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Challenges in EU Competition Policy

Foreword

As an informal group of Chairmen and CEOs of major multinational companies of European parentage, ERT has an ongoing dialogue with EU and national policy makers. This dialogue aims to voice the views of some of the most experienced European business people and to provide recommendations on how to create the best conditions for markets to thrive, which in turn are the conditions for growth, investments, innovation, entrepreneurship and job creation in a constantly changing environment.

The financial crisis that we have witnessed in 2008, followed by the most serious global economic crisis since the 1930s, has reinforced the need for such a dialogue. It has also become evident that a strong and relevant policy framework in the area of EU Competition Policy is more necessary than ever to ensure that the EU can achieve its goals.

Globalisation, technological changes, as well as emerging economic powers are some of the challenges that business and society face in the European Union.

EU Competition Policy is of crucial importance to the Internal Market and we therefore believe it is important to continuously follow the development of the EU Competition Policy and ensure that it evolves by analysing and debating the substance of the matter.

We believe that the formation of a single European market leads to growth and innovation in that market. In particular the benefits to consumers should not be underestimated in this context. In a global economy such competition rules are of even greater importance. Fortunately, many jurisdictions outside the European Union and the US have now adopted competition laws. The cooperation of competition authorities within the International Competition Network is another important step to introduce the idea of fair competition on a global scale, ultimately benefiting both the consumer and the suppliers.

Some of the successes achieved by EU Competition Policy in ensuring the good functioning of markets could be jeopardised in times of economic crisis.

It is with this backdrop and at the beginning of a new European Commission that the ERT Competition Policy Working Group has decided to commission a report with the overall objective of identifying areas where a need for reform may be necessary to ensure that the EU Competition Framework will work effectively in the future.

This report was conducted by Professor Lars-Hendrik Röller, the former chief economist for DG Competition, in an independent and careful manner. Following a systematic examination of EU Competition Policy, including the major reforms and initiatives undertaken in the last few years in the areas of merger control, antitrust and state aid, the report has identified four areas where we agree there is a need for reform for the future benefit of consumers and business.

Following this report, ERT suggests evolutionary reforms in the field of the economic standard applied in Competition Policy, market definition, state aid and the growing field of regulation. Such reforms may be decisive in securing the global competitiveness of European industry and at the same time continue to transfer the benefits of competition policy to the European Consumer.

Therefore, ERT believes that the recommendations Professor Röller makes in his report should be brought to the attention of the Commission:

- 1. While keeping a consumer orientation in competition policy, strengthen the role of efficiencies, in particular dynamic efficiencies, as the rationale for mergers.*
- 2. Strengthen supply-side factors in defining relevant antitrust markets to better reflect international competition, which industries increasingly face on the supply side.*

3. Enforce state-aid rules in times of economic crisis to safeguard the common market from distortions of competition.
4. Protect consumers not through more regulation but through effective competition.

Why are they important for European competitiveness? The first recommendation picks up an issue that is often underestimated in European Merger Control: efficiencies. A lot of mergers among companies only take place because the companies involved believe in the synergies of a merger. Very often the biggest synergies are associated with fixed cost savings, increased investment, and innovation. Macroeconomists call these dynamic efficiencies. So far these dynamic efficiencies unfortunately do not play a great role in EU merger decisions. To the contrary, in the past they have sometimes been held against the merging parties. This needs to be addressed and efficiencies have to play a bigger, more positive role.

With the second recommendation we are at the heart of globalisation. Many European industries compete in global markets. Their competitors are easily able to serve European markets without being established in Europe. Very often potential competition and easy supply from outside Europe has a great impact on European markets and their players. This is why it is important to take into account supply side factors and potential competition when defining markets.

The third recommendation addresses another important field of European Competition Policy: state aid. Europe is the only jurisdiction worldwide with an elaborated state aid regime. Properly applied it is able to enhance European competitiveness. Putting the distortion of competition test first, as proposed in the report, we may be able to have a filter that enables us only to address the important cases that lead to unfair competition and thus further enhance European competitiveness.

Finally, another very important subject is addressed: regulation. While we might all agree that a lack of regulation in financial markets has had its share in the current crises and that we may need more and better regulation in this field, this does not hold true for all other sector specific regulation. For example, the competitive effect of regulation in network industries needs to be carefully looked at. While regulation has very often played a very positive role in opening up markets, such as telecommunications and energy supply, it is important not to over-regulate markets and to protect consumers through effective competition rather than direct regulatory intervention. This is why impact assessments must play a much greater role before further regulating a market.

ERT believes that discussions on the issues in the report are crucial for developing better EU Competition Policy and ERT is looking forward to presenting this report to the new European Commission.



Jacob Wallenberg

Chairman
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The report was commissioned by the Competition Policy Working Group, chaired by Jacob Wallenberg and endorsed in February 2010. The report has been prepared by Professor Lars-Hendrik Röller, with thanks to Bas Dessens for research support.

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Executive Summary

EU Competition Policy is one of the success stories of Europe. The main reason for this success is the fact that member states have delegated substantial powers in the fields of merger control, antitrust and state aid to the European Commission. As a result, competition policy has developed into a powerful instrument to enforce a set of consistent rules across Europe.

In the last few years, Europe has undertaken a substantial amount of initiatives and reforms in the area of competition policy. Key policy reforms have been undertaken in the area of merger control and antitrust. In addition to these activities in the area of antitrust, the Commission has used Article 86 to liberalise a number of network industries, such as Telecommunications, Energy, Transport, and Postal Services. Finally, the area of state aid control has undergone substantial reforms as well. The so-called state aid action plan introduced the “balancing test” by which the positive (rectifying market failure) and negative effects (distortions of competition) of state aid measures are assessed.

The impact and significance of EU competition policy on European business and consumers can be seen in two fundamental areas. First, the internal dimension: ensuring a consistent set of rules through a one-stop shop, consistent implementation of competition law, as well as spreading these rules and cultures across Europe. The second dimension where EU competition policy has had a significant and ever increasing impact over the last few years is the external dimension: for example, Europe has had a significant impact on the emerging competition policy regime in China.

All these developments in EU competition policy are generally very positive. As a result, Europe has been at the forefront of competition policy and has been called by some the world's leading jurisdiction in antitrust matters. However, there are major policy challenges ahead that need to be addressed in order to keep the success story going.

This report will focus on four policy issues in EU competition policy in more detail. The goal is to identify areas where a need for reform may be needed to ensure that the EU Competition Framework works well in the future.

Specifically, the report will address the following four issues:

- (1) The objective of EU Competition Policy: are efficiencies in EU merger control properly accounted for?
- (2) Market definition
- (3) State Aid: The role of distortions of competition
- (4) Regulation: Do we have the right balance between competition policy and regulation?

In addition to the specific areas discussed in this report, a very fundamental challenge is to work towards an effective global governance structure in competition matters. The emerging economic powers (such as China, India, Mexico or Brazil) need to be fully integrated into the global competition architecture. Providing a potent European voice on competition-related issues in the international context - such as in state aid - is becoming more and more relevant. It is important for Europe to have a relevant voice to keep a level playing field on the global stage.

With the change in the White House, new leadership in the US antitrust agencies is beginning to take charge. Early indication is that US agencies will take a tougher stance in areas such as mergers and monopolisation. Developing and strengthening the key relationship between the EU and the USA is crucial, just as to promote ties with emerging countries with a view to strengthening competition codes and deepen cooperation with the competition authorities of developed countries.

More generally, competition policy has to be fully integrated into the “external strategy” of the EU, which includes other political and economic areas – such as trade policy. To keep a level playing field, the EU has to maximise its voice in the international arena in order to be relevant for the interests of European citizens and businesses. Integrating competition policy into the external policy dimension of the EU is crucial in this regard.

Recommendations

- 1. Keep a consumer orientation in competition policy, while strengthening the role of efficiencies in merger control*

While EU competition policy has an explicit consumer orientation, it is important that synergies from mergers, such as cost efficiencies, investment and innovation play a proper role in merger control, as they are in the end the main drivers of economic growth.

This report looks at all EU phase merger cases since 2004 and asks whether such synergies have played much of a role in EU merger control. As is usually done in competition policy, one differentiates between so-called *static efficiencies*, which are associated with variable and marginal cost savings, and more *dynamic efficiencies*, which are associated with fixed cost savings, increased investment, and innovation.

The empirical evidence presented in this report indicates that efficiencies have not played much of a role in merger assessments. Neither static nor dynamic efficiencies have been decisive in any EU merger case since 2004.

The reason for this irrelevance of efficiencies in merger control is not that DG Competition does not accept efficiency claims frequently. It is primarily because the parties do not put forward claims of synergies/efficiencies in the first place. The report argues that the reasons for this reluctance to be forthcoming with efficiencies/synergies is that the current legal approach does not provide any incentive for parties to put forward any evidence on efficiencies: failure to provide efficiency claims will not imply any negative consequences (or presumptions), while putting forward claims on efficiencies may be interpreted as a desperate "signal" that the case is weak. In the current environment, there are few incentives to put forward efficiency claims, and as a result efficiencies are almost irrelevant to merger control in practice.

The report thus recommends that the role of efficiencies in merger control should be strengthened by creating better incentives for parties to submit the relevant information pertaining to efficiencies.

The report also recommends that the role of dynamic efficiencies needs to be strengthened. The current approach emphasises static efficiencies more than dynamic efficiencies. Given the economic importance of dynamic efficiencies, it is time to be more explicit about what kind of dynamic efficiencies are acceptable.

2. Strengthen supply-side factors in defining relevant antitrust markets

Market definition is used as a screening device, and as such it is a crucial aspect of the practice of competition policy. Market definition in antitrust and merger control emphasizes demand-side substitutability over supply-side substitutability. This view of emphasizing demand-side substitutability is in contrast with the "business view" of markets, which often puts emphasis on the supply-side (i.e.

on potential competitors, through entry). Empirically, it may be argued that many industries are characterised by increasing international competition on the supply-side, while the demand side remains national or regional (for example retail electricity markets). In this context, the different approaches to market definition between antitrust cases as compared to market definition by the business world lead to some misunderstandings and even outright frustration.

