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COMMISSION STAFF WORKING DOCUMENT
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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE
COMMITTEE OF THE REGIONS**

Report on Competition Policy 2016

{COM(2017) 285 final}

TABLE OF CONTENTS

I.	LEGISLATION AND POLICY DEVELOPMENTS.....	3
	Antitrust and cartels.....	3
	1. Guidance in antitrust and cartel proceedings	3
	2. Significant judgments by the EU Courts in antitrust and cartels.....	5
	3. The fight against cartels remains a top priority	11
	4. Continuing close cooperation within the European Competition Network (ECN) and with national courts.....	14
	Merger control	15
	1. Evaluation of selected procedural and jurisdictional aspects of EU mergers	16
	2. Recent enforcement trends	17
	State aid control	19
	1. Uptake of the State Aid Modernisation	19
	2. State Aid Modernisation continues.....	26
	3. Monitoring, recovery and cooperation with national courts.....	29
	4. Significant judgments by EU Courts in the State aid area	31
	Developing the international dimension of EU competition policy.....	34
	1. Bilateral relations	34
	2. Multilateral cooperation	36
II.	SECTORAL OVERVIEW.....	37
	1. Energy & environment	37
	2. Information and Communication Technologies (ICT) and media	43
	3. Financial services	50
	4. Taxation and State aid	55
	5. Basic industries and manufacturing	58
	6. Agri-food industry	62
	7. Pharmaceutical and health services sector	65
	8. Transport and postal services	69

I. LEGISLATION AND POLICY DEVELOPMENTS

Competition policy helping make markets work more fairly

The EU remains the largest economic and trading area in the world, with more than half a billion consumers and 20 million companies forming its strongest lever – the internal market. The on-going process of improving and expanding the functioning of the single market goes hand in hand with developing competition policy. In essence, competition policy ensures that companies can compete on equal terms all across Europe.

But competition policy also has another dimension – the social side – as referred to in the State of the Union speech 2016¹. Enforcement of competition policy can contribute towards a fairer economy and promote markets so that businesses and consumers can get a fair share of the benefits of growth. Taken together, competition policy actions in the antitrust area, under the merger control and State aid control can make a real difference helping make markets work more fairly, for example, they stimulate innovation, prevent abuses from dominant players, contribute towards a connected Digital Single Market, a deeper and fairer internal market, an integrated and climate-friendly Energy Union, support competition-friendly regulation and foster a global competition culture.

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. Even if a horizontal or a vertical agreement could be viewed as restrictive (for example by combining the production of two competing companies) it might be allowed under Article 101(3) TFEU if it ultimately fosters competition (for example by promoting technical progress or by improving distribution).

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

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

1. Guidance in antitrust and cartel proceedings

In 2016, in order to further increase transparency of antitrust proceedings and to offer guidance to parties and practitioners, the Commission continued its work to facilitate access to file. It also developed the so far limited practice of cooperation in antitrust proceedings and actively engaged in work on the interaction of competition policy, personal data and big data.

The right to have access to the Commission's file is a central element of the rights of defence. The preparation of non-confidential versions of all documents on file for the purpose of granting access implies a significant burden on parties, third parties and the Commission. One

¹ State of the Union speech 2016 available at http://ec.europa.eu/priorities/state-union-2016_en

way to reduce this burden for all involved could be an increased use of the so-called "voluntary confidentiality rings". In 2016, the Commission continued to develop its practice of providing access to file through voluntary "negotiated disclosure" – also known as "confidentiality rings" – as set out in paragraph 96 of the Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU². The Commission used confidentiality rings in several cases in 2016, which allowed for more efficient access to file for undertakings subject to investigation, third parties and the Commission.

Furthermore, in non-cartel antitrust cases leading to a prohibition decision, there is no structured framework (comparable to settlements and leniency in cartels) to reward cooperation by the parties. Although rewards for cooperation by means of fines reduction are possible within the existing legal framework, there have so far been little incentives for the parties to cooperate in non-cartel antitrust prohibition decisions. There may be room, however, for the Commission to reward genuine and meaningful cooperation by parties through acknowledgment of the infringement, disclosure of evidence and/or the proposal of remedies. The possible level of fines reduction depends on the extent and timing of the cooperation in the specific case and the resulting benefits in terms of efficient procedure and effective enforcement. The first example of such a cooperation in 2016 was the ARA case³.

In 2016, the Commission also continued to actively work on the interaction of competition policy, personal data, and big data from both the antitrust angle and the merger control angle. The Commissioner set out some key issues in three speeches, including on the competition concerns and benefits of data sharing⁴. The interaction of competition policy and data was also discussed several times with the national competition authorities in the European Competition Network. As noted in the press release accompanying the Microsoft / LinkedIn merger clearance decision⁵, *"Privacy related concerns as such do not fall within the scope of EU competition law, but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor"*. In this instance, the Commission concluded that data privacy was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction⁶. Finally, the Commission continues to actively monitor markets in this area, both from an antitrust perspective and from a merger control perspective.

² Commission notice on *Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU*, OJ C 308, 20.10.2011, p. 6, paragraph 96.

³ For further details of the case see Section II.1 on Energy and Environment at p. 39.

⁴ For further information see https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world_en;

https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-data-work-us_en and https://ec.europa.eu/commission/2014-2019/vestager/announcements/big-data-and-competition_en

⁵ Case M.8124 *Microsoft / LinkedIn*, Commission decision of 6 December 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8124

⁶ For further information see IP/16/4284 of 6 December 2016 available at http://europa.eu/rapid/press-release_IP-16-4284_en.htm

2. Significant judgments by the EU Courts in antitrust and cartels

Article 101 TFEU

Reverse payments in patent settlements

In its judgments handed down on 8 September⁷ the General Court ruled for the first time on pay-for-delay agreements in the pharmaceutical sector. The General Court basically upheld the Commission's *Lundbeck* decision. It considered that Lundbeck and the generic undertakings concerned were potential competitors at the time the agreements at issue were concluded. It recalled that, in order to establish that an agreement restricts potential competition, it must be shown that, if the agreement had not been concluded, the competitors would have had real concrete possibilities of entering that market. The General Court considered that the Commission carried out a careful examination, as regards each of the generic undertakings concerned, of the real concrete possibilities they had of entering the market, relying on objective evidence such as the investments already made, the steps taken in order to obtain a marketing authorisation and the supply contracts concluded with suppliers of active pharmaceutical ingredients.

The General Court also confirmed that the Commission was entitled to conclude that the agreements at issue constituted a restriction of competition by object. The General Court found that in the agreements, a reverse payment was combined with an exclusion of generic competitors from the market or a limitation of the incentives to seek market entry. The reverse payments bought off competition. The General Court held there was uncertainty on patent law questions. Replacing that uncertainty in relation to whether or not the generic undertakings were infringing and to the validity of the applicants' patents with the certainty that the generic undertakings would not enter the market during the term of the agreements at issue constitutes, as such, a restriction on competition by object, when that result is obtained through a reverse payment. The General Court took the view that Lundbeck did not demonstrate that the restrictions set out in the agreements at issue were objectively necessary in order to protect its intellectual property rights. The General Court also confirmed that generic undertakings were exerting competitive pressure on Lundbeck. That competitive pressure was eliminated for the term of the agreements at issue, which constitutes, by itself, a restriction of competition by object. In conclusion, the General Court considered the agreements at issue were comparable to market exclusion agreements. The General Court made clear that the exclusion of competitors from the market constituted an extreme form of market sharing and of limitation of production.

Infringements "by effects" in two-sided markets

In the *Groupement des Cartes Bancaires*⁸ (CB) judgment of 2016, the General Court confirmed the Commission's finding that the fees adopted by CB had the effect of restricting

⁷ Cases T-472/13H *Lundbeck A/S and Lundbeck Ltd v Commission*, EU:T:2016:449; T-460/13 *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd and Ranbaxy (United Kingdom) Ltd v Commission*, EU:T:2016:453; T-467/13 *Arrow Group ApS and Arrow Generics Ltd v Commission*, EU:T:2016:450; T-469/13 *Generics (United Kingdom) Ltd v Commission*, EU:T:2016:454; T-470/13 *Merck KGaA v Commission*, EU:T:2016:452; T-471/13 *Xellia Pharmaceuticals ApS and Alphaarma, LLC, formerly Zoetis Products LLC v Commission*, EU:T:2016:460.

⁸ Case T-491/07 *RENV CB v Commission*, judgment of the General Court of 30 June 2016, EU:T:2016:379. The case was sent back to the General Court for the examination of the Commission's effects analysis after the Court of Justice held in 2014 (in case C-67/13P *Groupement des Cartes Bancaires (CB) v Commission*, judgment of the Court of 11 September 2014) that the General Court erred in law when accepting that the measures

competition in the French payment card issuing market, notably by discouraging the issuing of CB cards, increasing their price, preserving the revenues of the funding members of CB, and limiting technical development of the CB card system.

The judgment of the General Court follows the case law of the Court of Justice in the *MasterCard* judgment of 2014 concerning the analysis of "by effect" infringements in two-sided markets. In particular, concerning the implementation of Articles 101(1) and 101(3) TFEU in two-sided markets, the General Court stated that the analysis of the possible anti-competitive effects of a conduct must be made taking into consideration the legal and economic context in which the conduct takes place; in the case of two-sided markets, this means that one must also consider the interactions between the two-sides of the system. However, the balancing test of pro and anti-competitive effects must be made in the framework of Article 101(3) TFEU. Concerning the analysis of anticompetitive effects in two-sided markets, the General Court also confirmed that one of the sides may be considered as the relevant market for the purposes of analysing possible anti-competitive effects of a given behaviour and that the fact that there are interactions between the two-sides is an element of the context to be considered when analysing the effects. Concerning the analysis of the alternative framework of assessment, the General Court confirmed that this analysis must be made within the same market in which the Commission has identified anticompetitive effect.

Reciprocal obligations not to compete

In its *Telefónica* and *Portugal Telecom* judgments⁹ the General Court confirmed the Commission's finding that the clause concluded by Telefónica and Portugal Telecom not to compete with each other on the Iberian telecommunications markets, constituted a restriction of competition by object. The General Court confirmed that the Commission was not obliged to undertake a detailed analysis of the structure of the market concerned and of the potential competition between the companies on these markets before finding such an infringement.

The General Court nevertheless required the Commission to recalculate the value of sales and therefore the amount of the fines, on the basis of the sales of Telefónica and Portugal Telecom directly or indirectly linked to the infringement. In order to determine the value of the companies' sales to be taken into consideration for the calculation of the amount of the fines, the General Court asked the Commission to examine the arguments of Portugal Telecom and Telefónica in their replies to the statement of objections seeking to establish that there was no possibility of competition between them with regard to certain services.

Restriction by object

In its judgments in the *Smart card chips* case¹⁰ the General Court confirmed that an exchange of information on current and future prices as well as on capacities is in view of the market characteristics capable of influencing directly the commercial strategy of competitors and therefore an infringement by object. The same applies to the information to a competitor not to compete in respect of a product at a certain price because this information reduces the uncertainty which should exist between competitors.

introduced by CB were to be seen as restrictions of competition by object. The Court of Justice referred the case back to the General Court to determine whether the measures nonetheless had an anticompetitive effect.

⁹ Cases T-216/13 *Telefónica v Commission* and T-208/13 *Portugal Telecom v Commission*, judgments of the General Court of 28 June 2016, EU:T:2016:369 and EU:T:2016:368.

¹⁰ Cases T-758/14 *Infineon v Commission* and T-762/14 *Philips v Commission*, judgments of the General Court of 15 December 2016, EU:T:2016:737 and EU:T:2016:738.

Fines and inability to pay

On 29 February, the General Court handed down six judgments¹¹ in the *Freight Forwarding* case confirming in nearly all respects the cartel decision adopted against that international cartel in this sector of services. The cartel involved 15 undertakings, with each of them participating in at least one of four distinct cartels in the sector of international air freight forwarding services. The judgments upheld the Commission's fining methodology and its application of the 2006 Fining Guidelines. In particular, the General Court confirmed that even if cartel participants agree only on a certain price component of the overall price paid by the customers (in this case surcharges imposed on customers), this does not prevent the Commission from calculating the fine on the basis of the complete turnover generated by the sales of the final product or service containing this cartelised component.

On 7 September, the Court of Justice handed down the last judgment¹² against the UK based undertaking Pilkington in the *Carglass* case. The Court of Justice confirmed that the Commission was entitled, for the purpose of calculating the fine, to take into account the sales made during the infringement period on the basis of contracts concluded prior to that period. The overall plan of the cartel was to allocate all supplies of automotive glass between the cartel participants, with respect to both existing supply contracts and new contracts. It follows that all the sales of car glass had to be regarded as coming within the scope of the cartel and could be taken into account for the purposes of determining the fine, including those made pursuant to contracts that pre-dated the infringement period.

To calculate the legal maximum of 10% of the total turnover set out by Article 23 of Regulation 1/2003, the Commission took the average exchange rate EUR/GBP of the year preceding the adoption of the decision. The Court of Justice backed the choice made by the Commission as it corresponded to the period relevant for the calculation of the legal maximum and as it best met the requirement of predictability.

Finally, the Court of Justice confirmed the General Court's findings that the fact that the applicant's activities were less diversified compared with the other groups involved in the infringement was not capable of justifying a reduction of the fine. Also, the possible difference in proportion of the fine in relation to the total turnover of the undertaking(s) concerned is not a sufficient justification for departing from the standard methodology as set out by the Fining Guidelines.

In a judgment of 20 January, in the *Power Transformers* case¹³, the Court of Justice confirmed the application of point 18 of the 2006 Fining Guidelines, which provides for a method of attributing value of sales to such parties which had due to a market sharing arrangement no sales in the EEA. The Court of Justice stated that the objective of point 18 was to reflect in the most appropriate way possible the weight and economic power of the cartelists in order to ensure that the fine has a sufficient deterrent effect. Therefore, the Commission was right not to limit the determination of the market shares to the territories affected by the cartel, but to use the worldwide market shares to calculate each party's share in the value of sales generated in the EEA.

¹¹ Cases T-251/12 *EGL and Others v Commission*; T-254/12 *Kühne + Nagel International and Others v Commission*; T-265/12 *Schenker Ltd v Commission*; T-264/12 *UTi Worldwide Inc. and Others v Commission*; T-267/12 *Deutsche Bahn AG and Others v Commission*; and T-270/12 *Panalpina World Transport (Holding) Ltd and Others v Commission*, judgments of the General Court of 29 February 2016, EU:T:2016:114, EU:T:2016:113, EU:T:2016:111, EU:T:2016:112, EU:T:2016:110 and EU:T:2016:109.

¹² Case C-101/15P *Pilkington et al. v Commission*, judgment of the Court of 7 September 2016, EU:C:2016:631.

¹³ Case C-373/14P *Toshiba Corporation v Commission*, judgment of the Court of 20 January 2016, EU: C: 2015:427.

In a judgment of 14 July, in the *Marine Hoses* case¹⁴, the General Court confirmed the increase in the fine imposed by the Commission for the aggravating circumstance of cartel leadership and found that the 'coordination' of the cartel has been managed by two cartelists, upholding the Commission's assumption that there can be two leaders operating at the same time.

In a further judgment in the *Pre-stressing Steel* case of 2 June¹⁵, the General Court dismissed a number of appeals lodged by a Spanish group of companies, including the appeals against the rejection of the pre-decision and post-decision "inability to pay" (ITP) requests. In its judgment, the General Court confirmed that, when assessing the undertaking's ability to pay the fine, the financial situation of the shareholders could be taken into account even if these shareholders were not liable for the infringement. Moreover, the General Court considered as inadmissible appeals against the rejection of the post-decision ITP requests because those requests did not demonstrate that the financial situation of these companies had changed significantly since the Commission decision of 30 June 2010 which rejected the initial ITP requests. A number of judgments and orders¹⁶ of the Court of Justice in the *Pre-stressing Steel* case rejected the parties' appeals and thereby confirmed the Commission decision.

Application of 2006 Leniency Notice

In judgments¹⁷ in the *Freight Forwarding* case the General Court confirmed the scope of the immunity decision. The General Court did not consider it too broad although it has covered all surcharges covered in the Commission decision, some of which were not explicitly mentioned by the immunity applicant in its application. The General Court found that pursuant to 2006 Leniency Notice, it is not required that the materials submitted by the immunity applicant constitute evidence pertaining specifically to the infringements identified by the Commission in its final decision. Instead, it is sufficient that the materials provided enable the Commission to carry out a targeted inspection in connection with a behaviour which covers the infringement(s) that the Commission finds to exist in its final decision.

A preliminary ruling¹⁸ by the Court of Justice on 2 January provided some clarifications about the legal status of summary application before national competition authorities. The model leniency programme of the European Competition Network (ECN) foresees that companies which make a leniency application with the Commission can make simplified applications to national competition authorities (called "summary application") to secure their leniency rank with the national competition authorities as well, in case the Commission will not deal with the case. The Court of Justice found that the ECN model leniency programme was not binding on the national competition authorities and stated that there was no legal link between an immunity application submitted to the Commission and the summary application submitted to

¹⁴ Case T-146/09 RENV *Parker Hannifin Manufacturing and Parker-Hannifin v Commission*, judgment of the General Court of 14 July 2016, EU: T: 2016: 411.

¹⁵ Cases T-426/10 to 429/10 and T-438/12 to 441/12 *Global Steel Wire, Moreda-Riviere Trefilerías SA and Others v Commission*, judgment of the General Court of 2 June 2016, EU: T: 2016:335.

¹⁶ Cases C-490/15 P *Ori Martin v Commission* and C-505/15 P *Siderurgica Latina Martin SpA (SLM) v Commission*, judgment of the Court of 14 September 2016, EU:C:2016:678; C-510/15 P *Fapricela v Commission*, order of the Court of 7 July 2016, EU:C:2016:547; C-514/15 P *Hit Groep BV v Commission*, order of the Court of 7 July 2016, EU:C:2016:57; C-519/15 P *Trafilerie Meridionali v Commission*, judgment of the Court of 14 September 2016, EU:C:2016:682; C-523/15 P *Westfälische Drahtindustrie and Others v Commission*, order of the Court of 7 July 2016, EU:C:2016:541.

¹⁷ Cases T-265/12 *Schenker Ltd. v Commission* and T-267/12 *Deutsche Bahn AG and Others v Commission*, judgments of the General Court of 29 February 2016, EU: T: 2016:111 and EU: T: 2016:110.

¹⁸ Case C-428/14 *DHL Express (Italy) and DHL Global Forwarding (Italy) SpA v Autorita Garante della Concorrenza e del mercato*, judgment of the Court of 20 January 2016, EU:C:2016:587.

a national competition authority. Therefore, the national competition authority was not obliged to interpret the summary application in the light of the application submitted to the Commission. Further, the effective application of Article 101 TFEU did not preclude that a national leniency programme allows the acceptance of a summary application submitted by an undertaking which had not submitted an application for full immunity before the Commission.

Level of reasoning

On 13 December, the General Court annulled the fine imposed on one of the parties in the *Envelopes*¹⁹ settlement case after having found that the recitals concerning discretionary reductions granted in view of *inter alia* the parties' mono-product character were not sufficiently reasoned to allow the parties and the court to verify the respect of the equal treatment principle. The General Court underlined that the duty to state reasons must be complied with all the more rigorously when the Commission uses its discretion to depart from its Fining Guidelines. Although this was the first review by the General Court of a settlement decision, the level of reasoning in the concerned recitals fully mirrored the reasoning used in other decisions where such mono-product reductions have been granted, including decisions adopted under the normal procedure. The annulment was therefore not due to a more streamlined reasoning of a settlement decision.

Use of evidence

In its judgment of 8 September in the *Shrimps*²⁰ case, the General Court confirmed that wiretaps found during an inspection are admissible as evidence in cartel cases, irrespective of whether those wiretaps were made legally or not. What counts is that the Commission has obtained the wiretaps lawfully and that the parties had received all opportunities to defend themselves against the gathering and usage of this information. As in the case of any other type of document, once admissible, the wiretaps can be used as evidence if their content is credible. The General Court underlined in this respect that the Commission's case was not built exclusively on the wiretaps, but was also supported and corroborated by other evidence.

In the *Smart card chips* case, the authenticity of a series of e-mails written at the time of the infringement was questioned by a party. In its judgment of 15 December 2016²¹ the General Court underlined that the only relevant criterion of assessing the probative value of evidence is its credibility. When making this assessment, the General Court accepted the assessment made by the Commission, which consisted in the first place in an examination of the credibility of the Leniency applicant having submitted such documents and, secondly in the examination of the individual contested documents. In this respect, the Court noted that no expert report by the parties concluded that the e-mail was not authentic and that its content was confirmed by a body of evidence resulting also from other documents or statements.

¹⁹ Case T-95/15 *Printeos and Others v Commission*, judgment of the General Court of 13 December 2016, EU:T:2016:722.

²⁰ Case T-54/14 *Goldfish BV and Others v Commission*, judgment of the General Court of 8 September 2016, EU:T:2016:455.

²¹ Case T-758/14 *Infineon v Commission*, judgment of the General Court of 15 December 2016, EU:T:2016:737.

Article 106 TFEU

Definition of abusive practice

On 30 June, the Court of Justice in its order²² in *Slovenská pošta* rejected an application for annulment brought against a judgment²³ of the General Court concerning the application of Article 106(1) TFEU in conjunction with Article 102 TFEU.

The Court of Justice dismissed all the pleas of the applicants. Most importantly the Court of Justice confirmed that an abusive practice contrary to Article 106(1) TFEU existed where a Member State granted to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking was manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind. In this context the Court of Justice held that the case-law covered all cases of manifest inability to satisfy demand for certain activities, and not only those where the inability was "structural".

As regards the establishment of facts by the Commission and the General Court and the probative value of evidence the Court of Justice held that there is no rule or principle of EU law that precluded the Commission or the General Court from relying on a single piece of evidence in order to establish the relevant facts. The Court of Justice also held that the assessment of the probative value of the evidence concerned and the question whether it definitely attested to the existence of the fact alleged formed part of the assessment of the evidence and of the facts which fell, in principle, outside the jurisdiction of the Court of Justice, except where the evidence has been distorted.

State measures with an anticompetitive consequence

Also in relation to Article 106 TFEU, by judgments of 15 December, the General Court upheld the Commission's decisions of 2008 and 2009 in the *Greek Lignite* case²⁴ following a referral by the Court of Justice²⁵. The General Court confirmed that Greece had infringed Article 106 TFEU in conjunction with Article 102 TFEU by granting the Greek energy incumbent PPC/DEI privileged access to lignite and thereby maintained or reinforced PPC's dominant position on the wholesale electricity market in Greece. These judgments therefore confirm that the Commission is entitled to tackle Member States' interventions when they might lead to companies distorting competition.

Proportionality of commitments

In the *Morningstar* judgment²⁶ the General Court upheld the Commission's commitments decision in the *Reuters Instrument Codes* case²⁷ which intended to address the concerns that Thomson Reuters had abused its dominant position in the market for consolidated real-time datafeeds.

²² Case C-293/15 P *Slovenská pošta a.s. v Commission*, order of the Court of 30 June 2016, EU:C:2016:511.

²³ Case T-556/08 *Slovenská pošta a.s. v Commission*, judgment of the General Court of 25 March 2015, EU:T:2015:189.

²⁴ Case AT.38700 *Greek Lignite*. For further information see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38700

²⁵ Cases T-169/08 *RENV* and T-421/09 *RENV - Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission*, judgments of the General Court of 15 December 2016, EU:T:2016:733 and EU:T:2016:748.

²⁶ Case T-76/14 *Morningstar Inc. v Commission*, judgment of the General Court of 15 September 2016, EU:T:2016:481.

²⁷ Case AT.39654 *Reuters Instrument Codes*, Commission decision of 20 December 2012 available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

The General Court dismissed the application by Morningstar, a competitor of Thomson Reuters, as unfounded and confirmed that the review of the lawfulness of a decision making commitments binding must be assessed in the light of the Commission's concerns and not on the basis of the demands put forward by competitors. The General Court found that the Commission is not obliged to show that the commitments accepted were the most favourable to competition (compared to other alternatives). Moreover, the General Court found that the appropriateness of commitments is a prospective assessment and it is not possible to refute the adequacy of commitments because of lack of actual effect on the market. Of importance was rather whether at the point in time at which the Commission adopted its decision, the commitments were in themselves sufficient to remove the previously identified competition concerns.

Procedural issues

In a series of judgments in the *Cement* case²⁸, the Court of Justice ruled on the appeals brought by four cement producers against the judgments by the General Court concerning the Commission's request for information decisions adopted pursuant to Article 18(3) of Regulation 1/2003.

The Court of Justice annulled the Commission decisions and held that the General Court erred in law in finding that the decisions were adequately reasoned. The Court of Justice recalled that the requirement to state reasons must be assessed in light of all the circumstances of the case. In the case at hand, the Court of Justice found that the statement of reasons was not sufficient considering that the decisions were adopted at a time when the Commission already had information that would have allowed it to present more precisely the suspicions of infringement weighing on the companies involved.

