3. SELECTED COURT CASES

141. In 2006, the Community Courts handed down several judgments which had clear implications for State aid control in general and for the areas of definition of state aid, procedural issues and recovery in particular. A summary of these judgments is set out below.

3.1. Definition of aid

142. In *Portugal v Commission*⁸³, the ECJ confirmed the Commission's position with regard to the classification as State aid of the income tax rate approved by the regional government of the Azores. The case confirms that in order to identify the reference framework for assessing regional selectivity, it has to be established which is the territorial entity (the State or an infra-State body) that plays a fundamental role in defining the political and economic environment in which undertakings operate. The Court further enumerated three tests to assess whether a decision taken in such circumstances can be regarded as having been adopted in the exercise of sufficiently autonomous powers.

⁸² CR 57/03 *Tremonti Bis*, CR 36/01 *Beaulieu Ter Lembeek*, CR 8/04 *Fiscal incentives for newly listed companies*, CR 13/B/03 *France Telecom Business tax Scheme* and CR 57/02 *Article 44 Septies CGI*.

⁸³ C-88/03 *Portugal v Commission*.

- Institutional autonomy: the infra-State authority must have from the constitutional point of view a political and administrative status separate from the central government;
 - Procedural autonomy: the decision must have been taken without the possibility for the central government to directly intervene with regard to its content;
 - Economic autonomy: the financial consequences of a reduction of the national tax rate in the region must not be offset by aid or subsidies from other regions or central government.
143. It concludes that when an infra-State body is sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate, the selective character of its decisions must be assessed with respect to the factual and legal situation in place within its territory rather than within the Member State.
144. The CFI ruled in the *British Aggregates*⁸⁴ case on the selectivity of environmental taxes. Companies had argued that the exemption of certain types of aggregates from the scope of the UK aggregates levy constituted unlawful State aid. The CFI disagreed and confirmed that a tax levy applicable on virgin aggregates but not on waste aggregates was not selective, as the scope of the levy was justified by the logic and nature of the tax system (namely to promote the environment by encouraging waste recycling).
145. The CFI also provided further guidance in respect of the notion of imputability in *Deutsche Bahn*⁸⁵. No imputability is present when the Member State merely transposes the clear and precise exemption laid down in Directive 92/81 in its national law. In such circumstances, the provision at issue was considered not to be imputable to the German State, as it stemmed in fact from an act of the Community legislature.
146. In *Laboratoires Boiron*⁸⁶, the ECJ confirmed that not only a tax exemption but also the asymmetric imposition of a tax on a specific category of companies (and not on a category of competing companies) can, in certain very specific circumstances, be qualified as State aid.
147. Another adjudicated case, *Wam*⁸⁷, concerned the notion of affectation of trade and distortion of competition in the case of export aid. The affectation of trade does not imply an obligation for the Commission to make an in-depth economic analysis of the market, of the market share, of the market position of the beneficiary and its competitors, of the trade flows between Member States, or of the impact of the aid on prices. However, the notion of affectation of trade should be clearly substantiated. Although the judgment sets out the traditional case law, it seems to apply in practice

⁸⁴ T-210/02 *British Aggregates v Commission*.

⁸⁵ T-351/02 *Deutsche Bahn v Commission*.

⁸⁶ C-526/04 *Laboratoires Boiron v ACOSS*.

⁸⁷ Joined cases T-304/04 and T-316/04 *Italian Republic v Commission*.

a different standard, apparently requiring a demonstration of the real impact on trade. The Commission introduced an appeal against the judgment.

148. *Stadtwerke Schwäbisch Hall etc.*⁸⁸ dealt with the notion of advantage and selectivity in case of tax exemptions and noted that an economic advantage granted through state resources does not automatically amount to State aid if neither the tax exemption scheme nor the detailed rules for its implementation by the authorities grant to undertakings a specific advantage inherent in the notion of State aid. Moreover, the CFI pointed out that it is competent to verify to what extent the definition of aid posed a serious difficulty for the Commission which should have led it to open the formal investigation procedure.

3.2. State responsibility for recovery

149. *Commission v France*⁸⁹ was a major step forward in terms of recovery policy. For the first time in the area of State aid recovery, a Member State has been condemned for failure to execute a Commission recovery decision because of its national legal system and not because of its behaviour. The ECJ ruled that a national law providing for an automatic suspensory effect of actions brought against recovery orders should be left unapplied by the national judges. This would otherwise go against the principle of effectiveness mentioned in Art. 14(3) of the Procedural Regulation.

3.3. Procedural issues

150. *British Aggregates*⁹⁰ restricts the admissibility of actions for annulment of phase one decisions of the Commission. Under the first scenario of seeking to safeguard his procedural rights, an applicant must only prove that he is affected. However, when questioning the actual merit of a Commission decision, the applicant must also prove that he is individually concerned in line with the stricter Plaumann test⁹¹.
151. The *Air One*⁹² judgment seems to adopt a different approach. The Commission argued inter alia that Air One did not have standing, as it had not demonstrated that it was directly and individually concerned by the decision that the Commission failed to adopt, as Air One was not directly in competition. The CFI rejected the argument of the Commission that for all actions against decisions concerning State aid the competitor must demonstrate that its interests have been substantially affected. The CFI held inter alia that: "For the purposes of admissibility, it is sufficient to find that the applicant is a competitor of the recipient of the contested State measures insofar as those two undertakings operate, directly or indirectly, services providing scheduled air transport of passengers from or to Italian airports and, in particular, regional airports".

⁸⁸ T-92/02 *Stadtwerke Schwäbisch Hall GmbH, Stadtwerke Tübingen GmbH, Stadtwerke Uelzen GmbH v Commission*.

⁸⁹ C-232/05 *Commission v France*.

⁹⁰ Case T-210/02 *British Aggregates v Commission*.

⁹¹ For admissibility, see also Case T-88/01 *Sniace SA v Commission*.

⁹² T-395/04 *Air One v Commission*.

152. *Deutsche Bahn AG v Commission*⁹³ indicates that a letter from the Commission to a complainant, after examining the information provided by it, finding that the measure in question does not constitute aid, contains a decision within the meaning of Regulation No 659/1999 and is, therefore, a challengeable act. This judgment seems to imply that, when confronted with a complaint, the Commission can avoid adopting a decision only in the situation envisaged by Art. 20(2) of the Procedural Regulation, i.e. when there are "insufficient grounds for taking a view".
153. *Transalpine Ölleitung*⁹⁴ confirmed the existing case law to the effect that a compatibility decision of the Commission cannot regularise ex post the breach of the notification requirement. In line with the national law and the remedies available thereunder, a national judge may be called upon to order the recovery of unlawful aid from its recipients, even if that aid has subsequently been declared compatible with the common market by the Commission.
154. *Laboratoires Boiron v ACOSS*⁹⁵ states that when an aid is produced by the asymmetrical imposition of the charge upon only one category of undertaking, such undertakings are able to dispute the lawfulness of the charge in the national courts and to seek its repayment. The reimbursement can only be claimed for the parts of the tax which amount to an overcompensation of the wholesale distributors for carrying out public service obligations. The burden of proof for the overcompensation is in principle determined by the domestic legal system. If overcompensation cannot be demonstrated due to a lack of data, the national court is required to use all procedures available to it under national law⁹⁶.
155. In *Le Levant*⁹⁷, the CFI confirms that all beneficiaries need to be identified when the formal investigation procedure is opened (if this is possible at the time), in order for them to have a chance to submit comments (in particular in the context of an unlawful aid, which may lead to recovery).

⁹³ T-351/02 *Deutsche Bahn AG v Commission*.

⁹⁴ C- 368/04 *Transalpine Ölleitung*.

⁹⁵ C-526/04 *Laboratoires Boiron v ACOSS*.

⁹⁶ On questions of tax measures see also Joined Cases C-266/04 to C-270/04, C-276/2004 and C-321/04 to C-325/04 *Nazairdis* (now *Distribution Casino France*).

⁹⁷ T-34/02, *Le Levant 001 v Commission*.

II – Sector Developments

156. This section illustrates how the Commission used a mix of its instruments with the aim of ensuring that competition would not be distorted in selected priority sectors in 2006. It shows how the most effective instruments were applied in combination with each other according to the competition problem identified.

A – ENERGY

1. OVERVIEW OF SECTOR

157. Well functioning energy markets that ensure secure energy supplies at competitive prices are crucial for achieving growth and consumer welfare in the European Union. To achieve this objective the EU decided to open up Europe's gas and electricity markets to competition and to create a single European energy market. However, while progress has been made, the objectives of market opening have not yet been achieved. Significant rises in gas and electricity wholesale prices, persistent complaints about entry barriers and limited opportunities to exercise customer choice led the Commission to open an inquiry into the functioning of the European gas and electricity markets in June 2005. This inquiry, based on Article 17 of Regulation 1/2003, was aimed at assessing the prevailing competitive conditions and establishing the causes of the perceived market malfunctioning.
158. The final report on the sector inquiry, which was finalised at the end of 2006 and adopted by the Commission on 10 January 2007⁹⁸, has provided broad insight into the functioning of gas and electricity markets at all levels of the supply chain. The core competition problems identified can be summarised as follows:
- At the wholesale level, gas and electricity markets remain national in scope, and generally maintain the high level of concentration of the pre-liberalisation period. Incumbents generally control domestic production, imports and key infrastructure. This gives scope for exercising market power.
 - Many markets are characterised by a high degree of vertical integration. Incumbents are often engaged in production, network and supply activities, and current unbundling rules have not effectively prevented integrated incumbents from favouring their own affiliates. The current insufficient level of unbundling of network and supply interests therefore has negative repercussions on market functioning and on incentives to invest in networks. The latter is a particular problem at a time when the EU needs large-scale investment in networks to ensure security of supply.
 - Cross-border sales do not currently impose any significant competitive constraint on incumbents. Incumbents rarely enter other national markets as competitors. Insufficient or unavailable cross-border capacity and different market designs

⁹⁸ COM(2006) 851 final.

hamper market integration. There is a need for enhanced cross-border cooperation and coordination between regulatory authorities and transmission system operators.

- There is a lack of reliable and timely information on the markets. Data relating to network availability, especially for electricity interconnections and transit pipelines, are of particular importance. Moreover, insufficient unbundling creates asymmetries whereby vertically integrated supply affiliates have preferential access to information.
- More effective and transparent price formation is needed in order to deliver the full advantages of market opening to consumers. Many users have limited trust in the price formation mechanisms, while regulated supply tariffs below market prices discourage new entry.
- Competition at the retail level is often limited. The duration of retail contracts for industrial customers and local distribution companies can have a substantial impact on the possibilities for alternative suppliers to successfully enter the market.
- At present, balancing markets tend to favour incumbents and create obstacles for newcomers. The size of the current balancing zones is too small, which leads to increased costs and protects the market power of incumbents.

2. POLICY DEVELOPMENTS

159. The introduction of competition in Europe's gas and electricity markets is an integral part of European energy policy which is directed at achieving three closely related objectives: (i) a competitive and efficient energy sector, (ii) security of supply and (iii) sustainability in terms of climate change commitments and goals. All European consumers, i.e. households, commercial users and industrial users, depend heavily on the secure and reliable provision of energy at competitive prices. Also, achievement of the EU's goal of adequate protection of the environment is of fundamental importance as can be demonstrated by the reduction of greenhouse gases in the light of the Kyoto commitments. The sector inquiry conducted by the Commission therefore has to be viewed in this wider policy context.
160. European energy policy was set out in the Commission's Communication to the 2006 Spring European Council⁹⁹ concerning the renewed Growth and Jobs strategy. That Communication puts the creation of an efficient and integrated energy policy at the heart of the Commission's priorities. This goal was further underlined in the Commission's Green Paper "A European Strategy for Sustainable, Competitive and Secure Energy"¹⁰⁰, which was adopted in March 2006. The final report on the sector inquiry was presented in parallel to the Strategic Energy Review, which included the

⁹⁹ Time to move up a gear – Annual Progress on Growth and Jobs, 25.1.2006.

¹⁰⁰ COM(2006) 105 final, 8.3.2006, SEC(2006) 317.

Communication on "Prospects for the internal gas and electricity market"¹⁰¹ and the follow-up to the Green Paper.

161. It transpires from all these documents that the three policy objectives "competition, security of supply and sustainability" are closely interlinked and complementary. Competitive markets provide the necessary stimulus for investment, which leads to supply security in the most cost-efficient manner. Similarly, the creation of a competitive internal market will allow the EU's energy companies to operate in a market of a larger dimension, which will improve their ability to contribute to security of supply. At the same time, market forces oblige European operators to use the most efficient methods of production, which is beneficial for sustainability. Finally, competitive, cost reflective prices will help encourage energy efficiency, which is a highly effective way not to become overly dependent on external suppliers and which supports the EU's objective of sustainability and security of supply.
162. The sector inquiry and the various market malfunctionings that it has highlighted have been instrumental in developing Commission policies in two important ways. First, the findings have informed the Commission's competition enforcement policy in individual cases. Secondly, by highlighting the current insufficient level of unbundling and cross-border cooperation between regulatory authorities and transmission system operators, an important contribution to energy policy has been made. The sector inquiry and follow-up work was also discussed in the energy sectoral subgroup within the ECN.
163. Enforcement in individual cases can make a significant contribution to creating integrated and competitive energy markets in the EU. In order to maximise the overall enforcement impact, full and combined use of the Commission's powers under antitrust rules (Articles 81, 82 and 86 EC), merger (Regulation 139/2004) and State aid control (Articles 87 and 88 EC) is needed. The Commission's policy in each of these three areas is briefly described in the following sections.

2.1. Antitrust enforcement

164. The Commission is forcefully pursuing infringements of EU antitrust law in the sector wherever the Community interest so requires, in close cooperation with NCAs.
165. During 2006 the Commission carried out a number of own-initiative investigations. It also received and investigated several complaints. The sector inquiry has identified competition concerns at all levels of the electricity and gas supply chains and the overarching enforcement aim is to bring leading cases that address key obstacles to competition along the supply chain. If bottlenecks remain at any level, competitive markets will not develop.
166. The issues that are being investigated and analysed include hoarding of network and storage capacity, i.e. the reservation of more capacity than is actually used, long-term capacity reservations, strategic underinvestment in networks to protect downstream supply interests, blocking of interconnectors to favour domestic consumption, market sharing and long-term contracts between wholesalers/retailers and downstream

¹⁰¹ COM(2006) 851 final, Communication from the Commission, Prospects for the internal gas and electricity market.

customers. The initiatives can thus be grouped under the headings of foreclosure and collusion. It is also worth mentioning that important investigations have been conducted at Member State level. For instance, the Danish Competition Authority has intervened against excessive prices and market manipulation in western Denmark, the German Competition Authority has intervened against long-term gas supply agreements between wholesalers and Stadtwerke, the German municipal utility companies, and the Italian Competition Authority has intervened against failure to expand capacity in order to protect dominance on the downstream supply market.

167. Long-term contracts with customers have also been identified as a competition problem in energy markets outside the gas and electricity sectors. In 2006 the Commission adopted a commitment decision under Article 9 of Regulation 1/2003 concerning the petrol station network of Repsol, a Spanish supplier of motor fuels¹⁰². The commitments offered by Repsol relate to the distribution of motor fuel (petrol and diesel) to service stations. Repsol will allow all service stations with which it has signed long-term supply contracts to terminate these contracts, subject to compensation. The mechanism for calculating the compensation has been designed so as to give a financial incentive to stations to end their long-term contracts. Furthermore, Repsol will not sign any new exclusive supply contract of a duration exceeding five years. Repsol will also refrain from purchasing stations that it does not supply. Finally, Repsol will ensure that service stations in its network have complete freedom to offer discounts on the retail price.

2.2. Merger control

168. In the field of energy mergers, the Commission again adopted a large number of decisions. The most complex cases from a competition point of view were DONG/Elsam/Energi E2¹⁰³ and Gaz de France/Suez¹⁰⁴.
169. The DONG decision of 14 March 2006 cleared, subject to conditions and obligations, the acquisition of the two largest Danish electricity generators, Elsam and Energi E2, and of two local energy distribution companies, Københavns Energi and Frederiksberg Elnet, by the Danish gas incumbent DONG. The Commission's competitive assessment established that the concentration in its notified form would have significantly impeded effective competition on several gas markets in Denmark. In particular, the Commission found that the transaction would have resulted in the removal of actual and potential competition on the gas wholesale and retail markets. Moreover, the concentration would have raised entry barriers on these markets, foreclosed an important segment of the Danish demand for natural gas and strengthened DONG's ability to raise its rivals' costs for storage and flexibility.
170. To address these competition concerns, DONG offered a comprehensive remedies package, including the divestiture of the larger of its two Danish gas storage facilities and the implementation of a six-year gas release programme covering 10 % of the annual Danish gas consumption. On the basis of its past experience and the results of

¹⁰² Commission decision, 12.4.2006 in Case COMP/38.348 *Repsol CPP*.

¹⁰³ Case COMP/M.3868 *DONG/Elsam/Energi E2* Commission decision, 14.3.2006.

¹⁰⁴ Case COMP/M.4180 *Gaz de France/Suez* Commission decision, 14.11.2006.

the market test, the Commission concluded that these remedies would remove the identified competition concerns.

171. By decision of 14 November 2006 the Commission cleared, subject to conditions and obligations, the merger of Gaz de France and Suez. In its notified form, this concentration would have significantly impeded effective competition on a number of French and Belgian gas markets, on several electricity markets in Belgium and on the French market for district heating. On the Belgian gas markets, the proposed transaction would have removed GDF as the strongest competitor of the incumbent Distrigaz. The Commission's investigation established that the competitive pressure exerted by GDF was due to a unique combination of competitive advantages and could not be replicated by any other new entrant. Similarly, the proposed merger would have removed Distrigaz as one of the best placed new entrants on the French gas markets. In addition, the Commission found that high entry barriers, e.g. access to gas and infrastructure, would have further consolidated the dominant position of the parties on the Belgian and French gas markets. On the Belgian electricity and the French district heating markets, the horizontal overlap of Suez' and GDF's activities would have strengthened existing dominant positions.
172. The final and comprehensive remedies package submitted by the parties consists of a number of structural commitments. Most notably, Suez committed to divest Distrigaz, including its French activities, and relinquish control over Fluxys, the Belgian TSO. In turn, GDF committed to divest its shareholding in the Belgian electricity and gas company SPE and in its French district heating subsidiary Cofathec Coriance. These divestiture remedies are supplemented by infrastructure-related commitments, including the creation of a single entry point at Zeebrugge. The Commission carefully assessed the revised remedies in the light of the responses by market operators to an initial remedies package and concluded that the final package would be sufficient to remove all competition concerns in a clear-cut manner.

