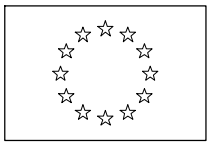

COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

Report on Competition Policy 2005

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Introduction

INTRODUCTION BY THE DIRECTOR-GENERAL FOR COMPETITION

In 2005, the Competition DG made substantial progress towards a more effective and targeted application of the competition rules across all of our areas of activity.

It saw the launching of the State Aid Action Plan (SAAP), a far-reaching reform package designed to deliver more focused state aid rules in order to promote better-targeted aid, for example, aid which aims at promoting innovation, risk capital, research and development. The ultimate goal of the SAAP is to offer more predictability in the control of state aid, better economic results and better governance. State aid control also saw a significant increase of workload in case-handling activities, with 676 new cases registered in 2005 (an 8% increase compared with the previous year).

In antitrust enforcement, the Competition DG gave the highest priority to detecting, dismantling and sanctioning cartels, the most pernicious form of anticompetitive behaviour. Cartels artificially raise the price of goods and services, reduce supply and hamper innovation (so that consumers end up paying more for less quality), and can significantly increase the input costs for European businesses. The success of the Commission's leniency programme, which has led to an increasing number of cartel investigations, is an encouraging sign of our policy's effectiveness. In 2005, the Commission adopted five decisions against cartels; the fines imposed totalled EUR 683.029 million. In order to reinforce cartel-fighting capabilities, in 2005 a dedicated Cartels Directorate was created in the Competition DG.

The Competition DG's other antitrust enforcement activity was marked by an increasing focus on addressing cases which involve practices most harmful to consumers. By way of example, the Commission sanctioned AstraZeneca for misusing the regulatory system in order to delay market entry of generic drugs competing with its blockbuster product Losec. Apart from formal infringement proceedings, use was also made of the new possibility offered by Regulation (EC) No 1/2003 to obtain binding commitments by undertakings with a view to solving competition issues. This was the case, for example, in relation to Coca-Cola's commercial policy.

A milestone in the implementation of Regulation (EC) No 1/2003 was the launching of the first two sector inquiries pursuant to Article 17: one in the financial services sector and one in the energy sector (gas and electricity), both of them key for the achievement of the Commission's wider policy objective of Growth and Jobs. With these sector inquiries, the Commission delivered on its commitment to a more proactive and economics-based approach to enforcement. The Commission will use the results of these inquiries to determine if and what enforcement and regulatory actions are necessary in these sectors to ensure the proper functioning of the internal market. Analysing the results of these sectoral inquiries and giving them the appropriate follow-up will be major tasks for the Competition DG in 2006 and beyond.

In the field of mergers, the enforcement activity in 2005 increased, due to the current general upward trend in merger and acquisition activity. There were 313 notified merger cases, which represented an increase of 25% compared with 2004. Investigations by the Competition DG also tend to rely on an increasingly thorough fact finding. The focus is on identifying

competition concerns that correspond to a sound economic analysis and are grounded in facts. Particular attention was paid to mergers which might impede the achievement of EU liberalisation objectives.

Enhancing the effectiveness of the EU competition rules was a major aim of modernisation, one that can only be achieved by ensuring the proper functioning of the European Competition Network (ECN), which brings together the Commission and the national competition authorities (NCAs) of the Member States. Its main aim is to ensure the coherent and consistent application of the EU's competition rules in the enlarged EU. In that context, the Commission was informed, pursuant to Article 11(4) of Regulation (EC) No 1/2003, of almost 80 cases where an NCA envisaged adopting a decision pursuant to Article 81 and/or 82.

The Competition DG plays, in coordination with the Information Society DG, an important role in the implementation of the regulatory framework for electronic communications adopted by the Commission in 2002, which builds on principles of EU competition law. Under that framework, the Competition DG is co-responsible, with the Information Society DG, for reviewing notifications by national regulatory authorities of regulatory measures for electronic communications markets. In 2005, 201 such notifications (more than twice the corresponding figure for 2004: 89) were dealt with. Decisions adopted by the Commission on such notifications have also nearly doubled in 2005 compared with 2004, going from 64 to 117.

In 2005, we also took important steps to ensure the effective implementation of Commission decisions in the competition field, as shown by the opening of formal proceedings for non-compliance in the Microsoft case (December). In the state aid area, too, the amount of illegal and incompatible state aid to be recovered on the basis of decisions adopted between 2000 and mid-2005 has been reduced: of the EUR 9.4 billion total, some EUR 7.9 billion had been effectively recovered by the end of June 2005.

In addition to the SAAP, the Competition DG made important progress on its ambitious review process in competition policy, which aims at extending competition enforcement to both enhance the effectiveness of the EU's competition rules and promote competitiveness. The Competition DG discussion paper on the application of Article 82 EC to exclusionary abuses and the adoption of the Green Paper on damages claims will contribute to a strengthened competition culture in the EU. As a further example, the Commission proposed to repeal the block exemption of liner conferences from the EU competition rules' ban on restrictive business practices. Repealing the exemption will benefit EU exporters by lowering transport prices while maintaining reliable services, thus enhancing the competitiveness of the EU industry.

Finally, the Competition DG also invested considerable resources in 2005 in support of better regulation initiatives. This included in particular the screening of new initiatives by the Commission to assess their impact on competition as well as competition advocacy vis-à-vis Member States. Together with our own policy development work, these actions contributed to improving the effectiveness of competition rules and to providing transparency and predictability to the business community and consumers.

All in all, 2005 was a year of important progress both in terms of consolidation of the reformed competition regime for antitrust and mergers, and in the far-reaching reform of the state aid area. 2005 also brought important advances in the implementation of a more impact-oriented, economics-based approach to competition problems across existing instruments. Finally, in

2005 the Competition DG launched important new projects – most notably the sector inquiries – whose results will lead to new initiatives and/or enforcement actions in the years to come. These will benefit EU consumers, whether individuals or businesses, and contribute to the competitiveness of the EU.

MESSAGE FROM THE HEARING OFFICER

The Commission created the post of Hearing Officer in order to entrust the conduct of administrative proceedings in antitrust and merger cases to an independent person experienced in competition matters, with the integrity necessary to contribute to objectivity, transparency and efficiency of those proceedings. The Hearing Officer carries out this task in accordance with the Mandate.

Confidentiality versus access to the file in the context of the Notice on the rules for access to the file

In 2005, difficult issues relating to access to the file arose in a number of cases. Specifically, in some cases where the case file contained thousands of documents for which confidentiality had reasonably been claimed, requests for access resulted in delays in the procedure. In view of the need to verify for each document whether the claimed interest in access for the purposes of the rights of defence prevailed over confidentiality, a thorough preparation of access to the file is essential to a timely procedure.

It is in the interests of all participants that the procedure moves swiftly and expeditiously. Thus, the guiding principles for confidentiality should be observed by the providers of information and those requesting access to confidential information. In particular:

- Providers of information should submit requests for confidentiality that are sufficiently reasoned and limited to the specific passages for which the danger of serious harm can reasonably be claimed. A non-confidential version of the information must be provided, and a concise description of each piece of deleted information should be included. It is important that the non-confidential versions and the descriptions of the deleted information be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed in question.

- Parties requesting access to confidential information should submit detailed, substantiated requests that clearly demonstrate their interest in specific documents in terms of the right of defence.

Decisions of the Hearing Officers

In the course of their activities dealing with individual requests for access to file, the Hearing Officers took 13 decisions under Article 8 of their Mandate in seven cases in 2005. Under Article 8, parties can request access to documents which they believe necessary for the proper exercise of their right to be heard and which have not been disclosed to them for reasons of confidentiality. The Hearing Officer may decide to refuse, or to grant full or partial access to such documents.

It was not necessary for the Hearing Officers to take any Article 9 decisions in 2005. Under this article of the Mandate, the Hearing Officers decide that the Commission may disclose information even if an undertaking objects to such disclosure, if they find that the information is not protected, or if the balance between the interest in disclosing the information and the damage that might result by disclosing it falls on the side of disclosure. An appeal against such a decision can be brought before the European courts, and the process is commonly referred to as the Akzo procedure.

In order to avoid a burdensome procedure, the Hearing Officers have instituted the practice of sending so-called "pre-Article 9 letters". These inform undertakings about the Hearing Officers' preliminary position before taking a definitive and legally binding decision pursuant to Article 9. A number of such letters were sent in 2005.

Scope of the case file

In the course of 2005, the Hearing Officers acknowledged that, in line with the case law, the parties should be entitled, upon request, to access all documents that are objectively related to the alleged infringement, subject to the normal exceptions on grounds of confidentiality or the internal nature of the documents concerned. However, the relevant Commission departments enjoy a certain margin of discretion in their decision to join investigations that they consider to be sufficiently related. Objective reasons may lead the relevant Commission departments to decide that a comprehensive and thorough analysis of the anticompetitive behaviour under investigation requires an exploration into different product or geographic markets at the same time, or not.

Hearing Officer reports and oral hearings

The Hearing Officers drew up interim and/or final reports in three merger and twelve antitrust cases in 2005, the hearings for some of which had been held in 2004. In 2005, oral hearings were requested in eight antitrust cases. There were no hearings in merger cases. The decreasing interest in oral hearings in merger cases might result from the parties' desire to use the limited time available for remedy negotiations instead of calling into question the Commission's assessment in front of a wider audience which might also include companies hostile to the concentration.

Procedure for oral statements

In 2005 a new procedure was put into place to ensure that undertakings wishing to cooperate with the Commission under the Leniency Notice are not dissuaded from doing so as a result of discovery in civil damage proceedings in non-EU jurisdictions. This implies that the other members of the suspected cartel do not have access to corporate statements in the usual manner (that is, by CD-ROM/DVD or in the form of hard copies). Instead, the parties are permitted to take notes of the recording of the leniency applicant's statements.

I – Antitrust – Articles 81, 82 and 86 EC

A – Legislative, interpretative and procedural rules

1. Abuse of dominance

1. On 19 December, the Competition DG issued a discussion paper on the application of the EU competition rules on the abuse of dominance (Article 82 EC)[1]. The discussion paper is designed to promote a debate as to how EU markets are best protected from exclusionary conduct by dominant companies, which is likely to limit the remaining competitive constraints on markets. The paper suggests a framework for the continued rigorous enforcement of Article 82 EC, building on the economic analysis carried out in recent cases, and setting out one possible methodology for the assessment of some of the most common abusive practices, such as predatory pricing, single branding, tying, and refusal to supply. Other forms of abuse, such as discriminatory and exploitative conduct, will be the subject of further work by the Commission in 2006. The Competition DG has invited comments on the present discussion paper by 31 March 2006.

2. Article 82 EC prohibits the abuse of a dominant position. Abuses are commonly divided into exclusionary abuses, which exclude competitors from the market, and exploitative abuses, where the dominant company exploits its market power by – for example – charging excessive prices. The discussion paper deals only with exclusionary abuses.

3. The paper describes a general framework for analysing abusive exclusionary conduct by a dominant company. Where a dominant company is present on a market, competition on that market is already weak. The object of the competition rules is therefore to prevent conduct by that dominant company which risks weakening competition still further, and harming consumers, whether that harm is likely to occur in the short, medium or long term. For price-based conduct, such as rebates, the paper considers whether only conduct which would risk excluding equally efficient competitors should be considered as abusive. The paper also considers whether efficiencies should be taken into account under Article 82 EC, and, if so, how. If they are to be taken into account, the claimed efficiencies would have to outweigh the restrictive effect of the conduct in question.

4. The Competition DG is consulting widely on the discussion paper. It has already discussed the paper in the European Competition Network and has now opened the consultation to the public. As part of this consultation process the Commission will hold a public hearing in spring 2006 on abuse of dominance, and in particular concerning the proposed framework set out in the discussion paper.

2. Agreements and concerted practices

[1] http://europa.eu.int/comm/competition/antitrust/others/article_82_review.html

2.1. Transport block exemption Regulations

2.1.1. Maritime transport

Repeal of Council Regulation (EEC) No 4056/86 – Liner conference block exemption

5. On 14 December, the Commission adopted a proposal[2] for a Council Regulation repealing Regulation (EEC) No 4056/86 applying Articles 81 and 82 EC to maritime transport[3]. The Council will decide on this proposal by qualified majority having consulted the European Parliament.

6. The objective is to put an end to the liner conference block exemption which allows shipping lines meeting in conferences to fix freight prices and to regulate capacity. After a three-year review the impact assessment carried out shows that liner conferences do not fulfil the four cumulative conditions of Article 81(3) and 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. The proposal envisages a two-year transition period from the time of the adoption of the Regulation by the Council for the provisions regarding the liner conference block exemption.

7. The proposal also aims to amend Council Regulation (EC) No 1/2003[4] by extending its scope to cabotage and tramp vessel services, thus applying the same general competition implementing rules to all sectors of economic activity.

8. To ease the transition to a fully competitive regime, the Commission plans to issue appropriate guidelines on competition in the maritime sector in 2007.

Prolongation of and amendments to Commission Regulation (EC) No 823/2000 – Consortia block exemption Regulation

9. On 20 April, the Commission adopted Regulation (EC) No 611/2005 amending the existing block exemption Regulation for liner shipping consortia[5]. It prolongs Commission Regulation (EC) No 823/2000 until 25 April 2010 and introduces two minor amendments. The amendments allow a consortium member the right to withdraw from a consortium agreement without financial penalty after an initial period of up to 24 months, which constitutes an extension of six months as compared with the previous regime. In addition, this initial period now also applies where the parties to an existing agreement have agreed to make substantial new investment in the maritime transport services offered by the consortium. Such investment must constitute at least half of the total investment made by the consortium members. Finally, one of the basic conditions for exemption, namely the existence of effective price competition within the consortium, has been amended: "individual confidential

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2 COM (2005) 651. Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 on the implementation of the rules on competition.

3 OJ L 378, 31.12.1986, p. 24.

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

5 OJ L 101, 21.4.2005, p. 10.

contracts" may now also be taken into consideration to demonstrate the existence of such competition.

10. The consortia block exemption is closely linked to the block exemption for liner shipping conferences (Council Regulation (EEC) No 4056/86). Due to the close links between the two block exemptions, the Commission considered that it is neither necessary nor appropriate to introduce substantial modifications to the consortia block exemption before the end of the review of Council Regulation (EEC) No 4056/86.

2.1.2. Air transport

Replacement of Commission block exemption Regulation (EEC) No 1617/93

11. The Commission pursued the consultation process launched in 2004 concerning the revision of Commission Regulation (EEC) No 1617/93[6], with the publication on 2 March of a paper discussing the submissions received in the context of the consultation.

12. On 15 November, the Commission adopted a preliminary draft block exemption regulation, with a view to replacing Commission Regulation (EEC) No 1617/93. The draft is due to be discussed by the Advisory Committee on Restrictive Practices and Abuses of Dominant Positions. The preliminary draft block exemption regulation provides that:

- consultations on tariffs for the carriage of passengers for intra-EU air services would benefit from a block exemption until 31 December 2006; this exemption would not be prolonged after that date;
- consultations on slot allocation and airport scheduling would benefit from a block exemption until 31 December 2006; this exemption would not be prolonged after that date;
- consultations on tariffs for passenger air services between the EU and third countries would benefit from a block exemption subject to data-reporting obligations until 31 December 2008.

13. In parallel with the preparation of a new block exemption Regulation, Commission departments have engaged in consultations with IATA and several individual airlines on the future of interlining.

2.2. Motor vehicle distribution block exemption Regulation

Location clauses in car distribution agreements no longer block exempted

14. On 1 October, the final part of the Commission's reform of the competition rules

[6] 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). Regulation as last amended by the 2003 Act of Accession.

applicable to motor vehicle distribution came into force: "location clauses" in distribution contracts between carmakers and dealers are now no longer covered by the Commission's motor vehicle block exemption Regulation (EC) No 1400/2002. Location clauses are provisions in car distribution agreements which assign a specific main location to the dealer and prohibit the dealer from operating additional sales or delivery outlets at other locations.

15. The new rule concerns passenger cars and light commercial vehicles. It does not apply to exclusive distribution systems, or agreements which only have minimal effects on the market[7]. For selective distribution agreements, the new rule means that location clauses prohibiting dealers from opening additional sales or delivery outlets will fall outside the "safe harbour" created by the block exemption Regulation.

16. The underlying policy objective of the new rule is twofold[8]:

- to reduce territorial restrictions so that consumers can benefit from effective competition between dealers, particularly on prices and in areas where they have no real opportunity to choose between dealers of the same brand; and

- to facilitate the development of innovative forms of distribution such as multi-brand outlets.

17. By dealing with location clauses under Article 5 of the Regulation, the Commission recognised the greater scope for individual assessment, on a case-by-case basis, of whether a clause meets all conditions required to justify an exception under Article 81(3). The most likely potential positive effects of location clauses in selective distribution systems are that they may prevent free-riding on the investments and promotion efforts of established dealers.

18. With respect to the first type of location clauses mentioned in the Regulation – i.e. clauses prohibiting additional *sales* outlets – it is difficult to see how restrictions on additional sales outlets could be required by carmakers to avoid free-riding. The Regulation allows carmakers to require that secondary sales outlets comply with all qualitative standards applicable to dealerships in the area where the outlet is to be opened, and to check this compliance in advance. This will normally avoid the danger of unfair free-riding on the investment and promotion efforts of existing dealers. Moreover, secondary sales outlets are unlikely to increase carmakers' transactional and logistical costs, as the contract in force with the dealer will continue to determine where the carmaker must deliver the cars ordered by the dealer. This means that where dealers open a secondary sales outlet in another Member State, an additional contract with the local importer is not needed, although the carmaker can of course delegate to the local importer functions such as checking compliance with the qualitative criteria. The purchasing conditions and sales targets will remain those determined in accordance with the existing dealership agreement.

19. With respect to the second type of location clause mentioned in the Regulation − i.e. clauses prohibiting dealers from setting up additional *delivery* outlets − an individual analysis under Article 81 EC might be more likely to lead to a different result. There

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7 See in this context, for instance, the *Porsche* case, press release IP/04/585, 3.5.2004.

8 See press release IP/05/1208, 30.9.2005.

may be a greater risk that such delivery points are (mis)used to free-ride on the investments, marketing efforts and goodwill of the dealer established in the target territory. In practice, if delivery points are *de facto* used to carry out "sales" (as opposed to mere "handover services"), a manufacturer might successfully invoke the derogation under Article 81(3), provided that limiting the opening of delivery outlets is the only way to prevent such free-riding risks, which could lead to a destabilisation of its distribution network.

3. Procedural rules

3.1. Access to file

20. On 13 December, the Commission adopted a Notice on the rules for access to the Commission file in antitrust and merger cases[9]. The Notice provides the framework for the exercise of the right to access to the file in accordance with the provisions referred to expressly in the Notice. It does not cover the possibility of the provision of documents in the context of other proceedings. The right of access to the file described in the Notice - which is distinct from the general right to access to documents under Regulation (EC) No 1049/2001[10] - enables the persons to whom the Commission has addressed a statement of objections to effectively exercise their rights of defence.

21. The purpose of the Notice – which replaces the Notice on access to the file adopted in 1997 – is to enhance transparency and clarity of the Commission's procedure in processing requests for access to the file in antitrust and merger cases. To that end, the Notice notes that the addressees of the Commission's objections have a right of access to the file, either in electronic or paper form. The Notice indicates when access to the file is granted to the parties. It specifies that the "Commission file" includes all documents associated with the specific procedure that has led to the Commission's statement of objections. Internal documents of the Commission (which includes documents exchanged with Member States), business secrets and other confidential information are, however, not accessible to the parties. The Commission interprets the concept of internal documents as including, in principle, all correspondence between the Commission and its external experts. However, the results of a study commissioned in connection with proceedings as well as documents that are necessary to understand the methodology applied in the study or to test its technical correctness are accessible.

22. The Notice includes a thorough description of procedures for treatment of confidential information and for implementing access to the file. It also describes the procedure for resolution of disagreements on confidentiality claims, including the role of Hearing Officers.

23. The Notice also covers the related question of access to specific documents for

[9] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C 325, 22.12.2002, p. 7).

[10] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

complainants in antitrust proceedings and other parties involved in merger proceedings. Such a right is, however, more limited in scope than the right of access to the file.

3.2. Dealing with market information and complaints

24. The Commission values information provided by businesses and consumers as this information helps to ensure the effective enforcement of the competition rules. The Commission welcomes information about areas in which the market is not functioning well and about suspected infringements of the competition rules.

25. This information can be provided to the Commission in various ways:

- Whistleblowing and leniency applications[11] are given the highest priority. Cartels are the worst form of anticompetitive activity and the Commission devotes significant resources to taking action against them.

- Market information[12] is always welcome, whether or not it leads to an investigation in an individual case. Only by gathering a range of information from a range of sources can the Commission build up a coherent understanding of the market.

- Formal complaints[13] that raise clear issues of Community interest and that contain appropriate background information are also welcomed. Many important Commission decisions may not have been possible without the information provided by, and the active support of, a complainant. It is usually helpful to contact the Competition DG before submitting a formal complaint. Informal pre-complaint contacts make it possible to have early discussions concerning the information available to the potential complainant and can help to clarify whether a case is likely to be a priority for the Commission.

26. Each of these ways of supplying information is important and can lead to enforcement action. The Commission will consider carefully and respond to every submission received.

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[11] Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3).

[12] On the different ways of informing the Commission (market information, complaint), see paragraphs 3 and 4 of the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004, p. 65) (referred to hereinafter as the "Commission Notice on Complaints").

[13] See the Commission Notice on Complaints, as well as Article 5 of Commission Regulation (EC) No 773/2004 and its annex (Form C).

Box 1: Articles 81 and 82 EC: Community interest in pursuing allegations of infringement and priority setting

Potential complainants are invited to take into account the following considerations before lodging a formal complaint with the Commission.

Member States' competition authorities and courts

When considering whether to send a formal complaint to the Commission, consumers and businesses should bear in mind that Member States' competition authorities also apply EU competition law and work together with the Commission in the European Competition Network (ECN). Potential complainants should therefore consider whether a Member State competition authority is likely to be well placed to act.

For example, where a suspected infringement affects competition mainly in the territory of one Member State it may be that the national competition authority (NCA) of that country will want to take a case forward. Even where a case has effects on competition in more than one Member State, NCAs can cooperate in gathering evidence for a competition case, and two or three Member States' competition authorities can take a case forward together. More extensive guidance on work-sharing in the ECN is available on the Commission's website[14].

Potential complainants should also consider bringing an action before a national court. Many cases can appropriately be dealt with by national courts including claims for performance of contractual obligations, the application of the civil sanction of nullity in Article 81(2) or applications for interim measures[15]. The Commission also strongly supports the right of those harmed by anticompetitive conduct to seek damages before national courts[16], and has issued a Green Paper[17] which discusses options as to how to make damages claims easier.

Priorities

Any potential complainant considering submitting a formal complaint to the Commission should also bear in mind that, although the Commission takes all information supplied to it very seriously, it does not have the resources to investigate every problem brought to its attention. The Commission has to set priorities and focus its limited resources on investigating and prosecuting the most serious infringements and on handling cases that are relevant for developing EU competition policy and for ensuring coherent application of Articles 81/82 EC[18].

Basing itself on the information available, the Commission uses one or several of the following criteria, as appropriate in the individual case, in order to decide whether or not there is

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14 See paragraphs 19 *et seq*. of the Commission Notice on Complaints, as well as paragraphs 5 *et seq*. of the Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43).

15 See paragraph 16 of the Commission Notice on Complaints.

16 See Case C-453/99 *Courage* v *Crehan* [2001] ECR I-6297, paragraphs 26 and 27; recital 7 of Regulation (EC) No 1/2003.

17 Green Paper on damages actions for breach of the EC antitrust rules, COM(2005)672 of 19.12.2005 (See Section A.I.5. below).

18 See in particular recital 3 of Regulation (EC) No 1/2003 as well as paragraph 11 of the Commission Notice on Complaints.

sufficient Community interest to carry out an in-depth investigation into a complaint[19]:

- the significance of the impact on the functioning of competition in the internal market, as indicated in particular by:
  - the geographic scope of the conduct complained of, or the economic significance of the conduct complained of, or the size of the market, or the importance for end consumers of the products concerned or of the conduct complained of; or
  - the market position of the undertakings targeted by the complaint or the overall functioning of the market in question;
- the extent or complexity of the investigation required, the likelihood of establishing an infringement and whether in light of these elements it is proportionate to conduct an in-depth investigation;
- the possibility for the complainant to bring the case before a national court in a Member State, in particular taking into account whether the case is or has already been the subject of private enforcement or is of a type that can appropriately be dealt with in this way;
- the appropriateness of acting on an individual complaint that concerns (a) specific legal issue(s) which the Commission is already in the process of examining in one or several other cases or which it has already examined and/or which is the subject of proceedings before the Community Courts;
- the cessation or modification of the conduct complained of, in particular where commitments have been made binding by a Commission decision pursuant to Article 9 of Regulation (EC) No 1/2003 or where the undertaking(s) complained of has/have changed its/their conduct for other reasons, provided that neither significant persisting anticompetitive effects nor the seriousness of the alleged infringement(s) give the complaint a Community interest in spite of the cessation or modification;
- the importance of other areas of Community or national law affected by the conduct complained of compared with the importance of competition concerns raised by the complaint.

However, these criteria are applied flexibly. It is impossible to define abstract rules as to when it would or would not be right for the Commission to act. There will always be factors, not mentioned in the paragraphs above, that may increase or decrease the degree of priority of a particular case. Moreover, the Commission is not obliged to set aside a case for lack of Community interest. But where the Commission does not believe there is a sufficient Community interest to warrant an in-depth investigation, it will normally reject the complaint with reference to one or more of these criteria.

The Commission endeavours to inform complainants within four months from the receipt of a complaint whether or not it intends to investigate the case.

[19] See paragraphs 41 *et seq*., and in particular paragraph 43, of the Commission Notice on Complaints.

4. Competition screening of EU legislation

27. A key action identified in the Lisbon Strategy, which was relaunched on 22-23 March, was to improve the regulatory environment at both EU and national level in order to enhance competitiveness. Work aimed at achieving "better regulation" began in 2002 under a Commission Action Plan, which was revised on 16 March. This covers all pending EU legislative proposals, existing rules (simplification) and new legislative and policy proposals. In line with the Action Plan, the Commission adopted revised Impact Assessment Guidelines in June[20], covering all legislative and policy initiatives included in the Commission's Annual Work Programme. Such assessments explore alternative options to solve a defined problem and evaluate their economic, environmental and social impact.

28. The Impact Assessment Guidelines recognise that "vigorous competition in a supportive business environment is a key driver of productivity growth and competitiveness"[21]. *Competition screening* therefore forms an integral part of impact assessment. The Impact Assessment Guidelines list – non-exhaustively – the types of proposals which need to be screened for possible negative impacts on competition (for instance rules on liberalised network industries, measures which have an impact on barriers to entry and exit, exemptions from competition rules, etc.)[22].

29. The basic "competition test" applied in the context of competition policy screening involves asking two fundamental questions at the outset. First: *what restrictions* of competition may directly or indirectly result from the proposal (does it place restrictions on market entry, does it affect business conduct, etc.)? Second: are *less restrictive means* available to achieve the policy objective in question? Competition screening may result in the choice of less restrictive regulatory or in market-based methods to achieve certain policy objectives, thereby avoiding unnecessary or disproportionate restrictions of competition. This is in the interests of both consumers and industry.

5. Green Paper on damages actions for breach of the EC antitrust rules

30. The competition rules set out in Articles 81 and 82 EC can be enforced both by competition authorities (public enforcement) and by private parties bringing proceedings before a national court (private enforcement). One of the aims of the modernisation of EC antitrust rules was to revitalise the role of national courts and national competition authorities (NCAs) in the enforcement of these rules. Regulation (EC) No 1/2003 emphasizes the joint responsibility of the Commission, the national courts and the NCAs in that regard, and provides the necessary tools to achieve an increased and coherent enforcement of the EC antitrust rules. With regard to public enforcement, the Commission and the NCAs now work closely together within the ECN (European Competition Network) to apply the EC antitrust rules. With regard to private enforcement, Regulation (EC) No 1/2003 abolished the Commission's monopoly on the application of Article 81(3), thus empowering national courts to

[20] SEC (2005) 791.

[21] See section 9 of the annexes to the Impact Assessment Guidelines.

[22] See section 9.2 of the annexes to the Impact Assessment Guidelines.

apply Articles 81 and 82 EC in their entirety. Those national courts have exclusive competence to award damages to the victims of competition law infringements.

31. Antitrust damages actions are the focus of the Green Paper adopted by the Commission on 19 December[23]. The Commission wishes to encourage this kind of action, of which there have been very few so far[24], because it serves a double purpose. Not only do actions for damages allow victims of infringements of EC antitrust law to obtain compensation, they also create an additional incentive for undertakings to respect the EC antitrust rules. Actions for damages do not merely reinforce the effects of infringement findings by competition authorities, they should also be an autonomous means of enforcement. Private enforcement of EC antitrust rules thus becomes a tool to widen the scope of enforcement of Articles 81 and 82 EC. Moreover, by being able effectively to bring a damages claim, individual firms or consumers in Europe become directly engaged in the enforcement of the competition rules. Such first-hand experience increases the direct relevance of the competition rules for firms and consumers. By increasing the level of enforcement of the EC antitrust rules, actions for damages contribute to the observance of those rules and thus to effective competition in Europe. They are thus important tools in creating and sustaining a competitive economy, a key element of the Lisbon Strategy, which aims at making the economy of the European Union grow and create employment for Europe's citizens.

32. In its 2001 judgment in *Courage* v *Crehan*, the Court of Justice confirmed that victims of an infringement of the EC antitrust rules have a right to claim damages and that Member States have to provide for a procedural framework allowing for an effective system of redress[25]. The main objective of the Green Paper is 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 EC antitrust law.

33. The Green Paper addresses a number of key issues, such as access to evidence, the necessity to prove fault, calculation of damages, the possibility to invoke the passing on defence, standing for indirect purchasers, the possibility of representative and collective action, the costs of actions, the coordination of public and private enforcement and the rules on jurisdiction and applicable law.

34. The purpose of the Green Paper is to provoke discussion on how to increase the number of successful actions for damages relating to infringements of the EC antitrust rules. On the basis of the responses received to the Green Paper, the Commission will assess what action, if any, is necessary to further promote such claims.

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[23] The Green Paper can be found at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html. It is accompanied by a Commission staff working paper, available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp.html, which gives the background to and elaborates on the political options mentioned in the Green Paper.

[24] See the study that was commissioned by the Commission and published in 2004, available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html

[25] Case C-453/99 *Courage* v *Crehan* [2001] ECR I-6297.

B – Application of Articles 81, 82 and 86

1. Energy, basic industries, chemicals and pharmaceuticals

1.1. Energy

Sector inquiries in gas and electricity

35. As regards the application of the EU antitrust rules in the energy sector the single most important action taken in 2005 was the launch of the sector inquiries into gas and electricity. On 13 June, the Commission adopted a decision[26] launching sector inquiries into the gas and electricity sectors pursuant to the Commission's powers under Article 17 of Council Regulation (EC) No 1/2003. The justification for the sector inquiries was set out in a Communication from the Commissioner for Competition, in agreement with the Commissioner for Energy[27].

36. The sector inquiries are part of the Commission's efforts to relaunch the Lisbon Strategy with its goals of boosting economic growth, increasing employment and transforming the European Union into "the most competitive and dynamic knowledge-based economy in the world". To help put the Lisbon Strategy back on track, the Commission decided to pursue a more proactive application of the competition rules, notably through sectoral screenings, in order to ensure open and competitive markets in Europe in particular in the energy sector[28].

37. The inquiries focus on the recently liberalized electricity and gas industries. Market integration has been disappointingly slow and has so far failed to make a significant dent in the often high levels of concentration that are a characteristic of both sectors. Significant price rises occurred in 2004 and 2005 and customers have increasingly complained of their inability to secure competitive offers from suppliers. These elements suggested that the markets are not functioning optimally and justified the opening of an inquiry under Article 17 of Regulation (EC) No 1/2003 and the use of the investigative instruments available to the Commission.

38. In the electricity sector, the inquiry focuses on the price formation mechanisms on the electricity wholesale markets, electricity generation and supply, and factors determining generators' dispatching and bidding strategies. There is a special focus on whether electricity generators possess significant market power and can influence electricity wholesale prices. Econometric analyses are likely to be part of this assessment. In addition, a close look will be taken at entry barriers and barriers to cross-border flows such as those that may arise from long-term supply agreements in certain Member States and the legal and operational regimes for the interconnectors

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[26] Commission Decision (EC) No C(2005)1682 of 13 June 2005 initiating an inquiry into the gas and electricity sectors pursuant to Article 17 of Council Regulation (EC) No 1/2003. See http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/energy/decision_en.pdf

[27] See http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/energy/communication_en.pdf

[28] Communication to the Spring European Council – Working together for growth and jobs – A new start for the Lisbon Agenda, COM(2005) 24 of 2.2.2005. See in particular pages 8 and 19.

that link national electricity grids.

39. In gas, the inquiry focuses on the long-term import contracts, swap agreements and barriers to cross-border flows of gas. The balancing requirements for gas network users and gas storage will also be investigated closely as well as downstream long-term contracts and the effects they may have on switching costs and market entry.

40. The gas and electricity inquiries examine different issues because competition in these sectors is at different stages of development and because they have quite different production structures. Nevertheless, the links between these sectors will be taken into account. Indeed, gas is an increasingly important primary fuel for electricity generation and more competitive gas markets could have an immediate beneficial impact on the electricity markets.

41. The Competition DG's objective is to identify whether infringements of Articles 81, 82 and 86 EC are responsible for the apparent malfunctioning of the electricity and gas markets, in which case the Commission could undertake proactive corrective action. Based on the facts collected in the inquiry and consequent priorities for enforcement, the Competition DG will take up cases under Articles 81, 82 or 86 EC as soon as they emerge. The results of the inquiries are also expected to play a role in assessing the effectiveness of the current legislative framework in the liberalisation of the gas and electricity markets.

42. When preparing the inquiries, the Competition DG consulted industry associations, consumer groups, other Commission departments (including the Transport and Energy DG), and national competition authorities (NCAs) and national regulatory authorities (NRAs) and their European representatives in order to focus the inquiry and ensure its effectiveness. The Competition DG's goal is to ensure transparency throughout the process. The Commission presented a set of issues resulting from a first analysis of the responses to a number of fora and, in particular, the Energy Council on 1 December, at which the Commission also reported on the implementation of the legislative package for energy liberalisation. The main concerns identified by the Competition DG in its Issues Paper[29] relate to the prevailing levels of concentration, vertical foreclosure, the lack of market integration, the lack of transparency and the price formation mechanism. A preliminary report is due to be presented in early 2006, followed by an intensive public consultation on the report. The final report on the energy sector inquiry is due at the end of 2006.

[29] See: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/energy/issues_paper15112005.pdf

43. The sector inquiries substantially reinforce the Commission's ability to proactively foster competition in the recently liberalised gas and electricity sectors, but enforcement activities in specific cases to support the liberalisation process were also vigorously pursued in 2005.

Long-term gas supply agreements in downstream markets

44. A particular problem that arose following the opening-up of the gas sector to competition in 2005 is possible foreclosure of the downstream market through long-term gas supply contracts between the traditional suppliers on the one hand and distribution companies and industrial and commercial users on the other hand.

45. Long-term contracts prevent customers from switching to alternative suppliers ready to offer better value for money. In some cases, contracts currently in force are not due to end for many years and these customers are therefore unable to benefit from the developing competition in the sector. Also, there are significant economies of scale in the gas supply market, due for example to the high cost of balancing and flexibility, which decrease in relative terms as supplied gas volumes increase. So long-term contracts in the downstream gas market can also delay the ability of alternative suppliers to build up sufficient market share to compete effectively. Such long-term contracts may therefore foreclose markets and give rise to competition concerns when they are not indispensable to generate countervailing benefits for consumers.

46. The Competition DG and the NCAs and NRAs discussed the issue of long-term downstream contracts in the European Competition Network (ECN) Energy subgroup on two occasions. The Bundeskartellamt published a report on the question of long-term contracts in the market for the supply of gas to local utilities ("*Stadtwerke*") in Germany. It then entered into negotiations with the 15 largest suppliers on this market to introduce clear limits on the duration of their supply contracts. These negotiations broke down in September, and the Bundeskartellamt announced that it would launch formal prohibition proceedings[30]. The Competition DG is also investigating a case concerning long-term gas supply contracts in the Belgian market.

Territorial restrictions cases

47. In the course of 2005, the Competition DG continued its endeavours to ensure that pre-liberalisation commercial practices in the energy markets do not undermine the liberalisation process. These endeavours were rewarded by the removal of territorial restrictions from the gas supply contracts concluded by Gazprom with a number of important historic wholesalers in the EU. Territorial restrictions prevent gas importers from exporting gas to other Member States and/or limit their incentives to do so, thereby frustrating market integration and competition between incumbents.

48. In 2003, the Competition DG had ensured that Gazprom and the Italian oil and gas company Eni Spa[31] would abandon such practices. In February[32], the Competition DG secured improvements to gas supply contracts between the Austrian incumbent gas

30 http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/EntschKartell.shtml

31 2003 Competition Report, point 98.

32 Press release IP/05/195, 17.2.2005.

wholesaler *OMV* and Russian gas producer Gazprom. In particular, OMV will no longer be prevented from reselling, outside Austria, the gas it buys from Gazprom, and Gazprom will be free to sell to other customers in Austria without having to first offer the gas to OMV (so-called right of first refusal). OMV also agreed to contribute to increasing capacity on the TAG pipeline that transports Russian gas, through Austria, to Italy. This outcome is similar to that reached with respect to Eni in 2003. The undertakings given are identical in substance to those given to the Commission by Eni, the other shareholder of the TAG pipeline, in October 2003. In light of these developments, it was decided to close the investigation.

49. In June[33], the Competition DG closed its investigation into the gas supply contracts between Gazprom and the biggest German wholesale company *E.on Ruhrgas* AG, which is part of the E.on group, having obtained the removal of territorial restrictions from these contracts. Moreover, Gazprom will no longer be bound by a "most favoured customer" provision previously included in these contracts. These clauses obliged Gazprom to offer Ruhrgas similar conditions to those it offered to Ruhrgas' competitors on the wholesale market in Germany.

50. The closure of these two cases implies that all Commission cases opened in 2001 into export restrictions on Russian gas (Austria, France, Germany, Italy and the Netherlands) have now been closed. Investigations, also opened in 2001, continue as concerns imports by Italian and Spanish operators of Algerian gas.

Regulatory framework

51. During 2005, the regulatory framework for the internal market in electricity and gas was further developed. On 28 September the Council and Parliament adopted a Regulation on the conditions for third party access to the natural gas transmission network, which is expected to improve opportunities for cross-border trade by new entrants[34]. A Directive on security of supply and infrastructure development in electricity will be adopted in early 2006[35]. It is expected to provide a reliable regulatory framework conducive to new investments in electricity generation and infrastructure.

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33 Press release IP/05/710, 10.6.2005.

34 Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks (OJ L 289, 3.11.2005, p. 1).

35 Directive 89/2005/EC of the European Parliament and of the Council concerning measures to safeguard security of electricity supply and infrastructure investment.

52. During 2005, the Commission continued its efforts to ensure that Member States implement the Second Gas[36] and Electricity[37] Directives, which constitute the regulatory cornerstones of the energy markets' liberalisation process. Significant progress has been made. The Second Gas and Electricity Directives also obliged the Commission to report, by the end of 2005, on the progress made in the creation of an internal gas and electricity market. The Commission presented its report to the Energy Council on 1 December. It is coherent with the analysis of the Competition DG in its sector inquiries, and suggests carrying out country reviews before deciding at the end of 2006 about the need for a third liberalisation package.

53. The Court of Justice also clarified some important aspects of the regulatory framework when, on 7 June, it handed down its judgment in the *VEMW* case[38]. Although the case specifically concerned long-term reservations of interconnector capacity into the Netherlands, it has important implications for many historic long-term capacity reservations on interconnectors that continued to exist after the entry into force of the First Electricity Directive[39].

54. The Court found that the priority access granted by Dutch legislation and regulation to historic supply contracts (23% of the overall interconnector capacity in this particular case) constituted discrimination prohibited by the 1996 Electricity Directive, because Articles 7 and 16 of that Directive require all old and new users of the network to be treated equally. The Court adopted this approach on the basis of the reasoning that any other interpretation would risk jeopardising the transition from a monopolistic, compartmentalised market to an open, competitive one. The Court also considered that the Netherlands could have asked for an exemption under the Directive for existing contracts, but failed to do so in good time.

55. This judgment could be followed by further court cases at national level and by action from NRAs. As regards antitrust enforcement, the judgment opens the door for possible cases to be brought by the Competition DG even though the Court's judgment did not explicitly address competition issues.

56. The sector inquiry is likely to provide the Competition DG with a good overview of factual issues surrounding long-term reservations and about the need for any follow-up investigations.

57. Finally, 2005 also saw the start of trading in CO_2 emission rights[40]. Although not relevant only to the energy sector, its effects are possibly most clearly felt in electricity

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36 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ L 176, 15.7.2003, p. 57).

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

38 Case C-17/03 *Vereniging voor Energie, Milieu en Water and Others* v *Directeur van de Dienst uitvoering en toezicht energie*.

39 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

40 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

markets. The emissions trading system appears to have had an effect on electricity prices as electricity generators partly factor the price of emission rights into the prices they charge end consumers. Certain electricity consumers have complained that price increases should not have occurred as emission rights were mostly allocated free of charge.

REPSOL

58. Although during 2005 the Commission gave priority to the recently liberalised gas and electricity sectors, action against infringements in other energy sectors, such as distribution of motor fuels, continued.

59. On 20 October 2004, the Commission published a notice[41] pursuant to Article 27(4) of Regulation (EC) No 1/2003 in order to market test commitments submitted by REPSOL C.P.P. (REPSOL) within the meaning of Article 9(1) of Regulation (EC) No 1/2003. The subject matter of the Commission's investigation pursuant to Article 81 EC is the use of exclusivity clauses for the supply of motor fuels in distribution contracts signed by REPSOL, which led to foreclosure of the Spanish market for wholesale and retail sales of motor fuels. The contracts were originally notified to the Commission, but this notification lapsed on 1 May 2004.

60. On 17 June 2004, a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003 was sent to REPSOL.

61. This preliminary assessment suggests that market access is difficult and that REPSOL's contracts contribute significantly to a possible foreclosure of the market because they tie a large part of the market to REPSOL and are of long duration (the "tenancy" and "usufruct" contracts in particular, where REPSOL had a time-limited property right, have durations of 25 to 40 years).

62. The commitments offered by REPSOL grant a number of dealers with a "tenancy" or "usufruct" contract ("U/S contract") a right of early termination, subject to payment of compensation to REPSOL. REPSOL would also not conclude any new agreement with DODO[42] stations longer than five years; and until the end of 2006, not buy any new DODO station. The implementation of the proposed commitments would be monitored by a trustee appointed by REPSOL.

63. Following the outcome of the market test of the proposed commitments, REPSOL submitted revised commitments and the Commission envisages proceeding to the adoption of a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, which would make these revised commitments binding.

1.2. Basic industries

ALROSA – De Beers trade agreement

64. On 3 June, the Commission published a notice[43] pursuant to Article 27(4) of

41 OJ C 258, 20.10.2004, p. 7.
42 DODO = Distributor Owned, Distributor Operated.
43 OJ C 136, 3.6.2005, p. 32.

Regulation (EC) No 1/2003 in order to market test commitments[44] submitted by ALROSA and De Beers within the meaning of Article 9(1) of Regulation (EC) No 1/2003. The subject matter of the Commission's investigation pursuant to Articles 81 and 82 EC and to Articles 53 and 54 EEA is a trade agreement between these two companies, which are both active in the mining and supply of rough diamonds. The agreement was originally notified to the Commission, but this notification lapsed on 1 May 2004.

65. The statements of objections addressed to the companies in January and July 2003 constituted the Commission's preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003.

66. The preliminary assessment suggests that De Beers holds a dominant position in a worldwide market for rough diamonds. By entering into the trade agreement with ALROSA, its largest competitor, De Beers would gain control over a significant source of supply on the rough diamonds market and obtain access to an extended range of diamonds otherwise not accessible to it. This would, on the one hand, eliminate ALROSA as a source of supply on the market outside Russia, and would enhance the already existing market power of De Beers with the effect of hindering the growth or maintenance of competition in a market for rough diamonds.

67. The preliminary assessment also noted that pursuant to the trade agreement, De Beers, the largest diamond producer in the world, would act as a distributor for around half the production of its largest competitor. In view of the fact that the quantities traded would be substantial and that the agreement was made between the two largest undertakings active in trading rough diamonds, competition on the market would be substantially weakened as a result of the trade agreement.

68. The commitments offered by ALROSA and De Beers proposed to gradually decrease the value of sales of rough diamonds between them to USD 700 million in 2005, USD 625 million in 2006, USD 550 million in 2007, USD 475 million in 2008, USD 400 million in 2009 and USD 275 million in 2010 and beyond. With respect to pricing, sorting and valuation, ALROSA and De Beers would conclude an agreement similar to the trade agreement. The implementation of the proposed commitments would be monitored by trustees appointed by ALROSA and De Beers, respectively.

69. Following the outcome of the market test of the proposed commitments, the Commission is considering whether to proceed to the adoption of a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, which would make revised commitments binding.

1.3. Chemicals

70. During 2005 the Competition DG carried out "competition screening" exercises in relation to a number of draft legislative texts in the chemicals sector, such as the planned revision of the Plant Protection Directive 91/414/EEC[45], which regulates the placement of plant protection products on the market, and the Commission's proposal

[44] See: http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_76.html#i38_381

[45] Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ L 230, 19.8.1991, p. 1).

for a Regulation concerning the registration, evaluation, authorisation and restriction of chemicals[46] (REACH), which will provide for registration of some 30 000 already existing chemicals, as well as of any future ones.

71. The competition analysis, which is ongoing in view of possible amendments to be made to the text of the proposals in the course of the legislative process, has focused on ensuring that these legislative texts and, in particular, the costs imposed on the industry do not lead to distortions of competition.

1.4. Pharmaceuticals

Generic competition

72. A competitive European pharmaceutical industry is high on the agenda of the Commission, notably in view of the Lisbon Strategy. It is necessary to ensure that innovative products enjoy strong intellectual property protection so that companies can recoup their R&D expenditure and be rewarded for their innovative efforts. But if companies try to unlawfully prolong this protection, it acts as a disincentive to innovation and can be a serious infringement of EU competition rules. Competition from generic products, produced by third parties after a patent has expired, normally encourages further innovation in pharmaceuticals.

73. Within the framework of the *AstraZeneca* case (see Box 2 below) and in parallel to it, the Competition DG has become aware of potentially anticompetitive behaviour aimed at excluding or delaying generic competition. These indications have resulted in intensified monitoring of competition within the sector of generic medicines.

Parallel trade in pharmaceuticals

74. The Commission considers parallel trade in pharmaceutical products to be a means of arbitration between high-price and low-price Member States, contributing to the creation of a common market in pharmaceutical products. The European Courts have taken a narrow view concerning the application of Article 81 EC to supply quota systems which limit or make impossible trade between Member States, on the ground that such systems constitute unilateral behaviour on the part of the undertakings.

75. Unilateral supply quota systems could nonetheless be caught by Article 82 EC. Possible objective justifications for such systems may however have to be taken into consideration.

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46 COM(2003) 644 final.

47 Press release IP/05/737, 15.6.2005.

Box 2: AstraZeneca: abuse of government procedures in the pharmaceutical sector

On 15 June, the Commission adopted a decision fining AstraZeneca AB and AstraZeneca Plc (AZ) EUR 60 million for having infringed Article 82 EC and Article 54 EEA by misusing public procedures and regulations in a number of EEA States with a view to excluding generic firms and parallel traders from competing against AZ's anti-ulcer product Losec[47]. The fine took into account that some features of the abuses – i.e. misuses of government procedures – can be considered novel.

1. The relevant market

The relevant market comprises national markets for so-called proton pump inhibitors (PPIs) sold on prescription which are used for gastro-intestinal acid related diseases (such as ulcers). AZ's Losec was the first PPI.

2. AZ's dominance on the national PPI markets concerned

The Commission's findings on dominance during the relevant years in the countries concerned are based *inter alia* on AZ's high market shares and position as incumbent on the PPI market. The first mover in a pharmaceutical market is generally able to obtain and maintain higher prices than later entrants to the market. The Commission's decision also considers the issue of monopsony buyers (i.e. national health systems) and price regulation. It observes that the bargaining power of monopsony buyers is considerably reduced vis-à-vis companies offering genuinely innovative new products (such as Losec). Moreover, the monopsony buyers are not in a position to control entry to the market.

3. Misuse of the regulatory system

AZ's first abuse involved misuse of a Council regulation adopted in 1992[48] creating a supplementary protection certificate (SPC) under which the basic patent protection for pharmaceutical products can be extended. The abuse essentially consisted of a pattern of misleading representations made by AZ as of mid-1993 before patent offices in a number of EEA countries in connection with its SPC applications for omeprazole (the active substance in AZ's product Losec). Due to this misleading information AZ obtained extra protection in several countries. The entry of cheaper generic versions of Losec was thus delayed, entailing costs for health systems and consumers.

The Commission found that the use of such procedures and regulations may be abusive in specific circumstances, in particular where the authorities or bodies applying such procedures have little or no discretion.

The existence of remedies under other legal provisions cannot by itself exclude the application of Article 82 EC, even if they cover aspects of the exclusionary conduct. The Commission found in its decision that there is no reason to limit the applicability of competition law to situations where such conduct does not violate other laws and where there are no other remedies.

4. Misuse of drug authorisation procedures

The second abuse took place towards the end of the 1990s and consisted of AZ's requests for the deregistration of its market authorisation for Losec capsules in Denmark, Norway and Sweden in a context where Losec capsules were withdrawn from the market and Losec MUPS tablets were launched in those three countries.

The selective deregistration removed the reference market authorisation on which generic firms and parallel traders arguably needed to rely at the time to enter and/or remain on the market.

The Commission found that through its conduct AZ sought to extend, and in part succeeded in extending, *de facto* the protection afforded well beyond the period provided for in the applicable

2. Information, communications and media

2.1. Electronic communications and postal services

Mobile telephony roaming charges

76. Concerning roaming (i.e. charges for the use of mobile telephones when travelling abroad), on 10 February the Commission sent statements of objections to the German mobile network operators *T-Mobile International AG & Co. KG (T-Mobile)* and *Vodafone D2 GmbH (Vodafone)*. The objections relate to the rates that both T-Mobile and Vodafone charged foreign mobile network operators for international roaming at the wholesale level (so-called inter-operator tariffs – IOTs). The provisional conclusions of the Commission's investigation into T-Mobile were that T-Mobile abused its dominant position in Germany for the provision of international roaming services at wholesale level on its own network from 1997 until at least the end of 2003, by charging unfair and excessive prices. The Commission has reached the same provisional conclusions as regards the tariffs charged by Vodafone for the period 2000 until at least the end of 2003.

Broadband services

77. As regards broadband services, in 2004 the Commission accepted commitments by Deutsche Telekom AG (DT) to terminate behaviour, in the form of a "margin squeeze" as regards shared access to the local loop (line sharing) in Germany, that had provisionally been found to amount to an abuse of a dominant position[49]. The resulting settlement was based on the margin squeeze methodology as established in the *Deutsche Telekom* decision[50]. After consulting the German national regulatory authority – the Bundesnetzagentur (BNetzA) – the settlement was accepted by the Commission and led to a substantial decrease in line-sharing fees. Subsequently, several companies started to roll out networks in order to provide broadband services on the basis of line sharing. However, in an application to the BNetzA dated 24 May, DT announced its intention to increase line-sharing fees again. After verifying that this would have led to a reoccurrence of the margin squeeze which took place prior to the settlement, the Commission's departments intervened and requested DT to comply with its commitments. In order to prevent the Commission from starting formal proceedings, DT filed a new application with the BNetzA in which it applied for the same tariffs as in 2004. BNetzA – with which the Commission's departments cooperated closely in this case – finally approved wholesale tariffs which were lower than those applied for and lower than necessary for DT to comply with its commitments[51]. The Commission expects the improved conditions for the provision of

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49 Case COMP/38.436 *QSC*; press release IP/04/281, 1.3.2004.

