European Commission publishes 2008 Annual Report on Competition Policy

Background

On 19 August 2009, the European Commission adopted its Annual Report on Competition Policy which provides an overview of the main developments in EU competition policy in 2008. In its first section, the Annual Report reviews cases relating to Articles 81 and 82, merger control, state measures and state aid control. In its second section, it provides an overview of key developments by sector (energy and environment, financial services, electronic communications, information technology, media, transport, pharmaceuticals, food, and postal services). The third section outlines the Commission’s approach to consumer activities, and a summary of the work within the ECN (European Competition Network) is presented in the fourth section. The fifth and sixth sections briefly cover international activities and cooperation between EU institutions. For the first time, the Annual Report includes a special ‘focus chapter’ on cartels. The Annual Report is accompanied by a Commission staff working paper which reviews the specific cases highlighted in the Annual Report. A brief overview of the Annual Report is presented below, with particular emphasis on the focus chapter and the first section, and a brief overview of the second and fourth sections.

Focus chapter: Cartels and Consumers

In this chapter the Commission emphasises the importance of taking action against cartels in order to ensure that the benefits of a properly-functioning competition regime are offered to the final consumer. It has estimated consumer harm of €7.6 billion resulting from the 18 cartels which were the subject of Commission decisions during the years 2005-2007.

In 2008 the Commission issued 7 final decisions1 to fine 34 undertakings a total of €2,271 million (compared with 8 final decisions, 41 undertakings and a total of €3,334 million in 2007). It imposed the highest fine in a cartel case to date of €1,383 million in the Car Glass2 case.

As part of its fight against cartels, in July 2008 the Commission introduced a new settlements package which will allow the Commission to settle cartel cases by means of a simplified procedure. Companies can benefit from a 10% reduction of the fine if, having seen the Commission’s evidence against them, they admit liability.

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1 Case COMP/38628 NBR; Case COMP/38543 International Removal Services; Case COMP/38695 Sodium Chlorate; Case COMP/39180 Aluminium Fluoride; Case COMP/39181 Candle Waxes; Case COMP/39.188 Bananas; Case COMP/39.125 Car Glass.
2 Case COMP/39.125.
Instruments of Competition Policy

1. Articles 81 and 82

In addition to the fight against cartels, in 2008 the Commission continued its work in relation to damages actions for breach of the European antitrust rules, adopting a White Paper. The White Paper puts forward concrete proposals to overcome the obstacles which currently block effective compensation at the national level, and its primary objective is to improve compensation for all victims.

In relation to Article 82, the Commission fined Microsoft €899 million for failing to comply with its obligation to offer complete and accurate interoperability information on reasonable and non-discriminatory terms that was originally imposed by the Commission in 2004. 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 Commission decision. The Commission also adopted a decision which rendered legally binding the commitments offered by E.ON to address concerns regarding abuse of dominance, an investigation which started as a follow-up to the energy sector inquiry in 2005.

2. Merger Control

In 2008, 347 merger cases were notified to the Commission, the third highest level on record. The Commission adopted 340 decisions in total. Of these, 307 were cleared at Phase I without remedies being required (189 of these unconditional decisions were adopted under the simplified procedure) and 19 were cleared at Phase I subject to remedies. The Commission initiated Phase II proceedings in 10 cases during 2008.

To provide improved guidance on questions related to remedies, the Commission adopted a new Notice on Remedies while also amending the Implementing Regulation. These reforms impose more stringent information requirements on merging parties, clarify the requirements for the sufficient scope of divestitures and for the suitability of purchasers, and explain the application of “up-front buyer” provisions and “fix-it-first” solutions. The Notice underlines that non-divestiture remedies are only acceptable where they are equivalent in their effects to divestiture and that difficulties in monitoring and risks of ineffectiveness may lead to the rejection of such remedies.

3. State Aid

In 2008, 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. Subsequently the Commission supplemented its guidance with a new Communication on how Member States can recapitalise banks in the current financial crisis whilst avoiding excessive distortions of competition. In addition, it adopted a new temporary framework providing Member States with additional possibilities to tackle the effects of the financial crisis. All measures are due to expire at the end of 2010, although the Commission will consider whether they should be maintained beyond that date.

Further information on this issue and on the policy initiative of the Commission in this field can be accessed here.

Case COMP/37.792 Microsoft
Case COMP/59.388
Up-front buyer and fix-it-first solutions apply when an undertaking is required by the Commission to divest part of its business to a suitable purchaser in order to proceed with a concentration. In the case of up-front buyer provisions, the parties will not be permitted to complete the concentration before entering into a binding agreement with a purchaser approved by the Commission. When the Commission requires a fix-it-first solution, the parties identify a purchaser for the business and enter into a binding agreement before the Commission makes its decision on the concentration, and therefore the identity of the purchaser is known to the Commission before it reaches its decision.