2.3. State aid control

173. As market opening is a key element in boosting competition within the sector, the general trend in State aid policy consists in applying Community rules with a view to accompanying and strengthening the liberalisation of the sector. In a field which was for a long time characterised by massive State involvement, it is not surprising that a lot remains to be done to phase out State subsidies that block the efficient development of the market.
174. The Commission worked both on upstream and on downstream markets. As regards the former, further efforts were made in 2006 to find a solution to the problems caused by long-term contracts between public network operators and generators in Hungary¹⁰⁵ and Poland¹⁰⁶. Such contracts still foreclose significant parts of the wholesale markets in these two countries. With the cooperation of the two Member States concerned, the Commission hopes to be able to solve this issue in 2007, with a view to making it possible for liberalisation to take place at an accelerated pace.

¹⁰⁵ OJ C 324, 21.12.2005, p. 12.

¹⁰⁶ OJ C 52, 2.3.2006, p. 8.

175. On the downstream side, the Commission analysed several regulated tariff schemes under formal State aid procedures in Italy¹⁰⁷. Certain industrial companies, accounting for a large share of the demand side in their region, benefit from favourable electricity tariffs below the market price. The Commission also started preliminary enquiries on similar schemes in France and Spain.
176. The Commission also analysed the State aid aspects of the reorganisation of nuclear liabilities of the public sector in the United Kingdom¹⁰⁸. It made sure that the polluter pays principle is respected. Consistent application of this principle is necessary to ensure a level playing field between nuclear and other generation technologies in the developing internal market for electricity. Another important area of work entailed analysis of the involvement of three Member States in the financing of the new nuclear power plant in Finland.
177. Increased competition in the energy sector must be accompanied by a greater focus on sustainable development, in order to strengthen the security of energy supply, increase competitiveness and protect the environment. Renewable energy and the EU Emission Trading Scheme (EU ETS) were focal points in 2006.
178. Also in order to attain Kyoto commitments, the EU adopted Directive 2001/77/EC on the promotion of electricity from renewable energy sources, which establishes targets for the share of renewable energy in the total consumption applicable to each Member State. As Member States face difficulties in reaching these targets, they have implemented various support mechanisms for the promotion of renewable energy sources.
179. State aid decisions in the area of renewable energy have sought mainly to verify the necessity of such aid and ensure that public financing covers only the *extra costs* of generation and supply as compared to conventional energy sources. Any financing exceeding these extra costs serves only to grant an unfair advantage to the generators and suppliers. Since the entry into force of the Environmental Aid Guidelines in 2001, the Commission has approved more than 70 support schemes for renewable energy.
180. The EU market for CO₂ emission allowances is based on Directive 2003/87/EC¹⁰⁹ establishing a scheme for greenhouse gas emission trading (ETS Directive) and constitutes the EU's flagship policy to achieve the Kyoto commitments. The starting point for each trading period is the National Allocation Plan (NAP) adopted by each Member State and examined by the Commission. Each NAP determines how many CO₂ emission allowances per trading period will be distributed and the rules by which these rights are allocated to the installations on the Member State's territory. For each Member State, the total quantity of emission allowances must provide sufficient reassurance that it will reach its Kyoto commitment and must in any event not exceed the expected needs of the ETS sector in respect of its emissions.
181. The EU ETS covers over 10 000 installations across the EU, which account for close to half of Europe's emissions of CO₂. These installations include combustion

¹⁰⁷ OJ publications in 2006: OJ C 145, 21.6.2006, p. 8, and OJ C 214, 6.9.2006, p. 5.

¹⁰⁸ OJ L 268, 27.9.2006, p. 37.

¹⁰⁹ OJ L 275, 25.10.2003, p. 32, as amended by Directive 2004/101/EC, OJ L 338, 13.11.2004, p. 18.

installations, oil refineries, coke ovens, iron and steel plants, and factories making cement, glass, lime, brick, ceramics, pulp and paper.

182. Article 10 of the ETS Directive stipulates that in the second trading period (2008-2012) at least 90% of emission allowances must be allocated free of charge and criterion 5 in Annex III to the Directive stipulates that the allocation must not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities. In 2006, the Commission took decisions on the NAPs for the second trading period of 10 Member States, with decisions on the remaining NAPs to be taken in 2007. In a number of cases, following its assessment pursuant to criterion 5, the Commission required the Member States to amend the proposed NAPs, hereby addressing as well potential problems under the state aid rules. The Member States did not notify the NAPs under the State aid rules. Therefore, the Commission has not taken formal State aid decisions.

B – FINANCIAL SERVICES

1. OVERVIEW OF SECTOR

183. The European banking sector has undergone significant growth and diversification over the last two decades. Today it directly provides over three million jobs in the EU. Retail banking – banking services to consumers and small and medium-sized enterprises (SMEs) – remains the most important sub-sector of banking, representing over 50 % of total banking activity in the European Union. The Commission estimates that in 2004 retail banking activity in the EU generated gross income of EUR 250-275 billion, equivalent to approximately 2.5 % of total EU GDP¹¹⁰.
184. A number of indicators such as market fragmentation, price rigidity and customer immobility suggest that competition in the EU retail banking market does not work effectively. On the basis of Regulation 1/2003, the Commission decided on 13 June 2005¹¹¹ to open an inquiry into the retail banking sector, in particular in relation to cross-border competition.
185. The sector inquiry forms part of the wider political context of the Lisbon Agenda for growth and jobs and, more specifically, will help to deliver the objectives set out in the Commission's White Paper *Financial services policy 2005-2010*¹¹², in which the Commission stressed the importance of the close interaction of internal market and competition policies. Likewise, the creation of a more competitive environment between service providers, especially those active in retail markets, was identified as a priority. The sector inquiry into retail banking contributes to this agenda by shedding light on the operation of the market, highlighting possible market failures and identifying where such failures can be tackled through competition law and, where appropriate, other measures.
186. The sector inquiry has already identified a number of symptoms suggesting that competition may not function properly in certain areas of retail banking. Perhaps most striking is the evidence of market fragmentation along national lines, including key retail banking infrastructures such as payment systems and credit registers. Different market structures lead to different market conduct and performance which is reflected, for instance, in a wide variety of profit margins, prices and selling patterns between the Member States. By contrast, the inquiry has found evidence of pronounced convergence of banks' prices and policies within individual Member States.
187. Although there is wide variation in banks' profitability between the Member States, comparative data from the OECD show that the overall profitability of the EU banking sector continues to rise over the long term. This pattern may be explained by a number of factors, including improved efficiency in banks' operations and risk

¹¹⁰ Figures taken from Interim Report II of the sector inquiry into retail banking (see http://ec.europa.eu/comm/competition/sectors/financial_services/overview_en.html).

¹¹¹ Commission decision, 13.6.2005 (OJ C 144, 14.6.2005, p. 13).

¹¹² See MEMO/05/465, 5.12.2005 and Press Release IP/05/1529, 5.12.2005.

management, as well as more effective banking supervision. However, in some Member States the sustained growth in banks' profitability suggests that competition is not sufficiently strong to pass on a significant share of the benefits to banking customers.

188. Market structures and conduct in the payment cards industry raise a range of competition concerns. The degree of concentration among issuers and acquirers, together with evidence of uncompetitive pricing structures, points to insufficient competition across Member States.
189. The sector inquiry has identified a number of factors explaining the symptoms discussed above. The banking industry is characterised by a variety of entry barriers. These barriers may consist of network and standardisation requirements for certain infrastructures, or be of a regulatory or behavioural nature. From the viewpoint of competition policy the latter are of particular concern. Behavioural entry barriers, such as access barriers to payment systems, may result from the abuse of a dominant position – e.g. by a dominant network – or from coordinated behaviour of incumbents to exclude newcomers.

2. POLICY DEVELOPMENTS

190. The two interim reports in the retail banking inquiry were published for consultation on 12 April (card payments) and 17 July (current accounts and related services) respectively¹¹³. The reports were presented to the large audience at a public hearing that took place on 17 July. Non-confidential replies and comments of stakeholders are published on the Competition DG's website¹¹⁴. The final report on retail banking was published on 31 January 2007.
191. In June 2005, together with the decision to launch the sector inquiry into retail banking, the Commission also launched an extensive sector inquiry into business insurance, which continued in 2006. The interim report on business insurance was published on 24 January 2007, and the final report is scheduled for September 2007. As with the retail banking inquiry, the business insurance inquiry addresses a broad spectrum of issues. The data have been collected from a vast array of market players, including insurance companies, insurance intermediaries, reinsurers and insurance associations.
192. In the framework of cooperation within the ECN, separate sectoral subgroups are dedicated to banking, securities and insurance. For example, in 2006, the banking subgroup addressed national experiences in relation to interchange fee arrangements.

2.1. Merger control

193. In 2006, the Commission assessed and cleared a large number of concentrations in the area of financial services. The only case leading to competition concerns related to the acquisition of the German Gerling Versicherungsgruppe by Talanx

¹¹³ See http://ec.europa.eu/comm/competition/sectors/financial_services/overview_en.html

¹¹⁴ http://ec.europa.eu/comm/competition/sectors/financial_services/overview_en.html

Aktiengesellschaft (Talanx), a German holding company¹¹⁵. In most segments of life and non-life insurance, the proposed transaction did not raise competition concerns because the merged entity would face competition from several strong insurance companies. However, the Commission's extensive market investigation revealed that the proposed acquisition could have significantly reduced competition as regards liability insurance for pharmaceutical companies in Germany. Both Talanx, via its subsidiary HDI, and Gerling had a very strong position in providing working cover and in acting as leading insurer in liability programmes of German pharmaceutical companies. To address these concerns, Talanx committed to divest the pharmaceutical liability business of its subsidiary HDI as far as concerns insurance for German companies outside the obligatory product liability insurance. This will allow other competitors to establish themselves in the market for liability insurance for pharmaceutical companies in Germany.

2.2. State aid

194. Financial services are now largely liberalised in the EU and direct State interventions have become less frequent in this sector. However, State interventions have not disappeared entirely and, where still present, take more complex forms, such as fiscal advantages or guarantees. The role of the Commission is to ensure, through its State aid control, a level playing field in financial services, especially for new entrants and foreign banks. In the reporting period the Commission investigated a large number of cases in this area.
195. In *Crédit Mutuel*¹¹⁶, the Commission investigated the possible existence of an overcompensation to accomplish a service of general economic interest (i.e. financing of social housing). Following the annulment of a previous decision by the CFI¹¹⁷, the Commission was assessing whether or not the brokerage fee paid by Caisse des Dépôts et Consignations to Crédit Mutuel for the distribution of livret bleu overcompensated its costs. In a separate procedure under Article 86 EC, the Commission sent France a letter of formal notice¹¹⁸ indicating its doubts as to the compatibility with internal market rules (freedom of establishment and freedom to provide services) of the special rights granted to Crédit Mutuel, La Poste and Caisses d'Épargne for the distribution of two popular tax-free savings products, Livrets A and Bleu.
196. On 19 July, the Commission took a final negative decision demanding the repeal of Luxembourg's existing fiscal aid scheme in favour of the so-called "1929 exempt, milliardaire and financial holdings"¹¹⁹. The scheme essentially exempted certain companies registered in Luxembourg from direct taxation. The Commission concluded that this was incompatible with the common market as hidden subsidy to holdings providing certain financial services to related and unrelated business entities within a multinational group.

¹¹⁵ Case COMP/M.4055 Talanx/Gerling, Commission press release IP/06/461, 5.4.2006.

¹¹⁶ Case C-88/1997, OJ C 210, 1.9.2006, p. 12.

¹¹⁷ Case T-93/02 *Crédit Mutuel* [2005] ECR II-143.

¹¹⁸ Case 2006/2249, Press Release IP/06/746.

¹¹⁹ OJ L 366, 21.12.2006, p. 47.

C – ELECTRONIC COMMUNICATIONS

1. OVERVIEW OF SECTOR

197. The electronic communications sector in the EU is characterised by rapid technological change and strong revenue growth. Broadband markets develop very dynamically due to technological progress and new business models, increasing broadband coverage and take-up by users. New, wireless networks are mushrooming in many European cities. Mobile services continue to grow, particularly in new Member States. Traditional fixed voice services are experiencing a gradual decline in revenue due to falling prices and substitution by alternative technological platforms such as voice over broadband.
198. The vast majority of providers of electronic communication services operate within the confines of the EU regulatory framework for electronic communications networks and services¹²⁰, which is designed to facilitate access to legacy infrastructure, foster investment in alternative network infrastructure and bring about choice and lower prices for consumers.
199. The EU regulatory framework in its current form recommends 18 specific product and services markets both at wholesale and at retail level for ex ante regulation. It obliges national regulators to conduct a review of these markets and determine whether a particular market should be regulated ex ante. In their analysis NRAs (national regulatory authorities) are to follow an economic approach where regulation is based on competition law principles. Where a regulator finds that one or more undertakings have significant market power (SMP)¹²¹, it must impose appropriate regulation. Regulation must be withdrawn where no undertaking is found to have SMP. The market review process is subject to scrutiny by the Commission under the Community consultation mechanism (Article 7 of the Framework Directive). Using this mechanism, the Commission assessed 244 notifications from NRAs and adopted 156 decisions in 2006. The Commission did not require any NRA to withdraw the draft measure. The draft measure was withdrawn by the NRA on its own motion in one case.

¹²⁰ 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).

¹²¹ The regulatory framework has aligned the definition of SMP with the Court of Justice's definition of dominance within the meaning of Article 82 EC.

200. A review in early 2006 of the Community consultation mechanism showed that most wholesale markets still exhibit the characteristics of enduring bottlenecks while a number of retail markets have already become effectively competitive in several Member States¹²². In June 2006 the Commission published a revised text of the list of markets susceptible to ex ante regulation, envisaging the number of markets on that list be significantly reduced¹²³.
201. Alongside sector-specific regulation the Commission applies EU competition rules in the sector. This is of particular importance in markets (i) not subject to ex ante regulation, (ii) where existing regulation is rolled back and (iii) where there is a risk of markets being re-monopolised.

2. POLICY DEVELOPMENTS

2.1. Review of the regulatory framework

202. The principal policy objectives in the electronic communications sector from a competition perspective are to ensure consistent regulation across the EU on the basis of competition law principles, to limit regulation to markets where there is a persistent market failure and to roll back regulation and rely on competition policy instruments only where an effectively competitive outcome would no longer depend on ex ante regulatory intervention.
203. In 2005 the Commission started to review the list of markets susceptible to ex ante regulation. In the draft revised Recommendation, which was subject to public consultation, the Commission proposes to deregulate retail calls markets and the retail market for low-capacity leased lines. In retail calls markets the Commission observes new market entry and a tendency towards effective competition on the basis of the wholesale regulation in place (carrier (pre-) selection, wholesale line rental and bitstream access enabling voice-over-broadband services). In general, the Commission is of the view that where wholesale regulation is efficient, the conditions at retail level should allow effective competition. Where wholesale regulation is less efficient, the risk of price-squeezing behaviour could be limited by the effective application of ex post competition law. On retail access markets, however, where entry barriers are still high due to the necessary investments in local loop unbundling which require considerable resources and time, the Commission proposes to retain ex ante regulation.

¹²² See also the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committees of the Regions on Market Reviews under the EU regulatory framework consolidating the internal market for electronic communications, available at: http://europa.eu.int/information_society/policy/ecommm/doc/article_7/comm_pdf_com_2006_0028_f_en_acte.pdf

¹²³ Commission staff working document, public consultation on a draft Commission recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, available at: http://europa.eu.int/information_society/policy/ecommm/doc/info_centre/public_consult/review/recommendation_final.pdf

2.2. Broadband markets

204. The market for wholesale broadband access provides an interesting example of the simultaneous application of ex ante sector-specific regulation and ex post competition law. On this market the majority of national regulators have imposed an obligation on the incumbent operator to offer so-called bitstream access. Bitstream access allows alternative operators to offer high-speed internet access to end customers using network elements of the incumbent operator. The growth of broadband penetration appears particularly strong in Member States which have successfully implemented an access regime and less so in countries where bitstream access is not yet available.
205. In Spain, however, the Commission has preliminarily found that, despite ex ante regulation being in place, the incumbent operator Telefónica leaves new entrants an insufficient margin to compete for retail subscribers. In February the Commission therefore sent a statement of objections preliminarily finding that Telefónica had been abusing its dominant position on the broadband access markets by way of a margin squeeze infringing Article 82 EC. Telefónica's behaviour was considered abusive because it had the commercial freedom to lower its wholesale prices.
206. Another important case concerns the German wholesale broadband access market. In its market review under the EU regulatory framework the German regulator had designated the incumbent, Deutsche Telekom, as SMP-operator. However, BNetzA had excluded very high speed digital subscriber line (VDSL) access from the relevant market, on the grounds that VDSL services were not yet available on the German market. Pursuant to Article 7 of the Framework Directive, the Commission decided to open a second phase investigation into this issue. In the Commission's view, the relevant market could contain also new wholesale broadband access products, as long as they are substitutable, independently of the infrastructure over which they are delivered. Subsequently the German regulator amended its notification and included in principle VDSL in the wholesale broadband access market subject to a substitutability analysis with other access products. Remedies on this market were notified in summer 2006 and require, for the first time in Germany, bitstream access at IP level.
207. From a State aid point of view, given the crucial importance of broadband for economic development and the creation of a knowledge-based society, the Commission is actively promoting the deployment of broadband¹²⁴. This may include State aid in geographic areas where operators do not offer broadband as they have no economic incentive to do so. State intervention has to be justified and must either pursue an objective of social or economic cohesion or remedy a well-defined market failure. Moreover, public support for broadband must be proportionate to the objective pursued and have a positive overall effect on welfare and competition.
208. In line with earlier decisions regarding State aid measures to support broadband, the Commission approved, in 2006, several projects involving state funding for broadband infrastructure and services. Whereas most decisions concerned rural or

¹²⁴ Commission Communication of 1.6.2005: *i2010 – A European Information Society for growth and employment*.

remote areas with no or only limited broadband coverage¹²⁵, the Commission accepted in some cases¹²⁶ state support for electronic communications infrastructure where the incumbent operators had a limited offer of broadband services. Each of these cases was assessed taking into account the specific market context (availability and take-up of broadband, available infrastructure, degree of competition, etc.) and the proportionality of the public intervention. The Commission concluded that, in view of particular structural impediments on the respective markets, the overall effect of these measures on the broadband markets would be positive and that the State aid granted was compatible with the common market.