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 2016. As in preceding years, the Commission adopted cartel decisions in important sectors for innovation and investment, such as the financial markets and the automotive industry. The settlement procedure remains an efficient tool regularly used by the Commission in its fight against cartels. Settlement can also apply to sanction large cartels covering important products as shown by the trucks settlement decision.

²⁸ Cases C-247/14P *Heidelberg Cement v Commission*; C-248/14P *Schwenk Zement v Commission*; C-267/14P *Buzzi Unicem v Commission* and C-268/14P *Italmobiliare v Commission*, judgments of the Court of 10 March 2016, EU:C:2016:149, EU:C:2016:150, EU:C:2016:151 and EU:C:2016:152.

The Trucks case

On 19 July, the Commission imposed a total fine of EUR 2.93 billion on five European truck producers for coordinating the gross pricing of heavy and medium trucks in the EEA between 1997 and 2011. DAF, Daimler, Iveco, MAN, Volvo/Renault had admitted their involvement in the cartel, which allowed the Commission to settle the case with them. MAN benefited from immunity under the Commission's 2006 Leniency Notice for revealing the existence of the cartel to the Commission. Volvo/Renault, Daimler and Iveco benefitted from fine reductions. Since all five undertakings agreed to settle the case with the Commission, their fines were further reduced by 10%. A sixth undertaking chose not to settle the case and the proceedings continue against it under the normal procedure.

The cartel concerned the sales of new trucks weighing between 6 and 16 tonnes ("medium trucks") and trucks weighing more than 16 tonnes ("heavy trucks") both as rigid trucks as well as tractor trucks. The case does not concern aftersales, other services and warranties for trucks, the sale of used trucks or any other goods or services. The parties colluded on pricing and gross price increases in the EEA for trucks and on the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards. The addressees' headquarters were directly involved in the discussion of prices, price increases and the introduction of new emission standards until 2004. From at least August 2002 onwards, discussions took place via German subsidiaries which, to varying degrees, reported to their Headquarters. The exchange was operated both on a multilateral and on a bilateral level. The infringement lasted from 17 January 1997 until 18 January 2011.

The Commission adopted two further settlement decisions against all participants in the cartels on 27 January concerning *Alternators and Starters*²⁹ and on 12 December concerning *Rechargeable Batteries*³⁰. This brings the total number of settlement decisions adopted since 2010 to 22 and during the same period, around 57% of the total amount of the fines imposed by the Commission was via settlement decisions.

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

On 6 April, the Commission fined Riberebro EUR 5.19 million for participating in the canned *Mushrooms* cartel³¹. The Commission fined three other producers of canned mushrooms for their participation in the same cartel by its settlement decision of 25 June 2014. These companies had admitted their involvement in the collusive arrangements in the mushrooms sector, which allowed the Commission to settle the case with them. Riberebro chose not to settle the case and proceedings continued against it under the normal procedure.

On 25 May, the Commission completed its investigation in the *Steel Abrasives cartel* case by adopting an ordinary decision against Pometon S.p.A and imposing a fine of EUR 6.2 million³². In April 2014, the Commission imposed fines on four producers that decided to settle the case with the Commission.

²⁹ Case AT.40028 *Alternators and Starters*, Commission decision of 27 January 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40028 For further information see IP/16/173 of 27 January 2016 available at http://europa.eu/rapid/press-release_IP-16-173_en.htm

³⁰ Case AT.39904 *Rechargeable Batteries*. For further information see IP/16/4356 of 12 December 2016 available at http://europa.eu/rapid/press-release_IP-16-4356_en.htm

³¹ Case AT.39965 *Mushroom*. For further information see IP/16/1261 of 6 April 2016 available at http://europa.eu/rapid/press-release_IP-16-1261_en.htm

³² Case AT.39792 *Steel abrasives*, Commission decision of 25 May 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39792

The EIRD case³³

On 7 December, the Commission fined Crédit Agricole, HSBC and JPMorgan Chase a total of EUR 485 million for participating in a cartel in Euro Interest Rate Derivatives (EIRD). These three banks chose not to settle this cartel case with the Commission, unlike Barclays, Deutsche Bank, RBS and Société Générale, with whom the Commission reached a settlement concerning the same cartel in December 2013. Since then, the investigation has continued under the Commission's standard cartel procedure.

Interest rate derivatives are financial products such as forward rate agreements, interest rate swaps or interest rate options, which are used by companies to manage the risk of interest rate fluctuations or for speculation. They derive their value from the level of a benchmark interest rate, such as the Euro Interbank Offered Rate (EURIBOR) and/or the Euro Over-Night Index Average (EONIA) for euro interest rate derivatives. The EURIBOR benchmark interest rate is meant to reflect the cost of interbank lending in euros and is based on individual quotes submitted daily by a panel of banks to a calculation agent.

The Commission's investigation found that there was a cartel in place between September 2005 and May 2008, involving a total of seven banks over varying time periods. It covered the whole European Economic Area (EEA). The participating traders of the banks were in regular contact through corporate chat-rooms or instant messaging services. The traders' aim was to distort the normal course of pricing components for euro interest rate derivatives. They did this by telling each other their desired or intended EURIBOR submissions and by exchanging sensitive information on their trading positions or on their trading or pricing strategies. This means that the seven banks colluded instead of competing with each other on the euro derivatives market. This market is very important not only to banks but also to many companies in the Single Market, which use euro interest rate derivatives to hedge their financing risk.

This decision marks the end of several investigations the Commission carried out into cartels set up by major international banks to manipulate the trading of derivatives. Over the past three years, the Commission has taken six decisions on cartels imposing fines of just above EUR 2 billion. In addition to this case, cartels concerning derivatives linked to the Japanese Yen and the Swiss Franc were also sanctioned. The common goal of all these decisions is to make sure that financial markets are competitive to the benefit of European consumers and businesses. By their adoption, a clear message was sent that banks, like all companies, have to respect EU competition rules.

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, the Commission will apply the ordinary procedure.

The Commission remains committed to pursuing all cartels across all sectors where it has sufficient evidence of an infringement detected through its leniency programme or its ex officio action (more information on the cartel decisions is available in the sectoral overview).

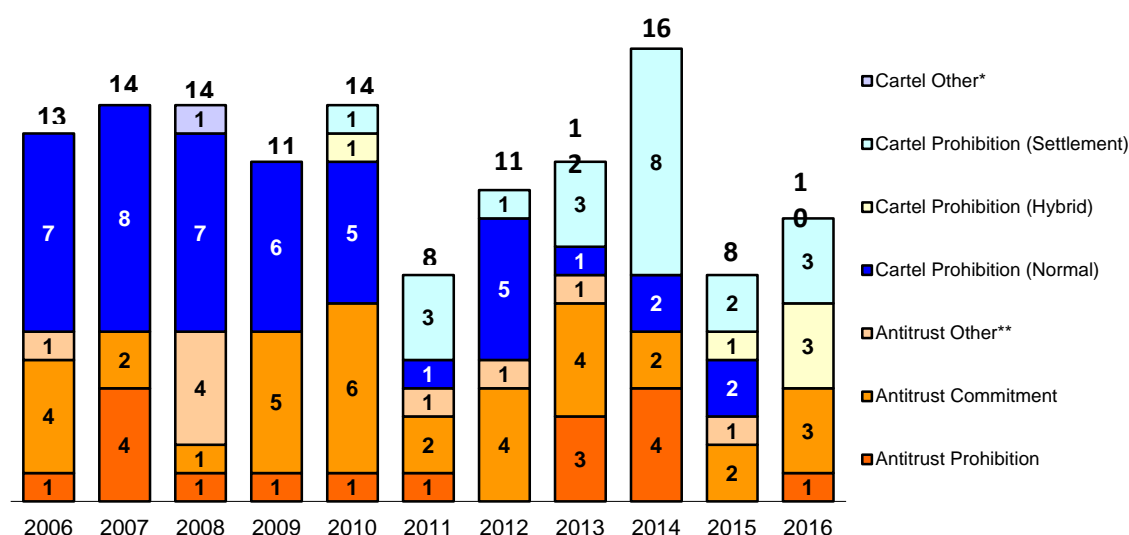
The Commission's cartel enforcement record remains strong and effective, with six decisions, fines totalling approximately EUR 3.73 billion and solid work for enforcement in future years.

³³ Case AT.39914 *EIRD*. For further information see [IP/16/4304 of 7 December 2016 available at http://europa.eu/rapid/press-release_IP-16-4304_en.htm](http://europa.eu/rapid/press-release_IP-16-4304_en.htm)

Case name	Adoption date	Fine imposed EUR	Undertakings concerned	Prohibition Procedure
Rechargeable batteries	12/12/2016	165 841 000	3	Settlement
Euro Interest Rate Derivatives (EIRD)	07/12/2016	484 456 000	3	Hybrid*
Trucks	19/07/2016	2 926 499 000	5	Settlement
Steel abrasives	25/05/2016	6 197 000	1	Hybrid**
Canned mushrooms	06/04/2016	5 194 000	1	Hybrid***
Alternators and Starters	27/01/2016	137 789 000	3	Settlement

normal procedure part of a hybrid case with a settlement decision in: December 2013(), April 2014(**) and June 2014(***)
 normal procedure part of a hybrid case with a settlement decision in: December 2013(*), April 2014() and June 2014(***)
 normal procedure part of a hybrid case with a settlement decision in: December 2013(*), April 2014(**) and June 2014()

Antitrust and cartel output:



* Rejection of complaint ** Rejection of complaint, procedural infringement, penalty payment

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

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

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

The 2014 Commission *Communication on Ten Years of Regulation 1/2003*³⁴ identified a number of areas of action to make enforcement by the NCAs more effective. In particular, action should be taken to guarantee that NCAs: (i) have the right tools to detect and sanction violations of the EU antitrust rules; (ii) have effective leniency programmes that encourage companies to come forward, possibly in several jurisdictions, with evidence of illegal cartels; and (iii) have adequate resources and are sufficiently independent when enforcing EU competition law.

Support for empowering NCAs to become more effective enforcers

Building on the *Communication on Ten Years of Regulation 1/2003*, the Commission launched a public consultation in November 2015 on empowering the NCAs to be more effective enforcers³⁵. The public consultation ended on 12 February 2016. 181 replies were submitted by a wide variety of stakeholders. Approximately 75% of stakeholders consider that the effectiveness of the NCAs could be improved and 80% thought that action should be taken to ensure that NCAs have the means and instruments they need.

A Public Hearing was co-organised with the European Parliament on 19 April 2016 to gather further views. There was overall support for empowering NCAs to be more effective enforcers. The Commission is working towards an EU legislative initiative to address this, with the aim of adopting a proposal in the first half of 2017³⁶.

Cooperation with national courts

In addition to its cooperation with NCAs in the context of the ECN, the Commission also continued its cooperation with national courts (NCs) under Article 15 of Regulation 1/2003. The Commission helps NCAs to enforce the EU competition rules in an effective and coherent manner by providing case-related information or an opinion on matters of substance or by intervening as *amicus curiae* in proceedings pending before the NCs.

The Commission publishes its opinions and *amicus curiae* observations on its website (http://ec.europa.eu/competition/court/overview_en.html) as soon as it receives approval from the courts concerned.

Merger control

EU merger control

The purpose of EU merger control is to ensure that market structures remain competitive while facilitating 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.

The substantive test for assessing mergers under the current legal framework seeks to obtain fairer results by protecting all aspects of competition, including innovation. As a result, EU merger control protects market structures, in which companies compete not only on price, but

³⁴ Communication from the Commission of 9 July 2014, *Ten Years Of Antitrust Enforcement Under Regulation 1/2003: Achievements And Future Perspectives*, COM/2014/0453 available at http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf

³⁵ For further information see IP/15/5998 of 4 November 2015 available at http://europa.eu/rapid/press-release_IP-15-5998_en.htm

³⁶ Commission Work Programme 2017 Annex 1: New Initiatives, p.3 item 6 under Implementation of the Single Market Strategy available at http://ec.europa.eu/atwork/pdf/cwp_2017_annex_i_en.pdf

also on innovation in order to attract customers. The Commission's enforcement practice in recent years, for example, in the pharmaceutical³⁷ and energy³⁸ sectors, shows that it considers innovation and investments as important aspects of competition. The Commission will continue to assess the effects on innovation in the ongoing investigation in the agro-chemical sector concerning the proposed merger between Dow and DuPont³⁹, among others.

By protecting all these aspects of competition, EU merger control contributes to the achievement of fairer market structures and a level playing field. Those transactions which may bring unfair results by distorting the parameters for competition are subject to close scrutiny by the Commission, which is committed to protect consumers by requesting the necessary commitments or, if necessary, by prohibiting the transaction. For example, the merger between Hutchison and O2⁴⁰, which was ultimately blocked to protect British mobile consumers and prevent unfair results.

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

As highlighted in previous reports on competition policy, the Commission continuously evaluates the substantive and procedural rules that make up the legal framework in force for merger control. In this context, the Commission regularly assesses concerns and suggestions for further improvement voiced by industry representatives and other stakeholders, evaluates the need for reform and policy changes in specific areas which give rise to new debates and checks that its policies and enforcement practices do not unduly create red-tape for companies and thereby hamper innovation and investment. If necessary, policy changes are proposed (see point 1 below).

1. Evaluation of selected procedural and jurisdictional aspects of EU mergers

In 2016, the Commission launched a public consultation in the context of an ongoing evaluation of selected procedural and jurisdictional aspects of EU merger control. This ongoing evaluation builds notably upon the results of the 2014 public consultation on the White Paper *"Towards more effective EU merger control"*.

The White Paper "Towards more effective EU merger control"

In the White Paper *"Towards more effective EU merger control"* adopted in July 2014⁴¹, the Commission made some concrete proposals to improve the Merger Regulation in a few areas. Those mainly concerned the possible extension of the EU Merger Regulation to minority shareholdings, the streamlining of the referral system and additional simplification.

³⁷ Case M.7275 Novartis / GlaxoSmithKline oncology business available at http://ec.europa.eu/competition/elojade/iseff/index.cfm?fuseaction=dsp_result

³⁸ Case M.7477 Halliburton / Baker Hughes available at http://ec.europa.eu/competition/elojade/iseff/index.cfm?fuseaction=dsp_result

³⁹ Case M.7932 Dow / DuPont available at http://ec.europa.eu/competition/elojade/iseff/index.cfm?fuseaction=dsp_result

⁴⁰ M.7612 Hutchison 3G UK / Telefonica UK, Commission decision of 11 May 2016. For further information see IP/16/1704 available at http://europa.eu/rapid/press-release_IP-16-1704_en.htm

⁴¹ White Paper *Towards more effective EU merger control*, COM(2014) 449 final available at http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf

The feedback received on the topics of referrals and further simplification was broadly supportive of the Commission's proposals. On the other hand, respondents to the 2014 public consultation on the White Paper generally expressed doubts about the proportionality of the White Paper's proposals as regards minority shareholdings, in view notably of the perceived limited scope of the problem identified.

Following this public consultation, the Commission commissioned a study to obtain additional information on the topic of minority shareholdings from the point of view of both competition and corporate law and practice in different jurisdictions. The results of this study were published on DG Competition's website in October⁴².

Evaluation of procedural and jurisdictional aspects of EU merger control

Meanwhile, a debate has emerged on the effectiveness of the turnover-based jurisdictional thresholds in EU merger control when it comes to some high-valued transactions involving target companies with limited or no turnover, which may have significant competitive effects in the EEA but fall outside the scope of application of the EU Merger Regulation. This debate concerned in particular the digital economy, where Facebook's acquisition of WhatsApp has been a catalyst for this discussion. However, this concern may also be relevant in other sectors, such as pharmaceuticals.

Against this background, the ongoing evaluation of selected procedural and jurisdictional aspects of EU merger control, launched in 2016, focusses on whether the current purely turnover-based thresholds of the Merger Regulation allow capturing all transactions which can potentially have an impact on the internal market and, if not, on the possibility to introduce complementary jurisdictional thresholds, based for instance on the transaction value.

In addition, the evaluation seeks to explore the potential for further simplification of EU merger control, going beyond the suggestions made in the White Paper. Moreover, the evaluation covers a possible streamlining of the referral system, building on the proposals put forward in the 2014 White Paper. Finally, a number of technical aspects of merger procedures will also be reviewed.

The public consultation closed in January 2017. The outcome of the planned evaluation will inform the type of follow-up and, in particular, any decision concerning possible subsequent proposals for legislative changes.

2. Recent enforcement trends

The substantial growth in merger activity in 2015 and 2016 is reflected in the significant increase in the number of merger notifications received by the Commission. The number of notified mergers in particular in 2016, increased significantly compared with the previous seven years: overall, 362 transactions were notified in 2016, whereas the average number of notifications received in the period 2009-2015 was 291 per year⁴³. Among these notifications, the Commission has received 29 reasoned pre-notification submissions by the notifying parties to request the referral of a case from the Commission to a Member State or from a Member State to the Commission. In eight cases, the Commission opened in-depth

⁴² See, the Report *Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings*, prepared by Spark Legal Network and Queen Mary University of London, 2016 available at <http://ec.europa.eu/competition/publications/reports/KD0416839ENN.pdf>

⁴³ The total number of notifications received in 2016 is 9% higher than in 2015 and 19% higher than in 2014.

investigations (second phase). These cases concerned various industry sectors, including agro-chemicals, telecoms, railway equipment systems, provision of oil exploration services, space and satellites, cement and construction materials, financial services and car components.

In 2016, the Commission took 355 final decisions in merger cases⁴⁴. The number of 27 interventions in 2016 was significantly higher compared with the average of the last six years, which amounted to around 16 interventions per year⁴⁵. In 2016, 19 mergers were cleared subject to commitments in first phase and six in the second phase. In one case, the parties abandoned a transaction during the in-depth investigation⁴⁶. Moreover, the Commission adopted a prohibition decision in one case⁴⁷.

The adoption of the simplification package in December 2013 has been followed by a significant increase in the number of cases reviewed under the simplified procedure: the number of cases dealt with under the simplified procedure increased by 10%: from 59% over the period 2004-2013 to around 69% of all notified transactions in 2016.

The Commission has also looked at its methodology in defining geographic markets and in taking into account competitive pressure from imports in its assessment of mergers. Market definition is a tool to identify effective alternative sources of supply for customers of the merging companies, and to calculate market shares as a meaningful starting point for an analysis of competitive forces. It is only the initial step of its analysis, however. In its competitive assessment, apart from examining, *inter alia*, barriers to entry and expansion of rivals and the expected price increase caused by the transaction, the Commission also considers the competitive pressure of imports.

The Commission held discussions with the EU national competition authorities, the United States antitrust agencies and legal and economic experts. It also asked two leading competition economists to evaluate the Commission's approach to geographic market definition on the basis of a sample of recent merger decisions. The study⁴⁸ largely supported the Commission's approach to geographic market definition and did not recommend that the Commission revise its basic methodology in this matter. It concluded that the Commission's approach was very much in line with that of all leading competition agencies in the EU and world-wide, with internationally recognised standards and with academic literature on the topic.

⁴⁴ 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.

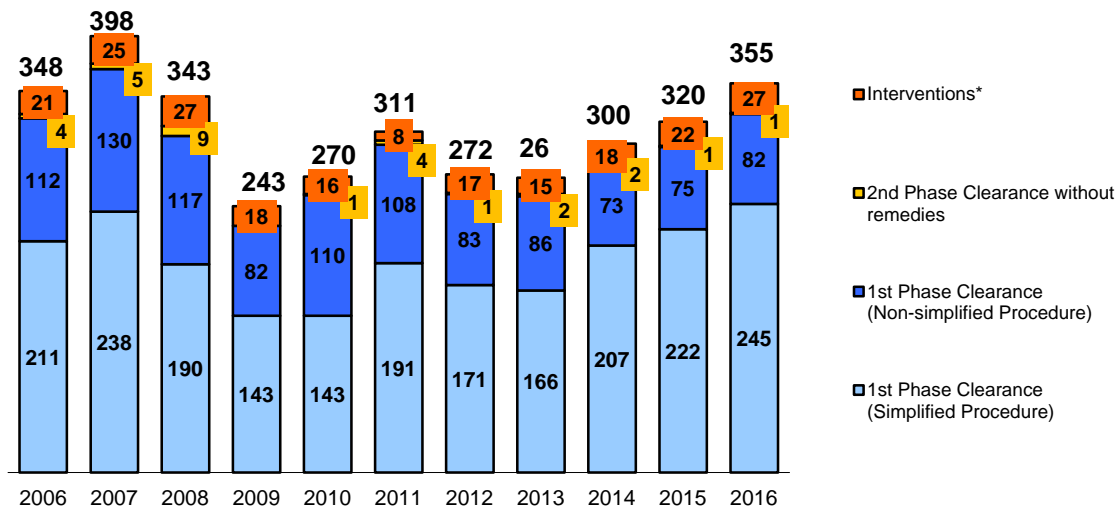
⁴⁵ Commission interventions in merger cases include prohibition decisions and mergers cleared subject to commitments, as well as withdrawals during second phase in-depth investigation.

⁴⁶ Case M.7477 *Halliburton / Baker Hughes*, Statement by Commissioner Vestager on announcement by Halliburton and Hughes to withdraw from proposed merger of 2 May 2016 available at http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm

⁴⁷ Case M.7612 *Hutchison 3G UK / Telefonica UK*, Commission decision of 11 May 2016. For further information see IP/16/1704 available at http://europa.eu/rapid/press-release_IP-16-1704_en.htm

⁴⁸ Amelia Fletcher and Bruce Lyons, *Geographic Market Definition in European Commission Merger Control, A Study for DG Competition*, January 2016 available at http://ec.europa.eu/competition/publications/reports/study_gmd.pdf

Merger decisions:



* Interventions in merger cases include prohibition decisions and mergers cleared subject to remedies, as well as withdrawals in Phase II; Prohibition decisions: one in 2007, 2011, 2012 and 2016 and two in 2013.
Source: Directorate-General for Competition

State aid control

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

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

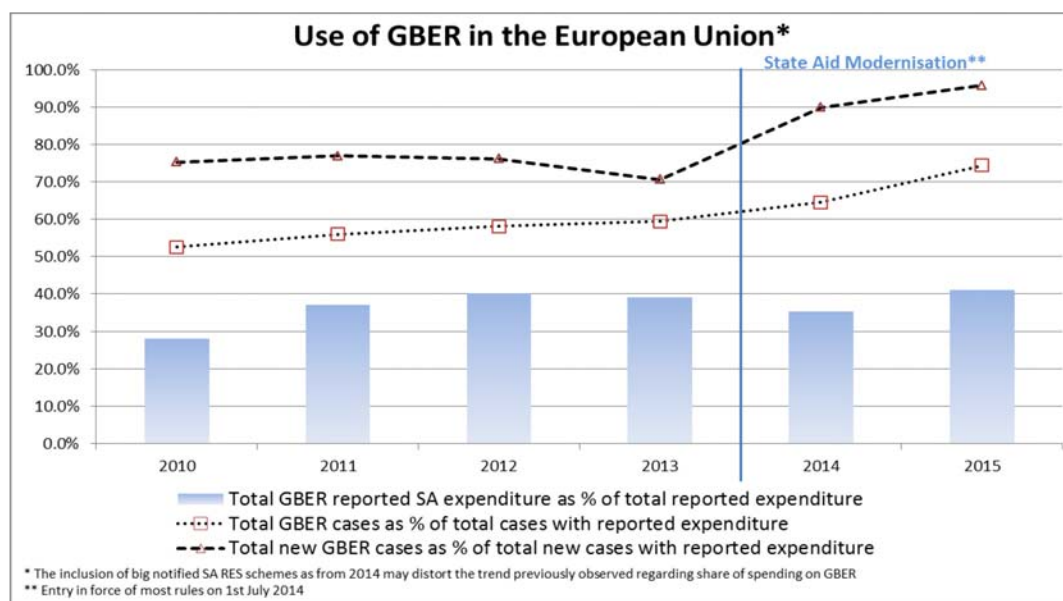
The objectives of the Commission's control of State aid are to ensure that aid is growth-enhancing, efficient and effective, and better targeted in times of budgetary constraints that aid does not restrict competition but addresses market failures for the benefit of society as a whole. In addition to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

1. Uptake of the State Aid Modernisation

One of the cornerstones of the State Aid Modernisation reform is the new General Block Exemption Regulation (GBER)⁴⁹, which simplifies aid granting procedures for Member States by authorising without prior notification a wide range of measures fulfilling EU objectives in the common interest. For the aid categories covered by the GBER, only cases with the biggest potential to distort competition in the single market will still face *ex ante* assessment (notification). As a result of the reform, a significantly larger number of smaller

⁴⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU), OJ L 187, 26.6.2014, p.1.

