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Report on Competition Policy 2018

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TABLE OF CONTENTS

I. LEGISLATION AND POLICY DEVELOPMENTS 3

1. ANTITRUST AND CARTELS 3

1.1 Guidance in antitrust and cartel proceedings 4

1.2 Important judgments by the European Union Courts 6

1.3 The fight against cartels remains a top priority 16

1.4 Continuing close cooperation within the European Competition Network and with national courts 18

2. MERGER CONTROL 19

2.1 Recent enforcement trends 20

2.2 The ongoing evaluation of EU merger control 22

2.3 Significant judgments by the European Union courts in merger control 23

3. STATE AID CONTROL 24

3.1 Uptake of the State Aid Modernisation 24

3.2 State Aid Modernisation continues 34

3.3 Monitoring, recovery, evaluation and cooperation with national courts 35

3.4 Significant judgments by the European Union Courts in the State aid area 38

4. DEVELOPING THE INTERNATIONAL DIMENSION OF EU COMPETITION POLICY 44

5. EXTERNAL COMMUNICATION 46

6. THE SINGLE MARKET PROGRAMME 48

II. SECTORAL OVERVIEW 49

1. ENERGY & ENVIRONMENT 49

2. INFORMATION AND COMMUNICATION TECHNOLOGIES AND MEDIA 54

3. FINANCIAL SERVICES 67

4. TAXATION AND STATE AID 71

5. BASIC INDUSTRIES AND MANUFACTURING 75

6. AGRI-FOOD INDUSTRY 78

7. PHARMACEUTICAL AND HEALTH SERVICES SECTOR 83

8. TRANSPORT AND POSTAL SERVICES.. 84

I. LEGISLATION AND POLICY DEVELOPMENTS

Competition policy empowering citizens and businesses for the benefit of all

With more than half a billion consumers and 24.5 million companies, the internal market is one of the EU's greatest achievements and its greatest asset. EU competition policy goes hand in hand with the development of a deeper and fairer internal market. Enforcing EU competition rules makes markets function better for the benefit of consumers - households as well as businesses - and for society as a whole. Competitive markets play an important role supporting the Commission's efforts to achieve a strong and prosperous EU. Moreover, EU competition policy aims at fostering a competition culture both within the EU, for instance by promoting competition-friendly regulation, and worldwide.

DG Competition's competition policy actions in 2018 targeted a wide range of sectors in the EU economy, thereby promoting open and efficient markets so that both businesses and citizens can get a fair share of the benefits of economic growth. Moreover, EU competition policy continued to support key political priorities of the Commission, in particular the Deeper and Fairer Internal Market, the Digital Single Market, the Energy Union, the fight against tax evasion, and climate action as set out in the Commission President's Political Guidelines and the Commission Work Programme 2018.

The present Staff Working Document is composed of two parts, one presents the main legislative and policy developments in 2018 across the three competition instruments (antitrust, including cartels, mergers and State aid), while specific actions are detailed in the sectoral overview part.

1. ANTITRUST AND CARTELS

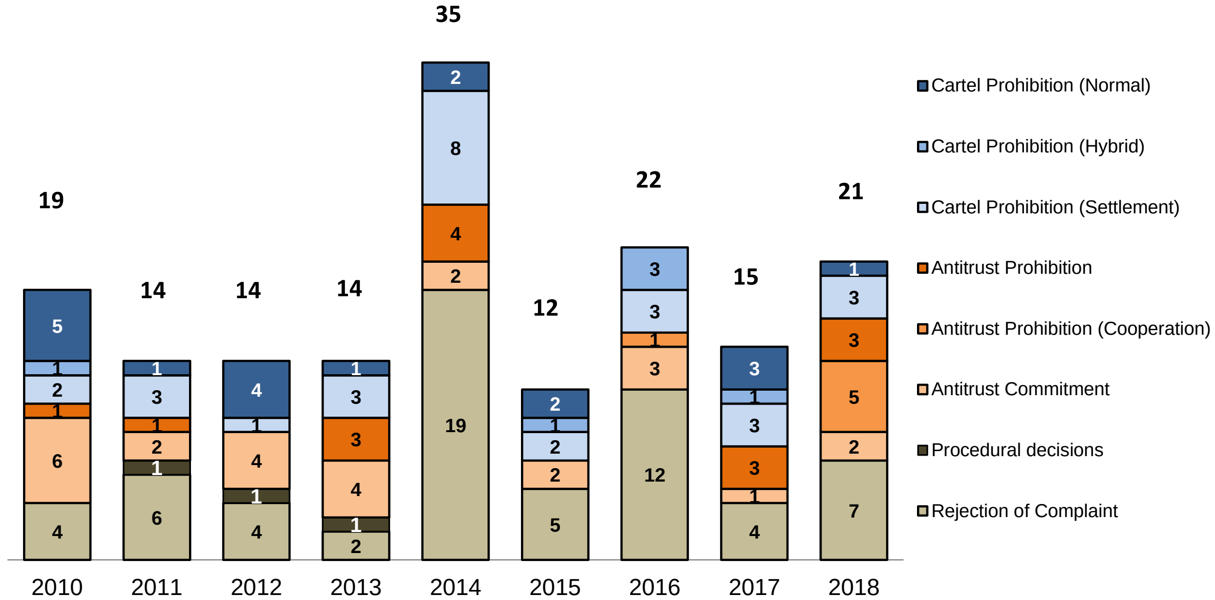
Articles 101, 102 and 106 TFEU

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 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, directly or indirectly impose unfair purchase- or selling prices or other unfair trading conditions.

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.

Antitrust and cartel decisions 2010-2018



Re-adoption decisions are included in the graph: one in 2010, one in 2012 and two in 2017.
Source: Directorate-General for Competition

1.1 Guidance in antitrust and cartel proceedings

During 2018, the Commission continued streamlining the procedures in competition cases to enhance the timeliness and effectiveness of EU competition rules.

Following the established and successful framework for rewarding cooperation by companies investigated in the area of cartels[1] and a first non-cartel cooperation case in 2016,[2] the Commission pursued five antitrust cases on the basis of cooperation in return for reduced fines.[3] In these cases, the investigated firms acknowledged that they had infringed the competition rules before the Commission issued a Statement of Objections. All five companies provided evidence that added significant value to the investigation and complemented evidence already on the Commission's file at the time when the voluntary submissions were made. Moreover, in one of the cases – *Guess* - the investigated company revealed an infringement of the EU competition rules which was not yet known to the Commission. In addition, all companies waived certain procedural rights, resulting in administrative efficiencies. The individual reductions granted, ranging between 40% and 50%, reflected the timing of the cooperation (both in terms of the acknowledgement of liability and the evidence) as well as the extent to which the evidence strengthened the Commission's case. On 17 December 2018, DG Competition published a fact-sheet setting out the framework for cooperation cases in the antitrust field.[4]

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[1] This framework allows the Commission to reduce the fine if a company has provided so-called self-incriminating evidence (see Commission Notice on Immunity from fines and reduction of fines in cartel cases) and/or if a company admits the infringement and agrees to follow a more streamlined and shorter procedure (see Commission Notice on the conduct of settlement procedures in cartel cases). See: http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html, and http://ec.europa.eu/competition/cartels/legislation/settlements.html.

[2] Case AT.39759 - *ARA foreclosure*, See: http://europa.eu/rapid/press-release_IP-16-3116_en.htm.

[3] Cases AT.40181 – *Philips*, AT.40182 - *Pioneer*, AT.40465 - *Asus* and AT.40469 - *Denon & Marantz*. (see: http://europa.eu/rapid/press-release_IP-18-4601_en.htm), and Case AT.40428 – *Guess* (see: http://europa.eu/rapid/press-release_IP-18-6844_en.htm).

[4] See: http://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

On 12 December 2018, updated guidance on confidentiality claims in access to file and the use of voluntary confidentiality rings was published by DG Competition.[5] The guidance explains how companies involved in antitrust investigations should identify business secrets and other confidential information in documents submitted to the Commission. Moreover, the guidelines explain how non-confidential versions of documents should be prepared. In addition, the guidance explains the benefits and the functioning of the confidentiality-ring procedure for access to file in pending antitrust investigations. By means of a confidentiality ring, documents in the Commission's file are made accessible to the addressee(s) of a Statement of Objections in a restricted manner. Similar to a data room, the number of persons having access to and who may use the information is restricted to what is strictly necessary for the rights of defence. The guidance include a template for a non-disclosure agreement between the addressee(s) of a Statement of Objections and the information providers.

In 2018, the Commission started a reflection process how competition policy can best serve European consumers in a fast-changing world. To this end, the Commission appointed, Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers on the future challenges of digitisation for competition policy.[6] The Special Advisers' Report "Competition Policy for the Digital Era" was published on 4 April 2019.[7] In their report, the Special Advisers (i) identify what they see as the main specific features of digital markets; (ii) provide their views on the goals of EU competition law in the digital era; and (iii) discuss the application of competition rules to digital platforms and data, as well as the role of merger control in preserving competition and innovation.

On 11 October 2018, DG Competition Director-General Johannes Leitenberger gave a speech which addressed current challenges for competition policy and enforcement, including digital platforms, algorithms and the relevance of data.[8]

In October 2018, the Commission launched the review of the Vertical Block Exemption Regulation (VBER) which will expire in May 2022.[9] The review is carried out in line with the Commission's Better Regulation requirements. The purpose of the evaluation exercise is to allow the Commission to decide whether to let the VBER-rules lapse, prolong their duration or revise them. An evaluation roadmap for stakeholder comments was published on 8 November 2018.[10] Stakeholders will be able to provide further comments at subsequent stages of the review process. In addition to stakeholder contributions, the review will take into account information gathered by the Commission in the E-commerce Sector Inquiry and the experience gained through the 2018 antitrust decisions against four consumer-electronics manufacturers for fixing online resale prices.[11] Moreover, the evaluation will draw on the national competition authorities' (NCAs) experience from enforcing the EU competition rules in this area.

5 See: http://ec.europa.eu/competition/antitrust/conf_rings.pdf.

6 See: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/commission-appoints-professors-heike-schweitzer-jacques-cremer-and-assistant-professor-yves_en and http://ec.europa.eu/competition/scp19/.

7 See: http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

8 See: http://ec.europa.eu/competition/speeches/text/sp2018_14_en.pdf.

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

10 See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en.

11 Cases AT.40181 – *Philips*, AT.40182 - *Pioneer*, AT.40465 - *Asus* and AT.40469 - *Denon & Marantz* (vertical restraints), available at http://europa.eu/rapid/press-release_IP-18-4601_en.htm.

1.2 Important judgments by the European Union Courts

Preliminary rulings

Dissemination of misleading information

In *Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato,*[12] the Court of Justice stated that an arrangement between competing undertakings to disseminate misleading information[13] about adverse reactions resulting from the off-label use of a medicine[14] sold by one of the undertakings to reduce the competitive pressure on the other, may constitute a restriction of competition by object within the meaning of Article 101(1) TFEU.[15] The Court of Justice considered that such an arrangement cannot be considered ancillary to the licensing agreement that the two undertakings had concluded several years before the arrangement in question, nor can it be justified under Article 101(3) TFEU. This is the first time that the Court of Justice reviewed the spreading of misleading information ("disparagement") and found it anticompetitive.[16] In the ruling the Court of Justice concluded that, in so far as a pharmaceutical product used on-label is substitutable by another product used off-label (for the same therapeutic indications), they can be included in the same product market.

Meaning of competitive disadvantage

In *MEO*,[17] the Court of Justice gave guidance on the interpretation of the concept of competitive disadvantage in Article 102(c) TFEU which precludes dominant undertakings from *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".* The Court of Justice held that the mere presence of an immediate disadvantage affecting trading partners, who were charged more, compared to their competitors for an equivalent service, does not mean that competition is distorted or is capable of being distorted. Instead, a finding of a competitive disadvantage must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that the behaviour at issue has or is capable of having an effect on the costs, profits or any other relevant interest of one or more of those partners. While this finding does not require proof of actual quantifiable deterioration in the competitive situation, it does require showing that the conduct is capable of affecting that situation. Furthermore, the Court of Justice concluded that the seriousness of a possible competitive disadvantage is not a requirement for finding an infringement of Article 102(c) TFEU given that there is no appreciability (*de minimis*) threshold for the application of Article 102 TFEU.

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[12] Case C-179/16 Hoffmann - *La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato*, Judgment of the European Court of Justice (Grand Chamber) of 23 January 2018, ECLI:EU:C:2018:25.

[13] To regulators, medical professionals and the general public.

[14] The term "off label" refers to the intentional prescription of an authorised medicine for a purpose that is not covered by the terms of its marketing authorisation.

[15] The two medical products - Avastin and Lucentis - were developed by the same company, Genetech. However, Avastin was commercialised by Genetech's parent company Roche, while the commercial exploitation of Lucentis was entrusted to Novartis group via licensing agreement. The arrangement to disseminate misleading information between Roche and Novartis concerned the use of Avastin and was designed to reduce its use and render more profitable the exploitation by Novartis of the technology rights over Lucentis.

[16] The ruling follows a series of four decisions by NCAs upheld by national courts, three by the French NCA and one by the Italian NCA. The latter case gave rise to this preliminary ruling.

[17] Case C-525/16 *Meo - Serviços de Comunicações e Multimédia*, Judgment of the Court of Justice of 18 April 2018, ECLI:EU:C:2018:270.

Actions for damages

In *Apple Sales International*,[18] a preliminary ruling concerning the interpretation of Council Regulation No 44/2001 ("Brussels Regulation"),[19] the Court of Justice concluded that, in the context of an action for damages for an infringement of Article 102 TFEU, brought by a distributor against its supplier, the application of a contractual jurisdiction clause is not excluded on the sole ground that it does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law. The Court of Justice thus made clear that in Article 102 TFEU cases where an anticompetitive behaviour is related to a contractual relationship, jurisdictional clauses in the agreement governing the commercial relationship between the parties will also affect any related antitrust damages claims.

Review of decisions finding an infringement

"Pay for delay" and market definition

In eight judgments[20] the General Court confirmed large parts of the Commission's decisions finding that a number of companies producing generic pharmaceuticals which had concluded anticompetitive "pay-for-delay" agreements.[21]

In line with its previous ruling in *Lundbeck,*[22] the General Court confirmed in *Servier*[23] that patent settlements involving payments from the originator to the generics producer can constitute pay-for-delay agreements having an anticompetitive object. The General Court therefore upheld the Commission's finding that the agreements concluded by Servier with five generic companies had such an object in breach of Article 101 TFEU. The General Court considered that it was the inducement (that is to say the reverse payment), and not a recognition of the validity of the patent, that led the generics producers to agree to withdraw from the markets.

Moreover, the General Court ruled that while in principle, side deals similar to direct payments can induce generics producers to withdraw from competition, not all side deals constitute an anticompetitive inducement. In particular, the General Court was not convinced that the license provided to *Krka*[24] constituted an inducement for Krka's withdrawal from a number of markets and therefore rejected the Commission's finding that the Krka agreement

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[18] Case C-595/17 *Apple Sales International and Others v MJA*, Judgment of the European Court of Justice of 24 October 2018, ECLI:EU:C:2018:854.

[19] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

[20] Case T-677/14 *Biogaran v Commission*, Case T-679/14 *Teva UK and Others v Commission*, judgment of 12 December 2018, ECLI:EU:T:2018:910;, Case T-680/14 *Lupin v Commission*, judgment of 12 December 2018; ECLI:EU:T:2018:908; Case T-682/14 *Mylan Laboratories and Mylan v Commission*, judgment of 12 December 2018, ECLI:EU:T:2018:907; Case T-684/14 *Krka v Commissio*n, judgment of 12 December 2018, ECLI:EU:T:2018:918; Case T-701/14 *Niche Generics v Commission* judgment of 12 December 2018, ECLI:EU:T:2018:92; Case T-705/14 *Unichem Laboratories v Commission* judgment of 12 December 2018; ECLI:EU:T:2018:915; Case T-691/14 *Servier and Others v Commission*, judgment of 12 December 2018 ECLI:EU:T:2018:922.

[21] Pay for delay agreements are settlement agreements that may restrict generic market entry in exchange for benefits transferred from an originator firm to a company intending to introduce a generic version of a medicine. Such agreements result in delayed market entry of cheaper generic medicines, to the detriment of patients and taxpayers financing the health systems.

[22] Case T-472/13 *Lundbeck v Commission*, judgment of 8 September 2016, ECLI:EU:T:2016:449.

23 Case T-691/14 *Servier and Others v Commission*, judgment of 12 December 2018, ECLI:EU:T:2018:922.

[24] Case T-684/14 *Krka v Commissio*n, judgment of 12 December 2018, ECLI:EU:T:2018:918.

restricted competition by object. Moreover, the General Court found that the Commission decision did not prove that the Krka agreement had restrictive effects under Article 101 TFEU. The General Court took the view that, considering that the agreement had been implemented, the Commission should have assessed actual, and not only potential effects on competition, taking into account also factual developments occurring after the agreement had been concluded.

Finally, the General Court annulled the Commission's finding that Servier had abused its dominant position on the market for perindopril, a medicine used to treat hypertension and heart failure. The General Court held that the Commission failed to show that the relevant product market was limited to the perindopril molecule alone. The General Court found that the Commission had made an incorrect assessment of the therapeutic substitution of perindropil with other medicines in the same therapeutic class. Moreover, the Commission had relied excessively on price-related factors. The General Court therefore concluded that the Commission erred in finding Servier in a dominant position in accordance with Article 102 TFEU.

Cartel participation and single and continuous infringement

In *Power Cables,*[25] the General Court referred to the necessary conditions for holding a cartel participant liable for a single and continuous infringement depending on the form of its participation. The General Court confirmed that even if a participant is unaware of, but could reasonably have foreseen the unlawful conduct planned and was prepared to take the risk, the cartel participant's potential lack of knowledge of some forms of that conduct does not exempt it from liability.[26] Moreover, the General Court held that when an undertaking has infringed Article 101 TFEU, it cannot escape being penalised on the ground that another cartel participant has not been fined.

Constructive refusal to deal and margin squeeze

With its rulings in *Deutsche Telekom*[27] and *Slovak Telekom*[28] the General Court largely upheld the Commission decision finding that Slovak Telekom, a subsidiary of Deutsche Telekom, had abused its dominant position by refusing access to its local loop and by engaging in margin squeeze practices. The General Court noted that the relevant regulatory framework had imposed on Slovak Telekom an obligation to grant unbundled access to the local loop. Moreover, the General Court acknowledged the need for alternative operators to access the local loop to allow the development of effective competition. Therefore, the General Court concluded that the Commission was not required to demonstrate that access to Slovak Telekom's local loop was indispensable for potential competitors. While largely upholding the Commission's finding of margin squeeze, the General Court held that the Commission had failed to show exclusionary effects for a period of four months when the margins were positive according to the "year-by-year" assessment method. Accordingly, the General Court reduced the amount of the fine.

[25] In the Power Cables judgments, the General Court dismissed all the appeals brought against the Commission's decisions in their entirety. For the sake of clarity, the various aspects covered by the *Power Cables* judgements are dealt with thematically in the sections that follow below. The 15 cases are the following: T-419/14 *The Goldman Sachs Group v Commission*, judgment of the General Court 12 July 2018, ECLI:EU:T:2018:445; T-422/14 *Viscas Corp. v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:446; T-438/14 *Silec Cable SAS and General Cable Corporation v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:447; T-439/14 *LS Cable & System Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:451; T-441/14 *Brugg Kabel AG and Kabelwerke Brugg AG Holding v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:453; T-444/14 *Furukawa Electric Co. Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:454; T-445/14 *ABB v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:449; T-446/*14 Taihan Electric Wire Co. Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:444; T-447/14 *NKT Verwaltungs and NKT Holding A/S v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:443; T-448/14 *Hitachi Metals, Ltd v Commission*, Judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:442; T-449/14 *Nexans France SAS and Nexans SA v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:456; T-450/14 *Sumitomo Electric Industries Ltd and J-Power Systems Corporation v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:455; T-451/14 *Fujikura Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:452; T-455/14 *Pirelli & C. SpA v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:450; T-475/14 *Prysmian SpA and Prysmian Cavi e Sistemi Srl v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:448. See also: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180107en.pdf.

[26] Case T-448/14 *Hitachi Metals, Ltd v Commission*, Judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:442.

[27] Case T-827/14, *Deutsche Telekom AG v European Commission*, Judgment of the General Court of 13 December 2018, ECLI:EU:T:2018:930.

[28] Case T-851/14, *Slovak Telekom a.s. v European Commission*, Judgment of the General Court of 13 December 2018, ECLI:EU:T:2018:929.

Parental liability

In *Deutsche Telekom,*29 the General Court upheld Deutsche Telekom's parental liability for the infringement, but found that Deutsche Telekom's turnover did not reflect the company's individual conduct in the infringement. Deutsche Telekom's turnover could therefore not serve as a basis for a calculation of an additional fine to be imposed on the company. The General Court consequently reduced the amount of the fine.

In *Power Cables,*[30] the General Court confirmed the line taken by the Commission and concluded that the fact that an undertaking is a *'pure financial investor'* does not constitute a legal criterion for the non-imputation of liability for the parent company. Therefore, a financial investor is to be treated like any other parent. In the case in question, the parent company had to assume parental liability based on 100% voting rights, even if its shareholding was as low as 33%.[31]

Territorial jurisdiction

In *Power Cables,*[32] the General Court confirmed the Commission's practice as regards territorial jurisdiction. The General Court held that the Commission is entitled to penalise practices implemented outside the EEA, when it is foreseeable that the practices in question will have an immediate and substantial effect in the internal market.

Review of investigatory powers - inspections

The General Court rendered two rulings on the actions for annulment brought by *České*

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29 Case T-827/14, *Deutsche Telekom AG v European Commission*, Judgment of the General Court of 13 December 2018, ECLI:EU:T:2018:930.

30 Cases T-441/14 *Brugg Kabel AG and Kabelwerke Brugg AG Holding v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:453; T-447/14 *NKT Verwaltungs and NKT Holding A/S v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:443.

31 Additional objective circumstances supported the conclusion that the undertaking in question exercised decisive influence.

32 Cases T-419/14 *The Goldman Sachs Group v Commission*, judgment of the General Court 12 July 2018, ECLI:EU:T:2018:445; T-422/14 *Viscas Corp. v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:446; T-438/14 *Silec Cable SAS and General Cable Corporation v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:447; T-439/14 *LS Cable & System Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:451; T-441/14 *Brugg Kabel AG and Kabelwerke Brugg AG Holding v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:453; T-444/14 *Furukawa Electric Co. Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:454; T-445/14 *ABB v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:449; T-446/*14 Taihan Electric Wire Co. Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:444; T-447/14 *NKT Verwaltungs and NKT Holding A/S v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:443; T-448/14 *Hitachi Metals, Ltd v Commission*, Judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:442; T-449/14 *Nexans France SAS and Nexans SA v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:456; T-450/14 *Sumitomo Electric Industries Ltd and J-Power Systems Corporation v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:455; T-451/14 *Fujikura Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:452; T-455/14 *Pirelli & C. SpA v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:450; T-475/14 *Prysmian SpA and Prysmian Cavi e Sistemi Srl v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:448. See also Court press release: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180107en.pdf.

dráhy,[33] concerning two Commission inspection decisions.[34]

In the first ruling, which partially upheld the Commission inspection decision, the General Court assessed whether the Commission had reasonable grounds to suspect an infringement of the competition rules and whether the inspections powers circumscribed by the inspection decision were restricted to the suspected infringement. The General Court found that the Commission had reasonable grounds to suspect an infringement of Article 102 TFEU by way of predatory pricing on the railway route Praha – Ostrava. However, the General Court concluded that the Commission had no grounds to suspect other types of anticompetitive conduct under Article 102 TFEU on the Praha – Ostrava route or on other routes. The General Court dismissed the other grounds for annulment put forward by České dráhy. In doing so, the General Court confirmed that parallel inspections by the Commission and NCAs, cannot give rise to legitimate expectations that the Commission would refrain from intervening in the case. The General Court also made clear that the fact that the route under investigation was domestic does not preclude the Commission from considering that the potential infringement could have an effect on trade between Member States.

In the second ruling, the General Court upheld the second Commission inspection decision addressed to České dráhy. The second inspection decision concerned a suspected infringement of Article 101 TFEU based on documents obtained during the first inspection. The General Court's review focused on whether the underlying evidence for the second inspection decision had been lawfully obtained during the first inspection. The General Court explored whether the documents that served as a basis for the second inspection decision concerning a suspected infringement of Article 101 TFEU were related to possible predatory pricing (the subject-matter of the first inspection under Article 102 TFEU). The General Court confirmed that the indications contained in these documents, albeit imprecise, were related to the costs of České dráhy and therefore relevant for the assessment of an alleged predatory pricing strategy on the Praha-Ostrava route. The documents were therefore found to have been lawfully obtained.

The judgment of the General Court in the *Bio-ethanol*[35] case declared as inadmissible all claims that the Commission had violated, through its methodology for electronic searches during the inspection, the principles of protection of legal and professional communication. Such claims are subject to Court review only in the context of a final Commission decision. It follows that companies cannot use arguments that the inspection was carried out in an unlawful manner to support claims for annulment of the inspection decision itself. Moreover, the General Court stated that any prior letter from the Commission refusing to suspend its investigation based on such claims is not an act that can be challenged in Court before the conclusion of the investigation.

[33] Cases T-325/16 *České dráhy a.s. v European Commission*, judgement of the General Court of 20 June 2018, ECLI:EU:T:2018:368 and T-621/16 *České dráhy a.s. v European Commission*, judgement of the General Court of 20 June 2018, ECLI:EU:T:2018:367.

[34] For the Commission's powers of inspection, see Articles 20 and 21 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pp.1-25.

[35] Case T-274/15 *Alcogroup and Alcodis v Commission*, judgment of the General Court of 10 April 2018, ECLI:EU:T:2018:179. Judgement currently under appeal with case reference C-386/15 P(R).

In *Power Cables,*[36] the General Court reviewed the continued inspection procedure. If the document review has not been concluded at the envisaged end of the on-site inspection, a copy of the dataset still to be searched may be sealed and brought to the Commission's premises, where the inspection is continued within a reasonable time limit. The General Court found that Article 20(2)(b) of Regulation No 1/2003 does not prescribe that the examination of business records must be carried out exclusively at the inspected company's premises. However, when examining documents at its own premises, the Commission must offer the same guarantees as those given when the examination takes place at the inspected undertaking's premises. Finally, the General Court considered that the intermediate step of copying or copy-imaging documents as a part of the forensic IT analysis falls within the scope of the powers provided for in Article 20(2)(b) and (c) of Regulation No 1/2003.

Review of fines

The judgments of the Court of Justice in the *Freight Forwarding*[37] cases confirm several policy points crucial for the Commission's decision-making practice, that is to say the leniency regime, the Commission's discretionary powers in choosing the entities to be addressed and its fining methodology. As regards fining, the Court of Justice affirmed that the cartelised services were international airfreight forwarding and not solely the various components of such services on which the parties colluded. Consequently, the Court of Justice considered that *"since the sales falling within the sphere of the infringements at issue were made on that market"* the Commission set the fines correctly based on the entire sales value of the overall market for international air freight forwarding services.

The judgment of the General Court in the *North Sea Shrimps*[38] case confirmed the existence and scope of the cartel and the company Stührk's participation in it. However, the General Court reminded the Commission of the fact that it must properly justify and explain the calculation of its fine, in particular when deviating from its own Fining Guidelines,39 even when it does so in favour of the parties.40 On this basis, the fine was annulled.

In *Power Cables,*[41] the General Court confirmed the use of Point 18 of the Fining Guidelines to re-distribute the value of sales (in this case the sales within the EEA) amongst all the cartel

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[36] Cases T-449/14 *Nexans France SAS and Nexans SA v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:456 and T-475/14 *Prysmian SpA and Prysmian Cavi e Sistemi Srl v Commission*,, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:448.

[37] Cases C-271/16 P *Panalpina v Commission*, judgement of the Court of Justice of 1 February 2018, ECLI:EU:C:2018:59; C-264/16 P *Deutsche Bahn / Schenker v Commission*, judgement of the Court of Justice of 1 February 2018, ECLI:EU:C:2018:60; C-263/16 P *Schenker Ltd. (successor of BAX Global UK) v Commission*, judgement of the Court of Justice of 1 February 2018, ECLI:EU:C:2018:58 and C-261/16 P *Kuehne & Nagel v Commission*, judgement of the Court of Justice of 1 February 2018, ECLI:EU:C:2018:56. See also court press release: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/cp180009en.pdf.

