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COMMISSION STAFF WORKING DOCUMENT

Ten Years of Antitrust Enforcement under Regulation 1/2003

Accompanying the document

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives

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I INTRODUCTION

1. Over the last ten years, the European Commission ("Commission") and the Member States' Competition Authorities ("NCAs"), which together form the European Competition Network ("ECN"), have engaged in a high number of enforcement actions based on Articles 101 and 102 TFEU (the "EU competition rules"). A keystone of the legal framework underpinning these actions is Regulation 1/2003.[1] The recent tenth anniversary of its entry into application on 1 May 2004 makes this a timely moment to: (1) provide a facts-based review of enforcement by the Commission and NCAs during the last decade; and (2) examine some key aspects of enforcement by the NCAs. This Staff Working Document, which accompanies the Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (the "Communication"), addresses aspect (1) and takes stock of the enforcement record of the Commission and the NCAs.[2]

2. This review of the application of the EU competition rules by the Commission and NCAs has illustrated their commitment and vigilance to detect and pursue infringements that may harm consumers and the economy in the EU. In the period covered, from 1 May 2004 until 31 December 2013, the Commission and NCAs have adopted more than 700 enforcement decisions, concerning a wide range of types of infringements, relating to almost all sectors of the economy and ensuring enforcement across all parts of the Union. More specifically, during the reported period the Commission has adopted 122 decisions enforcing the EU competition rules,[3] whilst NCAs have informed the Commission of 665 envisaged decisions applying these provisions.[4]

3. Regulation 1/2003 constitutes a major reform of antitrust procedures in the EU. It replaced the centralised notification and authorisation system set out in Regulation 17[5] by an enforcement system that is based on the direct applicability of the EU competition rules in their entirety. It has also empowered NCAs and national courts to apply all aspects of the EU competition rules and introduced new and closer forms of cooperation between enforcers, including notably the ECN.

4. The change in system has given greater scope to the Commission to set its priorities, enabling it to devote more significant resources to investigating cases and conducting

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1 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 Treaty (OJ L1, 4.1.2003, p.1), hereinafter "Regulation 1/2003" or "the Regulation".

2 The latter aspect is addressed in a separate Staff Working Document accompanying the Communication: Enhancing competition enforcement by the Member States' competition authorities: achievements and future perspectives, SWD(2014) 231 (the "Staff Working Document on enhancing competition enforcement by the Member States' competition authorities").

3 Including in conjunction with Article 106 TFEU.

4 See for details sections II and III below. The statistics regarding NCAs in this report are based on draft decisions submitted to the Commission pursuant to Article 11(4) of Regulation 1/2003, not on adopted final decisions (see further footnote 19 and section IV.F below). The report relies on the last envisaged decision submitted in any given case (for statistics including re-submissions, cf. the ECN website (http://ec.europa.eu/competition/ecn/index_en.html). It does not cover NCAs' enforcement action based on national competition law.

5 Council Regulation (EEC) No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty (OJ P 013, 21.2.1962, p. 204-211).

inquiries into key sectors of the economy suffering from market distortions,[6] and give attention to new sectors presenting less conventional forms of anticompetitive behaviour, which can be of particular importance to consumers.

5. As the new system relies even more on market players assessing the compatibility of their (contemplated) conduct with the antitrust rules, and on targeted *ex post* control by competition authorities, the provision of general guidance is emphasised. In this respect, the Commission adopted a set of notices giving guidance on a range of substantive and procedural matters at the entry into application of the regulation. In the following years, the Commission continued its commitment to providing guidance by adopting and revising block exemption regulations and accompanying guidelines concerning the application of Article 101 TFEU to horizontal,[7] vertical[8] and technology transfer agreements.[9] The Commission, moreover, issued a guidance paper on its priorities in the application of Article 102 TFEU to exclusionary abuses.[10] It further adopted a new set of guidelines on setting fines, a new leniency notice, rules on settlements in cartel cases, provided an information note on inability to pay and published a notice on best practices in antitrust cases.[11]

6. Regulation 1/2003 greatly enhanced the role of NCAs and of national courts as enforcers of the EU competition rules.[12] Over and above the power to apply the EU competition rules in full, the Regulation obliges NCAs and national courts to apply EU competition law when

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6 See on this aspect the Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 COM(2009) 206 final and the accompanying Staff Working Paper SEC(2009) 574 final, hereinafter: "2009 Report on Regulation 1/2003", part 2.

7 Commission Regulation (EU) 1217/2010 of 14 December 2010 on the application of Article101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 335, 18.12.2010, p. 36); Commission Regulation (EU) 1218/2010 of 14 December 2010 on the application of Article101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43); Guidelines on the applicability of Article101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1).

8 Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p.1); Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p.1).

9 Commission Regulation (EU) 772/2004 of 27 April 2004 on the application of Article101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 11) which expires on 30 April 2014 and has been replaced by a new Commission Regulation adopted on 21 March 2014 (OJ L 93, 28.3.2014, p. 17); Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101, 27.4.2004, p. 2), which have been replaced since 1 May 2014 by the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3).

10 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p.7).

11 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006, p. 2); Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17); Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ C 167, 2.7.2008, p. 1); Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases **(**Official Journal C 167, 2.7.2008, p. 1); Information note by Mr Joaquín Almunia Vice-president of the Commission and by Mr Janusz Lewandowski Member of the Commission: Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding and infringement and imposing fines (SEC(2010) 737/2 of 12 June 2010); and Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6).

12 Cf. 2009 Report on Regulation 1/2003, part 5.

agreements, decisions by associations of undertakings or concerted practices under scrutiny are capable of affecting trade between Member States. These changes have boosted enforcement of the EU competition rules by the NCAs. The Regulation also introduced cooperation tools and obligations with a view to ensuring efficient work sharing, effective cooperation in the handling of cases and to fostering coherent application. Building on the cooperation mechanisms in the Regulation, the ECN has developed into an effective forum for exchanging experience on the application of the EU competition rules as well as promoting the convergence of national procedures and sanctions with Regulation 1/2003.[13]

7. Since May 2004, the competent courts of the Member States also apply the EU competition rules in full. The present report focuses on the use of the tools for cooperation between the Commission and national courts that were clarified and refined by the Regulation. They include the possibility for national courts to request an opinion from the Commission and the now well established power of competition authorities to submit observations as *amicus curiae* to courts. The Commission has also been active in setting up regular training for national judges across the EU on the enforcement of the EU competition rules. Each year, hundreds of judges participate in these training programmes. The Commission has also focused on improving the effectiveness and coherence of private damages claims brought before national courts. Based on its proposal, a Directive on antitrust damages actions will be adopted soon.[14] Once implemented in the Member States,[15] private enforcement is likely to increase significantly across the EU. Moreover, as the Directive optimises the interplay between private damages claims and public enforcement by the Commission and the NCAs (for instance, the protection of investigation tools such as leniency programmes and strengthening the effect of infringement decisions by NCAs for damages actions before national courts, etc.), the overall effectiveness of antitrust enforcement in the EU is expected to increase. A review clause provides that within four years after the transposition deadline the Commission will review the impact of the Directive and, if appropriate, propose further legislative measures.

8. This report reviews the Commission's and NCAs' enforcement activities from three different perspectives: Chapter II looks at the Commission's and NCAs' enforcement practice by analysing the different types of infringements of the EU competition rules that were addressed in the decisions of these authorities. Chapter III examines the sectors on which the Commission's and the NCAs' antitrust enforcement activities have focussed in the past decade and considers in more detail the sectors which were at the centre of the authorities' actions. The last Chapter IV looks at the Commission's and the NCAs' antitrust enforcement activities by type of procedure used (e.g. prohibition decisions vs. commitment decisions). It also provides some insight into the enforcement and cooperation tools that the Commission and the NCAs have at their disposal. Finally, this chapter includes an overview of the cooperation mechanisms used within the ECN and those used in the relationship between the Commission and national courts.

II ENFORCEMENT ACTIVITY BY TYPE OF INFRINGEMENT

9. This Chapter looks at enforcement activities by type of infringement, and addresses the decision practice of the Commission and the NCAs, guidance provided through notices and regulations as well as general trends and developments.

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13 See further section IV below.

14 See the Internet (http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html).

15 Within two years from the date of its adoption.

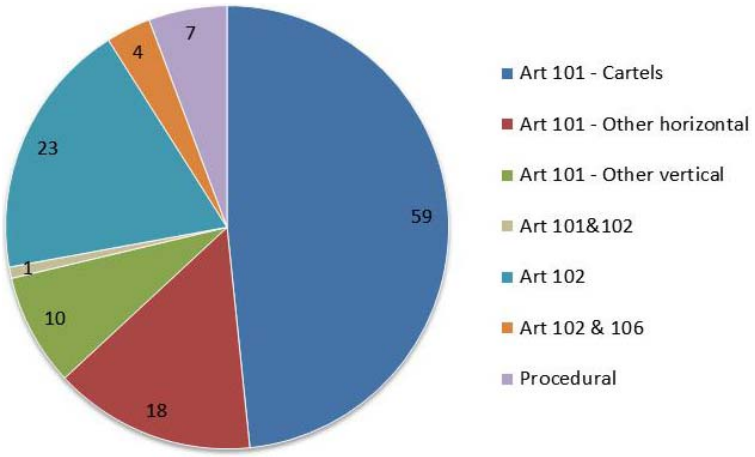
A General overview

1 Commission

10. Since the entry into application of Regulation 1/2003, the Commission has adopted a total of 122 decisions applying Article 101 TFEU and Article 102 TFEU (including when applied in conjunction with Article 106 TFEU).[16] Figure 1 illustrates the breakdown of these decisions by type of infringement. The large majority of the 122 decisions were cases applying Article 101 TFEU (73%, 89 decisions) and most of them related to cartels (59 decisions, amounting to 48% of all decisions), which shows the clear priority given by the Commission to the fight against these pernicious infringements. Other horizontal agreements account for 15% (18 decisions) and vertical agreements account for 9% (eleven decisions) of all Commission cases during the period. More details on the Commission's decisions applying Article 101 TFEU are set out in section B below.

11. In addition, the Commission since May 2004 adopted 24 decisions applying Article 102 TFEU (20% of all cases), which are discussed in more detail in section C below. The remaining cases consist of four decisions applying Article 106 TFEU in conjunction with Article 102 TFEU (3% of all cases)[17] and seven procedural decisions pursuant to Articles 23 and 24 of Regulation 1/2003 (6% of all cases).[18]

Figure 1: Commission's cartel and antitrust decisions from 1 May 2004 to 31 December 2013



16 Six of these cartel decisions are re-adoptions or amendments of older decisions.

17 See further section C below.

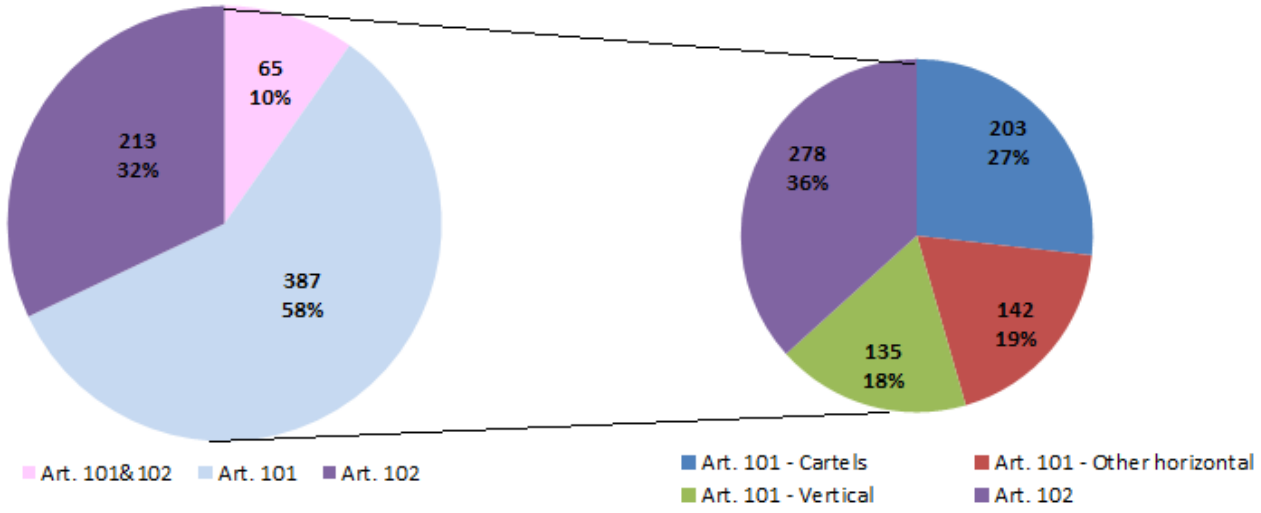
18 Note that COMP/39.230 - Rio Tinto Alcan, decision of 20 December 2012 was adopted under Articles 101 *and* 102. Throughout the analysis, for statistical purposes, this decision has been counted separately as both an Article 101 decision and an Article 102 decision.

2 NCAs

12. From May 2004 to December 2013, the NCAs informed the Commission of forthcoming enforcement decisions in 665 cases.[19] The majority were based on Article 101 TFEU (58%, 387 decisions),[20] whilst the remainder were mainly applying Article 102 TFEU (32%, 213 decisions) and a small percentage were based on both Articles 101 TFEU and 102 TFEU (10%, 65 decisions).

13. The material received shows that in many instances, NCAs pursued several types of alleged anti-competitive practices in the same envisaged decision. Within the 665 envisaged decisions, the NCAs have tackled abuses of dominant position (36%, about 278 instances), cartels (27%, about 203 instances), other horizontal agreements (19%, about 142 instances) and vertical agreements (18%, about 135 instances), calculated on a total of 758 practices.

Figure 2: Envisaged decisions submitted by NCAs in the period May 2004 – December 2013



B Article 101 TFEU

1 Commission

14. As can be seen in Figure 1 above, Article 101 TFEU has been the most applied provision of the EU competition rules by the Commission, in particular to cartels.

Cartels

15. Cartels are the most harmful type of competition infringement. As they are secret – hidden in particular from customers – public enforcement is vitally important as otherwise many cartels would never come to light. Rigorous enforcement action against cartels has therefore

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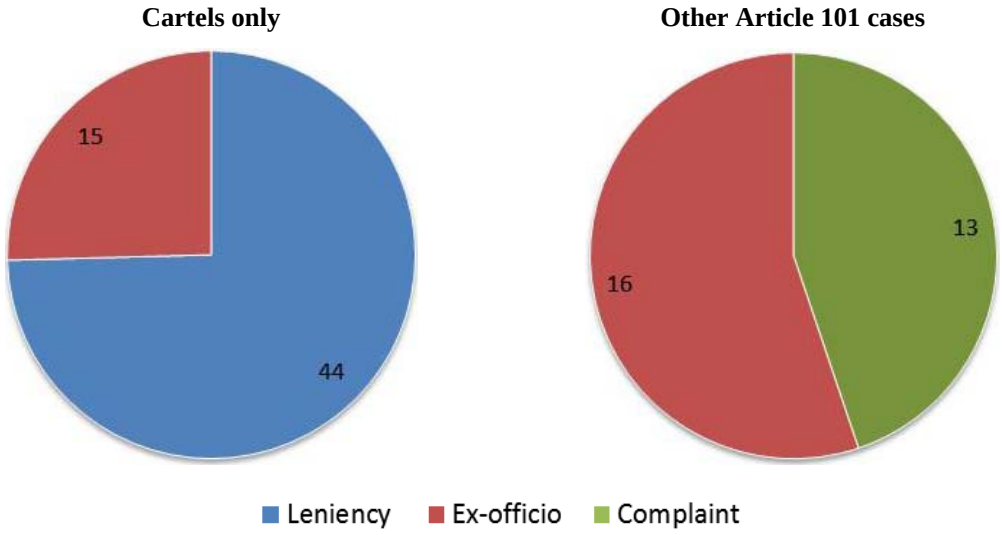
19 Under Article 11(4) of Regulation 1/2003 NCAs inform the Commission of their envisaged prohibition and commitment decisions (for more information on this process, cf. Section IV.F. below). The analysis in this report is derived from that set of information. This implies that the report does not take account of changes in the NCAs' course of action that occurred after the stage of the last information provided to the Commission, notably in the final decision. Since major changes at this stage occur only in a limited number of cases, analysis of the envisaged decisions nevertheless yields a meaningful proxy of the overall enforcement effort of NCAs.

20 When it comes to the work of the NCAs, the term "decision(s)" is a synonym for "envisaged decisions" under Article 11(4) of Regulation 1/2003.

been the top priority of the Commission throughout the last ten years.[21] An analogue trend can be observed for a number of NCAs.[22]

16. Effective public enforcement requires a mix of both ex officio and leniency cases; without ex officio cases, the incentive on undertakings to apply for leniency may be reduced. Leniency programmes are important to detect secret cartels, to collect the necessary evidence to sanction cartels and to de-stabilise cartels. Enforcement therefore requires adequate protection of leniency statements by companies – without such protection the incentive to apply for leniency is again reduced. Over the past ten years, the Commission has maintained both a good track record of ex officio cases and strong protection of leniency statements, with the result that leniency applications have continued at a high level throughout the period. The use of the leniency programme is further addressed in Chapter IV.

Figure 3: Origin of Commission's Article 101 decisions from 1 May 2004 to 31 December 2013[23]



17. Figure 3 shows that in the Commission's cartel investigations, approximately one quarter of cases were initiated ex officio, whereas around three quarters were triggered by leniency applications. In other (non-cartel) cases based on Article 101 TFEU the investigations originated in broadly equal numbers from complaints and from ex officio inquiries. Even if complaints may have triggered Article 101 TFEU decisions to a lesser extent than ex officio inquiries, they play an important role in investigations and may provide the Commission with useful market information. This report does not cover decisions rejecting complaints taken pursuant to Article 7(2) of Regulation 773/2004[24] on the basis of insufficient grounds for acting.

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21 For a breakdown of statistics per year, see Figure 13 in Chapter IV.A.1 below.

22 See section II.B.2 below.

23 Five of the ex officio cartel decisions are re-adopted decisions and one of the cartel leniency decisions is a re-adopted decision.

24 Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

18. With respect to cartels there has been a significant shift in the past ten years under Regulation 1/2003 as to the types of cases pursued. Firstly, the cases pursued are no longer primarily centred on industrial products and the chemicals sector in particular. Rather, investigations have branched out to incorporate a more diversified range of products (such as food and consumer electronics) and have also extended to the services sector, notably transport and financial services.

19. Secondly, due to the globalisation of the economy, cartels are also becoming more and more global nowadays. This implies that the geographic scope of investigations is often much wider than was previously the case. Investigation of worldwide cartels, which is undertaken alongside non-EU competition authorities, has become the norm rather than the exception. This is facilitated by the decentralisation put into place by Regulation 1/2003 as cartels that principally have effects in the territory of a single Member State or up to three Member States are usually pursued by the NCAs whilst the Commission is particularly well placed to tackle cartels of a broader geographic scope.

20. Thirdly, there has been an increasing number of follow on cases where an investigation in one market has led to leniency applications and subsequent investigations in related markets (see, for instance, the automotive parts investigations)[25]. This occurred without any system of additional incentives for leniency applicants as is the case in the United States (US) and the United Kingdom (UK) under their 'amnesty plus' and leniency plus' policies.

21. Fourthly, there are indications that cartels are becoming ever more sophisticated with the use of tools designed to minimize the risk of detection. This has been shown in recent cartels involving the use of code words, encrypted documents, dedicated email accounts and/or dedicated phones. There has also been a significant shift in the type of evidence found and relied upon. Nowadays a handwritten 'smoking gun' in hard copy form is unlikely to be found on the desk of one of the company's employees. Rather than finding such documents, which may have constituted sufficient proof of the cartel, the trend is more towards the piecing together of a huge number of documents to establish the infringement. Furthermore, documents are now almost exclusively in electronic form and the Commission responded to this by increasing the IT skills of its inspectors and by developing a specialist forensic IT capability.

22. Finally, conducting investigations into suspected cartel behaviour in recent years typically required in-depth cooperation with major authorities around the globe. Much more than in the past, the Commission now deals with large European-wide if not global cartels, involving large undertakings with considerable sales of the affected products or services, often over a long period (e.g. recent decisions in the TV & Computer Monitor Tubes,[26] Wire Harnesses[27] and Financial cases[28]). As a consequence, there is in recent years, in addition to cooperation within the ECN, increasing cooperation during the investigation with non-European authorities belonging to the International Competition Network (the ICN).[29]

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25 COMP/39.748 - Automotive wire harnesses, decision of 10 July 2013; COMP/39.922 - Car and Truck Ball Bearings, decision of 19 March 2014; MEMO/11/395 and MEMO/12/536.

26 COMP/39.437 - TV and computer monitor tubes, decision of 5 December 2012.

27 AT.39748 - Automotive wire harnesses, decision of 10 July 2013.

28 AT.39861 - Yen Interest Rate Derivatives, decision of 4 December 2013; AT.39914 - Euro Interest Rate Derivatives, decision of 4 December 2013.

29 See the Internet (www.internationalcompetitionnetwork.org). DG Competition is a former co-chair of the ICN Cartel Working Group.

Other horizontal anticompetitive agreement or concerted practices

23. The Commission's focus on rigorous enforcement actions against cartels did not prevent it from dedicating attention and resources to other agreements between competitors (horizontal agreements), in particular horizontal cooperation agreements. The challenge in assessing such practices is often to determine whether they restrict competition and may or may not be justified under Article 101(3) TFEU.

24. To assist market participants as well as enforcers in this assessment and to provide for a considerable degree of legal certainty, the Commission reviewed and, in 2010, updated the Block Exemption Regulations applicable to horizontal cooperation agreements. One of the overarching policy objectives of the review process was to ensure that the EU competition rules in this area are applied in a manner that promotes rather than stifles innovation and competitiveness. To this effect, the Commission adopted new Block Exemption Regulations on research and development ("R&D") agreements,[30] and on specialisation agreements.[31]

25. Both Regulations provide greater clarity about what type of R&D, specialisation and production agreements are unlikely to raise competition concerns. They also considerably extend the scope of the safe harbours created by the exemptions in relation to certain types of horizontal agreements which do not contain hard-core restrictions and are entered into by undertakings with relatively low market shares (that is below 20 or 25%). With a view to facilitating innovation, the 2010 R&D Block Exemption Regulation covers not only joint R&D activities, but also so-called "paid-for-research" agreements where one party finances the R&D activities carried out by the other party.

26. Along with the adoption of the two regulations the Commission revised the accompanying guidelines on the assessment of horizontal cooperation agreements ("Horizontal Guidelines").[32] One of the major novelties of the revised text is that it provides, for the first time, comprehensive and widely demanded guidance on how to assess the compatibility of exchanges of information between competitors with EU competition law. Moreover, the Horizontal Guidelines contain a chapter on standardisation agreements that was substantially revised and updated with a view to encouraging the establishment of open standard-setting systems and reflecting recent developments in this sometimes controversial area.

27. Moreover, in the first half of 2012, the Commission carried out a public consultation on a proposal to revise the then applicable technology transfer Block Exemption Regulation as well as the accompanying guidelines.[33] The new rules were adopted on 21 March 2014 and entered into application in May 2014.[34] Similar to the block exemption regime for horizontal

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30 Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements (OJ L 335, 18.12.2010, p. 36).

31 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43).

32 Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance (OJ C 11, 14.1.2011, p. 1).

33 Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 72).

34 Press release IP/14/299 of 21 March 2014 and MEMO/14/208.

cooperation agreements, they are designed to facilitate and incentivise pro-competitive behaviour, in particular innovation and the diffusion of intellectual property, in a manner that does not give rise to competition concerns.

28. As regards concrete enforcement actions, the Commission has applied Article 101 TFEU since May 2004 in 18 decisions against horizontal cooperation practices. These include practices such as non-compete and non-disclosure/use obligations, the limitation of retail price competition, pay for delay agreements, exclusive dealing and joint marketing agreements with price setting mechanisms or revenue sharing joint ventures. The Commission's intervention in these cases, be it through prohibition decisions pursuant to Article 7 of Regulation 1/2003 or through commitment decisions pursuant to Article 9, had an important impact in different sectors of the economy. For example, in a series of cases in the payment systems sector, such as MasterCard or Visa Debit,[35] the Commission challenged horizontal price setting agreements resulting in high interchange fees and achieved a reduction of these fees below an anti-competitive level to the benefit of millions of consumers and retailers in the EU.

29. The infringements tackled in the cases regarding horizontal practices were typically very serious infringements, with significant repercussions for consumers. In addition to protecting the effective competitive process and thus addressing consumer harm, many of the Commission's decisions have given guidance to market participants on important and often topical issues. For example, the non-compete obligations in *Telefónica/Portugal Telecom*[36] which provided that Telefónica and Portugal Telecom would no longer compete with each other in the Iberian telecommunications markets, constituted a clear breach of Article 101 TFEU. More recently, the Commission used Article 101 TFEU to prohibit "pay for delay" arrangements in the pharmaceutical sector, fining both originator and generic undertakings for agreeing to delay the launch of generic medicines in return for considerable value compensation.[37] Such arrangements, whereby generic producers commit not to enter the market in exchange for a value transfer from the originator, allowing the originator to keep prices at supra-competitive level and to share the resulting rent with the generic producers, are a very serious violation of Article 101 TFEU. They cost European patients, national health schemes and private health insurance companies billions of Euros per year.

30. In the transport sector the Commission has been particularly vigilant regarding revenue-sharing joint ventures that may restrict competition to the detriment of a large number of consumers. In both the *British Airways/American Airlines/Iberia* case and the *Star Alliance* case, the Commission intervened and accepted entry facilitating commitments by a number of international air carriers that had formed joint ventures for their transatlantic flights.[38] Those joint ventures affect a large number of European consumers and businesses for whom the Commission's intervention brings about direct benefits in ensuring competition on economically important travel routes.

31. The Commission's 2009 commitment decision in the *Ship Classification* case not only dealt with practices that were harmful to the ship classification market; it also gave much needed guidance on the competition law assessment of standardisation agreements, a very topical

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35 COMP/34.579 - MasterCard, decision of 19 December 2007; COMP/39.398 - Visa MIF, decision of 8 December 2010.

36 COMP/39.839 - Telefónica / Portugal Telecom, decision of 23 January 2013.

37 COMP/39.226 - Lundbeck, decision of 19 June 2013; COMP/39.685 - Fentanyl, decision of 10 December 2013.

38 For example COMP/39.595 - Continental/United/Lufthansa/Air Canada, decision of 23 May 2013 and COMP/39.596 - BA/AA/IB, decision of 14 July 2010.

issue at the time and still today. [39] Moreover, many of the issues dealt with during the investigation helped shaping the comprehensive guidance on standardisation agreements which was subsequently set out in the revised Horizontal Guidelines mentioned above.

Vertical restraints

32. Vertical agreements are the other large category of practices that can fall within the scope of Article 101 TFEU. These are agreements between undertakings that operate at different levels of the production or distribution chain and that therefore do not compete on the same markets. For many of these agreements, competition concerns only arise if there is insufficient competition at one or more levels of trade, in other words, if there is market power either at the level of the supplier or the purchaser. Vertical restraints are also generally seen as less harmful than horizontal restraints because they can provide substantial scope for efficiencies. Notwithstanding, certain restrictions contained in vertical agreements can have very significant negative effects on competition and thus be to the detriment of consumers.

33. During the past decade, the Commission addressed competition issues and provided guidance in relation to vertical agreements through a combination of policy initiatives and enforcement actions in concrete cases.

34. In April 2010, the Commission published a revised Block Exemption Regulation on vertical agreements, Regulation 330/2010,[40] and Guidelines on restraints in such agreements ("Vertical Guidelines").[41] The revised rules and guidance build on the approach which the Commission introduced fifteen years ago to take account of the effects of vertical agreements and continues to apply across sectors. The most significant novelty in the revised Regulation is that for an agreement to be block exempted not only the supplier's market share but also the market share of the buyer must be below 30%.

35. In the revised Vertical Guidelines, particular attention is given to restrictions that can arise in the rapidly growing area of e-commerce. In the context of online sales, the Guidelines establish the principle that authorised distributors must be free to sell on their websites as they do in their traditional shops and physical points of sales.[42] With these new rules in force, distributors have a clear basis to develop online activities allowing them to reach, and be reached by, customers throughout the EU thereby taking full advantage of the internal market.