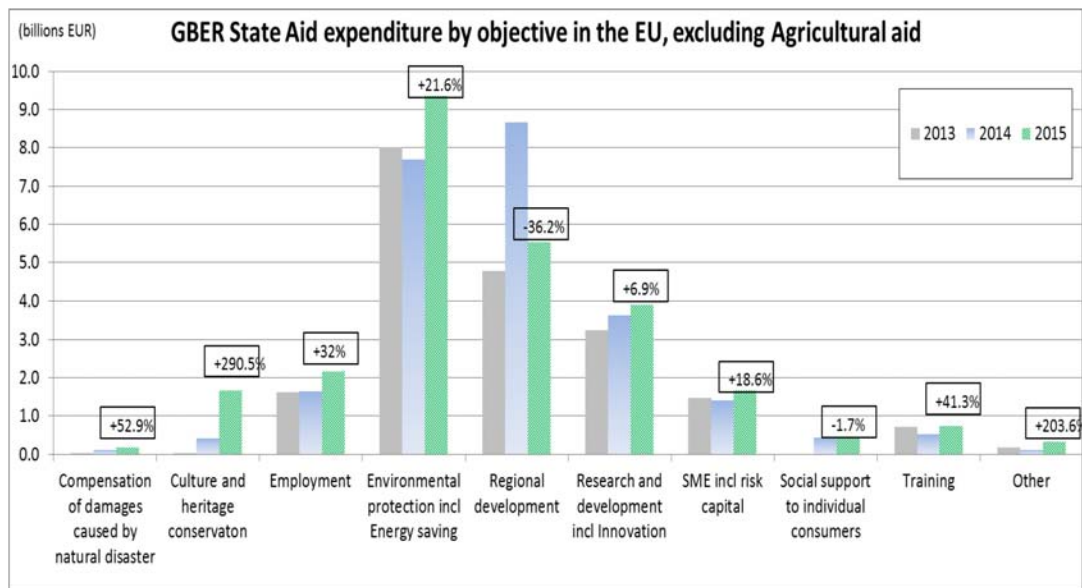
and unproblematic measures are exempted from prior notification, notably aid granted to tackle local needs.



Member States have already made extensive use of the possibilities offered by the comprehensive modernisation of State aid rules. Notably, a surge in aid excluded from prior Commission scrutiny indicates an important reduction of red tape. Based on the State Aid Scoreboard⁵⁰, more than 96% of new measures, for which expenditure was reported for the first time in 2015, were covered by the GBER, which entails an increase of about 24 percentage points compared to 2013. Three quarters of all measures for which expenditure was reported (i.e. not only new measures), took the form of block exempted measures in 2015. On average, total spending on GBER measures in the EU represented about 40% of total expenditure in 2015, i.e. an increase of about 5 percentage points compared to 2014.

On top of a broadening of categories already covered by the previous GBER, the new rules of the State Aid Modernisation reform introduced new categories of aid into the GBER, namely 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 and multifunctional recreational infrastructures, as well as investment aid for local infrastructure.

⁵⁰ The 2016 State Aid Scoreboard comprises aid expenditure made by Member States before 31 December 2015 and which falls under the scope of Article 107(1) TFEU. The data is based on the annual reporting by Member States pursuant to Article 6(1) of Commission Regulation (EC) 794/2004 available at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html



To a large extent, the reported increase in expenditure on GBER measures did already reflect the impact of the new Regulation in 2015. That year, total GBER spending for aid to culture and heritage conservation almost tripled, while it doubled for broadband and local infrastructure and significant increases were also recorded for aid to compensate damages caused by natural disasters (+53%), for training aid (+41%), for environmental protection and energy savings (+35%), for employment aid (+32%) and for SMEs (+19%).

State aid enforcement (Commission decisions, monitoring and Member States' Evaluation Plans) 2007-2016



Partnership with Member States

To facilitate the implementation of SAM, the Commission supports Member States in various ways and has started a closer cooperation with them.

Collaboration with Member States takes multiple forms. The Working Group on SAM implementation (SAM WG) is a forum for Member States to exchange best practices on their systems for State aid control, creating an effective network for the informal discussion of State aid issues among Member States and with the Commission. Other dedicated working groups or workshops have dealt with specific aspects of SAM implementation, in particular

the new requirements for transparency and evaluation or the implementation of the energy and environment guidelines. Once a year, the SAM WG reports to a High Level Forum (HLF) which in turn provides guidance on the future work of the Partnership.

The SAM WG met three times in 2016, under a United Kingdom Chair, and addressed several policy and compliance issues related to SAM implementation. It reported on its conclusions and recommendations to the HLF held on 3 June 2016, in Brussels. On this occasion it was agreed to further strengthen the partnership.

In 2016, the Commission also launched Bilateral Partnerships with certain Member States in order to address existing compliance problems and challenges in these Member States. The Bilateral Partnerships aim to build a structured bilateral dialogue between the Commission and the Member State concerned to allow identifying and addressing the obstacles that still hinder compliance with the State aid rules. In 2016, the Commission has agreed on practical work programmes on State aid with Italy, Bulgaria and Romania and work is on-going with a view to deepening cooperation with other Member States that could, in time, also lead to structured Bilateral Partnerships with these Member States.

Transparency

The new transparency provisions 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 000⁵¹. Member States have six months starting from the date of granting to provide the required aid awards' data, which is longer for awards in the form of fiscal aid. The Commission services facilitated compliance with this requirement by developing, in cooperation with Member States, the Transparency Award Module (TAM) – a new informatics tool for submission and publication of data required under the transparency provisions. The TAM is operational since 1 July and the submitted data is automatically available online⁵².

In addition, since February, the annual expenditure figures at scheme level as reported by Member States are published in the online case register of DG Competition⁵³, hence increasing overall transparency of State aid.

Finally, a Eurobarometer Survey about citizens' perceptions of transparency and awareness of State aid⁵⁴ was carried out in June. Some 27 818 EU citizens were asked about their awareness of State aid and the perceived ease of finding relevant information, as well as about their attitudes towards transparency of State aid. The results show that in all Member States, citizens do not feel well-informed about State aid and consider it difficult to find relevant information. Over 80% of respondents consider that EU citizens should have full access to information about State aid. In addition, the majority of Europeans consider transparency beneficial for public accountability and the good management of public funds, and as relevant for companies as for citizens.

⁵¹ For further information see the Competition Policy Brief 4/2016 available at http://ec.europa.eu/competition/publications/cpb/2016/2016_004_en.pdf

⁵² For further information see the Transparency Award Module (TAM) available at <https://webgate.ec.europa.eu/competition/transparency/public/search/chooseLanguage>

⁵³ The Commission's State aid case search tool open to the general public available at <http://ec.europa.eu/competition/elojade/iseef/>

⁵⁴ For further information see the Special Eurobarometer 448 on the European Union Open Data Portal available at https://data.europa.eu/euodp/en/data/dataset/S2135_85_3_448_ENG

Evaluation

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

Since 1 July 2014, evaluation is required for large GBER schemes in certain aid categories⁵⁵ as well as for a selection of notified schemes under the new generation of State aid guidelines⁵⁶.

By the end of 2016, the Commission had approved evaluation plans covering 28 State aid schemes submitted by 12 Member States⁵⁷, most of these decisions concerned either large regional or R&D&I aid schemes under the GBER or notified broadband schemes. These schemes account, in total, for about EUR 36 billion of annual State aid budget.

The Commission services have accompanied the implementation of this new requirement by publishing policy briefs⁵⁸ and by organising dedicated workshops with Member States' representatives and evaluation experts⁵⁹.

Aid for research, development and innovation

While one of the headline targets of the Europe 2020 Strategy⁶⁰ is for R&D&I investments in the EU to reach 3% of EU GDP, R&D spending in the EU has been lagging behind major global competitors, mainly due to lower levels of private investment.

The State aid rules for R&D&I help to ensure that public funding goes to research projects that would not have happened otherwise due to market failures, i.e. 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 projects by Member States.

In 2016, the Commission ensured that aid schemes and individual measures notified under the R&D&I rules were well targeted to projects enabling ground-breaking research and innovation activities. Its State aid control activities covered a variety of sectors including the automotive, aeronautic, railways and microelectronic sectors.

In one case⁶¹, following an in-depth investigation into a Spanish plan to finance the full investment costs for the construction of a test centre for high-speed trains, the Commission

⁵⁵ 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.

⁵⁶ Evaluation might apply to notified aid schemes with large budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen.

⁵⁷ The Czech Republic, Germany, Spain, France, Hungary, Italy, Lithuania, Austria, Poland, Portugal, Finland and the United Kingdom.

⁵⁸ For further information see the Competition Policy Briefs 7/2014 available at http://ec.europa.eu/competition/publications/cpb/2014/007_en.pdf and 3/2016 available at http://ec.europa.eu/competition/publications/cpb/2016/2016_003_en.pdf

⁵⁹ The most recent workshop was organised with the BRUEGEL think tank on 30 May 2016 available at <http://bruegel.org/events/state-aid-evaluation-two-years-of-implementation>.

⁶⁰ Communication of 3 March 2010 from the Commission, *Europe 2020 A Strategy For Smart, Sustainable And Inclusive Growth*, COM(2010) 2020 final available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427303331326&uri=CELEX:52010DC2020>

concluded that the project was not in line with EU State aid rules because it did not meet a genuine objective of common interest due to the absence of market demand for the type of R&D&I services to be provided by the test centre. This conclusion was underpinned by the fact that, despite the public funding allocated to this project, no private investor showed an interest in participating in the funding and that the project was expected to generate losses throughout its entire period of operation.

In another case⁶², the Commission found that public support granted by Lithuania to two Science and Technology Parks acting as innovation intermediaries and supporting innovation efforts by SMEs incubated within their facilities did not constitute State aid at the level of the parks, while accepting the Member State's commitments to maintain the support passed on by the parks to the incubated SMEs in line with the *de minimis* aid rules.

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 approximately one third of SMEs 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 new 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)⁶³.

The current Risk Finance Guidelines⁶⁴ 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 2016, under the new Risk Finance Guidelines, the Commission dealt with several notified schemes aimed at encouraging investment in innovative SMEs and midcaps. In particular, it approved one scheme in Italy granting fiscal incentives for investments in innovative start-ups, a German scheme providing grants for risk capital investments as well as the evaluation plan presented by France in connection with a risk finance scheme providing for fiscal advantages to physical persons investing in early stage SMEs. In all these cases, the Commission took the view that the measures at issue covered a real gap in the market, and worked together with the Member States on solutions to limit the impact on competition in the single market. In particular, the Commission considered that the risks inherent to the activities of these young firms and innovative companies (i.e. products/technologies not yet proven to be economically viable) and the lack of financial guarantees limited their capacity to access funding and that the aid was necessary to stimulate investment that would not have been provided by the market unprompted.

⁶¹ Case SA.37185 (2015/C) *Aid to ADIF*, Commission decision of 25 July 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_37185

⁶² Case SA.41540 (2015/N) *Aid to public legal persons – science and technology parks (STPs)*, Commission decision of 29 September 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_41540

⁶³ For an overview on the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises available at http://ec.europa.eu/enterprise/initiatives/cosme/index_en.htm

⁶⁴ Communication from the Commission, *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.1.2014, p. 4 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122\(04\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122(04))

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

Regional aid

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

The GBER has extended the range of regional aid measures, enabling Member States to put in place aid schemes and individual aid measures without having to notify them to the Commission. Examples of these are ad hoc regional investment aid measures below the notification thresholds, transport aid schemes and operating aid schemes for outermost regions. In 2016 the Commission continued advising Member States' authorities on how to interpret and implement the regional aid provisions of GBER, thus helping them to make a success of the reforms introduced under SAM.

Regional aid measures

In 2016, the Commission adopted decisions both under the former and under the current regional aid rules.

It endorsed two regional aid measures to support large investment projects under the Guidelines on National Regional Aid for 2007-2013: the Commission authorised the aid for Euroglas Polska⁶⁵ in the preliminary examination phase and approved the aid for AUDI Hungaria Motor Ltd⁶⁶ after having carried out an in-depth assessment in the formal investigation phase.

The Commission also adopted several decisions on regional aid measures under the new provisions, on investment aid schemes⁶⁷, on evaluation plans for exempted large regional aid schemes⁶⁸, and on individual regional aid measures. In particular, it took two decisions authorising individual regional aid: one for an investment relating to new process innovation by Hamburger-Rieger in a "c" region in Germany (paper production)⁶⁹ and one for a regional investment by STM in an "a" region in Southern Italy (electronics)⁷⁰. In addition it initiated a formal investigation into a notified regional aid in support of an investment involving a process innovation by REHAU in a "c" region in Germany. Since Germany withdrew this

⁶⁵ Case SA.36510 Poland - LIP - Euroglas Polska Sp. z o.o., Commission decision of 29 March 2016 available at http://ec.europa.eu/competition/elojade/iseif/index.cfm?fuseaction=dsp_result

⁶⁶ Case SA.36754-2014/C (ex 2014/NN and 2013/N) which Hungary has partly implemented and is planning to implement in favour of AUDI Hungaria Motor Ltd, Commission decision of 1 February 2016, OJ L 310, 17.11.2016, p. 24.

⁶⁷ Case SA.42225 (2015/N) Regional aid scheme for the promotion of the development of strategic information and communication technology (ICT) projects on strategic sites, Commission decision of 18 February 2016 available at http://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=3_SA_42225

⁶⁸ Case SA.45184 Evaluation plan of the tax credit scheme for regional investment aid in Southern Italy, Commission decision of 23 September 2016 available at http://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=3_SA_45184

⁶⁹ Case SA.43624 (2015/N) LIP – Aid to Hamburger Rieger GmbH, Commission decision of 13 June 2016 available at http://ec.europa.eu/competition/state_aid/cases/262014/262014_1770298_115_2.pdf

⁷⁰ Case SA.44547 LIP - Aid to STM Microelectronics S.r.l. (M9), Commission decision of 3 October 2016 available at http://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=3_SA_44547

notification after the initiation of a formal investigation, the Commission closed the case without taking a position on the aid⁷¹.

Further, the Commission adopted eight decisions on the mid-term review of the regional aid maps for Italy, Spain, Greece, Portugal, Finland, Germany, Hungary and the United Kingdom⁷².

Finally, further to a judgment of the General Court in 2015⁷³, partially annulling a Commission decision of 2008, the Commission adopted in 2016 a decision to open the formal investigation procedure in order to re-assess the aid element of two public guarantees granted by Germany in favour of Abalon Hessen GmbH and to determine whether this aid would be compatible with the internal market⁷⁴.

European Fund for Strategic Investments

In 2015, the Commission created the European Fund for Strategic Investments (EFSI), with the objective to generate EUR 315 billion in investment in Europe. In that context the Commission has put in place an accelerated procedure for approving within six weeks Member State co-financing constituting notifiable State aid. This accelerated procedure was applied in some cases and contributes to the necessary public and private financing to reach concrete infrastructure and innovation projects as quickly as possible.

European Structural and Investment Funds

In a Special Report on compliance with State aid rules in ESIF operations⁷⁵, the European Court of Auditors (ECA) found a number of State aid related errors in projects implemented by Member States and co-financed by ESIF in the programming period 2006-2013. ECA recognised that the Commission had already taken several measures to remedy the situation in the 2014-2020 programming period and called upon the Commission to continue its efforts to further increase awareness and knowledge of State aid rules among ESIF stakeholders in the Member States, including Managing Authorities and national audit authorities. The Commission will therefore continue to implement the recommendations formulated by ECA.

2. State Aid Modernisation continues

Notion of aid: comprehensive clarification including public funding of infrastructure

In 2016 the Commission took several steps to further clarify the notion of State aid with the aim of helping public authorities and companies to identify when public support measures can be granted outside the remit of State aid control and approval by the European Commission⁷⁶.

⁷¹ Case SA.43014 *Aid for REHAU AG + Co.*, Commission decision of 13 June 2016 available at http://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=3_SA_43014

⁷² Communication from the Commission, *Amending Annex I to the Guidelines on regional aid for 2014-2020*, OJ C 231, 25.06.2016 p.1 available at http://ec.europa.eu/competition/state_aid/regional_aid/regional_aid.html

⁷³ Case T-89/09 *Pollmeier Massivholz GmbH & Co. KG v the Commission*, judgment of the General Court of 17 March 2015, EU:T:2015:153.

⁷⁴ Case SA.24030 *Investment loan and working capital loan guarantees in favour of Abalon Hardwood Hessen GmbH* available at http://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=3_SA_24030

⁷⁵ Court of Auditors Special Report 24/2016 "More efforts needed to raise awareness of and enforce compliance with State aid rules in cohesion policy" available at http://www.eca.europa.eu/Lists/ECADocuments/SR16_24/SR_STATE_AIDS_EN.pdf

⁷⁶ For further information see IP/16/1782 of 19 May 2016 available at http://europa.eu/rapid/press-release_IP-16-1782_en.htm

As a first step the Commission continued the State aid Modernisation initiative with the publication of one of its last building block, namely the Notice on the notion of State aid⁷⁷. This Notice gives guidance on all aspects of the definition of the notion of State aid by systematically summarising the case law of the EU Courts and the Commission's decision making practice. By doing so it comprehensively clarifies the scope of the EU State aid rules and thereby facilitates public funding and investments in the European Union by helping Member States and companies to design such public funding in ways which do not distort competition. These clarifications were expected, more particularly, in the area of public funding of infrastructure following the Leipzig-Halle judgment of the Court of Justice.

In addition, the Commission, through its decisional practice in individual cases, further developed its guidance regarding the question under what circumstances State support granted to activities having a purely local impact do not effect intra-EU trade and, therefore, fall outside the rules on State aid.

Generally, State support that distorts competition between companies will, due to the high level of economic integration within the EU, also have an impact on intra-EU trade. However, if State support is granted to an activity which has a purely local impact, there may not be an effect on intra-EU trade, where (i) the beneficiary supplies goods or services to a limited area within one Member State and is unlikely to attract customers from other Member States and (ii) the measure has no – or at most marginal – foreseeable effects on cross-border investments in the sector or the establishment of firms within the EU's internal market.

In line with several decisions taken already in 2015⁷⁸ and building on the guidance given on that matter in the Notice on the notion of State aid, the Commission has concluded in September 2016 that five public measures for purely local operations in Spain, Germany and Portugal did not involve State aid within the meaning of the EU rules, since they were unlikely to have a significant effect on trade between Member States⁷⁹.

These decisions provide Member States and stakeholders with further guidance to determine which cases do not need to be cleared by the Commission under EU State aid rules. They thereby complement the Notice on the Notion of State aid, as well as the GBER.

Lastly, the Commission services have updated the analytical grids on the financing of infrastructure projects. The updated grids were presented to and discussed with Member States in a dedicated working group on infrastructures in November 2016. They explain when, in view of the Commission services, public funding does not involve State aid and when a notification for State aid clearance is needed. The grids also contain references to the most relevant Commission decisions relating to the sector concerned.

The Commission services revised these grids, which were last updated very recently in 2015, following the publication of the Notice on the notion of State aid, to provide more detailed sectorial clarifications which could not have been included in a general and comprehensive document such as the Notice on the notion of State aid.

⁷⁷ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50.

⁷⁸ For further information see IP/15/4889 of 29 April 2015 available at http://europa.eu/rapid/press-release_IP-15-4889_en.htm

⁷⁹ For further information see IP/16/3141 of 21 September 2016 available at http://europa.eu/rapid/press-release_IP-16-3141_en.htm

Together these different measures taken in 2016 to further clarify the notion of State aid and, thus, the scope of EU State aid rules help to stimulate investment by reducing the administrative burden for public authorities and companies, avoiding lengthy procedures and increasing legal certainty for aid beneficiaries and competitors. They also allow Member States to take responsibility for their policy choices for local measures and the Commission to focus resources on State aid investigations into measures with the biggest impact on competition in the Single Market.

Further extension of the scope of the GBER

The scope of the General Block Exemption Regulation (GBER) was extended significantly in 2014 compared to the previous GBER. It includes provisions for a large variety of aid measures in many different sectors. However, the 2014 GBER has not so far covered investments in ports and airports because at the time of its adoption in 2014, the Commission did not have sufficient case experience in these areas. This said, recital 1 of the GBER announced that the Commission planned to propose criteria for exempting port and airport infrastructure provided that sufficient case experience was developed.

In 2016, the Commission adopted a series of State aid decisions in particular relating to investment aid to ports⁸⁰. The Commission's experience in this field fully supports the extension of the scope of the GBER to facilitate the grant of aid in unproblematic cases.

To fulfil the commitment announced in recital 1 of the 2014 GBER, on the basis of acquired experience, two years later, the Commission launched a first public consultation on the GBER extension between March and May 2016 following which more than 200 replies were received from Member States and stakeholders. The draft Regulation was revised accordingly and a second public consultation was conducted between 13 October and 8 December 2016 with a view to adopt the new provisions on ports and airports in the first half of 2017.

This modification will provide a major simplification for unproblematic investments in ports and airports. Member States can implement a measure without the need to notify it after they have checked that it complies with the conditions of the Regulation. The revision will also address some other technical issues beyond ports and airports. In particular it will become easier for public authorities to compensate companies for the additional costs they face in the EU's outermost regions.

This targeted revision of the General Block Exemption Regulation further contributes to the objectives of the State Aid Modernisation launched by the Commission in 2012, in the sense that it minimises administrative burdens and make it easier for national, regional and local authorities to grant aid that contributes to a more dynamic and competitive Internal Market.

In 2016, the Commission adopted a series of State aid decisions in particular relating to investment aid to ports⁸¹. The Commission's experience in this field fully supports the extension of the scope of the GBER to facilitate the grant of aid in unproblematic cases.

⁸⁰ For example, cases SA.44479 *Extension of the Rostock Overseas Port*, Commission decision of 4 May 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44479; SA.40680 *Offshore-Terminal Bremerhaven*, Commission decision of 14 July 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40680; SA.45848 *Extension of cruise ship terminal Putbus-Lauterbach*, Commission decision of 19 August 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45848 and SA.44846 *Investment aid for Berth 9 in Cuxhaven port*, Commission decision of 20 April 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44846

Revision of the Simplified Procedure Notice and Best Practices Code

In 2016, the Commission launched a review of the Simplified Procedure Notice⁸² and of the Best Practices Code⁸³ in order to reflect, on the one hand, the amendments brought to the State aid framework within the State aid Modernisation initiative and, on the other hand, to take account of the experience gained by the Commission with its implementation.

The Simplified Procedure Notice sets out the conditions under which the Commission usually adopts short-form decisions declaring certain types of State support measures compatible with the internal market, and provides guidance in respect of the procedure to be followed. The Commission launched a public consultation on this notice from January to April 2016.

The Best Practices Code provides guidance on the day-to-day conduct of State aid procedures and exchange of information between the Commission and Member States. In that respect, it encourages Member States to engage in informal discussions with Commission services and use pre-notification contacts. The Commission launched a public consultation in November in order to gather the views of the Member States and stakeholders on the implementation of the Best Practices Code over the past seven years.

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

3. Monitoring, recovery and cooperation with national courts

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

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

To that end, the Commission introduced in 2006 a regular, *ex post*, sample-based control of existing aid schemes ("monitoring"). After a modest start covering about 20 schemes and ten Member States in each monitoring cycle, the Commission has considerably stepped up monitoring since 2011. Building on the Court of Auditors recommendations⁸⁴, the

⁸¹ For example, cases SA.44479 *Extension of the Rostock Overseas Port*, Commission decision of 4 May 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44479; SA.40680 *Offshore-Terminal Bremerhaven*, Commission decision of 14 July 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40680; SA.45848 *Extension of cruise ship terminal Putbus-Lauterbach*, Commission decision of 19 August 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45848 and SA.44846 *Investment aid for Berth 9 in Cuxhaven port*, Commission decision of 20 April 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44846

⁸² Commission notice on a simplified procedure for the treatment of certain types of State aid, OJ C 136, 16.06.2009, p. 3-12 available at [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0616\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0616(01))

⁸³ Commission notice on a Best Practices Code on the conduct of State aid control proceedings available at http://ec.europa.eu/competition/state_aid/legislation/best_practices_code_en.pdf

⁸⁴ In its 2011 report on the efficiency of State aid procedures, the Court of Auditors considered that, in view of the importance of aids granted under existing aid schemes, the Commission's monitoring activity should be reinforced. For further information see the recommendation n° 1 of the Court of Auditors Report recital 96, p. 41 available at <http://eca.europa.eu/portal/pls/portal/docs/1/10952771.PDF>

Commission has substantially increased the size of the monitoring sample in the last three annual cycles to 78 schemes in the 2016 review. It also extended the scope of its control.

The 2016 cycle covered all Member States and all main types of aid approved as well as block-exempted schemes. Furthermore, the sample contained some block-exempted schemes implemented under the new GBER⁸⁵. Also, the Commission continued on targeted monitoring where it examined whether Member States correctly applied the criterion on aid granted to companies in difficulty. Furthermore, the Commission monitored some schemes in which the granting of illegal aid could be involved.

The Commission systematically 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 2016, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

By 31 December, the sum of illegal and incompatible aid recovered from beneficiaries amounted to EUR 12.3 billion⁸⁶. At the same time, the outstanding amount pending recovery was EUR 19.8 billion.

In 2016, the Commission adopted eleven new recovery decisions and EUR 18.4 million was recovered by the Member States. As of the end of December, the Commission had 52 pending recovery cases.

Recovery decisions adopted in 2016	11
Amount recovered in 2016 (EUR million)	18.4
Pending recovery cases on 31 December 2016	52

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 2016, the Commission launched two actions under Article 108(2) TFEU⁸⁷ for failure to implement recovery (both instances concerned Greece)⁸⁸.

