

EU Competition & Regulatory

Legal and policy developments at the EU level

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ARTICLE

European Commission publishes 2009 Annual Report on Competition Policy

BACKGROUND

On 4 June 2010, the European Commission published its 2009 Annual Report¹ on Competition Policy (the Report). The Report is accompanied by a staff working paper, which gives a more detailed review of the specific cases and actions that are dealt with in the Report.

The 'focus' chapter of the 2009 Report relates to competition policy and the financial and economic crisis, including an assessment of the national measures adopted in response to the crisis. (This topic will be dealt with in a forthcoming Newsletter article.) The other sections are summarised below.

KEY INSTRUMENTS

State aid

The Commission progressed State aid programmes in relation to cinema, broadcasting, broadband, agriculture and the coal industry². In addition, the Commission has implemented further the State Aid Action Plan³ in relation to training aid and aid for disabled and disadvantaged workers, as well as Guidelines for Rescue and Restructuring Aid⁴.

By 31 December 2009, the total amount of illegal and incompatible aid that had been recovered amounted to €10.4 billion, compared to €2.3 billion in December

¹ COM(2010)282 final, 03.06.2010.

² More information on these programmes can be found at: Communication on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 43/6, 16.02.2002; Communication on the application of State aid rules to public service broadcasting, OJ C 257/1, 27.10.2009.

³ State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009 (COM(2005)107 final, 07.06.2005).

⁴ Prolongation of Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 156/3, 09.07.2009).

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2004. During 2009, 29 aid schemes and four non-aid decisions were adopted on the basis of the Community Framework for research and development and innovation. The Commission also approved 34 schemes and four individual applications in relation to environmental aid and 45 schemes that related to regional aid.

Antitrust

In 2009, the Commission adopted six cartel decisions⁵ and imposed fines of, in total, €1.62 billion on 43 undertakings⁶, including the first fines imposed on companies in Slovakia and Slovenia⁷. In relation to Article 102, the Commission adopted commitments decisions in four cases⁸ and an infringement decision in relation to Intel⁹, which included a record fine of €1.06 billion. This is the highest fine ever imposed by the Commission on a single company.

Also in 2009, the Commission published Guidance on its enforcement priorities in applying Article 102 to abusive, exclusionary conduct by dominant undertakings¹⁰. In addition, the Commission consulted on reviews of the Motor Vehicles Block Exemption, the Insurance Block Exemption, and the Vertical Agreements Block Exemption. All three block exemptions have since been adopted in 2010. The Commission adopted a new Liner Shipping Block Exemption¹¹ and began work on reviewing the rules relating to horizontal agreements. It has also adopted a new report that relates to the functioning of Regulation 1/2003 and assesses how the modernisation of the enforcement rules has worked, highlighting a number of areas which require further examination.

The European Parliament also adopted a resolution that supports the principles set out in the Commission's White Paper on damages actions, while the Commission began working on the technical instruments that are intended to achieve the White Paper's objectives. Finally, it published a study (commissioned from Oxera) on the quantification of damages.

Merger control

The number of concentrations notified in 2009 dropped below the record levels of previous years. 259 proposed transactions were notified to the Commission and 243 decisions were adopted. 225 of these were approved without conditions during Phase I; 82 under the regular procedure and 143 using the simplified procedure. Meanwhile, 13 transactions were cleared in Phase I, subject to conditions. In addition, the Commission initiated five Phase II proceedings, with three decisions being adopted with conditions in Phase II. Two cases were withdrawn during Phase II and six during Phase I. There were no prohibition decisions in 2009.

Finally, the Commission published a report which sets out the results of its review of the functioning of the EU Merger Regulation. This related particularly to jurisdictional thresholds and referral mechanisms, which were considered to provide an appropriate legal framework for the allocation of cases at EU and national level. However, the Commission raised a number of concerns in relation to the operation of the "two-thirds" rule¹², the handling

⁵ Cases COMP/39406, *Marine Hoses*; COMP/39401, *E.on/GDF*; COMP/39396, *Calcium Carbide*; COMP/37956, *Concrete reinforcing bars (re-adoption)*; COMP/39129, *Power Transformers* and COMP/38589, *Heat Stabilisers*.