36. The only sector for which specific rules for vertical agreements had continued to exist was the distribution of new cars and the corresponding aftersales services.[43] In 2010, the Commission reviewed these sector-specific rules and found that the level of competition regarding sales of new cars had appreciably increased in the past years whilst specific competition issues persisted with regards to aftersales services. The Commission therefore retained a sector specific Block Exemption Regulation only for repair and maintenance

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39 COMP/ 39.416 Ship Classification, decision of 14 October 2010.

40 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1).

41 Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p.1).

42 See for instance paragraphs 52-54 of the Guidelines on Vertical Restraints.

43 Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30).

services for cars.[44] Regarding the distribution of new cars, the general rules of Regulation 330/2010 now apply.[45]

37. A significant number of vertical business practices across different industries are block exempted pursuant to Regulation 330/2010. Of those vertical practices in the EU that become subject of an investigation by a competition authority, a significant portion are being dealt with by the NCAs, especially when the agreement or agreements concerned principally have effects on competition in one or in a small number of Member States.

38. Nonetheless, the Commission has also carried out some important investigations into vertical restraints cases and adopted eleven Article 101 TFEU decisions concerning vertical practices These Commission decisions concerned issues such as hard-core restrictions of parallel trade (by Topps barring imports of Pokémon stickers and cards from low price to high price countries, and by Peugeot obstructing French consumers from buying cars in the Netherlands),[46] the imposition of non-compete obligations (by Repsol tying petrol stations for a long period of time)[47] and agreements between car manufacturers (DaimlerChrysler, Toyota, General Motors and Fiat) and their after-sales service partners restricting the release of technical information to independent car repairers which risked foreclosing the latter from the car after-sales markets.[48]

2 NCAs

39. Article 101 TFEU has also been significantly enforced by NCAs. In the period of May 2004 – December 2013, the Commission received envisaged decisions concerning approximately 203 cartels, 142 other horizontal practices and 135 vertical practices.

Cartels

40. As can be seen in Figure 2 above, the fight against cartels has also been an important area of enforcement for the NCAs, accounting for 27% of their overall enforcement in the past ten years. The envisaged decisions regarding cartels concerned a variety of sectors, but the highest level of activity was in basic industries and manufacturing (66 decisions), as well as food (34 decisions), transport (31 decisions) and consumer goods (14 decisions).

41. About one third of these envisaged decisions (34%) were initiated on the basis of applications made under leniency programmes. However, most of the envisaged decisions involving cartels have been initiated ex officio (37%), and a large proportion were based on complaints (29%). Some NCAs, e.g. the Dutch authority, have implemented a package of measures to boost ex officio anti-cartel enforcement, for example by adopting informant

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44 Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 129, 28.5.2010, p.52). Agreements for the provision of repair and maintenance services for motor vehicles are block exempted if they fulfil the requirements of Regulation No 330/2010, and do not contain any of the hardcore restrictions contained in Article 5 of Regulation 461/2010.

45 The general rules of Regulation 330/2010 became applicable to agreements on the purchase, sell or resell new motor vehicles on 1 June 2013 as stated in Article 3 of Regulation 461/2010.

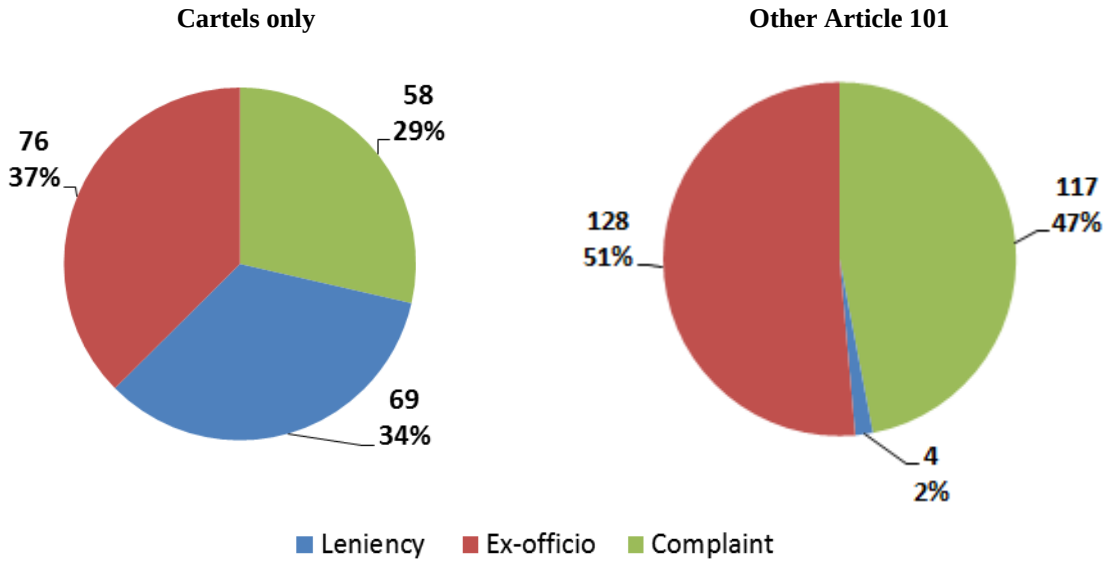
46 COMP/37.980 - Souris Topps, decision of 26 May 2004, COMP/36.623, 36.820 and 37.275 - SEP and others/Automobiles Peugeot, decision of 5 October 2005.

47 COMP/38.348 - REPSOL C.P.P., decision of 12 April 2006.

48 COMP/39.140 - DaimlerChrysler, decision of 13 September 2007; COMP/39.141 - Fiat, decision of 13 September 2007; COMP/ 39.142 - Toyota, decision of 13 September 2007 and COMP/39.143 - Opel, decision of 13 September 2007.

programmes and by establishing regular contacts with public bodies which may alert the NCA about suspected cartels. In a few Member States, where leniency programmes do not yet operate successfully, the NCAs continue to strongly rely on complaints and ex officio efforts. Continuous experience with ex officio enforcement strengthens EU-wide anti-cartel enforcement and makes it less dependent on the success of leniency programmes.

Figure 4: Origin of NCA Article 101 TFEU envisaged decisions in the period May 2004 – December 2013



42. As can be seen from Figure 4 above, other Article 101 TFEU envisaged decisions dealt with by NCAs also originated mainly ex officio (51%) or are based on complaints (47%). A very small part of these envisaged decisions (2%) originated from leniency applications as certain Member States have expanded their leniency programmes to a wider range of infringements than hard-core cartels.

Other horizontal restraints

43. In their envisaged decisions, NCAs have tackled a significant number of other alleged horizontal practices (142),[49] including cases involving exchanges of information,[50] but also exclusivity, joint selling, marketing and/or commercialisation, non-compete clauses and joint purchasing. A significant number of such envisaged decisions, even though not qualified as cartels, concern pricing issues, including price recommendations by trade associations, and domestic multilateral interchange fees (MIFs) cases which complement the Commission's enforcement action targeting bank interchange fees for cross border transactions.

44. Some envisaged decisions regarding horizontal agreements concern less "classical" types of infringements, for example, practices which denigrate competitors' products. Others cover decisions by associations of undertakings which aim at limiting market output, restricting entry of new competitors, limiting advertisement and/or addressing various pricing issues.

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49 See paragraph 13 and Figure 2 above.

50 There were about 20 cases tackling "stand alone" exchanges of information, i.e. cases in which the exchange of information did not form part of a broader cartel arrangement.

45. As concerns envisaged decisions addressing exchanges of information which were deemed to be anticompetitive, roughly half of them involved exchanges of information on prices, such as the actual future prices or price increases. The other half or so involved exchanges of other types of information which was characterised as commercially sensitive, because it related to competitive parameters, such as the value and volume of sales, market shares, model formulas for calculating price, production costs, inventories, or other key terms of credit arrangements. Almost all of these envisaged decisions contemplated proceeding on a by "object" basis.

46. From a sectoral point of view, the highest number of horizontal practices were addressed in sectors such as liberal professions, media, basic industries and manufacturing and payments systems.

Vertical restraints

47. The envisaged decisions received by the Commission from NCAs contained approximately 135 alleged anti-competitive practices involving vertical agreements under Article 101 TFEU,[51] in particular Retail Price Maintenance, long term agreements, market partitioning/restriction of parallel trade, exclusive distribution, exclusive purchasing, and/or non-compete clauses. The NCAs also addressed some less "classical" types of practices, such as the obligation in vertical agreements to disclose information about competitors.

48. NCAs have tackled alleged restrictions to parallel trade[52] and other export/import limitations and practices that allegedly aimed at partitioning the internal market and which may have had cross-border effects. The Court of Justice has held that "agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel imports, to be agreements whose object is to restrict competition" within the meaning of Article 101 TFEU.[53] Against that background, NCAs have tackled a variety of hindrances to parallel trade, including restrictions of both imports into, and exports from, Member States. Typical examples of restrictions imposed by suppliers include obligations not to sell to customers in certain Member States. They also include measures such as the threat of contract termination if such sales take place, monitoring systems to verify the destination of the supplied goods and the failure of the supplier to provide an after-sales guarantee service with respect to products sold in a particular Member State by "unauthorised" distributors. Such cases have been undertaken by the NCAs in a variety of sectors, ranging from pharmaceutical products to various electronic appliances.

49. The NCAs have also submitted envisaged decisions involving alleged restrictions to online trade. For example, several NCAs have been dealing with alleged vertical restrictions in the online hotel booking sector.

50. In terms of sectors, the highest numbers of alleged vertical practices dealt with by the envisaged decisions are to be found in energy, consumer goods, food/agriculture and motor vehicles.

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51 See paragraph 13 and Figure 2 above.

52 There were about 17 cases.

53 Judgment of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *Glaxo v Commission*; see also Joined Cases C-468/06 to C-478/06 *Sot.Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 65 and the case law cited therein.

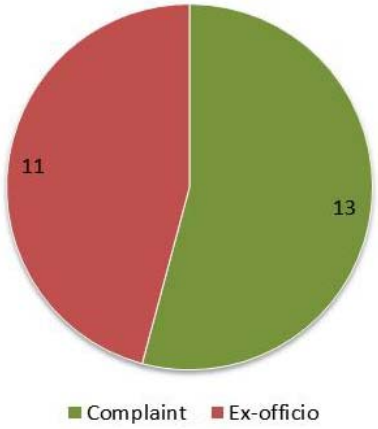
C Article 102 TFEU

51. For both the Commission and NCAs, actions under Article 102 TFEU against abuses of a dominant position constituted a sizeable portion of their overall enforcement activity, namely 20% and 32% of all their decisions respectively.[54] Some of these cases are amongst those that during the past ten years attracted most public attention and spurred debate amongst stakeholders and commentators.

1 Commission

52. Since 2004, the Commission has adopted 24 decisions finding 31 infringements (or alleged infringements, in the case of Article 9 decisions) of Article 102 TFEU. Just under half of these cases arose from complaints (11), with the remainder being ex-officio cases (13).

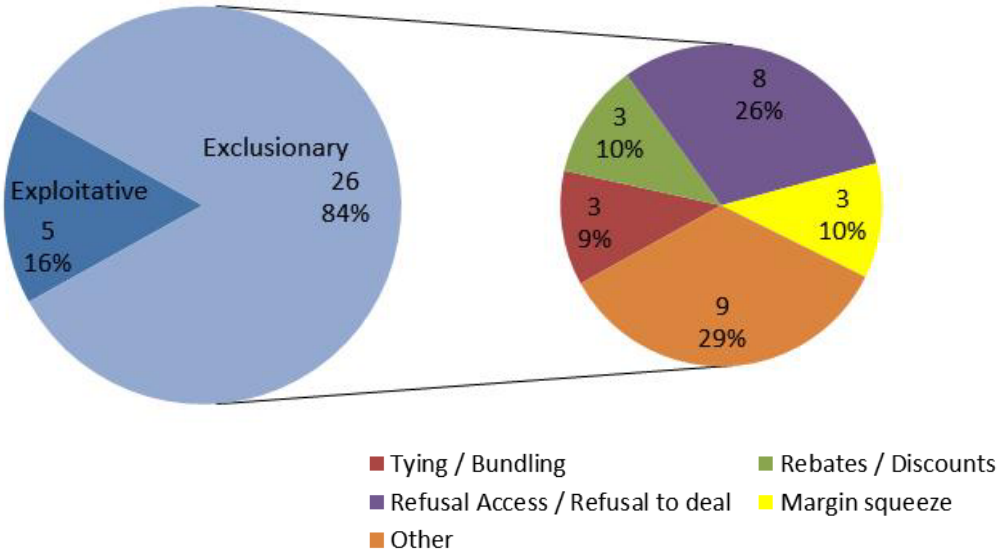
Figure 5: Origin of Commission's Article 102 TFEU decisions from 1 May 2004 to 31 December 2013



53. In its enforcement of Article 102 TFEU, the Commission's main focus has traditionally been on exclusionary practices. These are practices of dominant undertakings that are likely or capable of foreclosing competitors or limiting effective competition, thereby causing harm to consumers. Cases involving exploitative practices of dominant firms, such as discriminatory or excessive pricing, have been less common in the Commission's enforcement activity in the last ten years.

[54] See Figures 1 and 2 above.

Figure 6: Article 102 TFEU[55] – 24 decisions addressing 31 exclusionary and exploitative behaviour from 1 May 2004 to 31 December 2013[56]



Exclusionary abuses

54. The Commission issued a guidance paper that set out its enforcement priorities when applying Article 102 TFEU to abusive exclusionary conduct.[57] The guidance paper provides a general framework for the Commission's analysis of unilateral exclusionary conduct and a methodology for the assessment of the most commonly encountered specific forms of exclusionary abuses (e.g. exclusive dealing, rebates, predatory pricing, and refusal to deal).

55. The 26 instances of exclusionary behaviour referred to in Figure 6 were tackled in 20 different decisions (certain decisions covered several infringements). Several of these behaviours concern "classical" exclusionary abuses such as refusals to deal, rebates, exclusive dealing, tying practices and margin squeeze (see paragraph 57 et seq. below). Others concern less 'conventional' forms of exclusionary abuses (see paragraph 61 below).

56. Article 102 TFEU has been used, inter alia, to effectively challenge refusals to deal by former vertically integrated monopolists. Refusals to deal are not uncommon, for instance in the telecoms sector, where despite the liberalisation of markets, incumbents have frequently obstructed access of competitors to infrastructures which they were under regulatory obligation to provide and thereby hindered unfettered competition. Antitrust intervention has therefore been warranted to remedy this problem. In 2011, the Commission prohibited the refusal of the Polish Telekom incumbent to give access to its broadband wholesale products thereby preventing competition in the downstream broadband market.[58]

57. The Commission also adopted a number of decisions, where it had concerns that the incumbents in the investigated markets restricted competitors' access to networks through

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55 Figure 6 includes one decision adopted under both Article 101 and Article 102 but does not include decisions adopted under Article 106 in conjunction with Article 102.

56 There were a total of 24 Article 102 decisions in the analysis period. Some of these addressed several anti-competitive behaviours. Each of these behaviours has been counted in Figure 6.

57 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p.7).

58 COMP/39.525 - Telekomunikacja Polska, decision of 22 June 2011.

various forms of refusal to deal. This included, in the energy sector, abuse by integrated network operators, such as capacity mismanagement, strategic underinvestment and capacity hoarding,[59] as well as foreclosure through long term capacity bookings of gas infrastructure[60] and through pre-emptive capacity reservations on the power transmission networks.[61] The Commission adopted commitment decisions to make structural divestitures to remedy these network foreclosure concerns binding and enforceable.

58. Another type of infringement observed in particular in newly liberalised sectors is margin squeeze, which occurs where the spread between the price charged to competitors upstream and the price charged to the dominant undertaking's own customers downstream is either negative or insufficient for competitors, that are as efficient as the dominant undertaking, to cover the specific cost of the downstream product.[62] In such circumstances, efficient competitors may be able to operate on the downstream market only at a loss or at artificially reduced levels of profitability.[63] After having expressly addressed margin squeeze in Deutsche Telekom,[64] the Commission adopted a few years later a prohibition decision against the Spanish telecommunications incumbent Telefonica.[65] More recently, the Commission expressed concerns that the pricing behaviour of the German railway incumbent Deutsche Bahn could have resulted in margin squeeze and could have prevented rivals from competing profitably on rail transport markets in Germany. At the end of 2013, the Commission accepted commitments from Deutsche Bahn that addressed those concerns.[66] The Union Courts have so far upheld the Commission's decisions in margin squeeze cases confirming that margin squeeze is an independent form of abuse and upholding the analytical assessment carried out by the Commission in the assessment of margin squeeze.[67]

59. The Commission has also successfully challenged other traditional forms of exclusionary abuses such as exclusive dealing arrangements and rebate schemes:

(1) In 2006 the Commission imposed a fine on a Norwegian producer of reverse vending machines, Tomra, for having concluded a number of exclusive dealing arrangements and for offering retroactive rebate schemes foreclosing Tomra's actual and potential competitors. The Commission decision has been upheld on appeal by the Union Courts.[68]

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59 COMP/39.315 - ENI, decision of 29 September 2010, COMP/39.402 - RWE Gas Foreclosure, decision of 18 March 2009.

60 See COMP/39.316 - Gaz de France, decision of 3 December 2009 and COMP/39.317 - E.ON Gas, decision of 4 May 2010.

61 COMP/39.727 - CEZ, decision of 10 April 2013.

62 Case T-5/97 *Industrie des Poudres Sphériques v Commission* [2000] ECR II-3759, paragraph 178; Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 169; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, paragraph 32.

63 Case C-52/09 *TeliaSonera Sverige AB* [2011] ECR I-527, paragraph 33

64 COMP/37.451, 37.578, 37.579 - Deutsche Telekom AG, decision of 21 May 2003.

65 COMP/38.784 - Wanadoo España v Telefónica, decision of 4 July 2007.

66 COMP/39.678, COMP/39.731, COMP/39.915 - Deutsche Bahn I/II/III, decision of 18 December 2013.

67 Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555; Case T-336/07 *Telefónica and Telefónica de España v Commission* [2012] ECR II-000; Case C-52/09 - *TeliaSonera Sverige AB* [2011] ECR I-000.

68 Case T-155/06 *Tomra Systems and Others v. European Commission* [2010] ECR II-0000, on appeal judgment of 19 April 2012 in Case C-549/10 P, *Tomra and Others v European Commission*.

(2) In 2009 the Commission found that Intel had been giving wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their x86 CPUs from Intel. Intel had also made direct payments to a major retailer on condition it stock only computers with Intel x86 CPUs. Such rebates and payments were capable of effectively preventing customers - and ultimately consumers - from choosing alternative products. In addition to complying with the requirements established in case law, the Commission also conducted an equally efficient competitor analysis in its assessment of the compatibility of rebate schemes with Article 102 TFEU.[69] The Commission decision has been upheld on appeal by the General Court.[70]

(3) Exclusive dealing arrangements in the form of long term supply agreements may also raise concerns in the energy sector, notably to the extent that they lead to a significant degree of customer foreclosure. In 2007 and 2010, the Commission accepted commitments from incumbent operators in France and Belgium to put their customer foreclosure practices to an end and to restore competitive conditions.[71]

60. Tying is another type of traditional abusive behaviour which the Commission has continued to pursue. In 2009, the Commission accepted Microsoft's commitments offered in response to the Commission's concerns that Microsoft had been tying its web browser Internet Explorer to the Windows PC operating system.[72] In 2012, the Commission accepted commitments from Rio Tinto Alcan which put to an end the Commission's concern that the undertaking might have infringed the EU competition rules by contractually tying the licensing of its leading aluminium smelting technology to the purchase of equipment.[73]

61. In addition, the Commission has been confronted with some less conventional forms of exclusionary abusive behaviour which do not fit squarely in the traditional categories of exclusionary abuses. In *AstraZeneca*[74] for instance, the Commission dealt with the misuse of patent systems and national regulatory systems, while in the *Intel* case,[75] in addition to abusive rebates schemes, the Commission found that payments made by Intel to computer manufacturers for postponing or cancelling the launch of competitors' products constituted a naked restriction of competition falling within the ambit of Article 102 TFEU.

Exploitative abuses

62. Exploitative abuses are also liable to infringe Article 102 TFEU. They pertain to practices that exploit and harm consumers directly. Typical examples are excessively high prices or the discrimination of customers that undermines the integration of the internal market. The

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69 COMP/37.990 - Intel, decision of 13 May 2009.

70 Judgment of 12 June 2014 in Case T-286/09 *Intel v Commission*.

71 COMP/37.966 - Distrigas, decision of 11 October 2007; COMP/39.386 - Long term electricity contracts in France, decision of 17 March 2010.

72 COMP/39.530 - Microsoft, decision of 16 December 2009.

73 COMP/39.230 - Rio Tinto Alcan, decision of 20 December 2012. The Commission had concerns also that this behaviour might infringe Articles 101.

74 COMP/37.507 - AstraZeneca, decision of 15 June 2005, confirmed on appeal Case T- 321/05 *AstraZeneca AB, AstraZeneca plc v. European Commission* [2010] ECR II-2805, on further appeal judgment of 6 December 2012 in Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v European Commission*.

75 See above note 63.

Commission's enforcement efforts have traditionally tended to focus particularly on exclusionary abuses, as intervening against such behaviour can prevent dominant companies from further consolidating their market power and exploiting consumers. This being said, exploitative abuses are as much caught by Article 102 TFEU as exclusionary abuses, and in some instances, challenging the exploitative conduct itself is the only way to remedy consumer harm.

63. Out of the 24 decisions referred to in Figure 6, five decisions concerned alleged exploitative abuses, two of which concerned discrimination,[76] two excessive pricing[77] and one capacity withholding with the view to increasing prices for consumers.[78] For example, in the *Rambus* case, the Commission had concerns that Rambus would have abused its dominant position by not disclosing relevant patents in the context of a standard-setting process for DRAM technology and thereafter claiming excessively high royalties for the use of those patents. In response to the Commission's preliminary assessment that the conduct may constitute an exploitative abuse, Rambus offered a set of commitments addressing the Commission's concerns. The *Clearstream* case is an example of abusive price discrimination.[79] The Commission found that the dominant undertaking Clearstream had infringed Article 102 TFEU by charging customers different prices for its clearing and settlement services. The Commission found no objective justification for the different treatment of equal transactions. The decision was upheld by the General Court on appeal.[80]

2 NCAs

64. From May 2004 to December 2013, NCAs informed the Commission of 278 envisaged decisions covering alleged abuses of dominant position contrary to Article 102 TFEU. Figure 7 shows that more than two thirds of the enforcement actions by NCAs under Article 102 TFEU originated from complaints whereas the remainder was based on ex officio inquiries.

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76 COMP/39.351 - Swedish Interconnectors, decision of 14 April 2010, COMP/38.096 - Clearstream (Clearing and Settlement), decision of 2 June 2004.

77 COMP/38.636 - RAMBUS, decision of 9 December 2009; COMP/39.592 - Standard and Poor's, decision of 15 November 2011.

78 There two cases covered by one single decision of 26 November 2008: COMP/39.388 - German Electricity Wholesale Market, which concerned capacity withholding with the view to increasing prices for consumers, and COMP/39.389 - German Electricity Balancing Market, which concerned an abuse of network ownership to raise revenues from affiliates supplying services to the network.

79 See note 77. In the same decision the Commission found Clearstream guilty of refusing to supply clearing and settlement services.

80 Case T-301/04 *Clearstream Banking AG, Clearstream International SA v Commission* [2009] ECR II-3155.

Figure 7: Origin of NCA Article 102 TFEU envisaged decisions in the period May 2004 – December 2013

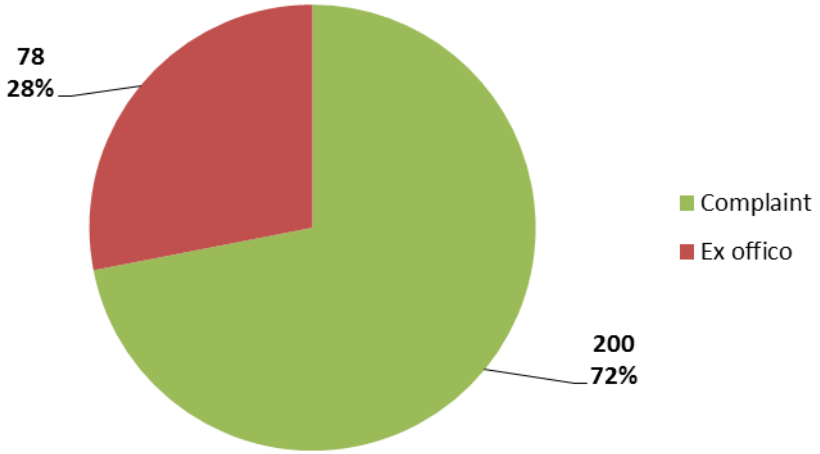
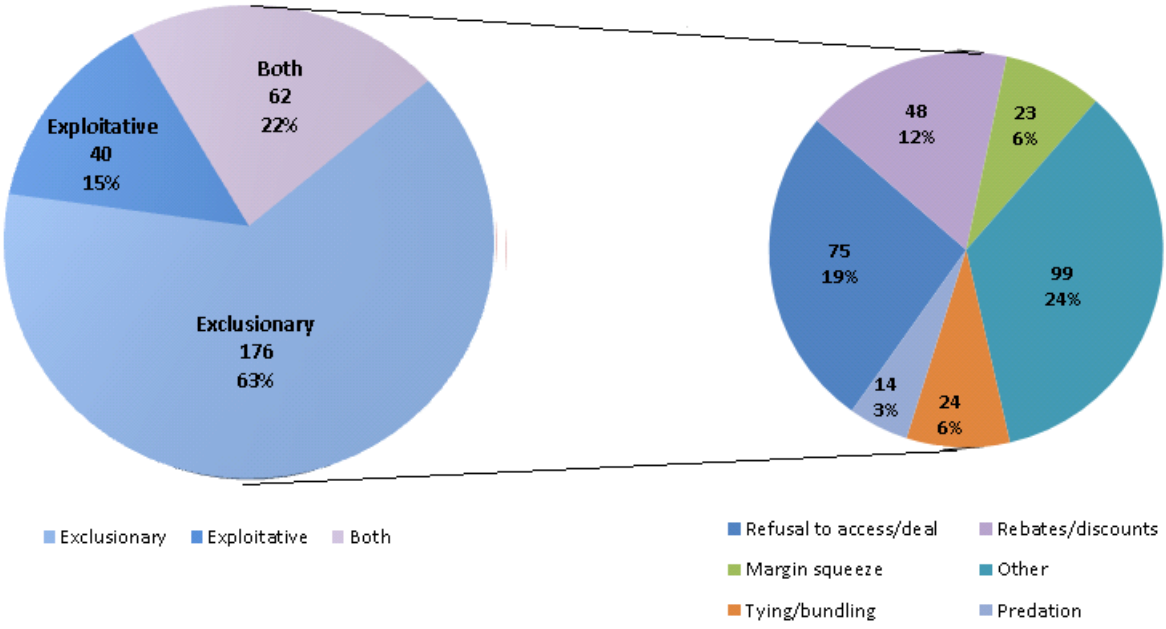


Figure 8: Types of alleged abuses submitted by NCAs[81]



65. Similar to the Commission's experience, the majority of NCAs' envisaged decisions under Article 102 TFEU dealt with exclusionary abuses (63%). These were followed in frequency

81 Left graph: this figure reflects each case investigated under Article 102 TFEU once, either as a case concerning exploitative abuse, exclusionary abuse or both. Certain cases covered more than one practice of the same type; they are not double-counted. Right graph: when the same envisaged decision covered more than one type of exclusionary abuse, it was counted under each exclusionary type of abuse, meaning that some envisaged decisions are counted more than once.

by envisaged decisions involving both alleged exclusionary and exploitative abuses (22%), and by envisaged decisions involving only alleged exploitative abuses (15%).[82]

66. Many envisaged decisions under Article 102 TFEU covered more than one type of abuse (see graph on the right above). When analysing the overall pool of alleged abuses tackled by the NCAs about 406 instances were counted, of which about 70% concerned exclusionary practices (about 283).