[38] Case T-58/14, *Stuehrk Delikatessen Import v Commission*. Judgment of the General Court of 13 July 2018, ECLI:EU:T:2018:474.

[39] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006/C 210/02) See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN.

[40] See also: case AT.39780 – *Envelopes*, decision of 10 December 2014. Annulled by the General Court, in case T-95-15, *Printeos and Others v Commission*, ECLI:EU:T:2016:722.

[41] Cases T-422/14 *Viscas Corp. v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:446; T-439/14 *LS Cable & System Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:451; T-444/14 *Furukawa Electric Co. Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:454; T-446/*14 Taihan Electric Wire Co. Ltd v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:444 and T-451/14 *Fujikura Ltd v*

participants. In this case, the undertakings active in the EEA reserved the EEA for themselves while the Asian undertakings committed to stay out of the EEA. The cartel participants allocated projects between themselves according to the geographic region or customer. In particular, the companies active in the EEA agreed to allocate projects within the EEA.

In this case, a direct application of point 13 of the Fining Guidelines (where the Commission uses the value of sales of each undertaking in the EEA) would result in zero sales (and therefore zero fines) for the Asian undertakings, because they had no sales in the EEA. By applying Point 18 of the Fining Guidelines, the sales achieved in the EEA amongst all the cartelists (regardless of activity within the EEA) were re-distributed in proportion with the market shares that the cartelists have in the entire geographic area covered by the infringement.

Regarding gravity and mitigating circumstances for the fines set by the Commission, the General Court confirmed the Commission's approach that less active participation in the infringement of an undertaking was correctly taken into account when the Commission assessed the mitigating circumstances.[42]

Moreover, the General Court held that the Commission did not have to allocate the internal shares of the overall fine imposed on those held jointly and severally liable. According to the General Court, such an allocation would harm the objective of the joint and several liability mechanisms, the purpose of which is to provide an additional legal device available to the Commission to strengthen both the effectiveness of the recovery of fines imposed and the objective of deterrence pursued generally by competition law.

In the *Heat stabiliser*[43] judgement, the General Court annulled the Commission's decision amending the attribution of joint and several liability, finding an infringement of the equal treatment principle when determining the joint and several liability for the fine. The issue arose on the facts that - at the time of the infringement - three entities were part of the undertaking, one (ACW) directly participating throughout the infringement, one (GEA) being the ultimate parent throughout the infringement and one being intermediate parent for part of the infringement (Chemson). After the infringement, but before the adoption of the decision, GEA sold ACW and Chemson. ACW's fine was capped due to the application of the 10% ceiling. The General Court found that this fine reduction for one party (ACW) breached the principle of equal treatment, and should have been attributed proportionately between the two other parties (GEA and Chemson).

In *Orange Polska,*[44] the Court of Justice dismissed the appeal by Orange Polska against a

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Commission, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:452. See also Court press release: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/cp180009en.pdf.

42 In addition, the General Court confirmed the line of the Commission that an '*exclusively passive or follow-the-leader*' position in the infringement implies, by definition, that the undertaking concerned will keep a 'low profile', that is to say not actively participate in the creation of any anticompetitive agreements and that this role can be shown by a significantly more sporadic participation in cartel meetings than that of the ordinary members of the cartel and also by an express declaration regarding the role played by that undertaking in the cartel made by a representative of another undertaking which has participated in the infringement.

43 Case T-640/16 *GEA Group AG v Commission*, judgment of the General Court of 18 October 2018, ECLI:EU:T:2018:700.

44 Case C-123/16 P *Orange Polska v Commission*, judgment of the Court of Justice of 25 July 2018, ECLI:EU:C:2018:590.

General Court judgment[45] which upheld the European Commission's decision[46] fining Telekomunikacja Polska (now Orange Polska) for abusing its dominant position on Polish broadband markets. The Court of Justice ruling confirms that, when imposing a fine for an infringement that has ended, the Commission is not obliged to justify in its decision the existence of a legitimate interest in finding that infringement. The Court of Justice also confirmed that in assessing the gravity of the infringement for the purpose of calculating the fine, the Commission is not required to take into account the actual or likely effects of the infringement committed.

Review of commitment decisions

In *Canal+*[47] the General Court dismissed the application for annulment brought by Canal+ against the Commission decision making binding the commitments offered by Paramount Pictures Ltd ("Paramount"). The commitments addressed the Commission's concerns that clauses in Paramount's pay-tv film licensing agreement with Sky UK prevented cross-border passive sales and therefore amounted to absolute territorial protection eliminating all cross-border competition between pay-tv broadcasters. In its commitments, Paramount committed not to enforce and not to honour contractual restrictions on passive sales for a period of five years throughout the EEA. Canal+ challenged the commitment decision as a third party, claiming that the contested clauses are not restrictive of competition and that the Commission decision breaches the principle of proportionality.

The General Court examined the legal and economic context of the contested clauses and confirmed the Commission's concerns that the contested clauses amounted to absolute territorial protection and have as their object the elimination of all cross-border competition between pay-tv broadcasters. According to the General Court, this finding applies to the licensed work, whether it is copyright-protected or not. In addition, the General Court noted that the clauses imposed restrictions that went beyond what was indispensable for the improvement of the production and distribution of copyright-protected works.

As regards the principle of proportionality, the General Court stated that, where a commitment consists of the non-implementation of a contractual clause, a Commission commitment decision will make binding such a commitment only on the undertakings that offered them, and not on third parties that could see their rights affected by the commitment. Third parties have the possibility to protect their legal rights before national courts. The General Court also confirmed that the Commission was entitled to, without breaching the principle of proportionality, accept Paramount's commitment not to implement the contested clauses in its contract with Sky UK for the United Kingdom and Ireland (countries where the Commission had expressed concerns), but also in license agreements with other broadcasters in the EEA for different national territories.

Review of decisions rejecting complaints

In *Agria Polska*,[48] the Court of Justice dismissed an appeal against the General Court's ruling upholding the Commission decision rejecting a complaint due to lack of EU interest. The

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[45] Case T-486/11 *Orange Polska v Commission*, judgment of the General Court of 17 December 2015, ECLI:EU:T:2015:1002.

[46] Commission Decision C(2011) 4378 final of 22 June 2011.

[47] Case T-873/16, *Groupe Canal + v European Commission*, judgment of the General Court of 12 December 2018, ECLI:EU:T:2018:904.

[48] Case C-373/17 P *Agria Polska and Others v European Commission*, judgment of the Court of Justice of 20 September 2018, ECLI:EU:C:2018:756.

Court of Justice found that the scope and cost of an investigation sought by a complainant cannot be regarded as decisive criteria for finding EU interest, even where the investigation would cover several Member States. Moreover, the Court of Justice dismissed the argument that the Commission should open an investigation to ensure the effectiveness of the competition rules if the complainant faces procedural or institutional obstacles to bring an action before national courts. The Commission has no obligation to compensate shortcomings in judicial protection at national level by opening an investigation. It is the Member States' responsibility to ensure effective judicial protection for individual parties, the Court of Justice concluded.

In *EAEPC*,[49] the General Court fully upheld a Commission decision rejecting the complaint of the European Association of Euro-Pharmaceutical Companies (EAEPC) alleging that GlaxoSmithKline (GSK) had violated Article 101 TFEU by applying a dual pricing scheme. GSK had notified the scheme to the Commission in 1998 under the previous authorisation regime of Regulation 17/1962[50] and EAEPC had filed its original complaint in 1999. Acting on the EAEPC complaint, the Commission adopted in 2001 a decision finding that the dual pricing scheme was a restriction by object and refused to exempt it. In 2006, the General Court annulled the Commission decision because the Commission had incorrectly found that the practice in question restricted competition by object and had failed to carry out an adequate assessment under Article 101(3) TFEU. In 2009, the Court of Justice partially overturned the General Court's judgment. The Court of Justice upheld the Commission's conclusion that the practice was a restriction by object but confirmed the General Court's finding that the Commission had failed to conduct a full examination under Article 101(3) TFEU. Following the Court of Justice judgment, GSK formally withdrew the application for an individual exemption of the practice under Article 101(3) TFEU. However, the EAEPC did not withdraw its complaint against GSK. In 2013, the EAEPC required that the Commission adopt a decision on the complaint. The Commission rejected the complaint for lack of EU interest considering among other things that the conduct at issue took place many years ago, was only in operation for a very short period, did not produce any persisting effects, and that the case could be brought before national authorities.

Review of publication decisions

EU Courts reaffirmed the Commission's publication policy in competition cases with two orders rejecting applications for interim measures.

In *Power Cables*,[51] the Vice-President of the Court of Justice issued an order upholding the order by the General Court President, refusing interim measures against the Hearing Officer's decision to publish a non-confidential version of the Power Cables decision, with minor amendments. The order by the Court of Justice confirms that the Commission has no obligation to wait for a final judgment on the substance of its decision before publishing. The Vice-President of the Court of Justice stated that the applicants' rights to be heard and to obtain redress in the main case would not be affected by the publication. Finally, the Court of

[49] Case T-574/14 *EAEPC v Commission*, judgment of the General Court of 26 September 2018, ECLI:EU:T:2018:605.

[50] Council Regulation No 17 of 6 February 1962, implementing Articles 85 and 86 of the EC Treaty, OJ English Special Edition 1959-62, p. 87.

[51] Case C-65/18 P(R)-R Order of the Vice-President of the Court of 2 February 2018 - Appeal – Application for suspension of operation and other interim measures under Articles 278 and 279 TFEU and Article 160(7) of the Rules of Procedure of the Court, ECLI:EU:C:2018:62 Case T-449/14 *Nexans France SAS and Nexans SA v Commission*, judgment of the General Court of 12 July 2018, ECLI:EU:T:2018:456.

Justice Vice-President concluded that the publication would not infringe the applicants' rights to an effective remedy in the main case.

The orders of the President of the General Court in *Euribor*[52] stipulated that the publication of a Commission decision under Article 101 TFEU cannot be stopped because the decision is being challenged in Court. The applicants' argument that the presumption of innocence would preclude the Commission from publishing a decision with the parties' names and details of the behaviour found to be anticompetitive, was rejected since the parties can submit an application for annulment of the decision in question. In Power Cables,[53] the Vice President of the Court of Justice confirmed the Order of the President of the General Court which rejected the claim that the information included in the decision should be covered by professional secrecy because of an ongoing appeal against that decision.

1.3 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 strong enforcement record against hard core cartels continued in 2018. As in preceding years, the Commission adopted cartel decisions in important sectors for innovation and investment, such as the electronic components market and the automotive industry. The settlement procedure remains an efficient tool regularly used by the Commission in its fight against cartels as shown by the fact that the procedure accounted for 75% of the decisions adopted this year.

The Commission fined eight producers of capacitors - *Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, Rubycon* (*Sanyo* received immunity) – EUR 254 million for participating in a cartel between 1998 and 2012.[54] Capacitors are electrical components that store energy electrostatically in an electric field and are used in a wide variety of electronic products. As these products included smart phones, appliances in homes and electronic systems in cars the cartel operated at the expense of both manufacturers and consumers. Although the meetings and contacts took place outside the EU, the cartel was implemented on a global scale including in the EEA. This decision, in contrast to the other cartel infringements in 2018, was conducted under the ordinary procedure.

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52 Cases T-419/18, *Crédit agricole and Crédit agricole Corporate and Investment Bank v Commission*, Order by the President of the General Court of 25 October 2018, ECLI:EU:T:2018:726 and T-420/18, *JPMorgan Chase and others v Commission*, Order by the President of the General Court of 25 October 2018, not yet published.

53 Case C-65/18 – *Nexans France and Nexans v European Commission*, Order of the Vice President of the Court of Justice of 2 February 2018, ECLI:EU:C:2018:426.

54 See: http://europa.eu/rapid/press-release_IP-18-2281_en.htm, and: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018XC1211(01).

Ordinary procedures remain significant because not all investigations may be eligible for settlement discussions. Relevant factors 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, as the Capacitors case shows, the Commission will apply the ordinary procedure.

The Commission continued its work against cartels in the maritime transport services and the automotive sectors. With regard to the maritime transport sector, it fined four maritime car carriers – *CSAV, "K" Line, NYK and WWL-EUKOR* (*MOL* received immunity)[55] - EUR 395 million for taking part in a cartel. For almost 6 years, from October 2006 to September 2012, the five carriers formed a cartel in the market for deep sea transport of new cars, trucks and other large vehicles such as combine harvesters and tractors, on various routes between Europe and other continents. The cartel affected both European car importers and final customers, as imported vehicles were sold within the EEA, and European vehicle manufacturers, as their vehicles were exported outside the EEA. In 2016, some 3.4 million motor vehicles were imported from non-EU countries, while the EU exported more than 6.3 million vehicles to non-EU countries in 2016. Almost half of these vehicles were transported by the carriers that were fined by the Commission. During its investigation, the Commission cooperated with several competition authorities around the world, including in Australia, Canada, Japan and the US.

With regard to the automotive sector, two further cartels were sanctioned. The Commission also fined two suppliers of spark plugs (automotive electric devices) - *Bosch* and *NGK* - EUR 76 million for participating in a cartel with immunity applicant Denso. The Commission also found two cartels relating to braking systems. The first concerned the supply of hydraulic braking systems and involved TRW (immunity applicant; now ZF TRW), Bosch and Continental. The second cartel concerned the supply of electronic braking systems and involved Bosch and Continental (immunity applicant) with the Commission imposing total fines of EUR 75 million.

The Commission remains committed to pursuing all cartels across all sectors where it has sufficient evidence of an infringement detected either through its leniency programme or its ex officio action (more information on the cartel decisions is available in the sectoral overview). The Commission's cartel enforcement was effective, with four decisions imposing fines in excess of EUR 800 million, and customer savings of approximately EUR 1.6 billion (or three euro per EU citizen).[56] Enforcement is expected to remain effective also in the future due to solid enforcement work in 2018.

Case name	Adoption date	Fine imposed EUR	Undertakings concerned	Prohibition Procedure
Maritime Car Carriers	**21/02/2018**	**395 288 000**	**4**	**Settlement**
Braking systems	**21/02/2018**	**75 426 000**	**3**	**Settlement**
Spark plugs	**21/02/2018**	**76 099 000**	**3**	**Settlement**

55 See: http://europa.eu/rapid/press-release_IP-18-962_en.htm., and: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018XC0906(01).

56 DG Competition 2018 Annual Activity Report. To be published here: https://ec.europa.eu/info/publications/annual-activity-reports_en.

Capacitors	**21/03/2018**	**253 935 000**	**9**	**Prohibition**

1.4 Continuing close cooperation within the European Competition Network and with national courts

The NCAs play a key role in applying the EU competition rules alongside the Commission. Action by the 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. The 2014 Commission *Communication on Ten Years of Regulation 1/2003*[57] 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[58] between November 2015 and February 2016 and sounded out options for concrete action with both the NCAs and the Member State ministries. In the public consultation, 80% of stakeholders considered that action should be taken to ensure that NCAs have the means and instruments they need.[59] On 22 March 2017, the Commission proposed a Directive to empower NCAs to be more effective enforcers.[60] The co-legislators adopted the Directive on 11 December 2018, and it was published in the Official Journal on 14 January 2019.[61] Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 February 2021.

Empowering NCAs to become more effective enforcers

Once transposed by Member States into national law, the Directive to empower NCAs to be more effective enforcers will ensure that all NCAs:

- benefit from the guarantees of independence when applying EU competition rules;
- have the basic guarantee of the human and financial resources they need to perform their tasks;
- have an effective investigative and decision-making toolbox, including to gather digital evidence stored on mobile devices;
- be able to impose deterrent fines, for example companies can no longer escape fines by restructuring;
- have effective leniency programmes in place which encourage companies to report cartels throughout the EU;
- provide each other with mutual assistance so that, for example companies with assets in other Member States cannot escape from paying fines.

The importance of companies' fundamental rights is underlined. Appropriate safeguards will be put in when NCAs exercise their powers, in accordance with the EU Charter of Fundamental Rights and general principles of EU law.

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57 Communication from the Commission of 9 July 2014, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM/2014/0453 See: http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf.

58 See: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

59 See: http://europa.eu/rapid/press-release_IP-15-5998_en.htm and http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

60 See: http://ec.europa.eu/competition/antitrust/nca.html.

61 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance.) *OJ L 11, 14.1.2019, p. 3–33.*

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 under Article 15 of Regulation 1/2003. The Commission helps national courts 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 national courts.

Following approval from the concerned courts, the Commission publishes its opinions and *amicus curiae* observations on its website.

Private enforcement

Directive 2014/104/EU on antitrust damages actions (Damages Directive)[62] 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. Seven Member States transposed it before the deadline expired. On 18 January 2017, the Commission sent Letters of Formal Notice opening infringement procedures for 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 half of 2018 The Commission is finalising the completeness checks of their transposing measures before the closure of the respective three infringement proceedings. The Commission is also proceeding to the conformity check of all the 28 national transpositions.

In addition, following the publication of a "Study on quantifying passing-on effects in antitrust damages actions" in October 2016, the Commission launched in July 2018 a targeted public consultation on draft guidelines in order to estimate the share of the overcharge passed on to indirect customers. The Commission intends to adopt a final version in 2019.[63] [64]

2. 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

[62] 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.

[63] European Commission Study on the Passing-On of Overcharges. See: www.ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf.

[64] As foreseen in Article 16 of the Antitrust Damages Directive.

aspects of competition. As a result, merger control helps to preserve market structures, in which companies compete not only on price, but also on other competitive parameters such as innovation. The Commission's merger enforcement practice in 2018, in the agri-chemical,[65] pharmaceutical66 and oxygen systems67 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 future cases.

EU merger control ensures that all firms active in EU markets can compete on fair and equal terms. Proposed transactions which may distort competition are subject to close scrutiny by the Commission. If necessary to protect competition, the Commission can give merging firms the possibility to dispel competition concerns by offering commitments. If sufficient commitments cannot be found or agreed upon, the Commission may prohibit the transaction.

In its assessments, the Commission takes into account efficiencies possibly brought about by mergers. Efficiencies may have positive effects on costs and innovation, for example, provided that 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 for merger control. Such reflections are conducted both internally, based on experience, and by using external input. In this context, the Commission regularly assesses concerns and suggestions for further improvements expressed by stakeholders. It evaluates the need for reform and policy changes in specific areas, and checks that its policies and enforcement practices do not create unduly high compliance costs for merging companies, thereby hampering investment and innovation.

2.1 Recent enforcement trends

In 2018, 414 mergers were notified to the Commission, the highest number in the history of EU merger control. This number represents a substantial increase compared with preceding years. The total number of notifications received in 2018 was 9% higher than in 2017 and almost 50% higher than in 2013. Moreover, the Commission received 23 reasoned pre-notification submissions by notifying parties, requesting referral of a proposed merger from the Commission to a national competition authority or *vice versa*.

Like previous years, most notified mergers did not raise competition concerns and could be processed speedily. The simplified procedure was used in 75% of all notified transactions in 2018, showing the impact of the simplification package adopted by the Commission in December 2013. The proportion of simplified cases in the period 2004-2013 was substantially lower, at 59%.

The year 2018 required intensive work by the Commission, due to the large number of notified transactions as well as the complexity of a large number of the cases. An increasing number of notified transactions concerned already concentrated industries, such as the agri-chemical and steel sectors. This development required the Commission to carefully assess the proposed mergers' potential impact on competition, employing sophisticated quantitative techniques and carrying out comprehensive qualitative investigations.

[65] Case M.8084 *Bayer/Monsanto*, Commission decision of 21 March 2018. See: http://europa.eu/rapid/press-release_IP-17-772_en.htm. See also Case M.8851 - *BASF / Bayer divestment business*, Commission decision of 30 April 2018. See: http://europa.eu/rapid/press-release_IP-18-3622_en.htm.

[66] Case M.8955 - *Takeda/Shire. See:* http://europa.eu/rapid/press-release_IP-18-6497_en.htm.

[67] Case M.8658 - *UTC/Rockwell*. See: http://europa.eu/rapid/press-release_IP-18-3682_en.htm.

In 2018, the Commission opened in-depth investigations (second phase) in twelve cases. These cases concerned sectors such as telecommunications, steel, industrial gases and, railway transport.

The Commission adopted 393 merger decisions in 2018,[68] and intervened in 25 cases, resulting in customer savings of approximately EUR 20 billion (or EUR 39 per EU citizen).[69] The number of interventions was somewhat higher compared to the average of the last seven years, with approximately 20 interventions per year.[70] In 2018, 17 mergers were cleared subject to commitments in the first phase, four were cleared without remedies after second-phase investigations, and six were cleared with remedies after second phase investigations. In two cases, the parties abandoned the transaction during the in-depth investigation.[71] The Commission did not prohibit any transactions in 2018.

When reviewing proposed concentrations, the Commission assesses their impact on all aspects of competition. In 2018, the Commission intervened in several proposed concentrations, which, in addition to price, quality and choice concerns, risked impeding innovation. In *Bayer/Monsanto*[72] and *BASF/Bayer divestment business*[73] the Commission identified concerns related to innovation. The Commission approved the Bayer/Monsanto transaction after the parties submitted an extensive divestiture package comprising in particular Bayer's global vegetable seed business and broadacre crop seed and trait business (including R&D), its glufosinate business, and its digital agriculture activities. These divestitures addressed all competition concerns identified by the Commission, including those related to innovation. The divestiture businesses were sold to BASF. The acquisitions would allow the company to compete and innovate as actively and effectively against the merged firms, for the benefit of European farmers and consumers.

Most remedies accepted by the Commission in 2018 were divestitures of tangible or intangible assets.[74] This is in line with the Commission's general preference for structural remedies in merger cases. In a few cases in 2018, the Commission accepted non-divestiture remedies,[75] where they were considered to solve the underlying competition concerns.

Moreover, in 2018 the Commission continued to make significant efforts to enforce procedural obligations under the EU Merger Regulation.[76] Following the fine of EUR 110 million imposed on Facebook in 2017 for providing misleading information during the review of its acquisition of WhatsApp[77], the Commission imposed in 2018 a fine of EUR 124.5

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

69 DG Competition 2018 Annual Activity Report. To be published here: https://ec.europa.eu/info/publications/annual-activity-reports_en.

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

71 Case M.8547 - *CELANESE / BLACKSTONE* / JV, notified to the Commission on 12 September 2017 and the notification withdrawn on 19 march 2018 and case M.8907 - *APERAM / VDM*, notified to the Commission on 23 October 2018 and the notification withdrawn on 21 December 2018.

72 Case M.8084 - *Bayer/Monsanto*. See: http://europa.eu/rapid/press-release_IP-17-772_en.htm.

73 Case M.8851 - *BASF / Bayer* divestment business. See: http://europa.eu/rapid/press-release_IP-18-3622_en.htm.

74 Case M.8084 - *Bayer/Monsanto*, Commission decision of 21 March 2018; Case M.8444 - *Arcelormittal/Ilva*, Commission decision of 7 May 2018; Case M.8480 - *Praxair/Linde*, Commission decision of 20 August 201.

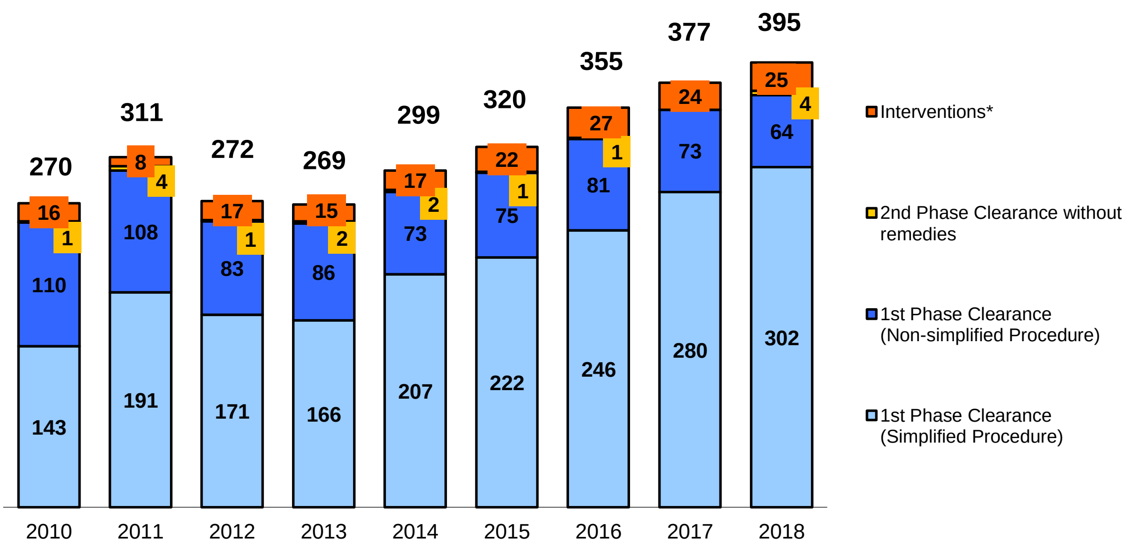
75 Case M.8306 - *Qualcomm/NXP semiconductors*, Commission decision of 18 January 2018; Case M.7000 - *Libery Global/Ziggo*, Commission decision of 30 May 2018.

76 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.

77 Case M.8228 - *Facebook/ WhatsApp*. See: http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

million on *Altice*[78] for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification or approval by the Commission (so-called gun jumping). Three other procedural infringement cases were under investigation in 2018; two against *General Electric* and *Merck GmbH* (including *Sigma-Aldrich*) concerning their alleged provision of incorrect and/or misleading information during the Commission's merger review. Moreover, the Comission is pursuing a case against *Canon* for allegedly implementing a merger before notification and clearance.

Merger decisions 2010-2018:



* Interventions in merger cases include prohibition decisions and mergers cleared subject to remedies, as well as withdrawals in Phase II;
Prohibition decisions: one in 2011, 2012 and 2016; two in 2013 and 2017.
Source: Directorate-General for Competition

2.2 The ongoing evaluation of EU merger controlselected procedural and jurisdictional aspects of EU mergers

In 2016, the Commission launched a public consultation concerning an evaluation of selected procedural and jurisdictional aspects of EU merger control. The evaluation builds upon the results of the public consultation on the 2014 Commission white paper "*Towards more effective EU merger control*".[79] 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. 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 2017.[80] The Commission is carrying out further research on the topics covered by the evaluation and will reflect on whether further action would be required.

78 See: http://europa.eu/rapid/press-release_IP-18-3522_en.htm.
79 See: http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.
80 For the summary of the submissions and their non-confidential versions, see: http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

2.3 Significant judgments by the European Union courts in merger control

In 2018, the EU Courts adopted five judgments in the field of merger control.

In its judgement of 16 May 2018,[81] the General Court partially annulled the Commission decision of 25 July 2016,[82] which rejected Lufthansa's request for a waiver of the commitments made binding by the Commission in its 2005 decision *Lufthansa/Swiss*.[83] The General Court annulled the Commission's decision to reject the request for a waiver for the Zürich-Stockholm route. The General Court considered that the Commission made a manifest error of assessment by failing to take into account and carefully examine all relevant information. The General Court concluded that the Commission has no obligation to review long-term commitments on its own initiative. It is for the parties bound by the commitments to make a waiver request and to provide the necessary evidence. However, the Commission must supplement or refute such evidence by way of an investigation. According the the General Court, the Commission had not adequately investigated the change in competitive conditions that had occurred on this route since the adoption of its decision. However, the General Court dismissed the appeal in relation to the Zürich-Warsaw route.

On 31 May 2018, the European Court of Justice issued its preliminary ruling on a question referred to it by a Danish Court concerning the interpreation of Article 7(1) of the Merger Regulation, which prohibits companies from implementing a concentration before the Commission has cleared it.[84] The issue at stake in the national proceedings was whether the termination by KPMG of its cooperation agreement with the KPMG international network prior to the approval of its merger with Ernst & Young by the Danish Competition Authority amounted to gun jumping or not. In its judgment, the Court of Justice concluded that Article 7(1) of the Merger Regulation must be interpreted in such a way that a concentration is considered to be implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking. The Court of Justice applied this test to the specific circumstances in the Danish proceedings and concluded that the termination of the cooperation agreement does not constitute gun-jumping, even if it had a conditional link with the concentration and was likely to be of ancillary and preparatory nature.

