

Report on the competition policy 2008

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PURPOSE: to present the Commission Report on Competition Policy 2008.

CONTENT: the first section of this report provides an overview of how the instruments of competition policy, namely the anti-trust rules and the rules on mergers and on State aid, were further developed and applied. The second section discusses how these and other instruments were deployed in selected sectors (energy and environment; financial services; electronic communications; information technology, media; transport; pharmaceutical industry; food industry; postal services). Section three gives an overview of consumer related activities developed in the past year. Section four focuses on cooperation within the European Competition Network (ECN) and with national courts, while section five deals with international activities. Lastly, section six gives a brief description of inter-institutional cooperation.

1) Consumer activities: this year, for the first time, the Annual Report on Competition features a chapter focusing on a topic that is considered to be of particular importance in the field of competition policy. The topic chosen for this year is "Cartels and consumers". Cartels are amongst the most serious violation of competition law. The fight against cartels is central to ensuring that the benefits of a properly functioning competition regime are offered to the final consumer in a given market for products or services.

Cases such as the *Banana cartel* show that the impact of the cartel on final consumers may be direct when they are purchaser or user of a product or service. Also in markets where the direct customers are industrial clients – where the breach of competition law takes place earlier in the supply chain - consumers ultimately benefit from fighting such cartels. For instance, in the *Car Glass* case, the product was car windows which consumers purchase as part of their cars and when they want repairs done.

In this context, the report recalls that:

- when the Commission prohibits anticompetitive behaviour and fines cartel members, its ultimate purpose is not only to punish those members for past behaviour, but above all to deter every company from continuing or engaging in anti-competitive behaviour;
- the Commission itself is not involved in seeking compensation for customers in individual cases. Actions for recovery of damages following Commission decisions can be submitted to national courts;
- through its fining policy, the Commission encourages a culture of compliance with competition law at the level of the entire company group;
- the Commission imposes higher fines on repeat offenders.

The Commission can uncover cartels in a number of ways; by analysing a market for evidence of anti-competitive behaviour or by obtaining evidence from different sources. Such evidence may come directly from consumers or other customers of the infringing companies. Alternatively, it may also come from individuals linked to a company who want to “blow the whistle”, or even from cartel members themselves, making use of the Leniency Programme. Under the **2006 Leniency Programme**, the first company to provide evidence can obtain full immunity from fines. This benefit acts as an extremely strong incentive to break the “code of silence” of cartels.

In 2008 the Commission continued its strong enforcement against cartels, **fining 34 undertakings a total of EUR 2 271 million in seven cartel cases**. In the *Car Glass* case the Commission imposed the highest fine for a cartel case to date, amounting to EUR 1 383 million.

In 2008 the Commission services also made some **general estimates of the harm to the economy caused by cartels**. The Commission services looked at the 18 cartels which were the subject of Commission decisions during the years 2005 to 2007, the size of the markets involved, the cartels' duration and the very conservative assumptions regarding the estimated overcharge. **Assuming an overcharge of between 5% to 15%, the harm suffered ranges from around EUR 4 billion to EUR 11 billion for these 18 cartels**. Taking the middle point of this overcharge range - 10% - gives a conservative estimate of consumer harm of **EUR 7.6 billion** due to these cartels. Even this figure is probably too low.

In addition, this figure does not take into account the benefits of deterrence and fostering compliance among undertakings through prohibition decisions and the imposition of fines. **Strong cartel enforcement ensures that cartels that may otherwise be formed are discouraged.**

The level of merger notifications continued at record levels in 2008 with a total of **347 transactions being notified to the Commission**, the third highest level on record. The Commission adopted a total of **340 final decisions during the year**. Of these final decisions, 307 transactions were approved without conditions during Phase I. A total of 118 decisions were approved without conditions under the normal procedure and a further 189 were cleared using the simplified procedure. There were also 19 transactions cleared in Phase I, but subject to conditions. The Commission initiated ten Phase II proceedings during the year.

As far as **abuses of dominant position** are concerned, following a statement of objections in the **Microsoft case** in March 2007, the Commission adopted on 27 February a decision concluding that Microsoft had not complied with its obligation to offer complete and accurate interoperability information on reasonable and non-discriminatory terms. **A definitive penalty payment of EUR 899 million was imposed on Microsoft**. Microsoft was the first company in the history of competition policy in the EU to have periodic penalty payments imposed on it for non-compliance with a previous decision from the Commission.

2) Due to the very difficult financial and economic circumstances that Europe experienced in 2008, and the way they impacted on the viability of European businesses, particular attention is paid in this year's Report to the European Commission's assessment of rescue and restructuring measures. A request to that end was also made by the European Parliament in its [resolution concerning the Annual Reports on Competition Policy for the years 2006 and 2007](#).