In defence of the demand-side definition used for antitrust purposes, it is often argued that concentrating on the demand side for market definition purposes does not necessarily lead to errors, since supply-side factors are taken into account at the competitive assessment stage. In any case, it is argued, market definition is only a screening device, that is a useful way to focus the analysis before proceeding in any number of ways.

This report argues that this line of argumentation is not convincing. Since indeed market definition is a screening device, it needs to be an unbiased screen, if it is to avoid systematic errors. In other words, a screen should not twist the analysis one way or the other; it should not tilt the playing field. Otherwise a screen leads to inconsistent decisions, where the direction and magnitude of the inconsistency will depend on whether supply factors did play a major role or not.

The evidence provided in this report supports the claim that supply-side factors are less taken into account in market definition. This approach leads to an overly restrictive market definition, and thus to a biased screen. Since market definition is likely to play a major role in antitrust cases, supply side factors need to be emphasized further in defining relevant antitrust markets. Given that the Commission's Notice on market definition is dated, a review would be timely.

It should be noted that it will suffice to introduce relatively simple indicators of potential competition. Note that merging parties are currently required to submit evidence of supply-side substitutability in any merger filing. The point is not to perform a complete analysis of potential competition at the market definition stage. Nevertheless, indicators of potential competition as screen are needed to keep the analysis consistent. In fact, any indicator of potential competition, however imperfect, will lead to a more consistent analysis as compared to the current situation, where they are simply ignored.

3. *Enforce state aid rules in times of economic crisis by an increased focus on the distortions of competition*

The most important challenge is to keep the rules of competition policy intact in times of economic crisis. One of the main challenges is thus to “not throw out the baby with the bathwater” and keep markets fair and open.

This applies in particular to the area of state aid. The financial and economic crisis has increased the demand for state aid, not only in banking and finance, but also increasingly in all sectors of the economy. State aid has always been an area of competition policy where political pressures are significantly higher. This is becoming more important as the crisis is propagating through into the real economy and the labor market. Competition policy needs to be enforced - in particular in the area of state aid - so that markets continue to be open and transparent. Distortion of competition across members states need to be prevented by a consistent application of the European state aid rules. This is a key challenge for the future.

At the same time, the area of state aid also marks an opportunity for the European Commission to assert itself and show that Europe has an important role to play in terms of the future economic strength of Europe's industrial base. This aspect is crucial for Europe's economic performance *ex post* the economic crisis. How we handle the industrial restructuring during the crisis is of paramount importance to what happens when economic activity picks up again, how Europe keeps maintaining its living standard and the welfare state, as well as tackle energy needs and global climate change. Getting the right industrial policy for Europe is key, getting it wrong will ensure Europe's industrial decline for years to come. We should not sacrifice national, short-run interests for the long-run growth prospects of all member states. Europe needs a strong Commission in the area of state aid and in the area of industrial policy in general.

In this context it is particularly important to uphold the role of *distortions of competition*. There are two reasons for this. First, distortions of competition need to be avoided in order to safeguard the Common Market, which has become even more important in light of the economic crisis. Second, distortions of competition are the most relevant criteria for deciding on jurisdiction, that is which cases need to be notified and assessed by the European Commission. Strengthening the role of distortions of competition in state aid control is therefore in line with the principle of *subsidiarity*.

The findings in this report suggest that issues of distortions of competition is not increasing over recent years, at least as measured by the number of times the issue is mentioned in the decision. This is unfortunate. As a result, we propose that the balancing test in state aid should be assessed, in particular with regard to how the role of distortions of competition can be strengthened.

In sum, the role of distortions of competition needs to be strengthened in order to safeguard the Common Market as well as to increase subsidiarity.

4. Increase the effective coordination across policy fields

Horizontal antitrust laws are often complemented by other types of regulation, such as consumer protection and safety, and environment. Furthermore, antitrust also interacts with sector specific regulations, such as in telecommunications.

As a result, there is a strong need to integrate policy instruments surrounding competition policy and other instruments at a top level to achieve the best policy outcomes.

A more important role should be played in this context by the so-called *impact assessments*. Impact assessments are carried out by the Commission before any regulation is being passed and implemented. It is supposed to assess the impact of the proposed regulation on the economy and its stakeholders.

A proper impact assessment is needed to inform policy makers of the consequences of the proposed action. Impact assessments should not be used to justify a decision which has already been taken. Best practice requires that the decision itself depends on the result of the impact assessment.

Specifically, a proper impact assessment should take three factors into account.

- Impact assessments need to take into account direct as well as indirect effects. In other words, the possibility of knock-on effects, either positive or negative, need to be thoroughly investigated and evaluated against the proposed policy target.
- Impact assessments need to take into account short-run as well as long-run considerations. While more difficult to assess and predict, the long-run impact of regulation are often more significant, as they affect incentives to invest and impact on market structure.

- Impact assessments need to take into account other policy instruments and conclude that the proposed regulation is “best placed” and most effective. This requires effective policy coordination across policy instruments.

In addition to the *ex-ante* approach of the impact assessment, more effort should be devoted to *ex-post* assessments of regulatory interventions. Ex-post assessments investigate regulatory decisions after they have been implemented. Ex-post assessments are not only useful as check on the ex-ante assessment, but also in order to guide future policy decisions.

In sum, more policy coordination between competition policy and other policies is needed. Impact assessments should be done more thoroughly and be given much more weight in the decision making process.

Introduction

In the last few years, Europe has undertaken a substantial amount of initiatives and reforms in the area of competition policy. Key policy reforms have been undertaken in the area of merger control, where a new test has been introduced in 2004. In addition, the role of efficiencies in merger control has been clarified and encouraged. Cartel enforcement has been one of the priorities of DG Competition in the European Commission. Record fines have been imposed not only in Cartel cases, but also in Article 102 cases - such as Microsoft and Intel, where the Commission is entrusted to prevent abuse of dominant position. As a result of these enforcement activities, many European companies have launched comprehensive - as well as expensive - compliance programs, in order to prevent future fines.

In addition to these activities in the area of antitrust, the Commission has used Article 86 of the Treaty of Rome to liberalise a number of network industries, such as Telecommunications, Energy, Transport, and Postal Services.

The impact from these initiatives on the European economy in general, and the European consumer in particular has been positive, even though competition is not always working well in all these sectors in all EU member states. Finally, the area of state aid control has undergone substantial reforms as well. The so-called state aid action plan introduced the "balancing test" by which the positive (rectifying market failure) and negative effects (distortions of competition) of state aid measures are assessed.

These developments in EU competition policy are generally very positive. As a result, Europe has been at the forefront of competition policy and has by some been called the world's leading jurisdiction in antitrust matters. However, there are major policy challenges ahead that need to be addressed in order to keep the success story going.

The study involves an assessment of some key challenges facing European Competition Policy. It starts out with the premises that European Competition Policy has been one of the great achievements of European Integration. However, there are several areas of Competition Policy that remain challenging, especially in terms of their economic impact on consumers, markets, and firms.

Specifically, this report will address four areas and suggest options for future direction. The following areas of competition policy will be addressed:

1. The objective of EU Competition Policy: are efficiencies in EU merger control properly accounted for?
2. Market definition
3. State aid: The role of distortions of competition
4. Regulation: Do we have the right balance between competition policy and regulation?

1. The objective of EU Competition Policy: are efficiencies in EU merger control properly accounted for?

1.1. The objective of EU Competition Policy

One of the key issues in competition policy is the objective that guides the Commission when and how decisions are taken. This is one of the most vigorously debated issues in recent years. Amongst the proposed standards are the consumer surplus (or welfare) standard, the total welfare standard (i.e. consumer welfare plus firms' profits) and the competitive process itself.

Without going into a detailed discussion of the appropriate standard, it is fair to say that the European Commission is applying a consumer surplus standard. Moreover, the consumer standard is accepted by many other jurisdictions, including the US and other major antitrust agencies around the world. Besides contributing towards international convergence, a consumer standard has certain advantages over the other policy standards. By focusing on consumers, it is clear that competition policy does not protect competitors but competition. It also allows for a proper analysis of the effects of competition on markets and ultimately consumers.

Using a consumer surplus standard brings in the use of economics when assessing how market structures and competitive positions of firms affect market outcomes. One of the more significant trends in EU competition policy has been the increased use of economics. Under the so-called "more economic approach", an effect-based analysis has been emphasized, that is, decisions are taken in light of their effects on markets and in particular on consumers. One of the key policy challenges of the new Commission is to move this process forward and focus on markets and consumer benefit, in other words to preserve competition and not competitors.

Let me conclude these brief remarks by stating that the debate surrounding the standard, in particular the so-called effect-based approach to antitrust, is characterised by a rather fundamentalist undertone. It is my reading that this kind of debate surrounding the standard often evaporates in particular cases, once the attention is squarely on the relevant empirical evidence.

Although it is helpful that Europe has converged on a consumer surplus standard in recent years, there are nevertheless some shortcomings that need to be kept in mind and improved¹. Focusing explicitly on the consumer raises the legitimate concern

¹ There are some areas of competition policy, where the consumer surplus standard runs into theoretical difficulties and thus is harder to implement, such as price discrimination, buyer power, and to some extent state aid. The main reason for these difficulties is the fact that economic efficiency and consumer surplus do not necessarily coincide. Price discrimination, for example, tends to lower consumer surplus, but increases output and thereby economic efficiency.

that issues surrounding “competitiveness” are not appropriately taken into account. After all, most economists agree that investment, innovation and more generally dynamic efficiencies are most important for Europe’s economy, and ultimately Europe’s welfare. Therefore the impact of competition policy on innovation and investment by firms must be fully incorporated in antitrust analysis.

Although a consumer surplus standard does not automatically exclude the benefit from increased investment and innovation, these benefits are only considered to be of relevance for competition policy agencies, if they are ultimately passed on to consumers. It is therefore important that the link between efficiencies and consumer benefit is properly taken into account. We will return to this point in the context of merger control shortly.

