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COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE  
COMMITTEE OF THE REGIONS**

**Report on Competition Policy 2017**

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## I. LEGISLATION AND POLICY DEVELOPMENTS

### Competition policy empowering citizens and businesses for the benefit of all

The European Union remains the largest economic and trading area in the world, with more than half a billion consumers and 20 million companies forming its strongest lever – the internal market. The on-going process of improving and expanding the functioning of the single market goes hand in hand with competition policy enforcement. The ultimate goal of EU competition policy is making markets function better for the benefit of consumers – both households and businesses – and the society as a whole, as well as fostering a competition culture in the EU and worldwide.

This is achieved by giving individuals a wide choice of products at prices they can afford, as well as by encouraging and enabling companies – big or small – to innovate, invest, and compete on equal terms on the market. Equally, enforcement of competition policy contributes towards an open and fair single market in which businesses and individual consumers can directly obtain, or lawfully claim, their fair share of the benefits of growth. Taken together, competition policy actions in the antitrust area, under the merger control and State aid control can make a real difference towards the benefit of European consumers and businesses. By stimulating innovation, preventing abuses from dominant players, helping achieve a connected Digital Single Market, an integrated and climate-friendly Energy Union, supporting competition-friendly regulation, and fostering a global competition culture, competition policy actions contribute to the right conditions for economic growth.

The present Staff Working Document is composed of two parts, one presenting the 2017 policy and legislative developments across the three competition instruments (antitrust and cartels, mergers, and State aid), while specific actions are detailed in the sectoral overview part.

#### Antitrust and cartels

##### Articles 101, 102 and 106 TFEU

According to Article 101 TFEU, anti-competitive agreements are *prohibited as incompatible with the internal market*. Article 101 TFEU prohibits agreements with an anti-competitive object or effects where companies coordinate their behaviour instead of competing independently. However, even if a horizontal or a vertical agreement could be viewed as restrictive (for example by combining the production of two competing companies) it might be allowed under Article 101(3) TFEU if it ultimately fosters competition (for example by promoting technical progress or by improving distribution).

Article 102 TFEU prohibits abuse of a dominant position. It is not in itself illegal for an undertaking to be in a dominant position or to acquire such a position. Dominant undertakings, as any other undertaking in the market, are entitled to compete on the merits. However, Article 102 TFEU prohibits the abusive behaviour by dominant undertakings that, for example, prevent new entry into the market or squeeze competitors out of the market. Such practices hamper competition and negatively affect incentives for innovation and growth, as well as consumer welfare.

Finally, Article 106 TFEU prevents Member States from enacting or maintaining in force measures contrary to the Treaty rules regarding public undertakings and undertakings to which Member States grant special or exclusive rights (privileged undertakings).

## 1. Guidance in antitrust and cartel proceedings

In 2017, the Commission introduced a new whistleblower tool that gives an opportunity to individuals who have knowledge of the existence or functioning of a cartel or other types of antitrust violations to help end such practices. Moreover, the Commission continued to encourage cooperation by parties also in non-cartel antitrust cases and worked on the interaction between competition policy, algorithms and data issues.

To further increase its ability to detect secret cartels and other antitrust violations, the Commission launched a new whistleblower tool to make it easier for individuals to alert the Commission about such infringements while maintaining their anonymity<sup>1</sup>. The new system increases the likelihood of detection and prosecution for undertakings and, as such, stands to further deter businesses from entering or remaining in cartels or carrying out other types of illegal anti-competitive behaviour. For these reasons, it complements and reinforces the effectiveness of the Commission's leniency programme. The new tool protects the anonymity of whistleblowers through a specifically-designed encrypted messaging system that allows for two way communication. The service is run by a specialised external service provider that acts as an intermediary, and which relays only the content of received messages without forwarding any metadata that could be used to identify the individual providing the information. Individuals that are willing to reveal their identity can instead contact the Commission's competition department directly through a dedicated phone number and e-mail address.



The Commission continued to encourage cooperation by parties also in non-cartel antitrust cases (as is already the well-established practice in cartel cases through the cartel-specific framework of leniency and settlement). In addition to acknowledging liability for an infringement, companies can further cooperate by voluntarily disclosing (or clarifying) evidence, or by helping in the design and implementation of remedies. As a reward for genuine and meaningful cooperation by parties, the Commission may decide to reduce the

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<sup>1</sup> For further information see <http://ec.europa.eu/competition/cartels/whistleblower/index.html>.

finer for an infringement<sup>2</sup>. The possible level of fines reduction depends on the extent and timing of the cooperation in the specific case and the resulting benefits in terms of efficient procedure and effective enforcement.

The Commission also continued to actively work on the interaction between competition policy, algorithms, and data issues. In March, Commissioner Vestager set out a number of issues relating to algorithms and automated systems, and how these can reinforce or lead to restrictions of competition<sup>3</sup>: a key message was that companies cannot shield themselves from antitrust liability by arguing that an algorithm was responsible for their pricing, and what is illegal offline is likely to be illegal when carried out through algorithms as well. In June, DG Competition made a written contribution to the OECD roundtable on competition and algorithms<sup>4</sup>. And in October, Director-General Laitenberger delivered a speech that also dealt with the competition implications of data and algorithms<sup>5</sup>.

## 2. Significant judgments by the European Union Courts in antitrust and cartels

### *Article 101 TFEU*

#### *Restriction of competition by object*

In *Telefónica*<sup>6</sup>, the European Court of Justice confirmed the Commission's decision<sup>7</sup> that an agreement between Telefónica and Portugal Telecom (now PT) not to compete with each other on the Iberian telecommunications markets was contrary to Article 101 TFEU. In its decision, the Commission had found that the relevant clause amounted to a market-sharing agreement with the object of restricting competition and it imposed fines on both Telefónica and PT. The European Court of Justice confirmed the General Court's finding<sup>8</sup> that the non-compete clause was unlawful under Article 101 TFEU and that the clause constituted a restriction of competition by object.

#### *Setting of minimum fees by professional organizations*

The preliminary ruling in joined cases *CHEZ Elektro Bulgaria and FrontEx International*<sup>9</sup> concerned the application of Article 101(1) TFEU, read in conjunction with Article 4(3) TEU, in relation to minimum legal fees established by the Bulgarian professional association of lawyers. The European Court of Justice held that national legislation, which does not allow for a lawyer and client to agree on a remuneration below the minimum amount established by the association, and does not authorise courts to order reimbursement of fees in an amount below this minimum level, is capable of restricting competition in the internal market within the meaning of Article 101(1) TFEU. The European Court of Justice, however, also recalled that account must be taken of the overall context and the objectives of the decision of the

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<sup>2</sup> This was done, for the first time under Regulation No 1/2003, in Case AT.39759 ARA foreclosure. For further information see IP/16/3116 of 20 September 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-3116\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3116_en.htm).

<sup>3</sup> For further information see [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en).

<sup>4</sup> For further information see <http://www.oecd.org/daf/competition/algorithms-and-collusion.htm>.

<sup>5</sup> For further information see [http://ec.europa.eu/competition/speeches/text/sp2017\\_15\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf).

<sup>6</sup> Case C-487/16, *Telefónica SA v European Commission*, Judgment of the European Court of Justice of 13 December 2017, ECLI:EU:C:2017:961.

<sup>7</sup> Commission Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39.839 – Telefónica/Portugal Telecom).

<sup>8</sup> Case T-216/13 *Telefónica v Commission*, judgment of the General Court of 28 June 2016, EU:T:2016:369.

<sup>9</sup> Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria AD v. Yordan Kotsev and FrontEx International EAD v Emil Yanakiev*, judgment of the European Court of Justice of 23 November 2017, ECLI:EU:C:2017:890.

professional association and it has to be considered whether the consequential effects are inherent in the pursuit of those objectives.

#### *Selective distribution and platform bans*

In *Coty*<sup>10</sup>, a preliminary ruling concerning a prohibition on a reseller of luxury cosmetics not to sell the contract goods on third party online platforms (Amazon.de in this case), the European Court of Justice clarified that a platform ban neither constitutes a restriction of customers under Article 4 b) nor a restriction of passive sales to end users under Article 4 c) of the Vertical Block Exemption Regulation<sup>11</sup>. The European Court of Justice also confirmed that a selective distribution system for luxury goods, designed primarily to preserve the luxury image of those goods can comply with Article 101(1) TFEU provided that the so-called "Metro criteria" are met (e.g. resellers are chosen on the basis of objective criteria, laid down uniformly for all resellers, not applied in a discriminatory fashion and the criteria do not go beyond what is necessary). In its response to the question of the referring court, the European Court of Justice also held that a contractual clause which prohibits authorised distributors in a selective distribution system for luxury goods to use visible third party platforms for online sales may be compatible with Article 101(1) TFEU insofar as the clause has the objective of preserving the luxury image (which is a legitimate aim), is laid down uniformly, is not applied in a discriminatory fashion and is proportionate in the light of the objective pursued.

#### *Competition rules in the agricultural sector*

In a preliminary ruling in *Endives*<sup>12</sup>, the European Court of Justice clarified the application of competition rules in the agricultural sector. While recalling that that Article 42 TFEU recognises that the common agricultural policy takes precedence over the objectives of the Treaty in the field of competition and recognising the EU legislature's power to decide to what extent the rules on competition are to be applied in the agricultural sector, the European Court of Justice also recalled that competition is one of the objectives of the Common Agricultural Policy. The European Court of Justice ruled that price fixing, volume limitations and exchange of commercially sensitive information between producer organisations and associations of producer organisations are prohibited under Article 101 TFEU. Furthermore, the European Court of Justice clarified that under certain conditions Article 101 TFEU may not be applicable to some of these practices when they are carried out within a producer organisation: first, if the producer organisation or association of producer organisations is formally recognised by a Member State; and, second, if these practices are strictly necessary and proportional for carrying out specific objectives assigned to them by EU legislation.

#### *Article 102 TFEU*

##### *Exclusivity rebates*

In *Intel*<sup>13</sup> the European Court of Justice set aside the General Court's ruling that had found that Intel's exclusivity rebates were anticompetitive in nature, and referred the case back to the General Court for further examination.

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<sup>10</sup> Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, judgment of the European Court of Justice of 6 December 2017, ECLI:EU:C:2017:941.

<sup>11</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

<sup>12</sup> C-671/15, *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others*, Judgment of the European Court of Justice of 14 November 2017, ECLI:EU:C:2017:860.

<sup>13</sup> C-413/14 P *Intel v Commission*, judgment of the European Court of Justice of 6 September 2017, ECLI:EU:C:2017:632.

The European Court of Justice held that previous case law on exclusivity rebates needed to be clarified. To this effect the European Court of Justice made clear that the presumption of illegality of exclusivity rebates can be rebutted if the dominant undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing the alleged foreclosure effects. In the latter case the European Court of Justice held that the Commission "*is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market*".

The European Court of Justice then observed that, while in the particular case at hand the Commission had emphasised that the exclusivity rebates at issue were by their very nature capable of restricting competition, it nevertheless had carried out an in-depth examination of the capability of those rebates to restrict competition, including by conducting an "as efficient competitor" test. As that test played an important role in the Commission's assessment, the European Court of Justice held that the General Court was required to examine all of Intel's arguments concerning that test, which the General Court had failed to do. The European Court of Justice therefore referred the case back to the General Court so that it may examine, in the light of the arguments put forward by Intel, whether the rebates at issue were capable of restricting competition.

Although the European Court of Justice found no procedural irregularities that affected Intel's right of defence, it stressed that "*the Commission is required to record, in a form of its choosing, any interview which it conducts, under Article 19 of Regulation 1/2003, for the purpose of collecting information relating to the subject matter of an investigation*". Moreover, the European Court of Justice also rejected Intel's argument alleging that the Commission lacked territorial jurisdiction to penalise the abuse and confirmed that conduct made outside of Europe falls within the scope of EU antitrust rules, if it has substantial effects on European markets.

### *Excessive prices*

On a preliminary ruling in *Latvijas Autoru apvienība*<sup>14</sup>, the European Court of Justice clarified a number of questions related to the assessment of excessive prices. The questions were referred to it by the Latvian Supreme Court in the context of a review of the legality of rates applied by the national copyright management society to shops and other commercial premises for playing copyrighted music. The European Court of Justice held that for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of Article 102(a) TFEU, it is appropriate and sufficient to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the purchasing power parity index, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. The European Court of Justice clarified that the difference between the rates compared must be regarded as appreciable, and thus indicative of an abuse, if that difference is significant and persistent. It is then for the copyright management organisation to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of right

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<sup>14</sup> Case C-177/16 *Biedrība "Autortiesību un komunikēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome*, judgment of the European Court of Justice of 14 September 2017, ECLI:EU:C:2017:689.

holders.

### *Procedural issues*

#### *Fines and inability to pay*

The European Court of Justice handed down judgments on 14 appeals<sup>15</sup> against the General Court's judgments relating to the Commission's cartel decision in the *Bathroom Fixtures and Fittings* case<sup>16</sup>. This case concerned a long-lasting cartel (1992-2004) in the bathroom fittings and fixtures sector, involving 17 manufacturers that coordinated price increases, both annually and linked to specific events, across six Member States (Germany, Austria, Italy, France, Belgium and the Netherlands). In its 2010 decision, the Commission had imposed fines totalling more than EUR 622 million on the participants.

The European Court of Justice dismissed the appeals of the majority of the applicants. In the appeal submitted by *Laufen Austria*<sup>17</sup>, the European Court of Justice set aside the judgment under appeal in so far as the General Court held that the Commission had not made an error in taking the turnover of the Roca Group into account for the purpose of applying the 10% ceiling in respect of the period for which Laufen Austria was held solely responsible for the infringement. The European Court of Justice observed that the Commission must, for the purpose of calculating the 10% ceiling for the period for which it was held solely liable, take account only of the subsidiary's own turnover, and must take as a basis the turnover in the business year preceding the year in which the fining decision was adopted. The European Court of Justice referred the case back to the General Court, which reduced the fine for Laufen Austria by EUR 9 511 999, to a final total of EUR 4 788 001<sup>18</sup>.

#### *The inclusion by the Commission of direct EEA sales through transformed products in calculating the fine*

In *LG Electronics Inc. (LGE) and Koninklijke Philips Electronics NV*<sup>19</sup> (television and computer monitor tubes), the European Court of Justice confirmed that, for fine calculation purposes, the "value of sales" in the EEA includes sales of finished products incorporating the cartelised components in the EEA, when those components were first sold intra-group to non-

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<sup>15</sup> Judgements of 26 January of the European Court of Justice in cases C-604/13 P *Aloys F. Dornbracht GmbH & Co. KG v Commission*, EU:C:2017:45; C-609/13 P *Duravit AG, Duravit SA and Duravit BeLux SPRL/BVBA v Commission*, EU:C:2017:46; C-611/13 P *Hansa Metallwerke AG, Hansa Nederland BV, Hansa Italiana Srl, Hansa Belgium, Hansa Austria GmbH v Commission*, EU:C:2017:47; C-613/13 P *Commission v Keramag Keramische Werke GmbH, Koralle Sanitärprodukte GmbH, Koninklijke Sphinx BV, Allia SAS, Produits Céramiques de Touraine SA, Pozzi Ginori SpA and Sanitec Europe Oy*, EU:C:2017:49; C-614/13 P *Masco Corp., Hansgrohe AG, Hansgrohe Deutschland Vertriebs GmbH, Hansgrohe Handelsgesellschaft mbH, Hansgrohe SA/NV, Hansgrohe BV, Hansgrohe SARL, Hansgrohe Srl, Hüppe GmbH, Hüppe GesmbH, Hüppe Belgium SA/NV and Hüppe BV v Commission*, EU:C:2017:63; C-618/13 P *Zucchetti Rubinetteria SpA v Commission*, EU:C:2017:48; C-619/13 P *Mamoli Robinetteria SpA v Commission*, EU:C:2017:50; C-625/13 P *Villeroy & Boch AG v Commission*, EU:C:2017:52; C-626/13 P *Villeroy & Boch Austria GmbH v Commission*, EU:C:2017:54; C-636/13 P *Roca Sanitario SA v Commission*, EU:C:2017:56; C-637/13 P *Laufen Austria AG v Commission*, EU:C:2017:51; C-638/13 P *Roca SARL v Commission*, EU:C:2017:53; C-642/13 P *Villeroy & Boch Belgium SA v Commission*, EU:C:2017:58; C-644/13 P *Villeroy & Boch SAS v Commission*, EU:C:2017:59.

<sup>16</sup> Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39092 - *Bathroom Fittings and Fixtures*).

<sup>17</sup> Case C-637/13 P *Laufen Austria AG v Commission*, EU:C:2017:51.

<sup>18</sup> Case T-411/10 RENV, judgement of 12 September 2017 of the General Court, EU:T:2017:598.

<sup>19</sup> Joined cases C 588/15 P and C 622/15 P *LG Electronics Inc. and Koninklijke Philips Electronics NV v Commission*, judgment of the Court of 14 September 2017, ECLI:EU:C:2017:679.



EEA entities. In particular, the Court found that although the concept of the ‘value of sales’ (point 13 of the Fines Guidelines) does not include sales made by the undertaking that do not come within the scope of the infringement, it would be contrary to the objective pursued by Article 23(2) of Regulation No 1/2003 if vertically integrated participants in a cartel could expect to have the value of those goods excluded from the calculation of the fine, solely because they incorporated the goods forming the subject matter of the infringement into products finished outside the EEA<sup>20</sup>. Given that the LPD group (a joint venture between LGE and Philips) intervened in the product market affected by the infringement (TV and computer monitor tubes), while LGE and Philips were active in the market for the transformed goods in which those products were incorporated (TV and computer monitors), the LPD group and its parent companies did form a vertically integrated undertaking within the meaning of the aforementioned judgment.

Therefore, the European Court of Justice held that "*the Commission was entitled to include direct EEA sales through transformed products by the economic unit formed by the LPD group and its parent companies when calculating the basic amount of the fine imposed on the appellants*".

#### *Investigative Powers and use of evidence*

##### *Admissibility of evidence transmitted by a National Authority to the Commission other than the National competition authorities*

In *FSL Holdings*<sup>21</sup> (exotic fruit), the European Court of Justice confirmed the findings of the General Court<sup>22</sup> that the European Commission can use in a cartel investigation evidence transmitted by a national authority other than a Member State competition authority. In particular, "*the lawfulness of the transmission to the Commission by a prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law and second that the Courts of the European Union have no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority*"<sup>23</sup>. The reason is the general principle of EU law that evidence must be freely adduced. The European Court of Justice also confirmed the findings of the General Court that the rules of Article 12 of Regulation 1/2003 (whose objective is to facilitate the exchange of information within competition authorities) are not applicable in this case.

#### *Parental liability*

The *Toshiba*<sup>24</sup> case (television and computer monitor tubes) has clarified that the parents of a joint venture may be held liable under EU competition law for anti-competitive activities of that joint venture. The General Court had previously held that the Commission was right to find that both parents of a joint venture exercised joint control as both parents had veto rights "*with respect to matters of strategic importance which were essential for the pursuit of the*

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<sup>20</sup> Case C 231/14 P *InnoLux Corp. v Commission*, judgment of the Court of 9 July 2015, ECLI:EU:C:2015:451.

<sup>21</sup> Case C-469/15 P *FSL Holdings and Others v Commission*, judgment of the Court of 27 April 2017, ECLI:EU:C:2017:308.

<sup>22</sup> Case T-655/11 – *FSL Holdings and Others v Commission*, judgment of the General Court of 16 June 2015, ECLI:EU:T:2015:383.

<sup>23</sup> See also Case C-407/04 P *Dalmine v Commission*, judgment of the Court of 25 January 2007, ECLI:EU:C:2007:53.

<sup>24</sup> Case T-104/13 *Toshiba Corp. v Commission*, judgment of the General Court of 9 September 2015, ECLI:EU:T:2015:610.

*joint venture's activity*". The holding of such veto rights is in itself sufficient for it to be considered that the parent exercised decisive control over the joint venture. The question whether such rights were actually exercised is irrelevant. This was confirmed by the European Court of Justice<sup>25</sup>, which stated that, contrary to Toshiba's assertions, the General Court was not required to determine whether Toshiba had actually influenced the joint venture's operational management in order to conclude that those two companies formed part of a single economic unit.

To sum up, although a "*full-function*" joint venture under the EU Merger Regulation can be economically autonomous from an operational point of view, this does not mean that it also enjoys full autonomy with regard to the adoption of strategic commercial decisions. Moreover, even if a parent company has only "*negative power*" (such as veto rights) to block certain decisions of the joint venture and was unable to impose any decisions on it, it can be still considered as having decisive influence over it.

The *Akzo Nobel NV and others*<sup>26</sup> case (heat stabilisers), has clarified the rules concerning the liability of parent companies for the unlawful conduct of their subsidiaries as regards limitation periods. The European Court of Justice has upheld the General Court's judgment, which confirmed that the Commission is not prevented from holding a parent company liable for infringements committed by two of its subsidiaries where the fines imposed on the two subsidiaries have been annulled due to prescription and the limitation period is not exceeded for the parent company. In particular, the European Court of Justice held that: "[...] *factors specific to the parent company may justify assessing the parent company's liability and that of its subsidiary differently, even if the liability of the former is based exclusively on the unlawful conduct of the latter*".

#### *Cartel settlements*

*The Commission is not bound by the proposals made during settlement proceedings if the undertaking decides not to settle. The parallel "hybrid" procedure is fully confirmed as lawful.*

"Hybrid" cartel cases are those in which not all cartel participants chose to participate in a settlement procedure. Therefore, in hybrid cases, there are two infringement decisions – a settlement decision, and an ordinary decision for the parties that chose not to settle.

In *Timab Industries and Compagnie financière et de participations Roullier/CFPR*<sup>27</sup> (animal feed), the European Court of Justice upheld the earlier findings of the General Court in the *Animal Feed* cartel case, in which the General Court fully endorsed the first "*hybrid*" decision adopted against Timab, a company that opted out of the settlement and was fined under the normal procedure (Timab). The decision against Timab was adopted at the same time as the settlement decision. It was thus a parallel "*hybrid*" case. The European Court of Justice agreed that, as long as the equal treatment principle is respected, there are no legitimate expectations that the scope of the case or the contemplated fine for the company that opted out of the settlement would remain the same as discussed and disclosed during the settlement procedure. Therefore, the settlement discussions do not necessarily determine the scope and amount of

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<sup>25</sup> Case C-623/15 P, *Toshiba Corp. v Commission*, judgment of the Court of 18 January 2017, ECLI:EU:C:2017:21.

<sup>26</sup> Case C-516/15P *Akzo Nobel NV and Others v Commission*, judgment of the Court of 27 April 2017, ECLI:EU:C:2017:314.

<sup>27</sup> Case C-411/15 P *Timab Industries and CFPR v Commission*, judgment of the Court of 12 January 2017, ECLI:EU:C:2017:11.

the fine in the ordinary decision.

In particular, the European Court of Justice's review confirmed that the General Court correctly verified the validity of the Commission's analysis. Under that analysis, the Commission was justified in ultimately imposing a higher fine on Timab (CFPR) under the standard administrative procedure than the amount proposed earlier during the settlement procedure. In this respect, the European Court of Justice agreed with the General Court in finding that the Commission had to take into account, during the standard procedure, new information requiring it to review the file, to redefine the duration of the cartel and to adjust the fine by not applying reductions it had proposed during the settlement procedure, thus rejecting any arguments of legitimate expectations and equal treatment.

*ICAP – restriction by object, facilitation, staggered hybrid procedure*

The Commission adopted in 2013 a first settlement decision against six banks and one broker, while a decision against the non-settling party, the broker ICAP, was adopted at a later stage in 2015. The judgement of the General Court<sup>28</sup> is a staggered hybrid case and it is important for several reasons.

Firstly, the General Court agreed with the Commission's assessment of the cartel infringements in the Japanese yen interest rate derivatives sector as a restriction of competition by object. The banks' manipulation of the interest rate benchmark was recognised as being similar to a "classic" price-fixing agreement despite the particularities of the derivative product and the fact that the manipulation of the benchmark could be either upwards or downwards.

Secondly, the conduct of ICAP qualified as cartel facilitation, because ICAP intentionally contributed to the common objective of the cartel and was not a peripheral, outside service provider. The judgement confirms that competition rules apply to both undertakings on the cartelised market and facilitators that are not present on that market. Moreover, the concept of facilitation is not limited to secretarial work, as it was the situation in the previous facilitation case upheld by the European Court of Justice (*AC Treuhand*)<sup>29</sup>. In particular, ICAP served as a communication channel between cartelists, contacted other banks not participating the infringement, with the aim of influencing their behaviour, and spread misleading information.

Finally, the judgment confirms the legality of the staggered hybrid procedure provided that it complies with the presumption of innocence of the non-settling parties. Staggered proceedings take place when the settlement decision, and the ordinary decision against the parties that chose not to settle, are not adopted at the same time.

At the same time, the General Court judgement partially annuls the Commission decision.

Firstly, the General Court has found that the Commission has not succeeded in proving that ICAP participated as a facilitator in one of the six infringements described in its decision (it is not proven that ICAP was aware of one of the banks' role in that infringement). Moreover, The General Court has found that the duration of ICAP's participation in four other infringements was shorter than the duration found by the Commission. The General Court has applied a so-called "comprehensive" standard of review which involves a document-by-document assessment of the evidence.

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<sup>28</sup> Case T-180/15 *ICAP. v Commission*, judgment of the General Court of 10 November 2015.

<sup>29</sup> Case C-194/14 P *AC Treuhand v Commission*, judgment of the European Court of Justice of 22 October 2015.

Secondly, the General Court has annulled the fines in full because it considered that the Commission failed to provide sufficient reasoning regarding the methodology for calculating the fines. The General Court followed its own case law (*Printeos*<sup>30</sup>) in requesting the Commission a detailed reasoning when it imposes a fine, the calculation of which was based on point 37 of the 2006 Fines Guidelines. On this aspect, the Commission has appealed the judgment and submitted that the General Court incorrectly applied the case law of the Court of Justice on the statement of reasons required when imposing fines<sup>31</sup>.

Finally, the General Court also held that the Commission has infringed the presumption of ICAP's innocence when adopting the 2013 settlement decision because ICAP is mentioned as a facilitator in that decision. However, after analysis, the General Court concluded that such breach did not have in this case a direct impact on the legality of the ICAP decision and therefore ICAP's plea for annulment of the decision on that basis was rejected.

#### *Commitment decisions*

In *Gasorba v Repsol*<sup>32</sup>, the European Court of Justice confirmed in a preliminary ruling that a national court may still review agreements that were the subject of a commitment decision adopted by the Commission. The European Court of Justice found that commitment decisions adopted by the Commission under Article 9(1) of Council Regulation (EC) No 1/2003 do not prevent a national court from finding that an infringement of Article 101 TFEU has been committed and, if necessary, declare the agreements in question void pursuant to Art. 101(2) TFEU. At the same time, the European Court of Justice observed that both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU.

#### *Publications*

*Issues regarding publication and Confidentiality under the Leniency Program and the scope of powers of the Hearing Officer (especially under Article 8 of the Terms of Reference)*

In *Evonik Degussa*<sup>33</sup> (hydrogen peroxide) the European Court of Justice set aside, in part, the General Court's judgment insofar as the General Court held that the Commission's Hearing Officer was correct to decline competence to answer the objections regarding the breach of the principles of equal treatment and protection of legitimate expectations to the proposed publication of a detailed, non-confidential version of the Commission's decision. The European Court of Justice, after giving an overview of the scope of the powers of the Hearing Officer (under Article 8 of Decision 2011/695 concerning the Terms of Reference for the Hearing Officer) held that the Hearing Officer has the mandate and competence to review any objection based on a ground, arising from rules or principles of EU law relied on by the interested person in order to claim protection of the confidentiality of the contested information.

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<sup>30</sup> Case T-95/15 *Printeos and others v Commission*, judgment of the General Court of 13 December 2016, ECLI:EU:T:2016:722.

<sup>31</sup> Case C-39/18 P *Commission v Icap and Others*.

<sup>32</sup> Case C-547/16, *Gasorba SL and others v Repsol Commercial de Productos Petrolíferos SA*, judgment of the European Court of Justice of 23 November 2017, ECLI:EU:C:2017:891.

<sup>33</sup> Case C-162/15 *Evonik Degussa v Commission*, judgment of the Court of 14 March 2017, ECLI:EU:C:2017:205.

The European Court of Justice thereafter dismissed the remaining grounds of appeal, with the most notable being the claim that the General Court wrongfully drew a distinction between the publication of documents communicated by applicants for leniency, which would generally be unlawful, and the publication of information from those documents, such as extracts from the statements made by those applicants, which would be lawful. In particular, the European Court of Justice held that "*In that regard, it must be pointed out that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances*".

### *Rejection of complaints*

In *Confédération européenne des associations d'horlogers-réparateurs (CEAHR)*<sup>34</sup> the General Court upheld the Commission's decision rejecting a complaint lodged by the European Confederation of Watch and Clock Repairers' Association's ("CEAHR").

CEAHR's complaint, lodged in 2004, alleged that manufacturers of prestige/luxury watches infringed EU competition law by refusing to continue to supply spare parts to independent repairers.<sup>35</sup> The 2008 Commission rejection decision of the complaint was annulled by the General Court for errors of assessment and insufficient motivation of some of the conclusions.<sup>36</sup> After a thorough re-assessment of the case, the Commission again rejected the complaint in 2014. The General Court fully upheld this second rejection decision. The General Court held that the Commission did not err in law by considering that a selective distribution system, and, by analogy, a selective repair system, was in conformity with Article 101 TFEU provided that it was objectively justified, non-discriminatory and proportionate.

The General Court then held that the Commission, when exercising its discretion, was correct in considering that if a selective distribution system falls outside the scope of Article 101(1) TFEU, this is an indication that the system is unlikely to have the effect of eliminating all competition within the meaning of the case-law relating to Article 102 TFEU. The General Court also upheld the Commission's position that it is only in certain circumstances that a refusal to supply can constitute an abuse within the meaning of Article 102 TFEU, and that for an abuse to be established there must be a risk of all effective competition being eliminated.

In *Agria Polska*<sup>37</sup>, the General Court upheld the Commission's decision rejecting a complaint claiming a vexatious administrative and criminal law campaign pursued by major agrochemical complainants allegedly seeking to exclude Agria Polska from markets for the supply of plant protection products. The General Court made clear that the Commission's refusal to pursue a case that could not be pursued by a national competition authority, due to the limitation period under national law, does not deprive Articles 101 and 102 TFEU of their

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<sup>34</sup> Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, judgment of the General Court of 23 October 2017, EU:T:2017:748.

<sup>35</sup> Case AT.39097 Watch Repair, for further information see [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39097](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39097).

<sup>36</sup> Case T-427/08 *CEAHR v Commission*, judgment of the General Court of 15 December 2010, EU:T:2010:517.

<sup>37</sup> Case T-480/15 *Agria Polska and Others v Commission*, judgment of the General Court of 16 May 2017, ECLI:EU:T:2017:339.

effectiveness. In this context, the General Court recalled that private actions for damages can contribute to the effective enforcement of these provisions in particular when the Commission does not pursue the case. The General Court also pointed out that the fact that the allegedly anticompetitive conduct took place in several Member States had to be treated as merely indicating that an action at EU level could be more effective than various actions at national level. However, such evidence would not, in itself, suffice to justify opening of an investigation by the Commission. The General Court's ruling has been appealed.<sup>38</sup>

In *Topps*<sup>39</sup>, the General Court upheld the Commission decision rejecting a complaint alleging inter alia that the manner in which certain football bodies and associations licensed intellectual property rights, for the purpose of producing collectibles related to major international football tournaments (stickers and trading cards), was in breach of Articles 101 and 102 TFEU.

The General Court, while reconfirming that Article 8(1) of Regulation 773/2004<sup>40</sup> provides for a limited access to file that entitles complainants to receive all the documents on which the Commission bases its provisional assessment of the complaint, stressed that this applies even if the Commission subsequently decides to no longer rely on those documents in the final decision rejecting the complaint. After careful examination of these documents, the General Court found no procedural error on the part of the Commission. The General Court also held that the Commission did not commit a manifest error of assessment in relying solely on the limited likelihood of establishing an infringement of Article 101 and Article 102 and on the disproportionate nature of the investigative measures required, nor had it made an error in the assessment of the low likelihood of finding infringements of the two provisions.

In *VIMC*<sup>41</sup> the General Court upheld a Commission decision<sup>42</sup> rejecting a complaint by Vienna International Medical Clinic GmbH ("VIMC") on the basis of Article 13(1) of Regulation 1/2003. The General Court recalled that for the application of Article 13(1), only two conditions need to be satisfied: that a Member State "is dealing with" the case before it and that the case concerns the "same agreement, decision of an association or practice". The General Court was satisfied with the evidence showing that the Austrian competition authority (Bundeswettbewerbsbehörde, "BWB") was actively dealing with the case, namely, the BWB's confirmation to the Commission that it had started an investigation and was dealing with the case. The fact that the BWB was dealing with the complaint against the same practice was also confirmed by documents showing that the BWB had informed the complainant of the on-going proceedings and had invited the complainant to a meeting.

The General Court took the opportunity to recall that national competition authorities and the Commission have parallel powers and that a complainant has no right for its case to be dealt with by the Commission, even if the Commission were particularly well placed to deal with its case.

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<sup>38</sup> Appeal Case before the European Court of Justice C-373/17 P.

<sup>39</sup> Case T-699/14 *Topps Europe v Commission*, judgment of the General Court of 11 January 2017, ECLI:EU:T:2017:2.

<sup>40</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123 , 27.04.2004, pp.18-24.

<sup>41</sup> Case T-431/16, *VIMC – Vienna International Medical Clinic GmbH v Commission*, Judgment of the General Court of 26 October 2017, ECLI:EU:T:2017:755.

<sup>42</sup> Commission Decision C(2016) 3351 final of 27 May 2016 (Case COMP/AT.40231 – VIMC/WK&FGB).