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

⁸⁶ The reference period is 1 January 1999 to 31 December 2016.

⁸⁷ Consolidated version of the TFEU, OJ C 115, 9.5.2008, p.47.

⁸⁸ Cases C-481/16 *Commission v Greece*, action brought on 2 September 2016, OJ C 383, 17.10.2016, p. 9 and C-363/16 *Commission v Greece*, action brought on 30 June 2016, OJ C 363, 22.8.2016, p. 19.

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 Regulation⁸⁹. 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 2016, the Commission responded to two requests for information. The Commission received a request for information and for a legal opinion from the Dutch Trade and Industry Appeals Tribunal⁹⁰ related to the aid scheme "*Subsidy for the preservation of sheep herds consisting of rare breeds*". The other request for information was issued by Italy and concerned the question whether the Commission was investigating a specific aid measure.

The Commission's possibility to submit *amicus curiae* observations on its own initiative before national courts is a novelty brought about by the 2013 amendment to the Procedural Regulation. In that respect, Article 29 of the Procedural Regulation mirrors Article 15(3) of Regulation 1/2003 in the field of antitrust. In 2016, the Commission decided to submit ten *amicus curiae* observations in national courts and tribunals (three in Estonia, one in Latvia, one in Greece, two in Belgium, two in Luxembourg and one in the United Kingdom) and requested to intervene in one commercial arbitration case, which was rejected. Five of these submissions concerned the *Micula*⁹¹ case. In this case, the Commission also took part in a hearing before the High Court in London.

The Commission intends to publish its opinions and *amicus curiae* observations on its website as soon as it receives approval from the courts concerned⁹².

In 2016, 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 conferences⁹³.

4. Significant judgments by EU Courts in the State aid area

In 2016, the EU Courts adopted a number of important judgments in the State aid area, in particular on the concept of State resources and advantage, and on the compatibility assessment. The following overview is based on a selection of court judgments.

State resources

In its *EEG* judgment⁹⁴ the General Court confirmed the Commission's decision that the German EEG levy qualifies as State resources. The EEG levy is a levy imposed on electricity suppliers per kWh, which is passed-on to the consumers and aimed to support the production

⁸⁹ 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, p. 9-29.

⁹⁰ College van Beroep voor het bedrijfsleven.

⁹¹ Case T-704/15 *Micula and Others v Commission*, action brought on 28 November 2015, OJ C 68, 22.2.2016, p. 30–32.

⁹² Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 22, paragraph 98.

⁹³ See also the dedicated section *Cooperation with national courts*, Antitrust and Cartels Section, item 7.

⁹⁴ Case T-47/15 *Germany v Commission (EEG)*, judgment of the General Court of 10 May 2016, EU:T:2016:281.

of renewable electricity. The EEG levy was introduced by law and managed by the German Transmission System Operators (TSO). The TSOs did not have to finance the advantage by their own private means, and their management of the EEG levy was monitored by the regulator. Reductions of the EEG levy were applicable to energy-intensive users.

The General Court stated that in order to constitute State resources, an advantage does not need to be granted directly by the State from the State budget, but can also be granted by bodies designated or established by the State. Next, it confirmed that the body entrusted with the management of State resources can be a public or a private body. Looking at the above-mentioned features, the EEG levy had to be considered as a charge unilaterally imposed by the State in the context of its policy to support producers of renewable energy and could be assimilated, from the point of view of its effects, to a levy on electricity consumption in Germany. As regards the reduction for energy-intensive users, the General Court also confirmed that it concerned State resources, because of the fact that the support for the production of renewable electricity was financed from State resources, and the reductions represented a loss of revenues for the TSOs that had then to be compensated by an increased EEG levy on the other consumers.

The judgment is under appeal⁹⁵. In parallel, a German court has also made a preliminary reference.

Advantage and Market Economy Investor Principle (MEOP)

Several important judgments were issued as regards the question of advantage. In the *IFP*⁹⁶ judgment, which is currently under appeal, the General Court held that the existence of an advantage deriving from an unlimited guarantee linked to the EPIC ("Établissement Public à caractère Industriel et Commercial", which exempts it from the normal bankruptcy rules) status of an undertaking cannot be automatically presumed, but rather that such presumption depends on the plausibility of the underlying assumptions on which the Commission relies.

The General Court's *FIH*⁹⁷ judgment, also under appeal, concerns a case where the transfer of property-related assets followed previous State aid measures (including a capital injection and guarantees). It held that the Commission should have applied the market economy creditor principle (rather than the market economy investor principle) as the behaviour of the State should not be compared to an investor trying to maximise his profits, but rather to that of a creditor seeking to minimise the losses to which that creditor would be exposed in the event of inaction.

The *Deutsche Post*⁹⁸ judgment of the General Court and the *Orange (France Télécom)*⁹⁹ judgment of the Court of Justice both concern the question whether a pension relief scheme limiting the pension burden inherited by certain enterprises which were created from State administrations constituted aid or not. The General Court held that such pension burden constituted a structural disadvantage and that freeing an undertaking from a structural

⁹⁵ Appeal Case before the Court of Justice C-405/16 P.

⁹⁶ Joined cases T-479/11 and T-157/12 *France and IFP Energies nouvelles v Commission*, judgment of the General Court of 26 May 2016, EU:T:2016:320.

⁹⁷ Case T-386/14 *FIH Holding A/S and FIH Erhvervsbank A/S v Commission*, judgment of the General Court of 15 September 2015, EU:T:2016:474.

⁹⁸ Case T-143/12 *Germany v Commission (Deutsche Post)*, judgment of the General Court of 14 July 2016, EU:T:2016:406.

⁹⁹ Case C-211/15P *Orange (France Télécom) v Commission*, judgment of the Court of 26 October 2016, EU:C:2016:798.

disadvantage that it has in relation to its competitors, did not constitute State aid, since the exceptionally high pension costs for civil servants could not be assumed to form part of the normal burden an undertaking has to bear. However, the Court of Justice agreed with the Commission and clarified in the Orange (France Télécom) judgment that compensation for a structural disadvantage can only be qualified as "no aid" if it fulfils the four *Altmark* criteria regarding the compensation for a service of general economic interest. In all other circumstances, even if it merely compensates a so-called structural disadvantage, a compensation would provide an advantage to the beneficiary and can therefore constitute State aid. The case of Deutsche Post remains open at this stage and the Commission will prepare a new final decision. Indeed, the final Commission decision finding incompatible aid for Deutsche Post was annulled in the General Court in July this year, but not the decision to open the investigation from 1999, which is not affected by the annulment.

Existing aid vs new aid

In its judgment in *Greek Aluminium*¹⁰⁰ the Court of Justice clarified that – contrary to what the General Court held when annulling the Commission's decision – the provisional extension of the duration of existing aid by a judgment rendered in interim proceedings must be regarded as an alteration of existing aid and therefore constitutes new aid, which should be notified to the Commission. This judgment is of particular significance, because it recalls the particular duty of national judges when ruling on measures that may constitute State aid.

GBER

In *Dilly's Wellnesshotel*¹⁰¹, the Court of Justice observed that given the general obligation to notify State aid to the Commission, the (old) General Block Exemption Regulation (GBER) and the conditions laid down therein have to be interpreted strictly. In order for an aid scheme to benefit from an exemption under the GBER, it was therefore mandatory – and not a mere formality – to include a reference to the GBER. Failure to fulfil that condition precluded an exemption under the GBER from being granted.

Compatibility

In its preliminary ruling in *Kotnik*¹⁰², the Court of Justice confirmed the validity of the Commission's Banking Communication¹⁰³ and held that burden sharing by shareholders and sub-debtholders as a prerequisite for State aid was not contrary to EU law.

The preliminary ruling in *PGE*¹⁰⁴ contains observations regarding the division of competences between the Commission and national authorities and courts. The assessment of compatibility of an aid scheme is an exclusive competence of the Commission. This means that national authorities and courts cannot review a State aid scheme at the time it is implemented to

¹⁰⁰ Case C-590/14P *DEI and Commission v Alouminion tis Ellados*, judgment of the Court of 28 October 2016, EU:2016:797.

¹⁰¹ Case C-493/14 *Dilly's Wellnesshotel GmbH v Finanzamt Linz*, judgment of the Court of 21 July 2016, EU:C:2016:577.

¹⁰² Case C-526/14 *Kotnik and others v Državni zbor Republike Slovenije*, judgment of the Court of 19 July 2016, EU:C:2016:767.

¹⁰³ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013XC0730%2801%29&from=EN>

¹⁰⁴ Case C-574/14 *PGE Górnictwo i Energetyka Konwencjonalna SA v Prezes Urzędu Regulacji Energetyki*, judgment of the Court of 15 September 2016, EU:2016:C:686.

determine whether it is consistent with the Stranded Costs Methodology Communication¹⁰⁵ if the Commission has already assessed that scheme in the light of the Communication as being compatible with the internal market before its implementation. However, the Commission decision should be interpreted in the light of the conditions of the Communication by the national court.

In *Magic Mountain*¹⁰⁶ the General Court established that the conditions of market failure and appropriateness of the aid measure are not conditions required under Article 107(3)(c) TFEU itself. It furthermore held that contrary to the Commission's guidelines, which are binding on it, the "*working paper on the more economic approach*" merely constituted an internal paper not meant to produce any effects outside the Commission and thus not binding on it.

Finally, in *Spanish goodwill*¹⁰⁷ the Court held that the only relevant criterion in order to establish the selective character of a tax measure consists in determining whether the effect of that measure is such as to favour certain undertakings over others which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory.

Developing the international dimension of EU competition policy

The Commission aims a level playing field as regards market access and promotes the values of EU competition enforcement across the world. While the EU has progressively integrated and opened its markets, EU companies still encounter discrimination and restrictions abroad. The progressive globalisation of trade and the spread of competition regulatory systems around the world call for convergence of competition rules and the coordinated enforcement of these rules. Companies need a transparent, stable and reliable competition enforcement wherever they do business. This is why the Commission seeks to reinforce the role of competition policy in international negotiations, in international organisations and cooperates with competition agencies globally.

1. Bilateral relations

At the international level, the Commission is holding negotiations on Free Trade Agreements (FTAs) with the aim to include competition and State aid provisions in such agreements. In 2016, the Commission's international priorities included the negotiations with the United States on a Transatlantic Trade and Investment Partnership Agreement (TTIP), launched in 2013. Significant progress was made on another important agreement currently being negotiated, namely the Free Trade Agreement with Japan. During 2016, the Commission also started FTA negotiations with Armenia, Mexico, Indonesia and Philippines, and re-opened negotiations with Mercosur. The Commission also continued negotiations with the People's Republic of China regarding an Investment Agreement. The agreement aims at establishing a

¹⁰⁵ Communication from the Commission relating to the methodology for analysing State aid linked to stranded costs available at http://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf

¹⁰⁶ Case T-162/13 *Magic Mountain v Commission*, judgment of the General Court of 9 June 2016, EU:T:2016:341.

¹⁰⁷ Joined Cases C-20/15 P *Commission v World Duty Free Group (formerly Autogrill España SA)* and C-21/15 P *Commission v Banco Santander SA and Santusa Holding SL*, judgment of the Court of 21 December 2016, EU:C:2016:981.

level playing field between EU and Chinese investors, including State owned enterprises, through *inter alia* enhanced provisions on transparency.

Negotiations between the Commission and its Canadian counterparts to include provisions on the exchange of evidence into the existing EU-Canada Cooperation agreement have been completed at working level. The present agreement does not make provision for the Commission and the Canadian Competition Bureau to exchange evidence collected in the course of their respective proceedings. The possibility to exchange such evidence would improve cooperation between both competition authorities in all competition cases which affect both markets and would lead to more effective and more efficient competition law enforcement. On 26 June, the Commission submitted the draft agreement to the Council and proposed to sign and conclude the agreement.

The cooperation agreement with Japan dates from 2003. In the margin of her visit to Japan in March, Commissioner Vestager agreed with Chairman Sugimoto, the Head of the Japan Fair Trade Commission, to initiate the respective internal procedures which would allow the start of negotiations to upgrade this agreement with provisions for the exchange of evidence.

Another key area of Commission activity at the international level is technical cooperation with main trading partners that are developing their competition policy and enforcement regimes and with which the Commission has signed Memoranda of Understanding (MoUs). The Commission has signed MoUs with all the BRICS¹⁰⁸ countries in recent years, of which the latest was the MoU signed with South Africa in June, and has engaged in technical cooperation with these countries to varying degrees. The Commission's technical cooperation activities with the Chinese competition authorities are particularly noteworthy and continued throughout 2016 under the management and financing of the Service for Foreign Policy Instruments (FPI). Finally, the programme for technical cooperation with the Indian competition authorities, CITD¹⁰⁹, continued in 2016 and will run until the end of 2017.

The Commission also assists in the implementation of the competition provisions included in recent FTAs with neighbouring countries. It is involved in negotiating the necessary implementing rules to this effect with Tunisia and Morocco, as well as monitoring the implementation of the EU competition acquis, including the State aid rules, in countries such as Ukraine and Moldova.

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

On 25 February, the Council presidency informed Serbia about the opening benchmarks for Chapter 8 (Competition). The Stabilisation and Association Agreement that EU had concluded with Kosovo in 2015 entered into force on 1 April, and on 15 February Bosnia and Herzegovina applied for EU membership.

¹⁰⁸ BRICS is the acronym for an association of five major emerging national economies: Brazil, Russia, India, China and South Africa.

¹⁰⁹ Capacity Building Initiative for Trade Development programme, launched in 2014.

2. Multilateral cooperation

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

The main work stream of the OECD, to which the Commission contributed in 2016, concerned disruptive innovation. On the related session of Big Data¹¹⁰ the Commission provided a comprehensive overview of its current thinking and experience on this matter. Other OECD sessions, to which the Commission contributed, included merger related discussions on public interest considerations, on jurisdictional thresholds and local nexus, on the merger decision making process and on geographic market definition. In relation to the latter topic the Commission reported on a recent commissioned study analysing the Commission's assessment of the relevant geographic market in large number of merger cases. Furthermore, in the field of antitrust, the Commission shared its experience with commitment decisions and sanctions in antitrust proceedings and it made a presentation on the issue of agency independence.

In the ICN, following the Singapore Annual Conference which took place in April 2016, the Commission took up a three year co-chair role of the Cartel Working Group and will work towards updating the ICN 2008 report on "*Setting Fines for Cartels in ICN Jurisdictions*" and carrying out a scoping exercise for new work for the "*Anti-Cartel Enforcement Manual*".

The Commission also participated in the 15th meeting of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy (CLP), which was held in Geneva in October 2016. The conference included discussions on the interface between competition law and IP rights, on the vertical distribution chain in the food sector and on competition compliance programs.

¹¹⁰ Further information available at <http://www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>

II. SECTORAL OVERVIEW

The Commission's competition policy actions in 2016 focused on a wide range of policy areas, helping make markets work more fairly. At the same time, EU competition policy supported several key EU policies and initiatives, including a connected Digital Single Market, an integrated and climate friendly Energy Union, a deeper and fairer internal market and taking actions against selective tax advantages. This section provides an overview of competition policy developments and enforcement activities that the Commission particularly focused on in 2016.

1. ENERGY & ENVIRONMENT

Overview of key challenges in the sector

Competition policy plays a key role in addressing these challenges and making the Energy Union function properly by opening markets, avoiding discrimination and creating a level playing field between all market players, regardless of their nationality. It ultimately promotes fairness and economic growth within the EU.

Moreover, ensuring that gas and electricity flow freely across borders between Member States, promoting interconnectivity and avoiding territorial restrictions or artificial market partitioning within the EU contribute to the Energy Union objectives.

Main policy developments

On 16 February, the Commission adopted a package of initiatives on security of energy supply implementing the Energy Union package¹¹¹. This package is based on three pillars: (i) improving security of supply by creating competitive gas markets; (ii) more effective crisis prevention and response based on cooperation and solidarity; and (iii) reducing import dependency by modernising the heating and cooling sector¹¹².

On 30 November, the Commission adopted another set of initiatives, the Clean Energy for All Europeans package¹¹³. This package comprises the largest set of initiatives made by the Commission to implement the Energy Union, as foreseen in the Energy Union Roadmap. It includes both legislative proposals as well as non-legislative initiatives. The key priorities for this package are energy efficiency, the EU's global leadership in renewables, and a fair deal for energy consumers.

Main issues of concern in relation to competition policy

The scope of competition law enforcement in the energy sector is to strengthen and integrate the principles outlined in sector-specific regulation in order to create a well-functioning unified market, where energy can be exchanged freely and securely across Europe and all

¹¹¹ Communication of 16 February 2016 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an *EU strategy for liquefied natural gas and gas storage*, COM/2016/49 final available at https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v10-1.pdf

¹¹² For further information see IP/16/307 of 16 February 2016 available at http://europa.eu/rapid/press-release_IP-16-307_en.htm

¹¹³ Communication of 30 November 2016 from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions and the European Investment Bank, *Clean Energy For All Europeans*, COM(2016) 860 final available at http://ec.europa.eu/energy/sites/ener/files/documents/com_860_final.pdf

related services are provided at competitive levels. For instance, by making sure that dominant positions by incumbent operators are not abused, that suppliers compete effectively and fairly, that State intervention is limited only to those areas in which is really needed and that renewables can compete in the market, competition policy helps keeping overall energy costs under control and at the same time allows for a sustainable economic growth in the EU.

Competition policy in 2016 has focused mainly on three areas:

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

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

At the same time, the Commission investigated with particular attention conduct that, besides infringing Articles 101 or 102 TFEU, might also have a negative impact on the environment and limit consumers' access to clean energy and efficient waste management.

The third fundamental pillar of competition policy in 2016 was the enforcement of State aid rules. A key principle embedded in the Commission's policy is that public support should result in a positive balance between the objectives achieved and the potential negative effects of State intervention on the European energy market.

In this context the Commission pays special attention to any market distortions that may arise as a result of public financing, such as the crowding out of investment, negative effects on upstream or downstream markets and excessive profits which may lead to strengthened market positions, deterrence of new entrants and ultimately market foreclosure.

By the effective enforcement of State aid rules in 2016 the Commission has ensured that the risk of such distortions is limited to the minimum. This has been achieved by promoting the implementation of more market oriented mechanisms in the energy support measures.

In 2016, the Commission adopted a number of decisions on forward looking renewable support schemes, which grant support on the basis of a competitive bidding process¹¹⁴. Competitive bidding processes not only foster competition between energy producers but also result in achieving objectives of common interest – environmental protection or security of

¹¹⁴ Cases SA.45461 *EEG 2017 - Reform of the Renewable Energy Law* and SA.41998 A) *Support to electricity from renewable energy sources and combined heat and power installations* and B) *Support for electro- intensive users in the form of reductions in electricity support scheme contributions*. For further information see IP/16/3361 of 10 October 2016 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/16/3361>; SA.44626 *Pilot tender for solar energy*. For further information see http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result and SA.43995 *Competitive bidding process for RES in Malta*. For further information see IP/16/2906 of 26 August 2016 available at http://europa.eu/rapid/press-release_IP-16-2906_en.htm

supply – at a lower cost to end consumers. Competitive bidding processes also contribute to the creation of a fairer EU economy in general.

Furthermore, in 2016 the Commission adopted the final decision on the Drax Biomass Conversion project¹¹⁵, approving the conversion of the coal fired plant into solid biomass fired plant after careful assessment of effects of the increase of solid biomass demand on raw materials markets outside the EU.

Contribution of EU competition policy to tackling the challenges

The ongoing Gazprom case¹¹⁶ is a good example of the efforts made by the Commission to facilitate the cross-border flows of energy between Member States. More specifically, the case aims at removing direct and indirect restrictions to re-sell gas cross-border and at allowing the flow of gas to Central and Eastern European gas markets. The Commission also wants gas prices in Central and Eastern Europe to reflect competitive benchmarks. It is essential for consumers throughout the EU that they can heat their homes and fuel their businesses with competitively priced natural gas. Furthermore, the Commission aims to ensure that Gazprom cannot act on any rights concerning gas infrastructure, which it obtained from customers by having leveraged its market position in gas supply. During the course of 2016, the Commission and Gazprom discussed the possibility of Gazprom making commitments to address, in a forward looking manner, the Commission's competition concerns.

The BEH Gas case provides another example of the Commission's efforts to ensure that incumbent companies do not perpetuate their dominant position¹¹⁷. State-owned and vertically integrated Bulgarian Energy Holding was being investigated for hindering competitors' access to key gas infrastructures in Bulgaria. The company is not only active in the gas supply market but also owns or controls the Bulgarian gas transmission network, the only gas storage facility in Bulgaria and the capacity on the main gas import pipeline into the country. The aim of the case is to ensure a competitive gas market in Bulgaria and foster the integration of the Bulgarian gas market with neighbouring markets.

The ARA case

Waste management is becoming an essential part of our economy. Allowing EU citizens to receive affordable and effective recycling services is at the heart of the EU's environmental and energy policies in the same way as gas and electricity.

On 20 September the Commission fined the Austrian waste management incumbent ARA for having abused its dominant position by blocking competitors from entering the Austrian market for management of household packaging waste¹¹⁸.

ARA owned a unique collection infrastructure, without access to which no company could provide waste management services throughout the country, as the law required. So by preventing other companies from accessing this infrastructure, ARA denied them a chance to compete. ARA was the first case where a cooperation procedure was used in a non-cartel antitrust prohibition decision. ARA co-operated with the Commission by

¹¹⁵ Case SA.38760 *Drax 3rd Unit Biomass Conversion*. For further information see IP/16/4462 of 19 December 2016 available at http://europa.eu/rapid/press-release_IP-16-4462_en.htm

¹¹⁶ Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*. For further information see IP/15/4828 of 22 April 2015 available at http://europa.eu/rapid/press-release_IP-15-4828_en.htm

¹¹⁷ Case AT.39849 *BEH Gas*. For further information see IP/15/4651 of 23 March 2015 available at http://europa.eu/rapid/press-release_IP-15-4651_en.htm

¹¹⁸ Case AT.39759 *ARA foreclosure*. For further information see IP/16/3116 of 20 September 2016 available at http://europa.eu/rapid/press-release_IP-16-3116_en.htm

acknowledging the infringement and ensuring that the decision could benefit from administrative efficiencies, as well as by proposing a structural remedy¹¹⁹.

The ongoing French Hydropower concessions case shows the Commission's strong commitment to tackle interventions by Member States that might lead companies to distort competition¹²⁰. In 2016, the Commission continued investigating whether granting most of the country's hydropower concessions to State-owned EDF at preferential financial conditions, without a tendering procedure and for very long periods maintained or strengthened EDF's dominance in the French electricity markets counter to Article 106 TFEU in conjunction with Article 102 TFEU. During the course of 2016 the Commission and the French authorities have discussed the possibility for France jointly with EDF of making commitments to address the Commission's competition concerns.

The Commission's antitrust enforcement is also contributing to the objective of a low carbon economy. Over the course of 2016, the Commission has continued the investigation on the conduct of ethanol producers, suspected of having colluded to affect ethanol benchmarks published by the price reporting agency Platts¹²¹. Such practices harm competition and undermine EU energy objectives by increasing prices for renewable energy, in this case biofuels used for transport.

Security of Supply and State aid

In the electricity sector, there are increasing concerns about generation adequacy and insufficient investment in new capacity due to market uncertainties and regulatory interventions. An increasing number of Member States are introducing capacity mechanisms to encourage investment in new capacity e.g. power plants or to provide incentives that power plants continue to operate, so that the supply of electricity meets demand at all times. At the same time, unnecessary and badly designed capacity mechanisms can distort competition, hamper necessary market reforms, hinder electricity flows across borders, lead to consumers overpaying for electricity and risk contradicting decarbonisation objectives.

Capacity mechanism sector inquiry - Final Report

Together with the adoption of the legislative Clean Energy Package, the Commission published on 30 November 2016 the final Report of its capacity mechanism sector inquiry¹²². The Report concludes that Member States need to better assess the need for such mechanisms and indicates how to improve their design to ensure security of supply while minimising competition distortions. The Report also concludes that many Member States have yet to implement market reforms that are indispensable to address security of supply issues. In those cases where a capacity mechanism is truly necessary, the Report indicates which types of capacity mechanisms may be most suitable to solve the identified problem. In particular, the Report concludes that the price paid for capacity must be determined by means of a competitive process, to which all types of capacities that can help address the security of supply problem (not only existing power plants but also, demand response providers, new capacities, storage facilities, interconnectors and foreign capacities) should be allowed to participate.

The capacity mechanism sector inquiry has provided input to and complements the Clean Energy Package adopted by the Commission on the same day to create modern, better working, more integrated electricity markets in the European Union. The Commission will continue to work with the Member States to bring their

¹¹⁹ The Commission took account of this comprehensive cooperation by ARA in calculating the fine, which was reduced by 30%.

¹²⁰ Infringement number 2015/2187 *Concessions hydroélectriques en France*.