On 9 October 2018, the General Court delivered judgements in three cases[85] concerning the implementation of remedies in the case *Telefónica Deutschland/ E-Plus*[86] that had been cleared conditionally in 2014. Each of the three applicants *1&1 Telecom*, *Mass Response* and *Multiconnect* claimed that the Commission incorrectly interpreted the scope of Telefónica's obligations under its commitments. The General Court declared the appeals inadmissible.

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[81] Case T-712/16 - *Deutsche Lufthansa AG v Commission*, judgment of the General Court of 18 May 2018.

[82] Commission Decision C(2016) 4964 final of 25 July 2016, see: http://ec.europa.eu/competition/mergers/cases/decisions/m3770_373_3.pdf.

[83] Case M.3770 – *Lufthansa/Swiss*, decision of 4 July 2005, see: http://ec.europa.eu/competition/mergers/cases/decisions/m3770_373_3.pdf.

[84] Case C-633/16 Ernst & Young vs C-633/16 Ernst & Young vs Konkurrencerådet, judgment of 31 May 2018.

[85] General Court judgements in cases T-43/16, T-884/16 and T-885/16.

[86] Case M.7018 - *Telefonica Deutschland/E-Plus*. See: http://ec.europa.eu/competition/mergers/cases/decisions/m7018_6053_3.pdf.

3. 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 internal market.

3.1 Uptake of the State Aid Modernisation

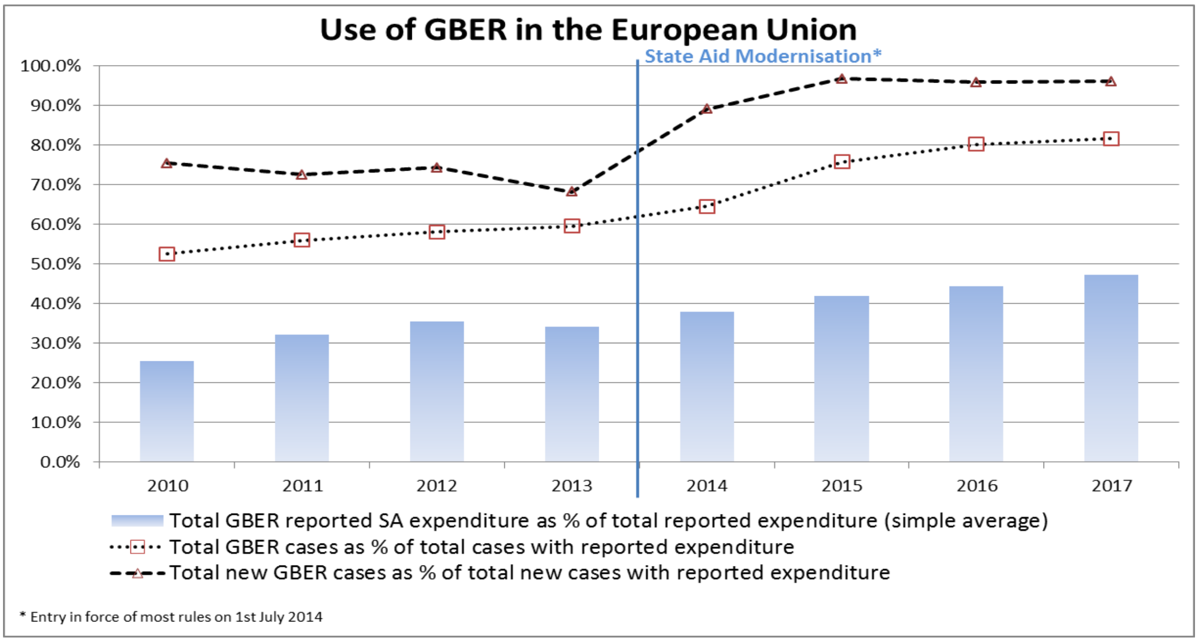
Since 2014, as part of the State Aid Modernisation (SAM), there has been a surge in State aid granted without prior notification to the Commission, indicating an important reduction in red tape. The 2018 State Aid Scoreboard[87] confirms that modernisation has lead to quicker implementation of public support by Member States. This is possible due to the General Block Exemption Regulation (GBER)[88], 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 in the common interest. For the aid categories covered by the GBER, only cases with the largest potential to distort competition in the single market have to be notified.

As shown in the graph below,[89] since 2015 more than 96% of new measures for which expenditure was reported for the first time were covered by the GBER, entailing an increase of some 28 percentage points compared to 2013. Approximately 82% of all measures with reported expenditure (that is to say not only new measures), fell under the block exemption in 2017. Total spending on measures covered by the GBER represented approximately 47% of total State aid expenditure (excluding agricultural aid) in 2017, that is to say an increase of some 13 percentage points compared to 2013.

[87] The 2018 State Aid Scoreboard comprises aid expenditure made by Member States before 31 December 2017 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. See: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

[88] 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 TFEU, OJ L 187, 26.6.2014, p.1.

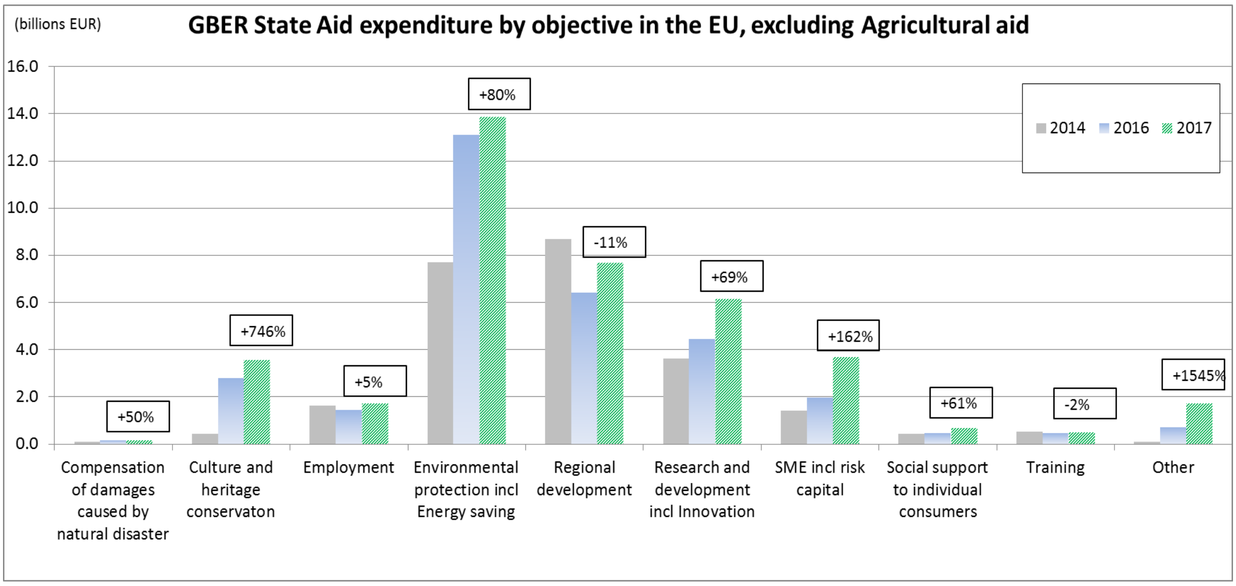
[89] The 2018 State Aid Scoreboard figures: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.



The 2014 GBER introduced new aid categories[90] and to a large extent, the reported increase in expenditure of GBER measures reflects the impact of the new Regulation. In 2017, as compared to 2014, total GBER spending for aid to culture and heritage conservation, for broadband and for local infrastructure has increased dramatically, while it more than doubled for SMEs, including risk finance. Large increases were also recorded for environmental protection and energy savings (+80%), for research, development and innovation (+69%) and for aid to compensate damages caused by natural disasters (+50%). The GBER was further extended in 2017, especially as regards aid to ports and airports.91 It is therefore to be expected that block-exempted aid as a share of total aid granted by Member States will increase even further in the coming years.

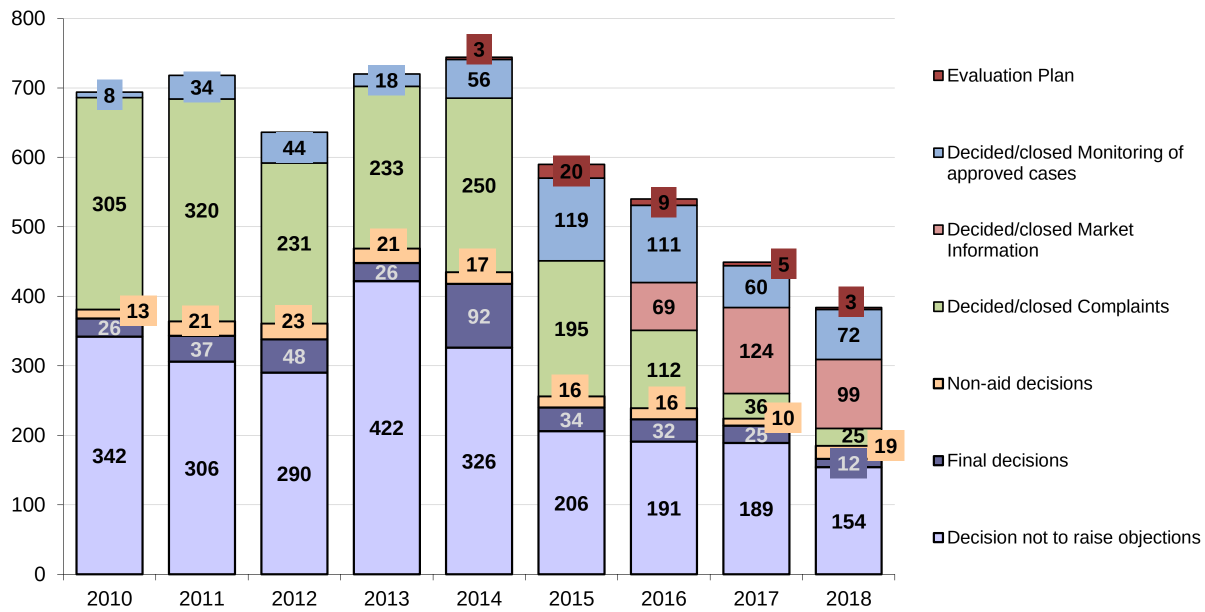
[90] Aid to innovation clusters and aid to process and organisational innovation, aid schemes to make good the damage caused by natural disasters, social aid for transport residents of remote regions, aid for broadband infrastructure, aid for culture and heritage conservation, including aid schemes for 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.

[91] In 2017, Member States reported more than 50 million EUR of State aid spending under Articles 56a and 56b of the GBER, of which 7 million EUR for inland ports, 39 million EUR for maritime ports and 6 million EUR for regional airports, respectively.



The growing share of spending falling under the GBER implies that on average State aid measures registered by the Commission are implemented much more quickly than in the past by Member States. Compared to 2013, the average time to implement State aid measures decreased by 15%. However, notified measures that are still subject to scrutiny tend to cover bigger budgets and spending than in the past, in line with the Commission's approach to be 'big on big things and small on small things'.[92] In 2017, the average annual budget of implemented notified measures was some EUR 230 million, an absolute increase of approximately 126% compared to 2013.

State aid enforcement (Commission decisions, monitoring and Member States' Evaluation Plans) 2010-2018



Source: Directorate-General for Competition

92 Speech by European Commission President-elect on 10 September 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-585_en.htm.

Cooperation 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 issues concerning the implementation of State aid rules among Member States and with the Commission. Other dedicated working groups or workshops deal with specific aspects of SAM implementation, in particular the requirements for transparency and evaluation (see respective sections infra) or issues related to international subsidy policy and State aid to infrastructure. Once a year, all these working groups report to a High Level Forum, which takes place in Brussels. The High Level Forum provides guidance on the future work of the SAM WG and is also the occasion for the Commission and Member States to discuss State aid policy more generally.

The SAM WG met three times in 2018, under the Chairmanship of France, and addressed several policy and compliance topics related to SAM implementation, such as specific aspects of the notion of aid and the interplay between State aid rules and Structural Funds implementation. It reported on the main topics discussed during the past year and on the follow-up to recommendations from past Chairs (Finland, Sweden and the United Kingdom) to the High Level Forum held on 19 June, in Brussels. On this occasion the High Level Forum also endorsed the work plan submitted by the Chair for the period 2018-2019.

In 2018, 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. Tailored to each Member State's specific needs, bilateral cooperations have taken a variety of dimensions, from structured cooperation processes (with Italy, Bulgaria and Romania), to more bespoke informal bilateral interactions (with Belgium, Croatia, Greece, Hungary, the Netherlands, Poland, Portugal, Slovenia and Spain). These various cooperation processes generally deal with horizontal cross-cutting State aid issues, such as country-specific compliance and implementation issues, governance issues and issues concerning State-owned enterprises, as well as cases in problematic sectors. Each Member State also has a dedicated State Aid Country Coordinator at the Commission, who acts as a first entry point for this Member State's horizontal State Aid questions. After several years of operation, work is on-going towards refining the various bilateral cooperation processes with all 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.[93] 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) – an informatics tool for submission and publication of data required under the transparency provisions.[94]

93 Competition Policy Brief 4/2016: http://ec.europa.eu/competition/publications/cpb/2016/2016_004_en.pdf.

94 See the Transparency Award Module (TAM): https://webgate.ec.europa.eu/competition/transparency/public/search/chooseLanguage.

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 capabilities of the tools, to incentivise those Member States already having National State Aid Registries in place to use the TAM as well.

At the end of 2018, 25 Member States have joined the TAM and more than 43 000 aid grantings have been published by 25 Member States and Iceland. The Commission services support the implementation of the TAM by facilitating, together with Member States' representatives, the Transparency Steering Group (one meeting in 2018) and by organising dedicated training courses upon request. In addition, the Commission conducted the first compliance checks in early 2018 to verify the completeness and accuracy of the information published by Member States under the transparency requirements through either the TAM or National State Aid Registries. This first round of compliance checks proved to be very effective in improving compliance with the transparency obligations. The scopoe of the compliance checks will be substantially extended in 2019.

Evaluation of aid schemes

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 to provide input for future policy-making by the Member States and the Commission.

Since 1 July 2014, evaluation is required for large GBER schemes in certain aid categories[95] as well as for a selection of notified schemes under the new generation of State aid guidelines.[96]

By the end of 2018, the Commission had approved evaluation plans covering 40 State aid schemes. Five additional schemes are currently under analysis, covering a total of 15 Member States.[97] Most of these decisions concerned either large regional aid projects or R&D&I aid schemes under the GBER or notified energy and broadband schemes. These schemes account, in total, for over EUR 50 billion of annual State aid budget. The first evaluation report was submitted in January 2018.

The Commission services have continued to accompany the implementation of the evaluation requirement by publishing policy briefs[98] and by organising dedicated workshops with Member States' representatives and evaluation experts. The current priorities of the Commission services are: (i.) to enlarge the scope of the evaluation initiative to additional Member States, including through bilateral contacts; and (ii.) to prepare the ground for a comprehensive assessment of evaluation reports, both intermediate and final, to provide appropriate feedback to Member States and make sure that results are effectively used for

[95] 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.

[96] Evaluation can apply to notified aid schemes with large budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen.

[97] Czechia, Germany, Greece, Spain, France, Hungary, Ireland, Italy, Lithuania, Austria, Poland, Portugal, Finland, Sweden and the United Kingdom.

[98] Competition Policy Briefs 7/2014: http://ec.europa.eu/competition/publications/cpb/2014/007_en.pdf; and 3/2016: http://ec.europa.eu/competition/publications/cpb/2016/2016_003_en.pdf.

better policy-making.

Aid for research, development and innovation

While one of the headline targets of the Europe 2020 Strategy[99] 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. To achieve the greatest possible impact with the available budgets R&D&I aid measures should not replace or crowd out private financing. On the contrary, efforts should be directed at encouraging more private investments. The very purpose of R&D&I aid is that it should bring added value where markets and companies do not deliver the investments for promising but highly risky innovative projects.

Therefore, 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, that is to say projects that truly go beyond the 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 2018, the Commission ensured that aid schemes and individual measures notified or pre-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, space, microelectronic sectors as well as virtual research infrastructures and innovation clusters.

Moreover, in a significant number cases 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. It is noteworthy that following the State Aid Modernisation in 2014, 95% of all R&D&I measures (70% in value terms) in the Union are implemented under the GBER.

Aid enabling Member States jointly to support important projects of common European interest

In June 2014, the Commission adopted a Communication on Important Projects of Common European Interest (IPCEI)[100], aiming to encourage Member States to support projects that make a clear contribution to economic growth, jobs and the competitiveness of Europe. The IPCEI framework complements other State aid rules such as the General Block Exemption Regulation[101] and the Research, Development and Innovation Framework[102], which allows supporting innovative projects whilst ensuring that potential competition distortions are limited. The rules thus enable ground-breaking research and innovation and sharing of the

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

100 Communication from the Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.6.2014, pp. 4–12.

101 See http://ec.europa.eu/competition/state_aid/legislation/block.html#gber.

102 Communication from the Commission - Framework for State aid for research and development and innovation, OJ C 198, 27.6.2014, pp. 1–29.

results widely, whilst ensuring that the support by taxpayer money truly serves European citizens.

In December 2018, the Commission found that an integrated project jointly notified by France[103], Germany[104], Italy[105] and the United Kingdom[106] for research and innovation in microelectronics is in line with EU State aid rules and contributes to a common European interest. The Commission has identified micro- and nano-electronics as one of six Key Enabling Technologies deemed to be crucial for future industrial development.[107]

This first case in the area of R&D&I of an Important Project of Common European Interest (IPCEI) demonstrates that the instrument can deliver intra-EU R&D&I cooperation and coordination for Key Enabling Technologies, including investment into first industrial deployment.

During 2018, in line with the Commission's battery alliance initiative, discussions with a group of Member States and companies for a possible important project of common European interest (IPCEI) in the area of batteries for e-mobility and energy storage have intensified. This is in line with the Commission's policy for a shift from the use of environmentally harmful fossil fuels to alternative fuel technologies.

Regional aid

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

In 2018, 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.

In 2018, the Commission adopted a decision under the Regional Aid Guidelines for 2014-2020 approving a regional investment aid for a large investment project to *BorsodChem*. [108] The investment has the objective to increase the vertical integration of BorsodChem's existing Hungarian methylene diphenyl diisosyanate (MDI) manufacturing plant in Kazincbarcika by adding a facility for the production of aniline.The Commission found that without the public funding, the project would not have been carried out in Hungary or another EU Member State, as it would be cheaper for the beneficiary to continue importing aniline from existing production plants outside EU. The investment project contributes to the economic development of a disadvantaged region and creates direct jobs. It also leads to the reduction of environmental risks associated with long distance transportation of aniline which is a toxic material.

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[103] Case SA.46705 *IPCEI on Microelectronics – France*, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46705.

[104] Case SA.46578 *IPCEI on Microelectronics - Germany*, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46578.

[105] Case SA.46595 *IPCEI on Microelectronics - Italy*, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46595.

[106] Case SA.46590 *IPCEI on Microelectronics - UK, see:* http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46590.

107 See: https://ec.europa.eu/growth/industry/policy/key-enabling-technologies/description_en.

[108] Case SA.49580 (2017/N), Large Investment Project (LIP) – Regional aid investment aid to BorsodChem, Commission decision of 28 of September 2018. The public version will become available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49580.

The Commission also adopted a positive decision on regional investment aid to *Jaguar Land Rover*[109] in Slovakia (car manufacturing). The Commission's formal investigation established that without the investment aid, the project would not have been carried out in Europe. It also showed that the aid was limited to the minimum necessary to trigger the decision by Jaguar Land Rover to carry out the investment in Slovakia. The Commission found that the investment aid contributes to job creation as well as to the economic development and to the competitiveness of a disadvantaged region. Finally, the Commission established, after a careful examination of all facts, that there was no causal link between the aid granted by Slovakia and the closure of activities elsewhere in Europe. Therefore, the positive effects of the project on regional development clearly outweigh any distortion of competition brought about by the State aid. The Commission also found that certain infrastructure measures financed by the Slovak state and carried out to develop the industrial estate where the new Jaguar Land Rover plant is located will not only benefit Jaguar Land Rover, but also all other companies located in the industrial estate and more generally in the Nitra region. These measures should for that reason not qualify as State aid. Finally, the Commission found that the transfer by the Slovak state to Jaguar Land Rover of the land plot, where the car plant is being built, was carried out at market price.

Finally, the Commission adopted two decisions approving evaluation plans relating to regional aid schemes for Hungary ('*Investment incentives*')[110] and for Greece (*'General Entrepreneurship' scheme*[111]). The first decision concerns the evaluation plan of an investment aid scheme intended to address the low level of employment and investment in Central Hungary's “c” areas and in the less developed regions of Hungary ("a" regions). It also aims to facilitate the development of new technical and technological solutions, facilitate the development of exports and increase the competitiveness of products manufactured and services provided in compliance with the GBER. The second Commission decision concerns the evaluation plan of a regional aid scheme aiming to boost the economy and increase of employment in Greece. The aid is directed towards enterprises of all sizes in all regions and to manufacturing and internationally traded services and products allowed by the GBER.

Disaster aid (promotion of economic development in areas affected by a natural disaster of an exceptional nature)

In 2018, the Commission approved under Article 107(3)(c) TFEU an Italian aid scheme to support investments in regions affected by earthquakes in 2016 and 2017.[112] The notified aid scheme aims at mitigating the economic and social damages in central Italy which have been affected by abnormal seismic activity. The aid takes the form of a tax credit for all companies making initial investments in the area. Support to large companies is limited to aid for setting up a new company, diversifying a company's activity or acquiring the assets of a company that has closed down. The Commission found that the aid scheme contributes in a

[109] Case SA.45359 (2017/C), Regional aid investment to Jaguar Land Rover – Large Investment Project – Slovakia, Commission decision of 4 October 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45359.

[110] Case SA.48680 (2017/EV), Evaluation plan regarding the Government decree 210/2014 (VIII.27.) concerning the use of investment incentives, Commission decision of 1 June 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48680.

[111] Case SA.47412 (2017/EV), *Evaluation plan of the aid scheme 'General Entrepreneurship' of Development Law 4399/2016*, Commission decision of 6 July 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47412.

[112] Case SA.48571 (2018/N), Italy - Tax credit for productive investments in the regions of Lazio, Umbria, Marche and Abruzzo affected by the 2016-2017 earthquakes, Commission decision of 6 April 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48571.

proportionate manner to the promotion of economic development and recovery in areas affected by a natural disaster of an exceptional nature.

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).[113]

The current Risk Finance Guidelines[114] 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.

Aid measures encouraging investment and innovation in SMEs

In 2018, 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 (that is to say 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.

Infrastructure

In 2018, the Commission continued providing guidance to the Member States' authorities by using analytical grids on the application of State aid rules to the public financing of infrastructure projects. The applicable provisions were revised in the light of the adoption of the Commission Notice on the notion of State aid in 2016,[115] and the adoption of the revised GBER in 2017.[116] The Comission continued advising Member States' authorities on how to interpret and implement the State aid provisions of the GBER on infrastructure projects, thus

[113] An overview on the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises. See: http://ec.europa.eu/growth/smes/cosme_en.

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

[115] OJ C 262, 19.7.2016 p. 1.

[116] OJ L 156, 20.6.2017, p. 1.

helping them to ensure legal certainty regarding the public funding of infrastructure.

The Commission also adopted three decisions on State aid for the development of motorways, notably by the approval of an investment plan for *Italian motorways*,[117] the approval of the prolongation of the existing concession agreement for the *Istrian Y motorway in Croatia*,[118] and the construction of the southern section of the *Central Greece Motorway* (E65 concession).[119]

Italian motorways plan: The Commission approved under EU State aid rules on services of general economic interest the Italian plans to prolong two motorway concessions and impose a cap on the tolls imposed on users. The Italian motorways plan involves the prolongation of major motorway concessions held by Autostrade per l'Italia (ASPI) and by Società Iniziative Autostradali e Servizi (SIAS). These concessions include a cap on potential toll increases at a sustainable level for motorway users. At the same time, the prolongation of the concessions provide ASPI and SIAS with sufficient revenues to finance significant investments on the concessions concerned. The approved plan is also accompanied by a series of safeguards to avoid that ASPI and SIAS are overcompensated and to limit competition distortions, including: (i) a cap on the amount that ASPI and SIAS could receive at the end of the concession from a sale of the assets; (ii) a mechanism to avoid overcompensation, and (iii) a series of detailed requirements to tender out the majority of infrastructure works downstream in order to limit distortions of competition. The Commission found that the measures will promote growth and unlock investment, while limiting the impact on motorway users. The limited prolongation of concessions and the safeguard measures minimises distortions of competition in line with the State aid rules.

Croatian Istrian Y motorway: The Commission approved under EU State aid rules on services of general economic interest the Croatian plan to prolong the existing Istrian Y motorway concession agreement. The positive decision allows new investments to go ahead, while limiting distortions of competition.The Commission found that the Croatian plan to prolong the Istrian Y motorway concession agreement does not overcompensated the concessionaire. It also found that the prolongation of the motorway concession is proportionate to the amount needed to finance the works required for building a second stretch of the carriageway on the north-eastern side of the motorway. The measure promotes growth and unlock investment, while limiting the impact on motorway users, in line with EU State aid rules.

Greek E65 motorway concession: The Commission approved approved under Article 107 3(c) TFEU Greek public funding for the construction of the southern section of the Central Greece Motorway (E65) in line with earlier decisions on the same road.[120] The Commission found the support measure necessary and proportionate for the implementation of the project insofar as Greece has demonstrated that (i) the public financing corresponds to

[117] Case SA.49335 (2017/N), Motorways investment plan for Società Asti Cuneo and Satap A4 and case SA. 49336 (2017/N), Motorways investment plan for Autostrade per l'Italia Spa, Commission decision of 27 April 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49335 and http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49336.

[118] Case SA.48472 (2018/N), Amended Concession Agreement relating to the Istrian Y motorway, Commission decision of 14 June 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48472.

[119] Case SA. 50233 (2018/N), State aid for the construction of Lamia-Xiniada section of the E65 Motorway, Commission decision of 19 October 2018. The public version will become available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50233.

[120] Case N565/2007 – Greece – Road infrastructure – Public financing of the Central Greece Motorway (E65) project, Commission decision of 30 January 2008. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N565_2007.

the inflation adjusted construction costs and that (ii) the concessionaire will assume the operation and maintenance costs of the project, and any excessive revenues will be returned to the State via a claw-back mechanism. The project will also not receive any cross-subsidies from other concessions Furthermore, the approved project contributes to objectives of common EU interest and in particular to EU transport policy, as it will support the completion of a key Trans-European Road Network and improve transport links for Greek citizens living in the Sterea Ellada region, without causing undue distortions of competition.

3.2 State Aid Modernisation continues

State aid modernisation started in 2012, culminating in a comprehensive review of the main State aid guidelines as well as the adoption of the General Block Exemption Regulation in 2014. The General Block Exemption Regulation enables Member States to implement a wide range of State aid measures without prior Commission approval because they are unlikely to distort competition to an extent that is contrary to the common interest. As a result, approximately 95% of State aid measures implemented by Member States are now exempted. In 2017 the Commission extended the scope of this Regulation to ports and airports.

Further extension of the scope of the GBER

The efforts to focus and modernise EU State aid rules and improve the Commission's working methods are continuing. In the context of the Multiannual Financial Framework 2021-2027, the Commission has proposed to simplify co-investment involving both EU funding and Member State investment, through a revision of the EU State aid Enabling Regulation, which is the legal basis for adopting the GBER. A revised GBER could also cover national financing combined with the InvestEU Fund, a single set of rules for all financial instruments and budgetary guarantees in the next EU budget. The Commission would have an important role in the selection and evaluation of the supported projects and schemes. Member State funds channelled through InvestEU could in the future be exempted from prior notification to the Commission under State aid rules.