### 3. The fight against cartels remains a top priority

Cartels are secret agreements between sellers or buyers of the same product or service. They are made with the objective of fixing prices, limiting output or allocating clients and suppliers. Cartels harm the consumers at all levels of the value chain and the economy as a whole. Cartelists charge inflated prices, limit the choice of the consumers and block innovation. Only undistorted competition guarantees that scarce resources are used in the most efficient way. The Commission's action to stop hard core cartels prevents companies from continuing to profit from illegal overcharges and thereby contributes to fair and balanced business relationships. The significant sanctions imposed by the Commission deter companies from entering into cartels or from remaining in cartels, sending a clear signal that operating a cartel will ultimately not pay off.

The Commission's cartel enforcement allows the consumers to benefit of an economy that works well for them. The Commission's strong enforcement record against hard core cartels continued in 2017. As in preceding years, the Commission adopted cartel decisions in important sectors for innovation and investment, such as the circular economy and the automotive industry. The settlement procedure remains an efficient tool regularly used by the Commission in its fight against cartels.

#### **The car parts investigations**

The Commission has been conducting a number of investigations in the car parts sector. Since 2013 the Commission adopted 8 cartel decisions covering around 30 different car parts and sanctioned the undertakings involved in these cartels with a total amount of fines of around EUR 1.6 billion. Several other competition authorities have sanctioned a number of cases and /or are in the process of adopting further decisions concerning these cartels.

On 8 March, the Commission imposed a total fine of EUR 155 million on six car *air conditioning and engine cooling*<sup>43</sup> suppliers for taking part in one or more of four cartels concerning supplies of components to car manufacturers in the EEA between 2004 and 2009. All six suppliers (Behr, Calsonic, Denso, Panasonic, Sanden and Valeo) acknowledged their involvement in the cartels and agreed to settle the case. Denso was not fined for three of the cartels as it revealed their existence to the Commission. Panasonic was not fined for one of the cartels as it revealed its existence to the Commission. All other parties co-operated with the Commission under the leniency program and benefitted accordingly from fine reductions. Since all six undertakings agreed to settle the case with the Commission, they benefited from a further reduction of fines by 10%.

The Commission fined EUR 27 million three companies which, for more than three years, coordinated prices and other trading conditions for the supply of vehicle *lighting systems*<sup>44</sup>, across the European Economic Area (EEA). Vehicle lighting systems include parts such as headlamps or daytime running lights. The cartel concerned the supply of these spare parts to manufacturers of passenger and commercial vehicles after the end of mass production of a car model. All three suppliers (Valeo, Automotive Lighting and Hella) acknowledged their involvement in the cartel and agreed to settle the case. Valeo was not fined for the cartel as it revealed its existence to the Commission. Since the 3 companies agreed to settle the case with the Commission, their fines were further reduced by 10%.

The Commission imposed a total fine of EUR 34 million for four different infringements on five *Occupant Safety Systems*<sup>45</sup> suppliers, which for several years coordinated prices or markets and exchanged sensitive

<sup>43</sup> Case AT.4000 *Thermal Systems*, Commission decision of 8 March 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39960](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39960). See also [http://europa.eu/rapid/press-release\\_IP-17-501\\_en.htm](http://europa.eu/rapid/press-release_IP-17-501_en.htm)

<sup>44</sup> Case AT.40013 *Lighting systems*, Commission decision of 21 June 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40013](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40013). See also [http://europa.eu/rapid/press-release\\_IP-17-1741\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1741_en.htm)

<sup>45</sup> Case AT.39881 *Occupant Safety Systems*, Commission decision of 22 November 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39881](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39881). See also [http://europa.eu/rapid/press-release\\_IP-17-4844\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4844_en.htm)

information for the supply of seatbelts, airbags and steering wheels to Japanese car manufacturers (Toyota, Suzuki, and Honda) in the European Economic Area (EEA). All companies (Tokai Rika, Takata, Autoliv, Toyoda Gosei, and Marutaka) acknowledged their involvement in the cartels and agreed to settle the case. Consequently, their fines were further reduced by 10%. Tokai Rika and Takata were not fined for one and three infringements respectively, as they revealed their existence to the Commission.

These three cases bring the total number of settlement decisions adopted since 2010 to 25. During the same period, around 54% of the total amount of the fines imposed by the Commission was via settlement decisions.

The Commission completed its investigation in one "hybrid" case in 14 months after the settlement decision. In "hybrid" cases, decisions are adopted both under the ordinary and under the settlement procedure in the same case. In these cases, all but a limited number of parties (generally one) were willing to settle and the Commission decided to adopt a settlement decision for the ones willing to settle which represented a large majority. For the parties which did not wish to follow the settlement route, the Commission subsequently adopted the decision under the normal procedure.

The Commission's investigation against Scania was carried out under the standard cartel procedure after Scania decided not to settle the *Trucks* cartel case, unlike the other five participants in the cartel. In July 2016, the Commission had reached a settlement decision concerning the trucks cartel with MAN, DAF, Daimler, Iveco and Volvo/Renault. The Commission's investigation revealed that Scania coordinated prices at "gross list" level for medium and heavy trucks in the European Economic Area (EEA), the timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards and the passing on to customers of the costs for the emissions technologies. The infringement lasted 14 years from 1997 to 2011. The Commission imposed a fine of EUR 880 523 000 to Scania its decision of 27 September<sup>46</sup>.

Ordinary procedures remain significant because not all investigations may be suitable for settlement discussions. Relevant factors for screening cases in order to determine whether a settlement procedure seems appropriate include the number of parties, the proportion of leniency applicants in relation to the total number of parties, the degree of contestation, conflicting positions between the parties and the existence of novel features or aggravating circumstances in the investigated practices. When the right circumstances are not met, the Commission will apply the ordinary procedure.

#### **The first cartel case in the circular economy**

On 8 February, the Commission imposed a total fine of EUR 68 million on four European recycling companies<sup>47</sup> for having participated, between 2009 and 2012, in a cartel to fix the purchase prices of scrap automotive batteries in Belgium, France, Germany, and the Netherlands. The cartel concerned the purchases of scrap lead-acid automotive batteries. The four companies – Campine, Eco-Bat Technologies, Johnson Controls and Recylex – colluded in order to reduce purchase prices of waste batteries or prevent their increase. Johnson Controls benefited from immunity under the Commission's 2006 Leniency Notice for revealing the existence of the cartel to the Commission. This was the first purchase price-fixing cartel to be sanctioned under the 2006 Guidelines on Fines and also the first European cartel case in a sector of the 'circular economy'.

<sup>46</sup> Case AT.39824 *Trucks*, Commission decision of 27 September 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39824](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824). See also [http://europa.eu/rapid/press-release\\_IP-17-3502\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3502_en.htm)

<sup>47</sup> Case 40018 *Car battery recycling*, Commission decision of 8 February 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40018](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40018). See also [http://europa.eu/rapid/press-release\\_IP-17-245\\_en.htm](http://europa.eu/rapid/press-release_IP-17-245_en.htm)



The Commission re-adopted two decisions annulled by the EU's General Court on procedural grounds in order not to let cartels unsanctioned and maintain deterrence.

In 2010, the Commission imposed fines of nearly €800 million on 11 air cargo carriers who participated in a price-fixing cartel, in the airfreight services market covering flights from, to and within the European Economic Area (a 12<sup>th</sup> cartel member received full immunity from fines). All but one of the 12 air cargo carriers that were the addressees of the 2010 decision challenged the decision before the General Court. In December 2015, the General Court annulled the Commission's decision against the 11 air cargo carriers that appealed, concluding that there had been a procedural error. In the re-adoption decision<sup>48</sup>, the Commission addressed the procedural error identified by the General Court while keeping exactly the same anticompetitive behaviour previously targeted by the Commission.

The Commission readopted a cartel settlement decision against the envelopes manufacturer *Printeos* and imposed a fine of nearly EUR 4,7 million for its participation in a price fixing cartel. *Printeos* and four other manufacturers agreed to settle the case in December 2014. In December 2016, the General Court annulled the fine against *Printeos* due to lack of sufficient reasoning concerning discretionary fine reductions. The judgment did not question *Printeos*' liability for the cartel, which the company had itself acknowledged in the settlement procedure. The re-adoption decision<sup>49</sup> addresses the procedural error identified by the General Court and re-imposes an identical fine on *Printeos*.

The Commission remains committed to pursuing all cartels across all sectors where it has sufficient evidence of an infringement detected through its leniency programme or its ex-officio action (more information on the cartel decisions is available in the sectoral overview). As part of the enhancement of its ex-officio activities, the anonymous whistleblower tool was launched in March<sup>50</sup>. Whistleblowers can contact the Commission by phone, e-mail or on fully anonymous basis through a dedicated online tool. Following the launch, the Commission received information through all three communication channels.

The Commission's cartel enforcement record in 2017 remains strong with seven decisions and fines totalling approximately EUR 1,945 billion, coupled with solid work for further enforcement in the years to come.

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<sup>48</sup> Case 39258 *Airfreight*, Commission decision of 17 March 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39258](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39258). See also [http://europa.eu/rapid/press-release\\_IP-17-661\\_en.htm](http://europa.eu/rapid/press-release_IP-17-661_en.htm)

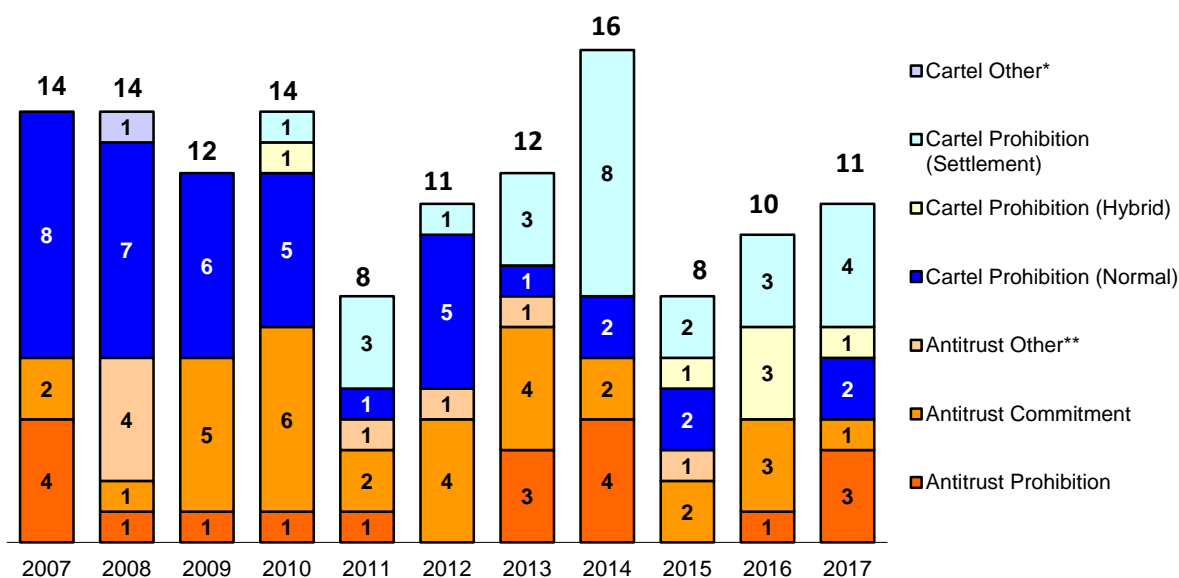
<sup>49</sup> Case 39780 *Envelopes*, Commission decision of 16 June 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39780](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39780)

<sup>50</sup> For further information see <http://ec.europa.eu/competition/cartels/whistleblower/index.html>

Case name	Adoption date	Fine imposed EUR	Undertakings concerned	Prohibition Procedure
Car battery recycling	08/02/2017	67 609 000	4	Prohibition
Thermal systems	08/03/2017	155 575 000	6	Settlement
Airfreight (readoption)	17/03/2017	776 465 000	11	Prohibition
Envelopes (readoption)	16/06/2017	4 729 000	1	Settlement
Lighting Systems	21/06/2017	26 744 000	3	Settlement
Trucks (Scania)	27/09/2017	880 523 000	1	Hybrid*
Occupant Safety Systems	22/11/2017	34 011 000	5	Settlement

\* normal procedure part of a hybrid case with a settlement decision in July 2016

### Antitrust and cartel output:



\* Rejection of complaint \*\* Rejection of complaint, procedural infringement, penalty payment  
Source: Directorate-General for Competition

## 4. Continuing close cooperation within the European Competition Network (ECN) and with national courts

The national competition authorities (NCAs) play a key role in applying the EU competition rules alongside the Commission. Action by NCAs accounts for 85% of public enforcement of the EU antitrust rules. This is a significant contribution to further drive economic growth and to make sure that markets work well, empowering consumers and businesses alike.

However, there is room for improvement. NCAs often lack the means and instruments they need to be truly effective enforcers. If NCAs cannot realise their full potential, this weakens one of the main facets of the single market namely, ensuring that competition is not distorted in Europe.

The 2014 Commission *Communication on Ten Years of Regulation 1/2003*<sup>51</sup> identified a number of areas of action to make enforcement by the NCAs more effective, in particular that they have effective enforcement powers and fining tools, and have adequate resources and are sufficiently independent when enforcing EU competition law. By way of follow-up, the Commission carried out a public consultation<sup>52</sup> between November 2015 and February 2016 and sounded out options for concrete action with both the NCAs and the Member State ministries.

#### **Support for empowering NCAs to become more effective enforcers**

On 22 March, the Commission adopted a proposal for a Directive to empower NCAs to be more effective enforcers<sup>53</sup>. The proposal follows on from the public consultation launched in November 2015, in which 80% of stakeholders thought that action should be taken to ensure that NCAs have the means and instruments they need<sup>54</sup>. The proposal aims to ensure that the NCAs have the necessary minimum guarantees that they can take decisions independently and have the resources and tools they need to stop and sanction infringements. This includes having effective leniency programmes that encourage companies across Europe to come forward with evidence of illegal cartels. The proposal takes the form of a Directive to ensure due respect of national traditions and specificities. The importance of companies' fundamental rights is underlined: appropriate safeguards must be in place for the exercise of NCAs' powers, in accordance with the EU Charter of Fundamental Rights and general principles of EU law.

#### *Cooperation with national courts*

Effective overall enforcement of antitrust rules in the EU, for the benefit of for both EU households and businesses, requires interplay between public and private enforcement. In addition to its cooperation with NCAs in the context of the European Competition Network (ECN), the Commission also continued its cooperation with national courts (NCs) under Article 15 of Regulation 1/2003. The Commission helps NCs to enforce the EU competition rules in an effective and coherent manner by providing case-related information or an opinion on matters of substance or by intervening as *amicus curiae* in proceedings pending before the NCs.

Following approval from the concerned courts, the Commission publishes its opinions and *amicus curiae* observations on its website<sup>55</sup>.

#### *Private enforcement*

Directive 2014/104/EU on antitrust damages actions (Damages Directive)<sup>56</sup> aims at ensuring that anyone harmed by infringements of the EU competition rules can effectively avail itself of the right to compensation before national courts. The deadline to implement the Damages Directive in Member States' legal systems expired on 27 December 2016. On 18 January 2017, the Commission sent Letters of Formal Notice opening infringement procedures for

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<sup>51</sup> Communication from the Commission of 9 July 2014, *Ten Years Of Antitrust Enforcement Under Regulation 1/2003: Achievements And Future Perspectives*, COM/2014/0453 available at [http://ec.europa.eu/competition/antitrust/legislation/antitrust\\_enforcement\\_10\\_years\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf).

<sup>52</sup> For further information see

[http://ec.europa.eu/competition/consultations/2015\\_effective\\_enforcers/index\\_en.html](http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html).

<sup>53</sup> For further information see <http://ec.europa.eu/competition/antitrust/nca.html>.

<sup>54</sup> For further information see IP/15/5998 of 4 November 2015 available at

[http://europa.eu/rapid/press-release\\_IP-15-5998\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5998_en.htm) and

[http://ec.europa.eu/competition/consultations/2015\\_effective\\_enforcers/index\\_en.html](http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html).

<sup>55</sup> For further information see [http://ec.europa.eu/competition/court/overview\\_en.html](http://ec.europa.eu/competition/court/overview_en.html).

<sup>56</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1-19.

non-communication of transposing measures by the deadline against 21 Member States. Of those, 18 Member States fully transposed the Directive in 2017 and the respective infringements proceedings were closed. Bulgaria, Greece and Portugal adopted transposing measures in the first months of 2018 and the completeness of their transposing measures will be assessed before the closure of the infringement proceedings. The Commission will also proceed to the conformity check of all the 28 national transpositions.

## Merger control

### EU merger control

The purpose of EU merger control is to ensure that market structures remain competitive while enabling smooth restructuring of the industry. This applies not only to EU-based companies, but also to any company active on the EU markets. Industry restructuring is an important way of fostering efficient allocation of production assets. However, there are also situations where industry consolidation can give rise to harmful effects on competition, taking into account the merging companies' degree of market power and other market features. EU merger control ensures that changes in the market structure which lead to harmful effects on competition do not occur.

EU merger control seeks to maintain open and competitive markets, which is the best way to ensure that businesses and final consumers obtain fair outcomes. It strives to protect all aspects of competition: as a result, it helps to ensure market structures, in which companies compete not only on price, but also on innovation in order to attract customers. The Commission's merger enforcement practice in 2017, for example, in the agro-chemical<sup>57</sup> and pharmaceutical<sup>58</sup> sectors, shows that the Commission considers innovation and investments as important aspects of competition. The Commission will continue to assess the effects on innovation in the ongoing investigations, where relevant, for example in the proposed acquisition by Bayer of Monsanto.

By protecting all these aspects of competition, EU merger control contributes to the achievement of fairer market structures and a level playing field. Those transactions which may potentially bring discriminatory results by distorting the parameters for competition are subject to close scrutiny by the Commission, which is committed to protect consumers by requesting the necessary commitments to dispel these concerns or, if necessary, by prohibiting the transaction. For example, in 2017 the merger between Deutsche Börse and London Stock Exchange<sup>59</sup> and the acquisition of Cemex Croatia by its rivals HeidelbergCement and Schwenk<sup>60</sup> were ultimately blocked to protect consumers and prevent unfair results.

EU merger control also takes into account efficiencies brought about by mergers which bring positive effects on price, innovation and other aspects, provided they are verifiable, merger-specific and likely to be passed on to consumers.

As highlighted in previous reports on competition policy, the Commission continuously evaluates the substantive and procedural rules that make up the legal framework in force for merger control. Such reflections are conducted both internally, based on collected experience,

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<sup>57</sup> Case M.7932 *Dow/ DuPont*, Commission decision of 27 March 2017. For further information see IP/17/722 available at [http://europa.eu/rapid/press-release\\_IP-17-772\\_en.htm](http://europa.eu/rapid/press-release_IP-17-772_en.htm).

<sup>58</sup> Case M.8401 *J&J/ Actelion*, Commission decision of 9 June 2017. For further information see IP/17/1582 available at [http://europa.eu/rapid/press-release\\_IP-17-1582\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1582_en.htm).

<sup>59</sup> Case M.7995 *Deutsche Börse/ London Stock Exchange Group*, Commission decision of 29 March 2017. For further information see IP/17/789 available at [http://europa.eu/rapid/press-release\\_IP-17-789\\_en.htm](http://europa.eu/rapid/press-release_IP-17-789_en.htm).

<sup>60</sup> Case M.7878 *HeidelbergCement/ Schwenk/ Cemex Hungary/ Cemex Croatia*, Commission decision of 5 April 2017. For further information see IP/17/883 available at [http://europa.eu/rapid/press-release\\_IP-17-883\\_en.htm](http://europa.eu/rapid/press-release_IP-17-883_en.htm).

and following external input. In this context, the Commission regularly assesses concerns and suggestions for further improvement voiced by stakeholders, evaluates the need for reform and policy changes in specific areas which give rise to new debates, and checks that its policies and enforcement practices do not unduly create red-tape for companies and thereby hamper innovation and investment.

## 1. Recent enforcement trends

In 2017, 380 mergers were notified to the Commission, the second highest number in the history of EU merger control. This continues to represent a substantial increase compared with preceding years: in the period 2010-2016 the average number of notifications was 306 per year<sup>61</sup>. Each year since 2013 there has been a steady upward trend in the number of merger notifications. Among the notifications received in 2017, 28 were reasoned pre-notification submissions by the notifying parties to request the referral of a case from the Commission to a Member State or *vice versa*.

Like in the previous years, most of the notified mergers have not raised any competition concerns and could be notified and processed speedily: around 73% of all notified transactions in 2017 were dealt with under the simplified procedure. This reflects the impact of the simplification package adopted by the Commission in December 2013: the proportion of simplified cases in the period 2004-2013 was significantly lower, amounting to 59%.

Nevertheless, 2017 involved intensive work by the Commission both due to the large number of notified transactions and the complexity of a significant number of cases. An increasing number of notified transactions related to industries already characterised by significant concentration. This required the Commission to cast a particularly close look at their potential impact on competition, employing sophisticated quantitative techniques and comprehensive qualitative investigations.

In 2017, in seven cases the Commission opened in-depth investigations (second phase). These cases concerned various sectors, including agro-chemicals and seeds, semiconductors, steel, eyewear, cellulose derivatives, titanium dioxide, and commercial vehicles components.

The Commission took 375 final decisions in merger cases in 2017<sup>62</sup>. The number of 24 interventions was somewhat higher compared with the average of the last seven years, which amounted to around 20 interventions per year<sup>63</sup>. In 2017, 18 mergers were cleared subject to commitments in the first phase and two in the second phase. In two cases, the parties abandoned a transaction during the in-depth investigation<sup>64</sup>. Moreover, in two cases the Commission had to adopt prohibition decisions<sup>65</sup>.

In enforcing control over mergers, the Commission continued to apply well-established legal and economic principles.

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<sup>61</sup> The total number of notifications received in 2017 is 5% higher than in 2016 and 13% higher than in 2015.

<sup>62</sup> For the purposes of this report, decisions based on Articles 6(1)(a), 6(1)(b), 6(1)(c) in combination with 6(2), 8(1), 8(2) and 8(3) of the Merger Regulation are considered as final decisions.

<sup>63</sup> Commission interventions in merger cases include prohibition decisions and mergers cleared subject to commitments, as well as withdrawals during second phase in-depth investigation.

<sup>64</sup> Case M.7095 *SOCAR/DESFA*, notified to the Commission on 1 October 2014 and the notification withdrawn on 2 February 2017. Case M.8222 *Knorr-Bremse/ Haldex*, notified to the Commission on 1 June 2017 and the notification withdrawn on 19 September 2017.

<sup>65</sup> Case M.7995 *Deutsche Börse/ London Stock Exchange Group*, Commission decision of 29 March 2017 and case M.7878 *HeidelbergCement/ Schwenk/ Cemex Hungary/ Cemex Croatia*, Commission decision of 5 April 2017.

To frame its competitive analysis, as an initial step, the Commission traditionally defines relevant markets taking into account all effective alternative sources of supply available to customers. The definition of relevant markets is case-specific and based on market realities. The Commission's approach is in line with the international best practices and well-founded economic principles, as confirmed, for example, by the 2016 independent report of professors B. Lyons and A. Fletcher of the University of East Anglia<sup>66</sup>. In its merger assessments in 2017, the Commission continued to apply those principles. Also, even when some sources of competition, such as imports, did not lead to a widening of the geographic market, the Commission took them into account, where relevant, as part of the substantive assessment<sup>67</sup>. However, the Commission did not artificially expand market definition – while this may allow for the creation of larger European Economic Area players, competition may suffer. And it is the exposure to continuous competition, from within the European Economic Area and abroad, which makes European companies stronger on the European and international arena in the long run.

When reviewing proposed concentrations, the Commission assesses their impact on all aspects of competition. In 2017, the Commission had to intervene into several proposed concentrations, which, in addition to price, quality and choice, risked to significantly hinder innovation. Hence, in *Dow/ DuPont*<sup>68</sup> the Commission identified concerns with respect to, among other areas, the likely negative impact of the merger on innovation in pesticides. The Commission approved this transaction only after the parties offered a comprehensive set of remedies, including the divestiture of the pesticide R&D assets, which should allow a new competitor to emerge and farmers to continue benefiting from innovative and safer products. Similarly, the Commission intervened and accepted a remedy in *J&J/ Actellion*<sup>69</sup>, where the transaction risked impeding the development of a novel promising drug for the treatment of insomnia, potentially affecting millions of patients. These examples show that the Commission is not only focussing on the impact of mergers on price, but it is also carefully examining dynamic effects on innovation, such as a reduction in new products in the future, which would potentially bring greater harm to consumers.

Most of the remedies accepted by the Commission in 2017 to approve the problematic transactions consisted of divestitures of tangible or intangible assets.<sup>70</sup> This is in line with the Commission's general preference in mergers for structural remedies as best suited to address, in a durable manner, competition concerns arising from a concentration. In a handful of cases in 2017, the Commission accepted non-divestiture remedies<sup>71</sup>, where they were proven to solve effectively the underlying competition concern.

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<sup>66</sup> Amelia Fletcher and Bruce Lyons, *Geographic Market Definition in European Commission Merger Control, A Study for DG Competition*, January 2016 available at [http://ec.europa.eu/competition/publications/reports/study\\_gmd.pdf](http://ec.europa.eu/competition/publications/reports/study_gmd.pdf).

<sup>67</sup> For instance, in Case M.8348 *RAG Stiftung/ Evonik Industries/ Huber Silica*, for some types of silica – a chemical product used in a wide range of products such as toothpaste – the Commission took into account imports from Chinese and Indian suppliers, while for other types of silica such imports did not constitute a valid alternative and hence remedies were required.

<sup>68</sup> Case M.7932 *Dow/ DuPont*, Commission decision of 27 March 2017. For further information see IP/17/722 available at [http://europa.eu/rapid/press-release\\_IP-17-772\\_en.htm](http://europa.eu/rapid/press-release_IP-17-772_en.htm).

<sup>69</sup> Case M.8401 *J&J/ Actelion*, Commission decision of 9 June 2017. For further information see IP/17/1582 available at [http://europa.eu/rapid/press-release\\_IP-17-1582\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1582_en.htm).

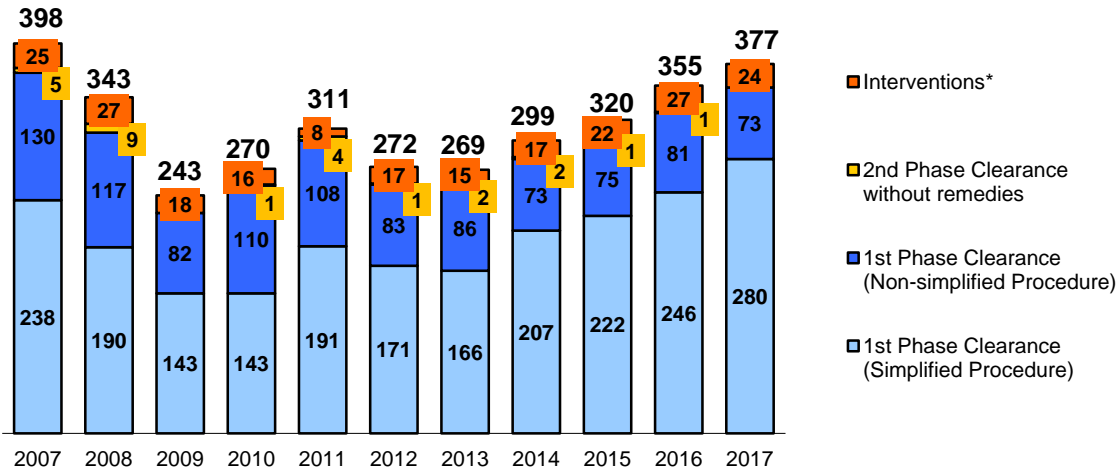
<sup>70</sup> See, for example, Case M.7962 *ChemChina/ Syngenta*, Commission decision of 5 April 2017; Case M.8059 *Investindustrial/ Black Diamond/ Polynt/ Reichhold*, Commission decision of 12 May 2017; Case M.8454 *KKR/ Pelican Rouge*, Commission decision of 25 August 2017.

<sup>71</sup> See, for example, Case M.8242 *Rolls Royce/ ITP*, Commission decision of 19 April 2017; Case M.8314 *Broadcom/ Brocade*, Commission decision of 12 May 2017.

Apart from the substantive merger enforcement, 2017 was marked by significant efforts of the Commission to enforce procedural obligations of companies under the EU Merger Regulation<sup>72</sup>.

In May, the Commission adopted a decision imposing a fine of EUR 110 million on Facebook for providing misleading information during the review of its acquisition of WhatsApp<sup>73</sup>. In May and July, the Commission also sent four Statements of Objections alleging procedural merger infringements: to Altice and Canon regarding their alleged implementation of notifiable acquisitions before their notification or approval by the Commission (so-called "gun-jumping"), and to Merck GmbH and General Electric concerning their alleged provision of incorrect or misleading information during the Commission's merger review proceedings. These Commission actions are aimed at ensuring that companies respect their procedural obligations under the EU Merger Regulation. The Commission is only able to conduct detailed and accurate assessment of mergers within the strict legal deadlines of the EU Merger Regulation and before any harm to consumers materialises provided that companies submit full and correct information and do not implement their concentrations before receiving final approval from the Commission.

**Merger decisions:**



\* Interventions in merger cases include prohibition decisions and mergers cleared subject to remedies, as well as withdrawals in Phase II;  
 Prohibition decisions: one in 2007, 2011, 2012 and 2016. Two in 2013 and 2017;

**2. The ongoing evaluation of selected procedural and jurisdictional aspects of EU mergers**

In October 2016, the Commission launched a public consultation in the context of the evaluation of selected procedural and jurisdictional aspects of EU merger control. This evaluation builds notably upon the results of the 2014 public consultation on the White Paper

<sup>72</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1-22.

<sup>73</sup> Case M.8228 Facebook/ WhatsApp (Art 14.1 proc.), Commission decision of 17 May 2017. For further information see IP/17/1369 available at [http://europa.eu/rapid/press-release\\_IP-17-1369\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1369_en.htm).

"Towards more effective EU merger control"<sup>74</sup>. The evaluation focusses on four topics, namely (i) possible further simplification of EU merger control, (ii) the functioning of the jurisdictional thresholds, (iii) the functioning of the referral system, and (iv) specific technical aspects.

The public consultation was open until mid-February 2017 and attracted wide interest. The Commission received more than 90 submissions from public and private stakeholders, including national competition authorities, other public bodies, associations, companies, law firms, research institutes and private individuals. A summary of the submissions received during the public consultation, together with their non-confidential versions, were published on the Commission's Competition website on 28 July<sup>75</sup>.

The replies to the public consultation imply that the EU merger control system works well overall and that there is no need for a fundamental overhaul.

With respect to simplification, there was a general recognition of significant efforts already undertaken by the Commission at the time of the adoption of the 2013 Simplification Package<sup>76</sup>. Nevertheless, some private stakeholders expressed concerns that a number of burdens still persist when notifying transactions under the simplified procedure. Public stakeholders voiced a more cautious view on further simplification, in particular with respect to any legislative changes to the European Union Merger Regulation.

Regarding jurisdictional thresholds, the replies to the consultation concluded that there may be some high-valued transactions that are not subject to EU merger control due to a low turnover realised by the target company. It was submitted that such transactions could occur in the digital sector, but also in other sectors, such as pharmaceuticals and biotechnology. Certain stakeholders expressed support for the introduction of a complementary jurisdictional threshold based on transaction value to close this possible enforcement gap. However, many other stakeholders perceived that there was no significant gap and/or the EU Merger Regulation referral mechanisms combined with national merger review systems in the Member States were sufficient to ensure that cases without EU dimension were reviewed either at national or European Economic Area level.

The Commission is currently reflecting - taking into account among other things the replies to the public consultation - whether potential improvements merit proposing any legislative or non-legislative changes to the EU Merger Regulation. The evaluation is however ongoing.

### **3. Significant judgments by the European Union Courts in mergers**

In 2017, the EU Courts handed down four judgments in the field of merger control.

On 7 March, the General Court annulled<sup>77</sup> the Commission decision of January 2013 prohibiting the acquisition of the Dutch courier delivery company TNT Express by the US-based competitor UPS.<sup>78</sup> The General Court based its annulment on a procedural ground, namely that the Commission had not communicated to UPS the final version of the econometric model used in the contested decision, thus infringing UPS' rights of defence. The

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<sup>74</sup> For further information on the 2014 public consultation on the White Paper, see [http://ec.europa.eu/competition/consultations/2014\\_merger\\_control/index\\_en.html](http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html).

<sup>75</sup> The summary of the submissions and their non-confidential versions are available at [http://ec.europa.eu/competition/consultations/2016\\_merger\\_control/index\\_en.html](http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html).

<sup>76</sup> For further information, see [http://europa.eu/rapid/press-release\\_MEMO-13-1098\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm).

<sup>77</sup> Case T-194/13 *UPS v Commission*, judgment of the General Court of 7 March 2017.

<sup>78</sup> Case M.6570 *UPS/ TNT Express*, Commission decision of 30 January 2013.



Commission takes due process in competition proceedings very seriously. After a careful analysis, it considered however that the General Court erred in assessing several points of law. Therefore, on 16 May the Commission lodged an appeal. It now looks forward for the European Court of Justice to definitively clarify those points.

On 7 September, the European Court of Justice issued its preliminary ruling on a question referred to it by the Austrian Supreme Court.<sup>79</sup> In that judgment, the European Court of Justice clarified that a change from sole to joint control over an existing undertaking is a notifiable concentration under the Merger Regulation only if the resulting joint venture will be “*full function*”, that is performing on a lasting basis all the functions of an autonomous economic entity. This judgment provides a welcome clarification for the assessment of joint ventures / acquisitions of joint control in the future.

On 26 October, the General Court annulled<sup>80</sup> the Commission decision of 14 March 2014 clearing the acquisition by the international cable operator Liberty Global of the Dutch cable operator Ziggo subject to commitments.<sup>81</sup> The General Court based its annulment on one procedural ground, namely that the Commission did not explain in its decision the reasons for not raising competition concerns in relation to Premium Pay TV sports channels, thus breaching its duty to state reasons. The General Court's ruling underscores the importance for the Commission to provide sufficient reasoning in its merger decisions.