209. On the other hand, on 19 July, the Commission decided to prohibit public funding for the planned construction of a fibre access network in the Dutch town of Appingedam¹²⁷. The project concerned an area already served by broadband networks at prices similar to other regions. The Dutch broadband market is one of the most advanced in Europe in terms of service coverage, innovation and competition. Consequently, the Commission considered that the construction of an additional network with State aid was not necessary to remedy either a market failure or unaffordable prices for broadband services. The Commission found that the planned aid would distort competition and harm private investment to an extent which would outweigh the positive effects of the project. Hence, the Commission concluded that the measure did not fulfil the criteria under Article 87(3)(c) and was incompatible with the Treaty. As construction of the network has not yet started, no aid had to be recovered.

2.3. Mobile telephony

210. Mobile markets are often characterised by competing infrastructures and, in most countries, retail markets were considered competitive by national regulatory authorities, following market analysis under the EU regulatory framework. At wholesale level the market for mobile access and call origination¹²⁸ is recommended for ex ante regulation and the competitive situation varies substantially across the EU. In some Member States, mobile network operators compete for hosting mobile virtual network operators (MVNOs) on their network. In other Member States, such access to the networks of mobile operators is not granted. In their market review, some NRAs have found that mobile network operators are either individually or collectively dominant at wholesale level and refuse to grant access to their network in order to protect market share and rents at retail level¹²⁹. The Commission has so far

¹²⁵ Cases N 398/2005 *Development Tax benefit for broadband in Hungary* Commission decision, 16.5.2006, N 118/2006 *Development of broadband communication networks in rural areas of Latvia* Commission decision, 7.6.2006; N 264/05 *Broadband for rural Tuscany* Commission decision, 13.9.2006, N 222/2005 *Aid to bridge the digital divide in Sardinia* Commission decision, 22.11.2006.

¹²⁶ Cases N 131/2005 *Fibrespeed Wales* Commission decision, 22.2.2006, N 284/2005 *Regional Broadband Programme: Metropolitan Area Networks ("MANs"), phases II and III* Commission decision, 8.3.2006; N 201/2006 *Broadband in underserved territories of Greece* Commission decision, 4.7.2006; N 157/2006 *South Yorkshire Digital Region* Commission decision, 22.11.2006.

¹²⁷ Case C 35/2006 *Broadband development Appingedam* Commission decision, 19.7.2006.

¹²⁸ Mobile access and call origination is usually purchased by so-called mobile virtual network operators (MVNOs). MVNOs buy minutes on the network of mobile network operators to offer mobile services to their own end customers.

¹²⁹ See notifications from Cyprus, Ireland, Malta, Spain and Slovenia. The Irish NRA has, however, withdrawn its SMP designation in the course of national court procedures.

not objected to the view that regulatory intervention at wholesale level might be necessary to avoid consumer harm¹³⁰. Whether or not to propose the market for mobile access and call origination for future regulation is yet to be decided and will be informed by the results of the Community consultation on the draft Recommendation.

211. The Commission also uses its merger control instrument to ensure that concentrations between mobile operators do not significantly impede effective competition. Accordingly, it only cleared the merger between T-Mobile Austria and tele.ring, two mobile operators in the Austrian retail mobile telephony market, subject to conditions¹³¹. In the absence of the remedies, the merger would have produced non-coordinated effects and significantly impeded effective competition through the elimination of a maverick competitor in the market¹³².
212. In the context of the regulatory framework, the Commission also proposes to regulate the market for international roaming services at national level. Although roaming charges remain high and well in excess of comparable retail tariffs, national regulators have so far been unable to establish a position of dominance, partly due to the special cross-border character of the roaming relationships. In July, the Commission proposed to the Council and Parliament a draft Regulation on roaming charges based on Article 95 EC, i.e. outside the regulatory framework for electronic communications.

2.4. Regulatory consistency in call termination

213. As outlined above, the Commission aims to ensure that sector-specific regulation is consistently applied across the internal market. NRAs have in most instances applied a similar set of remedies to similar market failures, which is in line with the Commission's objective. However, differences in detail and implementation of remedies are manifest, for example in methodologies used for cost orientation, which can result in very different prices for consumers. One example of a situation where there appears to be a need for more harmonisation can be found in the markets for fixed and mobile call termination. Termination rates should normally be symmetric and asymmetry requires an adequate justification. While the Commission does not object in principle to an initial asymmetry of termination rates between incumbent and alternative network operators, the fact that an operator entered the market later and has therefore a smaller market share can only justify higher termination rates for a limited transitory period. The Commission asks NRAs in co-operation with the European Regulators Group to develop a cost model for calculating alternative network operators' termination rates that takes account of the need for them to become cost-efficient over a limited period of time and along a so-called 'glide path'. Such transitory period of asymmetry should probably be shorter for mobile termination than for fixed termination.

¹³⁰ In other countries (France, Luxemburg, Poland, Slovakia) the threat of regulation seems to have encouraged network operators to enter into wholesale agreements on commercially negotiated terms.

¹³¹ Case COMP/M.3916 *T-Mobile Austria/tele.ring* Commission decision, 26.4.2006.

¹³² For details of the case see points 69-71.

2.5. Broadcasting transmission services

214. All NRAs that have notified their analysis of the market for broadcasting transmission services under the EU regulatory framework have proposed to regulate at least part of the market. The regulated platforms vary, however, from terrestrial transmission platforms in most Member States to cable networks in others. Existing regulation also varies greatly across the EU. In some cases, national legislation contains mast and site sharing provisions and must carry obligations which reduce the scope for commercially negotiated transmission agreements. The Commission is currently evaluating the extent to which existing regulation, the upcoming digitalisation of platforms and increasing competition between platforms at retail level may remove the need for ex ante regulation in this market. The Commission has made it clear, however, that only in exceptional circumstances would it accept an extension of regulation to the retail market for broadcasting transmission services¹³³. Given the dynamics in the retail broadcasting market caused by the development of alternative platforms such as satellite, digital terrestrial TV, and TV over DSL, the Commission takes the view that the retail market tends towards effective competition.

¹³³ This case has been notified to the Commission under Article 7 of the Framework Directive (case reference NL/2005/247).

D – INFORMATION TECHNOLOGY

1. OVERVIEW OF SECTOR

215. The information economy is a significant sector of economic activity. Encompassing the provision of infrastructure and services for the creation, exchange and processing of information and communication services as well as sales of information itself, this market is now in the range of 10 % of GDP in most developed countries, and accounts for more than half of their economic growth. Software is one of the key elements driving ICTs' role in the economy. In 2006, the European IT market amounted to EUR 310 billion. Whereas IT software and services accounted for around 20 % of the ICT market, hardware and consumer electronics accounted for around 12 % and 9 % of the market respectively.
216. Digital convergence continues to transform and restructure the three traditional market segments – IT, telecommunications and media. Separate, vertically integrated networks are being transformed into horizontally interconnected functional layers. In this new scenario, network operators and IT players as well as the big media conglomerates are all competing for market share. Convergence will continue to redefine devices and give them new functionalities. Nowadays, PCs are used to store and manipulate all types of media and are becoming the hub of our digital world. Items of consumer equipment, such as hi-fis and cameras, are able to communicate with each other and with computing devices.
217. Due to the opportunities made possible by convergence, the reach, scale and complexity of what can and should be made interoperable in order for the ICT ecosystem to deliver the benefits of convergence has grown even more. Therefore, interoperability is an important market feature for the ICT sector, given the network effects that prevail. Whilst interoperability is a beneficial characteristic, other important objectives, such as incentives for innovation and security, must also be taken into account.
218. In this context, standard-setting organisations can play a key role by facilitating interoperability through standardisation. It is therefore important that standard-setting organisations establish rules which ensure fair, transparent procedures and early disclosure of relevant intellectual property.
219. Open source software has become an established feature of the mainstream software market. In many software markets, open source software has become the only competitive constraint on incumbents. The "proprietary" business model, where the source code of the software is usually not made available, and the "open source" business model are not incompatible in the sense that the same company may develop and distribute certain products following the open source business model and others in binary code only.

2. POLICY DEVELOPMENTS

2.1. Enforcing the Microsoft decision

220. The Commission continued its efforts to ensure that Microsoft complies with its obligations under the decision of 24 March 2004, which found an infringement of Article 82 EC, namely to (i) supply complete and accurate interoperability information, and (ii) make that information available on reasonable terms.
221. As Microsoft did not provide the required complete and accurate interoperability information, the Commission adopted, on 12 July 2006, a decision pursuant to Article 24(2) of Regulation 1/2003 imposing on Microsoft a definitive penalty payment of EUR 280.5 million for non-compliance with its obligations for the period from 16 December 2005 to 20 June 2006 (calculated at EUR 1.5 million per day).
222. In its decision of 12 July 2006, the Commission also increased the level of the periodic penalty payment under Article 24(1) from EUR 2 million to EUR 3 million per day as from 31 July 2006. This increase was imposed in the light of the urgent need to establish compliance on Microsoft's part. This increased sum applied not only to the disclosure of interoperability information but also to the need to make that information available on reasonable terms, because a failure to do either was capable of depriving the decision of its effectiveness.

2.2. Controlling concentrations of network equipment manufacturers

2.2.1. Nokia/Siemens¹³⁴

223. On 13 November, the Commission cleared under the EU Merger Regulation the proposed merger between the Finnish company Nokia and the network equipment business of the German company Siemens AG. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.
224. The main competitive impact of the proposed transaction would be in the mobile network equipment sector, since Nokia has few activities in fixed-line telecommunications. The Commission's market investigation revealed that, despite the considerable market share the merged entity would have in the mobile network equipment sector, the market structure would remain competitive. A sufficient number of credible competitors would remain in the market, including market leader Ericsson and Alcatel-Lucent. Customers (mostly network operators) would still have alternative suppliers.
225. Furthermore, the Commission's investigation showed that the proposed merger would not give rise to competition concerns with respect to the other activities of the parties, namely fixed-line telecommunications network equipment and associated mobile and fixed-line services.

¹³⁴ Case COMP/M.4297 *Nokia/Siemens* Commission decision, 13.11.2006.

2.2.2. *Alcatel/Lucent*¹³⁵

226. On 24 July, the Commission also cleared the proposed merger between the French company Alcatel and the US firm Lucent Technologies. The Commission concluded that the transaction would not significantly impede effective competition in the EEA or any substantial part of it.
227. The main competitive impact of the proposed transaction would be on the supply of optical networking equipment (in particular, optical core switches - OCS) and broadband access solutions (in particular, Digital Subscriber Line Access Multiplexers - DSLAM). However, the Commission's investigation revealed that, despite the considerable market share the merged entity would have in these product areas, the market structure would remain competitive even after the proposed transaction. In particular, a number of effective competitors would remain in the market and customers (mostly network operators) would be able to sufficiently constrain the merged entity through their countervailing power in bidding procedures that are a characteristic of the industry.
228. The Commission's investigation also showed that it was unlikely that the proposed merger would give rise to competition concerns with respect to the other activities in which both the parties are active, including switching and routing equipment and narrowband (TDM) switches.

2.3. **State support for the creation of video games**

229. In the course of 2006, the Commission reviewed the French tax incentive project to support the creation of video games. The French authorities submitted that video games are cultural products and that, as such, they should benefit from the cultural derogation to the general ban on State aid of the Treaty. In view of the wider context, in particular the fierce competition from US, Canadian and Japanese video-game makers as well as the technological and economic leap of new-generation consoles, the Commission decided to open a wide consultation on whether this tax incentive pursues a genuine cultural goal. On the basis of the results of this consultation, the Commission will be in a position to take a final decision on this project.

¹³⁵ Case COMP/M.4214 *Alcatel/Lucent* Commission decision, 24.7.2006.

E – MEDIA

1. OVERVIEW OF SECTOR

230. As new technology increases the number of ways people can access entertainment and information, there is tough competition in the media sector to attract audiences. Traditional distribution channels, such as newspapers, television and compact discs, are facing competition from new distribution platforms such as the internet or mobile devices. The increase in the overall number of distribution channels fuels the demand for content. As a result, there is a trend towards consolidation between the more established media players and new media businesses, as well as between the owners of infrastructure networks and content producers.
231. The switch from analogue to digital broadcasting, which Member States are due to complete by the beginning of 2012¹³⁶, is already providing consumers with a greater number of TV channels and radio stations, better sound and picture quality and more interactive services such as video-on-demand. The digital switchover concerns all commonly available transmission platforms, obliging broadcasters and network operators to update their transmission equipment and viewers to install digital decoders. Digitisation is most advanced for satellite transmission, while both cable and terrestrial transmission networks are still largely operating in the analogue mode. A number of Member States are providing State aid to encourage broadcasters and consumers to make the switch.
232. Commercial operators continue to be concerned about State aid for public service broadcasters, with whom they compete for audience share, especially for what they consider to be purely commercial programmes such as live sports or blockbusters. They criticise the scope given to public service broadcasters to compete for advertising revenues. They also allege that the State funding for public service broadcasters may exceed what is necessary for their public service mission, allowing them to subsidise commercial activities and to engage in anti-competitive practices, for example inflating the price of television content such as sports rights or undercutting advertising prices. Private operators claim that the public funding of public service broadcasters' new media activities distorts competition and discourages private initiatives to develop new and innovative services.
233. European producers often have difficulty obtaining sufficient upfront commercial backing, so several Member States offer State aid for films and other audiovisual works. National film support schemes are allowed under the cultural exception¹³⁷ to the general ban on State aid provided they meet the criteria set out in the Commission's Communication on certain legal aspects relating to cinematographic and other audiovisual works (the "Cinema Communication")¹³⁸.

¹³⁶ Commission Communication on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final (OJ C 49, 28.2.2006, p. 24).

¹³⁷ Article 87.3 (d).

¹³⁸ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to

234. Technological developments are also affecting the way copyright is administered, especially for works distributed over the internet. The tradition of managing rights based on territorial borders is not suited to online, EEA-wide distribution, which could bring many benefits to artists and consumers.

2. POLICY DEVELOPMENTS

235. The Commission's main objective from a competition perspective is to ensure that there is a level playing field in the media sector, whether between different commercial operators or between commercial operators and publicly-funded operators.

2.1. Digital broadcasting

236. The switchover from analogue to digital broadcasting in the EU Member States is one of the developments in the media sector which the Commission has been monitoring closely. Following a complaint by the Italian consumer association Altroconsumo, the Commission is currently investigating the Italian legislation regulating the switchover. The Commission is concerned that the proposed law could introduce restrictions on broadcasters and grant competitive advantages to existing analogue operators, contrary to the EU Competition Directive¹³⁹. For example, firms which are not already active analogue broadcasters would be prevented from establishing their own digital networks, which would deprive competitors and consumers of the enhanced capacity of digital networks. The Italian authorities intend to amend the legislation as a result.
237. The Commission recognises that the digital switchover may be delayed if left entirely to market forces. So it has no objection to the principle of State aid in this area. This is in line with its general approach towards State aid, which supports sustainable growth, competitiveness and cohesion, as outlined in its State aid Action Plan. However, Member States have to demonstrate that the aid is the most appropriate instrument, is limited to the minimum necessary and does not unduly distort competition.
238. In 2006, the Commission continued to apply the approach adopted in decisions concerning Austria¹⁴⁰ and Germany¹⁴¹ in 2005. Following last year's negative decision on subsidies granted in the German *Land* of Berlin-Brandenburg, it opened formal inquiries into similar measures in two other German *Länder*, Bavaria¹⁴² and North

cinematographic and other audiovisual works (COM(2001) 534 final of 26.9.2001, OJ C 43, 16.2.2002); extended until 30 June 2007 by Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works of 26.9.2001 (COM(2004) 171 final of 16.3.2004, OJ C 123, 30.4.2004).

¹³⁹ 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).

¹⁴⁰ Case N622/2003 *Digitalisierungsfonds*, available at: http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-622-2003-WLWL-en-16.03.2005.pdf

¹⁴¹ Case C25/2004 *DVB-T Berlin-Brandenburg* (OJ L 200, 22.7.2006, p. 14).

¹⁴² Case C33/2006 *Introduction of digital terrestrial television (DVB-T) in Bavaria*, at http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-33-2006-WLWL-en-19.07.2006.pdf

Rhine-Westphalia¹⁴³. In decisions concerning France¹⁴⁴ and Italy¹⁴⁵, it has given more details of the conditions for granting subsidies to consumers to buy digital decoders. To be eligible for exemption under Article 87(3)(c), such measures need to take into account the principle of technological neutrality: they should not unjustifiably influence consumers' choice of technological platform. The national authorities may also encourage the use of open standards¹⁴⁶, which allow different producers and consumers to be connected via a unique technology which can be freely used by every operator in the market. In addition, the measure must be shown to be necessary, for example to overcome difficulties related to the launch of digital technology, to ensure coverage of remote areas or to facilitate access by low-income households.