50 Joined Cases COMP/37.451, 37.578 and 37.579 *Deutsche Telekom* (OJ L 263, 14.10.2003, p. 9). See press release IP/03/717, 21.5.2003. The decision is under appeal before the CFI as Case T-271/03 (OJ C 264, 1.11.2003, p. 29).

51 See press release IP/05/1033, 3.8.2005. One reason for the further decrease of the wholesale line sharing fees is that BNetzA based its *ex ante* margin squeeze test on the costs of DT (which were the basis for the *Deutsche Telekom* decision) and on the (most probably higher) costs of an efficient operator. Thereby, both possibilities which are set out in the Notice on the application of the competition rules on access agreements in the telecommunications sector (OJ C 265, 22.8.1998, p. 2)

broadband services via line sharing to influence competition positively and increase broadband penetration in Germany, which will ultimately increase consumer choice and decrease consumer prices.

3G sector inquiry

78. In September, the Commission concluded its sector inquiry into the competitive situation in the market for new systems of mobile communication that are able to transmit audiovisual content (3G). The findings of the sector inquiry had been the subject of a public presentation on 27 May and market participants had commented on the findings.

79. The sector inquiry, which was a joint initiative by the Commission and the EFTA Surveillance Authority, was carried out in 2004 and the first half of 2005 and was initiated because the Commission wanted to ensure that sports content, which is critical for the take-up of new mobile services, is not held back by anticompetitive conduct. It involved a comprehensive review of the behaviour of all actors involved in the acquisition, resale and exploitation of mobile rights to sports events.

80. Around 230 organisations responded to the questionnaires sent out in 2004. Furthermore, when reviewing the data collected the Competition DG analysed 50 case situations where competition problems arose at the time of selling 3G rights.

81. The results of the sector inquiry gave the Commission a clear view of current market developments and the prevailing marketing and exploitation patterns along the entire value chain of sports content for mobile platforms. The findings of the sector inquiry and follow-up actions have been described in a report summarising the conclusions of the sector inquiry[52].

82. This report highlights a number of potentially anticompetitive business practices, which were found during the sector inquiry, which may limit the availability of innovative mobile sport services to consumers. The report focuses on four main areas of competition concerns revealed by the inquiry:

- Bundling: situations where powerful media operators have bought all audiovisual rights to premium sports in a bundle in order to secure exclusivity over all platforms with no view to exploiting or sublicensing 3G rights.

- Embargoes: situations where overly restrictive conditions (serious time embargoes or unnecessary limitations of clip length) are imposed upon mobile rights that limit the practical availability of 3G content.

- Joint selling: situations where 3G rights remain unexploited, because collective selling organisations do not manage to sell the 3G rights of individual sports clubs.

- Exclusivity: exclusive attribution of 3G rights in situations leading to the monopolisation of premium content by powerful operators.

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to establish a margin squeeze test were considered.

52 Available at http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/

83. The report invited market players to review their business practices and to redress in time possible anticompetitive effects resulting from their business practices. It also announced that the Competition DG will, together with the national competition authorities concerned, review potentially harmful case situations with a national dimension which were identified during the sector inquiry.

Consultation procedure under Article 7 of the Framework Directive (2002/21/EC)

84. Under the EU regulatory framework for electronic communications networks and services[53], national regulatory authorities (NRAs) are obliged to define relevant electronic communication markets appropriate to national circumstances in accordance with the principles of EU competition law.

85. Following the market analysis procedure, NRAs must make accessible to the Commission all draft regulatory measures concerning the definition of the relevant markets, the finding or non-finding of significant market power (SMP) and the regulatory remedies proposed, if any. The Commission may either issue comments, which NRAs must take utmost account of, or request the NRA to withdraw the draft measure if the market definition and/or the determination of SMP is incompatible with Community law. In 2005, the Commission received 201 notifications from NRAs (a net increase compared with 89 notifications in 2004).

86. In 2005, the Commission adopted one decision requesting the withdrawal of notified measures[54]. In that case – which concerned wholesale fixed call termination in Germany – the NRA had proposed to designate Deutsche Telekom as an operator having SMP in the market for the provision of wholesale termination services on its own network. The NRA concluded that the 53 alternative fixed network operators in Germany did not have SMP, despite their monopoly positions for the provision of wholesale termination services on their respective networks, in light of Deutsche Telekom's countervailing buyer power. The Commission considered, however, that the NRA had not provided sufficient evidence to support the countervailing buyer power argument.

87. The Commission furthermore assessed three notifications in which the NRA found two or more operators to be collectively dominant in a relevant market. In two of these cases the NRA withdrew the notification prior to the Commission adopting a decision, on the basis of preliminary concerns expressed by the Commission's departments[55]. In the third case – which concerned the market for wholesale mobile access and call origination in Ireland – the Commission did not object to the NRA's finding of collective dominance.

88. Finally, the Commission accepted the French NRA's proposal to include in the relevant market for fixed voice calls so-called "voice over the Internet protocol"

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53 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).

54 Commission decision C(2005)1442 in Case DE/2005/0144 available at: http://forum.europa.eu.int/Public/irc/infso/ecctf/home

55 Case UK/2004/0111 (in respect of managed transmission services) and Case FR/2005/0179; notices about withdrawals available at: http://forum.europa.eu.int/Public/irc/infso/ecctf/home

(VoIP) services, which enable customers to make and receive calls in the same manner as traditional telephony services[56]. The French NRA made a distinction between pure internet-based VoIP services that resemble Instant Messaging and other peer-to-peer internet-based communications such as Skype, and VoIP services that are provided by alternative broadband operators that have invested in local loop unbundling and other broadband access products and are thus in a position to offer to their customers voice services that are of a higher quality than and have the same functionality as traditional telephony.

Infringement proceedings under Article 226 EC concerning the Competition Directive (2002/77/EC)

89. In addition to and in combination with the EU competition rules and the consultation procedure provided for in Article 7 of the Framework Directive, infringement proceedings under Article 226 EC are used by the Commission to ensure that Member States (i) transpose EC directives into national law and (ii) transpose them correctly. It is the responsibility of the Competition DG to monitor Member States' compliance with one of the directives in the EU regulatory framework for electronic communications, namely the so-called Competition Directive[57]. The purpose of the Competition Directive is primarily to ensure that Member States do not grant or maintain in force any exclusive or special rights for the provision of electronic communications networks and electronic communications services contrary to Article 86 EC, and thus to ensure that competitive market conditions prevail across the EU.

90. The Commission continued its infringement proceedings against those Member States which were late in adopting the necessary measures under national law to comply with the requirements of the Competition Directive. In the course of 2005, the Commission closed the proceedings pending against Belgium, Estonia and the Czech Republic after these Member States informed the Commission of the adoption of national measures. On the other hand, by judgment of 14 April the Court of Justice found that Greece had not yet adopted the necessary measures to comply with the Competition Directive[58]. Similarly, in a judgment of 16 June the Court of Justice concluded that Luxembourg had failed to adopt the measures necessary to comply with this Directive[59]. However, on 23 June Luxembourg notified measures to the Commission which will bring the country's legislation into line with the Competition Directive.

91. In 2004 it was brought to the Commission's attention that regulations remained in force in Sweden which oblige television broadcasters to acquire terrestrial broadcasting and transmission services exclusively from the state-owned company Teracom AB. The Commission therefore opened infringement proceedings against Sweden[60]. The Swedish Government's response to the Commission's letter of formal notice – which concerned analogue broadcasting services – did not contain any clear

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56 Commission decision in Cases FR/2005/221 to FR/2005/0226, SG-Greffe (2005) D/205048.

57 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). The Information Society DG is responsible for Member States' compliance with the other directives in the regulatory framework for electronic communications.

58 Case C-299/04 *Commission* v *Greece*, judgment of 14 April 2005.

59 Case C-349/04 *Commission* v *Luxembourg,* judgment of 16 June 2005.

60 Procedure 2004/2197 – Liberalisation – Sweden – Infringement of Directive 2002/77/EC.

commitment to bring the infringement to an end within a reasonable timeframe. Therefore, on 16 March, the Commission adopted a reasoned opinion against Sweden under Article 226 EC. The Commission concluded that the requirement that broadcasters must acquire analogue broadcasting services exclusively from Teracom is in breach of the Competition Directive. Further investigation in 2005 showed that the Swedish regulation of digital broadcasting services had similar effects. Broadcasters that wish to distribute their programming via a digital terrestrial network in Sweden are obliged to cooperate with Teracom for certain key aspects of the digital distribution chain (such as multiplexing). The Commission concluded that Teracom has *de facto* been awarded a special or exclusive right also for digital broadcasting services which infringes the Competition Directive. The Commission therefore sent a complementary letter of formal notice to the Swedish Government on 12 October.

92. On the same day, the Commission sent a letter of formal notice to Hungary, stating its view that the Hungarian Media Act is incompatible with the Competition Directive. By limiting the rights of cable-TV operators to provide broadcasting transmission services in a territory which may not include more than one third of the population, the Hungarian Media Act restricts the right to establish or provide electronic communications networks or services and prevents further consolidation of the cable-TV market. Abolishing the restriction would increase competition between cable operators as well as between cable operators and operators using other types of infrastructure.

Postal services

93. EU competition policy in the postal sector is applied in a context of yet incomplete liberalisation of postal markets. The Postal Directive[61] allows that, to the extent necessary to ensure the operation of the universal service under financially balanced conditions, Member States may reserve certain postal services to the universal postal service operators, which still account for a vast portion of the market. By 31 December 2006 at the latest, the Postal Directive requires the Commission to table proposals introducing, if appropriate, the full liberalisation of the EU postal market by 2009. Certain Member States have abolished their monopolies or announced plans to do so in advance of that date.

94. Against that background, in 2005, the Commission examined the draft laws on postal services in a number of Member States. The Commission took the view that the draft postal law of the Czech Republic contained provisions which would have extended the monopoly of the incumbent operator beyond the scope of the Postal Directive and would thus have remonopolised a market previously open to competition in that Member State. The Commission takes the view that, where the scope of exclusive rights does not go beyond the postal services that may be reserved, as defined in the Postal Directive, they may *prima facie* be justified in the light of Article 86(2)[62].

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61 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. 25); Directive 2002/39/EC 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).

62 Notice from the Commission on the application of the competition rules to the postal sector and on the

Subsequent to informal contacts between the Commission and the Czech government, the law was amended in a manner which did not extend the monopoly and permitted competition to develop further in the market at hand.

95. In addition, the Competition DG is currently investigating certain practices which may obstruct competition in intra-Community cross-border mail, which has in principle been liberalised under EU rules. In most of these cases, the allegedly abusive behaviour relates to practices which leverage the dominant position from the market of monopoly services into adjacent markets open to competition. Such practices are likely to become increasingly common as liberalisation progresses. Therefore, the Commission and NCAs must remain vigilant so as to ensure that anticompetitive behaviour does not cancel out the benefits of the gradual liberalisation process decided upon by the Council and Parliament.

2.2. Media

German Bundesliga

96. On 19 January, the Commission adopted the German Bundesliga[63] decision – the first commitment decision pursuant to Article 9 of Regulation (EC) No 1/2003. The decision declared the commitments of the German football league concerning the joint and exclusive selling of media rights for football matches legally binding and ended the proceedings.

97. With the Bundesliga decision, the Commission confirmed its antitrust policy in the media field with regard to the sale and acquisition of valuable audiovisual sports rights. Because of the structure of the media sector, where a limited number of operators are trading a small amount of valuable exclusive audiovisual sports rights, competition concerns easily arise in this sector. On the supply side, there are often only a few providers of premium sports rights. The concentration on the supply side is increased by joint selling, i.e. the pooling of club rights and marketing by a single entity[64]. There is also substantial concentration on the buying side, which can raise concerns given its potential effects on access to content for other operators in the market[65].

98. The Commission made a preliminary assessment on 18 June 2004 in accordance with Article 9(1) of Regulation (EC) No 1/2003 which was made available to the League Association and the DFB. According to this preliminary assessment the joint and exclusive selling of media rights by the Liga-Fußballverband raised a number of competition concerns. Bundesliga clubs were possibly prevented from dealing independently with broadcasters and/or sports rights intermediaries and in particular from taking independent commercial decisions about the price and content of the

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assessment of certain State measures relating to postal services (OJ C 39, 6.2.1998, p. 2, paragraph 5.4).

63 COMP/37.214 – Joint selling of the media rights to the German Bundesliga. Full text published on the Competition DG's website:
http://europa.eu.int/comm/competition/antitrust/cases/decisions/37214/en.pdf

64 See the Commission's *UEFA Champions League* decision (OJ L 291, 8.11.2003, p. 25), dealing with the issue of joint selling.

65 A number of Commission merger decisions dealt with this issue; for example *Newscorp/Telepiù*, in Case COMP/M.2876 of 2 April 2003.

rights packages, hence excluding competition between the clubs for the sale of rights. In addition, since access to football content plays an important role for broadcasters and new media operators, which are competing for advertising revenues and subscriptions, the joint selling of rights by Ligaverband could have risked adversely affecting the downstream television and new media markets by restricting output and foreclosing access.

99. To remedy these competition concerns, Ligaverband offered commitments which significantly modified its joint selling policy[66]. The proposed commitments were market tested in a notice published pursuant to Article 27(4) of Regulation (EC) No 1/2003[67]. In order to prevent the risk of foreclosure effects in the downstream markets, the media rights would be offered in a competitive bidding process under non-discriminatory and transparent terms. Moreover, whilst acknowledging the need for a certain degree of exclusivity to protect the value of sports rights, the risk of long-term market foreclosure has been addressed by a commitment to limit the duration of the exclusive vertical licence contracts to no more than three seasons. Longer contract duration would, according to the Commission's preliminary assessment, risk creating a situation where a successful buyer would be able to establish a dominant position on the market reducing the scope for effective *ex ante* competition in the context of future bidding rounds.

100. Furthermore, in order to allow a range of potentially interested buyers to bid for the audiovisual rights, the Ligaverband undertook that the scope of exclusivity would be limited by unbundling the audiovisual rights into a reasonable number of separate packages, which would be designed in such a way that each package is individually exploitable by an operator. The sale of several meaningful packages would enable less powerful operators with lesser financial means to bid for rights that suit their needs. Some packages would be earmarked for special markets/platforms: due to the strong asymmetric value of rights for different distribution platforms, access to sport rights may be foreclosed to market operators in certain evolving market platforms; by undertaking to earmark the packages for certain distribution platforms, free-TV and pay-TV operators, mobile operators and Internet service providers would be enabled to acquire rights.

101. Finally, in order to limit the risk of output restrictions caused by collective selling of exclusive rights, the clubs would retain the right to sell certain rights individually. A fall-back clause is intended to ensure maximum exploitation of the rights and avoids the presence of unused rights, i.e. any rights which the Ligaverband fails to sell or rights purchasers do not fully exploit. Unused rights would fall back to the clubs for individual exploitation on a non-exclusive basis.

102. The Commission accepted that a transitional stage[68] applied to the entry into force of the commitments to ensure that the arrangements were brought into line with the competition rules without jeopardising the operation of the German football league.

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66 MEMO 05/16 contains a comprehensive summary of the commitments and a detailed description of the rights packages.

67 OJ C 229, 14.9.2004, p. 15.

68 The changes relating to television and (partly) to the Internet will enter into force on 1 July 2006. All other changes applied from 1 July 2004.

103. The decision states that it deals solely with the joint and exclusive selling policy of Ligaverband with regard to the first and second German professional Football Leagues for men and does not cover competition issues arising from individually concluded licence contracts. For this purpose, the decision emphasises that future investigations by the Commission are not excluded, in particular if a single buyer purchases more than one of the rights packages.

104. The commitments offered by Ligaverband significantly improve the accessibility of the content for TV, radio and in particular for the operators in the emerging new media markets. They therefore comply with the Commission's policy ensuring maximum availability of content in order to foster innovation and dampen concentration tendencies in the media markets taking the viewers' interests fully into account.

Football Association Premier League[69]

105. In November, the Commission announced that it had received commitments from the FA Premier League (FAPL) in respect of their joint marketing in the UK of media rights to Premier League football matches. This follows a 2002 statement of objections and a public consultation on a first set of commitments in April 2004. The commitments are to apply for the sale of rights for the 2007 football season onwards. The main elements of the commitments are to create smaller and more evenly balanced packages of TV rights, to ensure that no one buyer can buy all of the packages, and to ensure that the sale of those rights is conducted fairly. To this end, the FAPL has committed itself to awarding the packages to the highest standalone bidder for each package, and to ensure that the process is overseen by an independent monitoring trustee. The commitments include various other elements that remove restrictions on output across various different media rights. On the basis of these commitments the Commission may adopt a decision under Article 9 of Regulation (EC) No 1/2003 in 2006.

2.3. Information industries, Internet and consumer electronics

Microsoft

106. On 28 July, the Commission adopted a decision concerning the monitoring trustee in the Microsoft case[70]. Article 7 of the Commission's decision of 24 March 2004 in the Microsoft case ("the Decision") provides for the setting-up of a suitable mechanism to monitor Microsoft's compliance with the Decision, including a monitoring trustee who is to be independent of Microsoft. This is one of the rare occasions in which the Commission has used a trustee to monitor compliance with a cease and desist order pursuant to Article 82 EC. Trustees are more frequently used to monitor compliance in merger cases.

107. The primary responsibility of the trustee is to provide expert advice to the Commission concerning compliance with the Decision. In particular, the trustee will advise the Commission on whether (i) Microsoft makes interoperability information available both completely, accurately and in a timely manner, and does not impose any unreasonable or discriminatory restriction to the access to, or use of, such information

69 Case COMP/38.173; see press release IP/05/1441, 17.11.2005.

70 C(2005) 2988 final.

and (ii) whether the unbundled version of the Windows client PC operating system that Microsoft makes available pursuant the Decision is full-functioning and does not include Windows Media Player and whether competing media player vendors have sufficient information so that their media player is not put at a disadvantage in interoperating with Microsoft's dominant client PC operating system, compared with Windows Media Player. To this end the trustee will have access to the source code of Microsoft's PC and server operating systems. All costs relating to the appointment and remuneration of the trustee are borne by Microsoft. The trustee was appointed on 4 October from a list of candidates presented by Microsoft.

108. After the rejection of Microsoft's application for interim measures on 22 December 2004, the Commission engaged in discussions with Microsoft concerning its compliance with the Decision. As regards the interoperability remedy (Article 5 of the Decision), the Commission focused on Microsoft's obligation to provide complete and accurate information which would allow Microsoft's competitors to develop work group server operating system products that interoperate with Windows PCs and servers on an equal basis with Microsoft's server operating system products. In order to comply with this obligation, Microsoft made available a technical description of the relevant software ("protocols") used in the communication between Windows PCs and work group servers (the "Technical Documentation").

109. This Technical Documentation was reviewed by the trustee, the Commission's technical experts and several third parties. They all came to the conclusion that it failed to provide sufficient information to build competing interoperable work group server operating system products.

110. The second question with respect to Microsoft's compliance with the interoperability remedy which the Commission extensively discussed with Microsoft in 2005 concerns the reasonableness of the conditions Microsoft imposes on beneficiaries of the remedy for access to and use of the Technical Documentation. Initially, Microsoft provided a set of agreements containing the terms it intended to impose on undertakings interested in using the Technical Documentation. Following discussions with the Competition DG, Microsoft amended these agreements several times. The Competition DG also conducted a market test consulting interested undertakings on Microsoft's proposals.

111. In light of the results of that market test and on the basis of the expert opinions on the Technical Documentation, the Commission decided to open proceedings against Microsoft in order to compel it to comply with its obligations stemming from the Decision. Consequently, on 10 November, the Commission adopted a decision pursuant to Article 24(1) of Regulation (EC) No 1/2003 ("the Article 24(1) Decision"). This decision is the first step in a procedure pursuant to Article 24 of the Regulation. By means of this decision, a periodic penalty payment of EUR 2 million per day was imposed on Microsoft as from 15 December in the event that it were not to comply with Article 5(a) and (c) of the Decision, i.e. its obligations to (i) supply complete and accurate interoperability information; and (ii) to make that information available on reasonable terms.

112. On 21 December, the Commission issued a statement of objections in the procedure pursuant to Article 24 with regard to Microsoft's obligation to supply complete and

accurate interoperability information. The Commission's objections are backed by further reports of the trustee in which he concludes that the Technical Documentation supplied by Microsoft in response to the Article 24(1) Decision was still incomplete and inaccurate.

3. Services

3.1. Financial services

113. Efficient financial services markets are vital to ensuring flexibility and dynamism in the European economy, raising productivity, growth and creating employment. Competition policy and internal market policy are complementary and can help deliver an integrated and competitive market for all financial services. The Commission is strengthening competition in financial services with the targeted use of sector inquiries, individual cases and the wider development of competition policy in this area.

Financial services sector inquiries

114. On 13 June, on the basis of its powers under Article 17 of Regulation (EC) No 1/2003, the Commission launched inquiries into the financial services sector. The justification for the sector inquiries was set out in a Communication from the Commissioner for Competition, in agreement with the Commissioner for Internal Market and Services[71].

115. The inquiries examine two significant sectors of financial services: retail banking and business insurance. These inquiries are being conducted in parallel. Within retail banking, the Commission is examining the area of payment cards and core retail banking services such as current accounts and financing for small and medium-sized enterprises[72]. In payment cards, the inquiry builds on the market knowledge the Commission has already developed through cases. On core retail banking services, the inquiry will explore, among other issues, low levels of market integration, effective choice on the demand side and barriers to market entry.

116. The inquiry into business insurance will examine in particular the extent of cooperation among insurers and insurance associations in areas such as the setting of standard policy conditions[73]. While in many cases such cooperation may create efficiencies, possibly distortive forms of cooperation may limit the potential for the demand side to negotiate terms of coverage and may also restrict competition and innovation in the market.

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71 See: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/communication_en.pdf

72 See: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/decision_retailbanking_en.pdf

73 See: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/decision_insurance_en.pdf

117. The analysis of the sector inquiries will rely largely on data provided by market participants. For instance, in July, on the basis of Article 18(1) of Council Regulation (EC) No 1/2003, the Commission undertook a survey of payment cards based on a representative sample of approximately 200 undertakings across the EU.

MasterCard Europe/International (multilateral interchange fees)

118. The Commission's investigation into MasterCard's MIF, opened on 24 September 2003, continued throughout 2005. After merchants had informed the Commission that banks were still reluctant to disclose the level of the MIF, Visa and MasterCard agreed to improve the transparency by publishing their respective MIFs and the categories of costs taken into account for setting these fees on their respective websites[74]. While MasterCard abolished certain network rules[75] and agreed to introduce a new licence for cross-border acquiring of Maestro debit cards, no consent was reached on the Commission's main concern, namely the composition of MasterCard's MIF.

Securities trading, clearing and settlement

119. Efficient capital markets are essential for reaching the Lisbon Strategy objectives of growth and employment. As competition can contribute to promoting this efficiency, the application of competition rules to this technically complex but economically very significant sector is a priority.

120. The Commission investigated a possible infringement of Article 82 EC in the context of *Euronext*'s response to competition from the London Stock Exchange with trading Dutch securities. The issues investigated were possible rebates and exclusionary behaviour. In October, the Competition DG decided not to pursue the investigation as, at a preliminary stage, no evidence of abuse was established. Indeed, the reduction in Euronext's prices had benefited users and the continued presence of London Stock Exchange in the Dutch equities trading market appeared to prevent Euronext from returning to its original pricing levels.

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74 See respectively: http://www.visaeurope.com/acceptingvisa/interchange.html and: http://www.mastercardintl.com/corporate/mif_information.html

75 The so-called No Surcharge Rule/No Discrimination Rule and the No Acquiring Without Issuing Rule; see Competition Policy Newsletter 2005 No 2, p. 57.

121. In parallel, after extended consultation with the market, the Competition DG issued a report commissioned from the consultancy London Economics on securities trading, clearing and settlement on regulated exchanges in the 25 Member States[76]. This describes the infrastructures serving each of the national markets and examines trends at a pan-European level. Its conclusion that users have little or no choice in the location of their clearing and settlement arrangements prompted the Competition DG to focus its further fact-finding on the economic and legal relationships between the different service providers and users. The aim of this ongoing work is to determine if more competition in these markets would bring user benefits, particularly in terms of lower costs.

Aviation insurance

122. Following an investigation by the Commission to establish whether certain practices in the aviation insurance industry in the aftermath of 11 September 2001 infringed Article 81 EC, leading European aviation insurers undertook to reform their practices in order to promote more competition and transparency[77].

123. The investigation had revealed that existing structures for cooperation among aviation insurers were impeding the market from working as well as it should, and that safeguards against excessive coordination among insurers could enhance competition. In the light of the commitments given, the investigation was closed.

124. The International Underwriting Association of London and the Lloyd's Market Association are parties to the commitments, which provide *inter alia* for greater transparency in key industry committees based in London, including the committee establishing standard wording for aviation insurance policies and clauses. In addition, the commitments provide that, if an unforeseeable crisis resulting from war or terrorism arises, insurers will limit any coordinated action to that which is indispensable to ensure that capacity continues to be available and which keeps the effects on competition to a strict minimum.

3.2. Transport

3.2.1. Air transport

Austrian Airlines/SAS

125. In 1999 SAS and Austrian Airlines notified a cooperation agreement to the Commission to obtain an individual exemption. Under the agreement the parties cooperated on all routes worldwide, with the most far-reaching cooperation on routes between Austria and the Nordic countries. Following discussions with the Competition DG, in 2002 the parties concluded an "amended cooperation agreement", but which still raised competition concerns on the Vienna-Copenhagen and Vienna-Stockholm routes. Therefore, the parties offered a commitment package, which includes notably access to slots, interlining agreements, access to frequent flyer programmes and a freeze on flight frequencies. On 22 September, the Commission

[76] Press release IP/05/1032, 2.8.2005.
[77] Press release IP/05/361, 23.3.2005.

published a notice[78] pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in which it published a concise summary of the cooperation agreement and the main content of the commitments.

International aviation policy – application of Regulation (EC) No 847/2004[79]

126. On 15 July and 23 December, the Commission adopted the first five decisions[80] under Council Regulation (EC) No 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries. In these decisions, the Commission set out the criteria according to which it assessed 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 law[81], the Commission also stated in the decisions that its discretion under the provisions of Regulation (EC) No 847/2004 cannot allow it to authorise a result which is otherwise contrary to EU law.

127. It is settled law that Articles 81 and 82 EC, read in conjunction with Article 10 EC, require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings; this would be the case, the Court of Justice has declared[82], if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 EC 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.

128. Such air service agreements, the Commission has argued in its decisions under Regulation (EC) No 847/2004, infringe Articles 10 and 81 EC read jointly. Accordingly, the Commission has allowed Member States to provisionally apply or to conclude such agreements *inter alia* on condition that the provisions breaching Articles 10 and 81 EC are brought in conformity with EU law within 12 months of the date of notification of the decisions.

129. The five decisions adopted by the Commission under Regulation (EC) No 847/2004 authorised the conclusion or provisional application of air service agreements negotiated by Member States with third countries *inter alia* on condition that infringements of Articles 10 and 81 EC are resolved in 45 instances.

EU-US negotiations on an Open Aviation Area

130. On 18 November, the Commission finalised the draft text of a new agreement with the United States of America that will replace the existing bilateral agreements concluded by Member States. The final approval of this first-stage agreement by the Transport

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78 OJ C 233, 22.9.2005, p. 18.

79 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).

80 Commission decisions C(2005)2667 and C(2005)2668 of 15 July 2005, Commission decisions C(2005)5736, C(2005)5737 and C(2005)5740 of 23 December 2005.

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

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

Council is linked to the outcome of a rule-making process initiated by the US Department of Transportation to expand opportunities for foreign citizens to invest in and participate in the management of US carriers. The agreement, if approved, would authorize every US and every EU airline to fly between every city in the European Union and every city in the United States; to operate without restrictions on the number of flights, the aircraft used, or the routes chosen, including unlimited rights to fly beyond the EU and US to points in third countries; to set fares freely in accordance with market demand; and to enter into cooperative arrangements with other airlines, including code-sharing and leasing. This agreement will create a new cooperation framework between the Commission and the US Department of Transportation in the areas of competition law and policy in the field of air transport. See also the International Activities Section, part IV.B.2. below, for the details.

3.2.2. Inland transport

131. On 20 July, the Commission tabled a revised proposal on public service requirements and contracts in passenger transport by road, rail and inland waterway[83]. Previous proposals had been introduced in 2000 and 2002, but they did not receive the necessary approval by the European Parliament and the Council. The proposal introduces the requirement for public service contracts on the provision of passenger transport between authorities and operators, thereby subjecting public service routes to certain rules, such as transparency of parameters for the award of compensation for public services obligations, cost equivalence and certain publication requirements. It also introduces a tendering obligation for regional bus and local bus and rail routes, as long as they are not operated by an internal operator (i.e. an operator controlled by the local or regional authority).

3.3. Distributive trades and other services

3.3.1. Professions

Introduction

132. The Commission's work in the professional services sector continued with the publication of its first follow-up report to the 2004 Report "Competition in Professional Services"[84]. The 2004 Report analysed the scope for reform or modernisation of specific professional rules. It drew on the results of an extensive stocktaking exercise the Competition DG had undertaken of Member States' regulation in this sector, focusing on six professions – lawyers, notaries, engineers, architects, pharmacists and accountants (including the neighbouring profession of tax advisers) – and analysed in detail five key restrictions on competition (i) fixed prices, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and

[83] This proposal aims to replace Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

[84] The Report is available at: http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf (This was supplemented by the Stocktaking Exercise on Regulation of Professional Services in the ten new EU Member States, published in November 2004, which can be found at: http://europa.eu.int/comm/competition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf).

reserved rights, and (v) regulations governing business structure and multi-disciplinary practices.

133. This research concluded that the professional services sector was characterised by restrictive rules – some of which dated back many years – that were unnecessarily inhibiting competition and harming the users of professional services – especially consumers. Examples include outdated price-fixing regulations, advertising bans and bans on interprofessional cooperation. The 2004 Report urged all involved to make a joint effort to reform or eliminate those rules which are unjustified. Regulatory authorities in the Member States and professional bodies were invited to voluntarily review existing rules taking into consideration whether those rules are necessary for the public interest, whether they are proportionate and justified, and whether they are necessary for the good practice of the profession. The Report promised to report on progress in 2005.

2005 Report "Professional Services – Scope for more reform"

134. The follow-up report was published on 5 September. It consists of two separate documents. The first is a Commission Communication "Professional Services – Scope for more reform"[85], and the second, annexed to the Communication, a Commission staff working document entitled "Progress by Member States in reviewing and eliminating unjustified restrictions to Competition in the area of Professional Services".

135. The Communication gives an overview of progress made by individual Member States in the review and removal of unjustified regulatory restrictions since the issue of the 2004 Report. It also provides details of enforcement action in this sector by national competition authorities and the Commission. It draws conclusions about the pace of reform and proposes a way forward. The Commission staff working document underpins the Communication and provides a detailed analysis of the information collected from Member States on reforms undertaken. It provides a critique of the justifications put forward by Member States for their continuing maintenance of restrictive rules, and highlights best practice.

136. The report sets out to provide a balanced analysis of progress made by comparing Member States' reported reform activity over the past 18 months against levels of existing regulation. The aim is for reported activity to be seen in the context of the level of existing regulation. This is important since Member States are all starting at different points; some have relatively low levels of regulation, while in others the professions are more heavily regulated.

137. The report finds a mixed picture in terms of reform activity during 2004/05. A handful of countries are making good progress while in others the reform process has yet to get started.

138. The Commission's analysis suggests that progress is being hampered in most Member States by several factors, including a lack of national political support and little appetite for reform from the professions themselves.

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[85] The follow-up report is available at: http://europa.eu.int/comm/competition/antitrust/legislation/#liberal

139. The report notes that the majority of national competition authorities (NCAs), along with the Commission, are now actively engaged in promoting change. A range of work is being undertaken, including bilateral discussions with national regulatory authorities (NRAs) and professional bodies, stocktaking exercises and sector studies. The NCAs are also actively applying the EU competition rules to cases in their countries. Eleven cases are reported as being opened in the six professions selected for study since February 2004.

140. In order to drive reform the report suggests that the issue of modernising the rules affecting the professions should be built into the National Reform Programmes for implementing the Lisbon Strategy. The report leaves open the possibility of the Commission taking further appropriate enforcement action using the EU competition rules, including the possible use of Article 86 EC where appropriate.

3.3.2. Waste management

141. In 2003, the Competition DG decided to enter into a comprehensive dialogue process with the NCAs to identify key competition issues in the field of waste management systems and to ensure a coherent competition policy by the Commission and the NCAs in this area. Discussions concerned in particular three types of waste which are dealt with by the corresponding EC Directives, namely: (i) packaging waste (Packaging Directive[86]), (ii) end-of-life vehicles or "car wrecks" (ELV Directive[87]) and (iii) waste electrical and electronic equipment (WEEE Directive[88]).

142. As a first step, a questionnaire was sent to the NCAs in 2003. A discussion paper was drafted in 2004 by the Competition DG on the basis of the Commission decisional practice[89] and on the basis of the replies received from the NCAs. The draft paper was circulated for consultation to the NCAs in December 2004. A meeting took place in February with 20 NCAs to discuss the draft paper and to learn from the NCAs' experiences. Following a second round of consultation in May, the draft paper was finalised and published on the Competition DG's website in September[90].

143. In applying competition policy to the waste management sector, the overall objective is to achieve the implementation of competition and environment policies in a mutually reinforcing way in order to best contribute to the Lisbon Strategy goal of making the EU the world's most dynamic, competitive and sustainable economy by 2010, while at the same time improving the welfare of consumers. The application of competition policy is important in the field of waste management since the markets for

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86 European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ L 365, 31.12.1994, p. 10). This Directive was amended by Directive 2004/12/EC of 11 February 2004 (OJ L 47, 18.2.2004, p. 26).

87 Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles (OJ L 269, 21.10.2000, p. 34).

88 Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) (OJ L 37, 13.2.2003, p. 24).

89 Commission Decision of 16.10.2003 (OJ L 75, 12.3.2004, p. 59; *ARA, ARGEV, ARO*, concerning Article 81 EC) – appeal pending; Commission Decision of 17.9.2001 (OJ L 319, 4.12.2001, p. 1; *DSD*, concerning Article 81 EC) – appeal pending; Commission Decision of 15.6.2001 (OJ L 233, 31.8.2001, p. 37; *Eco Emballages*, concerning Article 81 EC); and Commission Decision of 20.4.2001 (OJ L 166, 21.6.2001, p. 1; *DSD,* concerning Article 82 EC) – appeal pending.

90 The paper is available at http://europa.eu.int/comm/competition/antitrust/others/waste.pdf

recycled materials will become a major resource market of the future.

144. The markets in question are relatively new. The packaging waste markets have been developing gradually since the mid-1990s. As regards ELVs and WEEE, the markets in most countries are either in the process of being created or will be created in the future.

145. The Competition DG has identified three principal competition concerns in the field of waste management systems. First, anticompetitive practices such as, e.g., market sharing, price fixing and the exchange of other sensitive information need to be prevented. Second, it is important to ensure a legal environment that will allow for the existence of several competing waste management systems. Finally, exclusive arrangements of all kinds are to be avoided without solid and convincing economic justification thus allowing for increased competition and lower prices.

146. Cases in the waste management sector are likely to be dealt with mainly at the national level as most of the relevant markets would appear to be national. However, both the Commission and the NCAs will continue to actively monitor developments in the waste management sector in the future.

4. Industry, consumer goods and manufacturing

4.1. Consumer goods and foodstuffs

Coca-Cola[91]

147. On 22 June, the Commission adopted a commitment decision pursuant to Article 9 of Regulation (EC) No 1/2003, based on Article 82 EC and Article 54 EEA and addressed to The Coca-Cola Company (TCCC) and its three anchor bottlers, Bottling Holdings (Luxembourg) sarl, Coca-Cola Erfrischungsgetränke AG and Coca-Cola Hellenic Bottling Company SA (referred to collectively as "Coca-Cola"). The subject matter of the decision was certain business practices of TCCC and its respective bottlers in the supply of carbonated soft drinks ("CSDs") in the EU, Norway and Iceland.

148. In its preliminary assessment addressed to Coca-Cola on 15 October 2004, the Commission expressed concerns that TCCC and its respective bottlers may have abused their joint dominant position in the national CSD markets by pursuing certain practices in the distribution channels for consumption at home ("take-home channel") and for consumption on premise ("on-premise channel") in the EU, Norway and Iceland. Observations from interested third parties supported the Commission's preliminary competition concerns.

149. With respect to both distribution channels, the Commission's preliminary concerns related to exclusivity requirements, rebates granted on condition that the clients reached, on a quarterly basis, individually specified purchase thresholds separately set for colas and non-colas, tying arrangements and arrangements requiring the clients to

[91] Case COMP/39.116 – *Coca-Cola* (OJ L 253, 29.9.2005, p. 21, and OJ C 239, 29.9.2005, p. 19). See also http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_78.html#i39_116

carry for sale a range of cola stock keeping units ("SKUs") and/or non-cola SKUs. Furthermore, in the take-home channel, TCCC and its bottlers applied shelf space arrangements whereby the supermarkets reserved a large part of their CSD shelf space for TCCC-branded products to the advantage of the weaker CSDs of the TCCC brand portfolio. In the on-premise channel, customers received up-front financing and repaid the loan by purchasing TCCC-branded products over a number of years. Finally, TCCC and its bottlers also attached certain exclusivity-related restrictions to the installation of technical sales equipment, such as beverage coolers and fountain dispensers.

150. In response to the preliminary assessment, Coca-Cola submitted commitments which took into account the competition issues identified. On 26 November 2004 the Commission published a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003[92], inviting interested third parties to submit their observations on Coca-Cola's proposed commitments. The observations received were, on the whole, positive while indicating how the effectiveness of the commitments could be further improved (e.g. tightened wording, monitoring). In response to these observations, Coca-Cola submitted an amended commitment proposal.

151. The Commission's decision pursuant to Article 9 states that the commitments offered by Coca-Cola are sufficient to address the preliminary competition concerns identified. In particular, Coca-Cola will refrain from concluding exclusivity agreements save in specific circumstances and from granting growth and target rebates. In the preliminary assessment these practices were regarded as possibly making it more difficult for third parties to compete on the merits. By providing that requirements concerning assortment and shelf-space must be defined separately for certain categories of brands, the commitments address the concern identified in the preliminary assessment that strong brands might be leveraged in favour of weaker brands. With regard to financing and technical equipment, the commitments reduce contract duration, give customers the option of repayment and termination without penalties and free up a certain share of cooler space, thus addressing the preliminary concerns that the pre-existing arrangements unduly bound customers and led to outlet exclusivity.

152. In light of the commitments offered, the decision concluded that there were no longer grounds for action by the Commission, without reaching a finding as to whether or not there was or had been an infringement. By adopting the decision the Commission made Coca-Cola's commitments binding upon it until 31 December 2010.

4.2. Mechanical and other manufacturing industries including transportation equipment

SEP and Others/Automobiles Peugeot SA[93]

153. On 5 October, the Commission imposed a fine of EUR 49.5 million on Automobiles Peugeot SA and its wholly-owned importer Peugeot Nederland NV, for having obstructed, from January 1997 until September 2003, exports of new cars from the Netherlands to consumers resident in other Member States. In the Netherlands, prices

[92] OJ C 289, 26.11.2004, p. 10.

[93] Cases COMP/36.623, COMP/36.820 and COMP/37.275.

before taxes were generally substantially lower than in other Member States such as Germany and France. By implementing a strategy designed to prevent dealers from selling cars to consumers in other Member States, so as to curb exports by Dutch Peugeot dealers, the companies committed a very serious infringement of the prohibition on restrictive agreements set out in Article 81 EC.

154. The infringement by Peugeot consisted of two measures.

155. The first measure dealt with part of Peugeot's Dutch dealers' remuneration, which was granted on the basis of the final destination of the vehicle and discriminated against sales to foreign consumers. In particular, performance bonuses were refused if dealers sold cars which were subsequently registered outside the Netherlands.

156. The decision does not call into question the possibility for the manufacturer to tailor its commercial policy to the requirements of different national markets with a view to achieving better penetration rates in those markets. The decision also does not question the manufacturer's freedom to agree with its dealers sales targets set in terms of sales to be achieved in the contract territory or its freedom to adopt appropriate incentives, in the form of performance bonuses in particular, in order to urge dealers to increase sales volumes in their allocated territory.

157. However, the bonus system implemented by Peugeot in agreement with its Dutch dealer network went further than what was necessary to encourage Dutch dealers to devote their best sales efforts to their contract territory. Dutch dealers had to achieve certain sales targets in their territory in order to acquire the right to a bonus. Once dealers had acquired this right to a bonus, and therefore had proved to the carmaker that they had made their best efforts to develop their territory, the bonus was paid only for cars subsequently registered in the Netherlands and not for additional sales which may have been exports. It therefore created a discrimination against foreign consumers. For these reasons, the bonus system applied by Peugeot in the Netherlands did not comply with Article 6(1)(8) of Regulation (EC) No 1475/95[94], which provided that the exemption did not apply where "the supplier, without any objective reason, grants dealers remunerations calculated on the basis of the place of destination of the motor vehicles resold or the place of residence of the purchaser". Moreover, the evidence held on file showed that the bonus was economically significant for dealers throughout the period and that its loss on export sales significantly affected dealer interest in selling to non-resident consumers.

158. The second measure consisted in pressure exercised by Peugeot, through Peugeot Nederland, on those dealers who were identified as having developed a significant export activity, for example by threatening to reduce the number of cars supplied. Peugeot Nederland exerted direct pressure by occasionally acting to limit the export sales of certain dealers. The pressure also took the form of threats to reduce supplies, in particular of the most commonly exported models. In addition to this, certain models were also strictly reserved for the Dutch market and their export was regarded by Peugeot as improper conduct for which the exporting dealer would be held responsible.

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[94] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. This Regulation has since been replaced by Commission Regulation (EC) No 1400/2002 (OJ L 203, 1.8.2002).

159. As a result of the two measures, exports from the Netherlands declined after 1997, the year in which the remuneration system was implemented, then fell sharply after 1999. Such a drastic decline in exports could not be explained by extraneous factors such as changes in the level of price differentials between the Netherlands and other Member States.

160. In determining the level of the fine, the Commission took into account the very serious nature and the relatively long duration of the infringement committed by Peugeot and its Dutch subsidiary. An appeal against this decision is pending before the Court of First Instance[95].

BMW and General Motors – unjustified obstacles to multi-branding and restrictions on access to their authorised repair networks

161. The BMW[96] and the General Motors (Opel)[97] cases were opened in 2003/early 2004 following formal and informal complaints by several dealer associations. After in-depth investigations and constructive discussions with the parties, the Commission informed the respective complainants at the end of 2005 that, in view of measures taken by both BMW and GM, there are no longer grounds to pursue the proceedings further as far as the two central issues of the complaints are concerned[98]. These two issues relate to (i) unjustified obstacles to multi-brand distribution and servicing, and (ii) unnecessary restrictions for garages on becoming members of these manufacturers' authorised repair networks.

162. In order to address concerns expressed by the Commission and to benefit from legal certainty under Commission Regulation (EC) No 1400/2002[99], BMW and General Motors (GM) have clarified and adjusted their respective distribution and servicing agreements by means of circular letters to all members of their various authorised dealer and repairer networks.

163. As regards the possibility for dealers to sell competing brands of cars, BMW and GM have informed their respective networks that they accept the joint and non-exclusive use of all facilities other than the part of a showroom which is dedicated to the sale of their brands (e.g. reception counter, customer area, outside façade, back office). Both carmakers explicitly recognise the principle of coexistence of competing brands as regards their respective trademarks, distinctive signs or other corporate identity elements to be displayed in and outside the dealership premises. In addition, they will allow their dealers to use generic (multi-brand) computer infrastructure and management systems, including accounting methodology and accounting frameworks, provided that such systems' features, functionality and quality are equivalent to the solutions recommended by BMW and GM. GM has also made clear that Opel dealers can set up multi-brand Internet sites and that Opel-trained sales personnel can also be

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95 Case T-450/05 *Automobiles Peugeot and Peugeot Nederland* v *Commission*.

96 Case COMP/38.771 *Europäischer BMW- und Mini Partnerverband eV/BMW AG.*

97 Case COMP/38.864 *PO/General Motors – Opel distribution agreements* and Case COMP/38.901 *Verband Deutscher Opel-Händler/Adam Opel*.

98 With respect to other issues raised by one dealer association, discussions are still ongoing.

99 Commission Regulation (EC) No 1400/2002 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).

used for selling cars of other brands while Opel-specific training is no longer required in respect of staff entrusted with the sale of competing brands.

164. Both BMW and GM have made clear that reporting and auditing obligations of dealers do not extend to commercially sensitive information concerning dealers' business activities with products of competing suppliers.

165. In view of the potential deterrent effect of mechanisms for setting sales targets and evaluating performance on multi-brand dealers, GM has confirmed, first, that the sales targets will be mutually agreed with dealers. Second, targets will be set taking into account possible changes to the dealer's individual business circumstances (including the start of multi-brand activities) and local market conditions while refraining from assessing GM's dealers' performance on the basis of a comparison between local and national market shares. Such targets are subject to arbitration in the case of dispute. Third, the evolution of dealer performance in terms of local compared to national market shares of GM brands will not be used to sanction a dealer.

166. By contrast, the Commission did not find that BMW's requirements that its dealers display a minimum of three to four cars (a number which is far from covering the entire BMW model range) could be regarded as an indirect non-compete obligation. Showrooms below a certain size may in certain cases simply not be suitable for displaying a representative range of cars by more than one brand, without additional investment.

167. As regards multi-brand servicing and access to authorised networks, BMW and GM have eliminated requirements from their contracts that had the effect of preventing newcomers from joining the authorised repairer networks and/or servicing cars of competing brands.

168. In addition to implementing the principles set out above at points 162-165, BMW and GM have removed all quantitative criteria (e.g. minimum turnover targets and minimum throughput capacity requirements) from their repairer contracts. The BMW contracts contained an incremental scale of minimum capacity requirements in terms of work bays, equipment, stock and warehouse capacity, based on local potential demand rather than on the actual work orders history of each repairer. BMW now merely requires that each authorised repairer has at least three mechanical work bays and corresponding equipment in order to ensure quality service. Similar contractual adjustments have been introduced by GM. These changes will enable local market forces to determine the density and location of repair outlets to meet consumer demand.

169. BMW and GM also both introduced an "opening clause" to their servicing contracts which means that authorised repairers are free to source all equipment, tools and IT hardware and software from other than the designated suppliers (provided that the alternative products are of equivalent functionality and quality). Such *generic* tools, equipment and IT infrastructure can be used for servicing cars of different brands. GM also made clear that its repair contracts do not require the exclusive use of workshop facilities or equipment for Opel customers and reduced the number of special tools that authorised repairers must retain on their premises.

170. In order to remove potential obstacles to joint purchasing and stocking of spare parts, BMW and GM made clear that authorised repairers are free to organise buying groups and to jointly warehouse spare parts. They agreed to abolish the requirement that each authorised repairer should have its own warehouse on-site, without prejudice to the requirement to keep stocks only of so-called "over-the-counter-parts" at their premises (e.g. brake pads, light bulbs, filters – frequently demanded by customers).

Convergence for car prices continued to improve in the enlarged EU

171. In March and August, the Commission published reports on car price differentials within the EU based on November and May data respectively. During the year, price dispersion as measured by the average standard deviation of pre-tax prices between the 25 national markets continuously decreased to 6.3% compared to 6.9% in the August 2003 issue. Compared with May 2004, car prices at May 2005 have increased by 0.4% in the EU compared to 1.9% for headline inflation over the same period. Member States with traditionally low pre-tax prices generally did not experience significant increases in consumer prices for cars. Prices increased somewhat in Denmark (+2.4%) and Greece (+1.8%), whereas they decreased in Finland (-2%), Estonia (-8.3%) and Poland (-7.6%). This seems to indicate that car prices have not tended to converge upwards towards price levels in high-price countries.

5. Cartels

5.1. Overview of developments in cartel policy

5.1.1. A new Directorate

172. Upon taking up office the Commissioner for Competition, Neelie Kroes, identified the fight against hardcore cartels as one of the areas in which the Competition DG must concentrate its efforts. That increased focus has manifested itself in the setting up of a new Directorate within the Competition DG devoted exclusively to anti-cartel enforcement. The Directorate became operational on 1 June. The Directorate handles the majority of cartel cases and takes a leading role, in close cooperation with the Directorate for Policy and Strategic Support, in developing policy in the area of cartel enforcement.

173. The Cartels Directorate employs some 60 staff, about 40 of whom are case handlers. The major task of the new Cartels Directorate is to ensure the efficient and sound handling of a large volume of cartel investigations. Its task is to streamline and accelerate the handling of these investigations which by nature are complex and lengthy, so that the investigations started can be completed within a reasonable time-frame. The work of the Cartels Directorate will put the spotlight on the costs of cartels not only to final consumers but also on industrial customers. Such cartels give rise to no benefits for consumers or for the economy and have adverse effects on competitiveness and growth in the EU.

174. In terms of case work regarding hardcore cartels, the leniency programme continued to give rise to a steady stream of cases being reported to the Commission. However,

only a limited number of those cases actually led to investigations being opened. In 2005, the Commission received 17 applications for immunity and 11 applications for a reduction of fines. Conditional immunity was granted in six cases. Other information sources such as complaints and market monitoring and in particular cooperation with national competition authorities within the European Competition Network were valuable in detecting cartels. In terms of final decisions, the Commission issued five final decisions in which it fined 37 undertakings[100] a total of EUR 683 million (compared with 21 undertakings and a total of EUR 390 million in fines in 2004). Statements of objections were issued in eight cartel cases. It is noted that three out of the five cartel decisions adopted in 2005 were based on the 1996 Leniency Notice, but this ratio will of course change in the future: most of the statements of objections issued in 2005 resulted from applications filed under the 2002 Leniency Notice[101].

100 This amount does not include the immunity applicants.

101 The new notice applies where the application for leniency reached the Commission after 19 February 2002.

5.1.2. The Commission's leniency programme

175. Leniency remains a very important enforcement tool in cartel cases. Under the Commission's leniency programme, immunity from fines can be available for the first undertaking to provide evidence of a cartel to the Commission, and a substantial reduction in fines for any subsequent applicant. Whilst the Commission's first Leniency Notice of 1996 resulted in more than 80 applications in six years of operation, the Leniency Notice of 2002[102] has increased the number of applications (both for immunity and a reduction of fines) to 165 in less than four years (i.e. about three per month on average): 86 of these applications were for immunity and 79 for reduction of fines.