¹²¹ Case AT.40054 *Ethanol benchmarks*. For further information see IP/15/6259 of 7 December 2015 available at http://europa.eu/rapid/press-release_IP-15-6259_en.htm

¹²² For further information see IP/16/4021 of 30 November 2016 available at http://europa.eu/rapid/press-release_IP-16-4021_en.htm

schemes in line with State aid rules. In addition, any new plans of Member States to introduce capacity mechanisms will be assessed in light of the insight gained from the sector inquiry.

In 2016, the Commission also adopted a major capacity mechanism decision in relation to the market-wide French de-centralised capacity mechanism¹²³ as well as decisions relating to the German Network Reserve¹²⁴ and Interruptibility scheme¹²⁵.

Sustainability, Competitiveness and State aid

As seen above, promotion of renewable energy and energy efficiency increases the sustainability of the EU energy sector and contributes to environmental protection. In 2016 the Commission adopted 15 decisions on new support schemes to renewable energy producers. Currently almost every Member State has an approved renewable energy support scheme. That ensures not only that Europe becomes greener, but also provides certainty for investors, who receive aid under a clear, transparent and equitable set of rules.

In 2016, the Commission also approved a number of previously non-notified support schemes for energy from renewable sources, among them being the Polish green certificates scheme¹²⁶, the Czech renewable support scheme for RES-electricity¹²⁷ and the Bulgarian feed-in tariff scheme for RES small installations¹²⁸. Furthermore, the Commission approved a pilot bidding process for solar energy in Denmark that was open for producers located in Germany¹²⁹. At the same time, Germany opened its bidding process for solar energy producers located in Denmark.

In the area of energy efficiency the Commission adopted a decision in the case on the reform of support for cogeneration in Germany¹³⁰ and the case on certificates of origin for Combined Heat and Power (CHP) certificates support system¹³¹ in Poland. It has been established that highly efficient combined heat and power generation reduces the primary energy sources necessary for energy production. In this way highly efficient CHP technology contributes to the increase of energy efficiency.

Further to the measures focusing on energy policy objectives, the environmental protection was promoted through State aid schemes aiming at better air quality. For instance, the Portuguese scheme for Clean Buses in Urban Areas supported the acquisition of around 400 to 500 clean buses, *inter alia* including electric buses or electricity hybrid buses¹³². Through

¹²³ Case SA.39621 *French country-wide capacity mechanism*. For further information see IP/16/3620 of 8 November 2016 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/16/3620>

¹²⁴ Case SA.42955 *German Network Reserve*, Commission decision of 20 December 2016 available at http://ec.europa.eu/competition/state_aid/cases/265043/265043_1872192_91_2.pdf

¹²⁵ Case SA.43735 *German Interruptibility Scheme ABLAV*, Commission decision of 24 October 2016 available at http://ec.europa.eu/competition/state_aid/cases/264060/264060_1841480_86_2.pdf

¹²⁶ Case SA.36499 *Prolongation of environmental and renewable investment aid schemes*, Commission decision of 16 June 2016 available at http://ec.europa.eu/competition/elojade/iseef/index.cfm?fuseaction=dsp_result

¹²⁷ Case SA.40171 *2006 RES Support*. For further information see IP/16/4083 of 28 November 2016 available at http://europa.eu/rapid/press-release_IP-16-4083_en.htm

¹²⁸ Case SA.44840 *Bulgarian RES support scheme*, Commission decision of 4 August 2016 available at http://ec.europa.eu/competition/state_aid/cases/263396/263396_1780804_103_2.pdf

¹²⁹ Case SA.44626 *Pilot tender for solar energy*, Commission decision of 27 September 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_44626

¹³⁰ Case SA.42393 *Reform of support for co-generation in Germany*. For further information see IP/16/3525 of 24 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3525_en.htm

¹³¹ Case SA.36518 *Certificates of origin for CHP in Poland*. For further information see IP/16/3214 of 28 September 2016 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/16/3214>

¹³² Case SA.45694 *PO SEUR Programme for Clean Buses in Urban Areas - Portugal*, Commission decision of 24 October 2016 available at http://ec.europa.eu/competition/state_aid/cases/264817/264817_1873991_86_2.pdf

this measure significant reductions of NOx and particulate matter emissions could be expected in full alignment with EU Environmental policies. Scottish Green Bus Fund was another scheme adopted in 2016 with similar objectives¹³³. In addition, the measures approved in the context of environmental protection aid, the schemes promoting intermodal shift in the transport sector also aim at improving air quality as the eligible aid corresponds to the part of the external costs, which rail transport avoids in comparison with transport by road.

State aid to coal mines

In 2016, the Commission also adopted three decisions¹³⁴ under the 787/2010 Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines¹³⁵. The decisions involve aid to cover production losses and social costs of uncompetitive mines in Spain, Poland and Romania. The approved aid alleviates the social and environmental impact of the mine closures in the affected regions, but it is conditional on the definitive closure of the uncompetitive mines by the end of 2018. The conditionality of the aid is aimed at ensuring that only competitive undertakings are fostered to remain on the market, thus making the market fairer and more efficient.

Merger control

In the field of merger control, the trend for investments in European energy infrastructure by investment companies persisted¹³⁶. In 2016, as in the previous years, a number of companies invested in development and production from renewable sources, in particular in wind parks¹³⁷.

¹³³ Case SA.43564 *Scottish Green Bus Fund*, Commission decision of 28 July 2016 available at http://ec.europa.eu/competition/state_aid/cases/264763/264763_1783899_73_2.pdf

¹³⁴ Cases SA.41161 *State aid to polish coal mining in the period 2015-2018*. For further information see IP/16/3824 of 18 November 2016 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/16/3824>; SA.34332 *Aid to facilitate the closure of coal mines in Spain*. For further information see IP/16/1910 of 27 May 2016 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/16/1910> and SA.43414 *Închiderea unor mine de cărbune în România*. For further information see IP/16/3981 of 24 November 2016 available at http://europa.eu/rapid/press-release_IP-16-3981_en.htm

¹³⁵ 2010/787/EU: Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines, OJ L 336, 21.12.2010, p.24-29.

¹³⁶ Cases M.8116 *Macquarie / SLFL GIO II / SGI Italia*, Commission decision of 26 July 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8116; M.8119 *DIF / Electricité de France / Thyssengas*; Commission decision of 12 September 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8119 and M.8211 *Marubeni / Toho Gas / Galp Energia / GGND*, Commission decision of 13 October 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8211

¹³⁷ Cases M.8075 *Partners Group / Infrared Capital Partners / Merkur Offshore*, Commission decision of 8 July 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8075; M.8092 *PSP / OTTP / Cubico / Renewable Energy Power Generation Companies*, Commission decision of 23 August 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8092; M.8165 *Eneco / Elicio / Norther JV*, Commission decision of 5 October 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8165 and M.8232 *Diamond Offshore Wind Holdings II / Eneco Wind Belgium / Elnu / Norther*, Commission decision of 9 November 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8232

In addition, the Commission conducted an in-depth investigation into the proposed acquisition of Baker Hughes by Halliburton¹³⁸. The transaction raised competition concerns on a very large number of markets related to oilfield services provided to oil and gas exploration and production companies in the EEA. The transaction could have had a negative impact on the efficient use of available gas resources within the EU, a key element of the Energy Union strategy in terms of ensuring security of supply. In view of the competition concerns raised by the Commission and other competition agencies across the world, the parties abandoned the proposed transaction.

2. INFORMATION AND COMMUNICATION TECHNOLOGIES (ICT) AND MEDIA

Overview of key challenges in the sector

In 2016, competition policy and enforcement continued to contribute to the implementation of the Digital Single Market Strategy¹³⁹, one of the priorities of the Commission. In particular the Commission continued its sector inquiry into e-commerce and carried out a number of investigations in the information, communication and media sectors.

Contribution of EU competition policy to tackling the challenges

E-commerce sector inquiry

The ongoing sector inquiry into e-commerce¹⁴⁰ aims to gather market information in order to better understand the nature, prevalence and effects of barriers to online trade erected by companies, and to assess them in light of EU competition rules.

In March, the Commission published its initial findings on geo-blocking¹⁴¹. Geo-blocking refers to business practices whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper's location or country of residence. The inquiry shows that geo-blocking is widespread in the EU. This is partly due to unilateral decisions by distributors not to sell abroad but also due to contractual prohibitions preventing retailers to sell cross-border¹⁴². Unilateral behaviour by non-dominant companies falls outside the scope of the EU competition rules. To address these forms of geo-blocking, the Commission adopted in May a proposal for a Regulation aiming at addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment¹⁴³, identifying those

¹³⁸ Case M.7477 *Halliburton / Baker Hughes*, Statement by Commissioner Vestager on announcement by Halliburton and Baker Hughes to withdraw from proposed merger of 2 May 2016 available at http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm

¹³⁹ 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 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX%3A52015DC0192>

¹⁴⁰ For further information see sector inquiry website available at http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

¹⁴¹ For further information see IP/16/922 of 18 March 2016 available at http://europa.eu/rapid/press-release_IP-16-922_en.htm

¹⁴² Commission Staff Working Document, *Geo-blocking practices in e-commerce*, SWD (2016)70 final available at http://ec.europa.eu/competition/antitrust/e-commerce_swd_en.pdf

¹⁴³ Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM/2016/0289 final, 2016/0152 (COD) of 25 May 2016 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0289&from=EN>

situations where restrictions of access of customers to goods and services due to their location cannot be in any case justified.

In September, the Commission published its Preliminary Report setting out its initial findings of the e-commerce sector inquiry. The Preliminary Report¹⁴⁴ provides an overview of the main competition-relevant market trends identified in the e-commerce sector inquiry and points to possible competition concerns. It confirms the growing significance of e-commerce. E-commerce is an important driver of price transparency and price competition, increasing consumers' choice and their ability to find the best deals. The Preliminary Report identifies certain business practices that may limit more intense online competition.

Manufacturers of consumer goods have responded to the growth of e-commerce by adopting a number of business practices in order to better control the distribution of their products and the positioning of their brands. Selective distribution systems in which the products can only be sold by pre-selected authorized sellers are used more widely and manufacturers increasingly sell their products online directly to consumers. Manufacturers also increasingly use contractual online sales restrictions in their distribution agreements. These types of contractual restrictions may make cross-border shopping or online shopping in general more difficult and may ultimately harm consumers by preventing them from benefiting from greater choice and lower prices in e-commerce.

With respect to digital content, the availability of licences from the holders of copyrights in content is essential for digital content providers and a key determinant of competition in the market. The Preliminary Report finds that copyright licensing agreements are complex and often exclusive. The agreements provide for the territories, technologies and release windows digital content providers can use. Where appropriate, the Commission will assess whether certain licensing practices restrict competition and whether enforcement of the EU competition rules by the Commission is necessary in order to ensure effective competition.

In the autumn, interested stakeholders commented the findings extensively in the framework of the public consultation on the Preliminary Report. They also expressed their views at the stakeholder conference organised by DG Competition in Brussels on 6 October¹⁴⁵. The final Report is due in the first half of 2017.

Removing unjustified restrictions on cross-border provision of satellite and online pay-TV services

In April 2016, in the case concerning cross-border provision of pay-TV services across Europe, Paramount Pictures, one of the film studios under investigation, offered commitments, which the Commission made binding on 26 July 2016¹⁴⁶. Paramount's commitments and the Commission's decision making them binding followed the sending on 23 July 2015 of a Statement of Objections by the Commission to Sky UK and six major US film studios: Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.

¹⁴⁴ Commission Staff Working Document, *Preliminary Report on the E-commerce Sector Inquiry*, SWD (2016)312 final available at http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf

¹⁴⁵ For further information see the webstream of the stakeholder conference available at <https://webcast.ec.europa.eu/conference-on-e-commerce-sector-inquiry> and the summary of the findings of the Preliminary Report available at http://ec.europa.eu/competition/antitrust/summary_presentation_conference_en.pdf

¹⁴⁶ Case AT.40023 *Cross-border access to pay-TV*. For further information see IP/16/2645 of 26 July 2016 available at http://europa.eu/rapid/press-release_IP-16-2645_en.htm

Cross-border-access to pay-TV

The case¹⁴⁷ started in January 2014 when the Commission opened a formal investigation to assess certain clauses in the licensing agreements between the six film studios and Sky UK which required Sky UK to block access to films through its online pay-TV services or through its satellite pay-TV services to consumers outside the United Kingdom and Ireland. The Commission considered that such clauses restrict the ability of broadcasters to accept unsolicited requests (so-called "passive sales") for their pay-TV services from consumers located outside their licensed territory. Further, the Commission considered that these clauses eliminate cross-border competition between pay-TV broadcasters and partition the Single Market along national borders.

In the commitments accepted by the Commission in July, Paramount committed that it will neither act upon nor enforce the restrictive clauses existing in the contracts licensing its film output for pay-TV with any broadcaster in the European Economic Area (EEA). Furthermore, Paramount also committed to refrain from introducing such clauses in the contracts licensing its output for pay-TV with any broadcaster in the EEA. These commitments will remain in force for five years and cover both standard pay-TV services and subscription video-on-demand services. The Commission will closely monitor Paramount's compliance with its commitments. Simultaneously, the Commission's investigation continues regarding the five other studios and Sky UK.

Ensuring pro-competitive telecoms framework

One of the key actions under the second pillar of the Digital Single Market strategy is the review of the telecoms regulatory framework. The Commission adopted on 13 September two legislative proposals: a proposal for a Directive establishing the European Electronic Communications Code¹⁴⁸, which recasts the existing directives, and a proposal for a Regulation establishing the Body of European Regulators for Electronic Communications (BEREC), which enhances the role of BEREC and of national regulatory authorities. They are accompanied by two Communications: *Connectivity for a European Gigabit society: Laying the foundations for a competitive Digital Single Market*¹⁴⁹, which establishes a set of connectivity objectives for 2025, and *5G for Europe: An Action Plan*¹⁵⁰, which sets out targeted actions with the aim of fostering 5G deployment in Europe.

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

Operators with Significant Market Power (SMP) will continue to be obliged to provide access to their networks to other operators, where this is necessary for effective retail competition. De-regulation is possible only when competition is effective in a given telecoms market. Additional measures are proposed to promote further infrastructure competition in a targeted

¹⁴⁷ Case AT.40023 *Cross-border access to pay-TV*, Commission decision of 26 July 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023

¹⁴⁸ Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code, COM(2016) 590 final available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-590-EN-F1-1.PDF>

¹⁴⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society*, COM(2016)587 and Staff Working Document SWD(2016)300 available at <https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society>

¹⁵⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *5G for Europe: An Action Plan*, COM(2016)588 and Staff Working Document SWD(2016)306 available at <https://ec.europa.eu/digital-single-market/en/news/communication-5g-europe-action-plan-and-accompanying-staff-working-document>

way, but within the same predictable competition law based framework. For example, the new proposals incentivize network investment by alternative operators, in particular through access to civil infrastructures. A framework rewarding co-investment in very high capacity networks is set up, encouraging fibre deployments from both incumbents and alternative operators. Telecoms operators which are present only at wholesale level will benefit from a simplified regulatory model for wholesale-only networks with SMP.

Communication services provided by Over-the-Top (OTTs) providers such as Skype, Facebook and WhatsApp are now regulated in the new Electronic Communications Code and are included in the new definition of electronic communications services (ECS), which encompasses services using numbers (e.g. traditional voice and SMS services, as well as number-based interpersonal communications services) and those not using numbers (interpersonal communications services that do not connect with the public switched telephone network). Certain obligations are extended to all OTT communications services (e.g. the rules linked to security and confidentiality), while other obligations (e.g. contract and transparency-related rules) are only extended to OTTs using numbers. Also, regarding spectrum, the Commission proposals contain measures to promote competition (such as spectrum caps, spectrum reservation for new entrants or wholesale access obligations).

Antitrust enforcement in the telecoms sector

On 27 October, the Commission opened proceedings regarding a mobile network sharing agreement between the two largest operators in the Czech Republic¹⁵¹.

In the area of baseband chipsets, which process the core communication functions in smartphones, tablets and other mobile broadband devices, the Commission continued the investigations in the Qualcomm cases¹⁵² as regards payments to a major customer conditional on exclusivity and potential "predatory pricing" by charging prices below costs with a view to forcing its competition out of the market.

Antitrust enforcement in technology markets

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

Search and search advertising are markets of significant importance for a well-functioning Internet. Search on mobile devices is of increasing commercial significance.

In the mobile space, in April, the Commission sent Google and its parent company, Alphabet, a Statement of Objections¹⁵³ outlining its preliminary view that Google had abused a dominant position by: (1) as a condition to license the Google Play Store, requiring smartphone and tablet manufacturers to pre-install Google Search and Google's Chrome browser and to set Google Search as default search service on their devices; (2) preventing smartphone and tablet manufacturers from selling smart mobile devices running on competing operating systems based on the Android open source code; and (3) giving financial incentives to smartphone and tablet manufacturers and mobile network operators on condition that they

¹⁵¹ For further information see IP/16/3539 of 25 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3539_en.htm

¹⁵² Statements of Objections were sent to the company on 8 December 2015. For further information see IP/16/6271 of 8 December 2015 available at http://europa.eu/rapid/press-release_IP-15-6271_en.htm

¹⁵³ Statement of Objections was sent to the company on 20 April, 2016. For further information see IP/16/1492 of 20 April 2016 available at http://europa.eu/rapid/press-release_IP-16-1492_en.htm

exclusively pre-install Google Search on their devices. The Commission believes that these business practices are part of a strategy to maintain and strengthen Google's dominance in general internet search, and that they hinder the development of rival mobile operating systems, applications and services, to the detriment of consumers and innovation.

In July, the Commission sent Google and Alphabet a supplementary Statement of Objections in the comparison shopping case¹⁵⁴. This outlines additional evidence reinforcing the Commission's preliminary conclusion from the April 2015 Statement of Objections that Google has abused its dominant position by systematically favouring its comparison shopping service in its search results pages.

Also in July, the Commission sent Google and Alphabet a Statement of Objections outlining its preliminary view that the company has abused a dominant position by artificially restricting the possibility of third party websites to display search advertisements from Google's competitors¹⁵⁵.

Antitrust enforcement in sports markets

In September, the Commission sent a Statement of Objections to the International Skating Union (ISU) to convey its preliminary view that the ISU rules under which athletes face severe penalties for participation in unauthorised speed skating events could be in breach of Article 101 TFEU¹⁵⁶. The ISU, made up of national ice-skating associations, is the sole body recognised by the International Olympic Committee to administer the sports of figure skating and speed skating on ice. The Commission's Statement of Objections is the second formal step in the formal proceedings opened in October 2015 following a complaint by two Dutch professional speed skaters¹⁵⁷. In its Statement of Objections, the Commission raised concerns that the penalties set out in the ISU Eligibility rules restrict the commercial freedom of athletes and prevent new organisers of international speed skating events from entering the market because they are unable to attract top athletes. The rules concerned have provided, in particular, that athletes participating in unauthorised events may face life-time bans from all key international speed skating competitions, including the Olympic Games and the World and European Championships.

ICT and media in the context of the Merger Regulation

Overall, this sector saw an increased merger activity in 2016 compared to 2015. The Commission intervened at several occasions in the planned takeovers.

In the telecommunications sector, the Commission conditionally cleared the acquisition of the mobile-only operator BASE by the Belgian subsidiary of Liberty Global, cable operator and Mobile Virtual Network Operator (MVNO) Telenet (with a fixed infrastructure of regional coverage)¹⁵⁸ in February. The Commission had concerns that a merger would have significantly reduced competition, with a risk of higher prices and less choice and innovation

¹⁵⁴ A supplementary Statement of Objections was sent to the company on 14 July 2016. For further information see IP/16/2532 of 14 July 2016 available at http://europa.eu/rapid/press-release_IP-16-2532_en.htm

¹⁵⁵ Statement of Objections was sent to the company on 14 July 2016. For further information see IP/16/2532 of 14 July 2016 available at http://europa.eu/rapid/press-release_IP-16-2532_en.htm

¹⁵⁶ Case AT.40208 *International Skating Union's Eligibility rules*. For further information see IP/16/3201 of 27 September 2016 available at http://europa.eu/rapid/press-release_IP-16-3201_en.htm

¹⁵⁷ Case AT.40208 *International Skating Union's Eligibility rules* available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=1_40208

¹⁵⁸ Case M.7637 *Liberty Global / Base Belgium*, Commission decision of 4 February 2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_7637

for mobile consumers. The Commission ultimately approved the acquisition, subject to an MVNO remedy involving the transfer of part of BASE's customers to the purchaser.

In May, the Commission prohibited the acquisition of Telefónica UK, operating under the brand "O2", by the market challenger Hutchison, operating under the brand "Three", combining the first and the fourth players in the market¹⁵⁹. The Commission was concerned that the takeover would have led to higher prices and reduced choice and quality for consumers in the United Kingdom. The remedies proposed by Hutchison failed to adequately address the serious concerns raised by the takeover. The Commission decided to block the merger to protect consumers in the United Kingdom.

In August, the Commission approved, subject to conditions, the creation of a joint-venture combining the Dutch telecommunication business of Liberty Global (cable operator and MVNO) and Vodafone (Mobile Network Operator (MNO)) and recent entrant in fixed services¹⁶⁰. The Commission considered that the merger would have eliminated the benefits brought to the Dutch fixed and multi-play telecoms market by the recent entry (and expected expansion) of Vodafone. The transaction was cleared, subject to the divestment of Vodafone's fixed consumer business (including customer base).

In September, the Commission conditionally cleared the proposed creation of a joint venture combining the Italian operations of Vimpelcom (WIND) and Hutchison (H3G), respectively the third and the fourth players in the retail mobile market¹⁶¹. The parties undertook to divest to a pre-defined buyer, Iliad, all assets needed to create a viable fourth mobile network operator in Italy. Only once this transaction is complete, can the parties go ahead with the deal.

In the IT sector, the Commission approved two multi-billion mergers in the data storage sector in February: the Commission cleared the acquisition of data storage manufacturer SanDisk by rival Western Digital¹⁶² as well as the acquisition of data storage and software provider EMC by computer technology company Dell¹⁶³, after concluding in both cases that there would be no adverse effects on customers.

The Microsoft / LinkedIn case

In December, the Commission approved, subject to conditions, the acquisition by Microsoft, a global technology company, of LinkedIn¹⁶⁴, a provider of professional social networking services. The Commission was concerned that Microsoft would use its strong market position in operating systems (Windows) for personal computers (PCs) and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position. The increase in LinkedIn's user base would make it harder for new players to start providing professional social network services in the EEA and it could have tipped the market towards LinkedIn in Member States where a competitor of LinkedIn currently operates. The commitments offered by Microsoft address the competition concerns identified by the Commission.

¹⁵⁹ Case M.7612 *Hutchison 3G UK / Telefonica UK*, Commission decision of 11 May 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7612

¹⁶⁰ Case M.7978 *Vodafone / Liberty Global / Dutch JV*, Commission decision of 3 August 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7978

¹⁶¹ Case M.7758 *Hutchison 3G Italy / Wind / JV*, Commission decision of 1 September 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7758

¹⁶² Case M.7772 *Western Digital / SanDisk*, Commission decision of 4 February 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7772

¹⁶³ Case M.7861 *Dell / EMC*, Commission decision of 29 February 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7861

¹⁶⁴ Case M.8124 *Microsoft / LinkedIn*, Commission decision of 6 December 2016, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8124

State aid enforcement in ICT and media

The achievement of the European broadband targets¹⁶⁵, despite substantial progress, represents a significant challenge, in particular for the deployment of ultrafast networks¹⁶⁶. 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 providers¹⁶⁷.

Most of the financing for the upgrade and deployment of next-generation networks in the broadband sector comes from private companies. Private companies tend to invest mostly in urban, highly populated areas which can assure rapid return on investment. As a result, in certain areas - in particular rural - public funds support the deployment of broadband networks, within the broader objectives of inclusion and economic development. Such public spending alongside private investment continues to be the key to achieving the longer term objectives set by the Digital Agenda for Europe up to and beyond 2025¹⁶⁸. State aid control seeks to ensure that where a market failure arises and publicly funded networks are needed, these do not crowd out private investments.

Most Member States have gradually adopted and even updated national and/or regional broadband strategies¹⁶⁹. While their content differs, many of them foresee measures to support supply through the use of public funds. Extensive national broadband schemes have been approved by the Commission during 2016, in particular for the United Kingdom, Italy and France. Over a longer period 2009-2016, the Commission approved State aid for broadband totalling EUR 34.9 billion. During the same period, Member States adopted 69 broadband State aid measures benefitting from the GBER¹⁷⁰.

¹⁶⁵ In its Communication "*Connectivity for a Competitive Digital Single Market - Towards a European Gigabit*" (COM/2016/587), 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 vision for a European Gigabit society operationalised through three strategic objectives for 2025. 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.

¹⁶⁶ According to Europe's digital progress report 2016, Next Generation Access (NGA) networks coverage continues to improve. By mid-2015, NGA networks were available to 71 % of EU homes. However, deployment still focus mainly on urban areas and only 28% of rural homes were covered, mainly by VDSL.

¹⁶⁷ Based on the study by Analysys Mason (SMART 2015/0068) and the Commission's estimates.

¹⁶⁸ As defined in the 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*, 14.9.2016 COM(2016) 587 final:

- 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.