On 26 October, the General Court dismissed<sup>82</sup> the action for annulment brought by Marine Harvest against the Commission decision of 23 July 2014 imposing a fine of EUR 20 million on Marine Harvest for acquiring its rival salmon producer Morpol ASA before receiving a Commission's approval under the EU Merger Regulation<sup>83</sup>. The judgment provides a reminder to companies of their duty not to implement concentrations of EU dimension before notifying and receiving Commission's approval. The General Court also confirmed the Commission's approach when setting the level of the fine.

### State aid control

**State aid control** is an integral part of EU competition policy and a necessary safeguard to preserve effective competition and free trade in the single market.

The Treaty establishes the principle that State aid which distorts or threatens to distort competition is prohibited in so far as it affects trade between Member States (Article 107(1) TFEU). However, State aid, which contributes to well-defined objectives of common interest without unduly distorting competition between undertakings and trade between Member States, may be considered compatible with the internal market (under Article 107(3) TFEU).

The objectives of the Commission's control of State aid are to ensure that aid is growth-enhancing, efficient and effective, and better targeted in times of budgetary constraints that aid does not restrict competition but addresses market failures for the benefit of society as a whole. In addition to this, the Commission acts to prevent and recover State aid which is incompatible with the Single market.

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<sup>79</sup> Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellamt*, judgment of the Court of 7 September 2017.

<sup>80</sup> Case T-394/15 – *KPN BV v Commission*, judgment of the General Court of 26 October 2017.

<sup>81</sup> Case M.7000 *Liberty Global/ Ziggo*, Commission decision of 14 March 2014.

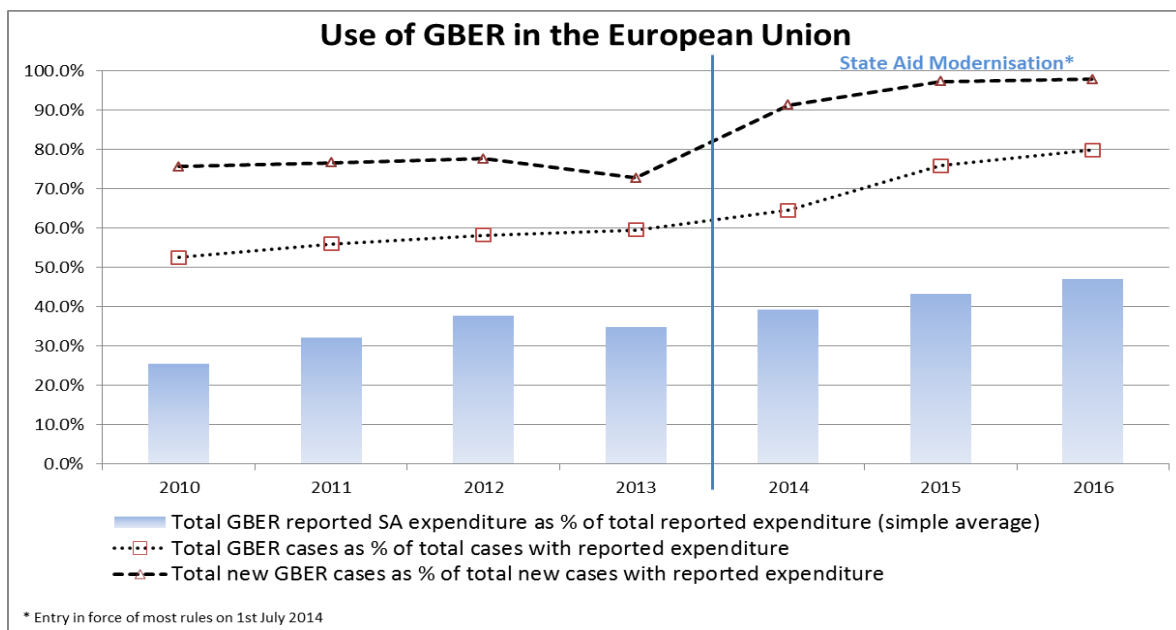
<sup>82</sup> Case T-704/14 – *Marine Harvest v Commission*, judgment of the General Court of 26 October 2017.

<sup>83</sup> Case M.7184 *Marine Harvest/ Morpol (Art 14.2 proc.)*, Commission decision of 23 July 2014.

## 1. Uptake of the State Aid Modernisation

Since 2014, as part of the State Aid Modernisation (SAM), there has been a surge in State aid granted without prior notification to the Commission, indicating an important reduction in red tape. Based on the 2017 State Aid Scoreboard<sup>84</sup>, this trend has continued to improve. This is possible due to the General Block Exemption Regulation (GBER)<sup>85</sup> adopted in the context of the State aid reform, which simplifies the aid granting procedure for Member States by authorising - without prior notification - a wide range of measures fulfilling certain criteria and specific EU objectives which are in the common interest. For the aid categories covered by the GBER, only cases with the biggest potential to distort competition in the single market will still face *ex ante* assessment and therefore require a notification.

As shown by the graph below<sup>86</sup>, since 2015, more than 97% of new measures, for which expenditure was reported for the first time, were covered by the GBER, which entails an increase of about 25 percentage points compared to 2013. About 80% of all measures for which expenditure was reported (i.e. not only new measures), took the form of block exempted measures in 2016. On average, total spending on GBER measures in the EU represented about 47% of total State aid expenditure (excluding agricultural aid) in 2016, i.e. an increase of about 12 percentage points compared to 2014.



The 2014 GBER introduced new categories of aid<sup>87</sup> and to a large extent, the reported

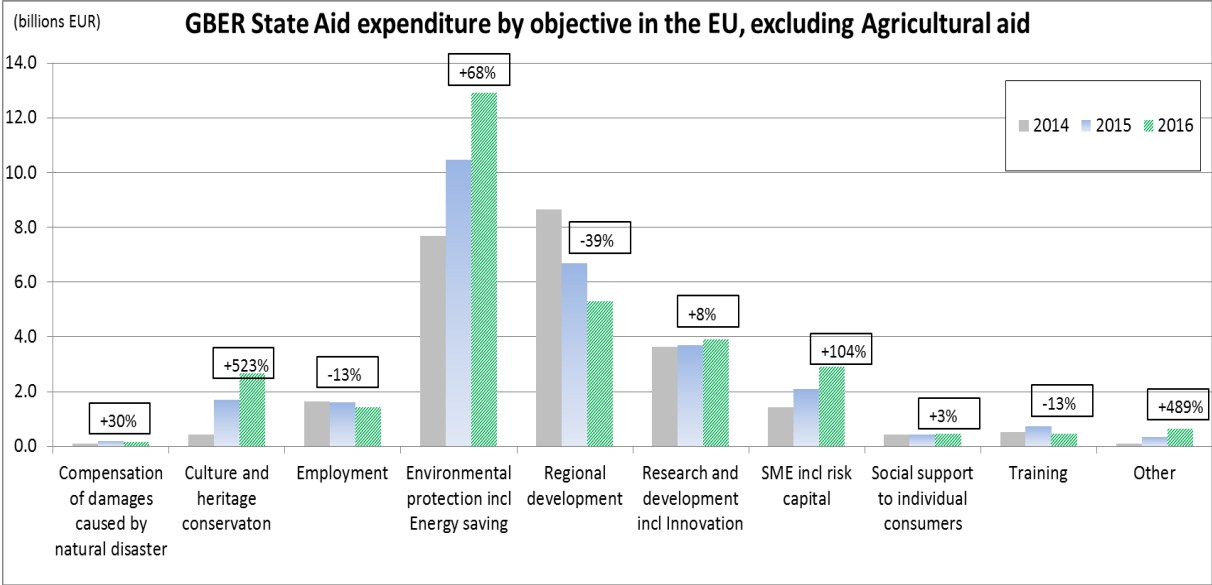
<sup>84</sup> The 2017 State Aid Scoreboard comprises aid expenditure made by Member States before 31 December 2016 and which falls under the scope of Article 107(1) TFEU. The data is based on the annual reporting by Member States pursuant to Article 6(1) of Commission Regulation (EC) 794/2004 available at [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html).

<sup>85</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU), OJ L 187, 26.6.2014, p.1.

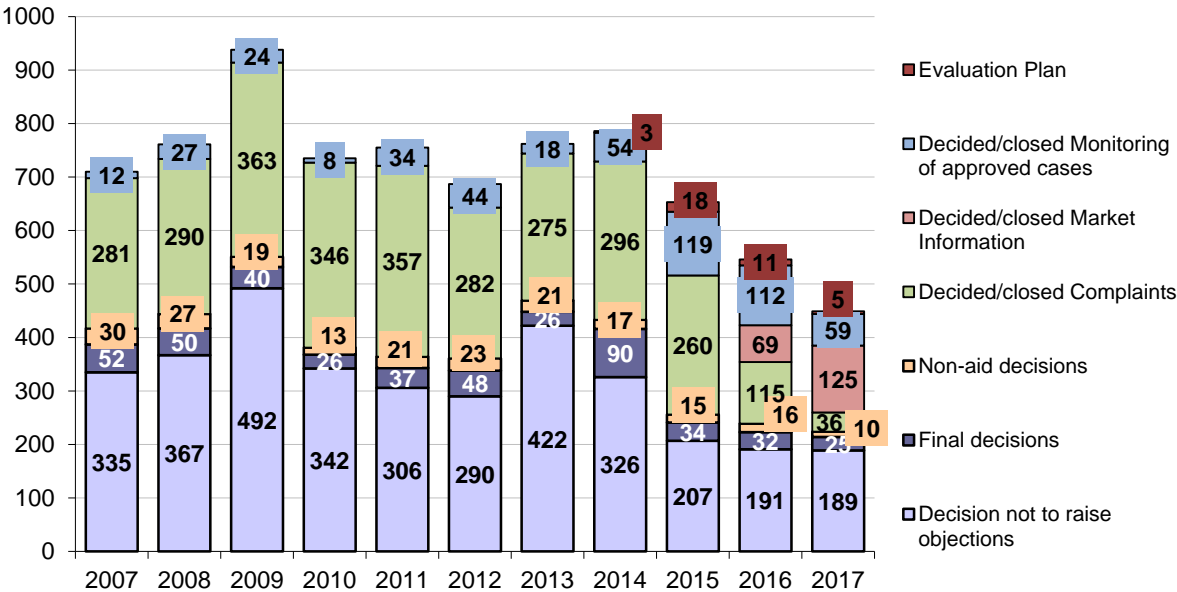
<sup>86</sup> Figures from the 2017 State Aid Scoreboard. For further information, see [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html).

<sup>87</sup> Aid to innovation clusters and aid to process and organisational innovation, aid schemes to make good the damage caused by natural disasters, social aid for transport residents of remote regions, aid for broadband infrastructure, aid for culture and heritage conservation, including aid schemes for audio-visual works, aid for sport multifunctional recreational infrastructures, as well as investment aid for local infrastructure; the new GBER also broadened categories of aid already covered by the previous (2008) GBER.

increase in expenditure on GBER measures already reflects the impact of the new Regulation. In 2016, as compared to 2014, total GBER spending for aid to culture and heritage conservation, for broadband and for local infrastructure has increased about fivefold, while it doubled for SMEs, including risk finance. Increases were also recorded for environmental protection and energy savings (+68%), for aid to compensate damages caused by natural disasters (+30%), and for research, development and innovation (+8%). The GBER was further extended in 2017, especially as regards aid to ports and airports (see section 2 below – State aid modernization continues). It is therefore to be expected that the share of block-exempted aid among total aid granted by Member States will increase even further in the coming years.



**State aid enforcement (Commission decisions, monitoring and Member States' Evaluation Plans) 2007-2017**



### *Partnership with Member States*

To facilitate the implementation of SAM, the Commission supports Member States in various ways in the framework of a multilateral partnership. The Working Group on SAM implementation (SAM WG) is a forum for Member States to exchange best practices on their systems for State aid control, creating an effective network for the informal discussion of State aid issues among Member States and with the Commission. Other dedicated working groups or workshops deal with specific aspects of SAM implementation, in particular the new requirements for transparency and evaluation (see respective sections below) or issues related to State aid to infrastructure. Once a year, the SAM WG reports to a High Level Forum (HLF) which in turn provides guidance on the future work of the Partnership.

The SAM WG met three times in 2017, under the Chair of France, and addressed several policy and compliance issues related to SAM implementation. It reported on the main topics discussed in the Working Group during the past year and on the follow-up to recommendations from past Chairs (Finland, Sweden and the United Kingdom) to the HLF held on 28 June, in Brussels. On this occasion it was agreed to extend the mandate of the Working Group in order to include issues related to the interpretation and implementation of State aid rules, in addition to national practices for complying with these rules. The HLF also endorsed the work plan submitted by the Chair for the period 2017-2018.

In 2017, the Commission also continued its bilateral cooperation with Member States. Launched in 2015, the overall objective of this process is to achieve both good State aid policy and effective State aid control at the national level. Three structured cooperation processes are on-going with Italy, Bulgaria and Romania. Based on practical work programmes, these cooperation processes are dealing with governance issues, issues concerning State-owned enterprises, as well as cases in problematic sectors. More tailor-made bilateral cooperation has been developed with nine Member States (Belgium, Croatia, Greece, Hungary, the Netherlands, Poland, Portugal, Slovenia and Spain), with a view to addressing country-specific compliance and implementation issues. Work is on-going towards deepening cooperation with additional Member States

### *Transparency Award Module*

The transparency provisions currently part of SAM are in force since 1 July 2016 and require Member States to publish information about the beneficiaries of aid awards above EUR 500 000<sup>88</sup>. Member States have six months starting from the date of granting to provide the required aid awards' data, with the exception of awards in the form of fiscal aid for which the information needs to be provided within one year from the date of granting. The Commission services facilitated compliance with this requirement by developing, in cooperation with Member States, the Transparency Award Module (TAM) – a new informatics tool for submission and publication of data required under the transparency provisions.<sup>89</sup>

The TAM ensures that information submitted by granting authorities is consistent and comparable across Member States. In addition, the associated transparency public search page provides all stakeholders, i.a. citizens, competitors and researchers, with a single entry point allowing them to make comparable extractions and analysis. For these reasons, the Commission pursues efforts to improve the user friendliness and the interoperability

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<sup>88</sup> For further information see the Competition Policy Brief 4/2016 available at [http://ec.europa.eu/competition/publications/cpb/2016/2016\\_004\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2016/2016_004_en.pdf).

<sup>89</sup> For further information see the Transparency Award Module (TAM) available at <https://webgate.ec.europa.eu/competition/transparency/public/search/chooseLanguage>.

capabilities of the tools, to incentivise those Member States already having National State Aid Registries in place to use the TAM as well. For example, the Commission has developed a so-called machine-to-machine interface to transfer directly the relevant information to the TAM, in view of reducing administrative burden and promoting the use of information and communication technologies applying the "only once" principle.

As of end October 2017, 24 Member States have joined the TAM. Approximately 15000 aid awards have been published by 22 Member States. The Commission services have supported the implementation of this new requirement by facilitating, together with Member States' representatives, the Transparency Steering Group (two meetings in 2017) and by organising dedicated trainings upon request.

### *Evaluation*

Evaluation of aid schemes is another requirement introduced by SAM. The aim is to gather the necessary evidence to better identify impacts, both positive and negative, of the aid and inform future policy-making by Member States and the Commission.

Since 1 July 2014, evaluation is required for large GBER schemes in certain aid categories<sup>90</sup> as well as for a selection of notified schemes under the new generation of State aid guidelines<sup>91</sup>.

By the end of December 2017, the Commission had approved evaluation plans covering 37 State aid schemes submitted by 13 Member States<sup>92</sup>. Most of these decisions concerned either large regional or R&D&I aid schemes under the GBER or notified energy and broadband schemes. These schemes account, in total, for about EUR 48 billion of annual State aid budget. The first evaluation report has been submitted in January 2018.

The Commission services have continued to accompany the implementation of the evaluation requirement by publishing policy briefs<sup>93</sup> and by organising dedicated workshops with Member States' representatives and evaluation experts.

### *Aid for research, development and innovation*

While one of the headline targets of the Europe 2020 Strategy<sup>94</sup> is for Research, Development and Innovation (R&D&I) investments in the EU to reach 3 % of EU GDP, R&D&I spending in the EU has been lagging behind major global competitors, mainly due to lower levels of private investment.

The State aid rules for R&D&I help ensure that public funding goes to research projects that would not otherwise be realised due to market failures, i.e. projects that truly go beyond the

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<sup>90</sup> Schemes with an average annual State aid budget above EUR 150 million in the fields of regional aid, aid for SMEs and access to finance, aid for research and development and innovation, energy and environmental aid and aid for broadband infrastructures.

<sup>91</sup> Evaluation might apply to notified aid schemes with large budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen.

<sup>92</sup> The Czech Republic, Germany, Spain, France, Hungary, Italy, Lithuania, Austria, Poland, Portugal, Finland, Sweden and the United Kingdom.

<sup>93</sup> For further information see the Competition Policy Briefs 7/2014 available at [http://ec.europa.eu/competition/publications/cpb/2014/007\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/007_en.pdf) and 3/2016 available at [http://ec.europa.eu/competition/publications/cpb/2016/2016\\_003\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2016/2016_003_en.pdf).

<sup>94</sup> Communication of 3 March 2010 from the Commission, *Europe 2020 A Strategy For Smart, Sustainable And Inclusive Growth*, COM(2010) 2020 final available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427303331326&uri=CELEX:52010DC2020>.

state of the art and which bring innovative products and services to the market and ultimately to consumers. The rules, using flexible and simple criteria for assessing the compatibility of State aid, facilitate the implementation of support for R&D&I projects by Member States.

In 2017, the Commission ensured that aid schemes and individual measures notified under the R&D&I rules were well targeted to projects enabling ground-breaking research and innovation activities. Its State aid control activities covered a variety of sectors including the automated/connected driving, e-mobility, aeronautic, and microelectronic sectors.

In one case<sup>95</sup>, the Commission found that public support by France and Germany for jointly developing a new, innovative heavy duty helicopter was compatible with the internal market under the R&D&I Framework as it contributed to a well-defined objective of common interest without unduly distorting competition on the market of the civil helicopters.

Moreover, the Commission cooperated with a number of Member States with a view to enabling them to adjust certain envisaged R&D&I measures and bring them in line with the GBER. This way, aid measures could be granted swiftly without having to be notified to the Commission, thereby speeding up public support for R&D&I.

The ongoing discussions with a group of Member States on an important project of common European interest (IPCEI) in the area of microelectronics is a good example of the Commission's policy to encourage intra-EU R&D&I cooperation and coordination in the area of Key Enabling Technologies, including first industrial deployment.

#### *Aid to risk finance*

SMEs across the EU remain heavily dependent on traditional bank lending, which is still limited by banks' refinancing capacity, risk appetite and capital adequacy. The financial crisis has exacerbated the problem with a large number of SMEs still being unable to receive the necessary finance in recent years. Given the pivotal importance of SMEs and midcaps for the whole EU economy, the situation has a significant negative impact on growth and job creation. The current Risk Finance rules aim to offer better incentives for private sector investors - including institutional ones – to increase their funding activities in the critical area of SME and midcaps financing. The rules also mirror other EU initiatives designed to promote wider use of financial instruments in the context of new support programmes such as Horizon 2020 or COSME (the Programme for the Competitiveness of Enterprise and SMEs)<sup>96</sup>.

The current Risk Finance Guidelines<sup>97</sup> and the corresponding parts of the GBER, provide the framework for seamless support for new ventures from their creation to their development into global players. The aim is to help new ventures to get past the critical stages where private financing is either unavailable or not available in the necessary amount or form.

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<sup>95</sup> Case SA.45183 (2017/N), *Avance remboursable pour le programme de recherche et développement de l'hélicoptère X6 (Airbus Helicopters)*, Commission decision of 19 June 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45183](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45183).

<sup>96</sup> An overview on the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises is available at [http://ec.europa.eu/growth/smes/cosme\\_en](http://ec.europa.eu/growth/smes/cosme_en).

<sup>97</sup> Communication from the Commission, *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.01.2014, p. 4 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122\(04\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122(04)).

### **Aid measures encouraging investment and innovation in SMEs**

In 2017, under the Risk Finance Guidelines, the Commission dealt with notified schemes aimed at encouraging investment in innovative SMEs and midcaps. In particular, it approved the prolongation of an amended scheme in Italy granting fiscal incentives for investments in innovative start-ups.

Moreover, the Commission cooperated with a number of Member States with a view to enable them to adjust certain envisaged risk finance measures and bring them in line with the current GBER. This way, aid measures could be granted swiftly without having to be notified to the Commission, thereby speeding up public support to innovative SMEs.

In all these cases, the Commission took the view that the measures at issue covered a real gap in the market, and worked together with the Member States on solutions to limit the impact on competition in the single market. In particular, the Commission considered that the risks inherent to the activities of these young firms and innovative companies (i.e. products/technologies not yet proven to be economically viable) and the lack of financial guarantees limited their capacity to access funding and that the aid was necessary to stimulate investment that, if unprompted, would not have been provided by the market.

### *Regional aid*

Regional aid is an important instrument in the EU's toolbox to promote greater economic and social cohesion. The 2014-2020 regional aid framework has been in place since July 2014.

In 2017, the Commission reviewed the regional aid provisions in the GBER. Three important changes were introduced. A first one relates to operating aid for outermost regions (widening of the sectoral scope of these provisions and a significant increase in the operating aid ceilings applicable to these regions). The second modification concerns operating aid for companies conducting business in very sparsely populated regions. Finally, the Commission modified the anti-relocation provisions by requiring a notification of the investment aid if it involves a transfer of the underlying economic activity from other Member States.

In 2017, the Commission continued advising Member States' authorities on how to interpret and implement the regional aid provisions of the GBER, thus helping them to make a success of the reforms introduced under SAM to the benefit of both consumers and businesses.

### *Regional aid cases*

The Commission also adopted several decisions on notified regional investment aid measures under the Regional aid Guidelines. It approved the Octroi de Mer scheme providing regional operating aid for companies located in the French Outermost regions<sup>98</sup>. It also adopted positive decisions on regional investment aid for two large investment projects, namely aid to Mondi (paper and paper products, Slovakia)<sup>99</sup> and aid to MOL Petrolkémia (petrochemical plant in Hungary)<sup>100</sup>. The Commission initiated a formal investigation procedure in relation to a regional investment aid to Jaguar Land Rover in Slovakia (cars)<sup>101</sup>. In addition, it approved

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<sup>98</sup> Case SA.46899 (2016/N), *Operating aid scheme for outermost regions providing reductions on the Octroi de Mer Tax*, Commission decision of 15 March 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46899](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46899)

<sup>99</sup> Case SA.45584 (2016/N), *Investment aid to Mondi*, Commission decision of 13 July 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45584](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45584)

<sup>100</sup> Case SA.48382 (2017/N), *Regional investment aid to MOL Petrolkémia Zrt*, Commission decision of 25 October 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48382](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48382)

<sup>101</sup> Case SA.45359 (2016/N), *Regional investment aid to Jaguar Land Rover Jaguar*, Commission decision of 24 May 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45359](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45359)

a Polish regional aid scheme targeting the shipbuilding sector<sup>102</sup> and an amendment of the French Regional aid map<sup>103</sup>.

Finally, the Commission adopted two decisions approving evaluation plans for Italy on a SME investment aid scheme for purchase of new machinery and equipment<sup>104</sup> and on an aid scheme for large investment projects "Contratti di Sviluppo"<sup>105</sup>.

### *Infrastructure*

In 2017, the Commission continued providing guidance to the Member States' authorities by way of so-called "analytical grids" on the application of State aid rules to the public financing of infrastructure projects, which were revised in the light of the adoption of the Commission Notice on the notion of State aid in 2016<sup>106</sup> and the adoption of the revised GBER in 2017<sup>107</sup>.

In 2017, the Commission adopted several positive decisions on aid for the development of infrastructures having an economic use, notably aid for the development of the Charles De Gaulle Express<sup>108</sup>, aid for the development of a logistics centre in the Port of Pitea<sup>109</sup>, a scheme to provide aid for investment in transshipment facilities for combined transport<sup>110</sup>, aid for the revitalisation of the Hamburg Congress Centre<sup>111</sup>, aid to the construction and operation of the Bratislava national football stadium<sup>112</sup> and aid for the construction of the Ice Hockey Arena in Tampere, Finland<sup>113</sup>.

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<sup>102</sup> Case SA.47690 (2017/N), *State aid scheme for regional investments of SMEs in the shipbuilding sector*, Commission decision of 15 January 2018, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47690](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47690)

<sup>103</sup> Case SA.47094 (2016/N), *Amendment of the Regional aid map 2014-2020 – Second use of the population reserve*, Commission decision of 10 February 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47094](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47094)

<sup>104</sup> Case SA.47180 (2017/EV), *SME investment aid scheme for purchase of new machinery and equipment*, Commission decision of 15 June 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47180](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47180)

<sup>105</sup> Case SA.48248 (2017/EV), *Evaluation plan of the aid scheme for large investment projects "Contratti di Sviluppo"*, Commission decision of 12 October 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48248](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48248)

<sup>106</sup> OJ C 262, 19.7.2016 p. 1

<sup>107</sup> OJ L 156, 20.6.2017, p. 1.

<sup>108</sup> Case SA.45997 (2017/N), *Liaison express directe entre l'aéroport Charles-de-Gaulle et la Gare de l'Est*, Commission decision of 26 June 2017. The public version of this decision will become available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45997](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45997)

<sup>109</sup> Case SA.46749 (2016/N), *Investment aid for the Haraholmen logistics centre in the Port of Pitea*, Commission decision of 19 April 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46749](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46749)

<sup>110</sup> Case SA.46341 (2016/N), *Scheme on funding for transshipment facilities for combined transport of non-federal companies*, Commission decision of 4 January 2017. The public version of this decision will become available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46341](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46341)

<sup>111</sup> Case SA.42545 (2015/N), *Revitalisation of the Hamburg Congress Centre (CCH)*, Commission decision of 7 April 2017, available at: [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42545](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42545)

<sup>112</sup> Case SA.46530 (2016/N), *Construction and operation of Bratislava national football stadium*, Commission decision of 24 May 2017, available at

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46530](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46530)

<sup>113</sup> Case SA.47683 (2017/N), *Tampere Arena*, Commission decision of 31 July 2017. The public version of this decision will become available at:

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47683](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47683)



## 2. State Aid Modernisation continues

### *Notion of aid: comprehensive clarification including public funding of infrastructure*

Since 2016, the Commission took several steps to further clarify the notion of State aid with the aim of helping public authorities and companies to identify when public support measures can be granted outside the remit of State aid control and approval by the European Commission<sup>114</sup>, in particular with the adoption of the Notice on the notion of State aid<sup>115</sup>. This Notice gives guidance on all aspects of the definition of the notion of State aid by systematically summarising the case law of the EU Courts and the Commission's decision making practice.

Furthermore, the Commission services continue updating the analytical grids on the financing of infrastructure projects originally adopted in 2015. A first part of these updated grids were presented to and discussed with Member States in a dedicated working group on infrastructures in November 2016. A second part was published on the Directorate-General for Competition's website in November 2017. These Commission services documents set out, sector by sector, when, in view of the Commission services, public funding does not involve State aid and when a notification for State aid clearance is needed. The grids also contain references to the most relevant Commission decisions relating to the sector concerned.

Together, these different measures further clarify the notion of State aid and, thus, the scope of EU State aid rules, reducing the administrative burden for public authorities and companies, avoiding lengthy procedures, and increasing legal certainty for aid beneficiaries and competitors.

### *Further extension of the scope of the GBER*

The scope of the General Block Exemption Regulation (GBER) was extended significantly in 2014 compared to the previous GBER, by including provisions for a large variety of aid measures in many different sectors. However, the 2014 GBER did not cover investments in ports and airports, as at the time of its adoption, the Commission considered it did not have sufficient case experience in these areas. Notwithstanding, recital 1 of the 2014 GBER announced that the Commission planned to propose criteria for exempting ports and airports infrastructure provided that sufficient case experience were to be developed.

In the years following the entry into force of the 2014 GBER, the Commission adopted numerous State aid decisions in the area of ports and airports. This case practice fully supports the extension of the scope of the GBER to facilitate the grant of aid in unproblematic cases.

On the basis of this acquired experience and to fulfil the commitment announced in recital 1 of the 2014 GBER, the Commission in 2016 published two drafts for consultation and held two meetings with the State aid advisory committee of Member States on an extension of the GBER. After revisions of the two drafts on the basis of the numerous replies received by Member States and stakeholders, the extension of the GBER was adopted on 14 June 2017<sup>116</sup>.

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<sup>114</sup> For further information see IP/16/1782 of 19 May 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-1782\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1782_en.htm)

<sup>115</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, pp. 1-50.

<sup>116</sup> Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for

It provides a major simplification for unproblematic investments in ports and airports. Member States can implement State aid measures in these areas without the need to notify them before to the Commission, as long as they have checked that they comply with the conditions of the Regulation. The revision also addresses some other technical issues beyond ports and airports. In particular it makes it easier for public authorities to compensate companies for the additional costs they face in the EU's outermost regions. In addition, the extension further increases the maximum amount of aid allowed under the GBER for culture projects (under the rare circumstances that public funding for culture actually constitutes State aid) and for multi-purpose sports arenas.

By doing so, the extension of the GBER further contributes to the objectives of the State Aid Modernisation launched by the Commission in 2012, in the sense that it minimises administrative burdens and make it easier for national, regional and local authorities to grant aid that contributes to a more dynamic and competitive internal market. It further focuses the Commission's State aid scrutiny to larger cases, by block exempting additional unproblematic cases.

#### *Revision of the Simplified Procedure Notice and Best Practices Code*

In 2016, the Commission launched a review of the Simplified Procedure Notice<sup>117</sup> and of the Best Practices Code<sup>118</sup> in order to reflect, on the one hand, the amendments brought to the State aid framework within the State Aid Modernisation initiative and, on the other hand, to take account of the experience gained by the Commission with its implementation.

In the light of the comments received from the public consultations<sup>119</sup>, the Commission will review these texts with the objective to ensure coherence and consistency in the application of the various instruments of the State aid framework.

### **3. Monitoring, recovery and cooperation with national courts**

#### *Increased monitoring of existing State aid to ensure a level playing field*

Over the years, the architecture of State aid control has evolved. Today, a substantial part of aid is granted under block-exempted schemes which are not examined by the Commission before entering into force. Overall, roughly 85% of aid is granted on the basis of previously approved aid schemes or Block Exemption Regulations. In that context, it is essential for the Commission to verify that Member States apply State aid rules for the schemes correctly and

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aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs – available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1497952641554&uri=CELEX:32017R1084>.

<sup>117</sup> Commission notice on a simplified procedure for the treatment of certain types of State aid, OJ C 136, 16.06.2009, pp. 3-12, [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0616\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0616(01)). It sets out the conditions under which the Commission usually adopts short-form decisions declaring certain types of State support measures compatible with the internal market. The Commission launched a public consultation on this notice from January to April 2016.

<sup>118</sup> Commission notice on a Best Practices Code on the conduct of State aid control proceedings, [http://ec.europa.eu/competition/state\\_aid/legislation/best\\_practices\\_code\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/best_practices_code_en.pdf). It provides guidance on the day-to-day conduct of State aid procedures and exchange of information between the Commission and Member States. The Commission launched a public consultation in November 2016 in order to gather on its implementation over the past seven years.

<sup>119</sup> Consultation on the Code of Best Practice on the conduct of State aid control proceedings, see [http://ec.europa.eu/competition/consultations/2016\\_cbp/index\\_en.html](http://ec.europa.eu/competition/consultations/2016_cbp/index_en.html); and Consultation on the Notice on a Simplified Procedure for the Treatment of Certain Types of Aid, see [http://ec.europa.eu/competition/consultations/2016\\_simplified\\_procedure/index\\_en.html](http://ec.europa.eu/competition/consultations/2016_simplified_procedure/index_en.html).

that they only grant aid when all required conditions are met.

To that end, the Commission introduced in 2006 a regular, *ex post*, sample-based control of existing aid schemes ("monitoring"). After a modest start covering about 20 schemes and ten Member States in each monitoring cycle, the Commission has considerably stepped up monitoring since 2011. Building on the Court of Auditors recommendations<sup>120</sup>, the Commission has substantially increased the size of the monitoring sample in the last three annual cycles to more than 50 schemes per year. It also extended the scope of its control.

The 2017 cycle covered most Member States<sup>121</sup> and all main types of aid approved as well as block-exempted schemes. Furthermore, the sample included block-exempted schemes implemented under the new GBER<sup>122</sup>. Also, the Commission continued on targeted monitoring where it examined whether Member States correctly applied the criterion on the incentive effect.

The Commission follows up on irregularities and uses the means at its disposal, as appropriate, to address the competition distortions that these may have caused. In some cases, Member States offer to voluntarily redress the problems detected, for example to amend national legislation or to recover the excess aid granted. In other cases, the Commission may need to take formal action.

#### *Restoring competition through recovery of State aid granted in breach of the rules*

To ensure the integrity of the single market, the Commission has the power and the duty to request that Member States recover unlawful and incompatible aid which has unduly distorted competition and trade between Member States. In 2017, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

By 31 December, the sum of illegal and incompatible aid recovered from beneficiaries amounted to EUR 13.3 billion<sup>123</sup>. At the same time, the outstanding amount pending recovery was EUR 18.4 billion.

In 2017, the Commission adopted six new recovery decisions and EUR 261.4 million was recovered by the Member States. As of the end of December, the Commission had 44 pending recovery cases.

Recovery decisions adopted in 2017	6
Amount recovered in 2017 (EUR million)	261.4
Pending recovery cases on 31 December 2017	44

As a guardian of the Treaty, the Commission may use all legal means at its disposal to ensure that Member States implement their recovery obligations, including launching infringement procedures. In 2017, the Commission filed one action to the European Courts under Article

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<sup>120</sup> In its 2011 report on the efficiency of State aid procedures, the Court of Auditors considered that, in view of the importance of aids granted under existing aid schemes, the Commission's monitoring activity should be reinforced. For further information see the recommendation n° 1 of the Court of Auditors Report recital 96, p. 41 available at <http://eca.europa.eu/portal/pls/portal/docs/1/10952771.PDF>.