Launch of the Fitness check of the 2012 State aid modernisation package, railways guidelines and short term export credit insurance

In 2018, the Commision launched in line with Commission's Better Regulation Guidelines, the evaluation of State aid rules, which were adopted as part of the State Aid Modernisation, the railways guidelines and the short term export credit insurance. The evaluation takes the form of a “fitness check” to verify whether the rules have actually worked in the way intended and are fit for purpose.[121] It will provide a basis for decisions, to be taken by the Commission in the future, about whether to further prolong or possibly update the rules. [122]

[121] A fitness check is an evaluation of a group of EU interventions which have a relationship with each other - normally a joint set of objectives – which justify a joint analysis. A fitness check assesses the performance of the relevant framework with respect to its policy objectives. A fitness check should pay particular attention to identifying and trying to quantify any synergies (e.g. improved performance, simplification, lower costs, reduced burdens) or inefficiencies (e.g. excessive burdens, overlaps, gaps, inconsistencies, implementation problems and/or obsolete measures) within the group of interventions which may have appeared over time, and help to identify the cumulative impact of the interventions, covering both costs and benefits. See: https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-evaluation-fitness-checks.pdf.

[122] The current fitness check will cover the General Block Exemption Regulation (GBER), De minimis Regulation, Regional aid Guidelines, Research, Development and Innovation (RDI) Framework, Communication on State aid for important projects of common European interest (IPCEI Communication), Risk finance, Airport and aviation Guidelines, Energy and Environmental Aid Guidelines (EEAG), Rescue and restructuring Guidelines but also the Railways Guidelines as well as the Short term export credit Communication (the two latter that have not been included in the 2012 SAM package).

Launch of the review of the Emissions trading scheme State aid guidelines (ETS Guidelines)

In line with Commission's Better Regulation Guidelines, the review of the ETS Guidelines has been launched. Under the ETS Guidelines the Member States can compensate some electro-intensive users, for part of the higher electricity costs resulting from the EU Emissions Trading Scheme. The objective of such compensation is to minimise carbon leakage risk, which materialises when emission costs cause relocation from the EU to third countries without comparable constraints. The existing rules allowing for compensation will be revised to ensure that they are adapted to the new Emissions Trading Scheme for the period 2021-2030.

Prolongation of the Export Credit Insurance State aid rules until 2020

On 17 December 2018, the Commisison adopted a Communication prolonging the State aid rules for export credit insurance until 2020.[123] The Export Credit Insurance State aid rules set criteria under which EU governments can provide financial support to buyers of exports from their country, in the form of short-term credit insurance. If there is a viable private market for insuring the risk that sellers will not be paid, public export credit agencies may only provide insurance at market rates.

Prolongation of the Regulation on de minimis aid to undertakings providing services of general economic interest (SGEI) until 31 December 2020

On 7 December 2018, the Commission adopted the prolongation of the Commission Regulation on de minimis aid to undertakings providing services of general economic interest until 31 December 2020.[124] The prolongation will reduce the administrative burden and provide legal certainty for compensation measures which do not exceed EUR 500 000 over any period of three fiscal years granted to undertakings providing such a service and therefore shall be deemed not to affect trade between Member States and/or not to distort competition.

Revision of the Simplified Procedure Notice and Best Practices Code

A new Best Practices Code[125] was adopted in July 2018 and replaces and combines the previous Simplified Procedure Notice and Best Practices Code. The Best Practices Code for State aid control gives guidance on how the Commission, Member States and other stakeholders work together in State aid procedures. This covers, for example, how to ensure that complex State aid cases are handled most effectively, how complaints about State aid are followed up, and monitoring of how Member States implement State aid measures in practice. The Best Practices Code explains how State aid procedures are carried out, and sets out the steps the Commission is taking to increase the speed, transparency and predictability of these procedures.

3.3 Monitoring, recovery, evaluation and cooperation with national courts

Increased monitoring of existing State aid to ensure competition on fair and equal terms

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[123] Communication from the Commission concerning the prolongation of the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance, Official Journal C457, 19.12.2018, p.9. See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC1219(01)&from=EN.

[124] Commission Regulation (EU) 2018/1923 of 7 December 2018 amending Regulation (EU) No 360/2012 as regards its period of application, Official Journal L 313 of 10.12.2018, p. 2–3. See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1923&from=EN.

[125] See: http://ec.europa.eu/competition/state_aid/reform/best_practise/en.pdf.

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 80% of aid is granted on the basis of previously approved aid schemes or block exemption regulations.[126] In that context, it is essential for the Commission to verify that Member States apply State aid rules for the schemes correctly and 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 some 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,[127] the Commission has substantially increased the size of the monitoring sample and is monitoring approximately 50 schemes per year. It also extended the scope of its control beyond block-exempted and authorised aid schemes, for example schemes falling under the SGEI Decision.[128]

The 2018 cycle covered most Member States[129] and all main types of aid approved as well as block-exempted schemes. Since the reporting of individual aid exceeding EUR 500 000 have to be encoded for the first time by Member States and is subsequently published in the TAM,[130] the Commission verified the reporting for the schemes monitored.

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 2018, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

By 31 December 2018, the sum of illegal and incompatible aid recovered from beneficiaries amounted to EUR 26.6 billion.[131] At the same point in time, the outstanding amount pending recovery was EUR 5 billion.

In 2018, the Commission adopted seven new recovery decisions and an amount of EUR 13.3 billion was recovered by the Member States. As of the end of December, the Commission had 43 pending recovery cases.

[126] State Aid Scoreboard 2017: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

[127] 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. See recommendation n° 1 of the Court of Auditors Report recital 96, p. 41. See: http://eca.europa.eu/portal/pls/portal/docs/1/10952771.PDF.

[128] OJ L 7, 11.1.2012, p. 3.

[129] Except Bulgaria, Cyprus, Denmark, Estonia and Slovakia.

[130] See: https://webgate.ec.europa.eu/competition/transparency/public/search/home/.

[131] The reference period is 1 January 1999 to 31 December 2018.

Recovery decisions adopted in 2018	7
Amount recovered in 2018 (EUR billion)	13.3
Pending recovery cases on 31 December 2017	43

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 2018, the Commission decided to file one infringement action to the European Courts under Article 108(2) TFEU.[132]

An in-depth review of the 2007 Commission's recovery notice[133] was initiated in 2018 with the aim to consolidate into the text the case law developments established since. The new notice will also include more information on the infringement procedures, both Articles 108(2) TFEU and 260 TFEU, as well as established new practices in the cooperation between the Commission and the Member State concerned by a recovery decision.

[132] Consolidated version of the TFEU, OJ C 115, 9.5.2008, p.47.
[133] Notice from the Commission: Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid; C 272, 15.11.2007, p. 1.

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.[134] 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 2018, the Commission responded to two requests for information. In one instance, a district court in the Netherlands enquired on the state of play in an investigation; the other request forwarded by a French administrative appeal court enquired on certain information which the Commission might have in the case file of a closed investigation.

The possibility for the Commission to submit *amicus curiae* observations before national courts on its own initiative was introduced in the 2013 amendment to the Procedural Regulation. In this respect, Article 29 of the Procedural Regulation mirrors Article 15(3) of Regulation 1/2003 in the field of antitrust. In 2018, the Commission intervened in proceedings before the courts in six Member States and in arbitral proceedings where State aid issues were considered.[135] To make its views publicly known, the Commission publishes its opinions and *amicus curiae* observations, as well as observations to others, on its website.[136]

In 2018, 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.[137]

Finally, in 2018 the Commission commissioned a study on the application of the cooperation tools by national courts to analyse in greater depth the State aid rulings of courts in the 28 EU Member States.

3.4 Significant judgments by the European Union Courts in the State aid area

In 2018, 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, notably on issues related to the concept of advantage, selectivity, compatibility assessment and on a number of procedural points.

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[134] 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.

[135] The Commission submitted written submissions in two cases before the Italian courts, one case before a Polish court and submitted written and/or oral submissions in four cases concerning the impact of Commission decision of 30 March 2015 in Case SA.38517 (2014/NN; 2014/C) *Micula v Romania* (ICSID arbitration award) on the recognition and enforcement of an arbitral award before the Courts of the Belgium, Luxembourg, Sweden and the United Kingdom. In addition, the Commission participated as a non-disputing party before the ICSID Arbitral Tribunal and submitted its written observations in case ARB/16/20 Iskandar and Akram Safa against Hellenic Republic on 5 October 2018. The Commission also submitted an amicus curiae brief in recognition and enforcement proceedings before the U.S. District Court of the District of Columbia in the Micula case.

[136] See: http://ec.europa.eu/competition/court/overview_en.html.

[137] See also the dedicated section *Cooperation with national courts*, Antitrust and Cartels Section, see I. Antitrust, chapter 4.

Advantage

The most relevant judgments as regards advantage are *FIH*[138] and *EDF*.[139]

In *FIH*, the Court of Justice overturned the General Court judgement and upheld the Commission 2014 decision. The case concerned two successive State aid measures declared compatible by the Commission (in 2009 and 2014) and the applicability/application of the MEOP to the second one, in its declination as market economy investor test (as argued by the Commission) or market economy creditor test (as held by the General Court).

The Court of Justice first confirmed that the Market Economy Operator Principle ("MEOP") is applicable to the case of FIH. The Court of Justice first noted that in order to apply the MEOP only the benefits and obligations linked to the situation of the State as a private operator, to the exclusion of those linked to its situation as a public authority, are to be taken into account. In this regard, in line with the *Land Burgenland* case law,[140] the Court of Justice reiterated that by granting aid, a Member State pursues by definition objectives other than that of making profits: the risks resulting from that State aid are not among the factors that a private operator under normal market conditions would have taken into account in its economic calculations. Since the 2009 measures were clearly State aid under Article 107 TFEU, the Court of Justice concluded that the General Court had wrongly required the Commission to assess the economic rationale of the second measure from the point of view of a private creditor rather than a private investor.

Another important judgement related to the existence of an advantage and the applicability/application of the MEOP is *EDF*. In its judgment, the General Court fully upheld the Commission's decision of 22 July 2015 and, accordingly, the obligation for France to recover approximately EUR 1.37 billion from EDF.

The General Court stated that the applicability of the MEOP test (in its declination as Market Economy Investor Principle, "MEIP", in this case) ultimately depends on the State having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage to an undertaking belonging to it. It is for the Member State to demonstrate that before or at the same time as conferring the advantage, it took the decision to make an investment in that undertaking in line with what a private investor would have done. In order to establish the economic rationale of its decision, the Member State can submit elements showing that the decision was based on economic evaluations comparable to those that a private investor would have made before implementing the measure at issue for the purposes of determining its future profitability. The elements taken into account must be contemporaneous to the measure and cannot result from ex post studies. The General Court noted that in the case of EDF this had not occurred and upheld the Commission decision.

Selectivity

In 2018, the EU courts delivered a number of judgements dealing with the selective nature of State measures.

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[138] Case C-579/16P *European Commission v FIH Holding A/S and FIH Erhvervsbank A/S* - EU:C:2018:159.

[139] Case T-747/15 *Électricité de France (EDF) v European Commission* - EU:T:2018:6.

[140] Joined Cases C214/12 P, C215/12 P and C223/12 P *Land Burgenland v European Commission* - EU:C:2013:682.

The three-step test

On selectivity issues, it is worth noting firstly the preliminary ruling in the *A-Brauerei* case.[141] The case concerns an exemption from the German tax on real property transfers (Grunderwerbsteuergesetz) in certain cases - transfers of properties in the context of transformations within groups - and in particular whether such an exemption constitutes a selective advantage and thus State aid. The Court of Justice confirmed that the selectivity of a fiscal measure has to be assessed using the methodology of the three-step test.[142] The Court of Justice ruled that the tax exemption at stake constitutes a *prima facie* selective advantage since it differentiates between companies which are in the same situation, in the light of its objective (taxing any change in ownership of real property). However, it also considered that this difference in treatment could be justified (in certain circumstances) by a guiding principle of the tax system, namely the principle to avoid double taxation, thereby potentially escaping the qualification as State aid.

Another important judgement on the application of the three-step test is *Sanierungklausel,*[143] where the Court of Justice overturned the General Court judgements[144] and annulled the Commission's decision of 26 January 2011.[145] In substance, the cases deal with the application of State aid rules to an exception from an exception in the corporate tax system. The German system of loss carry-forward allows companies to offset losses in a given year against taxes on profits in future years, except when there has been a significant change in ownership. The latter rule is aimed at preventing abuses, such as acquiring failed companies for the sole purpose of tax avoidance. A third rule, the so-called "Sanierungsklausel" or reorganisation clause, authorises the loss carry-forward for companies that are illiquid or over-indebted, despite a change in ownership, if the change serves the purpose of restructuring. The Commission's decision (confirmed by the General Court) concluded that this clause was incompatible aid because it departed from the general rule preventing the carry-forward of losses after a significant change in ownership and procured a selective advantage to companies in difficulty. The Court of Justice, however, overturned the General Court's judgements and annulled the decision, taking the view that the Commission had wrongly defined the reference framework. First, the Court of Justice pointed out that the selectivity of a tax rule does not depend on whether it is an exception to a general rule or not. This is only relevant when it leads to treating differently two groups of persons which, in light of the objective of the measure, are in a comparable legal and factual situation. The Court of Justice then held that the prohibition to carry forward losses in case of a significant change in ownership was clearly an exception to the general rule of loss carry-forward. The Court of Justice considered that the General Court erred when it accepted that the Commission, while noting the existence of a more general loss carry-forward rule, determined the reference framework to be the rule governing the forfeiture of losses in case of change of ownership. Because the incorrect definition of the reference system corrupts the entire selectivity

141 Case C-374/17 *Finanzamt B v A-Brauerei* - EU:C:2018:1024.

142 According to that test, the Commission first has to identify the "system of reference" (normal rules of taxation), then (second step) it assesses whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. In the third step, a prima facie selective measure can be regarded as justified by the nature or the general scheme of the tax system, and can thus fall outside the scope of State aid rules.

143 Case C-203/16P *Dirk Andres v European Commission* - EU:C:2018:505.

144 Cases T-287/11 and T-620/11.

145 2011/527/EU: Commission Decision of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel).

analysis, the Court of Justice annulled the decision.

Special purpose levies

A further important judgement in the field of selectivity (and in particular for the assessment of selectivity of special purpose levies with a parafiscal objective) is the preliminary ruling in *ANGED.*[146] The case concerns (regional) taxes on large retail operators. The objectives assigned to the retail taxes are environmental protection and town and country planning, that is to say the need to develop urban infrastructure and to take into account the pollution created by customers using private cars to go shopping.

The taxes are calculated on the basis of the surface of the retail establishment, as a proxy for the adverse effects caused mainly by the use of private cars by customers. The most prominent features of the measures are (i) an exemption for individual retail outlets below a given surface threshold; (ii) exemptions/reduction for certain specialised retail outlets (garden centres, establishments selling vehicles, construction materials, machinery or industrial supplies, furniture, doors and windows, and do-it-yourself stores); and (iii) a de facto exemption of large collective establishments (that is to say shopping malls) in Catalonia, because the individual outlets of the mall are below the surface threshold.

After having recalled the Member States' competence to design their fiscal measures, in the absence of EU rules governing the matter, the Court of Justice noted that the tax at stake pursues objectives of environmental protection and town and country planning and carries out the selectivity assessment (especially the comparability test) in the light of these objectives, noting that it is not disputed that the environmental impact of retail establishments largely depends on their size.

As regards the exemption of individual outlets below the threshold, the Court of Justice held that smaller establishments are not in a similar legal and factual situation as larger establishments subject to the taxes in particular in light of their environmental objective.

With regard to the exemption for specialised shops, the Court of Justice accepted the argument that such an exemption would be justified if these retail outlets, which require very large areas, do not have a significant adverse effect on environment and on town and country planning as the others. The Court of Justice accepted the justification in principle, but leaves this to be checked by the referring national court.

Finally, with regard to the *de facto* exemption of large collective establishments (that is to say) in Catalonia, the Court of Justice held that they are objectively in a comparable situation to large retail outlets considering the objectives of the measures. As a result, the exemption of collective establishments from the tax was held to be selective and to constitute State aid.

Compatibility

In its judgement in *Hinkley Point C,*[147] the General Court upheld the Commission decision of 8 October 2014 approving the aid in favour of the construction of the Hinkley Point C nuclear power station in the UK.

The General Court stated that to be compatible with Article 107(3)(c) TFEU an aid should

[146] Cases C-233/16 to C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* - EU:C:2018:280.
[147] Case T-356/15 *Republic of Austria v European Commission* - EU:T:2018:439.

relate to a public interest objective, be appropriate, necessary and proportionate. Concerning the objective of public interest, the General Court referred to the narrower concept of public interest rather than to common interest.[148] The General Court noted that the objective of promoting the creation of new nuclear energy is related to the Euratom Community's goal of facilitating investment in the nuclear field. Furthermore, it follows from the TFEU that each Member State has the right to choose its own energy mix. Consequently, the General Court held that the Commission did not err in taking the view that the UK was entitled to define the development of nuclear energy as being a public-interest objective, even though that objective is not shared by all Member States.

The General Cour also confirmed that Article 107(3)(c) TFEU does not require the existence of a “market failure”. The relevant question is whether the pursued public interest objective would be attained without the Member State's intervention, even if, as such, the market cannot be considered to be failing. In this regard, the General Court held that given the lack of market-based financial instruments and other types of hedging contracts, the Commission was correct to conclude that State intervention was necessary in order to develop, in good time, new nuclear energy generation.

Concerning the proportionality of the aid, the General Court concluded that Austria did not demonstrate that the Commission made a manifest error when it balanced the positive effects of the measure against its negative effects. The General Court indicated that the Commission was entitled to take into account all positive effects of the new nuclear capacity, including on security of supply and low carbon policy.

The General Gourt concluded that operating aid is not *per se* incompatible. It can be declared compatible if it fulfils all the requirement of Article 107(3)(c) TFEU, notably when the operating aid promotes new investment as in the present case. At the same time, the General Court notes that an operating aid solely intended to maintain the *status quo* and covering the operating expenditure of a normal business activity cannot be considered to pursue an objective of public interest.

In its judgment *Rittinger and Others* of 13 December 2018,[149] the Court of Justice confirmed that the German broadcasting contribution is compatible with EU law and that Germany did not have to notify the Commission of an alteration to existing state aid. In 2007 the Commission found that the broadcasting fee in Germany was to be classified as existing aid.[150] In 2013 Germany modified the basis for calculating the broadcasting fee. This modification was challenged before the Landgericht Tübingen, which made a referral to the Court of Justice for a preliminary ruling.

The Court of Justice found that the replacement of the broadcasting fee (which was payable on the basis of possession of a broadcast receiving device) with the broadcasting contribution (which is payable among other things on the basis of occupation of a dwelling or business

[148] A public interest objective of a Member State contrasts with the private interest of the beneficiary of the aid and it does not need to be in the interest of all Member States or even of a majority of Member States. This is different from the common interest that the Commission needs to take into account when it carries out the balancing test.

[149] Judgment of the Court of Justice in Case C-492/17, Rittinger and Others. See: http://curia.europa.eu/juris/document/document.jsf?text=&docid=208961&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12230735.

[150] Commission Decision of 24 April 2007 (C(2007) 1761 final – State aid E 3/2005 (ex CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in Germany (ARD/ZDF).

premises) does not constitute a substantial alteration to the system of financing public broadcasting in Germany. Therefore, it was not necessary to notify it to the Commission as an alteration to existing state aid.

The replacement of the broadcasting fee by the broadcasting contribution was made to simplify the levying of the broadcasting contribution, in a context of evolving technologies for receiving the public broadcasters' programmes. Moreover, that simplification did not lead to a substantial increase in the compensation received by the public broadcasters to cover the costs associated with the public service tasks entrusted to them.

Procedural issues

In 2018, the EU courts delivered a number of relevant judgements on procedural points.

In its judgement in *Dutch Seaports,*[151] the General Court dismissed the appeal by the Dutch public seaports (supported by the Netherlands), and upheld a 2016 Commission decision. The Commission had found that the Dutch corporate tax exemption for public seaports amounted to incompatible aid. Since the aid was existing, the Commission had asked the Netherlands to abolish it at the latest by 1 January 2017. The main focus of the judgement is the application of the principle of equal treatment by the Commission. The applicants criticised the Commission for not completing the investigations on similar measures implemented by Belgium, France and Germany the same time as the Dutch one.

The General Court first concluded that the Commission had sufficiently motivated its decision and that it had clearly explained why it considered that the situation of competing seaports was not relevant. On this basis, it was normal for the Commission not to give further explanations as to the investigations it was conducting on those competing seaports. The General Court then reiterated that a possible breach by a Member State of an obligation incumbent on it under the Treaty, in particular Article 107(1) TFEU, cannot be justified by the fact that other Member States could also be in breach of this obligation and that several distortions of competition do not neutralize each other but, on the contrary, have a cumulative effect.

The General Court moreover noted that the respect for the principle of equal treatment must be reconciled with the principle of legality, which means that a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party. Since the Commission had found that the Dutch corporate tax exemption as incompatible aid and that it had to be abolished, the applicants could not derive from the principle of equal treatment the right to continue to benefit from that incompatible aid.

Another important judgement procedure-wise is the General Court ruling in *Tempus Energy.*[152] The General Court annulled a 2014 Commission decision which declared a State aid for a UK capacity mechanism compatible with the internal market. The annulment is based on the General Court consideration that the Commission should have opened the formal investigation procedure under Article 108(2) TFEU, in light of the circumstances of the preliminary investigation and the characteristics of the measure. In particular, the General Court held that the Commission should have open the formal investigation in light of the length of the pre-notification phase (approximately 18 months), the complexity and novelty of the case (it was the first decision approving a capacity mechanism under the then new

[151] Case T-160/16 *Groningen Seaports NV and Others v European Commission* - EU:T:2018:317.
[152] Case T-793/14 *Tempus Energy Ltd and Tempus Energy Technology Ltd v European Commission* - EU:T:2018:790.

Guidelines on State aid for environmental protection and energy 2014-2020,[153] and its significance in terms of high aid amounts.

In the *Øresund* case[154] the General Court partially annulled the Commission's 2014 decision approving State guarantees granted by Denmark and Sweden to support the construction and operation of the Øresund Fixed Link (a 16-kilometre long toll-funded tunnel and bridge infrastrucuture linking the two countries). The Commission decision declared the State aid compatible under Article 107(3)(b) TFEU as funding for an important project of common European interest (IPCEI). The General Court upheld the decision insofar as it found that the State funding for the "hinterland" rail infrastructure connecting the Fixed Link to the national rail networks did not constitute State aid since there is no market for the operation of the national rail networks in Denmark or Sweden. However, the General Court found that the Commission had encountered serious difficulties in establishing the compatibility of the State aid to the Fixed Link on several points, in particular as regards the necessity and proportionalty of the State guarantees which were not clearly quantified in view of their undefined amount and duration. The Commission should consequently have opened a formal investigation pursuant to Article 108(2) TFEU.

Finally, the judgement in *Montessori*[155] is noteworthy. The case related to an exemption from the municipal real estate tax in Italy for religious entities and non-for-profit organisations since 2006. The Commission found that such an exemption (from 2006 until 2011) was unlawful and incompatible aid but did not order Italy to recover the aid from the beneficiaries, accepting the arguments raised by the Member States as regards the absolute impossibility of recovery. The judgment is important for two procedure-related reasons, namely the admissibility of actions for annulment under the third limb of Article 263(4) TFEU and the principles underlying absolute impossibility of recovery of unlawful and incompatible aid. First, the Court of Justice confirmed for the first time that a State aid decision declaring an aid scheme incompatible (without ordering recovery) can be considered a regulatory act that is subject to appeal under the third limb of Article 263(4) TFEU. Second, the Court of Justice, while confirming that the Commission can in principle accept arguments on absolute impossibility of recovery before the final decision, stressed that the condition of absolute impossibility cannot be satisfied when the Member State alleges mere internal difficulties. The Court of Justice held that recovery of unlawful and incompatible aid may be considered objectively and absolutely impossible when (i) the difficulties relied upon by the Member States are real, and (ii) there are no alternative methods of recovery.

4. DEVELOPING THE INTERNATIONAL DIMENSION OF EU COMPETITION POLICY

The main objective of the Commission's international activities in the competition field is to advocate a global competition culture, promoting competition conditions allowing companies to compete on the merits on fair and equal terms across the world. This endeavour includes subsidies. The Commission's strategy has a multilateral as well as a bilateral component.

4.1. Multilateral relations

In 2018, the Commission continued its endeavours to improve multilateral rules for subsidies.

153 OJ C200/1 of 28.6.2014.

154 Case T-68/15 *HH Ferries I/S, formerly Scandlines Øresund I/S and Others v European Commission* - EU:T:2018:563.

155 Joined cases C-622/16 P *Scuola Elementare Maria Montessori Srl v European Commission* - EU:C:2018:873.

Reforming the subsidy rules is one of the EU's main priorities for the modernisation of WTO trade rules. Moreover, in 2018 the Commission was engaged in several sectoral initiatives addressing subsidies in the international context, for example the G20 Global Forum on steel excess capacity,[156] the development of regional support guidelines for the semiconductor industry in the Government/authorities meeting on semiconductors (GAMS),[157] and for shipbuilding within the OECD. Finally, the Commission worked with EU Member States in the International Subsidy Policy Group, gathering information on subsidies granted by countries outside the EU, exchanging views and coordinating initiatives concerning international subsidy policies at multilateral and bilateral level.[158]

In 2018, the Commission continued its active engagement in competition-related international fora such as the OECD Competition Committee, the International Competition Network (ICN), the World Bank, and United Nations Conference on Trade and Development (UNCTAD).

At the OECD Competition Committee meeting in June 2018, the Commission contributed to the discussions on leniency progammes,[159] non-price effects of mergers,[160] implications of e-commerce for competition policy[161] and market concentration.[162] In December 2018, the Commission contributed to the Competition Committee's deliberations on the treatment of legally privileged information in competition proceedings,[163] gun jumping and suspensory effects of merger notifications,[164] excessive pricing in pharmaceuticals,[165] personalised pricing in the digital era,[166] quality considerations in the zero-price economy,[167] benefits and challenges of regional competition agreements,[168] and investigative powers in practice.[169]

In March 2018, the Commission participated in the Annual Conference of the ICN in New Dehli. Throughout the year, the Commission co-chaired the ICN Cartel Working Group and contributed to several projects such as the survey on the "Key elements for efficient and effective leniency programme and its application" and the new chapter of the ICN Anti-Cartel Enforcement Manual on Private Enforcement. The Commission is also an active member in the other ICN Working Groups; the Merger Working Group, the Unilateral Conduct Working Group, the Advocacy Working Group, and the Agency Effectiveness Working Group.

The Commission participated in the 17th meeting of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, held in Geneva in July 2018. The conference included discussions on policy challenges faced by developing countries in competition and regulation in the maritime transport sector, capacity building in competition law and policy,

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156 See: http://europa.eu/rapid/press-release_IP-18-5865_en.htm.
157 The members of GAMS are China, Chinese Taipei, the European Union, Japan, Korea and the United States.
158 See: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/state-aid-rules-fair-competition_en.
159 See: http://www.oecd.org/daf/competition/rethinking-antitrust-enforcement-tools-in-multi-sided-markets.htm.
160 See: http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm.
161 See: http://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm.
162 See: http://www.oecd.org/daf/competition/market-concentration.htm.
163 See: http://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm.
164 See: http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm.
165 See: http://www.oecd.org/daf/competition/excessive-pricing-in-pharmaceuticals.htm.
166 See: http://www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm.
167 See: http://www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm.
168 See: http://www.oecd.org/daf/competition/benefits-and-challenges-of-regional-competition-agreements.htm.
169 See: http://www.oecd.org/competition/globalforum/investigative-powers-in-practice.htm.

and competition issues in the sale of audio-visual rights for major sporting events.[170] Moreover, in 2018 contributed to a UNCTAD proposal to develop a Toolkit on International Cooperation within the UNCTAD Discussion Group for International Cooperation.[171]

4.2. Bilateral relations

At bilateral level, the Commission aims at including provisions on competition and State aid control when negotiating Free Trade Agreements (FTAs). In 2018, the Commission continued FTA negotiations with Chile, Mexico, Mercosur, Azerbaijan, Tunisia and Indonesia, and opened negotiations with Australia, New Zealand, Kyrgyzstan and Uzbekistan. At the end of 2018, the European Union and Switzerland agreed on the text of an Institutional Framework Agreement, which also includes State aid control rules. The draft agreement is currently in consultation with Swiss stakeholders.