OJ C 270, 25.10.2008, p.8
OJ C 10, 15.01.2009, p.2
The Commission also adopted a General Block Exemption Regulation\(^{11}\) giving automatic approval for a range of aid measures\(^{12}\) 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. It also launched a number of public consultations on procedural issues, such as a consultation on 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 Commission also published the 2008 update of the State aid Scoreboard\(^{13}\) which showed that Member States are making more use of the possibilities offered by the recently revised State aid rules to target their aid better. The Commission has also achieved a more effective and immediate execution of recovery of illegal State aid. From a financial point of view, of the €10.3 billion of illegal and incompatible aid to be recovered under decisions adopted since 2000, €9.3 billion had been recovered by the end of 2008.

**Sector Developments**

In its Annual Report, the Commission presents an overview of the key developments which have taken place in specific sectors in 2008. These sectors are energy and environment, financial services, electronic communications, information technology, media, transport, pharmaceuticals, food and postal services.

Some main points to highlight are the completion of the pharmaceutical sector inquiry\(^{14}\), the adoption of the ‘Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis’\(^{15}\), and the Roundtable on ‘Opportunities and barriers to online retailing in the European Single Market’. In addition, regarding postal services, the Parliament and Council have adopted the new postal directive\(^{16}\), which requires most Member States to achieve full market opening by 31 December 2010.

**The European Competition Network**

The ECN provides a platform for EU competition authorities to coordinate enforcement action, ensure consistency and discuss policy issues.

The Annual Report notes that in 2008, the Commission was informed of 150 new investigations launched by national competition authorities. It received copies of 50 national judgments and received several requests for opinions which were pending at the end of 2008. The Commission has also continued its training and education of national judges in EU competition law.

The Annual Report also notes that the ECN Model Leniency programme continued to produce results – by the end of 2008, 25 Member States had leniency programmes and the remaining two (Malta and Slovenia) are expected to introduce them in the near future. Moreover, many national leniency programmes are aligned with the ECN model.

**Sources**

Annual Report on Competition Policy 2008
Commission Staff Working Document (Annex to the Annual Report)
Press Release IP/09/1241, 19/08/2009

\(^{11}\) OJ L 214 09.08.2008, p.3
\(^{12}\) Aid in favour of SME, research, innovation, regional development, training, employment, risk capital, environmental protection and entrepreneurship, among others.
\(^{13}\) COM(2008) 751 final, 17.11.2008
\(^{15}\) OJ C 16, 22.01.2009, p.1
Merger Control

Notifications

1. **Novartis/Ebewe Spezial-Pharma Holding** – Proposed concentration whereby Novartis Group (Switzerland) acquires Ebewe Spezial-Pharma Group (Austria). Novartis is active in the development, production and distribution of medical products, and Ebewe Spezial-Pharma is active in the manufacture and distribution of speciality generic pharmaceutical products as well as in contract manufacturing of finished dose pharmaceuticals for other pharmaceutical companies (OJ C 201/10, 26.08.2009).

2. **Blackrock/Barclays Global Investors UK Holdings** – Proposed concentration whereby Blackrock Inc (Blackrock, US) acquires Barclays Global Investors UK Holdings Ltd (BGI, UK). Black rock is a US publicly traded company active in the provision of global asset management, risk management and advisory services to institutional and retail clients, and BGI is a UK company currently organised as a business division of the Barclays group and active in the provision of global asset management services primarily to institutional clients (OJ C 201/13, 26.08.2009).

3. **Sony/Seiko Epson** – Proposed concentration whereby Sony Corporation (Sony, Japan) acquires the whole of the small- and medium-sized TFI-LCD business of Seiko Epson Corporation (Epson, Japan). Sony is active in electronic consumer products and the small- and medium-sized TFI-LCD business of Epson is active in the development, production, marketing and sale of small- and medium-sized thin film transistor liquid crystal displays (OJ C 199/18, 25.08.2009).

4. **Simplified procedure cases**
   > **Partner Re/Paris Re** (OJ C 201/11, 26.08.2009).
   > **Dragados/Pol-Aqua Group** (OJ C 197/9, 21.08.2009).

Phase I Clearances

5. **Unconditional clearances**
   > **Centrica plc/Venture Production plc** (IP/09/1246, 21.08.2009).

6. **Unconditional clearances: simplified procedure**
   > **Raiffeisen Leasing/SAG/Advisory House/Mobility House/ElectroDrive** (MEX/09/0824, 24.08.2009).
Miscellaneous

7. **Commission publishes responses to Online Commerce Roundtable Report** – On 21 August 2009, the Commission published the contributions submitted by interested parties to the Online Commerce Roundtable Report. The Report set out the outcome of discussions on the online retailing of goods and music. Responses were provided by associations representing broadcasters, performers, media interests and consumers as well as from individual companies.