<sup>121</sup> Except Cyprus and Estonia.

<sup>122</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, OJ L 187, 26.6.2014, p. 1.

<sup>123</sup> The reference period is 1 January 1999 to 31 December 2017.

108(2) TFEU<sup>124</sup> for failure to implement recovery in the Apple case<sup>125</sup>.

### *Cooperation with national courts to ensure the effectiveness of State aid rules*

The Commission continued its cooperation with national courts and tribunals under Article 29 of the Procedural Regulation<sup>126</sup>. This cooperation includes direct case-related assistance to national courts when they apply EU State aid law. The courts and tribunals can ask the Commission to provide case related information, or to provide an opinion on the application of State aid rules. The Commission may also submit *amicus curiae* observations at its own initiative.

In 2017, the Commission responded to one request for information. The request was issued by the Supreme Administrative Court of Finland and enquired on the status of the investigation in a complaint.

The Commission's possibility to submit *amicus curiae* observations on its own initiative before national courts is a novelty brought about by the 2013 amendment to the Procedural Regulation. In that respect, Article 29 of the Procedural Regulation mirrors Article 15(3) of Regulation 1/2003 in the field of antitrust.

In 2017, the Commission submitted written observations for six court cases and also made oral observations for two of these cases<sup>127</sup>. All the cases concern the Micula decision.<sup>128</sup>

To make its views publicly known, in June 2017 the Commission started to publish its opinions and *amicus curiae* observations, as well as observations to others, on its website<sup>129</sup>.

In 2017, the Commission also continued its advocacy efforts. It was actively involved in evaluating the financing of training programmes for national judges and in assessing their needs. The Commission staff also provided training during workshops and conferences<sup>130</sup>.

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<sup>124</sup> Consolidated version of the TFEU, OJ C 115, 9.5.2008, p.47.

<sup>125</sup> C-678/17, registered on 5 December 2017 at the European Court of Justice concerning the recovery decision in SA.38373 *Aid to Apple*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38373](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38373).

<sup>126</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU, OJ L 248 of 24.9.2015, pp. 9-29.

<sup>127</sup> In particular, the Commission presented its written observations in front of the President of the Tribunal d'Arrondissement of Luxembourg on 16 March 2017 and participated to the hearing of 20 March 2017 in the case Romania against Viorel Micula (n° rôle 179517) challenging the execution of the arbitral award (case ARB/05/20) in Luxembourg. On 26 October 2017 the Commission submitted its written observations in front of the Nacka District Court of Sweden in the case Ioan Micula against Romania (réf. A 2550/17) for the execution of the arbitral award (case ARB/05/20). Finally, the Commission submitted its written observations and requested for permission to participate in the oral hearing of the appeals of Viorel Micula and others against Romania (Court of Appeal refs A3/2017/1855 and A3/2017/1853) and of Ioan Micula and others against Romania (Court of Appeal refs: A3/2017/1856 and A3/2017/1903) against the orders of Mr Justice Blair of 20 January 2017 and of 15 June staying the enforcement of the arbitral award (case ARB/05/20) in the United Kingdom pending the judgement of the General Court of the European Union. The Commission also appeared at the hearing before Mr Justice Blair on 24 May 2017.

<sup>128</sup> Case SA.38517 (2014/NN; 2014/C), *Micula v Romania* (ICSID arbitration award), Commission decisions of 26 May and 1 October 2014, and 30 March and 24 July 2015 respectively, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38517](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38517).

<sup>129</sup> For further information see [http://ec.europa.eu/competition/court/overview\\_en.html](http://ec.europa.eu/competition/court/overview_en.html).

<sup>130</sup> See also the dedicated section *Cooperation with national courts*, Antitrust and Cartels Section, see I. Antitrust, chapter 4.

#### 4. Significant judgments by the European Union Courts in the State aid area

In 2017, the EU Courts adopted a number of important judgments in the State aid area. The following overview is based on a selection of court judgments.

##### *State resources*

In its preliminary ruling in *ENEA*<sup>131</sup>, the European Court of Justice confirmed that a national measure placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration does not constitute an intervention by the State or through State resources when the extra costs resulting from that purchase obligation cannot be passed on entirely to end users and are not financed by a compulsory contribution imposed by the State or by a full offset mechanism. In the case at stake, the supply undertakings were not appointed by the State to manage a State resource, but were funding a purchase obligation imposed on them by having recourse to their own financial resources.

The ruling further clarifies that the mere fact that the majority of the undertakings having the purchase obligations were public companies could not lead to conclude that State resources were involved if it is not in addition demonstrated that the State exercised dominant influence over public undertakings to direct the use of their resources in order to finance advantages to the benefit of other undertakings.

The issue of State resources is also central in the *TV2/Danmark* judgment<sup>132</sup>, which put an end to the State aid assessment of the public financing of the Danish public broadcaster TV2/Danmark, started in 2003. In 2004, the Commission adopted a decision stating that the aid granted between 1995 and 2002 to TV2 in the form of licence fee resources was compatible, with the exception of an overcompensation for an amount of DKK 628.2 million (approximately EUR 85 million) for which the Commission ordered recovery.

Upon annulment by the General Court in 2008 of that decision<sup>133</sup>, the Commission adopted a second decision in 2011 declaring the public financing of TV2 between 1995 and 2002 to constitute in its entirety compatible aid. In 2015, the General Court annulled that second decision<sup>134</sup> in so far as the Commission had found that during 1995 and 1996 the advertising revenues generated by TV2 by broadcasting commercials constituted State resources because they were channelled through a Government-controlled fund. The General Court found that the fact that the revenues were channelled through a public entity would not render the commercial nature of the income a State resource, even if the State had the possibility to fix the amounts to be channelled to TV2. The advertising revenues would keep their character as income generated by commercial activities of TV2.

In *TV2/Danmark* the European Court of Justice set aside the judgment of the General Court. It considered decisive for the question whether TV2's advertising revenues constituted State resources that the State effectively had control over these funds before they were paid to the beneficiary. In particular, the European Court of Justice considered that the General Court was wrong to hold that resources originating with third parties that are managed by public

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<sup>131</sup> Case C-329/15 *ENEA S.A. v Prezes Urzędu Regulacji Energetyki*, judgment of the European Court of Justice of 13 September 2017, EU:C:2017:671.

<sup>132</sup> Case C-656/15 P *Commission v TV2/Danmark A/S*, judgment of the European Court of Justice of 9 November 2017, EU:C:2017:836.

<sup>133</sup> Joined cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark A/S and others v Commission* Judgment of the Court of First Instance of 22 October 2008, ECLI:EU:T:2008:457.

<sup>134</sup> Case T-674/11 *TV2/Danmark A/S v Commission*, Judgment of the General Court of 24 September 2015, ECLI:EU:T:2015:684.

undertakings can constitute State resources only when they are voluntarily placed at the disposal of the State by their owners or abandoned by their owners and when the State has assumed the management of those resources. The European Court of Justice also differentiated this case from *PreussenElektra* by stating that the latter case related to private undertakings that had not been appointed by the State to administer a State resource, but were bound by an obligation to purchase by means of their own financial resources. Further, in that case, the funds at issue were at no time under public control. By contrast, the present case concerns public undertakings, namely TV2 Reklame and the TV2 Fund, that were created, owned and appointed by the Danish State to administer the revenue produced by the sale of advertising space of another public undertaking, namely *TV2/Danmark*, and as a consequence that revenue was under the control and at the disposal of the Danish State.

#### *Economic v non-economic activity*

The preliminary ruling in *Congregación de Escuelas Pías*<sup>135</sup> related to an exemption of a Catholic school from a municipal real estate tax in Spain granted in respect of work to buildings intended to be used for educational activities that do not have a strictly religious purpose.

In its judgment, the European Court of Justice noted that the school was engaged in three types of activities: (i) strictly religious activities, which are non-economic; (ii) educational activities subsidised by the State, which cannot be classified as economic; and (iii) non-compulsory educational activities receiving no financial support from the State, which can be regarded as economic. The European Court of Justice held that the tax exemption may constitute State aid if and to the extent to which the activities carried on in the premises in question are economic activities, a matter which is for the national court to determine. On this basis, the European Court of Justice concluded that the prohibition in Article 107(1) TFEU can only apply to the tax exemption if (i) at least some of the activities carried on at the school can be classified as economic activities and (ii) the premises in question are used, at least in part, for such economic activities.

The European Court of Justice also held that the tax exemption, if classified as aid, should not be regarded as existing aid but as new aid. In the European Court of Justice's view, while the agreement between Spain and the Holy See (the basis for the tax exemption at issue) predated Spain's accession to the EU, the tax exemption as such was introduced into Spanish legislation only after accession.

Another relevant judgment as regards the definition of non-economic activity is the one of the General Court on *TenderNed*<sup>136</sup>, an electronic government platform for information on public tenders in the Netherlands. In 2014, upon complaint of several commercial players, the Commission adopted a decision<sup>137</sup> declaring that the financing of TenderNed by the Dutch authorities did not amount to State aid. In its judgment, the General Court comes to the conclusion that the activities of TenderNed (data collection and publication) provide the means to comply with statutory obligations and as such form part of the exercise of public powers and are non-economic.

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<sup>135</sup> Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, judgment of the Court of 27 June 2017, EU:C:2017:496.

<sup>136</sup> Case T-183/15 *Aanbestedingskalender BV and others v Commission*, judgment of the General Court of 28 September 2017, EU:T:2017:675.

<sup>137</sup> Commission Decision of 18 December 2014 on State aid case SA.34646 (2014/NN) (ex 2012/CP) – *The Netherlands – E-procurement platform TenderNed*, OJ C 422, 8.12.2017, p. 2.

In order to reach this conclusion, the General Court first noted that all the functionalities of TenderNed must be understood as linked to each other, all being indispensable for e-procurement and forming different facets of the same activity, and therefore not independent of each other. Next, the General Court looked at whether the activities of TenderNed, taken as a whole, may be connected with the exercise of public powers. It came to the view that when contracting authorities initiate a procurement procedure and comply with procurement rules, they are acting as public authorities. The nature and purpose of TenderNed's activities are closely linked to this activity and are therefore connected with the exercise of public powers. The fact that TenderNed provides its services free of charge is not sufficient in and by itself to determine whether an activity is economic or not although is nevertheless a relevant factor.

The General Court also noted that the question whether or not the creation of a centralised e-procurement system was provided for by the EU procurement directives, and whether provision is made for penalties in the event of breach of the obligations imposed by those directives, is not decisive for the purpose of determining the nature of TenderNed's activities. The General Court also stated that the coexistence of commercial platforms does not automatically make the activities of TenderNed economic.

### *Selectivity*

The *Retegal*<sup>138</sup> judgment relates to the Spanish plans to facilitate the transition from analogue to digital broadcasting for the entire territory of Spain (with the exception of the Autonomous Community of Castilla-La Mancha). In particular, the Spanish authorities set up a system of public financing to facilitate the digitisation of the so-called Area II, i.e. semi-remote and less urbanized areas with only 2.5% of the Spanish population, where the broadcasters had no economic interest to invest in digitisation.

In May 2009, the Commission received a complaint from a satellite operator alleging that the various regional schemes to facilitate the digitisation of Area II constituted non-notified aid which distorted competition between terrestrial and satellite broadcasting platforms, since the parameters of the tenders made satellite operators ineligible. The Commission adopted a decision in 2013 finding that the support granted to terrestrial operators in Area II amounted to incompatible State aid as it distorted competition between satellite and terrestrial broadcasting platforms. In 2015, the General Court entirely dismissed the actions brought by Spain, certain Autonomous Communities and other interested parties seeking annulment of the decision<sup>139</sup>.

On appeal<sup>140</sup>, the European Court of Justice rejected the arguments of the appellants with just one exception in *Retegal*. By that judgment, the European Court of Justice set aside the judgment of the General Court and moreover annulled the Commission decision for failure to state reasons. According to the European Court of Justice, the Commission had not sufficiently motivated why the measure under assessment was selective and dismissed the

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<sup>138</sup> Case C-70/16 P *Comunidad Autónoma de Galicia and Retegal v Commission and SES Astra SA*, judgment of the Court of 20 December 2017, EU:C:2017:1002.

<sup>139</sup> Cases T-461/13 *Spain v Commission*; T-462/13 *Comunidad Autónoma del País Vasco and Itelazpi v Commission*; Joined Cases T-463/13 and T-464/13 *Comunidad Autónoma de Galicia v Commission and Retegal v Commission*; Cases T-465/13 *Comunidad Autónoma de Cataluña and CTTI v Commission*; T-487/13 *Navarra de Servicios y Tecnologías v Commission*; and T-541/13 *Abertis Telecom and Retevisión I v Commission*.

<sup>140</sup> Joined Cases C-66/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, C-67/16 P *Comunidad Autónoma de Cataluña and CTTI v Commission*, C-68/16 P *Navarra de Servicios y Tecnologías v Commission*, and C-69/16 P *Cellnex Telecom and Retevisión I v Commission*. Cases C-70/16 P *Comunidad Autónoma de Galicia and Retegal v Commission*, and C-81/16 P *Spain v Commission*.

Commission's argument that no additional reasoning was necessary since the selectivity condition is automatically satisfied if a measure applies exclusively to a specific economic sector or to undertakings in a particular geographic area. Instead, the European Court of Justice argued, by making reference to *Lübeck Airport*<sup>141</sup>, that the decision contained no indication of the reasons why undertakings active in the broadcasting sector should be regarded as being in a factual and legal situation comparable to that of undertakings active in other sectors or why undertakings using digital terrestrial technology should be regarded as being in a factual and legal situation comparable to that of undertakings using other technologies. However, other recent judgments did not require such a detailed reasoning on selectivity<sup>142</sup>.

### *Advantage*

The most relevant judgment as regards advantage is *Frucona*<sup>143</sup>. In 2004, the beverage producer Frucona Košice became insolvent mainly due to accumulated tax debts amounting to SKK 640.4 million (approximately EUR 16.9 million). The company asked its creditors for an arrangement under the applicable insolvency legislation and in July 2004, the tax office agreed to write off 65% of its debt. Following a complaint, the Commission took in 2006 a decision concluding that the debt write-off was not consistent with the market economy creditor principle (MECP) and constituted unlawful and incompatible State aid.

In 2010, the General Court fully confirmed the decision (case T-11/07). However, the European Court of Justice concluded in 2013 (case C- 73/11 P) that the Commission had committed a manifest error of assessment by not taking into account in its MECP assessment the likely duration of the bankruptcy procedure. As a result, the European Court of Justice set aside the judgment of the General Court and referred back the case.

The Commission decided to replace its 2006 decision and to adopt a new negative decision with recovery in October 2013. Frucona Košice brought an action for annulment before the General Court who in 2016 annulled the 2013 decision (case T-103/14), in particular because the Commission had not proven to the sufficient legal standard the existence of State aid, since the evidence on the file was, according to the General Court, not capable of substantiating that a private creditor would have preferred alternative scenarios to the proposed arrangement.

On appeal in *Frucona*, the European Court of Justice fully confirmed the judgment of the General Court. It stressed that the MECP test is intended to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to the public creditor. As a result, the European Court of Justice came to the view that the Commission's assessment cannot be limited to just the options that the competent authority actually took into consideration but must cover all the options that a private creditor would reasonably have envisaged in such a situation. It is for the Commission to ask the Member State concerned to provide it with all the relevant information for such overall assessment. This must include all information liable to have a significant influence on the decision-making of a normally prudent and diligent creditor at the time the measure was granted. At the same time, in a series of recent judgements, which rely

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<sup>141</sup> Case C-524/14 P *Commission v Hansestadt Lübeck*, judgment of the Court of 21 December 2016, EU:C:2016:971.

<sup>142</sup> Such as cases C-323/16 P *Eurallumina SpA v Commission* and T-314/15 *Hellenic Republic v Commission*.

<sup>143</sup> Case C-300/16 P *Commission v Frucona Košice a.s.*, judgment of the Court of 20 September 2017, EU:C:2017:706.



rather on C 124/10 P *Commission v EDF*, the Union Courts have rather emphasised that the Market Economy Operator Principle (MEOP) test is not applicable if the Member State did not base its investment decision on preliminary economic evaluations, as a private investor would have done<sup>144</sup>. When a Member State invoked the MEOP, it had to show these in order to prove its claim.

#### *Existing aid vs new aid*

By its judgments in *Dutch social housing*<sup>145</sup>, the European Court of Justice set aside two orders of the General Court of 12 May 2015<sup>146</sup> upholding a Commission decision of 15 December 2009<sup>147</sup>.

The European Court of Justice concluded that when the Commission adopts a decision under Article 19(1), in conjunction with Article 18, of Regulation 659/1999 (now Articles 23(1) and 22 of Regulation 2015/1589), and accepts the commitments of the Member State, it concludes the examination process provided for in Article 108(1) TFEU. Such decision necessarily presupposes that the Commission had first assessed in its letter under Article 17 of Regulation 659/1999 (now Article 21 of Regulation 2015/1589) whether the existing aid scheme was compatible with the internal market, and that it had concluded that the existing aid scheme was not (or no longer was) compatible. Therefore, the conclusion that the Commission drew in its decision (i.e. that appropriate measures were needed) results from that first preliminary finding of incompatibility registered in the Article 17 letter (now Article 21 letter). According to the European Court of Justice, such first assessment cannot be excluded from judicial review without undermining the right to effective judicial review. Therefore, in the original appeal against the Article 19(1) decision, the General Court should have assessed the question of whether the existing aid scheme (before the commitments of the Member State) was compatible with the internal market.

The European Court of Justice also concluded that, irrespective of the respective roles of the Commission and the Member States in the procedure leading to the adoption of appropriate measures under Article 19(1) (now Article 23(1)), it is the Commission's decision recording the proposals of the Member State that renders those proposals binding. As a result, the European Court of Justice ruled that the General Court had erred in law by rejecting as manifestly unfounded the appellants' arguments that (i) the Commission had erred in law and abused its powers by requiring the Dutch authorities to provide a new definition of "social housing" and (ii) the Commission had incorrectly interpreted the 2005 SGEI Decision.

As a result, the cases were referred back to the General Court.

#### *Services of General Economic Interest (SGEI)*

The judgments of the General Court in *Société nationale maritime Corse Méditerranée*

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<sup>144</sup> See, for example, cases T-1/15 SNCM v Commission, C-472/15 P *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v Commission*, T-747/15 *Électricité de France (EDF) v Commission*, and T-423/14 *Larko Geniki Metallifitiki kai Metallourgiki AE v Commission*.

<sup>145</sup> Case T-202/10 RENV *Stichting Woonlinie and others v Commission*, order of the General Court of 12 May 2015, EU:T:2015:287, and case T-203/10 RENV *Stichting Woonpunt and others v Commission*, order of the General Court of 12 May 2015, EU:T:2015:286.

<sup>146</sup> Case C-414/15 P *Stichting Woonlinie and others v Commission*, judgment of the Court of 15 March 2017, EU:C:2017:215, and case C-415/15 P *Stichting Woonpunt and others v Commission*, judgment of the Court of 15 March 2017, EU:C:2017:216.

<sup>147</sup> Commission Decision of 15 December 2009 on State aid cases No E 2/2005 and N 642/2009 – *The Netherlands – Existing and special project aid to housing corporations*, OJ C 31, 9.2.2010, p.6.

(*SNCM*)<sup>148</sup> are relevant *inter alia* because they confirm the necessary link between the demonstration of a market failure and the discretion left to a Member State to define a public service obligation (PSO) in a given market.

These two judgments relate to a 2013 Commission Decision<sup>149</sup> concerning the award of a public service contract to the French shipping company *SNCM* for the period 2007-2013. The Commission concluded that the aid granted to *SNCM* for the additional service needed to cover peak periods during the holiday seasons did not compensate a real public service need (since the market could provide such services) and that it was incompatible.

By its judgments, the General Court dismissed the actions of France and *SNCM* seeking the annulment of the Decision. The General Court first clarified that the Commission, in its assessment of a possible manifest error in the definition of a PSO in the case of an SGEI may rely on non-State aid related EU legislation (such as the Maritime Cabotage Regulation), which may limit the discretionary power enjoyed by Member States. The General Court also confirmed that the definition of the PSO must meet a real need for public service and that its scope must be necessary and proportionate to that need. In particular, where a Member State has the choice between a PSO scheme open to all operators and a public service delegation entrusted to one or few operators, it must opt for the solution that will least distort the good functioning of the internal market.

In cases relating to SGEI/public service compensation, the General Court in T-220/14 *Saremar - Sardegna Regionale Marittima SpA* recalled that the Member States' discretion on the definition of SGEIs cannot preclude the Commission from verifying that the SGEI derogation has been properly applied.

#### *Autonomy of State aid rules*

The autonomous and separate nature of State aid rules as opposed to legislation relating to excise duties (and other tax rules) was confirmed definitively in the C-323/16 P *Eurallumina* case.

#### *Regulatory acts in the sense of the third limb of Article 263(4) TFEU*

The C-640/16 P *Greenpeace Energy* case gave further support to the position that State aid decisions are not regulatory acts in the sense of the third limb of Article 263(4) TFEU, although the Union Courts still have not explicitly stated this in cases relating to aid schemes.

#### *Rights of complainants*

On the rights of complainants (i) the C-228/16 P *Dimosia Epicheirisi Ilektrismou AE (DEI)* judgment reinforced these rights because the European Court of Justice considered that a formal decision can validly replace an illegal previous services' letter rejecting a complaint only if that decision explicitly states the illegality of the previous services' letter; (ii) the T-841/16 *Alex SCI* case confirmed that a services' letter may constitute a challengeable act if it is worded in categorical terms.

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<sup>148</sup> Case T-366/13 *France v Commission*, judgment of the General Court of 1 March 2017, EU:T:2017:135, and case T-454/13 *Société nationale maritime Corse Méditerranée (SNCM) v Commission*, judgment of the General Court of 1 March 2017, EU:T:2017:134.

<sup>149</sup> Commission Decision of 2 May 2013 on State aid case SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of *Société Nationale Maritime Corse-Méditerranée*, OJ L 220, 17.8.2013, p. 20.

## Developing the international dimension of EU competition policy

The Commission aims at fostering a level playing field as regards market access and promotes the values of EU competition enforcement, including State aid control, across the world. The progressive globalisation of trade and the spread of competition regulatory systems around the world call for convergence of competition rules and the coordinated enforcement of these rules. Companies need a transparent, stable and reliable competition enforcement wherever they do business. This will also benefit consumers in the long-term run. And this is why the Commission seeks to reinforce the role of competition policy in international negotiations, in international organisations and cooperates with competition agencies globally.

### 1. Bilateral relations

The Commission is holding negotiations on Free Trade Agreements (FTAs) with the aim to include competition and State aid provisions in such agreements. In 2017, the European Union concluded the negotiations with Japan and Armenia. The Commission continued FTA negotiations with Mexico, Mercosur and Indonesia, and opened negotiations with Chile and Azerbaijan.

The Commission also continued negotiations with the People's Republic of China regarding an Investment Agreement. The agreement aims at establishing a level playing field between EU and Chinese investors, including State owned enterprises, through *inter alia* enhanced provisions on transparency as regards subsidies.

In June, a Memorandum of Understanding was signed with the National Development and Reform Commission of the Peoples' Republic of China to create a permanent forum for dialogue on the enhancement of an effective, transparent and non-discriminatory state aid control and fair competition review.

Negotiations between the Commission and its Canadian counterparts to include provisions on the exchange of evidence into the existing EU-Canada Cooperation agreement have been completed at working level. The updated draft agreement (the so-called "Second Generation Agreement") with Canada will allow the Commission and the Canadian Competition Bureau to exchange evidence collected in the course of their respective proceedings. The possibility to exchange such evidence would improve cooperation between both competition authorities in all competition cases which affect both markets and would lead to more effective and more efficient competition law enforcement. In July 2017, the European Court of Justice issued its Opinion on another agreement, the envisaged EU-Canada Passenger Name Record Agreement, clarifying the standards for private data protection. The Commission is analysing the impact of the Court's Opinion on the draft Second Generation Agreement.

The Commission is also negotiating a similar agreement with Japan to update the existing cooperation agreement from 2003. The Council's authorisation for negotiations was received in April and negotiations started in October.

Another key area of Commission activity is technical cooperation with main trading partners that are developing their competition policy and enforcement regimes and with which the Commission has signed Memoranda of Understanding (MoUs). The Commission has signed MoUs with all the BRICS<sup>150</sup> countries in recent years, and has engaged in technical

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<sup>150</sup> BRICS is the acronym for an association of five major emerging national economies: Brazil, Russia, India, China and South Africa.

cooperation with these countries to varying degrees. In the same vein, the Commission will soon start negotiating an Administrative Arrangement with Mexico. The Commission also assists in the implementation of the competition provisions included in recent FTAs with neighbouring countries. It is involved in negotiating the necessary implementing rules to this effect with Tunisia, as well as monitoring the implementation of the EU competition acquis in countries such as Ukraine and Moldova.

In the accession negotiations with candidate countries, the Commission's main policy objective, in addition to fostering a competition culture, is to further help candidate countries and potential candidate countries to build up a legislative framework with well-functioning competition authorities and an efficient enforcement practice in order to meet the conditions for EU accession in the competition policy field. The Commission is continuously monitoring compliance of candidate countries with their commitments under the Stabilisation and Association agreements.

## 2. Multilateral cooperation

The Commission continued its active engagement in competition-related international fora such as the Competition Committee of the Organisation for Economic Co-operation and Development (OECD), the International Competition Network (ICN), the World Bank and United Nations Conference on Trade and Development (UNCTAD).

In OECD in June, the Commission contributed to the discussions on methodologies for conducting market studies<sup>151</sup>, use of traditional antitrust enforcements tools in multi-sided markets<sup>152</sup>, algorithms and collusion<sup>153</sup>, and competition issues in aftermarkets<sup>154</sup>. Likewise, during the OECD Competition Committee's meeting in June, the Commission presented, its proposal for a EU Directive to empower national competition authorities to be more effective enforcers (the ECN+ initiative), and the key findings of the e-commerce sector inquiry. In December, the Commission contributed to the OECD's discussions on judicial perspectives of competition law<sup>155</sup>, the challenges related to the imposition of extraterritorial remedies<sup>156</sup>, the cooperation between competition agencies and regulators in the financial market<sup>157</sup> and safe harbours, presumptions of illegality and standards in competition law<sup>158</sup>.

In the ICN, following the Porto Annual Conference which took place in May, the Commission continued co-chairing the Cartel Working Group and contributed to updating the ICN 2008 report on "*Setting Fines for Cartels in ICN Jurisdictions*"<sup>159</sup> and the "*Anti-Cartel Enforcement Manual*"<sup>160</sup>. The Commission is also an active member of the Merger and

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<sup>151</sup> For further information see <http://www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm>.

<sup>152</sup> For further information see <http://www.oecd.org/daf/competition/rethinking-antitrust-enforcement-tools-in-multi-sided-markets.htm>.

<sup>153</sup> For further information see <http://www.oecd.org/daf/competition/algorithms-and-collusion.htm>.

<sup>154</sup> For further information see <http://www.oecd.org/daf/competition/aftermarkets-competition-issues.htm>.

<sup>155</sup> For further information see <http://www.oecd.org/daf/competition/judicial-perspectives-competition-law.htm>.

<sup>156</sup> For further information see <http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm>.

<sup>157</sup> For further information see <http://www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm>.

<sup>158</sup> For further information see <http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm>.

<sup>159</sup> For further information see <http://www.internationalcompetitionnetwork.org/uploads/library/doc1127.pdf>.

<sup>160</sup> For further information see <https://icn2017.concorrenca.pt/downloads/materials/CWG-Compliance-of-Good-Practices.pdf>.

Unilateral Conduct Working Groups where it contributes to the various projects carried out by these groups, such as the development of the Unilateral Conduct Workbook<sup>161</sup> and the revision of the ICN Recommended Practices for Merger Notification and Review Procedures<sup>162</sup> and the ICN Recommended Practices for Merger Analysis<sup>163</sup>.

The Commission also participated in the 16th meeting of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy (CLP), which was held in Geneva in July 2017. The conference included discussions on the capacity-building and technical assistance in the area of competition law and policy, enhancing international cooperation in the investigation of competition cross-border cases and challenges faced by young and small competition authorities in the design of merger control.

## **External Communication**

The Directorate-General for Competition's external communication is largely based on the use of mass media to reach a variety of audiences, including businesses, lawyers, researchers, academics, students and the general public. This is achieved principally via the Commissioner's press conferences, press releases and speeches, as well as social media. In addition, the Directorate-General issues newsletters and other publications aimed at stakeholders and the general public, as well as participation by staff in stakeholder conferences.

The mass media are by far the most cost-effective channel to reach a wide audience. According to a 2014 Eurobarometer on "Citizens' Perception about Competition Policy", people's two main sources of information about competition policies were television (62%) and newspapers or magazines, including online (60%). These were followed by internet-based media (38%) and radio (34%).

The Directorate-General for Competition produced 518 press releases related to competition cases during 2017. Of these, 127 were longer, multilingual, press releases while a further 391 were shorter and monolingual. Media coverage of some of the cases was worldwide, reaching tens of millions of people, for example, the Google Shopping and Qualcomm antitrust cases and the Apple and Amazon state aid cases. All of these cases were covered by TV, radio, print and internet media around the globe.

Throughout 2017, Commissioner Vestager delivered around 70 speeches to a variety of audiences, including a TED Talk, the video of which was viewed over 1 million times. The Director-General delivered 25 speeches at a variety of international events.

On social media, the Directorate General for Competition was active on Twitter during 2017. Throughout the year, Over 1000 tweets from the Directorate-General's account achieved more than 3 million impressions (i.e. the number of times a tweet appears in someone's feed). Topics achieving high traffic included the Dow/Dupont, Bayer/Monsanto and Morpho Detection/Smiths mergers, the Apple and Amazon State aid cases, and the Google Shopping, International Skating Union and Aspen Pharma antitrust cases. Followers of the DirectorateGeneral's twitter account rose to 10,000 during the year.

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<sup>161</sup> For further information see <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/ucworkbook.aspx>.

<sup>162</sup> For further information see <http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf>.

<sup>163</sup> For further information see <http://www.internationalcompetitionnetwork.org/uploads/library/doc1107.pdf>.

The DirectorateGeneral's electronic newsletters had over 20,000 subscribers in 2017 while paper publications in the EU Bookshop were downloaded 5000 times.

## **II. SECTORAL OVERVIEW**

The Commission's competition policy actions in 2017 focused on a wide range of policy areas, helping make markets work more fairly. At the same time, EU competition policy supported several key EU policies and initiatives, including a connected Digital Single Market, an integrated and climate friendly Energy Union, a deeper and fairer internal market and taking actions against selective tax advantages. This section provides an overview of competition policy developments and enforcement activities that the Commission particularly focused on in 2017.

### **1. ENERGY & ENVIRONMENT**

#### **Overview of key challenges in the sector**

Competition policy plays a key role in making the Energy Union, one of the Commission's ten priorities, function properly by opening markets, avoiding discrimination and creating a level playing field between all market players, regardless of their nationality. Competition enforcement ensures that gas and electricity flow freely across borders between Member States, promotes interconnectivity and avoids territorial restrictions or artificial market partitioning within the EU. It ultimately empowers consumers – whether energy-intensive users, such as big manufacturing plants, small companies or citizens – to demand a fair deal, and gives them the trust that the EU markets are working well. This ensures that Europe has secure, affordable and green energy.

Competition policy is also key in the area of the environment for achieving the EU's climate targets in particular regarding the shift in the transport sector from polluting fossil fuels to alternative fuels in accordance with the Commission's mobility policy (e-mobility from renewable sources, use of hydrogen and natural gas for low emission vehicles) as well as the introduction of the necessary infrastructure to enable this shift. To this end aid measures aim to address market failures and stimulate demand for low emission vehicles both in public transport as well as for the acquisition of low emission vehicles by consumers.

#### **Contribution of EU competition policy to tackling the challenges**

The scope of competition law enforcement in the energy sector is to strengthen and integrate the principles outlined in sector-specific regulation in order to create a well-functioning unified market, where energy can be exchanged freely and securely across Europe and all related services are provided at competitive levels. For instance, by making sure that dominant positions by incumbent operators are not abused, that suppliers compete effectively and fairly, that State intervention is limited only to those areas in which is really needed and that renewables can compete in the market, competition policy helps keeping overall energy costs under control and at the same time allows for a sustainable economic growth in the EU.

Competition policy in 2017 has focused mainly on the four areas, as presented below:

First, the Commission acted against (privately or State-owned) companies' attempts to artificially segment or partition the internal energy market. In particular, the Commission is concerned that limiting the free flow of gas and electricity between Member States constitutes an obstacle to the Energy Union. For this reason, the Commission has enforced competition rules against territorial restrictions unduly limiting the possibility for customers to deliver or re-deliver energy where needed. Discriminatory conduct against foreign energy or any limitations of imports/exports within the EU have also been under closer scrutiny.

The second important focus was on ensuring that competitors could compete on fair terms and incumbent operators were not allowed to unduly exploit their dominant position, whether gained legitimately on the market, conceded by the State or favoured by national legislation. In fact, the Commission has showed that it is ready to intervene when national rules create or facilitate an infringement of competition law.

Third, the Commission enforced the State aid rules ensuring public support results in a positive balance between the objectives achieved and the potential negative effects of State intervention on the European energy market. In this context, the Commission pays special attention to any market distortions that may arise as a result of public financing, such as the crowding out of investment, negative effects on upstream or downstream markets and excessive profits which may lead to strengthened market positions, deterrence of new entrants and ultimately market foreclosure. By the effective enforcement of State aid rules in 2017 the Commission has ensured that the risk of such distortions is limited to the minimum. This has been achieved by promoting the implementation of more market-oriented capacity mechanisms, new support schemes to renewable energy producers, who receive aid under a clear, transparent and equitable set of rules. Ensuring that technology providers compete on equal grounds. In addition, the Commission ensured that technology providers compete on equal grounds, for example when assessing the restructuring aid to the nuclear technology provider Areva (Areva changed its name to Oreno as of January 2018).