The Commission's negotiations on an Investment Agreement with China are still ongoing.

As regards the draft Second Generation Agreement between the Commission and the Competition Bureau Canada, the Commission analysed the impact which the Opinion of the Court of Justice on the 2014 EU Canada Passenger Name Record Agreement[172] would have on the Second Generation Agreement. Moreover, the Commission continued the negotiations with Japan on a Second Generation Agreement with a view to update the existing cooperation agreement from 2003.[173]

Another key area of the Commission’s activities is technical cooperation on competition policy and enforcement with the European Union’s main trading partners. To frame this cooperation, the Commission has signed a number of Memoranda of Understanding (MoUs). The Commission has signed MoUs with the BRICS[174] countries, and it has engaged in technical cooperation with these countries to varying degrees. With the same objective, the Commission signed an Administrative Arrangement with Mexico in June 2018.[175]

The Commission also assists neighbouring countries when they implement the competition provisions included in FTAs. For example, in 2018 the Commission was involved in negotiating the FTA implementing rules with Tunisia and in monitoring the implementation of the EU competition *acquis* in countries such as Ukraine.

In negotiations with candidate countries and potential candiadate countries, the Commission's main policy objective - in addition to advocating a competition culture - is to help these countries to create legislative frameworks with well-functioning competition authorities and to build up a solid enforcement record. To meet the conditions for EU accession in the competition policy field, these requirements must be fulfilled. In 2018 the Commission continued to monitor candidate countries’ compliance with their commitments under the Stabilisation and Association agreements.

[170] See: https://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1675.
[171] See: https://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1675.
[172] See: http://curia.europa.eu/juris/liste.jsf?pro=AVIS&num=C-1/15.
[173] See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22003A0722(01).
[174] BRICS is an acronym commonly used to denote the countries Brazil, Russia, India, China and South Africa.
[175] See: http://ec.europa.eu/competition/international/bilateral/mexico_mou_2018_en.pdf.

5. EXTERNAL COMMUNICATION

DG Competition's external communication is focused 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 results of a Eurobarometer survey conducted in January 2019 show that newspapers or magazines and television remain the main information sources (both 58%), followed by radio and websites (both 33%), and online social networks (24%, an increase of 10% since 2014).

DG Competition produced 560 press releases related to competition cases during 2018. Of these, 140 were longer, multilingual, press releases while a further 420 were shorter and monolingual. Media coverage of some of the cases was worldwide, reaching tens of millions of people, for example, of the Google Android and Qualcomm antitrust decisions. All of these cases were covered by TV, radio, print and internet media around the globe.

Throughout 2018, Commissioner Vestager delivered 102 speeches to a variety of audiences. The Director-General delivered 16 speeches176 at a number of international events.

On social media, the Directorate-General for Competition was active on Twitter during 2018. Throughout the year, more than 1,200 tweets from the Directorate-General's account generated more than 3.6 million impressions.177 The most popular tweets related to the Google Android and Qualcomm decisions, the consumer electronics cartel decisions as well as the tweets concerning the investigation into possible collusion between car manufacturers about clean emission technology. Followers of the Directorate General's Twitter account rose to nearly 12 000 during the year.

The number of subscribers to DG Competition's electronic newsletters rose to over 21 000 in 2018, while its paper publications in the EU Bookshop were viewed or downloaded 6 000 times.

[176] The number of speeches published on the DG Competition web-site: ec.europa.eu/competition/speeches/index_2018.html.

[177] The number of impressions means the number of times a tweet appears in Instagram users' feed.

6. THE SINGLE MARKET PROGRAMME

Adapting to an increasingly digital environment is a major challenge for the enforcement of EU competition policy. New sophisticated IT tools and algorithms used by economic operators combined with an exponential increase in electronic communications, quantity of data and the number of documents on case files make many competition investigations increasingly complex and burdensome. The Commission's proposals for the next Multiannual Financial Framework (2021-2027) adopted in June 2018 included – for the first time - a Single Market Programme. If adopted, the Single Market Programme would enable the Commission to directly support competition policy development with an indicative budget of EUR 140 million dedicated to a Competition Programme.

The funds allocated to the Competition Programme would help the Commission to detect and investigate infringements in an increasingly paperless world where the use of algorithms becomes more and more widespread. Moreover, these funds would increase the Commission's ability to manage case files containing ever growing data volumes. If adopted as part of the Single Market Programme, the Competition Programme would enable the Commission to modernise EU competition policy enforcement by investing in state-of-the-art IT tools, knowledge and expertise, as well as strengthen cooperation between the Commission and Member States' competition authorities in all areas of EU competition law. Finally, the Competition Programme could be used to raise stakeholder awareness of EU competition policy.[178]

[178] Proposal for a Regulation of the European Parliament and of the Council establishing the Programme for single market, competitiveness of enterprises, including small and medium-sized enterprises, and European statistics and repealing Regulations (EU) No 99/2013, (EU) No 1287/2013, (EU) No 254/2014, (EU) No 258/2014, (EU) No 652/2014 and (EU) 2017/826. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540389031742&uri=CELEX%3A52018PC0441.
Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing the Programme for single market, competitiveness of enterprises, including small and medium-sized enterprises, and European statistics and repealing Regulations (EU) No 99/2013, (EU) No 1287/2013, (EU) No 254/2014, (EU) No 258/2014, (EU) No 652/2014 and (EU) No 2017/826. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540389285918&uri=CELEX%3A52018SC0320.

II. SECTORAL OVERVIEW

The Commission's competition policy actions in 2018 focused on a wide range of areas, with the common objective of making markets work better. Morever, 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 as well as taking action against selective tax advantages. This section provides a sector-by-sector overview of competition policy developments and enforcement activities that the Commission focused on in 2018.

1. ENERGY & ENVIRONMENT

Overview of key challenges in the sector

Completing the Single Market in the energy sector will bring significant benefits to Europe's consumers, businesses as well as the environment. Competition law enforcement in the energy sector plays a key role in removing obstacles to the free flow of gas and electricity across Member States, enabling decarbonisation, promoting interconnectivity and avoiding artificial market partitioning. Applying the competition rules contributes to market opening and safeguards that all market players can compete on fair and equal terms, regardless of their nationality. In other words, competition policy is essential to make the Energy Union function properly.

In addition, competition policy contributes to fulfilling the EU's climate targets, including the decarbonisation of the power sector and the shift in the transport sector from polluting fossil fuels to alternative fuels in accordance with the Commission's mobility policy.[179] To this end, the Commission authorises aid measures compatible with the internal market promoting the deployment of renewables, improve energy efficiency and stimulate demand for low emission vehicles for public and private transport.

Promoting competition in the energy sector means, ultimately, empowering consumers, whether energy-intensive users such as big manufacturing plants, small companies or households. They can demand a fair deal and it gives energy consumers the confidence that the EU energy markets are working well. In addition, consumers throughout the EU will benefit from an integrated European Energy market that guarantees security of energy supply at affordable prices and a cleaner environment.

Effective competition in the green economy

By means of the EU Emissions Trading System (ETS), State aid rules also play a key role in delivering on climate objectives by lowering the indirect costs of the EU's carbon market for the most electricity-intensive industries. The core principle of the ETS is that polluters should pay for their carbon emissions. However, outside of the EU, not all countries apply this principle. If enterprises were to delocalise some of their production outside the EU as a result of carbon costs, this would result in an increase of global carbon emissions. Because electricity generators do not receive free allowances, they have to buy them, thereby

[179] "E-mobility" means using energy 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. See: https://ec.europa.eu/transport.

increasing the electricity price for consumers. To this end, Member States may partially compensate electricity-intensive consumers for the indirect costs resulting from the ETS.

In 2012, the Commission adopted Guidelines setting the conditions under which Member States can grant such partial compensation regarded as constituting State aid for the trading period 2012-2020. On 14 March 2018, the Council and the Parliament adopted a revised ETS Directive for the period 2021-2030. It underlines that Member States should seek to limit their compensation to 25% of their ETS auction revenues. The Commission therefore launched on 20 December 2018 the revision process of the ETS State aid Guidelines.

On 18 December 2018, a political agreement was reached on the Clean Energy for All Europeans Package.[180] When adopted, the Package will constitute an important step towards the decarbonisation of the European energy system. Future capacity mechanisms will incorporate new caps regarding the carbon emissions of fossil fuel origin. Thus, the Package introduces a new market design to create the right investment incentives and to enable further development of renewables in the electricity sector.

In 2018, the enforcement of State aid rules in the renewable energy and energy efficiency fields remained high. The Commission approved 21 renewables and combined heat and power support schemes. As a result, almost all Member States have now received State aid clearance for their renewables and combined heat and power support schemes and brought them in line with the 2014 Guidelines on State aid for environmental protection and energy. In particular, an increasing number of Member States are granting support for the production of renewable energy through competitive and technology neutral tenders and integrating renewables installations in the electricity market. This has resulted in lower cost for consumers in the electricity system as a whole. As an example, the first technologically neutral tender in Denmark held under the scheme approved in 2018 delivered record low prices, with both solar and on-shore wind projects winning support.

In 2018 the Commission approved a scheme to support the acquisition of low emission battery electric and hybrid public transport buses in Germany,[181] and a budget increase for a similar Portuguese scheme approved in 2016.[182] Both measures include support for the infrastructure necessary to operate the buses. In addition, it approved a German scheme to incentivise the retrofitting of diesel buses used in public transport with devices that significantly reduce their nitrogen oxides emissions.[183]

Effective competition in electricity markets

To address concerns about the free flow of electricity, on 7 December 2018 the Commission adopted a decision rendering legally binding commitments offered by German grid operator *TenneT*[184] to increase cross-border flows of electricity between Denmark and Germany. The Commission was concerned that TenneT may have infringed EU antitrust rules by systematically limiting southward capacity at the electricity interconnector between Western Denmark and Germany. This conduct prevented the export of cheap electricity from the Nordic countries, where it is largely generated from renewable energy sources (mostly wind

180 See: https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans.
181 See: http://ec.europa.eu/competition/state_aid/cases/269473/269473_1980325_81_2.pdf.
182 See: http://europa.eu/rapid/press-release_IP-16-3521_en.htm.
183 See: http://europa.eu/rapid/press-release_IP-18-6414_en.htm.
184 Case AT.40461 – *TenneT*. See: http://europa.eu/rapid/press-release_IP-18-6722_en.htm.

and hydro) to Germany, leading to less competition between electricity producers on the German wholesale market and thus higher electricity prices. Following a market test, the Commission accepted commitments, proposed by TenneT, and made them legally binding:

- TenneT has committed to make available the maximum capacity compatible with the safe operation of the interconnector and, in any event, will guarantee a minimum hourly capacity of 1,300 megawatts on the interconnector (around 75% of its technical capacity). Following expansion of the interconnector between Western Denmark and Germany, TenneT will increase the guaranteed hourly capacity.

- TenneT can reduce the capacity offered below the minimum guaranteed level only in a very limited number of exceptional circumstances, when no other option is available to ensure the security of the high-voltage electricity network.

The commitments will remain in force for nine years and a trustee will be in charge of monitoring TenneT's compliance with the commitments.[185]

Moreover, on 17 April 2018 the Commission made legally binding measures submitted by Greece to ensure fair access to lignite-fired power generation for the competitors of *Public Power Corporation (PPC)*[186] the incumbent electricity operator. In 2008 the Commission found that Greece had infringed competition rules by giving the state-owned electricity incumbent, PPC, privileged access rights to lignite, and called on Greece to propose measures to correct the anti-competitive effects of that infringement. Due to appeals at both the General Court and the Court of Justice, such corrective measures had not been implemented so far. With the 2018 decision, the Commission concluded that the amended final version of the remedies submitted by Greece on 19 January 2018 fully addressed the infringement identified by the Commission in its 2008 Decision, while also taking into account Greece's environmental objectives and current market circumstances. The remedies should remove the privileges created by the special access rights granted to PPC. In particular, the remedies provide that PPC will divest the lignite-fired units of Meliti (including the licensed unit of Meliti 2) and Megalopoli 3 and 4. The assets to be divested will allow the purchasers to compete immediately and more effectively in the Greek wholesale electricity market. PPC has launched a tender procedure for the divestment of the plants which should be completed in 2019.

In 2018 the Commission analysed several mergers in the electricity sector. For example, it approved the *Fortum/Uniper* merger.[187] The Transaction mainly concerned the generation and wholesale of electricity in the Nordic countries, in particular through hydro power. The Commission also assessed various energy-related activities, such as the financial trading, retail supply of electricity and district heating, as well as energy production-related services. In this case, the analysis carried out by the Commission revealed that competition in those countries is healthy, also as a result of the high level of interconnectivity between different countries in the Nordic area.

Ensuring reliable electricity supplies

Capacity mechanisms are measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. Capacity mechanisms are designed to support investment to fill the expected capacity gap and ensure security of supply. Typically,

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[185] See: http://europa.eu/rapid/press-release_IP-18-6722_en.htm.
[186] See: http://europa.eu/rapid/press-release_IP-18-3401_en.htm.
[187] See: http://ec.europa.eu/competition/mergers/cases/decisions/m8660_525_3.pdf.

capacity mechanisms offer additional rewards to capacity providers, on top of income obtained by selling electricity on the market in return for maintaining existing capacity or investing in new capacity needed to guarantee security of electricity supplies. However, capacity mechanisms cannot substitute electricity market reforms at national and European levels. In parallel, Member States must implement market reforms to address regulatory failures that undermine the incentive for energy operators to invest in energy capacity in accordance with the decarbonisation objectives of the EU.

In its 2016 report of the Sector Inquiry on Capacity Mechanisms,[188] the Commission concluded that capacity mechanisms can affect the generation mix and in particular interact with instruments aimed at fostering decarbonisation. To promote non-fossil based capacity, the Commission recommended that eligibility or allocation criteria for capacity mechanisms allow renewables and demand-side operators to compete alongside other capacity. Otherwise, capacity mechanisms may risk jeopardising decarbonisation objectives while pushing up the price for security of supply.

In 2018, the Commission approved seven electricity capacity mechanisms (in Belgium, France, Germany, Greece, Italy and Poland).[189] In its assessment, the Commission verified that the capacity mechanisms met strict criteria under EU State aid rules, in particular the Commission's 2014 Guidelines on State aid for environmental protection and energy.[190] In parallel, Member States must implement market reforms to address regulatory failures that undermine the incentive for energy operators to invest in electricity capacity.

Effective competition in gas and oil markets

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 case concerning Central and Eastern European gas markets is a good example of the efforts made by the Commission to facilitate cross-border flows of energy between Member States. On 24 May 2018, the Commission adopted a decision rendering legally binding on Gazprom commitments that address the Commission's competition concerns and enable the free flow of gas at competitive prices in Central and Eastern European gas markets, to the benefit of European consumers and businesses. *Gazprom* appears to be the dominant gas supplier in a number of Central and Eastern European countries. The Commission was concerned that Gazprom may have breached EU antitrust rules by pursuing an overall strategy to partition gas markets along national borders in eight Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia) and that this strategy may have enabled Gazprom to charge higher gas prices in five of these Member States (Bulgaria, Estonia, Latvia, Lithuania and Poland). The Commission decision put an end to this behaviour by Gazprom. Furthermore, it imposed on Gazprom a detailed set of rules that will significantly change the way Gazprom operates in Central and Eastern European gas markets:

188 See http://ec.europa.eu/competition/sectors/energy/capacity_mechanisms_final_report_en.pdf

189 See: http://europa.eu/rapid/press-release_IP-18-682_en.htm., and http://ec.europa.eu/competition/sectors/energy/state_aid_to_secure_electricity_supply_en.html.

190 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01).

- No more contractual barriers to the free flow of gas: Gazprom has to remove any restrictions placed on customers to re-sell gas cross-border.
- Obligation to facilitate gas flows to and from isolated markets: Gazprom will enable gas flows to and from parts of Central and Eastern Europe that are still isolated from other Member States due to the lack of interconnectors, namely the Baltic States and Bulgaria.
- Structured process to ensure competitive gas prices: Relevant Gazprom customers are given an effective tool to make sure their gas price reflects the price level in competitive Western European gas markets, especially at liquid gas hubs.
- No leveraging of dominance in gas supply: Gazprom cannot act on any advantages concerning gas infrastructure, which it may have obtained from customers by having leveraged its market position in gas supply.

Combined, these obligations address the Commission's competition concerns and achieve its objectives of enabling the free flow of gas in Central and Eastern Europe at competitive prices. If Gazprom breaks any of these obligations, the Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of EU antitrust rules.[191]

On 17 December 2018, the Commission fined *Bulgarian Energy Holding (BEH)*,192 its gas supply subsidiary Bulgargaz and its gas infrastructure subsidiary Bulgartransgaz (the BEH group) EUR 78 million for blocking competitors' access to key gas infrastructure in Bulgaria. BEH is the incumbent state-owned energy company in Bulgaria. It is vertically integrated meaning that BEH supplies gas and its subsidiaries own or control key gas infrastructure in Bulgaria. The Commission found that the BEH group was dominant in the Bulgarian gas supply and gas infrastructure markets and that, between 2010 and 2015, the BEH Group blocked the access to key gas infrastructure, which it owned or controlled. This infrastructure is indispensable for supplying gas on the Bulgarian wholesale gas market and consists of:

- The domestic Bulgarian gas transmission network,
- The only gas storage facility in Bulgaria and
- The only import pipeline bringing gas into Bulgaria, which was fully booked by BEH.

Without access to this essential infrastructure, it was impossible for potential competitors to enter the Bulgarian wholesale gas market, and they were therefore prevented from competing with BEH, which was ensured of a monopoly in gas supply in Bulgaria. The Commission concluded that this behaviour by the BEH group infringed Article 102 (TFEU), which prohibits the abuse of a dominant market position.

To address concerns that *Transgaz*,193 the gas network operator in Romania, might be hindering the free flows of gas from Romania, on 21 September 2018 the Commission launched a market test on draft commitments submitted by Transgaz. The commitments are intended to enable natural gas exports from Romania to other Member States, in particular Hungary and Bulgaria. The Commission was concerned that Transgaz may have restricted exports from Romania and breached EU competition rules that prohibit the abuse of a

[191] See: http://europa.eu/rapid/press-release_IP-18-3921_en.htm.
[192] See: http://europa.eu/rapid/press-release_IP-18-6846_en.htm.
[193] Case AT.40335 - *Romanian gas interconnectors.* See: http://europa.eu/rapid/press-release_IP-18-5861_en.htm.

dominant market position. To address the Commission's concerns, Transgaz offered commitments that would allow commercially meaningful export capacities from Romania to be made available for the first time. The Commission has received the replies to the market test and is currently considering them.

Finally, concerning mergers in the gas sector, following the abandonment of the proposed acquisition of the Greek gas transmission system operator *DESFA* by the State Oil Company of Azerbaijan Republic (*SOCAR*)[194] by the Parties to that transaction, the Greek authorities issued a new tender which included an unbundling requirement, thus addressing the concerns raised by the Commission when opening the in depth investigation in *SOCAR/DESFA*. The tender was won by Italian company SNAM and the Commission reviewed and approved the acquisition of *DESFA* by *SNAM.*

2. Information and Communication Technologies and media

Overview of key challenges in the sector

In 2018, competition policy and enforcement continued to contribute to the implementation of the Digital Single Market Strategy,[195] one of the priorities of the Commission, by means of a number of investigations in the information, communication and media sectors.

Contribution of EU competition policy to tackling the challenges

Addressing restrictions to cross-border and online sale of goods and digital products

As announced in the Final Report of the e-commerce sector inquiry adopted in May 2017,[196] 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.

On 24 July 2018, the Commission fined, in four separate decisions, consumer electronics manufacturers *Asus, Denon & Marantz, Philips and Pioneer*[197] for imposing fixed or minimum resale prices ("resale price maintenance”) on their online retailers for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products.

The four manufacturers intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics

[194] Case M.7095 – *Soca /Desfa* (notification withdrawn). See: http://ec.europa.eu/competition/mergers/cases/decisions/m8953_141_3.pdf.

[195] 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 Europe, COM(2015)192 final. See: http://eur-lex.europa.eu/legal-ontent/EN/TXT/?qid=1447773803386&uri=CELEX%3A52015DC0192.

[196] 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. See: http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

[197] Cases AT.40465 - *Asus*, AT.40469 - *Denon & Marantz*, AT.40181 - *Philips* and AT.40182 - *Pioneer*. See: http://europa.eu/rapid/press-release_IP-18-4601_en.htm.

products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases. The price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers. In addition, Pioneer limited the ability of its retailers to sell cross-border to consumers in other Member States in order to maintain different resale prices in different Member States, for example by blocking orders of retailers who sold cross-border.

All four companies cooperated with the Commission by providing evidence with significant added value and by expressly acknowledging the facts and the infringements of EU competition rules. The fines totalling over EUR 111 million were in all four cases reduced due to the companies' cooperation with the Commission.

On 17 December 2018, the Commission imposed a fine of EUR 40 million on *Guess*,198 a US-based clothing manufacturer and retailer. The Commission found that Guess' distribution agreements restricted authorised retailers from (i) using the Guess brand names and trademarks for the purposes of online search advertising; and (ii) selling online without a prior specific authorisation by Guess. The company had full discretion for this authorisation, which was not based on any specified quality criteria. Moreover, the distribution agreements restricted authorised retailers from (iii) selling to consumers located outside the authorised retailers' allocated territories; (iv) cross-selling among authorised wholesalers and retailers; and (v) independently deciding on the retail price at which they sell Guess products. Selective distribution systems must comply with the EU competition rules. In particular, consumers must be free to purchase from any retailer authorised by a manufacturer, including across national borders. At the same time, authorised retailers must be free to offer the products covered by the distribution contract online, to advertise and sell them across borders, and to set their resale prices.

The Commission granted Guess a 50% fine reduction in return for its cooperation. Guess cooperated with the Commission beyond its legal obligation to do so, in particular by revealing an infringement of EU competition rules not yet known to the Commission (the prohibition to use Guess brand names and trademarks for the purposes of online search advertising). The company also provided evidence with significant added value and acknowledged the facts and the infringements of the EU competition rules.

The Commission continued its investigation into *Valve Corporation*, owner of the Steam game distribution platform, and *five PC video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax*[199] concerning potentially illegal bilateral agreements. The investigation focuses on whether the agreements in question require or have required the use of technology to (so-called activation keys) for the purpose of geo-blocking. In particular, an activation key can be devised to limit access to a purchased game only to consumers in a particular EU Member State. This practice may breach of EU competition rules by reducing parallel trade within the Single Market and preventing consumers from buying cheaper games available in other Member States.

In 2018, the Commission continued three separate antitrust investigations against Nike,

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[198] Case AT.40428 - *Guess*. See http://europa.eu/rapid/press-release_IP-18-6844_en.htm.

[199] Cases AT.40413 - *Focus Home*, AT.40414 - *Koch Media*, AT.40420 - *ZeniMax*, AT.40422 - *Bandai Namco* and AT.40424 - *Capcom*. See: http://europa.eu/rapid/press-release_IP-17-201_en.htm.

Sanrio and Universal Studios[200] regarding 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 merchandising products concerned by the investigations 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.

The pay-TV investigation, opened in 2014, continued in 2018. The investigation relates to certain contractual clauses in the licensing agreements concluded between Sky UK and six major film studios (Disney, Fox, Paramount, NBCUniversal, Sony and Warner Bros). In a statement of objections, addressed to Sky and the six Hollywood film studios in 2015, the Commission took the preliminary view that such clauses restricted Sky UK's (and in some cases other broadcasters') ability to accept unsolicited requests from consumers located outside the UK and Ireland and, therefore, violate EU antitrust rules.

In 2016, Paramount offered commitments, which the Commission accepted and made legally binding in the same year. The commitments provide that throughout the EEA Paramount shall remove the contractual restrictions from existing pay-TV licensing agreements and not (re)introduce them for a period of at least five years. Canal+, a French pay-TV broadcaster, brought an appeal against this decision. In December 2018, the General Court[201] dismissed the appeal and held, among other things, that the Commission acted within the limits of Article 9 Regulation 1/2003 and that, in particular, the Commission's decision respected the principle of proportionality. Furthermore, the General Court held that the passive sales restrictions in Paramount's licensing agreements at issue represented restrictions by object. According to the judgment, the removal of these restrictions is consistent with the essential objective of the Treaty to establish a market without internal borders.

In November and December 2018, Sky UK and four US film studios, namely Disney, NBC Universal, Sony, and Warner Bros., also offered commitments to address the Commission's concerns. Like in the Paramount commitments, the five companies offered to remove throughout the EEA the contractual restrictions from existing pay-TV licensing agreements and not to (re)introduce them for a period of five years. The proposed commitments cover all future and current subsidiaries of the companies concerned.[202] To verify the appropriateness of the proposed commitments, the Commission consulted market participants in November and December 2018.[203] In the light of the results of the market test, the Commission considered that the commitments addressed its concerns in a satisfactory way.[204]

[200] Case AT.40432 - *Licensed merchandise – Sanrio*, Case AT.40433 - *Licensed merchandise Universal Studios*, and Case AT.40436 - *Licensed merchandise – Nike*. See: IP/17/1646 of 14 June 2017. See: http://europa.eu/rapid/press-release_IP-17-1646_en.htm.

[201] Case T-873/16 *Groupe Canal+ v Commission*.

[202] Notably, Disney's commitments cover its future subsidiary Fox. The Commission approved Disney's acquisition of Fox on 6 November 2018. See: http://europa.eu/rapid/press-release_IP-18-6312_en.htm.

[203] See IP/18/6346 http://europa.eu/rapid/press-release_IP-18-6346_en.htm and IP/18/6894 http://europa.eu/rapid/press-release_IP-18-6894_en.htm.

[204] On 7 March 2019, the Commission adopted a decision making the commitments offered by Sky, Disney, NBC Universal, Sony, and Warner Bros., legally binding under EU antitrust rules. See:

Antitrust enforcement in technology markets

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

On 24 January 2018, the Commission fined *Qualcomm*[205] EUR 997 million for abusing its market dominance in LTE baseband chipsets. The decision found that Qualcomm prevented rivals from competing in the market by making significant payments to a key customer, Apple, on condition that it would not buy from rivals. This meant that Qualcomm's rivals were denied the possibility to compete effectively for Apple's significant business, no matter how good their products were. They were also denied business opportunities with other customers that could have followed from securing Apple as a customer.

The Commission also continued its investigations against Qualcomm for charging prices below costs with a view to forcing competitors out of the market ("predatory pricing") and issued a Supplementary Statement of Objections.[206]

On 18 July 2108, the Commission fined *Google* EUR 4.34 billion for breaching EU antitrust rules.[207] The Commission found that Google had imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search.

The Google Android case

In its decision the Commission concluded that Google is dominant in:

◦ the national markets for general internet search services throughout the EEA. The Commission based its finding on the fact that Google has shares of more than 90% in most EEA Member States and there are high barriers to enter these markets;

◦ the worldwide market (excluding China) for licensable smart mobile operating systems. The Commission based its finding on the fact that Google has a market share of more than 95%, there are high barriers to entry and that significant resources are required to develop a successful licensable smart mobile operating system. Android is different from operating systems exclusively used by vertically integrated developers (like Apple iOS) which are not part of the same market because they are not available for licence by third party device manufacturers; and

◦ the worldwide market (excluding China) for app stores for the Android mobile operating system. The Commission based its finding on the fact that Google's app store, the Play Store, accounts for more than 90% of apps downloaded on Android devices and that this market is characterised by high barriers to entry. Google's app store dominance is not constrained by Apple's App Store, which is only available on iOS devices.

The Commission found that Google abused its market dominance by engaging in three separate types of practices, which all had the aim of cementing Google's dominant position in general internet search:

◦ Illegal tying of the Google Search app and Google Chrome browser: Google offered its mobile apps and services to device manufacturers as a bundle, which included the Google Play Store, the Google Search app and the Google Chrome browser. In this way, Google ensured that its Google Search app and its mobile browser were pre-installed on practically all Android devices sold in the EEA. The Decision outlined a range of evidence that for search and browser, pre-installation constitutes a significant commercial advantage that cannot be offset

http://europa.eu/rapid/press-release_IP-19-1590_en.htm. Following the completion of Fox’s acquisition by Disney, on 20 March 2019, the commitments are binding on Fox as well.