2.2. Public service broadcasting

239. In line with the interpretative Protocol on the system of public service broadcasting ("Amsterdam Protocol"), the Commission recognises that it is the prerogative of Member States to organise and fund public service broadcasting. The objective of the Commission's policy towards State aid for public service broadcasters is to ensure that public funding does not exceed what is necessary to fulfil their public service mission and does not lead to unnecessary distortions of competition.
240. The Commission considers that the different ways in which public service broadcasters are financed (such as budgetary contributions or licence fee financing) constitute State aid also in view of the conditions formulated in the "*Altmark*" judgment¹⁴⁷. State aid to public service broadcasters may, however, be declared compatible where the requirements laid down in the "Broadcasting Communication" are fulfilled¹⁴⁸. The Commission has assessed the numerous complaints against the financing of public service broadcasters on the basis of the Broadcasting Communication and further clarified and developed the requirements in its decisions.
241. The Commission accepts a broadly defined public service mission to offer balanced and varied programmes, including information as well as entertainment and sports. The Broadcasting Communication also recognises that the public service remit may include, for instance, online services provided that they serve the same democratic, social and cultural needs of society as traditional broadcasting and provided that they are properly defined and entrusted.

¹⁴³ Case C34/2006 *Introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia*, at http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-34-2006-WLWL-en-19.07.2006.pdf

¹⁴⁴ Case N111/2006 *Aide à la TNT dans les régions sans simulcast*, at http://ec.europa.eu/community_law/state_aids/comp-2006/n111-06.pdf; Case N546/2006 *Fonds d'aide à des particuliers sous conditions de ressources dans la perspective de la fin de la radiodiffusion analogique*, at http://ec.europa.eu/community_law/state_aids/comp-2006/n546-06.pdf

¹⁴⁵ Case N270/2006 *Subsidies to digital decoders with open API*, at http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-270-2006-en-WLWL-24.01.2007.pdf

¹⁴⁶ Open standards allow different producers and consumers to be connected via a unique technology which can be used freely by every operator in the market.

¹⁴⁷ Case C-280/00, (Reference for a preliminary ruling from the Bundesverwaltungsgericht): *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

¹⁴⁸ Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15.11.2001, p. 5.

242. Furthermore, the Commission has consistently approved State financing for public service broadcasters where the State funding does not exceed the public service costs¹⁴⁹. In recent cases, the Commission has also asked Member States to introduce mechanisms to avoid overcompensation¹⁵⁰. The Commission has asked for aid to be recovered if a public service broadcaster has received more public funds than necessary (i.e. overcompensation). However, the Commission has accepted that it may be justifiable for public service broadcasters to keep a surplus as a buffer against possible fluctuations in costs/revenues¹⁵¹.
243. The State aid rules do not prevent public service broadcasters from undertaking commercial activities, provided that this is done on market terms. So, in more recent cases, the Commission has asked Member States to introduce measures which ensure that public service broadcasters act in line with the market¹⁵².
244. Under the Commission's rules concerning services of general economic interest¹⁵³, compensation paid to small local or regional public service broadcasters may be compatible with Article 86(2) and not subject to prior notification under certain conditions.

2.3. Premium sports content

245. The Commission continues to give high priority to ensuring that premium content is made available under open and transparent conditions allowing a maximum number of operators to bid for the rights. Premium content is a principal driver of innovation in both the traditional and the new media markets, and therefore makes an essential contribution to the Lisbon objectives.
246. The *English Premier League (FAPL)* decision¹⁵⁴, a commitment decision pursuant to Article 9(1) of Regulation 1/2003, confirmed the basic principles established in the *UEFA Champions League* and *Bundesliga* decisions with respect to joint selling of sport media rights¹⁵⁵. The FAPL decision concerned the joint marketing of the media exploitation rights in respect of matches of the English Premier League. The Commission was concerned that the (joint) exclusive selling of the commercial broadcasting rights by the League Association could infringe Article 81 EC by

¹⁴⁹ Cf. Commission decision approving the financial restructuring plan for the Portuguese PSB in July 2006 (State aid NN 31/2006 – Portugal).

¹⁵⁰ Cf. Commission decision closing the existing aid investigation concerning the general financing regime for the Portuguese public service broadcaster RTP (State aid E 14/2005 – Portugal).

¹⁵¹ Cf. Commission decision concerning the *ad hoc* financing of Dutch public service broadcasters adopted in 2006 (State aid C 2/2004 –the Netherlands).

¹⁵² Cf. Commission decision closing the investigation into the general financing regime of the Portuguese public service broadcaster RTP following a commitment from Portugal to oblige public service broadcasters to respect market principles as regards the commercial activities (cf. State aid, E 14/2005 – Portugal).

¹⁵³ Commission decision, 28.11.2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. OJ L 312, 29.11.2005, p. 67.

¹⁵⁴ Case COMP/38.173 *Joint selling of the media rights to the FA Premier League*, at http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_76.html#i38_173

¹⁵⁵ Case COMP/37.398, *Joint selling of the commercial rights of the UEFA Champions League* (OJ L 291, 8.11.2003, p. 25) and Case COMP/37.214, *Joint selling of the media rights to the German Bundesliga* (OJ L 134, 27.5.2005, p. 46).

restricting competition between the clubs, depriving media operators and British football fans of choice, leading to higher prices and reducing innovation. Under the commitments, live TV rights were to be sold in six balanced packages with no one bidder being allowed to buy all six packages (the "no single buyer rule"). Packages were to be sold to the highest standalone bidder for each package and bids other than simple standalone bids would be disregarded. The commitments also took account of technological convergence in the media sector by awarding the live and near-live rights on a "*technology neutral basis in respect of the delivery systems and technologies*"¹⁵⁶. The subsequent auction process resulted in the award of two out of six packages of live rights to a new market entrant.

247. Premium sport content was also a main concern in the Commission's clearance, under the Merger Regulation, of the acquisition by CVC, a private equity firm, of SLEC, the owner of the Formula One Group and of all TV rights to the Formula One competition¹⁵⁷. The clearance was conditional upon the divestiture by CVC of its Spanish subsidiary Dorna, which is the promoter and rights owner, *inter alia*, of the Moto GP motorcycle championship. The Commission's market investigation had shown that the proposed acquisition of SLEC by CVC, which would have combined the rights to the two most popular motor sport events in the EU in the hands of CVC, could have significantly impeded competition as regards the selling of the TV rights to these events in Italy and Spain, i.e. the countries within the EU where these events are most popular. In addition, concerns were raised that in Member States where Moto GP is less popular than Formula One, CVC might bundle the TV rights for both events. The divestiture commitment eliminated these concerns.

2.4. Films and other audiovisual works

248. The Commission assesses State aid measures for films and other audiovisual works and exempts those which promote culture from the general ban on State aid, provided they do not significantly affect competition and trading conditions within the EU. In 2006, the three most significant decisions in this sector concerned the French film support schemes, the UK film tax incentive scheme and the new German Film Fund¹⁵⁸. All these measures were approved by the Commission on the basis that they would be amended by the national authorities to take account of any changes in the State aid rules.
249. The French film support schemes¹⁵⁹ affect all stages in the life of a film, including its development, production and distribution. Aid is also given to cinema halls and the video industry. The Commission considered that most of the French schemes satisfied the conditions for applying the cultural derogation, particularly on the basis of the Cinema Communication¹⁶⁰.

¹⁵⁶ Paragraph 2.5 of the commitments.

¹⁵⁷ Case COMP/M.4066, *CVC/SLEC*, at http://ec.europa.eu/comm/competition/mergers/cases/index/m81.html#m_4066

¹⁵⁸ The Commission also approved several smaller measures during the year, issuing 24 decisions concerning film support measures.

¹⁵⁹ Case NN 84/05: http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-84-2004-WLWL-fr-22.03.2006.pdf

¹⁶⁰ See footnote 138.

250. The UK film tax incentive scheme¹⁶¹ aims to use tax-based incentives to encourage film-makers to produce culturally British films. The scheme has been approved until 31 March 2012 on the basis of the revised UK Cultural Test. As with the French and other European film support schemes, the UK film tax incentive scheme includes conditions which require that a proportion of the film production expenditure is incurred in the territory providing the aid ("Territorial conditions"). Territorial conditions are allowed under the criteria laid down in the Cinema Communication, provided that they do not exceed 80 % of the film production budget.
251. Germany's new film fund¹⁶² provides direct grants to film producers to encourage the production of feature films, documentaries and animation films. Aid is only awarded to films with cultural content, determined on the basis of a cultural test.

2.5. Rights management and online distribution

252. The development of a strong presence of European music and European culture in the new Europe-wide online markets is a vital concern in the overall context of the Lisbon objectives. Rights management and the new forms of music distribution such as via the internet therefore continue to feature prominently on the Commission's agenda. Special attention is given to anti-competitive restrictions which may impede the improvement of existing services and the development of new ones, thus limiting consumer choice and potentially leading to higher prices for consumers.
253. In this context, the Commission adopted the *Cannes Extension Agreement* decision, a commitment decision under Article 9 of Regulation 1/2003¹⁶³. The Cannes Extension Agreement is an agreement between thirteen European collecting societies managing mechanical copyright (the right involved in the production of physical carriers of sound recordings, such as CDs) and the five major music publishers, which are members of these societies. First, the Commission was concerned that collecting societies were excluded, in the context of central licensing agreements, from granting rebates to record companies. Under a central licensing agreement, a record company can obtain a copyright licence for the combined repertoires of all the collecting societies and covering the whole of the EEA or part thereof, from any collecting society within the EEA. The commitments ensure that rebates may be granted by the collecting societies out of the administration fees that they retain from the royalties which they collect on behalf of their members. Second, the Commission was concerned that the agreements in question prevented collecting societies from entering either the music publishing or the record production market. The parties committed to remove the respective no-competition clause and the Commission was able to close the case as a result.
254. The Commission also issued a Statement of Objections against CISAC (the "International Confederation of Societies of Authors and Composers") and the individual collecting societies in the EEA Member States which are members of

¹⁶¹ Case N 461/05: http://ec.europa.eu/community_law/state_aids/comp-2005/n461-05.pdf

¹⁶² Case N 695/06: http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_n2006_690.html#695

¹⁶³ Case COMP/38.681 *Cannes Agreement*, commitments at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38681/commitments.pdf> See also Press Release IP/06/1311, 4.10.2006.

CISAC¹⁶⁴. Collecting societies manage copyright and grant exploitation licences to commercial users of public performance rights. The Statement of Objections only concerned certain relatively new forms of copyright exploitation, namely music broadcasting via satellite, cable retransmission and internet transmission. The Commission is concerned about certain provisions in the CISAC model contract and in bilateral agreements between CISAC and its members which prevent authors from becoming members of other collecting societies and which oblige commercial users to obtain a licence from the domestic collecting society for each territory they wish to be present in. They therefore extend the traditional offline national monopolies of collecting societies into the online sector.

¹⁶⁴ Press Release MEMO/06/63, 7.2.2006.

F – TRANSPORT

1. OVERVIEW OF SECTOR

255. Efficient transport systems and services are vital for ensuring flexibility and dynamism in the European economy, raising productivity and growth, and creating employment.

1.1. Road transport

256. Road transport, of both passengers and goods, in the EU is characterised by the predominance of small companies and the impact on competition of the considerable differences in fuel tax levels between Member States, which are important factors that will influence future development.

1.1.1. *Transport of goods*

257. While national road haulage markets are largely protected, international road transport markets are largely liberalised. Demand is driven by the increasing importance of door-to-door and just in time service, undoubtedly contributing to the strong sustained growth of road transport, which accounts for the largest share (44 %) of total intra-EU transport of goods.

258. As a result, road congestion has increased and is costing the EU about 1 % of GDP. While harmful emissions from road transport have declined significantly, the introduction of catalysers, particulate filters and other vehicle-mounted technologies has helped to reduce emissions of NO_x and particulates by between 30 % and 40 % over the last 15 years despite rising traffic volumes.

1.1.2. *Transport of passengers*

259. The market for the international transport of passengers has been opened through Community legislation. International bus lines are competing through low fares with international railway services and low-cost airlines.

260. The market for national public transport of passengers has so far not been liberalised through Community legislation. A certain degree of market opening has resulted from the application of the public procurement directives, which apply to contracts – other than concessions – that are concluded for the provision of public transport services. However, the public procurement directives do not apply to concessions for public transport services, which are a common way of organising public transport, in particular in central Europe.

1.2. Rail transport

261. The opening of the market for rail freight transport will be completed by 2007. The third railway legislative package¹⁶⁵ will also open international passenger transport. Enforcement of the *acquis* by national regulatory bodies will enable the renewal of the rail industry, already observed in those Member States which have opened their markets, to spread to the whole EU internal market. However, structural obstacles to the competitiveness of the rail industry remain. These include technical barriers, such as low levels of interoperability, lack of mutual recognition of rolling stock and products, weak coordination of infrastructure and interconnection of IT systems, and the problem of the single wagon load.
262. Rail has shown its strength in passenger transport, notably on high-speed connections between city centres. Enlargement opens further long-distance (over 500 km) rail links which, combined with efficient logistics operations, may compete with road transport to provide environmentally friendly door-to-door service. Unlocking these opportunities requires the adaptation of freight services and infrastructure management in terms of quality, reliability, flexibility and customer orientation.

1.3. Maritime transport

263. Maritime transport of goods is crucial to the European economy. Transport by sea accounts for about 50 % of the external trade in goods in terms of weight and about 20 % of the trade between Member States. Maritime transport of passengers is also crucial for social, economic and territorial cohesion, especially for the circa 20 % of the EU population living on islands.
264. The expected growth of sea transport will need to be absorbed through the EU's ports infrastructure. Increased investment in ports and towards the hinterland is necessary in order to improve and extend services so that ports become poles for growth instead of potential transshipment bottlenecks. A competitive ports sector depends on sound competition both within and between ports, clear rules for public contributions to investment and transparent access to port services, the availability of competitive services and an increase in quality employment.

1.4. Air transport

265. The internal air transport market has become more of a reality as well as an engine of growth. The restructuring of the sector as well as its integration are well advanced. The sector has developed substantially as a result of the growth of air connections in Europe, the growth and importance of low-cost carriers and the development of regional airports. The European Union is an important world actor, both in terms of the production of aircraft and as regards the market for air transport services. Financing of airports, start-up aid to airlines departing from regional airports and the conditions of providing airport services all play a role in shaping competition between airports.

¹⁶⁵ Adopted on 3 March 2004, consisting of a Communication, four legislative measures and a Commission working document, COM(2004) 139, 140, 142, 143 and 144 final.

2. POLICY DEVELOPMENTS

266. Further to the Commission's legislative initiatives in the field of transport policy with a view to creating EU-wide integrated and competitive transport markets, the goal of competition policy is to ensure that the efficient functioning of these markets is not hindered by anti-competitive practices or distortions of competition. This is done with the targeted use of legislative and regulatory instruments on the one hand, and application of the competition rules on a case-by-case basis on the other hand.

2.1. Road transport

2.1.1. *Applying State aid rules to road transport*

267. In the area of State aid, the Commission maintained its policy of approving aid for measures such as retrofitting particulate filters on old and new heavy-duty vehicles as well as on passenger buses¹⁶⁶, in order to favour the uptake of cleaner technology, in particular on old vehicles.

268. With regard to the application of public procurement and State aid rules to public service contracts and public service concessions, a revised regulation for public services in the field of land transport, proposed by the Commission in July 2005, is currently awaiting its second reading in the European Parliament.

269. In the meantime, the Commission is applying the existing State aid rules to public service contracts and public service concessions: in 2006, the Commission took two important decisions, declaring State aid for public service obligations in the German region *Wittenberg* and in the Dutch province *Gelderland* compatible with the common market¹⁶⁷.

270. Concerning state aid for road infrastructure, the Commission clarified the conditions under which the public involvement in a public private partnership constitutes State aid, when assessing the construction of two Irish road projects¹⁶⁸. Furthermore, it decided that the extension of the concession for the Mont Blanc tunnel and the adjacent motorways, which helped to finance the renovation of the tunnel following the accident in 1999, constituted State aid, which was found to be compatible with the common market as compensation for a service of general economic interest, namely the management of the tunnel¹⁶⁹.

2.2. Rail transport

2.2.1. *Railways liberalisation: Implementation of Rail Infrastructure Package*

271. On 3 May, the Commission adopted a report on the implementation of the first railway package¹⁷⁰. In this report, the Commission indicated the criteria which it will

¹⁶⁶ N 400/2006 Italy adopted on 6.12.2006 and N 573/2005 Denmark to be adopted.

¹⁶⁷ See Commission decision N 604/2005, 16.5.2006 (OJ C 209, 31.8.2006) and Commission decision N 556/2005, 19.7.2006 (OJ C 207, 30.8.2006).

¹⁶⁸ N 149/2006, 16.5.2006 (OJ C 209, 31.8.2006).

¹⁶⁹ N 420/2005 (France) 23.2.2006 (not yet published) and N 562/2005, 16.5.2006 (Italy).

¹⁷⁰ COM(2006) 189, available on the EUR LEX server at : http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0189en01.pdf

use for monitoring the implementation of the first railway package in the Member States. One important question is the independence of the infrastructure manager, insofar as it exercises essential functions such as infrastructure access and charging, from any railway operator. This is particularly relevant for Member States where railway undertaking and infrastructure manager still belong to the same holding. The Commission requests, among other conditions, that board members of the holding should not be on the board of the infrastructure manager. The board members of the infrastructure holding must be appointed and dismissed under the control of the rail regulator, and other statutory and contractual provisions have to ensure that the infrastructure managers exercise essential functions independently of rail holdings.

272. Annex 7 of the report contains a list of criteria against which the Commission will decide whether the regulatory bodies established by the Member States have the necessary independence. One of the conditions stipulated in Annex 7 is that regulators must be able to take decisions themselves and should not just be confined to proposing measures to be taken by other state bodies. They must have a budget on which they are entitled to decide, and which allows them to recruit a sufficient number of competent staff to perform their tasks efficiently and investigate all complaints within two months of receipt of all information.

2.2.2. *Applying State aid rules to rail transport*

273. The Commission adopted several decisions to promote rail transport. It authorised a Czech aid measure consisting in guaranteeing a loan to Czech Railways (Česke dráhy) to facilitate the purchase of new passenger rolling stock¹⁷¹. In addition, the Commission allowed the Netherlands to grant aid for the deployment of the European Train Control System (ETCS)¹⁷².
274. Concerning State aid to rail infrastructure, the Commission decided, in a case concerning the Irish Railways, that the financing and supervision of the construction of new railway infrastructure did not constitute economic activities, but fell within the public policy remit¹⁷³.