¹⁶⁹ Even though a few Member States do not yet have a single document that can be regarded as a national broadband plan, all of them have at least an overall strategic approach for the deployment of next generation access networks that is implemented in practice.

¹⁷⁰ 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.

In assessing notified measures, Member States and selected operators must fulfil a number of conditions which include measures to ensure third parties' effective (wholesale) access to the subsidised broadband infrastructure as specified in the Broadband State Aid Guidelines¹⁷¹. Risks of distortion of competition are addressed through requirements, such as using the open selection process and the least distortive public financing mechanism. Overall, these conditions help to ensure that the positive effects of an aid measure outweigh its potential negative effects and minimise any distortive effect.

3. FINANCIAL SERVICES

Overview of the key challenges in the sector

The financial services sector has become substantially more stable over the last years. While anticipating a series of remaining challenges, EU competition policy has ensured a level playing field and maintained the integrity of the internal market. In view of the essential functions the sector provides for society, effective competition among financial service providers is a key component for a stable economy.

Banks have not only suffered from huge losses during the financial crisis but are also confronted with the current low interest environment that squeezes their margin income and with structural changes such as increased online banking and growing pressure from non-bank financial institutions. Existing business models are put into question and the sector will have to restructure, for instance, its costly branch network. Finally, society's call for a fairer use of taxpayers' money, namely for a protection from bail-out requests by banks in distress, has been reflected in the legislative framework completing the Banking Union, notably in the new bail-in rules in the Bank Recovery and Resolution Directive (BRRD)¹⁷² which entered into force in January 2016.

The insurance sector is also affected by the current low interest rate environment, in particular in the life insurance sector. Greater risk-taking by insurers on derivatives markets is one of the consequences that need to be monitored. As to non-life insurance, numerous legislative initiatives to remove regulatory barriers have unfortunately not resulted in increased cross-border competition, and the markets remain fragmented along national barriers to the detriment of consumers. In contrast, the traditional way to co-insurance unconventional risks in wholesale insurance - such as ecological damage, natural catastrophes, terrorism, or nuclear risks - is evolving from non-competitive cooperation frameworks like insurer-driven pools towards more pro-competitive arrangements like customer-driven ad-hoc agreements and broker-led co-insurance.

As regards capital markets, a substantial set of regulatory technical standards and implementing measures were adopted under MiFID II¹⁷³ in 2016 that aim in particular at increasing transparency, strengthening the regulation of market infrastructures, and enhancing

¹⁷¹ Communication from the Commission, *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ C 25, 26.1.2013, p.1 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF>

¹⁷² 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.

¹⁷³ European Parliament and Council Directive 2014/65/EU of 15 May 2014 Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance, OJ L 173, 12.6.2014, p. 349–496.

competition in capital markets. These measures underpin the Capital Markets Union initiative to create a stable, fair and competitive single market and generate sustainable growth for Europe. In addition to this regulatory work, enforcement through individual cases such as in the Deutsche Börse / LSE merger¹⁷⁴ remains important to ensure that the objectives of regulation are not undermined through anti-competitive mergers or conduct.

As in previous years, the Commission has remained very active in the financial services sector to promote effective and undistorted competition. It continued its role in merger control as well as in antitrust enforcement to combat anti-competitive behaviour. The primary aim of State aid control was the limitation of competition distortions and of the use of taxpayers' money when aided financial institutions were restructured or had to exit the market in an orderly way.

Contribution of EU competition policy to tackling the challenges

Contribution of EU competition policy to innovation and fairness in payments

2016 was an important year for the European payments market, as the legislative "payment package" with new rules profoundly changing the way payment providers operate in the EU gradually being implemented.

In June, the final part of the Interchange Fee Regulation¹⁷⁵ was implemented, making payment costs more transparent to retailers and consumers and allowing them to make efficient choices. The Regulation will generate substantial savings for retailers and consumers, as it is expected to reduce hidden fees on card payments by EUR 6 billion annually. It will also make business practices fairer and more transparent and allow competition to be more effective¹⁷⁶.

2016 also saw extensive technical work on the Regulatory Technical Standards (RTSs) to be drafted by the European Banking Authority (EBA) under the revised Payment Services Directive (PSD II)¹⁷⁷, including on the regulated access to the internet payments market by non-banks to the benefit of retailers and consumers¹⁷⁸.

¹⁷⁴ Case M.7995 *Deutsche Börse / London Stock Exchange* available at http://ec.europa.eu/competition/elojade/iseff/index.cfm?fuseaction=dsp_result

¹⁷⁵ European Parliament and Council Regulation (EU) No 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123, 19.5.2015, p.1 available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.123.01.0001.01.ENG

¹⁷⁶ The Interchange Fee Regulation was preceded by extensive legal action by the Commission challenging the interchange fees applied by MasterCard and Visa, including in particular the prohibition of MasterCard's intra-regional MIFs in 2007 and commitments from Visa Europe in 2010 and 2014 to reduce significantly all the MIFs it fixes in the EU. In September 2014 the Court of Justice endorsed the Commission's decision in the MasterCard case. For further information see case C-382/12 P *MasterCard and Others v Commission*, judgment of the Court of 11 September 2014, EU:C:2014:2201.

¹⁷⁷ European Parliament and Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35 available at http://ec.europa.eu/finance/payments/framework/index_en.htm#151008

¹⁷⁸ The Directive was preceded by competition enforcement action against the European Payments Council (EPC), the coordination and decision-making body of the European banking industry for payments. For further information see memo for Commission decision of 13 June 2013 available at http://europa.eu/rapid/press-release_MEMO-13-553_en.htm The Commission then proposed PSD II which provided a clear legal basis for such bank-independent players, who will become Payment Institutions and be regulated by financial supervisors.

In most Member States credit cards are the main means of internet payment. But card payments over the internet are cumbersome, expensive to merchants (with traditionally very high interchange fees for card transactions over the internet) and insecure with high levels of fraud¹⁷⁹. Moreover, only 60 % of EU citizens possess such cards. The PSD II opens the market for (bank-owned and non-bank owned) regulated third-party players who offer alternative means of internet payments (e.g. through credit transfers via the consumer's bank's website, including most importantly the Single Euro Payment Area (SEPA) Credit Transfer system).

The PSD II also enhances the security of internet payments in general. It will open the market to a whole range of other secure and efficient services building on the consumer's bank account, including account information services (allowing consumers to keep track on their mobile phone of their spending on different bank accounts) and payment instrument issuers (who are third parties who can issue cards and other payment instruments to consumers). Some of these services are already on the market and many more are expected after the transitional period elapses.

The "payment package" opens the door for competition and innovation in the payments sector, to the benefit of consumers and merchants.

Antitrust and cartel investigations in the financial services sector

In 2016, 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 investigation in the Credit Default Swaps (CDS) market came to an end on 20 July with the adoption of two commitment decisions addressed to the International Swaps and Derivatives Association (ISDA) and data provider IHS Markit¹⁸⁰. The commitments will apply for ten years and address the concerns of coordination and entry barriers in the intransparent over-the-counter (OTC) credit derivatives market. They aim at stabilising derivatives markets and facilitating the emergence of more efficient and less costly forms of CDS trading on exchanges. The key obligation is to facilitate entry by licensing industry standard inputs for CDS exchange trading purposes.

In 2016, the Commission continued its antitrust investigations into MasterCard's, Visa Inc.'s and Visa International's¹⁸¹ multilateral interchange fees ("MIFs") for transactions in the EEA made with cards issued outside the EEA ("inter-regional transactions"). Inter-regional MIFs are not capped by the Interchange Fee Regulation, but still represent a significant burden to European merchants. The Commission has also continued the investigation into MasterCard's rules with respect to cross-border acquiring, which allegedly have prevented merchants in countries with high prices for acquiring services to seek lower priced services from acquirers

¹⁷⁹ 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.

¹⁸⁰ Case AT.39745 *CDS - Information market*, Commission decision of 20 July 2016 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39745/39745_14237_7.pdf For further information see IP/16/2586 of 20 July 2016 available at http://europa.eu/rapid/press-release_IP-16-2586_en.htm

¹⁸¹ These proceedings were closed as regards Visa Europe following its commitments, Case AT.39398 *VISA MIF*, Commission decision of 26 February 2014 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf

established in other Member States. In the MasterCard case following the Statement of Objections issued to MasterCard in July 2015¹⁸², an oral hearing was held in May 2016.

As technology allows new services to emerge, such as electronic and mobile payments, with huge potential benefits for consumers and businesses notably in the Digital Single Market, the Commission has monitored developments. It is important to ensure that new and innovative services have a fair chance to develop and that incumbents acting as 'gate keepers' do not exclude new market entrants or attempt to secure substantive parts of markets for themselves.

Review of the Insurance Block Exemption Regulation

In 2016 the Commission continued its Review of the operation of the Insurance Block Exemption Regulation¹⁸³ (IBER). The objective of the Review was to verify whether this instrument is still the best approach to strike a balance between the need for effective protection of competition, prices and innovation and the needs of the insurance industry to continue cooperating by exchanging data and co-insuring and co-reinsuring risks. In March the Commission presented to the European Parliament and Council a Report¹⁸⁴ accompanied by a Commission Staff Working Document¹⁸⁵ evaluating the IBER since its adoption in 2010. The Commission's preliminary conclusion was that the strict conditions for the creation of an Insurance Block Exemption Regulation no longer seem to be met. In addition, complementary studies on issues identified during the Review were carried out, in particular: (1) the role of asset-switching in the production of insurance products¹⁸⁶ and (2) the effects of the different forms of co(re)insurance available on the market¹⁸⁷. The current IBER is in operation until 31 March 2017 as foreseen in a sunset clause in this Regulation.

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 2016, the consolidation trend in a number of financial services sectors continued, including in the payments area and the financial infrastructure space. While this consolidation may also be a sign of deeper integration between previously national markets dominated by an incumbent, the Commission remained vigilant that these developments do not come at the cost of the consumer. For example, it authorised the acquisition of Equens / Paysquare by Worldline¹⁸⁸

¹⁸² Case AT.40049 *MasterCard II*. For further information see IP/15/5323 of 9 July 2015 available at http://europa.eu/rapid/press-release_IP-15-5323_en.htm

¹⁸³ Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83, 30.3.2010, p.1.

¹⁸⁴ Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, COM(2016) 153.

¹⁸⁵ Commission Staff Working Document SWD (2016)62 accompanying the document Report from the Commission to the European Parliament and the Council On the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, COM(2016) 153.

¹⁸⁶ For further information see http://ec.europa.eu/competition/sectors/financial_services/KD0216917ENN.pdf

¹⁸⁷ For further information see http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf

¹⁸⁸ Case M.7873 *Worldline / Equens / Paysquare* available at http://ec.europa.eu/competition/elojade/iseef/index.cfm?fuseaction=dsp_result

only after the parties submitted remedies, and has opened an in-depth investigation into the merger between Deutsche Börse and London Stock Exchange¹⁸⁹.

State aid investigations in the financial sector

Coping with the deep impact the financial and sovereign crisis had on European banks continued to be the focus of State aid control also in 2016. Although the crisis years seem to be over in some Member States and the overall improvement of the sector at aggregated level is obvious, State support is still sought by some banks in difficulty.

In general, the banking sector is still in need of structural adjustments and investments in view of increasing competition from alternative suppliers regarding, for instance, payments. Moreover, historically low interest rates and overbanking put significant pressure on the profitability of the institutions. These factors, combined with higher regulatory capital requirements, question the viability of some business models. An additional aggravating element is the recent economic recession which translated into particularly high levels of non-performing loans in the banking system of some Member States. As a consequence of all this, a non-negligible portion of the banks in the EU is structurally weak, burdened by legacy losses and incapable of generating sufficient income internally or of raising sufficient capital on the market to redress the situation.

The EU State aid crisis rules, today primarily the Banking Communication of 2013¹⁹⁰, which is in line with the current key building blocks of the Banking Union – the Single Supervisory Mechanism (SSM), Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) - allows State aid when absolutely necessary and ensures that distortions of competition are limited. That latter objective is achieved not only by requiring the restructuring of the aid beneficiaries and the repayment or adequate remuneration of the State support but also by requiring orderly market exits of banks that are not able to return to viability. The most distortive type of support, especially at a time when each and every bank has to carry out deep adjustments to ensure that it keeps a profitable business model, is the support which keeps artificially alive banks with business models that are not viable anymore in the new economic, technological and regulatory environment.

In addition, to put an end to moral hazard and the unfair burdening of taxpayers when saving institutions that are failing or likely to fail, today's rules provide for bail-in tools that require a fair contribution from share and debt holders before any State support can kick in.

This, however, also means that State aid for banks is still possible, both within and outside resolution, if it meets all the requirements listed above. As a consequence, State aid control will remain an indispensable and permanent component of the day to day operation of the Banking Union.

Ensuring burden sharing of private shareholders and creditors is important to reduce the burden for taxpayers. However, there are repeated calls for a continuation of full State support, thereby trying to re-impose the entire burden on taxpayers. This also means that those banks taking wrong decisions do not have to face the consequences of their decisions with the losses being shifted to the taxpayer. In contrast, banks having taken the right and

¹⁸⁹ Case M.7995 *Deutsche Börse / London Stock Exchange* available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

¹⁹⁰ Communication from the Commission on the *Application of State aid rules to support measures in favour of banks in the context of the financial crisis (Banking Communication)*, OJ C 216, 30.7.2013, p.1 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0730%2801%29&from=EN>

prudent decisions are not rewarded in full, as they continue to face artificially supported competitors that would have to exit the market under normal conditions of a functioning competition undistorted by State aid.

So far no EU bank has been put into resolution, using the bail-in tool¹⁹¹.

Member States chose not to intervene in banks on terms that do not trigger resolution and thereby avoid bail-in, for instance by structuring interventions as no aid, as precautionary recapitalisation¹⁹² or under national insolvency regimes. A series of cases can be mentioned here, for instance a Hungarian bad bank purchasing Non Performing Loans (NPLs) at market price and an Italian scheme for State guarantee on senior debt instruments issued by vehicles purchasing NPLs where the guarantee was offered at a market conform fee. Both measures were approved as aid-free measures in 2016.

Therefore, the current situation requires a key role for State aid control to play in close co-operation with the new authorities created by the Banking Union in order to ensure and protect a level playing field within the Union market and equal treatment between Member States. In order not to undermine the very core of the Banking Union, this includes the setting of limits regarding the increasing creativity in finding solutions outside resolution.

Early interventions of Deposit Guarantee Schemes outside their pay-out function may or may not constitute State aid depending on the individual design and structure of such a scheme. In any event, a Deposit Guarantee Scheme's support for an orderly market exit of a bank can be easily approved under State aid rules.

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 activity¹⁹³. 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

¹⁹¹ According to the BRRD the 8% bail-in rule is a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of total liabilities including own funds of the institution under resolution to be made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise according to (see Articles 37 (10)(a) and 43 et seq. BRRD).

¹⁹² Precautionary capitalisation is, according to Article 32(4)(d)(iii) BRRD, an exceptionally allowed public injection of own funds or purchase of capital instruments outside resolution of a precautionary and temporary nature that can be only granted to remedy a serious disturbance in a Member State and preserve financial stability when confined to a solvent institution without conferring an advantage upon the institution and is not used to offset losses the institution has incurred or is likely to incur in the near future and which is conditional on final approval under State aid rules.

¹⁹³ OECD (2013) *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris.

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.

The Commission's State aid decision of 30 August, requiring Ireland to recover a selective tax advantage granted to Apple in Ireland of up to EUR 13 billion, was another step forward in the Commission's overall strategy to ensure fair taxation¹⁹⁴.

Both collecting taxes and combating tax avoidance and evasion are normally competences of the Member States. However, even in this area where the Member States enjoy fiscal autonomy, any national tax measures adopted have to comply with internal market rules and, amongst others, abide by competition law¹⁹⁵.

Contribution of EU competition policy to tackling the challenges

State aid investigations and decisions concerning aggressive tax planning

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

Throughout 2014-2016, 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.

¹⁹⁴ President Juncker stressed in his State of the Union speech of 14 September 2016 that the decision shows that "every company, big or small, has to pay its taxes where it makes its profits. This goes for giants like Apple too, even if their market value is higher than the GDP of 165 countries in the world. In Europe we do not accept powerful companies getting illegal backroom deals on their taxes" available at http://ec.europa.eu/priorities/state-union-2016_en

¹⁹⁵ 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 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN>

Specific cases

Belgian excess profit system

On 11 January, the Commission adopted a negative decision with recovery¹⁹⁶, concluding that selective tax advantages granted by Belgium under its "excess profit" tax scheme are illegal under EU State aid rules. The scheme has benefited at least 35 multinationals mainly from the EU, who must now return unpaid taxes to Belgium. The scheme provides certain Belgian entities that are part of a multinational group with a reduction of their tax base. The tax base reduction concerns a part of an entity's actually recorded profit which exceeds the alleged hypothetical average profit of a stand-alone entity (i.e. not part of a group) deemed to be comparable. Belgium deems that part of the profit "excess profit". This unilateral downward adjustment of the tax base, is claimed to be granted to prevent double taxation, but it applies irrespective of any risk of double taxation. The benefits of the scheme are available subject to an advance ruling issued by a Special Ruling Commission.

Ireland – the Apple decision

On 30 August, the Commission decided to require Ireland to recover a selective tax advantage granted to Apple by way of two tax rulings¹⁹⁷.

The tax rulings endorsed a method to allocate profits within two Apple companies incorporated in Ireland: Apple Sales International (ASI) and Apple Operations Europe (AOE). The profits were allocated between the Irish branches of ASI and AOE and their "head offices" (that existed only on paper). These head offices were not tax resident in any country, had no employees or premises and did not engage in any real activities. The profits allocated to the respective head offices were not subject to tax because the head offices were not tax resident in any tax jurisdiction. According to the Irish tax rulings given to Apple, virtually all profits of ASI and AOE were recorded in Ireland and attributed to these untaxed head offices, rather than to the branches, tax resident in Ireland. The Commission found that the profit allocation as approved in the rulings had no factual or economic justification as the head offices of both companies had no operational capacity to handle or manage any substantive business of the company. Only the branches of ASI and AOE had the capacity to generate any income from trading. Therefore, the Commission found that the sales profits of both companies should have been attributed to the branches and taxed in Ireland.

This "incorrect allocation" of the profits, leading to a very low tax base for both Irish companies, ASI and AOE, gave Apple a selective advantage over other businesses that are subject to taxation in Ireland. The Commission estimated that this unfair tax advantage amounts to up to EUR 13 billion since 2003, which Ireland will have to recover from Apple. Both Ireland and Apple has appealed the decision.

Luxembourg - Engie

On 19 September, the Commission opened an in-depth investigation into Luxembourg's tax treatment of Engie (formerly known as GDF Suez)¹⁹⁸. The Commission is assessing whether the tax authorities have selectively derogated from provisions of national tax law in tax rulings issued to GDF Suez. In particular, they appear to misapply certain provisions of their national law in several rulings which endorse the treatment of the same financial transaction between companies of GDF Suez (two zero-interest convertible loans) in an inconsistent way. The borrowers of the convertible loans are allowed to significantly reduce their taxable profits in Luxembourg by deducting the (provisioned) interest payments of the convertible loan as expenses. At the same time, the lenders avoid paying any tax on the profits the convertible loans

¹⁹⁶ For further information see IP/16/42 of 11 January 2016 available at http://europa.eu/rapid/press-release_IP-16-42_en.htm

¹⁹⁷ For further information see IP/16/2923 of 30 August 2016 available at http://europa.eu/rapid/press-release_IP-16-2923_en.htm

¹⁹⁸ For further information see IP/16/3085 of 19 September 2016 available at http://europa.eu/rapid/press-release_IP-16-3085_en.htm

generate for them, because the ruling considers the income as equity-like remuneration which is not subject to taxation. The final result seems to be that a significant proportion of the profits recorded by GDF Suez in Luxembourg through the two arrangements are not taxed at all. The Commission considers at this stage that the treatment endorsed in the tax rulings resulted in tax benefits in favour of GDF Suez, which are not available to other companies subject to the same national taxation rules in Luxembourg.

Fight against discriminatory tax schemes and measures sheltering national companies from EU competition

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 EU competition.

In 2014, Hungary introduced (1) a tax on the turnover derived from the publication of advertisements in the media (advertisement tax); (2) a tax on the annual turnover derived from the production and trade of tobacco products; and (3) amended an existing tax on the annual turnover of food chain operators, introducing a multiple progressive rate structure for retail stores selling items of daily consumer goods. These three turnover tax measures had progressive rates depending on annual turnover, and placed companies with low turnover in an advantaged position compared to others.

In July and November, the Commission adopted final negative decisions in respect of the Hungarian turnover tax measures considering that the progressivity of the tax rates granted a selective advantage to undertakings with low turnover (mainly national) and constituted State aid, which was not compatible with the internal market¹⁹⁹. Furthermore, in September the Commission opened a formal investigation procedure in respect of a Polish retail tax featuring a progressive rate structure similar to the Hungarian taxes²⁰⁰.

With regard to the investigation into fiscal aid to EU ports, in January 2016 the Commission adopted a negative decision as regards the corporate tax exemption for Dutch public seaports²⁰¹. Furthermore, in July 2016, the Commission opened the formal investigation procedure as regards the corporate tax exemptions for ports in Belgium²⁰² and France²⁰³. 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 is excluded from corporate taxation. 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 are neither transparent, nor limited or targeted at financing activities which are

¹⁹⁹ Cases SA.39235 *Hungarian advertisement tax*, Commission decision of 4 November 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39235; SA.40018 *Amendment to the Hungarian food chain inspection fee*, Commission decision of 4 July 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40018 and SA.41187 *Hungarian health contribution of tobacco industry businesses*, Commission decision of 4 July 2016 available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

²⁰⁰ Case SA.44361 *Polish tax on retail sector with progressive rates*, Commission decision of 19 September 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44351

²⁰¹ Case SA.25398 *Corporate tax exemption of Dutch public enterprises*, Commission decision of 21 January 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_25338

²⁰² Case SA.38393 *Ports taxation in Belgium*, Commission decision of 8 July 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38393

²⁰³ Case SA.38398 *Ports taxation in France*, Commission decision of 8 July 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38398

objectively justified in the public interest. The exemptions grant operating aid, which is the most distortive type of aid.

5. BASIC INDUSTRIES AND MANUFACTURING

Overview of key challenges in the sector

Basic industries and manufacturing are key to the European economy. In 2016 the Commission spent significant resources on competition policy actions in these sectors, which range widely from consumer products such as toys and musical instruments, to intermediary products such as engine parts, lubricants, and solar panels, to industry inputs such as chemicals and outputs such as plastics. To ensure an economy and a society where manufacturers, distributors and consumers alike reap a fair share of the benefits of a modern specialised economy, the entire value chain of such products is subject to scrutiny under EU competition rules. Where unfair restrictions on the manufacturing or the distribution of these products to certain customers or in certain areas within the EU lead to a reduction in efficiency and to an unfair accrual of the benefits to one particular part of the value chain, to the detriment of consumers in particular, the role of the Commission is to remove these unfair restrictions to the benefit of all.

Contribution of EU competition policy to tackling the challenges

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

Antitrust investigations in basic industries

Basic manufacturing and consumer goods industries continue to represent a significant share of the Commission's enforcement practice. In 2016, the Commission continued its lines of action (including individual case work, market surveillance and advocacy) in these sectors. The EU's high value-added manufacturing industry requires access to basic materials at affordable prices that reflect international cost conditions. In 2016, the Commission actively monitored the markets for these inputs to ensure there is adequate access in a healthy and competitive environment.

Cartel investigations in basic industries

Breaking cartels remains a priority for the Commission, in particular when they affect important consumer goods, such as cars. The collusion in the *Alternators and Starters* settlement case²⁰⁴ affected component costs for a number of car manufacturers selling cars in Europe, and ultimately European consumers buying them.

The Alternators and Starters case

The Alternators and Starters settlement case is the fifth cartel case in the automotive sector which brings the total amount of fines imposed in cartel cases in the automotive sector to EUR 1.42 billion.

An alternator is a device which converts mechanical energy to electrical energy and a starter is a motor that starts the engine of the car. The cartel was operated by three Japanese automotive suppliers: Denso, Hitachi and

²⁰⁴ Case AT.40028 *Alternators and Starters*, Commission decision of 27 January 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40028

Mitsubishi Electric. However, Hitachi had a limited participation to the cartel, only with respect to the supply of alternators and starters to two out of the 12 groups of car manufacturers.

The cartel participants fixed prices, allocated customers and exchanged commercially sensitive information. Their aim was to avoid a decline in prices and to maintain their market shares within the EEA. Their main operating principle was the incumbency principle.

The cartel lasted for five years and five months from 14 September 2004 until 23 February 2010 and covered the supplies of alternators and starters to 12 groups of major car manufacturers across the EEA.

The Commission's investigation in this case started with an immunity application in 2011. The decision was adopted under the settlement procedure concerning all three parties. Denso received full immunity under the Commission's Leniency Notice for revealing the existence of the cartel, while the two other undertakings received fines reductions as leniency applicants. The Commission imposed fines of EUR 137.8 million on the three automotive suppliers.