Another concern with the consumer surplus standard relates to politics. If consumers are underrepresented in the political environment, then a more “conservative” standard - such as a consumer surplus standard - makes sense. The problem with this argument is that consumers are not necessarily underrepresented in all areas of competition policy. Take for example the area of excessive pricing under Article 102. In such cases, competition policy is very close to regulation of prices. It is far from clear that consumers’ interests are underrepresented in this area. In fact, regulatory intervention - rather than competition policy - is very popular in many cases, such that the politics in favour of intervention can be very potent. This may lead to too much regulation at the European level. We will return to this point below in Section 4.

This report does not suggest that the standard should be changed as it focuses attention on the right empirical facts that need to be uncovered in competition policy cases. However, it is important that efficiencies, the quality of goods, investment and innovation play a proper role under a consumer surplus standard. Whether this has been accomplished in EU competition policy over the last few years is an empirical question. It is therefore informative to ask what the evidence on this issue is. We will do this next in the context of EU merger control.

1.2. Efficiencies in EU Merger Control

Recall that in May 2004 a new merger regime took effect². Besides the introduction of the new merger test (the so-called SIEC test) an explicit efficiency analysis was introduced in the accompanying Merger Guidelines (“Guidelines on the assessment of horizontal mergers under the Council Regulation on the control

² With effect from 1 May 2004 Regulation (EC) No 4064/89 was repealed by Regulation (EC) No 139/2004 “on the control of concentrations between undertakings”.

of concentrations between undertakings"). As the new merger regime was fully in line with a consumer surplus standard, it is especially important to look at the conditions under which efficiencies would be considered relevant for merger decisions.

The Merger Guidelines stipulate efficiencies to be relevant for merger control as follows

*"For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to **benefit consumers, be merger-specific and be verifiable**. These conditions are cumulative." Paragraph 78 of the Merger Guidelines (emphasis added).*

Box 1 summarise the three conditions - (i) benefit consumers, (ii) merger-specific and (iii) verifiability - in more detail.

Box 1: The three conditions for efficiencies to matter

(i) Benefit to consumers

"The relevant benchmark in assessing efficiency claims is that consumers (105) will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur." Paragraph 79 of the Merger Guidelines.

(ii) Merger specificity

"Efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives. In these circumstances, the efficiencies are deemed to be caused by the merger and thus, merger-specific (108). It is for the merging parties to provide in due time all the relevant information necessary to demonstrate that there are no less anticompetitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. The Commission only considers alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned." Paragraph 85 of the Merger Guidelines.

(iii) Verifiability

"Efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers. The more precise and convincing the efficiency claims are, the better the Commission can evaluate the claims. Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about." Paragraph 86 of the Merger Guidelines.

All three conditions need to be present in order for the efficiencies to be accepted by the Commission and to count in the decision (i.e. cumulative). The first condition (i) follows directly from the consumer surplus standard.

An issue we will address below relates to the difference between *static* and *dynamic efficiencies*. Static efficiencies are associated with variable and marginal cost savings, while dynamic efficiencies are associated with fixed cost savings, increased investment, and innovation³. The distinction between static and dynamic efficiencies is important as it related to the consumer surplus standard and thus to condition (i) that the efficiencies directly benefit consumers. The Commission states in the Merger Guidelines,

“In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs (106) are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers (107).”

Paragraph 80 of the Merger Regulation.

... and further in Footnote 107

“Generally, fixed cost savings are not given such weight as the relationship between fixed costs and consumer prices is normally less direct, at least in the short run.”

In other words, one may get the impression that the Guidelines stipulate that static efficiencies are more likely to benefit consumers, and as such are more important in the assessment of merger control. Given the above discussion on the consumer surplus standard this may lead to an overly restrictive approach.

³ See paragraph 81 of the Merger Guidelines: “Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation. A joint venture company set up in order to develop a new product may bring about the type of efficiencies that the Commission can take into account.”

The introduction of an explicit efficiency analysis in merger control in May 2004 constitutes an ideal institutional scenario where one can test whether, and to what extent, efficiencies are taken into account within a consumer surplus standard.

The next subsection will take a look at the evidence from case law.

1.3. Evidence on the use of efficiencies in EU merger control

In order to understand the role of efficiencies, we have considered all phase II merger cases under the new merger regulation. Table 1 summarizes these cases. As can be seen, there are a total of 49 cases, where 37 decisions have been published. Of the published decisions 19 cases were cleared with no remedies imposed, while 17 were cleared with remedies. Finally, one case was prohibited (Ryanair's proposed takeover of Aer Lingus).

We thus use the 37 published decisions as our sample for this study. For a complete list of all cases see Appendix 1.

Table 1: Sample for analysis: phase II merger cases under the new regulation

139/2004 case decisions	Art. 8(1)	Art. 8(2)	Art. 8(3)	Aborted/ withdrawn	Total
Published	19	17	1	0	37
Not published*	0	1	0	11	12
Total	19	18	1	11	49

Source: <http://ec.europa.eu/competition/mergers/cases/>. *As of May 29th 2009

Recall that a consumer surplus standard does imply that efficiencies or profits to firms do not matter in the decision. It only implies that efficiencies and profits to firms matter *when they benefit consumers, are merger specific, and are verifiable*. In addition, they must be alleged by the merging parties, as the Commission is only going to consider efficiency arguments in case the parties put them forward.

Accordingly, using the published decisions, we categorize the 37 cases on our sample according to whether efficiencies have been "alleged" by the parties, are deemed by DG Competition as "verifiable", "merger specific", or having "consumer benefit". Finally, we report the number of cases where all three conditions are present.

We also separate the above categorization into *static* and *dynamic efficiencies*, in order to investigate whether static efficiencies are more important in the assessment of merger control.

Recall that static efficiencies are those related to a decrease in variable costs, which in a competitive setting are likely to be passed on to consumers in the short run. Dynamic efficiencies are those related to fixed cost savings, increased investment, and innovation, which in a competitive setting are likely to be passed on to consumers in the long run.

Table 2 reports our findings for the 37 cases.

Table 2: Efficiencies in EU phase II merger decisions: 2004 - present

	Static efficiencies	Dynamic efficiencies	Total number of cases
Alleged*	5	6	37
Verifiable	3	2	37
Merger specific	3	3	37
Consumer Benefit	3	3	37
Accepted	2	0	37
Decisive	0	0	37

Source: <http://ec.europa.eu/competition/mergers/cases/>. *In the case "M.5046 - FRIESLAND / CAMPINA" the Commission indicated that the parties put forward an efficiency defence, but did not provide details. Therefore those efficiency claims could not be included in the above overview.

As can be seen in Table 2, static efficiencies have not played a major role in phase II merger evaluations since 2004. In only 5 out of the 37 cases were static efficiencies alleged by the parties. Of those 5 cases, there were 3 cases where those efficiencies were deemed either verifiable, merger specific, or benefit the consumer. In 2 out of those cases, all three conditions were deemed to be satisfied, i.e. the efficiencies were accepted as being relevant for the merger assessment. In other words, alleged static efficiencies were not infrequently accepted by DG Competition: in 2 out of 5 cases were alleged static efficiencies accepted, which is in about 40% of the cases. This suggests that parties were rather successful in claiming static efficiencies, even though in none of the 2 cases were the static efficiencies decisive.

Table 2 also addresses the role of dynamic efficiencies. Dynamic efficiencies have not played a major role in phase II merger evaluations since 2004 either, having been alleged in 6 out of 37 cases. Furthermore, alleged dynamic efficiencies have never been accepted by DG Competition, failing either the "verifiability", merger-specificity", or the "consumer benefit" criteria.

Interestingly, there is no evidence that DG Competition follows a *per se* approach with regard to dynamic efficiencies. Indeed all three criteria are deemed to hold in at least one case in our sample, albeit they never hold simultaneously in one case.

The following Box 2 summarises the cases where efficiencies have played a role in EU merger decisions our sample⁴.

Box 2: The role of efficiencies in EU Merger cases

- *T-Mobile Austria / Telering (05):* Mobile phone operators. Dynamic efficiencies claimed, consumer benefit not accepted.
- *Inco / Falconbridge (06):* Companies active in the mining, processing and refining of nickel and other metals. Both static and dynamic efficiencies were claimed, but deemed not to be merger specific or benefit consumers.
- *Ryanair / Aer Lingus (06):* Two leading airlines operating from Ireland. Both static and dynamic efficiencies were claimed, but not deemed verifiable or merger specific. However, the efficiency assessment was indicated not to be decisive: “... even if these criteria were met, the claimed efficiency gains would in all likelihood be insufficient in magnitude to reverse the anti-competitive effects identified...” (§1127 of decision text)
- *TomTom / Tele Atlas (07):* Vertical acquisition of a navigable digital map provider by a portable navigation devices producer. The claimed static efficiencies were accepted (elimination of double mark-ups), but not the dynamic ones as they were deemed not verifiable.
- *Nokia / NAVTEQ (08):* Vertical acquisition of a navigable digital map database provider by a mobile telephone producer. Static efficiencies were accepted (elimination of double mark-ups), but dynamic efficiencies were deemed not verifiable or merger specific.
- *KLM / Martinair (08):* Dutch airlines active in the transport of passengers and cargo. Both static and dynamic efficiencies were claimed but not accepted due to a lack of verifiability.

⁴ In *Friesland / Campina (08)*, a horizontal merger between two Dutch companies active in a range of dairy products, the Commission indicated that the parties put forward efficiencies, but did not provide details. In light of this conclusion, it is not necessary to consider the efficiency defense invoked by the notifying parties. It is not clear whether the claimed efficiencies were static or dynamic, or whether they would have been accepted, but they were definitely not decisive.

Remarkably, in 2 cases DG Competition indicated pro-competitive (static) efficiencies, yet the parties did not claim them. As a result they were not taken into account. In *Itéma Holding / Barcovision Division* (08), which was a vertical acquisition of a sensors and other input manufacturer for the textiles industry by a producer of textile machinery, DG Competition suggested it would have accepted a static efficiency claim with regards to the elimination of double mark-ups, but this could not be verified as the parties did not claim such efficiency. Similarly, in *DONG/Elsam/Energi E2* (05), which was an acquisition of regional Danish electricity generation incumbents and electricity suppliers by the state-owned gas incumbent, DG Competition indicated that any efficiencies due to dual fuel supplies can be pro-competitive but as DONG did not set out an efficiency defense, they could not verify whether the relevant criteria are met.