2.3. **Maritime transport**

2.3.1. *Repeal of the liner conference block exemption regulation*

275. On 25 September, the Council adopted Regulation (EC) No 1419/2006 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 1/2003 as regards the extension of its scope to include cabotage and international tramp services¹⁷⁴. The repeal of Regulation 4056/86 also included the repeal of the block exemption for liner conferences which was the result of a three-year in-depth investigation into the liner shipping sector.

¹⁷¹ Commission decision N 565/2005, 22.2.2006, C(2006) 457 final.

¹⁷² Commission decision N 622/2005, 7.6.2006, C(2006) 2077 final.

¹⁷³ N 478/2004, 7.6.2006 (OJ C 209, 31.8.2006).

¹⁷⁴ OJ L 269, 28.9.2006, p. 1.

276. Regulation 4056/86 was predicated on the assumption that liner conferences had a stabilising effect, assuring shippers of reliable services, and that such results could not be obtained without joint price fixing and capacity regulation. During the review process the Commission showed that in today's market conditions this is no longer the case. In fact, the four cumulative conditions of Article 81(3) were not met and thus the block exemption was no longer justified. The Commission's impact assessment indicated that the repeal of the block exemption is likely to lower transport prices whilst maintaining reliable services and enhancing the competitiveness of European industry, in particular that of EU exporters.
277. Existing liner conferences will be able to continue operating on routes to and from Europe until 18 October 2008. After that date, conference activities and in particular price fixing and capacity regulation will no longer be permitted¹⁷⁵.
278. Regulation 1419/2006 also amended Regulation 1/2003 so as to include in its scope cabotage and tramp vessel services. Tramp vessel services are unscheduled transport services of bulk and break-bulk cargo. They account for most of the transport of cargo by sea and are central to the development of the EU economy. Cabotage is defined as maritime transport services between ports of one and the same Member State.
279. The decision to bring these services under the common competition implementing rules does not involve a great change for the industry as the substantive competition rules, set out in Articles 81 and 82 EC, already applied. More precisely, it establishes equality of procedural treatment between these sectors of the economy and all others. The amendment to Regulation 1/2003 came into effect on 18 October.
280. In line with a request from the European Parliament and given that Regulation 1/2003 did not apply in full to the liner sector, the Commission has undertaken to issue guidelines on the application of competition law to maritime services so as to help smooth the transition to a fully competitive regime. The guidelines will address information exchanges in the liner sector and cooperative agreements between tramp vessel operators. They are intended to help shipping operators to self-assess their conduct in accordance with the directly applicable exemption system introduced by Regulation 1/2003. They are due to be adopted before the end of the transitional period for existing liner conferences on 18 October 2008. As an interim step in the preparation of the guidelines, the Competition DG published in September a staff paper on the potential impact of information exchanges between liner carriers on the market for liner shipping, calling for comments from stakeholders by 31 October.

2.3.2. *Ensuring competition between ports is not distorted – The Sea-Invest/Emo-Ekom merger case*

The only merger case in the transport sector leading to an in-depth market investigation in 2006 concerned the market for cargo handling services for coal and iron ore. These services comprise the unloading of coal and iron ore from ocean-going vessels, the storage of these commodities and their loading on trains or barges

¹⁷⁵ Commission press release IP/06/1249, 25.9.2006 and MEMO/06/344, 25.9.2006 with frequently asked questions.

for further inland transport. When assessing the proposed acquisition of joint control in the Dutch company EMO-EKOM by the Belgian company Sea-Invest, the Commission was initially concerned about horizontal overlaps of the parties' activities on the market for coal and iron ore terminal services at the ports of Antwerp, Rotterdam and Amsterdam, including Zeeland, the so-called ARA range. It therefore opened a detailed inquiry. However, the in-depth investigation showed that in practice there is only very limited competition for the services concerned between the ports of Antwerp and Rotterdam. The Commission thus cleared the case under the EU Merger Regulation¹⁷⁶.

2.3.3. *Applying State aid rules to maritime transport*

281. In 2006, the Commission favoured tight convergence of aid schemes in maritime transport to achieve the best possible level playing field within Europe, including towage and dredging activities, and insisted on the dismantling of any nationality clause attached to schemes exempting ship-owners from payment of the social contributions of their seafarers¹⁷⁷. The Commission also expressed doubts about the financial injections granted by the French State to Société Nationale Maritime Corse-Méditerranée in the framework of its partial privatisation and the new restructuring plan, with a view, *inter alia*, to ensuring a level playing field in maritime cabotage¹⁷⁸.

2.4. Air transport

2.4.1. *Block exemption of consultations on passenger tariffs and slot allocation - Commission Regulation (EC) No 1459/2006*

282. On 28 October, the Commission adopted Regulation 1459/2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports¹⁷⁹. This Block Exemption Regulation takes over from Commission Regulation (EEC) No 1617/93¹⁸⁰, which expired on 30 June 2005.

283. Commission Regulation 1459/2006 provides that:

- IATA passenger tariff conferences for routes within the EU are exempted until 31 December 2006 and no longer thereafter;
- IATA passenger tariff conferences on routes between the EU and the US or Australia are exempted until 30 June 2007 subject to a reporting requirement;

¹⁷⁶ Case COMP/M.3848 *Sea-Invest/EMO-EKOM*, Commission press release IP/06/1107, 18.8.2006.

¹⁷⁷ Commission decision of 16.5.2006 in Case N 408/05.

¹⁷⁸ State Aid C 58/2002 *France – Aid for the restructuring of Société Nationale Maritime Corse-Méditerranée (SNM)* Commission decision, 13.9.2006 (not yet published).

¹⁷⁹ OJ L 272, 3.10.2006, p. 3.

¹⁸⁰ Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18), as last amended by the 2003 Act of Accession.

- IATA passenger tariff conferences on routes between the EU and other non-EU countries are exempted until 31 October 2007 subject to a reporting requirement;
- IATA slots and scheduling conferences are exempted until 31 December 2006 and no longer thereafter.

284. The purpose of the reporting requirement in the Regulation is to allow the Commission to consider whether the exemption for tariff conferences on routes between the Community and third countries should be extended beyond the expiry dates.

285. IATA has known since 2005, when the preliminary draft block exemption Regulation was adopted, that the Commission was minded not to prolong the exemption for passenger tariff conferences within the EU beyond 2006.

286. The new Regulation also discontinues the exemption for slots and scheduling conferences for routes within the EU as of 1 January 2007. The legal certainty provided by a block exemption is no longer needed for these conferences.

2.4.2. *Enforcement of Article 81 – SkyTeam global airline alliance*

287. On 15 June, the Commission sent a Statement of Objections to all members of the SkyTeam global airline alliance (Aeromexico, Air France, Alitalia, Continental Airlines, CSA, Delta Airlines, KLM, Korean Air Lines and Northwest). The Commission does not raise objections to the alliance as a whole but has concerns about a number of routes, for which the Commission considers that the SkyTeam cooperation may have a negative effect on competition and therefore might infringe Article 81 EC. The Commission's goal is to ensure that the negative effects of reduced competition in certain markets do not outweigh the benefits of SkyTeam cooperation for customers.

2.4.3. *International aviation policy – application of Regulation (EC) No 847/2004¹⁸¹*

288. On 31 May and 20 June, the Commission adopted two decisions¹⁸² under Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries. In these decisions, the Commission sets out the criteria according to which it assesses the agreements negotiated by Member States with a view to authorising or not their provisional application or their conclusion by Member States. In line with settled case law¹⁸³, the Commission also states in the decisions that its discretion under the provisions of Regulation 847/2004 does not allow it in any case to authorise a situation which is otherwise contrary to EU law.

289. It is settled case law that Article 10 EC, read in conjunction with Articles 81 and 82 EC, requires Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules

¹⁸¹ Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (OJ L 157, 30.4.2004, p. 7).

¹⁸² Commission decisions C(2006) 2009, 31.5.2006 and C(2006) 2010, 20.6.2006.

¹⁸³ Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 41.

applicable to undertakings. This would be the case, the Court of Justice has declared¹⁸⁴, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 or reinforce their effects. A fair proportion of bilateral air service agreements concluded between Member States and third countries require or encourage air carriers designated under these agreements to agree on or coordinate tariffs and/or the capacity they operate.

290. Such air service agreements, the Commission found in its decisions under Regulation 847/2004, infringe Articles 10 and 81 read jointly. Accordingly, the Commission allows Member States to provisionally apply or to conclude such agreements *inter alia* on condition that the provisions breaching Articles 10 and 81 are brought into line with EU law within 12 months of the date of notification of the decisions.

2.4.4. *International aviation policy – application of the Horizontal Mandate*

291. On 5 June 2003, the Council adopted a decision (the Horizontal Mandate) authorising the Commission to negotiate Community-level agreements with third countries to replace certain specific provisions agreed bilaterally by Member States¹⁸⁵. The rationale of these Community-level agreements, so-called Horizontal Agreements, is to bring the air service agreements between Member States and third countries into line with EU law.

292. Two Horizontal Agreements were signed in 2006 between the Community on the one hand and Uruguay¹⁸⁶ and the Maldives¹⁸⁷ on the other, which contain provisions on EU competition law. These Horizontal Agreements ensure that the 12 air service agreements between Member States and the two countries concerned are brought fully into line with EU law, *inter alia* by resolving any infringements of Articles 10 and 81 EC in these air service agreements. A further two Horizontal Agreements were initialled in 2006 with Paraguay and Malaysia, containing similar provisions and referring to 24 air service agreements between Member States and those two countries.

2.4.5. *Applying State aid rules to air transport*

293. During 2006 the Commission opened investigative procedures concerning governmental assistance to carriers in difficulty (*Cyprus Airways*¹⁸⁸), while enlarging the scope of its inquiry in the matters covered by the 2005 Aviation State aid guidelines. It adopted a number of decisions concerning start-up aid, notably in relation to Malta (N 640/06 – adopted on 22 November), and aid to airports (notably a case involving capital expenditure for six small airports in Ireland (N 353/06 - adopted on 26 September) as well as cases involving aid to both airlines and airports (*DHL - Leipzig Halle Airport* – adopted on 22 November¹⁸⁹). The Commission has

¹⁸⁴ Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769, paragraph 16.

¹⁸⁵ Press release IP/03/806, 5.6.2003.

¹⁸⁶ Agreement between the European Community and the Oriental Republic of Uruguay on certain aspects of air services (not yet published).

¹⁸⁷ Agreement between the European Community and the Republic of Maldives on certain aspects of air services, OJ L 286, 17.10.2006, p. 20.

¹⁸⁸ OJ C 113, 13.5.2006, p. 2.

¹⁸⁹ Case C 48/2006; *DHL – Leipzig Halle Airport* (OJ C 48, 2.3.2007, p. 7). See also point 312.

also begun a dialogue with Member States aimed at taking stock of existing aviation support measures throughout the EU so that all such financing can be brought into line with the 2005 Aviation State aid guidelines by June 2007¹⁹⁰.

¹⁹⁰ As provided for by point 83 of the 2005 Aviation guidelines.

G – POSTAL SERVICES

1. OVERVIEW OF SECTOR

294. Postal services in the EU earn about 0.9 per cent of the gross domestic product (GDP). The postal sector is thus a significant element in the economy of the European Union. Virtually all Universal Service Providers ("USPs") in the EU are public undertakings controlled by the Member States, with the notable exception of Germany and the Netherlands.
295. Postal services are an essential vehicle of communication and trade and they are vital for many economic and social activities. Many key sectors, such as e-commerce, publishing, mail order, insurance, banking and advertising depend on the postal infrastructure. Postal services bring social benefits which cannot always be qualified in economic terms. Postal services are labour-intensive and are also one of the principal public employers in Europe. Employment in the sector is in the first instance provided by USPs and is fairly stable, with about 1.71 million persons employed by USPs¹⁹¹. However, roughly 5 million jobs are related to postal activities, i.e. directly dependent on or induced by the postal sector¹⁹².
296. Postal services are changing fast. The sector is at the crossroads of three dynamic business areas which are vital to the European economy: communications, advertising and transportation/logistics. There are a number of drivers of change within the postal sector, the five most important ones being: demand and changing customer needs; organisational change; market opening; automation/new technologies; and electronic substitution.
297. Most EU USPs are active in at least five separate service markets in addition to the monopoly. All USPs provide express and unaddressed mail services. Similarly, most USPs offer mail preparation services, hybrid mail services, e-mail services and financial services. Eight public postal operators ("PPOs"), mainly active in Member States with high-volume markets, are active in ten or more different mail-related markets. These activities share, to varying extents, the same commercial and logistic infrastructure which is also used for the provision of services under monopoly and/or universal service obligations.
298. Objective analysis of competitors' market share as well as subjective perception of key players both confirm that even in cases where the monopoly has been completely abolished or considerably reduced, real competition is only now emerging. Meaningful competition in the letter post market has yet to develop. In the letter post segment, most of which is subject to monopoly rights, profit margins can vary between 10 % and 20 %, while in the parcel and express segment profit margins are

¹⁹¹ WIK Consult, Main Developments in the Postal Sector (2002-2004), 2006.

¹⁹² Pls Rambøll, Employment trends in the EU postal sector, October 2002.

between 2.5 % and 10 %¹⁹³. Despite ongoing diversification of activities, monopolies are still the main source of cash flow and profits for USPs.

2. POLICY DEVELOPMENTS

2.1. Objectives of the Commission

299. Postal services are an important element of the internal market for services¹⁹⁴ and are included in the framework of the Lisbon Strategy (fundamentally re-launched in 2005¹⁹⁵) as a source of economic growth and job creation. According to the Lisbon Strategy, the internal market must be made fully operational¹⁹⁶, while preserving the European social model, an element of which is the provision of effective and high-quality Services of General Economic Interest ("SGEI"). The Commission considers that postal services are an essential instrument for ensuring social and territorial cohesion, and contribute to competitiveness¹⁹⁷.

300. The EU Regulatory Framework for Postal Services is enshrined in the Postal Directive¹⁹⁸, which lays down a harmonised regulatory framework for the postal sector. The main elements of this framework include the minimum characteristics of the universal postal service which is to be guaranteed by all Member States, the quality standards for intra-EU cross-border services, tariff principles and principles governing transparency of accounts of universal service providers and the separation of regulatory and operational functions in the postal sector and, especially, common maximum limits for those services which may be reserved by a Member State for its universal service provider(s) to the extent necessary to ensure the maintenance of the universal service, which have been progressively reduced – in 1999, 2003 and 2006.

301. The 2006 Commission Report on the application of the Postal Directive¹⁹⁹ confirms that a wide range of high-quality universal postal services are available throughout the Community, in compliance with the requirements of the Postal Directive. The Commission's policy in this sector is geared to preserving this situation and adapting it to create a more competitive and customer-oriented environment. The main pillars of this policy have thus been a staged reduction of the services for which monopoly rights are granted to USPs on the one hand, and the preservation of competition in liberalised areas of the postal market, to avoid de facto re-monopolisation by USPs, on the other hand.

¹⁹³ See Section 4.4 of Annex to Commission Report on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), SEC(2006) 1293.

¹⁹⁴ Communication from the Commission, Internal Market Strategy – Priorities 2003-2006, COM(2003) 238 final, p. 13.

¹⁹⁵ Presidency Conclusions, Brussels European Council, 22-23 March 2005.

¹⁹⁶ Presidency Conclusions, Brussels European Council, 23-24 March 2006.

¹⁹⁷ Communication from the Commission, Common Actions for Growth and Employment: The Community Lisbon Programme, COM(2005) 330 final.

¹⁹⁸ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14), as amended by Directive 2002/39 of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21).

¹⁹⁹ COM(2006) 596 final. Previous reports were COM(2005) 102 final and COM(2002) 632 final.

2.2. Initiatives of the Commission

302. On 18 October, the Commission put forward a proposal to open EU postal markets fully to competition by 2009, in line with the indicative target date set out in the current Postal Directive. The proposal has been submitted to the European Parliament and the Council for adoption in accordance with the co-decision procedure (Article 251 EC) and transmitted to the European Economic and Social Committee and the Committee of the Regions for their opinion. As is the case with the current Directive, the proposed draft applies without prejudice to the application of the EU competition rules. The Commission proposal is now being discussed by the EU legislators.
303. Regarding the application of State aid rules to the postal sector, in the light of the *Chronopost*²⁰⁰ and *Altmark*²⁰¹ case law and the SGEI package, the Commission has deepened its analysis of the accounts of the universal service providers so as to ensure the absence of overcompensation and of cross-subsidies. In particular, the Commission has examined the methods applied by the postal operators to allocate costs between universal services and other services and to calculate the financial burden of the public tasks.
304. The *Altmark* case law defines the conditions under which compensation for a SGEI escapes qualification as State aid. One of these conditions is that, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed should be determined on the basis of the costs which a typical undertaking, well run and adequately provided with means of transport, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. Due to the difficulties in establishing the costs incurred by a typical undertaking, well run and adequately provided with means of transport, compensation for SGEIs rarely escapes qualification as State aid where the SGEI provider is not chosen in a public procurement procedure.
305. However, in the case "*Poste Italiane – BancoPosta, Remuneration paid for the distribution of postal savings financial products*"²⁰², the Commission indicated that the remuneration received by Poste Italiane for distributing postal savings books is similar to what a private investor would have paid. Since this remuneration is in conformity with the market, it is also an appropriate estimate of the level of the costs which a typical undertaking, well run and adequately provided within the same sector, would incur, taking into account the receipts and a reasonable profit from discharging the obligations. The Commission therefore concluded that the compensation paid by Italy to Poste Italiane was not State aid according to the *Altmark* case law.

²⁰⁰ Joined cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost SA* [2003] ECR I-6993.

²⁰¹ Case C-280/00, *Altmark Trans GmbH* [2003] ECR I-7747.

²⁰² Case C 49/06, *Poste Italiane – BancoPosta, Remuneration paid for the distribution of postal savings financial products* (OJ C 31, 13.2.2007, p. 11).