67. Most of the alleged exclusionary abuses investigated by NCAs concerned "classical" abuses such as refusal to deal, rebates, margin squeeze and tying/bundling, foreclosure through long-term supply agreements (especially in the energy sector) and exclusivity clauses. In addition, NCAs have submitted a number of alleged abuses that do not fit squarely in the usual categories of exclusionary abuses, for example, tackling cross-subsidies by a dominant undertaking and the denigration of a competitor's products.

68. The NCAs submitted about 123 instances of alleged exploitative abuse. Most commonly, the alleged practices were discrimination, unfair terms and excessive pricing. In a number of envisaged decisions alleging "discrimination", the practice under scrutiny did not concern discrimination among independent operators in equivalent transactions, but rather favouring without objective justification a group's related downstream entity (for example with respect to prices of inputs) as compared to conditions offered to competitors downstream. Furthermore, in a number of envisaged decisions addressing the behaviour of an incumbent operator in the market, an alleged infringement described as discrimination was included along with an exclusionary abuse (for example, refusal to supply).

69. In a few envisaged decisions, NCAs have investigated alleged excessive prices. These cases concerned the energy sector and media with intellectual property related issues, as well as the telecoms and transport markets.

70. As far as the energy markets are concerned, the Danish NCA ruled on the abusive behaviour of dominant electricity providers using their flexible production capacities to operate bidding strategies which allowed them to charge excessive prices on the wholesale market during certain critical hours.[83] In Germany, excessive pricing cases concerned electricity prices charged by dominant energy providers. The German NCA found that charging industrial customers the value of so-called CO2-allowances which had been allocated to these electricity providers free of charge according to a German Emissions Trading Scheme amounted to excessive pricing.[84]

71. In the media sector, excessive pricing was mostly interlinked with intellectual property rights. The Latvian NCA ruled on excessive tariffs imposed by the dominant collecting society for the public use of musical works.[85] Likewise, in Spain, the collecting society for intellectual property rights was found to have allegedly abused its dominant position by imposing excessive and discriminatory prices on private TV stations for the management of public performance and mechanical reproduction rights over phonograms.[86] Inter alia, the

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82 The envisaged decisions taken into account are based either on Article 102 TFEU only or on both Articles 101 and 102 TFEU. See Figure 2 which shows that 10% of the cases investigated by the NCAs (65) are based on both Articles 101 and 102 TFEU.

83 Decision of the Danish NCA of 20 June 2007 in the Case *Elsam A/S*.

84 Decision N°B 8-88/05-2 of the German NCA of 26 September 2007 in the Case *CO2 allowances*.

85 Decision N°E02-14 of the Latvian NCA of 2 April 2013.

86 Decision N°S/0297/10 of the Spanish NCA of 14 April 2012.

Spanish NCA compared the national fees with those applied in other EU member states. Further Spanish cases in the media sector concerned a collecting society's abusive imposition of royalties for TV transmissions of audio-visual works in hotels while yet another decision ruled on the abusive tariffs applied by a specific collecting society for the collective management of performers' rights.[87]

72. In the telecoms sector, NCA cases dealing with excessive pricing include the Spanish investigation into excessive prices imposed by dominant mobile telephony providers for their provision of wholesale services for SMS and MMS[88] as well as a French case dealing with several alleged exclusionary practices of France Télécom in the French overseas territories' markets for fixed line telecommunications and the Internet, together with the excessive pricing of leased submarine cable connections between La Réunion island and mainland France.[89]

73. The Italian NCA dealt with non-cost-related tariffs imposed by the manager of airports in Milan (SEA) and qualified them as abusive.[90] More specifically, SEA was fined by the Italian NCA for setting inequitable and excessive charges for: (i) the provision of refuelling infrastructure; (ii) common and individual catering infrastructure; and (iii) office space for cargo handlers. For all these services, the charges applied by SEA were found to be far above the economic value of the services provided. According to the Italian NCA, the prices giving access to airport infrastructure are in principle regulated and tariffs must be cost-related within the scope of the remaining independent decision-making powers of the relevant airport manager.

D Article 106 TFEU (in combination with Article 101 TFEU or 102 TFEU)

1 Commission

74. Article 106 TFEU enables the Commission to protect competition in the internal market by prohibiting measures of Member States which lead public or privileged undertakings to abuse a dominant position or to enter into anticompetitive agreements. In such instances, and provided that the measures go beyond what is necessary for the provision of a service in the public interest,[91] Article 106(3) TFEU entitles the Commission to adopt a decision against the Member States concerned.

75. Since May 2004, the Commission has adopted four decisions against Member States, finding infringements of Article 106(1) TFEU in conjunction with Article 102 TFEU. In the *BdKEP/Deutsche Post AG* decision of 2004[92] the Commission challenged certain provisions in Germany's postal regulatory framework which barred commercial mail preparation firms from earning discounts for handing over pre-sorted letters at Deutsche Post AG's (DPAG) sorting centres. The provisions induced DPAG, which enjoyed exclusive rights in providing basic postal services, to discriminate against mail preparation firms. While large senders

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87 Decision N°S/0208/09 of the Spanish NCA of 19 December 2011.

88 Decision N°S/0248/10 of the Spanish NCA of 19 December 2012.

89 Decision N°09-D-24 of the French NCA of 28 July 2009.

90 Decision N°A377 of the Italian NCA of 26 November 2008 in the Case *SEA/Servizi areoportuali*.

91 Services in the public interest, also referred to in Article 106 TFEU as services of general economic interest, are economic activities that would not be produced by market forces alone or at least not in the form of an affordable service available indiscriminately to all.

92 COMP/38.745 - BdKEP/Deutsche Post AG & Bundesrepublik Deutschland, decision of 10 October 2004.

were allowed to feed self-prepared mail directly into sorting centres and were granted discounts for doing so, commercial firms were barred from discounts for mail preparation.

76. In 2008, the Commission challenged an amendment in the Slovak postal law which had the effect of reserving the delivery of hybrid mail to the incumbent postal operator, Slovenská Pošta. Since the entry into force of that amendment, the delivery of hybrid mail had been re-monopolised to the benefit of the incumbent operator. Private operators were prevented from exercising their activity in this field and, as a consequence, incurred losses that endangered their viability.[93] In another decision of 2008, the Commission found that the Hellenic Republic had granted a public undertaking exclusive rights to explore and exploit all significant lignite deposits in Greece. These rights secured for the public undertaking the cheapest available fuel for production of electricity and enabled it to maintain or reinforce its dominant position in the downstream wholesale market of electricity by excluding or hindering market entry of competitors who could rely only on less competitive fuel.[94]

77. The Commission's experience suggests that Article 106 TFEU can be an effective instrument for safeguarding competition in newly liberalised markets, especially where these markets are closely linked to markets reserved by the State for public or privileged incumbents. Although the completion of the liberalisation process reduces the temptations of Member States to provide privileges that may induce anticompetitive behaviour, the Commission remains vigilant about any State measures that may restrict competition without justification.

2 NCAs

78. Many NCAs attentively follow government action and play a vital role as advisors to governments and legislators, advocating pro-competitive approaches and promoting a culture of competition in their jurisdictions. Such competition advocacy is an integral part of their remit. It is often used to promote competition friendly solutions in regulatory contexts and/or to warn against state action that could entail competition issues. Many NCAs have express powers to issue opinions or similar advocacy instruments[95] and use them regularly. Some are specifically equipped with powers to take action against measures taken by local or regional state authorities, where they raise competition problems. Moreover, in a limited number of envisaged decisions, NCAs have envisaged setting aside a state measure, held to be contrary to the EU competition rules, on the basis of the *CIF* judgment.[96] For example, in a recent decision against Poste Italiane, the Italian NCA decided to set aside national rules on VAT benefiting the incumbent and concluded that Poste Italiane engaged in an abuse of dominance.[97] The Greek NCA imposed a decision on the Port of Piraeus finding that it had breached Article 101 TFEU in conjunction with Article 106 TFEU for unjustified and exclusionary treatment which favoured one port user to the detriment of others.[98] In a

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93 COMP/39.562 - Slovakian postal Law, decision of 7 October 2008. Slovenská Pošta appealed the Commission decision before the General Court (Case T-556/08 *Slovenská pošta v Commission*).

94 COMP/38.700 - Greek lignite and electricity markets, decision of 5 March 2008. The decision has been appealed, see Case T-421/09 *DEI v Commission* and Case C-554/12 P - *Commission v DEI.*

95 For example, Finland has conducted a competition review covering a wide range of sectors in Finland (Competition Review I and II, 2008 and 2011).

96 Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055.

97 Decision N°A441 of the Italian NCA of 27 March 2013 in the Case *Applicazione dell'IVA sui servizi postali*..

98 Decision N°428/V/2009 of the Greek NCA of 23 January 2009.

decision against Riga International Airport, the Latvian NCA obliged the airport to discontinue the application of provisions establishing a discriminatory discount system for services provided to airlines.[99]

III ANTITRUST ENFORCEMENT ACTIVITY BY SECTOR

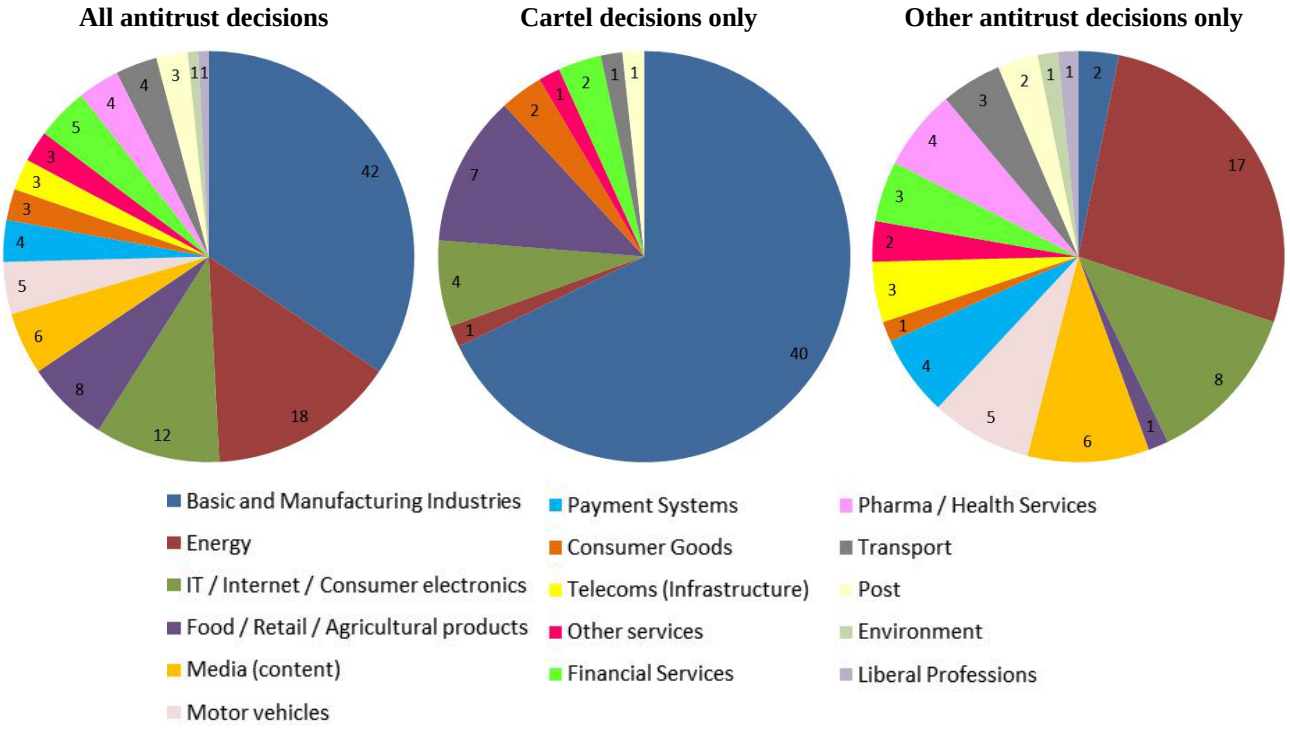
79. This chapter looks at enforcement activities by the Commission and the NCAs by sector. It first presents an overview of the overall level of antitrust enforcement by sector. Thereafter, it provides a more detailed presentation of the antitrust enforcement activities and general trends and developments in ten specific sectors.

A General overview

1 Commission

80. As mentioned above in Chapter II, since May 2004 the Commission has adopted a total of 122 decisions relating either to proceedings under the EU competition rules (including in conjunction with Article 106 TFEU) or to procedural issues under Article 23 and 24 of Regulation 1/2003. Figure 9 shows the distribution of these decisions among different economic sectors. Although these 122 decisions cover a broad range of products and services, it is clear that over the past ten years the Commission has focused on a number of specific key sectors.

Figure 9: Commission antitrust decisions by sector from May 2004 to December 2013



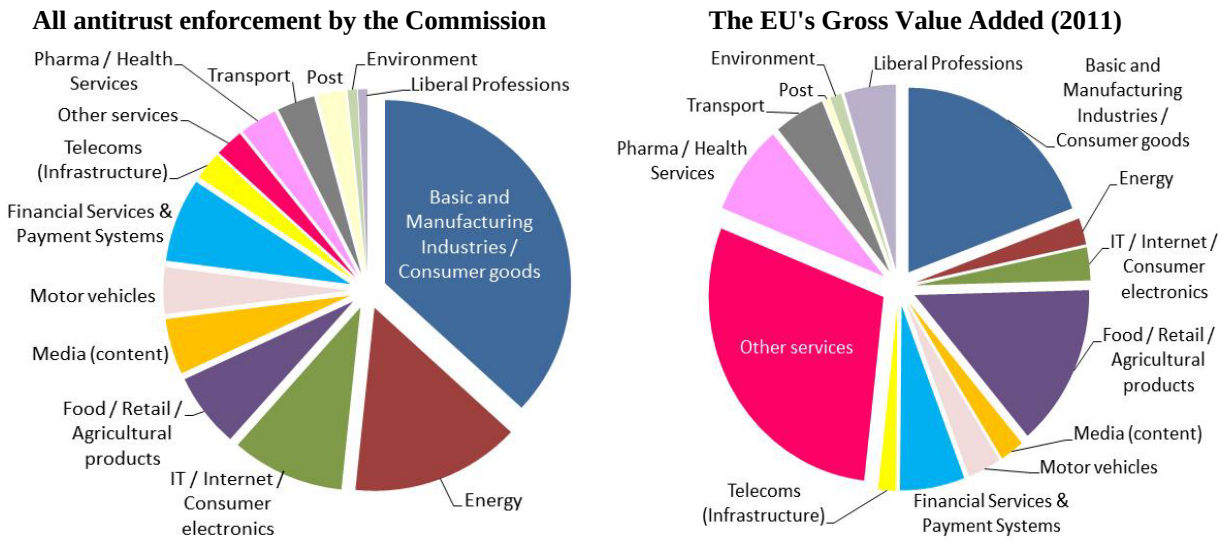
81. Over the review period, the basic and manufacturing industries sector has been the most heavily investigated by the Commission – 42 decisions were adopted in this area. Energy and the information technology ("IT") sector have also remained high on the enforcement

[99] Decision N°134 of the Latvian NCA of 22 December 2006.

agenda, with the Commission issuing 18 and 12 decisions, respectively. The remaining 50 decisions are spread broadly across thirteen different economic sectors, with only food and agricultural products accounting for more than 5 decisions. Whilst in the basic and manufacturing industries and the food sectors the decisions related almost exclusively to cartels, in sectors such as energy, IT & consumer electronics and payment systems, the majority of Commission decisions concerned other infringements.

82. Figure 10 compares the Commission's antitrust enforcement efforts per sector with the equivalent share of the EU's Gross Value Added (GVA) for each sector. GVA is a measure of output produced by a specific sector, assessing the difference between output and intermediate consumption. It can be seen as a measure of the weight of different sectors in the overall EU economy.

Figure 10: Commission antitrust decisions (May 2004 to December 2013) vs EU GVA (2011), by sector



Source: Eurostat, DG COMP. NACE code O (Public administration) has been removed from the chart.

83. It should be noted that the comparison in Figure 10 can only provide a broad picture. Economic areas such as education and real estate activities (both included in "Other Services") are not frequently captured by competition law although they are responsible for around 17% of the EU's GVA. Furthermore, the categories used in the Eurostat databases do not always match precisely those used in the Commission's antitrust work. Finally, there is no reason that the intensity of antitrust enforcement should necessarily match the size a sector has in the economy in terms of GVA: there can be larger sectors of the economy that are less prone to antitrust infringements than others; equally, there can be smaller sectors that are more vulnerable to infringements whilst being particularly important for economic growth and welfare.

84. Nevertheless, some trends can still be noted:

(1) The amount of enforcement in areas such as financial services, telecoms, transport, motor vehicles and media (entertainment) generally matches the economic weight of these sectors.

(2) The Commission has undertaken a significant amount of work in information and communication technologies and the energy sector, which is proportionately higher than the relative importance of these sectors in the economy. Regarding the former, this corresponds to the importance of these sectors for digital development, which is a key

element of the EU's Lisbon Strategy and subsequent Europe 2020 Strategy. Regarding the latter, strong competition scrutiny and enforcement has closely followed the de-regulation of the energy sector.

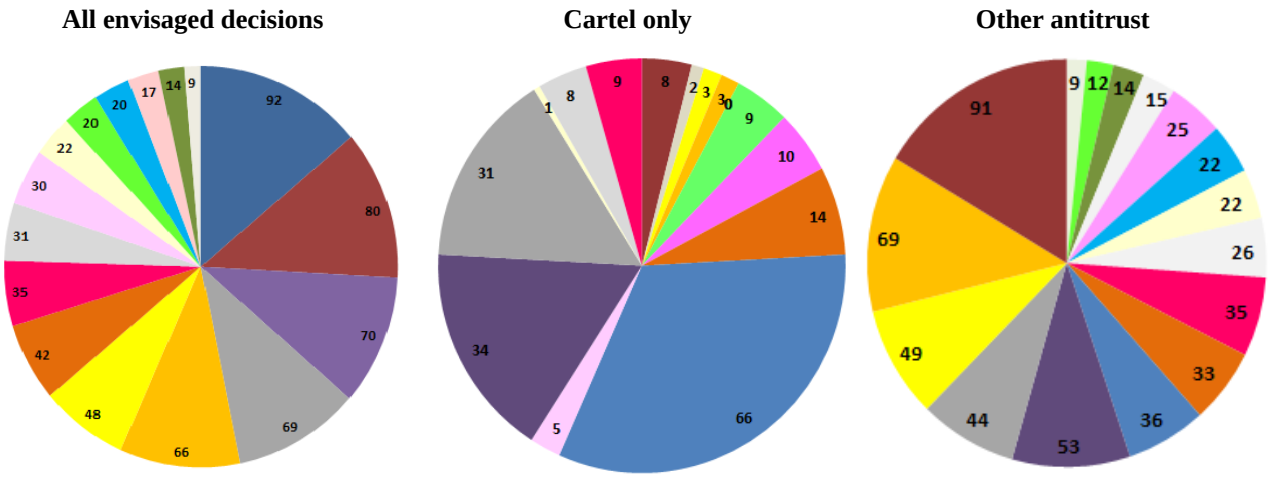
(3) In contrast, professional and scientific services have not been targeted by the Commission at the level that their importance to the economy would suggest. The same also appears to apply to the wholesale and retail trade, as well as food products. In these cases, the enforcement activity of NCAs is higher than that of the Commission, which may be explained by the fact that the markets in those sectors tend to be national in scope.

85. The Commission has pursued a significant number of cases in regulated sectors where it had carried out sector inquiries, such as in energy, financial services and pharmaceuticals. Other sectors on which the Commission's antitrust enforcement has focussed are sectors that have been recently liberalised or were in the process of liberalisation over the last ten years. Examples include, in addition to the energy sector, the media, telecommunications and postal sectors.

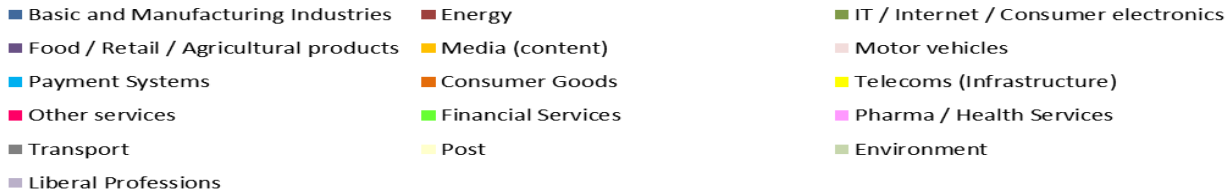
2 NCAs

86. As concerns enforcement by NCAs, Figure 11 shows the number and types of alleged anti-competitive practices investigated in different economic sectors. Although there are several sectors which account for a significant proportion of the enforcement record, the envisaged decisions submitted by NCAs are spread over a variety of economic sectors, most notably basic industries and manufacturing (92), energy (80), transport (69), food (70), media (66), telecoms (48), consumer goods (42) and "other services" (35).

Figure 11: Envisaged decisions by NCAs by sector May 2004 – December 2013[100]



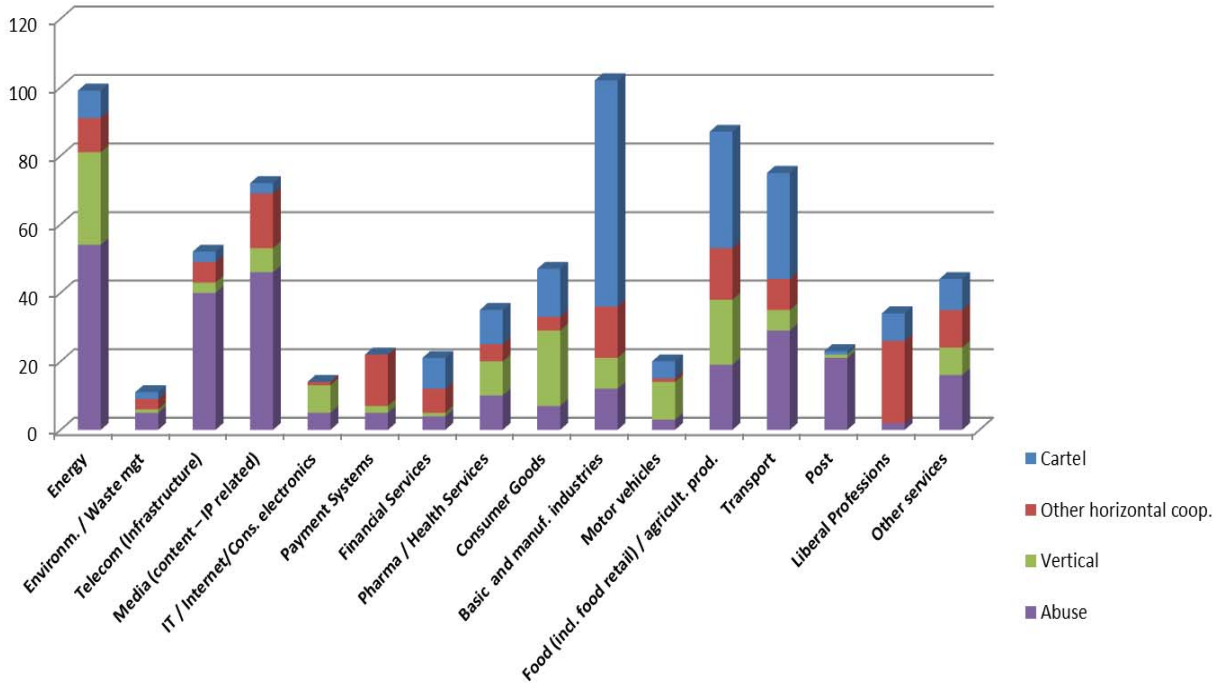
100 When the same envisaged decision covered cartels as well as other antitrust infringements, this envisaged decision was counted in each category of respective infringements; hence double-counting of envisaged decisions is included in this figure.



87. Similarly to the Commission, a number of NCAs were active in recently liberalised sectors or sectors in the process of liberalisation. Both the Commission and NCAs were active in the sectors of energy, media, telecommunications and post. In addition, NCAs were active in other recently liberalised sectors, in particular transport.

88. The graph below provides details regarding the distribution of alleged anti-competitive practices submitted by the NCAs across various economic sectors. For example, there were a significant number of alleged cartels in the basic industries and manufacturing, food, and transport sectors. It appears that the telecoms, media, energy and transport sectors were more prone to alleged abuses of dominant positions. Indeed, these sectors are characterised by high market concentration and/or the presence of historically dominant operators.

Figure 12: type of infringement by NCAs by sector May 2004 – December 2013



B Specific sectors

89. This section examines and briefly comments on the work and type of cases investigated in different economic sectors by the **Commission** and **NCAs** since May 2004.

1 IT, Internet & Consumer Electronics

90. The IT, Internet and consumer electronics industries are fast-moving sectors in terms of technological development. They are widely seen as a high growth area for the European economy, a potential that can only be fully activated in properly functioning and competitive markets. At the same time, these are industries characterised with strong network efforts, which enable the lock-in of customers and further strengthening of dominant positions. Vigilance on the part of competition authorities is thus warranted.

91. The **Commission's** antitrust enforcement actions over the past ten years have contributed to achieving better functioning and more competitive markets, for instance, by targeting activities hindering interoperability between operating systems (*Microsoft* is the landmark decision).[101] Dealing with unjustified obstacles to the interoperability of software and systems has indeed been a recurring theme of antitrust enforcement in the sector in the past ten years. A second theme has been the intersection of intellectual property and antitrust law in the context of standardisation, where the focus of the Commission' activity has been on preventing undertakings from unfairly exploiting the market power that they have obtained as a result of the setting of a standard. Given the technological characteristics of the sector and the importance of innovation as a key parameter of competition, this theme together with the development of "new" technologies has taken a more prominent place in antitrust enforcement than more 'traditional' issues of price competition. That being said, the Commission also found and took action against price-fixing cartels in relation to products such as LCD panels, cathode ray tubes and videotape formats.

92. The twelve decisions adopted by the Commission in these sectors in the last decade were equally split between proceedings under Article 101 TFEU, proceedings under Article 102 TFEU and procedural cases. The Article 101 TFEU cases were all cartels, whereas the Article 102 TFEU cases concerned several types of (alleged) infringements, such as abusive rebates, tying, refusal to deal and unfair pricing. Six of the cases in this sector were initiated at the Commission's initiative. The remainder were three complaints and three applications for leniency.

93. Prominent examples of Article 102 TFEU cases are *Microsoft* (refusal to supply interoperability information and tying),[102] *Intel* (practices preventing new and innovative products of competitors from entering the market)[103] and *Rambus* (unfair pricing in the context of standardisation).[104]

94. Amongst the twelve cases mentioned above, there were three non-compliance decisions which were significant in their own right: two related to periodic penalties imposed on Microsoft in relation to its non-compliance with the prohibition decision against it 2004 regarding interoperability, and the other was a decision imposing a fine on Microsoft for its non-compliance with a subsequent commitments decision from 2009 regarding the tying of its browser to its PC operating system. These three decisions illustrate the Commission's commitment to ensure that the EU competition rules and decisions ordering their enforcement are fully complied with.

95. **NCAs** informed the Commission of 14 envisaged decisions in the IT/Internet/consumer electronics sectors. Among the products investigated in the IT sector was, for example, advertising via the Internet where the French and Italian authorities investigated allegations of discriminatory practices by Google.[105] Consumer electronic products investigated included Hi-fi and home cinema equipment as well as plasma and LCD TVs. Furthermore, some envisaged decisions dealt with competition restrictions related to the distribution of

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101 COMP/37.792 - Microsoft, decision of 24 March 2004. It was confirmed on appeal by a judgment of the EU's General Court in September 2007, see Case T-201/04 *Microsoft Corp v Commission* ECR [2007] II-3601.

102 COMP/37.792 - Microsoft, decision of 24 March 2004; COMP/39.530 - Microsoft (Tying) - decision of 16 December 2009.

103 COMP/37.990 - Intel, decision of 13 May 2009.

104 COMP/38.636 - Rambus, decision of 9 December 2009.

105 See e.g. Decision N°A420 of the Italian NCA of 22 December 2010.

business software. The infringements investigated by the NCAs were evenly distributed between Article 101 TFEU and Article 102 TFEU infringements, with vertical restrictions, such as retail price maintenance, constituting the majority of alleged Article 101 TFEU infringements.