Fourth, the Commission swiftly approved aid measures in support of the introduction of the necessary infrastructure for low-emission mobility (networks of charging stations for e-mobility and for the use of other alternative fuels) and worked together with a number of Member States to ensure that schemes promoting the acquisition of low/zero emission vehicles would not create competition concerns.

#### *Reaping the benefits of a pro-competitive gas, oil and other fuel sectors in the EU*

The purpose of antitrust enforcement in the gas sector is to achieve more competitive markets in Europe, thereby offering citizens and businesses arbitrage opportunities and greater choice at lower prices.

The *Gazprom* case<sup>164</sup> is a good example of the efforts made by the Commission to facilitate cross-border flows of energy between the Member States. In its Statement of Objections, the Commission considered that Gazprom may have abused its dominant position by pursuing an overall strategy to partition the Central and Eastern European gas markets. This may have enabled Gazprom to charge unfair prices in certain Member States. The Commission also considered that Gazprom may have abused its dominant market position by making the supply of gas dependent on obtaining unrelated commitments from wholesalers concerning the gas transport infrastructure.

Gazprom offered commitments to address the Commission's competition concerns and ensure the free flow of gas at competitive prices across the Central and Eastern European gas markets.

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<sup>164</sup> Case AT.39816, *Upstream gas supplies in Central and Eastern Europe*. For further information see IP/15/4828 of 22 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4828\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4828_en.htm).



### The commitments offered by Gazprom

In order to ensure cross-border flows of gas across the investigated Central and Eastern European Member States, Gazprom has offered to remove **all contractual barriers to the free flow of gas** in Central and Eastern European gas markets (including clauses which merely reduce customers' incentive to re-sell gas). In addition, Gazprom has committed to **take active steps to enable better integration of these markets**. First, Gazprom has offered to **facilitate market interconnections between Bulgaria and its EU neighbours**, by committing to introduce changes to its contracts that are necessary for the conclusion of interconnection agreements between Bulgaria and other EU Member States. Second, Gazprom offered to overcome the isolation of the Bulgarian and Baltic gas markets, caused by the lack of gas connecting infrastructure, by creating **additional opportunities for gas flows through swap-like operations** between, on the one hand, the Baltic and Bulgarian gas markets and, on the other hand, other parts of Central and Eastern Europe.

Gazprom has also committed to introduce a number of important changes to its contractual price revision clauses to ensure **competitive gas prices** in the five Member States (Bulgaria, Estonia, Latvia, Lithuania and Poland) in which Gazprom had been preliminary found to charge unfair prices. In essence, Gazprom's customers would be able to ask for a price renegotiation when prices diverge from Western European price benchmarks, including prices at competitive and liquid European gas hubs. The level of the new prices would have to take account of these benchmarks. In case of disagreement between Gazprom and its customer, the matter could be referred to binding arbitration, which would revise prices in line with the same competitive benchmarks. Finally, contractual price revisions would also become more frequent and their timing streamlined as compared to current price revision clauses.

Finally, as regards South Stream, Gazprom has committed **not to seek any damages** from its Bulgarian partners following the termination of the South Stream project.

In March, the Commission decided to submit Gazprom's commitments to a market test.<sup>165</sup> In response to the market test, the Commission has received a significant number of comments and submissions from various market players and interested parties. The Commission has subsequently discussed with Gazprom how the commitments would need to be improved in the light of the comments received in the market test.

In 2017, the Commission also continued its investigation into the possible foreclosure of gas markets in Bulgaria by *Bulgarian Energy Holding (BEH)*<sup>166</sup>. State-owned and vertically integrated Bulgarian Energy Holding was being investigated for hindering competitors' access to key gas infrastructures in Bulgaria and the import pipeline bringing gas to Bulgaria. The company is not only active in the gas supply market but also owns or controls the Bulgarian gas transmission network, the only gas storage facility in Bulgaria and the capacity on the main gas import pipeline into the country. The aim of the case is to ensure a competitive gas market in Bulgaria and foster the integration of the Bulgarian gas market with neighbouring markets.

In June, the Commission opened formal proceedings against the *Romanian Transmission System Operator of natural gas (Transgaz)*<sup>167</sup> to investigate whether it might be hindering the free flows of natural gas from Romania to neighbouring Member States. The aim of the investigation is to ensure the free flow of the natural gas from Romania to neighbouring countries and to improve integration of Romania into the European gas network.

Whilst the Commission primarily focuses on the gas sector, it also monitors other fuel sectors, such as ethanol, a biofuel. Oil and biofuel prices are important to Europe's citizens and

<sup>165</sup> Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*. For further information see IP/17/555 of 13 March 2017 available at [http://europa.eu/rapid/press-release\\_IP-08-386\\_en.htm](http://europa.eu/rapid/press-release_IP-08-386_en.htm).

<sup>166</sup> Case AT.39849 *BEH Gas*. For further information see IP/15/4651 of 23 March 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4651_en.htm).

<sup>167</sup> Case AT.40335 *Romanian gas interconnectors*. For further information see IP/17/1501 of 1 June 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1501\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1501_en.htm).

businesses. In 2017, the Commission continued its investigation into potential collusion practices between three ethanol producers, *Abengoa SA* of Spain, *Alcogroup SA* of Belgium and *Lantmännen ek för* of Sweden, in relation to the ethanol price formation mechanism at wholesale level.<sup>168</sup> If confirmed, these practices would increase prices for renewable energy, in this case biofuels used for transport, and would be therefore harming competition and undermining EU energy objectives.

The *Greek Lignite*<sup>169</sup> case shows the Commission's willingness to tackle also anticompetitive behaviours created or facilitated by national legislation. During 2017 the Commission has reopened the case after the judgments by the General Court<sup>170</sup> in December 2016, upholding the 2008 Commission decision. In the 2008 Commission decision it was established that the Hellenic Republic granted in violation of Article 106 TFEU together with Article 102 TFEU to the State-controlled dominant electricity operator PPC special rights for the exploitation of lignite in Greece. Those special rights created inequality of opportunities for PPC's competitors and enabled PPC to maintain its dominant position on the Greek wholesale electricity market. To remedy this imbalance around 40% of lignite-fired generation capacity had to be divested by PPC to third parties. At the end of 2017 the Hellenic Republic submitted a divestment package proposal.

#### *Benefits of properly functioning and interconnected electricity markets*

Electricity transmission networks in various countries and/or regions are interconnected, and therefore electricity transmission system operators from various areas also manage interconnections with other networks. Where a transmission system operator resolves network congestion problems by limiting cross-border transmission capacity, this may constitute discrimination against cross-border flows of electricity as compared to internal flows and could impede consumers from reaping the benefits of the EU's single market for energy. It can also distort prices, leading to inefficient electricity production and the wrong investment signals.

#### *State aid measures to ensure security of energy supply for European citizens and businesses*

In 2017, the Commission started its enforcement actions based on the findings of the Commission's 2016 sector inquiry into capacity mechanism, which has formed the basis for a close cooperation between the Commission and the EU Member States to ensure that capacity mechanisms are well-designed and fit for purpose. In 2017, the Commission took a final decision on a capacity mechanism in France<sup>171</sup> and approved the joint capacity mechanism for Ireland and Northern Ireland<sup>172</sup>. The joint capacity mechanism for Ireland and Northern Ireland is open to all potential types of capacity providers, including the demand response, in the 'all-island market'. The power plants and other capacity providers will be paid for being

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<sup>168</sup> Case AT.40054 *Ethanol Benchmarks*. For further information see IP/15/6259 of 7 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6259\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6259_en.htm).

<sup>169</sup> Case AT.38700 *Greek Lignite and electricity markets*. For further information see IP/08/386 of 5 March 2008 available at [http://europa.eu/rapid/press-release\\_IP-08-386\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_IP-08-386_en.htm?locale=fr).

<sup>170</sup> Judgments of the General Court T-169/08 *RENV* and T-421/09 *RENV* of 15 December 2016.

<sup>171</sup> Case SA.40454 Tender for additional capacity in Brittany, for further information see IP/17/1325 of 15 May 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1325\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1325_en.htm).

<sup>172</sup> Case SA.44464 *Irish Capacity Mechanism: reliability option scheme*, Commission decision of 24 November 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_44464](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44464), and SA.44465 *Northern Irish Capacity Mechanism: reliability option scheme*, Commission decision of 24 November 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_44465](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44465). For further information see IP/17/4944 of 24 November 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-4944\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4944_en.htm).

available to generate electricity, and the demand response operators for being ready to reduce their electricity consumption to help balancing the demand with supply. The capacity contracts are allocated through regular, competitive auctions. When the electricity prices reach very high levels (i.e. more than €500 per MWh), the capacity mechanism triggers an obligation for power plants selected in the auctions to pay back some of the State aid received. They can finance this payback obligation from the revenues they generate from the sale of electricity. This ensures that the capacity is available, and encourages power plants to use this capacity to offer their electricity on the market when there is scarcity.

Commission continued to ensure that six further capacity mechanisms<sup>173</sup> in Belgium, France, Germany, Greece, Italy and Poland - which concern more than half of EU population - are well-designed and meet the strict criteria under EU State aid rules, in particular the Commission's 2014 Guidelines on State Aid for Environmental Protection and Energy.<sup>174</sup>

### *Sustainability, Competitiveness and State aid*

Promotion of renewable energy and energy efficiency increases the sustainability of the EU energy sector and contributes to environmental protection. In 2017 the Commission adopted 22 decisions on new support schemes to renewable energy producers. Currently almost every Member State has an approved renewable energy support scheme. That ensures not only that Europe becomes greener, but also provides certainty for investors, who receive aid under a clear, transparent and equitable set of rules.

A recently approved State aid scheme provides support to landlords in Germany<sup>175</sup> who are willing to install solar panels on the roof of the rented buildings and sell this electricity to their tenants. The scheme is a new feature of the already approved *EEG 2017*<sup>176</sup>. It will allow new investments in a segment of the solar market that is currently under developed, and will tap on the potential of rented buildings for the production of renewable electricity.

### *Ensuring that technology providers compete on equal grounds*

In 2017 the Commission authorised restructuring aid in form of a capital injection to the nuclear technology provider *Areva*<sup>177</sup> (*Oreno*) in exchange for commitments aimed at minimising competition distortions in the markets of nuclear fuel. For instance, Areva is not allowed to increase its production capacity of enriched nuclear fuel and acquire companies during the time of its restructuring.

### *Merger control*

In the field of merger control, as in the previous years, a number of companies invested in

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<sup>173</sup> See IP/18/682 of 7 February 2018 available at [http://europa.eu/rapid/press-release\\_IP-18-682\\_en.htm](http://europa.eu/rapid/press-release_IP-18-682_en.htm).

<sup>174</sup> See IP/14/400 of 9 April 2014 available at [http://europa.eu/rapid/press-release\\_IP-14-400\\_en.htm](http://europa.eu/rapid/press-release_IP-14-400_en.htm).

<sup>175</sup> Case SA.48327 *Support for PV installations on apartment buildings (Mieterstrom)*, Commission decision of 20 November 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48327](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48327).

<sup>176</sup> Case SA. 45461 *EEG 2017 Reform of the Renewable Energy Law*, Commission decision of 20 December 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45461](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45461). For further information see IP/16/4471 of 20 December 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-4471\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4471_en.htm).

<sup>177</sup> Case SA. 44727 *Restructuring aid to Areva*, Commission decision of 10 January 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_44727](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44727). For further information see IP/17/36 of 10 January 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-36\\_en.htm](http://europa.eu/rapid/press-release_IP-17-36_en.htm).

development and production from renewable sources,<sup>178</sup> in particular in wind parks.<sup>179</sup>

In 2017 the Commission also analysed two acquisitions in the industry for the production of wind turbines: the acquisition of *Gamesa* by *Siemens*<sup>180</sup> and of *LM Wind* by *GE*<sup>181</sup>. In both cases, the analysis carried out by the Commission revealed that competition in the industry will not be negatively affected and that developers and operators of wind parks will continue to have sufficient choice of wind turbines manufacturers and that prices will remain competitive.

Following extensive review, the proposed acquisition of the Greek gas transmission system operator *DESFA* by the *State Oil Company of Azerbaijan Republic (SOCAR)*<sup>182</sup> has been abandoned by the parties. The new tender issued by the Greek authorities included an unbundling requirement, addressing the concerns raised by the Commission when opening the in depth investigation.

In 2017, the Commission analysed and authorised the acquisition of Areva's nuclear reactors business by *EDF*.<sup>183</sup> The acquisition was part of the restructuring plan to restore Areva's competitiveness.

The Commission also analysed the acquisition of *Baker Hughes* by *GE*<sup>184</sup> in the oilfield services industry and concluded that it will not negatively affect competition in that industry.

## 2. INFORMATION AND COMMUNICATION TECHNOLOGIES AND MEDIA

### Overview of key challenges in the sector

In 2017, competition policy and enforcement continued to contribute to the implementation of the *Digital Single Market Strategy*<sup>185</sup>, one of the priorities of the Commission. In particular

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<sup>178</sup> Case M.8508 *Engie/Cdc/Solairecorsica 1-2-3*, Commission decision of 4 July 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8508](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8508); Case M.8413 *Engie/Omnes Capital/Predica/Engie Pv Besse/Engie Pv Sanguinet*, Commission decision of 10 April 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8413](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8413).

<sup>179</sup> Case M.8635 *Sojitz/Kepco/Luricawne/Fixarra/Evalair/Plum*, Commission decision of 25 October 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8635](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8635); Case M.8608 *Engie/La Caisse Des Depots Et Consignations/Ceolfalram76*, Commission decision of 18 October 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8608](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8608); Case M.8595 *GE/Macquarie/Mett*, Commission decision of 28 August 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8595](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8595); M.8592 *Centerbridge/Egph/JV*, Commission decision of 4 September 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8592](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8592); M.8346 *Macquarie/Ussl/Osw Assets Of UK Gib*, Commission decision of 22 May 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8346](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8346).

<sup>180</sup> Case M.8134 *Siemens/Gamesa*, Commission decision of 13 March 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8134](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8134).

<sup>181</sup> Case M.8283 *GE/LM Wind Power Holding*, Commission decision of 20 March 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8283](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8283).

<sup>182</sup> Case M.7095 *SOCAR/DESFA*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7095](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7095).

<sup>183</sup> Case M.7764 *EDF/Areva Reactor Business*, Commission decision of 29 May 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7764](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7764). For further information see IP/17/1466 of 29 May 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1466\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1466_en.htm).

<sup>184</sup> Case M.8297 *GE/Baker Hughes*, Commission decision of 31 May 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8297](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8297).

<sup>185</sup> Communication of 6 May 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for*

the Commission completed its sector inquiry into e-commerce and carried out a number of investigations in the information, communication and media sectors.

## **Contribution of EU competition policy to tackling the challenges**

### *Completing the e-commerce sector inquiry*

On 10 May, the Commission adopted the final report<sup>186</sup> on the *e-commerce sector inquiry*.<sup>187</sup> The objective of the sector inquiry was to gather market information in order to better understand the nature, prevalence and effects of barriers to online trade erected by companies, and to assess them in light of EU Competition rules.

The report confirms that the growth of e-commerce over the last decade and, in particular, increased online price transparency and price competition, had a significant impact on companies' distribution strategies and consumer behaviour.

#### **The final results of the e-commerce sector inquiry highlight the following major market trends:**

- a large proportion of manufacturers decided over the last ten years to sell their products directly to consumer through their own online retail shops, thereby competing increasingly with their distributors;
- increased use of selective distribution systems, where the products can only be sold by pre-selected authorised sellers, allows manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price;
- increased use of contractual restrictions to better control product distribution - depending on the business model and strategy, such restrictions may take various forms, such as pricing restrictions (resale price maintenance), marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks.

Some of these practices may be justified, for example in order to improve the quality of product distribution, others may unduly prevent consumers from benefiting of greater product choices and lower prices in e-commerce.

With respect to digital content, the results of the sector inquiry confirm that the availability of licences from content copyright holders is essential for digital content providers and a key factor that determines the level of competition in the market. The report points to certain licensing practices which may make it more difficult for new online business models and services to emerge. Any assessment of such licensing practices under the EU competition rules has however to consider the characteristics of the content industry. One of the key findings of the sector inquiry is that almost 60% of digital content providers who participated in the inquiry have contractually agreed with right holders to "geo-block". Geo-blocking prevents consumers from purchasing consumer goods and accessing digital content online from other EU Member States.

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*Europe*, COM(2015)192 final available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX%3A52015DC0192>.

<sup>186</sup> Report of 10 May 2017 from the Commission to the Council and the European Parliament on the Final report on the E-commerce Sector Inquiry (SWD(2017) 154 final), COM(2017) 229 final available at [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf).

<sup>187</sup> For further information see sector inquiry website available at [http://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e\\_commerce.html](http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html).

**In light of the results of the e-commerce sector inquiry, the Commission is:**

- targeting enforcement of the EU competition rules at the most widespread business practices that have emerged or evolved as a result of the growth of e-commerce and that may negatively impact competition and cross-border trade and hence the functioning of a Digital Single Market; and
- broadening the dialogue with national competition authorities within the European competition network on e-commerce-related enforcement to contribute to a consistent application of the EU competition rules as regards e-commerce-related business practices.

Furthermore, the sector inquiry has prompted companies to review their commercial practices on their own initiative. This can help consumers to purchase products more easily cross-border and benefit from lower prices and a wider choice of retailers.

*Addressing restrictions to cross-border and online sale of goods*

On 2 February, the Commission has launched three separate investigations to assess if certain online sales practices mandated by vertical agreement among companies prevent, in breach of EU antitrust rules, consumers from enjoying cross-border choice and being able to buy consumer electronics<sup>188</sup>, video games<sup>189</sup> and hotel accommodation<sup>190</sup> at competitive prices.

With respect to consumer electronics, the Commission is investigating whether *Asus, Denon & Marantz, Philips and Pioneer*<sup>191</sup> have breached EU competition rules by restricting the ability of online retailers to set their own prices for widely used consumer electronics products such as household appliances, notebooks and hi-fi products. The effect of these suspected price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors. As a result, the alleged behaviour may have had a broader impact on overall online prices for the respective consumer electronics products.

Concerning video games, the Commission is investigating bilateral agreements concluded between *Valve Corporation*, owner of the Steam game distribution platform, and *five PC video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax*.<sup>192</sup> The investigation concerns geo-blocking practices, where companies prevent consumers from purchasing digital content, in this case PC video games, because of the consumer's location or country of residence. After the purchase of certain PC video games users need to confirm that their copy of the game is not pirated to be able to play it. This is done with an "activation key" on Valve's game distribution platform, Steam. This system is applied for a wide range of games, including sports, simulation and action games. The investigation focuses on whether the agreements in question require or have required the use of activation keys for the purpose

<sup>188</sup> Cases AT.40465 *Asus*, AT.40469 *Denon & Marantz*, AT.40181 *Philips* and AT.40182 *Pioneer*. For further information see IP/17/201 of 2 February 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-201_en.htm).

<sup>189</sup> Cases AT.40413 *Focus Home*, AT.40414 *Koch Media*, AT.40420 *ZeniMax*, AT.40422 *Bandai Namco*, and AT.40424 *Capcom*. For further information see IP/17/201 of 2 February 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-201_en.htm).

<sup>190</sup> Case AT.40308 *Holiday pricing*. For further information see IP/17/201 of 2 February 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-201_en.htm).

<sup>191</sup> Cases AT.40465 *Asus*, AT.40469 *Denon & Marantz*, AT.40181 *Philips* and AT.40182 *Pioneer*. For further information see IP/17/201 of 2 February 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-201_en.htm).

<sup>192</sup> Cases AT.40413 *Focus Home*, AT.40414 *Koch Media*, AT.40420 *ZeniMax*, AT.40422 *Bandai Namco* and AT.40424 *Capcom*. For further information see IP/17/201 of 2 February 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-201_en.htm).

of geo-blocking. In particular, an "activation key" can grant access to a purchased game only to consumers in a particular EU Member State (for example the Czech Republic or Poland). This may amount to a breach of EU competition rules by reducing cross-border competition as a result of restricting so-called "parallel trade" within the Single Market and preventing consumers from buying cheaper games that may be available in other Member States.

On 6 June, the Commission has opened a formal antitrust investigation into the distribution agreements and practices of clothing manufacturer and retailer *Guess*<sup>193</sup>. The Commission investigates information indicating that Guess' distribution agreements may restrict authorised retailers from selling online to consumers or to retailers in other Member States. They may also restrict wholesalers from selling to retailers in other Member States.

On 14 June, the Commission opened three formal antitrust investigations against *Nike*, *Sanrio* and *Universal Studios*<sup>194</sup> respectively to investigate potential barriers to online and offline cross-border trade stemming from licensing practices implemented by the companies concerned. Nike, Sanrio and Universal Studios license the rights for some of the world's most well-known brands. Sports apparel manufacturer Nike is responsible for licensing of rights for, in particular, Fútbol Club Barcelona's merchandise. Sanrio is a licensor of rights for, in particular, Hello Kitty. Universal Studios is a licensor of rights for, in particular, the Minions and Despicable Me. The investigated merchandising products are of a varied nature (mugs, bags, clothing, shoes, toys, etc.), but all carry one or more logos or images from a licensor.

The three investigations aim to ascertain whether certain licensing and distribution practices of these companies illegally restrict traders from selling licensed merchandise cross-border and online within the EEA.

#### *Defending innovation in the e-books market*

On 4 May, the Commission adopted a decision rendering legally binding a set of commitments offered by *Amazon*<sup>195</sup> to increase competition in e-books distribution. In essence, the commitments ban Amazon from enforcing or putting in place any non-price and price-parity clauses in the whole of the EEA for a period of 5 years.

#### **The Amazon Case**

This e-book investigation had been opened on 11 June 2015 to examine whether Amazon may have abused its dominant position in the distribution of English and German language e-books to consumers in the EEA by imposing a number of parity provisions (so-called Most Favoured Nation or MFN clauses). These provisions required e-books publishers to notify Amazon of more favourable or alternative non-price and price terms and conditions they offer elsewhere and/or to make available to Amazon those more favourable or alternative terms and conditions.

During its investigation, the Commission reached the preliminary conclusion that these MFNs were reducing publishers' incentives to support and invest in differentiated offers with Amazon's competitors. They also reduced Amazon's competitors' ability and incentives to develop and differentiate their offerings, thus deterring their entry and/or expansion. The binding commitments offered by Amazon and made legally binding apply for five years to all e-book distribution agreements in the EEA and cover the following points:

<sup>193</sup> Case AT.40428 *Guess*. For further information see IP/17/1549 of 6 June 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1549\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1549_en.htm).

<sup>194</sup> Case AT.40432 *Licensed merchandise – Sanrio*, Case AT.40433 *Licensed merchandise Universal Studios*, and Case AT.40436 *Licensed merchandise – Nike*. For further information see IP/17/1646 of 14 June 2017, [http://europa.eu/rapid/press-release\\_IP-17-1646\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1646_en.htm).

<sup>195</sup> Case AT.40153 *MFNs and related matters*. For further information see IP/17/1223 of 4 May 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1223\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1223_en.htm).

- Amazon will not enforce clauses requiring publishers to offer Amazon (or inform it about) similar terms and conditions as those offered to Amazon's competitors;
- Publishers whose e-book contracts with Amazon contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a competing platform (so-called Discount Pool Provision) will be offered the possibility to terminate such contracts; and
- Amazon will not include in any new e-book agreement any of the MFN clauses mentioned, including Discount Pool Provisions.<sup>196</sup>

A Monitoring Trustee is in charge of monitoring the application of the commitments throughout their duration. Third parties who have queries in relation to the Commitments may contact the Trustee as provided for in the Commission's Decision.<sup>197</sup>

### *Ensuring pro-competitive telecoms framework*

One of the key actions under the second pillar of the Digital Single Market strategy is the review of the telecoms regulatory framework. On 14 September 2016 the Commission adopted three legislative proposals: a proposal for a *Directive establishing the European Electronic Communications Code*<sup>198</sup>, which recasts the existing directives, a proposal for a Regulation establishing the *Body of European Regulators for Electronic Communications* (BEREC)<sup>199</sup>, which enhances the role of BEREC and of national regulatory authorities and a proposal for a Regulation on the promotion of Internet connectivity in local communities and public spaces (WiFi4EU)<sup>200</sup>. They are accompanied by two Communications: *Connectivity for a European Gigabit society: Laying the foundations for a competitive Digital Single Market*<sup>201</sup>, which establishes a set of connectivity objectives for 2025, and *5G for Europe: An Action Plan*<sup>202</sup>, which sets out targeted actions with the aim of fostering 5G deployment in Europe.

The Commission proposals introduce a new connectivity (i.e. investment) objective as an additional policy objective, alongside the other objectives of the framework, namely safeguarding competition, internal market and consumer protection. Indeed, stimulating competition not only drives investments but also results in lower prices, better quality and

<sup>196</sup> For further information see IP/17/1223 of 4 May 2017, [http://europa.eu/rapid/press-release\\_IP-17-1223\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1223_en.htm).

<sup>197</sup> Case AT.40153 *MFNs and related matters*. For further information see [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40153/40153\\_4447\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4447_3.pdf).

<sup>198</sup> Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code, COM(2016) 590 final available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-590-EN-F1-1.PDF>.

<sup>199</sup> Proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0591&from=EN>.

<sup>200</sup> Proposal for a Regulation amending Regulations No 1316/2013 and No 283/2014 as regards the promotion of Internet connectivity in local communities <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0589&from=EN>.

<sup>201</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society*, COM(2016)587 and Staff Working Document SWD(2016)300 available at <https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society>.

<sup>202</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *5G for Europe: An Action Plan*, COM(2016)588 and Staff Working Document SWD(2016) 306 available at <https://ec.europa.eu/digital-single-market/en/news/communication-5g-europe-action-plan-and-accompanying-staff-working-document>.



more choice. At the same time, investment is not an end in itself, as investment as such does not directly benefit consumers. It is the impact of investment on parameters of competition such as lower prices, better quality of service or greater adoption that translates into consumer benefits.

Operators with *Significant Market Power* (SMP) will continue to be obliged to provide access to their networks to other operators, where this is necessary for effective retail competition. De-regulation is possible only when competition is effective in a given telecoms market. The proposal contains new elements which aim at stimulating investments, while safeguarding effective competition. For example access to civil infrastructure is incentivized and a framework rewarding co-investment in very high capacity networks is set up, encouraging fibre deployments from both incumbents and access seekers.

Communication services provided by *Over-the-Top* providers (OTTs) such as Skype and WhatsApp would fall within the proposed scope of the new Electronic Communications Code under the new heading of *interpersonal communications service*. OTTs are typically present at different levels of the value chain, as telcos own network infrastructure and OTTs do not. Regarding spectrum, the Commission proposals contain measures to enhance investment certainty (a minimum licence duration of 25 years, timely availability of spectrum in the market and enhanced co-ordination of spectrum authorisation) and promote competition (such as a possibility to apply spectrum caps, spectrum reservation for new entrants or wholesale access obligations). The proposals also reinforce the role of national regulators and of BEREC, to ensure the consistent and predictable application of the telecoms rules.

The legislative proposals are in their final stages of negotiations between the European Parliament and the Council. Political agreement is envisaged in 2018, during the Bulgarian Presidency<sup>203</sup>.

The Commission *Guidelines on Significant Market Power* (SMP Guidelines)<sup>204</sup> are also part of the telecoms framework. They were adopted in 2002 on the basis of Article 15(2) of the Framework Directive to provide guidance to national regulatory authorities for the analysis of markets and effective competition under the regulatory framework. After 15 years, there is a need to review the SMP Guidelines to bring more clarity, in particular, on the criteria for the finding of joint dominance, in accordance with the European Courts' jurisprudence. The Commission is working towards the adoption of new SMP Guidelines before the entry into force of the European Electronic Communications Code.<sup>205</sup>

#### *Antitrust enforcement in the telecoms sector*

In 2017 the Commission continued its investigation into a mobile network sharing agreement between the two largest operators in the Czech Republic, *O2 CZ/CETIN* and *T-Mobile CZ*.<sup>206</sup> The Commission investigates in particular whether the cooperation between O2 CZ/CETIN

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<sup>203</sup> For further information see <http://www.consilium.europa.eu/en/press/press-releases/2017/10/11/new-eu-telecoms-rules/>.

<sup>204</sup> European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p.6.

<sup>205</sup> Additional information on the public consultation on the review of SMP Guidelines is available at <https://ec.europa.eu/digital-single-market/en/news/commission-reports-public-consultation-smp-guidelines>. The text of the new SMP Guidelines, adopted on 26 April 2018, is available at <https://ec.europa.eu/digital-single-market/en/news/communication-smp-guidelines>.

<sup>206</sup> AT. 40305 - *Network sharing - Czech Republic*. For further information see IP/16/3539 of 25 October 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-3539\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3539_en.htm).

and T-Mobile CZ risks slowing down quality improvements in existing infrastructure, and delaying or hindering the deployment of new technologies, such as 4G/LTE and future technologies, and new services based on them, in particular in densely populated areas.

In the area of baseband chipsets, which process the core communication functions in smartphones, tablets and other mobile broadband devices, the Commission continued the investigations in the *Qualcomm* cases<sup>207</sup> as regards Qualcomm's payments to a major customer conditional on exclusivity and potential "predatory pricing" by charging prices below costs with a view to forcing Qualcomm's competition out of the market.

#### *Antitrust enforcement in technology markets*

The Commission's actions in technology markets aim to keep markets competitive, and maximise incentives to innovate.

On 27 June, the Commission fined *Google* EUR 2.42 billion for breaching EU antitrust rules.<sup>208</sup> The Commission found that Google has abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.

#### **The Google case**

In its decision, the Commission concluded that Google is dominant in general internet search markets throughout the EEA. The Commission based its finding on the fact that Google's search engine has held very high market shares in all EEA countries, exceeding 90% in most, and on the presence of high barriers to entry in these markets, in part because of network effects: the more consumers use a search engine, the more attractive it becomes to advertisers.

The Commission found that Google abused its market dominance by giving its own comparison shopping service an illegal advantage, notably through the more favourable positioning and display, in its general search results pages, of its own comparison shopping service compared to competing comparison shopping services. As such, Google leveraged its dominant position in the market for general search into the adjacent market for comparison shopping. Google's service is positioned prominently and not subject to dedicated algorithms that make competing comparison shopping services prone to having their ranking reduced, thus affecting their visibility in Google's general search pages. Furthermore, Google's own comparison shopping service is displayed with enhanced features (e.g. product pictures) at or near the top of the first general search page, while such features are not available to its rivals.

The Google decision is based on a detailed effects-based analysis:

First, to show that Google's conduct diverts traffic from competing comparison shopping services, the decision analyses the influence of visibility of generic search results on user behaviour and the actual evolution of traffic to competing comparison shopping services and to Google's own comparison shopping service (short-term impact on click-through rates, visibility data and long-term evolution of traffic).

<sup>207</sup> AT. 39711 *Qualcomm* (predation) and AT.40220 *Qualcomm* (exclusivity payments). Statements of Objections were sent to the company on 8 December 2015. For further information see IP/16/6271 of 8 December 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-6271\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6271_en.htm). On 24 January 2018, the Commission adopted a prohibition decision in case AT.40220 *Qualcomm* (exclusivity payments) and fined Qualcomm EUR 997 million for abusing its market dominance in LTE baseband chipsets. For further information see IP/18/421 of 24 January 2018, available at [http://europa.eu/rapid/press-release\\_IP-18-421\\_en.htm](http://europa.eu/rapid/press-release_IP-18-421_en.htm).

<sup>208</sup> Case AT.39740 *Google Search (Shopping)*, Commission decision of 27 June 2017 available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf). For further information see IP/17/1784 of 27 June 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm) and MEMO/17/1785 of 27 June 2017 available at [http://europa.eu/rapid/press-release\\_MEMO-17-1785\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm).

Second, the decision shows that generic search traffic from Google's general search results pages represents a large proportion of competing comparison shopping services' traffic and cannot be replaced effectively through alternative sources of traffic, such as AdWords, mobile applications and direct traffic.

Third, the decision shows that Google's conduct had a number of potential anti-competitive effects: (i) foreclosure of competing comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers, and less innovation; (ii) likelihood to reduce the ability of consumers to access the most relevant comparison shopping services.

Google's conduct would also have potential anti-competitive effects even if comparison shopping services did not constitute a distinct relevant product market, but rather a segment of a possible broader relevant product market comprising both comparison shopping services and merchant platforms.

The Commission concluded that Google's behaviour stifled competition on the merits in comparison shopping markets and ordered Google to bring the abuse to an end within 90 days of the decision and to refrain from any measure that has the same or an equivalent object or effect. In particular, the Decision orders Google to comply with the simple principle of giving equal treatment to rival comparison shopping services and its own service, meaning that Google has to apply the same processes and methods to position and display rival comparison shopping services in Google's search results pages as it gives to its own comparison shopping service.

It is Google's sole responsibility to ensure compliance, and the Commission is monitoring Google's compliance closely.

### *Antitrust enforcement in sports market*

On 8 December, the Commission decided that the *International Skating Union's (ISU)* rules imposing severe penalties on athletes participating in speed skating competitions that were not authorised by the ISU were in breach of EU antitrust law.<sup>209</sup>

#### **The ISU case**

In October 2015 following a complaint by two Dutch professional speed skaters the Commission opened formal proceedings into ISU's rules under which athletes would face severe penalties for participation in unauthorised speed skating events.<sup>210</sup> The ISU, made up of national ice-skating associations, is the sole body recognised by the International Olympic Committee to administer the sports of figure skating and speed skating on ice. The ISU and its members organise and generate revenues from speed skating competitions, including from major international competitions such as the Winter Olympic Games and the World and European championships.