306. Where compensation for SGEI does not escape qualification as State aid, it can nevertheless be declared compatible with the Treaty under Article 86(2)²⁰³. The conditions under which compensation for SGEI can be declared compatible with State aid rules were clarified by the 2005 Community Framework²⁰⁴. In 2006, two notified projects of compensation to postal operators were declared compatible in line with the 2005 Community Framework.
307. In the case "*Government rural network support funding to Post Office Limited (POL) for 2006-2008*"²⁰⁵, the Commission decided not to raise objections to the aid proposed by the UK authorities to compensate POL for the costs incurred in discharging public service obligations for the period 2006 to 2008, since all the conditions for obtaining the exemption were fulfilled. In particular, the amount of the compensation will not exceed the costs of the public service obligation, taking into account all the relevant receipts and a reasonable profit for discharging that obligation, in conformity with paragraph 14 of the 2005 Community Framework.
308. Similarly, in the case "*State compensation to Posten AB for providing basic payment and cash facility services*"²⁰⁶, the Commission decided not to raise objections as the compensation paid by the Swedish State to Posten AB for the provision of a service of general economic interest will not exceed the net costs of the public tasks entrusted to it. To check that Posten AB is not overcompensated, the Commission has verified that transfer prices between Posten AB and its subsidiary SKS AB, which is in charge of providing the basic cashier services of general economic interest, comply with the benchmark defined in the *Chronopost* case law. According to *Chronopost*, when no comparable market prices exist, transfer prices should at least cover all the additional, variable costs incurred in providing the service, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment. It is to be noted that, while in *Chronopost* the mother company received State compensation for a public service and the subsidiary was not entitled to any State aid, in this case the situation was reversed, i.e. the compensation was received by the subsidiary. The *Chronopost* criteria therefore had to be applied *mutatis mutandis*, i.e. it was necessary to check whether the transfer prices were set higher (and not lower as in *Chronopost*) than the benchmark.
309. In the case "*Poste Italiane SpA – State compensation for universal postal service obligations 2000 – 2005*"²⁰⁷, the Commission again decided not to raise objections to compensation paid to Poste Italiane from 2000 to 2005 to meet the cost of fulfilling its public service obligations, as Poste Italiane's net costs for delivering its

²⁰³ Under Article 86(2), undertakings entrusted with a SGEI can escape the application of the rules on competition if the application of these rules obstructs the performance, in law or in fact, of the particular tasks assigned to them.

²⁰⁴ Community Framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p.4).

²⁰⁵ Case N 165/2005, *Government rural network support funding to Post Office Limited (POL) for 2006-2008* (OJ C 141, 16.6.2006, p. 2).

²⁰⁶ Case N 642/05, *State compensation to Posten AB for providing basic payment and cash facility services*.

²⁰⁷ Case NN 51/2006, *Poste Italiane SpA - State compensation for universal postal service obligations 2000 – 2005* (OJ C 291, 30.11.2006, p. 17).

obligations exceeded the financial support granted by Italy over the relevant period. The assessment was not based on the 2005 Community Framework, but on the provisions in force when the aid was granted, i.e. the 2001 Communication from the Commission on SGEI in Europe²⁰⁸.

310. Besides assessing the compatibility of compensation granted to postal operators for providing SGEI, the Competition DG examined whether postal operators were enjoying other advantages.
311. In the case "*France; Recommandation proposant l'adoption de mesures utiles concernant la garantie illimitée de l'Etat en faveur de La Poste*"²⁰⁹, the Commission sent France a recommendation that it end the unlimited State guarantee enjoyed by the French Post Office (La Poste) in its capacity as a public body by the end of 2008. In the case "*France; projet de réforme du financement des retraites des fonctionnaires de La Poste française*"²¹⁰, the Commission decided to open an investigation into the proposed reform of the La Poste workers' pension regime. The Commission will examine whether or not the reduction in La Poste's pension costs sought by the reform would give La Poste an advantage over its competitors.
312. Lastly, in addition to checking that subsidiaries of postal operators active in competitive markets outside the SGEI were not being cross-subsidised, the Commission ensured that these subsidiaries were not enjoying State aids. For instance, in the case "*DHL - Leipzig Halle Airport*"²¹¹, the Commission decided to open proceedings to determine whether Land Sachsen and the publicly owned Leipzig Airport behaved as private investors when providing DHL with infrastructures and guarantees in case of a ban on night flights.

²⁰⁸ Communication from the Commission on Services of general interest in Europe (OJ C 17, 19.1.2001, p. 4).

²⁰⁹ Case E 15/2005, *Recommandation proposant l'adoption de mesures utiles concernant la garantie illimitée de l'Etat en faveur de La Poste* (not yet published).

²¹⁰ Case C 43/2006; *Projet de réforme du financement des retraites des fonctionnaires de La Poste française*, (OJ C 296, 6.12.2006, p. 6).

²¹¹ Case C 48/2006; *DHL – Leipzig Halle Airport* (OJ C 48, 2.3.2007, p. 7).

BOX 1: THE APPLICATION OF STATE AID RULES IN PARTICULAR SECTORS

1. Steel

The Commission continues to apply its restrictive approach for allowing State aid in the steel sector. Given that restructuring and investment aid to the steel sector is generally prohibited under EU rules, the Commission did not decide any new cases in 2006. The Commission did, however, grant (prior to accession) derogations from this rule to the new Member States Poland, the Czech Republic and Slovakia, as well as to the accession countries Bulgaria and Romania. The restructuring aid in Poland and the Czech Republic is allowed on the basis of a national restructuring plan and individual business plans which will restore the viability of steel producers by 2006. The implementation of the plans is monitored by the Commission.

In this context, the Commission took a decision approving a modification of the ongoing steel restructuring in the Czech Republic, concerning its biggest steel producer, Mittal Steel Ostrava²¹². In its decision, the Commission also decided that, if the restructuring plan is not properly implemented, it will be necessary to recover a certain amount of restructuring aid. In the case in question, however, this was not necessary because the company actually received less aid than originally authorised.

In addition, the Commission opened a formal investigation procedure in two Polish cases. In the case of Technologie Buczek, the implementation of a restructuring plan was a complete failure²¹³ and the Commission is investigating whether additional incompatible aid was granted. In the case of Arcelor Huta Warszawa, the Commission is investigating to what extent a failure to properly implement a restructuring plan results in misuse of previously obtained aid²¹⁴.

2. Shipbuilding

The Commission decided to prolong the Framework on State Aid to Shipbuilding ("the Shipbuilding Framework") by two years, until 31 December 2008, for reasons linked to the need to obtain more experience with its rules, in particular the innovation aid rules which are new in the Framework²¹⁵. As the Framework has been in force since 1 January 2004, only a few cases have been assessed to date. The provision on innovation aid aims to encourage greater efficiency and competitiveness of European yards in an increasingly competitive global market. The Commission has so far approved three innovation aid schemes – in Germany, France and Spain. However, these schemes have not yet been applied in practice.

Regarding cases assessed during the year, the Commission adopted, following the initiation of

²¹² Case N 350/2006 Commission decision, 13.9.2006 (OJ C 280, 18.11.2006, p. 4).

²¹³ Case C 23/2006 Commission decision, 16.5.2006 (OJ C.196, 19.8.2006, p. 23).

²¹⁴ Decision of 6 December 2006 (not yet published).

²¹⁵ Rules for innovation aid were already included in the Council Regulation (EC) N° 1540/98 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998, p. 1). However, these rules were apparently not practical and never used during the years the Regulation applied. The rules have consequently been changed in the present Framework.

the formal investigation procedure at the beginning of 2006, two positive decisions concerning regional investment aid to two German shipyards²¹⁶. The Commission initially had doubts that the notified investments respected the provisions of the Shipbuilding Framework and that they were limited to the modernisation of an existing yard and would improve the productivity of existing installations. Moreover, the Commission was concerned that the investments might lead to a significant capacity increase of the yard. The Commission finally concluded that the aided investments did aim at improving the productivity of the yard. At the same time, the Commission's doubts that the investment would lead to a disproportionate capacity increase were dispelled. The Commission also initiated the formal investigation procedure with respect to investment aid for a Slovak shipyard in Komarno²¹⁷.

The Commission endorsed a new scheme for shipbuilding financing in France²¹⁸. The State counter guarantees will be available for financing the construction of new ships for which the contract value exceeds EUR 40 million. The Commission has concluded that the scheme is free of aid, as adequate guarantee premiums will be systematically charged. Their level will vary according to the risk of the project financed. The Commission has in the past already approved similar schemes in Germany and in the Netherlands. In this context, in 2006 the Commission also authorised the prolongation, for an unlimited period, of a German scheme²¹⁹ which had been endorsed for the first time in December 2003 for a limited period ending in December 2006.

3. Coal

After the ECSC Treaty expired, the Council adopted an exemption regulation based on Article 87(3)(e), laying down favourable rules for State aid for hard coal and meta-lignite. In 2006, the Commission took relatively few decisions in the coal sector, and no decision in the lignite sector. In particular, it approved the plan for access to coal reserves in the Slovak Republic²²⁰. Following this decision, there is only one plan for access to coal reserves outstanding, namely that of Spain, which notified it in 2006. The Commission approved the plans for the UK in

²¹⁶ Case C 5/2006 *Rolandwerft* Commission decision, 6.12.2006 (not yet published); and Case C6/2006 *Volkswerft Stralsund* Commission decision, 20.12.2006, (not yet published).

²¹⁷ Case C 21/2006, ex N 635/2005 (OJ C 194, 18.8.2006, p. 30).

²¹⁸ Case N 35/2006, Guarantee scheme for shipbuilding (OJ C 259, 27.10.2006, p. 13).

²¹⁹ Case N 325/2006, Prolongation of the Shipbuilding guarantee scheme (OJ C 288, 25.11.2006, p. 3).

²²⁰ N 324/2005, 25.1.2006 (OJ C 89, 12.4.2006).

²²¹ Cases N 274/05 *Huta Cynku Miasteczko Slaskie* Commission decision, 13.9.2005 (OJ C 207, 30.8.2006 p. 5); NN 14/06 *Ottana Energia* Commission decision, 12.12.2006 (not yet published); NN 16/06 *CIT* Commission decision, 7.7.2006 (OJ C 244, 11.10.2006, p. 14); N 28/06 *Techmatrans* Commission decision, 20.2.2006 (OJ C 87, 11.4.2006, p. 2); N 802/06 *Sandretto* Commission decision, 29.1.2007 (not yet published).

²²² N 584/04 *AB Vingriai* Commission decision, 1.6.2005 (OJ C 187, 30.7.2005, p. 15); N 464/05 *AB Kauno* Commission decision, 22.2.2006 (OJ C 270, 7.11.2006, p. 2); N 632/05 *Energetyka Wislosan* Commission decision, 19.7.2006 (OJ C 232, 27.9.2006, p. 2).

²²³ Case C 44/2005 *Huta Stalowa Wola* Commission decision, 20.12.2006 (not yet published).

²²⁴ Case C 3/2005 *FSO* Commission decision, 20.12.2006 (not yet published).

²²⁵ Case C 44/2005 *Huta Stalowa Wola* Commission decision, 20.12.2006 (not yet published).

²²⁶ Case C 25/2005 *Frucona Košice* Commission decision, 7.6.2006 (not yet published).

²²⁷ Case C 42/2005 *Konas* Commission decision, 26.9.2006 (not yet published).

²²⁸ Case C 1/2005 *Euromoteurs* Commission decision, 26.4.2006 (OJ L 307, 7.11.2006, p. 213).

²²⁹ NN 16/06 *CIT* Commission decision, 7.7.2006 (OJ C 244, 11.10.2006, p. 14).

²³⁰ COM(2006) 103 final of 9.3.2006.

²³¹ Commission Regulation (EC) No 1595/2004 of 8 September 2004.

2003 and for Germany, Poland, Hungary and Czech Republic in 2004. The plan for Slovenia was approved prior to its accession by the Slovenian competition authorities.

In 2006, the Commission also prepared the mid-term report on the application of Council Regulation (EC) No 1407/2002 on State aid to the coal industry, in accordance with Article 11 of the Regulation. The report evaluates the application of the Regulation in the years 2003 to 2006, and lays out the options for the future of State aid to the coal industry after 2010, when the current Regulation expires.

4. Rescue and restructuring aid

Experience in applying the rescue and restructuring (R&R) Guidelines, introduced in 2004, is limited. To date, the Commission has taken only five rescue aid decisions²²¹, three no objection decisions as regards restructuring aid²²², one positive decision²²³ and no negative decision on the basis of the 2004 R&R Guidelines. Other decisions mentioned below were taken on the basis of the earlier 1999 R&R Guidelines.

In 2006, the Commission closed the investigation into restructuring aid to the Polish car producer FSO with conditional approval²²⁴ in respect of a production and sales cap limiting production until February 2011. The Commission also closed the formal investigation concerning Huta Stalowa Wola S.A., approving the aid²²⁵ which was granted after accession without the Commission's approval in the form of a write-off of public liabilities, but was found to be compatible with the R&R Guidelines.

In the Frucona Košice²²⁶ and Konas²²⁷ cases, the financial support was granted in the form of a debt write-off by the tax office. The Commission compared the yield obtained by the tax office in the arrangement with each company with the possible yield that the tax office could have obtained in a tax execution procedure. In both cases the Commission found that the tax authorities did not act as a market economy creditor and that the write-off thus constituted aid which, in the case of Konas, was found to be compatible, whereas in the case of Frucona it was incompatible as there was no genuine restructuring plan.

The Commission adopted a negative decision in the Euromoteurs²²⁸ case as the aid would not restore the company's long-term viability. The company had previously received illegal and incompatible aid which it never repaid. The Commission took into account the cumulative effect of this aid with the new notified aid and the negative effect of recovery on restoration of viability.

The Commission also dealt with a number of rescue aid cases in 2006. In the case of the Italian tour operator CIT, the Commission first approved an illegally granted sum of rescue aid for six months²²⁹. Two months later, the Commission amended this decision in so far as it requested Italy to stop the rescue aid *ex nunc* because its prolongation, which was obtained by presentation of a restructuring plan, was not justified, as the restructuring plan was too poor.

5. Agriculture

In 2006 the Commission adopted new rules on the granting of State aid in the agricultural sector. These rules consist of two parts: an exemption regulation which allows Member States not to notify State aid given to small and medium-sized undertakings involved in agricultural production provided that certain requirements are met, and guidelines which complement the regulation and lay down rules applicable to notified aid. The two documents cover the period

from 2007 to 2013.

Quicker crisis support for farmers and simplified administration of agricultural State aids - this is the objective of the new State aid exemption regulation. In particular, the first-ever inclusion of compensation for animal and plant diseases and bad weather losses will greatly speed up the implementation of State aid in such situations of crisis for farmers. At the same time, the new regulation will encourage better risk management. From 2010 onwards, bad weather aid will only be reduced if the farmer has not taken out insurance against such risk; drought compensation will require implementation of the water framework directive, requiring adequate contributions from the sector.

The new categories of aid in the new guidelines include aid for compliance with standards, "Natura 2000" aid and aid relating to the payments provided for in Directive 2000/60/EC (water policy), aid relating to exemption from excise duties as provided for in Directive 2003/96/EC (taxation of energy products and electricity) and aid to the forestry sector.

In 2006, the Commission received 319 notifications of State aid draft measures to be granted in the agricultural and agro-industrial sector. Overall, the Commission approved 268 measures. The Commission initiated the formal investigation procedure in respect of three cases, where the measures concerned raised serious doubts of compatibility with the common market.

6. Fisheries

In 2006, the Commission presented to the Member States a draft *de minimis* Regulation in order to increase the ceiling which can be granted per enterprise from EUR 3 000 to EUR 30 000. The Regulation is likely to be adopted during 2007.

In March, the Commission adopted a Communication to the Council and the European Parliament on improving the economic situation in the fishing industry²³⁰. In this Communication, the Commission highlighted the need for the fishing industry to recover a healthy financial situation in a context of lower yields due to depleted fish stocks and of rising operational costs following the increase in fuel prices. For that purpose, the Commission encouraged Member States to set up rescue and restructuring aid schemes addressing the fishing enterprises in difficulty and indicated the specific criteria under which it will assess the schemes notified in accordance with the 'horizontal' Guidelines on rescue and restructuring aid.

During 2006, 33 new State aid cases were registered and 25 decisions were adopted by the Commission. In addition, the Commission received 22 summary information sheets concerning schemes which are exempted from notification in accordance with the block exemption Regulation²³¹. Among the decisions taken in 2006, the Commission decided in March to initiate the formal investigation procedure concerning French State aid granted to fishing enterprises aiming at alleviating their operational costs due to the increase in fuel prices by paying back to them, via a private body controlled by the State, the amount exceeding a reference price.

III – The European Competition Network and National Courts – Overview of cooperation

1. GENERAL OVERVIEW

313. 2006 was the second full year of implementation of the enforcement system set up by Regulation 1/2003. It saw a further strengthening of cooperation between the members of the ECN, i.e. the EU Member States' NCAs and the Commission. The ECN continues to function well, with the mechanisms provided for by Regulation 1/2003, aiming at ensuring efficient and consistent enforcement of the law, operating smoothly throughout the year.

1.1. Cooperation on policy issues

314. The strength and the potential of the ECN cooperation go beyond the legal obligations set out in the Regulation. The ECN also provides a useful platform for EU competition authorities to discuss general policy issues. During 2006, such work took place in four different fora:

315. First, the Director General of the Competition DG and the heads of all NCAs met for their annual meeting in the ECN context to discuss important competition policy issues. The 2006 meeting focused on the ECN Leniency Model Programme, which was developed in response to requests for a one-stop leniency shop and is intended to improve the handling of parallel leniency applications in the ECN without jeopardising the flexible work-sharing arrangements between the ECN members. The aim of the Model Programme is to set out the basis for soft harmonisation of all European leniency programmes and to persuade the few Member States that do not yet have a programme in place to adopt one. The programme sets out the main procedural and substantive rules which the ECN members believe should be common to all such programmes. It also introduces a model for a uniform summary application system at national level for immunity applications in cases concerning more than three Member States. The Directors General endorsed the ECN Model Programme²³² and agreed to make every effort to align their current and future European leniency programmes with its provisions.

316. Second, the NCAs and the Commission met at regular intervals, on three occasions, in so-called "plenary meetings", during which general issues of common interest relating to antitrust policy were debated and experiences and know-how were exchanged. Such discussions and exchanges are intended to foster the creation of a common competition culture within the ECN. In particular, based on the work of the Leniency working group, preparations were made for launching the ECN Leniency Model Programme. Useful discussions also took place on cooperation within the ECN for sector inquiries.