96. There were also sector inquiries/market analyses carried out by NCAs regarding online delivery of services.[106] The reach of the Internet is such that ever more products and services are provided via this means, with online platforms becoming increasingly popular. Some NCAs have investigated so-called price parity or best price clauses which oblige providers of goods or services to offer their "best" prices and terms to online platforms offering consumers access to these goods or services from a wide selection of providers in a convenient one-stop shop. Recent examples include the investigations of the German and UK NCAs regarding use of these clauses by Amazon, when offering products in its online "marketplace" from other competing retailers. Both NCAs closed their investigations after Amazon dropped these clauses. Investigations by several NCAs of similar clauses used for hotel online bookings have led to date to enforcement decisions by the German and UK NCAs.[107] Both authorities addressed the same potential threat to competition, namely that it may: eliminate intra-brand price competition for the same room; reduce the incentive for online travel agents to compete on commission; and create barriers for new online travel agents to enter, and tailored the remedy to the cases before them. The use of these parity clauses was prohibited by the Bundeskartellamt for the booking of hotels located in Germany. The Office of Fair Trading accepted commitments from a large hotel group whereby: (i) online platforms can offer discounts from the rates of its hotels located in the UK to consumers participating in the platforms' membership schemes; and (ii) its hotels can also offer discounts to consumers participating in the platforms' membership schemes. The Lithuanian NCA has dealt with a case in which it imposed fines on several tour operators/travel agents for having coordinated their actions online.[108] The ECN closely coordinates its approach to online vertical issues in the Working Group on Vertical Issues.

2 Energy

97. The energy sector comprises, in particular, the electricity, gas, oil, coal and water industries. The enforcement of competition rules in EU energy markets forms an integral part of the EU's energy policy and has been a key driver for the EU's internal market agenda, in particular the adoption of the third energy package[109] and its subsequent implementing rules.[110]

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106 See e.g. Opinions of the French NCA N°12-A-20 of 18 September 2012 on the competitive operation of e-commerce and N°10-A-29 of 14 September 2010 on online advertising.

107 Decision N°B9-66/10 of the German NCA of 20 December 2013 and Decision N°OFT1514 of the UK NCA of 31 January 2013.

108 Decision N°2S-3 of the Lithuanian NCA of 7 June 2012: the Supreme Administrative Court of Lithuania has made a reference for preliminary ruling in this case on 17 January 2014 (Case C-74/14).

109 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94); Regulation (EC) no 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 176, 14.8.2009, p. 15); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005,

98. The **Commission's** antitrust enforcement activities in the energy sector have provided both backing and stimulus for the liberalisation process and the creation of the internal energy market. Once the decision is taken to dismantle the former legal monopolies and to create a functioning internal market, antitrust enforcement plays an essential role in ensuring that effective competition becomes a reality. The Commission's carefully tailored remedies, including ownership unbundling, have significantly contributed to the success of liberalisation and have shown the complementarity of antitrust enforcement and regulation.

99. Between 2005 and 2007, the Commission carried out a sector inquiry into the energy markets.[111] This inquiry was a useful and necessary tool to achieve the high level of successful antitrust enforcement during the following years. In particular, it identified several central problems standing in the way of well-functioning markets, namely the high concentration and illiquidity of energy markets, the insufficient unbundling of network and supply activities and the absence of cross-border integration and cross-border competition. The sector inquiry found that gas and electricity wholesale markets had remained largely national in scope and had maintained the high level of concentration of the pre-liberalisation period. The level of unbundling was also found to be insufficient. As a result, vertically integrated undertakings (usually the incumbents) had an incentive to take investment decisions which were not in the interest of network/infrastructure operations but on the basis of the supply interests of the integrated undertaking. Market integration was hampered inter alia by the fact that incumbents rarely entered other national markets as competitors, by insufficient or unavailable cross-border pipeline (gas) capacity or interconnector (electricity) capacity, by under-investment and by ineffective congestion management.

100. Over the past ten years, the Commission has adopted 18 decisions in the energy sector, dealing mainly with electricity and gas markets but also including two cases relating to automotive fuel and nuclear power. In recent years, investigations have been launched inter alia in the fuel markets.[112] The focus of the Commission's antitrust enforcement has been on the three major structural problems mentioned above: the 2008 decision regarding *German electricity wholesale*, for instance, dealt with highly concentrated and illiquid energy markets,[113] the *RWE Gas Foreclosure* (2009) and *ENI* (2010) decisions dealt with the insufficient unbundling of network and supply activities[114] and the *Swedish Interconnectors* (2010) and *E.ON/GDF* (2009) decisions are examples for dealing with the absence of cross-border integration and cross-border competition.[115]

101. The vast majority of the decisions adopted by the Commission related to proceedings under Article 102 TFEU against exclusionary practices of dominant firms (mostly the former holders of legal monopolies), primarily in the form of refusals to grant access to

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(OJ L 211, 14.8.2009, p. 36); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1).

110 See the Gas and Electricity Directives of the third legislative package for an internal EU gas and electricity market of September 2009.

111 Communication from the Commission - Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final.

112 The Commission is investigating behaviour of companies active in and providing services to the crude oil, refined oil and biofuel sectors, see press release of 14 May 2013, Memo/13/435.

113 See e.g. COMP/39.388 - German electricity wholesale market, decision of 26 November 2008.

114 See e.g. COMP/39.402 - RWE Gas Foreclosure, decision of 18 March 2009 and COMP/39.315 - ENI, decision of 29 September 2010.

115 See e.g. COMP/39.351 - Swedish Interconnectors, decision of 14 April 2010 and COMP/39.401 - E.ON/GDF, decision of 8 July 2009.

infrastructure, for example in the form of sector specific practices, such as capacity hoarding,[116] strategic underinvestment[117] or foreclosure through long-term capacity bookings.[118]

102. The energy sector is a very good illustration of the significant role that sector inquiries can play in fostering the enforcement of competition rules: since the sector inquiry, all but two of the Commission's cases leading to decisions began at the Commission's own initiative and did not depend on complainants or market informants bringing a competition issue to its attention). Furthermore, the sector inquiry also allowed the Commission to take an active role in the debate on unbundling in the third energy package and created a political momentum for increased competition enforcement and efficient remedies.

103. **NCAs** informed the Commission of 80 envisaged decisions in the energy sector. The majority tackled alleged abuses of dominant position under Article 102 TFEU, with the most frequently occurring alleged practices concerning refusal to deal, restrictions on market access, foreclosure, abusive long terms contracts and discriminatory behaviour. There were also a significant number of alleged infringements of Article 101 TFEU, most of which were vertical in nature, but they also included cartels and other horizontal practices.

104. The NCAs often addressed alleged abuses by energy incumbents, in particular in the traditional gas and electricity markets, which accounted for about two thirds of the envisaged decisions. A significant proportion derived from sets of cases investigated by the German and Spanish NCAs in the gas and electricity markets respectively. In the case of Germany, there were a number of envisaged commitment decisions that followed a case in which the NCA, in order to prevent the foreclosure of competitors, prohibited E.ON Ruhrgas from the continuation of existing, and the conclusion of, new gas supply agreements with regional and local gas resellers under certain conditions concerning duration and customers' capacity coverage.[119] With regard to Spain, most of the envisaged prohibition decisions provided for the imposition of fines on the main national electricity incumbents for hindering access of their competitors to information on the points of supply or for having abused their dominant positions in the connection works market.[120] The Italian NCA intervened in the electricity sector in most cases with commitment decisions for alleged exclusionary conduct in the local distribution and wholesale market.[121]

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116 See e.g. COMP/39.402 - RWE Gas Foreclosure, decision of 18 March 2009 and COMP/39.315 - ENI, decision of 29 September 2010.

117 See e.g. COMP/39.315 - ENI, decision of 29 September 2010 and COMP/39.316 - Gaz de France, decision of 3 December 2009.

118 See COMP/39.316 - Gaz de France, decision of 3 December 2009 and COMP/39.317 - E.ON Gas, decision of 4 May 2010.

119 Decision N°B 8-113/03 of the German NCA of 13 January 2006 in the Case *E.ON Ruhrgas*.

120 Decisions Nº643/08, N°642/08, N°641/08, N°645/08, N°644/08 of the Spanish NCA of 2 April 2009; Decision NºS/0159/09 of the Spanish NCA of 13 May 2011; Decision N°S/0211/09 of the Spanish NCA of 21 February 2012; Decision NºS/0089/08 of the Spanish NCA of 29 September 2011; Decision NºS/003/07 of the Spanish NCA of 8 November 2011 and Decision N°2795/07 of the Spanish NCA of 20 September 2011.

121 See Decisions N°A411, N°A411a, N°A411d of the Italian NCA of 8 September 2010 and Decision N°A423 of the Italian NCA of 22 December 2010.

105. The other main focus of the NCAs' envisaged decisions concerned oil markets, with a large number of authorities addressing issues such as the production, distribution and supply of fuel and LPG.[122]

106. New ground has been broken by the NCAs in several cases. For example, the Italian and the Spanish NCAs were the first ECN authorities to act against network operators. In the case of Italy, the NCA took a decision against the gas network operator Eni for hindering the capacity expansion of the pipeline which imported gas from Algeria into Italy and, in a recent case, accepted commitments by the same operator concerning international gas transport.[123] The Spanish case related to restrictions imposed by the national natural gas operator Grupo Gas Natural on access to re-gasification infrastructures of third parties.[124] Likewise, the Danish NCA was the first ECN authority to act against excessive pricing by an undertaking in an exchange electricity market.[125] Elsam, an electricity production company active in the Nordic transmission exchange network, Nord Pool, was able to create or remove bottlenecks in the transmission network between neighbouring areas and countries, increasing wholesale prices.

107. In addition to investigations leading to possible enforcement actions, NCAs have also carried out a large number of sector inquiries/market analyses in the energy markets showing that this sector constitutes one of their top priorities. Inquiries were carried out into the electricity and gas markets, the fuel markets and the market for district heating.[126] These inquiries have allowed the NCAs to identify a variety of competition issues in different markets. A sector inquiry carried out by Germany into the fuel sector revealed the existence of dominant oligopolies or high levels of concentration in the retail sale of fuel at regional level in Germany.[127] The Italian NCA carried out a sector inquiry which found that liberalisation measures had made a positive impact on the growth of the number of unbranded distributors and contributed to modifying the oligopolistic structure of the fuel retail market.[128] In the same sector, the Spanish and Portuguese NCAs also carried out inquiries finding asymmetries between the formation of the pre-tax retail prices for petrol and diesel and the variations of international fuel prices.[129] In the gas sector, another inquiry in Germany revealed the risk of foreclosure in the use of transmission capacity at interconnection points which were fully booked due to long-term contracts and in the

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122 See e.g. Decision N°97/21.12.2011 of the Romanian NCA of 21 December 2011 which found that OMV Petrom, OMV Petrom Marketing, Lukoil, Rompetrol Downstream, MOL and ENI entered into an agreement/concerted practice to stop selling one fuel product.

123 Decision N°A358 of the Italian NCA of 15 February 2006 in the Case *ENI/Trans-Tunisian Pipeline* and Decision N°A440 of the Italian NCA of 9 September 2012 in the Case *Mercato italiano dell'approvvigionamento all'ingrosso del gas naturale*.

124 Decision N°580/04 of the Spanish NCA of 16 June 2005 in the Case *Gas Natural*.

125 Decision of the Danish NCA of 20 June 2007 in the Case *Elsam A/S*.

126 See e.g. Austria (electricity and gas - 2010); Germany (electricity generation and wholesale markets -2011, district heating - 2012), Italy (natural gas storage market – 2009), Slovakia (gas – 2010, central heating - 2013). The Estonian NCA has regularly carried out sector inquiries into the energy sector in the reported period. The Lithuanian NCA has carried out market research into the liquid oil gas market (2009).

127 Germany (fuel - 2011).

128 Italy (road fuel market -2012).

129 Portugal (analysis of the liquid fuel and bottled gas sectors in Portugal - 2009) Spain (report on automotive fuel sector - 2009: follow-up report on the CNC's automotive fuel report - 2011) and report monitoring the automotive fuel distribution market in Spain- 2012). In addition, the Austrian NCA also conducted sector inquiries into fuel during the reporting period and published a regular newsletter on developments in fuel prices and the Bulgarian NCA carried out a sector inquiry into the production and sale of petrol and diesel fuel (2011).

downstream market for gas distribution.[130] Other more recent inquires/market analyses have been also carried out by the UK,[131] Latvia,[132] and Bulgaria.[133]

108. By way of follow up, some NCAs have undertaken new initiatives to foster competition in certain markets. For example, in Germany a market transparency unit has been set up to ensure that information provided to the NCA by all undertakings operating or setting prices in public petrol stations is made available to consumers.[134] This makes the comparison of retail fuel prices easier and also allows the NCA to monitor price changes, facilitating potential investigations.

3 Pharmaceuticals and Health Products & Services

109. This sector involves pharmaceuticals, medical devices, other health products and health services. The effective enforcement of antitrust law in this sector is very important not only because of the increasing share of Member States' budgets which are dedicated to health spending (total healthcare expenditure is around 8% of the EU's gross domestic product, on average),[135] but also because competition law has been influential in encouraging reforms in the health sector and promoting growth and innovation.

110. A central theme of the **Commission's** competition enforcement over the past years has been the market entry by generic drugs producers, delays in such entry and the role originator undertakings played in such delay. Indeed, originator undertakings regularly face a "patent cliff" for their blockbuster products, i.e. where expiration of their patent is followed by an abrupt drop in sales due to cheaper generics entering the market. Depending on the market concerned, the entry of a generic medicine can lead to up to an 80% decrease in prices.[136] This situation has prompted originator undertakings to deploy certain strategies aimed at preserving their monopoly rents beyond the duration of their patents, to the detriment of health systems and ultimately tax payers.

111. The Commission carried out an extensive inquiry into the pharmaceuticals sector in 2008-2009. This allowed the Commission to better understand the patterns and impact of entry and uptake of generic medicines on the market, as well as the business practices developed by both originator and generic undertakings facing this challenge. It provided, in particular, valuable insight into patent settlements between originator and generics producers, which are now being addressed in individual cases. The inquiry also identified certain regulatory deficiencies (the absence of a single EU patent, lengthy reimbursement proceedings, etc.). Moreover, the sector inquiry created enforcement opportunities for the NCAs and the insights it produced had a considerable influence on shaping the Commission's proposal for a transparency directive concerning national pricing and reimbursement decisions.[137]

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130 Germany (gas transmission - 2009).

131 UK (petrol and diesel sector - 2013).

132 Latvia (electro-energy trade - 2013).

133 Bulgaria (delivery and supply of natural gas and the competitive environment on the electricity markets - 2013).

134 ECN Brief of October 2013: see the Internet (http://ec.europa.eu/competition/ecn/brief/04_2013/DE_fuel.pdf).

135 Source: Eurostat Health Database, Healthcare expenditure by all financing agents. Average of 22 Member States with available data in 2008.

136 EC Pharmaceutical Sector Inquiry Final Report, p. 79.

137 Proposal for a Directive of the European Parliament and the Council on the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of public health insurance systems (OJ C 171, 16.6.2012, p.2), was adopted by the Commission on 1 March 2012 and subsequently

112. Over the past ten years, the Commission adopted four prohibition decisions relating to the pharmaceuticals and health services industries. Further investigations, building on the results of the sector inquiry, are ongoing. Three of the mentioned four decisions (*LABCO/ONP,*[138] *Lundbeck*[139] and *Fentanyl)*[140] relate to non-cartel infringements under Article 101 TFEU and the other (*AstraZeneca*)[141] to exclusionary behaviour under Article 102 TFEU. The decisions in *AstraZeneca* (misusing the patent system and regulatory setting to delay market entry), *Lundbeck* (pay-for-delay settlements), *Fentanyl* (pay-for-delay transaction) are a good illustration of restrictions of competition relating to the foreclosure of generics manufacturers through practices of originator undertakings.

113. The **NCAs** informed the Commission of 30 envisaged decisions. Recently, NCAs have opened cases relating to practices aimed at delaying generic entry, namely a pay-for-delay agreement (UK),[142] denigration practices (France)[143] and exclusionary conduct based on the patent system (Italy).[144] The NCAs have also handled cases in the pharmaceutical and health markets in relation to predatory pricing,[145] anti-competitive influence on retail prices,[146] retail price maintenance,[147] bid-rigging,[148] price fixing and market partitioning,[149] exclusionary clauses in health care contracts,[150] refusal to license the production of an active principle[151] and restrictions to parallel trade (basically export and import ban clauses).[152]

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amended on 18 March 2013. A number of sector inquiry recommendations were taken up, with the aim of simplifying and shortening market authorisation and pricing and reimbursement processes.

138 COMP/39.510 - ONP, decision of 8 December 2010.

139 COMP/39.226 - Lundbeck, decision of 19 June 2013.

140 COMP/39.685 - Fentanyl, decision of 10 December 2013.

141 See note 72.

142 An investigation was started in 2011 against GSK and various generic companies in the market of paroxetine.

143 Decisions of the French NCA N°13-D-11 of 14 May 2013 fining Sanofi in the French market for clopidogrel and N°13-D-21 of 18 December 2013 on practices implemented on the French market for high-dosage buprenorphine sold in private practices.

144 Decision N°A431 of the Italian NCA of 11 January 2012 against Pfizer in the market of anti-glaucoma eye drops.

145 Decision N°07-D-09 of the French NCA of 14 March 2007 fining GSK for predatory pricing in order to avoid generic entry in the hospital market.

146 Decision N°B 3-123/08 of the German NCA of 25 September 2009 in the Case *Contact lenses*.

147 Decision N°PRC-13/2006 of the Portuguese NCA of 10 December 2010.

148 Decision N°I729 of the Italian NCA of 4 August 2011 against Alliance Medical, Siemens, Philips and Toshiba on bid-rigging practices for tenders in the market of medical devices and Decision N°306-45/2010 of the Slovenian NCA of 14 October 2013 regarding bid-rigging, market sharing and price fixing practices undertaken by pharmaceutical wholesalers inter alia in public procurement procedures.

149 Decision N°I639 of the Italian NCA of 26 April 2006 against suppliers of antiseptic and disinfectant products and Decision N°2S-2 of the Lithuanian NCA of 20 January 2011 regarding price fixing, output limitation and market sharing by producers of orthopaedic devices.

150 Decision N°B 3-134/09 of the German NCA of 18 November 2011 in the Case *BIHA*.

151 Decision N°A363 of the Italian NCA of 8 February 2006 against GSK finding an abuse of dominant position consisting in a refusal to grant a license to produce an active substance.

152 Decisions N°51 and N°52 of the Romanian NCA of 28 October 2011 and Decision N° 98 of the Romanian NCA of 27 December 2011 against agreements concluded between Bayer, Sintofarm, Belupo, Baxter and their distributors having as their object the restraint of competition through prevention of parallel trade.

114. A number of NCAs have carried out sector inquiries/market analyses in the pharmaceutical and healthcare sectors.[153] For example, the French NCA undertook a sector inquiry into the pharmaceutical industry which concluded in 2013, calling for more competition throughout the distribution chain and supporting the supervised opening up of the retail distribution of non-prescription medicinal products.[154] The Romanian NCA launched a sector inquiry in 2013 to assess possible malfunctions in the pharmaceutical market, following a sector inquiry which had concluded in 2011 that originator medicines were prevalent on the market although cheaper generics were expected to gain market shares. In 2012, the OFT carried out a market study of the dentistry market in which it identified a range of recommendations to foster competition, in particular with regard to patients' access to accurate and impartial information to help make informed decisions.[155] In the same year, the Dutch NCA commissioned a study on the medical devices market, which found that health care providers can curb the cost of medical equipment by having an efficient purchasing process in place. The Danish NCA also published an analysis containing recommendations on the deregulation of pharmacies in 2012

115. NCAs have also engaged in a variety of advocacy initiatives, including issuing opinions regarding pharmaceuticals and healthcare services, in particular on the compliance of their national pharmaceutical regulatory framework with competition rules, and have proposed measures to enhance competition in the markets concerned. For example, in late 2013 and early 2014, the Bulgarian NCA adopted opinions calling for more competition in the hospital services market and in the provision of ambulatory care.[156] In 2012, the French NCA issued an opinion on a draft decree regarding the supply of medicinal products for human use.[157] The Italian NCA repeatedly intervened in this sector to spur competition in the retail distribution by reporting, inter alia, on the positive effects of the sale of non-prescription pharmaceuticals in "para-pharmacies"[158] and the Spanish NCA issued reports on draft regulations relating to medicinal products.[159] .

4 Telecoms

116. Since 1998, the EU's telecommunications landscape has been liberalised, moving from static public service monopolies to competition. The application of competition law has been instrumental in ensuring that markets operate more competitively, bringing lower prices and

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153 See e.g. Bulgaria (2006); Estonia (2005-2009-2011-2013); Finland (2012); Latvia (2011); Sweden (2007-2009-2010-2012-2013); UK (medicine distribution - 2007 and the Pharmaceutical Price Regulation Scheme - 2006) and Lithuania (parallel import of drugs - 2013).

154 Opinion N°13-A-24 of the French NCA of 19 December 2013.

155 See also Sweden (Competition in the dental care market - 2004).

156 The Bulgarian NCA has also, since 2008, adopted several opinions concerning trade in medicines and on their reimbursement.

157 Opinion N°12-A-18 of the French NCA of 20 July 2012. The French NCA also adopted an Opinion N°13-A-12 of 10 April 2013 on the online sale of medicinal products.

158 See the following reports: Report on design of public tenders for pharmaceuticals (2008); Report on remuneration mechanism for reimbursable pharmaceuticals (2009); Marketing authorisation procedures for generic drugs (2010); New provisions on biosimilar medicines (2011); and Public procurement and biotech products (2013).

159 See the reports on the following draft measures: Service Directive Transposition on Drugs for Veterinary Use (2010): Royal Decree regarding the distribution of medicinal products for human use Report (2013); Ministerial Order regarding new medicinal products and their reference prices Report (2013) and Royal Decree regarding the price reference system and homogeneous groups in the National Health System (2013).

better quality of service to consumers throughout the EU. In telecoms, competition law and sector regulation complement each other and go hand-in-hand; in sector regulation, it is on the basis of the competition law principles that markets are defined and the significance of market power is appreciated. Ex-ante regulatory obligations are imposed only where there is no effective and sustainable competition;[160] if effective competition in the market can be maintained through the enforcement of competition law only, there is no need for sector specific regulation and the role of competition law becomes even more crucial.

117. Consistent ex-ante regulation in the telecoms sector has played a key role in ensuring a level playing field between operators in the EU and has contributed to the dismantling of barriers to entry to various markets in the sector. However, the Commission's experience suggests that competition law enforcement will play an increasing role where individual markets no longer merit sector specific ex ante regulation

118. For example, recently the main focus of the Commission's enforcement in the telecoms sector has been to improve access by new entrants to the incumbents' networks. Three Article 7 prohibition decisions have been adopted since 2007. Two of them were based on Article 102 TFEU (Telefónica in 2007[161] and Telekommunikacja Polska in 2011[162]) and dealt with access of competitors to the incumbent's broadband Internet and network infrastructure. In addition to setting a clear precedent, these two cases provide a good example of competition law being enforced in parallel with the application of ex ante sector specific rules by national telecom regulators. In the third case, (Telefónica, Portugal Telecom in 2013), the Commission challenged under Article 101 TFEU a non-compete clause in an agreement between competitors which risked partitioning markets and hindering the integration process of the EU telecoms sector.

119. Prior to 2007, the Commission had adopted two other prohibition decisions on the basis of Article 102 TFEU (Wanadoo Interactive[163] and Deutsche Telekom,[164] both in 2003). The Union Courts have fully confirmed the Commission's action in Wanadoo Interactive,[165] and Deutsche Telekom.[166] The Telefónica decision of 2007 has been upheld by the General Court and a decision on appeal by the ECJ is expected.[167]

120. While the Commission's antitrust enforcement in these types of cases concerning access to the incumbent's network continues (see the pending investigation in the Slovak Telekom case),[168] the Commission has also began to investigate new areas such as the case on Internet

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160 See for instance recital 5 of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, 18.12.2009, p. 37).

161 COMP/38.784 - Wanadoo España v Telefónica, decision of 4 July 2007.

162 COMP/39.525 - Telekomunikacja Polska, decision of 22 June 2011.

163 COMP/38.233 - Wanadoo Interactive, decision of 16 July 2003.

164 See footnote 52.

165 Case T- 340/03 *France Télécom v Commission* [2007] ECR II-10754, Case C-202/07 P France Télécom v Commission [2009] ECR I-2369.

166 Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555.

167 Case T-336/07 *Telefónica and Telefónica de España v Commission* [2012] ECR II-000. The General Court is still to decide on *Telkomunikacja Polska* and *Telefónica / Portugal Telecom*.

168 COMP/39.523 - Slovak Telekom, decision of 8 April 2009.

connectivity, where inspections were carried out at the premises of three telecom operators in 2013.[169]

121. **NCAs** submitted 48 envisaged decisions in the telecoms sector. Most of the envisaged decisions tackled alleged abuses of dominant position, including by incumbent operators. Like the Commission, the bulk of envisaged decisions by NCAs were brought under Article 102 TFEU, and mainly tackled similar issues concerning access to networks and margin squeeze practices. However, the envisaged decisions also addressed other alleged anticompetitive practices, such as various forms of discrimination and the use of rebates/discounts,[170] tying/bundling, and long-term contracts. The use of information about customers to attract or keep them with the aim of excluding competitors was also alleged to be contrary to Article 102 TFEU.

122. The markets affected by NCAs' enforcement actions were mainly those for wholesale access to mobile networks. There were also several cases on the provision of electronic communication services via fixed networks. The remainder of the envisaged decisions submitted by NCAs in this sector tackled alleged horizontal agreements or concerted practices concerning prices between telecoms operators. Some were "classic" price cartels[171] while others related to coordinated terms for roaming services or refusals to supply a particular distributor. The German NCA also examined a planned joint venture of three mobile network operators for the setup and operation of a mobile television broadcasting platform under Article 101 TFEU and addressed competitive concerns by adopting a commitment decision.[172]

123. Over the period covered, a number of NCAs engaged in advocacy efforts and carried out sector inquiries/market analyses in the telecoms sector.[173]

5 Basic industries, manufacturing industries, including motor vehicles, and consumer goods.

124. This category includes a broad range of sectors consisting primarily of raw materials, manufactured goods and intermediate products used in the manufacture of end products, including motor vehicles.

125. Some of these sectors are of particular importance for the budget for the average consumer as well as for the European economy as a whole. A particular feature of many of the markets in these sectors, such as those for raw materials, is their maturity. This can imply inter alia oligopolistic market structures which may be prone to collusive conduct. Moreover, margins on primary product sales, such as those for motor vehicles, can be very slim and firms may therefore seek to extract profits from aftermarkets. The Commission's antitrust enforcement activities in this wide range of sectors have mainly targeted cartels but have also addressed

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169 European Commission - MEMO/13/681 of 11 July 2013.

170 See e.g. Decision N°A428 of the Italian NCA of 9 May 2013 on access to the fixed telephony network.

171 See e.g. Decision N°05-D-65 of the French NCA of 30 November 2005 relative to practices observed in the mobile telephony market.

172 Decision N°B 7-17/06 of the German NCA of 29 October 2007 in the Case *DVB-H*.

173 See e.g. Opinion N°13-A-08 of the French NCA of 11 March 2013 on conditions for sharing and roaming on mobile networks and Opinion N°10-A-13 of the French NCA of 14 June 2010 relative to the crossed usage of client databases in the context of the convergence between fixed-line and mobile telecommunications. See also the various reports of the Spanish NCA adopted in 2011 and 2012 on measures proposed by the Telecommunication Market Commission (CMT).

vertical competition issues in relation to the distribution and servicing of consumer goods and in particular motor vehicles.

126. Out of a total of 50 Commission decisions in these sectors, 49 related to proceedings under Article 101 TFEU and the large majority of those (42) concerned cartel cases. The strong focus on cartels is explained by the fact that certain traditional industries are often characterised by highly concentrated markets and homogeneous products, a combination that can make these industries particularly vulnerable to cartelisation. 33 of the 42 cartel cases followed an application for leniency. A large number of cartel investigations related to the chemicals industry and the metal processing industry, but the Commission's cartel decisions over the past ten years in this area also concerned products such as elevators, car glass, bathroom fittings, gas insulated switchgear and power transformers.