205 Case AT.40220 - *Qualcomm* (exclusivity payments). See: http://europa.eu/rapid/press-release_IP-18-421_en.htm.

206 Case AT. 39711 - *Qualcomm* (predation). See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39711.

207 Case AT.40099 - *Google Android*. See: http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

through other means.

◦ Illegal payments conditional on exclusive pre-installation of Google Search: Google granted significant financial incentives to some of the largest device manufacturers as well as mobile network operators on condition that they exclusively pre-installed Google Search across their entire portfolio of Android devices. The Decision outlined a range of evidence on how this significantly reduced the commercial possibilities for the pre-installation or rival search providers.

◦ Illegal obstruction of development and distribution of competing Android operating systems: Google prevented device manufacturers from using any alternative version of Android that was not approved by Google (Android forks). To pre-install Google's proprietary apps on their devices, manufacturers had to have prior agreement from Google to run a device on an Android fork. This significantly reduced the commercial opportunity for devices running on Android forks to be developed and sold.

Google's practices denied rival general internet search services the possibility to compete on the merits. The tying practices ensured the pre-installation of Google's search service and browser on practically all Google Android devices and the exclusivity payments strongly reduced the incentive to pre-install competing search engines. Google also obstructed the development of Android forks, which could have provided a platform for rival search engines to gain traffic.

The Decision requires Google to bring its illegal conduct to an end in an effective manner within 90 days of the decision. At a minimum, Google has to stop and to not re-engage in any of the three types of practices. The Decision also requires Google to refrain from any measure that has the same or an equivalent object or effect as these practices. It is Google's sole responsibility to ensure compliance. The Commission is monitoring Google's compliance closely to make sure that the remedy is effective and does indeed comply with the Decision.

Ensuring a 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,[208] which recasts the existing directives, a proposal for a Regulation establishing the Body of European Regulators for Electronic Communications (BEREC),[209] 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).[210] They were accompanied by two Communications: Connectivity for a European Gigabit society: Laying the foundations for a competitive Digital Single Market,[211] which establishes a set of connectivity objectives for 2025, and 5G for Europe: An Action Plan,[212] which sets out targeted actions with the aim of fostering 5G deployment in

[208] Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code, COM (2016) 590 final. See: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-590-EN-F1-1.PDF.

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

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

[211] 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. See: https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society.

[212] 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. See: https://ec.europa.eu/digital-single-market/en/news/communication-5g-europe-action-plan-and-accompanying-staff-working-document.

Europe.

Political agreement on the proposals for the Electronic Communications Code and the Regulation establishing BEREC was reached in June 2018. The legal acts were adopted on 11 December 2018.[213]

The agreed text of the Electronic Communications Code introduces a new objective of connectivity (that is to say investment) of very high capacity networks 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 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 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 when competition is effective in a given telecoms market. The proposal also contains new elements which aim at stimulating investments, while safeguarding effective competition. For example access to civil infrastructure is incentivised 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 agreed draft Electronic Communications Code contains measures to enhance investment certainty (the co-legislators agreed on a minimum licence duration of at least 20 years, timely availability of spectrum in the market and enhanced co-ordination of spectrum authorisation between regulators) and promote competition (such as a possibility to apply spectrum caps, spectrum reservation for new entrants or wholesale access obligations). The agreed text also maintains the role of national regulators and of BEREC, to ensure the consistent and predictable application of the telecoms rules.

The Commission also adopted new Guidelines on Significant Market Power[214] as part of the telecoms framework. They replace the previous ones 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.[215] After 15 years, there was 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'

[213] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, p. 36–214; Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321, 17.12.2018, pp. 1–35.

[214] Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications network and services (2018 SMP Guidelines), OJ C 159, 7.5.2018, p. 1.

[215] 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.

jurisprudence.

Antitrust enforcement in the telecommunications sector

In 2018 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.*[216] The Commission investigates in particular whether the cooperation between O2 CZ/CETIN 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 new services based on them, in particular in densely populated areas.

Merger review in ICT and media

In the telecommunications sector, the Commission reapproved in May, following a new investigation, the acquisition of *Ziggo* by *Liberty Global*, subject to conditions.[217] Before the transaction, Ziggo and Liberty Global were separate cable TV operators providing mainly fixed telecommunications services, operating in different parts of the Netherlands. The Commission first approved this merger in 2014, subject to conditions, but the General Court annulled the approval in October 2017 on the ground that the Commission did not fully explain why the merger would not lead to vertical anti-competitive effects on the potential market for premium pay TV sports channels. The Commission reassessed the merger and its investigation confirmed the concern it had in 2014 that the merger would have increased Liberty Global's negotiating power vis-à-vis TV channel broadcasters, hindering innovation in the delivery of audio-visual content over the internet (the so-called over-the-top or "OTT" services). The renewed approval is again conditional upon the implementation of a commitments package. The reassessment also confirmed that there are no concerns for premium pay TV sports channels and this is fully motivated in the decision.

Furthermore, the Commission unconditionally approved two mergers between a fixed and a mobile telecommunications services operator in Austria (*T-Mobile Austria / UPC Austria*)[218] and Sweden (*Tele2 / Com Hem Holding*).[219] The impact of these transactions on the fixed and mobile telecommunications markets in Austria and Sweden was very limited. In particular, while both T-Mobile and UPC are active in Austria in the provision of internet access services for residential customers, UPC's fixed internet access products differ considerably from T-Mobile's mobile broadband products. Similarly, although both Tele2 and Com Hem are active in Sweden in the provision of retail mobile telecommunications services, retail fixed internet access services and multiple play services, Com Hem has a marginal role in the provision of mobile services and Tele2's fixed telecommunication activities are limited. The Commission also found that each of the merged entities would continue to face significant competition from other players in Austria (such as A1 Telekom Austria and Hutchison Drei Austria) and Sweden (such as Telia, Telenor and Tre). Additionally, both in Austria and Sweden, the merged entities would not be able to use their market power to shut out or marginalise its fixed or mobile competitors by bundling fixed and mobile products.

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[216] Case AT. 40305 - *Network sharing - Czech Republic*. See: http://europa.eu/rapid/press-release_IP-16-3539_en.htm.

[217] Case M.7000 - *Liberty Global / Ziggo*, Commission decision of 30 May 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7000.

[218] Case M. 8808 - *T-Mobile Austria / UPC Austria*, Commission decision of 9 July 2018 See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8808.

[219] Case M. 8842 - *Tele2 / Com Hem*, Commission decision of 8 October 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8842.

After an in-depth investigation,[220] the Commission authorised on 27 November 2018 the merger between mobile network operators *T-Mobile NL* and *Tele2 NL* in the Netherlands.[221] On 11 December 2018, the European Commission opened an in-depth investigation to assess Vodafone's proposed acquisition of *Liberty Global*'s business in Czechia, Germany, Hungary and Romania under the EU Merger Regulation. The Commission is concerned the takeover may reduce competition in Germany and Czechia.[222]

In the IT sector, the Commission cleared in September 2018 *Apple*'s acquisition of *Shazam*.[223] The merging firms offer mainly complementary services, with Apple operating "Apple Music", the second largest music streaming service in Europe and Shazam offering a leading music recognition application. The Commission had opened an in-depth investigation in April based on the concern that Apple would obtain access to commercially sensitive data about customers of Apple Music's competitors and to investigate whether those competitors would be harmed if Apple were to discontinue referrals from the Shazam app to them. The investigation showed that the merged entity would not be able to shut out competing providers of digital music streaming services. Access to Shazam's data would not materially increase Apple's ability to target music enthusiasts and any conduct aimed at making customers switch would only have a negligible impact. In addition, Shazam's application has a limited importance as an entry point to the music streaming services of Apple Music's competitors. Moreover, the integration of Shazam's and Apple's datasets on user data would not confer a unique advantage to the merged entity in the markets on which it operates because Shazam's data is not unique and Apple's competitors would still have the opportunity to access and use similar databases. While the transaction did not meet the turnover thresholds of the EU Merger Regulation, the Commission assessed the transaction after acceptance of a referral request from Austria, France, Iceland, Italy, Norway, Spain and Sweden.

On 11 December 2018 the Commission approved, subject to conditions, the proposed acquisition of *Gemalto* by *Thales*,[224] which combines the two largest suppliers of general purpose hardware security modules (GP HSM) used for enterprise key management solutions, both in the European Economic Area (EEA) and at global level. HSM is a dedicated hardware appliance running on encryption software to generate, protect, and manage encryption keys used to protect data in a secure tamper-resistant module. In July, the Commission had opened an in-depth investigation based on concerns that the merger could lead to higher prices and reduce choice and innovation for customers of hardware security modules. The Commission found that the proposed merger would lead to very high combined market shares in the GP HSM market and would eliminate the competitive constraints that Thales and Gemalto exercised on each other. The Commission also found that cloud service providers offering cloud-based HSMs did not provide a strong competitive constraint and were not expected to do so in the near future. The approval is conditional on the divestment of Thales' GP HSM business.

In October, the Commission unconditionally approved the acquisition by *Microsoft* of *GitHub*[225] a company active in the supply of tools used for developing and releasing software

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[220] See: http://europa.eu/rapid/press-release_IP-18-4141_en.htm.
[221] See: http://europa.eu/rapid/press-release_IP-18-6588_en.htm.
[222] See: http://europa.eu/rapid/press-release_IP-18-6772_en.htm.
[223] Case M. 8788 - *Apple / Shazam*, Commission decision of 6 September 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8788.
[224] Case M. 8797 - *Thales / Gemalto*, Commission decision of 11 December 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8797.
[225] Case M. 8994 - *Microsoft / Github*, Commission decision of 19 October 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8994.

("DevOps tools"). Both Microsoft and GitHub provide access to platforms for software development and both provide code editors (computer programs designed specifically for editing source code) and integrated development environments (applications consisting of a code editor, as well as additional features such as intelligent code completion). The Commission found that the merged entity would continue to face significant competition from other players on both markets. The Commission also assessed whether there would be a risk of weakened competition, if Microsoft were to leverage the popularity of GitHub's software development platform to boost its own sales of DevOps tools and cloud services, but found that Microsoft would not have the incentive to undermine the open nature of GitHub to the detriment of competing DevOps tools and cloud services as this would reduce the value of GitHub for developers, who are willing and able to switch to other platforms.

In the media sector, in February 2018 the Commission conditionally approved *Discovery*'s acquisition of *Scripps,*[226] both providers of basic pay-tv channels to TV distributors. Scripps is particularly active in the UK, where it operates UKTV jointly with the BBC, and in Poland, via TVN. The companies' activities gave rise to only a limited overlap in the UK. However, there was a risk that Discovery's bargaining power vis-à-vis TV distributors in Poland would increase, because it would acquire channels that are particularly important in distributors' basic pay-tv channel packages, in particular TVN24, TVN's flagship news channel. Discovery would therefore have been able to impose the licensing of its whole TV channel portfolio and to increase its licensing fees to the detriment of Polish consumers and competition. To address these concerns, Discovery committed to making TVN24 available to TV distributors in Poland for a reasonable fee determined by reference to comparable agreements for a period of seven years. In parallel, the Commission rejected a request to refer the merger to the Polish competition authority, as the Commission was better placed to deal with this case and any competition concerns were fully addressed by the commitments.

In October, the Commission unconditionally cleared the proposed acquisition by *Sony* of sole control and ownership over *EMI Music Publishing* (EMI MP).[227] Sony already had joint control (together with Mubadala) of EMI MP since 2012 and therefore the transaction would not lead to any increase in market share in any of the markets where Sony and EMI MP are active. The Commission examined whether Mubadala had acted as a constraint on Sony's ability to leverage across both recording music and music publishing rights and, in particular, into the potential impact of the removal of this constraint. Because Sony/ATV already administers EMI MP's catalogue, the transaction does not change the competitive position of EMI MP. Moreover, the transaction would not materially increase Sony's bargaining power vis-à-vis online music platforms.

In November 2018, the Commission approved, subject to conditions, the acquisition by *Disney* of the film and television studios and cable and international television businesses of Fox.[228] These companies constituted two of the six major Hollywood film studios and were also providers of TV channels. In relation to production and distribution of films for release in movie theatres and distribution of content for home entertainment and licensing of films and other TV content, the Commission found that the merged entity would continue to face significant competition from other players, such as Universal, Warner Bros and Sony.

[226] Case M. 8665 - *Discovery / Scripps*, Commission decision of 6 February 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8665.

[227] Case M. 8989 - *Sony / EMI Music Publishing*, Commission decision of 26 October 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8989.

[228] Case M. 8785 - *The Walt Disney Company / Twenty-First Century Fox*, Commission decision of 6 November 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8785.

However, the Commission found that the proposed transaction would raise competition issues in the market for the wholesale supply of "factual channels" (which broadcast documentaries, drama and scientific-themed entertainment programmes), such as National Geographic, because the transaction would have eliminated competition between two strong suppliers of such channels. Disney committed to divest its interest in the channels History, H2 and Crime & Investigation it controls in the EEA thereby fully removing the overlap between Disney's and Fox's activities in the wholesale supply of factual channels in the EEA.

In a separate decision of June 2018, the Commission had already cleared *Comcast*'s proposed acquisition of *Sky*.[229] Comcast and Sky competed with each other only to a limited extent in Austria, Germany, Ireland, Italy, the UK and Spain. The Commission found that pay-tv distributors will continue to have access to content from Comcast's competitors and multiple alternative channels with comparable programming and audiences in the relevant Member States. It is also unlikely that Sky would have the incentive to cease purchasing content from Comcast's competitors as it would reduce the quality of Sky's product offering. The Commission also rejected concerns that Sky could prevent competing channels from accessing its platform.

State aid enforcement in ICT and media

Broadband deployment

The achievement of the *European broadband targets,*[230] despite substantial progress, represents a significant challenge, in particular for the deployment of ultrafast networks.[231] 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.[232]

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229 Case M. 8861 - *Comcast / Sky*, Commission decision of 15 June 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8861.

230 In its Communication *"Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society"* of 14 September 2016 (COM/2016/587 See: 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.

231 According to Europe's digital progress report 2017. See: 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.

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

Most of the financing for the upgrade and deployment of next-generation networks in the broadband sector comes from private companies. These tend to invest mostly in urban, highly populated areas which can assure rapid return on investment. As a result, in certain underserved, mostly rural areas public funds support the deployment of broadband networks, within the broader objectives of inclusion and economic development. State aid control seeks to ensure that such investments do not crowd out (planned) private investments and that downstream compatition remains possible over the subsidised network.

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, resulting from an appropriate mapping of infrastructure and market consultation, to avoid a crowding out of private initiatives (definition of the market failure).

ii) Different technologies should be allowed to bid for the objective connectivity targets set (technological neutrality principle).

iii) A competitive selection process has to take place to ensure the best offer for the best price.

iv) To avoid a 'subsidy to monopoly', publicly funded projects have to be open to all users at fair, reasonable and appropriate conditions.

These principles are also embedded in the General Block Exemption Regulation[233] (GBER) which is intended particularly for fully underserved areas ('white' areas) and allows Member States to deploy broadband networks without State aid notification. In assessing measures which do require notification, Member States and selected operators must fulfil a number of conditions as specified in the Broadband State Aid Guidelines.[234]

All Member States have adopted and/or updated their national and/or regional broadband strategies.[235] As proposed in the Commission Communication of 14 September 2016,[236] Member States have initiated a process to adapt their National Boadband 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 2018, in particular for Lithuania,[237] the Netherlands[238] and Austria.[239] Some Member States completed

[233] 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.

[234] 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. See: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF.

[235] Despite the fact that 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.

[236] Commission Communication COM/2016/587 "Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society" of 14 September 2016. See: https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society.

[237] State aid case SA.49614 - Lithuania - *Development of Next Generation Access Infrastructure – RAIN 3*, Commission decision of 12 October 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

[238] State aid case SA.46613 – The Netherlands - *Broadband Rivierenland Region*, Commission decision of 10 April 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

or modified former broadband schemes with additional investment in the roll-out of Next Generation Access networks, in particular in Germany[240] and the UK.[241]

State aid for gigabit infrastructure – the Bavarian gigabit pilot project[242]

Building on the EU's existing 2020 broadband targets, the Commission identified in its Gigabit Communication of 2016 the connectivity needs to build a European Gigabit society, where very high capacity networks enable the widespread use and development of products, services and applications in the Digital Single Market.

In this context, in 2018, the European Commission approved under EU State aid rules a Bavarian project to deploy very high capacity networks in six municipalities. This was the first time the Commission looked at a support measure as envisaged in the objectives of the Gigabit Communication. The aid aims to bring very fast broadband access to customers in areas where the market has not provided them, in line with the EU broadband connectivity goals. The project represented a first step towards a future larger roll-out of such infrastructure in Germany.

The new network will be capable of offering speeds of 200 megabits per second (Mbps) for households and 1 gigabit per second (Gbps) for companies and public institutions. These transmission speeds are far above those that users have had so far in the target areas. The new networks will therefore bring about a significant improvement in line with the strategic objectives of the Gigabit Communication.

In the period 2009-2018, the Commission approved State aid for broadband amounting to EUR 39 billion. The Member states effectively spent 30% of this amount, often with a co-financing from European funds[243] amounting to roughly EUR 3 billion. In the same period, Member States adopted 126 broadband State aid measures benefitting from the GBER.

Media, culture and broadcasting

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[244] and the Broadcasting Communication[245] to ensure that support is well-designed to meet the underlying objectives of common interest while limiting negative effects on competition.

In 2018, the Commission adopted nine decisions concerning media and cultural activities. The

239 State aid case SA.50844 - Austria - *Broadband Styria*, Commission decision of 8 November 2018, not published yet and State aid case SA.48325 – Austria - *NGA-Broadband project in Upper Austria*, Commission decision of 26 July 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

240 State aid case SA.50847 – Germany - *Prolongation of NGA Bayern Abänderung (SA.38690)*, Commission decision of 4 June 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

241 State aid case SA.49445 – UK - *Modification of the National Broadband Scheme for the UK for 2016-2020 (BDUK - SA 40720)*, Commission decision of 15 January 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

242 State aid case SA.48418 - Germany- *Bayerisches Gigabit Pilotprojekt (Bavarian gigabit pilot project)*, Commission decision of 18 December 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48418.

243 State aid case SA.46805 – Germany – *Follow up German NGA/Vula product*. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46805.

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

245 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. See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC1027(01)&from=EN.

Commission notably approved an aid scheme designed by *Sweden*[246] to support its media sector and aid schemes for *Belgium,*[247] *France*[248] *and Germany*[249] to stimulate the development and the promotion of educational and culturally valuable video games which would not have subsisted under normal market conditions. Video games have become a vibrant and successful commercial product. In this sector, the presence of market failure has to be assessed carefully, because the potential to distort competition in a well-functioning market is higher. As aid for video games is approved as cultural aid, the Commission undertakes a more particular assessment of the cultural characteristics of the games than for feature films.

Since the inclusion of projects promoting culture and heritage conservation in the GBER in 2014, Member States have taken the opportunity offered by the Exemption Regulation. In 2018, 466 schemes were covered by Article 53 GBER related to aid for culture and heritage conservation and 77 schemes by Article 54 GBER related to aid schemes for audio-visual works.[250]

Spectrum migration of broadcasters

In 2018 the Commission approved, under the EU State aid rules, German plans to compensate the direct costs incurred by operators of terrestrial television services to migrate from the 694-790 MHz frequency band (the "700 MHz band") to lower frequencies. This migration follows a 2017 Decision[251] by the European Parliament and the Council that imposed the availability of the 700 MHz band for the deployment of wireless broadband services by June 2020, therefore compelling the current users - among them the terrestrial television service providers - to liberate the frequency band. However, the Decision provides that Member States should ensure the availability of the sub-700 MHz band for terrestrial television services until 2030. It also allows for the possibility to compensate certain direct costs incurred by terrestrial television operators for the spectrum migration. The Commission assessed the aid measure and found that the aid is limited to the costs that are strictly necessary for the migration, and has no significant impact on trade and competition. Furthermore, the measure will contribute to the EU's objective of introducing 5G mobile services, while keeping terrestrial television services available for consumers.

3. Financial services

Overview of key challenges in the sector

The financial services sector has continued to stabilise. Generally, EU banks have reduced their legacy assets and are equipped with higher capital buffers. Banks have also limited their

[246] State aid case SA.49405 – Sweden - *Media Aid*, Commission decision of 22 October 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49405.

[247] State aid case SA.49947 – Belgium - *Funds for videogames – Flanders*, Commission decision of 28 May 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

[248] State aid case SA.50512 – France - *Fonds d'aide aux jeux video*, Commission decision of 21 August 2018. See: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

[249] State Aid case A.51820 – Germany - *Video games support – North Rhine Westphalia*, Commission decision of 10 December 2018.See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51820.

[250] There might be some overlap between the figures as schemes could be informed both under article 53 and article 54 (and potentially other articles of the GBER as well).

[251] Decision (EU) 2017/899 of the European Parliament and of the Council of 17 May 2017 on the use of the 470-790 MHz frequency band in the Union. See: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32017D0899.

exposures to market risks, primarily by reducing their bond and derivative portfolios. As a consequence, they are more resilient in case of adverse conditions. The minimum requirement for own funds and eligible liabilities (MREL) as currently set with binding targets by the competent resolution authorities for the banks within their remit, will add to that resilience.

However, challenges remain. The level of non-performing loans is still too high for certain banks in some Member States. There is still pressure on the banks' profitability due to the low-interest environment and tight interest margins. Also the insurance sector, in particular the life insurance sector, is affected by these conditions.

The current legislative framework of the Banking Union, notably the Bank Recovery and Resolution Directive (BRRD),[252] has been fully in force for two years. Although State support for banks and, consequently, the number of State aid cases have been reduced, there are still some legacy situations where support from the public budget for banks to exit the market or as a temporary buffer is necessary.

Moreover, there is growing pressure from new types of financial institutions, as well as from so-called FinTech companies, re-shaping the interaction with customers in areas such as payments, lending and brokerage platforms. The financial sector is currently undergoing restructuring efforts with a higher focus on digital services.

EU competition policy with its three enforcement instruments – antitrust, merger and state aid control - plays an important role in ensuring that competition takes place on fair and equal terms throughout the sector. The enforcement of the competition rules remains key to ensure fair competition that benefits consumers.

This applies, for instance, to the area of payments, where the Commission closely monitors the ongoing technological change and the emergence of new financial service providers. The Commission intervenes, as in other areas, when it detects anti-competitive behaviour. Similarly, the Commission has continued to use its merger control instrument to ensure that mergers or joint ventures do not significantly impede effective competion. Finally, State aid control tackles cases of public support for financial service companies with a view to limit distortions of competition and to ensure, for instance, that non-viable banks exit the market and are not kept alive artificially.

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[253] (IFR). The Commission contracted a study which was launched in September 2018. The purpose of the study is to collect and analyse key qualitative and quantitative market information from all Member States on application of the Interchange Fee Regulation. The study is intended to inform the European Commission when preparing a Report to the European Parliament and to the Council on the application of the IFR.

[252] European Parliament and Council Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173, 12.6.2014 p. 190–348.

[253] 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. See: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R0751.

On 18 January 2018, the Commission published Regulatory Technical Standards*254* (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 became applicable from 7 February 2018. The RTS relate to the implementation of the IFR requirement on independence of card schemes and processing entities.

On 7 February 2018, the General Court issued a ruling in the American Express case.[255] regarding the application of the Interchange Fee Regulation to three-party schemes. The General Court clarified that a three-party scheme that issues a payment instrument with a co-branding partner or agent is considered to be a four-party scheme and thus subject to the relevant provions of the IFR irrespective of whether the co-branding partner or agent acts as an issuer. 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.[256] Moreover, only 60 % of EU citizens possess such cards. The Payment Services Directive[257] (PSD II) takes account of and regulates third-party providers (bank-owned and non-bank owned) which offer alternative means of internet payments (for example through credit transfers via the website of the consumer's bank, including the Single Euro Payment Area Credit Transfer system) or allow consumers to have a overall 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 2018, 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 competition in capital markets, in particular focussing on the markets for equity data and equity trading where high fees/prices persist. In the field of motor insurance, the Commission continued to investigate allegations of breaches of Articles 101 and 102 TFEU in the Irish market. Moreover, the Commission progressed with its investigation into *Mastercard's* cross-border acquiring rules, which allegedly prevent merchants located in countries with high interchange fees to seek lower-priced services from acquirers established in Member States with lower interchange fees.

In addition, the Commission continued its antitrust investigations into *Mastercard's, Visa Inc.'s* and *Visa International's*[258] multilateral interchange fees (MIFs) for transactions in the

[254] 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 L 13, 18.1.2018, p. 1–7.

[255] See: http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-304/16.

[256] 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.

[257] 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. See: http://ec.europa.eu/finance/payments/framework/index_en.htm#151008.

[258] These proceedings were closed as regards Visa Europe following its commitments, Case AT.39398 - *VISA MIF*, Commission decision of 26 February 2014. See: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf.

EEA made with cards issued outside the EEA (inter-regional MIFs). 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 Comission issued a Supplementary Statement of Objections to Visa Inc and Visa International on inter-regional MIFs in August 2017[259] and the oral hearing was held in February 2018.

In November 2018 Mastercard and Visa offered commitments to address the Commission's competition concerns. Both card-schemes offered to reduce the current level of inter-regional MIFs to or below binding caps. Moreover, Mastercard and Visa agreed to publish all inter-regional MIFs covered by the commitments in a clearly visible manner on their respective websites. To verify the appropriateness of the proposed commitments, the Commission consulted market participants on 5 December 2018.[260]

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 the Commission continued antitrust investigation concerning 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.[261] 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.

[259] Case AT.39398 - *Visa MIF*. See: http://europa.eu/rapid/press-release_MEX-17-2341_en.htm.
[260] See: http://europa.eu/rapid/press-release_IP-18-6655_en.htm.
[261] See: MEMO/17/3761 http://europa.eu/rapid/press-release_MEMO-17-3761_en.htm.

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. In 2018, the Commission dealt with a number of cases in the sector, in particular involving activities in insurance, banking and payments, which did not pose a competitive threat and could be approved without requiring remedies.[262]

State aid investigations in the financial sector

The general stabilisation of the financial sector has resulted in a reduction of State aid cases. Moreover, the Commission could close the monitoring of further ten banks with respect to commitment obligations resulting from previous State aid decisions. Despite this overall positive development, the EU banking sector still faces some challenges, and also in 2018 banks asked for public support.

In 2018, the Commission continued to apply the EU State aid rules for banks, in particular the *2013 Banking Communication*[263] while ensuring close coordination with the authorities which are in charge of banking supervision and relate with the framework of the Banking Union[264] As regards ailing banks, the State aid rules distinguish those that can be restructured and return to viability from non-viable banks that have to exit the market.

One of the current main concerns is the still high level of non-performing loans (NPLs) in some Member States. High NPL ratios weaken banks that are burdened by legacy losses and high provisions and render their attempts to generate sufficient income almost impossible. At the same time, it is often very difficult for the affected banks to raise new capital on the market.

Banks that are troubled by high NPLs ratios have, therefore, asked for aid to support their restructuring efforts, for instance, by hiving off NPLs. To limit distortions of competition, the Commission could, however, only approve support for a non-viable bank under the condition that it will exit the market. In 2018, for example, the Commission approved State aid for the sale of Cyprus' second largest bank, the Cyprus Cooperative Bank, and the winding down of the residual entity as liquidation aid.265 This allowed for the orderly market exit of the bank that had already received State support twice in the past.

Further progress has also been made regarding guarantee schemes of some Member States. For example, the *Italian guarantee scheme to facilitate the securitisation of non-performing loans* (GACS), initially approved in February 2016, was prolonged for a second time on 31 August 2018.266 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

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[262] See for example M.8764 - *Sedgwick /Cunningham Lindsey* and M.9056 - *Generali CEE /AS*.

[263] 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. See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0730%2801%29&from=EN.

[264] In particular, the Single Resolution Board (SRB) under the Single Resolution Mechanism (SRM) and the European Central Bank (ECB) under the Single Supervisory Mechanism (SSM).

[265] Case SA.35334 – *Cyprus*, Commission decisions of 19 June 2018 and 28 August 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35334.