Merger investigations in basic industries

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

In particular, the Commission investigated further consolidation in the cement sector, after a number of transactions which had taken place in the previous years. On 26 May, the Commission cleared the acquisition of the Italian building materials group Italcementi by German-based HeidelbergCement, subject to the divestment of Italcementi's integrated building materials business in Belgium²⁰⁵. The Commission also opened an in-depth investigation into the joint acquisition of the Croatian assets of Cemex by cement manufacturers HeidelbergCement and Schwenk²⁰⁶.

In 2016 the Commission also closed its in-depth investigation into the acquisition of office supplies company Office Depot by its rival Staples, both based in the United States. The Commission approved the transaction subject to the divestiture of the entire European contract distribution business of Office Depot, as well as Office Depot's whole business operations in Sweden. The two companies, however, abandoned the transaction after an adverse ruling by a US Court on the acquisition²⁰⁷.

The Commission also carried out an in-depth investigation into the acquisition of French train equipment supplier Faiveley Transport by its US rival Wabtec. The transaction was cleared on 4 October 2016 subject to the divestment of the entirety of Faiveley Transport's activities in sintered friction materials²⁰⁸.

2016 saw also the acquisition by the number one global brewer AB InBev of its largest global competitor SAB Miller. After a preliminary investigation, the Commission found a risk that the transaction may have led to higher prices in a number of Member states, and may have facilitated tacit price coordination among brewers in the EEA. The acquisition was thus approved subject to the divestiture of the whole of SAB Miller's business in a number of

²⁰⁵ Case M.7744 *HeidelbergCement / Italcementi*. For further information see IP/16/1929 of 26 May 2016 available at http://europa.eu/rapid/press-release_IP-16-1929_en.htm

²⁰⁶ Case M.7878 *HeidelbergCement / Schwenk / Cemex Hungary / Cemex Croatia*. For further information see IP/16/3362 of 10 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3362_en.htm

²⁰⁷ Case M.7555 *Staples / Office Depot*. For further information see IP/16/278 of 10 February 2016 available at http://europa.eu/rapid/press-release_IP-16-278_en.htm

²⁰⁸ Case M.7801 *Wabtec / Faiveley Transport*. For further information see IP/16/3305 of 4 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3305_en.htm

Member States (France, Italy, the Netherlands, the United Kingdom, Czech Republic, Hungary, Poland, Romania and Slovakia)²⁰⁹.

As regards further interventions in basic industries and manufacturing without an in-depth investigation, the Commission approved the acquisition of the crane and container handling business of the United States based Terex by the Finnish lifting equipment supplier Konecranes subject to the divestiture of the entire global business for hoists, cranes and handling materials Stahl, currently owned by Konecranes, including a production facility based in Germany²¹⁰. Remedies were also required by the Commission for the clearance of the acquisition of German laser supplier Rofin-Sinar by US rival Coherent, subject to the divestment of Rofin-Sinar's UK based business for the manufacturing of low power CO2 lasers²¹¹, and for the clearance of the acquisition of alumina companies Alteo ARC and Alufin by French multinational company Imerys, subject to the divestiture of the entire white fused alumina business of Alteo²¹².

State aid investigations in basic industries

On 20 January, the Commission adopted a decision²¹³ finding that a EUR 211 million funding granted by the Walloon authorities in Belgium to several steel companies within the Duferco group between 2006 and 2011 distorted competition in breach of EU State aid rules. In its decision, the Commission concluded that no private investor would have accepted to invest on the same terms.

Further, on 20 January, the European Commission opened an in-depth investigation²¹⁴ to assess whether Italian State support for the steel producer Ilva granted in 2014 and 2015 is in line with the EU State aid rules. These measures amount to EUR 806 million of publicly supported finance already disbursed to support Ilva. In May, the Commission extended the proceedings to an additional EUR 300 million State loan²¹⁵.

The Commission's State aid investigations in the steel sector have to be considered against the background that steelmakers across the EU are struggling with overcapacity. State interventions should therefore be market driven to avoid a harmful subsidy race between Member States, which would increase overcapacity and jeopardise the efforts already made by EU steelmakers to remain competitive.

On 19 July, the Commission opened an in-depth investigation to determine whether the French State's contribution to the financing of the Areva group's restructuring gave the

²⁰⁹ Case M.7881 *AB InBev / SAB Miller*. For further information see IP/16/1900 of 24 May 2016 available at http://europa.eu/rapid/press-release_IP-16-1900_en.htm

²¹⁰ Case M.7792 *Konecranes / Terex MHPS*. For further information see IP/16/2763 of 8 August 2016 available at http://europa.eu/rapid/press-release_IP-16-2763_en.htm

²¹¹ Case M.8055 *Coherent / Rofin-Sinar Technologies*. For further information see IP/16/3548 of 26 October 2016 http://europa.eu/rapid/press-release_IP-16-3548_en.htm

²¹² Case M.8130 *Imerys / Alteo Certain Assets*. For further information see IP/16/3572 of 28 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3572_en.htm

²¹³ Cases SA.33926 *Interventions de la région wallonne en faveur de Duferco*, Commission decision of 20 January 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33926, decision under appeal and T-254/16 *Steel Invest & Finance (Luxembourg) v Commission*, OJ C 251, 11.07.2016.

²¹⁴ Case SA.38613 *Alleged Aid for Ilva in A.S.*, Commission decision of 20 January 2016, OJ C 142, 22.04.2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38613

²¹⁵ Case SA.38613 *Alleged Aid for Ilva in A.S.*, Commission decision of 13 May 2016, OJ C 241, 01.07.2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38613

company a selective advantage not available to its competitors²¹⁶. This investigation was concluded with two positive decisions, both adopted on 10 January 2017²¹⁷. Areva is active in a range of activities in the nuclear fuel cycle and it is majority-owned by the French State. A significant part of the investigation was to verify whether the long-term viability of Areva is ensured to avoid injections of public funds in the future.

On 26 January, the European Commission has opened an in-depth investigation into whether public measures in favour of the Spanish mining company Iberpotash gave it a selective advantage over its competitors²¹⁸. Iberpotash owns and operates several potash mines in the Catalonia region of Spain. The investigation focuses on the legality of financial State guarantees related to environmental protection legislation and to the financing of environmental protection measures.

On 8 April 2016 the Commission opened an in-depth investigation into State support for the insolvent Romanian petrochemical company Oltchim²¹⁹. The company, which is controlled by the Romanian State, is in a process of reorganisation, with the aim of paying existing debts from the proceeds of its privatisation. The main question is whether by accepting debt waivers, Oltchim's public creditors granted incompatible State aid.

The Commission is continuing its investigation into possible restructuring aid to the Greek railway company TRAINOSE²²⁰ and the cancellation of debts incurred prior to Bulgaria's accession to the EU by the Bulgarian rail incumbent BDZ²²¹.

6. AGRI-FOOD INDUSTRY

Overview of key challenges in the agricultural sector

The European food sector is facing important challenges at the different levels of the food supply chain.

Specific characteristics of the agricultural sector

EU farmers face challenges due to the characteristics of the agricultural sector. Unforeseeable natural elements (such as adverse weather conditions and diseases) can significantly alter production, resulting in volatility of prices and revenues. Farmers also face increased demands in terms of quality, variety and traceability by end consumers. In addition,

²¹⁶ Case SA.44727 *Restructuring aid to Areva*, Commission decision of 19 July 2016, OJ C 301, 19.08.2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_44727

²¹⁷ Cases SA.44727 *Restructuring aid to Areva*, Commission decisions of 10 January 2017 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_44727 (in the form of a capital injection of EUR 4.5 billion by the French State) and SA.46077 *Aide au sauvetage en faveur du Groupe Areva*, available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_46077 on the rescue aid to Areva (regarding a EUR 3.3 billion loan from the French State to two entities in the Areva Group, later converted into a capital injection, which is the subject of the restructuring aid decision).

²¹⁸ Case SA.35818 *Iberpotash*, Commission decision of 26 January 2016, OJ C 14, 22.04.2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_35818

²¹⁹ Case SA.36086 *Potential aid to Oltchim*, Commission decision of 8 April 2016, OJ C 284, 05.08.2016 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_36086

²²⁰ Case SA.32544 *Restructuring of the Greek Railway Group – TRAINOSE S.A.*, Commission decision of 13 July 2011, OJ C 272, 15.09.2011 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_32544

²²¹ Case SA.31250 *Restructuring aid to BDZ*, Commission decision of 9 November 2011, OJ C 10, 12.01.2012 available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_31250

agricultural producers form the least concentrated level in the food supply chain. The most common situation across sectors and Member States is that agricultural producers remain atomised or grouped into small cooperatives and other producer organisations. In contrast, their input suppliers and customers (processors, wholesalers and retailers) are often much larger and more concentrated. Agricultural producers therefore typically have very little bargaining power in their negotiations vis-à-vis large suppliers and buyers. Integration of producers in large organisations can improve the management of these challenges significantly where these organisations aggregate supply (both in terms of volumes and variety of products), offer supporting services and add value through processing. Such integration can provide more stability, scale to reach more customers, flexibility, more value and more bargaining power.

Contribution of EU competition policy to tackling the challenges

Making agricultural markets more competitive

In order to increase the competitiveness of the EU agricultural sector and to strengthen the bargaining power of smaller agricultural producers, the 2013 Common Agricultural Policy (CAP) Reform, maintained the application of competition law to agriculture and set out new derogations to antitrust rules for certain agricultural sectors (olive oil, beef and veal, and arable crops (cereals, oilseeds, etc.))²²². The new rules aim at creating more efficiencies in the EU agricultural sector by promoting and stimulating more integration through joint selling by producer organisations provided that the amounts sold remain at moderate levels in the relevant market (15% or 20%) or other joint activities such as joint storage or distribution. To ensure a coherent application of the new derogations and in order to help farmers to apply such derogations and provide guidance on how to obtain efficiencies in joint activities, the Commission adopted Guidelines in November 2015²²³.

Milk Package

The Commission has prepared a report on the functioning and implementation of the Milk Package. There is evidence that the package has improved the position of farmers in the chain to some extent, including through various collective actions of producers going beyond the milk package. The survey ordered by the Commission for the purpose of drafting the report shows notably that producer organisations in the sector do much more than negotiating prices and deliveries. Most producer organisations provide one or more services that add value to the supply of milk and/or support producers' activities, such as milk collection, quality control, technical support, and joint procurement of inputs.

Agricultural Markets Task Force

The Agricultural Markets Task Force (AMTF), a task force of experts set up by the Commissioner for Agriculture and Rural Development, delivered its report on 15 November. The report contains recommendations on various issues, including competition rules. The AMTF suggests that the rules of collective organisation and competition law should be clear

²²² European Parliament and Council Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products (CMO Regulation) and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R1308>

²²³ Commission notice *Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors*, OJ C 431, 22.12.2015, p. 1.

and workable, in order to enhance genuinely the opportunities for farmers to cooperate. The Commission will analyse the recommendations and assess any impact that they may have.

Report on the application of competition rules

The Commission is mandated by the Common Market Organisation Regulation (CMO Regulation²²⁴) to report to the legislator on the implementation of competition rules in the agricultural sector in all Member States, in particular, the new specific competition rules regarding joint selling by producers in the agricultural sector of olive oil, beef and veal and arable crops. In addition, the European Parliament called for a review of competition rules in the sector in its opinion on the Annual Competition Report of 2015. It asked the Commission to draft a report on the application of competition rules to the agricultural sector in all Member States. This report shall be finalised and presented to the European Parliament and the Council by the end of 2017 as required by the CMO Regulation²²⁵.

Olive sector in Spain

The Spanish olive oil sector has presented an initiative pursuant to Article 209 of the CMO Regulation to stabilise market prices and provide consumers with food at reasonable prices through the use of joint facilities for storage. The general derogation contained in this article does not provide a basis for a prior authorisation or opinion by any authority. The Commission has been working together with the sector and the National Competition Authority to examine if this initiative can comply with the conditions of the derogation.

Preventing market segmentation and parallel trade restrictions by food manufacturers

On 29 June, the Commission opened formal investigations into practices of AB InBev restricting imports of its beer from less expensive Member States, such as the Netherlands and France, to the more expensive Belgian market. AB InBev practices may result in a violation of Article 102 TFEU²²⁶. The Commission is investigating, in particular, practices of changing the packaging of products to make it more difficult to sell them in other Member States and of limiting retailers' access to certain forms of promotion or key products to prevent them from importing less expensive products into Belgium.

Investigating the practices of modern retailers

In October 2014 the Commission published its study, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector* (the Study).

An important part of the follow-up to the Study has been an investigation into the role of private labels, given that the Study suggested that private labels may have a strong negative relationship with innovation in a given category at the shop level. During 2016, the Commission worked with the Consortium who produced the Study to extract some further data on private labels and innovation. The Commission used this data to conduct some additional analysis into the nature of private labels and published the results at the end of

²²⁴ European Parliament and Council Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products (CMO Regulation) and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R1308>

²²⁵ Article 225 of the CMO Regulation, see footnote above.

²²⁶ For further information see IP/16/2361 of 30 June 2016 available at: http://europa.eu/rapid/press-release_IP-16-2361_en.htm

2016²²⁷. Based on the evidence available, it appears that the role and nature of private labels is likely to vary depending on specific markets and consumer tastes. It cannot be ruled out that in some particular market situations, retailers' practices involving their private labels may diminish brands' incentives and ability to innovate but the likelihood of infringements of competition rules is low at this stage.

There are also complaints that increased retailer concentration has led to fewer innovative products. The results of the Study did not support those claims. National Competition Authorities (in France, Germany, Italy, Norway and Spain) have investigated some national buying alliances in the last two years. In Italy and Norway, they ordered the dissolution of two buying alliances because the alliances would severely weaken competition. In France in 2016, one alliance gave up part of its project following an investigation by the authority under merger rules. The Commission is in close contact with the National Competition Authorities to follow up on these national initiatives.

Merger investigations in the agri-food industry

The year 2016 confirmed the trend of consolidation in the agrochemical industry, which had been signalled in 2015 with the failed offer of global seed leader Monsanto to acquire the global crop protection leader Syngenta and with the announced merger between the United States based Dow and DuPont, both active in seeds and crop protection. In 2016, ChemChina, which controls Adama, the largest generic crop protection company, announced plans to acquire Syngenta, while Bayer, a German multinational chemical, pharmaceutical and life science company, announced an agreement to acquire Monsanto.

In 2016, the Commission opened in-depth investigations in both the ChemChina / Syngenta case²²⁸ and the Dow / DuPont case²²⁹. In the latter, in addition to investigating concerns in crop protection markets, the Commission also announced an investigation into preliminary concerns that the merger may lead to a reduction of innovation in crop protection as a whole.

At the end of 2016, the Commission cleared the acquisition of WhiteWave, a US manufacturer of packaged foods and beverages, by the French Danone group. The overlaps concerned mainly plant-based and dairy based yoghurts but also plant-based growing-up milk. The Commission's concerns were limited however, so that the transaction could be cleared subject only to the divestment of a large part of Danone's growing-up milk business in Belgium²³⁰.

7. PHARMACEUTICAL AND HEALTH SERVICES SECTOR

Overview of key challenges in the sector

The ongoing key challenge in the pharmaceutical and health care services sector remains the balance between, on the one hand, rewarding companies for successful R&D investment activities, and, on the other, enabling a competitive environment which promotes access to

²²⁷ For further information see http://ec.europa.eu/competition/sectors/agriculture/overview_en.html

²²⁸ Case M.7962 *ChemChina / Syngenta*. For further information see IP/16/3579 of 28 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3579_en.htm

²²⁹ Case M.7932 *Dow / DuPont*. For further information see IP/16/2784 of 11 August 2016 available at http://europa.eu/rapid/press-release_IP-16-2784_en.htm

²³⁰ Case M.8150 *Danone / The WhiteWave Foods company*. For further information see IP/16/4438 of 16 December 2016 available at http://europa.eu/rapid/press-release_IP-16-4438_en.htm

less expensive quality medicines and services²³¹. This challenge is further complicated by the high degree of regulation at Member State level which leads to significant national variations of medicine pricing and wholesale and pharmacy margins.

On 17 June, the Council of the European Union published conclusions on strengthening the balance in the pharmaceutical systems in the EU and its Member States. In particular, it invited Member States to cooperate voluntarily, for example, on exchange of information with respect to pricing and reimbursement and it invited the Commission to "*continue and where possible intensify, including through a report on recent competition cases following the pharma sector inquiry of 2008/ 2009, the merger enforcement pursuant to the EC Merger Regulation (Regulation 139/2004) and the monitoring, methods development and investigation - in cooperation with national competition authorities in the European Competition Network (ECN) - of potential cases of market abuse, excessive pricing as well as other market restrictions specifically relevant to the pharmaceutical companies operating within the EU, such in accordance with Articles 101 and 102 of the Treaty on Functioning of the European Union*"²³².

The initiative is in line with the Commission's enforcement policy in this sector which has contributed and will continue to promote innovation, R&D and growth while providing access to cheaper medicines for European citizens.

Contribution of EU competition policy to tackling the challenges

In 2016, the Commission welcomed the General Court judgment²³³ upholding its *Lundbeck*²³⁴ decision in the first pharma pay-for-delay case. The Commission's decision found that the Danish pharmaceutical company Lundbeck and four generics competitors had concluded agreements that harmed patients and health care systems. This allowed Lundbeck to keep the price of its blockbuster drug citalopram artificially high, in breach of Article 101 TFEU. The decision imposed a fine of EUR 93.8 million on Lundbeck and fines totalling EUR 52.2 million on the four generics competitors Generics UK, Arrow, Alpharma and Ranbaxy.

In particular, before the agreements were concluded, Lundbeck's basic patent for the blockbuster antidepressant medicine citalopram had expired. Lundbeck still held a number of process patents that provided limited protection. Generics producers were preparing for market entry with much cheaper generic versions of citalopram. Lundbeck paid the generics

²³¹ See, Reports *External reference pricing of medicinal products: simulation-based considerations for cross-country coordination* (2013) prepared by Prof. Mondher Toumi, MD, PhD, MSc, Mrs Cécile Rémuzat, PharmD, MSc, Mrs Anne-Lise Vataire, MSc and Mr Duccio Urbinati, PharmD, MSc available at http://ec.europa.eu/health/sites/health/files/systems_performance_assessment/docs/erp_reimbursement_medicinal_products_en.pdf and *Study on enhanced cross-country coordination in the area of pharmaceutical product pricing* (2105) prepared by Gesundheit Österreich Forschung- und Planungs GmbH available at http://ec.europa.eu/health/sites/health/files/systems_performance_assessment/docs/pharmaproductpricing_frep_en.pdf

²³² Conclusions of the Council of the European Union published on strengthening the balance in the pharmaceutical systems in the EU and its Member States available at <http://data.consilium.europa.eu/doc/document/ST-10315-2016-INIT/en/pdf>

²³³ Cases T-472/13 *H. Lundbeck A/S and Lundbeck Ltd v Commission*, EU:T:2016:449; T-460/13 *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd and Ranbaxy (United Kingdom) Ltd v Commission*, EU:T:2016:453; T-467/13 *Arrow Group ApS and Arrow Generics Ltd v Commission*, EU:T:2016:450; T-469/13 *Generics (United Kingdom) Ltd v Commission*, EU:T:2016:454; T-470/13 *Merck KGaA v Commission*, EU:T:2016:452 and T-471/13 *Xellia Pharmaceuticals ApS and Alpharma, LLC, formerly Zoetis Products LLC v Commission*, EU:T:2016:460.

²³⁴ Case AT.39226 *Lundbeck*, Commission decision of 19 June 2013 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39226/39226_8310_11.pdf

competitors for their promise to stay out of the citalopram market. As a result, Lundbeck was certain to avoid competition from the four companies for the entire duration of the agreements. Lundbeck and generics companies appealed the decision to the General Court which upheld the Commission's decision.

In addition, the Commission published a second provisional non-confidential version of the *Servier* decision²³⁵ which is subject to confidentiality claims before the Hearing Officer.

In its pay-for-delay investigation in relation to the market entry of generic *modafinil* (sleeping disorder medicine), the Commission's preliminary view is that Cephalon induced Teva to abandon its efforts to enter markets worldwide independently with cheaper generic versions of modafinil and kept the prices for modafinil artificially high during several years. If established, such behaviour to agree to deliberately delay the entry of a cheaper generic medicine would have caused substantial harm to health systems and patients and breached Article 101 TFEU²³⁶.

Finally, the Commission continued monitoring patent settlements between originator and generic companies. The seventh report published on 13 December, confirmed the continued use of settlement agreements which reached 125 in total in 2015, the year covered by the seventh monitoring exercise. The portion of B.II settlements (i.e. those containing a limitation on generic entry and a value transfer from the originator to the generic company) remained low, constituting 10% of all settlements concluded in 2015²³⁷.

Recent enforcement trends

Merger review in the pharmaceutical sector

The consolidation in the pharmaceutical sector continued in 2016. The main transactions concerned the acquisition by Teva of Allergan's generics business²³⁸, acquisition by Mylan of Meda²³⁹, as well as the asset swap between Boehringer Ingelheim and Sanofi²⁴⁰. The Commission continued to ensure that consolidation of the industry does not lead to market distortions and cleared the cases subject to certain conditions.

Country-wide concerns in the generics industry

In view of the unprecedented scale of the *Teva / Allergan Generics* merger, the Commission had to address novel competition issues in the generics pharmaceutical sector. In addition to the traditional product-by-product assessment, the Commission considered that the impact of the transaction ought to be assessed also from the angle of generics products portfolio competition. The Commission found concerns at country level in the United Kingdom, Ireland and Iceland where Teva and Allergan were the two largest generics manufacturers closely competing with their portfolio of generics. As a result the commitments included the majority of Allergan Generics marketed generics activities and generics activities in development pipeline in Ireland and the United Kingdom, covering all the main steps in the manufacture, supply and distribution of these products and a manufacturing plant in the United Kingdom.

²³⁵ Case AT.39612 *Perindopril (Servier)*, Commission decision of 9 July 2014 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39612/39612_12422_3.pdf

²³⁶ Case AT.39686 *Cephalon*. For further information see IP/11/511 of 28 April 2011 available at http://europa.eu/rapid/press-release_IP-11-511_en.htm

²³⁷ For further information see <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/>

²³⁸ Case M.7746 *Teva / Allergan Generic*. For further information see IP/2016/727 of 10 March 2016 available at http://europa.eu/rapid/press-release_IP-16-727_en.htm

²³⁹ Case M.7975 *Mylan / Meda*. For further information see IP/16/2956 of 20 July 2016 available at http://europa.eu/rapid/press-release_IP-16-2596_en.htm

²⁴⁰ Case M.7917 *Boehringer Ingelheim / Sanofi animal health business*. For further information see IP/16/3641 of 9 November 2016 available at http://europa.eu/rapid/press-release_IP-16-3641_en.htm

Viability and feasibility of a remedy

The case Boehringer Ingelheim/Sanofi's animal health business (Merial) raised an issue of viability and feasibility of a remedy consisting in a production technology transfer for a number of animal health vaccines. Production transfer of vaccines poses important challenges as to the reproducibility of manufacturing processes in a different environment and in a timely manner while complying with strict regulatory requirements. In this case, a remedy evolving around the vaccine production technology transfer was ultimately approved following a very detailed analysis of production processes and subject to the identification of a buyer having suitable facilities and expertise in the relevant production processes. In the decision, the Commission approved Ceva Santé Animale (Ceva) as the purchaser of the Divestment Businesses.

Continued merger enforcement practise focused on innovation

In continuation of its focus on innovation in 2015, the Commission published a competition policy brief on "*EU merger control and innovation*"²⁴¹ in April 2016. This publication emphasises that theories of harm involving loss of, or harm to, innovation have been at the core of a number of merger cases where the Commission intervened, and that remedies can be, and have been, designed with the specific goal of preserving innovation.

The 2015 enforcement trend on innovation continued in 2016, with cases such as Boehringer Ingelheim/Sanofi's animal health business (Merial) where the Commission found concerns on a market despite the absence of high market shares due to the merging parties being amongst the leading innovators in the industry having promising products just entering the market or in the pipeline. In addition, in a decision adopted at the very end of 2015 (Novartis / GSK (ofatumumab auto-immune indications)²⁴²), the Commission took the view that it had jurisdiction (under article 5(2) of EUMR) over an acquisition of a pharmaceutical product still under development to prevent companies from artificially splitting marketed and pipeline products in different transactions to circumvent the Commission's scrutiny of R&D projects.

State aid actions in the health services sector

The Commission's State aid actions in the health services sector mainly concern hospitals, related services (e.g., ambulance transport) and health insurance. The Commission decision of 20 December 2011 (based on Article 106(2) TFEU²⁴³) specifies the conditions under which compensation to companies for providing public services is compatible with the EU State aid rules and does not have to be notified to the Commission in advance. Compensation granted to hospitals, including emergency services and ancillary services, for services of general economic interest, benefits from the decision irrespective of the amounts involved provided that the conditions are met. Accordingly, the Commission very rarely takes decisions on financing covered by this exemption decision.