127. As to the motor vehicle sector, the Commission addressed competition concerns both by pursuing cases and by providing for a block exemption regime. During the first half of the last ten years, there were five Article 101 TFEU decisions (outside cartels) in the motor vehicles sector. One of these concerned the strategy of Peugeot SA, designed to prevent its Dutch dealers to sell cars to interested consumers in other Member States. Such behaviour constitutes a severe restriction of competition. The other four cases concerned a failure on the part of car manufacturers to grant independent car repairers' access to crucial technical information needed to undertake repair and maintenance work.[174] As already mentioned in Chapter II above, the Commission also reviewed and significantly revised its sector-specific block exemption regime applicable to vertical agreements in the motor vehicle sector.[175]

128. The Commission also dealt with competition concerns in relation to some other diverse product markets: these included the supply of rough diamonds (*De Beers*, 2006)[176] and technology for aluminium smelting (*Rio Tinto Alcan*, 2012).[177] In the former case, the Commission addressed the concern, under Article 102 TFEU, that De Beers might have abused its dominant position under a long-term purchase relationship with Alrosa, and rendered binding under Article 9 De Beers' commitment to end that relationship. In the latter case, commitments addressed the concern under both Articles 101 TFEU and 102 TFEU that Rio Tinto Alcan's practice of contractually tying the purchase of handling equipment to the licensing of its leading smelting technology could foreclose competitors and hamper innovation.

129. **NCA**s have also been active in these sectors and have informed the Commission of a significant number of envisaged decisions: 92 in basic industries and manufacturing, 17 in motor vehicles and 42 in consumer goods.

130. In the basic industries and manufacturing sector, NCAs have mostly dealt with cartels, which, in the case of the Dutch NCA, included approximately 1400 construction companies.[178] The manufacturing of materials used in house and road construction accounted

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174 See paragraph [38] above.

175 Regulation No 461/2010 is supplemented by the Commission's Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (OJ C 138, 28.5.2010, p. 16).

176 COMP/38.381 - De Beers, decision of 22 February 2006.

177 COMP/39.230 - Rio Tinto Alcan, decision of 20 December 2012.

178 The investigation was conducted according to various sectors of construction work: road construction and civil engineering, installation engineering, traffic light control systems and the laying of cables and pipelines. A large

for the majority of envisaged decisions. A wide variety of other products were also covered, ranging from metals, plastics, paint and chemicals to wood-based products, machinery and elements for electrical power systems. The French NCA also fined a cartel between major distributors of commodity chemicals.[179] In terms of other horizontal agreements, a number of envisaged decisions dealt with "stand alone" exchanges of sensitive information which did not form part of a broader cartel agreement. Exclusionary practices or joint selling were also addressed. A small number of envisaged decisions covered vertical agreements, most of them dealing with exclusive or selective distribution. The NCAs also conducted a number of sector inquiries/market analyses, covering products such as cement, ready-mix concrete, aggregates, lime, asphalt and wall construction materials.[180]

131. Regarding consumer goods, the actions taken by the NCAs cover numerous products and a variety of competition issues under Articles 101 and 102 TFEU. NCAs mostly tackled alleged vertical agreements, of which the majority concerned resale price maintenance for a wide array of products ranging from electrical household appliances, women's clothing, cosmetics, foreign language books, cat and dog food to aquarium products. Most other envisaged decisions concerned cartel conduct, namely price fixing (including information exchanges on future prices). For certain types of products, such as cosmetics, detergents and flour, infringements were pursued in a number of Member States; in relation to a range of other products enforcement action took place in a single Member State, as was the case for, e.g. stationery, ophthalmic glasses and lenses, and radiators.

132. The NCAs were also active enforcers in the motor vehicles sector with respect to products such as cars, motorcycles and other types of vehicles such as firefighting vehicles, heavy cargo and tourism cars. As is the case for the Commission, the majority of the NCA's enforcement actions tackled vertical agreements in the motor vehicle after-markets, addressing in particular limiting maintenance during warranty periods to authorised repairers, spare parts and access for independent repairers to technical information and training. In addition, several cartels were fined concerning car electrodes and speciality vehicles (firefighting) where the main producers of firefighting vehicles had divided up the market in the context of public tenders by municipalities. An investigation into an alleged abuse by a manufacturer of tyres for heavy cargo and tourism vehicles was closed with commitments. In addition to these case investigations, a number of NCAs conducted sector inquiries/market analyses.[181]

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number of decisions imposing fines were adopted on 25 October 2006. For more information, see: Staatscourant 26 October 2006, nr. 209 / p. 23.

179 Decision N°13-D-12 of the French NCA of 28 May 2013.

180 See e.g. Austria (cement and concrete - 2009); Finland (2008), Germany (asphalt – 2012); Poland (cement and ready mix concrete – 2006; lime - 2007; wall construction materials – 2009; cement - 2012; ready mix concrete - 2013); Spain (cement – 2006); and the UK (aggregate sector – 2011).

181 See e.g. Bulgaria (2012); Czech Republic (2008); France (2012); Romania (2012); Slovenia (2007); Sweden (2008-2010).

6 Food/Retail/Agricultural products

133. EU consumers spend 15% of their budget on food.[182] The food, retail and agricultural products sectors are often subject to regulation. There are rules governing the production and/or trade of products like wine, cheese, milk and fisheries as well as the actual management of different products supply chains. Antitrust enforcement complements regulatory action and contributes to more competitive markets, which is particularly important for a sector where all consumers are affected by price levels. Antitrust enforcement has, in particular, stopped and sanctioned cartels which raised prices significantly (e.g. cartel cases involving millers or regarding pasta and bread). It has also stopped manufacturers from preventing their distributors from reducing their prices (e.g. soft drinks) and it has contributed to an increased choice for consumers by removing exclusivity obligations imposed by manufacturers on distributors (e.g. coffee). Antitrust enforcement benefitted all operators in the food-chain, in particular farmers by ensuring access to inputs (seeds) and by sanctioning buyers' cartels (e.g. in the pork market).

134. The **Commission's** antitrust activities in the food/retail and agricultural sector have focused mainly on pursuing cartels, including price fixing behaviour. That was for instance the case in the *beer,*[183] *raw tobacco,*[184] *shrimps*[185] and *bananas*[186] cases. Outside the cartel area, the most prominent case was *Coca Cola* (2005)[187] where the Commission had concerns that Coca Cola's behaviour would foreclose competitors, reduce choice for consumers and prevent downward pressure on prices. The Commission looked, under Article 102 TFEU, at the undertaking's exclusivity arrangements with retailers and ultimately adopted a commitment decision pursuant to Article 9. Like in the *Coca Cola* case, and outside the cartel area, many of the potential antitrust issues regarding the food and retail sectors are likely to arise from vertical agreements between market players.

135. The Commission also carried out important advocacy and policy initiatives. The most significant example is the Commission's action in co-operation with NCAs in the 2013 reform of the Common Agricultural Policy,[188] to safeguard the market orientation of the sector: as a result new competition rules address the atomisation and other challenges of the agricultural production in a way that ensures the competitiveness of the EU food supply chain. An ECN Report was also adopted on the activities of the Competition Authorities in the Food Sector and analysed the many antitrust and merger enforcement actions including sector inquiries/market analyses of the NCAs[189] and the Commission in the food supply chain in the EU ("ECN Food Report").[190] Furthermore, the Commission, in reaction to

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182 Commission calculation for 2012 based on figures published by Eurostat, see the Internet (http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do) and the industry association Fooddrink Europe, see the Internet (http://www.fooddrinkeurope.eu/uploads/publications_documents/Data__Trends_%28interactive%29.pdf).

183 COMP/37.766 - Dutch beer market, decision of 18 April 2007.

184 COMP/38.281 - Raw Tobacco Italy, decision of 20 October 2005. One specific feature of this case was that it concerned a buyer cartel. See also COMP/38.238 – Raw tobacco Spain, decision of 20 October 2004.

185 COMP/39.633 - Shrimps, decision of 27 November 2013.

186 COMP/39.482 - Exotic Fruit (Bananas), decision of 12 October 2011.

187 COMP/39.116 - Coca-Cola, decision of 22 June 2005.

188 See the Internet (http://ec.europa.eu/agriculture/cap-post-2013/).

189 Subsequent to the ECN Food Report, some NCAs carried out sector inquiries/market analyses. See e.g. Greece (food – 2013); and Italy (retail markets – 2013).

190 See the Internet (http://ec.europa.eu/competition/ecn/food_report_en.pdf).

concerns that practices of large operators in the supply chain may reduce choice and innovation to the detriment of consumer welfare, launched a comprehensive study aimed at measuring the impact of concentration and market imbalances on the evolution of choice and innovation. [191]

136. **NCAs** investigated a large number and a variety of anti-competitive practices in this as presented in the above mentioned ECN Food Report.[192] Since 2004, they have investigated more than 180 cases covering a wide range of food markets, with particular emphasis on multi-product retail (21% of all cases), cereals and cereal-based products (18%), milk and dairy products (12%), followed by fruit and vegetables (10%), and meat, poultry and eggs (9%). While NCAs have scrutinised all levels of the supply chain, the largest number of cases concern the processing level (28%), followed by retail (25%) and manufacturing (16%).

137. Half of the cases identified in the report are cartel cases in the form of price fixing, market and customer sharing in particular in the markets for cereals and meat, poultry and eggs. Approximately 20% of the cases concerned vertical restraints (resale price maintenance or exclusivity obligations) mainly in the coffee, sugar and multi-products markets. Other cases concerned abuses in the form of exclusionary practices in markets such as dairy products and soft drinks.

7 Media

138. The media sector includes music, film, television broadcasting, books, written press (magazines and newspapers), and related advertising, as well as the collective management of copyrights and related rights.[193] It is characterised by technological convergence and innovation, which has led to the emergence of new forms of media delivery and consumption, as well as the further evolution of more traditional forms of delivery and consumption.

139. Antitrust enforcement plays an important role in creating and strengthening the digital internal market and rendering markets more competitive. In particular, removing obstacles to the development of cross-border trade (such as territorial restrictions) and ensuring that consumers can reap the benefits of new and innovative services has been the focus for the Commission's enforcement in this area.

140. Over the past ten years, the **Commission** has adopted six decisions in the media sector. It has mainly focused on addressing competition concerns relating to collecting societies and joint selling of broadcasting rights for sports events, but it has also taken action in newly developed markets such as the E-books sector.

141. Many enforcement actions in the field of media aimed to overcome the territorial fragmentation of the internal market. One area of focus has been the collective rights

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191 See the Internet (http://ec.europa.eu/competition/sectors/agriculture/overview_en.html).

192 See the Internet (http://ec.europa.eu/competition/ecn/food_report_en.pdf).

193 There is no uniform definition of the media sector. The Commission has recently referred to the 'cultural and creative sectors' to describe media and related sectors, including architecture, archives and libraries, artistic crafts, audio-visual (including film, television, video games, and multimedia), cultural heritage, design (including fashion design), festivals, music, performing and visual arts, publishing, and radio. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting cultural and creative sectors for growth and jobs in the EU, COM(2012) 537 final.

management, which was addressed in the *Cannes Extension Agreement* case.[194] In that case, the Commission accepted commitments that set an important precedent on the acceptable level of cooperation between collecting societies and the major music publishers on licensing conditions, in particular by requiring a degree of price competition (in the form of rebates) among the collecting societies. In the *CISAC* case[195] the Commission addressed, among other restrictions, territorial fragmentation deriving from exclusivity clauses and adopted a decision prohibiting 24 European collecting societies from restricting competition by limiting their ability to offer their services to authors and commercial users outside their domestic territory.[196]

142. The Commission carefully assessed and enforced competition rules as regards joint selling of broadcasting rights. This is illustrated by the *Bundesliga* (2005) and *Premier League* (2006) cases.[197] In these cases, the Commission had concerns that the agreements to jointly sell the media rights for sports events entailed restrictions of competition which could not be outweighed by the efficiencies stemming from the agreements. The Commission therefore accepted commitments which reduced the negative effects of the agreements so that the efficiency gains, on balance, could prevail.

143. The *E-books case*[198] is an example of the Commission's efforts against potential impediments to the development of new and innovative services delivered via the Internet under Article 101 TFEU. In this case, the Commission addressed concerns about a concerted practice in the nascent and fast-moving market of digital books. The Commission was concerned that Apple and five international publishers had contrived to limit retail price competition for e-books in the EEA. The Commission accepted commitments that address the competition concerns and ensure the restoration of competitive conditions for the benefit of the buyers and readers of e-books. Moreover, the case is a good example of an antitrust enforcement contributing to the attainment of the EU 2020 objectives by ensuring that consumers reap the benefits of digitalisation and digitized content.

144. The **NCAs** have been active enforcers in this sector, submitting 66 envisaged decisions. This relatively high number compared to other sectors reflects the fact that intellectual property laws applicable to media content are granted on a national basis. In addition, language plays a significant role in the consumption of media content by consumers and the alleged anticompetitive tends to affect consumers located predominately within a certain Member State.

145. The largest number of these envisaged decisions concerned the collective management of copyrights where several NCAs intervened against alleged exploitative abuses of the

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194 COMP/38.681 -The Cannes Extension Agreement, decision of 4 October 2006.

195 COMP/38.698 - CISAC, decision of 16 July 2008.

196 The prohibited practices consisted of clauses in the reciprocal representation agreements concluded by members of CISAC (the "International Confederation of Societies of Authors and Composers") as well as other concerted practices between those collecting societies. On appeal the General Court upheld the Commission's conclusion that the collecting societies had included illegal exclusivity clauses and illegal membership restrictions in their model contracts, but annulled other aspects of the decision. See judgment of 12 April 2013 in Case T-401/08, *Säveltäjäin Tekijänoikeustoimisto Teosto ry v Commission*.

197 COMP/37.214 - Joint selling of the media rights to the German Bundesliga, decision of 19 January 2005 and COMP/38.173 - Joint selling of the media rights to the FA Premier League, decision of 22 March 2006. The decisions largely built on earlier Commission practice, see COMP/37.398 - Joint selling of the media rights of the UEFA Champions League on an exclusive basis, decision of 23 July 2003.

198 COMP/39.847 - E-Books, decisions of 12 December 2012 and 25 July 2013.

dominant positions of collecting societies (e.g. discrimination, excessive pricing) under Article 102 TFEU.

146. There were also many envisaged decisions concerning the joint selling of TV broadcasting rights for sport events, with respect to which NCAs examined bidding terms and procedures, as well as long-term contracts and/or the granting of exclusivity to one broadcaster under Article 101 TFEU.[199] The German NCA also applied Article 101 TFEU to the coordinated introduction of encryption of digital TV signals by major German broadcasters.[200]

147. Lastly, there was another group of envisaged decisions concerning alleged abuses of dominance in television broadcasting or newspaper markets. In these cases, several NCAs investigated refusals to deal or refusal to grant access to a dominant platform for disseminating content to consumers.[201]

148. A number of sector inquiries/market analyses were carried out in the media sector, including by the Spanish NCA for collecting societies, by the Spanish, Swedish and Portuguese NCAs for television, and by the Bulgarian, Latvian and Italian NCAs for books/editorial distribution.[202]

8 Financial services, including payment systems

149. Financial services include a wide range of markets such as banking, payment systems, insurance and securities markets. Antitrust enforcement in the financial services sector aims not only to maintain the competitive market structures that offer EU customers the best products and services at the lowest prices, but also to remove entry barriers to ensure access to financial market infrastructure and pave the way to innovation in EU financial markets. Moreover, antitrust enforcement aims to support and supplement the Commission's regulatory actions to create a single market for financial services.

150. This is in particular the case for payment systems, which have been identified as a priority area in the context of the EU's Europe 2020 initiative and the Digital agenda. A serious problem as regards payments systems is the issue of multilateral interchange fees (MIFs), a horizontal mechanism for price co-ordination with a harmful impact on retailers and final consumers. Effects of MIFs are exacerbated by rules in card payments schemes decreasing the level of transparency and discouraging cross-border competition, and together lead also to detrimental effects on the internal market and creating obstacles to new market entry.

151. Regarding securities markets, antitrust enforcement efforts to establish access to benchmarks in the financial sector, for instance through its investigation regarding credit default swaps (CDS)[203] can be seen as a complement to the legislative efforts in this area. In particular, legislation such as the European Market Infrastructure Regulation (EMIR) and the Markets

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199 See e.g. Decision N°B 6-114/10 of the German NCA of 12 January 2012, in the Case *Bundesliga*; Decision of the Danish NCA of 31 October 2007 concerning the joint selling of media rights to Danish football; Decision N°13 of the Romanian NCA of 19 April 2011 and Decision N°S/0006/07 of the Spanish NCA of 14 April 2010.

200 Decision N°B 7-22/07 of the German NCA of 27 December 2012 in the Case *Basic Encryption*.

201 See e.g. Decision N°S/0020/07 of the Spanish NCA of 28 January 2010.

202 See e.g. Spain (collective management of Intellectual Property Rights -2009 and competition in the markets for the acquisition and exploitation of football broadcasting rights - 2008); Sweden (from TV to moving images - 2009 and analysis of the market for moving images- 2013); Portugal (digital terrestrial television - 2013); Latvia (school textbooks - 2013); Italy (books/editorial inquiry - 2009); Bulgaria (distribution of newspaper and print editions - 2013).

203 For details, see paragraph 157.

in Financial Instruments Directive (MIFID)[204] aim to create access rights to central clearing counterparties, trading venues and benchmarks at fair, reasonable and non-discriminatory conditions.

152. The **Commission** carried out two sector inquiries regarding financial services, one on business insurance,[205] and another one on retail banking.[206] The first looked, amongst other issues, into how ad hoc co(re)insurance agreements are formed. It provides, together with a follow-on study on co(re)insurance pools and on ad hoc co(re)insurance agreements on the subscription market, empirical knowledge for the ongoing review of the Insurance Block Exemption.[207]

153. Payments systems were one of the main issues examined in the sector inquiry into retail banking[208] and a central focus of the Commission and the NCAs' antitrust enforcement and regulatory activities over the past decade, in particular the MIFs applied within payment cards schemes. The Commission has adopted four decisions under Article 101 TFEU in the area of payments, among which three prohibition decisions and a commitment decision making binding commitments by Visa concerning MIFs.[209]

154. Regarding banking and capital markets, the Commission has in recent years also stepped up its antitrust enforcement activity. A total of five decisions were taken over the past decade in the sector, of which two cartel decisions and three Article 102 TFEU decisions. In the two cartel decisions, the Commission fined a number of banks for their anti-competitive manipulation of the *Libor* and *Euribor* benchmark rates.[210] Financial derivative products linked to these benchmarks play a key role in the management of financial risks in the internal market.

155. The decisions under Article 102 TFEU concerned mainly securities trading, where the Commission centred its attention on addressing the barriers for new competitors to enter the trading markets. Both the *Standard & Poor's* case and the *Thomson Reuters* case dealt with the issue of access to important information for securities trading. These cases related to concerns about exclusionary practices and were concluded through commitments decisions

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204 Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories COM(2011) 652 final (MiFIR) (OJ C 37, 10.2.2012, p.17). That regulation, together with MiFID (Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011) 656 final (OJ C 37, 10.2.2012, p.17)) will provide harmonised regulation for investment services across the EU and deal with the less regulated parts of the financial system and create more efficient, transparent and sound securities markets for the benefit of the whole economy.

205 Sector inquiry launched on 13 June 2005; Final report presented on 25 September 2007. See the Internet (http://ec.europa.eu/competition/sectors/financial_services/inquiries/business.html).

206 Sector inquiry launched on 13 June 2005; Final report presented on 31 January 2007. See the Internet (http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html).

207 Commission Regulation (EU) No. 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 83, 30.3.2010, p.1), which will expire on 31 March 2017.

208 See the Internet (http://ec.europa.eu/competition/sectors/financial_services/inquiries/sec_2007_106.pdf).

209 COMP/38.606 - Groupement des Cartes Bancaires (CB), decision of 17 October 2007; COMP/37.860 - Morgan Stanley / Visa International And Visa Europe, decision of 3 October 2007; COMP/34.579 - MasterCard, decision of 19 December 2007; COMP/39.398 - Visa MIF, decision of 8 December 2010.

210 COMP/39.861- Yen Interest Rate Derivatives, decision of 4 December 2013 and COMP/39.914 - Euro Interest Rate Derivatives, decision of 4 December 2013.

pursuant to Article 9.[211] The proceedings against these financial market information providers are examples of enforcement action seeking to lower the purchasing costs of financial information for users in the EEA. The *Standard & Poor's* case regarding US ISINs concerned unfair pricing and the case against Thomson Reuters dealt with certain restrictions as regards the use of Reuters Instrument Codes that created substantial barriers to switching consolidated real-time data feed providers. In the ongoing *CDS* case which concerns Article 101 TFEU, the Commissions is analysing whether various investment banks and an information service provider have hindered the development of a trading exchange for CDS derivatives and if access to benchmarks has been unlawfully refused.[212]

156. **NCAs** submitted 20 envisaged decisions in the payment systems sector and 20 in other financial services. With respect to the envisaged decisions concerning payment systems, most of the alleged practices were horizontal other than cartels. The enforcement actions of NCAs in this field have reflected the Commission's concerns in the above-mentioned *MasterCard* and *Visa* cases and they have identified MIFs as the main competition problem in the card payments markets. Fees fixed by national banking communities operating under the "umbrella" of the Visa and MasterCard systems have not been investigated by the Commission: it was considered that the NCAs are usually well placed to assess such domestic MIFs. After the Commission addressed cross-border MIFs in the first MasterCard case, NCAs have relied on this case as a precedent and have become increasingly active in investigating payments cases. The regular meetings of the ECN's Subgroup of Banking and Payments have served as an active platform for the exchange of experience and discussion. In 2012, the Subgroup published an information paper on competition enforcement in the payments sector.[213] The work of the Subgroup has been very useful in terms of ensuring coherency throughout the ECN.

157. In addition to the Commission's decisions, the General Court's judgment in the *MasterCard* case provides national enforcers with a clear assessment of the application of Article 101 TFEU to collectively agreed inter-bank fees in four party card systems such as MasterCard and Visa.[214] MasterCard has appealed the judgment to the Court of Justice. Once the Court of Justice delivers its judgment, further action by NCAs and national courts may follow in a number of cases which are on hold awaiting the outcome. In Italy[215] and Hungary,[216] court appeals against decisions of the NCAs are pending and in the UK, the OFT's investigation is on hold. In France, the NCA investigated a number of MIFs for a variety of means of payments[217] and recently approved commitments[218] whereby MIFs of both Visa and

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211 COMP/39.654 - Reuters Instrument Codes (RICs), decision of 12 December 2012, COMP/39.592 - Standard & Poor's, decision of 15 November 2011.

212 COMP/39.745 - CDS - Information Market, opening of proceedings of 1 July 2013; European Commission - IP/13/630 of 1 July 2013.

213 See the Internet (http://ec.europa.eu/competition/ecn/documents.html and http://ec.europa.eu/competition/sectors/financial_services/information_paper_payments_en.pdf).

214 Judgment of 24 May 2012 in Case T-111/08, *MasterCard and Others v Commission*.

215 Decision N°I720 of the Italian NCA of 3 November 2010 in the Case *Carte di Credito;* Decision N°I704 of 9 April 2009 in the Case *Assegni MAV-Commissioni interbancarie and* Decisions N° I724 and N° I725 of 30 September 2010 in the Case *Commissione interbancaria Pagobancomat* and in the Case *Accordi interbancari RIBA-RID-Bancomat.*

216 Decision N°Vj - 18/2008 of the Hungarian NCA of 24 September 2009.

217 Decisions of the French NCA N°10-D-28 of 20 September 2010, N°11-D-11 of 7 July 2011 and N°12-D-17 of 5 July 2012.

218 Decision N°13-D-17 and 13-D-18 of the French NCA of 20 September 2013.

MasterCard were reduced and capped. In Germany, Hungary and the Netherlands, the NCAs are pursuing or are actively investigating cases. In certain Member States (such as Poland, Hungary and Romania) authorities other than the NCA and/or the government are also involved in addressing the issues of inter-bank fees. For example, in Hungary and in Poland interchange fees were recently regulated (capped). In some cases (e.g. in the UK) such domestic fees are also challenged by retailers in private damages actions before national courts.

158. As for other financial services, the alleged practices were mostly cartels and other horizontal infringements. The majority of these decisions concerned insurance products,[219] while others addressed competition issues arising in a variety of financial services, including privately managed pension funds, bank loans and brokerage fees.

159. One of these decisions concerned the Slovak market for cashless foreign exchange operations and gave rise to a preliminary ruling of the Court of Justice on the interpretation of Article 101 TFEU. The Slovak NCA initially found on 7 December 2009 that three major Slovakian banks had entered into an agreement with the aim of excluding a Czech company from the market, contrary to Article 81 EC, now Article 101 TFEU. In order to provide such services in Slovakia, the Czech company needed to hold current accounts administered by Slovak banks, and preferably with the same banks where its clients held current accounts to ensure the easy availability of its services. All three Slovak banks had agreed to close the current accounts that the Czech company held with them and not to renew them. The decision was appealed to the Supreme Court of the Slovak Republic, which referred a number of questions to the Court of Justice, including whether it was relevant for the application of Article 101 TFEU that the Czech company was operating on the Slovak market without the necessary licence from the Bank of Slovakia. The Court of Justice ruled that "*Article 101 must be interpreted as meaning that the fact that an undertaking that is adversely affected by an agreement whose object is the restriction of competition was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement of that provision*."[220]

160. With respect to banking and financial services more generally, NCAs carried out a significant number of sector inquiries/market analyses, especially in the years 2009-2013.[221]

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219 See e.g. Decision N°I731 of the Italian NCA of 28 September 2011 relating to bid-rigging in the insurance sector and Decision N°2S-33 of the Lithuanian NCA of 23 December 2010 relating to an insurance pool agreement.

220 Judgment of 7 February 2013 in Case C-68/12, *Slovenská sporiteľňa*, paragraph 21. The Supreme Court of the Slovak Republic subsequently upheld the decisions of the Slovak NCA against two of the banks and one was annulled and referred back to the NCA for further investigation.

221 Banking: see e.g. Ireland (2005); Slovakia (2007), Bulgaria (2008); Hungary (2009); UK (2010-2013); Italy (2011); Portugal (2009); Sweden (2006); Denmark (retail banking market - 2013). Other Financial services: see e.g. Ireland (insurance - 2005); Italy (car insurance - 2013); Romania (2013); Netherlands (health insurance – 2006, funeral insurance -2008); and the Netherlands (mortgages – 2011-2013).

9 Transport and Postal Services

161. This category concerns the sectors for transport services, transport infrastructure and postal services. Similar to the energy and telecommunications sectors, many markets in these sectors have moved from public service monopolies to liberalised markets, and the Commission's competition policy and enforcement is aimed at ensuring the effective and efficient functioning of these markets. However, the incumbents in the post and transport sector still enjoy substantive market power, and new entrants have, if at all, only managed to gain small market shares. Competition problems often relate to the pricing for the use of essential infrastructure or to access to such infrastructure which is otherwise impeded. There are also examples in the liberalised postal sector of Member States taking or maintaining measures, e.g. by granting tax exemptions to incumbents or by restricting market access to newcomers, that induce the incumbent to abuse its dominant position to protect or regain market share.

162. Regarding the air transport sector, the **Commission** adopted three decisions relating to the assessment of practices under Article 101 TFEU. These decisions could only be adopted after the exclusion of international transport from Regulation 1/2003 was repealed in 2004.[222] Two of these decisions involved horizontal cooperation agreements where the parties offered commitments under Article 9 (the *Oneworld* transatlantic joint venture[223] and the *Star Alliance* transatlantic joint venture),[224] and one was a cartel case where the Commission issued an Article 7 decision and imposed a fine (the *Airfreight* decision involved a dozen large airlines).[225]

163. In the maritime sector, the Commission's activities so far focused mainly on legislative and soft law developments: the repeal of the Liner Conference Block Regulation Exemption in 2008, the repeal of the exception in favour of cabotage and tramp services in 2006, the adoption (2008) and subsequent repeal (2013) of the Maritime Antitrust Guidelines, and the four reviews of the Liner Consortia Block Exemption.[226] Since the repeal of the Liner Conference Block Exemption, the Commission has been carefully monitoring the markets for long-range maritime transport of containers and is currently investigating two cases in this area, both under Article 101 TFEU: the *Container shipping* signalling case and the *P3 joint venture* among the world's top three liner shipping operators.[227] The Commission has also monitored other types of maritime shipping. In particular with regard to "short-sea" and passenger transport (e.g. ferries), it appears for the time being that NCAs are well placed to handle potential antitrust infringements in these markets (see further below).