The Commission's investigation found that under the ISU eligibility rules, in place since 1998, speed skaters participating in competitions that were not approved by the ISU faced severe penalties up to a lifetime ban from all major international speed skating events. The ISU could impose these penalties at its own discretion, even if the independent competitions posed no risk to legitimate sports objectives, such as the protection of the integrity and proper conduct of sport, or the health and safety of athletes. By imposing such restrictions, the ISU eligibility rules restricted competition and enabled the ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events. In particular, the Commission considered that the ISU eligibility rules restricted the commercial freedom of athletes who were prevented from participating in independent skating events. As a result of the ISU eligibility rules, athletes were not allowed to offer their services to organisers of competing skating events and could be deprived of additional sources of income during their relatively short speed skating careers. The ISU eligibility rules made it more difficult for independent organisers from putting together their own speed skating competitions because they were unable to attract top athletes. This has limited the development of alternative and innovative speed skating competitions.

<sup>209</sup> Case AT.40208 *International Skating Union's Eligibility rules*. For further information see IP/17/5184 of 8 December 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-5184\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5184_en.htm).

<sup>210</sup> Case AT.40208 *International Skating Union's Eligibility rules* available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40208](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40208).

The ISU introduced certain changes to its eligibility rules in June 2016. The Commission, however, found that the 2016 rules still did not allow for equality of opportunity for third party organisers and that the penalties set by the eligibility rules remained disproportionately punitive. Therefore, the Commission concluded that the ISU eligibility rules were anticompetitive and had breached Article 101 TFEU since 1998.

### *Merger review in ICT and media*

In the telecommunications sector, the Commission cleared in July the creation of a joint venture that will provide mobile payment services to businesses and consumers in Lithuania.<sup>211</sup> The parents of the *JV, Bitė, Tele2* and *Telia* are all retail mobile telecommunications services providers, while *Telia* also provides colocation services, hosting other companies' servers in its data centers. The Commission approved the transaction since it raised no competition concerns on the nascent market for mobile payment services in Lithuania and there was no risk that the joint venture's parents would shut out rivals, which have alternative means to securely store information and to authenticate users.

In the IT sector, the Commission conditionally approved in April the acquisition of smart card maker *Morpho* by *Advent International*<sup>212</sup>, a private equity firm already controlling smart card and digital security provider *Oberthur*. Smart cards are widely used in the banking sector (payment cards), in the telecommunications sector (SIM cards) and in the identity document sector (e-passports, e-ID cards, e-health cards). The Commission was concerned that the proposed transaction would have significantly reduced competition for payment smart cards in France, a particularly difficult market for suppliers to enter. To address these concerns, *Morpho* offered to divest its French subsidiary *CPS* and ultimately the Commission cleared the transaction.

In May, the Commission cleared the acquisition of networking products supplier *Brocade* by semiconductor manufacturer *Broadcom*, subject to conditions.<sup>213</sup> The Commission had concerns that confidential information from competitors could be used by the merged entity to favour its own products in markets for Fibre Channel Storage Area Network products. In addition, there was a risk that the merged entity could degrade the interoperability between its own Fibre Channel switches and the Host Bus Adaptor (HBA) cards of competing vendors to favour its own HBA cards. The transaction was cleared subject to remedies which ensure that *Broadcom* will cooperate closely and in a timely manner with competing HBA cards suppliers to achieve the same level of interoperability as that of its own HBA cards and that it will protect third party confidential information.

In January 2018, the Commission cleared, subject to conditions, the proposed acquisition of *NXP* by *Qualcomm*, two of the leading players in the semiconductor industry.<sup>214</sup> In June 2017, the Commission had opened an in-depth investigation based on concerns that the merger could lead to higher prices, less choice and reduced innovation in chipset products used in mobile devices, such as smartphones. The Commission also had concerns that the combination of the two companies' IP Portfolio related to *Near Field Communication* (NFC) chips would enable the merged entity to disproportionately improve its bargaining power and

<sup>211</sup> Case M.8251 *Bitė/Tele2/Telia Lietuva/JV*, Commission decision of 19 July 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8251](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8251).

<sup>212</sup> Case M.8258 *Advent International/Morpho*, Commission decision of 19 April 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8258](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8258).

<sup>213</sup> Case M.8314 *Broadcom/Brocade*, Commission decision of 12 May 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8314](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8314).

<sup>214</sup> Case M.8306 *Qualcomm/NXP Semiconductors*, Commission decision of 18 January 2018, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8306](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8306).

allow it to charge significantly higher royalties for the NFC patents than the Parties charge currently for the same patents. Ultimately, the Commission considered that the IP commitments, the product-related commitments and the *MIFARE*<sup>215</sup> commitments proposed by Qualcomm (interoperability between third party products and the parties' baseband chipsets and NFC products, third party access to NXP's MIFARE technology and carve-out and licensing and non-assert obligations in relation to the NXP's NFC portfolio) fully addressed its concerns and cleared the transaction.

In the media sector, in April the Commission cleared *21st Century Fox's* (Fox) proposed acquisition of *Sky*<sup>216</sup>, the leading pay-tv operator in Austria, Germany, Ireland, Italy and the United Kingdom. Fox is a diversified global media company and one of the six major Hollywood film studios (20th Century Fox), as well as a TV channel operator (Fox, National Geographic). The Commission found that the transaction would lead to only a limited increase in Sky's existing share of the markets for the acquisition of TV content as well as in the market for the wholesale supply of TV channels in the relevant Member States.

The Commission approved the acquisition of *Telecom Italia* by *Vivendi*, subject to conditions, in May.<sup>217</sup> Telecom Italia provides voice and data services through mobile and fixed technologies, digital content services and IT services to enterprises in Italy. Vivendi is active in the music, TV, cinema, video sharing and games businesses and advertising. Both Telecom Italia and Vivendi also hold a significant share, through their respective shareholdings in Persidera and Mediaset, in the market for the wholesale access to digital terrestrial networks for the broadcast of TV channels. The Commission was concerned that Vivendi would raise prices charged to TV channels in that market as other players did not constitute a viable alternative for TV channels, making it more expensive for them to reach audiences in Italy. The Commission ultimately cleared the transaction subject to the divestment of Telecom Italia's stake in Persidera.

#### *State aid enforcement in ICT and media*

The achievement of the *European broadband targets*<sup>218</sup>, despite substantial progress,

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<sup>215</sup> MIFARE is NXP's proprietary technology used mainly for public transit and hospitality.

<sup>216</sup> Case M.8354 *Fox/Sky*, Commission decision of 7 April 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8354](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8354).

<sup>217</sup> Case M.8465 *Vivendi/Telecom Italia*, Commission decision of 30 May 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8465](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8465).

<sup>218</sup> In its Communication "*Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society*" of 14 September 2016 (COM/2016/587, available at <https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society>), the Commission confirmed the importance of Internet connectivity for the Digital Single Market and, building on the Digital Agenda for Europe goals for 2020, set out a strategy for a European Gigabit society operationalised through three strategic objectives for 2025:

- Gigabit connectivity for all main socio-economic drivers such as schools, transport hubs and main providers of public services as well as digitally intensive enterprises.
- All urban areas and all major terrestrial transport paths to have uninterrupted 5G coverage.
- All European households, rural or urban, will have access to Internet connectivity offering a downlink of at least 100 Mbps, upgradable to Gigabit speed.

As indicated in the Communication, the Commission will reflect the foreseeable evolution of long-term demand when applying the "step change" approach of the Broadband State Aid Guidelines in conjunction with the strategic objectives set in this Communication, and will consider favourably efficient blended financing that contributes to lower the aid intensity and to reduce risks of distorting competition, as part of its assessment of State aid interventions.

represents a significant challenge, in particular for the deployment of ultrafast networks<sup>219</sup>. Reaching the Digital Single Market connectivity objectives for 2020 and 2025 is estimated to require an overall investment of around EUR 500 billion over the coming decade, representing an additional EUR 155 billion over and above a simple continuation of the trend of current network investment and modernisation efforts of the connectivity providers<sup>220</sup>.

Most of the financing for the upgrade and deployment of next-generation networks in the broadband sector comes from private companies. Private companies tend to invest mostly in urban, highly populated areas which can assure rapid return on investment. As a result, in certain areas - in particular rural - public funds support the deployment of broadband networks, within the broader objectives of inclusion and economic development. State aid control seeks to ensure that where a market failure arises and publicly funded networks are needed, these do not crowd out private investments.

#### **Pro-competitive principles for public funding to support the deployment of broadband networks**

Where Member States provide funding or have discretion in the spending of European funds, a number of pro-competitive principles apply, based on the State aid rules:

- i) Public support must be based on an **identified need of investment**, based on appropriate **mapping and market consultation**, to avoid a crowding out of private initiatives (defining the market failure);
- ii) **different technologies** should be allowed to bid for the objective connectivity targets set;
- iii) a **competitive selection process** has to take place to ensure the best offer for **the best price** and;
- iv) to **avoid a 'subsidy to monopoly'**, publicly funded projects have to be **open to all users at fair, reasonable and appropriate**.

These principles are also embedded in the **General Block Exemption Regulation**<sup>221</sup> (GBER) which is intended particularly for underserved areas and allows Member States to deploy broadband networks without State aid notification. In assessing notified measures, Member States and selected operators must fulfil a number of conditions as specified in the **Broadband State Aid Guidelines**<sup>222</sup>.

All Member States have adopted and/or updated their national and/or regional broadband strategies<sup>223</sup>. As proposed in the Commission Communication of 14 September 2016<sup>224</sup>,

<sup>219</sup> According to Europe's digital progress report 2017, available at <https://ec.europa.eu/digital-single-market/en/news/europes-digital-progress-report-2017>, Next Generation Access (NGA) networks coverage continues to improve. At the end of 2016, NGA networks were available to 76 % of EU homes. Despite a persistent gap with urban areas, NGA networks rollout is catching up in rural areas, covering 40% of homes in 2016 compared with just 30% a year before.

<sup>220</sup> Based on the study by Analysys Mason "Costing the new potential connectivity needs" (SMART 2015/0068, available at <https://publications.europa.eu/en/publication-detail/-/publication/e81ae17f-9d27-4b68-8560-7cd45dbe21d8>) and the Commission's estimates.

<sup>221</sup> The *General Block Exemption Regulation* (GBER) frees categories of State aid, deemed to bring benefits to society, that outweigh the possible distortions of competition in the Single Market triggered by public funding from the requirement of prior notification to the Commission. Consequently, Member States may implement measures which fulfil the condition of the GBER without prior scrutiny by the Commission.

<sup>222</sup> Communication from the Commission, *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ C 25, 26.1.2013, p.1; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF>.

<sup>223</sup> Even though a few Member States do not yet have a single document that can be regarded as a national broadband plan, all of them have at least an overall strategic approach for the deployment of next generation access networks that is implemented in practice.

<sup>224</sup> Commission Communication COM/2016/587 "Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society" of 14 September 2016, available at <https://ec.europa.eu/digital-single->

Member States have initiated a process to adapt their National Broadband Strategies to the new 2025 connectivity strategic objectives proposed by the Commission. Extensive national and regional broadband schemes have been approved by the Commission during 2017, in particular for Lithuania<sup>225</sup>, Croatia<sup>226</sup>, Austria<sup>227</sup>, Germany<sup>228</sup> and Poland<sup>229</sup>. Some Member States completed or modified former broadband schemes with additional investment in the roll out of Next Generation Access networks. For instance, Austria supported the roll out of a passive broadband infrastructure in rural areas of Lower Austria operated by an operator selected through a tender to provide only wholesale services. During the period 2009-2017, the Commission approved State aid for broadband amounting to EUR 38 billion. The Member States effectively spent 30% of this amount, often with a co-financing from European funds<sup>230</sup> amounting to roughly EUR 3 billion. During the same period, Member States adopted 85 broadband State aid measures benefitting from the GBER.

During the period 2009-2017, the Commission approved State aid for broadband amounting to EUR 38 billion. Despite the approval of this amount of State aid by the Commission, the Member States only effectively spent around 30% of this amount, often with a co-financing from European funds<sup>231</sup> amounting to around EUR 3 billion. During the same period, Member States adopted 85 broadband State aid measures benefitting from the GBER.

In the media and broadcasting markets State aid support measures may also be justified to overcome market failures and fulfil public service missions. In this area, the Commission relies on the guidance of the Cinema Communication<sup>232</sup> and the Broadcasting Communication<sup>233</sup> to ensure that support is well-designed in order to meet the underlying objectives of common interest while limiting negative effects on competition.

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[market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society.](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46372)

<sup>225</sup> State aid case SA.46372 - Lithuania - *NGA broadband deployment in rural areas of Lithuania (PRIP 2)*, Commission decision of 4 July 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46372](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46372).

<sup>226</sup> State aid case SA.41065 - Croatia - *National Programme for broadband aggregation infrastructure*, Commission decision of 6 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41065](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41065). For further information see IP/17/1545 of 6 June 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1545\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1545_en.htm).

<sup>227</sup> State aid case SA.46731 - Austria - *Aid to fast broadband infrastructure in rural areas in Niederösterreich*, Commission decision of 3 April 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46731](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46731).

<sup>228</sup> State aid case SA.46805 - Germany - *Follow up German NGA/Vula product*, Commission decision of 11 August 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46805](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46805). For further information see IP/17/2502 of 11 August 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-2502\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2502_en.htm).

<sup>229</sup> State aid case SA.46203 - Poland - *Modifications in the aid scheme the Broadband network project in Eastern Poland*, Commission decision of 21 December 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46203](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46203). Further information available under <http://europa.eu/rapid/midday-express-21-12-2017.htm>.

<sup>230</sup> See State aid case SA.46805 - Germany - *Follow up German NGA/Vula product*. For further information see [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46805](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46805).

<sup>231</sup> European funds mostly used by Member States for the financing of their broadband programmes are the European Regional Development Fund, the European Agricultural Fund for Rural Development and to a less extent the Cohesion Fund.

<sup>232</sup> Communication from the Commission on State aid for films and other audio-visual works (2013/C 332/01), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:332:0001:0011:EN:PDF>.

<sup>233</sup> Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257 of 27.10.2009, p.1 to 14, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC1027\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC1027(01)&from=EN).

In 2017, the Commission notably approved aid schemes designed by Germany<sup>234</sup> and Denmark<sup>235</sup> to favour the development and the promotion of educational and culturally valuable video games which would have not subsisted under normal market conditions.

### 3. FINANCIAL SERVICES

#### Overview of the key challenges in the sector

Financial services provide the lifeblood of the European economy. Banks, payment operators, insurance companies, stock exchanges and trading platforms and other financial infrastructure providers are crucial for economic growth. Free and equal access to financial services is key because it empowers citizens and business alike to participate in and benefit from economic opportunities. This is why the Commission is committed to equip the EU with a strong and effective Banking Union and Capital Markets Union to which competition policy provides decisive contributions.

While the new institutions in charge of supervision and resolution of banks<sup>236</sup> have assumed their responsibilities under the new *Banking Union* framework, competition policy continues to play an important role to ensure that financial markets remain competitive. 2017 has shown good examples of close cooperation with the new supervisory and resolution authorities as well as very effective collaboration across instruments. While State aid rules ensure that public money is not used to keep non-viable banks artificially alive, merger rules ensure that the takeover of assets or full institutions as part of a recovery scheme do not result in less competition which would harm citizens and businesses that depend on competitive services provided by banks. Competition enforcement by the Commission has played an important role in restructuring the sector for financial services across the single market.

The importance of well-functioning financial markets that are based on fair competition and enable equal access to finances is not restricted to banks. The whole economy benefits when businesses can raise money also on competitive financial markets for which exchange operators create the necessary infrastructure. Because the proposed merger between *Deutsche Börse and London Stock Exchange*<sup>237</sup> would have significantly reduced competition by creating a de facto monopoly in the crucial area of clearing of fixed income instruments, and no sufficient remedies were offered, it had to be prohibited by the Commission in March 2017.

From an antitrust perspective, the Commission also continues to closely monitor regulatory developments on EU capital markets to ensure that new rules are implemented in a procompetitive way. The same is true for payment systems, an area that is undergoing rapid technological change and where competition policy plays a crucial role to ensure that new as well as existing technology is applied to the benefit of the consumer. The Commission is actively enforcing competition rules in this sector along with regulatory action, in particular

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<sup>234</sup> State aid cases SA.46572 – Germany - *Bavarian games support measure*, Commission decision of 4 September 2017 available at

[http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=3](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3).

<sup>235</sup> Case SA.45735 – Denmark - *Scheme for the development, production and promotion of cultural and educational digital games*, Commission decision of 12 May 2017 available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=3](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3).

<sup>236</sup> In particular the Single Supervisory Mechanism (SSM), and the Single Resolution Mechanism (SRM).

<sup>237</sup> Case M.7995 *Deutsche Börse/London Stock Exchange* available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result).



the implementation of the *Interchange Fee Regulation*<sup>238</sup> and the new *Payment Services Directive*<sup>239</sup>. Last but not least, close monitoring has been taking place in the insurance sector, notably retail insurance, to make sure that citizens are not disadvantaged by anticompetitive practices.

As in previous years, the Commission has been very active in the financial services sector to promote effective and undistorted competition. It continued its role in State aid and merger control as well as in antitrust enforcement to combat anticompetitive behaviour and empower citizens and businesses. In 2017 it has been able to show significant progress in all three areas by ensuring that the Single market for financial services remains competitive for the benefit of all.

## **Contribution of EU competition policy to tackling the challenges**

### *Contribution of EU competition policy to innovation and fairness in payments*

The Commission continues to monitor the implementation of the *Interchange Fee Regulation*<sup>240</sup> (IFR). On 4 October, the Commission adopted the *Regulatory Technical Standards*<sup>241</sup> (RTS) under the Interchange Fee Regulation, which establish the requirements for payment card schemes and processing entities to ensure independence in terms of accounting, organisation and decision making processes. The RTS gives guidance for implementation of the IFR requirement on independence of card schemes and processing entities. The requirement on independence aims at making the processing of card payments more competitive by allowing banks and retailers to choose processors for their card-based payment transactions.

In most Member States credit cards are the main means of internet payment. But card payments over the internet can be cumbersome, expensive to merchants and insecure with high levels of fraud<sup>242</sup>. Moreover, only 60 % of EU citizens possess such cards. *The Payment Services Directive*<sup>243</sup> (PSD II) takes account of and regulates third-party players (bank-owned and non-bank owned) who offer alternative means of internet payments (e.g. through credit transfers via the consumer's bank's website, including most importantly the *Single Euro*

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<sup>238</sup> European Parliament and Council Regulation (EU) No 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123, 19.5.2015, p.1 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.)

<sup>239</sup> European Parliament and Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35 available at [://ec.europa.eu/finance/payments/framework/index\\_en.htm#151008](http://ec.europa.eu/finance/payments/framework/index_en.htm#151008).

<sup>240</sup> European Parliament and Council Regulation (EU) No 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123, 19.5.2015, p.1 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R0751>.

<sup>241</sup> Commission delegated Regulation (EU) 2018/72 of 4 October 2017 supplementing Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process, OJ L13, 18.1. 2018, p. 1 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2018:013:TOC>.

<sup>242</sup> Estimated by the European Central Bank (ECB) to represent about two-thirds of total card fraud in the EU worth EUR 800 million in 2014.

<sup>243</sup> European Parliament and Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35 available at [http://ec.europa.eu/finance/payments/framework/index\\_en.htm#151008](http://ec.europa.eu/finance/payments/framework/index_en.htm#151008).

*Payment Area* (SEPA) Credit Transfer system) or allow consumers to have a global view on their financial situation and spending patterns across all their bank accounts.

Implementation of the IFR and PSD II opens the door for more competition and innovation in the payments sector, to the benefit of consumers and merchants.

#### *Antitrust and cartel investigations in the financial services sector*

In 2017, the Commission continued its antitrust investigations in the financial sector, one of the Commission's priority areas to achieve a fairer and more integrated internal market. The Commission also continued to monitor the competition in the capital markets, in particular it focussed on the markets for equity data and equity trading where high fees/prices persist. In the field of motor insurance, the Commission carried out inspections in July 2017 in view of allegations of breaches of Articles 101 and 102 TFEU in the market of Ireland.

In 2017, the Commission continued its antitrust investigations into *MasterCard's*, *Visa Inc.'s* and *Visa International's*<sup>244</sup> multilateral interchange fees ("MIFs") for transactions in the EEA made with cards issued outside the EEA ("inter-regional transactions"). Inter-regional MIFs are not capped by the Interchange Fee Regulation. Those fees still represent a significant burden to European merchants and increase retail prices for all consumers. The Commission has also continued the investigation into MasterCard's rules with respect to cross-border acquiring, which allegedly have prevented merchants in countries with high interchange fees for acquiring services to seek lower priced services from acquirers established in other Member States. The Commission issued a Supplementary Statement of Objections to Visa Inc and Visa International on inter-regional MIFs in August<sup>245</sup>. In the MasterCard case the Statement of Objections was issued in July 2015<sup>246</sup>, and an oral hearing was held in May 2016.

As technology allows new services to emerge, such as electronic and mobile payments, with significant potential benefits for consumers and businesses notably in the Digital Single Market, the Commission has continued to monitor developments in the new payments services and in October it carried out inspections investigating allegations that online access to bank account information by competing non-bank owned service providers may be prevented in order to exclude such service providers from the market.<sup>247</sup> It is important to ensure that new and innovative services have a fair chance to develop and that incumbents do not exclude new market entrants or attempt to secure substantive parts of markets for themselves.

#### *Merger investigations in the financial sector*

The Commission continued to ensure that concentrations in the financial services sector do not lead to consumers paying higher prices or being offered less choice. 2017 did not show a major consolidation trend but several important cases were reviewed.

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<sup>244</sup> These proceedings were closed as regards Visa Europe following its commitments, Case AT.39398 *VISA MIF*, Commission decision of 26 February 2014 available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39398/39398\\_9728\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf).

<sup>245</sup> Case AT.39398 *Visa MIF*. For further information see European Commission daily news of 3 August 2017 available at [http://europa.eu/rapid/press-release\\_MEX-17-2341\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-2341_en.htm).

<sup>246</sup> Case AT.40049 *MasterCard II*. For further information see IP/15/5323 of 9 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5323\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5323_en.htm).

<sup>247</sup> For further information see MEMO/17/3761 available at [http://europa.eu/rapid/press-release\\_MEMO-17-3761\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-3761_en.htm).

In March, the Commission prohibited the merger between *Deutsche Börse* and *London Stock Exchange*<sup>248</sup> because the merger would have led to a de facto monopoly in clearing of fixed income instruments (bonds and repurchase agreements) in Europe. This monopoly in clearing fixed income instruments would also have had a knock-on effect on the downstream markets for settlement, custody and collateral management. The remedies proposed by the parties were not sufficient to solve the competition concerns as was revealed in the market test so that the Commission could not clear the transaction.

In June, the Commission conditionally approved the acquisition of *Intrum Justitia* active in credit management services by *Nordic Capital*.<sup>249</sup> The decision is conditional on the divestment of the companies' overlapping debt collection and debt purchasing activities in Denmark, Estonia, Finland, Norway and Sweden. The remedies imposed by the Commission ensure that competition in the relevant markets is not affected because it will lead to a new competitor entering the market for the benefit of customers and businesses active in the relevant areas.

In addition, several smaller cases were cleared in the banking and insurance sector that did not negatively impact competition. This included the acquisition of *Banco Popular* by *Banco Santander*<sup>250</sup> in Spain and the acquisition of *Novo Banco* of Portugal by *Lone Star Funds*<sup>251</sup> which both showed the well-functioning cooperation of the EU bank recovery procedures, state aid rules and merger review processes to ensure that the orderly restructuring of the banking sector does not impede effective competition for the benefit of customers and businesses in Europe.

#### *State aid investigations in the financial sector*

In 2017, the Directorate-General for Competition continued exercising State aid control in the financial sector, within the framework of the Banking Union. While the *Bank Recovery and Resolution Directive* ("BRRD")<sup>252</sup> is fully in force since 2016, its application does not prejudice the application of State aid rules.

Since the *2013 Banking Communication*<sup>253</sup>, the application of State aid rules for the financial sector has been resting on three pillars: (1) Restoring long-term viability of aided financial institutions or orderly market exit otherwise, (2) burden sharing by shareholders and subordinated creditors in the cost of ailing banks, (3) Minimisation of distortions of competition from the aid.

In this vein, the rules make a basic distinction between ailing banks for which a return to viability can be demonstrated and non-viable banks. The most distortive type of support, especially at a time where banks are overall carrying out deep adjustments to reduce overcapacities, is keeping artificially alive banks with a business that is not viable anymore in the new economic, technological and regulatory environment. Under State aid rules, banks are required to present a restructuring plan that demonstrates the return to viability in the long

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<sup>248</sup> For more details see [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7995](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7995).

<sup>249</sup> For more details see [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8287](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8287).

<sup>250</sup> For more details see [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8553](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8553).

<sup>251</sup> For more details see [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8487](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8487).

<sup>252</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059>.

<sup>253</sup> Communication from the Commission on the *Application of State aid rules to support measures in favour of banks in the context of the financial crisis (Banking Communication)*, OJ C 216, 30.7.2013, p.1 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0730%2801%29&from=EN>.

term, otherwise they need to exit the market in an orderly manner. Last but not least, State aid rules ensure that the cost to taxpayers is reduced by burden sharing from shareholders and holders of subordinated debt.

In 2017 a series of decisions were adopted – both, related to some “*legacy*” cases preceding the entry into force of the BRRD, but also some cases where the interaction of State aid rules with the BRRD was tested.

In April and June, the Commission approved the sale of the four Italian bridge banks, which were created by the Italian Resolution Authority in 2015 in the resolution of *Banca Marche*, *Banca Etruria*, *Carichiati and Carife*, to *Unione di Banche Italiane* (UBI Banca) and *BPER Banca*, respectively.<sup>254</sup> All bridge banks will be fully integrated into the respective acquirer's operations, so as to turn around their loss-making operations to viability. This will also avoid undue distortions of competition.

In June, the Commission approved State support by Italy to facilitate the liquidation of *Banca Popolare di Vicenza* and *Veneto Banca* under national insolvency law following the European Central Bank declaration that the banks were failing or likely to fail and the Single Resolution Board decision that resolution action was not in the public interest.<sup>255</sup> These non-viable banks were not artificially kept alive but exited the market. At the same time, State aid has cushioned repercussions on the real economy, in particular of the regions in which these banks mainly operated. The aid granted facilitated the transfer of some activities of the liquidated banks, with full integration and downsizing by the acquiring bank. Nonetheless, the aid was limited under State aid rules by full burden sharing from shareholders and subordinated creditors.

In July, *Banca Monte dei Paschi di Siena*<sup>256</sup> (MPS) was recapitalised by the Italian government. To ensure MPS's long-term viability, the bank will re-focus its business model and move more than €26 billion in non-performing loans off its balance sheet. As the bank met the conditions for compatible aid qualifying as “precautionary recapitalisation” under the BRRD (i.e. the recapitalisation is of temporary nature, injected into a solvent institution and is not used to offset losses the institution has incurred or is likely to incur in the near future), this capital injection could only be approved after junior bondholders and shareholders have contributed to the costs of restructuring, in line with “burden-sharing” requirements under the State aid rules.

In October, the Commission approved Portuguese aid in the context of the sale of *Novo Banco*<sup>257</sup>, the bridge bank that Portugal had created in 2014 in the resolution of Banco Espirito Santo (BES), prior to the entry into force of the BRRD. The aid approval was based on the viability of the sold entity ensured through a plan proposed by the buyer, which also

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<sup>254</sup> Case SA.41925 – Italy, Commission decision of 29 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41925](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41925). And State aid cases SA.39543, SA. 41134, SA. 43547 – Italy, Commission decision of 30 April 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39543](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39543).

<sup>255</sup> Case SA.45664 – Italy, Commission decision of 25 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45664](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45664). For further information see IP/17/1791 of 25 June 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1791\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1791_en.htm).

<sup>256</sup> Case SA.47677 – Italy, Commission decision of 4 July 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47677](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47677). For further information see IP/17/1905 of 4 July 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1905\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1905_en.htm).

<sup>257</sup> State aid case SA.49275 – Portugal, Commission decision of 11 October 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_49275](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49275). For further information see IP/17/3865 of 11 October 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-3865\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3865_en.htm).

contained measures to limit distortions of competition.

Finally, there have been cases where the Member State intervened in a market-conform manner and where the Commission found that such measure therefore did not constitute aid. In March 2017 *Caixa Geral de Depósitos*<sup>258</sup> (CGD) was recapitalised by the Portuguese government on market investor terms. The industrial plan running until end-2020 presented by Portugal foresees a structural transformation of CGD and should enable the bank return to profitability in 2018.

In September, the Commission approved the prolongation of the *Italian guarantee scheme to facilitate the securitisation of non-performing loans*<sup>259</sup> (GACS), initially approved in February 2016. Under the scheme, Italian banks, meeting certain conditions, will continue to be able to request a State guarantee on the lower-risk senior notes issued by private securitisation vehicles which help to finance the purchase of non-performing loan portfolios from them. The GACS mechanism is set up such to ensure that State guarantees on the senior notes will be remunerated at market terms according to the risk taken, i.e. in a manner acceptable for a private operator under market conditions.

In all these cases State aid control has been important to make sure that public support is kept to the necessary minimum and that adequate measures are taken to ensure return to viability and minimise distortions of competition, to preserve equality of treatment among Member States and to maintain the integrity of the internal market. Fair competition in the banking sector means that banks with sound business models, lending practices and cost-efficient structures can indeed play their role in supporting jobs and growth in the economy and put their customers' funds into viable projects.

#### **4. TAXATION AND STATE AID**

##### **Overview of key challenges on tax evasion and avoidance and fiscal aid**

The focus the Commission has put on fighting tax evasion and tax avoidance echoes the priorities set by President Juncker in his Political Guidelines and which are also reflected in his Mission Letter to Commissioner Vestager. That is also in line with efforts at the international level, namely by the OECD, to tackle tax base erosion and profit shifting to better align the right to tax with economic activity<sup>260</sup>. State aid investigations into Member States' tax ruling practices, which began in 2013, before the Luxleaks revelations, are one of the tools the Commission has at its disposal to ensure that companies pay the taxes they owe in the Member States where they generate economic value.

Tax evasion and avoidance can be the result of aggressive tax planning strategies, in so far as they shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. Aggressive tax planning can be pursued by making use of preferential tax schemes, or by requesting individual tax rulings. They all have in common that they result in a loss of tax revenue in the Member State where economic value is generated but not taxed, and in Europe as a whole because the tax eventually paid is less than it would have been if the profits had not been shifted.

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<sup>258</sup> State aid case SA.47178 – Italy, Commission decision of 10 March 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47178](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47178). For further information see IP/17/556 of 10.03.2017 available at [http://europa.eu/rapid/press-release\\_IP-17-556\\_en.htm](http://europa.eu/rapid/press-release_IP-17-556_en.htm).

<sup>259</sup> Case SA.48416 – Italy, Commission decision of 6 September 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48416](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48416).

<sup>260</sup> OECD (2013) *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris.

The side effects of aggressive tax planning for the EU are particularly negative: first, it results in undue tax reliefs that distort competition by granting advantages only to selected companies; second, it involves an issue of social equity as the revenues foregone from untaxed multinationals need to be compensated, which normally shifts the burden to the less mobile income of SMEs and labour and third, from the perspective of the dislocation of activities, aggressive tax planning can present a threat to the sustainable growth of the internal market if some Member States were to offer exit points for European profits of multinationals in exchange for creating jobs on their territory and a limited tax payment.

The Commission's State aid decision of 4 October, requiring Luxembourg to recover a selective tax advantage granted to *Amazon* in Luxembourg of up to EUR 250 million, was another step forward in the Commission's overall strategy to ensure fair taxation<sup>261</sup>.

Both collecting taxes and combating tax avoidance and evasion are normally competences of the Member States. However, even in this area where the Member States enjoy fiscal autonomy, any national tax measures adopted have to comply with internal market rules and, amongst others, abide by competition law<sup>262</sup>.

### **Contribution of EU competition policy to tackling the challenges**

#### *State aid investigations and decisions concerning aggressive tax planning*

Since 2013, the Commission has been looking into tax planning practices via its dedicated Task Force, which was turned into a regular administrative unit in 2016.

Throughout 2014-2017, the Commission has continued to gather information on tax planning practices, enquiring into the tax rulings practice and possible fiscal aid schemes of all Member States. The enquiry is aimed at clarifying allegations that tax rulings may constitute State aid and to allow the Commission to take an informed view of the practices of all Member States. Overall the Commission has looked into more than 1 000 rulings.

Financing companies provide financial services intra-group and their profit is the remuneration for their financing activities. This remuneration has to be in line with the arm's length principle. This issue has been one of Directorate-General for Competition's key areas since it started looking into the tax ruling practices of Member States. The Working Paper published as part of

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<sup>261</sup> President Juncker stressed in his State of the Union speech of 14 September 2016 that the decision previously taken with respect to the granting of State aid by Apple in Ireland shows that "every company, big or small, has to pay its taxes where it makes its profits. This goes for giants like Apple too, even if their market value is higher than the GDP of 165 countries in the world. In Europe we do not accept powerful companies getting illegal backroom deals on their taxes" available at [http://ec.europa.eu/priorities/state-union-2016\\_en](http://ec.europa.eu/priorities/state-union-2016_en). For further information on the decision of 4 October see IP/ of 4 October 2017/17/3701, [http://europa.eu/rapid/press-release\\_IP-17-3701\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3701_en.htm).

<sup>262</sup> The Commission work in the area of tax rulings was closely followed by the European Parliament's Special Committee on Tax Rulings and Measures Similar in Nature or Effect (TAXE). On 25 November 2016, European Parliament adopted a Report on tax rulings and other measures similar in nature or effect prepared by the TAXE Committee, which viewed positively the contribution of State aid control to tax fairness in Europe. In fact, it "strongly welcomes and supports the key role of the Commission as the competent competition authority in the ongoing State aid inquiries dealing with tax rulings" (para. 130). On 25 November 2016, the Committee issued a report which broadly endorsed the Commission's approach on State aid available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN>.

this review in June 2016 indicated concerns that some tax rulings for financing companies endorse very low margins and a low taxable base.<sup>263</sup>

The Directorate-General for Competition supported Luxembourg and Cyprus to amend their tax rules in order to avoid undue advantages to financing companies. Luxembourg amended its rules on financing companies at the end of 2016, by way of an administrative circular<sup>264</sup>. These rules entered into effect as of 1 January 2017. Similarly, with a circular dated 30 June 2017, Cyprus introduced changes to their national rules to make them more stringent as regards the tax treatment of financing companies.