In the context of the **financial crisis**, the Commission:

- first gave initial guidance on the application of State aid rules to measures taken in relation to financial institutions, which exceptionally were based on Article 87(3)(b) of the EC Treaty which allows for aid to remedy a serious disturbance in the economy of a Member State;
- supplemented and refined its guidance with a new Communication on how Member States can recapitalise banks in the current financial crisis to ensure adequate levels of lending to the rest of the economy and stabilise financial markets, whilst avoiding excessive distortions of competition;
- adopted a new temporary framework providing Member States with additional possibilities to tackle the effects of the credit squeeze on the real economy. All measures are time-limited until the end of 2010, although the Commission, based on Member States' reports, will evaluate whether the measures should be maintained beyond 2010, depending on whether the crisis continues.

As regards the **implementation of the SAAP**, the Commission adopted:

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- a General Block Exemption Regulation (GBER) giving automatic approval for a range of aid measures and so allowing Member States to grant such aid without first notifying the Commission, provided that they fulfil all the requirements laid down in the Regulation;
- in the context of the Climate Change Package, new guidelines on State aid for environmental protection which introduce a standard assessment for minor cases and a detailed assessment for cases that may involve significant distortions of competition;
- a prolongation of the Framework on State aid rules for shipbuilding for a further three years, until 31 December 2011;
- a new Notice on State aid in the form of guarantees which sets out clear and transparent methodologies to calculate the aid element in a guarantee and provides simplified rules for SMEs, including predefined safe-harbour premiums and single premium rates for low-amount guarantees.

In addition, **public consultations** were launched on:

- new rules relating to public service broadcasting;
- the possible extension until 2012 of the Cinema Communication (scheduled for adoption in January 2009);
- the guidance documents on the in-depth assessment of regional aid to large investment projects and on criteria for the compatibility analysis in the field of training, as well as on disadvantaged and disabled workers for State aid cases subject to individual notification;
- a draft Best Practice Code on the conduct of State aid control proceedings and the draft notice on Simplified procedure for the treatment of certain types of State aid. The aim of both documents is to ensure greater transparency, predictability and efficiency of State aid procedures in line with the State Aid Action Plan. The drafts are currently due to be adopted in the first half of 2009.
- a draft Commission Notice on the enforcement of State aid law by national courts.

3) Recovery of State Aids: in 2008, the Commission continued its efforts to improve the enforcement and monitoring of State aid decisions. The Commission is seeking to achieve, on the basis of the recovery notice adopted in 2007, a more effective and immediate execution of recovery decisions.

Information submitted by the Member States concerned shows that good progress towards recovery was made during that period. This is also reflected in the amounts of aid recovered. This is also reflected in the amounts of aid recovered. **Of the EUR 10.3 billion of illegal and incompatible aid to be recovered under decisions adopted since 2000, some EUR 9.3 billion (i.e. 90.7% of the total amount) had actually been recovered by the end of 2008.** In addition, a further EUR 2.5 billion in recovery interest had been recovered.

As announced in the State Aid Action Plan, the Commission continued to take a strict line towards Member States that failed to effectively implement recovery decisions addressed to them.

In 2008, the Commission approved 88 notified schemes on the basis of the 2006 Community Framework for **research and development and innovation.**

In the area of risk capital financing for SMEs, the Commission approved 18 risk capital schemes under the **Risk Capital Guidelines.**

In addition, an important decision was adopted in several individual cases involving the Italian **aeronautic sector** supported by the Italian authorities during the 1990s. The decision requires the immediate

reimbursement of the loans for most of the individual projects, plus interest on arrears in certain cases. The beneficiaries have reimbursed around EUR 350 million within the time limit of two months laid down by the decision.

4) Consumer activities: the Commission places consumers' concerns at the heart of its competition activities and considers it essential that the main thrust of competition policy should be on maximizing consumer welfare. That is why a **dedicated Consumer Liaison unit** was created in 2008 within DG Competition.

Consumers and their representatives are now able to provide the Commission services with information that is helpful both for a better understanding of the markets and for identifying potential market malfunctioning. They are also best placed to report directly on how they perceive the impact of a particular action.

5) Inter-institutional cooperation: in 2008, the Commission continued its cooperation with the other Community institutions in accordance with the respective agreements or protocols entered into by the relevant institutions. Also in 2008, the European Parliament adopted a resolution or a report on the following topics: the retail banking sector inquiry, the agreement concluded between the Government of the Republic of Korea and the European Community concerning cooperation on anti-competitive activities and the White Paper on Damages Actions.

The Annual Competition Reports 2006 and 2007 were also discussed at committee level during 2008 and are due to be adopted in 2009. The Commission also participated in discussions held in the European Parliament on other related topics, including the application of State aid response to the unfolding financial and economic crisis.