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222 Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (OJ L 68, 6.3.2004, p.1).

223 COMP/39.596 - BA/AA/IB, decision of 14 July 2010.

224 COMP/39.595 - Continental/United/Lufthansa/Air Canada, decision of 23 May 2013.

225 COMP/39.258 - Airfreight, decision of 9 November 2010.

226 Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (OJ L 269, 28.9.2006, p.1)*;* European Commission - IP/13/122 of 19 February 2013; European Commission - IP/14/717 of 24 June 2014.

227 COMP/39.850 - Container Shipping, initiation of proceedings on 21 November 2013.

164. In the rail sector, the incumbent operators in the Member States have only recently experienced liberalisation: in 2007 for freight transport and in 2010 for cross-border passenger transport.[228] For domestic freight transport and domestic passenger transport liberalisation is still outstanding. In almost all Member States, rail markets remain highly concentrated and new entrants have only been able to take small market shares. To date, the Commission has adopted one decision in the rail sector: *Deutsche Bahn* was a decision pursuant to Article 9 based on the Commission's concerns that the German incumbent had operated margin squeeze practices foreclosing competitors contrary to Article 102 TFEU.[229]

165. The markets for postal services underwent significant changes over the last ten years, such as altered customer needs and gradual market opening. In this market environment, the main pillars of the Commission's policy have been, on the one hand, a staged (regulatory) reduction of the services for which monopoly rights are granted[230] and, on the other, the preservation of competition in liberalised areas of the postal market by means of antitrust enforcement. This latter pillar is evident in the two decisions that the Commission adopted under Articles 106 TFEU and 102 TFEU, i.e. *BdKEP/Deutsche Post* and *Slovakian postal law*, which dealt with national legislation favouring the incumbent postal operators, putting commercial operators at a considerable competitive disadvantage. The Commission's actions aimed at establishing a competitive level playing field for postal operators. The Commission also adopted a cartel decision in the *freight forwarding* sector worldwide.[231]

166. **NCAs** submitted 69 envisaged decisions in the transport sector, which is a priority for many NCAs. The alleged practices cover a variety of areas: rail, maritime transport, air transport, and bus transport and consisted largely of cartels and abuses of dominant position.

167. Most of the envisaged decisions submitted by NCAs dealing with anticompetitive behaviour in the air transport sector concerned abusive practices of dominant airlines or different service providers at airports. In a number of cases, the alleged behaviour concerned unfair conditions, discriminatory pricing or access schemes and refusals to give access to competitors to do business at airports which were dominated by one undertaking. In a German case the incumbent airline operated a corporate customer programme which incentivised its clients to disclose sensitive data of its competitors and enabled the dominant airline to distort competition by targeted price cutting on specific routes.[232]

168. In the maritime sector, NCAs have often addressed the issue of harbours constituting an essential facility. In a case investigated by the French NCA, competitors agreed to share existing and newly built berthing capacities of a harbour contrary to Article 101 TFEU.[233] In a German case it was found that a dominant firm refused to grant access to competitors to port infrastructure for ferries and thus abused its dominant position under Article 102 TFEU.

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228 Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 164, 30.4.2004, p.164), and Directive 2007/58/EC of the European Parliament and Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 315, 3.12.2007, p.44).

229 COMP/39.678 - Deutsche Bahn, decision of 18 December 2013.

230 Directive 97/67/EC, later modified by Directives 2002/39/EC and 2008/6/EC**.**

231 COMP/39.462 - Freight forwarding, decision of 28 March 2012.

232 Decision N° B 9-96/09 of the German NCA of 17 December 2012 in the Case *Lufthansa*.

233 Decision N°10-D-13 of the French NCA of 15 April 2010 regarding the practices implemented in the handling sector for the transport of containers in the harbour of Le Havre.

[234] The Spanish NCA accepted commitments in a case in which independent carriers were hindered from entering a port.[235] Tying in the market for harbour towage services was found by the Estonian NCA to be contrary to Article 102 TFEU.[236] In several other cases, anticompetitive market sharing and price fixing agreements were found by different NCAs in the sector for cargo and passengers and between companies providing ferry services on specific short sea shipping routes.[237]

169. In the area of postal services, the vast majority of the cases submitted by the NCAs concerned infringements of Article 102 TFEU, namely discrimination, anticompetitive rebates and discounts imposed by the incumbents. Often the NCAs worked closely together with their national regulator, for example, to establish non-discriminatory pricing schemes for postal services. The Belgian,[238] Danish[239], French[240], German[241], Romanian[242], Slovenian[243] and Spanish[244] NCAs dealt with rebate schemes set by their former national monopolists. New postal service providers, active as intermediaries, could either not benefit from (quantitative or other) rebates, and thus were unable to compete successfully or were foreclosed from a specific customer base which was tied to the incumbent provider through attractive loyalty schemes. Already at an early stage of the network, NCAs and the Commission coordinated their action against national legislation favouring former monopolists.[245] A decision of the Danish NCA[246] on the pricing policy of the former monopolist, where there was no proof of a plan to eliminate a competitor, was appealed before the Danish courts and gave rise to a preliminary ruling of the Court of Justice. In *Post Danmark,* the Court held that " … *a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests."*[247] The NCAs also tackled other forms of abuse of dominance in the postal sector, for example, the Italian NCA found in a number of decisions that the incumbent post service

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234 Decision N°B 9-188/5 of the German NCA of 27 January 2010 in the Case *Puttgarden*.

235 Decision N°S/0012/07 of the Spanish NCA of 17 March 2011.

236 Decision N°3.1-8/08-011L of the Estonian NCA of 5 March 2008.

237 See e.g. Decision N°I743 of the Italian NCA of 11 June 2013 regarding the routes from the Italian mainland to Sardinia.

238 Decision N°2012-P/K-32 of the Belgian NCA of 10 December 2012.

239 Decision of the Danish NCA of 30 August 2007 and Decision of the Danish NCA of 22 December 2010.

240 Decision N°05-D-63 of the French NCA of 17 November 2005 and Decision n°04-D-65 of the French NCA of 30 November 2004.

241 Decision N°B 9-55/03 of the German NCA of 11 February 2005 in the Case *Deutsche Post*.

242 Decision N°52 of the Romanian NCA of 16 December 2010.

243 Decision N°306-35/2005 of the Slovenian NCA of 28 May 2008.

244 Decision N°S/0373/11 of the Spanish NCA of 21 January 2014.

245 See para 165 above and the 2009 Report on Regulation 1/2003 (SWP), para 217.

246 Decision of the Danish NCA of 29 September 2004.

247 Judgment of 27 March 2012 in Case C-209/10 *Post Denmark v Konkurrencerådet.*

provider abused its dominant position by hindering the provision of services by its competitors and imposing an abusive credit scheme on its rivals.[248] The Spanish NCA found that the Spanish incumbent abused its dominant position by refusing to give access to specific wholesale services that are reserved to the incumbent, impeding competition in the provision of postal services to public administrations.[249]

170. A number of NCAs carried out sector inquiries/market analyses in the transport and postal services sector.[250] Inter alia, these studies looked into factors which contributed to limited competition in these markets, the impact of sectoral regulation thereon and the need for further action to open the sectors to full competition.

10 Services in other sectors

171. The Commission's and the NCAs' antitrust enforcement activities have of course not been limited to the economic sectors mentioned above. They extended, in particular, also to the area of other services which are an important part of the EU economy and have a significant impact on consumer welfare.

172. One area of particular focus was the organisation of professional services (known also as liberal professions) such as architects, lawyers, notaries and accountants. The services of these professions tend to be highly regulated either by national governments or by professional associations. In 2004, the **Commission** adopted a decision prohibiting the recommended minimum fee scale operated by the *Belgian Architects' Association*.[251] In addition to restoring competition in the market in question, the decision served as a precedent giving guidance and facilitating competition law enforcement at national level. The Commission also adopted two Reports in 2004 and 2005 explaining its position on the need to reform or modernise specific professional rules. The Commission considers that there are legitimate arguments in favour of certain regulations in the liberal professions. However restrictive regulations should only exist where they provide an effective and proportionate means of protecting consumers. The Reports set out the legal framework in which these rules and regulations should be analysed and how the EU Competition rules apply to regulation in this sector. They have proved to be a useful source of guidance for national enforcers.[252]

173. Liberal professions are commonly regulated at national level and many **NCAs** have an active enforcement record in this area. They have submitted 31 envisaged decisions to the Commission during the period under review. The NCAs mostly investigated the legal

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248 Decision N°A441 of the Italian NCA of 27 March 2013; Decision N°A438 of 14 March 2012; Decision N°A414 of 16 December 2009 and Decision N°A388 of 27 February 2008.

249 Decision N°S/0341/11 of the Spanish CNC of 22 April 2004.

250 Transport: see e.g. Ireland (1999, Irish ports - 2013); the Netherlands, (rail - 2006, 2007, 2008, 2009, 2010 and 2012) (water transport industry - 2008); Spain (2008-2010-2011-2013); Slovakia (rail - 2010), Romania (maritime transport – 2010). Post: see e.g. Denmark (parcel distribution – 2013); Spain (2010).

251 COMP/38.549 - Barême d'honoraires de l'Ordre des Architectes belges, decision of 24 June 2004.

252 In the 2004 Report (COM(2004 83 final) the Commission focused on six professions - lawyers, notaries, engineers, architects, pharmacists and accountancy (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 reserved rights, and (v) regulations governing business structure and multi-disciplinary practices. The Commission invited regulatory authorities in the Member States and professional bodies to voluntarily review existing rules applicable to the liberal professions and to reform or eliminate those rules which are unjustified. In the 2005 Report (COM(2005) 405 final), it assessed the level of progress made.

services sector, but a wide range of other professions also came under scrutiny, including the medical, real estate, dentist, psychologist, accountant, architect, veterinarian, geologist and engineering professions. The NCAs largely dealt with infringements of Article 101 TFEU. Often this consisted of the fixing of minimum fees or the fixing of a permissible scale of prices or unjustified restrictions on advertising. Such anticompetitive practices were often established by the competent professional associations.[253]

174. A number of NCAs have also engaged in sector inquiries/market analyses of constraints that hinder the proper functioning of the professional services sector.[254] In particular, assessments have been made of the state of competition in the professional services sector following the implementation of the EU Services Directive into national law. Specific recommendations include removing obstacles for taking up and exercising professional activities in another Member State.

175. The Commission's antitrust enforcement has extended also to other types of services. For instance, in 2008 the Commission fined several undertakings for price-fixing, market sharing and bid rigging for *international removal services.*[255] In 2009, the Commission made binding commitments offered by the International Association of Classification Societies (*IACS*) in response to the Commission's concern that IACS' practice in relation to non-members classification societies, may have led to distortions on ship classification market.[256]

176. The NCAs submitted cases dealing with anticompetitive behaviour in a wide variety of service sectors. The majority of envisaged decisions concerned infringements of Article 101 TFEU, including a number of hard-core cartels, and covered services such as washing and (dry) cleaning, language schools, national motor vehicle events, tariffs applicable to guides, translators and interpreters, the organisation and ticketing of public events and ski pass prices. Some cases were assessed under both Article 101 TFEU and 102 TFEU and a smaller group of cases concerned abusive behaviour. The latter was found in the context of a wide range of activities, including the provision of facilities at fairs and exhibitions, the registration of plumbing and heating products for professional use and the conditions imposed by a holiday home organisation.

177. Moreover the Italian, German, French and Romanian NCA have dealt with complex situations in the betting markets, which are still not entirely liberalised in the Member States. Hindering online competitors or cross-subsidising funds of legally protected businesses were investigated by the Italian and French NCA as abusive practices.[257] The German NCA dealt with a case concerning anti-competitive measures taken by various regional state controlled lottery companies which colluded to hinder commercial agency

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253 See e.g. Decision N°I716 of the Italian NCA of 12 December 2009 against a decision of an association fixing minimum fees for psychologists and Decision N°306-32/2010 of the Slovenian NCA of 26 September 2012 against a decision of an association fixing fees for doctors and dentists services.

254 See e.g. Bulgaria (auditors - 2007, pharmacists - 2008, architects and engineers - 2008, veterinarians – 2012, private enforcement agents – 2010 and 2013, opticians, optometrists and ophthalmologists - 2011); Czech Republic (2010); Estonia (2005); Ireland (engineers - 2004, architects - 2006, optometrists - 2006, dentists - 2007, solicitors & barristers - 2006, veterinary practitioners - 2008, general medical practitioners - 2009 and 2010); Italy (2007); the Netherlands (real estate agents – 2012); Portugal (notaries – 2007); Spain (2008-2012). The UK NCA has carried out work relating to professional services though-out the period covered.

255 COMP/38.543 - International removal services, decision of 11 March 2008.

256 COMP/39.416 - Ship classification, decision of 14 October 2009.

257 Decision N°A419 of the Italian NCA of 13 April 2011 in the Case *Giochi24/Sisal* and Decision N°14-D-04 of the French NCA of 25 February 2014.

services for lotteries and thereby infringed Article 101 TFEU.[258] The Romanian NCA found that the non-compete clause agreed to by the Romanian Lottery with three other companies, whereby it undertook not to carry out any video lottery programmes with other undertakings for 10 years, significantly limited the possibility of potential competitors to enter the Romanian market contrary to Article 101 TFEU.[259]

178. **NCAs** also informed the Commission of nine envisaged decisions in the sector of environment/waste management covering a range of practices' which were evenly split between alleged infringements of Article 101 TFEU and Article 102 TFEU. These practices ranged from cartels, other horizontal practices and a vertical infringement to abuses of dominant position including refusal to deal, discrimination and tying/bundling. Investigations were conducted in several markets, including waste collection, the treatment of plastic, glass, paper and packaging and the collection of urban solid waste. Several NCAs have also carried out sector inquiries/market analyses in the environment/waste management sectors.[260]

IV INFRINGEMENTS BY TYPES OF PROCEDURE AND USE OF MODERNISED ENFORCEMENT TOOLS

179. The purpose of this Chapter is, first, to give an overview of the **Commission's** enforcement activity from a procedural perspective, i.e. an overview of its decisions broken down by the type of procedure used. Particular focus is put on the procedural tools introduced by Regulation 1/2003, such as commitment decisions pursuant to Article 9 of the Regulation. As will be seen, commitment decisions quickly obtained a prominent position in the Commission's enforcement practice. This Chapter also looks at the use of the Commission's investigative powers and sanction mechanisms under Regulation 1/2003 (supplemented by the implementing Regulation 773/2004) as well as the leniency programme.

180. In addition, this Chapter aims to present the **NCAs'** enforcement activity from a procedural perspective, as well as the use of co-operation mechanisms between the different enforcers of the EU competition rules. Regulation 1/2003 gave significant impetus to NCAs to actively enforce the EU competition rules, but did not harmonise institutional structures, procedures or sanctions (except for the rules contained in Articles 5 and 35 of Regulation 1/2003). Nevertheless, the last ten years have shown a notable degree of convergence which was actively supported by work in the ECN.[261] As a result, numerous NCAs dispose of broadly similar instruments as the Commission.

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258 Decision N°B 10-148/05 of the German NCA of 23 August 2006 in the Case *Lottery companies*.

259 Decision N°53/2013 of the Romanian NCA of 23 December 2013.

260 See e.g. Italy (packaging waste – 2008); Sweden (public procurement of waste services - 2008); the Netherlands (water – 2009); UK (organic waste – 2011); Germany (compliance schemes - 2012). Estonia has also carried out a number of sector inquiries in the environment sector in the reported period.

261 See further the ECN Investigative Powers Report and Decision Making Powers Report, of 31 October 2012 (http://ec.europa.eu/competition/ecn/documents.html). The Reports were prepared by way of follow-up to the 2009 Report on Regulation 1/2003, which had identified the diversity of procedures as an area for further examination. In view of the divergences identified in these Reports, the ECN developed a set of ECN Recommendations on selected topics. The ECN Recommendations are aimed at fostering further procedural convergence in the absence of legal harmonisation. They can be used by the NCAs in discussions with Member States' lawmakers, see the Internet (http://ec.europa.eu/competition/ecn/documents.html). For further details, see the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities.

181. The following sections are structured as follows. The first section (A) provides an overview of the extended set of instruments at the disposal of the Commission and NCAs and their role in the overall enforcement. The second section (B) focuses on the enhanced investigatory tools, while section C looks at developments in the field of sanctions and leniency. The last two sections shed light, respectively, on safeguards for procedural fairness and co-operation between the different EU competition law enforcers.

A Extended set of instruments in the new enforcement system

182. Regulation 1/2003 equipped the Commission with an extended set of instruments. Chapter III of the Regulation provides for Commission decisions concerning inter alia the finding and termination of an infringement (Article 7), interim measures (Article 8), commitments (Article 9) and a finding of inapplicability (Article 10). In the Commission's decision-making practice since May 2004, prohibition decisions pursuant to Article 7 (often combined with an imposition of fines pursuant to Article 23) and commitment decisions pursuant to Article 9 have clearly been the most relevant tools.

1 Prohibition and commitment decisions

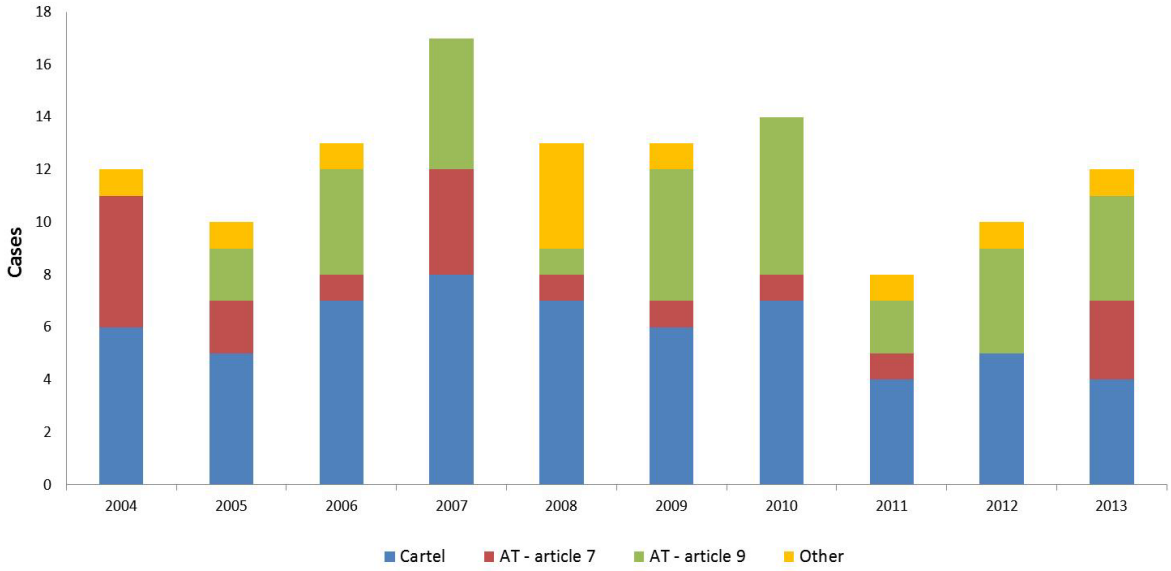
183. One of the important novelties of Regulation 1/2003 has been the introduction in Article 9, of the power for the **Commission** to adopt a decision that makes commitments voluntarily offered by undertakings binding and enforceable. Such a decision does not establish the existence of an infringement nor does it impose sanctions. It presupposes the finding of competition concerns by the Commission. The Commission is required to assess if the undertaking(s) has offered commitments that address the concerns expressed in its preliminary assessment and that they have not offered less onerous commitments that also address those concerns adequately.[262] The possibility under Article 9 to make commitments binding through a directly enforceable EU decision is an improvement as compared to the former legal framework (Regulation 17) under which no legally binding mechanism, and hence no enforcement possibility, was available for cases concluded by "informal settlements". The primary purpose of commitments decisions is to preserve effective competition by addressing the competition concerns and to lead to a quick impact on the market. Due to the more consensual mode of concluding the case, the commitment path may result in more efficient proceedings and more effective remedies; it allows for a more fine-tuned tailoring of the commitments and swifter implementation. An Article 9 decision opens up a period of monitoring of the implementation of the commitments. The effectiveness of the commitment procedure is further enhanced by the fact that the breach of commitments is a legal offence, which can be sanctioned pursuant to Article 23 without finding any further breach of the substantive EU competition rules. In 2013, for instance, the Commission imposed a fine on Microsoft for a failure to comply with its commitments made binding pursuant to an Article 9 decision.[263]

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262 Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, paragraph 41.

263 COMP/39.530 - Microsoft (Tying), decision of 6 March 2013.

Figure 13: Number of decisions by type of procedure and year (2004-2013)



184. As can be seen in Figure 13, Article 7 prohibition decisions continue to be the most important pillar of the Commission's EU antitrust enforcement with 78 decisions adopted between May 2004 and December 2013. Cartels are clearly the largest category of infringements for which decisions have been adopted pursuant to Article 7.[264]

185. However, if only decisions outside the area of cartels are considered, the number of decisions adopted during the past ten years pursuant to Article 9 exceeds the number of Article 7 decisions. This is shown in Figure 14 below.

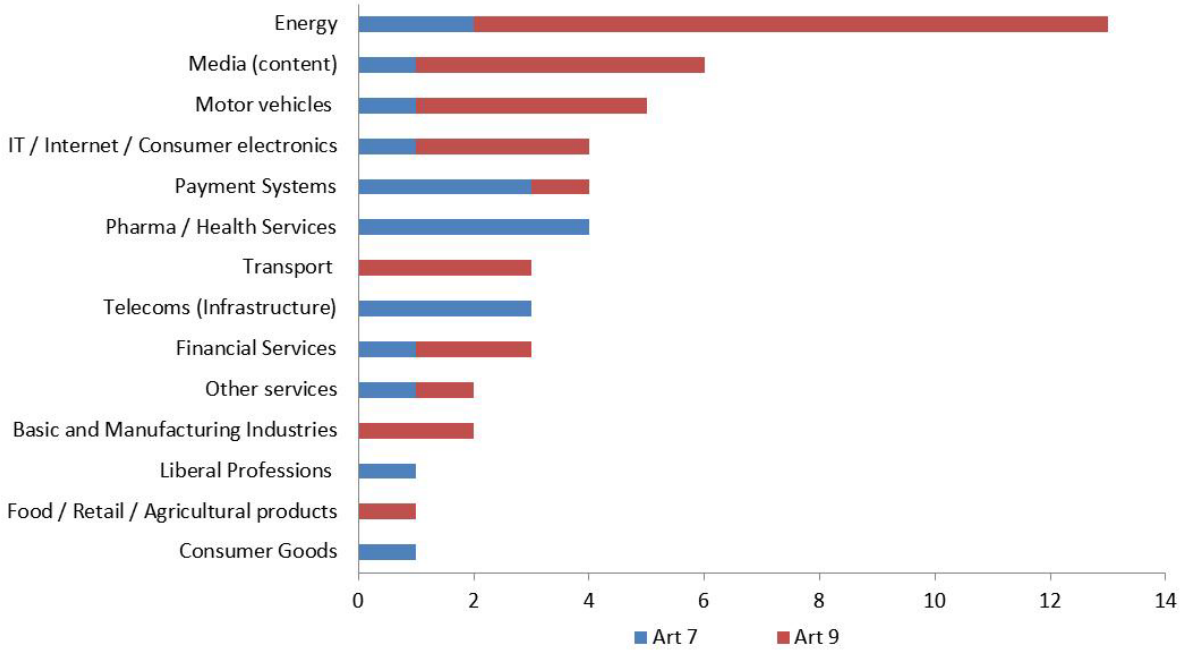
186. From May 2004 until December 2013, the Commission has adopted 33 decisions under Article 9 in relation to cases in almost all economic sectors. However, the usage of Article 7 and Article 9 decisions has not been uniform across sectors. Article 9 has been used most often in the energy sector (eleven decisions), followed by the media (five decisions) and motor vehicles sectors (four decisions). Conversely, competition enforcement in sectors such as pharmaceuticals (four decisions) and telecoms (three decisions) has relied exclusively on Article 7 prohibition decisions.

187. The Commission’s decision to engage in the commitment path or to remain on the prohibition path largely depends on the main objectives pursued: the efficient and swift solving of competition concerns on the one hand, and enhanced deterrence by imposing sanctions and, where appropriate, the precedent value of an established infringement, on the other. Of course, a pre-requisite for engaging in the commitment path is that effective, clear and precise remedies are identified, and effectively offered, by the parties. In some cases Article 7 was applied because suitable remedies were either not offered or not identifiable or because the Commission considered it necessary to ensure deterrence and set a clear precedent. In other cases, it was considered that the competition problems on the markets could be better addressed through remedies under Article 9. Figure 12 details the number of decisions taken under Article 7 and Article 9 by sector.

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264 According to Recital 13 of Regulation 1/2003, commitment decisions are not, in principle, appropriate in cases where the Commission intends to impose a fine, which would be the case in a hard-core cartel. For those cases, the settlement procedure (see further below) may allow for more expeditious proceedings.

Figure 14: Prohibition and Commitment Decisions: number of decisions by sector (January 2004 – December 2013)[265]



188. Article 7 decisions aim at ensuring that infringements found, and their effects, are effectively brought to an end, and that the infringer and other undertakings are deterred from committing the same or similar infringements again in the future. For this purpose, the Commission can impose on undertakings any necessary and proportionate remedies. The standard (baseline) remedy in Article 7 decisions are cease and desist orders. They are often combined with fines imposed pursuant to Article 23 to ensure that effective deterrence is achieved.[266] In addition, the Commission is empowered under Article 7 to adopt behavioural and structural remedies in prohibition decisions. On several occasions the Commission has imposed such additional remedies. To date, these remedies were all behavioural in nature.[267] Structural remedies can only be imposed either where there is no equally effective behavioural remedy, or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. The Commission has so far not yet imposed structural remedies in prohibition decisions under Article 7. Also under Article 9, behavioural commitments have been by far more frequent than structural commitments.[268] Nevertheless, Article 9 decisions have allowed for more structural remedies to be adopted in anti-trust cases. As a result, there is a form of convergence between

265 Excludes cartel cases, procedural cases and Article 102 and 106 TFEU cases.

266 Further details can be found in section IV.C, which deals with fines.

267 Since 2004, positive remedies (all behavioural) were imposed in three Article 7 decisions (COMP/37.792 - Microsoft, decision of 24 March 2004, COMP/34.579 - MasterCard, decision of 19 December 2007 and COMP/38.698 - CISAC, decision of 16 July 2008). Most Article 7 procedures are concluded with a cease and desist order. Conversely, all decisions with structural remedies were taken under Article 9.

268 For examples of structural remedies, see COMP/39.388 - German Electricity Wholesale Market, decision of 26 November 2008, COMP/39.389 - German Electricity Balancing Market, decision of 26 November 2008, COMP/39.317 - E.ON Gas, decision of 4 May 2010, COMP/39.315 - ENI, decision of 29 September 2010, COMP/39.727 - CEZ, decision of 10 April 2013. Other cases with structural (or at least "quasi-structural") remedies are COMP/39.402 - RWE Gas Foreclosure, decision of 18 March 2009, COMP/39.316 - Gaz de France, decision of 3 December 2009, COMP/39.596 - BA/AA/IB, decision of 14 July 2010, COMP/39.595 - Continental/United/Lufthansa/Air Canada, decision of 23 March 2013.

remedies in anti-trust cases and remedies in merger cases. Other examples of this alignment are implementation provisions on monitoring trustees, buyer approval etc.