176. However, the high number of applications received does not reflect the number of cartel investigations the Commission has opened since 2002. In deciding which hardcore cartels to target, the Commission, within the framework of the European Competition Network, focused its efforts on violations that have an impact in at least several Member States or in the EEA as a whole. A number of cases, although formally falling within the prohibition set out in Article 81 EC, concerned violations that were of limited size, often limited to a single Member State or even part of a Member State. In such cases, the applications were sometimes given an investigative follow-up by a national competition authority (NCA) in the Member State concerned rather than the Commission, in particular when similar applications were also made by the undertaking to the NCA in the Member State. However, such cases are included in the above statistics as the Commission initially issued a conditional immunity decision in these cases. Moreover, under the 2002 Notice, immunity may be granted when an undertaking has provided sufficient evidence for the Commission to launch inspections. Such evidence may not be sufficient to actually prove the infringement and complementary fact-finding is most often necessary. In deciding which cases to pursue, the Commission therefore has to set its priorities. For instance, where the applications concerned cases where the alleged infringement had ceased a number of years earlier, it may be considered that a new investigation was unlikely to bring any conclusive results. In other cases, the evidence presented may be too scarce or imprecise to justify a decision of conditional immunity and/or the opening of an inquiry.

177. The number of applications which did not meet the substantive conditions for immunity increased in 2005 as compared with previous years. Five immunity applications were formally rejected as the information provided to the Commission neither allowed it to carry out surprise inspections nor to find an infringement under Article 81 EC. (The undertakings concerned chose, however, not to withdraw the evidence provided, but asked the Commission to consider the information for a reduction of a fine instead, should the Commission nevertheless impose a fine in the future in relation to the alleged violation.) In one case, where it was clear from the outset that the Commission would not open an investigation, an applicant was informed of the Commission's intention not to take action on the immunity application because it was unlikely that the conditions for immunity were met and the case was not suitable for further investigation by the Commission. Three applications were considered non-eligible in 2005 because the facts reported were not covered by

[102] Notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002).

the material scope of the Leniency Notice. The Commission must ensure that the leniency programme is not misused to bring agreements to the attention of the Commission that previously would have fallen under the notification system that was abolished with the entry into force of Regulation (EC) No 1/2003. Finally, the Commission informed an undertaking to which it had granted conditional immunity that its status would not be confirmed in the final cartel decision. The undertaking had breached its duty of cooperation by disclosing to other competitors that it had applied for immunity before inspections were carried out by the Commission.

178. As regards applications for a reduction in fines, the statistics provided should be seen in the light of the fact that in a single investigation normally more than one undertaking applies for a reduction in fines.

179. Three years of experience in working with the Commission's 2002 Leniency Notice give rise to a number of general observations. The benefits of immunity are granted to undertakings which fulfil the conditions and duties set out in the Leniency Notice. Undertakings which are awarded conditional immunity must cooperate fully and continuously with the Commission. This duty of cooperation includes, *inter alia*, the duty not to disclose the application to third parties without the prior consent of the Commission, to search for and provide to the Commission all possible information regarding the alleged cartel and to answer all questions the Commission may ask, which includes the possibility of taking oral statements from company employees. A paperless procedure (i.e. recorded oral corporate statements) which the Commission has put in place is used in many cases and serves only to avoid immunity applicants being placed at a disadvantage compared to other cartel participants before civil courts. Pre-existing documents relevant to the infringement must, however, always be supplied.

180. Whether or not evidence can be recorded as having significant added value – and therefore qualifying for a reduction in the fine – depends on the facts of the case and the strength of the evidence already in the possession of the Commission. Where the information provided by the immunity applicant and the inspections is still insufficient to prove the infringement, new evidence provided by an applicant for a reduction of fines may allow the Commission to actually prove the infringement. Significant added value can also occur where the leniency applicant does not provide new evidence, but corroborates the already existing evidence and this corroboration is needed to prove the infringement. Even where the Commission has already been able to find an infringement, additional evidence can still have a significant added value if it has a direct bearing on the gravity or duration of the suspected cartel. The Commission decisions in *Italian Raw Tobacco* and *Rubber Chemicals* discussed below shed light on some aspects of the notion of significant added value. Further decisions under the 2002 Notice that will be issued in the course of 2006 will provide further clarity.

181. The Commission's task in the years ahead is to maintain and further strengthen the effectiveness of its leniency policy. The purpose is to ensure effective deterrence of cartels to allow for prompt investigation and to ensure that cartels are severely penalised, in order to ensure a competitive environment for the benefit of consumers.

5.2. Cases

Monochloroacetic acid[103]

182. On 19 January, the Commission fined three chemicals undertakings Akzo, Hoechst and Atofina (now known as Arkema) a total amount of nearly EUR 217 million for their participation in a cartel in the market for monochloroacetic acid (MCAA). A fourth undertaking, Clariant, which had acquired its MCAA business from Hoechst in 1997, escaped the imposition of a fine because of its cooperation with the Commission under the Leniency Notice.

183. MCAA is a reactive organic acid which is a chemical intermediate used in the manufacture of detergents, adhesives, textile auxiliaries and thickeners used in food, pharmaceuticals and cosmetics. The participants in the cartel held over 90% of the European market for MCAA. They shared the market through a volume and customer allocation scheme for at least 15 years from 1984 until 1999. They met two to four times a year on a rotating basis in their respective countries. As from 1993, the cartel became more formalised with the involvement of AC Treuhand, a Swiss statistical agency, which organised legitimate meetings close to Zurich airport that in fact served as pretext for the participants to meet unofficially to discuss the cartel arrangements.

184. Clariant, Atofina and Akzo all cooperated with the Commission under the Leniency Notice. The 1996 Leniency Notice was applicable as the investigation started prior to the introduction of the 2002 Notice. Clariant provided decisive evidence of the cartel (which triggered the investigation) and was granted full immunity. Atofina was the second undertaking to come forward and was granted a 40% reduction in fines. Akzo was the third undertaking to cooperate with the Commission and it received a reduction of 25%. In setting the fines, the Commission also took into account the duration of the infringement, the large size and overall resources of some of the undertakings and the fact that some of the undertakings were addressees of previous Commission decisions establishing infringements of the same type. On this basis, Akzo, the largest producer of MCAA, received the highest individual fine of EUR 84.38 million, followed by Hoechst with EUR 74.03 million and Atofina with EUR 58.5 million.

[103] Case COMP/37.773 *MCAA*.

Industrial thread[104]

185. On 14 September, the Commission fined thread producers from Germany, Belgium, the Netherlands, France, Switzerland and the United Kingdom a total of EUR 43.497 million for operating cartels in the market for industrial thread. Industrial thread is used in a variety of industries to sew or embroider various products such as clothes, home furnishings, automotive seats and seatbelts, leather goods, mattresses, footwear and ropes.

186. By means of unannounced inspections carried out by the Commission in November 2001 at the premises of several Community producers of textile/haberdashery products and the subsequent investigation, the Commission discovered evidence that undertakings had taken part in the following three cartel agreements and concerted practices: a cartel on the market in thread for industrial customers in Benelux and the Nordic countries from January 1990 until September 2001; a cartel on the market in thread for industrial customers in the United Kingdom from October 1990 until September 1996; and a cartel on the market in thread for automotive customers in the EEA from May/June 1998 until 15 May 2000.

187. For these three markets, the thread producers took part in regular meetings and had bilateral contacts to agree on price increases and/or on target prices, to exchange sensitive information on price lists and/or prices charged to individual customers, and to avoid undercutting the incumbent supplier's prices with a view to allocating customers.

188. The following companies were involved: Ackermann Nähgarne GmbH & Co, Amann und Söhne GmbH, Barbour Threads Ltd, Belgian Sewing Thread NV, Bieze Stork BV, Bisto Holding BV, Coats Ltd, Coats UK Ltd, Cousin Filterie SA, Dollfus Mieg et Cie SA, Donisthorpe & Company Ltd, Gütermann AG, Hicking Pentecost plc, Oxley Threads Ltd, Perivale Gütermann Ltd and Zwicky & Co AG.

189. The infringements committed by the addressees are considered as "very serious" as they have the object of fixing prices, thereby restricting competition and affecting trade between Member States.

Raw tobacco Italy[105]

190. On 20 October, the Commission imposed fines totalling EUR 56.05 million on four Italian tobacco processors (Deltafina, Dimon – now renamed Mindo, Transcatab and Romana Tabacchi), for colluding over a period of more than six years (1995–2002) on the prices paid to tobacco growers and intermediaries and on the allocation of tobacco suppliers in Italy. The decision is also addressed to Universal Corporation (the US parent company of Deltafina and the biggest tobacco merchant worldwide) and Alliance Once International Inc., the company resulting from the merger of the parent companies of Transcatab and Dimon and the second biggest tobacco merchant worldwide.

191. The decision also applies fines of EUR 1 000 on the processors' and producers'

104 Case COMP/38.337 *PO/Thread*.

105 Case COMP/38.281 *Raw tobacco Italy*.

associations (APTI and UNITAB) for their price-fixing activities in the negotiation of sector-wide agreements.

192. This is the second time that the Commission has taken a decision with fines in the raw tobacco sector. In October 2004, the Commission imposed fines on processors and producers associations in Spain[106].

193. This is the first case in which the 2002 Leniency Notice has been applied. The fines imposed on Mindo/Dimon and Transcatab include reductions of 50% and 30% respectively. Deltafina was granted conditional immunity at the beginning of the procedure under the terms of the Leniency Notice. The decision however refused the benefit of immunity to Deltafina due to a serious breach by Deltafina of its cooperation obligations (Deltafina informed its competitors that it had applied for leniency, thereby revealing the existence of an investigation against them, before the Commission could carry out surprise inspections). Nevertheless, based on the specific circumstances of the present case, Deltafina's actual contribution to the establishment of the processors' infringement justifies a reduction of 50% in the fine imposed.

Industrial bags[107]

194. On 30 November, the Commission fined sixteen industrial plastic bag producers a total amount of EUR 290.71 million for their participation in a cartel in Germany, the Benelux countries, France and Spain. The participants in the cartel held around 75% of the market for industrial bags in those countries in 1996. They agreed amongst themselves prices and sales quotas by geographical area, shared the orders of large customers through allocation schemes, organised collusive bidding to tenders and exchanged information on their sales volumes and prices, some of them for over 20 years from 1982 until 2002. The cartel was organised at two levels: the global level within the framework of the professional association "Valveplast" where participants held meetings three to four times a year and the regional and functional sub-groups which also held meetings regularly.

195. Industrial plastic bags are used to pack various products, mainly of an industrial nature, but also products destined for consumers, such as raw materials, fertilizer, agricultural products, animal feed and building materials.

196. The investigations started on the basis of the information brought to the attention of the Commission by one of the members of the cartel, British Polythene Industries (BPI) under the 1996 Leniency Notice. Surprise inspections were carried out by the Commission in June 2002 at the premises of most of the cartel participants. BPI was granted full immunity from fines for being the first to provide the Commission with evidence allowing inspections to be organised. Several other undertakings had their fines reduced under the Leniency Notice in reward for the information they provided (Trioplast, Bischof + Klein, Cofira-Sac) or for not contesting the facts as set out in the statement of objections addressed to them (Nordfolien, Bonar Technical Fabrics and Low & Bonar). Aggravating circumstances led to an increase of the fines for Bischof + Klein (destruction of a document during the inspection) and

106 Case COMP/38.238 *Raw tobacco Spain* (an unofficial version is available on the Competition DG's website).

107 Case COMP/38.354 *Industrial bags*.

UPM-Kymmene (repeated infringement of the same type).

Rubber chemicals[108]

197. On 21 December, the Commission fined four undertakings a total amount of EUR 75.86 million for operating a cartel in rubber chemicals. The companies involved agreed to exchange information about prices and/or raise prices of certain rubber chemicals (antioxidants, antiozonants and primary accelerators) in the EEA and the worldwide markets.

198. Rubber chemicals are synthetic or organic chemicals that improve the production and the characteristics of rubber products, used in a wide range of applications, the most important of which is tyres for cars and other vehicles. In 2001, the value of the EEA market was estimated at about EUR 200 million and the value of the worldwide market at EUR 1.5 billion.

199. The investigation into the rubber chemicals sector began following an application for conditional immunity from fines by Flexsys in April 2002. Subsequently, the Commission carried out unannounced inspections at the premises of Bayer, Crompton Europe and General Quimica in September 2002. After these inspections, Crompton (now Chemtura), Bayer and General Quimica applied for leniency.

200. Whilst there are a number of indications that collusive activities within the rubber chemicals industry were already taking place at least occasionally in the 1970s, the Commission only had sufficiently firm evidence of the existence of the cartel for the period covering the years 1996-2001 for Flexsys, Bayer and Crompton (now Chemtura) (including Crompton Europe and Uniroyal Chemical Company) and 1999 and 2000 for General Quimica. Repsol YPF SA and Repsol Quimica SA, although they did not themselves participate in the arrangements in question, are nevertheless held responsible for the conduct of their wholly owned subsidiary General Quimica.

[108] Case COMP/38.443 *Rubber chemicals*.

C – ECN: Overview of cooperation

1. General overview

201. 2005 was the first full year of implementation of the new enforcement system set up by Regulation (EC) No 1/2003. It saw a further deepening of the cooperation between the EU Member States' national competition authorities (NCAs) and the Commission. The mechanisms provided for by the Regulation aiming at ensuring an efficient and consistent enforcement of the law operated smoothly throughout the year.

1.1. Cooperation on policy issues

202. During 2005, the ECN was used as a forum for EU competition authorities to discuss general policy issues. Work took place in four different fora:

203. First, the Director-General of the Competition DG and the heads of all NCAs met in order to discuss important competition policy issues; it is planned that this meeting should take place once a year. In 2005, the discussion focused on the review of Article 82 policy.

204. Second, the NCAs and the Commission met in so-called "plenary meetings" where general issues of common interest relating to antitrust policy are discussed and where exchanges of experiences and know-how take place; such discussions and exchanges foster the creation of a common competition culture within the Network; for example useful discussion took place concerning sector inquiries and the oral procedure for corporate statements in the context of leniency. Plenary meetings also allow preliminary discussions between Network members on policy proposals from the Commission such as the Green Paper on actions for damages.

205. Third, there are six working groups dealing with specific issues. In 2005, one working group was dedicated to transitional issues arising from the new enforcement system; another was devoted to addressing the possible difficulties arising from discrepancies between leniency programmes; the third working group addressed issues related to the heterogeneity of procedures and sanctions in the Member States; the fourth working group dealt with information and communication about the ECN; the fifth working group is 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.

206. Finally, there were 13 ECN sectoral subgroups dedicated to particular sectors[109]. Some scheduled regular meetings whereas others communicated mainly via electronic means; they can address any sector-specific issues and allow for a useful exchange of experience and best practices; for example, in 2005, the Telecommunications subgroup examined price squeezing in the telecommunications markets and the

[109] Banking; Securities; Insurance; Food; Pharmaceuticals; Professional services; Healthcare; Environment; Energy; Railways; Motor vehicles; Telecoms; Media.

Energy subgroup dealt with long-term gas supply contracts. The sectoral subgroups ensure a good upstream coordination and lead to a common approach and broad consistency in the application of EU competition law, beyond individual cases.

1.2. Adapting national laws to ensure efficient enforcement by NCAs

207. 2005 also saw important legislative work in the Member States to ensure the efficient functioning of Regulation (EC) No 1/2003. Over and above legal obligations arising from the implementation of Regulation (EC) No 1/2003, a significant level of convergence of national laws towards EU law can be observed in new national legislation. This is for instance reflected in the abolition of the notification system in a large number of Member States; today, in all but eight Member States, national competition law systems are aligned on the system of direct application of Article 81(3) that was introduced by Regulation (EC) No 1/2003; of those eight Member States three are considering an amendment to their system. There has also been an alignment with the Commission's investigative powers, for example in the field of inspections at private homes. Convergence has also been observed in the types of decisions which can be taken by NCAs: more now have the power to order interim measures and to accept commitments.

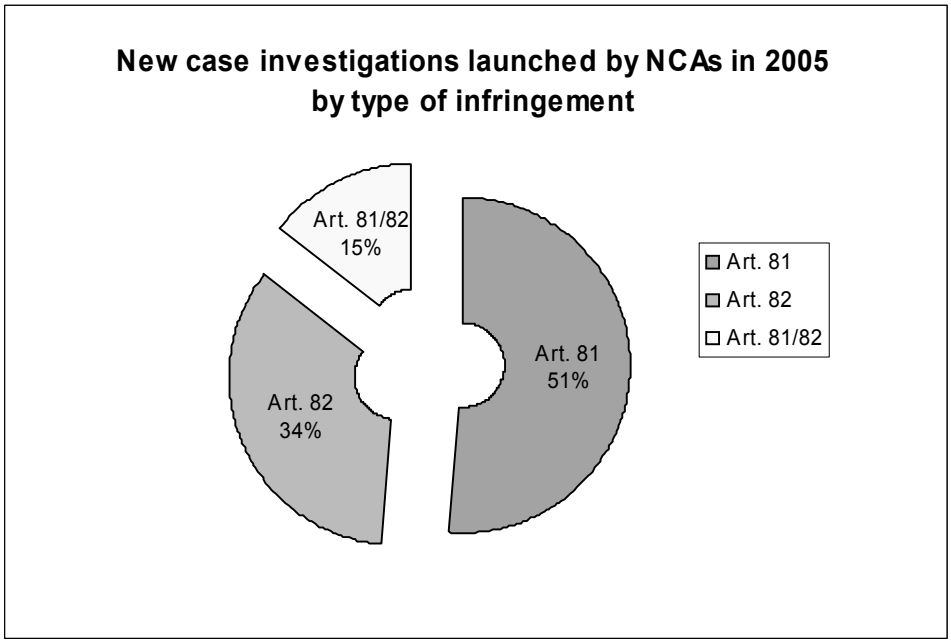
208. The adoption of national leniency programmes is another trend which has been very marked: whereas only three Member States had a leniency programme in 2000, there are now 19. Of the authorities which as yet have no programme (Spain, Italy, Portugal, Slovenia, Malta, Denmark), at least three are now considering whether to introduce one. This is a very significant development for cartel enforcement in the Community as leniency programmes are the cornerstone of efficient cartel detection. It will also greatly ease the decision of potential applicants to seek the benefit of leniency programmes as they can now be protected almost everywhere in the EU.

1.3. Cooperation in individual cases

209. Cooperation between the ECN members in individual cases is organised around two principal obligations on the NCAs to inform the Commission: at the outset of proceedings (Article 11(3) of Regulation (EC) No 1/2003) and before the final decision (Article 11(4) of Regulation (EC) No 1/2003). The first requirement to inform facilitates the swift reallocation of cases in the few cases where it appears necessary, whereas the second plays an important role in ensuring consistent application of EU law.

Case allocation

210. The Commission was informed of some 180 new case investigations launched by NCAs. It is on the basis of this information that, if need be, reallocation discussions take place with a view to ensuring the most efficient work-sharing arrangement for a particular case within the ECN.



211. The experiences of worksharing within the Network have confirmed that the flexible and pragmatic approach which has been introduced by the Regulation and the Network Notice functions very well in practice. However, it is also important to note that, as predicted by the Network Notice[110], situations where cases change hands are rare in comparison with the overall number of cases dealt with by the ECN members. From the experience in 2005, there were two principal areas in which work sharing in the ECN can be said to have played a role.

212. The first scenario in which work sharing in the ECN was an issue concerned the very early stages of cartel cases in which the next step to be organised were inspections. This situation is characterised by a strong need for confidentiality and speed.

213. An example can be cited in relation to the investigation in the flat glass sector[111]. This investigation goes back to the fact that several NCAs had indications of a price-fixing cartel. Considering that the suspected scope of the case might call for action by the Commission, the NCAs informed the Commission at a very early stage and suggested it take up the case. On the basis of information received pursuant to Article 12, the Commission organised inspections. It is currently reviewing the evidence gathered. This is an excellent example of how close cooperation within the ECN contributes to efficient enforcement. The Commission and Member States' NCAs also cooperated in the early stages of several cases in which parallel leniency applications had been received.

214. The second scenario concerned a certain number of complaints received by the Commission or an NCA or both[112] and which have been or are being followed up by a well-placed authority in the network.

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110 Network Notice, paragraph 6.

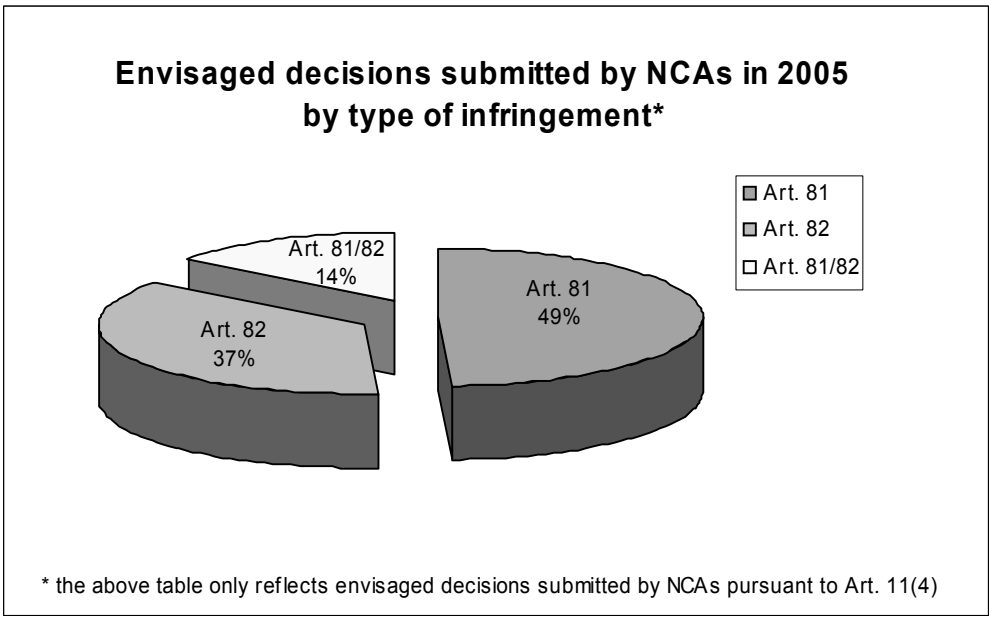
111 Press release MEMO 05/63, 24.2.2005.

112 This possibility had been anticipated in the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004, p. 65, paragraphs 19 *et seq*.).

Consistent application

215. In order to ensure consistent application of Articles 81 and 82 EC, Article 11(4) of Regulation (EC) No 1/2003 requires NCAs to inform the Commission at the latest 30 days before they adopt a prohibition decision or a decision accepting commitments. Pursuant to Article 11(5) of Regulation (EC) No 1/2003, the NCAs may consult the Commission on any case involving the application of EU law.

216. In 2005, the Commission received information pursuant to Article 11(4) of envisaged decisions in almost 80 cases, from 18 different NCAs. These cases related to a large variety of infringements in various sectors of the economy.



217. The Commission did not open proceedings in any of these cases. In a number of instances, the services of the Competition DG at various levels entered into discussions with the NCA and provided comments and advice to the authority on an informal basis. These comments, which do not represent an official position of the Commission, are regarded as an internal correspondence between competition authorities and are not accessible to the parties under Regulation (EC) No 1/2003. Should an NCA draw inspiration from these comments to envisage new objections against the undertakings, it would have to issue a further statement of objections (or its national equivalent) and allow the parties to be heard. This did not happen in 2005.

218. The open and constructive discussions which took place between competition authorities in the EU in 2005 have permitted a smooth and consistent enforcement of EU competition law.

2. Application of EU competition rules by national courts in the EU: Report on the implementation of Article 15 of Regulation (EC) No 1/2003

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

219. Article 15(1) of Regulation (EC) No 1/2003 gives national judges the option of asking the Commission for information in its possession or for an opinion on questions concerning the application of the EU competition rules. In 2005, the Commission provided information in reply to three requests from national judges and issued six opinions: three in reply to requests from Belgian courts, one to a Lithuanian court and two to Spanish courts (see below summaries of these opinions). Three requests received in 2005 were pending at the end of the year.

220. In order to enhance the consistent application of EU competition law and to avoid conflicting opinions from the Commission and NCAs, it was agreed that, as soon as a national court turns to the Commission or to an NCA for an opinion on the application of EU competition law, the Commission and the NCA of that Member State will inform each other.

221. Furthermore, in order to increase transparency, it has been decided to make publicly available opinions which the Commission has given on the application of the EU competition rules at the request of a national court pursuant to Article 15(1) of Regulation (EC) No 1/2003. Opinions will be posted on the Competition DG's website once the judgment in the case in which the opinion was requested has been notified to the Commission pursuant to Article 15(2) of Regulation (EC) No 1/2003. Opinions will be made available only to the extent that there is no legal impediment, in particular with regard to the procedural rules of the requesting court.

2.2. Judgments by national courts

222. Article 15(2) of Regulation (EC) No 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 54 judgments handed down in 2005, which were posted on the Competition DG's website to the extent that the transmitting authority did not class them as confidential (confidential judgments are merely listed). The majority of those judgments (43) resulted from private enforcement actions, in most cases seeking the annulment of an agreement on the ground of its incompatibility with the EU competition rules. Only 10 judgments were given by appeal courts reviewing NCA administrative decisions.

2.3. *Amicus curiae* intervention

223. Article 15(3) of Regulation (EC) No 1/2003 allows the Commission and NCAs to submit observations to national courts on issues relating to the application of EU competition rules. The Commission did not have recourse to this device in 2005.

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

224. Continuing training and education of national judges in EU competition law is very important so as to ensure both effective and coherent application of those rules. In 2005, the Commission cofinanced 12 training projects, committing almost EUR 600 000 for the training of national judges from all 25 EU Member States.

2.5. Summaries of opinions issued by the Commission under Article 15(1) of Regulation (EC) No 1/2003

Belgium

The following three requests for opinions were received from the Court of Appeal in Brussels:

225. Firstly, the Court of Appeal asked whether it was compatible with Article 81 EC for a brewery to conclude a five-year exclusive purchasing agreement for beverages other than beer in 1997, after having concluded a 10-year exclusive purchasing agreement for beers with the same buyer in 1993. If the agreements were deemed to be incompatible with Article 81 EC, the court sought guidance on the scope of nullity under Article 81(2) EC.

226. With regard to the issue of compatibility with Article 81 EC, the opinion referred to the *Delimitis* judgment of the European Court of Justice (ECJ) and the Commission's *de minimis* Notices. The opinion drew attention to the relevant Commission block exemption Regulations (namely Regulation (EC) No 1984/83 (until 31 May 2000) and its successor Regulation (EC) No 2790/1999). Finally, with regard to the scope of Article 81(2) EC, the opinion recalled the relevant case law of the ECJ, in particular the *Courage* judgment.

227. Secondly, the Court of Appeal asked whether under Article 81 and 82 EC an agreement between the organiser of a truck exhibition and the importers and distributors showing their trucks at the exhibition could include a prohibition on participation in any similar event in Belgium for the six-month period prior to the exhibition.

228. The opinion set out the analytical framework under Article 81 EC, highlighting the guidelines on the application of Article 81(3), as well as the decision-making practice of the Commission in the field of exhibitions. It underlined the need to define the relevant geographic market to assess whether the non-compete clause was capable of foreclosing competitors. The opinion also clarified the relationship between Article 81 EC and Article 82 EC and pointed out that efficiencies can be taken into account in assessments under Article 82 EC.

229. Finally, the Court of Appeal asked whether the criteria set by a collecting society for giving the status of "*grand organisateur*" to certain commercial users and the rebate of 50% granted to such users are compatible with Article 82 EC or whether this amounts to illegal discrimination within the meaning of that provision.

230. The opinion, by reference to the case law on collecting societies, set out the various elements which can be taken into account to determine whether the criteria or their application may constitute a breach of Article 82 EC.

Spain

231. A request for an opinion arose in the context of litigation between a supplier on the Spanish wholesale market for petroleum products and a service station operator. The Spanish court asked whether the type and size of the network of the supplier in Spain could affect interstate trade and lead to a restriction of competition and whether the contractual relationship between the parties could benefit from an exemption further

to Article 81(3).

232. The opinion set out the Commission's line of reasoning concerning the assessment of the compatibility of such exclusive supply agreements with EU competition law. It highlighted that a network of exclusive supply contracts can lead to problems of foreclosure and explained how to assess possible foreclosure of the market by reference to the ECJ's case law (*Delimitis*), the Commission's guidelines and notices, as well as an Article 27(4) notice that was published in the context of Case COMP/38.348 (REPSOL). The opinion referred to the Commission's guidelines on the application of Article 81(3) for an assessment of whether the contract meets the conditions of Article 81(3).

233. In a similar case, a Spanish court asked whether an agreement between a wholesale supplier of petroleum products and a service station operator was compatible with Article 81 EC. In particular, it requested clarification as to whether a non-compete clause and a resale price maintenance clause (RPM) were compatible with Article 81 EC, whether the agreement at stake could benefit from the block exemption Regulations, and whether the service station operator could be considered an agent.

234. The opinion stated that a hardcore restriction on RPM precludes the availability of a block exemption and indicated that clauses providing for a hardcore restriction on RPM are void in so far as they are not part of a genuine agency contract. The opinion outlined the criteria for assessing whether a retailer is an agent under EU competition rules by reference to the Commission's guidelines. The opinion further explained how to carry out the analysis of possible market foreclosure as well as the assessment of whether the agreement could benefit from an exemption under Article 81(3), by reference to the ECJ's case law (*Delimitis*), the Commission's guidelines and notices, as well as the Article 27(4) notice that was published in the context of Case COMP/38.348 (REPSOL). Finally, the opinion noted that it is for the court to conclude whether any clause that it might find void could be severed from the contract or whether the entire contract should be set aside.

Lithuania

235. The Vilnius District Court asked whether it was compatible with Article 86(1) EC, in conjunction with Article 82 EC, for a municipality to carry out a tender procedure for the award of an exclusive right to collect waste for 15 years. The applicant in the legal action pending before the court had argued that such long-term exclusivity would grant the concession-holder the opportunity to charge excessive prices to certain clients.

236. The opinion addresses the issue of the existence of a dominant position in the waste management sector under Article 82 EC by reference to the ECJ's case law on waste management (*Københavns*[113] and *Dusseldorp*[114]) and the Commission Notice on the definition of relevant market for the purposes of Community competition law[115]. The opinion outlines the conditions to be fulfilled for a finding of a violation of Article 86(1), in conjunction with Article 82 EC, namely that an abuse by the successful concession-holder would have to be the inevitable or at least the likely result of the tender conditions. Finally, the opinion indicates that a violation of the competition rules may be justified under Article 86(2) EC, with reference to the *Københavns* judgment.

3. ECN cooperation in the different sectors

ECN working group on information and communication about the ECN

237. The ECN working group on information and communication about the ECN established its mandate and work started on the following issues: a general description of the ECN; the statistics on the functioning of the ECN to be published on the Competition DG's website; the structure of the web pages dedicated to the ECN; an ECN logo and a FAQ text. The Competition DG's website is being revamped and as a temporary solution figures on antitrust cases dealt with by ECN authorities (new investigations and envisaged decisions) are published on a monthly basis since September in the hot topics section of the Competition DG's website.

ECN working group on abuse of dominant position

238. Five meetings of the ECN working group on abuse of dominant position were held between February and April. In these meetings, particular types of abuse were discussed – predation, refusal to deal and margin squeeze, rebates, tying, excessive pricing and discrimination – with the help of some cases presented by the NCAs. In general, the discussions showed that the different enforcement practices have much in common and that the same or similar issues arise.

ECN working group of chief competition economists

239. The first meeting of the ECN working group of chief competition economists was

113 Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD)* v *Københavns Kommune* [2000] ECR I-3743.

114 Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others* v *Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075.

115 OJ C 372, 9.12.1997, p. 1.

held on 30 September. The economic analysis of a number of selected national and EU merger and antitrust cases was discussed. By establishing closer contact between economists from the NCAs and the Commission, this subgroup aims to develop technical expertise and a joint approach in the application of modelling tools to competition policy. As a next step, in March 2006 an ad-hoc meeting will discuss working methods for economists in competition authorities.

ECN subgroup on telecommunications and postal services

240. During 2005 the NCAs engaged in a high level of activity within the telecommunications and postal sector, submitting a large number of new cases as well as envisaged decisions to the ECN. Only exceptionally did the cases concern Article 81 EC. The large majority of the cases, as expected, concerned the incumbent's attempts to abuse its market dominance, often by leveraging of market power from the upstream (access) markets to the downstream (services) markets such as broadband or voice telephony. It is interesting to note that almost 50% of all the Article 82 cases in the ECN concerning the telecommunications sector related to margin squeeze, which was also the topic of the first ECN telecommunications subgroup meeting. In the postal sector, most of the cases also concerned various abuses aimed at leveraging market power or tying monopoly markets with liberalised markets. The large number of ongoing national cases shows that that there is ample scope for the application of antitrust rules in addition to the sector-specific Regulation.

ECN subgroup on energy

241. The year 2005 was very important for cooperation between competition authorities in the energy sector, as the energy sector was a priority not only for the Commission but also for many NCAs. Following its launch in 2004, the ECN subgroup on energy met three times in 2005. There were two technical meetings in April and July and one high-level meeting for the heads of competition authorities and energy regulators in November. The subgroup meetings focused on the ongoing/concluded inquiries into the gas and electricity sectors by the Commission and certain national authorities. At the meeting in November, the heads of the NCAs and energy regulators strongly supported the Competition DG's initial findings in the sector inquiry as set out in the issues paper. The subgroup also discussed market definitions in electricity wholesale markets. A number of very prominent cases in the energy sector dealt with at national level were submitted to the Commission, relating to highly important issues such as the compatibility of long-term exclusive gas supply contracts with EU competition law or excessive pricing in the electricity sector.

ECN subgroup on railways – Rail Transport Competition Network (RTCN)

242. In March the RTCN met for the third time. Following previous discussions it was possible to have a first exchange of views with the rail regulatory bodies (RBs) on how to strengthen cooperation between NCAs and RBs with respect to the opening up of the railway market. The exchange of views will be pursued once a year. The aim is to identify the bottlenecks to competition/liberalisation in both the freight and transport railways markets and decide which authority is well placed to act. Cooperation within the RTCN and with RB has already proved to be very fruitful. The challenge is to continue to explore avenues and decide on concrete actions that would significantly facilitate the entrance of newcomers and improve competition in the sector.

ECN subgroup on environment

243. In 2005, the ECN subgroup on environment discussed the Competition DG paper concerning issues of competition in waste management systems which was published on the Competition DG's website in September. The paper examines antitrust issues that may arise with respect to waste management systems in particular as regards packaging waste, car wrecks and electronic waste.

ECN subgroup of experts in securities issues

244. A third annual meeting of the ECN subgroup of experts in securities issues took place in September. Regular contacts facilitate convergence in the application of competition rules to this sector at national and EU level. Consolidation was a major topic at this meeting where NCAs shared their recent experiences. As a new initiative, some preliminary theoretical modelling of the welfare effects of consolidation in the settlement sector was presented.

max.mobil[116]

245. By judgment of 22 February, the European Court of Justice (ECJ) set aside the judgment of the Court of First Instance (CFI) in Case T-54/99 *max.mobil* v *Commission*, which acknowledged a general right of the complainants to challenge the Commission's refusal to act under Article 86(3) EC. In its judgment the ECJ held that complainants under Article 86(3) cannot challenge decisions of the Commission not to open a procedure against a Member State because such act cannot be regarded as producing binding legal effects. In doing so, the ECJ confirmed the practice of the Commission of handling Article 86(3) EC complaints in a way similar to the approach taken under Article 226 EC.

Syfait (Glaxo Greece)[117]

246. By judgment of 30 May, the ECJ rejected as inadmissible a request for a preliminary ruling made by the Greek Competition Council in relation to an interpretation of Article 82 EC with regard to parallel trade in pharmaceuticals. The ECJ found that the Greek national competition authority (NCA) was not a tribunal within the meaning of Article 234 EC. This conclusion was reached on the basis of a series of elements considered as a whole, including the lack of sufficient safeguards to guarantee the full independence of the Greek NCA and, more importantly, the circumstance that a competition authority can be relieved of its competence by a Commission decision based on Article 11(6) of Regulation (EC) No 1/2003.

Specialty graphite[118]

247. By judgment of 15 June, which largely deals with fines, the CFI supported the essence of the Commission's findings and reasoning in its decision of 17 December 2002 concerning two cartels in the specialty graphite sector.

248. The CFI confirmed, with regard to the concept of "undertaking", that the Commission can generally assume that a wholly owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power.

249. The CFI ruled that, when assessing the respective weight of the participants to a worldwide price-fixing cartel and accordingly when setting the starting amount of the fine to be imposed on each of them, the Commission is entitled to use worldwide product turnover and market shares as a reference.

250. The CFI confirmed that, under the principle of territoriality, there is no conflict in the exercise by the Commission and by the US authorities of their power to impose fines on undertakings which infringe the competition rules of the EEA and of the United

116 Case C-141/02 P *Commission* v *T-Mobile Austria GmbH*.
117 Case C-53/03 *Syfait and Others* v *GlaxoSmithkline AEVE*.
118 Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai, Intech EDM and SGL Carbon* v *Commission*.

States. The Commission therefore does not infringe the "*ne bis in idem*" principle if it imposes fines on undertakings for a given infringement when penalties have already been imposed in the US for the same infringement, even if the Commission has referred to worldwide market shares and worldwide turnover when setting the fines.

251. With regard to attenuating circumstances, the CFI confirmed that the Commission is under no obligation to reduce a fine for the termination of a manifest infringement, whether that termination occurred before or after its investigation.

252. Reductions of fines have however been granted on three grounds. First, the CFI found a factual error concerning the turnover of one of the addressees. Second, the CFI found that the conduct of one of the cartel members was not so readily distinguishable from that of two others; it therefore reduced the level of the corresponding increase imposed on that company for aggravating circumstances from 50% to 35%. Third, the CFI ruled that, where an undertaking breaks up before the adoption of the prohibition decision, the ceiling of the fine must be applied individually to the resulting separate entities; the CFI therefore reduced the amount of the fine imposed on the smaller addressee. The judgment is under appeal by one company[119].

Pre-insulated pipes[120]

253. By judgment of 28 June, the ECJ dismissed all appeals against the judgments of the CFI of 20 March 2002[121] concerning the Commission decision in the pre-insulated pipes case. For the first time, the legality of the Commission's method of setting fines as described in the 1998 Guidelines on fines[122] was confirmed by the ECJ.

254. The ECJ held that the application of such a method is not contrary to the principle of protection of legitimate expectations. It underlined that the Commission enjoys a wide discretion in the field of competition policy, in particular as regards the determination of the amount of fines. The proper application of the EU competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy. Undertakings involved in an administrative procedure in which fines may be imposed cannot acquire legitimate expectations that the Commission will not exceed the level of fines previously imposed or that a particular method of calculating the fines will be used.

255. Furthermore, the ECJ found that the new method of calculating fines contained in the Guidelines was reasonably foreseeable for undertakings, such as the appellants, at the time when the infringements concerned were committed. The principle of non-retroactivity was therefore not violated. Moreover, the ECJ stated that in setting out in the Guidelines the method which it proposed to apply when calculating fines,

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119 Case C-328/05 P *SGL Carbon* v *Commission*.

120 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P. *Dansk Rørindustri and others* v *Commission*.

121 Cases T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647, Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633 and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881.

122 Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

the Commission remained within its legal framework and did not exceed the discretion conferred on it by the legislator.

Stainless steel (alloy surcharge)[123]

256. By judgments of 14 July, the ECJ rejected the appeals lodged against the judgments of the CFI of 13 December 2001[124] that had largely upheld the Commission's decision of 21 January 1998[125] fining six producers of stainless steel flat products, accounting for more than 80% of European production, for an infringement of Article 65 of the ECSC Treaty. The infringement consisted of a concerted increase in stainless steel prices achieved by changing the method for calculating the "alloy surcharge".

257. The ECJ confirmed that the Commission cannot presume that a parent company that has acquired a subsidiary of another party and expressly assumes liability for the acts of this subsidiary has waived its right to exercise its rights of defence in respect of the subsidiary's earlier conduct, before the transfer of the latter's business. The ECJ also reiterated that an express admission of the infringement, on top of merely admitting the nature of the facts, may give rise to an additional reduction of the fine under the 1996 Leniency Notice.

SAS[126]

258. By judgment of 18 July, the CFI rejected all grounds raised by SAS in support of its claim for annulment or reduction of the fine imposed on it by Commission decision of 18 July 2001 which found that SAS and Maersk Air had infringed Article 81 EC by entering into a series of market-sharing agreements.

259. The CFI held that the Commission was fully justified in considering the infringement "very serious" for the purposes of imposing fines, given the very nature of the infringement (which is an essential criterion), its geographic scope (since it covers routes to and from Denmark), and its noticeable effect on the market. With regard to duration, the CFI decided that the Commission rightly considered the date when the agreement was reached as the starting date of the infringement, even though the infringement would not be implemented until later. The Court also decided that, for the purpose of attenuating circumstances, the willingness of a company to cooperate is irrelevant; only the actual degree of cooperation matters.

Luxembourg beer cartel[127]

260. By judgment of 27 July, the CFI confirmed in its entirety the Commission's decision of 5 December 2001 imposing fines for a long-standing cartel established by way of an express agreement on beer ties in Luxembourg. The CFI also confirmed the established case law according to which no effects need to be demonstrated where the

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123 Joined Cases C-65/02 P and C-73/02 P *Thyssen Krupp Stainless and Thyssen Krupp Acciai speciali Terni* v *Commission*, and Case C-57/02 P *Acerinox* v *Commission*.

124 Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757 and Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859.

125 Case COMP/35.814 *Alloy surcharge* (OJ L 100, 1.4.1998, p. 55). For a comprehensive description of the decision, see the 1998 Competition Report.

126 Case T-241/01 *SAS* v *Commission*.

127 Joined case T-49/02, T-50/02, T-51/02 *Brasserie nationale* v *Commission*.

infringement has as its object the restriction of competition. The CFI held that for the purpose of fines this infringement could have been be qualified as very serious solely on the basis of the nature of the infringement, and this would be the case even though it concerned only one Member State, namely Luxembourg.

Daimler Chrysler[128]

261. In its judgment of 15 September the CFI confirmed part of the Commission's decision of 10 October 2001 in the *Mercedes-Benz* case[129] in which the Commission found that DaimlerChrysler AG had, itself or through its Belgian and Spanish subsidiaries, infringed EU competition rules. The decision imposed a fine of over EUR 71 million on DaimlerChrysler for three distinct infringements. First, DaimlerChrysler had given its German sales agents instructions to sell new cars only to customers in their own contract territory, so as to avoid their competing with other members of the network, and for requiring the payment of a deposit of 15% of the price of the vehicle for orders for new cars from customers from outside the territory. Second, DaimlerChrysler was sanctioned for having prevented its German agents and Spanish dealers from supplying cars to leasing companies where no customer was identified, thus preventing them from having a stock of immediately available vehicles for upcoming leasing contracts. Third, DaimlerChrysler participated, through its wholly owned Belgian subsidiary, in agreements to restrict discounts to new car buyers in Belgium.

262. Following the appeal brought by DaimlerChrysler, the CFI annulled the decisions as regards the first two infringements which relate to Germany and Spain.

263. With respect to the alleged anticompetitive conduct of DaimlerChrysler in Germany, the CFI found that the distribution agreements concluded by DaimlerChrysler in Germany came within the definition of genuine agency agreements and fell, therefore, outside the scope of Article 81 EC. In particular, the CFI came to this conclusion after having considered that German agents did not acquire the ownership of the vehicles which they sold in the name and on behalf of DaimlerChrysler to final consumers. In addition, the CFI found that neither the agents' market-specific investments identified in the Commission's decision, nor the other service obligations imposed on them, such as repairs under warranty and after-sales service, entailed commercial risks of such a magnitude that the commercial relationship amounted to an agreement coming within the scope of Article 81.

264. With respect to the conduct of DaimlerChrysler in Spain, the CFI found that under Spanish law every leasing company must already have an identified customer for the leasing contract at the time of acquiring the vehicle. The type of conduct sanctioned by the Commission, therefore, derived from the applicable national legislation and was not the result of the implementation of an agreement contrary to EC competition rules.

265. The CFI confirmed the fine of EUR 9.8 million relating to the participation of DaimlerChrysler, through its Belgian wholly owned subsidiary, in a retail price maintenance agreement with its Belgian dealers. This agreement was intended to

128 Case T-325/01 *DaimlerChrysler* v *Commission*.

129 See the 2001 Competition Report, p. 187.

restrict price competition in Belgium by introducing detection and deterrent measures against discounts of more than 3% for in particular the E-class.

Belgian beer cartel[130]

266. By judgments of 25 October and 6 December, the CFI confirmed the Commission's decision of 5 December 2001 in the Belgian beer cartel case by rejecting the arguments adduced by Danone and Haacht. Only Danone's fine was slightly reduced because one of the circumstances identified by the Commission as aggravating had no causal link with the extension of the cartel.

267. The judgment is particularly important with regard to the aggravating circumstance of recidivism. The CFI considered that recidivism justifies a very significant increase in the fine. It decided that recidivism can be found where there are previous Commission decisions finding an infringement, but which did not impose a fine, and confirmed that decisions adopted a long time ago can form a proper basis for recidivism. The CFI also confirmed that there is no obligation to define a relevant market for infringements by object and that a reduction for cooperation is not due for replies which do not go beyond what the undertaking is obliged to provide, in response to a request for information. As a consequence, there is no right to a reduction of the fine for providing factual answers to questions put by the Commission in a request for information concerning the dates of meetings and the identity of the participants.

Vitamins[131]

268. By judgment of 6 October, the CFI annulled the Commission decision of 21 November 2001 in the Vitamins case, as far as Sumitomo Chemical Co Ltd and Sumika Fine Chemicals Ltd are concerned. They were addressees of a decision finding an infringement of competition rules; however, the Commission did not impose a fine on these two companies, because the infringement they committed was time-barred.

269. The CFI stated that, under such circumstances, the Commission is entitled to adopt a decision finding a past infringement, provided that it has a legitimate interest in so doing. Concerning the present case, the CFI held that it cannot be inferred from the decision whether the Commission in fact considered whether it had a legitimate interest in adopting a decision finding infringements which the applicants had already brought to an end, and that furthermore, the Commission had not demonstrated to the Court the existence of such a legitimate interest.

Zinc phosphate[132]

270. In four judgments handed down on 29 November, the CFI fully confirmed the Commission's assessment and dismissed all applications for annulment or reduction of fines that had been imposed in a price-fixing and market-sharing cartel in zinc phosphate, an anti-corrosion mineral pigment widely used in the manufacture of industrial paints. The CFI considered that, in view of the gravity and duration of the

130 Case T-38/02 *Groupe Danone* v *Commission* and Case T-48/02 *Haacht* v *Commission*.

131 Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd* v *Commission*.

132 Cases T-33/02 *Britannia Alloys & Chemicals Limited*, T-52/02 *Société Nouvelle des Couleurs Zinciques SA*, T-62/02 *Union Pigments AS* and T-64/02 *Hans Heubach GmbH & Co KG*.

infringement, the fines were justified and were calculated in an appropriate manner.

271. The companies concerned were SMEs, and the fines represented a significant percentage of their global turnover. The CFI validated the infringement's classification as "very serious", the cartel's span of more than four years and the "differential treatment" applied to the companies.

272. In the *Britannia* case, the CFI stated that the Commission was not obliged, in setting the upper limit of 10% of the turnover, as set out in Article 15(2) of Regulation (EC) No 17, to refer to the turnover achieved in the business year preceding the decision imposing the fine. This was because at the time Britannia's relevant turnover was nil as it had become a non-trading company. Instead, the CFI went on to say that in this particular case, the Commission was correct in relying on the most recent turnover corresponding to a "complete" year of economic activity, i.e. the business year ending 30 June 1996 and not 30 June 2001.