1.4. Remarks on efficiencies in EU merger control

The main finding of this section is that efficiencies have not played a major role in phase II EU merger evaluations since 2004. Out of the 37 published cases, in only 6 cases did efficiencies play any role at all (16%) in the sense of being claimed by the parties. Once, static efficiencies were claimed, they were accepted in about 40% of the cases, while dynamic efficiencies were never accepted as being relevant for the merger assessment. In the end, efficiencies have never been decisive in EU merger decisions.

Since the economic rationale of mergers is to create efficiencies, this finding is rather disappointing. As empirical evidence shows, there are mergers with significant efficiencies, while others produce virtually no efficiencies at all. As a result, a merger assessment that does not consider efficiencies more explicitly is likely to come to wrong conclusions.

A related question is why efficiencies are not more often claimed by the parties. There are two possible explanations. First, efficiencies do not exist in more than 6 out of 37 cases. This is unlikely. Second, efficiencies are not being claimed, because they are not likely to contribute towards a pro-competitive assessment of the proposed merger.

There is a further refinement of the second explanation: by claiming efficiencies, the parties signal that they have a "weak" case, i.e. they signal that the proposed merger is likely to be anti-competitive. In other words, claiming efficiencies may be held against the parties as a signal of the merger leading to market power.

This signalling dilemma is further supported by the Commission's approach to not providing information on efficiencies.

"It should be noted that submitting information in response to Section 9.3 is voluntary. Parties are not required to offer any justification for not completing this section. Failure to provide information on efficiencies will not be taken to imply that the proposed concentration does not create efficiencies or that the rationale for the concentration is to increase market power."

COMMISSION REGULATION (EC) No 802/2004 of 7 April 2004, Footnote 1.

In other words, submitting information on efficiencies is both voluntary and failure to provide this information does not imply that the merger is anti-competitive. Both of these conditions dampen the incentives for firms to come forward with evidence on efficiencies: if parties claim efficiencies, it may be held against them, if they do not, it will not be held against them. This approach to information on efficiencies is reminiscent of the so-called *efficiency offence*, where evidence on efficiencies is turned against the merging parties, because they may lead to (or signal) market power. Efficiency offence arguments have been heavily criticized. In the current context, an informational efficiency offence will often not lead to firms providing the much needed information. To bring efficiency analysis into merger control in more systematic fashion will depend on creating the right incentives to provide the necessary information. This is currently not the case. For instance, asking parties to provide a justification for the failure to provide information on efficiencies will create better incentives for an appropriate efficiency analysis.

Despite this favourable treatment of not providing information on efficiencies, the fear that efficiencies will not be accepted (or turned against the parties) is not borne out by our case evidence as far as static efficiencies are concerned. The Commission has looked upon static efficiencies in a positive way. After all, in about 40% of the cases (2 out of 5), static efficiencies have been accepted. It appears that a more pro-active stance by the merging parties - at least vis-à-vis static efficiencies - is warranted.

The situation is rather different with regard to dynamic efficiencies. As stated in the Merger Guidelines, the current approach by the Commission is to emphasize static efficiencies, not dynamic efficiencies. This approach is confirmed by our empirical finding. In none of the 6 cases where dynamic efficiencies were claimed did DG Competition accept them as relevant for the assessment. Nevertheless,

there does not appear to be a *per se* approach to dynamic efficiencies: all three conditions are met in cases - albeit not cumulative in the same case.

1.5. Conclusion

The consumer surplus standard focuses attention on the right empirical facts that need to be uncovered in competition policy cases. However, it is important that efficiencies, investment and innovation play a proper role under a consumer surplus standard.

The empirical evidence presented in this section does not suggest that efficiencies have much of a role in merger assessments. Neither static nor dynamic efficiencies have been decisive in EU merger cases. Integrating dynamic efficiencies will be one of the major challenges in the future.

Given the importance of efficiencies as the rationale for mergers, the role of efficiencies in merger control should be strengthened. This should be done by inviting parties to submit the relevant information pertaining to efficiencies.

The role of dynamic efficiencies is even more limited than static efficiencies. This approach has been proclaimed by the Commission, and the evidence of the last few years confirms this. The evidence also shows that there is no *per se* approach to dynamic efficiencies, which implies that the claimed dynamic efficiencies are assessed thoroughly by DG Competition. Given the economic importance of dynamic efficiencies, it may be time to be more explicit about what kind of dynamic efficiencies are acceptable.

2. Market definition

2.1. The role of market definition as a screen

Market definition is used as a screening device, and as such it is a crucial aspect of the practice of competition policy. As stated by the Commission in its Notice on market definition:

“Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face”.

Market definition in antitrust and merger control emphasises demand-side substitutability over supply-side substitutability as it relates to potential competition. Box 3 summarises the Commission's approach to market definition. As can be seen the Commission differentiates between short-run supply-side substitutability at the analytical stage of market definition and the long-run effects of potential competition at subsequent stages.

The Commission's emphasis on demand-side substitutability is in contrast with the “business view” of markets, which puts more emphasis on the supply-side (i.e. on potential competitors, through entry). Empirically, it may be argued that many industries are characterized by increasing international competition on the supply-side, while the demand side remains national or regional (for example retail electricity markets). In this context, the different approaches to market definition between antitrust cases as compared to market definition by the business world lead to some misunderstandings and even outright frustration.

In defense of the demand-side definition used for antitrust purposes, it is often argued that concentrating on the demand side for market definition purposes does not necessarily lead to errors, since supply-side factors are taken into account at the competitive assessment stage (indeed this is the argument by the Commission, see Box 3, with regard to potential competition). In any case, it is argued, market definition is only a screening device, that is a useful way to focus the analysis before proceeding in any number of ways.

This line of argumentation is not convincing for the following reason. Since indeed market definition is a screening device, it needs to be an unbiased screen if it is to

avoid systematic errors. In other words, a screen should not twist the analysis one way or the other; it should not tilt the playing field. Otherwise a screen leads to inconsistent decisions, where the direction and magnitude of the inconsistency will depend on whether supply factors did play a major role or not.

Box 3: Commission Notice on the definition of relevant market for the purposes of Community competition law

The three main sources of competitive constraints:

Demand substitution

The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices.

Supply substitution

Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term (that is such a period that does not entail a significant adjustment of existing tangible and intangible assets) without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

Potential competition

The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

In this section we will first look at evidence of how supply-side factors are taken into account in market definition in EU merger control. The cases we analyse are the same ones as discussed in the previous section. We will then conclude with some policy suggestions.

2.2. Evidence on market definition in EU merger control

Table 3 summarizes the market definition outcomes of our sample of phase II merger cases since 2004. We concentrate on geographic market definition. As can be seen, there are a total of 273 market definitions for the 37 cases in our sample.

Interestingly, markets are defined as national more often than any other way: out of the 273 markets, 103 are national. Despite European integration and globalisation, there are only 81 geographic markets that are defined as being EEA wide, while a mere 41 markets are defined worldwide.

Table 3: Market Definition in phase II decisions (same sample as in Table 1)

Overview	
Number of cases	37
Number of product markets	273
Average number of product markets per case	7.4
Geographic markets	
Left open	1
500 km radius	1
O&D approach	4
Local	7
National	103
Regional	35
EEA wide	81
Worldwide	41
Total	273

Source: <http://ec.europa.eu/competition/mergers/cases/>.

We next turn to the role of supply side factors. The role of supply side factors is measured by reference to „supply side substitution“, „entry/entrants“, and „potential competitors“. Table 4 reports on the number of paragraphs mentioning „supply side substitution“, „entry/entrants“, or „potential competitors“ under market definition compared to the competitive assessment section.

As can be seen in Table 4, supply-side factors are much less discussed at the market definition stage as compared to the competitive assessment stage in our sample. Across all market definitions, supply-side factors are mentioned in 3 times less paragraphs (37%) under the market definition stage.

Furthermore, the evidence in Table 4 suggests that supply side factors are more taken into account under market definition, the wider the geographical market definition. Supply side factors play a much smaller role for market definition, when markets are **local, regional or national**.

Table 4: The role of supply side factors in market definition

Geographic markets	Role of supply side factors
	<i>Number of paragraphs under market definition compared to the competitive assessment</i>
Local	5 %
National	29 %
Regional	25 %
EEA wide	81 %
Worldwide	79 %
Total	37 %

Source: <http://ec.europa.eu/competition/mergers/cases/>.

2.3. Remarks on market definition in EU merger control

The evidence above confirms that under current European Commission practice supply-side factors are less important at the market definition stage. Furthermore, wider geographic markets have a more extensive elaboration of supply-side factors⁵. This raises the question as to whether this leads to an overly restrictive definition of antitrust markets.

As already discussed above, market definition is meant to be a screening device, which is meant to focus the analysis before proceeding in any number of ways. To lead to the correct decisions on average, a screening device needs to be unbiased, i.e. by focusing the analysis a screen should not twist the analysis one way or the other; it should not tilt the playing field.

Since supply-side substitutability can only lead to a wider market definition, putting less emphasis on supply-side substitutability leads to an overly restrictive market definition. In this way, the market definition screen leads to inconsistent decisions, depending on whether supply factors did play a major role or not.

⁵ This evidence is consistent with the view that less emphasis on supply-side factors leading to an overly restrictive geographic market definition, but also with the view that the lack of supply-side substitutability leads to smaller geographic market definition. In other words, it is not clear whether supply-side factors are not discussed more thoroughly because they do not exist or because they are not fully considered.

Note that the argument that there is no bias in market definition, provided supply side factors are properly taken into account at the competitive assessment stage, is not really convincing. Either market definition is a *true* screening device - in which case subsequent steps are structurally determined by the screen - or subsequent steps can in effect undo earlier short cuts, in which case the screen is useless, since all the analysis has to be done later on anyway.