[266] Case SA.51026(2018/N) – *Italy*, Commission decision of 31 August 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51026.

notes continue to be remunerated at market terms according to the risk taken, that is to say in a manner acceptable for a private operator under market conditions. Since its entry into force until mid-November 2018, the scheme has been accessed 17 times, removing ca. EUR 51 billion (gross book value) of non-performing loans from the Italian banking system, which corresponds to over 60% of the total reduction of non-performing loans in Italy during that period.

As in previous years, State aid control in 2018 included legacy cases which preceded the entry into force of the BRRD. The Commission monitored the Member States' compliance with their commitments given in the context of previous decisions. When an additional assessment was required, the Commission adopted an additional decision. This happened in the case of the German *HSH Nordbank* where the Commission in 2016 approved the bank's guarantee ceiling - which was re-increased in 2013 back to the level of 2011 – but adopted an additional decision assessing Germany's compliance with its commitment to split the bank and either privatise the operational subsidiary or, in case of a failed sale, to cease new business and divest its assets.[267]

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.[268] 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.

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.

Tax legislation and tax collection are competences of the Member States. However, even in this area where the Member States enjoy fiscal autonomy, any national tax measures adopted

[267] Case SA.52288 – Germany, Commission decision of 23 November 2018, See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52288.

[268] OECD (2013) *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris.

have to comply with internal market rules and, amongst others, abide by competition law.[269]

Contribution of EU competition policy to tackling the challenges

State aid investigations and decisions concerning aggressive tax planning

Throughout 2014-2018, 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 the key areas since the Commission started looking into the tax ruling practices of Member States. The Working Paper published as part of this review in June 2016 indicated concerns that some tax rulings for financing companies endorse very low margins and a low taxable base.[270]

In this context, the Commission 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.[271] 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. Additional changes were made by Cyprus on 3 September 2018 on the rules on non-return capital contributions. On 21 December 2018, Luxembourg addressed certain issues with regard to Art. 22bis LIR272 and Art. 16 StAnpG.273

Important cases

On 20 June 2018, the Commission adopted a decision requiring Luxembourg to recover a selective tax advantage granted to *Engie*[274] by way of several tax rulings amounting to more than EUR 120 million.

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[269] 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 Commissions approach on State aid. See: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN.

[270] 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. See: http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf.

[271] Circular of the Director of Contributions, L.I.R. n° 56/1 – 56bis/1 of 27 December 2016. See: http://www.impotsdirects.public.lu/content/dam/acd/fr/legislation/legi16/circulairelir561-56bis1-27122016.pdf

[272] Luxembourg now forbids the tax-free exchange or conversion of a convertible loan for participations or equity. A similar issue was the subject of the Commission investigation in the case SA.44888 – *Engie.*

[273] Luxembourg now requires a taxpayer to prove that the other state is also recognizing a permanent establishment before granting an exemption based on the applicable double tax treaty. A similar issue was the subject of the Commission investigation in the case SA.38945 – *McDonald*s.

[274] Case SA.44888 – Luxembourg – *Aid implemented by Luxembourg in favour of ENGIE*, Commission decision of 20 June 2018. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44888.

Luxembourg – The Engie decision

In 2008 and 2010, respectively, Engie implemented two complex intra-group financing structures in Luxembourg. These involved triangular financing transactions where two holdings of the Engie group would provide financing via intermediary companies to two subsidiaires, Engie LNG Supply and Engie Treasury Management, in the form of highly complex convertible loans.

Subsequent tax rulings issued by the Luxembourg tax administration from 2008 endorsed a tax treatment where the same financing transaction was treated as debt at the level of Engie LNG Supply and Engie Treasury Management and equity at the level of the holdings. According to the tax rulings, Engie LNG Supply and Engie Treasury Management are allowed to deduct annually from their tax base the interest related to the convertible loans, which in practice amounted to more than 99% of their profit. That interest is however paid only at conversion and in the form of shares to the intermediaries, that would pass on the shares to the holdings. The holdings would then cancel the shares to cash the profit made by Engie LNG Supply and Engie Treasury Management, which would remain tax-exempt in application of the participation exemption. The result is that Engie did not pay any tax on more than 99% of the profit generated by Engie LNG Supply and Engie Treasury Management in Luxembourg.

The Commission concluded that the tax rulings endorsed an inconsistent tax reatment of the same financing transaction leading to non-taxation at all levels. This is a more favourable treatment than under the standard Luxembourg tax rules, which exempt from taxation income received by a shareholder from its subsidiary, provided that income is in general taxed at the level of the subsidiary. Luxembourg did not provide any valid justification for this derogation. Therefore, the tax treament granted to Engie constitutes a selective advantage.

The Commission estimates that this unfair tax advantage amounted to up to EUR 120 million corresponding to the profit generated by Engie LNG Supply in the period between 2009 and 2014 and exempted at the level of the holding after the partial conversion of the convertible loan in 2014. As regards Engie Treasury Management, its profits will have to be taxed in line with standard Luxembourg tax rules, as soon as the loan is converted.

On 19 September 2018, the Commission decided that the non-taxation of certain *McDonald's*[275] profits in Luxembourg did not lead to illegal State aid, as it was in line with national tax laws and the Luxembourg-United States Double Taxation Treaty.

Luxembourg – The McDonald's decision

McDonald's Europe Franchising is a subsidiary of McDonald's Corporation, based in the United States. The company is tax resident in Luxembourg and has two branches, one in the United States and the other in Switzerland. In 2009, McDonald's Europe Franchising acquired a number of McDonald's franchise rights from McDonald's Corporation in the United States, which it subsequently allocated internally to the US branch of the company. As a result, McDonald's Europe Franchising received royalties from franchisees operating McDonald's fast food outlets in Europe, Ukraine and Russia for the right to use the McDonald's brand.

McDonald's Europe Franchising also set up a Swiss branch responsible for the licensing of the franchise rights to franchisors and through which royalty payments flowed from Luxembourg to the US branch of the company. The tax rulings given by the Luxembourg authorities confirmed that McDonald's Europe Franchising was not due to pay corporate tax in Luxembourg on the grounds that the profits were to be attributed to the branch in the US. This was justified by reference to the Luxembourg-US Double Taxation Treaty, despite the fact that the US did not recognise the US branch of McDonald's as a taxable entity.

Following an in-depth investigation and after having thoroughly considered the Luxembourg authorities' and McDonald's arguments in response to the opening decision, in particular as regards the correct application of the Luxembourg – US Double Taxation Treaty by the Luxembourg tax authorities, the Commission found that its concerns under EU State aid rules raised in the opening decision were unfounded. In particular, the Commission concluded that Luxembourg had not misapplied the Luxembourg – US Double Taxation Treaty and that the contested tax rulings therefore did not selectively favour McDonald's Europe over other companies that are in a similar legal and factual situation.

[275] Case SA.38945 - *Alleged aid to McDonald's*, Commission Decision of 19 September 2018. See: http://europa.eu/rapid/press-release_IP-18-5831_en.htm.

In addition, the Commission adopted on 19 December 2018[276] a final decision on the corporate income tax regime (including the tax ruling practice) in *Gibraltar*. The Commission found that the exemption for interest and royalties (between 2011 and 2013) under the 2010 Corporate Tax Act was designed to attract multinationals and it effectively reduced the tax bill of a limited number of companies belonging to multinational groups. In addition, the investigation also confirmed that five rulings granted in 2011 and 2012 by the Gibraltar tax authorities to large multinationals involve illegal state aid, as they continued to exempt interest and royalties from taxation even after Gibraltar adopted legislative amendments to bring these types of income within the scope of taxation. With its decision, the Commission confirmed that these measures involve illegal and incompatible aid and ordered recovery of the tax foregone.

In the context of that case, the Commission also supported Gibraltar in taking steps to provide clarification and guidance on their tax rules in order to mitigate risks of cross-border tax avoidance and prevent that potential discretion exercised by the tax authorities in granting tax rulings results to undue State aid. To this end, in October 2018, the Gibraltar authorities introduced changes to their Income Tax Act[277] and adopted Guidance notes on territoriality[278] and the tax ruling procedure.[279]

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.

With regard to the investigation into fiscal aid to ports, further to the negative decisions adopted in January 2016[280] (Dutch seaports) and July 2017 (Belgian[281] and French[282] ports), the Commission initiated in April 2018 the cooperation procedure with regard to the corporate tax exemptions benefitting ports in Spain and Italy. 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.

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[276] Case SA.34914 - *Gibraltar Corporate Tax regime (ITA 2010)*, Commission Decision of 19 December 2018. See: http://europa.eu/rapid/press-release_IP-18-6889_en.htm.

[277] The Income Tax (Tax Rulings) Rules 2018, of 25 October 2018, see: http://www.gibraltarlaws.gov.gi/articles/2018s227.pdf; and The Income Tax (Amendment) Regulations 2018, of 25 October 2018, see: http://www.gibraltarlaws.gov.gi/articles/2018=228.pdf.

[278] The Guidance Notes on Accrued and Derived, of 25 October 2018. See: https://www.gibraltar.gov.gi/new/downloads-ito.

[279] The Guidance Notes on the Tax Rulings Procedure, of 25 October 2018. See: https://www.gibraltar.gov.gi/new/downloads-ito.

[280] Case SA.25398 *Corporate tax exemption of Dutch public enterprises*, Commission decision of 21 January 2016. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_25338.

[281] Case SA.38393 *Ports taxation in Belgium*, Commission decision of 27 July 2017. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38393.

[282] Case SA.38398 *Ports taxation in France*, Commission decision of 27 July 2017. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38398.

More generally, thoughout 2018, the Commission provided guidance to Member States and helped them designing tax measures that comply with State aid rules, for example health related taxes[283] or real estate taxes.[284]

5. BASIC INDUSTRIES AND MANUFACTURING

Overview of key challenges in the sector

Manufacturing is important to the EU economy as a driver of growth and employment. Close to 30 million people, that is, more than 20% of the European workforce is active in the sector. Substantial advancements in automatisation and the growing widespread use of robotics in many industries in the past decades have led to significant restructuring and job losses across Europe. The manufacturing sector faces additional challenges, due to the relocation of jobs to countries with lower labour costs and the rise of global supply chains with producers located outside the EU. Moreover, high energy prices and low productivity growth as compared to the OECD average are hampering the competitiveness of European companies. While new technologies and digitisation help to increase efficiencies and reduce costs, these techniques are also available to competing economies.

The EU's renewed industrial policy strategy[285] aims to address these challenges by boosting investment in a smart, innovative and sustainable industry. Enforcing the competition rules in the manufacturing sector contributes to these objectives, in particular by ensuring that firms can compete on fair and equal terms in the internal market. In addition the State aid rules are used to steer public funding towards research, training and energy efficiency. Only innovative companies with a sustainable business plan can deliver smart goods and services at competitive prices for European consumers and businesses. Improving companies' efficiency and long-term competitiveness at home also makes them fit for competing in the global market place.

Contribution of EU competition policy to tackling the challenges

Antitrust investigations in basic industries

Basic manufacturing and consumer goods industries continue to represent a significant share of the Commission's enforcement practice. In 2018, the Commission continued its lines of action (including individual case work, market surveillance and advocacy) in these sectors, including for example, those in the motor vehicle and consumer goods sectors. The EU's high value-added manufacturing industry requires access to basic materials at affordable prices that reflect international cost conditions. In 2018, the Commission actively monitored the markets for these inputs to ensure that firms have adequate access in a healthy and competitive environment.

[283] Case SA.45862 *NL_BZK_CSDO_LB* – the Netherlands. See: http://europa.eu/rapid/press-release_IP-18-3521_en.htm.

[284] See: https://www.mf.gov.pl/en/news/-/asset_publisher/X7ac/content/arrangements-with-the-eu-commission-on-the-minimum-income-tax-from-commercial-buildings.

[285] Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee, the Committee of the regions and the European Investment Bank of 13.9.2017 "Investing in a smart, innovative and sustainable Industry". See: https://eur-lex.europa.eu/resource.html?uri=cellar:c8b9aac5-9861-11e7-b92d-01aa75ed71a1.0001.02/DOC_1&format=PDF.

Merger investigations in basic industries and manufacturing

The Commision's main merger investigations in basic industries concerned notably the steel sector, as well as a broad range of other sectors, including the manufacture of machinery and components for aircrafts, robotic cleaners for swimming pools, construction material, paper and paperborad, as well as pet food.

Amongst those investigations, most noteworthy is the one into the acquisition of *Ilva* by *ArcelorMittal*.[286] The merger combined ArcelorMittal, the largest producer of flat carbon steel in Europe and worldwide, with the main assets of Ilva, notably its steel plant in Taranto, Italy, which is Europe's largest single-site integrated flat carbon steel plant. Both companies are significant producers in Europe of hot rolled, cold rolled and galvanised flat carbon steel. ArcelorMittal has a wide production network across the EEA and Ilva has major production assets in Italy.

After an in-depth investigation, where the Commission identified competition concerns, it made the clearance decision conditional on the divestiture, proposed by ArcelorMittal, of an extensive remedy package to preserve effective competition on European steel markets to the benefit of consumers and businesses.

Steel is a critical input for many EU industries and for products used every day. The Commission's intervention ensured that ArcelorMittal's acquisition of Ilva, creating the by far largest steelmaker in Europe, does not result in higher steel prices – at the expense of European industries, the people they employ and consumers. ArcelorMittal proposed to sell a number of steel plants throughout Europe to one or more buyers, who will run them to compete with ArcelorMittal on a lasting basis. This will preserve effective competition on European steel markets. It goes hand in hand with decisive EU action to protect the European steel industry from unfair trade distortions from third countries.

On 13 July 2018, the Commission opened an in-depth investigation of the proposed acquisition of *Alstom* by *Siemens*, under the EU Merger Regulation.[287] The mobility division of Siemens offers a broad portfolio of trains (rolling stock), rail automation and signalling equipment, as well as rail electrification systems. Alstom is active worldwide in the rail transport industry, offering a wide range of rolling stock (from high-speed trains to metros and trams) as well as signalling and rail electrification systems. On 6 February 2019, the Commission prohibited the proposed transaction under the EU Merger Regulation.[288] The proposed transaction would have combined the two largest suppliers of trains and signalling solutions in the EEA, not only in terms of size of the combined operations, but also in terms of their geographic footprint. The Commission considered that the merger would have reduced competition in the supply of several types of trains and signalling systems in the EEA.

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

[286] See: http://europa.eu/rapid/press-release_IP-18-3721_en.htm.

[287] Case M.8677 - *Siemens /Alstom*. See: http://europa.eu/rapid/press-release_IP-18-4527_en.htm.

[288] Case M.8677 – *Siemens / Alstom.* Decision of 6 February 2019. Not yet published. See: http://europa.eu/rapid/press-release_IP-19-881_en.htm.

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 2018, the Commission concluded its in-depth investigation into the restructuring of the Romanian petrochemical company *Oltchim.*[289] The Commission found that Oltchim received around EUR 335 million of incompatible aid from Romania since the company's failed privatisation in September 2012. This gave the company an unfair economic advantage over competitors, who have to work without such subsidies. Oltchim now needs to pay back the money to the Romanian State to make up for the distortion of competition created by the aid. At the same time, the Commission made sure that the sale of Oltchim's assets was carried out at market conditions and thus none of the past aid was passed on to the buyers. Indeed, After the Commission opened its in-depth investigation in April 2016, Romania amended the terms of sale, in particular allowing interested investors to bid for any one of nine asset bundles. This increased the likelihood of a successful sale as well as the proceeds from the asset sale and dispelled the Commission's initial doubts.

In May 2018, the Commission also opened an in-depth investigation into the restructuring of *CNU*[290], a Romanian company active in the mining of uranium and its processing into nuclear fuel. After a rescue loan of around EUR 13 million to keep the company afloat, which the Commission temporarily approved in 2016, Romania intends to grant around EUR 95 million of restructuring support to CNU. The Commission's investigation aims to ensure in particular that the company addresses the problems that caused its difficulties and becomes viable in the long-term without continued State support.

Moreover, in November 2018, the Commission requested Romania to recover around EUR 60 million of from the State-owned electricity and heat producer *CE Hunedoara*.291 The company was incorporated in November 2012 with assets of other failed and dissolved State-owned companies and had in turn been in financial difficulties as from 2013. Following rescue aid approved in April 2014 and not reimbursed after a six-month period, the Commission found that CE Hunedoara's restructuring plan was not capable of making the company viable without continued State support after the restructuring period. CE Hunedoara had also received three other State loans that it could not have obtained on the market. Moreover, Hunedoara was not sufficiently contributing with market-based revenues or finance to the cost of restructuring and no measures to limit the distortions of competition caused by the aid were put in place. The Commission therefore concluded that the State aid through public loans did not meet the compatibility conditions under the Rescue and Restructuring Guidelines.

289 Case SA.36086 *Potential aid to Oltchim*, Commission decision of 17 December 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36086; and IP/18/6845, see: http://europa.eu/rapid/press-release_IP-18-6845_en.htm.

290 Case SA.48394 *Restructuring of National Uranium Company* (Companiei Nationale a Uraniului CNU), see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48394; and IP/18/3733, see: http://europa.eu/rapid/press-release_IP-18-3733_en.htm.

291 See: http://europa.eu/rapid/press-release_IP-18-6341_en.htm.

6. AGRI-FOOD INDUSTRY

Overview of key challenges in the sector

While most firms in the European food sector benefit from operating in the EU internal market, others face challenges operating in this market and in a globalised world. EU farmers, food manufacturers and retailers should get more out of their access to the internal market and the ensuing possibility ability to buy and sell produce across EU borders. EU competition policy contributes to this process.

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 facing (i) more competition from other farmers inside as well as outside Europe, (ii) higher demands from end consumers in terms of quality, variety and traceability, and (iii) higher investments needs linked to initiatives towards a greener and more sustainable agriculture.

The European agricultural sector has certain structural characteristics which make it more difficult to cope with these challenges. First, agricultural producers are the least concentrated level of the food supply chain in the EU. They are mostly small or grouped into small cooperatives and other types of 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.[292] Second, unforeseeable natural elements (such as adverse weather conditions and diseases) can significantly alter production, resulting in volatility of production and prices.

European farmers can manage these challenges better by their integration into larger producer organisations where these organisations aggregate supply (in terms of both volumes and variety of products), offer supporting services and add value through processing. Such integration can provide more stability and risk-management, 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 that supply wide arrays of products to customers. 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. On the one hand, 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).

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[292] There are approximately 11 million farms in the European Union which produce agricultural products for processing by about 300 000 enterprises in the food and drink industry. The food processors sell their products through some 2.8 million enterprises within the food distribution and food service industry, delivering food to the EU's 500 million consumers. See: https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/factsheet-food-supply-chain_march2017_en.pdf.

Challenges for the optimal functioning of the EU internal market

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 types of discrimination 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 compartmentalise 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 aimed to help European farmers to 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 have been introduced. Several derogations from the competition rules were granted to the EU agricultural sector through the CMO Regulation.[293] For instance, the reform of the Common Agricultural Policy in 2013 introduced derogations to antitrust rules for certain agricultural sectors (olive oil, beef and veal, and arable crops) and to manage crisis situations. These sector-specific derogations were deleted in 2018 when the Council and the European Parliament amended the application of the competition rules to the agricultural sector through the "Omnibus Regulation"[294] 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 June 2018 the Commission published proposals for the CAP 2020 reform. These proposals do not contain any possible modifications of the competition rules applicable in the agricultural sector.[295]

Analysis and reporting

a) *Study on producer organisations and their activities in the olive oil, beef and veal and arable crops sectors*

In order to understand better the challenges of farmers in the supply chain and to help them to

[293] 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. See: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R1308.

[294] Regulation No. Regulation (EU) 2017/2393 of 13 December 2017. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.350.01.0015.01.ENG.

[295] See: http://europa.eu/rapid/press-release_MEMO-18-3974_en.htm.

become more efficient, the Commission launched an external study. In June 2018 the Commission published the Study on producer organisations and their activities in the olive oil, beef and veal and arable crops sectors.[296] In these sectors there are overall five times more unrecognised producer organisations/associations of producer organisations than those formally recognised by Member States under EU legislation.

The study revealed that the main motivating factors for farmers to set up a producer organisation or an association of producer organisations are (i) to improve access to markets due to an increased volume and (ii) to improve the position of the members in negotiations with buyers. Furthermore, according to the study the main benefits for members in a Producer Organisation/an Association of producer organisations are (i) improved market access and price stability and (ii) reduced costs and economies of scale.

The study also shows that two-thirds of producer organisations and associations of producer organisations carry out contractual negotiations and other commercialisation-related activities (commercialisation strategies and the planning of quantities). More than 90% of the entities that carry out these commercialisation-related activities also carry out common efficiency-enhancing activities, such as quality control, distribution/transport, and procurement of inputs, as was foreseen by the sector-specific derogations from competition rules for these sectors.

Most producer organisations carry out these efficiency-enhancing activities because they consider that they improve their position in negotiations with buyers and because they reduce the costs of the members.

296 See: http://ec.europa.eu/competition/publications/reports/kd0218732enn.pdf.

b) *Report on the application of competition rules in the agricultural sector*

In October 2018, the Commission published the *Report on the application of competition rules in the agricultural sector.*[297]

EU competition authorities have carried out around 170 investigations in the agricultural sector. More than a third of these concerned processors of agricultural products. The report found that the enforcement work of EU competition authorities benefitted farmers with better deals for their products. In particular, the report identifies several instances of European competition authorities stopping and sanctioning practices employed by large buyers that aimed at reducing prices paid to farmers. Furthermore, the work of EU competition authorities also helped farmers improve their conditions with cooperatives.

One of the key findings of the report is a new trend of national initiatives to restrict imports of specific agricultural products from other Member States. Several NCAs (as well as the Commission in its 2015-2016 enquiry into the dairy sector in several Member States) have investigated and stopped a number of collective agreements, where for instance farmers in a given Member State attempt to hinder sales by farmers from other Member States.

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

On 30 April 2019, the Directive on unfair trading practices in business-to-business relationships in the food supply chain entered into force. The Directive is based on a 2018 Commission proposal aiming to tackle at EU level the imbalances of bargaining power throughout the food supply chain by banning the most damaging unfair trading practices imposed by buyers with strong bargaining power on small suppliers, in particular small farmers. [298]

The list of unfair trading practices in the Commission proposal was carefully tailored based on input from DG Competition's Chief Economist, in order not to prevent trading partners from engaging in efficiency-enhancing agreements or trading conditions.[299] The scope of protection was designed to avoid protecting businesses that have sufficient bargaining power to fend for themselves. Protecting businesses with bargaining power in the food supply chain through rules on unfair trading practices would not benefit farmers.

Member States will be able to maintain or introduce stricter national rules as the proposed Directive only introduces minimum harmonisation at EU level.

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

[297] See: http://ec.europa.eu/competition/sectors/agriculture/report_on_competition_rules_application.pdf.

[298] See: http://europa.eu/rapid/press-release_IP-18-2702_en.htm., and https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0173.

[299] See: Annex H to the Commission Impact Assessment: Economic impact of unfair trading practices regulations in the food supply chain, p. 260, see: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0092&from=EN.

Following the adoption of the Statement of Objections in November 2017,[300] the Commission continued in 2018 its investigation of AB InBev's apparent strategy to allegedly 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. AB InBev's practices, which may prevent the free trade of goods in the EU Internal Market, may result in a violation of Article 102 TFEU.

Merger investigations in the agri-food industry

In 2018, the agri-food sector was characterised by the continuation of the consolidation wave of agro-chemical players. Following the conditional clearances of *Dow/Dupont* and *ChemChina/ Syngenta* in 2017, the Commission took again a rigorous stance in the assessment of the proposed acquisition of *Monsanto by Bayer*,[301] thereby ensuring that farmers in Europe continue to benefit from innovative inputs at competitive prices.

Bayer is a German company, active in pharmaceuticals, consumer health, agriculture (through its Bayer Crop Science division) and animal health. Monsanto was a US agriculture company that produced seeds for broad acre crops, fruits and vegetables. It also produced plant biotechnology traits and supplied pesticides. Monsanto was perhaps most known for its glyphosate herbicide, sold under the "Roundup" brand, and the development of genetically modified crops. There was a degree of complementarity between Bayer, a leading player in crop protection, particularly in Europe, and the Monsanto businesses, the world's leading seed supplier, with its main markets in the Americas. The acquisition of Monsanto by Bayer created the biggest integrated agrochemical, trait and seed player worldwide and was viewed by some commentators and interested observers as transformative for the industry.

After a comprehensive in-depth investigation, the Commission identified likely harmful effects of the concentration on product and innovation competition in several seeds, traits, pesticides and digital agricultural markets. Bayer offered far reaching remedies comprising the divestiture of its entire seeds and traits business, its glufosinate business and its digital agriculture efforts, which addressed all competition concerns including those related to innovation. This remedy package was sold to BASF, which the Commission approved as a suitable buyer. In the review of the Bayer/Monsanto transaction, the Commission closely cooperated with many competition authorities around the world.

300 Case AT.40134 - *AB InBev beer trade restrictions (previously Limes)*. See: http://europa.eu/rapid/press-release IP-17-5041 en.htm.

301 See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084.

7. PHARMACEUTICAL AND HEALTH SERVICES SECTOR

Overview of key challenges in the sector

The pharmaceutical sector and the health sector are of particular societal and economic importance. Health and access to effective and affordable medicines are key concerns for the general public. The economic crisis, demographic evolution and changes in the types of diseases affecting EU citizens have put significant constraints on public health budgets. Public spending on healthcare overall has over past decades increased to between 5.7% and 11.3% of GDP in the different Member States,[302] and is expected to grow further. Spending on pharmaceuticals constitutes a significant share of government spending on healthcare.[303]

On 28 January 2019, the Commission published a report to the Council and the European Parliament entitled "Competition enforcement in the pharmaceutical sector (2009-2017) - European competition authorities working together for affordable and innovative medicines".[304] This report provides an overview and examples of how the Commission and the national competition authorities of the 28 Member States have enforced the EU antitrust and merger rules in the pharmaceutical sector over the period 2009-2017. The pharmaceutical sector requires close competition law scrutiny. The report explains, in response to concerns expressed by the Council and the European Parliament, how enforcing competition law specifically helps to safeguard EU patients' access to affordable and innovative medicines. Since the conclusion of the Commission inquiry into the pharmaceutical sector in 2009, NCAs have adopted a wide range of antitrust decisions against pharmaceutical companies. These imposed sanctions (fines over EUR 1 billion in total) and made binding commitments to remedy anti-competitive behaviour. In its task of overseeing that pharmaceutical markets do not get overly concentrated due to mergers, the Commission in this period reviewed more than 80 transactions. In 19 cases competition concerns were detected, and the Commission cleared these mergers only after the companies offered to address concerns and to modify the transaction.

Ensuring access to innovative, high quality healthcare and medicines at competitive prices is an important objective in competition law enforcement in the pharmaceutical and health services sectors. Innovation can lead to increased healthcare benefits flowing from R&D into novel treatments and more efficient technologies which may reduce the cost of treatments, for example, by developing production processes that make it viable for cheaper medicines to be commercially produced. Competition law enforcement can complement the regulatory framework that exists in this sector.

The Commission's competition enforcement on pharmaceutical and health markets fosters both dynamic competition, which leads to more innovative medicines, and effective price competition, which contributes to more affordable medicines and treatments.

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302 The spending was 5.7% in Latvia and 11.3% in Germany in 2016. *Source:* OECD (2017), *Health at a Glance 2017: OECD Indicators*, OECD Publishing, Paris, pp. 134-135. See: http://dx.doi.org/10.1787/health_glance-2017-en.

303 Pharmaceuticals sold in retail represented 16% of health expenditure on average across OECD countries in 2015 (or the nearest year); this figure does not yet include expenditure on pharmaceuticals in hospitals. See: https://www.oecd-ilibrary.org/docserver/health_glance-2017-68-en.pdf?expires=1551708629&id=id&accname=oid031827&checksum=EC3C51C8A5CC457130B602AD5CA1F827.

304 See: http://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/index.html.

Contribution of EU competition policy to tackling the challenges

Antitrust enforcement in the pharmaceutical sector

The Commission is actively monitoring and screening markets for diverse competition issues concerning pharmaceuticals. In 2018, the Commission initiated proceedings in two cases where it is investigating firms suspected of preventing or reducing consumers' access to effective, innovative and affordable medicines.