E – Statistics

Figure 1
New cases

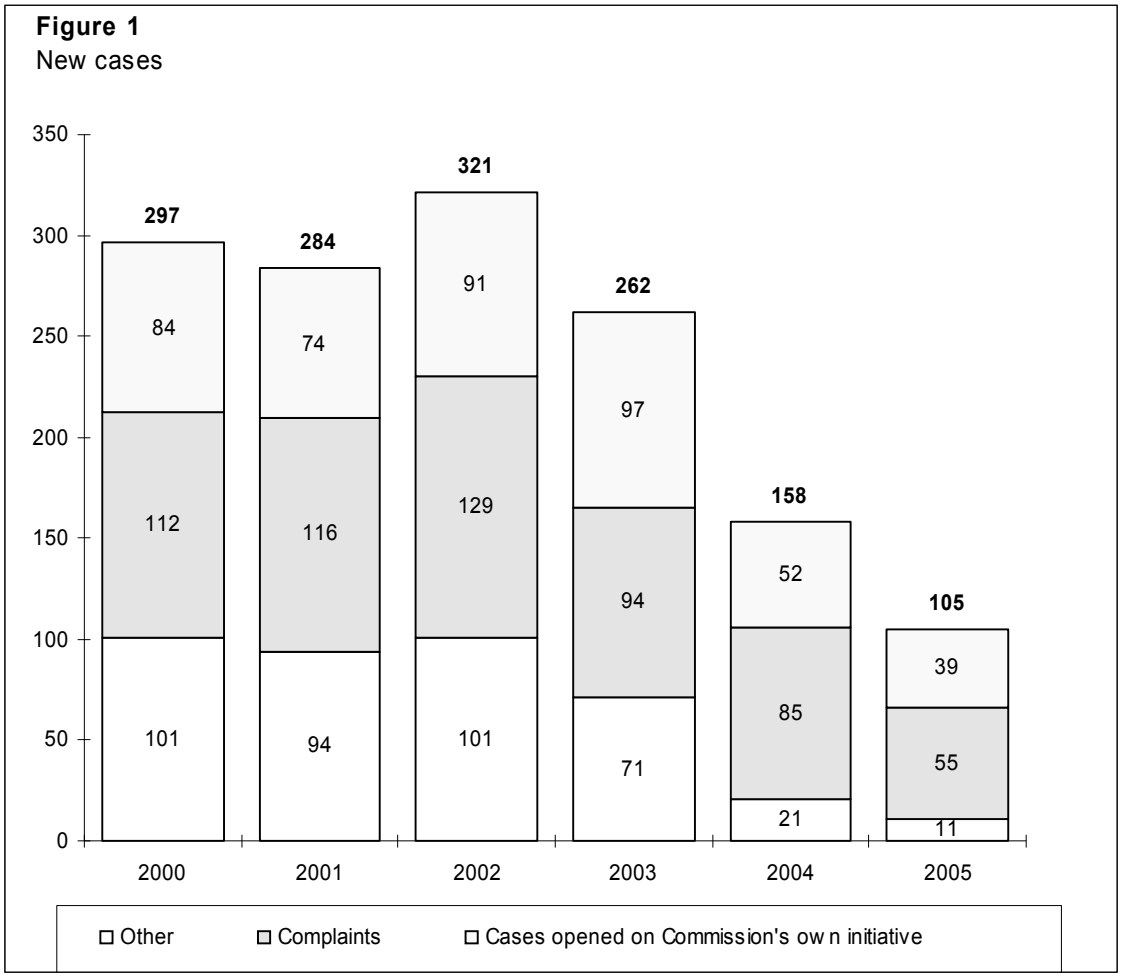


Figure 2
Cases closed

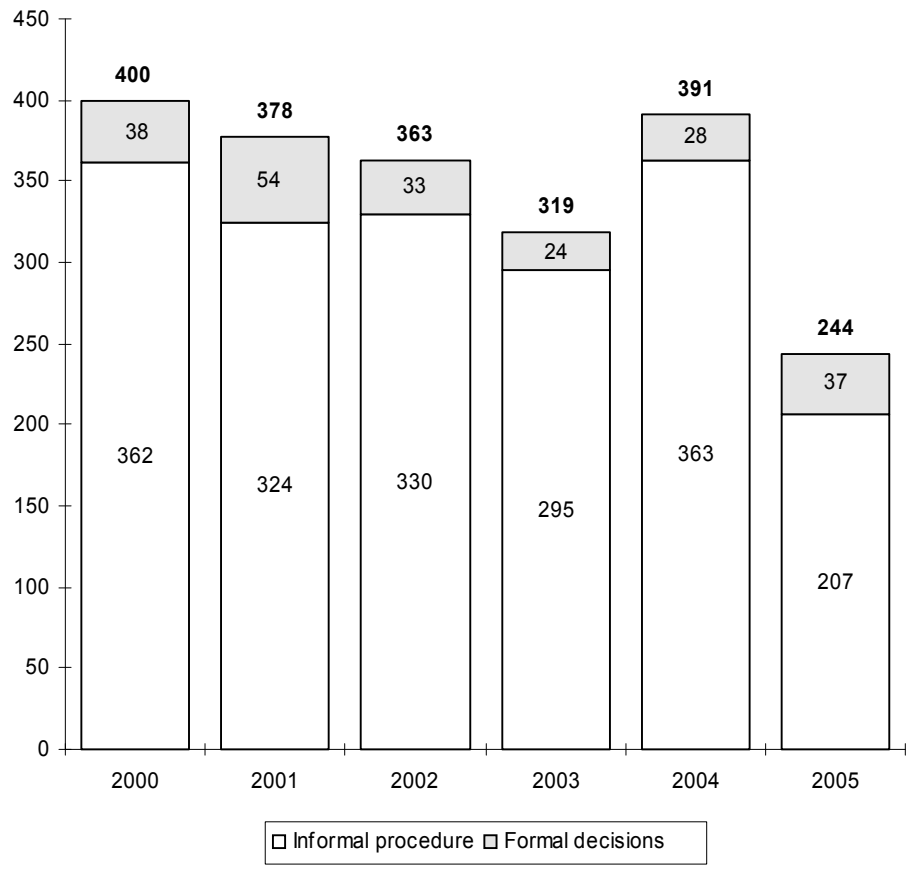
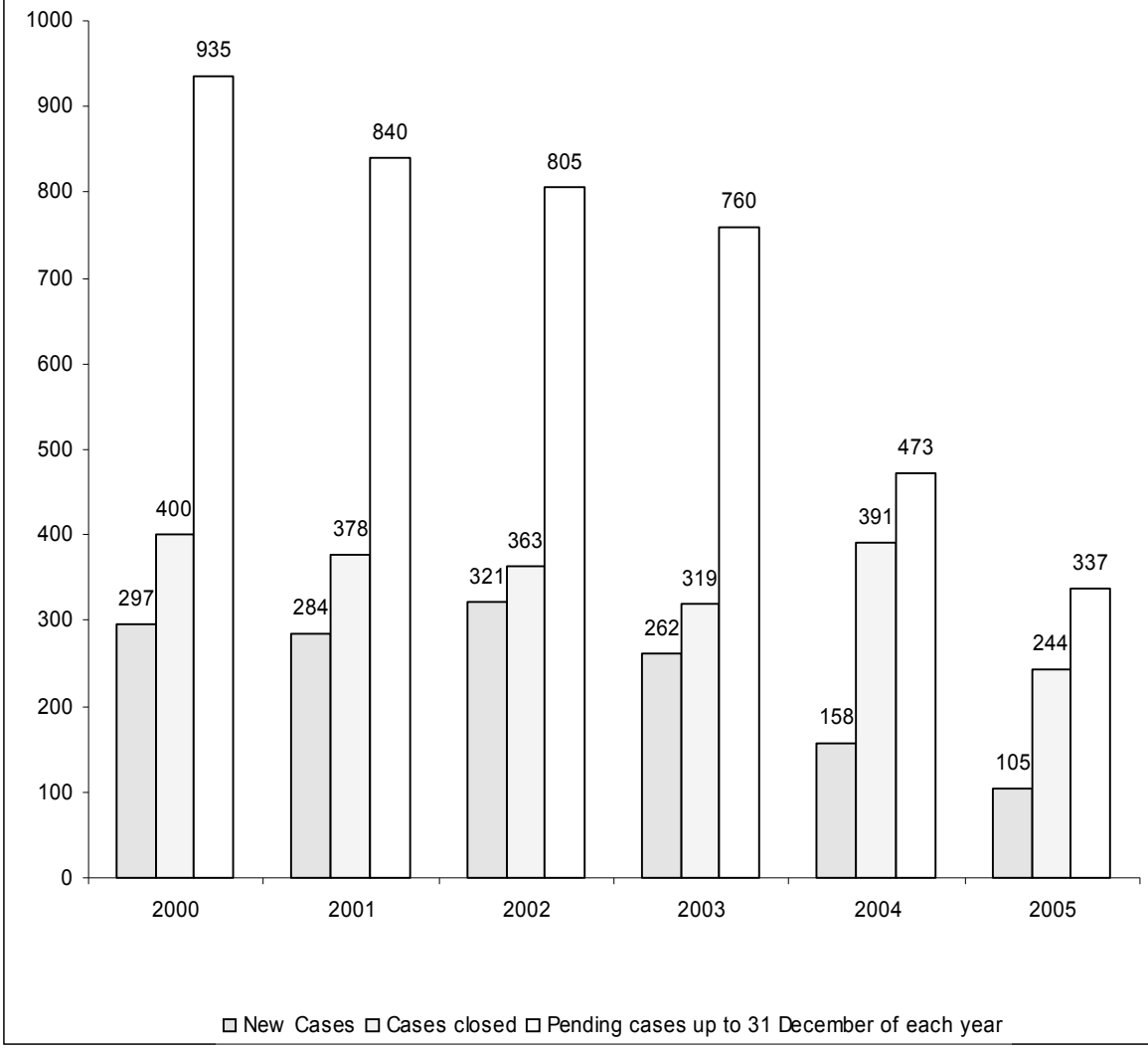


Figure 3
Changes in the number of pending cases at the year end



II – Merger control

273. The number of mergers and acquisitions notified to the Commission increased considerably in 2005 to 313 cases as compared with 249 cases the previous year.

274. In total the Commission took 296 final decisions. It took 291 clearance decisions following an initial investigation ("Phase I"). Of these, 15 were conditional clearances and 167 decisions (57%) were taken in accordance with the simplified procedure. The Commission took five decisions following in-depth investigations ("Phase II"). Of these there were no prohibitions, two clearances without conditions and three conditional clearance decisions. In addition the Commission referred seven cases to national competition authorities pursuant to Article 9 of Council Regulation (EC) No 139/2004 (the "Merger Regulation")[133]. The Commission also received 14 requests pursuant to Article 4(4) of the Merger Regulation, 27 requests under Article 4(5) as well as four requests pursuant to Article 22. For further details as regards the outcome of these requests see Section 3 below.

275. Despite the high total number of notifications, there were only five decisions taken pursuant to Article 8 of the Merger Regulation. There were no prohibition decisions taken under Article 8(3). In addition three notifications were withdrawn by the notifying parties in Phase II.

276. The percentage of notified concentrations resulting in a prohibition decision remains modest, averaging at around 1% or 2% if Phase II withdrawals are included. There is no discernible upward or downward trend in the risk incurred by a notifying party of a prohibition decision (or withdrawal in Phase II), as the chart below indicates.

Chart 1 – Prohibitions and Phase II withdrawals, 1995-2005

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Total
Notifications	110	131	172	235	292	345	335	279	212	249	313	2673
Prohibitions	1			1	2	3	1	2	1	2	0	13
Phase II withdrawals	0	1	0	4	5	6	4	1	0	2	3	26
Regulatory Risk	0.9%	0.7%	0%	2.1%	2.4%	2.6%	1.5%	1%	0.5%	1.6%	1.0%	1.4%

[133] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004).

A – Legislative and interpretative rules

1. Remedies Study

277. The Merger Remedies Study was published on 21 October. This was a major ex post evaluation exercise reviewing the design and implementation of merger commitments accepted by the Commission over a five-year period, 1996 to 2000. The objectives of the Study were to identify with the benefit of hindsight i.e. three to five years after the Commission's decision: (i) any serious issues arising in the design and implementation of remedies; (ii) the effectiveness of the Commission's merger remedies policy during the reference period; and (iii) areas for further improvement of the Commission's existing merger remedies policy and practice.

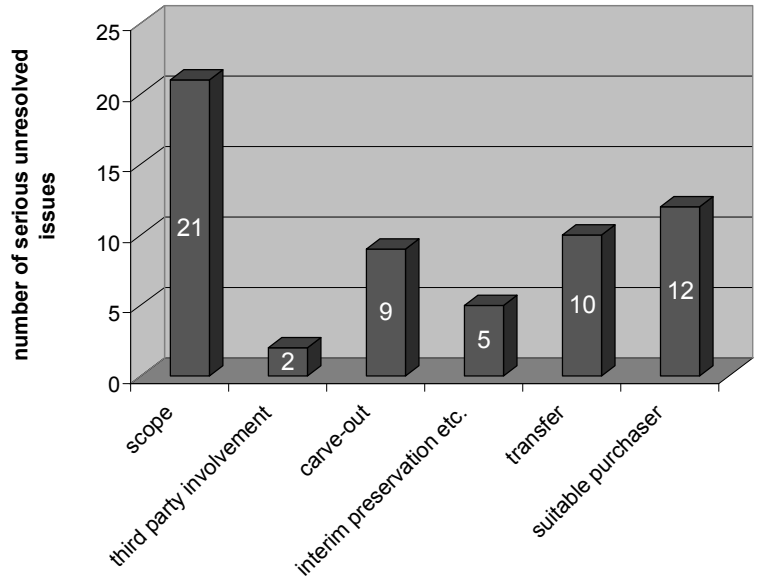
278. The Study analysed 40 Commission decisions, which included 96 different remedies. These 96 remedies accounted for 42% of the 227 remedies adopted by the Commission during this five-year reference period and are a representative sample as regards the types of remedies accepted, the number of remedies accepted in Phase I or after an in-depth Phase II investigation, and the different industrial sectors involved.

279. A team of case handlers carried out 145 interviews with practitioners who were involved in the design and implementation of the remedies at the time, including committing parties (40 interviews), purchasers (61 interviews), trustees (37 interviews), and customers and competitors (seven interviews). The Study thus created a well-received opportunity for the business and legal communities to provide feedback to the Commission on all aspects of merger remedies, while being assured full anonymity.

280. The vast majority of remedies examined – 84 out of the total 96 – consisted of divestiture commitments. The Study's findings confirmed the relevance of various aspects of the Commission's merger remedies practice introduced since 2000, i.e. after the reference period of the selected sample, such as the Remedies Notice and the Model Commitments Texts. Nevertheless, the findings also identified a number of serious issues regarding the design and implementation of the analysed remedies which require further attention.

281. Chart 1 below illustrates the number and type of such serious unresolved design and/or implementation issues the Study encountered in the different stages of the life of the analysed remedies that most likely led to reducing the effectiveness of the remedies to restore conditions of effective competition. Of these issues, the failure to adequately define the scope of the divested business was the most frequent problem, followed by unsuitable purchasers being approved, the incorrect carve-out of assets and the incomplete transfer of the divested business to the new owner.

Chart 2 – Number of serious unresolved issues



282. The Study analysed ten stand-alone commitments to grant access that were designed to maintain actual or potential competition in the relevant market by preventing foreclosure to critical infrastructure, technology or IPRs, or by surrendering exclusive rights. These access remedies raised a number of serious design and implementation issues. The primary causes for the failure of access commitments were found to lie in the inherent difficulties in setting upfront the terms for effective access and in monitoring them. The insights offered by the Study tend to suggest that such access remedies have only worked in a limited number of instances.

283. The Study also attempted an overall evaluation of the effectiveness of each remedy. This was based on the qualitative assessment as regards design and implementation as well as an assessment of collected quantitative market data, such as the operational status of the divested business and the evolution of relative market shares. This effectiveness indicator classifies the assessed remedies on the basis of the extent to which they have fulfilled their competition objective (i.e. maintaining effective competition by preventing the creation or strengthening of a dominant market position). However, in the absence of a full new market investigation for each remedy the Study's evaluation can only provide indications.

284. The overall effectiveness evaluation was possible in 85 of the 96 analysed remedies. Of the 85 thus analysed, 57% of remedies were fully effective, while 24% were considered only partially effective. Few remedies, 7%, had clearly failed to achieve their intended objective and were thus considered ineffective. As regards different types of remedies, the Study found that, overall, remedies for the exit from a joint venture were the most effective type of remedy (no failure), while the effectiveness of access remedies was the weakest.

285. As a complement, the Commission commissioned a study to carry out an ex post economic analysis of merger remedies. The analysis was designed to assess the economic effectiveness of a smaller number of remedies with simple econometric simulation models. Results of this study will be published in 2006.

286. The results of the studies and comments will be contributing to an upcoming review of the Merger Remedies Notice and of the Model Divestiture Commitments and Trustee Mandate.

2. New guidance on abandonment of mergers

287. On 1 July the Competition DG published an Information Note regarding the conditions which have to be fulfilled by the notifying parties in case of the abandonment of a concentration[134]. The recast Merger Regulation introduced a new provision in Article 6(1)(c) setting out the requirements for the closure of merger control procedures after the initiation of proceedings. This provision states that such proceedings shall be closed by a decision according to Article 8 unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the transaction. This provision clarifies that, once a decision to open proceedings pursuant to Article 6(1)(c) has been adopted and a case has gone into Phase II, the Commission loses its jurisdiction not by a mere withdrawal of the notification, but only if the parties demonstrate that they have abandoned the transaction.

288. The Information Note also clarifies how parties can demonstrate that they have abandoned the operation. In this respect, it has to be taken into account that the recast Merger Regulation allows for a notification not only on the basis of a binding agreement or the announcement of a public bid, but already on the basis of good faith intentions (Article 4(1)). The Information Note states, as a general principle, that the requirements for the proof of the abandonment must correspond in terms of legal form, format, intensity, etc. to the initial act that was considered sufficient to make the concentration notifiable. If, after a notification has been made on the basis of good faith intention, a binding agreement is subsequently concluded, the relevant act is the later one.

289. Consequently, the Information Note submits that, in cases where there is a binding agreement, there must be proof of the legally binding cancellation of the agreement; expressions of intention to cancel the agreement or unilateral declarations by the parties are not sufficient. Expressions of more intention to cancel the agreement or not to implement it or unilateral declarations by one of the parties will not be considered sufficient. In cases of good faith intention to conclude an agreement, a document reversing a letter of intent or a memorandum of understanding is required. Other proof may be relevant for other forms of good faith intention. In case of a public announcement of a public bid, a public announcement terminating the bidding procedure is required. For implemented concentrations, the parties need to show that the situation prevailing before the implementation has been re-established. The Information Note stresses that the parties must submit the necessary documents to

[134] http://europa.eu.int/comm/competition/mergers/legislation/abandonment_of_concentrations_en.pdf

meet the specified requirements for each type of abandoned case.

3. Streamlined case allocation in action – experience during 2005

290. The system of case referral from the Commission to Member States and vice versa, which underwent a substantial overhaul with the adoption of the revised Merger Regulation and the subsequent adoption of a Commission Notice on Case Referral[135], has been in place since 1 May 2004. The revised system of case referral appears to be enjoying considerable success, in terms of the extent to which it is being availed of by merging companies and by the EU Member States' national competition authorities (NCAs), in terms of the nature of the cases concerned and their suitability as candidates for referral, and in terms of how the system has operated at a practical level.

3.1. Statistical overview

291. During the course of 2005 each of the four provisions in the Merger Regulation relating to the referral of cases from the Commission to Member States and vice versa (Articles 4(4), 4(5), 9 and 22) was resorted to. To summarise:

- *Article 4(4)*: during 2005 the Commission received 14 requests for referral pursuant to Article 4(4), a considerable increase on the two requests lodged between 1 May and 31 December 2004; 11 requests for referral were acceded to, and the cases transferred in their entirety; two requests were withdrawn and one remained pending at the end of the year;

- *Article 4(5)*: during 2005 the Commission received 27 requests for referral pursuant to Article 4(5); no requests were vetoed by Member States and three remained pending at the end of the year; 24 requests resulted in the cases acquiring a "Community dimension", a figure which represents roughly 8% of the cases notified to the Commission during this period[136];

- *Article 9*: during 2005 the Commission received seven requests for referral pursuant to Article 9; six requests were acceded to, three in their entirety and three partially; one request was withdrawn;

- *Article 22*: during 2005 the Commission received requests in relation to the referral of four concentrations pursuant to Article 22; in three cases the requests were acceded to and in one the request was refused.

3.2. Practicalities of pre-notification referral

292. In order to ensure that the pre-notification referral system works effectively, especially in view of the tight deadlines provided for in Article 4, the Competition DG and the NCA(s) concerned by an Article 4(4) or 4(5) request have generally entered into direct contact as soon as such a request seems likely. The Commission also encourages parties contemplating making such a request to approach the Competition

135 Commission Notice on Case Referral in respect of concentrations (OJ C 56, 5.3.2005, p. 2) (Hereinafter "Notice on Case Referral").

136 313 merger notifications were lodged with the Commission during 2005.

DG and the NCA(s) concerned by a likely Article 4(4) or 4(5) request informally beforehand. The Competition DG will in particular advise parties contemplating making such a request on the legal requirements for referral and on the categories of cases which the Commission considers appropriate for referral as set out in the Notice on Case Referral. A draft Form RS may sometimes be provided to the Commission. To date, parties have frequently availed themselves of this opportunity to approach the relevant authorities informally before lodging Article 4(4) or 4(5) requests.

293. Where Article 4(5) requests are concerned, requesting parties are in particular encouraged by the Commission to make a thorough check before filing, if necessary by making direct contact with the relevant NCAs, to ensure that the Form RS is accurate and complete as regards the Member States which it identifies as "competent" to review the case in question.

294. Where Article 4(4) requests are concerned, if the Member State confirms that it agrees to the referral within the prescribed deadline, the Commission generally intends to take a decision accepting or refusing the referral, as it has done in relation to the requests filed to date, rather than allowing the 25 working day deadline provided for in Article 4(4) to elapse. If the Member State does not agree to the referral, the case proceeds in the normal manner, with the parties filing a notification with the Commission in the normal manner.

B – Commission decisions

1. Decisions taken under Article 8

Bertelsmann/Springer[137]

295. On 3 May, the Commission approved the creation of the rotogravure printing joint venture by German media companies Bertelsmann AG and Axel Springer AG. The in-depth investigation showed that the concentration would not significantly impede effective competition in the common market or any Member State.

296. The joint venture combines the five German printing facilities operated by Bertelsmann's subsidiaries Arvato and Gruner+Jahr and by Springer as well as one UK site which is currently being set up by Arvato. By contrast, the joint venture includes neither Bertelsmann's rotogravure facilities in Spain and Italy nor any offset printing operations held by the companies involved.

297. The transaction was notified to the Commission on 4 November 2004. Although the national competition authority (NCA) made a referral request, the Commission decided to deal with the case itself given the joint venture's Europe-wide effects in the markets for rotogravure printing of catalogues and advertisements. However, the Commission focused in particular on the German market for rotogravure printing of magazines. In view of the particularly strong position of the companies involved on this market, the Commission opened an in-depth investigation on 23 December 2004.

298. The in-depth investigation confirmed the Commission's initial findings that for high printing volumes of magazines, catalogues and advertisements, rotogravure printing is not substitutable by the offset technique. Although all print products are printed on the same rotogravure printing presses, the Commission found separate markets for high-volume printing of catalogues and/or advertisements, on the one hand, and magazine printing, on the other hand. This difference is due in particular to the time-sensitivity of the printing of some magazines and the specific know-how required for magazine printing. Geographically, the market for rotogravure printing of magazines is limited to Germany, whereas there is a market for high-volume printing of catalogues and advertisements comprising Germany, its neighbouring countries, and Italy and Slovakia.

299. On the German market for rotogravure printing of magazines, the parties' combined share amounts to nearly 50%. However, the market investigation also revealed that despite high market shares the joint venture would not be able to increase prices as its competitors in Germany exert effective competitive constraints. These competitors could readily expand their capacity allocated to magazine printing. The analysis also showed that competitors would have an incentive to allocate capacity to magazine printing as the contribution margin for magazine printing proved to be higher than for the printing of catalogues and advertisements. In addition to the competitive constraints exerted by German competitors, the joint venture will face potential competitors on the German market for rotogravure printing of magazines in particular

[137] Case COMP/M.3178 *Bertelsmann/Springer/JV*.

from printers based in the Netherlands, France and Italy.

300. On the other affected product markets, no competition concerns arose either on a national or on a broader level. The Commission also concluded that Springer and Bertelsmann's vertical integration into magazine publishing would not be altered by the notified concentration.

Blackstone/Acetex[138]

301. On 13 July, the Commission approved the proposed acquisition of sole control of the Canadian chemicals company Acetex, by the US based merchant-banking firm Blackstone. The Commission concluded that the transaction would not significantly impede effective competition in the EEA or a significant part of it.

302. Blackstone is a private merchant-banking firm based in the US, active mainly in financial advisory services, private equity investing and property investment. One of the companies controlled by Blackstone, Celanese, is a chemicals company which is active in four main sectors: chemical products, acetate products, technical polymers and food ingredients.

303. Acetex, headquartered in Vancouver, is active in the acetyls and the plastic business. Both Celanese and Acetex produce commodity chemicals including acetic acid, vinyl acetate monomer (VAM) and acetic anhydride. Celanese is a major global supplier, while Acetex is mostly active in Europe.

304. The transaction was notified to the Commission on 20 January. After an in-depth market investigation, the Commission concluded that the markets for acetic acid, VAM and acetic anhydride are global. For these products, the difference between the average price charged in different regions around the world and production costs leaves a large enough margin to pay for transport, storage and duties, allowing additional trade above the already high level between the different world regions.

305. Although Celanese, by acquiring Acetex, would enhance its position on the global markets for acetic acid, VAM and acetic anhydride, the Commission concluded that the transaction would not lead to competition concerns. Several strong competitors are active on the relevant markets, including BP, Millennium, Daicel, Dow, DuPont and Eastman. Furthermore, a detailed examination of the development of demand and of planned new capacity showed that although demand for these products is growing relatively quickly, planned new capacity particularly in the Far and Middle East would grow even faster. The Commission concluded that in this situation any attempt by the parties to raise prices or reduce capacity would not succeed.

[138] Case COMP/M.3625 *Blackstone/Acetex*.

Siemens/VA Tech[139]

306. On 13 July, the Commission authorised the proposed takeover of the VA Tech group of Austria by Siemens of Germany, subject to the condition that Siemens divests itself of VA Tech's hydro power business and ensures the independence of metal plant builder SMS Demag. In light of the commitments given by Siemens, the Commission concluded that the transaction would not significantly impede effective competition in the EEA or a significant part of it.

307. Siemens and VA Tech operate throughout the world in a number of similar sectors. Their products are used in areas such as power stations, electricity supply networks, trains, steelworks and large buildings. They are market leaders in some of the relevant products.

308. The transaction was notified to the Commission in January, and the Commission initiated Phase II proceedings on 14 February.

309. In particular, a subsidiary of VA Tech, VA Tech Hydro, is the European market leader for key components used in hydroelectric plants, such as turbines and generators. Siemens has a 50% stake in a joint venture with another German engineering company, Voith Siemens, that is one of VA Tech Hydro's main competitors in this market. The Commission found that a combination of the activities of VA Tech Hydro with Voith Siemens would have resulted in the creation of a dominant position in the EEA-wide market for equipment and services for hydroelectric plants, thereby significantly impeding competition in this market. Siemens' commitment to sell VA Tech's hydro power business, operated by VA Tech Hydro, to a suitable purchaser meant that the overlap between the parties' activities would be removed and hence competition would not be significantly affected.

310. In metallurgy plant building, Siemens owned a 28% shareholding in SMS Demag, which the Commission found to be VA Tech's main competitor in the building of steel production plants. Siemens had exercised a put option (effective 31 December 2004) to sell its stake to SMS, the parent company of SMS Demag. The transfer of the shares had, however, been delayed due to a legal dispute relating to their valuation. The Commission's investigation revealed that Siemens' continued stake in SMS Demag gave it access to certain competition-sensitive information relating to that company. In the highly concentrated worldwide market for metallurgy plant building, the merger between Siemens and VA Tech would therefore have substantially reduced competition between two of the three leading players, SMS Demag and VA Tech, and would thereby lead to a significant impediment of effective competition. Under the commitments given by Siemens, Siemens' representatives on SMS Demag's shareholder bodies will be replaced by independent trustees, thus ensuring the company's independence from Siemens.

311. In all the other markets in which the parties' activities overlap, the Commission came to the conclusion that the merger would not significantly impede effective competition. These markets include equipment and services for thermal electric plants, power transmission and distribution ("t&d"), rail equipment, low-voltage electrical

[139] Case COMP/M.3653 *Siemens/VA Tech*.

equipment, building technology and management, traffic infrastructure and cable car equipment.

312. In a separate decision designed to ensure that a structural link between the competitors Bombardier and Siemens in the market for trams was brought to an end, the Commission released Bombardier from its obligation, laid down in the Commission's decision to clear Bombardier's takeover of ADtranz of April 2001[140], to purchase certain traction systems for trams from VA Tech.

Johnson & Johnson/Guidant[141]

313. On 25 August, the Commission approved, subject to conditions, the planned USD 24 billion (around EUR 18 billion) acquisition by US healthcare group Johnson & Johnson (J&J) of its competitor Guidant, a US company specialised in cardiovascular medical products. In particular, the parties committed to divest either J&J or Guidant Endoscopic Vessel Harvesting products (EVH), plus Guidant's EEA endovascular business and J&J's EEA Steerable Guidewires business. The Commission decision followed an in-depth investigation into the takeover. In light of the commitments given by J&J, the Commission concluded that the transaction would not significantly impede effective competition in the EEA or a significant part of it.

314. Both J&J and Guidant are active worldwide in the development, production and sale of vascular medical devices. Their products are used to treat vascular diseases; both in the heart (coronary arteries) and in peripheral parts of the human body (e.g. carotid, renal, femoral arteries). The firms are direct competitors in respect of a number of products and are both among a limited number of leading companies on the market for these products in Europe and worldwide. The Commission opened an in-depth market investigation on 22 April.

315. The investigation focused on three major areas: coronary drug eluting stents (DES) and accessories, endovascular stents and accessories used in peripheral arteries, and devices used in cardiac surgery.

316. Coronary drug eluting stents are expandable wire tubes coated with a drug which are placed in an occluded coronary artery in order to remove the plaque and support the walls of the vessel. In this fast-growing market, there are currently only two major suppliers worldwide, J&J and Boston Scientific, plus a number of imminent entrants, including Guidant. In its investigation the Commission had to assess whether, by eliminating Guidant as a potential competitor, the merger would remove the major competitive constraint in the DES market.

317. The investigation has revealed that, while Guidant would likely have been one of the key players in the market for DES, other new entrants, primarily Medtronic and Abbott, will also be likely to exert a significant competitive constraint, compensating for the loss of competition resulting from J&J's acquisition of Guidant.

318. However, in the case of stents used in peripheral parts of the body, the Commission found that the merger would give rise to competition concerns in the EEA given that

140 Case COMP/M.2139 *Bombardier/ADtranz*; see the 2001 Competition Report.

141 Case COMP/M.3687 *Johnson & Johnson/Guidant*.

both J&J and Guidant are among the leading suppliers in Europe, the market is very concentrated and there are high entry barriers. The Commission also found that the combination of J&J's and Guidant's interests would have impeded competition in two small markets for cardiovascular devices (coronary guidewires and endoscopic vessel harvesting systems in cardiac surgery). The commitments offered by J&J mean that competition will not be significantly affected by the transaction.

E.ON/MOL[142]

319. On 21 December, the Commission approved, subject to conditions and obligations, the acquisition of MOL WMT and MOL Storage, two subsidiaries of MOL, the incumbent oil and gas company in Hungary, by E.ON Ruhrgas (E.ON).

320. E.ON is a large integrated German energy operator active in gas and electricity production and supply in several European countries. In Hungary, E.ON is primarily active in the retail supply of gas and electricity through its ownership of regional distribution companies. MOL is active in gas production (MOL E&P), transmission (MOL Transmission), storage (MOL Storage) and wholesale and trading (MOL WMT).

321. Through the transaction, E.ON acquired MOL WMT and MOL Storage. E.ON also took over the long-term gas supply contracts currently in MOL WMT's portfolio, notably with Gazprom, and was in a position to control all of Hungary's gas resources, both imported and domestic.

322. After an in-depth investigation, the Commission initially found that the operation would have anticompetitive effects in the gas and electricity wholesale and retail markets in Hungary. These effects were due to the vertical integration of the dominant position in gas wholesale and storage with E.ON's activities in gas and electricity retail.

323. The Commission analysed the impact of the proposed operation on gas and electricity supply in Hungary under both the current regulatory framework of the Hungarian gas and electricity markets and its likely future developments, in the light of the full liberalisation of these markets by July 2007, and concluded that the transaction as notified would significantly impede effective competition on these markets. In particular, the Commission found that after the transaction E.ON would be in a position to use its control over gas resources in Hungary to increase its market power on the downstream markets for retail supply of gas and electricity and for generation/wholesale of electricity.

324. To address these concerns, E.ON offered a comprehensive and far-reaching package of remedies. Most notably, the remedies would achieve a full ownership unbundling of gas production and transmission activities, which are retained by MOL, from gas wholesale and storage activities, which are acquired by E.ON, through the divestiture by MOL of its remaining minority interest in MOL WMT and MOL Storage. E.ON also undertook to release significant volumes of gas onto the market at competitive conditions. E.ON committed to implement an eight-year gas release programme (1 billion cubic meters ("bcm") per year) and divest half of its 10-year gas supply

142 Case COMP/M.3696 *E.ON/Mol*.

contract with MOL E&P through a so-called contract release. These two measures would release 16 bcm until 2015, up to 2 bcm per year, equivalent to 14% of Hungarian consumption. This would be the most significant gas "release" ever implemented in Europe, in terms of both volumes and duration. As such, it would enable all current and future market participants to conclude gas supply contracts on a level playing field.

325. The Commission carefully assessed the remedies on the basis of experience with previous gas release programmes at national level and detailed comments by market operators from Hungary and other Member States. It concluded that the remedies would offer wholesalers and customers access to sizeable gas resources independently of E.ON at non-discriminatory and competitive conditions. The remedies were thus sufficient to remove the competitive concerns stemming from the transaction and would create the conditions for the development of competition in the newly liberalised Hungarian energy markets.

326. The Commission cooperated closely with the Hungarian authorities, in particular with the Hungarian Energy Office. This cooperation will continue in the future to ensure the full and effective implementation of the remedies.

2. Decisions taken under Article 6(1)(b) and Article 6(2)

327. During the year the Commission adopted in total 15 clearance decisions with conditions under Article 6(2) and 291 unconditional clearances under Article 6(1)(b). A selection of the more interesting of the conditional cases under Article 6(2) is summarised below. References to all of these clearance decisions will be published in the second volume of this Report and the text of the decisions can be found on the Commission's website[143].

Reuters/Telerate[144]

328. On 23 May, the Commission approved, subject to conditions, a proposed acquisition of the financial data provider Moneyline Telerate Holding (Telerate) by its major global competitor, Reuters Limited (Reuters).

[143] http://europa.eu.int/comm/competition/mergers/cases/

[144] Case COMP/M.3692 *Reuters/Telerate*.

329. Reuters is one of the two main global providers of financial market data and multimedia news tailored for professionals in the financial services, media and corporate sectors. It is particularly strong in the delivery of money market, equity and equity-related over-the-counter data. Reuters' activities are somewhat complementary to the activities of its major competitor, Bloomberg, which focuses on different asset classes in the financial market data segment and delivers its products without market data platforms (MDPs). Telerate is also a financial market data and news provider on a global scale, focusing on the distribution of real-time market data from many different sources.

330. The investigation focused on the effects on competition of the proposed acquisition on the markets for the supply of real-time market data and MDPs. With respect to the market for the supply of real-time data the Commission found no indication that the merger would significantly impede effective competition, since a sufficient number of strong competing suppliers would remain in the market post-merger. The investigation did, however, reveal that the merging parties are the only major providers of MDPs worldwide, and that the combination of their proprietary platforms would lead to a nearly uncontested market position in the provision of MDPs. MDPs are the technological means that enable customers of real-time market data to integrate and deliver information from various data vendor sources. With a view to addressing this competition concern, Reuters and Telerate undertook to grant a perpetual exclusive global licence for TRS (Telerate's MDP) to Hyperfeed. The licence agreement provides the appropriate legal framework for Hyperfeed to be able to establish itself as a viable and effective competitor to Reuters.

331. The transaction was referred to the Commission under Article 4(5) of the EC Merger Regulation thus allowing the Commission to examine an acquisition which would otherwise have been reviewed under the laws of twelve Member States. The Commission's departments worked closely with the US Department of Justice and coordinated efforts to find a suitable remedy that fully resolved the competition problem in market data platforms.

Lufthansa/Swiss[145]

332. On 4 July, the Commission cleared, subject to conditions, an agreement whereby Deutsche Lufthansa AG would acquire the majority of the shares in, and sole control of, Swiss International Air Lines Ltd. The Commission's investigation showed that the proposed acquisition by Lufthansa of Swiss would eliminate or significantly reduce competition on a number of intra-European routes, most importantly Zurich-Frankfurt and Zurich- Munich, as well as on some long-haul routes to the US, South Africa, Thailand and Egypt. In reaching this conclusion the Commission took into account the impact of Lufthansa's close cooperation with members of the Star Alliance.

[145] Case COMP/M.3770 *Lufthansa/Swiss*.

333. To address the Commission's concerns, the parties agreed to surrender certain take-off and landing slots at the airports of Zurich, Frankfurt, Munich, Düsseldorf, Berlin, Vienna, Stockholm and Copenhagen. This surrender of slots would create the conditions for up to 41 roundtrips per day to be supplied by new entrants on these routes.

334. In order to encourage market entry, a new operator may also, after a certain period, acquire so-called "grandfather rights" over the slots obtained for the Zurich-Frankfurt and Zurich-Munich routes, provided that it offers the service on this route for at least three years. The undertaking on slots is accompanied by measures requiring Lufthansa to refrain from increasing its planned offer of flights on these routes in order to give a new entrant a fair chance to establish itself as a credible competitor.

335. Finally, the Swiss civil aviation authority assured the Commission that it would grant traffic rights to other carriers wishing to stop over in Zurich en route to the United States or other non-EU destinations. The Swiss and German aviation authorities also provided assurances that they would refrain from regulating prices on these long-haul routes. This point was important because the Commission took into account the existence of indirect, or network, competition on long-haul routes as a factor in its market analysis.

Maersk/PONL[146]

336. On 29 July, the Commission cleared, subject to conditions, a proposed acquisition by the shipping company AP Møller-Maersk A/S (Maersk) of another shipping company Royal P&O Nedlloyd (PONL). The proposed acquisition would create the world's largest shipping company, deploying over 800 container vessels with a worldwide turnover of roughly EUR 28 billion. AP Møller-Maersk A/S owns the shipping container lines Maersk and Safmarine and is also active in container terminal services, harbour towage, tankers, logistics, oil and gas exploration, air transport, shipbuilding and supermarkets. PONL is mainly a container liner shipping company. It is also involved in container terminal services, logistics and air transport. The parties' activities overlap mainly in the container shipping business and to a lesser extent in the terminal services business.

337. The Commission's market investigation focused on the shipping trade routes to and from Europe with a view to determining whether the parties' market shares and the links created by their participation in various conferences and consortia with their competitors would result in anticompetitive effects.

338. Under the EU's competition rules applicable to shipping, liner conferences (groupings of shipping companies engaged in regular scheduled services) benefit from antitrust immunity. This immunity was granted some 20 years ago. Shipping lines grouped in consortia also benefit from an antitrust exemption. The Commission's White Paper published in October 2004 concluded that the exemption for liner conferences should be abolished because it did not result in efficient and reliable services that meet shippers' requirements.

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146 Case COMP/M.3829 *Maersk/PONL*.

339. The proposed transaction created links between Maersk and the conferences and consortia of which only PONL is a member. Where their combined market shares gave rise to competition concerns the Commission granted approval on condition that PONL withdraw from these conferences and consortia. Another area of concern was trade between Europe and Southern Africa, especially the transport of refrigerated goods in reefer containers where the parties' combined market share was higher than 50%. Maersk undertook to divest PONL's business dealing with the transport of cargo from South Africa to Europe. These undertakings removed the Commission's competition concerns.

Honeywell/Novar[147]

340. On 31 March, the Commission approved Honeywell's proposed acquisition of Novar subject to conditions pursuant to Article 6(2) of the Merger Regulation. Honeywell, a US corporation, is an advanced technology manufacturing company supplying customers worldwide with aerospace products and services, automotive products, electronic materials, specialty materials, performance polymers, transportation and power systems, home and building controls, and industrial controls. Novar is an international group based in the UK focusing on intelligent building systems (IBS), Indalex aluminum solutions (IAS) and security printing services (SPS). This acquisition will allow Honeywell and Novar to combine their activities in the sectors of fire alarm systems, intrusion and other security systems as well as building control systems.

341. The Commission's investigation showed that the merger would significantly impede effective competition in the market for fire alarm systems in Italy, where the merged entity would have held a very strong position. With a view to addressing the serious competition concerns identified, Honeywell proposed a divestiture of Novar's entire fire alarm business in Italy (known in Italy under the brand Esser Italia). This undertaking was considered sufficient to eliminate the competition concerns.

3. Referrals

Blackstone/NHP[148]

342. In response to a request from the UK Office of Fair Trading (OFT), the European Commission decided on 1 February to refer the acquisition of UK-based NHP plc by the US Blackstone Group to the OFT. Both parties are active in the UK private care home market for the elderly.

147 Case COMP/M.3686 *Honeywell/Novar*.
148 Case COMP/M.3669 *Blackstone/NHP*.

343. Blackstone is an international merchant-banking firm, which has recently acquired Southern Cross Healthcare Limited (Southern Cross), a UK-based company which operates care homes for the elderly in the UK. NHP is a UK-listed company also active in the care home sector in the UK. The transaction will lead to some horizontal overlaps between the parties in the provision of care home services for the elderly in the UK, whichever way the markets are defined.

344. The OFT submitted that the care home market in the UK is local and that the transaction affects competition especially within areas falling under three UK local authorities (Arbroath, Nottingham and Port Talbot), where the parties would have high combined market shares, either in nursing or residential care homes.

345. The OFT therefore filed a request to the Commission for the decision on the concentration to be referred to it (pursuant to Article 9(2)(b) of the Merger Regulation). According to this provision, the Commission has an obligation to refer the case when a concentration affects competition on a market within a Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

346. The Commission's investigation showed that the UK care home market is local in scope. Furthermore, on the basis of the results of this investigation, it cannot be excluded that there are separate product markets for nursing and residential care homes in the UK. The parties would have become the biggest service provider in some local areas. Therefore the merger would have affected competition in some local markets in the UK which do not represent a substantial part of the common market. The OFT's request to assess the impact of the concentration on competition was therefore granted.

IESY Repository/Ish[149]

347. On 17 February, the Commission decided to refer the examination of the proposed acquisition of the North Rhine-Westphalian network cable operator Ish by the Hessian cable operator Iesy to the German Bundeskartellamt. The case was notified to the Commission on 17 December 2004.

348. Iesy and Ish each operate a cable network, bought from Deutsche Telekom AG, in their respective regions of Hessen (Iesy) and North Rhine-Westphalia (Ish). Via these networks they deliver radio and television signals to households and other network operators. The Bundeskartellamt requested that the case be referred to it on the grounds that the merger was liable to affect competition in the German market for cable television and that the effects of the merger were limited to Germany. The Commission concluded that the conditions for a referral were met, and that a national investigation was appropriate given the experience the Bundeskartellamt gained in previous cable TV cases.

349. Iesy and Ish mainly supply cable television services in their respective German regions (*Bundesländer*) and are not active outside Germany. It was considered, therefore, that the relevant markets for cable television were distinct markets within the EU. The

[149] Case COMP/M.3674 *IESY Repository/Ish*.

Commission agreed with the Bundeskartellamt's view that the planned merger might affect competition on parts of the German market for cable television.

Strabag/Dywidag (Walter Bau)[150]

350. On 29 April, the Commission received notification of a proposed operation consisting in the acquisition by the Austrian Strabag construction group of a number of subsidiaries of insolvent German construction company Walter Bau AG. Strabag is a construction company that operates worldwide in all areas of the industry, especially in building and civil engineering. Walter Bau provides services in connection with turnkey construction, civil engineering and road building.

351. Strabag planned to take over Walter Bau's existing building and civil engineering projects, which were transferred to the recently founded Dywidag Schlüsselfertig- und Ingenieurbau GmbH. Strabag was also acquiring control of the civil engineering company Walter Heilit Verkehrswegebau GmbH, Dywidag International GmbH, Dyckerhoff & Widmann GmbH, which operates in Austria, and RIB GmbH, which is continuing some bridge-construction projects managed by the Walter Bau subsidiary Niklas GmbH.

352. Although Strabag and Walter Bau are among the largest construction companies in Germany and although the operation gave rise to horizontal overlaps in a number of construction markets or market segments in Germany and Austria, the operation did not give rise to any competition concerns. This was because it was planned that Strabag would take over only a small number of Walter Bau's construction contracts and the parties' combined shares of the construction, road-building and other civil engineering markets would remain well under 20%. While Strabag is the largest construction company in Austria, Walter Bau's companies have only small-scale operations there and, by taking them over, Strabag would increase its market share only slightly.

353. On 30 May, the German Bundeskartellamt, made a request for partial referral of the case under Article 9(2)(b) of the Merger Regulation. The request informed the Commission that the proposed transaction would affect competition on the Hamburg regional market for asphalt, that this market had all the features of a distinct market and that it did not constitute a substantial part of the common market. In the Hamburg region Walter Heilit had a shareholding in an asphalt mixing plant. Norddeutsche Mischwerke GmbH & Co AG, which also had a shareholding in this plant, also controlled four of the other eight plants in the region. Strabag is another competitor, which, according the request, would mean that there would be a risk that Article 81 EC could be breached and that a dominant market position could be created. The German NCA therefore applied for a referral of the case in relation to this market. The Commission concluded that the conditions for referral were met and therefore referred the assessment of the impact of the operation on the Hamburg regional asphalt market to Germany's NCA.

354. As regards the other relevant markets, the Commission concluded that the operation would not significantly impede effective competition in the EEA or any substantial part of it, as the parties' combined market shares on the relevant markets in Germany

[150] Case COMP/M.3754 *Strabag/Dywidag*.

were limited and the transaction would lead only to a slight increase in the market share in Austria.

Macquarie/Ferrovial/Exeter Airport[151]

355. On 27 June, the acquiring parties Macquarie Airport Group (MAG) and Ferrovial Aeropuertos notified their intention to acquire joint control of Exeter airport.

356. MAG, a UK-based company, is part of the Macquarie Group and is a global private equity fund with investments in airports and associated infrastructure. In the EU, Macquarie Group companies also jointly control the Rome Airports and Brussels Airport and have shares in Birmingham Airport and Copenhagen Airport. Together with Ferrovial, MAG jointly controls Bristol Airport. Ferrovial was also active in the management of airport infrastructure concessions. Apart from its stake in Bristol Airport, Ferrovial had investments in Sydney Airport, Belfast City Airport and Antofagasta Airport.

357. Subsequent to this notification the UK Office of Fair Trading (OFT), filed a referral request pursuant to Article 9(2)(a) of the EC Merger Regulation. In this request the OFT informed the Commission that the South West of England could be a distinct market for the supply of airport infrastructure services to airlines. As the parties already controlled Bristol Airport, the acquisition of Exeter Airport would mean that their share of the market in this area could be high enough to potentially raise competition concerns. In addition the OFT had received comments from third parties raising concerns about the acquisition.

358. The Commission's investigation indicated that the product market was the provision of airport infrastructure services to airlines and that the geographic market could be as small as the South West of England (Bristol, Exeter, Bournemouth, Plymouth, Newquay, and Southampton). If these indications were confirmed the market shares of the two airports in the region would be sufficiently high to potentially affect competition. The Commission therefore agreed that further investigation was warranted and that the UK authorities were best placed to carry out such an investigation.

359. The Commission therefore decided to refer the joint acquisition of Exeter Airport by the Macquarie Airport Group (MAG) and Ferrovial Aeropuertos to the UK NCA on the grounds that the concentration threatened to affect significantly competition in the South West of England in respect of airport infrastructure services to airlines.

[151] Case COMP/M.3823 *MAG/Ferrovial Aeropuertos/Exeter Airport*.

FIMAG/Züblin[152]

360. The proposed acquisition, which was notified to the Commission on 26 August, involved the acquisition of control of the German construction company Züblin by FIMAG, the holding company of Strabag Group (Strabag). Strabag is an Austrian-based construction group which operates in all areas of the industry, especially in building construction and civil engineering. Furthermore, it produces and distributes building materials. Züblin is a German construction company and also operates in building construction and civil engineering as well as in construction-related services. Through its subsidiary ROBA Baustoff GmbH (Roba), it is active in the production and distribution of building materials. By acquiring the share package of the insolvent Walter Bau, FIMAG would gain control of Züblin.

361. Strabag and Züblin are among the largest construction companies in Germany. However, the parties' combined shares of the construction and civil engineering markets would remain well under 15% even if these markets were to be further divided. Equally, while Strabag is the largest construction company in Austria, the parties' shares in the Austrian market did not reach a level which would give rise to competition concerns.

362. A request for partial referral of the case was made by the German Bundeskartellamt, under Article 9(2)(b) of the Merger Regulation on 20 September. It considered that the notified operation would affect competition in the regional markets for asphalt mix in Berlin, Chemnitz, Leipzig/Halle, Rostock and Munich, each of which presented all the characteristics of a distinct market and did not constitute a substantial part of the common market. The Bundeskartellamt submitted that there was a risk that Strabag's takeover of Roba, one of the last remaining independent competitors for producing asphalt mix, would, because of the structural relationship between Strabag and the Wehrhahn group as joint shareholders of Deutag, further restrict competition on the relevant regional markets. The Commission concluded that the conditions for referral were met and thus referred the assessment of the impact of the operation on the regional asphalt markets in Berlin, Chemnitz, Leipzig/Halle, Rostock and Munich to the Bundeskartellamt.

363. The Commission found that the remaining parts of the proposed concentration would not significantly impede effective competition in the EEA or any substantial part of it, as the parties' combined market shares on the relevant markets in Germany would be limited and there would be only a slight increase of market share on the relevant markets in Austria.

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[152] Case COMP/M.3864 *FIMAG/Züblin*.

Tesco/Carrefour[153]

364. The proposed acquisition, which was notified to the Commission on 4 November, involved the acquisition of sole control of the Czech and Slovak business of the undertaking Carrefour (France) by Tesco (UK). The Commission's investigation showed that the proposed transaction would lead to horizontal overlaps in a number of local markets for the retail sale of daily consumer goods in the Czech Republic and Slovakia.

365. Tesco, based in the UK, is active in food and non-food retailing and has over 2 300 stores worldwide covering a wide variety of shop formats. The company owns and operates 31 stores in Slovakia and 27 stores in the Czech Republic. The French company Carrefour is also active in food and non-food retailing with more than 11 000 stores worldwide. It operates 11 large-format stores in the Czech Republic and four large-format stores in Slovakia.

366. On 30 November, the Commission received a request for partial referral of the case from the Slovak NCA. In its request the NCA claimed that the transaction would affect competition under Article 9(2)(b) of the Merger Regulation in the market for the retail sale of daily consumer goods in supermarkets and hypermarkets in three local markets in the cities of Bratislava, Košice and Žilina. In addition the Slovak NCA considered that these markets do not constitute a substantial part of the common market.

367. In the Slovakia, there were indications that the transaction would strengthen Tesco's position as the leading retailing company at the national level. Furthermore in the cities of Bratislava, Košice and Žilina the merged entity would have high market shares and the number of available alternative stores would be reduced. Therefore the Commission concluded that the transaction affected competition in these three local markets. Each of these local markets constitutes less than 0.1% of the total grocery sales in the common market and cannot be regarded as a substantial part of the common market. In line with the Merger Regulation, the Commission thus referred the assessment of the Slovak part of the transaction to the Slovak NCA. This was the first time that a transaction had been referred to a competition authority in a new Member State.

368. As regards the Czech Republic the Commission's investigations indicated that the merged entity would still only be the fourth largest retailing group on a national basis. Even within individual local markets the parties would still face competition from a number of other strong retailers such as Lidl&Schwarz, Ahold or Rewe.

369. The Commission approved the transaction with regard to the Czech Republic as it would not significantly impede effective competition in the Czech retailing sector.

4. Notifications withdrawn/abandoned operations

Microsoft/Time Warner/ContentGuard JV[154]

[153] Case COMP/M.3905 *Tesco/Carrefour*.

370. On 12 July 2004, Microsoft and Time Warner notified to the Commission the operation by which they had acquired from Xerox a number of shares in a US company called ContentGuard and that, following this acquisition, they each held 48% of the voting rights (prior to this transaction Microsoft already had a 25% stake). In addition they entered into a stockholder voting agreement giving them joint control over ContentGuard.

371. ContentGuard is active in the development and licensing of intellectual property rights (IPRs) relating to digital rights management (DRM) solutions. ContentGuard holds a key patent portfolio, as an inventor of foundational DRM technology. DRM technology consists of software solutions that enable digital content of any type (e.g. audio, films, documents) to be transmitted securely over an open network e.g. to end-users or exchanged between devices. DRM is set to become the standard throughout the entire IT industry, and is already the standard for online delivery of media content such as music and video. Microsoft is currently the leading, and possibly dominant, supplier of DRM solutions.

372. After a routine, Phase I, review, the Commission opened an in-depth investigation on 25 August 2004 and sent the parties a statement of objections on 29 November 2004. One of the Commission's main concerns was that the operation could have buttressed Microsoft's monopoly in the market for PC operating systems. Indeed, under Microsoft's and Time Warner's joint ownership, ContentGuard could have had both the incentives and the ability to use its IPR portfolio to put Microsoft's rivals in the DRM solutions market at a competitive disadvantage. DRM could have been used as a gatekeeper technology, because Microsoft controls on which PC operating system its DRM software could be used. Furthermore, this joint acquisition could also have dramatically slowed down the development of open interoperability standards.

373. Following the Commission's objections, Microsoft and Time Warner informed the Commission that Thomson was acquiring a 33% stake in ContentGuard. Although this acquisition by Thomson was announced in November 2004, it only took place on 14 March 2005. The Commission's departments carefully reviewed whether the transaction involving Thomson would have fallen under the Merger Regulation. Through the conjunction of Thomson's acquisition of an equity stake and changes in ContentGuard's governance structure, no one shareholder would have had control over ContentGuard. Therefore, the Commission considered that following a substantial change in ContentGuard's governing rules and the entry of a new key shareholder (Thomson), Microsoft was no longer in a position to shape ContentGuard's licensing policy to the detriment of Microsoft's competitors. The original operation, whereby Microsoft and Time Warner acquired joint control of ContentGuard, was abandoned and the companies withdrew their notification under the Merger Regulation.

Total/Sasol/JV[155]

374. Sasol Wax International AG (Sasol), Germany, which belongs to the South African Sasol Group, is a specialised company active in the field of petroleum-based waxes, in

154 Case COMP/M.3445 *Microsoft/Time Warner/ContentGuard JV*.
155 Case COMP/M.3637 *Total/Sasol/JV*.

particular in paraffin and micro waxes. Total France SA (Total) is part of the Total group, one of the largest oil and gas companies worldwide. In addition to the production of paraffin and micro waxes, Total produces necessary raw materials for their production: slack wax and bright stock slack wax.