189. The proceedings leading to the adoption of a prohibition decision under Article 7 employ significant resources of the parties, the Commission and often also of third parties. Depending on the scope of the investigation and/or the number of parties involved, the various procedural steps may be very time consuming. In this respect, proceedings leading to commitment decisions under Article 9 have a clear advantage of greater procedural efficiency, especially when commitments are offered at an early stage of the procedure.

190. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine, such as in cartels.[269] In cartel cases, the settlement procedure was introduced[270] to allow the Commission to handle more cases with the same resources, which also leads to a considerable shortening of administrative proceedings. Parties that acknowledge their involvement in a cartel and their liability for it, may request their cases to be treated under the settlement procedure. In exchange, the parties receive a 10% reduction in the fine. The settlement procedure usually results in greater expediency of proceedings, which has advantages for the parties as well as for the Commission. Undertakings benefit from faster and less burdensome procedures and they obtain a reduced fine in addition to the fine reduction possible under the leniency programme. The Commission is able to handle more cases with the same resources, not only due to the normally shorter duration and lesser administrative complexity of the proceedings, but also due to the lower likelihood of appeals before the EU courts. Since the introduction of the cartel settlements procedure in 2008, and until December 2013, nine cartel cases have been settled.[271]

2 Other types of proceedings

191. Other proceedings available to the Commission are the penalties for procedural infringements provided for in Articles 23(1) and 24 of Regulation 1/2003. According to those provisions, the Commission may impose fines or periodic penalty payments for procedural infringements, such as failure by an undertaking to comply with an Article 7 or 9 decision, a decision ordering interim measures, a decision requesting complete and correct information or a decision ordering an inspection. Penalties for procedural infringements existed also before, under Regulation 17. However, Regulation 1/2003 introduced in particular more effective sanctions under Article 23(1) for non-compliance with the obligations incumbent on undertakings in the context of investigations, which have led to sanctions for breach of seals[272] and for tampering with e-mails during an inspection.[273] Furthermore, Article 24 substantially increased the ceilings for periodic penalty payments. The upper limit for periodic penalties was set at 5% of the average daily turnover in the

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269 Recital 13 of Regulation 1/2003.

270 See the 2008 amendment of Regulation 773/2004 introducing Article 10(a) which provided for the possibility of cartel participants to settle their case with the Commission. See also Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ L 171, 1.7.2008, p. 3).

271 DRAMs, in June 2010; the "hybrid" case Animal Feed Phosphates in July 2010, Consumer Detergents in April 2011, CRT glass in October 2011, and Refrigeration Compressors in December 2011, Water Management Products in June 2012, Wire Harnesses in July 2013, and LIBOR and EURIBOR in December 2013. Settlement discussions are currently on-going in a number of other cases.

272 COMP/39.326 - E.ON Energie AG, decision of 20 January 2008, COMP/39.796 - Suez Environnement breach of seal, decision of 24 May 2011.

273 COMP/39.793 - EPH and others, decision of 28 March 2012.

preceding business year per day. The main purpose of the changes was to ensure effective compliance with Commission decisions of a procedural nature. Further details on the application of decisions imposing penalties for procedural infringements are set out in section B.1 below.

192. In Article 10, Regulation 1/2003 also introduced a further type of procedure, which is the Commission's power to adopt decisions finding that an agreement or practice does not infringe Article 101 or 102 TFEU, should the Union public interest so require. The Commission has not yet made use of that power.

193. Although stakeholders have argued that greater legal certainty would be guaranteed if the Commission were to adopt decisions under Article 10 of Regulation 1/2003, the term "Community public interest" in Article 10 excludes the adoption of decisions purely in the interests of individual undertakings. In fact, the purpose of this instrument is not to create a substitute for the abolished exemption decisions in the old notification system (although Regulation 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings in cases presenting novel or unresolved issues).[274] Recourse to Article 10 is limited to "exceptional cases" (recital 14) where it is necessary to clarify the law and ensure its consistent application throughout the Union, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice. At the stage of drafting the Regulation, it was thought that could for instance be the case if a diverging decision practice of NCAs or national courts was observed in a given area. In practice, this concept of ensuring consistency by formal decisions may have been overtaken by the ECN developing as a successful forum to discuss competition policy issues.

3 Experience of NCAs with different types of decisions

194. The 665 envisaged decisions submitted to the Commission by the NCAs concern proposed prohibition decisions (with or without fines)[275] and commitments.[276] NCAs also adopt interim measures, decisions on procedural infringements or decisions finding no grounds for action but are not obliged to inform the Commission about such decisions.[277]

195. Prohibition decisions and commitment decisions are also the principal tools for the enforcement work of the NCAs. The power to prohibit conduct that has been found to violate competition law is traditionally central to the toolkit of public enforcers; it exists in all Member States.[278] In the vast majority of jurisdictions, prohibition decisions are adopted by the NCA that is an administrative authority; the only exceptions in this respect are Ireland and Austria where prosecutor-type authorities apply to a decision-making court for cease and desist orders. The majority of NCAs have the power to adopt prohibition decisions with

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274 The Commission issued a Notice on guidance letters setting out how undertakings should make requests for guidance in such circumstances but to date only a few approaches have been made to the Commission and none of them fulfilled the conditions for a request for a guidance letter set out in the Notice.

275 This also includes decisions imposing fines only.

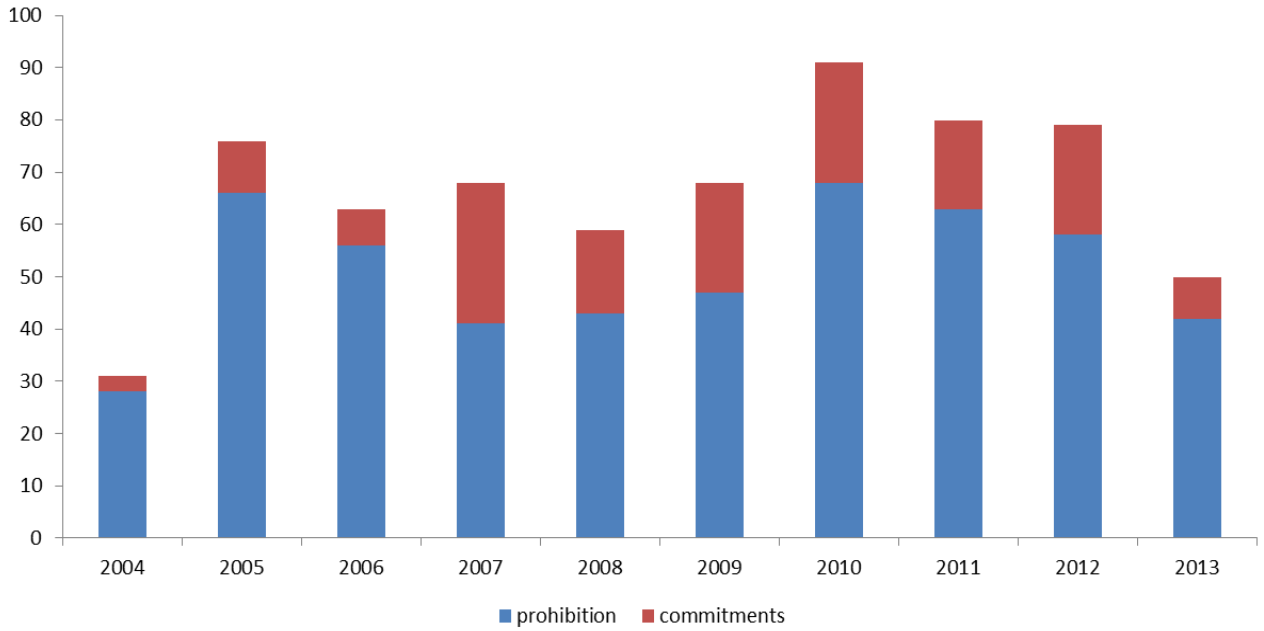
276 Art. 11(4) of Council Regulation 1/2003 also expressly requires information about envisaged decisions withdrawing the benefit of a block exemption regulation. The last type of decisions is rarely adopted by NCAs.

277 Such types of decisions are therefore not included in the 665 envisaged decisions.

278 There is some divergence as regards the remedies that NCAs can impose, notably structural remedies are not available to some NCAs. The ECN endorsed in 2013 a Recommendation to promote the concept that NCAs should have the power to impose structural remedies, see the Internet (http://ec.europa.eu/competition/ecn/documents.html).

fines (like the Commission), while in a minority of jurisdictions, decisions imposing fines are a separate instrument.[279] The graph below reflects the outcome of NCAs' envisaged decisions over the years.

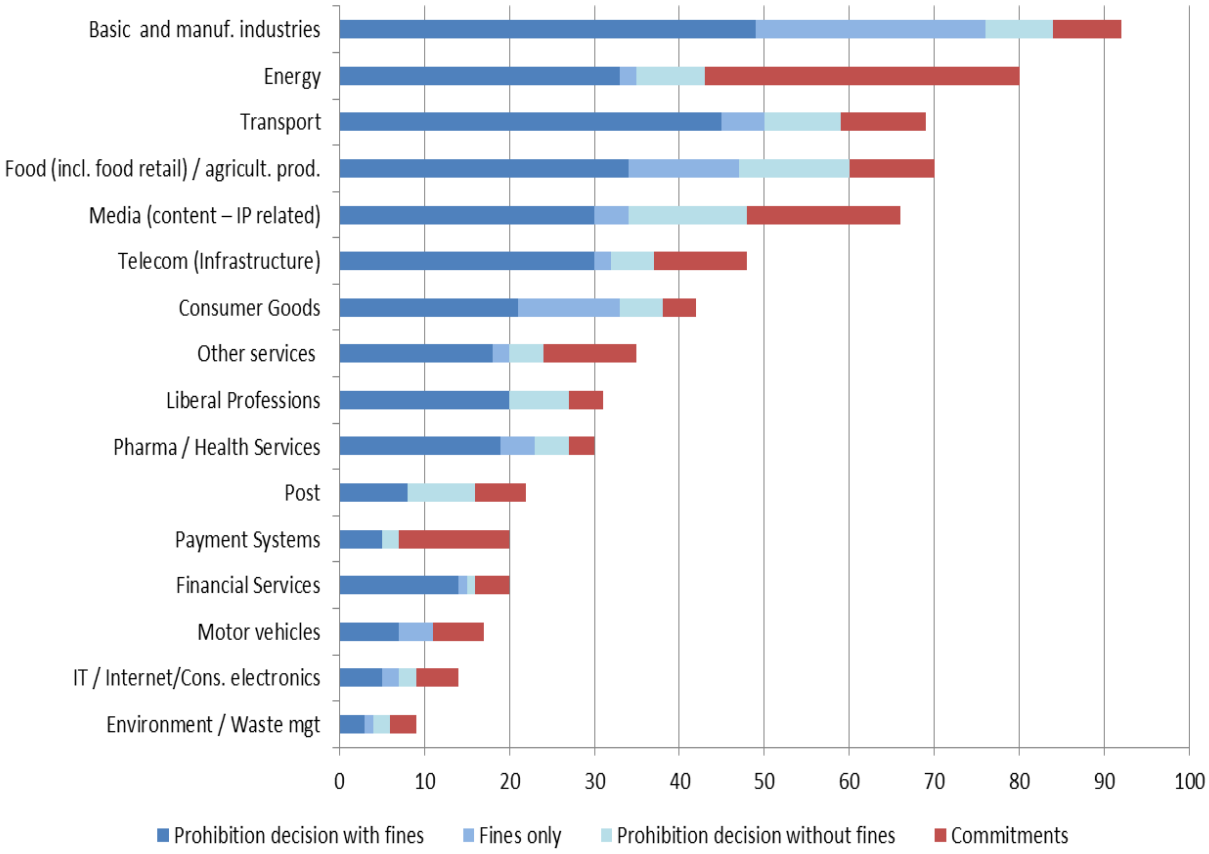
Figure 15: NCA envisaged decisions per year: Prohibition vs. Commitments (May 2004 – December 2013)



196. Commitment decisions have been rolled out in the ECN in the last ten years under Regulation 1/2003. They are a prime example of procedural convergence based on inspiration from the EU model and the cross-fertilisation of ideas supported by multilateral cooperation. By the time of reporting, even though differences in procedures remain, nearly all NCAs have express powers to adopt commitment decisions. Overall, commitment decisions adopted by NCAs make up a significant share of the enforcement effort of the ECN. They accounted for 23% of all envisaged decisions submitted by the NCAs in the period of May 2004 to December 2013. Commitment decisions were most often used by NCAs in the following sectors (in order of magnitude): energy, media, payment systems, telecom and other services.

279 In some Member States, such decisions are adopted by a court, in others these procedures have to follow a different set of procedural rules. The case database of the ECN takes account of these particularities and treats decisions imposing fines (only) as a separate category.

Figure 16: NCAs envisaged decisions per sector: Prohibition vs. Commitments (May 2004 – December 2013)



197. Formalised settlement procedures in the context of the imposition of fines exist in a minority of Member States. Many NCAs do not have such a formalised procedure but still have the possibility to reach a more consensual outcome in a fining case, using their ordinary procedural framework. There are no statistics on settled cases in the ECN context.

198. NCAs are not empowered to adopt decisions that make a formal finding that there was no infringement of the EU competition rules. Article 5 of Regulation 1/2003 provides that where the conditions for prohibition are not met, they may decide that, on the basis of the information available, there are no grounds for action. Such decisions do not bind other NCAs or national courts (nor the Commission). This provision was introduced to avoid that one NCA – possibly on the basis of incomplete information – issues an "exemption" decision that could be invoked to block enforcement by other enforcers.[280] Against this background, the Regulation does not provide for obligatory reporting of such decisions in the ECN. NCAs may consult the Commission on such cases of their own motion; this has been done in a small number of cases.

199. The extent to which NCAs may adopt decisions concluding that there are no grounds for action depends on national procedural laws and varies greatly within the ECN. While a certain number of NCAs are obliged to rule on every formal complaint by a decision on substance, many others are able to reject complaints for priority reasons. In a range of jurisdictions, complaints do not trigger an administrative procedure with decision; rather,

280 This interpretation of Article 5 was confirmed by the ECJ in Case C-375/09 - *Tele2 Polska* [2011] I-3055.

they are treated as incoming correspondence that receives a reply by letter. Notwithstanding this, many NCAs have the power to adopt no-grounds-for-action decisions at their discretion where they consider it appropriate to close a case that does not give rise to an enforcement decision.[281]

B Increased investigatory powers

1 Requests for information, inspections and interviews

Commission

200. Already under Regulation 17, the **Commission**'s principal means of investigation were requests for information and inspections. Regulation 1/2003 reinforced both of these instruments. Under Article 18, the Commission now has the choice to issue either a simple request for information or to proceed immediately to a decision requiring the information to be provided (whereas Regulation 17 foresaw a two-stage procedure whereby failure to respond to a simple request was a prerequisite to a request by decision, which obliges the addressees to provide the information under the penalty of fines or period penalty payments). Equally, Regulation 1/2003 introduced new powers with respect to inspections, such as the power to inspect private premises, to affix seals in business premises, to ask oral questions on facts or documents and to record the answers, and has provided for increased penalties for obstruction of investigations.

201. Since 2004, the Commission has issued a series of decisions requiring undertakings to supply information pursuant to Article 18(3) in relation to well above 20 cases. Moreover, since 2004, the Commission has undertaken inspections in more than 100 cases. Broadly 20% of the inspections have been carried out in recent years and relate to investigations that are not yet concluded. The inspections are normally carried out through parallel inspections at the premises of several undertakings (and/or private premises) in one or several Member States. Some of the larger inspections have targeted up to 20 sites in parallel. The majority of the inspections that have been carried out relate to suspected infringements of Article 101 TFEU (mainly cartels).

202. During the inspections, the Commission has made regular use of its powers to affix seals in business premises and to ask questions – both are now common practice during inspections. On two occasions, the Commission made use of its power to impose penalties for obstruction of inspections because seals were breached.[282] The purpose of seals is to protect evidence from being tampered with or lost and it is the inspected undertaking's responsibility to ensure that the instruction not to breach the seal is complied with. The sanctions imposed show the Commission's determination to prevent any risk of obstruction and to ensure the effectiveness and reliability of its investigations.

203. Business information is nowadays largely stored in IT environments like e-mail systems and can be quickly modified or deleted. The Commission thus sanctioned an inspected undertaking for having tampered with its e-mail storage system during an inspection without informing the Commission inspectors. This decision has sent a clear message to all undertakings that the Commission will not tolerate IT-related practices which could undermine the integrity and effectiveness of inspections.

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281 For further details about NCAs procedures, see the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities..

282 See Chapter IV.C for further details.

204. Given the invasive nature of an inspection of private premises, the Commission has made judicious use of this possibility and used the procedure only to a limited extent.

205. The power introduced in Article 19 to interview legal and natural persons with their consent has also been used to acquire additional information.[283] While Article 19 builds on the Commission's practice in leniency cases, it opened up the possibility to conduct interviews and record statements in all other cases. Given the voluntary nature of these interviews, no negative conclusions can normally be drawn from (or any penalties imposed for) any refusal to be interviewed or to answer a specific question.

206. The Commission normally carries out its own inspections under Article 20 with assistance of officials of the NCAs. On two occasions, the Commission used the possibility to request NCAs to carry out inspections on its behalf[284] pursuant to Article 22(2).

NCAs

207. **NCAs** generally have the power to inspect business premises and to request information.[285] Most NCAs also have the power to inspect non-business premises. While the broad picture is largely one of convergence, a range of differences can be observed at a more granular level (e.g. the treatment of 'incidental evidence'; the power to seal premises during an inspection; the position of undertakings that are not suspected of an infringement; powers to enforce investigatory powers and sanction breaches thereof; the extent to which the privilege against self-incrimination limits the duty of undertakings to cooperate with an investigation etc.).[286] Despite the existence of such divergences, the need for NCAs to have appropriate fact-finding tools to gather information about alleged infringements is widely recognised. Indeed, in practice these tools are frequently used by NCAs and form an indispensable part of their competition toolbox.

2 Sector inquiries

Commission

208. Since the entry into force of Regulation 1/2003, sector inquiries have become an important investigative tool for the **Commission**, reflecting its increased scope for taking action in priority areas that are vital to Europe's citizens and where market information suggests that competition does not work as it should. The Commission has used this instrument to deepen its knowledge about a sector with a view to better identifying its main shortcomings caused by market participants.

209. The Commission has carried out five sector inquiries into the media,[287] gas and electricity,[288] retail banking,[289] business insurance[290] and pharmaceutical sectors.[291] These sector inquiries

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283 Voluntary interviews under Article 19 are to be distinguished from the possibility to ask oral questions during an inspection pursuant to Article 20(2)(e).

284 The Commission has used this provision in the context of the investigation in COMP/39.165 - Flat glass in France and in Germany in February 2005.

285 See further the ECN Investigative Powers Report of 31 October 2012 on the Internet (http://ec.europa.eu/competition/ecn/documents.html).

286 See further the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities..

287 3G - Sale of sports rights and third generation mobile phone services, Sector inquiry launched on 30 January 2004. See the Internet (http://ec.europa.eu/competition/sectors/media/inquiries).

have enabled the Commission, through a wealth of factual material, to identify shortcomings in the competitive process of the sectors under investigation and adopt a number of decisions in these sectors, as evidenced above in the sector specific chapter above.

NCAs

210. Most **NCAs** equally have the power to carry out sector inquiries. A large number of such inquiries have been used in a broad variety of sectors since 2004.[292] In the absence of any legal obligation, a simple reporting mechanism has been put in place so that ECN members have the possibility to provide basic information to each other via the Network. Joint sector inquiries by two or several NCAs remain very rare apart from the established cooperation of the Nordic competition authorities that regularly carry out joint sector inquiries.

C Fines and penalty payments

1 Commission

211. Regulation 1/2003 essentially took over from Regulation 17 the legal basis for imposing fines for breaches of the substantive competition rules. In accordance with Article 23(2), the Commission may impose fines on infringing undertakings and associations of undertakings that do not exceed ten percent of their total turnover in the preceding business year. Fines with sufficient deterrent effect, coupled with an effective leniency programme, constitute the most efficient weapon in the Commission's armoury to fight cartels. In particular, appropriately deterrent fines discourage undertakings to enter into cartel agreements and encourage cartelists to blow the whistle on existing cartels in return for immunity or a reduced fine under the leniency notice. Moreover, appropriately deterrent fines in non-cartel cases dampen undertakings' incentives to engage in other forms of anti-competitive practices.

212. The purpose of the 2006 Fining Guidelines is to ensure the deterrent effect of fines in a transparent manner. This was largely achieved by basing the fine on the sales of the relevant product or service and by taking the length of the infringement fully into account. Accordingly fines under the revised Guidelines have increased for infringements on large markets or of long duration.

213. Figure 13 provides an overview of the ten highest cartel fines. Notably nine out of the ten highest cartel fines imposed by the Commission to date have come under the revised Guidelines. The current fining policy therefore better reflects the potential impact of the cartel on the market – cartels affecting larger markets will typically be fined higher amounts – as well as the impact of the cartel over time – long lasting cartels will be typically be fined a higher amount than shorter ones. This way, the Commission ensures that fines are proportionate to the gravity and duration of the infringement, while also respecting the legal

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288 Gas and electricity Sector inquiry launched in 2005; Final report presented on 10 January 2007. See the Internet (http://ec.europa.eu/competition/sectors/energy/inquiry).

289 Sector inquiry launched on 13 June 2005; Final report presented on 31 January 2007. See the Internet (http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html).

290 Sector inquiry launched on 13 June 2005; Final report presented on 25 September 2007. See the Internet (http://ec.europa.eu/competition/sectors/financial_services/inquiries/business.html).

291 Sector inquiry launched on 15 January 2008; Final report presented on 8 July 2009. See the Internet (http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf).

292 For reference to numerous examples of inquiries carried out by NCAs in a large number of sectors, see Section III.B on the relevant sectors.

maximum of ten percent of the undertaking's total turnover in the preceding business year laid down in Article 23 of Regulation 1/2003.

Figure 17: Ten highest cartel fines per case

Year	Case name	Amount in EUR[293]
2012	TV and computer monitor tubes	1 470 515 000
2008	Car glass	1 354 896 000
2013	Euro interest rate derivatives (EIRD)	1 042 749 000
2007	Elevators and escalators	832 422 250
2010	Airfreight	799 445 000
2001	Vitamins	790 515 000
2008	Candle waxes	676 011 400
2007/2012	Gas insulated switchgear (incl. re-adoption)	675 445 000
2013	Yen interest rate derivatives (YIRD)	669 719 000

214. Since the introduction of Regulation 1/2003 significant fines have also been imposed on undertakings which have abused their dominant position. These fines decisions have mainly concerned the telecoms and technology sectors (see Figure 18). Similar to fines in cartel cases the highest fine (Intel) has been imposed under the revised Fines Guidelines.

Figure 18: 'Five highest abuse of dominance fines per case

Year	Case Name	Amount in EUR[294]
2009	Intel	1 060 000 000
2004	Microsoft	497 000 000
2007	Telefonica	151 875 000
2011	Telecomunikacja Polska	127 554 194
2005	Astra Zeneca	52 500 000

215. Moreover, Regulation 1/2003 introduced more effective sanctions for non-compliance with the obligations incumbent on undertakings in the context of investigations:

(a) The Commission made use of this provision twice for breach of seals and imposed a fine of EUR 38 million in one case[295] and EUR 8 million in the other.[296]

(b) In addition, the Commission has imposed a fine of EUR 2.5 million in a case involving obstruction of its inspection.[297] Obstruction (during inspection and/or

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293 To the extent the Commission decisions were appealed, the amounts indicated are adjusted for any changes to the level of fines made by the General Court and/or European Court of Justice) and/or by Commission amendment decisions.

294 To the extent the Commission decisions were appealed, the amounts indicated are adjusted for any changes to the level of fines made by the General Court and/or European Court of Justice and/or by Commission amendment decisions.

295 COMP/39.326 - E.ON Energie AG, decision of 20 January 2008.

296 COMP/39.796 - Suez Environnement breach of seal, decision of 24 May 2011.

during other phases of the investigation) has also been punished as an aggravating circumstance in the calculation of the fine for the substantive infringement.[298]

(c) The Commission also adopted two decisions under Article 24(2) against *Microsoft*[299] for its non-compliance with the 2004 Decision that had ordered Microsoft to supply interoperability information on reasonable terms. The total fine amount was EUR 1 140.5 million.[300]

(d) Finally, and for the first time, the Commission has imposed a EUR 561 million fine on an undertaking that failed to comply with its commitments made binding pursuant to an Article 9 decision.[301]

2 NCAs

216. Sanctions imposed by NCAs for infringements of the EU competition rules are not harmonised by Regulation 1/2003. Member States are therefore free in their choice of sanctions as long as they are effective, proportionate and dissuasive.[302] Some foresee sanctions on individuals involved in anticompetitive conduct but the vast majority of Member States provide for fines on undertakings as the primary means of punishment and deterrence in the competition field. In a minority of Member States, the national law does not explicitly allow for fines to be imposed on undertakings as defined in EU competition law, but only on the individual legal entities which directly participated in the infringement. In the large majority of jurisdictions, such fines are imposed by the **NCAs** on the basis of national laws that are often closely aligned with Article 23(2) of Regulation 1/2003. Numerous jurisdictions have in addition introduced fining guidelines many of which are modelled on the approach set out in the Commission's 2006 Guidelines.[303] Such methodology includes taking into account gravity and duration of the infringement together with mitigating and aggravating circumstances and limiting the fine to 10% of the undertaking's turnover in a given year.[304] Notwithstanding this similarity in basic methodology, comparisons of fines imposed in individual cases remain very complex. Overall, many NCAs – and notably those of the larger economies inside the EU - appear to have attained a clearly deterrent level of fines, while some NCAs remain at globally more

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297 COMP/39.793 - EPH and others, decision of 28 March 2012.

298 COMP/38.432 - Professional videotapes, decision of 20 November 2007, COMP/38.354 - Industrial bags, decision of 30 November 2005, COMP/38.121 - Fittings, decision of 20 September 2006 and COMP/38.456 - Bitumen Nederland, decision of 13 September 2006.

299 COMP/37.792 Microsoft, decision of 12 July 2006 and 27 February 2008.

300 Amounts adjusted for changes following judgments of the General Court and/or European Court of Justice and/or amendment decisions.

301 COMP/39.530 - Microsoft (Tying), decision of 6 March 2013.

302 Case 68/88, *Commission v Greece*, [1989] ECR 2965, paragraphs 23 – 25, Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-04833, in particular, paragraph 37, Judgment of 18 June 2013 in Case C-681/11 *Schenker & Co*.

303 See the Internet (http://ec.europa.eu/competition/antitrust/legislation/fines.html).

304 The interpretation given by national courts to national fining rules modelled on the EU rules can, however, diverge significantly from the interpretation given by the Union courts: see the judgment by the German Federal Supreme Court of 26 February 2013 - KRB 20/12, on the interpretation of the ten percent limit under German law.

restrained levels. Enduring differences in the level of the fines may partly be explained by remaining divergences in the fines methodology used by the NCAs.[305]

D Leniency

1 Commission

217. The leniency programme is an essential element in the Commission's enforcement toolbox against cartels as the great majority of cartel cases originate from leniency applications (see Figure 3). It is therefore crucial that the attractiveness of the leniency programme is preserved and with this goal in mind a number of initiatives were taken since the entry into application of Regulation 1/2003.

218. In 2006 the Commission took an important step towards further detecting and bringing cartels to an end with the introduction of a new Leniency Notice.[306] This replaced the former 2002 Notice and introduced a number of improvements, including the clarification of the thresholds for immunity and reduction of fines as well as introducing amendments to the procedure, most notably the establishment of a discretionary marker system.[307] Changes introduced by the 2006 Leniency Notice in the Commission's leniency programme also reflect the creation at the same time of the ECN Model Leniency Programme ("MLP"). The MLP provides a model of the procedural and substantive elements that the ECN members consider every leniency programme should contain.[308]

219. Other examples of efforts to maintain the attractiveness of leniency include: (i) the establishment of the system for submitting applications orally (aimed at protecting applicants from risks of civil discovery of their leniency submissions in US courts), (ii) coordination with the UK authorities in order to ensure that employees of companies that are granted immunity by the Commission are also immunised from criminal prosecution in the UK, and (iii) close cooperation with other jurisdictions outside the EU in global cartel investigations (to develop leniency programmes in jurisdictions outside the EU where EU companies may also be active).