²³² The ECN Model Programme is available at http://ec.europa.eu/comm/Competition/ecn/index_en.htm together with a list of most frequently asked questions (MEMO/06/356).

317. Third, during 2006, six working groups dealt with specific issues. One working group was dedicated to preparing the ECN Leniency Model Programme. The mandate of a second working group, initially created to explore transitional issues, was adapted to cover cooperation issues more generally; the group focused closely on the subject of sector inquiries, exploring options for cooperation in the network. The third working group addressed issues related to the diversity of procedures and sanctions in the Member States as well as the interface of competition enforcement procedures with certain third pillar instruments. A fourth working group dealt with information and communication about the ECN. In particular, it prepared the launch of a website that provides information about the ECN and its basic texts and facilitates access to the annual reports and news releases of all the authorities in the network²³³. A fifth working group was dedicated to issues relating to abuse of dominant position, and the sixth working group consists of chief competition economists from the agencies within the ECN. These working groups provide an excellent forum for sharing experiences on concrete issues and developing best practices.
318. Finally, 15 ECN sectoral subgroups dedicated to particular sectors²³⁴ addressed specific issues and engaged in a useful exchange of experience and best practices. For example, in 2006, the professional services subgroup discussed reforms and transparency in the professional services sector across the EU. The sectoral subgroups ensure good upstream coordination and engender a common approach and broad consistency in the application of EU competition law, beyond individual cases²³⁵.

1.2. Evolution of national laws and instruments for efficient enforcement by NCAs

319. The year 2006 saw the continuation of the 'convergence' process observed in the context of Regulation 1/2003. Over and above legal obligations arising from the implementation of the Regulation, there is a trend towards greater approximation of national procedural laws and policies. A major example of this is the continued trend towards introduction of leniency programmes. By the end of 2006, all but six Member States were operating a leniency programme or were in the process of introducing one. The first indications are that new or revised programmes are aligning on the provisions of the ECN Leniency Model Programme. There is also a sustained trend in respect of the abolition of notification systems for the purposes of national competition laws. Currently, all but five Member States have abolished (or are in the process of abolishing) their notification system. The new, largely similar, instruments are increasingly being used in practice. For example, a large number of NCAs now have the power to adopt commitment decisions in line with Article 9 of Regulation 1/2003. In consequence, a significant increase in such decisions could be observed in 2006 among the decisions communicated to the Commission on the basis of Article 11(4) of Regulation 1/2003.

²³³ http://ec.europa.eu/comm/competition/ecn/index_en.html

²³⁴ Banking, Securities, Insurance, Food, Pharmaceuticals, Professional services, Healthcare, Environment, Energy, Railways, Maritime Transport, Motor vehicles, Telecoms, Media, and Sports.

²³⁵ See additional references to the work of sectoral subgroups under Sector Developments.

1.3. Cooperation in individual cases

320. Cooperation between the ECN members in individual cases is organised around two principal obligations on the part of the NCAs, namely to inform the Commission when new cases are opened (Article 11(3) of the Regulation) and before the final decision is taken (Article 11(4) of the Regulation). The first requirement of informing the Commission and the network facilitates the swift reallocation of cases on the few occasions where it appears necessary and promotes enhanced and effective enforcement, whereas the second plays an important role in ensuring consistent application of EU law.

1.3.1. Case allocation

321. The Commission was informed of some 150 new case investigations launched by NCAs in 2006. Amongst the new cases about which the Commission was informed under Article 11(3) of the Regulation, 45 % concerned the application of Article 81 EC, 37 % concerned the application of Article 82 EC and 18 % concerned the application of both Article 81 and 82 EC.

322. The experiences of work-sharing within the Network have so far confirmed that the flexible and pragmatic approach introduced by the Regulation and the Network Notice²³⁶ functions very well in practice. As in previous years, there were in 2006 few instances where case-allocation discussions took place, and even fewer occasions where a case changed hands. The situations where work-sharing plays a role typically occur when a complainant or a leniency applicant chooses to contact both the Commission and one or more NCAs. In 2006, a small number of complaints were re-allocated from the Commission to NCAs that were willing to follow up the matters raised. Furthermore, in a limited number of instances, NCAs expressly drew the Commission's attention to suspected competition problems that appeared to have effects in several Member States. To date, there have been no instances where allocation of an individual case has not been solved through bilateral discussions.

1.3.2. Coherent application of the rules

323. In 2006, the Commission and its services reviewed or advised on, either on the basis of the formal cooperation provisions or on an informal basis, some 125 cases originating from NCAs. These cases related to a broad range of infringements in different sectors of the economy.

324. To date, the Commission has not made use of the possibility of relieving an NCA of its competence in a given case by initiating proceedings under Article 11(6). In several instances, the services of the Competition DG entered into discussions with the NCA and provided comments and advice to the authority on an informal basis.

325. The aim of such observations is to draw the NCA's attention to certain issues or to raise points which might merit further consideration. The possibility of submitting (oral or written) observations informally has proved to be very helpful for achieving smoother and more consistent enforcement of EU competition law. The willingness

²³⁶ Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43), hereinafter referred to as the Network Notice.

of the authorities to engage in these dialogues and to take account of suggestions has turned this voluntary cooperation instrument into a useful complement to the formal powers given to the Commission.

2. APPLICATION OF EU COMPETITION RULES BY NATIONAL COURTS IN THE EU: REPORT ON THE IMPLEMENTATION OF ARTICLE 15 OF REGULATION 1/2003

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

326. 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 2006, the Commission issued an opinion following a request made in 2005 by a court in the Netherlands. During 2006, the Commission received two requests from national judges (Belgium and Sweden) for an opinion under Article 15(1). In response to these requests, the Commission issued one opinion to the Belgian judge, whereas the Swedish request was still pending at the end of the year.

2.1.1. The opinion provided to a court in the Netherlands

327. Further to a request received in 2005, the Commission provided an opinion to the Gerechtshof in The Hague in a case that concerned quota allocations for mussel seeds in the Netherlands, set by an association of mussel farmers for its members. The Court essentially asked the Commission for its opinion on whether the EU competition rules applied to this practice or whether it fell within the scope of Regulation 26/62 on the application of competition rules to agricultural products.

328. In its opinion, the Commission examined in particular the conditions of the application of Article 2(1) of the above-mentioned Regulation to the case at issue and expressed the view that those conditions seemed to be fulfilled.

2.1.2. The opinion requested by a Belgian court

329. In 2006, an opinion was requested by the Antwerp Court of Appeal. The case before this court concerned an accident in the port of Antwerp in 1995, in which a ship hit a container crane while a pilot was onboard assisting the master of the vessel. The accident resulted in the death of the crane operator and considerable damage to the port infrastructure. One of the main issues at stake in this case related to the liability of the pilot and the company that holds the concession for the provision of pilot services in the port of Antwerp. In particular, the Court of Appeal asked for the Commission's opinion on the conformity, with Article 82 EC, of the general conditions in the pilotage contract, including both an exoneration of responsibility and an indemnity clause, while also taking into account the apparent contradiction in the exoneration clause and the circumstances in which these conditions were proposed by the concession holder to potential users of pilotage services.

330. In its reply, the Commission commented on the existence of a dominant position and abuse of that position under Article 82(a) EC. The opinion highlighted principles that could be derived from the case law concerning exploitative abuses and the imposition of unfair trading conditions. In this respect, the Commission drew the

Court's attention in particular to the *BRT v SABAM* case. The Commission also reminded the Court of Appeal of the need to take into account all relevant interests in a case when analysing whether trading conditions are unfair, and the need for the liability clause to be seen in the light of the overall contract and the relevant context, rather than viewed in isolation. In particular, as regards the question of whether contractual exclusion of liability is an abuse, it seemed relevant to the Commission to analyse whether the dominant undertaking would have been able to impose a similar exclusion of liability if there had been normal and sufficiently effective competition and whether the contractual clause raises obstacles, the effect of which goes beyond the objective to be obtained.

2.2. Judgments by national courts

331. Article 15(2) of Regulation 1/2003 requires the EU Member States to forward to the Commission a copy of any written judgment issued by national courts deciding on the application of Articles 81 or 82 EC. The Commission received copies of some 30 judgments handed down in 2006, which were posted on the Competition DG's website in so far as the transmitting authority did not class them as confidential (confidential judgments are merely listed).

2.3. Amicus curiae intervention under Article 15(3) of Regulation 1/2003

332. Article 15(3) of Regulation 1/2003 provides that where the coherent application of Articles 81 or 82 EC so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States, and may also make oral observations with the permission of the court in question.

333. In 2006, for the first time since the entry into force of Regulation 1/2003, the Commission made use of the amicus curiae possibility under Article 15(3), by presenting written observations to the Cour d'appel de Paris. The case in question relates to car distribution and involves a discussion of the concept of 'quantitative selective distribution' in Regulation (EC) No 1400/2002 (the motor vehicle block exemption regulation)²³⁷. The Commission's observations in this case restated its interpretation of the relevant provisions of the block exemption regulation with a view to raising awareness on the part of the court. Whilst not binding on the court, the Commission's observations could also prompt a referral for a preliminary ruling from the ECJ.

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

334. Continuous training and education of national judges in EU competition law is very important in order to ensure both effective and coherent application of those rules. Since 2002, the Commission has co-financed several training projects each year and did so again in 2006, co-financing 15 projects for the training of national judges from all 25 EU Member States.

²³⁷ Commission Regulation (EC) No 1400/2002 of the 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30).

IV – International activities

1. ENLARGEMENT, WESTERN BALKANS AND NEIGHBOURHOOD POLICY

335. In the run-up to the accession of Romania and Bulgaria in January 2007, the Commission closely monitored the preparations for membership and assisted in the enforcement of the competition rules.
336. The Commission reviewed the State aid measures which Bulgaria and Romania notified in accordance with the so-called existing aid mechanism established by the Accession Treaty. This mechanism provides that any State aid measure put into effect before and still applicable after accession is, upon accession, regarded as existing aid within the meaning of Article 88(1) EC only when the Commission has had an opportunity to review it and does not raise an objection.
337. In addition, with regard to Romania, the Commission closely monitored the State aid enforcement record by reviewing draft decisions before their final adoption by Romania.
338. The Competition DG assisted Croatia and Turkey and the Western Balkan countries in further aligning their competition rules with EU law. This included help in drafting competition and State aid laws and advice on setting up the necessary institutions for the enforcement of these rules.
339. The Competition DG was involved in negotiating with several neighbourhood policy countries the competition provisions in the action plans.

2. BILATERAL COOPERATION

2.1. Introduction

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

2.2. Agreements with the USA, Canada and Japan

United States of America

341. Cooperation with the US competition authorities is based on two dedicated competition cooperation agreements²³⁸. During 2006, the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). Contacts between Commission officials and their counterparts at the two US agencies were frequent and intense.

²³⁸ 1991 EU-US Competition Cooperation Agreement (OJ L 95, 27.4.1995, pp. 47 and 50) and 1998 positive comity agreement (OJ L 173, 18.6.1998, pp. 26–31).

These contacts range from cooperation in individual cases to more general competition policy-related matters.

342. Case-related contacts usually take the form of regular telephone calls, e-mails, exchanges of documents and other contacts between the case teams. In cartel investigations, many of the case-related contacts took place as a result of simultaneous applications for immunity in the US and the EU. Furthermore, in a number of instances, coordinated enforcement actions took place in the US and the EU, in which the agencies tried to ensure that the time lapse between the start of the respective actions was as short as possible. Cooperation in merger control with the DoJ and the FTC continued at a high level of intensity during 2006. The 2002 EU-US best practices on cooperation in reviewing mergers provide a useful framework for cooperation, in particular by indicating critical points in the procedure where cooperation could be particularly useful.
343. Commissioner Kroes met the heads of the US antitrust agencies, Chairman Deborah Majoras of the FTC, and Tom Barnett, Assistant Attorney General at the DoJ, on several occasions. Director General Philip Lowe spoke on 12 September at the joint FTC/DoJ hearings on unilateral conduct. The annual bilateral EU/US meeting, attended by all heads of agencies, took place on 20 October in Brussels. Numerous other meetings and video- or teleconferences took place to discuss issues such as cooperation in cartel investigations, abuse of dominance or the application of the competition rules in particular sectors.

Canada

344. Cooperation with the Canadian Competition Bureau is based on the EU/Canada Competition Cooperation Agreement signed in 1999²³⁹. Contacts between the Commission and the Bureau, its Canadian interlocutor, have been frequent and fruitful. Case-related contacts concerned all areas of competition law enforcement, though the most frequent contacts concerned merger and cartel investigations. In the area of cartel cases, this includes the coordination of investigative measures; in the area of mergers, discussion on possible remedies. The Commission and the Canadian Competition Bureau also continued their dialogue on general competition issues of common concern and officials visited one another.

Japan

345. Cooperation with the Japan Fair Trade Commission (JFTC) is based on the 2003 Cooperation Agreement²⁴⁰. Contacts with the JFTC increased considerably in the course of 2006, in connection with both case-related issues and more general policy matters. Commissioner Kroes met JFTC Chairman Takeshima on the occasion of the annual bilateral meeting which took place on 7 March in Tokyo. In addition to numerous contacts on individual cases, the Commission and the JFTC continued their ongoing dialogue on general competition issues of common concern. In this context, four meetings took place in Brussels in 2006: one on 2 February focusing on

²³⁹ 1999 EU-Canada Competition Cooperation Agreement (OJ L 175, 10.7.1999, p. 50).

²⁴⁰ 2003 EU-Japan Competition Cooperation Agreement (OJ L 183, 22.7.2003, p.12).

IPR and technology transfer; one on 28 September focusing on merger analysis; and two on 22 November focusing on economic analysis and cartel cooperation.

2.3. Cooperation with other countries and regions

China

346. Cooperation with China continued under the "EU-China competition policy dialogue"²⁴¹. Contacts dealt with general policy issues and questions concerning the drafting of the Chinese anti-monopoly law. Commissioner Kroes discussed the draft law with Ms Ma, Vice-Minister in charge of competition, in the margins of the annual bilateral meeting on 20 June.
347. The Competition DG took part in the EU-China Anti-Monopoly Law Workshop with representatives of the National People's Congress on 18 and 19 December in Beijing. The topics which were addressed included merger review, abuse of dominant market positions, enforcement and judicial review. This workshop, which was very well received on both sides, contributed to a better understanding of the approach taken by China and the EU respectively.
348. During the year, the Competition DG took various steps to help China develop its competition law by providing technical assistance. The Competition DG hosted two interns from the Chinese Ministry of Commerce for a period of five months.

European Free Trade Area

349. During the year, the European Commission continued its close cooperation with the EFTA Surveillance Authority in enforcing the Agreement on the European Economic Area.

Korea

350. The Competition DG continued its close cooperation with the competition authority of South Korea (Korean Fair Trade Commission – KFTC). Representatives of both parties met on several occasions to exchange views on individual cases and policy issues. At the annual bilateral consultation meeting in Seoul in June, Commissioner Kroes and Chairman Kwon agreed to enhance bilateral cooperation by exploring the possibility of an inter-governmental agreement between the European Communities and the Republic of Korea. This would replace the existing Memorandum of Understanding²⁴² between the Competition DG and the KFTC.

Russia

351. The chairman of the Russian Federal Anti-monopoly Service (FAS), Igor Artemyev, visited Brussels in October for bilateral discussions with Commissioner Kroes and the Competition DG. This visit marked the entry into force of the new Russian competition law, which embodies a certain convergence with EU law (for example,

²⁴¹ Terms of Reference of the EU-China competition policy dialogue (May 2004).

²⁴² Memorandum of Understanding on cooperation between the Fair Trade Commission of the Republic of Korea and the Competition Directorate-General of the European Commission (October 2004).

regarding criteria for exemption of anti-competitive practices, and as regards State aid). The Competition DG had been consulted by the FAS on the drafting of the law.

3. MULTILATERAL COOPERATION

3.1. International Competition Network

352. The Competition DG continued to play a leading role in the International Competition Network, in which it is a member of the Steering Group, co-chair of the Cartels Working Group, and an active member of the other Working Groups, on Mergers, Competition Policy Implementation, and Unilateral Conduct. This latter Working Group is a new ICN initiative, having been launched at the 2006 ICN annual conference, and aims to examine the approaches of different jurisdictions with regard to behaviour by individual undertakings (abuse of dominant positions, monopolisation and so forth). The first fruits of its work are expected to be presented at the 2007 ICN conference, in the form of reports covering the objectives of legislation on unilateral conduct and definitions of "dominance".

353. Particular mention should also be made of the Cartels Working Group, co-chaired by the Competition DG. At the 2006 ICN conference, this Working Group presented reports on cooperation between agencies in cartel investigations (drafted by the Competition DG), and interaction of public and private enforcement, along with a new chapter on electronic evidence gathering for the ICN's Anti-Cartel Enforcement Manual and a reinforced chapter on leniency. In addition, the Working Group organised the annual ICN cartel workshop, in the Netherlands in November, which was largely based on a hypothetical cartel case.

3.2. OECD

354. The Competition DG continued to participate actively in and contribute to the work of the OECD Competition Committee. The Competition DG participated in all competition policy round tables and also participated actively in the peer reviews of Sweden and South Korea. It attended the Global Forum and other competition-related OECD meetings (e.g. of the Investment Committee, Trade Committee and Group on Regulatory Policy).

355. OECD Competition Committee meetings were held in February (Global Forum), June and October. In February, the Global Forum on competition held a peer review of Chinese Taipei and round tables on concessions and on prosecuting cartels without direct evidence of agreement. The latter round table was followed by breakout sessions on cartel case studies. In June, the Competition Committee held two round tables, one on remedies and sanctions in abuse of dominance cases, and one on competition policy and environmental protection. The October meeting of the Competition Committee again featured two round tables. The first one, on competition, patents and innovation, addressed in particular the positive and negative ways in which competition and patents can influence innovation. The second one discussed competition in bidding markets, how to maximise competition in auctions (including the effect of transparency on competition in auctions and on corruption in the organisation of auctions), and how to carry out merger evaluations in bidding markets.