### *Specific cases*

On 4 October, the Commission decided to require Luxembourg to recover a selective tax advantage granted in 2003 to *Amazon*<sup>265</sup> by way of tax ruling amounting up to up to EUR 250 million.

#### **Luxembourg – The Amazon decision**

The ruling was prolonged in 2011 and remained valid until mid-2014. The tax ruling agreed to a calculation of the tax base of Amazon's Luxembourg based subsidiary Amazon EU, which records all the sales of Amazon in the EU. Following the application of the calculation method endorsed by the ruling, Amazon EU paid a tax deductible royalty to its parent, also established in Luxembourg, but which is not subject to corporate tax in Luxembourg. As a result, around 75% of the European sales profits of Amazon were shifted to the parent and were not taxed.

The Commission concluded that the level of royalty could not be justified for two reasons: First, the parent company was an empty shell with no employees and no business activities. Therefore, it did not, and could not, develop, enhance or manage these rights so as to justify the level of royalties received. Second, the operating company was the only entity which managed and added value to the IP and actively took decisions and carried out activities related to Amazon's European retail business. It was therefore entitled to higher profits than those established by the ruling.

This incorrect determination of the royalty, leading to a very low tax base for Amazon EU, gave Amazon a selective advantage over other businesses that are subject to taxation rules in Luxembourg. The Commission estimates that this unfair tax advantage amounts to up to EUR 250 million for the period 2006-2014, which Luxembourg has to recover from Amazon.

On 26 October, the Commission opened an in-depth investigation into the United Kingdom scheme that exempts certain transactions by multinational groups from the application of United Kingdom rules targeting tax avoidance.<sup>266</sup>

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<sup>263</sup> Directorate-General for Competition working paper on state aid and tax rulings, Internal Working Paper – Background to the High Level Forum on State Aid of 3 June 2016 available at [http://ec.europa.eu/competition/state\\_aid/legislation/working\\_paper\\_tax\\_rulings.pdf](http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf).

<sup>264</sup> Circular of the Director of Contributions, L.I.R. n° 56/1 – 56bis/1 of 27 December 2016 available at <http://www.impotsdirects.public.lu/content/dam/acd/fr/legislation/legi16/circulaireir561-56bis1-27122016.pdf>.

<sup>265</sup> Case SA.38944 – Luxembourg – *Aid to Amazon*, Commission decision of 4 October 2017 available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=1,2,3&case\\_title=amazon](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1,2,3&case_title=amazon). For further information see IP/17/3701 of 4 October 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-3701\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3701_en.htm).

<sup>266</sup> Case SA.44896 – United Kingdom – *Potential State aid scheme regarding United Kingdom CFC group financing exemption*, Commission decision of 26 October 2017, the letter is available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=1,2,3&case\\_title=cfc](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1,2,3&case_title=cfc). For further information see IP/17/4201 of 26 October 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-4201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4201_en.htm).

### **United Kingdom – The CFC Group financing exemption**

The scheme is an exemption from the United Kingdom's Controlled Foreign Company (CFC) rules. The purpose of these rules is to prevent United Kingdom companies from using a subsidiary, based in a low or no tax jurisdiction, to avoid taxation in the United Kingdom. Under the CFC rules such profits artificially shifted to an offshore subsidiary are reallocated back to the United Kingdom parent company, where it is taxed accordingly. However, in 2013 the United Kingdom introduced an exception from CFC rules

for certain financing income (i.e. interest payments received from loans) – the Group Financing Exemption. The United Kingdom's Group Financing Exemption exempts from reallocation of the CFC income financing income received by the offshore subsidiary from another foreign group company.

At this stage, the Commission has doubts whether this exemption is consistent with the overall objective of the United Kingdom CFC rules, which is to reallocate income artificially shifted to offshore subsidiaries of United Kingdom parent companies to the United Kingdom for taxation. The Commission does at this stage consider that the United Kingdom should apply the anti-abuse rule to all companies which artificially divert income, including those earning group financing income, since they all are in a comparable factual and legal situation with regard to the objective of that measure. The case law of the EU Courts confirms that an exemption from an anti-avoidance provision can amount to State aid.

On 18 December, the European Commission opened an in-depth investigation into the Netherlands' tax treatment of *Inter IKEA*, one of the two groups operating the IKEA business.<sup>267</sup>

### **Netherlands – The Inter IKEA investigation**

Inter IKEA Systems, a Dutch entity part of the Inter IKEA group, records all revenues from franchise fees paid by IKEA shops worldwide. The Commission's investigation concerns two tax rulings, granted by the Dutch tax authorities in 2006 and 2011, which have significantly reduced Inter IKEA Systems' taxable profits in the Netherlands.

The 2006 tax ruling endorsed a method to calculate an annual licence fee to be paid by Inter IKEA Systems to another company of the Inter IKEA group based in Luxembourg. The annual licence fee, which represents a significant part of Inter IKEA Systems' revenue, remained untaxed in Luxembourg due to a special regime.

In 2011, simultaneously to the repeal of the special regime in Luxembourg as requested by a Commission decision of 2006 which concluded that it was illegal and incompatible<sup>268</sup>, the Inter IKEA group amended its structure and Inter IKEA Systems acquired the intellectual property rights located in the past in Luxembourg. The Dutch authorities issued a second tax ruling, which endorsed the price paid by Inter IKEA Systems for the acquisition of the intellectual property and thus the deduction of the interests of the inter-company loan granted to finance this acquisition.

The Commission considers at this stage that the treatment endorsed in the two tax rulings may have resulted in a selective advantage in favour of Inter IKEA Systems, which was not available to other companies subject to the same national taxation rules in the Netherlands.

*Fight against discriminatory tax schemes and measures sheltering national companies from competition in the internal market*

Beyond the cases involving tax rulings, the Commission remains vigilant to ensure that Member States do not use fiscal tools to unduly favour certain companies/sectors and shelter national companies from competition in the internal market.

In 2016, Poland introduced a tax on the retail sector. Subject to the tax were undertakings

<sup>267</sup> Case SA.46470 – Netherlands – *Potential State aid to Inter Ikea*, Commission decision of 18 December 2017. The public version of this decision will become available at [http://ec.europa.eu/competition/ejojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46470](http://ec.europa.eu/competition/ejojade/isef/case_details.cfm?proc_code=3_SA_46470). For further information see IP/17/5343 of 18 December 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-5343\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5343_en.htm).

<sup>268</sup> The so called "1929 billionaire scheme", for further information see IP/06/1021 of 19 July 2006 available at [http://europa.eu/rapid/press-release\\_IP-06-1021\\_en.htm](http://europa.eu/rapid/press-release_IP-06-1021_en.htm).



operating in Poland in the retail sector. The tax had progressive rates, increasing with the turnover in a way that it would result to a disproportionate burden for big companies. On 30 June 2017 the Commission adopted a negative decision considering that the progressivity of the tax rates granted a selective advantage to undertakings with low turnover (mainly national companies) and constituted State aid which was not compatible with the internal market.<sup>269</sup> This case is similar to previous cases of Hungarian progressive turnover-based taxes in which the Commission adopted three final negative decisions in 2016.<sup>270</sup>

With regard to the investigation into fiscal aid to ports, further to the negative decision on the corporate tax exemption for Dutch public companies, including seaports of January 2016<sup>271</sup>, the Commission took two further negative decisions in July 2017 requiring France<sup>272</sup> and Belgium<sup>273</sup> to abolish the corporate tax exemptions for their ports and continues to assess the taxation of ports in other Member States to ensure fair competition in the sector across the EU. The Commission's action is consistent with the need to ensure that all companies pay their fair share of taxes and that no sector or company of a certain type unduly receives a more favourable corporate tax treatment. Ports are essential to the EU economy and the Commission does not prevent Member States from providing aid to their ports, for instance when this is necessary to develop port infrastructure. However, corporate tax exemptions provide a bigger advantage to those beneficiaries who are most profitable. They are neither transparent, nor limited or targeted at financing activities or investments which are necessary and justified by objectives of common interest.

## 5. BASIC INDUSTRIES AND MANUFACTURING

### Overview of key challenges in the sector

The European manufacturing sector is currently facing important challenges related to globalisation, the "fourth industrial revolution" and digitisation of the industry, as well as decarbonisation. Manufacturing accounts for over 80% of Europe's exports and private research and innovation. However, over the last forty years, the relative contribution of industry to the EU economy has declined and its productivity growth has been lagging behind that of other OECD countries. Moreover, certain sectors such as steel are characterised by structural overcapacities.

Basic industries and manufacturing are key to the European economy. In 2017 the Commission expended significant resources on competition policy actions in these sectors, which range widely from consumer products such as cars and musical instruments, to manufactured goods, intermediary products such as coolants and solar panels, to industry inputs such as chemicals and outputs such as plastics. To ensure that manufacturers,

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<sup>269</sup> Case SA.44361 *Polish tax on retail sector with progressive rates*, Commission decision of 30 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_44351](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44351).

<sup>270</sup> Cases SA.39235 *Hungarian advertisement tax*, Commission decision of 4 November 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39235](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39235); SA.40018 *Amendment to the Hungarian food chain inspection fee*, Commission decision of 4 July 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_40018](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40018); and SA.41187 *Hungarian health contribution of tobacco industry businesses*, Commission decision of 4 July 2016 available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result).

<sup>271</sup> Case SA.25398 *Corporate tax exemption of Dutch public enterprises*, Commission decision of 21 January 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_25338](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_25338).

<sup>272</sup> Case SA.38398 *Ports taxation in France*, Commission decision of 27 July 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38398](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38398).

<sup>273</sup> Case SA.38393 *Ports taxation in Belgium*, Commission decision of 27 July 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38393](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38393).

distributors and consumers alike reap a fair share of the benefits of a modern specialised economy and society, the entire value chain of such products is subject to scrutiny under EU competition rules. Where unfair restrictions on the manufacturing or the distribution of these products to certain customers or in certain areas within the EU lead to a reduction in efficiency and to an unfair accrual of the benefits to one particular part of the value chain, to the detriment of consumers in particular, the role of the Commission is to remove these unfair restrictions to the benefit of all.

### **Contribution of EU competition policy to tackling the challenges**

Competition enforcement in manufacturing is aimed at addressing these challenges, in particular by boosting the competitiveness of European manufacturers and by maintaining a level playing field in the internal market, where companies can compete on the merits. Competition enforcement supports the efficient functioning of markets and ensures that public funding is steered towards objectives of common interest, such as reducing pollution by promoting environment-friendly means of transport, providing affordable food and medicines or fostering sustainable growth and jobs.

Healthy and vigorous competition is of fundamental importance to a fair EU economy and society. Anti-competitive practices stifle innovation, introduce rigidities, push prices up, and reduce the competitiveness of EU companies and the real income of EU consumers. The Commission must therefore be vigilant to ensure that the fairness of business dealings in Europe is not jeopardised by such practices.

#### *Antitrust investigations in basic industries*

Basic manufacturing and consumer goods industries continue to represent a significant share of the Commission's enforcement practice. In 2017, the Commission continued its lines of action (including individual case work, market surveillance and advocacy) in these sectors. The EU's high value-added manufacturing industry requires access to basic materials at affordable prices that reflect international cost conditions. In 2017, the Commission actively monitored the markets for these inputs to ensure that firms have adequate access in a healthy and competitive environment.

#### *Merger investigations in basic industries*

Over the past year, there have been several merger investigations in the basic industries and manufacturing sectors. The Commission intervened in some of those cases in order to avoid a significant loss of competition to the detriment of customers.

As regards the cement industry, the Commission prohibited the joint acquisition by German cement manufacturers HeidelbergCement and Schwenk of the operations of Mexican-based Cemex in Hungary and Croatia. The Commission concluded that the takeover would have significantly reduced competition in grey cement markets in Croatia. This decision followed previous conditional clearances in the cement industry where the Commission had approved the acquisition of Italian cement company Italcementi by HeidelbergCement subject to the divestment of Italcementi's cement plant in Belgium (in 2016) and the acquisition of Lafarge by Holcim subject to the divestment over several cement plants across Europe (in 2015).

As regards other basic industries, the Commission investigated in particular two transactions in the refractories industry. In June 2017, the Commission cleared the acquisition of Magnesita Refratários by RHI subject to the divestment of the two companies' overlapping businesses in certain dolomite-based and magnesite-based refractories. In June 2017, the

Commission cleared the acquisition of specialty cement manufacturer Kerneos by French minerals and refractories producer Imerys unconditionally. The Commission also continues to investigate transactions in the aerospace sector where the Commission approved Rolls Royce's acquisition of ITP subject to the condition that Rolls-Royce eliminates a conflict of interest concerning the EPI engine consortium. As regards consumer goods, the Commission opened an in-depth investigation into the proposed merger of Italian manufacturer of frames and sunglasses Luxottica with the French manufacturer of ophthalmic lenses in September 2017.

In 2017, the Commission analysed the acquisition of *Haldex*, a manufacturer of various brake-related systems and components for commercial vehicles by a competitor, *Knorr-Bremse*. The transaction had the potential to severely negatively affect this concentrated market, however, the transaction was ultimately abandoned during the Commission's Phase 2 market investigation.<sup>274</sup>

In the automotive sector, the Commission closely scrutinised a number of transactions concerning both the manufacture and supply of vehicles (*Peugeot/Opel*) and the manufacture of automotive components. In *Valeo/FTE*, for example, the Commission intervened as the acquisition would have reduced the supplier base of passive hydraulic actuators from 3 to 2, leading to potential price increases and reduces choice in the EEA. The Commission will continue to closely monitor the ongoing concentration in the automotive industry.

#### *State aid investigations in basic industries*

Economic growth is only possible where efficient and innovative companies have room to expand. To make this happen, less efficient companies with outdated products have to leave the market. Subsidising inefficient companies interferes with this process and may significantly slow down economic growth. The State aid rules on industrial restructuring ensure that public funding goes to companies that are addressing their problems in order to become viable on their own.

In 2017, the Commission has continued its in-depth investigation into the restructuring of the Romanian petrochemical company *Oltchim*<sup>275</sup>. After years of loss-making, the state-owned company is being privatised with the aim of restructuring its business model with a new industrial partner and paying existing debts from the sales proceeds. The Commission's inquiry is aimed at ensuring that the privatisation will enable the company to become viable in the long term and that debt waivers by Oltchim's public creditors do not result in giving the company an unfair advantage over its competitors.

In order to address the particular challenges of Europe's steel sector, the EU State aid rules focus public support in this area on measures aimed at improving long-term competitiveness and efficiency (research and development, training, energy and environment) for viable companies. That's why no rescue and restructuring aid can be granted to steel companies. Keeping ailing companies afloat with public money would only aggravate the structural problems of the steel sector and lead to subsidy races between Member States. Since the mid-90s, the Commission has therefore consistently prohibited such aid.

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<sup>274</sup> Case M.8222 Knorr-Bremse / Haldex available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8222](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8222).

<sup>275</sup> Case SA.36086 *Potential aid to Oltchim*, Commission decision of 8 April 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_36086](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36086). For further information see IP/16/1321 available at [http://europa.eu/rapid/press-release\\_IP-16-1321\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1321_en.htm).

In line with these principles, the Commission has concluded that two measures granted by Italy in favour of the Italian steel maker *ILVA*<sup>276</sup> gave the company an undue advantage over competitors. In particular, this concerns the pricing conditions of a State guarantee on a €400 million loan and a €300 million public loan. These served to finance *ILVA*'s liquidity needs for its commercial activity and not for any environmental clean-up carried out at the site. Both were granted on terms below market conditions and placed *ILVA* in a better situation than other EU steelmakers, which have to finance their operations and restructure at their own expense. *ILVA* has to pay back the undue advantage of around €84 million, consisting in the difference between the rates. *ILVA* would have had to pay to raise the funding on the market and the price at which the company actually received the money.

## 6. AGRI-FOOD INDUSTRY

### Overview of key challenges in the food sector

While many undertakings in the European food sector are able to grasp the full benefits from operating in a broad common European market place, some others seem to face challenges operating in the EU Internal Market and in a globalised world. European farmers, food manufacturers and retailers can get more out of their ability to buy and sell across national borders and their access to a wide common market in a pro-competitive way.

#### *Challenges for European farmers operating in the Internal Market*

Farmers are particularly vulnerable to the challenges raised by globalisation and their functioning in a larger internal market for a number of reasons. European farmers are increasingly facing (1) more competition from other farmers inside as well as outside Europe, (2) higher demands from end consumers in terms of quality, variety and traceability, and (3) higher investments needs linked to initiatives to come to a greener and more sustainable agriculture.

The European agricultural sector still has some structural characteristics which make it harder to cope with these challenges. First, agricultural producers are still the least concentrated level in the food supply chain in Europe. The most common situation across sectors and Member States is that agricultural producers remain atomised or grouped into small cooperatives and other producer organisations. In contrast, their input suppliers and customers (processors, wholesalers and retailers) are often much larger and more concentrated, giving them more bargaining power in their negotiations with farmers. Second, unforeseeable natural elements (such as adverse weather conditions and diseases) can significantly alter production, resulting in volatility of production and therefore volatility of prices and revenues.

European farmers operating in a globalised world and in the Internal Market can manage these challenges better by their integration in larger organisations where these organisations aggregate supply (both in terms of volumes and variety of products), offer supporting services and add value through processing. Such integration can provide more stability, scale to reach more customers, flexibility, more value and more bargaining power.

#### *Opportunities and challenges posed by increased retail concentration in the Internal Market*

Chains of retailers have developed sophisticated distribution systems and varied store formats

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<sup>276</sup> Case SA.38613 – Italy – Aid to Ilva, Commission decision of 21 December 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38613](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38613). For further information see IP/17/5401 available at [http://europa.eu/rapid/press-release\\_IP-17-5401\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5401_en.htm).

that supply wide arrays of products to customers. Using the characteristics (scalability, economies of scale, etc.) of their business model, chains of retailers seem to take the benefits of operating in a global world and an EU Internal Market. Many such chains have opened shops in other Member States than their home market, hereby bringing a different business model and more competition to other markets. Indeed the number of shops of retail chains has increased very significantly since 2000. Consumers often value the offer of different products, a wider choice and variety coming from other markets, especially when this goes along with lower prices. On the other hand, the increasing concentration of retailers (through internal growth, mergers/acquisitions and/or the formation of buying alliances) continues to worry certain trading partners, especially smaller operators. In particular, they question whether large retail chains have obtained too much bargaining power (in the bilateral negotiations with their suppliers) and buyer power (in the market overall) thanks to their dual role of customers and competitors (through private labels) of their suppliers.

#### *Challenges to the optimal functioning of the EU Internal Market itself*

There are challenges to the EU Internal Market itself, restricting competition at all levels of the food supply chain.

Operators in some national markets sometimes agree on excluding operators from other Member States and give preference to domestic products even though this preference is not based on objective criteria (quality, specific traits, etc.) of the products. These discriminations based on nationality are hurting the fundamental principle of the EU to give a fair chance to all producers inside the EU independently of their origin.

Further, international food manufacturers, for years already present with equal or similar brands in different Member States reportedly (try to) segment the Internal Market by preventing or hindering retailers from bringing products from lower-priced markets into higher-priced markets.

#### **Contribution of EU competition policy to make the Internal Market work better**

##### *Making farmers more competitive in the EU Internal Market*

In previous years, several legislative initiatives were launched in order to help European farmers better cope with the challenges posed by the Internal market and globalisation, to increase the competitiveness of the EU agricultural sector and to strengthen the bargaining power of smaller agricultural producers. Several derogations from competition rules were granted to the EU agricultural sector through the CMO Regulation: for instance, the reform of the Common Agricultural Policy in 2013 set out derogations to antitrust rules for certain agricultural sectors (olive oil, beef and veal, and arable crops (cereals, oilseeds, etc.))<sup>277</sup>. The sector-specific derogations have been deleted in 2017 when the Council and the European Parliament amended the application of the competition rules to the agricultural sector by creating a horizontal provision which allows recognised producer organisations and their associations to engage in practices such as production planning and contractual negotiations, in derogation from Article 101 TFEU.

In 2017, the co-legislators decided to amend competition rules to the agricultural sector by

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<sup>277</sup> The CMO Regulation is the European Parliament and Council Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R1308>.

amending the Omnibus legislative proposal made by the Commission for a different purpose, i.e. the simplification of financial regulations.

The Commission confirms its commitment to maintain effective competition in the agricultural sector, and give full effect to the objectives of the CAP laid down in Article 39 TFEU. In this context, the Commission noted in an accompanying statement to the Omnibus Regulation that the amendments agreed by the co-legislators foresee only a very limited role for both the Commission and the national competition authorities to act to preserve effective competition. The Commission noted that the legal text must be interpreted in a manner consistent with the Treaty, notably as regards the possibility for the Commission and national competition authorities to intervene if a producer organisation, which covers a large share of the market, seeks to restrict the freedom of action of its members.

*Tackling the challenges of increased retail concentration and unequal bargaining power in the EU Internal Market*

*Supply Chain Initiative* - In parallel with the Omnibus legislative proposal and as a follow-up to the AMTF Report,<sup>278</sup> the Commission has published an Inception Impact Assessment (IIA) to improve the functioning of the food supply chain.<sup>279</sup> The IIA covers three areas which have a bearing on the functioning of the food supply chain in respect of agri-food products and the bargaining position of operators in the chain: (i) unfair trading practices (UTPs)<sup>280</sup> in Business-to-Business relationships, (ii) market transparency and (iii) producer cooperation through value sharing agreements.<sup>281</sup>

*Preventing market segmentation and trade restrictions by food manufacturers in the EU Internal Market*

In November, the Commission sent a Statement of Objections to AB InBev<sup>282</sup> outlining its preliminary view that AB InBev pursued a deliberate strategy to prevent supermarkets and wholesalers from buying its most popular beer brands in Belgium, at lower prices in the Netherlands and France and from importing them into Belgium.<sup>283</sup> AB InBev practices, which prevent the free trade of goods in the EU Internal Market, may result in a violation of Article 102 TFEU.

The Commission's objections concern Jupiler and Leffe, two brands that are long established in Belgium, France and the Netherlands, and relate to different practices put in place by AB InBev:

- AB InBev apparently changed the packaging of Jupiler and Leffe beer cans to prevent imports;
- AB InBev seems to have required a supermarket in the Netherlands with retail outlets in Belgium to buy certain Jupiler products in Belgium instead of importing these from the Netherlands;

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<sup>278</sup> For further information see [https://ec.europa.eu/agriculture/agri-markets-task-force\\_en](https://ec.europa.eu/agriculture/agri-markets-task-force_en) and the Annual Competition Report 2016: [http://ec.europa.eu/competition/publications/annual\\_report/2016/part2\\_en.pdf](http://ec.europa.eu/competition/publications/annual_report/2016/part2_en.pdf).

<sup>279</sup> For further information see [http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735471\\_en](http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735471_en).

<sup>280</sup> UTPs are defined as “practices which grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on its counterparty.

<sup>281</sup> Value sharing agreements have in the meantime been addressed by the Omnibus Regulation through amendments by the European Parliament.

<sup>282</sup> Case AT.40134 *AB InBev* (previously *Limes*). For further information see IP/17/5041 of 30 November 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-5041\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5041_en.htm).

<sup>283</sup> For further information see [http://europa.eu/rapid/press-release\\_IP-17-5041\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5041_en.htm).

- AB InBev apparently capped the quantities of Jupiler products sold to a wholesaler in the Netherlands;
- AB InBev seemingly did not offer certain Jupiler products and/or certain day-to-day Jupiler promotions to supermarkets in the Netherlands.

#### *Further competition enforcement in the EU Internal Market*

The Commission is looking into an alleged infringement of EU antitrust rules that prohibit agreements between undertakings (Article 101 TFEU) by some supermarket chains and some alliances of supermarket chains. The Commission, accompanied by national competition authorities, carried out inspections at the premises of several supermarket chains and alliances of supermarket chains, in France and Belgium.

The Commission's investigation concerns possible competition issues linked to the general commercial strategies of some supermarket chains and to the procurement by some supermarket chains and alliances of supermarket chains of a large range of everyday consumer goods.

#### *Merger investigations in the agri-food industry*

In 2017, the trend of consolidation in the agrochemical industry continued. The Commission ensures effective competition also in this sector so that farmers can have access to innovative products, better quality and competitive prices, as seeds and pesticide products are essential for farmers and ultimately consumers.

In August, the Commission opened an in-depth investigation to assess the proposed acquisition of Monsanto (US) by Bayer (Germany) under the EU Merger Regulation<sup>284</sup>. The Commission had preliminary concerns that the proposed acquisition could reduce competition in a number of different markets resulting in higher prices, lower quality, less choice and less innovation. In particular, the initial market investigation identified preliminary concerns in the areas of pesticides, seeds and traits. The Commission also investigated whether competitors' access to distributors and farmers could become more difficult if Bayer and Monsanto were to bundle or tie their sales of pesticide products and seeds, notably with the advent of digital agriculture. Digital agriculture consists in the collection of data and information about farms with the aim of providing tailored advice or aggregated data to farmers. Both Bayer and Monsanto are currently investing in this emerging technology.

Given the worldwide scope of Bayer and Monsanto's activities, the Commission has cooperated closely with other competition authorities, notably with the Department of Justice in the US and the antitrust authorities of Australia, Brazil, Canada and South Africa.

In the same market, the Commission also assessed under the EU Merger Regulation the recent mergers between Dow and Dupont and between Syngenta and ChemChina. Both decisions followed an in-depth review of the proposed transactions.

In March, the Commission approved the merger between US-based chemical companies Dow and DuPont, subject to conditions on the divestiture of major parts of DuPont's global pesticide business, including its global Research & Development organisation<sup>285</sup>. The

<sup>284</sup> Case M.8084 *Bayer / Monsanto*, see IP/17/2762 of 22 August 2017, available at [http://europa.eu/rapid/press-release\\_IP-17-2762\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2762_en.htm).

<sup>285</sup> Case M.7932 *Dow / DuPont*, Commission decision of 27 March 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7932](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7932).

Commission had concerns that the merger as notified would have reduced competition on price and choice in a number of markets for existing pesticides. Furthermore, the merger would have reduced innovation. The commitments submitted by Dow and DuPont addressed these concerns in full.

In April the Commission cleared ChemChina acquisition of Syngenta (based, respectively, in China and Switzerland), subject to conditions<sup>286</sup>. The Commission had concerns that the transaction as notified would have reduced competition in a number of existing markets for pesticides. Furthermore, the Commission had concerns that the transaction could reduce competition for plant growth regulators. The approval was therefore conditional on the divestiture of significant parts of ChemChina's European pesticide and plant growth regulator business. The Commission's investigation focused on competition for existing pesticides, since ChemChina does not compete with Syngenta for the development of new and innovative pesticides.

## **7. PHARMACEUTICAL AND HEALTH SERVICES SECTOR**

### **Overview of key challenges in the sector**

Ensuring access to high quality healthcare and medicines at competitive prices is an important objective in competition law enforcement in pharmaceutical and health services sector. Competition law enforcement can complement regulation that exists in this sector.

Taking into account the sensitive balance between ensuring innovation, on the one hand, and more affordable medicines, on the other, the Commission's antitrust enforcement will continue to promote open and competitive markets in the sector and, in particular, access to affordable medicines for European citizens, whilst safeguarding the incentives for innovation, research and development.

### **Contribution of EU competition policy to tackling the challenges**

On 15 May, the Commission initiated formal antitrust proceedings against Aspen Pharma for a suspected abuse of market dominance under Article 102 TFEU.<sup>287</sup> The Commission intends to investigate information that Aspen has imposed unfair and excessive prices in the form of significant price increases for medicinal products containing the active pharmaceutical ingredients chlorambucil, melphalan, mercaptopurine, busulfan and tioguanine in the EEA Member States except Italy<sup>288</sup>.

In its pay-for-delay investigation in relation to the market entry of generic *modafinil* (sleeping disorder medicine), on 17 July, the Commission sent a Statement of Objections to Teva regarding an agreement with Cephalon whereby Teva would undertake not to sell its generic modafinil products in the EEA until October 2012.<sup>289</sup> In exchange, Teva received a substantial transfer of value from Cephalon through a series of cash payments and various other agreements. The Commission's preliminary view is that the transferred value served as a

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<sup>286</sup> Case M.7962 *ChemChina / Syngenta*, Commission decision of 5 April 2017, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7962](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7962).

<sup>287</sup> Case AT.40394 *Aspen*. For further information see IP/17/1323 of 15 May 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1323\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1323_en.htm) and the opening of proceedings at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40394/40394\\_235\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_235_3.pdf).

<sup>288</sup> The Italian competition authority already adopted an infringement decision against Aspen on 29 September 2016.

<sup>289</sup> Case AT.39686 *Cephalon*. For further information see IP/17/2063 of 17 July 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-2063\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2063_en.htm).



significant pay-for-delay inducement for Teva not to compete with Cephalon's modafinil worldwide, including in the European Economic Area. The Statement of Objections argues that the agreement between Cephalon and Teva may have caused substantial harm to EU patients and health service budgets. This is because they may have delayed the entry of a cheaper generic medicine, leading to higher prices for modafinil. This behaviour, if confirmed, would infringe Article 101 TFEU that prohibits restrictive business practices.

The Commission continued monitoring patent settlements between originator and generic companies. The 2017 report (on the eighth monitoring exercise covering the year 2016) shows that the number of settlements that might merit closer scrutiny by competition authorities has progressively decreased since the 2009 Pharmaceutical Sector Inquiry and has stabilized at a low level (around 10%).<sup>290</sup>

#### *Merger review in the pharmaceutical sector*

Merger activity in the pharmaceutical sector continued to be sustained in the course of 2017, with the Commission taking a leading role in ensuring that concentration would not result in reduced competition or innovation to the detriment of patients and health systems.

In June, the Commission approved the acquisition of Actelion by Johnson & Johnson<sup>291</sup>, subject to remedies. While the activities of the two companies were largely complementary, they were both working on a treatment for insomnia, based on a novel way to cure this condition. The Commission's market investigation indicated that the transaction as notified would give Johnson & Johnson the ability and incentive to rationalise its competing insomnia research and development programmes by either delaying or discontinuing one of them. In order to address these competition concerns Johnson & Johnson offered remedies to ensure that it cannot influence negatively the development of either insomnia research programme.

#### *State aid actions in the health services sector*

The Commission's State aid actions in the health services sector mainly concern hospitals, related services (e.g., ambulance transport) and health insurance. The Commission decision of 20 December 2011 (based on Article 106(2) TFEU<sup>292</sup>) specifies the conditions under which compensation to companies for providing public services is compatible with the EU State aid rules and does not have to be notified to the Commission in advance. Compensation granted to hospitals, including emergency services and ancillary services, for services of general economic interest, benefits from the decision irrespective of the amounts involved provided that the conditions are met. Accordingly, the Commission very rarely takes decisions on financing covered by this exemption decision.

During 2017, the Commission continued examining and/or decided on a number of complaints lodged by private health service providers about their allegedly unfair treatment or potentially excessive compensation of publicly-owned hospitals. Those complaints usually came from operators in Member States with healthcare markets more open to competition (e.g. France and Germany).

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<sup>290</sup> More information is available on the [Commission's competition website](#), in the [pharmaceuticals section](#).

<sup>291</sup> Case M.84401 J&J/Actelion. For further information, see

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8401](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8401).

<sup>292</sup> Commission decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted the with operation of services of general economic interest, OJ L 7, 11.1.2012, p.3.

## 8. TRANSPORT AND POSTAL SERVICES

### Overview of key challenges in the sector

The transport and postal services sectors account for about 5.0 % of the EU economy<sup>293</sup>, and their performance can have many beneficial effects for other sectors of the European economy. Transport is the key to both an integrated internal market and to an open economy integrated into the world economy. In the postal sector parcel services are supplied by competitive transnational suppliers while other services are mostly in the hands of national postal operators often depending on compensation from their government<sup>294</sup>.

In 2017, the Commission used its competition tools to keep the transport and postal markets open and competitive, and to facilitate entry. It also continued to facilitate State aid that enabled interoperability between different modes of transport as well as on State aid for modern infrastructure.

### Contribution of EU competition policy to tackling the challenges

#### *Merger review in air transport*

The air transport sector is still very fragmented. In the EU there are more than 150 airlines offering scheduled air passenger transport. The five largest airlines in the EU, comprising Lufthansa, Air France / KLM and the International Consolidated Airlines Group ("IAG" is the parent company of Aer Lingus, British Airways, Iberia, and Vueling), Ryanair, and easyJet, account for around 50 % of the EU market. In contrast, in the United States, the three legacy carrier groups American Airlines, Delta and United together with the low cost carrier Southwest jointly control more than 80 % of the United States market. The need for further consolidation was underpinned by the insolvency of three major airlines: Alitalia, Air Berlin and Monarch Airlines.

In this context, the Commission reviewed the acquisition of certain Air Berlin assets by Lufthansa<sup>295</sup> and easyJet.<sup>296</sup> Lufthansa initially notified the Commission of its intention to acquire two of Air Berlin's subsidiaries, NIKI and LGW, as well as a collection of Air Berlin's aircraft, crew and slots. Following a comprehensive market investigation and a market test of the commitments proposed by Lufthansa, the Commission shared its preliminary views with Lufthansa, indicating that the acquisition of NIKI would lead to a significant number of routes where the merged entity would hold very high market shares, and that barriers to entry for competitors would increase significantly. While the Commission's investigation was still on-going, Lufthansa decided to rescind the NIKI transaction on 13 December, leading to NIKI filing for insolvency on the same day.<sup>297</sup> The

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<sup>293</sup> For further information see *EU transport in figures Statistical pocketbook* (2017) available at <http://ec.europa.eu/transport/facts-fundings/statistics/doc/2017/pocketbook2017.pdf>, p.19; prepared by the Commission with around EUR 651 billion in Gross Value Added (GVA) at basic prices, the transport and storage services sector (including postal and courier activities) accounted for about 5.0 % of total GVA in the EU-28 in 2015 (or 4.5 % excluding postal and courier services).