2 NCAs

220. As illustrated below, leniency programmes have proven to be a formidable tool for the detection of secret cartels by **NCAs**. In the ECN, where information about cases is being shared and a case may change hands from one authority to another if a re-allocation takes place, leniency programmes are mutually interdependent. From the earliest stages, the Network has therefore given considerable attention to ensuring that leniency incentives are preserved. A landmark in this regard was the development of the ECN MLP[309] which helped

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305 For further details about the fining powers of the NCAs and issues of parental liability, see the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities.

306 Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

307 The Commission may grant a marker to an immunity applicant which protects their place as first in the queue for leniency. The marker is granted for a specified period while the applicant gathers the necessary information and evidence to complete its application.

308 See further below.

309 The text of the MLP is available on the Internet (http://ec.europa.eu/competition/ecn/model_leniency_en.pdf).

to encourage and guide – ultimately - all ECN jurisdictions in developing leniency policies, the basic features of which are largely aligned.[310]

221. This means that undertakings can benefit from leniency programmes throughout the EU. To alleviate the burden of multiple filings in cases where the Commission is particularly well placed (i.e. there are effects in more than three Member States) to deal with a case, the summary application system was created. It allows immunity applicants (and after the recent revision of the MLP in 2012 also other leniency applicants) before the Commission to file simplified applications with NCAs to reserve a place in the leniency queue.

222. As from 2009, the ECN assessed the status of convergence and subsequently engaged in an in-depth review of the MLP which resulted in amendments to the model programme that were endorsed by ECN Directors General in November 2012.[311] ECN members also regularly exchange their experience at the ECN cartels working group with a view to further enhance cooperation in cartel cases and promote the coherent application of leniency policies under the MLP.[312]

E Ensuring transparent, fair and effective administrative proceedings

1 Commission

223. The EU system of competition enforcement has throughout the years guaranteed high standards of fairness and impartiality. The European Court of Justice has repeatedly found the EU system of competition enforcement to fulfil the requirements of Article 6 ECHR on the right to a fair trial. The system respects the undertakings' fundamental right to effective judicial protection under Article 47 of the Charter of Fundamental Rights since the European Courts undertake a full review of the Commission's decisions, including the fines imposed.[313] The compatibility of the EU's system of competition enforcement with fundamental rights has also been confirmed by the *Menarini* judgment of September 2011,[314] in which the European Court of Human Rights ruled that the Italian system of antitrust enforcement is compatible with Article 6 ECHR on the right to a fair trial. The institutional set-up of the Italian Authority ruled upon by the Court is very similar to that of the Commission and of the majority of EU Member States and many other agencies throughout the world. This judgment thus confirmed that the EU institutional framework of competition enforcement, with an administrative authority subject to full judicial review, contains all the necessary guarantees to respect undertakings' fundamental rights.

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310 The MLP provides a blueprint that needs to be transposed. By endorsing the MLP, the heads of the ECN authorities have agreed to use their best efforts to align their current and future leniency programmes and practices on the MLP. By the time of reporting, all EU jurisdictions operate leniency policies, with the exception of Malta which is currently contemplating introducing such a programme.

311 See the Internet (http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf).

312 For further details about the leniency policies of the NCAs, see the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities..

313 See, for example, the judgments of 8 December 2011 in Case C-386/10 P, *Chalkor v Commission*, paragraphs 45-67, and in Case C-272/09 P, *KME v Commission*, paragraphs 91-107; judgment of 11 July 2013 in Case C-439/11P, *Ziegler v Commission*, paragraphs 154-160; judgment of 18 July 2013 in Case C-501/11 P, *Schindler v Commission*, paragraphs 36-39; judgment of 24 October 2013 in Case C-510/11 P, *Kone v. Commission*, paragraphs 20-32.

314 Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, Application No 43509/08.

224. Over and above these guarantees, the **Commission** constantly strives to improve its procedures within the framework set out in Regulation 1/2003 and the implementing Regulation 773/2004 in order to achieve efficiency and ensure transparency.

225. To this effect, in 2011, the Commission adopted a notice on best practices for the conduct of proceedings concerning the EU competition rules,[315] which introduced a number of practical novelties such as opening formal proceedings earlier, introducing state of play meetings at key stages of the proceedings, giving access to "key submissions" of complainants or third parties (such as economic studies) at an early stage of the investigation, and informing parties already in the Statement of objections of the main relevant parameters for the possible imposition of fines.

226. In addition, the Commission also revised the Terms of Reference of the Hearing Officer strengthening its role as the guardian of parties' procedural rights.[316] Parties can now refer disputes which arise at any stage of antitrust proceedings to the Hearing Officer for review. The Hearing Officer has new functions in the investigation phase of proceedings, including:

(a) a dispute resolution function for disagreements about legal professional privilege;

(b) a new role with regard to disputes about extensions of the deadline to reply to Article 18(3) decisions and the right to be informed of one's procedural status;

(c) other key functions in the investigative phase, for example, parties are able to call upon the Hearing Officer if they consider that they should not be compelled to reply to questions that might force them to admit responsibility for an infringement.

2 NCAs

227. The **NCAs** have to ensure procedural fairness in accordance with national law and practices, including fundamental rights standards laid down in their national law, while respecting the requirements flowing from EU law, including the Charter on Fundamental Rights, as well as the ECHR.[317] All this may have an impact on the institutional structures and the decision-making processes of NCAs which are not harmonised by EU law. For instance, in certain Member States, national courts consider that there should be a strict division of investigation and decision-making phases over and above the requirements of the ECHR.

228. The NCAs have in place guarantees to ensure procedural fairness. Notably, parties have the opportunity to defend themselves and make their views known on the basis of a Statement of objections or equivalent document in all jurisdictions within the ECN. Equally, access to file is ensured in all EU jurisdictions. Wide variations exist with regard to oral hearings which are available upon request or are compulsory in nearly all jurisdictions, in accordance with the overall structure of procedures as organised by domestic law. Accordingly hearings play a very prominent role in some jurisdictions while they are infrequently requested in others.

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315 OJ C 308, 20.10.2011, p.6-32.

316 Decision 2011/695/EU, OJ L 275, 20.10.2011, p. 29. See further on the Internet (http://ec.europa.eu/competition/hearing_officers/legislation.html).

317 See the jurisprudence regarding Article 51(1) of the Charter of Fundamental Rights of the European Union according to which the Member States are required to comply with the provisions of the Charter "when they are implementing Union law". See in particular the judgment of 26 February 2013 in Case C-617/10 *Åklageren v Hans Åkerberg Fransson*, paragraphs 16-29 and the judgment of 6 March 2014 in Case C-206/13 *Siragusa v Regione Sicilia- - Soprintendenza Beni Culturali e Ambientali di Palermo.*

Decisions of administrative competition authorities in the EU are subject to judicial review – most often including more than one tier of appeal.[318]

F Cooperation in the application of the competition rules

1 Cooperation within the European Competition Network (ECN)

229. The enforcement record set out in this paper is underpinned by the Commission and NCAs cooperating in the ECN. The ECN became operational together with the new enforcement system of Regulation 1/2003. The setting up of the Network responded inter alia to stakeholder concerns about a risk of diverging outcomes in a system with multiple enforcers.[319] The results achieved within the ECN in the last decade confirm that the fears of some commentators that NCAs would be operating in isolation from each other and from the Commission and develop 'national' versions of the EU competition rules were unfounded.

230. From the outset, NCAs have used the case law of the EU Courts and Commission decisional practice as a basis for their application of the EU competition rules. Exchanges of experience within the ECN have become part and parcel of the Network members' operations, contributing to the development of a common space to think within the ECN.[320] Stakeholders have consistently formulated high expectations in terms of coherent application.[321] By the time of reporting, the enforcement efforts of both the Commission and NCAs are generally viewed as feeding into a common set of case practice. Despite the language barriers, cases are followed and commented on an EU-wide or wider scale among the enforcers and by the specialised public.[322]

Multilateral cooperation

231. Multilateral cooperation in the ECN is an important driver of this development. It is organised in different fora comprising the Director Generals' meeting, the ECN Plenary (meeting of policy coordinators at middle management level) as well as a range of ECN working groups (horizontal topics) and subgroups (by sector).[323] This basic structure has remained stable since the creation of the Network while the emphasis on subjects and priorities has evolved over the years.

232. Developments in recent years include the increased strategic role of the Director Generals' meetings. The Directors General set the work programme for the ECN and endorse outputs prepared at the level of the working groups or subgroups and the Plenary. Since 2010 their meetings are held bi-annually. They now also regularly respond to topical subjects of major relevance to the competition authorities in the EU through resolutions that are made

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318 See further the ECN Decision-Making Powers Report, see the Internet (http://ec.europa.eu/competition/ecn/documents.html).

319 For a detailed discussion of this topic, see the 2009 Report on Regulation 1/2003 (SWP), paragraphs 248-268.

320 See the 2009 Report on Regulation 1/2003 (SWP), paragraphs 248-268.

321 See the 2009 Report on Regulation 1/2003 (SWP), paragraphs 248-268.

322 The ECN itself issues a regular newsletter ("ECN Brief", see the Internet (http://ec.europa.eu/competition/ecn/brief/index.html) that has seen rising subscriptions since its inception in 2010. Private-sector operators also offer various types of information services, ranging from daily news reporting to more classical academic publications.

323 2009 Report on Regulation 1/2003, (SWP), paragraphs 248-268.

public.[324] While enforcement priorities are a matter for each Network member to determine, the Directors General regularly inform each other about their authorities' focal areas of attention, in terms of enforcement and advocacy. By doing so, they contribute to mutual awareness and foster potential further exchanges among authorities with similar priorities and/or facilitate the use of experience from other Network members, e.g. in the preparation of sector inquiries or similar actions.[325]

233. Following up on areas for further reflection identified in the 2009 Report on Regulation 1/2003, projects conducted in recent years include work on convergence of investigation and decision-making procedures which result in a set of reports and ECN recommendations, which were endorsed and made public in 2012/2013.[326] In 2012, the ECN Directors General also endorsed the revised version of the Network's key leniency policy document, the Model Leniency Programme.[327]

234. Work in the ECN subgroups on sectors has seen gradual developments. In the early years, attention was inter alia focussed on the energy, liberal professions, sports and waste management areas.[328] More recently, subgroups in the payments, food, pharmaceuticals sectors have been particularly active. For example, the Food subgroup was instrumental in preparing wider policy work in relation to the retail sector as well as in preparing Resolutions by the Directors General in connection with this sector.[329] It also drew up the ECN Food Report which was published in May 2012.[330] This Report provides a comprehensive overview of the most significant enforcement, advocacy and monitoring actions undertaken by the NCAs and the Commission from 2004 to 2011 and is aimed at emphasising the significant contribution of competition authorities in the EU to the proper functioning of the food supply chain.

235. Activity has also been intense in the ECN subgroup on Payments, reflecting antitrust scrutiny in numerous jurisdictions of interchange fees on cards, internet payment or cash withdrawal from automatic teller machines and the high need for coordination in this field. This is inter alia reflected in the ECN Information Paper on competition enforcement in the payment sector in the EU.[331]

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324 See for example the Resolution on the Reform of the Common Agricultural Policy of 21 December 2012 on the Internet (http://ec.europa.eu/competition/sectors/agriculture/resolution_nca_en.pdf), and the Resolution on Competition authorities in the European Union - the continued need for effective institutions of 16 November 2010, on the Internet (http://ec.europa.eu/competition/ecn/ncas.pdf).

325 Actual joint inquiries remain extremely rare reflecting both procedural and substantive complexities of such projects at the present stage.

326 See further on this subject, the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities..

327 See paragraph 219 above and further on this subject the Staff Working Document on enhancing competition enforcement by the Member States' competition authorities..

328 See 2009 Report on Regulation 1/2003, part 5.1.

329 See the Resolutions of the Heads of the European Competition Authorities on the Common Agricultural Policy and on the High Level Group on Milk aimed at improving the bargaining power of dairy farms (http://ec.europa.eu/competition/ecn/documents.html). See also Chapter III above.

330 See the Internet (http://ec.europa.eu/competition/ecn/food_report_en.pdf) and Chapter III above.

331 See the Internet (http://ec.europa.eu/competition/sectors/financial_services/information_paper_payments_en.pdf). The Report was published as background information to the Green paper 'Towards an integrated European market for card, internet and mobile payments'. See also Chapter III above.

236. Multilateral cooperation now also takes place in a Merger Working Group. While operating in a different legal framework, it also pursues objectives of facilitating cooperation and enhancing convergence.[332]

Cooperation in individual cases

237. Cases dealt with by NCAs often have cross-border implications. Cooperation in the field of fact-finding has become an every-day occurrence in the ECN. The possibility under Regulation 1/2003 to exchange information, including confidential information, has facilitated cooperation among enforcers in the EU at all stages of antitrust proceedings.[333] In individual cases, case files have been transferred or shared by cooperating authorities. Among NCAs, the possibility to request another authority to carry out investigatory measures in their territory on behalf of the requesting authority has proven to be very useful and is well used in practice.

238. The application of EU competition rules further entails a range of formal information and consultation obligations in individual cases aimed at ensuring that the EU competition rules are applied in a consistent manner.

239. From the outset of competition enforcement by the Commission, NCAs have been involved in the decision-making process of the Commission through the consultation of the Advisory Committee which is composed of representatives of NCAs. They are called upon to provide the Commission with their expert advice and experience.[334]

240. Regulation 1/2003 further introduced a process for NCAs' envisaged decisions to be submitted to the Commission, set out in Article 11(4). According to this provision, NCAs must inform the Commission at least 30 days prior to adopting a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of an EU block exemption regulation. The Commission has the possibility to make observations on envisaged decisions submitted to it. Envisaged decisions are analysed systematically and observations are communicated in many cases.[335]

241. Observations may range from purely technical points to, in very rare cases, the suggestion to re-examine the line taken with respect to particular allegations. Such observations are necessarily advisory in nature and leave the responsibility of the authority dealing with the case entirely intact.[336] They have often led to fruitful discussions and NCAs generally take this interaction with the Commission services very seriously.

242. In this context, Regulation 1/2003 further provides the Commission with formal powers to counter a serious risk of incoherence by itself initiating proceedings in the same case, thereby relieving the NCA of its competence to deal with this case.[337] This situation is

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332 See the Internet (http://ec.europa.eu/competition/ecn/mergers.html).

333 In relation to processing of personal data, EU law on data protection applies, in particular Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p.31 and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.01.2001, p.1

334 Article 14 of Regulation 1/2003.

335 Network Notice, paragraphs 43-49; 2009 Report on Regulation 1/2003, paragraphs 248-261.

336 Network Notice, paragraphs 43-49; 2009 Report on Regulation 1/2003, paragraphs 248-261.

337 Network Notice, paragraphs 54ss.

distinct from the scenario where the Commission initiates proceedings as part of its own enforcement action.[338] To date, the Commission has not used the power to initiate proceedings after the reception of an envisaged decision pursuant to Article 11(4) over the entire period of application of Regulation 1/2003, essentially for the reason that case practice in the ECN has developed in a broadly coherent manner and more upstream means of interaction have been preferred as being more efficient.

243. In terms of the outlook for the future, it can be expected that the Network will continue to be a forum that ensures a high degree of exchange of experience and cross-fertilisation of ideas, as well as a framework for more intense coordination regarding sectors or cross-cutting questions. in particular, in areas where new business models or other forms of economic or technological innovations bring up new questions for antitrust enforcement. Fluency of cooperation (including work sharing between the enforcers) and coherent outcomes benefit from upstream cooperation and early exchanges, over and above the formal cooperation mechanisms that play a role at a relatively advanced stage.

2 Cooperation with the courts of EU Member States

244. Constructing a network of national courts, with the same degree of cooperation, consultation and exchange of information as in the ECN, would have been unsuitable in view of the independent position of the judiciary and the number of national courts involved in applying the EU competition rules. Nevertheless, Regulation 1/2003, building on the mutual duty of loyal cooperation enshrined in Article 4(3) TEU, provides for a number of devices to promote consistency in the application of these rules.

245. Article 15(1) enables national courts to request the Commission to transmit to them information in its possession. This provision has most often been used by national courts to obtain information about the state of proceedings of cases investigated by the Commission. The Commission may refuse to provide information only for over-riding reasons related to the need to safeguard the Union's interests or to avoid any interference with its functioning and independence. Moreover, it may refuse to provide the requested information where it is covered by professional secrecy and the respective national court is not able to provide a guarantee of confidentiality.

246. Article 15(1) also allows national courts to request the Commission's opinion on questions concerning the application of the EU competition rules. Courts have regularly made use of this possibility. The requests pertain to a wide range of issues including, but not limited to, questions concerning market definition, the qualification of a practice as an abuse, the applicability of Article 101(3) TFEU to agreements which are restrictive of competition, etc. Since 2004 until the end of 2013 the Commission has provided 26 opinions, twelve of which were to Spanish courts, nine to Belgian courts, two to Lithuanian courts, two to Swedish courts, and one to a Dutch court. The opinions have been provided to serve the national courts at different stages of the national proceedings. The majority of the opinions have however been provided to assist first instance courts. The Commission publishes those opinions for which national courts have granted permission for publication. During the reporting period, the Commission has published 13 opinions.

247. While Article 15(1) obliges the Commission to provide assistance to national courts, Article 15(2) of Regulation 1/2003 imposes an obligation on the Member States to forward to the

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338 However, the legal basis for the initiation of proceedings by the Commission is the same, namely Articles 11(6) of Regulation 1/2003 and Article 2 of Regulation 773/2004; cf. also the Network Notice, para 53.

Commission copies of any written judgment concerning the application of the EU competition rules. This obligation is, inter alia, intended to enable the Commission to become aware of cases for which it might be appropriate to submit (in the next instance) observations to national courts as *amicus curiae* pursuant to Article 15(3). The Commission has received around 370 judgments during the reporting period, primarily from courts in Spain, Germany and France. About ten Member States have not sent any judgment yet to the Commission. The absence of feedback on judicial activity in those Member States and the overall small number of judgments received suggest that there are lapses in the cooperation mechanism that need to be corrected. The Commission is considering options for resolving this problem.

248. Finally, the Commission has made use of the possibility, provided for in Article 15(3), to participate as *amicus curiae* in national court proceedings on 13 occasions and in eight different Member States: France, Belgium, Slovakia, Austria, the Netherlands, the UK, Ireland and Spain.[339] While in the first five years of the application of Regulation 1/2003 the Commission made use of Article 15(3) only three times, the Commission intervened on ten occasions in the last five years. Most *amicus curiae* interventions have been made before courts of last instance (eight interventions). The remaining interventions have been made before appeal courts (three interventions) and first instance courts (two interventions).

249. The scope of issues on which the Commission can take a position as *amicus curiae* is broadly defined in Article 15(3) of Regulation 1/2003. The provision empowers the Commission to intervene on its own initiative whenever the coherent application of the EU competition rules so requires. The European Court of Justice has clarified that this power implies that the Commission may also intervene in order to guarantee the effectiveness and coherent application of the competition law provisions, even if the litigation concerns non-competition rules, the application of which may have an impact on the effective and coherent enforcement of the competition rules (such as rules on tax deductibility of fines).[340] On this basis, and using its discretion to set priorities, the Commission has provided *amicus curiae* observations on a wide range of issues concerning, for example, tax deductibility of cartel fines, conditions for access to leniency documents in actions for damages before national civil courts, interpretation of the notions of appreciable effect on trade between Member States, as well as the application of Article 101 TFEU to vertical agreements. Those issues arose in relation to commercial behaviour in different sectors, including telecommunications, energy, motor vehicles and basic industries. The *amicus curiae* observations have proven to be particularly useful as they give an opportunity for the Commission to clarify the approach taken in its soft law instruments.

250. Some of the *amicus curiae* interventions have prompted national courts to refer questions on the interpretation of EU law to the Court of Justice and have thereby contributed to the clarification of the law. One such example is the Commission's observations submitted to the Austrian Supreme Court in the Austrian *Freight Forwarding* case[341]. The Commission took the view that a finding by a national court acting as a competition authority that a cartel is *de minimis* and therefore is compatible with national competition rules does not shield the same cartel from the application of Article 101 TFEU. The Commission argued also that Regulation 1/2003 does not preclude NCAs from finding an infringement of competition law without imposing a fine if the infringer has participated in a leniency programme. Upon

339 See the Internet (http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html).

340 See further below.

341 Judgment of the Austrian Supreme Court 16 Ok 4/13 of 2 December 2013.

referral pursuant to Article 267 TFEU, the Court of Justice in essence confirmed the Commission's views.[342] Another example is the Commission's observations to the Paris Court of Appeal in a case concerning a general prohibition on online sales imposed by a supplier on distributors belonging to a selective distribution network. In line with the policy set out in its Guidelines on vertical restraints,[343] the Commission took the view that such a prohibition constitutes a hard-core restriction and a restriction by object. The Paris Court of Appeal sought the opinion of the ECJ, which in its *Pierre Fabre*[344] ruling confirmed that a general prohibition of online sales constitutes a restriction by object which cannot benefit from the relevant block exemption regulation.[345]

251. On the issue of whether fines imposed by the Commission can be deductible from tax for the undertakings fined, the Commission submitted three *amicus curiae* observations, before the Dutch Court of Appeal, the Supreme Court of the Netherlands and the Belgian Constitutional Court. Relying on earlier jurisprudence, the Commission took the view that allowing fines imposed for a breach of the EU competition laws to be deducted from tax would undermine the punitive and deterrent character of the fines and thereby the effectiveness of enforcement of EU competition law. The *amicus curiae* intervention before the Dutch Court of Appeal gave rise to the ruling of the Court of Justice in *Inspecteur van de Belastingdienst v. X B.V.*[346] This judgment dispelled any remaining doubts as to the Commission's right to submit observations as *amicus curiae* in national proceedings and emphasised that the effectiveness of the sanctions imposed for infringements of the EU competition rules, and the coherent application of those provisions, would be compromised if it was possible to deduct tax from the fines.

252. Finally, the Commission continuously endeavours to encourage the exchange of knowledge and practical experience in the enforcement of the competition rules. DG Competition's Grant Programme on the "Training of National Judges in EU Competition Law" provides practice-oriented training tailored to the needs of competition law judges in the Member States. This Programme enables hundreds of judges to be trained in EU competition law every year. In the last six years approximately 6000 judges have benefited from the programme.

3 The EEA Agreement

253. Cooperation also occurs pursuant to the Agreement on the European Economic Area (the "EEA Agreement"), which entered into force on 1 January 1994. The EU Member States and the EEA EFTA States, Norway, Iceland and Liechtenstein (the "EEA EFTA States") are parties to that Agreement.

254. The competition rules in the EEA Agreement essentially replicate the EU competition rules. Thus, the rules prohibit agreements and conduct that distort or restrict competition: Article 53 EEA (equivalent to Article 101 TFEU); and they prohibit dominant undertakings from abusing their market power: Article 54 EEA (equivalent to Article 102 TFEU). Article 59

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342 Judgment of 18 June 2013 in Case C-681/11, *Bundeswettbewerbsbehörde, Bundeskartellanwalt v Schenker & Co. and Others.*

343 See the Internet (http://ec.europa.eu/competition/antitrust/legislation/vertical.html).

344 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Others* [2011] I-9419.

345 Such a prohibition could only be justified under Article 101(3) TFEU on the basis of an individual assessment.

346 Case C-429/07 *Inspecteur van de Belastingdienst v. X B.V* [2009] I-4833.

EEA (equivalent to Article 106 TFEU) prohibits measures adopted by an EEA EFTA State which induce public undertakings or undertakings granted special or exclusive rights to abuse a dominant position or to enter into anti-competitive agreements. Under Article 6 EEA, EEA law should be interpreted in accordance with the relevant case law of the Court of Justice.[347]

255. The EEA Agreement is based on a two-pillar system, with the EEA EFTA States on one side and the EU and its Member States on the other. The EFTA Surveillance Authority ("ESA") enforces the EEA competition rules in the EEA EFTA States and has equivalent powers and similar functions to those of the European Commission. ESA is, like the Commission, independent from the States over which it has jurisdiction. There is no concurrent competence between the Commission and ESA: the EEA Agreement foresees only one competent jurisdiction in any given case ("one-stop-shop"). The Commission is competent to apply the competition provisions in the EEA Agreement when Article 101 and/or Article 102 TFEU are applicable to a given set of facts. This means, in practice, that in many competition cases the Commission is also competent to apply the EEA competition rules.

The EEA Agreement and Regulation 1/2003

256. By way of two decisions of the EEA Joint Committee in 2004, the EU competition reforms in Regulation 1/2003 were extended to the EEA, and to the EFTA pillar. The reforms entered into force in the EEA EFTA States in mid-2005. The enforcement regime on the EEA EFTA side thus reflects, to a large extent, the regime in the EU.

257. Some parts of Regulation 1/2003 have not, however, been implemented in the EEA Agreement. For example, ESA and the competition authorities in the EEA EFTA States are not part of the operational co-operation mechanisms for the handling of cases.[348]

EEA rules on co-operation in competition cases

258. A system for co-operation with the national authorities and national courts in the EEA EFTA States has been put in place to ensure uniform interpretation of the EEA competition rules. This replicates the equivalent system in place in the EU.

259. The EEA Agreement contains detailed rules and procedures on co-operation and exchange of information between the Commission and ESA. ESA also carries out inspections in the EEA EFTA States on behalf of the Commission. It has been involved in a number of high profile cases which have often resulted in the imposition of high fines on the undertakings concerned. Examples include inspections in the shipping sector in 2004, the paper industry in 2004, ship classification services in 2008, trading in the energy sector in 2012 and in the oil sector in 2013.

260. The EEA Agreement also contains provisions regarding the involvement of the EEA EFTA States in the ECN. ESA and the competition authorities of the EEA EFTA States are not formally members of the ECN but participate in ECN meetings for the purpose of discussion of general policy issues, with a view to ensuring consistent interpretation and application of the EEA and EU competition rules. On this basis, ESA and the competition authorities in the EEA EFTA States contribute actively in a range of ECN fora.

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347 See also C-452/01 *Ospelt* 2003 ECR, I-9743.

348 For example, the exchange of information provided for in Article 12 of Regulation 1/2003 and the possibility to request assistance from an EU competition authority pursuant to Article 22 of Regulation 1/2003.

Enforcement activities: overview

261. Since the reforms in 2005, ESA has investigated a number of cases under Article 53 EEA and/or Article 54 EEA. Examples include: an investigation into the behaviour of the incumbent oil companies in Norway concerning access to distribution facilities in Norway; an investigation into exclusive distribution agreements between the Norwegian companies TV2 and Canal Digital; an investigation into the alleged exclusion of ferry company Fjord Line from the Port of Kristiansand (Norway); and an investigation into the express bus sector in Norway.

262. In 2010, ESA adopted a decision concluding that Posten Norge AS, the Norwegian postal incumbent, had abused its dominant position under Article 54 EEA by preventing competing providers of parcel delivery services from having access to some of the largest retail groups in Norway. ESA imposed a fine of EUR 12.89 million. In 2011, ESA adopted a decision finding that Norwegian ferry company Color Line had infringed Articles 53 and 54 EEA in respect of its long-term exclusive access to harbour facilities in the Port of Strömstad (Sweden). ESA imposed a fine of EUR 18.8 million on Color Line.

263. In terms of investigations and envisaged decisions by the national competition authorities in the EEA EFTA States, under the co-operation mechanism established between ESA and the competition authorities in the EEA EFTA States, ESA is informed of new investigations initiated by the competition authorities where they envisage that Article 53 and/or Article 54 EEA may be applied. Before the competition authorities of the EEA EFTA States can adopt decisions applying Article 53 and/or Article 54 EEA, they are required to submit the envisaged decision to the Authority for review. Since 2005, ESA has been informed about approximately 60 new investigations in the EEA EFTA States and of approximately 15 envisaged decisions.

Sector inquiries

264. Sector inquiries are usually conducted by ESA in parallel to similar inquiries by the Commission. By conducting parallel inquiries into the same sector, the two authorities seek to gain an EEA-wide overview of competitive conditions in the relevant areas. Sectors that have been subject to an inquiry by ESA include: financial services, energy, new media, and sport content for 3G mobile phones and telecommunications.

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