Empirically, the bias in the market definition screen becomes problematic when markets are subject to significant supply-side substitutability, while demand side substitutability remains limited. While a complete empirical assessment of these conditions is beyond the scope of this report, it is nevertheless not unreasonable to claim that many industries are characterised by increasing international competition on the supply-side, while the demand side remains national or regional (take for example retail electricity or telecommunications markets).

2.4. Conclusion

By not taking supply-side factors sufficiently into account at the market definition stage (in particular, potential competition), the current approach leads to an overly restrictive market definition, and thus to a biased screen. Since market definition is likely to play a major - in some cases decisive - role in antitrust cases, supply side factors need to be emphasized further in defining relevant antitrust markets. Given that the Commission's Notice on market definition is dated, a review would be timely.

It should be noted that it will suffice to introduce relatively simple indicators of potential competition. Note that merging parties are currently required to submit evidence of supply-side substitutability in any merger filing. The point is not to perform a complete analysis of potential competition at the market definition stage. Nevertheless, indicators of potential competition as a screen are needed to keep the analysis consistent. In fact, any indicator of potential competition, however imperfect, will lead to a more consistent analysis as compared to the current situation, where they are simply ignored⁶.

⁶ The two new "chief economists" at the FTC and DOJ, Carl Shapiro and Joseph Farrell have recently suggested complementary screens to market definition.

3. State Aid: The role of distortions of competition

State aid is a unique governance structure for Europe. There is no system alike in the world, where a group of countries has delegated so much power to a supranational institution to control the flow of state aid.

The objective behind the European state aid system laid down in Arts. 107ss. EC is the protection of competition in the EU Internal Market. Hence the economic reason for transferring the supervision of national state aid to a European level is to avoid distortions of competition and to prevent negative spill-over effects in one member state on another member state.

The financial and economic crisis has increased the demand for state aid, not only in banking and finance, but also increasingly in all sectors of the economy. State aid has always been an area of competition policy where political pressures are significantly higher. This is becoming more important as the crisis is propagating through to the real economy and the labor market. Competition policy needs to be enforced - in particular in the area of state aid - so that markets continue to be open and transparent.

In this section we will concentrate on the role of distortions of competition within the European Commission's control of state aid under Art. 107(3). We believe that the role of the distortions of competition is the fundamental issue underlying the legitimacy of EU state aid control. Furthermore, the issue of controlling distortions in the economy is becoming significantly more important in times of economic crisis.

3.1. The role of distortions of competition in EU state aid control

In 2005, Commissioner Kroes introduced the State Aid Action Plan (SAAP). The SAAP constitutes the blueprint for reform in the area of state aid.

One of the main components of the SAAP was the so-called balancing test. The state aid balancing test is grounded in economic principles and allows for a meaningful assessments of the positive (correcting market failures or social objectives) and negative (avoid market distortions) implications of granting government aid. Specifically, the *balancing test* proceeds in three steps and is summarized in Box 4.

Box 4: The state aid balancing test

- (a) *Is there a market failure or another objective of common interest? (e.g. social or regional cohesion)*
- (b) *Is the aid measure targeted, i.e. does the proposed aid address the market failure or other objective? In particular,*
- i. *is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?*
 - ii. *is there an incentive effect, i.e. does the aid change the behaviour of firms?*
 - iii. *is the aid measure necessary, i.e. could the same change in behaviour be obtained with less aid?*
- (c) *Are the distortions of competition and effect on trade limited, so that the overall balance is positive?*

Fundamentally, the test balances the positive and negative effects of state aid. This can be done by first analysing the “benefits” of a state aid measure through (a) and (b). Finally, the “cost” or negative effects of an aid measure are assessed under (c), including the balancing⁷.

In general, the balancing is the correct approach in times of financial and economic crisis, as it provides a proper framework - based on economic effects - to assess when state aid is needed. In other words, the SAAP is an advantage in times of economic crisis, provided that the distortions of competition are given its proper weight.

As one can see the role of distortions of competition comes in under the final leg (c) of the test. Although the three conditions of the balancing test are supposed to be cumulative, this raises the question as to whether distortions of competition are given the proper weight in the assessment, if it comes at the end. We will look at this issue in the next section.

3.2. Evidence on the role of distortions of competition in EU state aid control

Table 5 reports the notified phase II state aid cases decided since 2004 that we use for our analysis of this section. For more details see Appendix 2. There are a total of 122 cases.

⁷ *It should also be stated that the balancing test - which includes a more in depth analysis of markets - is only done in certain cases (phase II cases). In this way, the vast majority of state aid cases will not be subject to a detailed economic analysis on its effect on markets, providing much needed legal certainty.*

Table 5: Notified Phase II State Aid cases (2004-2008)

	2004	2005	2006	2007	2008
Phase II decisions	26	17	21	34	24
Article 7(2) – decision does not constitute aid (after formal investigation procedure)	0	0	0	2	0
Article 7(3) - positive decision	10	5	8	8	10
Article 7(3) - positive decision / Article 7(5) only - negative decision on notified aid not put into effect	1	1	2	1	1
Article 7(3) - positive decision / Article 7(5) and 14(1) - negative decision with recovery	1	0	0	0	0
Article 7(3) - positive decision / Article 7(5) and 14(1) - negative decision without recovery	0	0	0	1	1
Article 7(4) - conditional decision	1	2	3	2	1
Article 7(4) - conditional decision / Article 7(5) and 14(1) - negative decision with recovery	0	1	0	0	0
Article 7(5) and 14(1) - negative decision with recovery	1	0	2	2	2
Article 7(5) and 14(1) - negative decision without recovery	5	0	0	1	4
Article 7(5) only - negative decision on notified aid not put into effect	5	4	4	7	3
Article 8(2) - withdrawal of notification (after formal investigation procedure)	2	4	2	9	2
Article 10(3) – information injunction	0	0	0	1	0

Source: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

We now turn to the role of competition and effect on trade in State aid. The role of distortion of competition is measured by reference to „affect/distort competition“ or „effect/impact on or distortion of competition“, whereas the role of effect on trade is measured by reference to „affect/distort on trade“ or „effect/impact on or distortion of trade“.

We only use cases which have been published, not withdrawn, and were considered state aid. This leaves us with a total of 93 cases. Table 6 reports the average number of times these phrases are mentioned for those cases.

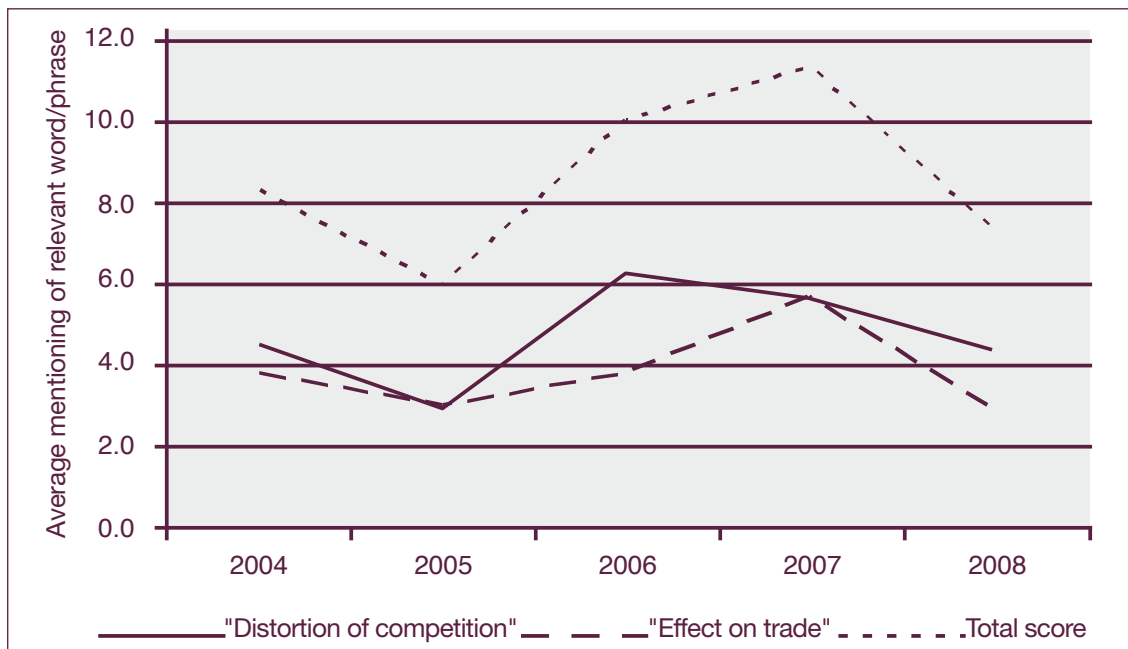
Figure 1 illustrates the results graphically.

Table 6: The role of distortion of competition and effect on trade in phase II EU state aid cases (2004-2008)

	2004	2005	2006	2007	2008
Phase II decision analyzed	24	13	18	22	16
“Distortion of competition”	4.5	2.9	6.2	5.6	4.4
“Effect on trade”	3.8	3.0	3.8	5.7	2.9
Total score	8.3	5.9	10.0	11.3	7.3

Source: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Figure 1: The role of distortion of competition and effect on trade in phase II EU state aid cases (2004-2008)



Source: ESMT CA analysis

As can be seen in Table 6 and Figure 1, the role of distortion of competition is not becoming more prominent in state aid cases. The discussion of distortions of competition and trade increased temporarily when the State Aid Action Plan was introduced in 2005, but decreased again afterwards.

3.3. Remarks on distortion of competition in EU merger control

Our findings suggest that the importance of the issue of distortions of competition is not increasing over recent years, at least as measured by the number of times the issue is mentioned in the decision. This is unfortunate, since there are good reasons as to why distortions should be put more - not less - in the focus of state aid cases.