V – Outlook for 2007

A – INSTRUMENTS

1. ANTITRUST

356. The establishment of a dedicated Cartels' Directorate in the Competition DG in June 2005 and the resources invested in this work area, together with the revised leniency programme, are already bearing fruit. The Commission has, during the past year, adopted decisions on a number of cases and has opened numerous investigations. The revised Leniency Notice is now being applied and initial investigative measures have been taken. The Competition DG is also examining the possibility of introducing a form of direct settlements for cartels whereby companies that acknowledge their responsibility in a cartel infringement would, in line with conditions to be set out, benefit from a shorter administrative procedure and receive a reduction in the amount of fines that would have been applied otherwise. From the perspective of cartel prosecution and efficacious use of enforcement resources, this would herald a new phase of cartel deterrence.
357. As a follow-up to the Green Paper, the Commission has endorsed in its 2007 legislative and work programme the preparation of a White Paper on antitrust damages actions²⁴³. The White Paper will be accompanied by an impact assessment. The Commission would hope that such a White Paper will foster and put into sharper focus the ongoing discussions on private enforcement as the second pillar of enforcement of EU competition rules. It could also serve as a reference point for the Member States when they are reassessing their applicable national procedural rules. The White Paper will be followed by a period of consultation similar to that which followed the December 2005 Green Paper, during which all relevant stakeholders will be invited to comment.

2. MERGERS

358. In the area of mergers and with a view to building on past experience, the Commission will continue to ensure that the assessment of all proposed transactions is based on sound economic theory and analysis and high-quality investigative techniques. As part of these efforts the Commission also plans to continue its work on three sets of guidelines which are designed to improve the transparency, predictability and consistency of its policy and to ensure that it is based on a sound economic framework. These guidelines comprise:
- guidance on non-horizontal mergers. It is planned to publish a draft Notice during the course of the year.

²⁴³ The Commission's legislative and work programme for 2007 is available at http://ec.europa.eu/atwork/programmes/index_en.htm

- an amended Notice on Remedies. This will build on the experience gained and proposals contained in the Remedies Study published in 2005.
- a consolidated jurisdictional Notice. It is hoped that the Commission will adopt this Notice by summer 2007 following finalisation of the consultation process initiated in 2006.

3. STATE AID

359. In the area of State aid, the Commission intends to continue work on the implementation of the State Aid Action Plan by adopting in 2007 new guidelines on environmental protection, new rules for aid in the form of guarantees, a new notice on the Commission's reference rates and a notice on the recovery of illegal or incompatible aid.
360. While priority will be given to completing this legislative package, the entry into force of the texts adopted in 2006 will also require a programme of training, help desks and scrutiny to ensure smooth and efficient implementation. Furthermore, the Commission intends to consolidate its practice with a more refined economic approach, which should lead to a guidance document.
361. In the course of 2007, the Commission will also reflect on the need to revisit the rules on rescue and restructuring, aid in the form of taxation and aid for broadcasting and cinema. In addition, the Commission will prepare a new general block exemption, to be adopted in 2008, which will simplify, rationalise, consolidate and significantly expand the possibilities for Member States to grant aid without having to notify it to the Commission. The current block exemption for SMEs already offers possibilities to support investment aid, aid for consultancy and other services activities and aid for R&D projects. The aim is to make the new block exemption even more comprehensive, with possible new exemptions for regional aid, R&D and innovation and environmental aid. This lightened administrative burden will mostly benefit SMEs.

B – SECTOR DEVELOPMENTS

1. ENERGY

362. The Commission intends to bring forward proposals in the summer of 2007 for a third legislative package to promote effective competition in the gas and electricity sectors. In addition, the Commission will pursue investigations into a number of antitrust, merger and State aid cases. The Distrigas case concerning long-term downstream contracts should be completed in 2007, and a number of other antitrust cases are likely to be opened, for example on the basis of the unannounced inspections the Commission carried out in 2006 and/or complaints the Commission has received. The consolidation of the energy sector is expected to continue and the Commission will investigate thoroughly all merger notifications that it receives.
363. With the cooperation of the Member States concerned, the Competition DG anticipates deploying resources in the State aid control field mainly on two issues in both upstream and downstream markets during 2007. In upstream markets, control of the State aid implications of long-term Power Purchase Agreements, with particular emphasis on the new Member States, will continue to be the focal point. Such contracts still foreclose significant parts of the wholesale markets. In downstream markets, the Competition DG anticipates a big workload in the field of regulated electricity tariffs. Favourable electricity tariffs undercut the market in a number of Member States. The cases are likely to concentrate mainly on energy-intensive undertakings and/or sectors.

2. FINANCIAL SERVICES

364. The Commission expects to finalise the sector inquiries both in retail banking and in business insurance in 2007. The Commission will decide on specific remedies to address the competition problems identified by the inquiries.
365. The Single Euro Payments Area (SEPA) will result in the creation of a single market for payments throughout the euro area. In 2007, competition policy will play an important role alongside other Community policies in ensuring that the European banking industry's efforts to implement a new framework for SEPA are successful. It is, however, essential that the SEPA framework be conceived in a way that supports competition and innovation and enables cost savings to be passed on to businesses and consumers.
366. For payment card networks, SEPA offers the potential to remove restrictive rules prohibiting co-branding of cards and surcharging of payment card transactions by retailers. The Commission will pay particular attention to ensuring that co-branding restrictions are not used to compartmentalise markets²⁴⁴. SEPA should make it easier to move away from blending of merchant fees, which weakens price competition

²⁴⁴ This could, for example, be the case if an international cards scheme deems another scheme a competitor simply because it decides to operate outside its home Member State.

between the major payment card networks. Crucially, the new framework should provide retailers with greater choice of supplier for acquiring services, opening up greater competition in this highly concentrated market²⁴⁵.

367. Deregulation in financial services is of paramount importance for promoting competition and efficiency in the EU. In this respect, preferential taxation is critical for the success of national financial centres because it has a direct influence on the conditions under which financial providers compete. Unlike deregulation, however, preferential taxation does not promote efficiency or the optimal allocation of financial investments. Preferential taxation alters the level playing field between financial providers to compensate for extra production costs and inefficiencies, and it can make it more convenient to use unregulated and expensive closely held vehicles as opposed to more transparent lending institutions. Against this background, the Commission will continue to monitor the existing preferential tax regimes to eliminate possible competition distortions resulting from State aid. The Commission will also continue to ensure that capital injections to public financial institutions are exempt from State aid. In this respect, the ongoing investigations into the Landesbanken recapitalisations are expected to be completed in 2007.

3. ELECTRONIC COMMUNICATIONS

368. As far as the future regulatory framework is concerned, the draft revised Recommendation on relevant markets was subject to public consultation until the end of October 2006. The Commission plans to adopt the final revised Recommendation in the first half of 2007 and it will enter into force immediately thereafter. With the proposal to deregulate at least the retail calls markets, and with a clear opening created for NRAs to deregulate wholesale trunk leased lines and transit services where alternative infrastructures have been rolled out, the draft revised Recommendation would substantially reduce the scope of ex ante regulation.
369. The behaviour of operators on those markets will in the future be governed by ex post enforcement of competition law only, which will probably give rise to an increased number of complaints, investigations and decisions involving the national and European antitrust authorities. In this respect, particular attention will be paid to potential problems of margin squeeze between wholesale and retail level and anti-competitive bundling. Reducing the number of markets susceptible to ex ante regulation is, however, an important step towards introducing competition into the electronic communications sector in Europe, and the Commission is confident that competition policy will prove an effective tool to safeguard this process.
370. From the State aid perspective, while the Commission expects further cases of broadband support in remote and rural areas to be notified for State aid approval, there are signs that public intervention is shifting from basic broadband infrastructure to advanced broadband networks capable of delivering advanced services over fibre and wireless networks. If public authorities support the deployment of electronic communications networks in areas where several providers are already offering

²⁴⁵ It should be remembered that in some Member States retailers currently face only one 'offer' from a monopoly provider of acquiring services.

broadband services, state intervention raises a whole new set of issues as competition is more likely to be distorted. The Commission intends to monitor these developments closely and its policy will evolve in response to new patterns of public intervention.

4. INFORMATION TECHNOLOGY

371. Consistent with its approach under the Community Lisbon Programme for growth and jobs, the Commission will continue to monitor developing product markets in order to concentrate its efforts on those ICT sectors where it can produce the greatest effects on competitiveness. In particular, it will ensure that existing markets remain open and that new markets do not become closed, either via the unilateral actions of dominant companies in various markets or via restrictive agreements. It will promote investment and growth in ICT markets and by extension in the knowledge economy as a whole, for example by removing anti-competitive barriers to innovation and market entry.
372. The Commission will continue to make full use of its enforcement powers in order to benefit consumers by ensuring vigorous competition in the IT sector and creating incentives and space for companies to innovate. Specifically, the Commission will ensure that Microsoft respects its obligations set out in the Commission decision of 24 March 2004 (see for example MEMO/06/430).
373. The Commission will also investigate, inter alia, possible abusive practices by companies in both the software and hardware industries. As in previous years, it will continue to monitor developments in standard-setting bodies, so as to ensure that procedures within such bodies are transparent and that they contribute to the achievement of pro-competitive outcomes.

5. MEDIA

374. Technological developments in the media markets will continue to raise new issues for the Commission's enforcement activities. Priorities will be similar to those in 2006. The Competition DG will focus on ensuring that scarce premium media content is being made available in compliance with EU competition rules, monitor the transition from analogue to digital broadcasting and maximise consumer benefits from new forms of distribution by fighting anti-competitive restrictions at both the collective rights management level and the distribution level. Besides continuing its ongoing investigations, the Commission plans to adopt a White Paper on Sports in 2007, summarising, inter alia, the application of EU competition rules to sport media rights in the light of existing case law.
375. The Commission will continue with the policy established in 2005 and 2006 towards State aid to promote digital broadcasting. As the target date for switching from analogue to digital broadcasting approaches, Member States are likely to propose more initiatives to facilitate the switchover. In assessing these initiatives, the Commission will pay particular attention to technological neutrality and to the ultimate objective of ensuring wide consumer access to digital broadcasts.

376. The Commission intends to review the Broadcasting Communication in 2007/2008, particularly regarding the scope of public service activities in view of new digital technologies and of Internet-based services.
377. The Commission's Cinema Communication of 2001²⁴⁶ is due to expire on 30 June 2007 but is expected to be extended until a new policy is in place, or 31 December 2009 at the latest. When reviewing the Cinema Communication, the Commission will take into account the results of a study it has launched to examine the economic and cultural effects of conditions which require that a proportion of the film production expenditure be incurred in the territory providing the aid ("territorial conditions"). The results of the study should be available in late 2007.

6. TRANSPORT

378. The Commission plans to adopt and publish, in 2007, draft guidelines on the application of competition law to maritime transport services. It will also initiate a review of Commission block exemption Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)²⁴⁷.
379. As to the application of competition rules, the Commission will follow up the proceedings in the Skyteam global alliance case in the air transport sector. It will also launch actions with a view to improving competition in the railway sector in order to ensure that anti-competitive practices do not countervail the effects of liberalisation.

7. POSTAL SERVICES

380. In 2007, while the legislative process continues on the Commission proposals regarding full market opening by 2009, most EU Member States will still maintain monopoly rights to USPs. Some Member States have completely abolished the reserved area (Finland, Sweden, United Kingdom), while others have a substantially more reduced reserved area than permitted in the Directive. Two other Member States (Germany, the Netherlands) have decided or are deciding to move to full market opening. This means that around 60 % of the EU letter post volumes are expected to be completely open to competition in advance of the 2009 deadline proposed by the Commission. Irrespective of *de jure* market opening, the fact remains that for most market segments and services, USPs in each Member State will remain predominant. This trend and the focus of operators on business segments is expected to continue as the growth rates of business products (unaddressed and

²⁴⁶ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works (COM(2001) 534 final of 26.9.2001, OJ C 43, 16.2.2002); extended until 30 June 2007 by Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works of 26.9.2001 (COM(2004) 171 final of 16.3.2004, OJ C 123, 30.4.2004).

²⁴⁷ OJ L 100, 20.4.2000, pp. 24–30, as last amended by Commission Regulation (EC) No 611/2005 of 20 April 2005 (OJ L 101, 21.4.2005, pp. 10–11).

addressed direct mail in particular) are substantially higher than those of traditional letter mail.

381. In 2007, EU competition rules, notably Articles 81-82 and 86 EC, will thus still apply in a context in which most USPs in the EU retain legal monopolies or positions of unrivalled strength and in which the most dynamic segments of the market are vying with such monopolies. The preparation of a more competitive environment by 2009 entails the risk of attempts by USPs to diversify and expand their operations and, possibly, leverage their market power unlawfully in service or geographic markets rivalling their monopoly, e.g. direct or express mail, business segments. The preservation of residual or nascent competition in service markets adjacent to the monopoly will thus remain a key concern. The Commission will therefore continue to give priority to investigations which i) concern EU-wide or cross-border issues, ii) address barriers to competition set up by State measures or by attempts to unlawfully leverage market power, iii) set a legal or economic precedent.
382. From a State aid point of view, the Commission will continue to ensure that Member States do not overcompensate undertakings entrusted with SGEI, in order that commercial activities outside the SGEI should not be improperly cross-subsidised. In this regard, it is worth recalling that Member States which have agreed to the appropriate measures proposed by the Commission under the 2005 Community Framework for State aid in the form of public service compensation²⁴⁸ will have to bring existing schemes of public service compensation into line with the Framework before 29 May 2007. This implies that from that date, any existing or new aid of these Member States will have to abide by the conditions imposed by the 2005 Framework. In particular, under Article 12 of the 2005 Framework, any aid will have to be based on an instrument specifying the public service obligations, the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and repaying any overcompensation. Member States which had not approved the appropriate measures by the end of 2006 were formally reminded to do so. Similarly, those Member States which had not yet transposed Commission Directive 2005/81/EC amending Directive 80/723/EEC (on the transparency of financial relations) were also sent an official reminder.

²⁴⁸ Community Framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

C – INTERNATIONAL ACTIVITIES

383. The Competition DG's work with the candidate countries, the Western Balkan countries and the neighbourhood policy countries will continue in 2007.
384. Regarding bilateral cooperation, the Competition DG will explore ways to enhance cooperation with other agencies which would make it possible to exchange confidential information, in particular in relation to cartel investigations.
385. The cooperation with China will continue, in particular with the National People's Congress, which is expected to adopt the draft anti-monopoly law in the course of 2007.
386. The Competition DG intends to further strengthen its cooperation with the Korean competition authority. The Commission has presented to the Council a draft mandate for a dedicated intergovernmental cooperation agreement in the field of competition. Once the mandate is adopted, negotiations will formally start.
387. The Commission will negotiate free trade agreements with a number of countries, e.g. Ukraine. The Competition DG will provide input as far as the competition provisions of these agreements, including State aids, are concerned.
388. The International Competition Network's annual conference will be held in Moscow from 30 May to 1 June 2007. The Working Group on Unilateral Conduct will deliver its first results there, which are of particular interest to the Commission. The 2007 ICN cartel workshop will be held in El Salvador. The Competition DG will continue to co-chair the Cartels Working Group.

VI – Interinstitutional cooperation

389. The Commission continued its cooperation with the other Community institutions in accordance with the respective agreement or protocols entered into by the relevant institutions²⁴⁹.

1. EUROPEAN PARLIAMENT

390. As is the case each year, the European Parliament issued an own initiative report on the Commission's annual Report on Competition Policy of the previous year, after an exchange of views was held on the issues raised in the report.

391. The Commission also participated in discussions held in the European Parliament on Commission policy initiatives, such as on State aid reform (in particular on R&D and Innovation) and the Green Paper on damages actions for breach of EC antitrust rules.

392. The Commissioner and/or the Director General responsible for Competition hold regular exchanges of views with the responsible Parliamentary Committees to discuss competition policy matters. In 2006, four exchanges of views were held with the Economic and Monetary Affairs Committee and further meetings with the Internal Market and Consumer Protection Committee and the Committee on Industry, Research and Energy respectively. Issues of major importance during these 2006 meetings were the energy sector inquiries, implementation of the state aid action plan, the Green Paper on damages actions for breach of EC antitrust rules and the continued efforts to bring down illegal cartels. Outside the framework of these more formalised meetings, the cooperation with the European Parliament may also take the form of bilateral meetings with individual Members of Parliament on specific topics of interest to them.

393. The Committee in charge of Economic and Monetary Affairs also receives regular lists of pending cases in the public domain as well as information on the main policy initiatives in the field of competition.

394. Finally, the Commission also cooperates closely with Members of the European Parliament responding to Parliamentary Questions (both oral and written) and Petitions as well as with the European Ombudsman. In 2006, the Commission responded to 551 written questions, 66 oral questions and 48 petitions involving matters of competition policy²⁵⁰.

²⁴⁹ Framework Agreement of 26 May 2005 on relations between the European Parliament and the Commission; Protocol of Cooperation between the European Commission and the European Economic and Social Committee of 7 November 2005; Protocol on the Cooperation Arrangements between the European Commission and the Committee of the Regions of 17 November 2005.

²⁵⁰ Of which respectively 141 written question, 20 oral questions directly given by the Commissioner in charge of Competition; 48 responses to petitions of which 13 given directly by the Commissioner in charge of Competition.

2. COUNCIL

395. The Commission also closely cooperates with the Council, informing the Council of important policy initiatives in the field of competition such as on the State aid reform and the energy and financial services sector inquiries and it participates in Council working groups dealing with competition policy matters, maintaining close links with the respective Presidencies. As the case may be, the cooperation may also consist of participation in informal Council formations, such as there have been for the Competitiveness Council. In 2006, the Commission informed for instance the Council on the results of the electricity and gas markets sector inquiries.

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

396. The Commission further informs the European Economic and Social Committee and the Committee of the Regions on major policy initiatives and participates in debates that may be held at the respective Committee, such as for instance for the adoption of the yearly report by the European Economic and Social Committee on the Commission's annual Report on Competition Policy. In 2006, the Commissioner responsible for Competition met with the Employers' Group of the EESC holding an exchange of views on major policy developments, such as in the fields of state aid, energy sector inquiries and the fight against cartels.