⁶ This includes entities not fined such as immunity applicants. If more than one legal entity of the same group were subject to the decision, they are counted as one.

⁷ Case COMP/39396, *Calcium Carbide*.

⁸ Case COMP/39402, *RWE*; Case COMP/39316, *GDF Suez*; COMP/37792, *Microsoft and Rambus*.

⁹ Case COMP/37990 *Intel* (OJ C 227/13, 22.09.2009).

¹⁰ OJ C 45/7, 24.02.2009.

¹¹ OJ L 256/31, 29.09.2009.

¹² If all parties to a merger have two-thirds of its aggregate Community-wide turnover within one and the same Member State then there will no Community dimension.

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of cases which are notified to three or more National Competition Authorities and the issue of the further convergence of national rules with EU competition rules.

SECTOR DEVELOPMENTS

The Report provides an overview of key developments in specific sectors during 2009. These include financial services, energy and environment, transport, electronic communications, information technology, media, the pharmaceutical industry and health, the automotive industry, the food industry and postal services.

Some of the highlights include: the Commission's continuing effort on ensuring compatibility with competition law within the Single European Payments Area¹³; the adoption of the third energy liberalisation package¹⁴; the Commission stepping up investigations into air transport (mergers and alliances, for example, oneworld and Star); the Commission's decision to accept legally binding commitments in the *Rambus* case¹⁵; the publishing of a joint statement setting out general principles for the future of the distribution of music online¹⁶; the publishing of the final report on the pharmaceutical sector inquiry¹⁷; the release of a report on competition within the food supply chain¹⁸ and, in relation to postal services, the Commission clearing, subject to conditions, the first merger between two incumbent postal operators, Post Danmark and Posten of Sweden¹⁹.

EUROPEAN COMPETITION NETWORK

The ECN provides a forum for National Competition Authorities to discuss issues of policy, coordinate enforcement action and ensure consistency. In 2009, the ECN published a report on the convergence of leniency programmes²⁰.

The Commission was informed of 129 new case investigations that were launched by National Competition Authorities in 2009 and 69 envisaged decisions. The Commission issued five opinions in response to questions by national judges with regards to the application of EU competition rules.

INTERNATIONAL COOPERATION

A Memorandum of Understanding was reached with the Brazilian Competition Authorities and a bilateral cooperation agreement was signed with South Korea²¹. In addition, the Commission continued to work with Croatia and Turkey in order to align their competition regimes with EU rules, in preparation for possible EU membership.

¹³ The Single European Payments Area is a self-regulatory initiative, launched by the European Banking Industry, with the aim of establishing an integrated Euro payments area, which ensures that cross-border payments are as easy and efficient as domestic payments.

¹⁴ OJ L 211, 14.08.2009.

¹⁵ A non-confidential version of the Decision and the commitments is available at the DG COMP's [website](#). In this case, the Commission was concerned that Rambus was imposing unreasonable royalties in relation to the use of certain patents for DRAM chips, which are used in virtually all PCs.

¹⁶ This resulted from discussions which the Commission held with senior consumer and industry representatives in the form of the Online Commerce Roundtable.

¹⁷ Commission Communication of 8 July 2009 on the Executive Summary of the Pharmaceutical Sector Inquiry Report, press release IP/09/1098.

¹⁸ The Report is available at the DG COMP [website](#).

¹⁹ Case COMP/M.5152.

²⁰ The Report is available at the DG COMP [website](#).

²¹ Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities (OJ L 202/36, 04.08.2009).

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Merger Control

1. Notification

- *Simplified procedure case: Sacyr/Eiser/Aunor/Turia/Itemosa/Itepesa* (Case M. 5905, 04.06.2010).