375. The proposed operation consisted in the creation of a joint venture active in the production, marketing and sale of petroleum-based wax products and bitumen additives combining Sasol's and Total's activities in these areas. Slack wax and bright stock slack wax are produced in refineries as by-products of the oil refining process. They can be used captively, sold directly to third parties or further refined into paraffin waxes or micro waxes. Paraffin waxes and micro waxes are used in a variety of end applications such as candles, rubber, packaging, cable, chewing gum or adhesives.

376. The Commission opened an in-depth investigation into the proposed joint venture on 13 April because it had serious concerns that the transaction could significantly impede effective competition in the common market. In particular, the initial market investigation had found that the combination of Total's and Sasol's commercial activities, the supply of raw material from Total to the joint venture and the increase in the capacity constraints resulting from the transaction could significantly strengthen Sasol's leading position in the markets for paraffin and micro waxes. At the end of the initial investigation, a commitment had been proposed. However, the Commission, following a market test, had found that the draft remedy was too complex while not addressing the serious concerns as regards paraffin waxes.

377. On 20 April, the parties communicated to the Commission the termination of the joint venture agreement and the withdrawal of the notification.

AMI/Eurotecnica[156]

378. On 18 October, the Commission opened an in-depth (Phase II) investigation into the proposed acquisition of the Italian engineering company Eurotecnica by the Austrian company Agrolinz Melamine International (AMI). The Commission had been referred the case by the German and the Polish NCAs. On 20 December the notifying parties withdrew from the deal.

[156] Case COMP/M.3923 *AMT/Eurotecnica*.

379. AMI is active in the production of melamine, a specialty chemical which is used in a wide range of applications such as surface applications, adhesives and glues, and as a flame retardant. AMI also has its own melamine production technologies which it has not licensed to third parties in the last ten years. Eurotecnica is currently the only licensor for melamine production technology operating at a worldwide level but does not produce any melamine itself.

380. The Commission had opened an in-depth investigation because the concentration would have strengthened AMI's already strong position on the melamine market. The Commission was concerned that by buying the only global licensor of melamine production technology AMI would be in a position to hamper further market entry and to control the expansion projects of its competitors. Furthermore, the elimination of these competitive constraints could have increased the likelihood of coordinated commercial behaviour in the already concentrated melamine market.

C – Selected Court cases

Commission v *Tetra Laval BV*[157]

381. On 15 February, the Court of Justice (ECJ) dismissed the Commission's appeal against the judgment of the Court of First Instance (CFI) in the *Tetra Laval* v *Commission* case[158], which annulled the Commission's decision declaring the concentration between Tetra Laval and Sidel to be incompatible with the common market pursuant to Article 8(3) of the Merger Regulation[159]. The judgment clarifies three issues of particular importance: the standards of proof and of judicial review in merger control; the relationship between the Merger Regulation and Article 82 EC; and the acceptability of behavioural commitments.

382. As regards the standard of proof required, the ECJ's judgment underlines that the prospective analysis of the kind necessary in merger control involves a prediction of events which are more or less likely to occur in future and that such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them is the most likely. The ECJ's judgment thus upholds the Commission's view that the requisite standard of proof in all merger cases is that of a balance of probabilities. In the present case, the ECJ considered that the CFI did not, in fact, alter the conditions relative to the standard of proof but merely drew attention to the requirement that the evidence should establish convincingly the merits of an argument or decision. As regards the prospective analysis of conglomerate mergers, the ECJ found that the question whether a conglomerate merger will permit the merged entity to leverage its strength in order to gain a dominant position over time involves "chains of cause and effect which are dimly discernible, uncertain and difficult to establish". Consequently, the quality of the evidence justifying prohibition of such mergers is particularly important in order to support the view that this economic development would be "plausible".

383. As regards judicial review of such findings, the ECJ held that the Commission has a margin of discretion with regard to economic matters but that the courts must establish whether the evidence relied upon is factually accurate, reliable and consistent, whether it contains all the information that must be taken into account and whether it is capable of substantiating the conclusions drawn from it. In this particular case, the ECJ considered that the CFI had respected the requirements of judicial review.

384. The CFI had held that in conglomerate cases, where the future creation of a dominant position depends on the incentives and disincentives for the merged entity to engage in leveraging behaviour, the Commission should also consider whether the illegality of certain leveraging behaviour under Article 82 EC and the likelihood of detection and punishment might deter the merged entity from such a line of conduct. The Commission argued that those requirements would contradict the Merger Regulation.

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157 Case C-12/03P *Commission* v *Tetra Laval BV*.

158 Case T 5/02 *Tetra Laval BV* v *Commission* [2002] ECR II-4381.

159 Case COMP/M.2416 *Tetra Laval/Sidel*, adopted under the former Merger Regulation, Council Regulation (EC) No 4064/89, which has been replaced by Council Regulation (EC) No 139/2004.

385. The ECJ concurred with the Commission's view and found that the CFI erred in law in this respect. Although the Commission should assess comprehensively both incentives and disincentives to engage in leveraging conduct, the ECJ found that it would be contrary to the Merger Regulation's preventive purpose to examine, for each proposed merger, the disincentives caused by unlawfulness, likelihood of detection and penalties. This would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts. However the ECJ found that this error of law was not sufficient to lead to the annulment of the judgment.

386. Concerning behavioural commitments, the CFI held that the Commission had failed to take into account a number of possible behavioural commitments when assessing the leveraging behaviour which would be open to the merged entity. The Commission argued on appeal that it had in fact considered the commitments but had found them unacceptable, principally because of the difficulty in monitoring them.

387. In its judgment, the ECJ draws a distinction between cases where there is an immediate structural change in the market and those where dominance may only be achieved in due course, through leveraging. In cases of the latter type, commitments as to future conduct may have to be taken into account when assessing the likelihood that the merged entity might engage in such conduct. In view of the recitals to the decision, the ECJ holds that, in the present case, the Commission had refused to accept Tetra's commitments as a matter of principle. Consequently, the ECJ found that the CFI's judgment annulling the Commission's decision had to be upheld despite the CFI's error of law regarding the deterrent effect of Article 82 EC.

Energias de Portugal SA (EDP) v *Commission*[160]

388. On 21 September, the CFI dismissed EDP's action for annulment of the Commission decision of 9 December 2004, which declared the joint acquisition of Gás de Portugal (GDP), the incumbent Portuguese gas company, by Energias de Portugal (EDP), the incumbent Portuguese electricity company, and Eni SpA, an Italian energy company, incompatible with the common market pursuant to Article 8(3) of the Merger Regulation[161].

389. In its decision, the Commission had concluded that, in spite of the commitments proposed by the parties, the concentration would strengthen EDP's dominant positions on the electricity markets in Portugal as well as GDP's dominant positions on the Portuguese gas markets, as from when they were opened to competition, with the consequence that competition would be significantly impeded in a substantial part of the common market.

390. This merger was assessed against the background of the ongoing process of the opening of the energy markets throughout the EU. In Portugal, electricity markets are open to competition and gas markets are to be progressively opened. Pursuant to the Second Gas Directive, Portugal benefits from a derogation that allows it to begin gas liberalisation at the latest in 2007 with the opening of the market for the supply of

160 Case T-87/05 *EDP- Energias de Portugal SA* v *Commission*.

161 Case COMP/M.3440 *ENI/EDP/GDP*, adopted under the former Merger Regulation, Council Regulation (EC) No 4064/89.

natural gas to power generators. The opening of the other gas markets is due to take place in 2009 at the latest for non-residential customers and in 2010 at the latest for residential customers.

391. The case brought by EDP was heard by the CFI under the "fast-track" procedure and judgment rendered within seven months, which is the shortest period ever achieved for a case of this type.

392. The CFI rejected various pleas submitted by the applicant regarding the assessment of the commitments proposed by the merging parties.

393. In particular, the CFI confirmed the way in which the Commission currently assesses remedies by examining first the competition concerns raised by the concentration, and then the commitments offered in relation to these concerns. The CFI ruled that the Commission could not within the time constraints imposed by the Merger Regulation recommence entirely its analysis of a merger, in the light of the submission of commitments, as though that transaction had been notified anew in the form modified by the commitments. The CFI found that such an approach would conflict with the requirement of speed that characterises the general structure of the Merger Regulation.

394. With regard to commitments presented after the deadline imposed by the various regulations, the CFI indicated that the Commission had correctly applied its Notice on remedies when assessing both the electricity and the gas commitments. With respect to the latter, which were presented in full only three working days before the Commission decision, the CFI also underlined that the Commission was right to reject them on the sole ground of their "extreme lateness".

395. As regards the substantive assessment of the merger, the CFI considered that the Commission erred in law when it concluded that the concentration would strengthen GDP's dominant positions and give rise to a significant impediment to competition on the gas markets. The CFI recalled that, as a result of the derogation provided for in the Second Gas Directive, the gas markets in Portugal were not open to competition on the date of adoption of the decision. According to the CFI, it follows that, in the total absence of competition, there was no competition that could be significantly impeded by the concentration on the date of the adoption of the contested decision. The CFI then went on to rule that, by assessing only the future effects of the concentration on the gas markets when these markets were to be open to competition, the Commission had wrongly refrained from taking into account the immediate effects of the concentration on those markets. In that respect, the Court referred to the fact that the situation on the gas markets would be distinctly improved by the concentration as modified by the gas commitments mentioned above.

396. However, despite that error, the CFI recalled that there is no reason to annul a decision prohibiting a concentration if certain grounds of that decision which are not vitiated by illegalities, in particular those concerning one of the relevant markets, are sufficient to justify its operative part. In the present case, the CFI found that the Commission did not make a manifest error of assessment when it considered that the concentration would cause an important potential competitor (GDP) to disappear from all the electricity markets. That fact would entail the strengthening of EDP's

dominant positions on each of the electricity markets, with the consequence that effective competition would be significantly impeded. That conclusion was in itself sufficient to justify the Commission's decision. There was no need to also consider the vertical effects of the merger.

397. The CFI therefore dismissed EDP's application and upheld the decision of the Commission.

Honeywell v *Commission and General Electric* v *Commission*[162]

398. On 14 December, the CFI upheld the Commission's decision to prohibit the merger between the General Electric Company (GE) and Honeywell Inc. (Honeywell). In July 2001, the Commission had prohibited this merger[163] as it considered that the deal would create or strengthen dominant positions as result of which effective competition would be significantly impeded in the markets for aerospace products and industrial systems and customers would be deprived of the benefits of competition. The CFI found errors in the Commission's assessment of the conglomerate and vertical effects of the merger, but considered that the horizontal effects of the merger alone were sufficient to justify the prohibition of the transaction. The judgment acknowledges that conglomerate mergers can be anticompetitive in particular circumstances and provides useful guidance for future cases.

399. Honeywell's application was dismissed on procedural grounds, as it focused on only one aspect of the decision (i.e. the conglomerate effects) and could not thus lead to an annulment of the decision.

400. In relation to GE's application, the CFI upheld the decision on the basis of the horizontal effects of the transaction on the markets for jet engines for large regional jets, corporate jet aircraft and small marine gas turbines, finding that the proposed commitments submitted by the parties were rightly rejected by the Commission. It also confirms the Commission's conclusion that GE's market share for large commercial jet aircraft engines is indicative of pre-merger dominance and reinforced through GE's vertical integration and the characteristics of the industry. In addition, the CFI rejected the applicant's reliance on procedural irregularities that would allegedly have vitiated the Commission's decision.

162 Case T-209/01 *Honeywell* v *Commission* and Case T-210/01 *General Electric* v *Commission*.

163 Case COMP/M.2220 *GE/Honeywell*.

401. On the other hand, the CFI considered that the Commission's assessment with regard to vertical and conglomerate effects was vitiated by manifest errors of assessment. According to the judgment, concerning the vertical effects, the Commission established that GE would have the capability and incentive to foreclose its rival engine makers from Honeywell's starters, but failed to take into account the potential deterrent effect of Article 82 EC on such conduct. The CFI noted that the more convincing the Commission's case as to the effectiveness of the conduct in question and thus the clearer the commercial incentive to engage in it, the greater the likelihood of the conduct being classified as anticompetitive under Article 82 EC.

402. In its judgment, the CFI confirmed that conglomerate mergers may produce anticompetitive effects in some cases, and that conglomerate theories may form a plausible basis to prohibit a merger in certain circumstances. However, the judgment also requires the Commission to prove this with convincing evidence. With regard to the transfer of GE Capital's financial strength and GECAS's vertical integration to Honeywell's avionics and non-avionics markets, the CFI considered that the Commission had not established this to a sufficient degree of probability. Whilst the Court considered the internal documents on GE's financial vertical integration conclusive for proving the reinforcement of GE's pre-merger dominance in jet engines, it concluded that the decision did not provide sufficient evidence that the new entity will use its financial leverage/strength to obtain selection of Honeywell products. In that respect, evidence of past conduct is not sufficient to conclude that the merged entity would have used its financial power in the future. Also, the CFI observed that the Commission had not produced an economic study proving that the short-term commercial sacrifices that GE would need to make to convince its customer of selecting Honeywell products could have been covered by additional future revenues.

403. Equally, for the conglomerate effects based on various bundling practices, the CFI required the Commission to prove both ability and interest of the merged entity to engage in mixed bundling. In that respect, the documented past bundling practices of Honeywell were considered by the CFI as insufficiently probative. Also, the CFI took note of the fact that the Commission's economic model was abandoned because the Commission could not disclose the confidential input data to the parties and in addition concluded that the economic theories presented by the various economists heard were subject to controversy. By applying the standard of review for conglomerate mergers that it had set in the *Tetra Laval* case, the CFI concluded that the Commission had not established that the merged entity would have bundled sales of GE's engines with Honeywell's avionics and non-avionics products. The CFI then concluded that, in the absence of such proof, the mere fact of having a wider range of products does not suffice to conclude that dominant positions would have been created. As in *Tetra Laval*, the CFI considered that the Commission had failed to take account of the possible impact of the deterrent effect of Article 82 EC on practices such as pure bundling and mixed bundling.

D – Statistics

Figure 4
Number of final decisions adopted each year since 1999 and number of notifications

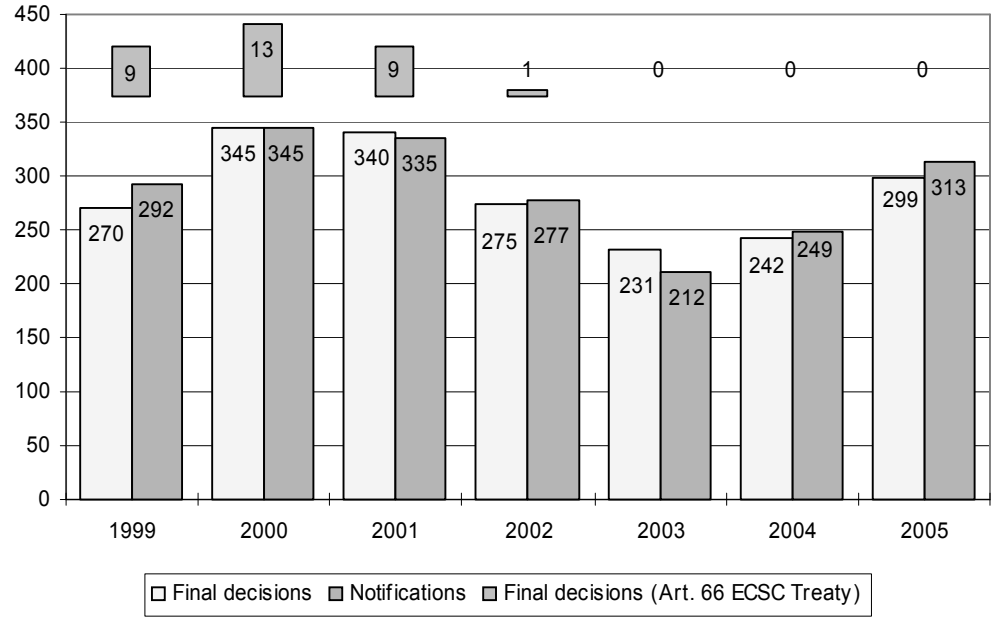
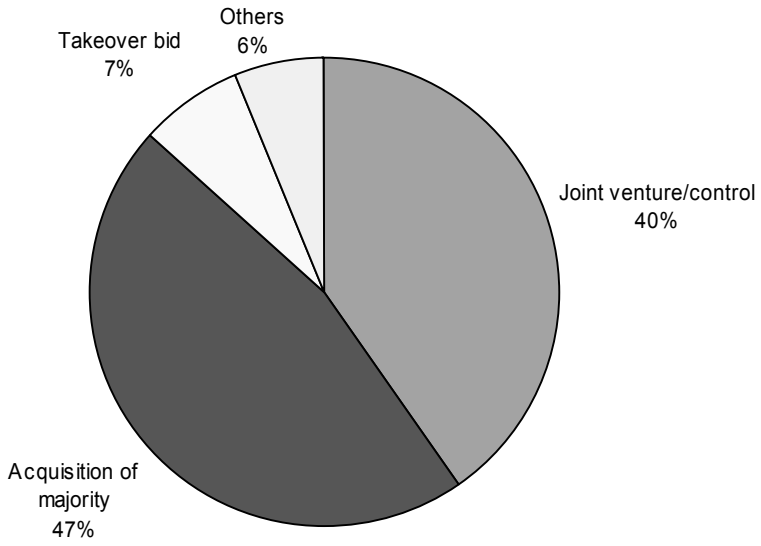


Figure 5
Breakdown by type of operation (1996-2005)



III – State aid control

A – Legislative and interpretative rules

1. Regulations, guidelines and communications

1.1. State Aid Action Plan

[164] COM(2005) 107 final, 7.6.2005, http://europa.eu.int/comm/competition/state_aid/others/action_plan/

Box 3: State Aid Action Plan

In June, the Commission launched a State Aid Action Plan[164] outlining the guiding principles for a comprehensive reform of state aid rules and procedures over the next five years. In particular, the Commission intends to use the EU's state aid rules to encourage Member States to contribute to the Lisbon Strategy by focusing aid on improving the competitiveness of EU industry and creating sustainable jobs (aid for R&D, innovation and risk capital for small firms), on ensuring social and regional cohesion and on improving public services. The Commission also aims to rationalise and streamline procedures, so that the rules are clearer and less aid has to be notified, and to accelerate decision making.

The State Aid Action Plan is based on the following elements:

- less and better-targeted state aid, in line with the European Council's repeated declarations, so that public money is used effectively to the benefit of EU citizens in terms of improving economic efficiency, generating more growth and sustainable jobs, social and regional cohesion, improving services of general economic interest, sustainable development and cultural diversity;

- a more refined economics-based approach, so that less distortive aid, particularly where money is less readily available from financial markets, can be approved more easily and quickly and so that the Commission concentrates its resources on the cases liable to create more serious distortions of competition and trade;

- more streamlined and efficient procedures, better enforcement, higher predictability and enhanced transparency; for example, Member States currently have to notify to the Commission most of the state subsidies they plan to give. The Commission proposes to exempt more measures from this notification obligation and to simplify procedures;

- a shared responsibility between the Commission and Member States: the Commission cannot improve state aid rules and practice without the effective support of Member States and their full commitment to comply with their obligations to notify envisaged aid and to enforce the rules properly.

The reform is not a complete break from current practice but rather an attempt to improve the existing framework, so that it is more efficient and better suited to present challenges such as enlargement and the Lisbon Strategy. It represents an effort to better explain the policy, to use a refined economics-based approach to improve the rules by clarifying on what basis a measure qualifying as state aid should be authorised by the Commission, or on the contrary be declared incompatible with the common market. In addition, the Commission has emphasized the importance of European citizens in the process, by putting its reform programme out for consultation and by seeking views on the proposals.

The consultation process that ended in September attracted comments from more than 130 interested parties. The Economic and Social Committee, the Committee of the Regions and the European Parliament also made comments. Having assessed the results of the consultation, the Commission has begun to implement the various aspects of the Action Plan, including drawing up future rules.

The Commission aims to adopt a future R&D and Innovation Framework and new Risk Capital Guidelines around the summer of 2006, a general block exemption Regulation at the beginning of 2007, and future Environmental Aid Guidelines in 2007.

1.2. Guidelines on national regional aid for 2007–2013

404. The compatibility of regional aid with the EC Treaty is governed by the Commission's Regional Aid Guidelines. The current Regional Aid Guidelines were adopted in 1998 for an unlimited period. In April 2003, the Commission decided to apply these guidelines until 2006 and to proceed to their review for the period after 2006 "in due course in order to give the Member States and the Commission time before the end of 2006 to draw up, notify and approve the regional aid maps for the period after 1 January 2007". These new guidelines should apply for the whole of the next Structural Fund programming period, from 2007 to 2013.

405. In order to prepare new guidelines, the Commission undertook an extensive consultation process, which began in April 2003. Two discussion papers were circulated to Member States and placed on the Competition DG's website. A document proposed by the Competition DG containing draft guidelines was sent to Member States in July, and also placed on the Competition DG's website. Two multilateral meetings with experts from the Member States, EEA countries, Romania and Bulgaria were organised in February and September, and numerous meetings took place at all levels with representatives of the regions concerned. In total, more than 500 submissions were received from interested parties. The Committee of the Regions and the Economic and Social Committee gave an opinion on the review of the guidelines, which was very largely taken into account. The European Parliament adopted an own-initiative report on the guidelines on 15 December, which was also largely taken into account.

406. The Commission adopted the Guidelines on national regional aid on 21 December. The provisional text appears on the Competition DG's website[165] and the final text will be published in the *Official Journal*.

407. In preparing the new draft guidelines, two principles have been of fundamental importance:

- the need to provide a solid contribution to the cohesion policy of the EU, by ensuring the maximum possible coherence with the Structural Fund Regulations;
- the need to give effect to the conclusions of successive European Councils calling for less and better-targeted aid, following the general approach set out in the State Aid Action Plan.

408. In line with these principles, the three key features of the new guidelines are:

- the need to refocus regional aid on the most deprived regions of the EU of 25, and soon to be 27, Member States, while allowing sufficient flexibility for the Member States themselves to designate other regions as eligible for support based on local conditions in terms of wealth and unemployment;
- the need to improve the overall competitiveness of the EU, its Member States and its regions by means of clearly differentiated and well-balanced aid intensity

[165] http://europa.eu.int/comm/competition/state_aid/regional/

ceilings, to reflect the importance of the individual regional problems as well as concerns about the spillovers to the non-assisted areas; and

- the need to ensure a smooth transition from the present system to the new approach that gives enough time to adjust and does not put at risk what has been achieved in the past.

409. In regions which are not eligible for support under the Regional Aid Guidelines, other forms of aid can be given to promote regional development (such as support for R&D, risk capital, training, environmental aid, etc.). As announced in the State Aid Action Plan, these horizontal aid measures are being reformed, and should allow ample scope for the Member States to implement the regional competitiveness and employment objectives set out in the Structural Fund Regulations and to address specific market failures that can occur within those regions.

1.3. Future Framework for R&D and Innovation

410. The existing Community Framework for state aid for Research and Development[166] was to expire on 31 December[167] but was prolonged until 31 December 2006[168]. In the State Aid Action Plan, the Commission decided "to consider if the scope of the Framework for Research and Development should be extended to cover types of aid in favour of certain innovative activities, not already covered by existing guidelines or regulations thereby creating a Framework for R&D and Innovation"[169].

411. Following the Commission's adoption of a consultation document on innovation, it was not possible to have a common Framework for R&D and Innovation in place before the end of 2005. A first exchange of views with Member States should take place at the beginning of 2006, with a view to adoption of the future R&D and Innovation Framework around the summer of 2006. Accordingly, the Commission decided to apply the existing R&D Framework until the entry into force of such a document, by 31 December 2006 at the latest.

412. In September, the Commission launched a public consultation on measures to improve state aid for innovation. The suggested improvements, set out in a draft Communication on state aid for Innovation[170], include rules for aid that funds innovation, criteria to help public authorities to target aid more effectively, clarifying the rules to increase legal certainty and simplification of the regulatory framework.

413. The Communication invited comments on a series of concrete measures for which state aid could be authorised by the Commission through ex-ante rules and criteria. On the basis of the consultation, which the Commission is currently assessing, new provisions will be integrated into the existing state aid rules. These provisions will not only mean for those Member States which apply them, more speedy approval of state aid for innovation, but also help Member States target public money more effectively.

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166 OJ C 45, 17.2.1996, as amended by the Commission communication amending the Community framework for state aid for research and development (OJ C 48, 13.2.1998, p. 2).

167 OJ C 111, 8.5.2002.

168 OJ C 310, 8.12.2005.

169 Paragraph 28 of the State Aid Action Plan.

170 COM(2005) 436 final, 21.9.2005. Press release IP/05/1169, 21.9.2005. MEMO/05/33.

414. The Commission makes clear in the consultation that state aid is not the answer to all of the EU's competitiveness or innovation problems. While the Commission recognises that, in an effort to create growth and jobs, state aid policy can be used proactively to support innovation by tackling the market failures that prevent markets from naturally delivering innovation, it also stresses that, for business to embark on a more innovative path, it requires first and foremost effective competition. Competition creates natural incentives for companies to come up with new ideas and new products; it makes them adapt to change; and it sanctions those that stay put or lag behind. Ensuring competition as a driver of innovation is therefore of paramount importance.

415. In line with the refined economics-based approach laid down in the State Aid Action Plan, the Communication sets out a clear methodology for formulating state aid measures for innovation activities. The principles are that state aid can be authorised where (i) the aid instrument targets a well-defined market failure; (ii) state aid is an appropriate policy instrument (which is not always the case, as sometimes structural policies or regulatory action may be more appropriate); (iii) the aid has an incentive effect on innovation and is proportionate to the defined objective; and (iv) distortions of competition are limited.

416. The proposals for innovation aid cover six broad areas: innovative start-ups; risk capital; the integration of innovation into the existing rules on state aid for research and development (R&D); innovation intermediaries; training and mobility between university research personnel and SMEs; and poles of excellence for projects of common European interest.

1.4. Communication on state aid to export-credit insurance

417. The Communication on the application of the state aid rules to short-term export-credit insurance ("STEC")[171] expired on 31 December. Following the completion of a study on the situation of the private reinsurance market in the field of export-credit insurance and after consulting the Member States and other interested parties, the Commission decided to leave the definition of marketable risks contained in the 2001 amendment unchanged. However, owing to the fact that in most Member States there is no or insufficient export-credit insurance cover offered by private insurers to micro and small companies with a limited export turnover, the Commission decided to consider their export-related risks, if and to the extent that the private market in the Member States does not currently exist, to be temporarily non-marketable. This also takes into account the need for the private market to adapt to the increased market size created by EU enlargement. This new provision will apply from 1 January 2006 until 31 December 2010. However, the Commission will assess the market situation for those SMEs with limited export turnover within three years. Should export-credit insurance cover for such SMEs prove to be sufficiently available in the private market, the Commission will amend this Communication by considering their export-related risks to be "marketable." The Commission published the final Communication[172] in December. At the same time, it decided to extend the

[171] OJ C 281, 17.9.1997, as amended in OJ C 217, 2.8.2001, and OJ C 307, 11.12.2004.

[172] OJ C 325, 22.12.2005. Communication of the Commission to Member States amending the communication pursuant to Article 93(1) [now Article 87] of the EC Treaty applying Articles 92 and

validity of the 1997 Communication until 31 December 2010.

1.5. Revision of the Environmental Aid Guidelines

418. The Commission has started reviewing the current guidelines[173], which are applicable until the end of 2007, in order to prepare new guidelines for environmental aid. As a starting point, the Commission published a questionnaire[174] in August and invited all Member States and other interested parties to share their experience with the current guidelines. The questionnaire included a wide range of questions, such as: whether a block exemption for environmental aid should be introduced; which categories of environmental aid should be included; should the polluter-pays principle be strengthened and less aid for polluting undertakings be approved; whether the possibility of granting aid for environmental innovation should be introduced, etc. The Commission will analyse the answers and incorporate the conclusions in the new draft guidelines for environmental aid, which will be discussed with Member States during the course of 2006.

1.6. Services of general economic interest

93 [now Articles 87 and 88] of the Treaty to short-term export-credit insurance.

173 Community Guidelines on state aid for Environmental Protection (OJ C 37, 3.2.2001).

174 http://europa.eu.int/comm/competition/state_aid/others/00910_questionnaire_env_en.pdf

175 OJ L 312, 29.11.2005, p. 67.

176 OJ C 297, 29.11.2005, p. 4. The Community Framework for state aid in the form of public service compensation is not applicable to public service broadcasting covered by the Commission communication on the application of state aid rules to public service broadcasting.

177 Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/732/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 312, 29.11.2005, p. 47).

178 Case C-280/00 of 24 July 2003 concerning the grant of licences for scheduled bus transport services in the *Landkreis* of Stendal (Germany) and public subsidies for operating those services.

Box 4: Services of general economic interest

One of the first initiatives taken in the context of the State Aid Action Plan was the launch in July of an important package on state aid and the financing of public services. The package adopted by the Commission provides greater legal certainty to the financing of services of general economic interest. The measures will ensure that companies can receive public support to cover all costs incurred, including a reasonable profit, when carrying out public service tasks as defined and entrusted to them by public authorities, while still ensuring that there is no over-compensation liable to distort competition. Compensation necessary for running a public service can be accepted, but there is no justification for over-compensation or for cross-subsidisation of adjacent markets. The measures apply only to undertakings conducting economic activities, as financial support granted to entities not conducting economic activities (e.g. basic compulsory social security schemes) does not constitute state aid.

The measures take the form of a Commission Decision[175], a Community Framework[176] for state aid in the form of public service compensation and an amendment to the Commission Directive on financial transparency[177].

The package is important because, following the July 2003 *Altmark* judgment[178] by the European Court of Justice, compensation for many small services could amount to state aid. The adopted package offers a pragmatic, non-bureaucratic solution to this by exempting such state aid from the notification requirement as long as the amount of compensation falls under certain thresholds and is no more than is necessary.

The Commission Decision (based on Article 86(3)) specifies the conditions under which compensation to companies for the provision of public services is compatible with the EU State aid rules and does not have to be notified to the Commission in advance. The Decision is applicable to compensation of less than EUR 30 million per year provided its beneficiaries have an annual turnover of less than EUR 100 million. Compensation granted to hospitals and social housing for services of general economic interest also benefits from the Decision irrespective of the amounts involved, as does compensation for air and sea transport to islands as well as airports and ports below specific thresholds defined in passenger volumes.

Hospitals and social housing are entirely exempted from the notification obligation whatever the amount of compensation because running a hospital, or real estate investments for social housing, result in very high amounts of aid per undertaking. This means that aid would almost always be above the thresholds, and almost all hospitals would have to be notified to the Commission. This would constitute a huge bureaucratic burden.

This does not, of course, mean that Member States can freely grant state aid: the exemptions from notification granted by the Decision applies only if all the conditions are met; in particular there must be no over-compensation and a clearly defined public service mission. The Member States continue to be responsible for defining what "public service" includes, the quality of services, as well as how they want to provide these services.

The Commission Framework specifies the conditions under which compensation not covered by the Decision is compatible with State aid rules. Such compensation will have to be notified to the Commission due to the higher risk of distortion of competition. Compensation that exceeds the costs of the public service, or is used by companies on other markets open to competition, is not justified, and is incompatible with the EC Treaty's State aid rules.

The amendment to the Commission Transparency Directive clarifies that companies receiving compensation and operating on both public service and other markets must have separate accounts for their different activities, to avoid cross-subsidies.

2. Agriculture

2.1. New annual reporting on state aid

419. A new era of reporting state aid expenditure for the agricultural sector was launched on 1 March. Member States now have to report their annual expenditure on state aid measures relating to the agricultural sector in a new, simplified and unified electronic format facilitating comparison between Member States, calculation of total expenditure, identification of types of expenditure, etc. The unified format will increase overall transparency significantly. In the past, reporting discipline varied greatly between Member States. Despite the launch of infringement procedures, some Member States never or only partially submitted annual reports of very variable quality, making analysis and comparisons very difficult.

420. The new reports are a further example of the substantial efforts towards simplification being made in the area of state aid. As a result, all 25 Member States, with the exception of Luxembourg and Portugal, communicated detailed data on their state aid expenditure for 2004.

2.2. Transparency

421. In accordance with Annex IV, part 4, point 4 of the Accession Treaty concerning existing state aid in the agricultural sector, the new Member States could communicate to the Commission all schemes and individual aid granted before accession and still applicable after accession in order to have them considered by the Commission as "existing" aid within the meaning of Article 88(1) EC. Until the end of the third year from the date of accession the new Member States must, where necessary, amend these measures in order to comply with the guidelines applied by the Commission. After that date, any aid found to be incompatible with those guidelines will be considered new aid.

422. The Accession Treaty requires the Commission to publish a list of aid measures it has approved as existing aid. On 17 June, the Commission published a list of existing aid measures in the *Official Journal*[179], and the full text of all existing state aid measures notified by the ten new Member States has also been put on the Competition DG's website. A total of 451 measures have thus been made accessible. This is a big step towards creating more transparency in the field of state aid. Since these existing state aid measures are not subject to a full assessment by the Commission, it would otherwise be difficult for the public to know the substance of the state aid measures that are in place in the new Member States. This transparency notably improves legal certainty for farmers in the new Member States as they (and their representatives) can now easily check whether state aid they receive is covered by an existing aid scheme.

423. The number of measures submitted per new Member State is as follows: Czech Republic (63), Lithuania (30), Latvia (33), Slovakia (32), Estonia (23), Malta (19), Hungary (108), Cyprus (70), Poland (51) and Slovenia (22). The Commission has

[179] OJ C 147, 17.6.2005.

published the full texts of these existing measures on the Competition DG's website[180].

3. Coal

424. The enlargement of the EU has increased the number of coal-producing countries from three (Germany, United Kingdom, Spain) to seven, with the addition of Poland, the Czech Republic, Slovakia and Hungary. Despite the recent dramatic increase in the spot market price for coal, the German, Spanish and Hungarian coal industries remain uncompetitive without sizeable state subsidies for current coal production. The situation is better in the United Kingdom, Poland, the Czech Republic and Slovakia, where state subsidies only cover inherited liabilities and costs for initial investment.

425. In June, the Commission approved the long-term restructuring plans for the coal sectors in Germany, Poland and Hungary. These plans had been notified in 2004 and cover the years 2004 to 2010. The Commission, after opening the formal procedure, in December approved the restructuring plan for the Spanish coal industry for the years 2003 to 2005. In 2005 Slovakia submitted its plan for initial investments for the years 2005 to 2010.

426. In 2005, the Commission also adopted a number of individual state aid decisions. It took four decisions authorising state aid for inherited liabilities to the Slovak mine HBP, it authorized investment aid for the Czech mine Lignin Hodin, it authorized state aid for inherited liabilities to various Czech mines, and it authorized the annual state aid for the German coal industry for the year 2005.

4. Transport

427. One of the main objectives of the common transport policy is the promotion of environmentally friendly modes of transport in order to achieve a reduction of the negative effects of transport.

428. In this sense, the revitalisation of the railway sector is considered a key element in the EU's common transport policy. Rail transport has to be made competitive enough to remain a significant player in the transport system in an enlarged EU. By January 2007, the entire EU freight network, both internationally and nationally, will have been opened up completely to competition. The arrival of new railway companies should make the sector more competitive and encourage the national companies to restructure.

429. In this context, specific Guidelines for the railway sector will be issued in 2006. The main objective of these Guidelines is to establish a common approach to public contributions to the railway sector. It is necessary from both a legal and a political point of view that national authorities, companies and individuals are made aware, in a clear and transparent way, of the rules applicable to the railway sector in this new and more competitive environment. This initiative will significantly increase transparency and legal certainty.

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180 http://europa.eu.int/comm/agriculture/stateaid/newms/index_en.htm

430. Further, as regards legislation, following the consultation of Member States in April, the Commission published in June a draft proposal amending the *de minimis* Regulation by including in its scope the transport sector (except for aid given for the purchase of vehicles by road transport companies) and excluding the coal industry. Observations from all interested parties were received by the Commission as of July. Finally, following the publication of the Green Paper on energy efficiency and the adoption of a proposal for a Directive on the promotion of green cars in public procurement, state aid for improving the energy performance of the different modes of transport plays an increasingly important role. The Commission has approved aid schemes with this purpose for Germany and the Czech Republic. During the ongoing revision of the environmental guidelines, this aspect will play an important role.

431. Concerning the air sector, on 6 September the Commission adopted a Communication on guidelines on financing of airports and start-up aid to airlines departing from regional airports[181]. Following a wide-ranging public consultation, the Commission has adopted new rules which will encourage the development of regional airports. These rules lay down the conditions under which start-up aid can be granted to airlines to operate new routes from regional airports. New regional air services will encourage mobility in the EU and regional development. The clear rules adopted guarantee equal treatment for public and private airports and ensure that airlines receiving aid are not unduly favoured. These Guidelines also give airports and Member States guidance on the public financing of airports establishing a firm legal framework for agreements between airports and airlines. The new Guidelines will increase transparency and prevent any discrimination in the agreements concluded by regional airports and airlines on start-up aid.

5. Transparency

432. The Commission continues to produce two editions of the state aid scoreboard each year. The autumn 2005 update[182] looked at the extent to which Member States have responded to the Lisbon targets of less and better-targeted aid, providing an overview of the amount and type of (potentially) distortive state aid awarded by the Member States in 2004 and then examining the underlying trends. For the first time, comprehensive data on all EU-25 Member States were presented. This update also included a special focus on state aid for the environment and energy saving. The spring 2005 update[183] included a focus on how the Commission has dealt with a series of cases on state aid awarded to public service broadcasters and an extensive section on the recovery of unlawful state aid. An online Scoreboard[184] contains electronic versions of this and previous Scoreboards, as well as a set of key indicators and a wide array of statistical tables.

433. Following an extensive review, a major revamp of the Commission's state aid Register[185] is planned and should be fully operational by mid-2006. The Register provides detailed information on all state aid cases which have been the subject of a

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

182 COM(2005) 624 final, 9.12.2005, State Aid Scoreboard, autumn 2005 update.

183 COM(2005) 147 final, 20.4.2005, State Aid Scoreboard, spring 2005 update.

184 http://europa.eu.int/comm/competition/state_aid/scoreboard/

final Commission decision since 1 January 2000. It is updated daily and thus ensures that the public has timely access to the most recent state aid decisions.

6. Enlargement

6.1. Existing aid in the new Member States

434. The 2003 Accession Treaty provided that the following aid measures were to be regarded as existing aid within the meaning of Article 88(1) EC from the date of accession:

- aid measures put into effect before 10 December 1994;
- aid measures listed in an appendix to the Accession Treaty (the "Treaty" list);
- aid measures which were put into effect before and were applicable after accession, and which, prior to the date of accession, were assessed by the state aid authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise any objection on the ground of serious doubts as to the compatibility of the measure with the common market (the "interim procedure").

435. All measures which constituted state aid and did not fulfil the conditions set out above were considered new aid upon accession for the purposes of applying Article 88(3) EC.

436. Under the interim procedure, the ten new Member States had the possibility of submitting measures between the beginning of 2003 and the date of accession. By the end of 2005, the Commission had finalised its preliminary assessment of all measures submitted, thereby bringing to an end the interim procedure for the ten new Member States. Overall, 559 measures were submitted. The Commission took a preliminary decision on 344 measures (62%) and the remaining 215 measures (38%) were either withdrawn by the new Member States, considered as not applicable after, or not having entered into effect before, accession, or were subject to different procedures such as those applicable to the coal sector. Of the 344 measures for which there was a preliminary decision, 335 (97%) were accepted as existing aid. The Commission decided to open the formal investigation procedure in respect of the remaining nine measures (3%).

6.2. Accession of Bulgaria and Romania

437. According to the Commission's comprehensive monitoring report on the state of preparedness for EU membership published in October, both Bulgaria and Romania have continued to make progress in adopting and implementing EU legislation and have reached a considerable degree of alignment. Romania and Bulgaria were called on to make increased efforts in the area of competition policy as regards in particular the enforcement of state aid rules. The Commission will continue to monitor progress intensively up to accession and intends to present a monitoring report to the Council

[185] http://europa.eu.int/comm/competition/state_aid/register/

and Parliament in April/May 2006. At that moment, the Commission may recommend that the Council postpone the accession of Bulgaria or Romania until 1 January 2008 if there is a serious risk of either of these two countries being manifestly unprepared to meet the requirements of membership by January 2007 in a number of important areas.

438. The 2005 Accession Treaty of Bulgaria and Romania to the EU lays down conditions, similar to those applied to the accession of the ten new Member States in 2004, for state aid measures to be regarded as existing aid from the date of accession. No existing aid measures have been attached to the Accession Treaty of Romania, nor will the interim procedure be applied until the Commission concludes that Romania's state aid enforcement record has reached a satisfactory level. In the case of Bulgaria, three measures have been annexed to the Accession Treaty that will thus be regarded as existing aid upon accession. In October, Bulgaria submitted its first request to the Commission under the interim procedure pursuant to Annex V § 2.1(c) of the Accession Treaty. By the end of 2005, no decision had been taken as to its possible classification as existing aid.

B – Cases

1. Rescue and restructuring aid

1.1. Rescue aid

439. The Commission approved rescue aid in favour of five companies in 2005[186]. The rescue aid consisted of loans or loan guarantees. SVZ[187] (EUR 21 million), MG Rover[188] (GBP 6.5 million) and CMS[189] (EUR 2.5 million) were in insolvency proceedings when they notified rescue aid to the Commission. The causes of the financial difficulties varied. SVZ, a German company active in the treatment of hazardous waste, incurred unexpected additional costs while setting up a pilot project for a more effective treatment of waste which led to its insolvency. For MG Rover, a British car manufacturer with 6 100 employees, the difficulties stemmed not only from adverse market conditions but also from the inability to present new attractive and technologically up-to-date models on the market. For CMS, an Italian company manufacturing computers, the major problem appeared to be competition from low-wage countries. HCM[190] (EUR 2.95 million), a Polish producer of zinc, faced an unexpected rise in the price of coke and significant currency losses due to an appreciation of the Polish zloty against the US dollar. Finally, EUR 2 million was awarded to Ernault[191], a French manufacturer of machine tools.

440. For MG Rover, the aid was meant to give the appointed administrators up to one week to look at any remaining prospect of selling the assets in administration as a going concern after the negotiations about a possible joint venture with Shanghai

186 Excluding the transport sector.
187 Case NN 44/2004 *Rescue aid to SVZ Schwarze Pumpe GmbH*.
188 Case NN 42/2005 *Rescue aid in favour of MG Rover* (OJ C 187, 30.7.2005).
189 Case N 91/2005 *Rescue aid in favour of Computer Manufacturing Services* (OJ C 187, 30.7.2005).
190 Case N 275/2005 *Rescue aid to Cynku Miasteczko Śląskie*.
191 Case N 575/2004 *Rescue aid for Ernault*.

Automotive Industry Corp broke down. When this appeared impossible, the administrators did not request further aid. The UK authorities instead made a significant effort to help the region respond to MG Rover's collapse (see below under Restructuring aid).

441. In four of the cases, in compliance with the Community Guidelines on state aid for rescuing and restructuring firms in difficulty[192], the Member State concerned undertook to provide the Commission with a credible restructuring plan or a liquidation plan within six months. The UK, however, undertook to present the Commission with proof that the aid had been repaid, or had been claimed back by enforcement procedures, within the same period of six months. The Commission accepted this, as such an undertaking goes further than the requirement under the Guidelines. France has already notified restructuring aid in favour of Ernault, which the Commission is currently investigating.

1.2. Restructuring aid

Monitoring Alstom (France)[193]

442. On 7 July 2004, the Commission authorised France to grant restructuring aid to Alstom. This authorisation was subject to compliance with a series of conditions, which stretch until July 2008. During 2005, the Commission carefully monitored the correct and timely implementation of these conditions. Firstly, it was verified that the company was implementing the operational restructuring plan, which is indispensable to making it competitive and viable in the long term. Secondly, the Commission followed up the implementation of the divestitures required by the decision. In monitoring certain divestitures, the Commission was assisted by a trustee who performed a detailed review of the sale processes and reported regularly to the Commission. Thirdly, the Commission monitored implementation of the structural measures aimed at rendering the French rolling-stock market more competitive. Finally, verification of compliance with the other conditions – absence of predatory pricing, prohibition of additional aid, prohibition of large acquisitions in the transport sector, conclusion of industrial partnerships – was carried out.

Frucona (Slovakia)[194]

443. On 5 July, the Commission decided to initiate a formal investigation procedure with respect to the write-off by the Slovak tax authorities of a tax debt owed by Frucona Kosice, a.s. under a so-called arrangement with creditors. The latter is a form of court-supervised collective insolvency procedure which results in an agreement between the indebted company and its creditors and on the basis of which the creditors are partially satisfied by the debtor and write off the remainder of their receivables. The Commission raised doubts that the tax office acted in this procedure as a private creditor, whose objective is to obtain the repayment of sums due to it under conditions as advantageous as possible in terms of the degree of satisfaction

192 Community Guidelines on state aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999).

193 Case C 58/2003, conditional decision of 7 July 2004.

194 Case C 25/2005 (ex NN 21/2005, ex CP 193/2004) *Measures in favour of Frucona Kosice* (OJ C 233, 22.9.2005).

and the time frame. In particular, the tax office did not use its prerogative as a separate creditor whose receivables are secured and did not initiate a bankruptcy procedure, which would in all probability have led to a higher return. The Commission concluded that the measure in question constituted state aid, and raised doubts as to its compatibility as rescue or restructuring aid under the 1999 Guidelines, which apply to this case.

AB Vingriai (Lithuania)[195]

444. On 1 June, the Commission authorised Lithuania to grant LTL 7 million in restructuring aid to AB Vingriai, a company producing metal-cutting machine tools. In its decision, which was based on the new Rescue and Restructuring Guidelines, the Commission took account of the fact that the heavy debt burden, the loss of markets and the excessive workforce were all inherited from a period when the Lithuanian economy was still in transition. It also noted that the company had severely (minus 90%) but correctly adjusted the workforce to the lower level of demand and the lower need resulting from the implementation of efficient production processes. Finally, the Commission verified the own contribution of the recipient to the restructuring cost and analysed the commercial side of the restructuring plan. The latter involves some risk but nevertheless seems achievable and therefore able to restore viability over the long term.

Chemische Werke Piesteritz GmbH (Germany)[196]

445. On 2 March, the Commission terminated a three-year-long investigation into aid granted to Chemische Werke Piesteritz (CWP), a producer of phosphoric acid and phosphates situated in the *Land* of Saxony-Anhalt, Germany. The Commission concluded that an amount of EUR 6.7 million provided to the company in 1997 and 1998 for its restructuring constituted state aid incompatible with the common market and ordered its recovery. The Commission found that the 1996 restructuring plan for CWP was not sound. The decision followed a judgment of the Court of First Instance of 2001 by which the Court annulled the initial 1997 Commission decision approving the aid.

Euromoteurs[197] *and Ernault*[198] *(France)*

446. On 19 January, the Commission opened a formal investigation into restructuring aid for Euromoteurs, a French manufacturer of engines, and on 6 September it opened a formal investigation into restructuring aid for Ernault, a French manufacturer of machine tools (lathes). Both companies had seen a dramatic decrease in their sales over time, while Euromoteurs was also suffering from overcapacity. The Commission raised doubts as to whether the restructuring plan would restore the companies' viability, whether the aid was limited to the minimum necessary and whether undue distortions of competition were avoided. In the case of Euromoteurs, the Commission also questioned whether the company had received illegal and incompatible aid under

195 Case N 584/2004 *Restructuring aid to AB Vingriai*.
196 Case C 43/2001 *Chemische Werke Piesteritz GmbH* (OJ L 296, 12.11.2005).
197 Case C 1/2005 *Restructuring aid for Euromoteurs* (OJ C 137, 4.6.2005).
198 Case N 250/2005 *Restructuring aid in favour of Ernault* (OJ C 324, 21.12.2005).

the French scheme "*article 44 septies du Code des Impôts*"[199], which had not yet been repaid.

Imprimerie Nationale (France)[200]

447. On 20 July, the Commission approved restructuring aid of EUR 197 million granted to Imprimerie Nationale (IN), a state-owned company operating in the printing industry. While enjoying a legal monopoly for certain official fiduciary documents, IN was also active on various competitive markets including chiefly continuous printing, rotary printing and sheet printing. The company encountered difficulties as a result of the downturn in the printing industry since 2001. In February 2004, the Commission authorised rescue aid for IN under the condition that the French authorities presented a restructuring plan within six months.

448. The aid was authorised in exchange for significant compensatory measures to limit any adverse effects of the aid on IN's competitors. In particular, it was crucial to prevent any risk that the aid might aggravate restrictions of competition resulting from the legal monopoly granted to IN on the fiduciary market. Accordingly, the French authorities proposed appropriate *quid pro quos* including the establishment of an exhaustive list of the products covered by the monopoly and, with a view to ruling out any risk of cross-subsidisation, legal separation of the monopoly from the company's competitive activities by 1 July 2007. Before this separation, an independent expert will examine IN's accounts and cost-allocation arrangements and confirm that no cross-subsidisation is taking place.

449. The restructuring plan presented by the French authorities should enable IN to refocus on its traditional business, namely security printing (for the fiduciary document and continuous printing markets). Moreover, the restructuring plan also provided for withdrawing completely from some substantial business areas such as rotary and sheet printing, mail order catalogues and technical publications. It also involved reorganising and rationalising the company's remaining resources. A redundancy programme will enable the workforce to be cut by two thirds. Profitability should be restored by 2008. Consequently, the Commission considered that the restructuring plan was likely to restore the company's long-term viability. It concluded that the aid was limited to the minimum necessary to restore the financial situation of the company and did not unduly distort competition. As such, the aid was declared fully compatible with the 1999 Guidelines on state aid for rescuing and restructuring firms in difficulty.

British Energy plc (United Kingdom)[201]

450. On 22 September 2004, the Commission authorised the restructuring aid that the UK Government had earmarked for British Energy plc (BE) and imposed three conditions for that authorisation.

451. On 7 March 2003, the UK authorities had notified a restructuring plan in favour of

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199 Case C 57/2002 *Tax aid for takeovers of ailing companies* (OJ L 108, 16.4.2004). The Commission adopted a negative decision with recovery on 16 December 2003.

200 Case N 370/2004 *Restructuring aid for Imprimerie Nationale*.

201 Case C 52/2003 *Aid in favour of British Energy plc* (OJ L 142, 6.6.2005).

BE. The plan aimed at restoring the long-term viability of BE. BE had faced financial difficulties since September 2002, mainly on account of a large drop in the prices for wholesale electricity following the introduction of new electricity trading arrangements in England and Wales.

452. On 23 July 2003, the Commission launched an in-depth probe aimed at assessing whether the plan was compatible with the EU state aid rules. During this inquiry, the Commission received contributions from the United Kingdom and BE, but also from more than twenty interested third parties. Many third parties stressed the importance of the existence of BE as a source of baseload electricity. But a number of competitors expressed their concerns that the company might use the aid for purposes other than meeting its historical nuclear liabilities, such as making new investments in more efficient power plants or aggressively gaining market share by offering abnormally low prices in the most rewarding segments of the market.

453. After having analysed all the information it received, the Commission came to the conclusion that the aid could be found compatible with the EU rules. In particular, the Commission found out that the funding of nuclear liabilities by the UK Government was compatible with the provisions of the 1999 Guidelines on state aid for rescue and restructuring. It also found out that the renegotiation of BE's fuel supply and waste fuel management arrangements with BNFL had been done at market conditions.

454. In order to ensure that the concerns raised by BE's competitors do not materialise, the Commission decided to impose three conditions on the authorisation of the aid. Firstly, British Energy will have to separate legally its nuclear generation, non-nuclear generation and trade businesses. Cross subsidy between the three businesses will be forbidden. All aid will have to be directed to the nuclear generation branch only. Secondly, the company will be forbidden for six years to increase its generation capacity. Electricity generated from renewable sources of energy is, however, excluded from this ban since the increase of the market share of this type of energy is favoured by the EU. Thirdly, it will be forbidden for six years to offer prices below the wholesale market prices to its direct business customers. The three conditions, which largely reinforce each other, make sure that BE does not divert the aid received from the State to purposes other than the funding of its nuclear liabilities.