The first case concerns the Commission's formal antitrust proceedings against *Aspen Pharma*[305] for a suspected abuse of a dominant position infringing Article 102 TFEU. The Commission investigates allegations that Aspen may have imposed unfair and excessive prices for a range of cancer medicines in all countries in the EEA except Italy.[306]

The second case concerns the Commission's investigation into so-called pay-for-delay practices for the market entry of generic *modafinil* (a sleeping disorder medicine). A Statement of Objections was sent to *Teva* regarding an agreement with Cephalon. According to the agreement, Teva undertook not to sell its generic modafinil products in the EEA.[307] The Commission is in the process of concluding its investigation in the course of 2019.

Merger review in the pharmaceutical sector

The Commission continued its careful review of mergers in the pharmaceutical sector, to ensure availability of affordable medicines to patients across Europe, and to protect innovation and choice for consumers. On 20 November 2018, the Commission approved the acquisition of *Shire* by *Takeda Pharmaceutical Company*308, subject to the divestment of a biologic treatment product under development by Shire to treat inflammatory bowel disease. The Commission had identified the risk that that Takeda would be unlikely to continue developing Shire's new drug, causing a serious loss of innovation on a market where patients currently have few treatment options available to them.

State aid actions in the health services sector

The Commission did not adopt any State aid decisions in the field of healthcare services in 2018. In February 2018, however, the General Court annulled a Commission Decision from 2014 concerning funding measures to public health insurance companies in *Slovakia*.309 Although the General Court confirmed the Commission's finding that the Slovak compulsory health insurance system had predominant social, solidarity and regulatory features, the General Court nevertheless rejected the Commission's conclusion that the insurance companies in question did not constitute undertakings within the meaning of Article 107(1) TFEU on the ground that their activities were not economic in nature. The Commission has appealed the judgment before the Court of Justice (pending case C-262/18 P).

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305 Case AT.40394 *Aspen*. See: IP/17/1323 of 15 May 2017: http://europa.eu/rapid/press-release_IP-17-1323_en.htm and http://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_235_3.pdf.

306 The Italian competition authority already adopted an infringement decision against Aspen on 29 September 2016.

307 Case AT.39686 Cephalon, see: IP/17/2063 of 17 July 2017: http://europa.eu/rapid/press-release_IP-17-2063_en.htm.

308 M. 8955 - Takeda/Shire, See: http://europa.eu/rapid/press-release_IP-18-6497_en.htm.

309 Case T-216/15 *Dôvera zdravotná poist'ovňa v Commission,* Judgment of the General Court of 5 February 2018, see: http://curia.europa.eu/juris/liste.jsf?language=en&num=T-216/15.

8. TRANSPORT AND POSTAL SERVICES

Overview of key challenges in the sector

The transport and postal services sectors account for approximately 5% of the EU economy,[310] 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.[311]

In 2018, 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 and a modal shift to more environmentally-friendly modes of transport, as well as 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 financial difficulties encoutered by two medium-sized European airlines, WOW and Flybe, which were looking for a strong partner to continue their development.

In this context, the Commission reviewed the acquisition of sole control over *LaudaMotion* by the air carrier *Ryanair*.[312] LaudaMotion is the company through which Mr Niki Lauda re-acquired in January 2018 the assets of NIKI, the leisure air carrier he founded in 2003 and which was then later integrated into Air Berlin. The assets of NIKI were for sale because in December 2017 Lufthansa decided not to acquire NIKI and NIKI immediately filed for insolvency. As for the two mergers involving Air Berlin's assets that the Commission reviewed in 2017,[313] the Commission investigated the impact of the transaction from two angles. First, the Commission assessed the effects of the transaction on the market for air transport of passengers, more specifically on the routes from German, Austrian and Swiss airports to leisure destinations in the Mediterranean and Canary Islands, where the activities of Ryanair and LaudaMotion overlap. Second, the Commission examined whether LaudaMotion's portfolio of airport slots to be acquired by Ryanair at different airports would

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[310] See *EU transport in figures Statistical pocketbook* (2017). See: http://ec.europa.eu/transport/facts-fundings/statistics/doc/2017/pocketbook2017.pdf, p.19; prepared by the Commission with around EUR 664 billion in Gross Value Added (GVA) at basic prices, the transport and storage services sector (including postal and courier activities) accounted for approximately 5 % of total GVA in the EU-28 in 2016 (or 4.5 % excluding postal and courier services).

[311] 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.

[312] Case M.8869 *Ryanair/LaudaMotion*, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8869.

[313] Cases M.8633 *Lufthansa/Certain Air Berlin assets* and M.8672 *easyJet/Certain Air Berlin assets.*

allow Ryanair to prevent competitors from entering or expanding their presence at these airports. Control over a large slot portfolio at congested airports can result in higher barriers to entry for airlines wanting to operate to and from these airports, which in turn could result in higher fares for passengers. As no serious doubts arose either on the overlap routes or through the acquried slots, the Commission cleared the takeover unconditionally.

In 2018, in the framework of commitments attached to previous clearance decisions, a number of new applications highlighted increased interest in slots made available under the Commission commitments. In particular, the Commission received requests for additional slots by Flybe on the route connecting London Heathrow to Edinburgh,[314] and by easyJet on two routes connecting London Gatwick to Belfast and Dublin.315 Furthermore, Transavia requested additional slots at Ibiza for the city pair Paris-Ibiza under the commitments given by Iberia in the framework of the Commission clearance decision of Iberia's takeover of Clickair and Vueling.[316]

Antitrust enforcement in the aviation sector

On 23 November 2018, the Commission opened proceedings under Article 101 TFEU against computerised reservation systems[317] providers Amadeus and Sabre. The Commission suspects that certain terms in Amadeus' and Sabre's agreements with airlines and travel agents may restrict competition for the provision of ticket distribution services, by limiting the ability of airlines and travel agents to use alternative suppliers of these services.

On 30 October 2018, the Commission decided to close its antitrust investigation into a codeshare agreement between *Brussels Airlines and TAP Air Portugal* relating to the Brussels-Lisbon route. Following a thorough analysis of all relevant evidence, including the parties' responses to the Commission's statement of objections, the Commission concluded that there were insufficient grounds to confirm its initial concerns.

In early 2018, the Commission received an application from the airline *Norwegian* for take-off and landing slots at Amsterdam Schiphol and New York JFK airports, pursuant to the Commission's 2015 commitments decision relating to the Skyteam transatlantic joint venture. The Commission decided that Norwegian satisfied the conditions for the award of slots, and the Skyteam joint venture parties accordingly released three weekly slots at these two airports, enabling Norwegian to provide a daily service between Amsterdam Schiphol and New York JFK.

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[314] Case M.6447 *IAG/bmi*, Commission decision of 12 November 2018 concerning the assessment of the viability of the Applicant and evaluation of its formal bid pursuant to Clause 1.4.9 of the Commitments attached to the Commission decision of 30 March 2012 in case M.6447 – *IAG/bmi*.

[315] Case M.7541 *IAG/Aer Lingus*, Commission decision of 12 November 2018 concerning the assessment of the viability of the applicant and evaluation of its formal bid pursuant to Clause 2.26 of the Commitments attached to the Commission decision of 14 July 2015 in case M.7541 – *IAG/Aer Lingus*.

[316] Case M. 5364 *Iberia/Clickair/Vueling*, Commission decision of 12 November 2018 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*.

[317] Computerised Reservation Systems ("CRS"), also known as Global Distribution Systems ("GDS") provide a technical interface between, on one side, airlines and other travel service providers, such as rail operators, and, on the other side, travel agents (both online and brick-and-mortar). The CRSs aggregate fare, schedule and availability information provided by the airlines and supply it to the travel agents, enabling them to search for, compare, reserve and book flights, The CRSs give travel agents access to the services of hundreds of airlines worldwide and provide airlines with a distribution channel to thousands of travel agents worldwide.

State aid to airports and airlines

On 10 December 2018, the Commission adopted a communication prolonging until 2024 the specific regime for operating aid for airports with up to 700 000 passengers per year in the Aviation Guidelines adopted in 2014. The prolongation will provide legal certainty to airports with less than 700 000 passengers per year, and will align the period concerning operating aid for all airports.[318]

In addition, the Commission continued to apply the 2014 Aviation Guidelines. In 2018, the Commission adopted several decisions in cases involving operating aid to airports,[319] or the operation of an airport as a service of general economic interest.[320] The Commission also opened proceedings in relation to marketing agreements at Montpellier airport,[321] and in relation to marketing agreements and potential aid to the airport at Frankfurt-Hahn.[322]

The Commission intervened in many occasions to support Member States to ensure that investments or changes in concessions they are planning at public airports are market conform. These interventions generally require in-depth business and/or legal analyses, but are not necessarily the object of a Commission's decision. They are thus less publicized than cases subject to a decision. Nevertheless they contribute substantially to the promotion of market-conform practices.

On 12 December 2018, the Commission adopted a decision finding that the twenty-year extension of the concession for *Athens International Airport* [323] does not constitute State aid.

In April 2018, following complaints, the Commission also opened a formal investigation procedure into a EUR 900 million bridging loan granted by Italy to its flag carrier *Alitalia*.[324] The company has been in financial difficulties for several years and is currently looking for an investor. The investigation aims to establish whether the loan was granted on market terms or whether it involves State aid within the meaning of the EU rules. In the latter case, the loan needs to be in line with EU rules on the rescue and restructuring of companies in difficulty, to ensure that inefficient companies are not artificially kept alive with continued State support.

Antitrust enforcement in maritime transport

The Commission began a review of Commission Regulation 906/2009 ("the Consortia Block

[318] See: http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=list&coteId=3&documentType=COMMUNICATION_FROM_COMMISSION&version=ALL.

[319] Case SA.46945 *Erfurt-Weimar Airport*, Commission decision of 15 November 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46945; Case SA.49709, *Rostock Airport*, Commission decision of 13 September 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49709.

[320] Case SA.49482 *Highlands and Island Airports Limited - Sumburgh Airport*, Commission decision of 25 May 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49482. Case SA.49331 *SGEI compensation for Bornholm Airport*, Commission decision of 16 April 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49331; Case SA.49203 *SGEI Compensation for Bacau Airport*, Commission decision of 6 September 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49203.

[321] Case SA.47867 *Aide présumée en faveur de Ryanair à l'aéroport de Montpellier*, Commission decision of 5 July 2018, see : http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47867.

[322] Case SA.43260 *Alleged aid to Frankfurt Hahn Airport and Ryanair*, Commission decision of 26 October 2018, see: http://europa.eu/rapid/press-release_IP-18-6222_en.htm.

[323] See: http://europa.eu/rapid/press-release_IP-18-6785_en.htm.

[324] Case SA.48171 *Complaints against alleged State aid in favour of Alitalia*, Commission decision of 23/04/2018, see: at http://ec.europa.eu/competition/state_aid/cases/274312/274312_1991247_21_2.pdf; and IP/18/3501, see: http://europa.eu/rapid/press-release_IP-18-3501_en.htm.

Exemption Regulation"),[325] with a view to informing its decision on the future of the Regulation in view of its statutory expiration on 25 April 2020.[326] On 7 May 2018, the Commission invited the public to comment on the evaluation Roadmap and on 27 September 2018 the Commission launched a 12-week public consultation on the Regulation, inviting the public to respond to a questionnaire or otherwise make its views known.[327] In addition, targeted questionnaires were sent to groups of major stakeholders (shipping companies, customers and ports) and the Competition authorities of the Member States were invited to contribute.

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.

A wave of consolidation can be observed, which started in 2014 with the merger of *Hapag-Lloyd and CSAV*[328] and intensified in 2016 and 2017. In 2018, the Commission assessed the acquisition of control over *Container Finance Ltd Oy*, of Finland, by the French group *CMA CGM*.[329] Both CMA CGM and Container Finance provide intra-European door-to-door multimodal transport services and, to a lesser extent, container terminal services and freight forwarding services. Due to its limited structural impact on these services in the EEA, the Commission cleared the merger without conditions.

Moreover, the Commission investigated the (reverse) vertical integration of *Unifeeder*, of Denmark, into the *DP World group*, based in the United Arab Emirates.[330] Unifeeder is active in the provision of maritime transportation services for containerised goods including feeder services (transport of cargo between hub ports and out-ports) and short sea services (transport of cargo from point to point). Unifeeder operates primarily in Northern Europe and the Mediterranean. DP World is a global marine terminals operator.

The Commission analysed whether the vertically integrated entity would have the ability and

[325] Council Regulation 246/2009 provides that, in accordance with the provisions of Article 101(3) TFEU, the Commission may, by way of Regulation, exempt consortia agreements from the application of Article 101(1) TFEU for a period limited to five years with the possibility of prolongation. Accordingly, in 2009 the Commission adopted the Consortia Block Exemption Regulation which sets the specific conditions for the exemption of consortia agreements. These conditions notably aim at ensuring that customers enjoy a fair share of the resulting benefits.

[326] Liner shipping services consist of the provision of regular, scheduled maritime cargo transport on a specific route. They require significant levels of investment and therefore are regularly provided by several shipping companies cooperating in "consortia" agreements. Consortia can lead to economies of scale and better utilisation of the space of the vessels.

[327] For the Roadmap, consultation documents and further information on the evaluation, see: http://ec.europa.eu/competition/consultations/2018_consortia/index_en.html.

[328] 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.

[329] Case M.9016 *CMA CGM/Container Finance*, Commission decision of 22 October 2018, will become available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_by_date.

[330] Case M.9093 *DP WORLD INVESTMENTS / UNIFEEDER*, Commission decision of 4 December 2018, will become available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_by_date.

incentive to foreclose customers. The Commission considered that, even if Unifeeder's feeder volumes were re-routed to DP World's terminals in Belgium, France, the Netherlands, the United Kingdom, or Cyprus, this would only have a limited impact on the capacity utilisation of DP World's rivals for terminal services. The majority of the respondents to the Commission’s market investigation did not foresee any significant negative impact on their companies due to the proposed transaction. For these reasons, the Commission concluded that the implementation of a customer foreclosure strategy by Unifeeder in Belgium, France, the Netherlands, the United Kingdom, or Cyprus would be unlikely to have overall negative effects on effective competition. The transaction was cleared without conditions.

State aid enforcement in the maritime transport sector

In 2018, the Commission continued to ensure compliance with the Maritime State aid Guidelines.[331] The aim of those Guidelines is to maintain the European maritime sector's competitiveness. The Commission is determined to ensure consistency and equal treatment throughout the EU while at the same time making sure that the beneficial tonnage tax regimes do not contravene internal market rules.

In order to support that objective and ensure compliance with the Commission's current interpretation of the Maritime State aid Guidelines, the Commission organized two technical meetings on the enforcement of the 2004 Guidelines on State aid to Maritime Transport with the Member States and sector representatives (both ship owners and seafarer representatives) on 13 and 21 June 2018 respectively. In these meetings, the Commission described the technical standards that it had progressively developed to ensure compliance with the objectives of the Maritime Guidelines and with the internal market rules as a response to questions of interpretation which arose over time regarding certain provisions of the guidelines.

Moreover, on 6 April 2018, the Commission approved the first tonnage tax and seafarer scheme put in place by Portugal.332 The Commission found that the scheme would encourage ship registration in Europe and contribute to the competitiveness of maritime transport while preserving employment in the sector and promoting high environmental standards.

On 12 July 2018, the Commission also approved State aid to five ferry connections between Croatian islands and the mainland to be operated as services of general economic interest.333 The aid will be granted to maritime companies selected through public tenders and will cover the difference between revenues from ferry tickets and the cost of operating the ferries regularly so as to allow the islands' inhabitants to commute daily to work or study, as well as to transport vehicles and supplies to and from the islands. The Commission found that the aid is necessary to ensure operation of the routes with adequate frequencies over the whole year, since ticket revenues exceed the cost of the ferry operations only during the summer peak season.

[331] Communication from the Commission, *Community guidelines on State aid to maritime transport*, OJ C 13, 17.01.2004, p. 3. See: http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:52004XC0117(01).

[332] Case SA.48929 (2018/N) - *Portugal - Tonnage Tax and Seafarer Scheme*. See: http://europa.eu/rapid/press-release_IP-18-2842_en.htm.

[333] Cases SA.48119 (2017/N) and SA.49523 (2017/N) – *Croatia –SGEI* – scheduled coastal maritime public transport on the ferry routes Nos 431, 432, 632 and 635. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48119. and http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49523.

On 12 October 2018, the Commission approved the extension of an existing *Danish tonnage tax scheme* to new types of vessels[334] (guard vessels, vessels servicing off-shore installations, and vessels for raising, repairing and dismantling wind turbines). The Commission considered that these types of vessels are involved in maritime activities that are subject to the same legal requirements and competitive conditions as maritime transport. The Commission also took into account commitments from Denmark to amend certain aspects of its existing tonnage tax scheme to align it with the Commission's current interpretation of the Maritime Guidelines (notably regarding ancillary services and bareboat chartering out activities).

Furthermore, the Commission approved the prolongation of the *Dutch scheme*[335] and the prolongation and extension of the French scheme[336] for the reduction of social contributions for seafarers subject to the commitment by the Netherlands and France to open their schemes to all EEA-flagged vessels.

Antitrust enforcement in the rail sector

On 25 September 2018 the Commission adopted a Statement of Objections against the Slovak rail company *ZSSK*337 for obstruction of a Commission inspection. The Commission carried out inspections at the ZSSK premises in June 2016. The inspection focussed on whether ZSSK had entered into anti-competitive agreements aimed at excluding its competitors on the rail passenger market, in breach of EU antitrust rules.

In the Statement of Objections, the Commission took the preliminary view that ZSSK may have obstructed the inspection by providing incorrect information about the location of the laptop of one of its employees and by failing to provide requested data from this laptop by allowing its re-installation. Therefore, ZSSK may not have fulfilled its obligation to comply with the inspectors’ requests under Regulation 1/2003.

Rail and intermodal State aid enforcement

In 2018, 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.[338]

[334] Case SA.45300 - Denmark - *Amendment of the Danish Tonnage Tax scheme* (Extension of the tonnage tax scheme to cover a number of specialized vessels). See: http://europa.eu/rapid/press-release_IP-18-6107_en.pdf.

[335] Case SA. 46727 – The Netherlands - *Prolongation of the extension of reduced remittances for maritime navigation to commercial cruising vessels*, Commission decision of 7 November 2018, OJ C 462 of 21 December 2018, p.1.

[336] Case SA. 46309 – France – *Modification du régime d’allègement des charges sociales patronales des entreprises d’armement maritime*, Commission decision of 20 December 2018. See: http://europa.eu/rapid/midday-express-20-12-2018.htm.

[337] Case AT.40565 *ZSSK procedural case*. See: IP/18/5905 of 25 September 2018 http://europa.eu/rapid/press-release_IP-18-5905_en.htm.

[338] Case SA.49153 - Czechia - *Aid for intermodal transport units*, Commission decision of 15 May 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49153; Case SA.49518 - United Kingdom - *Freight Facilities Grant*, Commission decision of 15 October 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49518; Case SA.49749 - Sweden - *Environmental compensation for rail freight transport*, Commission decision of 20 April 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49749; Case SA.50165 - Germany - *Support for the promotion of energy efficiency in rail transport*, Commission

Moreover, the Commission continued its investigation into State measures in favour of the ailing state-owned Romanian rail freight operator *CFR Marfa*, opened in December 2017 following a complaint by the Association of Romanian Private Rail Freight Operators.[339] Since the liberalisation of the Romanian rail freight transport market in 2007, numerous private operators have successfully entered the market, which is highly competitive. It is therefore particularly important that public interventions do not relieve selected companies from normal business costs that their competitors have to bear. The Commission's investigation focuses on a debt-to-equity swap of around EUR 360 million as well as the non-collection of social security debts, taxes and debts towards the public rail infrastructure manager CFR Infrastructure. The Commission will examine whether these measures have procured CFR Marfa an unfair economic advantage over its competitors.

In January 2018, the Commission opened an in-depth investigation into the restructuring of Polish Regional Railways.[340] the largest passenger regional rail operator in Poland. The company has been in financial difficulties for some time. In 2015, Poland notified restructuring aid of around EUR 188 million in favour of the company. Under EU rules, companies in difficulty can receive restructuring aid only once in ten years (the "one-time / last-time" principle). This is to avoid that ailing firms rely on public funding to stay in business, instead of improving their business performance and competing on the merits. During its investigation, the Commission found that Polish Regional Railways had already received State support in the past. The Commission now has to determine, in particular, whether this past aid qualifies as restructuring aid and whether the 2015 restructuring support is in line with the one-time/last-time principle.

State aid review in the road sector

The Commission continued to enforce Regulation (EC) No 1370/2007 on public passenger transport services.[341]

Recent case law[342] has confirmed the Commission approach on the application *rationae temporis* of the application of the above-mentioned Regulation. More specifically, these

decision of 26 July 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50165; Case SA.50217 - Sweden - *Swedish Eco-bonus scheme for short sea shipping and inland waterway transport*, Commission decision of 9 November 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50217; Case SA.50395 - Germany - *Offshore-surcharge reduction for railway undertakings in Germany*, Commission decision of 27 March 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50395; Case SA.50584 - Belgium - *Structural aid measure reducing the cost disadvantage of bundling volumes transported by rail/inland waterways to and from Flemish seaports in order to promote a modal shift* Commission decision of 24 October 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50584.

339 Case SA.43549 - Alleged aid to CFR Marfa, Commission decision of 18 December 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43549; and IP/17/5345, see: http://europa.eu/rapid/press-release_IP-17-5345_en.htm.

340 Case SA.43127 *Restructuring of the Polish Regional Railways*, Commission decision of 23 January 2018, see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43127; and IP/18/394, see: http://europa.eu/rapid/press-release_IP-18-394_en.htm.

341 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.

342 Judgement T720/16 *Arfea v Commission* and Judgements T185/15 *Buonotourist v Commission* and T186/15 *CSTP v Commission*.

judgments confirmed that the compatibility of public measures adopted in the past but continuing having effects (i.e. they continue to provide aid), are assessed not on the basis of old rules but on the basis of the rules which are applicable at the moment the aid measures produce effects that fall within the scope of the new rules, unless the new rules explicitly exclude them from their scope.

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 distort competition 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 February 2018, the Commission approved in two decisions two sets of compensations in favour of *Czech Post*: the first one amounting to CZK 2.6 billion (around EUR 97 million) for the delivery of the universal postal service over 2013-2017[343] and the second one amounting to CZK2.3 billion (around EUR 86 million) for the provision of a Data Boxes Information System over the period 2018-2022.[344]

In May 2018, the Commission also approved compensations in favour of *Post Denmark* amounting to DKK 1.2 billion (around EUR 160 million) for the delivery of the universal postal service over 2017-2019.[345]

Finally, in July 2018, the Commission concluded its investigation in the *Correos*[346] case with a negative decision with recovery. The Commission found that Correos, the publicly-owned Spanish postal operator, was overcompensated for the delivery of its universal postal service obligation between 2004 and 2010, and also benefited from incompatible tax exemptions. The recovery amounted to EUR 167 million.

Anti-trust Enforcement in Legal Services

In early 2018, the Commission raised concerns about the compatibility with the competition rules of the *Cyprus Bar Association's*[347] minimum fees scale for out-of-court work. In this

[343] Case SA.45281 (2017/N) and State Aid SA.44859 (2016/FC) – Czech Republic – *State compensations granted to Czech Post for the provision of the universal postal service over the period 2013-2017*.

[344] Case SA.47293 (2017/N) – Czech Republic – *State compensations granted to Czech Post for the provision of the Data Boxes Information System over the period 2018-2022*.

[345] Case SA.47707 SA.47707(2018/N) – Denmark – *State compensations granted to PostNord for the provision of the universal postal service*. See: http://europa.eu/rapid/press-release_IP-18-3965_en.htm.

[346] Case SA.37977 *Complaint regarding unlawful State aid in favour of Sociedad Estatal Correos y Telégrafos, S.A*. See: http://europa.eu/rapid/press-release_IP-18-4444_en.htm.

[347] See: http://europa.eu/rapid/press-release_MEMO-18-6247_en.htm.

context out-of-court work includes for instance the drawing up of wills and contracts, the administration of estates and the registration of companies.

The relevant minimum fees for out-of-court work had been adopted by the Cyprus Bar Association pursuant to legislation adopted by the Cypriot State (the Advocates' Law). Member States are required under Article 4 (3) TEU to sincerely cooperate in applying the competition rules. The Commission took the preliminary view that the Cypriot State, by empowering the Cypriot Bar Association to adopt the minimum fee scale, had failed in its duty to sincerely cooperate in applying the competition rules. Moreover, the Commission raised concerns with the Cypriot authorities that certain provisions of the Advocates' Law were incompatible with EU competition rules. In response to the concerns raised, Cyprus amended the legislation in question by removing the specific provision empowering the Cyprus Bar Association to set these fees. In response to the Commission's concerns, the Cyprus Bar Association abrogated the minimum fee scale, and the Commission could close its antitrust investigation in November 2018.

ANNEX

Banking State aid cases: Decisions adopted by the Commission in 2018

By country

	Member States	Case Number/Title		Type of Decision	Date of Adoption
1	Austria	SA.48840(2018/N) -	Austrian Risk Capital Premium Scheme	Decision not to raise objections	11/07/2018
2	Cyprus	SA.35334(2018/N-2) -	Liquidation aid for the orderly market exit of Cyprus Cooperative Bank Ltd	Decision not to raise objections	19/06/2018
3	Cyprus	SA.35334(2018/N-3) -	Liquidation aid for the orderly market exit of Cyprus Cooperative Bank Ltd	Decision not to raise objections	28/08/2018
4	Denmark	SA.51200(2018/N) -	Prolongation of the winding-up scheme for small banks	Decision not to raise objections	31/08/2018
5	Greece	SA.51087(2018/N) -	Prolongation of the Greek State Guarantee Scheme for banks (Art. 2 law 3723/2008)	Decision not to raise objections	07/06/2018
6	Ireland	SA.52132(2018/N) -	Eighth prolongation of the Credit Union restructuring and stabilisation scheme	Decision not to raise objections	08/11/2018
7	Ireland	SA.50953(2018/N) -	13th prolongation of the Credit Union Resolution Scheme 2018	Decision not to raise objections	25/05/2018
8	Ireland	SA.50692(2018/N) -	Seventh prolongation of the Credit Union restructuring and stabilisation scheme	Decision not to raise objections	30/04/2018
9	Italy	SA.51026(2018/N) -	Prolongation of the Italian guarantee scheme for the securitisation of non-performing loans	Decision not to raise objections	31/08/2018
10	Italy	SA.50640(2018/N) -	Italy - liquidation scheme for small banks	Decision not to raise objections	13/04/2018
11	Netherlands	SA.48350(2017/N) -	Uitgebreide groeifaciliteit – Nederlandse garantieregeling voor middelgrote en grote ondernemingen met een aanzienlijk groeipotentieel – Nederland	Decision not to raise objections	26/03/2018
12	Netherlands	SA.48197(2018/N) -	Groeifaciliteit	No aid decision	09/07/2018
13	Poland	SA.51482(2018/N) -	Eighth prolongation of the Credit Unions Orderly Liquidation Scheme	Decision not to raise objections	31/08/2018

14	Poland	SA.51403(2018/N) -	Second prolongation of the resolution scheme for cooperative banks and small commercial banks	Decision not to raise objections	10/08/2018
15	Poland	SA.51235(2018/N) -	Eighteenth prolongation of the Polish bank guarantee scheme	Decision not to raise objections	11/07/2018
16	Portugal	SA.51042(2018/N) -	17th Extension of the Portuguese Guarantee Scheme	Decision not to raise objections	09/08/2018
17	Portugal	SA.51041(2018/N) -	Ninth Prolongation of the Portuguese Guarantee Scheme on EIB lending	Decision not to raise objections	09/08/2018
18	Slovenia	SA.33229(2017/N-3) -	Amendment of the restructuring commitments of Nova Ljubljanska Banka d.d.	Positive final decision	10/08/2018
19	Slovenia	SA.33229(2018/N-4) -	Amendment of the restructuring commitments of Nova Ljubljanska Banka d.d.	Decision not to raise objections	10/08/2018
20	United Kingdom	SA.49923(2018/N) -	Amendments to the existing aid scheme "Enterprise Investment Scheme" and "Venture Capital Trust scheme"	Decision not to raise objections	05/07/2018