2. Article 9 partial referral

- *Eurovia/Tarmac* – On 19 April 2010, the proposed acquisition by which Tarmac's aggregate activities in Germany, Poland, France and the Czech Republic would be acquired by Eurovia, was notified to the European Commission. The markets concerned by the transaction, either horizontally or vertically, are aggregates, asphalt mix and civil engineering, where Eurovia is already active. France and the Czech Republic asked the Commission to refer the parts of the concentration concerning the French and the Czech markets to their competition authorities, claiming that the transaction threatens to significantly affect competition in their respective territories. The Commission's preliminary market investigation confirmed that the proposed transaction would lead to significant overlaps in the aggregates market in France and the Czech Republic. In the Commission's view, the French and the Czech Competition Authorities are the best placed to investigate the effect of the transaction on their respective national markets. It has therefore, on 10 June 2010, decided to refer the assessment of the French's and the Czech's parts of the transaction to the French and Czech competition authorities (IP/10/720, 10.06.2010).

3. Partial Phase I clearance

- *Eurovia/Tarmac* – On 19 April 2010, the proposed acquisition by which Tarmac's aggregate activities in Germany, Poland, France and the Czech Republic would be acquired by Eurovia, was notified to the European Commission. The Commission held that Eurovia's acquisition of Tarmac's activities in Germany and Poland would not give rise to competition concerns and cleared that part of the proposed acquisition. (See also partial Article 9 referral under item 2.) (IP/10/720, 10.06.2010).

4. Court proceedings

- *General Court rules on Commission decision refusing access to its file on a merger case* – On 9 June 2010, the General Court delivered its judgment on an appeal brought by Editions Odile Jacob SAS against a European Commission decision. The decision refused disclosure of certain documents relating to the Commission's investigation under the EU Merger Regulation into the acquisition by Lagardère of Editis (formerly Vivendi Universal Publishing). The General Court found that the Commission's decision refusing to grant Editions Jacob access to the documents was vitiated by error of law and must be annulled. The Court did however make an exception as regards a Commission Legal Service opinion providing advice to the Commission on the application of Article 3(5)(a) of the old Merger Regulation, refusal of access of which was justified under Article 4(2) of Regulation 1049/2001 (Case T-237/05, *Éditions Jacob v. Commission*, judgment of 09.06.2010, not yet available in English).

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Antitrust

5. *Commission opens formal proceedings against Suez Environnement for alleged breach of a seal during an inspection* – The premises of various companies operating in the water and waste water sectors, including Lyonnaise des Eaux in France were the object of surprise inspections by the Commission from 13 to 16 April 2010. The Commission suspected that anti-competitive practices had been taking place in this sector. During the inspection at the premises of Lyonnaise des Eaux (fully owned by Suez Environnement), a seal affixed on the door of an office was apparently breached. If the Commission finds that seals affixed during an inspection have been breached, either intentionally or negligently, it can impose a fine on the companies concerned amounting to 1% of their total turnover in the preceding business year. The opening of proceedings is without prejudice to the final decision ([IP/10/691](#), 04.06.2010).

State Aid

6. *Commission issues consultation on Services of General Economic Interest Package* – The European Commission has launched a public consultation on the application of its 2005 Package on Services of General Economic Interest (SGEI). The package aims at clarifying under which conditions State funding of SGEIs can be considered compatible State aid. The package was adopted in July 2005, following the landmark *Altmark* ruling of the European Court of Justice. The Commission has published the reports received from Member States on the application of the rules, as well as a questionnaire addressed to public service providers, public service users, stakeholders, citizens and other interested parties. Contributions for this questionnaire are to be submitted by no later than 10 September 2010. The results of the public consultation will serve as a basis for evaluating the 2005 Package and for eventually proposing improvements (IP/10/715, 10.06.2010; the [questionnaire](#) is available on the DG COMP website).

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