Biria group (Germany)[202]

455. On 20 October, the Commission initiated a formal investigation into two guarantees granted to companies of the Biria group, a German producer of bicycles, in 2003 and 2004, and into a public participation in another company of the group in 2001. The Commission had doubts that the two guarantees were granted in line with an approved regional aid scheme as claimed by Germany. The Commission considered that the companies were in difficulty at the time of the granting of the guarantees and had doubts that the conditions for restructuring aid were met. As regards the public participation, the Commission – considering the difficult financial situation of the company – doubted that it complied with the private investor principle as claimed by Germany.

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202 Case C 38/2005 *Biria group*.

Konas (Slovakia)[203]

456. On 9 November, the Commission decided to initiate the Article 88(2) procedure with respect to the write-off by the Slovak tax authorities of a tax debt owed by Konas s.r.o. under a so-called arrangement with creditors. The case resembles another case in which the Commission opened a formal investigation, namely that of Frucona, Slovakia. The Commission first concluded that the tax write-off constituted state aid, pursuant to the private creditor principle. Various factors led the Commission to conclude that the tax office did not act as a diligent private creditor (securities available but not used, non-use of prerogatives of a separate creditor, continuous absence of enforcement of tax obligations due). The Commission, applying the 1999 Guidelines on state aid for rescuing and restructuring firms in difficulty, then raised doubts whether the aid was compatible as restructuring aid. In particular, the Commission was concerned whether the recipient presented a genuine restructuring plan. The Commission noted in this context that, although some conditions for authorising restructuring aid might be less stringent in the case of an SME in an assisted area, Member States are none the less not exempted from the obligation to make restructuring aid conditional upon implementation of a restructuring plan, which would be duly monitored.

Aid package in favour of MG Rover (United Kingdom)[204]

457. Following the collapse of MG Rover (see also Section 1.1. above on rescue aid) and the crisis in its supply chain, the UK authorities proposed actions in order to refocus the Structural Funds programme on priorities with a direct relationship to job creation, safeguarding of jobs and increased GDP through restructuring to high-added-value manufacturing. The overall budget of the UK proposals amounted to some GBP 87 million. Among the measures proposed and put in place were consultancy support to help SMEs in the Rover supply chain; support for the creation of a short-term loan fund and a loan guarantee fund; the creation of a wage subsidy scheme, which would be used as an incentive for employers who currently have unfilled vacancies for skilled workers; and the creation of a European Social Fund loan fund for the purpose of helping redundant persons over the age of 50.

458. From a state aid point of view, all the above measures were operated under approved aid schemes, the block exemption Regulations for SME, training and employment aid, and the *de minimis* rule. Accordingly, since there was no need for prior notification to the Commission, the UK authorities were able to put the support package in place quickly in order to tackle the crisis.

Huta Stalowa Wola SA (Poland)[205]

459. On 23 November, the Commission opened a formal investigation into restructuring aid for Huta Stalowa Wola SA, a Polish construction machinery company. According to the Polish authorities the aid was granted before accession and cannot be considered still applicable after accession. Poland notified the case for reasons of legal certainty. The Commission's assessment led to the conclusion that not all measures

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203 C 42/2005 (ex NN 66/2005, ex N 195/2005) *Restructuring aid in favour of Konas, Ltd.*

204 Case PN 26/2005 *Amendment of the regional aid map – MG Rover*.

205 Case C 44/2005 *Restructuring aid to Huta Stalowa Wola SA*.

were granted before accession. Some of the aid measures (write-off of public liabilities) were granted after accession without the Commission's approval.

Chemobudowa Kraków (Poland)[206]

460. On 21 December, the Commission opened a formal investigation into restructuring aid for Chemobudowa Kraków, a Polish building company. The notified aid measures are a loan of about EUR 2.5 million and a deferral of payment of a public liability of about EUR 170 000. Moreover, Poland informed the Commission about 18 state aid measures granted in the period August 2001 – August 2004. Poland claims that part of them is *de minimis* and that the rest fulfil the private creditor principle, i.e. do not constitute aid. On the basis of the information provided, the Commission's departments have strong doubts about the future viability of the company and its own contribution to the restructuring.

2. Shipbuilding

Innovation aid

461. In March, the Commission approved schemes for innovation aid to shipbuilding for Germany[207], France[208] and Spain[209], the first of their kind after the entry into force in January 2004 of the new Framework on state aid to shipbuilding ("the Shipbuilding Framework")[210]. All the above schemes follow a similar structure with regard to the eligibility of the recipients and projects, eligible costs and procedural requirements (e.g. the innovative project is assessed by an independent expert competent in the area of shipbuilding). The detailed conditions of application of the Shipbuilding Framework's provisions on innovation aid result from close cooperation between the Commission and European industry.

462. Innovation aid may be granted to companies active in the building, repair and conversion of ships in support of the industrial application of products and processes the implementation of which carries a risk of technological or industrial failure, and which are technologically new or represent a substantial improvement over the state of the art in the shipbuilding industry within the EU.

463. The German scheme provides a budget of nearly EUR 27 million in total for the period 2005 to 2008. The French scheme has an annual budget of EUR 25 million. Both will expire at the latest six years after their approval by the Commission. The Spanish scheme will expire on 31 December 2006. In addition to innovation aid, the latter also allows for aid to shipbuilding companies for regional investment, and for research and development. For all types of aid, the scheme's total budget amounts to approximately EUR 20 million annually.

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206 Case N 233/2005 *Restructuring aid to Chemobudowa Kraków.*

207 Case N 452/2004 *Innovation aid for shipbuilding* (OJ C 235, 23.9.2005).

208 Case N 429/2004 *Innovation aid for shipbuilding* (OJ C 256, 15.10.2005).

209 Case N 423/2004 *Innovation aid for shipbuilding* (OJ C 250, 8.10.2005).

210 OJ C 317, 30.12.2003.

Temporary defensive mechanism

464. As part of a response to unfair Korean shipbuilding practices, in 2002 the Council adopted a temporary defensive mechanism (TDM) for shipbuilding as an exceptional and temporary measure[211]. The mechanism, which expired initially on 31 March 2004, was extended by the Council until 31 March 2005.

465. On its basis, in January and February the Commission approved national aid schemes in Germany[212], Finland[213] and Poland[214]. Under these schemes, final contracts for the production of container ships, product tankers, chemical tankers and liquefied natural gas carriers concluded until 31 March were eligible for direct support of up to 6% of the contract value before aid, if it was concretely demonstrated that there had been competition for that contract from a shipyard in South Korea offering a lower price. These schemes, as well as the other TDM schemes approved by the Commission in the past, expired on 31 March.

Three-year delivery limit

466. In 2005, the Commission approved two requests for extension of the three-year delivery limit imposed as a condition for receiving contract-related operating aid for ships pursuant to Council Regulation (EC) No 1540/1998 establishing new rules on aid to shipbuilding[215]. In a Greek case[216], it was demonstrated that the delay in the working programme of Neorion Shipyards SA was substantial and defensible and was caused by exceptional and unforeseen circumstances external to the company (the 11 September 2001 terrorist attacks in the United States and the wars in Afghanistan and Iraq resulting in a decrease in bookings for luxury passenger cruises). The Commission was furthermore satisfied that the extension of the deadline was of a reasonable duration. In a Portuguese case[217], the extension in favour of Estaleiros Navais de Viana do Castelo SA was approved on the basis of the technical complexity of the vessel (e.g. delays due to the need to implement new standards for steel processing according to the requirements of the shipowner).

Development aid

467. In accordance with the Shipbuilding Framework, on 2 February the Commission authorised development aid that the Netherlands had granted to BV Scheepswerf Damen Gorinchem for the construction of two tugboats for Ghana[218] and three search and rescue vessels for Vietnam[219]. Furthermore, on 16 March and 9 November two development projects were authorised for Spain: the construction at Astilleros de Huelva SA of a tugboat for Bangladesh[220] and the construction at Astilleros

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211 Council Regulation (EC) No 1177/2002 of 27 June 2002 (OJ L 172, 2.7.2002). Amended by Council Regulation (EC) No 502/2004 of 11 March 2004 (OJ L 81, 19.3.2004).

212 Case N 23/2005 *Temporary defensive measures for shipbuilding* (OJ C 131, 28.5.2005).

213 Case N 39/2005 *Temporary defensive mechanism for shipbuilding* (OJ C 131, 28.5.2005).

214 Case N 81/2005 *Temporary defensive measures for shipbuilding* (OJ C 162, 2.7.2005).

215 OJ L 202, 18.7.1998.

216 Case N 596/2003 *Neorion shipyards* (OJ C 230, 20.9.2005).

217 Case C 33/2004 (ex N 63/2004) *Extension of three-year delivery limit for two ships*.

218 Case N 450/2004 *Development aid to Ghana-Tugboats* (OJ C 100, 26.4.2005).

219 Case N 185/2005 *Aid to Vietnam shipbuilding*.

Zamacona SA of a towboat for Mauritania[221].

468. Among other conditions, aid granted as development assistance to a developing country must have a clear development content in order to be compatible with the internal market. In all the cases mentioned above, the Commission was satisfied that the vessels supplied were equipped with state-of-the-art technology making them suitable for operations such as the berthing of large-tonnage vessels, assistance to ships in difficulty, fire fighting or the prevention of natural disasters.

Ship financing guarantee schemes

469. The Commission confirmed its practice concerning the treatment of ship financing guarantee schemes. In April it prohibited an Italian scheme[222] and in July it allowed a scheme in the Netherlands[223] as being free of aid. The prohibition of the Italian aid scheme reiterated the Commission's strict application of the competition rules in the shipbuilding industry. The operation of this guarantee scheme would have had a significant negative effect on competing European yards, because it did not impose an adequate premium and did not involve any proper risk differentiation.

470. The two decisions were based on the Commission's 2003 approval of a German scheme for ship financing guarantees[224]. The latter duly applies the Commission Notice on the application of Articles 87 and 88 EC to state aid in the form of guarantees[225] in that it charges adequate premiums and differentiates the premium level by risk.

Polish shipyards

471. On 1 June, the Commission decided to initiate the procedure under Article 88(2) with respect to restructuring aid to the major Polish shipyards in Gdynia, Gdansk[226] and Szczecin[227]. All three shipyards commenced their restructuring in 2002 and received support from various Polish authorities at both central and local level. As the restructuring process was partially implemented before the accession of Poland to the EU on 1 May 2004, the Commission first had to determine its jurisdiction with regard to these cases. The Commission has no competence under the EC or the Accession Treaty to investigate or order recovery of any aid granted before accession and not applicable after accession (so-called "past aid").

472. The measures with regard to which the Commission is not competent to act constitute past aid, which cannot be recovered from the recipient by a Commission decision. It will nevertheless be taken into account in the final compatibility assessment, in particular in the context of the criterion that the aid is limited to the minimum

220 Case N 517/2004 *Shipbuilding – Tugboat Bangladesh* (OJ C 162, 2.7.2005).
221 Case N 436/2005 *Aid to Mauritania – Shipbuilding decision*.
222 Case C 28/2003 (ex N 371/2001) *Guarantee scheme for shipbuilding*.
223 Case N 253/2005 *Guarantee scheme for shipbuilding* (OJ C 228, 17.9.2005).
224 Case N 512/2003 *German ship financing guarantee schemes* (OJ C 62, 11.3.2004).
225 OJ C 71, 11.3.2000.
226 Joined Cases C 17/2005 (ex N 194/2005, ex PL 34/2004) and C 18/2005 (ex N 438/2004) *Restructuring aid to Stocznia Gdynia* (OJ C 220, 8.9.2005).
227 Case C 19/2005 (ex N 203/2005, ex PL 31/2004) *Restructuring aid to Stocznia Szczecinska* (OJ C 222, 9.9.2005).

necessary for restoration of the company's viability. The other measures constitute new aid.

473. The Commission raised doubts as to the compatibility of this aid with the 1999 Guidelines on state aid for rescuing and restructuring firms in difficulty, which apply to these cases. Specifically, the Commission doubted whether the restructuring undertaken was capable of restoring the long-term viability of the yards, as it consisted mainly of debt restructuring and liquidity support. Furthermore, the Commission doubted whether adequate capacity reductions were being carried out to offset the distortion of competition and whether the contribution of the recipients themselves or of external private sources to the restructuring activities was sufficient to indicate market confidence in the ongoing restructuring.

3. Steel

474. The Commission took several decisions concerning the restructuring of the steel industry in the new Member States. While restructuring aid to the steel sector is generally prohibited under EU rules, two Protocols to the Accession Treaty (on the restructuring of the Czech (No 2) and Polish (No 8) steel industry) grant a derogation from this rule. The Protocols allow the granting of restructuring state aid on the basis of a national restructuring plan which must restore steel producers' viability by 2006. The plan's implementation is being monitored by the Commission[228].

Huta Czestochowa (Poland)

475. In its decision of 5 July[229] the Commission found that the restructuring of Huta Czestochowa, Poland's second-biggest steel producer, did not involve state aid, thereby clearing the way for the sale of the company. The sale is part of the restructuring and serves to pay the company's creditors. The Commission opened an investigation because the company's restructuring required a significant debt write-off, *inter alia* by public creditors, although the company was not eligible for state aid under the above-mentioned steel protocol. On the basis of a detailed assessment of all claims and waivers, the Commission concluded that the write-off of public claims was compliant with normal market behaviour and therefore did not involve state aid. However, it also decided that some EUR 4 million of restructuring aid previously given to the company was illegal and had to be recovered.

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228 More detail is provided in COM(2005) 359 final of 3.8.2005. Second monitoring report on steel restructuring in the Czech Republic and Poland. See also http://europa.eu.int/comm/enterprise/steel/index.htm

229 Case C 20/2004 *Huta Czestochowa*.

476. In this case, the Commission further honed its practice on the application of the private creditor test. The company had planned comprehensive restructuring in 2003, including a partial write-off of public and commercial debt claims. However, according to settled case law, where a debtor in financial difficulties is proposing to reschedule debt in order to avoid liquidation, each public creditor must at least carefully balance the advantage inherent in obtaining the offered sum according to the restructuring plan and the sum that could be recovered following possible liquidation of the firm[230]. If liquidation brings higher proceeds than restructuring, the waiver of public claims will be state aid. The decision established that such evaluation may consider a realistic bankruptcy scenario taking into account that bankruptcy proceedings are more time-consuming and costly than restructuring. On this basis and following a detailed assessment of all claims and waivers, the Commission concluded that the write-off of public claims was compliant with normal market behaviour and therefore did not involve state aid.

Two decisions concerning amendments to national restructuring plans

477. The Commission took two decisions accepting a modification of the ongoing steel restructuring in the new Member States, Poland and the Czech Republic. The first concerned Czech steel producer Válcovny Plechu Frýdek-Místek[231] and the second Mittal Steel Poland[232], the biggest steel producer in Poland.

4. Public broadcasting, broadband, film industry

Broadband

478. Building on first decisions regarding public support for broadband, which were adopted in 2004, the Commission approved a series of projects involving state funding for broadband infrastructure and services. The projects in the United Kingdom[233], Spain[234] and Austria[235] aim at providing broadband services in rural and remote areas where these are not available. State support will help to bridge the digital divide between areas which have access to fast Internet connections and those which do not. Accordingly, it is in line with EU policies[236]. In these cases the Commission considered that, while state aid was present, the authorities had proved the necessity of the intervention, which was implemented in a proportionate manner, including a multitude of safeguards. The Commission thus came to the conclusion that the state aid did not distort competition to an extent contrary to the common interest and was therefore compatible in accordance with Article 87(3)(c). It is worth noting that the use of open and non-discriminatory tender procedures has played an important role in excluding overcompensation and reaching a proportionate result in these cases.

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230 Case T-152/99 *Hamsa* [2002] ECR II-3049, paragraph 168.

231 Case N 600/2004 *Approval of capacity reductions for VPFM* (OJ C 176, 16.7.2005).

232 Case N 186/2005 *Mittal Steel Poland – Change of IBP*.

233 Case N 57/2005 *Broadband support for Wales*, Commission decision of 1.6.2005; Case N 267/2005 *Rural Broadband Access Project*, Commission decision of 5.10.2005.

234 Case N 583/2004 *Banda ancha en zonas rurales y aisladas*, Commission decision of 6.4.2005.

235 Case N 263/2005 *Breitband Kärnten*, Commission decision of 20.10.2005.

236 Such as the eEurope 2005 Action Plan and the i2010 initiative.

479. In a French case concerning the funding of an open broadband infrastructure in Limousin[237], the regional authorities supported the establishment of an open infrastructure and wholesale service in a geographic area where coverage and service offerings were deemed unsatisfactory. The Commission accepted that the measure fulfils the definition of a service of general economic interest and since the criteria established by the Court of Justice in its *Altmark* judgment[238] were met, the state funding involved did not constitute state aid. An appeal against this decision has been brought by UPC France in the Court of First Instance[239].

480. On 20 October, the Commission opened a formal investigation to assess whether the public funding for a fibre access network in the Dutch town of Appingedam complied with the EU state aid rules[240]. This was the first time the Commission opened a formal inquiry concerning public support for broadband development following doubts regarding the compatibility of the measure. The outcome of the case is likely to affect similar projects all over Europe.

Digital terrestrial television (DVB-T) (Austria and Germany)

481. The transition from analogue to digital broadcasting ("digital switchover") has great advantages in terms of more efficient spectrum usage and increased transmission possibilities. These will lead to new and better-quality services and to wider consumer choice and will thus contribute to the Lisbon objectives. A number of Member States have initiated support programmes for the rollout of digital broadcasting.

482. On 16 March, the Commission issued its first decision regarding state support for digital broadcasting, concerning the Austrian Digitalisierungsfonds[241]. The Commission decided not to raise objections after the measure had been substantially modified by the Austrian authorities during the notification process. The modifications ensured that the measure would comply with the principle of technology neutrality, i.e. it would not unnecessarily and unjustifiably favour digital terrestrial (DVB-T) transmission over competing TV platforms. The measure consisted of different sub-measures: financial support for pilot projects and research activities regarding digital TV transmission, financial incentives for consumers to purchase digital receivers, grants to companies to develop innovative digital services and subsidies to broadcasters to compensate for additional transmission costs when broadcasting analogue and digital TV in parallel ("simulcast phase").

483. On 9 November, the Commission issued a final negative decision concerning subsidies in favour of DVB-T in the German *Land* of Berlin-Brandenburg[242]. It decided that subsidies worth some EUR 4 million granted to commercial broadcasters for use of the DVB-T network were incompatible with the common market and it ordered recovery of the part of the aid which had already been paid to broadcasters (about half the total).

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237 Case N 382/2004, Commission decision of 3.5.2005.

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

239 Case T-367/05 *UPC* v *Commission*.

240 Case C 35/2005 *Broadband development Appingedam*, Commission decision of 20.10.2005.

241 Case N 622/2003 *Digitalisierungsfonds*, Commission decision of 16.3.2005.

242 Case C 25/2004 *Digital terrestrial TV (DVB-T) in Berlin-Brandenburg*, Commission decision of 9.11.2005.

484. Without notifying the Commission, the media authority of Berlin-Brandenburg (Mabb) gave the subsidy to commercial broadcasters, for example RTL and ProSiebenSat.1, to meet part of their transmission costs via the DVB-T network launched in November 2002. In return, the broadcasters undertook to use the DVB-T network licensed to the company T-Systems for at least five years. Following complaints by cable operators, the Commission had opened a formal inquiry in July 2004. As a result of the inquiry, the Commission concluded that Mabb's subsidy violated the EC Treaty state aid rules. The aid was not based on any specific switchover costs and was decided after the switchover had been agreed. Different amounts of funding were given without objective justification to broadcasters, who already benefited from receiving free digital licences which allowed greater transmission capacity at lower cost per channel. The subsidies thus indirectly favoured the DVB-T network over competing TV platforms, such as cable and satellite, disregarding the principle of technological neutrality.

485. In the decision, the Commission recognised that the digital switchover might be delayed if left entirely to market forces and that public intervention could be beneficial. The onus is on Member States to demonstrate that aid is the most appropriate instrument, is limited to the minimum necessary and does not unduly distort competition. In the case of Berlin-Brandenburg none of these conditions were met. The Commission recognised the existence of certain market failures, but found that the aid was neither the most appropriate instrument nor necessary to solve these problems. Appeals against the decision were brought by Germany, FAB Fernsehen aus Berlin and Medienanstalt Berlin-Brandenburg.

Digital decoders (Italy)

486. On 21 December, the Commission opened a formal investigation into subsidies for digital decoders granted by Italy in 2004 and 2005. The measures provide over EUR 200 million in public grants to buyers of decoders which receive programmes in digital terrestrial technology.

487. Whereas the Commission encourages the transition to digital TV and values interoperability, state support must avoid unnecessary distortions of competition between terrestrial, cable and satellite platforms. In this case, the subsidies were not technology-neutral since they were not available for decoders using satellite broadcasting. As a result competition might have been distorted, particularly in the pay-TV market where entry by terrestrial operators had been facilitated.

488. Besides the issues of digital switchover and technological neutrality, the decision also discusses the aspects of applicability of the Article 87(2)(a) derogation to measures that do not have a social character and of qualification as state aid of advantages granted indirectly to undertakings.

Licence fee schemes

489. The public broadcasters in France, Italy and Spain are granted the receipts from licence fees in order to finance their public service missions. These licence fee mechanisms constitute existing aid because they were established before the EEC Treaty entered into force in the countries concerned and their essential features have

remained unaltered since then.

490. In the course of an existing aid procedure aimed at ensuring the ongoing compatibility of the licence fee schemes in force in these countries, the Commission formally recommended appropriate measures[243] which were accepted by the three countries. These recommendations aimed at securing compliance with the following principles: public and private broadcasters must compete on equal terms in commercial markets such as TV advertising; and the financing of public broadcasters should not exceed the strict minimum necessary to ensure the proper execution of the public service mission, should not unduly benefit commercial activities (cross-subsidies) and should be transparent. In addition, in the Spanish case, the national authorities undertook to remove for the future the unlimited state guarantee benefiting the public service broadcaster. In view of the three Member States' commitments, the Commission closed the three cases.

Request for information on existing aid

491. On 3 March, the Commission requested clarifications[244] from Germany, Ireland and the Netherlands about the role and financing of public service broadcasters. Having examined allegations from several complainants, the Commission's preliminary view was that the current financing system in those Member States is no longer in line with the EU rules requiring Member States not to grant subsidies liable to distort competition (Article 87 EC).

492. These investigations reflect the Commission's general approach to ensuring the transparency necessary to assess the proportionality of state funding and to prevent cross-subsidies for activities not related to public service functions as laid down in its 2001 Communication on applying state aid rules to public service broadcasting[245]. The investigations do not question the prerogative of the Member States to organise and finance public service broadcasting, as recognised in the Amsterdam Treaty Protocol on public service broadcasting.

493. In line with the approach taken in past investigations into similar financing schemes in France, Italy, Spain and Portugal, the Commission has requested Germany, Ireland and the Netherlands to implement the very same principles: clear definition of the public service remit, separation of accounts distinguishing between public service and other activities and adequate mechanisms to prevent overcompensation of public service activities. Member States also need to ensure that commercial activities by public broadcasters are in line with market principles. Finally, there should be an independent (national) authority checking compliance with these rules.

494. The complaints in Germany and the Netherlands have also raised new issues, such as the financing of public broadcasters' online activities. The Commission does not question that public broadcasters may offer online services as part of their public

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243 Case E 10/2005 (France) *Licence fee*, Commission decision of 20.4.2005. Case E 9/2005 (Italy) *Capital and other measures – RAI*, Commission decision of 20.4.2005. Case E 8/2005 (Spain) *Spanish national public broadcaster RTVE*, Commission decision of 20.4.2005.

244 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

245 Communication from the Commission on the application of state aid rules to public service broadcasting (OJ C 320, 15.11.2001).

service mission. However, the scope of such online activities and whether they are financed by public funds should be determined not by the public broadcasters themselves but by the Member States concerned, to ensure that only those services are included which serve the same democratic, social and cultural needs of society as traditional broadcasting.

495. The three Member States have submitted their first comments on these preliminary views. The Commission has started to discuss with the Member States concerned which changes in the national broadcasting systems are necessary to clarify the role and the financing of the public broadcasters. If the Member States adopt these measures, the Commission will formally close the cases.

Funding of a new French international news channel[246]

496. On 7 June, the Commission approved, on the basis of Article 86(2), financing for the new international news channel initiated by the French authorities. The French authorities tried to demonstrate, through a detailed study, that the project would qualify under the criteria set out in the ECJ's *Altmark* judgment and that it therefore did not involve any state aid. The Commission concluded that the results of the study were not convincing enough. In particular, the Commission took into account that there was no adequate benchmark for assessing the envisaged costs of the new channels. It was therefore not possible to conclude that the budget forecast reflected the costs of a well-run and adequately equipped company.

497. The Commission therefore concluded that the project's funding involved state aid. However, the Commission found that the project offered adequate guarantees that the principles of Article 86(2) would be complied with. In this respect, the Commission had to take into account the specificities of the project, namely that the parent companies of the new channel would be the French public broadcaster, France Télévision, and the main French commercial broadcaster, TF1. In particular, the project included detailed rules in case the channel made a profit, with a view to preventing the parent companies from unduly obtaining a share of that profit. The Commission was also satisfied with the project's safeguards against the risk that the channel might not behave according to normal market conditions in the commercial area (e.g. advertising) and towards its shareholders.

5. Banking

Hessicher Investitionsfonds (Germany)[247]

498. On 6 September, the Commission authorised the transfer of the Hessian Investment Fund (HIF), a special fund of the *Land* of Hessen, as unlimited silent partnership participation to Landesbank Hessen-Thüringen (Helaba), a German regional public bank. The transfer did not result in an injection of liquidity or inflow of revenue for Helaba. Nevertheless, the transfer of the fund would strengthen Helaba's own-capital basis. The Commission concluded that the remuneration agreed by the *Land* of Hessen in return for the assets corresponded to the normal return on investment that a

246 Case N 54/2005 *International news channel CFII*, Commission decision of 7.6.2005.

247 Case N 248/2004 *Hessicher Investitionsfonds*, Commission decision of 6.9.2005.

private investor would expect. The transaction did not therefore constitute state aid within the meaning of Article 87(1).

Capital increase in two German banks

499. On 6 September, the Commission authorised capital increases worth a total of some EUR 1.2 billion by their public shareholders for the German Landesbanks HSH Nordbank[248] (EUR 556 million) and BayernLB[249] (EUR 640 million). The capital increases were aimed at strengthening the core capital of the two Landesbanks. They occurred after the abolition of the public-law guarantee mechanism for Landesbanks on 18 July and after the repayment of state aid for HSH and BayernLB (and five other Landesbanks) ruled illegal and incompatible by the Commission's decision of 20 October 2004. The Commission assessed whether the capital was made available on terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market-economy conditions (i.e. the market economy investor principle). The Commission came to the conclusion that the expected return on the investments was indeed in conformity with what a private investor would accept and that therefore the investments did not constitute state aid.

6. Regional aid

Individual regional aid

500. In its scrutiny of individual regional aid cases, which are approved outside any schemes, directly on the basis of the EC Treaty provisions, the Commission takes into account a higher risk of distortion of competition compared with aid based on authorised regional aid schemes. In accordance with Section 2 of the Regional Aid Guidelines[250], in order to justify the compatibility of ad hoc regional aid with the internal market, the positive impact on development of the region in question must demonstrably outweigh the distortion of competition caused by the aid.

Regional development aid in favour of SABIC (Netherlands)[251]

501. On 2 February, the Commission authorised EUR 4.2 million in investment aid to SABIC, a Saudi-based chemicals producer, to help it set up its European headquarters in the Netherlands. Despite it being ad hoc in nature, the Commission found that the aid was compatible with the common market as the Dutch authorities had demonstrated that the investment would have a sizeable effect on the whole region, which has traditionally been closely connected with the chemical industry. The fact that the investment concerned headquarters rather than production capacity did not alter this assessment. All the other conditions of the Regional Aid Guidelines were also fulfilled.

Lignit Hodonín (Czech Republic)[252]

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248 Case NN 71/2005 *Capital increase in HSH Nordbank*, Commission decision of 6.9.2005.

249 Case NN 72/2005 *Capital increase in BayernLB*, Commission decision of 6.9.2005.

250 Guidelines on national regional aid (OJ C 74, 10.3.1998).

251 Case N 492/2004 *Regional development aid in favour of SABIC* (OJ C 176, 16.7.2005).

502. On 20 July, the Commission authorised individual regional aid to Lignit Hodonín, the operator of a Czech lignite mine situated in an area assisted under Article 87(3)(a). The aid of CZK 155.5 million (EUR 5 million) covers investment for opening new lignite deposits which will safeguard 350 direct jobs in a primarily agricultural region suffering from high unemployment and structural difficulties. Due to specificities of lignite trading and a relatively low level of production by Lignit Hodonín, the distortive effects on competition and trade between Member States are in this particular case fairly limited. The Commission authorised the ad hoc aid as being compatible with the common market since its effects on the region's social cohesion and economic development outweigh any distortions of competition.

Kronoply (Germany)[253]

503. In 2001, the Commission approved about EUR 35 million of investment aid to Kronoply's production plant for oriented strand boards (wood panels used mainly in the construction business) in the German region of Brandenburg on the basis of the 1998 Multisectoral Framework. In 2003, Germany notified an increase in the amount of aid of about EUR 4 million. Germany argued that the Commission's original decision had been based on incorrect information about market conditions and demanded a reassessment of the market and an increase to the maximum level of aid.

504. The Commission opened a formal investigation in 2004, expressing significant doubts about the lack of incentive and necessity because the plant had already been finished. In the final decision adopted on 21 September, the Commission maintained its position that Kronoply's production plant was a viable economic operation because Kronoply had continued its operations after the approval of the lower aid amount in 2001.

505. As further aid would not provide any incentives for regional development in this case, the Commission concluded that the exemptions of Article 87(2) and (3) were not applicable. The notified additional aid measure therefore constituted incompatible operating aid which should not be implemented.

E-Glass (Germany)[254]

506. In December 2003 the German authorities notified, in accordance with the 1998 Multisectoral Framework, investment aid to E-Glass AG, Osterweddingen, Saxony-Anhalt (Germany) – an assisted area under Article 87(3)(a). The purpose of the project was to build a new plant for the production of raw float glass. On 20 April 2004, the Commission approved the aid project with eligible costs of EUR 121 million and an aid intensity of 35% gross.

507. The German authorities informed the Commission in autumn 2004 that the original notification contained wrong information regarding the owners of E-Glass. The information about the owners was used in the grounds of the decision to define the recipients as well as the relevant market. Since the new information could have had an influence on the maximum allowable aid intensity, it had to be considered a

252 Case N 597/2004 *Lignit Hodonín, s.r.o.* (OJ C 250, 8.10.2005).
253 Case C 5/2004 *Aid in favour of Kronopoly GmbH*.
254 Case C 12/2005 *E-Glass AG*.

determining factor for the decision within the meaning of Article 9 of the Procedural Regulation[255]. Accordingly the Commission had to open the formal investigation procedure in order to determine whether it was necessary to revoke the earlier decision and to take a new, correct decision. In April, the Commission took the decision to open the formal investigation procedure and expects to reach a final decision in the first half of 2006.

Glunz (Germany)[256]

508. On 25 July 2001, the Commission adopted a decision not to raise objections to the granting of EUR 69.8 million in aid to Glunz AG and OSB Deutschland GmbH for the setting-up of a centre for wood processing which comprises two combined plants and which produces OSB (oriented strand board) and particle boards. The investment project is located in Nettgau, Saxony-Anhalt (Germany) – an assisted area under Article 87(3)(a). The assessment was based on the 1998 Multisectoral Framework.

509. In its judgment of 1 December 2004, the CFI annulled the decision in a proceeding launched by a competitor. The main reason was that the Commission had analysed only data on capacity utilisation and not also whether the relevant market was in decline by using data on apparent consumption. Following a detailed analysis, the Commission decided on 20 July to take a new decision to open the formal investigation procedure, in particular as there were difficulties assessing the maximum allowable aid intensity and determining the relevant markets.

255 Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

256 Case C 28/2005 *Aid in favour of Glunz AG* (OJ C 263, 22.10.2005).

Real estate transfer tax exemption for housing companies in Berlin (Germany)[257]

510. On 23 November, the Commission prohibited, under the state aid rules, the implementation of a proposed German aid scheme to exempt housing companies in the labour market region of Berlin from real estate transfer tax in case of mergers and acquisitions. The declared objective of the scheme was to restructure the housing market in the labour market region of Berlin as this market was characterised by oversupply. As the scheme was not targeted at so-called "pockets of deprivation" where high levels of social exclusion exist, the Commission considered that a tax exemption covering the whole of Berlin was disproportionately wide, and the resultant distortion of competition could not be justified under Article 87(1) EC. Those parts of the scheme that were restricted to the other new German *Länder* (Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia) had already been approved by the Commission.

511. Tackling physical deprivation and regeneration of deprived urban areas is an increasing political priority in the EU. The Commission has accordingly approved aid schemes directly on the basis of Article 87(3)(c) under the EU objective of economic and social cohesion, which aims at the reduction of disparities between different areas. The Commission acknowledges that many cities in the EU, including the most prosperous ones, contain "pockets of deprivation", i.e. areas that are characterised by a lack of social inclusion and a poor physical environment in terms of infrastructure, housing and local amenities. In the present case, however, the Commission's examination showed that the scheme proposed by Germany was not proportionate to the objective as the benefits would be available to all housing companies owning real estate in the labour market region of Berlin whereas only certain districts are in fact in need of regeneration.

512. In December 2004, the Commission decided to raise no objections to those parts of the scheme that were restricted to the other new German *Länder*. The scheme was approved in view of the particular handicaps in the new *Länder*, the limited degree of distortion of competition and the expected positive effects on the housing market.

Modifications to the national regional state aid maps in Finland[258] *and Greece*[259]

513. In accordance with point 5.6 of the Guidelines on Regional Aid, Finland and Greece notified adjustments to the aid intensity rates for some of their regions, demonstrating that the socio-economic data for these regions had worsened in comparison with other similar regions.

514. The Commission accepted for Finland an increase in the aid intensity in the 87(3)c region of Vakka-Suomi from 16% NGE[260] to 20% NGE and for Greece an increase in the aid intensity in the 87(3)(a) regions of Drama and Kavala from 33.2%-50% NGE to 45.5%-50% NGE, depending on the type of project. These modified regional state aid maps will remain in force until the end of 2006, when the national regional state aid maps for all Member States will be revised.

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257 Case C 40/2004 *Real estate transfer tax exemption for housing companies in the new Länder*.

258 Case N 331/2004 *Amendment of the Regional aid map in Finland 2000-2006* (OJ C 223, 10.9.2005).

259 Case N 236/2005 *Amendment of the Greek regional aid map*.

260 Net grant equivalent.

7. Research and development aid, innovation aid

Individual R&D aid to BIAL (Portugal)[261]

515. On 5 July, the Commission decided not to object to an individual R&D aid award to Portela & C[a], SA (better known as BIAL), a Portuguese firm in the pharmaceutical sector.

516. The Portuguese Government awarded a EUR 45.2 million grant to BIAL in support of an R&D project for the development of drugs in the central nervous system area. The project is to be carried out over five years (2004-2008) and consists of testing prototype drugs on animals and humans. It includes industrial research and precompetitive development activities to be carried out both in Portugal and abroad.

517. The Commission concluded in particular that the project's stages and eligible costs were in line with the R&D Framework criteria, that the aid intensity was compatible with the applicable thresholds and that the aid had a clear incentive effect, especially in view of the large risks inherent in the ambitious programme.

R&D aid to the aeronautical sector (Italy)[262]

518. Following a complaint, the Commission decided to investigate 13 R&D projects in the Italian aeronautical sector, funded under Italian Law 808/85 and approved by the Commission back in 1986. In October 2003, the Commission decided to open the procedure in respect of six projects. Doubts were raised in particular about the stages of research involved, the aid intensities and the incentive effect of the aid.

519. The investigation did not dispel the doubts surrounding the six projects. On the contrary, serious doubts emerged concerning the application of Law 808/85, for instance as to the exact modalities of repayment of the principals of loans. These modalities would have a major impact on the compatibility of the aid measures, since the gross grant equivalent of a loan is larger if its principal does not have to be repaid than if only interests are waived. Gross grant equivalents are crucial for determining aid intensities, which are in turn the determinant in deciding whether an R&D aid measure fulfils the conditions of the Community Framework for state aid for research and development[263].

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261 Case N 126/2005 *Individual R&D aid to BIAL* (OJ C 275, 8.11.2005).

262 Case C 61/2003 *Italian aeronautical law No 808/85* (OJ C 252, 12.10.2005).

263 OJ C 45, 17.2.1996.

520. The Commission also concluded that serious doubts existed as to the existence of further large non-notified individual aid awards. These new doubts exceeded the scope of the proceedings as opened on 1 October 2003, not only because they concerned issues that were not raised within the scope of those proceedings, but also because they were not limited to the six cases.

521. Taking all this into account, the Commission decided on 22 June to widen the scope of the Article 88(2) procedure to include doubts concerning the repayment modalities of the principal loan and on the possible existence of other large non-notified individual aid awards, and to extend the scope of these doubts to include the whole application of Law 808/85. This extension is restricted, however, to civilian applications of the Law.

Aid to newly created or technology-oriented small and medium-sized enterprises (Germany)[264]

522. On 3 May, the Commission authorised an aid scheme in Germany amounting to approximately EUR 120 million per year for newly created or technology-oriented small and medium-sized enterprises (SMEs) using the services of technology centres, incubators and industrial centres. The scheme will provide public support for the creation or development of such centres, with companies using the services of the centres being the indirect beneficiaries.

523. In its decision to initiate the formal investigation procedure on 18 February 2004, the Commission expressed doubts as to whether the measure was compatible with the common market, as Germany had not provided sufficient information as to whether state aid was involved at all levels of the scheme, particularly at the level of the owners of the centres and the SMEs using the services of the centres, or whether all aid was passed through to the said SMEs. In the course of the formal investigation procedure, Germany amended its original notification and ensured that all aid would be passed through to the enterprises using the services of the centres. As Germany committed itself to respecting all the requirements of Commission Regulations on *de minimis* aid[265] and aid to SMEs[266], the Commission considered that the aid did not threaten to distort competition in the single market and was therefore compatible with Article 87 EC. The approved measure was based on Part II, point 7 of the Framework Plan for the joint Federal Government/*Länder* programme for improving regional economic structures and runs until 31 December 2006.

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264 Case C 3/2004 *Technology centres* (OJ L 295, 11.11.2005).

265 Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 EC to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

266 Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 EC to state aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 (OJ L 63, 28.2.2004, p. 22).

Investbx (United Kingdom)[267]

524. On 20 October, the Commission opened a formal investigation pursuant to Article 88(2) into a proposal by the United Kingdom to spend GBP 3.8 million (approximately EUR 4.38 million) to set up "Investbx", a market for equity investments in SMEs in the West Midlands. Investbx would act as an intermediary exchange facility bringing together SMEs and investors to make it easier for SMEs to raise equity financing by creating a practical forum for exchanging and/or issuing tranches of new shares with a value between GBP 500 000 (approximately EUR 730 000) and GBP 2 million (approximately EUR 2.9 million) on an electronic platform. Funding of GBP 3.8 million would be provided by Advantage West Midlands (AWM), the regional development authority of the West Midlands region. The funding would solely serve to set up and operate Investbx. It is claimed that none of these funds would be transferred to SMEs or to investors. After five years, AWM would either sell its shares in Investbx or close it down.

525. The UK argues that the measure addresses a market failure caused by imperfect information on both the demand and the supply side: SMEs usually face problems in finding appropriate equity investors, and investors have difficulties obtaining appropriate and reliable information about potential investees. The UK claims that Investbx is a completely novel measure, serving a need that is not currently met on the market. However, the owners of Ofex, an independent UK market for the shares of SMEs, have complained to the Commission that it would be adversely affected by the measure. They state that Ofex already operates, and is seeking to grow, in the same market as the one in which Investbx will operate.

526. The Commission, in its decision to open the formal investigation procedure, considered that the measure constituted state aid to Investbx within the meaning of Article 87(1), but that neither the investors nor the SMEs using Investbx's services *prima facie* seemed to be aid recipients. However, the Commission announced that it would investigate further the presence of state aid at the level of the investors and the investees.

527. As to the compatibility of the project, the Commission expressed doubts concerning the compliance with Article 87(3)(c), particularly in light of the complaint received, and announced that it would assess in more detail whether the measure addresses a well-defined market failure, whether the aid instrument targets the identified market failure and whether the distortions of competition and the effect on trade are limited to ensuring that the aid measure is not, on balance, against the common European interest.

[267] Case N 373/2005 *Investbx* (OJ C 288, 19.11.2005).

Enterprise capital funds (United Kingdom)[268]

528. On 3 May, the Commission approved under the state aid rules a scheme that promotes the establishment of venture capital funds for small to medium sized businesses (SMEs) throughout the UK. The objective of the scheme is to increase the amount of equity funding for SMEs. Licensed enterprise capital funds (ECFs) will combine private and public money and use these funds to supply equity finance to SMEs. Public money will be used solely to leverage private money and will have to be repaid by the ECFs with interest plus a share of the profits for the public.

529. The investment tranches proposed by the UK range between GBP 250 000 (EUR 357 000) and GBP 2 million (EUR 2.9 million). These tranches exceed the maximum investment tranche provided for in the Commission's Communication on state aid and risk capital[269]. In such cases, the Communication states that the Member State needs to furnish evidence of the market failure.

530. In May 2004, the Commission opened a formal investigation under Article 88(2) in order to give interested third parties the opportunity to comment on the actual size of the equity gap. The Commission received comments from twenty interested parties, showing that there is a great deal of interest in the issue. All comments received were positive and supportive of the measure proposed by the UK. The uniform opinion was that there is an equity gap of at least EUR 3 million. Due to the relatively high transaction costs involved, private venture capital firms are not interested in providing "small" amounts of equity and consequently move to larger deal sizes. The result is a finance gap in the small-to-medium range deal size that slows down business start-ups, growth and job creation. This trend was not only evidenced by private venture capital funds active in the same market, but also by academic studies and by other Member States. The widening of the equity gap can thus be regarded as a pan-European phenomenon.

531. As all other conditions of the Communication on state aid and risk capital were fulfilled, the Commission therefore closed the formal investigation procedure with a positive final decision and concluded that enterprise capital funds are compatible with the common market pursuant to Article 87(3)(c).

Invention and Innovation Programme to support newly created innovative firms (United Kingdom)[270]

532. On 20 October, the Commission approved under the EU state aid rules a EUR 35.3 million risk capital fund that supports newly created innovative micro and small-sized enterprises in the UK. The UK NESTA (National Endowment for Science, Technology and the Arts) Invention and Innovation Programme sets up a risk capital fund that provides equity and quasi-equity capital to newly created innovative micro and small-sized enterprises (SMEs) to help them overcome a lack of funding opportunities. This equity gap arises because SMEs are often only at the proof of concept stage and at the initial investment stage private investors are reluctant to invest.

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268 Case C 17/2004 *Enterprise Capital Funds*.

269 Commission Communication on state aid and risk capital (OJ C 235, 21.8.2001).

270 Case NN 81/2005 *Nesta invention and innovation programme*.

533. The fund follows a two-step approach when making investments. The scheme provides for the option of making first-stage initial investments up to EUR 217 000 without private involvement, but on a strictly profit-driven basis. All second-stage follow-up investments will be made alongside private investors with exactly the same conditions (*pari passu*). This set-up is intended to make SMEs attractive to business angels and other early-stage capital providers and to increase their ability to obtain follow-on funding from private sources, thereby minimising public sector assistance.

534. In its assessment, the Commission concluded that the measure contributes to overcoming a specific equity gap for SMEs in their seed and other early stages. The potential adverse effects on trade and competition are very limited and are proportionate and necessary to achieve the objectives of the scheme. As the measure fulfils all other conditions of the Commission Communication on state aid and risk capital, the Commission concluded that the scheme was compatible with Article 87(3)(c).

8. Environmental and energy saving aid

Wave and tidal stream energy demonstration (United Kingdom)[271]

535. On 20 October, the Commission approved a EUR 58.8 million scheme, notified by the United Kingdom, for wave and tidal stream demonstration energy plants. To achieve an acceptable rate of return, these types of projects require relatively high investment and high operating aid. The operating aid complies with the rules in the Guidelines on aid for environmental protection[272]. While the investment aid intensity did not, strictly speaking, comply with the relevant rule in the Environmental Guidelines, the Commission took into account that, if investment aid were granted in the form of additional operating aid, this would comply with the rules. From an economic point of view, the measure provides a minimum incentive without overcompensating developers of plants and the split between investment and operating aid causes no undue distortion to the electricity market. Moreover, the results of the programme will be widely disseminated. Therefore, the aid could still be found compatible directly on the basis of Article 87(3)(c).

Operating aid for dealing with hazardous waste (The Netherlands)[273]

536. On 22 June, the Commission authorised EUR 47.3 million in operating aid to AVR (Rotterdam) of the Netherlands for hazardous waste disposal over the period 2002-2005. The aid compensated for the cost of a service of general economic interest, which consisted in the proper treatment of hazardous waste originating in the Netherlands. The aid ensured sufficient domestic capacity, which is in line with the objectives of EU waste legislation. Due to decreasing supply of the waste concerned, the cost to the State increased dramatically. Therefore, the Dutch authorities decided to terminate the aid scheme and close down the installations. In fact, a significant part of the authorised aid was due to the extra cost of closing down the installations earlier than originally planned. In contrast, aid to compensate for the cost of acquisition of

271 Case N 318/2005 *Wave and tidal stream energy demonstration*.

272 Community Guidelines on state aid for environmental protection (OJ C 37, 3.2.2001, p. 3).

273 Case C 43/2003 *Aid in favour of AVR*.

the waste, EUR 2.4 million, was not found compatible. Such acquisition would encourage waste disposal rather than its recovery, and gave AVR an unfair advantage over its competitors. This aid has been recovered from the recipient.

Environmental aid to three chlorine producers (Italy)

537. On 16 March and 26 June, the Commission authorised environmental aid to three chlorine producers in Italy. Solvay Rosignano, Altair Chimica and Tessenderlo[274] intended to support investment in their plants to end the production of chlorine based on the mercury technology and introduce the so-called membrane technology for which no mercury is needed. The aid of EUR 13.5 million for Solvay Rosignano, to promote a EUR 48 million investment, about EUR 5 million for Altair Chimica, which planned a EUR 13.5 million investment, and EUR 5.7 million for Tessenderlo, which invested EUR 19 million, represented in each case 30% of the eligible investment cost, plus an additional 10% of the eligible cost in the case of Altair as it is a medium-sized enterprise. The Commission considered that the measures supported the sustainability goal of the Lisbon Strategy by avoiding future environmental costs, and that they were fully in line with the proposed EU strategy of January to reduce mercury pollution and with the Guidelines on aid for environmental protection.

Volvo (Sweden)[275]

538. On 1 June, the Commission approved environmental aid of SEK 85 million (EUR 9 million) in favour of Volvo Lastvagnar AB. Upon building a new coating and painting plant, Volvo had made an additional investment of SEK 245 million (EUR 26 million) in order to improve on EU standards regarding noise and volatile organic compounds emissions. The Commission found that aid amounting to 35% of this additional environmental investment was compatible with the common market since it represented an incentive for the company to minimise pollution and contributed to the Community objective of sustainable production.

274 Case N 345/2004 *Environmental aid for Solvay Rosignano* (OJ C 176, 16.7.2005); Case N 346/2004 *Environmental aid – Altair Chimica* (OJ C 131, 28.5.2005) and Case N 356/2004 *Tessenderlo Italia – Environmental aid* (OJ C 223, 10.9.2005).

275 Case N 75/2005 *Environmental aid for Volvo Trucks* (OJ C 230, 20.9.2005).

Alumina production (France, Ireland and Italy)[276]

539. On 7 December, the Commission concluded the formal investigation procedure concerning aid granted in the form of full exemption from excise duty on mineral oils used as fuel for alumina production to three undertakings in France, Ireland and Italy. According to the rules on operating aid in the Community Guidelines on aid for environmental protection, a partial exemption from such excise duty can be allowed, but where the reduction concerns a Community tax the beneficiaries should pay at least the harmonised Community minimum in order to provide them with an incentive to improve environmental protection. Thus, as regards the period up to 31 December 2003, the Commission found that exemption up to the level of EUR 13 per 1 000 kg[277] was incompatible with the common market. The Commission ordered the respective Member States to recover only the incompatible aid received from 3 February 2002, i.e. as from the publication of the decision to open the formal investigation procedure, until 31 December 2003, in order to respect the principle of legitimate expectations.

540. Since Council Directive 2003/96/EC[278] became applicable on 1 January 2004, there is no longer a minimum level of excise duty on energy products used for electrolytic and metallurgical processes, including alumina production. In this situation, according to the same rules on aid for environmental protection, the beneficiaries should pay at least a significant proportion of the national tax. The Commission doubted, therefore, whether the total exemptions were fully compatible with the common market and extended the investigation in this respect for the period starting January 2004.

CO2 tax reductions (Slovenia)[279]

541. On 23 November, the Commission closed the investigation procedure and approved under the state aid rules a Slovenian scheme granting reductions in carbon dioxide taxation to operators of combined heat and power (CHP) installations, non-energy-intensive companies that participate in the EU emissions trading scheme, and companies that enter into voluntary environmental agreements.

542. The Slovene legislation on CO2 taxation has been brought into line with the Guidelines on state aid for environmental protection[280] and with the Directive on the taxation of energy products[281]. The measure allows beneficiaries to adapt more easily to national environmental taxation, with a decreasing rate of tax reduction each year. The scheme ends in 2009 and no reductions will apply as of 2010.

543. The tax paid by the companies that participate in the EU emissions trading system and benefit from the above tax reduction remains above the harmonised Community minimum levels of energy taxation.

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276 Cases C 78/2001, C 79/2001 and C 80/2001.

277 Article 6 of Council Directive 92/82/EEC on the approximation of the rates of excise duties on mineral oils (OJ L 316, 31.10.1992, p. 19). The aid had been authorised by successive Council Decisions.

278 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

279 Case C 44/2004.

280 OJ C 37, 3.2.2001.

281 Council Directive 2003/96/EC.

Operating aid for biofuels

544. During 2005, the Commission authorised aid schemes, mostly excise tax reductions, in favour of biofuels notified by Austria[282], the Czech Republic[283], Estonia[284], Hungary[285], Italy[286], Ireland[287], Lithuania[288], Sweden[289] and Belgium[290].

9. Aid for training, employment and small and medium-sized enterprises

545. Beginning in 2001, block exemption Regulations for small and medium-sized enterprises, training and employment have been adopted.[291] The Regulations declare certain categories of state aid compatible with the Treaty if they fulfil certain conditions and exempt them from the requirement of prior notification and Commission approval. In 2005 alone, there were 197 measures for which information sheets[292] were submitted by Member States under the SME block exemption, 70 under the training block exemption and 26 under the employment block exemption. Since the introduction of these exemption Regulations, the number of notified cases falling under one of these three objectives has fallen significantly. Occasionally however, a notified aid measure or an unlawful aid measure may require a more in-depth investigation by the Commission.