<sup>294</sup> It should be noted however, that the third postal Directive (2008/6/EC) introduced full opening of the Member States' postal markets, allowing new operators and services.

<sup>295</sup> Case M.8633 *Lufthansa/certain Air Berlin assets*. Further information available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8633](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8633).

<sup>296</sup> Case M.8672 *easyJet/certain Air Berlin assets*. Further information available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8672](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8672).

<sup>297</sup> Following a decision of NIKI's creditors committee, the assets of NIKI were sold in January 2018 to its founder, Mr Niki Lauda, and rebranded as Laudamotion.

Commission eventually approved the remaining part of the transaction between Lufthansa and Air Berlin on 21 December.<sup>298</sup>

This decision followed the approval granted on 12 December to easyJet for the acquisition of Air Berlin's operations at Berlin Tegel airport.<sup>299</sup> In both cases, the Commission's investigation focused on airport dominance, in order to adapt the framework of the competitive assessment to two specific facts. First, with the exception of NIKI and LGW, Air Berlin's fleet had been grounded by the time of the notification of the transactions; therefore, Air Berlin was not actively competing anymore on the routes that it used to operate. Second, Air Berlin's assets were key to getting access to highly demanded and increasingly congested European airports. In this context, the Commission assessed whether the slot portfolio to be acquired by easyJet and Lufthansa at different airports would allow them to prevent competitors from entering or expanding their presence in the markets for passenger air travel to and from these airports. While the Commission found that the easyJet transaction was not likely to bring anti-competitive effects at any airport, it raised serious doubts about the compatibility of the Lufthansa transaction with the internal market as a result of the reinforcement of Lufthansa's slot holding position at Düsseldorf airport. Lufthansa remedied the Commission's doubts by amending its sale and purchase agreement with Air Berlin to reduce the scope of the transfer of slots at Düsseldorf airport.

**The Lufthansa/Air Berlin case – an example of the application of merger control rules to an insolvent air carrier**

Lufthansa's failed attempt to acquire NIKI exemplifies two elements of the application of EU merger control rules to transactions occurring in the framework of an air carrier's insolvency proceedings.

Firstly, it is important that the risk that a transaction may not be implemented on regulatory grounds (including, but not limited to, State aid and merger control rules) is not underestimated by creditors' committees and insolvency administrators. In this regard, the Commission had informed Air Berlin's insolvency administrator of the problems that may be entailed by the proposed takeover of parts of Air Berlin, Germany's second largest air carrier, by Lufthansa ahead of the designation of the latter as preferred bidder.

Secondly, the potential acquirer of the insolvent company may take interim measures to preserve the viability of the latter, subject to compliance with the Merger Regulation. Following the initiation of Air Berlin's insolvency proceedings in August 2017, its financial situation quickly deteriorated, to the extent that it became clear that the rescue aid granted by Germany in order to ensure an orderly liquidation of the company would not suffice to maintain Air Berlin's operations until the completion of the Commission's merger control procedures. On 27 October 2017, the Commission granted Lufthansa a derogation from the standstill obligation, as allowed under Article 7(3) of the EU Merger Regulation.<sup>300</sup> Lufthansa was notably authorised to lease or purchase aircraft for use by LGW and NIKI and to wetlease them from LGW and NIKI. These measures aimed at ensuring the continuity of LGW's and NIKI's operations, thus limiting the seat capacity shortage and disturbance brought about by Air Berlin's insolvency. Considering the prima facie competition concerns raised by the transaction, the Commission attached clear conditions to its authorisation.

In 2017, in the framework of commitments attached to previous clearance decisions, a

<sup>298</sup> Case M.8633 *Lufthansa/certain Air Berlin assets*, Commission decision of 21 December 2017 pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area, available at [http://europa.eu/rapid/press-release\\_IP-17-5402\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5402_en.htm).

<sup>299</sup> Case M.8672 *easyJet/certain Air Berlin assets*, Commission decision of 12 December 2017 pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m8672\\_673\\_5.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m8672_673_5.pdf).

<sup>300</sup> Case M.8633 *Lufthansa/Certain Air Berlin Assets*, Commission decision of 27 October 2017 pursuant to Article 7(3) of Council Regulation (EC) No. 139/2004 and Article 57 of the Agreement on the European Economic Area, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m8633\\_1376\\_4.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m8633_1376_4.pdf).

number of new applications highlighted increased interest in slots made available under the Commission commitments. The Commission approved the acquisition of British Midlands Limited (bmi) by IAG in 2012 subject to among others slot commitments. The Commission received requests for additional slots by Aeroflot on the London Heathrow – Moscow route and by Flybe on two routes connecting London Heathrow to Aberdeen and Edinburgh.<sup>301</sup> Furthermore, Transavia requested additional slots at Ibiza for the city pair Pairs-Ibiza under the commitments given by Iberia in the framework of the Commission clearance decision of Iberia's takeover of Clickair and Vueling.<sup>302</sup>

### *State aid to airports and airlines*

On 14 June, the Commission has simplified the State aid rules for smaller airports by including them in the GBER.<sup>303</sup> The revised GBER introduces a block exemption for investment aid for airports with less than 3 million passengers. This implies that for such airports an individual approval by the Commission of State aid is no longer needed provided the conditions set out in the GBER are met (in particular, avoiding financing airport infrastructure which unnecessarily duplicates existing infrastructure and ensuring aid is limited to what is necessary to trigger the investment). The revised GBER also foresees simplified and less demanding rules for investment and operating aid for very small airports (below 200 000 passengers), compared to the substantive rules laid down in the 2014 Aviation Guidelines<sup>304</sup>. The Commission's experience has shown that it can be difficult for very small airports to comply with the rules in the Aviation Guidelines. In addition, many small airports are dependent on public funding for their survival. On the other hand, the impact of aid to such airports on competition is very limited, of a local nature and therefore does not warrant an EU scrutiny. Airports under 200 000 passengers represent almost half of all airports in Europe, but less than 1% of the traffic at EU level.

In addition, the Commission continued to apply the Aviation Guidelines adopted in 2014. In 2017, several decisions were adopted, closing long-standing investigations into aid to airports and airlines.

In the Brussels airport case<sup>305</sup>, the Commission conducted an in-depth investigation of the public support granted by Belgium to three airlines flying from Brussels Airport. After discussions with the Commission, the Belgian government abolished the scheme and ordered the beneficiary airlines to reimburse the aid already received, with interest, whilst the

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<sup>301</sup> Case M.6447 *IAG/bmi*, Commission decision of 30 October 2017 concerning the assessment of the viability of Applicants and evaluation of their formal bids pursuant to Clause 1.4.9 of the Commitments attached to the Commission decision of 30 March 2012 in case M.6447 *IAG/bmi* following the Monitoring Trustee's opinion of 19 October 2017, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m6447\\_5764\\_7.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6447_5764_7.pdf).

<sup>302</sup> Case M. 5364 *Iberia/Clickair/Vueling*, Commission decision of 31 October 2017 concerning the Assessment of the viability of Applicants and evaluation of their formal bids pursuant to Clause 1.4.9 of the commitments attached to the Commission decision of 9 January 2009 in case M. 5364 *Iberia/Clickair/Vueling* available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=2](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=2).

<sup>303</sup> Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs. OJ L 156, 20.6.2017, pp. 1–18 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1497952641554&uri=CELEX:32017R1084>.

<sup>304</sup> Communication from the Commission, *Guidelines on State aid to airports and airlines*, OJ C 99, 4.4.2014, p. 3 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.099.01.0003.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.099.01.0003.01.ENG).

<sup>305</sup> Commission decision of 18 July 2017, SA.38105 (2014/C (ex 2014/NN)) - *Belgium - Subside en faveur de certaines compagnies aériennes opérant à l'aéroport de Bruxelles-National*. For further information see Daily News (MEX/17/2071) of 18 July 2017 available at [http://europa.eu/rapid/press-release\\_MEX-17-2071\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-2071_en.htm).

investigation was still pending. As the competitive harm caused by the aid has already been remedied before the end of the Commission's investigation, the decision did not order recovery of the illegal aid, found to be incompatible with the internal market.

In the Irish Air Travel Tax case<sup>306</sup>, the Commission examined whether the exemption for transfer and transit passengers from the Irish air travel tax was in line with EU State aid rules. The in-depth investigation confirmed that the exemption did not selectively favour certain airlines and therefore involved no State aid.

The Commission's decision<sup>307</sup> on Lübeck airport closed its formal investigations opened in 2007 and 2012. The Commission found that FLG and the city of Lübeck had both acted according to the Market Economy Operator Principle (MEOP) and therefore no advantage had been granted to Ryanair and to Infratil, respectively. Two airport service agreements concluded between FLG and Ryanair in 2010 will be assessed in a separate decision.

Furthermore, the Commission adopted several decisions in cases involving start-up aid to airlines<sup>308</sup> and cases involving operating and/or investment aid to airports<sup>309</sup>.

The Commission has also authorised a temporary EUR 150 million bridging loan granted by Germany in favour of *AirBerlin*<sup>310</sup>. The airline filed for insolvency in August, after its main shareholder Etihad withdrew its financial backing for the loss-making company. The Commission found that the measure would help to protect the interests of air passengers and to maintain temporarily air passenger services. At the same time, the strict conditions attached to the loan, its short duration and the fact that Air Berlin was expected to cease operations at the end of the process, would reduce the distortion of competition, potentially triggered by the state support, to a minimum.

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<sup>306</sup> Commission decision of 14 July 2017, SA.29064 (2011/C) (ex 2011/NN) - *Ireland - Non-application of the Air Travel Tax to transit and transfer passengers*. For further information see Daily News (MEX/17/2042) of 14 July 2017 available at [http://europa.eu/rapid/press-release\\_MEX-17-2042\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-2042_en.htm).

<sup>307</sup> Commission decision of 7 February 2017, SA.21877, SA.27585, SA.31149 - *Germany - Alleged State aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:339:FULL&from=EN>.

<sup>308</sup> See for example Commission decision of 4 August 2017 SA.47746 - *Netherlands - Start-up aid to Maastricht-Aachen airport (Provincie Limburg)*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47746](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47746); Commission decision of 27 March 2017, SA.46709 - *Italy - Start-up aid for new routes from/to airports in the Region of Calabria*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46709](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46709).

<sup>309</sup> See for example Commission decision of 25 September 2017, SA.42413 - *France – Aide à l'investissement pour l'aéroport de Tarbes*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42413](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42413); Commission decision of 7 September 2017, SA.43787 - *Germany - Investment aid to Memmingen airport*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43787](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43787); Commission decision of 13 February 2017, SA.44058 - *Germany - Saarbrücken Airport*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_44058](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44058); Commission decision of 9 August 2017, SA.44377 - *Denmark - Aarhus Airport - Operating and Investment Aid*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_44377](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44377); Commission decision of 7 April 2017, SA.47969 - *Germany - Operating aid to Frankfurt-Hahn Airport*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47969](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47969).

<sup>310</sup> Case SA.48937 – *Germany – Rescue aid in favour of Air Berlin PLC & Co. Luftverkehrs KG*, Commission decision of 4 September 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48937](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48937). For further information see IP/17/3083 available at [http://europa.eu/rapid/press-release\\_IP-17-3083\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3083_en.htm).

## *Merger review in maritime transport*

The global container shipping industry is undergoing a period of change, in reaction to the challenges it has been facing in recent years. The sector is characterised by overcapacity, resulting from several carriers' expansion and investment in ultra-large vessels in recent years, and a slow recovery of demand following the economic crisis. Also as a means to improve their efficiency and reduce their operating costs, container shipping companies do not only provide services individually, but they have also put in place operational agreements, such as consortia or alliances, with other shipping companies that allow them to combine their vessels and offer a joint service.

2017 saw a significant change in the alliances landscape, with the termination of three of the previously four global alliances, namely CKYHE, G6 and the Ocean Alliance, and their replacement by only two, The Alliance and the Ocean Alliance, by 1 April. Together with the enlarged 2M, there are now only three global alliances. Moreover, a wave of consolidation can be observed, which started in 2014 with the merger of Hapag-Lloyd and CSAV<sup>311</sup> and intensified in 2016 and 2017. Like the year before,<sup>312</sup> there were three major mergers in the industry.

On 10 April, the Commission cleared the acquisition of Hamburg Süd by Maersk Line, the Danish world market leader.<sup>313</sup>

### **The Acquisition of Hamburg Süd by Maersk Line**

As initially notified, the transaction would have created new links between previously unconnected consortia to which the two companies belonged (Maersk is a founding member of the 2M Alliance whereas Hamburg Süd was a member of certain route specific consortia).

The Commission had concerns that these potential new links would have resulted in anti-competitive effects on five trade routes, notably between Northern Europe and (i) Central America/Caribbean, (ii) West Coast South America and (iii) Middle East as well as between the Mediterranean and (iv) West Coast South America and (v) East Coast South America. On these routes, competition from liner shippers which have no connection with the merged entity or its alliance partners would have been insufficient. As a result, the transaction could have enabled the merged entity, through the consortia that the two companies belong to, to influence capacity and therefore prices to the detriment of shippers and consumers for a very large part of those markets.

Maersk offered to terminate the participation of Hamburg Süd in the five consortia (Eurosail 1/SAWC, Eurosail 2/SAWC, EPIC 2, CCWM/MEDANDES and MESA) which entirely removes the problematic links between Maersk Line and HSDG's consortia that would have been created by the transaction.

The Commission also cleared the combination of the global container liner shipping and container terminal business (excluding terminals in Japan) of the Japanese carriers MOL, NYK and K-Line in a joint venture.<sup>314</sup> As MOL, NYK and K-Line were, since 1 April and therefore prior to the merger, already members of the same global alliance, the Alliance, no

<sup>311</sup> Case *M.7268 CSAV/HGV/Kühne Maritime/Hapag-Lloyd*, Commission decision of 11 September 2014 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7268\\_1503\\_2.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7268_1503_2.pdf).

<sup>312</sup> Case *M.7908 CMA CGM / NOL*, Commission decision of 29 April 2016 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7908\\_1366\\_3.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7908_1366_3.pdf); Case *M.8120 Hapag-Lloyd / United Arab Shipping Company (UASC)*. For further information see IP/16/2942 of 23 November 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-3942\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3942_en.htm), and the merger between the two Chinese state-owned enterprises Cosco and CSCL.

<sup>313</sup> Case *M.8330 Maersk / Hamburg Süd*, Commission decision of 10 April 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-904\\_en.htm](http://europa.eu/rapid/press-release_IP-17-904_en.htm)

<sup>314</sup> Case *M.8472 NYK, MOL and K Line*, Commission decision of 28 June 2017 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m8472\\_128\\_3.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m8472_128_3.pdf)

new links between previously unconnected consortia were created. Since also the market position of the merged entity, including its consortia partners in the Alliance, would be rather moderate, the Commission cleared the merger unconditionally.

The last merger dealt with by the Commission in 2017 was the takeover of Hong Kong-based OOCL by the Chinese state-owned firm Cosco<sup>315</sup> which created the third largest container shipping company in the world. The Commission found that the combination of the Parties' activities would not raise competition concerns, despite very high combined market shares of COSCO and OOIL and their consortia partners on the Northern Europe-North America trade route, since on that route (a) the link between the consortia the two firms were members of was pre-existing (b) there would still be significant competitors left post-merger, (c) the companies were not close competitors and (d) COSCO position was marginal.

#### *State aid enforcement in the maritime transport sector*

In 2017, the Commission continued to ensure compliance with the Maritime State aid Guidelines<sup>316</sup>. The aim of those Guidelines is to maintain the European maritime sector's competitiveness and to avoid flagging out to "flags of convenience" for which environmental and security standards might be low. The Commission is determined to ensure consistency and equal treatment throughout the EU whilst at the same time making sure that the beneficial tonnage tax regimes do not contravene internal market rules.

For example, on 6 November, the Commission approved under the EU State aid rules the prolongation until end 2022 of the Belgium tonnage tax scheme.<sup>317</sup> The Belgian authorities have committed to extend the benefit of the scheme to all eligible ships that fly an EEA flag and thus prevent any discrimination between shipping companies and registries of different EEA States. Furthermore, the Commission took a decision concerning the prolongation and modification of the Lithuanian tonnage tax scheme<sup>318</sup>. In December, the Commission approved the Maltese tonnage tax scheme subject to commitments<sup>319</sup>. The Commission's in-depth investigation found certain features of the original scheme, such as tax exemptions applied to Maltese residents and the broad scope of the scheme extending to vessels not carrying out maritime transport activities, to be in breach of EU State aid rules. As a result, Malta has committed to introduce a number of changes to its scheme to prevent any discrimination between shipping companies and to avoid undue competition distortions.

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<sup>315</sup> Case *M.8594 Cosco Shipping/OOIL*, Commission decision of 5 December 2017 available at [http://europa.eu/rapid/press-release\\_MEX-17-5149\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-5149_en.htm)

<sup>316</sup> Communication from the Commission, *Community guidelines on State aid to maritime transport*, OJ C 13, 17.01.2004, p. 3, available at [http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:52004XC0117\(01\)](http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:52004XC0117(01)).

<sup>317</sup> Case SA.41330 *Prolongation du régime de taxe au tonnage Belgique*, Commission decision of 6 November 2017 available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=1,2,3&case\\_number=41330](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1,2,3&case_number=41330). For further information see IP/17/4382 of 6 November 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-4382\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4382_en.htm).

<sup>318</sup> Case SA.45764 *Lithuania – State aid in favour of maritime transport Prolongation and modification of the tonnage tax scheme*, Commission decision of 16 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_45764](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45764).

<sup>319</sup> Case SA. 33829, *Maltese tonnage tax scheme and other State measures in favour of shipping companies and their shareholders*, Commission Decision of 19 December 2017, not yet published. For further information see IP/17/5361 of 19 December 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-5361\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5361_en.htm).

## *Antitrust enforcement in the rail sector*

On 2 October, the Commission fined Lithuanian Railways<sup>320</sup> (Lietuvos geležinkeliai, LG<sup>321</sup>) for abusing its dominant position in the management of rail infrastructure in Lithuania by removing a rail track connecting Lithuania and Latvia an amount of €27.9 million. The Commission also ordered LG to bring the infringement to an end.

### **The Lithuanian Railways (LG) Case**

The infringement started in 2008 when Orlen, the only oil refinery in the Baltic states and a major commercial customer of LG, considered redirecting its freight from Lithuania to Latvia by using the services of another rail operator from Latvia. In October 2008, LG dismantled a 19km long section of track connecting Lithuania and Latvia, close to Orlen's refinery. The removal of the track meant that Orlen would need to use a much longer route to reach Latvia. Since then the dismantled track has not been rebuilt.

The Commission's investigation found that these actions hindered competition on the rail freight market by preventing a major customer of LG from using the services of another rail operator. LG failed to show any objective justification for the removal of the track. The EU's rail freight market was liberalised in 2007. Since then, the Commission has been working to complete the single market for rail services, including by ensuring the independent management of rail infrastructure and fostering investment in tracks that interconnect Member States. In this context, the enforcement of EU competition rules is important to ensure that regulatory barriers are not replaced by anti-competitive behaviour of dominant rail companies that would prevent the EU from achieving its ultimate goals for rail transport.

## *Rail and intermodal State aid enforcement*

In 2017, the Commission approved a number of schemes supporting rail and intermodal transport, which aim to support the transfer of cargo from the road to the safer and more environmentally friendly rail transport modes<sup>322</sup>, including support for systems ensuring

<sup>320</sup> Case AT.39813 Baltic Rail, Commission decision of 2 October 2017. Summary of the decision was published in OJ C 308, 14.11.2017, p. 7.

<sup>321</sup> LG is the incumbent state-owned rail company in Lithuania. The company is vertically integrated, meaning that it is responsible for both railway infrastructure and rail transport. It enjoys a statutory monopoly of the management of the rail infrastructure in Lithuania and a de facto monopoly in the provision of both passenger and freight rail services in Lithuania.

<sup>322</sup> Commission decision of 25 July 2017, SA. 46806 - *Italy - Aid for combined transport in the Province of Trento*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_46806](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46806); Commission decision of 14 June 2017, SA.47779 - *Italy - Friuli Venezia Giulia - Interventi per lo sviluppo del trasporto combinato*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47779](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47779); Commission decision of 6 June 2017, SA.47109 - *Belgium - Prolongation du régime de promotion du transport combiné ferroviaire et du trafic diffus pour 2017-2020*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47109](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47109); Commission decision of 25 October 2017, SA. 48759 - *Italy - Prolongation of rail freight transport scheme*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48759](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48759); Commission decision of 25 October 2017, SA.48390 - *Austria - Aid scheme supporting rail freight transport in certain production forms 2018 – 2022*, for further information see Daily News (MEX/17/4163) of 25 October 2017 available at [http://europa.eu/rapid/press-release\\_MEX-17-4163\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-4163_en.htm); Commission decision of 15 September 2017, SA.48485 - *Austria - BMVIT - Prolongation of a programme supporting the development of connecting railways and transfer terminals in intermodal transport 2018 - 2022*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48485](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48485); Commission decision of 12 October 2017, SA.48634 - *Denmark - Subsidy Scheme Rail Freight*, for further information see Daily News (MEX/17/3924) of 12 October 2017 available at [http://europa.eu/rapid/press-release\\_MEX-17-3924\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-3924_en.htm); Commission decision of 30 October 2017, SA.48093 - *Poland - Intermodal transport*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_48093](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48093).



interoperability<sup>323</sup>.

In August, the Commission also approved EUR 96 million of State aid for the building of light maintenance workshops for passenger trains in Slovakia.<sup>324</sup> This will further help to shift transport from road to rail in Slovakia, fostering environmental protection and decongestion of roads. The Commission has made sure that the aid will not hinder the development of competition on the Slovak rail transport market with respect to access to light maintenance facilities. While the workshops will initially be operated by the Slovak incumbent rail operator, in the future, its operation can be transferred to other rail transport companies, if they win new tenders for rail transport services under public service contracts. In addition, an equal and non-discriminatory access for other train operators is safeguarded.

Moreover, the Commission has examined the restructuring of the Bulgarian publicly-owned railway incumbent *BDZ*<sup>325</sup>. As *BDZ* is the only provider of railway passenger transport in Bulgaria, it is of crucial importance to the country's connectivity and economy. The Commission concluded that certain debt write-offs granted by Bulgaria were necessary and proportionate to support *BDZ*'s operation and did not prevent effective competition in the market. Another investigation in the rail sector related to the restructuring of *OSE*<sup>326</sup>, the Greek national rail infrastructure manager, and *TRAINOSE*<sup>327</sup>, the passenger and freight rail transport operator. The restructuring measures will ensure that rail services continue operating in Greece, thus avoiding a serious disturbance of the Greek economy. For the aid measures to *OSE* and *TRAINOSE* that the Commission found to be in line with EU state aid rules, the Commission took into particular account the difficulties the Greek railway sector is facing and the importance of a well-functioning railway service for the population. The measures have the legitimate objective of avoiding a serious disturbance of the Greek economy, without unduly distorting competition in the Single Market.

#### *State aid review in the road sector*

The Commission continued to enforce Regulation (EC) No 1370/2007 on public passenger transport services<sup>328</sup>. On 23 August, the Commission took a negative decision with recovery on the shadow toll compensation granted by Poland to the A2 motorway concessionaire to

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<sup>323</sup> Commission decision of 10 July 2017, SA.38283 - Denmark - ERTMS funding for Danish rail freight operators. For further information see IP/17/1961 of 11 July 2017 available at [http://europa.eu/rapid/press-release\\_IP-17-1961\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1961_en.htm).

<sup>324</sup> State aid case SA.42525 – Slovakia – Workshops for light maintenance of trains, Commission decision of 23 August 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42525](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42525).

<sup>325</sup> Case SA.31250 – Bulgaria – Measure implemented by Bulgaria in favour of *BDZ Holding EAD SA, BDZ Passenger EOOD and BDZ Cargo EOOD*, Commission decision of 16 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_31250](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_31250). For further information see IP/17/1659.

<sup>326</sup> Case SA.32543 – Greece – Measures in favour of *OSE group*, Commission decision of 16 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_32543](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32543). For further information see IP/17/1661.

<sup>327</sup> Case SA.32544 – Greece – Restructuring of the Greek Railway Group - *TRAINOSE S.A.*, Commission decision of 16 June 2017 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_32544](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32544). For further information see IP/17/1661.

<sup>328</sup> Regulation (EC) No 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

compensate for a legislative change<sup>329</sup>.

#### *State aid review in the postal services sector*

The postal sector continues to evolve and traditional letter delivery, against the backdrop of electronic substitution, remains on a declining trajectory. Nevertheless, postal services have retained a very significant economic and social value. In a shrinking market of traditional letter delivery, many postal incumbents are being forced to diversify the portfolio of their activities and innovate in order to stay competitive. At the same time, the explosive growth of e-commerce necessitates a well-functioning parcel delivery market linking buyers and sellers. Efficient postal services are thus a key factor in allowing e-commerce to realise its potential in propelling growth and creating jobs.

Through State aid control in the postal sector, the Commission pursues multiple related goals. State aid control ensures that where a postal service provider – typically a postal incumbent – is entrusted with a costly public service obligation, any compensation paid to the provider does not undermine a level playing field between postal incumbents and new entrants. State aid should not shield the recipients from competitive pressures and market developments, but should incentivise efficiency, innovation and investment.

In 2017 the Commission continued its investigation in the Correos case, on which it opened the formal investigation procedure in 2016.<sup>330</sup> The investigation focusses on whether Correos had been overcompensated between 2004 and 2010 for the provision of the universal postal service given that profitability levels achieved by Correos with the public funding seemed to exceed the level of reasonable profit allowed under EU State aid rules on public service compensation. The Commission is also investigating other measures granted by Spain to Correos since 2004, notably tax exemptions, capital increases and compensation for the distribution of electoral material.

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<sup>329</sup> Commission decision of 25 August 2017, SA.35356 - *Aid to Autostrada Wielkopolska - Shadow toll compensation*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35356](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35356).

<sup>330</sup> Case SA.37977 *Complaint regarding unlawful State aid in favour of Sociedad Estatal Correos y Telégrafos, S.A.* For further information see IP/16/284 of 11 February 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-284\\_en.htm](http://europa.eu/rapid/press-release_IP-16-284_en.htm)

## ANNEX

### Banking State aid cases: Decisions adopted by the Commission in 2017

#### By country

	Member State	Case number/Title	Type of Decision	Date of adoption
1	Austria	SA.32745 (2017/NN-2) – Sale of parts of Kommunalkredit Austria AG	No aid decision	17/03/2017
2	Austria	SA.46205 (2016/N) - Amendment of the methodology of AWS GmbH to calculate the aid element of guarantees	No objection decision	21/04/2017
3	Belgium	SA.49039 (2017/N) - Plan de conversion des actions préférentielles de Dexia en actions ordinaires	No objection decision	19/09/2017
4	Croatia	SA.48287 (2017/N) - Prolongation of the resolution scheme for small credit institutions with total assets below EUR 1.5 billion	No objection decision	23/06/2017
5	Denmark	SA.34720 (2015/C) - Aid for the restructuring of Vestjysk Bank	Final decision	18/07/2017
6	Denmark	SA.44031 (2015/N) - Denmark-Winding-up scheme for small banks	No objection decision	02/08/2017
7	France	SA.49039 (2017/N) - Plan de conversion des actions préférentielles de Dexia en actions ordinaires	No objection decision	19/09/2017
8	France	SA.41147 (2017/NN) - Service d'intérêt économique général (SIEG) d'accessibilité bancaire du Livret A de La Banque Postale – prolongation 2015-2020	No objection decision	24/10/2017
9	Greece	HT.4524 - STEC - 2017 Greece	Communication	29/06/2017
10	Greece	SA.48400 (2017/N) - Prolongation of the Greek State Guarantee Scheme for banks (Art. 2 law 3723/2008)	No objection decision	03/07/2017
11	Greece	SA.49459 (2017/N) – Exchange of Eurobank State preference shares for Tier 2 bonds	No objection decision	24/11/2017
12	Greece	SA.49583 (2017/N) - Prolongation of the Greek State Guarantee Scheme for banks	No objection decision	06/12/2017
13	Ireland	SA.48099 (2017/N) - Fifth prolongation of the Credit Union restructuring and stabilisation Scheme	No objection decision	17/05/2017

	<b>Member State</b>	<b>Case number/Title</b>	<b>Type of Decision</b>	<b>Date of adoption</b>
14	Ireland	SA.48337 (2017/N) - 11th prolongation of the Credit Union Resolution Scheme H2 2017	No objection decision	05/07/2017
15	Ireland	SA.49194 (2017/N) - Sixth prolongation of the Credit Union restructuring and stabilisation scheme	No objection decision	25/10/2017
16	Ireland	SA.49274 (2017/N) - 12th prolongation of the Credit Union Resolution Scheme 2017-2018	No objection decision	15/11/2017
17	Italy	SA.47149 (2016/N) - Liquidity support to Banca Popolare di Vicenza	No objection decision	18/01/2017
18	Italy	SA.47150 (2016/N) - Liquidity support to Veneto Banca	No objection decision	18/01/2017
19	Italy	SA.47940 (2017/N) - Additional liquidity support to Banca Popolare di Vicenza	No objection decision	12/04/2017
20	Italy	SA.47941 (2017/N) - Additional liquidity support to Veneto Banca	No objection decision	12/04/2017
21	Italy	SA.39543 (2017/N-2), SA.41134 (2017/N-2), SA.43547 (2017/N-2) – Italy – Sale of the bridge banks Marche, Etruria and Carichieti to UBI Banca (third amendment to the resolution of the banks Marche, Etruria and Carichieti)	No objection decision	30/04/2017
22	Italy	SA.45664 (2017/N) - Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca - Liquidation aid	No objection decision	25/06/2017
23	Italy	SA.41925 (2017/N-2) - Sale of Cassa di risparmio di Ferrara S.p.A	No objection decision	29/06/2017
24	Italy	SA.47677 (2017/N) - New aid and amended restructuring plan of Banca Monte dei Paschi di Siena	No objection decision	04/07/2017
25	Italy	SA.48416 (2017/N) - Prolongation of the Italian guarantee scheme for the securitisation of non-performing loans	No aid decision	06/09/2017
26	Latvia	SA.47233 (2017/N) – Latvia Short-term export-credit Scheme	No objection decision	30/03/2017
27	Lithuania	SA.48920 (2017/N) - Recapitalisation of Lithuanian Central Credit Union	No objection decision	18/12/2017

	<b>Member State</b>	<b>Case number/Title</b>	<b>Type of Decision</b>	<b>Date of adoption</b>
28	Netherlands	SA.47416 (2017/N) - Guarantee scheme for Energy Transition (ETFF)	No objection decision	17/07/2017
29	Netherlands	SA.46664 (2017/N) - State guarantee on senior debt funding for loans to shipping companies	No aid decision	04/08/2017
30	Poland	SA.46982 (2016/N) - Sixth prolongation of the Credit Unions Orderly Liquidation Scheme – H1 2017	No objection decision	02/03/2017
31	Poland	SA.48227 (2017/N) - Sixteenth prolongation of the Polish bank guarantee scheme – H2 2017	No objection decision	05/07/2017
32	Poland	SA.48256 (2017/N) - Seventh Prolongation of Credit Unions Orderly Liquidation Scheme - H2 2017 - H1 2018	No objection decision	02/08/2017
33	Poland	SA.48302 (2017/N) - Prolongation of the resolution scheme for cooperative banks and small commercial banks	No objection decision	02/08/2017
34	Poland	SA.49404 (2017/N) - Seventeenth prolongation of the Polish bank guarantee scheme	No objection decision	07/12/2017
35	Portugal	SA.47164 (2016/N) - Seventh Prolongation of the Portuguese Guarantee Scheme on EIB lending.	No objection decision	17/02/2017
36	Portugal	SA.47168 (2016/N) - 15th Extension of the Portuguese Guarantee Scheme	No objection decision	17/02/2017
37	Portugal	SA.47178 (2017/NN) - Recapitalização da Caixa Geral de Depósitos, S.A.	No aid decision	10/03/2017
38	Portugal	SA.49275 (2017/N) - Sale of Novo Banco with additional aid in the in the context of the 2014 Resolution of Banco Espírito Santo, S.A.	No objection decision	11/10/2017
39	Portugal	SA.48549 (2017/N) Eighth Prolongation of the Portuguese Guarantee Scheme on EIB lending	No objection decision	07/11/2017
40	Portugal	SA.48550 (2017/N) 16th Extension of the Portuguese Guarantee Scheme	No objection decision	07/11/2017
41	Romania	SA.46974 (2016/N) - Prolongation of the Romanian short-term export-credit scheme	No objection decision	08/02/2017

	<b>Member State</b>	<b>Case number/Title</b>	<b>Type of Decision</b>	<b>Date of adoption</b>
42	Romania	SA.46974 (2016/N) - Prolongation of the Romanian short-term export-credit scheme COR	No objection decision Corrigendum	08/03/2017
43	Slovenia	SA.37316 (2015/FC) - Complaint concerning alleged unlawful State Aid for T-2	No aid decision	27/04/2017
44	Slovenia	SA.33229 (2017/N-2) - Restructuring of NLB - Slovenia	No objection decision	11/05/2017
45	Spain	SA.47174 (2016/N) - Amendment of the Restructuring of Banco CEISS through integration with Unicaja Banco - Amendment to the restructuring plan of Banco CEISS	No objection decision	27/01/2017
46	United Kingdom	SA.47702 (2017/N) - Alternative package to replace the commitment for the Royal Bank of Scotland to divest the Rainbow business	Decision to initiate the formal investigation procedure	04/04/2017
47	United Kingdom	SA.47702 (2017/C) - Alternative package to replace the commitment for the Royal Bank of Scotland to divest the Rainbow business	Final decision	18/09/2017