First, there is an issue of subsidiarity. One could argue that the issue of market failure is a matter of economic efficiency, and as such should only concern the member state, not the European Commission, provided that there are no distortions of competition across member states. In other words, the Commission should only consider controlling state aid if there are distortions of competition across member states. The current sequencing of the balancing test does not reflect this logic. By first considering the issue of market failure, distortions of competition are in danger of being delegated to the status of a rebuttal. To prevent this, and to make it clear that it is the distortion of competition test that

needs to be safeguarded, the order of the balancing test should be reversed as follows: (a) distortions of competition, (b) market failure, and (c) targeting market failures.

Second, distortions of competition become even more important in light of the economic crisis. The economic approach, which is reflected in the balancing of the test, expands the analysis of state aid control for in-depth cases into an effect based approach. The advantage of an effect-based approach is that it is based on effects in the marketplace, which of course may change as the economic environment changes. As a result there is no need to change an effect-based approach when an economic crisis occurs. By contrast a more *per se* approach is likely to run into political difficulty in times of crisis.

In other words, the balancing test is the right approach in times of economic crisis, provided that the distortions of competition are put in the center of the economic analysis⁸.

3.4. Conclusion

The financial and economic crisis has increased the demand for state aid, not only in banking and finance, but also increasingly in all sectors of the economy. This is becoming more important as the crisis is propagating through to the real economy and the labor market. Competition policy needs to be enforced - in particular in the area of state aid - so that markets continue to be open and transparent.

State aid also marks an opportunity for the new Commission to assert itself and show that Europe has an important role to play in terms of future economic strength of our industrial base. This is crucial for future economic performance, including our welfare state. Getting the right industrial policy for Europe is key, getting it wrong will ensure Europe's industrial decline for years to come. We should not sacrifice national, short-run interests for the long-run growth prospects of all member states. We need a strong Commission in the area of state aid, and we need a strong Commission in the area of industrial policy in general.

⁸ There are two other significant issues. First, the distortions of competition should be used to reduce the case load through the definition of state aid - Article 107(1). This will not only help DG Competition to concentrate resources on relevant cases, but also strengthen subsidiarity. Second, in order to strengthen the role of distortions of competition, state aid control benefits from being fully integrated into DG Competition.

In this context it is particularly important to uphold the role of *distortions of competition*. There are two reasons for this. First, distortions of competition need to be avoided in order to safeguard the Common Market, which has become even more important in light of the economic crisis. Second, distortions of competition are the most relevant criteria for deciding on jurisdiction, that is which cases need to be notified and assessed by the European Commission. Strengthening the role of distortions of competition in state aid control is therefore in line with the principle of *subsidiarity*.

The findings in this report suggest that the use of distortions of competition is not increasing over recent years, at least as measured by the number of times the issue is mentioned in the decision. This is unfortunate. As a result, we propose that the balancing test in state aid should be assessed, in particular with regard to how the role of distortions of competition can be strengthened.

In sum, the role of distortions of competition in competition analysis needs to be strengthened in order to safeguard the Common Market as well as to increase subsidiarity.

4. Regulation: Do we have the right balance between competition policy and regulation?

4.1. The interaction between regulation and competition policy

Horizontal antitrust laws are often complemented by other types of regulation, such as in consumer protection and safety, and environment. Furthermore, antitrust also interacts with sector specific regulations, such as in telecommunications⁹.

To understand the interaction of regulation and competition policy it is useful to differentiate between policy objectives and policy instruments. Often the policy objectives are different, such as for environmental objectives and competition policy¹⁰. In this case, it is important to ensure that the policy instruments do not countervail each other. Strong policy coordination at a higher level is then badly needed.

Regulation and competition policy frequently follow the same first-level policy objectives, or at least very similar. This is true for consumer protection and competition policy which both address consumer benefit, albeit with very different policy instruments¹¹. Since both areas of policy have the same goal, it is important to determine which policy area has the best placed instruments to achieve the common objective. Strong policy coordination is needed.

More generally, it is important not to over-regulate markets, and to protect consumers through effective competition whenever possible, and only turn to direct regulatory intervention when market failures are likely to exist¹².

⁹ A prominent example is the Regulatory Framework for Electronic Communication.

¹⁰ It is often argued that there are no trade-offs between policy objectives. This is often justified by alluding to some long run argument, i.e. in due time – and after all effects have been played out – environmental objectives and consumer surplus are not at odds with one another. Leaving aside the issue of how long the long run is, “assuming away” trade-offs is not helpful for policy.

¹¹ Sometimes the policy instruments are the same. Take for example the issue of price regulation. Article 102 allows for excessive pricing to be an exploitative abuse, which can be remedied by requiring firms to reduce prices. This is an area where competition policy is very close to price regulation.

¹² For an empirical study that quantifies the economic costs (in terms of lost investment) of over-regulation in the context of access regulation see Friederiszick, Grajek, Röller (2007).

4.2. The need to coordinate across policy areas

At the European Commission, there is a strong need to integrate policy instruments at a horizontal level.

An important role should be played by the so-called *impact assessments* in this regard. Impact assessments are carried out by the Commission before any regulation is being passed and implemented. It is supposed to assess the impact of the proposed regulation on the economy and its stakeholders. Even though impact assessments are difficult to do, they should be done more thoroughly and be given much more weight in the decision making process.

One such example is in the context of the regulation of prices for roaming on public mobile telephone networks. While price regulation is sometimes warranted under certain circumstances - such as the lack of actual and potential competition now and in the foreseeable future - it is a very strong interference in the market. Before reverting to price regulation it is therefore necessary to be fully aware of the impact on the market and consumers, which includes all segments of the market today and tomorrow. A thorough assessment of the current state of competition as well as its likely development into the future is needed, especially if price regulation is at stake.

In the context of the roaming case, this was not done. Box 5 summarises the major developments.

Box 5: Case study - International Roaming

- *In 2006 the European Commission made a proposal to implement Regulation (EC) No 717/2007 for roaming on public mobile telephone networks within the Community, as: "Prices for EU-wide roaming at both wholesale and retail levels are not justified by the underlying costs of providing the service".*
- *The regulation introduces pricing rules on calls made and received abroad and entered into force on 30 June 2007. The Commission is currently reviewing it and planning amendments to extend its scope further (include SMS, and set specific price caps).*

Impact Assessment

- *An impact assessment concluded that spill-over effects resulting from a reduction in roaming revenues are unlikely to result in operators raising prices for other services, "given intense competition in major markets".*

The conclusion of the impact assessment “that spill-over effects resulting from a reduction in roaming revenues are unlikely to result in operators raising prices for other services, given intense competition in major markets” was not based on a robust economic analysis and the methodology was rather rudimentary. For example, there are a number of empirical studies that question this conclusion.

Research finds a significant waterbed effect¹³ (Genako and Valletti (2008) “Testing the “Waterbed” Effect in Mobile Telephony”) and it runs opposite to what is alleged in the roaming impact assessment, i.e. spill-over effects are stronger as competition is more intense.

More generally, if one takes the issue of regulation seriously, a proper impact assessment is needed to inform policy makers of the consequences of the proposed action. Impact assessments should not be used to justify a decision which has already been taken. Best practice requires that the decision itself depends on the result of the impact assessment.

Specifically, a proper impact assessment should take three factors into account.

- Impact assessments need to take into account direct as well as indirect effects. In other words, the possibility of knock-on effects, either positive or negative, need to be thoroughly investigated and evaluated against the proposed policy target.
- Impact assessments need to take into account short-run as well as long-run considerations. While more difficult to assess and predict, the long-run impact of regulations are often more significant, as they affect incentives to invest and impact on market structure.
- Impact assessments need to take into account other policy instruments and conclude that the proposed regulation is “best placed” and most effective. This requires effective policy coordination across policy instruments.

¹³ The „waterbed effect“ is a term to indicate that reduced profits in one market can lead to higher prices in another market, for example on one of the two sides in telecom networks.

The last issue of policy coordination can be demonstrated by the roaming case again. High roaming prices can also be addressed using Article 102 under exploitative abuses¹⁴. As a result there are two alternative instruments - Regulation or Antitrust (Art. 102) - both having the same policy objective (i.e. lower roaming prices). A proper impact assessment should consider both options.

Another example is the regulatory framework for electronic communications, which requires that 3 criteria are satisfied before regulatory intervention can take place. The third criterion specifies that regulation should not occur if competition policy law can address the identified market power. However, in practice this third criterion is not properly assessed.

In addition to the *ex-ante* approach of the impact assessment, more effort should be devoted to *ex-post* assessments of regulatory interventions. *Ex-post* assessments are more accurate (since only one counterfactual needs to be constructed). *Ex-post* assessments are not only useful as check on the *ex-ante* assessment, but also in order to guide future policy decisions^{15 16}.

4.3. Conclusion

A main challenge remains to increase the coordination of competition policy measures with those in other policy areas. Impact assessments should be done more thoroughly and be given much more weight in the decision making process.

¹⁴For an analysis of the circumstance when Article 102 in connection with exploitative abuses see Röller "Exploitative Abuses", in *European Competition Law Annual 2007, A Reformed Approach to Article 82 EC*, Hart Publishing, 2008.

¹⁵Recall that sector specific regulation should be abolished if market conditions improve. It is thus important to assess those market conditions periodically and independently.

¹⁶Note that there may be a need for some legal safeguards in order to ensure that *ex post* assessments can not lead to a reopening of closed cases, which would harm legal certainty.