Reform of the Italian vocational training system (Italy)[293]

546. Following a complaint in 2002 alleging that unlawful aid was being granted by the Region of Piedmont to entities in charge of training activities, it emerged that the scheme applied to the whole vocational training system in Italy, as its main legal basis was a national law. Accordingly the Commission, in its decision to initiate the formal investigation procedure, decided to widen the assessment to include the national scheme.

547. The aim of the measure was to help recipients attain certain quality requirements associated with the ongoing reform of the Italian training system. It consisted of grants to compensate for various types of costs incurred by the recipients, which were both public and private entities, profit-making and not. Furthermore, they were

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282 Case NN/43/2004.

283 Cases N/206/2004 and N/223/2005.

284 Case N/314/2005.

285 Case N/427/2004.

286 Case N/582/2004.

287 Case N/599/2004.

288 Case N/44/2005.

289 Case N/187/2004.

290 Case N/334/2005.

291 State aid to SMEs – Commission Regulation (EC) No 70/2001 of 12 January 2001 (OJ L 10, 13.1.2001), amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 (OJ L 63, 28.2.2004); training aid – Commission Regulation (EC) No 68/2001 of 12 January 2001 (OJ L 10, 13.1.2001), amended by Commission Regulation (EC) No 363/2004 of 25 February 2004 (OJ L 63, 28.2.2004); aid for employment – Commission Regulation (EC) No 2204/2002 of 5 December 2002 (OJ L 337, 13.12.2002).

292 The mechanism provided for by the block exemption Regulation and which replaces the notification requirement.

293 Case C 22/2003 *Reform of the training institutions*.

carrying out vocational training activities both within the framework of the Italian national education system (institutional social targeted training addressed to individuals) and on the open market, vis-à-vis undertakings and their employees. The former was considered, also on the basis of the relevant EU case law, not to involve any economic activity. Moreover, a separate accountancy obligation was imposed on the recipients, allowing a distinction between costs and related aid according to the above fields of activity.

548. Accordingly, the Commission concluded, in its final decision adopted on 28 February, that a large part of the activities concerned were not of an economic nature and therefore compensations related to these activities were deemed not to constitute state aid. However, public funding related to the economic activities carried on was regarded as state aid. The Commission concluded that a part of the aid was compatible under the block exemption Regulations on aid to training and to employment but considered the remainder to be incompatible and ordered its recovery from the recipients.

Ford Genk (Belgium)[294]

549. On 22 June, the Belgian authorities notified a proposal for training aid to Ford-Werke GmbH - part of the Ford Motor Company - in Genk, Belgium. It concerns ad hoc aid from the Flemish Community amounting to EUR 12.28 million, for eligible costs covering a period of three years (2004 to 2006). The total eligible costs of the training project (including specific and general training) are EUR 33.84 million. The Commission opened a formal investigation procedure in view of the serious doubts that the envisaged aid fulfils the conditions of the training aid Regulation. Such doubts refer both to the eligibility of certain costs (in particular as regards the incentive effect of the aid) and to the proposed classification of expenses ("general training" versus "specific training").

IRAP deductions (Italy)[295]

550. On 7 December, the Commission authorised fiscal incentives for companies adopted by Italy in the Competitiveness Decree-law (14.03.2005 No 80). The scheme provides for reductions to the Italian tax on regional productive activities (IRAP) and should stimulate job creation, especially in southern Italy. The budgetary cost (revenue foregone) amounts to around EUR 846 million.

551. The measure aims at favouring job creation by reducing the labour costs borne by enterprises through yearly deductions in the IRAP tax base for each newly created job. Enterprises operating in assisted areas can benefit from higher deductions. When calculating the net job creation, the measure takes into account only open-ended contracts, ensuring in this manner that the new employment thus created will be stable and maintained for a reasonably long period.

552. A case on IRAP is pending before the Court of Justice, which has been asked to give a preliminary ruling on whether a tax such as IRAP is compatible with the EU prohibition of national turnover taxes other than VAT. However, this does not

294 Case N 331/2005 *Ford Genk*.

295 Case N 198/2005 *Law No 80/2005, Article 11-ter*.

prevent the Commission from reaching a decision on this measure, to the extent that Italy is entitled to apply IRAP. In fact the measure tends towards the gradual elimination of the tax, giving priority to the exclusion of labour costs from the tax base, so that its approval will not impair the current situation.

553. Therefore, in its assessment, the Commission concluded that, to the extent that Italy is entitled to apply IRAP, the measure meets all the conditions laid down in Regulation (EC) No 2204/02 on the application of state aid rules for employment and considered the measure to be compatible with the state aid rules because it encourages the creation of jobs particularly in assisted areas (the Mezzogiorno) where unemployment is still high compared with other parts of Italy.

10. Fiscal aid

Gibraltar Exempt Companies (United Kingdom)[296]

554. On 19 January, the Commission proposed appropriate measures for the United Kingdom to phase out the Gibraltar exempt companies legislation. Once these appropriate measures were formally accepted by the UK on 18 February, they became legally binding. Under this scheme an "exempt company" did not pay any income tax on its profits, but was subject only to a fixed annual tax of between GBP 225 and GBP 300 (approximately EUR 350-EUR 500). No Gibraltarian or Gibraltar resident could have a beneficial interest in the shares of an exempt company and it could not conduct any trade or business in Gibraltar.

555. The scheme constituted state aid as the exemption from profit tax conferred an advantage on the exempt companies compared with companies subject to Gibraltar's standard 35% corporate tax rate. In addition, it was limited to companies with activities exclusively abroad (offshore activities), thus distorting trade and competition between Member States. As the scheme predated the accession of the United Kingdom to the EU it was considered to be existing aid, for which the Commission has to follow a cooperation procedure with the Member State and cannot order recovery.

556. The Commission measures will phase out the scheme by the end of 2010, and impose strict limits on existing beneficiary companies changing ownership or activities. This was the first time that the Commission imposed such limits in a state aid case. New entrants will only be accepted into the scheme during a short transitional period of less than eighteen months, and only in very limited numbers. Moreover, new entrants' benefits will end in December 2007, instead of December 2010 for existing beneficiaries. The five-year transition period for existing beneficiaries of existing fiscal aid reflects the Commission's decisional practice in similar cases[297].

Tax exempt reserve fund in Greece[298]

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296 Case E 7/2002 *Gibraltar Exempt Companies*, Commission decision of 19.1.2005.

297 Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, 2003/755/EC (OJ L 282, 30.10.2003); Commission Decision of 17 February 2003 on the state aid implemented by the Netherlands for international financing activities, 2003/515/EC (OJ L 180, 18.7.2003).

557. On 20 October, the Commission opened a formal investigation procedure and in the same decision adopted for the first time a suspension injunction on a tax exempt reserve fund scheme in Greece. Companies in several sectors (including textiles, basic metals, car manufacturing, energy production, mining, intensive agriculture and fisheries, large international trading companies and specific tourism undertakings), were allowed to reduce their tax base by up to 35% of their profits. The funds created were designated to finance investment and other projects such as expansion and modernisation of plants and buildings, purchase of new equipment or vehicles, environmentally motivated investments, leasing costs, studies, training, patent registration, restructuring plans and many others.

558. This measure constitutes state aid as it partially relieves companies in the specified sectors that are involved in active cross-border trade from corporate taxation. Moreover, the Commission concluded on a preliminary basis that the scheme does not fulfil the compatibility conditions set out in the appropriate state aid rules.

559. The measure is illegal because it was never notified to the Commission. Being part of the Greek tax system it was directly applicable; therefore, thousands of companies could claim the benefit directly from the tax authorities. In order to stop its application immediately and to prevent an increase in the distortion of competition, the Commission ordered Greece to suspend immediately the granting of state aid until a final decision was taken.

Tax breaks for investment vehicles specialized in small capitalization companies (Italy)[299]

560. On 6 September, the Commission took a negative decision ordering recovery in respect of an Italian tax scheme reducing the substitute tax on capital earnings accruing to open-ended collective investment vehicles specialised in holding stocks of small and medium-sized capitalised companies listed on EU regulated stock exchanges ("small caps") from 12.5 to 5%. The collective investment vehicles to which the tax break applied included both corporate-type vehicles (such as SICAV companies) and contractual vehicles. The latter do not have corporate form, but are managed by financial intermediaries who are undertakings for the purposes of competition law. The small caps in question were companies listed on regulated stock exchanges in the EU, having a capitalisation below EUR 800 million.

561. Although formally available to all specialised vehicles, the scheme was found to be an indirect subsidy favouring (i) financial intermediaries setting up investment vehicles dedicated to investing in the stocks of listed small caps, and in particular the management companies, and (ii) the small caps themselves, which would have access to capital on more favourable conditions than companies in general. The Commission also concluded that the aid was incompatible with the common market on the grounds that it was not aimed at achieving either development objectives or job creation. The aid was enacted without prior Commission approval and the Commission ordered the recovery of the tax breaks received by the financial intermediaries. The decision is

298 Case C 37/2005 (ex-NN 11/2004) *A tax-exempt reserve fund for certain companies*.

299 Case C 19/2004 *Tax breaks for investment vehicles specialized in small capitalization companies*, Commission decision of 6.9.2005.

interesting in that it makes clear that (i) a tax break favouring certain financial products may constitute indirect aid for the undertakings promoting and receiving the investments, and (ii) financial intermediaries have to reimburse a tax break found to constitute aid.

Tax breaks in favour of newly listed companies (Italy)[300]

562. On 16 March, the Commission decided that an Italian scheme reducing the nominal and effective tax rates of companies listing on a regulated EU stock exchange in 2004 constituted aid incompatible with the common market. Italy enacted this special tax scheme in its 2004 budget law with a view to encouraging companies to obtain listings. The scheme provided for the exclusion from taxable income of listing expenses (in addition to the ordinary tax deduction) and a three-year reduction in the corporate tax rate of 13% for such companies.

563. The decision is interesting in that it clarifies the concept of selectivity of business tax measures. The Commission decided that, although formally available to all undertakings listing on an EU stock exchange, the incentives had to be viewed as state aid because they were granted only to companies that could list within the narrow timeframe permitted by the Italian legislation. The Commission found that the incentives resulted in partial exemption of the revenues earned by beneficiaries in the three-year period following listing - a tax incentive disproportionate to the aim of encouraging new listings. The fact that a significant tax reduction was available only to companies listing in 2004 had the effect of favouring some of the most high-growth undertakings in Italy and could adversely affect intra-Community trade and competition. The Commission finally considered that, since the aid was not paid in relation to investments eligible to receive assistance under the state aid rules, it was incompatible with the single market. As the aid was enacted without prior approval from the Commission, the final decision orders recovery of the tax breaks granted.

Exempt 1929 holding companies (Luxembourg)[301]

564. On 20 October, the Commission proposed appropriate measures regarding Luxembourg's legislation on "Exempt 1929 Holdings". This legislation provides that holding companies registered in Luxembourg under the special forms for exempt holdings are free from Luxembourg's business taxes on dividends, interest, royalties and other earnings, provided that they exercise only certain activities including financing, licensing, management, and coordination services within the multinational group to which they belong. The Commission's review was hastened by the inclusion, in 2003, of the exempt holdings' regime in the list of harmful tax measures in breach of the Council's Code of Conduct on Business Taxation. The review took place under the cooperation procedure applicable to measures in force before the EEC Treaty came into effect.

565. The Commission considered that the tax exemptions constituted aid incompatible with the common market. It found that the exemptions favoured only holding companies carrying on certain selected activities and could seriously distort competition as the financial services typically performed by the exempt holdings took place on

300 Case C 8/2004 *Tax premium in favour of newly listed companies*, Commission decision of 16.3.2005.

301 Case E 53/2001 *Exempt 1929 holding companies*, Commission decision of 20.10.2005.

international markets where competition was intense. It considered that the tax breaks were operating aid, as they relieved beneficiaries of charges typically imposed on undertakings in Luxembourg without contributing to economic development or job creation. In closing the cooperation procedure, the Commission called on Luxembourg to repeal the exemptions. Since the aid qualified as existing aid, the Commission could only request changes for the future but not for the past.

Commission closes state aid investigation into tax breaks for sports clubs in Italy (the "Salvacalcio" law)

566. In November 2003, the Commission opened a formal investigation procedure into legislative measures adopted by Italy (the "*Salvacalcio*" law), which modified the accounting rules for professional sports clubs and gave them certain tax advantages. In view of the concerns expressed by the Commission, the Italian authorities agreed to modify the measures with a view to removing any effect on taxation. The modifications were introduced by Italy by Law No 62 of 18 April, which allowed the Commission to decide on 22 June[302] that the amended measures no longer constituted state aid. This case emphasises that – notwithstanding the Commission's positive attitude towards the promotion of sports – professional football clubs engage in relevant economic activities and are subject to normal state aid rules like any other undertaking.

Exemption from tax on non-health insurance contracts in favour of mutual and provident societies (France)[303]

567. On 2 March, the Commission adopted measures calling on France to abolish, by 1 January 2006, the exemption from tax on insurance contracts enjoyed by mutual and provident societies in the case of non-health insurance risks.

302 Case C 70/2003 *Measures in favour of Italian sports clubs*, Commission decision of 22.6.2005.

303 Case E 20/2004 *Exemption from tax on non-health insurance contracts in favour of mutual and provident societies*, Commission decision of 2.3.2005.

568. In France, insurance contracts concluded by mutual societies governed by the Code on mutual societies and provident societies were not subject to the tax on insurance contracts. The Commission considered that this exemption constituted state aid in that it conferred an advantage on mutual and provident societies not enjoyed by other French and foreign insurance companies with which they were in competition.

569. Since France accepted the appropriate measures, the distortion of competition between mutual and provident societies on the one hand and insurance companies on the other has come to an end in this respect. The Commission's recommendation and its implementation by France is a follow-up to the action taken on 13 November 2001[304], when the Commission called on France to put an end to the exemption of mutual and provident societies from the tax on insurance contracts in the case of health insurance risks. Subsequent to that proposal, France replaced the specific exemption for mutual and provident societies with an exemption for so-called "solidarity" health insurance contracts, i.e., contracts concluded without a prior medical examination, irrespective of the status of the body providing the cover. The latter exemption was considered by the Commission to be compatible with the rules on state aid on 2 June 2004[305].

Tax breaks for takeovers of ailing industrial firms (France)[306]

570. On 1 June, the Commission approved a new French scheme of tax breaks for takeovers of ailing industrial firms. The aid takes the form of reductions in corporation tax, trade tax (*taxe professionnelle*), and property tax (*taxe foncière*)[307]. The amount of aid varies depending on the number of jobs created and the region in which the takeover takes place. In the least-favoured regions, the aid is available for all firms; elsewhere it is confined to small and medium-sized enterprises.

571. The Commission considered the scheme to be compatible with the Guidelines on Regional Aid[308] and the Regulation on aid to SMEs[309], and required that the jobs created be maintained for at least five years.

572. The scheme replaces an earlier one under which aid for takeovers of industrial firms was not subject to any upper limit, and there was no link to job creation; that scheme was held to be incompatible with the EU rules on state aid[310].

11. Aid to make good the damage caused by natural disasters

Flooding during summer 2005 (Germany and Austria)[311]

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304 See the 2001 Competition Report, Case E 46/2001.

305 OJ C126, 25.5.2005.

306 Case N 553/04 *Tax breaks for takeovers of ailing industrial firms*, Commission decision of 1.6.2005.

307 Articles 44 septies, 1383 A and 1464 B of the French General Tax Code.

308 Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9), as amended by new regional aid guidelines for 2007-2013 adopted on 21 December 2005.

309 Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 EC to state aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 (OJ L 63, 28.2.2004, p. 22).

310 OJ L 108, 16.4.2004.

311 Case N 435/2005 *Austrian measures to make good damage caused by the Flood 2005*; Case N

573. In August several flood disasters of unprecedented proportions took place in Germany and Austria. In some provinces local authorities measured water levels not experienced in the past for up to 300 years which caused considerable damage to public infrastructure, households and enterprises located in the affected areas. In order to partially make good the damage to enterprises caused by this natural disaster, the Governments of Austria and Germany notified to the Commission several aid schemes.

574. The Commission decided in all notified cases not to raise objections and to approve the aid on the basis of Article 87(2)(b). The Commission based its assessment on the following "guiding principles": in order to avoid a situation where an enterprise would be better off after receiving aid for a natural disaster, overcompensation had to be strictly ruled out, therefore only material damage caused directly by the natural disaster was considered eligible and the maximum compensation of 100% of these costs was not exceeded in any of the cases. To verify that overcompensation was effectively ruled out, a centralised and institutionalised surveillance mechanism needed to be in place to determine to what extent the damage might have been covered by insurance and to guarantee that the maximum possible support was not exceeded. In all cases the concept of damage was based on refinancing costs and/or replacement value. Incurred losses and foregone profits associated with temporary interruptions in the production process and with the loss of orders, customers or markets was not considered to be eligible.

12. Other: health, postal services, defence

Reform of the Dutch health care insurance system[312]

575. On 3 May, the Commission authorised EUR 15 billion of public funding for a fundamental reform of the health insurance system in the Netherlands. The objective of the reform is to guarantee access for all citizens while promoting efficiency and financial sustainability in health care provision. To this end, the authorities have set up a risk equalisation system between insurers and support the transformation of the system by granting start-up capital to certain insurers.

576. The new Health Insurance Act will create a single market for private health insurance in the Netherlands. In order to ensure solidarity, health insurers will be obliged by the Dutch Government to accept all citizens and will be prevented from differentiating premiums. First, in order to compensate the insurers for these public service obligations, the Dutch authorities will introduce a system designed to neutralise the different risk profiles of the health insurers due to their different client portfolios. Although the Commission was not convinced that the measure fulfilled the conditions set out in the ECJ's *Altmark* judgment, it found the measure compatible with the common market under Article 86(2).

442/2005 *Assistance towards firms and liberal professionals to make good damage caused by the August 2005 flood in Bavaria*; and Case N 466 B/2005 *Bavarian Hardship Fund - Summer Flood 2005*.

312 Cases N 541/2004 and N 542/2004 *The reform of the Dutch health care insurance system*, Commission decision of 3.5.2005.

577. Secondly, as a one-off measure, existing sickness funds will be allowed to carry over their financial reserves into the new market regime as a form of start-up capital. The sickness funds, which will be transformed into normal private insurers, need these reserves in order to meet the solvency requirements imposed on health insurers. In reforming the health care system, the Dutch Government is acting in accordance with one of the priorities of the Lisbon Strategy, namely to seek to ensure "financially sustainable and viable health care and long-term care". The Commission found this measure to be necessary and proportional and thus concluded that the measure was compatible with the common market under Article 87(3)(c).

Creation of Banque Postale (France)[313]

578. Following notification by the French authorities, the Commission examined several measures forming part of the hiving-off of the financial business of the Post Office, La Poste (LP), to its subsidiary, Banque Postale (BP).

579. The Commission checked that the own funds transferred to BP, in line with the accounting standards applicable to operations of this nature, corresponded to the own funds currently assigned to the financial services of LP. In the absence of additional capital from LP, the Commission took the view that, taking into account the situation at the time of transfer of the business, this measure did not constitute state aid. Verification that BP's equity level is sufficient for the volume and nature of its business is not a matter for the Commission but is instead the responsibility of the national prudential authorities.

580. The Commission also verified on the basis of relevant case law[314] that BP will not receive any economic advantage through the remuneration paid to LP for the provision of services. In particular, the Commission checked that mechanisms preventing the transfer of LP's potential advantages were in place to prevent any leakage between LP and its subsidiary. Among other things, the French authorities committed themselves to ensuring that BP will be financed strictly on market conditions. Moreover, the Commission checked that this remuneration was calculated on the basis of LP's analytical accounting, established according to principles that were applied consistently and were objectively justifiable.

581. On 21 December, the Commission approved the hiving-off of the financial activities of LP because it would not confer any economic advantage on BP. The associated issues, not directly linked to the hiving-off, such as the special right to distribute the "*livret A*" (a tax-free savings account), the unlimited state guarantee granted to LP and the pension schemes for LP officials reassigned to BP, will be examined separately.

Hellenic Vehicle Industry SA – ELVO

582. On 7 December, the Commission initiated a formal investigation procedure in the case of non-notified aid in favour of Hellenic Vehicle Industry SA – ELVO[315], a Greek producer of civilian and military motor vehicles and the main supplier to the Greek

313 Case N 531/2005 *Creation of Banque Postale*, Commission decision of 21.12.2005.
314 Case C-83/01 P *Chronopost* [2003] ECR I-6993.
315 Case C 47/2005 *Aid to ELVO (Hellenic Vehicle Industry SA) – Greece*.

Army. In 1999, the Greek Government approved the write-off of the company's debts toward the public sector incurred in 1989-1999. According to Greece, the aid amounts to EUR 3.5 million, benefited only the military production of ELVO and, therefore, would be covered by Article 296 EC, which allows derogation from the general prohibition of state aid for reasons directly linked to essential interests of national security. On the basis of the information available, the Commission considers, however, that only part of the aid was in favour of military production and falls within the scope of Article 296 EC. The remaining aid has to be examined under the general state aid rules.

13. Agriculture

Tax on mineral phosphorous in feed phosphates (Denmark)

583. On 19 January, the Commission decided not to raise objections to Denmark's proposed new tax on phosphorous in feed, which aims at reducing the use of phosphorous in agriculture[316]. In order not to increase the overall tax level in the Danish agriculture sector, the tax on agricultural land will be lowered in return. The scheme is considered not to constitute state aid in favour of farmers. A general reduction of the land tax for agriculture is considered the administratively most efficient way of redistributing the revenue from phosphorous tax to the agricultural sector. The land tax will be decreased for all agricultural sectors, not only those using animal feed and paying the phosphorous tax, which, at least in theory, could lead to an advantage for plant producers. However, based on the environmental logic of the scheme and the fact that the relevant state aid rules expressly refer to property tax as one way to counterbalance new environmental taxes, the Commission has decided not to raise objections even if the scheme were to lead to such an advantage. The average amount of the tax reduction per farmer is also very low (approximately DKK 700 (EUR 95) per year).

National LFA aid scheme (Finland)

584. On 16 March, the Commission approved a new state aid measure[317] that would be combined with existing support for less-favoured areas cofinanced by the Community within the framework of the Finnish rural development programme. The aid consists of a basic payment of EUR 20 per hectare in support areas A, B and C1 and EUR 25 per hectare in support areas C2-C4. This basic payment is granted for all areas eligible for a cofinanced allowance. In addition, areas situated in animal husbandry farms receive an additional payment of EUR 80 per hectare.

585. The Commission has ensured that the combined sum (existing cofinanced support, new basic payment and new additional payment) does not exceed EUR 250 per hectare on average. The amount of the new basic payment and additional payment will be monitored annually. If necessary, it will be reduced proportionally in the whole of the country so that the maximum average payment of EUR 250 per hectare is not exceeded. The Commission concluded that the combined payments to less-favoured areas in Finland comply with EU legislation, in particular with point 6 of the EU

316 Case N 343/2004.
317 Case N 284/2004.

Guidelines for state aid[318] in the agricultural sector and Articles 14 and 15 of Regulation (EC) No 1257/99[319], for the following reasons: the payments are distributed geographically in such a way that areas with lowest yields benefit the most; the sectors facing particular structural problems due to natural handicaps receive more aid; and there is no overcompensation when the payment levels are compared with those in comparable regions in the EU.

Disposal of animal waste in 2003 (équarrissage) (France)

586. On 5 July, the Commission approved state aid of approximately EUR 325 million granted within the framework of the public service system for rendering (*service public d'équarrissage*) for the storage and destruction of meat meals and for the transport and destruction of fallen stock and animal waste in 2003[320]. At the same time the Commission decided to open the formal investigation procedure provided for in Article 88(2) concerning aid granted to certain meat traders, consisting of an exemption from the rendering tax in 2003. France continued exonerating certain companies from payment of the tax, as was already the case between 1997 and 2002. This exemption was applicable to companies whose turnover was less than EUR 762 245 in the previous calendar year. The rendering tax was imposed on the basis of total turnover of the company and not on the basis of meat sales. Certain companies could, therefore, be exempted from the tax even if they sold more meat than other companies with higher total turnover obtained from the sale of any product. This exemption does not seem justified by the nature of the tax system and could therefore constitute state aid. In addition, the aid seems to be incompatible operating aid since such a reduction in charges lacks any incentive element and any quid pro quo on the recipients' part. This position is in line with that formulated by the Commission in its decision of December 2004 on the rendering tax (*taxe d'équarrissage*)[321].

318 Community guidelines for state aid in the agriculture sector (OJ C 28, 1.2.2000).

319 Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ L 160, 26. 6.1999, p. 80).

320 Case C 23/2005.

321 Case NN 8/2004.

Plans de Campagne (France)

587. On 20 July, the Commission opened a formal investigation into potentially illegal state aid granted by France between 1991 and 2002 in the fruit and vegetable sector[322]. The aid was granted by means of yearly "contingency plans" (*plans de campagne*). It included measures designed to counter the oversupply of French fruit and vegetables on the internal market by means of price support, support for temporary storage, destruction of products or support for processing. Subsidies may also have been paid to favour sales of French products outside the EU in times of crisis. Support would seem to have been as high as EUR 50 million per year.

588. The Commission doubts that such measures may be considered compatible with the competition rules, as they would seem to interfere with the proper functioning of the common market organisation for fruit and vegetables. A final decision is expected in 2006.

Banana producer groups support (Guadeloupe and Martinique)

589. On 6 September, the Commission decided not to raise objections to state aid of approximately EUR 1.41 million granted via subsidised loans to producer groups to accompany restructuring measures in the banana sector[323]. The aid, granted to producer groups in financial difficulty, did not meet the conditions laid down in EU legislation for restructuring aid, since the amounts involved were too small for a full-blown restructuring of the banana sector, and the measures envisaged (improved concentration of supply) could not be construed as a credible restructuring plan. The Commission authorised this support as operating aid, using the special legal basis for those regions in which the aid was granted, which allows operating aid to be granted to compensate for the combination of handicaps which seriously hinder economic development in ultra-peripheral regions.

Aid for the protection of livestock against attacks by predators (Tuscany, Italy)

590. On 6 September, the Commission approved for the first time state aid towards the cost of insurance premiums for the damage incurred by stock breeders as a result of attacks by predators such as wolves or bears[324]. These measures aim to protect livestock (cattle, sheep, goats and horses), bred in the proximity of natural parks, that are prone to predation. The losses concerned are only the death of the animals and the abortions due to attacks by predators. In addition, the Commission concluded that state aid consisting in the financing of prevention and protection investments such as the construction/restructuring of cattle sheds, systems of photographic alert and the construction of animal enclosures are compatible with the Guidelines for state aid in the agricultural sector. The aid was approved in order to combine the safeguarding of protected species with the reduction of the risk of loss to stockbreeders.

322 Case NN 8/2004.
323 Case NN 40/2004.
324 Case N 211/2005.

Bad weather solidarity fund (Italy)

591. On 7 June, the Commission adopted a decision not to raise objections to a new framework law for state aid of approximately EUR 100 million per year towards the compensation of farmers for various losses due to bad weather[325]. The new law will establish a coherent legal basis for future bad weather compensation financed by central government. A notable change in comparison with the past will be that farmers who could have taken out (subsidised) insurance will no longer receive any compensation. That way, farmers will be encouraged to take out insurance, making forward planning of public expenditure much easier. The Italian Government foresees spending approximately EUR 100 million a year on direct compensation, and another EUR 100 million as a subsidy to insurance contracts.

Holland Malt (Netherlands)[326]

592. On 3 May, the Commission decided to open a formal investigation into the planned subsidising in the Dutch malt sector of an investment project by Holland Malt BV (a collaborative venture between Bavaria NV and Agrifirm, a cereal farmers cooperative) relating to the establishment of a production plant. The whole chain of storage and processing of malting barley and the production of and trade in malt would be integrated.

593. The Commission decided to open the formal investigation procedure as it doubts whether the planned assistance is compatible with the common market for the following reasons:

- on the basis of the information available to the Commission, it cannot be excluded that the malt market shows overcapacity;
- Holland Malt claims to provide "premium malt" of high quality for the production of "premium beer" and that the market for this kind of malt and beer is still growing.

594. However, it is not clear whether "premium malt" and "premium beer" are not simply marketing concepts, and do not correspond to a specific separate product market for which overcapacity could be excluded.

Climate change levy (United Kingdom)

595. On 20 July, the Commission authorised an aid scheme to grant the agriculture sector a tax rebate of EUR 687 million over a period of 10 years[327]. The rebate of the climate change levy of 50% for horticulture and 80% for agriculture sectors covered by integrated pollution prevention and control (IPPC) agreements allows the United Kingdom agricultural sector to accommodate higher energy prices caused by the levy while helping to meet the CO2 reduction targets for the United Kingdom and also for the EU.

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325 Case NN 54/A/2004.

326 Case C 14/2005, originally Case N 149/2004.

327 Case NN 12/2004.

596. The climate change levy on the non-domestic use of energy was introduced by the United Kingdom in 2001 in order to meet the Kyoto targets. Energy-intensive industries were offered a significant rebate of 80% for a period of 10 years in order to adapt to the new environment and improve energy efficiency and cut carbon dioxide emissions. The agricultural sectors concerned by this decision (pig and poultry, food and drink) have entered into IPPC agreements and have committed themselves to emission reduction targets and energy efficiency targets. The United Kingdom ensures strict monitoring of the commitments.

597. The loss of levy reduction for the future while the company has at the same time to catch up on the targets is an efficient mechanism for keeping companies in the agreement and for achieving the targets. The recovery mechanism, which is proportional to non-achieved targets at the end of the agreement period, is accompanied by a penalty mechanism. The agreements are reviewed on a regular basis. When assessing multisectoral state aid in the context of energy taxes, the Commission accepted equal treatment for agriculture with other sectors subject to the Guidelines on state aid for environmental purposes. The IPPC agreements were approved under point 51(1)(a) of the Guidelines.

598. A separate special measure involving a five-year rebate of 50% allows the horticulture sector to offset the loss of international competitiveness resulting from the introduction of the climate change levy. The legal basis for this was point 5.5.4 of the Guidelines for state aid in the agricultural sector.

14. Fisheries

599. Among the cases in which the Commission took decisions in 2005, the following three cases are worth mentioning:

600. An investment of GBP 3 million was made in 1999 and 2000 in a fish processing company in the Shetland Islands by a company named Shetland Leasing and Property Ltd (SLAP)[328]. The Commission was made aware of it by a complaint. The investigation led to the conclusion that the funds used for the investment were derived from two trusts managed by the Shetland Islands Council and had to be considered state aid. This investment constituted operating aid incompatible with the common market. However, as the same kind of funding was considered to be a private participation in the field of structural funds, recovery of the aid has not been required for reasons of legitimate expectations on the part of the authorities and the bodies involved.

[328] Case C 13/2005.

601. The Commission approved a scheme[329] of GBP 1 million notified by the United Kingdom, the aim of which was to provide aid for a voluntary subscription system allowing salmon fish farmers to collect and dispose of their farmed fish waste. In its decision, the Commission considered that the Guidelines for state aid concerning TSE tests, fallen stock and slaughterhouse waste, which were adopted in the context of the BSE crisis, apply also to state aid towards the fallen stock from fish farms.

602. Following an exceptionally strong storm in the Baltic Sea at the beginning of January, the Commission approved a scheme[330] notified by Latvia to compensate for damage suffered by fishermen and fish farmers. Notifications of aid schemes of this kind, e.g. following a storm or other extraordinary event such as pollution, are not unusual but this is the first time that a new Member State has notified such a case.

15. Coal

603. The Commission took a significant number of state aid decisions concerning coal in 2005. In June, it approved the restructuring plans for the coal sectors in Germany, Hungary and Poland.

604. In January, the Commission approved the annual aid payments for Germany for the year 2005. In March, it approved state aid granted by Germany in 2001 and 2002 to its coal industry (although such state aid was unlawful since it was not notified). In June, it authorized annual aid for Slovakia for the year 2004 and annual aid for Poland for the years 2004 to 2006. In July, the Commission authorized aid for a new ortho-lignite mine in the Czech Republic on the basis of the Regional Aid Guidelines, as the Coal Regulation does not apply to ortho-lignite. Finally, the Commission authorized closure aid for mines in the Czech Republic, annual aid for 2005 for mines in Slovakia and annual aid for the years 2004 to 2006 for Hungary.

16. Transport[331]

16.1. Rail transport

605. On 3 May, the Commission authorized the Czech Republic[332] to grant aid to facilitate the purchase of new railway rolling stock. The Czech authorities will guarantee a loan amounting to EUR 45 million offered by the financing company EUROFIMA to Czech Railways. The measure has a very limited adverse impact on present trading conditions. First, Czech Railways is paying interest on the loan, albeit at a more advantageous rate than under full market conditions, and is paying a price for the guarantee. Secondly, the guarantee applies only to rail passenger transport, a sector not yet opened to competition under EU legislation.

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329 Case N 285/2005.

330 Case N 177/2005.

331 The following transport cases fall under the responsibility of the Directorate-General for Energy and Transport.

332 Case N 323/2004 – *Czech Republic - State guarantee for the purpose of financing the purchase of railway rolling stock by České dráhy (Czech Railways)*, Commission decision of 3.5.2005.

606. On 7 June, the Commission approved a measure in the Netherlands[333] to grant aid to promote the installation of the European Train Control system (ETCS), a new signalling and speed-control system, on freight trains on the new railway freight line called the Betuwe Route. The ETCS – the new European standard for train control – will be installed on this line to ensure safety. The Dutch authorities will partially compensate the cost of fitting ETCS to the first freight locomotives in a series that is going to use the Betuwe Route.

607. Finally, on 3 March, the Commission approved a restructuring aid measure for SNCF Freight[334]. The measure formed part of a restructuring plan, which will allow the return to viability of SNCF's freight activities. The Commission considered that the plan is compatible with EU legislation as the aid is limited to the minimum necessary and is accompanied by compensatory measures such as the reduction of capacity and the anticipated opening of the French railway freight market.

16.2. Combined transport

608. On 16 March, the Commission approved a Belgian aid scheme[335] aimed at granting subsidies for the acquisition of combined transport equipment in the Walloon region. On 5 July, another Belgian aid scheme[336] to promote national combined transport services was authorised. The three-year scheme will benefit combined transport operators using railway services. The aid is intended to compensate for the difference in external costs between road and rail which are especially high for short distances.

609. In addition, a German scheme[337] designed to encourage the creation of new combined transport services and the acquisition of dedicated equipment was authorised by the Commission on 16 March.

610. On 20 April, the Commission approved an Italian aid scheme[338] aimed at encouraging the transfer of heavy goods vehicles from road to sea. To this end, subsidies will be granted to road haulage companies which make use of existing or new maritime routes instead of road transport. The scheme will be in force for three years and its budget will amount to EUR 240 million. Nevertheless, one condition for the granting of the aid is that recipients must use the maritime services for three years following the expiry of the scheme.

16.3. Road transport

611. The Commission decided on 7 December to approve the financial part of the restructuring plan for the ABX Logistics[339] group, worth EUR 176 million. The

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333 Case N 569/2004 – *The Netherlands – Aid scheme for conversion of European Train Control System (ETCS) for freight locomotives*, Commission decision of 7.6.2005.

334 Case N 386/2004 – *France – Aid for restructuring SNCF Freight*, Commission decision of 2.3.2005.

335 Case N 247/2004 – *Combined transport aid scheme for the Walloon region*, Commission decision of 16.3.2005.

336 Case N 249/2004 – *Aid scheme for combined transport*, Commission decision of 5.7.2005.

337 Case N 238/2004 – *Germany – Aid scheme for the funding of new combined transport traffic*, Commission decision of 16.3.2005.

338 Case N 496/2003 – *Italy – Aid for the development of logistics chains and the upgrading of intermodality*, Commission decision of 20.4.2005.

339 Case C 53/2003.

decision was based on a restructuring plan which significantly reduced the capacity of the ABX Worldwide group, including its branches ABX Germany and ABX Netherlands, restored the viability of the whole of the group and transferred all of its capital to a private investor who must act within 12 months of the decision. As for the domestic activities of ABX France, these were privatised in 2005.

612. The Commission decided to approve these measures, which should be enough to restore the ABX Worldwide group's viability, even if it means having to sell the whole of the ABX Worldwide group. This is why the Commission made the acceptance of the restructuring aid conditional on selling the ABX group to a private investor who, in addition to the market price, should also make a substantial financial contribution to the ABX group.

16.4. Air transport

Alitalia (Italy)

613. The Commission decided on 7 June that the recapitalisations of Alitalia and its services subsidiary do not involve any state aid, provided that the conditions laid down to ensure that the State behaves like a prudent investor are strictly complied with. On the one hand, the State's minority participation in the future EUR 1.2 billion increase in the capital of AZ Fly must take place at the same price and under the same conditions as a private investor. In that respect, the Commission obtained a letter of intent from an international bank, which guarantees the effective and majority involvement of the private sector in this operation. This will ensure compliance with the undertaking given by Italy in July 2004 to privatise the business. The recapitalisation of the airline, finally limited to around EUR 1 billion, effectively took place in December without any need to use the guarantee provided by the banks.

614. On the other hand, the proposed investment of EUR 216 million by the public holding company Fintecna in the ground activities of AZ Services must comply with market conditions. The Commission has verified, by means of an independent investigation, that this investment offers a return consistent with what a private investor would expect. The first steps of the recapitalisation effectively took place as scheduled in December.

615. When investigating the restructuring, the Commission gave third parties an opportunity to comment on how Alitalia had used the loan of EUR 400 million which on 20 July 2004 it authorised Italy to guarantee. In the light of these comments, the Commission carried out a full analysis of Alitalia's behaviour, including an independent examination. It took the view that no misuse of this aid had taken place, and that, in particular, the company's capacity complies with the commitments made and that the new routes are profitable.

Ryanair (Belgium)

616. In its decision of 12 February 2004 concerning advantages granted by the Walloon Region and the publicly owned Brussels South Charleroi Airport (BSCA) to the airline Ryanair in connection with its establishment at Charleroi, the Commission concluded that certain types of aid which permit genuine development of new routes

under clearly defined conditions could be authorised by the Commission. The decision also indicated, however, that certain forms of aid cannot be authorised.

617. In that respect and pursuant to the decision, the Belgian authorities agreed in 2004 with Ryanair to put part of the incompatible aid, around EUR 4 million, on an escrow account, while awaiting a judgment by the Court of First Instance (CFI) on the action for annulment of the Commission decision brought by the airline. Belgium had to sue Ryanair before an Irish court to obtain repayment of the additional amount of around EUR 2.3 million (the case is still pending).

618. Also in the context of the follow-up to the Ryanair/Charleroi decision, on 9 December the Commission adopted a set of guidelines in response to recent developments in the air transport sector, namely the emergence of low-cost airlines and increased competition between airports, and in particular between regional airports, which has been particularly active in recent years in a drive to attract new air links. These guidelines[340] seek to enhance the transparency of the applicable rules by establishing what the Commission will or will not allow.

Olympic Airways (Greece)

619. In September, the Commission also concluded its investigation into allegations surrounding the granting by Greece of illegal and incompatible aid to Olympic Airways. The Commission concluded that since 11 December 2002 (the date of its previous decision concerning the Greek flag carrier) Olympic Airways and Olympic Airlines had continued to receive unlawful state aid. See also the reference to the ECJ judgment regarding the recovery of such aid in section D below.

620. In opening the investigation procedure the Commission had expressed doubts about the continuing non-payment by Olympic Airways of tax and social security liabilities, as well as about the way in which Olympic Airlines was established in late 2003.

621. In December 2003 all flight activities that were previously carried on within the Olympic Airways Group by Olympic Airways, Olympic Aviation and Olympic Macedonian were concentrated in a new entity renamed Olympic Airlines. Having carried out an in-depth study of the finances of Olympic Airways and of Olympic Airlines, the Commission found on 14 September that Greece had granted illegal and incompatible state aid through a number of measures including the non-payment of tax and social security liabilities, the overvaluation of the assets transferred by Olympic Airways to Olympic Airlines, cash grants made by the State to Olympic Airways and the lease of aircraft to Olympic Airlines at below cost[341].

Airport infrastructure (Germany and Belgium)

622. Furthermore, in 2005, the Commission adopted two decisions relating to the financing of airport infrastructure. On 19 January, the Commission decided that a German aid scheme[342] for the construction and development of regional airports in structurally

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

341 Case C 11/2004.

342 Case N 644i/2002 – *Germany*, Commission decision of 19.1.2005.

weak regions is compatible with EU state aid rules. The scheme allows for grants which are used only for investment costs in airport infrastructure that are open to all potential users on equal terms. However, no cost for the daily operational activity of the airport is eligible for financial support, nor may any specific investments by an air carrier that uses the airport in question be funded under the scheme.

623. The other airport infrastructure decision concerned the creation of a public-private partnership to develop and operate Antwerp International Airport at Deurne[343]. On 20 April, the Commission considered, in particular, that the amount of public contributions and the choice of a commercial partner were finally determined by means of an open and non-discriminatory public tendering procedure, which respected the principle of equal treatment between competitors and ensured that the level of public participation is limited to the minimum necessary.

[343] Case N 355/2004 – *Belgium*, Commission decision of 20.4.2005.

C – Enforcement of state aid decisions

1. Introduction

624. The State Aid Action Plan emphasizes that the effectiveness and credibility of state aid control presupposes a proper enforcement of the Commission's decisions, especially as regards the recovery of illegal and incompatible aid. The State Aid Action Plan announces that the Commission will seek to achieve a more effective and immediate execution of recovery decisions, which will ensure equality of treatment of all aid recipients.

625. During 2005, the Enforcement Unit in the Competition DG continued to monitor the measures taken by the Member States to execute the Commission's recovery decisions. The number of recovery decisions still awaiting execution fell from 94 on 31 December 2004 to 75 on 31 December 2005. In the course of 2005, the Commission adopted 12 new recovery decisions. In the same period, 31 recovery cases were closed.

626. The geographical distribution of pending recovery cases remains relatively stable: Germany still accounts for the largest number of pending recovery cases (35%). Taken together, Spain, Italy and France account for a further 53% of all the pending recovery cases. There are no pending cases in 16 of the Member States. Almost two thirds of the pending recovery cases concern individual aid measures, while the remainder concern aid schemes.

627. Information provided by the Member States concerned shows that substantial amounts of illegal and incompatible aid have been recovered in recent years. In 2005, the Commission received information documenting recovery of significant amounts related to a limited number of recently adopted decisions such as the decisions concerning German Landesbanks and Bull. These developments have contributed to a significant improvement in the overall recovery statistics. Of the EUR 8.6 billion of aid to be recovered under decisions adopted since 2000, some EUR 8.2 billion (a principal amount of EUR 6.0 billion and almost EUR 2.2 billion interest) had been effectively recovered by the end of 2005. Excluding interest, this represents 71% of the total amount to be recovered[344].

628. In the course of 2005, the Commission ensured a close and consistent 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 measures available in its respective legal system to implement the decision, it commenced legal action under either Article 88(2) or Article 228(2). In 2005, the

[344] It should be kept in mind that these statistics refer only to pending recovery cases for which Member States provided relatively accurate data. For 31 of the 104 recovery decisions adopted since 2000, the Member State concerned has not yet submitted reliable information on the amount of aid involved. The availability of information on amounts to be recovered is particularly limited in the case of aid schemes, especially tax or quasi-tax aid measures, and aid measures involving guarantees. The Commission continues its efforts to obtain information from the Member States on the amounts of aid involved.

Commission decided to initiate Article 88(2) proceedings for failure to execute a recovery decision in three cases, outlined below.

2. Individual cases

Municipalizzate (Italy)[345]

629. On 19 January[346], the Commission decided to refer Italy to the European Court of Justice (ECJ) for failure to comply with a decision of 5 June 2002. The decision provided that aid granted by Italy to public service companies was incompatible and had to be recovered from the recipients. Two years after the adoption of the decision, the Commission concluded that Italy had not taken any effective measures under national law to obtain immediate recovery of the aid. Italy had adopted only preliminary measures, but no concrete measure ordering recovery from the recipients.

Thüringen Porzellan GmbH, Kahla (Germany)[347]

630. On 16 February, the Commission found that Germany had not fully complied with the recovery decision of 30 October 2002 regarding aid granted to German porcelain manufacturer Kahla Porzellan GmbH and its successor company Kahla/Thüringen Porzellan GmbH. It considered that Germany had failed to seek the recovery of part of the amount of illegal and incompatible aid specified in the decision.

Urgent employment measures (Italy)[348]

631. On 6 April, the Commission decided to refer Italy to the ECJ for failure to comply with a recovery decision of 30 March 2004. The decision found that the Italian aid scheme for companies acquiring companies in liquidation was contrary to the state aid rules and that the aid in question had to be recovered from the recipients. The scheme was aimed at protecting employment in large companies in difficulties by granting a reduction in social security contributions. One year after the adoption of the recovery decision, Italy had not yet informed the Commission of any measures taken to comply with it.

Basque fiscal scheme (Spain)[349]

632. On 20 December, the Commission decided to refer Spain to the Court of Justice for failure to comply with three recovery decisions concerning a Basque fiscal scheme. These recovery decisions found that the Basque fiscal scheme providing a ten-year corporate tax exemption for newly created firms was contrary to the state aid rules. Four years after the adoption of the three decisions, there is still no indication that Spain has taken any concrete measures to put an end to the scheme in question or to recover the illegal and incompatible aid already granted.

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345 CR 27/1999.
346 Case C-207/2005.
347 CR 62/2000.
348 CR 62/2003.
349 CR 58/1999, CR 59/1999 and CR 60/1999.

Application of the Deggendorf case law – Aid to ACEA Electrabel (Italy)[350]

633. In 2003, the Commission opened an Article 88(2) procedure in respect of a district heating project in a neighbourhood of Rome, pursuant to the *Deggendorf* case law, because the recipient of the aid was ACEA, a company controlled by the municipality of Rome[351]. In the meantime, ACEA had organised and created a joint venture with the Belgian company Electrabel, called AceaElectrabel. A subsidiary of the joint venture, AceaElectrabel Produzione, jointly controlled by Acea and Electrabel, became the aid recipient.

634. On 16 March, the Commission decided to close the procedure with a decision confirming that the measure constitutes compatible aid, and that the recipient remains the same as in the "*municipalizzate*" case, even if there is a partial change in the recipient's identity. The positive decision was taken on the condition that the aid can be granted only after the recovery of the aid which had been declared illegal and incompatible.

635. In August, AceaElectrabel Produzione decided to appeal against this decision before the CFI.

D – Selected Court cases

Streekgewest Westelijk Noord-Brabant[352]

636. Streekgewest Westelijk Noord-Brabant, a body responsible for collecting waste, had to pay a tax each time waste was delivered to a processing facility. It requested a refund of the amount paid on the ground that the tax was levied in breach of the standstill obligation in Article 88(3). The amendments to the law imposing the tax and the exemption from it entered into force before the Commission had approved them. However, after an investigation of these measures, the Commission concluded that no aid elements were incompatible with the common market.

637. In its judgment of 13 January on the preliminary questions put by the national court seized of the matter, the European Court of Justice (ECJ) held that taxes did not fall within the scope of the state aid provisions unless they constituted the method of financing an aid measure, so that they formed an integral part of that measure. This close relationship and mutual dependence (hypothecation) exist only if the revenue from the tax is necessarily allocated to the financing of the aid. If this is the case, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the compatibility of the aid measure. In the case of such a link, the notification must also cover the method of financing and then the tax itself is covered by the prohibition on implementation.

638. The ECJ noted further that the last sentence of Article 88(3) has direct effect. This means that if a tax forms an integral part of an aid measure, the Member States are in principle required to repay the charges levied in breach of EU law. Individuals can

350 Case C 35/2003 *Lazio – Greenhouse gas reduction*.
351 See Case CR 27/1999 referred to in point 624.
352 Case C-174/2002 *Streekgewest Westelijk Noord-Brabant*.

rely on the direct effect of this article before national courts not only if they are affected by the distortion of competition, but also simply to obtain a refund of a tax levied in breach of that provision, provided of course that the individual was subject to a tax implemented in breach of the Treaty.

F.J. Pape[353]

639. In accordance with its findings in the *Streekgewest Westelijk Noord-Brabant* case discussed above, the ECJ examined in the *F.J. Pape* case whether the tax in question formed an integral part of an aid measure. As in *Streekgewest*, the Netherlands had started granting the aid before the Commission gave its approval. The ECJ ruled on 13 January that there was not a sufficient link between the tax and the aid measure, since under Dutch law the competent authorities could exercise discretion in allocating the revenue from the tax for various purposes. Therefore, the revenue from the tax had no direct impact on the amount of aid, and the ECJ concluded that there was no link between the tax and the aid measure such as to oblige the Member State to repay the tax to Mr Pape.

Confédération nationale du Crédit Mutuel v *Commission*[354]

640. In its judgment of 13 January, the Court of First Instance (CFI) annulled the Commission decision of 15 January 2002 declaring aid granted by France to Crédit Mutuel to be incompatible with the common market. The aid had been granted in the form of collection and management of regulated savings under the "*Livret Bleu*" system. France and Crédit Mutuel appealed against the decision before the CFI.

641. The CFI annulled the Commission decision for lack of a sufficient statement of reasons, pursuant to Article 253 EC.

642. First of all, the CFI stated that the designation of the aid in the operative part of the decision did not enable the persons concerned to identify the state measures held by the Commission to constitute aid. As a result, the Court was not able to exercise its power of review over the assessment of those measures.

643. Secondly, as the operative part of the decision and the statement of reasons constitute an indivisible whole, the CFI looked at the other parts of the decision, and in particular at the analysis of the conditions of Article 87(1). It concluded that the other parts of the decision did not provide sufficient reasons regarding the identification of the measures treated as aid.

Belgium v *Commission*[355]

644. In this case, Belgium was seeking the annulment of Commission Regulation (EC) No 2204/2002 concerning the application of Articles 87 and 88 EC to state aid for employment. The ECJ in its judgment of 14 April rejected the appeal by Belgium, upheld the Commission Regulation and made the following statements concerning the respective powers of the Commission and the Council in the field of state aid.

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353 Case C-175/02 *F.J. Pape* v *Minister van Landbouw, Natuurbeheer en Visserij*.

354 Case T-93/02 *Confédération nationale du Crédit Mutuel* v *Commission*.

355 Case C-110/03 *Belgium* v *Commission*.

645. The ECJ stated that the Commission did not exceed its powers by defining compatibility criteria for state aid. The Commission did not have to confine itself to simple codification of its previous practice, but was allowed to use its experience to lay down new compatibility criteria, including even stricter criteria than the existing ones. The Council, by means of Council Regulation (EC) No 994/98, conferred on the Commission the power to declare that certain categories of aid were compatible with the common market and were not subject to the obligation of notification. But this Regulation did not confer on the Commission any power to interpret Article 87(1) and to impose a general and binding definition of the concept of state aid as laid down in Article 87(1).

Sniace v *Commission*[356]

646. The CFI judgment of 14 April clarified the conditions for the admissibility of an action brought before the European Courts by the competitor of a recipient of aid. In the case in question the applicant, Sniace, a Spanish company producing artificial and synthetic fibres, challenged a Commission decision allowing Austria to grant aid to the company Lenzing Lyocell GmbH & Co. KG (LLG).

647. The CFI emphasized that a competitor, in order to challenge a decision by the Commission, has to show that it is individually concerned by the decision. For this purpose, two factors were taken into consideration:

- first, the role of the competitor in the pre-litigation procedure: Sniace played only a minor role in the pre-litigation procedure, as it lodged no complaint with the Commission and the conduct of the procedure was not largely determined by its submissions;

- second, the evidence adduced by the applicant to show that the decision might affect its position on the market; the CFI noted that the applicant did not operate on the same market as LLG nor did it intend operating on the same market in the future; furthermore, the applicant could not establish sufficiently that the contested decision could significantly affect its position on the market since its statements were based on completely unsupported assumptions lacking evidence and giving no indication of losses or negative consequences suffered.