Appendix 1: Overview of reviewed merger decisions in this study (as of 18.6.09)

Table 7: reviewed merger decisions - all phase II cases under the 139/2004 regulation

Year	Case	Decision	Published
2008	M.5153 - ARSENAL / DSP	Art. 8(2)	No
2008	M.5141 – KLM / MARTINAIR	Art. 8(1)	Yes
2008	M.5046 - FRIESLAND / CAMPINA	Art. 8(2)	Yes
2008	M.4989 – ALO / MX	Aborted/withdrawn	No
2008	M.4985 – BHP BILLITON / RIO TINTO	Aborted/withdrawn	No
2008	M.4980 – ABF / GBI BUSINESS	Art. 8(2)	Yes
2007	M.4956 – STX / AKER YARDS	Art. 8(1)	Yes
2008	M.4942 - NOKIA / NAVTEQ	Art. 8(1)	Yes
2008	M.4919 - STATOILHYDRO / CONOCOPHILLIPS	Art. 8(2)	Yes
2008	M.4874 - ITEMA HOLDING / BARCOVISION DIVISION	Art. 8(1)	Yes
2007	M.4854 - TOMTOM / TELE ATLAS	Art. 8(1)	Yes
2008	M.4799 - OMV / MOL	Aborted/withdrawn	No
2007	M.4781 - NORDDEUTSCHE AFFINERIE / CUMERIO	Art. 8(1)	Yes
2007	M.4747 – IBM / TELELOGIC	Art. 8(1)	Yes
2007	M.4734 - INEOS / KERLING	Art. 8(1)	Yes
2007	M.4731 - GOOGLE / DOUBLECLICK	Art. 8(1)	Yes
2007	M.4726 - THOMSON CORPORATION / REUTERS GROUP	Art. 8(2)	Yes
2007	M.4662 - SYNIVERSE / BSG (wireless business)	Art. 8(1)	Yes
2007	M.4647 – AEE / LENTJES	Art. 8(1)	Yes
2007	M.4525 - KRONOSPAN / CONSTANTIA	Art. 8(2)	Yes
2007	M.4523 - TRAVELPORT / WORLDSPAN	Art. 8(1)	Yes
2007	M.4513 - ARJOWIGGINS / M-REAL ZANDERS REFLEX	Aborted/withdrawn	No
2006	M.4504 – SFR / TELE 2	Art. 8(2)	Yes
2006	M.4498 - HgCAPITAL / DENTON	Aborted/withdrawn	No

2006	M.4439 - RYANAIR / AER LINGUS	Art. 8(3)	Yes
2006	M.4404 - UNIVERSAL MUSIC GROUP / BMG MUSIC PUBLISHING	Art. 8(2)	Yes
2006	M.4403 - THALES / FINMECCANICA / AAS / TELESPAZIO	Art. 8(1)	Yes
2006	M.4397 - CVC / FERD / SIG	Aborted/withdrawn	No
2006	M.4381 - JCI / FIAMM	Art. 8(2)	Yes
2006	M.4215 - GLATFELTER / CROMPTON ASSETS	Art. 8(1)	Yes
2006	M.4209 - THULE / SCHNEEKETTEN	Aborted/withdrawn	No
2006	M.4187 - METSO / AKER KVAERNER	Art. 8(2)	Yes
2006	M.4180 - GAZ DE FRANCE / SUEZ	Art. 8(2)	Yes
2006	M.4094 - INEOS / BP DORMAGEN	Art. 8(1)	Yes
2006	M.4000 - INCO / FALCONBRIDGE	Art. 8(2)	Yes
2005	M.3975 - CARGILL / DEGUSSA FOOD INGREDIENTS	Art. 8(1)	Yes
2005	M.3923 - AMI / EUROTECNICA	Aborted/withdrawn	No
2005	M.3916 - T-MOBILE AUSTRIA / TELE.RING	Art. 8(2)	Yes
2005	M.3868 - DONG / ELSAM / ENERGI E2	Art. 8(2)	Yes
2006	M.3848 - SEA-INVEST / EMO-EKOM	Art. 8(1)	Yes
2005	M.3796 - OMYA / J.M. HUBER PCC	Art. 8(2)	Yes
2005	M.3696 - E.ON / MOL	Art. 8(2)	Yes
2005	M.3687 - JOHNSON & JOHNSON / GUIDANT	Art. 8(2)	Yes
2005	M.3653 - SIEMENS / VA TECH	Art. 8(2)	Yes
2005	M.3637 - TOTAL / SASOL / JV	Aborted/withdrawn	No
2005	M.3625 - BLACKSTONE / ACETEX	Art. 8(1)	Yes
2004	M.3423 - RWA / AMI / INTER-FERT	Aborted/withdrawn	No
2004	M.3178 - BERTELSMANN / SPRINGER / JV	Art. 8(1)	Yes

Source: <http://ec.europa.eu/competition/mergers/cases/>. As of May 29th 2009

Appendix 2: Overview of state aid decisions in this study (as of 18.6.09)

Table 8: Reviewed State aid cases - all phase II case decisions from 2004 - present

Year	Case	Country	Primary Objective
2009	C47/2008(ex. N270/2008) Restructuring aid to Przedzalni Zawiercie	Poland	Restructuring firms in difficulty
2009	C13/2008(ex. N589/2007) aid to channel 4 linked to digital switchover	United Kingdom	Services of general economic interest
2009	C22/2007(ex. N43/2007) Danish Tonnage Tax - Cable Laying Vessels - Prolong. NN 116-98	Denmark	Scheme
2009	C43/2007(ex. N64/2007) Change of restructuring plan of Huta Stalowa Wola	Poland	Restructuring firms in difficulty
2008	C20/2008(ex. N62/2008) Modification of scheme N 59/2004 concerning a Temporary Defence Mechanism for Shipbuilding	Italy	Sectoral development
2008	C35/2007(ex. N256/2007) Training aid to Volvo Cars in Gent	Belgium	Training
2008	C23/2007(ex. N118/2007) Training aid for Vauxhall at Ellesmere Port	United Kingdom	Training
2008	C1/2008(ex. N283/2007) Industries de transformation et de commercialisation du secteur de la pêche et de l'aquaculture	France	Services of general economic interest
2008	C33/2007(ex. N729/2006) IBG Risk capital fund	Germany	Risk capital
2008	C11/2007(ex. N476/2006) Restructuring aid to Ottana Energia	Italy	Restructuring firms in difficulty
2008	C9/2007(ex. N608/2006) R&D aid to ITPitp for the TRNT 1000 project	Spain	Research and development
2008	C48/2006(ex. N227/2006) DHL Leipzig-Halle	Germany	Regional development
2008	C29/2007(ex. N310/2006) Short term export credit guarantee to SMEs	Hungary	SMEs
2008	C21/2007(ex. N578/2006) MSF-2002-HU Ibidem Hungary Ltd	Hungary	Regional development
2008	C57/2007(ex. N843/2006) Tax exemption to ALAS Slovakia s.r.o	Slovakia	Regional development

2008	C19/2005(ex. N203/2005) Restructuring aid for Szczecin shipyard	Poland	Restructuring firms in difficulty
2008	C17/2005(ex. N194/2005) Restructuring aid for Stoczni Gdynia	Poland	Restructuring firms in difficulty
2008	C74/2003(ex. N450/2001) Intervention dans le secteur de la sericulture	Netherlands	Investment in agricultural holdings
2008	C15/2006(ex. N291/2000) MSF 98 - Pilkington/interpane	France	Regional development
2008	C25/2000(ex. N145/1999) Environmental aid to Lucchini	Italy	Environmental protection
2008	C51/2007(ex. N530/2007) Soutien de l'Agence de innovation industrielle en faveur du programme VHD	France	Research and development
2008	C7/2008(ex. N655/2007) DE-Guarantee scheme of Saxony for investment and working capital loans	Germany	Regional development
2008	C44/2007(ex. N460/2007) Restructuring aid to FagorBrandt	France	Restructuring firms in difficulty
2008	C4/2008(ex. N97/2007) Investment in Ahoy' by the Municipality of Rotterdam	Netherlands	Culture
2008	C11/2008(ex. N908/2006) - MSF - 2002 - PL - BVG Medien Beteiligungs GmbH (BVG)	Poland	Regional development
2008	C58/2002(ex. N118/2002) Aide à la restructuration de la SNCM	France	Sectoral development
2008	C31/2006(ex. N621/2005) Mesures urgentes pour la prévention de l'influenza aviaire	Italy	Animal diseases
2008	C29/2004(ex. N328/2003) Aides à la sucrerie de Villasar (Sadam ISZ) pour les pertes souffertes suite à la sécheresse des années 2001 et 2002 (Sardegna)	Italy	Natural disasters or exceptional occurrences
2007	C32/2006(ex. N179/2006) Restructuring aid to Huta Cynku Miasteczko Slaskie	Poland	Restructuring firms in difficulty
2007	C6/2007(ex. N558/2006) Restructuring aid for Techmatrans	Poland	Restructuring firms in difficulty
2007	C43/2006(ex. N410/2006) réforme du mode de financement des retraites des fonctionnaires de l'Etat rattachés à La Poste	France	Other

2007	C54/2006(ex. N276/2006) Restructuring aid for Bison-Bial	Poland	Restructuring firms in difficulty
2007	C51/2006(ex. N748/2006) Misuse of aid by Arcelor Huta Warszawa	Poland	Restructuring firms in difficulty
2007	C32/2007(ex. N389/2006) TDM aid to ENVC for seven ships	Portugal	Sectoral development
2007	C26/2006(ex. N110/2006) Temporary Defensive Mechanism for Shipbuilding, Portugal	Portugal	Other
2007	C12/2007(ex. N799/2006) Tax exemption to Glunz&Jensen	Slovakia	Regional development
2007	C53/2006(ex. N262/2005) Citynet Amsterdam	Netherlands	Other
2007	C10/2006(ex. N555/2005) Restructuring to CYPRUS AIRWAYS	Cyprus	Restructuring firms in difficulty
2007	C12/2006(ex. N132/2005) Aide au transport combiné pour la periode 2006-2010	Czech Republic	Sectoral development
2007	C2/2006(ex. N405/2005) OTE - EARLY RETIREMENT SCHEME	Greece	Sectoral development
2007	C30/2006(ex. N623/2005) Excise tax reduction for biofuel	Italy	Environmental protection
2007	C21/2006(ex. N635/2005) Regional aid to shipyard Komarno	Slovakia	Regional development
2007	C45/2005(ex. N364/2005) Waste and Resources Action Programme (WRAP) recycled fibre printings and writings grade mill capacity scheme	United Kingdom	Environmental protection
2007	C36/2005(ex. N373/2005) Investbx	United Kingdom	Risk capital
2007	C14/2006(ex. N624/2005) Training aid to General Motors Antwerp	Belgium	Training
2007	C43/2005(ex. N99/2005) Stranded costs compensations in Poland	Poland	Other
2007	C32/2005(ex. N250/2005) Restructuration aid for Renault	France	Restructuring firms in difficulty
2007	C34/2005(ex. N113/2005) IRAP Reduction - Regional law 17/04 - Sicily	Italy	Regional development
2007	C4/2006(ex. N180/2005) Aide A L'entreprise Djebel	Portugal	Other
2007	C41/2004(ex. N221/2004) FDI aid to ORFAMA	Portugal	Sectoral development

2007	C36/2004(ex. N220/2004) FDI aid to CORDEX	Portugal	
2007	C31/2005(ex. N329/2004) Loi régionale n. 21 - 29/12/2003	Italy	Regional development
2007	C2/2007(ex. N137/2006) Notification of the danish alternative marketplaces	Denmark	Risk capital
2007	C17/2006(ex. N3/2006) Training aid to Auto-Europa	Portugal	Training
2007	C46/2006(ex. N347/2006) CO2 tax relief for EU ETS participants	Sweden	Environmental protection
2007	C8/2006(ex. N536/2005) Dornbirner Sparkasse Bank AG	Austria	Other
2007	C44/2006(ex. N614/2005) Regional aid to textile sector in Greece	Greece	Regional development
2007	C18/2006(ex. N524/2005) Merger Incentive	Italy	SMEs
2007	C48/2005(ex. N561/2004) Aides à l'investissement pour une malterie (Maltacarrión S.A.)(Castilla y León)	Spain	
2007	C42/2004(ex. N350/2004) Business premises renovation allowances (BPRA)	United Kingdom	Other
2007	C33/2006(ex. N576/2004) DVB-T in Bavaria	Germany	Sectoral development
2007	C18/2005(ex. N438/2004) Restructuring aid to Stoczni Gdansk	Poland	Restructuring firms in difficulty
2006	C6/2006(ex. N417/2005) Investment aid for Volkswerft Stralsund	Germany	Regional development
2006	C11/2005(ex. N21/2005) Aid for an ethylene pipeline - Bavaria	Germany	Regional development
2006	C5/2006(ex. N230/2005) Investment aid for Rolandwerft	Germany	Regional development
2006	C40/2005(ex. N331/2005) FORD GENK	Belgium	Training
2006	C11/2006(ex. N127/2005) Stranded costs for the municipalizzate	Italy	Other
2006	C35/2005(ex. N59/2005) Broadband development Appingedam	Netherlands	Employment
2006	C33/2004(ex. N63/2004) Extention of 3 year delivery limit for 2 ships from Estaleiros navais de viana do castelo	Portugal	Other

2006	C33/2005(ex. N277/2004) Aid to MARKET Passage Plan Project	Netherlands	Other
2006	C3/2005(ex. N592/2004) Restructuring aid to DAEWOO - FSO	Poland	Restructuring firms in difficulty
2006	C14/2005(ex. N149/2004) Sybsidy for a malt house	Netherlands	
2006	C30/2005(ex. N78/2004) Restructuring aid to KLIQ NV	Netherlands	Restructuring firms in difficulty
2006	C1/2005(ex. N426/2004) Aide à la restructuration en faveur d'Euromoteurs	France	Restructuring firms in difficulty
2006	C8/2005(ex. N451/2004) NUW - biofuel	Germany	Regional development
2006	C12/2005(ex. N611/2003) Large investment aid under the 1998 multisectoral framework in favour of e-glass AG	Germany	Regional development
2006	C17/2004(ex. N566/2003) Enterprise capital funds	United Kingdom	Risk capital
2006	C39/2004(ex. N613/2003) Nuclear Decommissioning Authority	United Kingdom	Other
2006	C48/2004(ex. N595/2003) Cantiere Navali di Termoli - extension of three-year delivery period for a product tanker	Italy	Other
2006	C17/2001(ex. N98/2000) Interventions aux fins de l'amélioration des conditions de transformation et de commercialisation des produits agricoles (Veneto)	Italy	Investment in processing and marketing
2006	C49/2005(ex. N233/2005) Restructuring aid for Chemobudowa Krakow	Poland	Restructuring firms in difficulty
2006	C16/2005(ex. N232/2004) Sale of the TOTE	United Kingdom	Sectoral development
2006	C22/2006(ex. N615/2005) Tax rebates on oil emulsions with water	Italy	Environmental protection
2005	C44/2004(ex. N402/2004) Modification of case SI 1/03 (The Reduction of Burdening of the Environment with Emissions of Carbon Dioxide)	Slovenia	Environmental protection
2005	C2/2005(ex. N501/2004) Alitalia - Plan industriel de restructuration	Italy	Restructuring firms in difficulty

2005	C40/2004(ex. N42/2004) Real Estate Transfer Tax Exemption for Housing Companies in the Neue Lander	Germany	Other
2005	15/2004(ex. N267/2003) Aides au secteur des producteurs et négociants de vins de liqueur: Pineau des Charentais, Floc de Gascogne, Pommeau de Normandie et Macvin du Jura	France	
2005	C3/2004(ex. N644g/2002) Technology centres	Germany	
2005	C26/2005(ex. N580b/2003) Interventions en faveur de l'agrumiculture italienne - lutte contre la tristezza des agrumes	Italy	
2005	C43/2003(ex. N43/2003) CR43/03 - Aid in favour of AVR for treatment of «C2» hazardous waste	Netherlands	Environmental protection
2005	C5/2004(ex. N609/2003) Kronoply	Germany	Regional development
2005	C32/2004(ex. N347/2003) Fincantieri - Extention of three-year delivery limit for four cruise vessels	Italy	Other
2005	C48/2003(ex. N791/2002) De Tomaso Cutro	Italy	Regional development
2005	C35/2003(ex. N90/2002) Lazio - Réduction des émissions de gaz à effet de serre	Italy	Environmental protection
2005	C52/2002(ex. N833/2001) Disposizioni particolari per il settore del trasporto (Provincia Autonoma di Trento)	Italy	Regional development
2005	C28/2003(ex. N371/2001) Fond de garantie pour le crédit naval	Italy	Sectoral development
2005	C34/2004(ex. N258/2004) Restructuring aid Metallindustriewerk Staaken	Germany	Restructuring firms in difficulty
2005	C28/2004(ex. N314b/2003) AIDES AUX ORGANISATIONS DE PRODUCTEURS	Belgium	
2005	C31/2002(ex. N149/2000) Régime transitoire du marché de l'électricité	Belgium	Sectoral development
2005	C4/2004(ex. N55/2003) Environment aid for Wagner	Germany	Environmental protection
2004	C10/2004(ex. N94/2004) Restructuring aid in favour of BULL	France	Restructuring firms in difficulty

2004	C69/2003(ex. N473/2003) Investment aid for a propylene pipeline - Flanders	Belgium	Environmental protection
2004	C67/2003(ex. N355/2003) Propylene-pipeline - Nordrhein-Westfalen	Germany	Environmental protection
2004	C63/2003(ex. N14a/2003) Fiscal advantages in favour of publishing industry in Italy (art. 8, L.7.03.2001)	Italy	
2004	C68/2003(ex. N400/2003) Investment aid for a propylene pipeline	Netherlands	Environmental protection
2004	C45/2003(ex. N1/2003) MSF 1998 - Aid in favour of Infineon Technologies-Fabrico de semiconductores, Portugal, S.A. (MSF)	Portugal	Regional development
2004	C72/2003(ex. N134/2003) INVEST NI «VENTURE 2003»	United Kingdom	
2004	C73/2003(ex. N167/2003) Investment aid under the environmental guidelines in favour of Stora Enso Langerbrugge N.V.	Belgium	Environmental protection
2004	C26/2003(ex. N351/2002) Modification régime centres de coordination (décision anticipée-ruling)	Belgium	
2004	C30/2003(ex. N788/2002) Peugeot Ryton	United Kingdom	Regional development
2004	C34/2003(ex. N728/2002) CR34/03 - Aid to CMR - Marseille shipyard	France	Restructuring firms in difficulty
2004	C31/2003(ex. N813/2002) SIOEN/Mouscron	Belgium	Regional development
2004	C59/2003(ex. N645/2002) Intervention nationale contre la crise de la culture de la pêche (Piemonte)	Italy	
2004	C66/2003(ex. N601/2002) Matching of alleged Spanish shipbuilding aid - containerships - Bodewe shipyard	Netherlands	Other
2004	C66/2002(ex. N534/2002) Gibraltar government corporation tax reform	United Kingdom	
2004	C32/2002(ex. N522/2001) Aide à l'achat d'équipements destinés à garantir la provenance et la qualité de la viande bovine (Brescia)	Italy	
2004	C50/2002(ex. N373/2001) Aides aux organisations des producteurs de l'huile d'olive (Extremadura)	Spain	

2004	C40/2002(ex. N513/2001) CR40/02 - Aid to Hellenic shipyards	Greece	Other
2004	C39/2002(ex. N130/2001) Restructuration de l'entreprise «Cooperativa Agricola Moderna» (Marche)	Italy	
2004	C27/2003(ex. N148/2001) Urgent measures to compensate farmers for the damage caused by the strike of road hauliers (Sicilia)	Italy	
2004	C5/2001 (ex. N775/2000) Interventions pour compenser les dommages causés par la fièvre catarrhale des ovins (Blue Tongue) (Sardegna)	Italy	
2004	C81/2001 (ex. N781/2000) Financement des activités agricoles pour l'amélioration de la qualité des produits et de la vie des opérateurs (Molise)	Italy	
2004	C50/2000(ex. N50/2000) Protection de la Bergamote de ses dérivés (Calabria)	Italy	
2004	C59/2001 (ex. N797/1999) Programme AIMA secteur avicole	Italy	
2004	C65/2003(ex. N134/2001) FRIULI VENEZIA GIULIA - DEVELOPPEMENT DU TRANSPORT COMBINE	Italy	Sectoral development
2004	C40/2003(ex. N50b/2002) R&D aid to group IBERMATICA	Spain	Research and development

Source: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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