648. Therefore, the CFI declared that the action introduced by Sniace was inadmissible as the applicant was not individually concerned by the Commission decision.

Italy v *Commission*[357]

649. By its judgment of 10 May in this case, the ECJ partly annulled the Commission decision of 6 August 1999 initiating proceedings concerning state aid granted to undertakings in the Tirrenia di Navigazione group. Italy sought the annulment of this decision in so far as it ordered the suspension of the aid in question.

650. The judgment is interesting as it clarifies some procedural rules to be applied by the Commission when assessing aid measures.

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356 Cases T-88/01 and T-141/03 *Sniace* v *Commission*.

357 Case C-400/99 *Italy* v *Commission*.

651. First, concerning the possibility for the Commission to order the suspension of new aid measures, this suspension should be preceded by an opportunity for the Member State to discuss all the measures and to submit comments. In the case at issue, the Commission did not discuss with the Italian authorities the tax treatment which the Tirrenia group benefited from for supplies of fuel and lubricating oil for its vessels. The ECJ therefore concluded that the Commission decision should be partly annulled to the extent to which it entailed suspension of this specific aid measure.

652. Second, on the alleged misuse of powers by the Commission, the ECJ indicated that a misuse of powers could only be established if there were clear doubts that the measures constituted existing aid or measures not incorporating any element of aid. In that case, the Commission would not have been entitled to consider them as being new aid measures and subsequently to order the suspension of these measures. In the case in question, the suspension of the measures, classified as new aid measures, did not entail a misuse of powers.

653. Finally, the ECJ examined whether the Commission was right in qualifying the measures as new aid in the opening decision. The ECJ first stated that it was the responsibility of the Member State, which considered that the aid in question was existing aid, to provide the Commission at the earliest possible stage with the information on which that position was based, as soon as the Commission drew its attention to the measures concerned. If, for the purposes of a provisional assessment, that information enabled the Commission to take the view that the measures in question probably constituted existing aid, it had to deal with them within the procedural framework provided for in Articles 88(1) and 88(2). However, this did not apply to the case at issue.

Commission v *Greece*[358]

654. On 11 December 2002, the Commission took a decision declaring restructuring aid to Olympic Airways to be illegal and incompatible. Consequently, it ordered Greece to recover the aid.

[358] Case C-415/03 *Commission* v *Greece*.

655. Some preliminary measures were taken by Greece to recover the aid. However, after the recovery decision had been taken, Greece transferred the personnel and the most profitable assets of Olympic Airways, free of all debt and for no consideration, to a newly created company called Olympic Airlines and made it impossible to recover the former company's debts from the new firm. Hence, the Commission began an action for failure to act against Greece before the ECJ.

656. The ECJ ruled on 12 May that the transfer of the assets of the aid recipient was structured in such a way as to make it impossible to recover the recipient's debts. The operation created an obstacle to effective implementation of the recovery decision. The purpose of the recovery decision, which is to restore competition, was therefore seriously compromised.

657. The measures taken by Greece did not result in the recovery of the sums owed by Olympic Airways, as they were either incomplete, too late (as they were not taken within the prescribed period of two months) or non-binding. The ECJ therefore concluded that Greece had failed to comply with the Commission decision.

Corsica Ferries France SAS v Commission

658. The Commission's decision of 9 July 2003 on the recapitalisation of the French ferry company SNCM was annulled by the CFI on 15 June[359]. The CFI annulled the decision owing to the fact that the Commission's analysis regarding the proceeds of a sale of assets worth EUR 12 million was not such as to allow the Commission to ascertain whether the amount of aid was limited to the strict minimum. However, all the other arguments of the plaintiff were rejected.

CDA v *Commission*[360]

659. By its judgment of 19 October in this case, the CFI partly annulled the Commission decision concerning state aid granted by Germany to CDA Compact Disc Albrechts GmbH (Thuringia) in so far as it ordered Germany to recover aid to undertakings other than the initial recipient.

660. First, the CFI indicated that recovery can be ordered from an undertaking only if it can be proven that that undertaking actually benefited from the aid. Such a benefit cannot be established if the aid has been fraudulently diverted from the original undertaking by another undertaking. The Commission should use all means at its disposal to seek more precise information from the Member State on the amount of aid diverted.

661. Second, the CFI stated that the extension of a recovery order to an undertaking other than the original one would be possible in the case of an established circumvention of the recovery order. However, such circumvention is difficult to establish in the case at hand. Even if it is true that the assets were used by the successor company to continue the activity of the original recipient, and even if the aim of this transfer was to save part of the assets from legal and economic uncertainties, this was not sufficient to demonstrate that there was an intention to circumvent the recovery order of the

359 Case T-349/03 *Corsica Ferries France SAS* v *Commission*.

360 Case T-324/00 *CDA* v *Commission*.

Commission. The elements taken into consideration by the CFI in rejecting the circumvention alleged by the Commission were the fact that a market price had been paid for the assets by the successor company, and the fact that there had been an open and unconditional tender for the transfer of the assets.

Nazairdis[361]

662. This case concerned a reference for a preliminary ruling made by a French court on the question whether a progressive tax borne directly by retail stores in France (the TACA) constituted state aid. The ECJ applied the criteria set out in the *Streekgewest and Pape* cases discussed above.

663. The revenue generated by the TACA was used in several ways. It was initially used to finance so-called "cessation payments", i.e. aid to traders and craftsmen who are over the age of 60 and permanently cease their activity. Since the TACA was established, the revenue generated had increased considerably and this revenue surplus was then allocated to basic old-age insurance schemes for self-employed persons in the crafts sector or in manufacturing and trading occupations, as well as to the FISAC[362] and the CPDC[363]. With respect to each of the above-mentioned allocations, specific legal provisions set out either who decided on the amount of tax-related revenue to be spent for a given purpose and/or how the individual amount paid to an applicant would be determined.

664. In April 2001 the claimant companies in the main proceedings brought several actions before national courts in France against the body in charge of collecting the TACA. Those actions sought to obtain reimbursement of the sums which the companies had paid as TACA over past years. The argument was that the TACA was unlawful as it formed an integral part of state aid measures which were not notified to the Commission.

665. In its judgment of 27 October, the ECJ first examined the exemption from the TACA enjoyed by small retail outlets. It held that the possible illegality of an exemption from the TACA for small retail outlets was not as such sufficient to affect the legality of the tax itself. Second, it recalled the *Streekgewest and Pape* case law discussed above, noting that a tax is considered to form an integral part of an aid measure only in the event of a hypothecation of this tax to the aid measure. This means that the revenue from the tax must necessarily be allocated to the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the common market.

666. In the case at hand the ECJ concluded that such a link did not exist. It pointed out the following characteristics: the national legislation did not provide for hypothecation of the TACA to the alleged aid measure, but established the amount of alleged aid between a minimum and a maximum measure regardless of the revenue from the tax; the activity of the recipient funds did not constitute an economic activity; and the

361 Joined Cases C-266/04 to C-270/04 and C-321/04 to C-325/04 *Nazairdis* (now Distribution Casino France).

362 Intervention Fund for the Support of Crafts and Trade.

363 Fuel Distributors' Trade Committee.

Ministers enjoyed a margin of discretion to allocate the revenue from the TACA to finance some insurance schemes.

667. Therefore, the businesses which were liable to pay the TACA could not rely on the possible illegality of the exemption before the national courts in order to avoid payment of that tax or to obtain its reimbursement.

E – Statistics

Figure 6
Trend in the number of aid cases registered (excluding complaints received in agriculture, fisheries, transport and coal) between 2000 and 2005

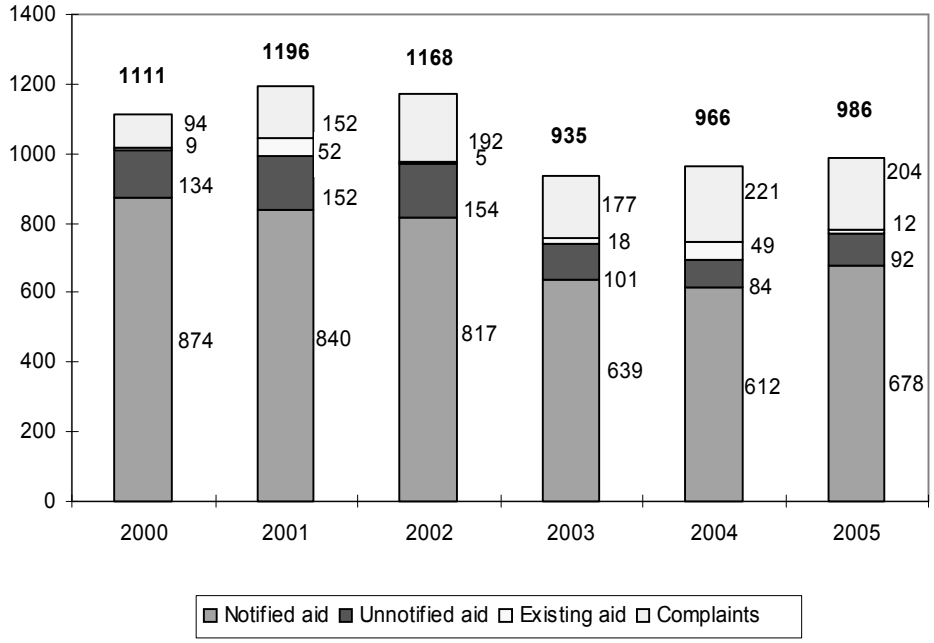


Figure 7
Trend in the number of cases decided by the Commission between 2000 and 2005

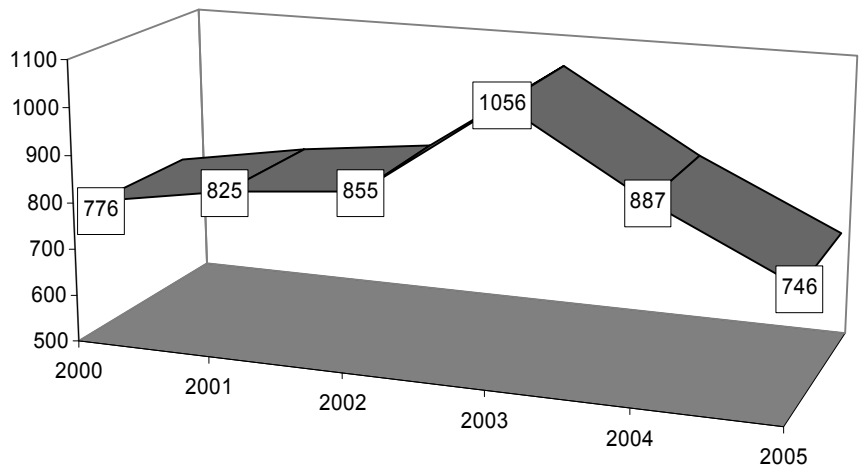
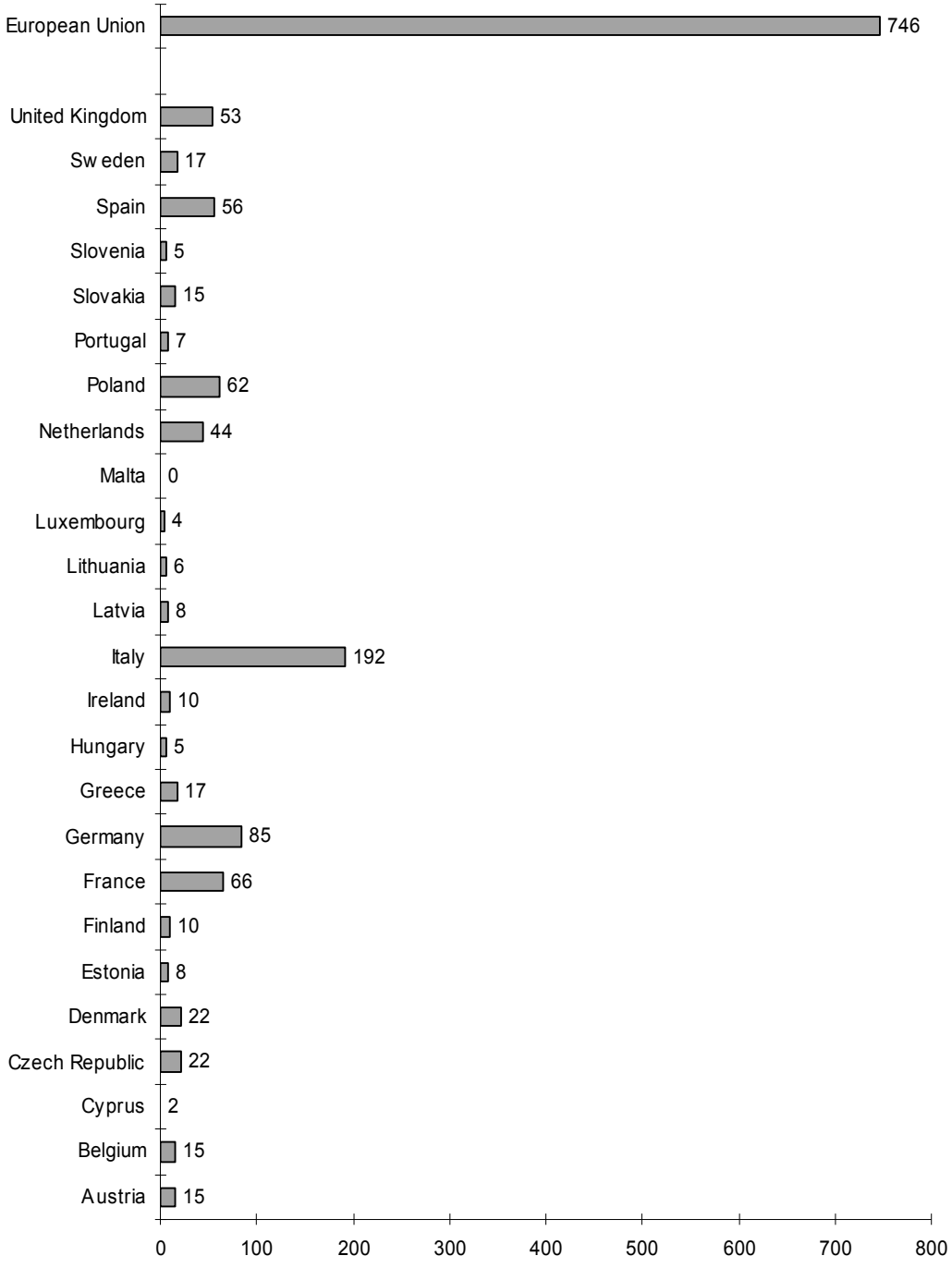


Figure 8
Number of cases decided relating to each Member State in 2005



IV – International activities

A – Enlargement and Western Balkans

668. On 3 October, the EU opened accession negotiations with Turkey and Croatia. The first round of discussions on the competition chapter ("*acquis* screening") took place in November and December. The candidate countries are expected to establish a legislative framework for antitrust policy, merger control and state aid control, set up competition and state aid authorities, and ensure effective enforcement of these rules by the time of a possible accession.

669. In the run-up to the accession of Romania and Bulgaria in 2007, the Commission closely monitored the preparations for membership and assisted in the enforcement of the competition rules.

670. The Commission reviewed the state aid measures which Bulgaria notified in accordance with the so-called existing aid mechanism in the Accession Treaty. This mechanism provides that any aid measure applicable after accession which is considered to be state aid within the meaning of the Treaty and is not included in the existing aid list is deemed to constitute new aid upon accession.

671. With regard to Romania, the Commission closely monitored the state aid enforcement record by reviewing all draft decisions before their final adoption by Romania. On 25 October, the Commission adopted a report on Romania's progress in the area of competition policy[364], finding that Romania had made considerable progress in the enforcement of competition rules, notably in the area of state aid control.

672. The Competition DG has been active in assisting in the development of sound competition regimes in all Western Balkan countries. This included help in drafting competition and state aid laws, advice on setting up the necessary institutions for the enforcement of these rules and promoting competition discipline.

[364] Annex 1 to the Comprehensive Monitoring Report on Romania, SEC (2005) 1354 final.

B – Bilateral cooperation

1. Introduction

673. The Competition DG cooperates with numerous competition authorities on a bilateral basis and in particular with the authorities of the EU's major trading partners. The EU has dedicated cooperation agreements in competition matters with the United States of America, Canada and Japan. With Korea, a Memorandum of Understanding establishes the formal basis of collaboration.

674. The principal elements of these dedicated agreements are mutual information on, and coordination of, enforcement activities and the exchange of non-confidential information. Under the agreements one party may request the other to take enforcement action (positive comity), and one party may take into account the important interests of the other party in the course of its enforcement activities (traditional comity).

675. The EU has also concluded several free trade agreements and association and cooperation agreements, which usually contain basic provisions concerning cooperation on competition matters. Examples of such agreements are the EuroMed Agreements, agreements with certain Latin American countries and with South Africa. Cooperation between the European Commission and the competition authorities of other OECD member states is carried out on the basis of a recommendation adopted by the OECD in 1995.

2. Agreements with the USA, Canada and Japan

United States of America

676. Cooperation with the US competition authorities is based on dedicated competition cooperation agreements[365].

677. In the field of air transport, on 18 November, the Commission finalised the draft text of a new agreement with the US that will replace the existing bilateral agreements concluded by Member States (see also part I.B.3.2 above). The agreed institutional cooperation framework provides in broad terms for the same means of cooperation as the existing EC/US agreement governing competition policy cooperation between the Commission, the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). It includes notification of relevant cases, exchange of information

365 The agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws was concluded on 23.9.1991. By a joint decision of the Council and the European Commission on 10.4.1995 the Agreement was approved and declared applicable from the date it was signed by the European Commission (OJ L 95, 27.4.1995, p. 47). On 4.6.1998 the positive comity agreement, which strengthens the positive comity provisions of the 1991 Agreement, entered into force (Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998, p. 26)).

both on general and case-related issues, and regular meetings to discuss developments in the market as well as issues of common interest. With regard to this last area of cooperation, it was agreed to set up a regular discussion forum to discuss general policy issues. The new cooperation framework between the Commission and the US Department of Transportation on competition law and policy in the field of air transport will facilitate the joint assessment of alliances between EU and US carriers and promotes the emergence of compatible regulatory results. The agreement, if finally approved, could be applied as early as late October 2006.

678. During 2005, the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice and the US Federal Trade Commission. Contact between Commission officials and their counterparts at the two US agencies were frequent and intense. These contacts range from cooperation in individual cases to cooperation in relation to more general competition policy-related matters. Case-related contacts usually take the form of regular telephone calls, e-mails, exchanges of documents, and other contacts between the case teams. Cooperation continues to be of considerable mutual benefit to both sides, in terms of enhancing the respective enforcement activity, avoiding unnecessary conflicts or inconsistencies between those enforcement activities, and in terms of better understanding each other's competition policy regimes.

679. Cooperation in merger control with the US antitrust agencies continued at a high level of intensity during 2005. 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. In practice, cooperation on cases occurs in a very pragmatic and flexible way, adapted to the case and the issues involved.

680. In 2005, there were numerous merger cases with an impact on both sides of the Atlantic where there was a considerable degree of practical cooperation and exchanges of views between the respective EU and US case teams. Over the course of the year, a number of merger cases involved substantial cooperation. These included *Johnson & Johnson/Guidant*[366], where cooperation with the FTC focused on the patent dimension in the US market and led to the investigations being aligned so far as was possible even though the timing of the procedures in the EU and US differed. In *Procter & Gamble/Gillette* there was again close cooperation with the FTC as regards product market, assessment of possible anticompetitive effects and remedies as well as to keep the procedures aligned to the extent possible given the different timing of the procedures. In both of these cases the competition issues differed between the US and the EU so that in *J&J/Guidant* in the EU the case was cleared subject to remedies in endovascular stents and coronary steerable guidewires whereas in the US no issue arose in these markets and in *P&G/Gillette* the Commission's investigation identified only a horizontal competition concern in battery toothbrushes whereas in the US there were broader competition concerns addressing battery toothbrushes, teeth whiteners and deodorants. A common merger remedy was also found in the *Reuters/Telerate* case[367], which the Commission investigated together with the DoJ.

366 Case M.3687.

367 Case M.3692.

681. As in previous years, the Commission's experience demonstrates that cooperation and coordination on mergers is most useful on issues related to the design, negotiation and implementation of remedies to any competition problems identified by the agencies. A concerted approach helps to reduce potential inconsistencies of approach, to the mutual benefit of the merging parties and of the agencies themselves.

682. During the year, there were also frequent contacts in a number of non-merger cases. One area of growing importance in the Commission's bilateral relationship with the US DoJ is the joint fight against cartels which both authorities regard as a priority. Therefore, bilateral cooperation between the Commission and the US DoJ was particularly intense in cartel cases: numerous contacts took place between officials of the Competition DG's cartel units and their counterparts at the DoJ on several current investigations. The exchanges of information on particular cases were most frequent, but discussions also concerned policy issues. 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, coordination of investigative measures and 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.

683. In the declaration to the EU-US summit of 20 June "The European Union and the United States Initiative to Enhance Transatlantic Economic Integration and Growth", both sides agreed to enhance cooperation in competition matters further and to explore ways of exchanging certain confidential information, including with respect to international cartels.

684. Commissioner Neelie Kroes met the heads of the US antitrust agencies on several occasions. The annual bilateral EU/US meeting took place on 21 September in Washington.

685. There were 82 formal notifications made by the Commission during the year. The Commission received 27 formal notifications from the US authorities during the same period.

Canada

686. Cooperation with the Canadian Competition Bureau is based on the EU/Canada Competition Cooperation Agreement signed in 1999[368]. Contacts between the Competition DG and the Bureau, its Canadian counterpart, have been frequent and fruitful. Discussions have concerned both case-related issues and more general policy issues. Case-related contacts concerned all areas of competition law enforcement, though the most frequent contacts concerned merger and cartel investigations.

687. Contact between the agencies usually takes the form of regular telephone calls, e-mails, and conference calls between case teams. For cartel cases, this also includes the coordination of investigations.

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368 Agreement between the European Communities and the Government of Canada regarding the application of the competition laws (OJ L 175, 10.7.1999, p. 50). The Agreement was signed at the EU/Canada Summit in Bonn on 17.6.1999 and entered into force at signature.

688. The Competition DG and the Canadian Competition Bureau also continued to maintain an ongoing dialogue on general competition issues. In this respect, several meetings took place. In February a meeting to discuss merger remedies was held in Paris; in June representatives of the Bureau met with their EU counterparts twice to discuss cooperation in cartel investigations and in dominance and other non-cartel cases.

689. There were eight formal notifications by the Commission during the year. The Commission received one formal notification from the Canadian authorities during the same period.

Japan

690. Cooperation with the Japan Fair Trade Commission (JFTC) is based on the 2003 Cooperation Agreement[369]. Contacts with the JFTC have increased considerably in the course of 2005. Contacts concerned both case-related issues and more general policy issues.

691. In addition to numerous contacts on individual cases, the Competition DG and the JFTC continued their ongoing dialogue on general competition issues of common concern. In this connection, three meetings took place in Brussels in 2005, one on 21 March focusing on economic analysis, one on 12 April focusing on cooperation in cartel investigations and one on 13 December focusing on merger analysis. A further meeting between the Competition DG and the JFTC took place on 11 November in Tokyo where a whole range of issues was discussed.

692. The Commission received one formal notification from the Japanese authorities during the year.

3. Cooperation with other countries and regions

Australia

693. During 2005, the Competition DG engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia. These contacts concerned both case-related and more competition policy-related issues.

China

694. Cooperation with China is based on the 2004 Terms of Reference on structured dialogue on competition policy[370]. During 2005, contacts with Chinese authorities on competition policy matters increased considerably and dealt with both general policy issues and questions concerning the establishment of a competition authority.

695. During the course of the year, the Competition DG took various actions to help China

369 Agreement between the European Community and the Government of Japan concerning cooperation on anticompetitive activities (OJ L 183, 22.7.2003, p. 12). The Cooperation Agreement between the European Community and Japan was signed in Brussels on 10.7.2003 and it entered into force on 9.8.2003.

370 Terms of Reference of the EU-China competition policy dialogue. Signed in Brussels on 6 May 2004.

in its process of developing its first comprehensive competition law and a competition authority. The Commission held meetings with the Chinese officials involved in drafting the new competition law. In April, it jointly organised with the Chinese Ministry of Commerce a seminar on competition policy in Beijing and it participated in various other international seminars on competition policy in China. The Competition DG has also financed and supervised a study that responds to a number of questions from the Chinese authorities relating to the EU approach and experience in developing an effective legislative and enforcement framework for competition policy.

European Free Trade Area

696. During the course of the year the Commission continued its close cooperation with the ESA (EFTA Surveillance Authority) in enforcing the Agreement on the European Economic Area. In May the provisions adapting Protocols 21 and 23 of the EEA Agreement to the changes introduced by Regulation (EC) No 1/2003 entered into force. Protocol 23 deals with cooperation between the ESA and the Commission in the application of Articles 53 and 54 of the EEA Agreement. In December the EFTA States which have ratified the EEA Agreement (i.e. Liechtenstein, Iceland and Norway) made use of the "review clause" contained in Protocol 21. Based on this clause the EFTA States requested that the mechanisms for the enforcement of Articles 53 and 54 of the Agreement be reviewed.

Korea

697. Cooperation between the Competition DG and the Korean Fair Trade Commission (KFTC) is based on a Memorandum of Understanding (MoU) which was signed in October 2004. In June the first bilateral consultation meeting between the Competition DG and the KFTC under the MoU took place in Brussels with the participation of Commissioner Neelie Kroes and Director-General Philip Lowe on behalf of the European Commission and Chairman Kang on behalf of the KFTC. Information was exchanged on the respective modifications recently made to the EC and Korean competition laws. It was also explored how to further improve and strengthen cooperation. The two authorities increasingly cooperate on various competition issues and have exchanged views in particular on investigative methods and on remedies in antitrust cases. The second bilateral consultation meeting will be held in Korea in 2006.

Latin America

698. During 2005, the Competition DG engaged in cooperation with the competition authorities of Mexico and Brazil concerning case-related and competition policy-related issues (for example on joint and collective market power, telecommunications issues, etc.). The Commission received five formal notifications from the Mexican authorities.

Russia

699. The Road Map for a Common Economic Space between the EU and Russia, agreed at the EU-Russia summit of 10 May, includes a substantial section on competition, which commits the two jurisdictions to further coordination and dialogue on competition policy, including in the field of state aid. Talks between DG Competition and the Russian Federal Anti-Monopoly Service (FAS) on policy issues took place in July (at Director-General level), and in October and December. In particular, the Competition DG provided input to the FAS, at the request of the latter, on matters relating to a draft new anti-monopoly law for the Russian Federation, which was before the Duma at that time. EU technical assistance to the FAS continued, with the start of a new TACIS programme in the competition field, and the Commission sponsored the participation of one FAS representative at the ICN annual conference in Bonn in June.

C – Multilateral cooperation

1. International Competition Network

International Competition Network annual conference, Bonn, June 2005

700. The ICN, to which the Commission attaches considerable importance as a forum for discussion and coordination between competition agencies, continued to grow in membership in 2005, with over 90 agencies as members. The level of activity remained high, as was evidenced at the annual conference in Bonn, Germany, in June. The conference was a great success in terms of the number of attendees, the range and quality of the discussion, and the work products presented by the various working groups. The products of the cartels and merger working groups are discussed below; the working groups on "Antitrust Enforcement in Regulated Sectors" (AERS) and "Competition Policy Implementation" (CPI) also presented a number of relevant and useful work products. These include reports on technical assistance activities, outreach to consumers, advocacy, and interaction between competition agencies and sectoral regulators. The AERS working group was wound up in Bonn, and a new working group on the telecommunications sector was created. The Competition DG organised one panel at Bonn (on cartels), and participated in numerous others.

ICN cartels working group and Seoul Cartels workshop

701. The ICN cartels working group, launched in 2004, which is co-chaired by the Competition DG and the Hungarian competition agency (GVH), completed a number of significant projects in 2005, and undertook several others. The work products of the cartels working group in its first year, which it presented to the ICN annual conference in Bonn, were the following:

- a report entitled "Building Blocks for Effective Anti-cartel Regimes, Vol. 1" covering the following subjects: defining hardcore cartel conduct, effective institutions in the fight against cartels, and effective penalties;
- an anti-cartel enforcement manual, including the introduction and chapters on searches/inspections (with best practices) and on leniency programmes (to which further chapters will be added later);
- a template for providing information concerning laws and regulations regarding cartels, which ICN member agencies will be invited to fill in.

702. For the 2005/2006 ICN year, the cartels working group has undertaken new work projects on: electronic evidence gathering (on which a chapter for the aforementioned manual will be prepared), cooperation between agencies in cartel investigations (the Competition DG is in the lead on this project), interaction of public and private enforcement, and obstruction of investigations. The results of these projects will be presented at the next ICN annual conference in Cape Town in May 2006, together with the template for information on cartel laws and regulations, filled in by ICN member agencies.

703. In November the annual ICN cartels workshop (organised by the cartels working group) took place in Seoul, South Korea. The Competition DG played an active role in the workshop, participating in sessions on effective institutions for investigating cartels, cooperation between agencies in cartel investigations, and IT forensics.

ICN Mergers Working Group – Notification and Procedures Sub-group

704. The Competition DG continued to be actively involved in the work of this sub-group during the course of 2005. In the early part of the year, the sub-group finalised its preparation of a further two recommended practices covering (1) merger remedies; and (2) agency enforcement powers, resources and independence. These were endorsed by the ICN membership in plenary session at the ICN Annual Conference in Bonn in June. These two new texts bring to thirteen the number of recommended practices adopted by the ICN, on the basis of drafts produced by this sub-group. The eleven others concern: (1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) flexibility in the timing of merger notification; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; (7) transparency; (8) confidentiality; (9) procedural fairness; (10) conduct of merger investigations; and (11) interagency cooperation. With these two practices the set of ICN recommendations seems to be complete, and it was agreed that no further recommendations would be developed at this stage.

705. The subgroup also finalised work on a couple of other projects: the development of a model form or forms for use by merging parties and competition agencies governing waivers of confidentiality protection for materials submitted in connection with merger review; and the preparation of a study on filing fees in merger control. The work on waivers and filing fees was presented for endorsement at the annual conference in Bonn in June.

706. Finally the sub-group continued its work during the year regarding implementation of the recommended practices. This includes mainly the collation of information on impediments to jurisdictions' ability to implement the recommended practices, as well as the preparation of a report identifying challenges agencies face in adopting the practices and techniques to help surmount impediments. This report was presented in Bonn and showed that as of April, 46% of ICN member jurisdictions with merger laws have made or have proposed changes that bring their merger regimes into closer conformity with the Recommended Practices, and an additional 8% are planning to make such changes. To further support the implementation process, it was decided to hold an implementation workshop in spring 2006 to provide examples and guidance on further alignment with the ICN practices. Since Bonn the sub-group's work has been concentrated on the preparation of this Workshop. The sub-group continues to monitor reform efforts and to provide support to ICN members considering changes to legislation, regulations, and agency practices, as well as working with non-members developing new merger review legislation.

2. OECD

707. In 2005, the OECD Competition Committee for the first time held a peer review

examination of competition law and policy in the EU. This review follows the 2003 OECD review of economic policies in the euro zone. It is a common understanding among OECD members that the review of the economic policy of a given jurisdiction must be followed by an in-depth review of its competition policy.

708. The review process started with the preparation of a draft review report by the OECD Secretariat, which studied the accomplishments and current challenges facing EU competition policy and institutions, and raised policy options for consideration. The process culminated in the oral examination at the OECD Competition Committee's October meeting. The OECD Secretariat completed the report after the oral examination and published it in the OECD publications series[371].

709. The peer review report outlines the following four policy options for consideration:

- clarify the relationships among the leniency programmes of the EU and the national enforcement agencies;
- in adopting an economics-based approach to dominance, make liability depend upon effects that harm competition; in appropriate cases, assessing the scope for recoupment should be an integral part of such an approach;
- increase further the Competition DG's capacity for economic analysis by increasing the staffing in the Chief Economist Team;
- consider means for extending sanctions to individuals as well as firms, such as coordination with application of Member State laws that provide for individual sanctions.

710. The Competition DG is analysing each of these options further in its ongoing policy development projects. In the field of leniency policy, the Competition DG is working towards what is broadly referred to as a one-stop-shop system. Concerning abuse of dominance, the Competition DG issued a discussion paper in December, which also addresses the issues raised in the peer review report. The Competition DG has been building up economic expertise in recent years. Economists work in various departments of the Directorate-General and form part of multidisciplinary case teams. The Chief Economist Team provides further support. Concerning cartel sanctions, the system in the EU is based on effective application of a combination of corporate and individual sanctions at Community and national level. There is scope for examining how to fully use the options available in this system.

[371] The report is available on the OECD website: http://www.oecd.org/dataoecd/7/41/35908641.pdf

711. In addition to the peer review, the Competition DG continued to participate in and contribute to the work of the OECD Competition Committee. The Competition DG participated in all competition policy roundtables of the OECD and participated actively in the peer reviews of the competition policies of Turkey and Switzerland. It also attended other competition-related OECD meetings such as the Global Forum on Competition and the joint sessions of the Competition Committee with the Trade Committee. Commissioner Neelie Kroes gave the keynote speech entitled "Regulating for Competition and Growth" at the OECD Global Forum on Competition in February. The Global Forum discussions concentrated on competition problems in regulated sectors. In March, the OECD Council adopted a Recommendation on Merger Review and in October the Competition Committee adopted Best Practices for Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations and a report on action against hardcore cartels[372].

712. In 2005, OECD Competition Committee meetings were held in February, June and October. In the first meeting, the Committee working parties held roundtables on structural reform in the rail sector and cross-border remedies in merger review. The roundtable on the rail sector completed a series of discussions on experiences with structural separation in various industries (covering *inter alia* energy, telecommunications, postal services and rail transport sectors). The discussion showed that there are considerable differences in the rail industries across OECD countries and that the nature, scope and role for competition also vary from country to country as will the appropriate structure which most facilitates competition. Structural separation was seen as a complement to regulation of access to the track infrastructure. Depending on the circumstances of the market, competition for the market is also a potentially valuable tool for introducing a form of competition.

713. The roundtable discussion on cross-border merger remedies showed that positive comity forms of cooperation, where one jurisdiction takes the lead on behalf of other jurisdictions in the negotiation and implementation of cross-border remedies, was more suitable to jurisdictions which had discretionary prosecutorial power in relation to merger control (such as the US) but was not legally compatible with systems which impose an obligation to take both positive and negative decisions (such as in the EU). It also emerged from the discussion that for the purposes of monitoring implementation of a remedy, the fact that the assets offered for divestment may be located outside the EU had only a limited impact.

714. The second Competition Committee meeting held roundtables on competition on merits and on the evaluation of actions and resources of competition authorities. The roundtable on competition on merits showed that there are wide differences among countries on how this issue should be approached: some countries have a more form-based approach while other countries have an economics-based approach or are in a transition towards an economics-based approach. The roundtable on evaluation of actions and resources gave an overview on evaluation activities that the OECD member countries have undertaken or are planning and served to explore ground for further discussions on this topic.

715. The Committee working parties held roundtables on the impact of substitute services

372 Both texts are published on the OECD website: www.oecd.org/competition

on regulation and private remedies. The first roundtable concentrated on telecom, transport and energy services and addressed issues that arise over regulation of substitute services. The discussion showed that often substitute services are subject to few or different regulatory obligations, which gives rise to potential regulatory asymmetry between the services. In general such asymmetries should be eliminated so that the only differences in regulation that remain are those which are necessary to reflect differences in market power, externalities or other market failures in the underlying services themselves. The discussion also highlighted the fact that active competition law enforcement is likely to be required to avoid incumbent firms' behaviour limiting competition from the substitute services.

716. The private remedies roundtable focused on discovery and gathering of evidence. This was the first roundtable in the working party on private remedies and additional discussions will follow in 2006. A Committee working party also discussed, following expert presentations, how to measure the harm caused by cartels and how to assess the benefits of competition enforcement. The discussion showed that calculations of damages find their use mostly in private enforcement. Some authorities (e.g. the OFT) are also looking at the impact of cartels to justify their own work.

717. The third Competition Committee meeting held roundtables on entry barriers and resale below cost (RBC) laws and regulations. The first roundtable showed that OECD member countries have clearly been moving from an analysis that focused on evaluating whether certain factors would form barriers to entry, towards analysing the competition process and the impact of barriers to entry in such process. The member countries are also developing their economic tests in measurement of entry barriers; they often combine both quantitative and qualitative assessment in the case of technical and regulatory barriers to entry, whereas for behavioural barriers quantitative assessment is usually not considered possible.

718. The roundtable on RBC laws showed that there are beginning to be systematic studies on the impact of RBC laws and that such studies show that such laws raise costs for consumers. There is therefore a conflict between RBC laws and the economic efficiency and consumer welfare objectives of competition laws. The discussion also demonstrated how essential it is for competition authorities to invest in promoting competition principles in the national lawmaking processes where RBC law initiatives are discussed. The Committee working parties discussed competition in the provision of hospital services and held a full day meeting with the participation of public prosecutors on cooperation between competition authorities and public prosecutors in cartel investigations.

719. The roundtable on hospital services showed that competition is being introduced more and more in the provision of hospital services and that this has a beneficial effect on efficiency in provision of the services. Some OECD countries had very good experiences with the introduction of regulation that promotes competition among public hospitals.

720. The meeting with public prosecutors explored the following issues: selection of cases for criminal prosecution and discretion to prosecute; gathering of evidence; interplay between leniency programmes and criminal prosecution; formal and informal relationships between prosecutors and competition authorities.

721. During 2005, the Competition DG presented eight written submissions to the Competition Committee covering the following discussion topics in OECD roundtables:

- structural separation in rail transport;
- cross-border remedies in merger review;
- competition on the merits;
- evaluation of actions and resources of competition authorities;
- impact of substitute services on regulation;
- discovery and gathering of evidence;
- barriers to entry;
- competition and efficiency in the provision of hospital services.

722. The Competition DG also submitted its 2004 Report on competition policy to the Competition Committee.

V – Outlook for 2006

723. The 2005 Report on competition policy provides an opportunity to set out the direction that will be taken by the Commission in the competition policy field in 2006.

724. The three multi-annual general objectives identified by the Competition DG that will enable it to continue to make a significant contribution to the Commission's strategic objectives as defined in the Commission's Annual Policy Strategy Decision 2006 and the EU's Lisbon Strategy are:

- to focus enforcement actions on those practices that are most harmful for the EU economy;
- to enhance competitiveness within the EU by helping to shape the regulatory framework;
- to focus action on key sectors for the internal market and the Lisbon Strategy.

1. Antitrust

725. In 2006, the Competition DG will give high priority to the prevention and deterrence of cartels. Cartels artificially raise the price of goods and services, reduce supply and hamper innovation, so that consumers end up paying more for less quality. Cartels can also significantly increase the input costs for European businesses. The detection and deterrence of cartels therefore brings important benefits to the EU economy and to European consumers.

726. The Competition DG's other priority in 2006 will be the completion and effective follow-up of the sector inquiries launched by the Commission in 2005, into the gas and electricity markets, on the one hand, and into the retail banking and insurance sectors, on the other. The findings of the sector inquiries will allow the Commission to decide on the right type of policy mix to solve the problems identified. The "mix" will include competition enforcement and/or advocacy, and, possibly, regulation in the areas of internal market and/or consumer protection. The inquiries will also cast light on other market conditions that permit anticompetitive behaviour.

727. In support of these priorities, the Competition DG's guiding principles as regards enforcement will continue to be prioritisation of enforcement actions according to the degree of harmfulness of anticompetitive practices vis-à-vis consumers, both business and individuals. Priority will be given to those actions that address competition problems with the highest negative impact on consumer welfare, account being taken of the volume of spending affected by the anticompetitive practice and the nature of the conduct. The existence of a significant impact on the competitive process (market foreclosure) can be used as a proxy for consumer harm. An additional element to be taken into account when defining the priorities for enforcement is the precedent value of a specific intervention which achieves the objective of clarifying the application of competition rules to complex legal or economic issues.

728. One of the major risks to the Commission's enforcement activity, as also recognized by the OECD[373], is lack of coherence in the application of EC competition rules by national competition authorities and national courts. Improving coordination within the European Competition Network (ECN) and ensuring effective interface with national competition authorities will therefore continue to be a major priority of the Competition DG's work in 2006-2007.

729. Finally, the Competition DG will continue its efforts to increase predictability and transparency in the application of competition rules through policy instruments and intensified communication vis-à-vis the public, the business community and the other institutions, in particular in the field of abuse of dominance.

2. Mergers

730. In merger control, apart from the core enforcement activities, the Competition DG's emphasis will be on ensuring continuity in how it assesses the effects of business restructuring. It will continue to identify competition concerns only on the basis of sound economic analysis and solid fact finding. Particular attention will also need to be paid to mergers which might impede the achievement of EU liberalization objectives. In 2006 the Commission will adopt revised and consolidated jurisdictional guidelines. It will also prepare guidance on non-horizontal mergers and work on updating its remedies policy to take account of the ex-post study on remedies published in 2005. Work will begin on the re-examination of the two-thirds rule, contained in Article 1(2) and (3) of Council Regulation (EC) No 139/2004, which is one of the criteria relevant for establishing the Commission's jurisdiction for mergers with a Community dimension.

3. State aid

731. In the field of state aid, the specific enforcement priorities to be pursued in 2006 are laid down in the State Aid Action Plan. Regarding policy review, the Competition DG will introduce a more economics-based approach in the design of state aid rules, focusing in particular on market failures that state aid is meant to rectify, strengthening transparency and predictability of state aid policy. It will revise the current horizontal texts accordingly, both on substance and procedure, focusing at the same time on adopting measures (best practices) for the efficient handling of cases, pending the entry into force of the super block exemption Regulation, and developing decisional practice to focus on the most distortive measures as regards the effect on trade.

[373] OECD, "Peer review of the competition law and policy in the European Community".

732. Furthermore, it will continue to pursue an active State aid control by strengthening the economic analysis in case assessment and through the systematic recovery of incompatible aid granted. In order to sanction illegality and incompatibility, the Competition DG will focus on developing a new approach to remedies, geared to a better functioning of the market where the beneficiary is present. The Competition DG will continue to apply a more integrated approach in the assessment of cases as well as in the scrutiny of major proposals.

733. The Competition DG will continue to promote an increased sense of shared responsibility between Commission and Member States for the reform of state aid rules, and will consider the establishment of a state aid network in this context. It will also continue to encourage national courts to play a more active role in the enforcement of state aid rules at national level.

734. As a complement to this work, the Competition DG will develop ex-post analysis of past enforcement actions with a view to drawing lessons about their impact.

4. International activities

735. The Competition DG's work with the candidate countries and the other Western Balkan countries will continue in 2006.

736. Within the framework of the neighbourhood policy, negotiations on the action plans which remain to be agreed (Egypt, Georgia, Armenia, Azerbaijan, Lebanon) should be completed in 2006.

737. The Commission is keen to further strengthen cooperation with major third-country jurisdictions and will prepare a framework for a Second Generation Agreement which would allow exchanging confidential information.

738. The International Competition Network annual conference will be held in Cape Town on 3 to 5 May. The results of the cartel working group, which the Commission co-chairs, and the creation of a working group on Unilateral Conduct are of particular importance to the Commission.

739. Within the framework of the formal EU–China bilateral competition dialogue, the Commission will continue to assist China in drafting its competition law.

Annex – Cases discussed in the Report

1. Articles 81, 82 and 86 EC

Case	Publication	Point
3 G Sector inquiry		78
Alrosa – De Beers Trade Agreement	OJ C 136, 3.6.2005	64
AstraZeneca	IP/05/737, 15.6.2005	73, Box 2
Austrian Airlines/SAS	OJ C 233, 22.9.2005	125
Aviation insurance		122
BMW		161
Brasserie nationale v Commission (Luxembourg beer cartel)		260
Britannia Alloys & Chemicals, Société Nouvelle des Couleurs zinciques, Union Pigments and Hans Heubach v Commission (Zinc phosphate)		270
Broadband services via line sharing in Germany		77
Coca-Cola	OJ L 253, 29.9.2005 and OJ C 239, 29.9.2005	147
Commission v Greece		90
Commission v Luxembourg		90
Commission v T-Mobile Austria GmbH (max.mobil)		245
Daimler Chrysler v Commission (Mercedes-Benz)		261
Dansk Rørindustri and others v Commission (pre-insulated pipes)		253
E.on Ruhrgas	IP/05/710, 10.6.2005	49
Euronext		120
Financial services sector inquiries		114
Football Association Premier League	IP/05/1441	105

General Motors (Opel)		161
German Bundesliga		96
Groupe Danone v Commission and Haacht v Commission (Belgian beer cartel)		266
Industrial bags		194
Industrial Thread		185
MasterCard Europe/International (multilateral interchange fees)		118
Microsoft		106
Monochloroacetic acid		182
OMV	IP/05/195, 17.2.2005	48
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SAS v Commission		258
Sector inquiries in gas and electricity		35
SEP and others/Automobiles Peugeot		153
Sumitomo Chemical and Sumika Fine Chemicals v Commission (Vitamins)		268
Syfait and others v GlaxoSmithkline		246
Territorial restrictions cases (gas supply)		47
Thyssen Krupp Stainless and Thyssen Krupp Acciai speciali Terni v Commission and Acerinox v Commission (Stainless steel (alloy surcharge))		256
T-Mobile		76
Tokai, Intech and SGL Carbon v Commission (specialty graphite)		247

VEMW v Directeur van de Dienst uitvoering en toezicht energie		53
Vodafone		76

2. Merger control

Case	Publication	Point
AMI/Eurotecnica		378
Bertelsmann/Springer		295
Blackstone/Acetex		301
Blackstone/NHP		342
Commission v Tetra Laval		381
E.on/Mol		319
Energias de Portugal (EDP) v Commission		388
FIMAG/Züblin		360
Honeywell v Commission and General Electric v Commission		398
Honeywell/Novar		340
IESY Repository/Ish		347
Johnson & Johnson/Guidant		313, 680
Lufthansa/Swiss		332
Maersk/PONL		331
MAG/Ferrovial Aeropuertos/Exeter Airport		355
Microsoft/TimeWarner/ContentGuard JV		370
Reuters/Telerate		328, 680
Siemens/VA Tech		306

Strabag/Dywidag (Walter Bau)		350
Tesco/Carrefour		364
Total/Sasol/JV		374

3. State aid

Case	**Publication**	**Point**
AB Vingriai (Lithuania)		444
ABX Logistics group		610
Aeronautical sector (Italy)	OJ C 252, 12.10.2005	518
Aid for the development of logistics chains and the upgrading of intermodality (Italy)		610
Aid for the protection of livestock against attacks by predators (Tuscany, Italy)		590
Aid scheme for conversion of European Train Control System (ETCS) for freight locomotives (Netherlands)		606
Aid scheme for the funding of new combined transport traffic (Germany)		609
Aid to Mauritania Shipbuilding (Spain)		467
Aid to Vietnam shipbuilding (Netherlands)		467
Airport infrastructure (Germany and Belgium)		622
Alitalia (Italy)		613
Altair Chimica (Italy)	OJ C 131, 28.5.2005	537
Alumina production (France, Ireland and Italy)		539
Amendment of the Greek regional aid map		513

Amendment of the Regional aid map in Finland 2000-2006	OJ C 223, 10.9.2005	513
Annual aid payments for coal (Germany, Hungary, Poland and Slovakia)		604
AVR (Netherlands)		536
Bad weather solidarity fund (Italy)		591
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Banda ancha en zonas rurales y aisladas (Spain)		478
Basque fiscal scheme (Spain)		632
BayernLB (Germany)		499
Belgium v Commission		644
BIAL (Portugal)	OJ C 275, 8.11.2005	515
Biria group (Germany)		455
Breitband Kärnten (Austria)		478
British Energy plc (United Kingdom)	OJ L 142, 6.6.2005	450
Broadband development Appingedam (Netherlands)		480
Broadband support for Wales (United Kingdom)		478
České dráhy (Czech Railways) (Czech Republic)		605
Chemische Werke Piesteritz (Germany)	OJ L 296, 12.11.2005	445
Chemobudowa Kraków (Poland)		460
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CO2 tax reductions (Slovenia)		541
Combined transport aid scheme for the Walloon region and Aid scheme for combined transport (Belgium)		608

Commission v Greece		654
Compact Disc Albrechts v Commission		659
Computer Manufacturing Services (CMS) (Italy)	OJ C 187, 30.7.2005	439
Confédération nationale du Crédit Mutuel v Commission		640
Corsica Ferries France v Commission		658
Creation of Banque Postale (France)		578
Cynku Miasteczko Śląskie (Poland)		439
Development aid to Ghana-Tugboats (Netherlands)	OJ C 100, 26.4.2005	467
Digital decoders (Italy)		486
Digital terrestrial TV (DVB-T) in Berlin-Brandenburg (Germany)		483
Digitalisierungsfonds (Austria)		482
Disposal of animal waste in 2003 (équarrissage) (France)		586
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ELVO (Hellenic Vehicle Industry) (Greece)		582
Enterprise Capital Funds (United Kingdom)		528
Ernault (France)		439
Ernault (France)	OJ C 324, 21.12.2005	446
Euromoteurs (France)	OJ C 137, 4.6.2005	446
Exempt 1929 holding companies (Luxembourg)		564
Exemption from tax on non-health insurance contracts in favour of mutual and provident societies (France)		567

Extension of three-year delivery limit for two ships (Portugal)		466
F.J. Pape v Minister van Landbouw, Natuurbeheer en Visserij		639
Fisheries sector - Damages caused by Storm (Latvia)		602
Flooding during summer 2005 (Austria and Germany)		573
Ford Genk (Belgium)		549
Frucona Kosice (Slovakia)	OJ C 233, 22.9.2005	443
Gibraltar Exempt Companies (United Kingdom)		554
Glunz (Germany)	OJ C 263, 22.10.2005	508
Guarantee scheme for shipbuilding (Italy)		469
Guarantee scheme for shipbuilding (Netherlands)	OJ C 228, 17.9.2005	469
Hessicher Investitionsfonds (Germany)		498
Holland Malt (Netherlands)		592
HSH Nordbank (Germany)		499
Huta Czestochowa (Poland)		475
Huta Stalowa Wola (Poland)		459
Imprimerie Nationale (France)		447
Innovation aid for shipbuilding (France)	OJ C 256, 15.10.2005	461
Innovation aid for shipbuilding (Germany)	OJ C 235, 23.9.2005	461
Innovation aid for shipbuilding (Spain)	OJ C 250, 8.10.2005	461
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IRAP deductions (Italy)		550
Italy v Commission		649
Konas (Slovakia)		456
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Lignit Hodonín, s.r.o. (Czech Republic)	OJ C 250, 8.10.2005	502
Measures in favour of sports clubs (Italy)		566
MG Rover (United Kingdom)	OJ C 187, 30.7.2005	439, 457
Mittal Steel Poland (Poland)		477
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Neorion shipyards (Greece)	OJ C 230, 20.9.2005	466
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Tax premium in favour of newly listed companies (Italy)		562
Tax-exempt reserve fund for certain companies (Greece)		557
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Temporary defensive measures for shipbuilding (Finland, Germany and Poland)	OJ C 131, 28.5.2005 OJ C 162, 2.7.2005	465
Tessenderlo Italia (Italy)	OJ C 223, 10.9.2005	537
Thüringen Porzellan, Kahla (Germany)		630
Tugboat Bangladesh (Spain)	OJ C 162, 2.7.2005	467
Urgent employment measures (Italy)		631
Volvo Trucks (Sweden)	OJ C 230, 20.9.2005	538
VPFM (Czech Republic)	OJ C 176, 16.7.2005	477
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