During 2016, the Commission continued examining and/or decided on a number of complaints lodged by private health service providers about their allegedly unfair treatment or

²⁴¹ For further information see the Competition Policy Brief 1/2016 available at http://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf

²⁴² Case M.7872 Novartis / GSK (ofatumumab autoimmune indications), Commission decision of 18 December 2015 available at http://ec.europa.eu/competition/mergers/cases/decisions/m7872_329_3.pdf

²⁴³ Commission decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p.3.

potentially excessive compensation of publicly-owned hospitals. Those complaints usually came from operators in Member States with healthcare markets more open to competition (e.g. Belgium, France and Germany). In the Brussels hospitals case²⁴⁴, the Commission concluded after an in-depth investigation that public financing granted to compensate the Brussels public IRIS hospitals for deficits incurred for the provision of health and social services of general economic interest since 1996 was in line with EU State aid rules.

8. TRANSPORT AND POSTAL SERVICES

Overview of key challenges in the sector

The transport and postal services sectors account for about 4.9 % of the EU economy²⁴⁵, 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. While some transport sectors have already been liberalised and competition is generally fierce to the benefit of customers, such as the air and maritime transport sectors, other sectors such as passenger rail transport are still lagging behind. Similarly, 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 government²⁴⁶.

In 2016, the Commission used its competition tools to keep the transport and postal markets open and competitive, and to facilitate entry. A continued benevolent focus is on State aid that facilitates interoperability between different modes of transport as well as on State aid for modern infrastructure.

Contribution of EU competition policy to tackling the challenges

Antitrust enforcement in air transport

On 27 October, the Commission sent a Statement of Objections to Brussels Airlines and TAP Portugal²⁴⁷ and informed both companies of its preliminary view that their codeshare cooperation on passenger services between Brussels and Lisbon restricted competition between the two airlines, in breach of EU antitrust rules. The Commission has concerns that the two airlines pursued an anti-competitive strategy on the Brussels-Lisbon route by:

- discussing a capacity reduction and an alignment of their pricing policy on the route;
- granting each other unlimited rights to sell seats on each other's flights on the route where they had previously competed; and
- implementing these arrangements by actually reducing capacity, completely aligning their fare structures as well as their ticket prices on the route.

²⁴⁴ Case SA.19864 *Public financing of Brussels public IRIS hospitals*, Commission decision of 5 July 2016 available at http://ec.europa.eu/competition/state_aid/cases/254584/254584_1779214_235_2.pdf

²⁴⁵ See, *EU transport in figures Statistical pocketbook* (2015) available at <http://ec.europa.eu/transport/facts-fundings/statistics/doc/2015/pocketbook2015.pdf> p.19, prepared by the Commission with around EUR 562 billion in Gross Value Added (GVA) at basic prices, the transport and storage services sector (including postal and courier activities) accounted for about 4.9 % of total GVA in the EU-28 in 2012 (or 4.4 % excluding postal and courier services).

²⁴⁶ 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.

²⁴⁷ Case AT.39860 *Brussels Airlines / TAP Air Portugal*. For further information see IP/16/3563 of 27 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3563_en.htm

The Commission's preliminary conclusion is that these practices eliminated competition on prices and capacity between the two airlines on the Brussels-Lisbon route and led to higher prices and less choice for consumers. To safeguard their rights of defence, the parties have been invited to provide comments.

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 (i.e. IAG the holding company of British Airways and Iberia, Ryanair and EasyJet) account for only 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 drive towards further consolidation of the EU market in 2016 was lessened by low fuel costs which had a positive impact on airline profitability.

In this context, the Commission reviewed the acquisition of the Irish carrier Aer Lingus by IAG²⁴⁸. The Commission's investigation indicated that the merger would raise two types of competition concerns. Firstly, on certain routes where both airlines operated there would not be sufficient competition. Secondly, the choices of airlines available for connecting long-haul flights would have decreased if Aer Lingus were to connect only to long-haul flights operated by IAG and *vice versa*. Consequently, the transaction was cleared subject to two types of commitments: (1) IAG releasing up to five slots at London Gatwick Airport to entice new entrants on the Dublin-London and Belfast-London routes. In 2016, Ryanair started operations on both routes; and (2) IAG entering into agreements with competing airlines which operate long-haul flights out of London Heathrow, London Gatwick, Manchester, Amsterdam, Shannon and Dublin, so that Aer Lingus will continue to provide these airlines with connecting passengers. On several of these routes, IAG and Virgin Atlantic Airways entered into a special prorate agreement in 2016²⁴⁹.

In 2016, in the framework of the commitments attached to the decision approving the acquisition of British Midlands Limited (bmi) by IAG in 2012, the Commission has approved Aeroflot as potential entrant on the London Heathrow – Moscow route²⁵⁰ as well as Flybe as potential entrant on two routes connecting London Heathrow to Aberdeen and Edinburgh²⁵¹. Aeroflot started its operations on the route connecting London Heathrow to Moscow as of the IATA Winter Season 2016/2017, broadening passengers' choice on the route. Flybe will start

²⁴⁸ Case M.7541 IAG / AerLingus, Commission decision of 14 July 2015 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7541

²⁴⁹ Case M.7541 IAG / Aer Lingus, Commission decision of 25 May 2016 concerning the approval of the special prorate agreement between Aer Lingus and Virgin Atlantic Airways in accordance with the commitments annexed to the Commission decision of 14 July 2015 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7541

²⁵⁰ Case M.6447 IAG / bmi, Commission decision of 17 June 2016 concerning the Assessment of the viability of Applicants and evaluation of their formal bids pursuant to Clause 1.4.9 of the commitments attached to the Commission decision of 30 March 2012 in case M.6447 IAG/bmi available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6447

²⁵¹ Case M.6447 IAG / bmi, Commission decision of 4 November 2016 concerning the Assessment of the viability of the Flybe Group Plc and evaluation of its formal bid pursuant to Clauses 1.4.4 and 1.4.9 of the commitments attached to the decision in the above-mentioned case following the Monitoring Trustee's opinion of 24 October 2016 – Summer 2017 IATA Season, not yet published at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6447

operating flights from London Heathrow to Aberdeen and Edinburgh as of the IATA summer season 2017²⁵².

State aid to airports and airlines

In 2016, several decisions were adopted, closing long-standing investigation into aid to airports and airlines. The Commission continued to apply the aviation guidelines adopted in 2014²⁵³.

In the Berlin-Brandenburg airport case, a major public funding package granted for the completion of the new single Berlin airport and the upgrade of its capacity compared to the initial design was found to be aid free on the basis of an in-depth assessment of the market economy investor principle²⁵⁴. The decision on Romanian regional airports partially closed a formal investigation opened in 2011 into operating aid for eleven small airports²⁵⁵. The decisions in the Sardinian airports²⁵⁶ and Klagenfurt airport cases²⁵⁷ imposed recovery on airlines, notably low cost carriers, bringing to eight the number of recovery decisions against airlines adopted since the entry into force of the Aviation Guidelines. The Commission's decision in SEA Handling contained an assessment of economic continuity in a labour-intensive and asset light sector (ground handling) where the case law and previous decisional practice did not provide replies to all the questions that arose²⁵⁸.

The Commission also adopted decisions in cases involving aid to airports and start-up aid to airlines²⁵⁹.

The Commission also proposed an extension of the State aid General Block Exemption Regulation (GBER) to airports²⁶⁰. The extended GBER would cover investment aid to airports with less than three million passengers per year under certain conditions, in particular the absence of other airports with scheduled traffic within 100 km or 60 minutes by road/train ("catchment area condition"). The GBER foresees lighter conditions for very small airports.

²⁵² Flybe's announcement available at <http://otp.investis.com/clients/uk/flybe1/rns/regulatory-story.aspx?cid=59&newsid=830572>

²⁵³ Communication from the Commission, *Guidelines on State aid to airports and airlines*, OJ C 99, 4.4.2014, p. 3 available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.099.01.0003.01.ENG

²⁵⁴ Case SA.41342 *Flughafen Berlin-Brandenburg*, Commission decision of 3 August 2016 available at http://ec.europa.eu/competition/state_aid/cases/262544/262544_1846884_138_2.pdf

²⁵⁵ Case SA.30931 *Romanian regional airports*, Commission decision of 27 September 2016 available at http://ec.europa.eu/competition/state_aid/cases/240754/240754_1283768_107_3.pdf

²⁵⁶ Cases SA.33983 *Sardinian airports*, Commission decision of 29 July 2016 available at http://ec.europa.eu/competition/state_aid/cases/247487/247487_1426436_82_2.pdf

²⁵⁷ Case SA.24221 *Klagenfurt airport*, Commission decision of 11 November 2016 available at http://ec.europa.eu/competition/state_aid/cases/243805/243805_1580487_960_2.pdf

²⁵⁸ Case SA.21420 *SEA Handling*, Commission decision of 5 July 2016, the public version is not yet available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=3_SA_21420

²⁵⁹ Cases SA.43023 *Lamezia Terme airport*, Commission decision of 28 July 2016 available at http://ec.europa.eu/competition/state_aid/cases/260316/260316_1834868_112_2.pdf and SA.41635 *Flughafen Heringsdorf* Commission decision of 5 July 2016 available at http://ec.europa.eu/competition/state_aid/cases/258231/258231_1777940_193_5.pdf (first decision on individual operating aid to an airport since the entry into force of the Aviation Guidelines).

²⁶⁰ For further information see IP/16/3398 of 13 October 2016 available at http://europa.eu/rapid/press-release_IP-16-3398_en.htm

Antitrust enforcement in maritime transport

In July, the Commission adopted a decision that renders legally binding the commitments offered by fourteen container liner shipping companies (the Carriers)²⁶¹. The commitments addressed the Commission's concerns that the companies' practice of publishing their intentions on future price increases may have harmed competition and customers.

The Carriers have regularly announced their intended future increases of freight prices on their websites, via the press, or in other ways. These price announcements, known as General Rate Increases (GRI) announcements, do not indicate the fixed final price for the service concerned, but only the amount of the increase in USD per transported container unit (Twenty-foot Equivalent Unit, TEU), the affected trade route and the planned date of implementation. They generally concern sizable increases of several hundred USD per TEU. GRI announcements are made typically three to five weeks before their intended implementation date, and during that time some or all of the other carriers announce similar intended rate increases for the same or similar route and same or similar implementation dates. Carriers are not bound by the announced increases and some carriers have indeed postponed or modified announced General rate increases, possibly aligning them with those announced by other carriers.

The Commission had concerns that GRI announcements do not provide full information on new prices to customers but merely allow carriers to be aware of each other's pricing intentions and may make it possible for them to coordinate their behaviour. Announcing future price increases may signal the intended market conduct of carriers and by reducing the level of uncertainty about their pricing behaviour, decrease their incentives to compete against each other. Because the announcements provide only partial information to customers and may not be binding on the carriers, customers may not be able to rely on them and therefore carriers may be able to adjust prices without the risk of losing customers. This practice may lead to higher prices for container liner shipping services and harm competition and customers.

In order to address the Commission's concerns, the carriers offered to stop making GRI announcements. In addition, those Carriers who choose to make public price announcements will include in their published price the five main elements of the price representing about 90% of its full amount thus giving customers a good basis to compare prices²⁶². Such announcements will be binding on the Carriers as maximum prices allowing customers to rely on them (customers could however negotiate lower prices). Price announcements will be made no later than 31 days before the sailings to which they apply. This time gap corresponds to the period when customers usually start booking in significant volumes. Earlier announcements may give competitors insight into each other's future prices while not being useful for customers since they are not booking yet, thus possibly leading to a collusive outcome.

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 larger vessels in recent years and

²⁶¹ Case AT.39850 *Container Shipping*, Commission decision of 7 July 2016 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39850/39850_3377_3.pdf

²⁶² The remaining elements are charges which are difficult or impossible for the Carriers to publish in advance of the sailing.

combined with the gradual 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.

Currently, there is a significant change in the alliances landscape, with the termination of three of the current four global alliances, namely CKYHE, G6 and the Ocean Alliance, and their replacement by three new or enlarged ones, namely 2M, The Alliance and the Ocean Alliance by 1 April 2017. Moreover, a wave of consolidation can be observed, with the acquisition of Neptun Oriental Lines of Singapore (NOL) by CMA CGM, the acquisition of the UASC by Hapag-Lloyd, the combination of Cosco and CSCL and the intended combination of activities of the Japanese carriers MOL, NYK and K-Line and the announced acquisition of Hamburg Süd by Maersk Line. Last, the Korean carrier Hanjin filed for receivership in August 2016 and is in the process of exiting the market.

The Commission ruled on two major mergers in this industry. Earlier in 2016, the Commission cleared the acquisition of NOL by CMA CGM, a French shipping company with worldwide activities²⁶³. As initially notified, the transaction would have created new links between previously unconnected consortia to which the two companies belonged (CMA CGM is a founding member of the Ocean Three Alliance (O3 Alliance) whereas NOL is currently a member of the G6 Alliance). The Commission had concerns that these potential new links would have resulted in anti-competitive effects on two trade routes, notably between Northern Europe and North America and between Northern Europe and the Middle East. On these routes, competition from liner shippers who have no connection with the merged entity or its alliance partners would have been insufficient. As a result, the transaction could have enabled the merged entity, through the consortia that the two companies belong to, to influence capacity and therefore prices to the detriment of shippers and consumers for a very large part of those markets. The companies offered to make the transaction contingent upon the removal of the link that would have been created between CMA CGM's O3 Alliance and NOL's G6 Alliance. Although CMA CGM had previously stated publicly that it intended to remove NOL from the G6 alliance, the formal commitment to do so was necessary to remove the risk of anti-competitive effects on the two trade routes described above.

The Commission also cleared the acquisition of the Middle-Eastern UASC, world's number eleven, by the German Hapag-Lloyd, which after its merger with CSAV was the sixth largest container shipping company²⁶⁴. The Commission found that the combination of the Parties' activities would raise competition concerns on the two legs of the Northern Europe – North America trade. Even though the market position of UASC was rather limited, both Hapag-Lloyd and the UASC were members to different alliances and consortia on those markets. As consortia and alliances members decide jointly on a number of parameters relevant for competition, such as capacity, schedules, ports of call, the merged entity would have influence over such competition features over a very large part of those markets. In order to ensure that the merged entity would face sufficient competition also on those routes, UASC undertook terminating its consortium participation on the two legs of the trade. As a result the merged entity's position on those markets will be comparable to the current position of Hapag-Lloyd.

²⁶³ Case M.7908 *CMA CGM / NOL*, Commission decision of 29 April 2016 available at http://ec.europa.eu/competition/mergers/cases/decisions/m7908_1366_3.pdf

²⁶⁴ Case M.8120 *Hapag-Lloyd / United Arab Shipping Company (UASC)*. For further information see IP/16/2942 of 23 November 2016 available at http://europa.eu/rapid/press-release_IP-16-3942_en.htm

State aid enforcement in the maritime transport sector

In 2016, the Commission continued to ensure compliance with the Maritime State aid Guidelines²⁶⁵. The aim of those Guidelines is to maintain the European maritime sector's competitiveness and to avoid flagging out to "flags of convenience" for which environmental and security standards might be low. The Commission is determined to ensure consistency and equal treatment throughout the EU whilst at the same time making sure that the beneficial tonnage tax regimes do not contravene internal market rules.

For example, the Commission adopted decisions concerning the Swedish tonnage tax scheme and a prolongation of the German scheme for the reduction of social security contributions for seafarers²⁶⁶.

Antitrust enforcement in the rail sector

Following the inspections carried out in April, the Commission opened an investigation against the Czech railway incumbent České dráhy a.s. on 10 November, to assess whether it charged prices below costs with the aim of foreclosing competition in rail passenger transport services, in breach of EU antitrust rules (Article 102 TFEU). Furthermore, on 28 June the Commission carried out inspections in the rail passenger transport sector in several Member States since it has concerns that the companies concerned may have entered into anti-competitive agreements aiming to foreclose new entrants from this market, in breach of EU antitrust rules (Article 101 TFEU). The Commission's investigations continue in both cases.

Rail and intermodal State aid enforcement

In 2016, 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 mode²⁶⁷.

During 2016, the European Parliament and the Council reached an agreement on the so-called Fourth Railway Package²⁶⁸. This bundle of legislation should help further open up the railway sector to competition.

²⁶⁵ Communication from the Commission, *Community guidelines on State aid to maritime transport*, OJ C 13, 17.01.2004, p. 3.

²⁶⁶ Cases SA.43642 *Tonnage Tax scheme*, Commission decision of 18 August 2016 available at http://ec.europa.eu/competition/state_aid/cases/261398/261398_1830463_166_2.pdf and SA.45258 *Prolongation and amendment of the scheme on the reduction of nonwage labour costs in maritime shipping*, Commission decision of 14 November 2016 available at http://ec.europa.eu/competition/state_aid/cases/264071/264071_1847335_61_2.pdf

²⁶⁷ Cases SA.41033 *Integrated transport scheme in the Province of Trento*, Commission decision of 29 April 2016 available at http://ec.europa.eu/competition/state_aid/cases/263023/263023_1753823_116_2.pdf; SA.45606 *Measures for the development of intermodality in the Friuli-Venezia Giulia region*, Commission decision of 19 July 2016 available at http://ec.europa.eu/competition/state_aid/cases/264659/264659_1855847_97_2.pdf, SA.44627 *Ferrobonus – Incentive for rail transport*, Commission decision of 24 November 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44627 and SA.45482 *Rail freight transport support scheme*, Commission decision of 19 December 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45482

²⁶⁸ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, *The Fourth Railway Package – Completing the Single European railway area to foster European competitiveness and growth*, COM(2013) 25 final available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0025&from=EN>

State aid review in the road sector

The Commission continued to enforce Regulation (EC) No 1370/2007 on public passenger transport services²⁶⁹. On 10 June, the Commission took a negative decision with recovery on *ex-post* public service compensation granted by the Region of Piedmont (Italy) to Arfea²⁷⁰. The Commission also adopted a decision in the long-standing Emsländische Eisenbahn case²⁷¹.

State aid review in the postal services sector

The postal sector continues to evolve and traditional letter delivery, against the backdrop of electronic substitution, remains on a declining trajectory. Nevertheless, postal services have retained a very significant economic and social value. In a shrinking market of traditional letter delivery, many postal incumbents are being forced to diversify the portfolio of their activities and innovate in order to stay competitive. At the same time, the explosive growth of e-commerce necessitates a well-functioning parcel delivery market linking buyers and sellers. Efficient postal services are thus a key factor in allowing e-commerce to realise its potential in propelling growth and creating jobs.

Through State aid control in the postal sector, the Commission pursues multiple related goals. State aid control ensures that where a postal service provider – typically a postal incumbent – is entrusted with a costly public service obligation, any compensation paid to the provider does not undermine a level playing field between postal incumbents and new entrants. State aid should not shield the recipients from competitive pressures and market developments, but should incentivise efficiency, innovation and investment.

First, on 11 February the Commission opened the formal investigation procedure in order to examine whether State measures since 2004 in favour of Correos, the publicly-owned Spanish postal operator, were in line with EU State aid rules²⁷². Following complaints alleging that Correos had benefitted from several illegal and incompatible State aid measures, the Commission launched an investigation into whether Correos had been overcompensated between 2004 and 2010 for the provision of the universal postal service given that profitability levels achieved by Correos with the public funding seemed to exceed the level of reasonable profit allowed under EU State aid rules on public service compensation. The Commission is also investigating other measures granted by Spain to Correos since 2004, notably tax exemptions, capital increases and compensation for the distribution of electoral material.

Second, the Commission found in its decision of 3 June a compensation of EUR 1.3 billion granted to the Belgian postal provider Bpost to be compliant with State aid rules²⁷³. Belgium

²⁶⁹ 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.

²⁷⁰ Case SA.38132 *PSO compensation to ARFEA*, Commission decision of 10 June 2016 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:321:FULL&from=EN>

²⁷¹ Case SA.23216 *State aid to Emsländische Eisenbahn*, Commission decision of 30 September 2016 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_C54_2007

²⁷² Case SA.37977 *Complaint regarding unlawful State aid in favour of Sociedad Estatal Correos y Telégrafos, S.A.* For further information see IP/16/284 of 11 February 2016 available at http://europa.eu/rapid/press-release_IP-16-284_en.htm

²⁷³ Case SA.42366 *Compensations accordées par l'État à Bpost pour la fourniture de services publics au cours de la période 2016-2020*. For further information see IP/16/2034 of 3 June 2016 available at http://europa.eu/rapid/press-release_IP-16-2034_en.htm

notified to the Commission in spring 2016 its plan to compensate Bpost for the delivery of certain postal services over the period 2016-2020. In particular, Belgium intended to compensate Bpost for maintaining a post office network throughout Belgium, delivering pension payments, providing universal cash at counter services, delivering printed material related to elections as well as distributing recognised newspapers and periodicals in Belgium. The Commission's assessment showed that the compensation granted to Bpost for the provision of these services was based on a robust methodology, which ensured that such compensation will not exceed the net cost of the public service mission. The compensation mechanism also includes incentives for Bpost to increase the efficiency and quality of its public services. As regards the task of delivering recognised newspapers and periodicals, it has been entrusted to Bpost following an open, transparent and non-discriminatory procurement procedure. This is in line with Belgium's commitment under the Commission's May 2013 decision endorsing the public service compensation for Bpost between 2013 and 2015.

Merger review in postal services

Postal services play a crucial role in allowing e-commerce to develop, the promotion of which is one of the goals of the Digital Single Market strategy. The Commission's investigation of the acquisition of TNT Express by FedEx²⁷⁴ focused on ensuring that prices for customers, including SMEs active in e-commerce, and ultimately consumers, would not rise for cross-border small package deliveries, and that the quality of service would not be degraded as a result of the merger.

The in-depth investigation opened by the Commission into FedEx's takeover of TNT Express²⁷⁵ was prompted by concerns that the proposed acquisition would substantially lessen competition in certain markets for international deliveries of small packages up to 31.5 kg within the European Economic Area (EEA) or from the EEA to the rest of the world.

FedEx and TNT are two out of four so-called "integrators" currently operating in the small package delivery sector in Europe. Integrators are companies that control a comprehensive air and road small package delivery network and are capable of offering a broad portfolio of reliable delivery services. The Commission was concerned that following the transaction, the merged entity would face insufficient competitive constraints from the only two remaining integrators, DHL and UPS. A lack of sufficient competitive constraints could lead to higher prices for business customers and consumers.

The Commission found, based on a market reconstruction, that the combined market position of the parties was rather moderate in most markets. The parties were furthermore not particularly close competitors and no important competitive force would be removed by the merger. This was mirrored in the reaction of customers, the vast majority of who adopted a neutral or even positive stance on the merger. The Commission also carried out a price concentration analysis that did not establish likely price increases and found that the transaction would give rise to efficiencies, due to network cost savings to the benefit of customers. The Commission thus cleared the concentration.

The Commission also thoroughly investigated allegations that the transaction may cause particular harm to small and medium enterprises (SMEs). After a comprehensive market

²⁷⁴ Case M.7630 *FedEx / TNT*, Commission decision of 8 January 2016 available at http://ec.europa.eu/competition/mergers/cases/decisions/m7630_4582_4.pdf

²⁷⁵ Case M.7630 *FedEx / TNT*. For further information see IP/15/5463 of 31 July 2015 available at http://europa.eu/rapid/press-release_IP-15-5463_en.htm

investigation, the Commission concluded that SMEs will not be more affected by the acquisition than other customers.

Banking State aid cases: Decisions adopted by the Commission in 2016

By country

	Member State	Case number/Title	Type of Decision	Date of adoption
1.	Austria	SA.45940 (2016/N) - Repurchase offer for guaranteed liabilities of Heta Asset Resolution AG	no-aid decision	01/09/2016
2.	Austria	SA.43740 (2015/N) - Prolongation of the Austrian short-term export credit insurance scheme with regard to disaster risks	export credit scheme	15/02/2016
3.	Croatia	SA.46066 (2016/N) - Resolution scheme for small credit institutions with total assets below EUR 1.5 billion	no-objection decision	05/10/2016
4.	Cyprus	SA.45004 (2016/N) State grant scheme to borrowers and micro companies	no-objection decision	28/06/2016
5.	Cyprus	SA.45598 (2016/N) - Eighth Prolongation of Cypriot guarantee scheme for banks - H2 2016	no-objection decision	28/06/2016
6.	Cyprus	SA.45051 (2016/N) – Cyprus - Final valuation of the Cooperative Central Bank Ltd	no-objections decision	27/04/2016
7.	Estonia	SA.45282 (2016/N) - Short Term Export Credit Insurance Scheme - Estonia	no-objection decision	20/06/2016
8.	France	SA.37649 (2013/CP); SA.45860 (2016/PN); SA.45860 (2016/N) – France - (i) garantie illimitée octroyée à la Caisse Centrale de Réassurance (CCR) pour son activité de réassurance des risques de catastrophes naturelles en France; (ii) transfert d'actifs et passifs liés aux activités non garanties de la CCR vers une nouvelle filiale, et; (iii) apport en capital et souscription d'un prêt subordonné par la CCR en faveur de cette nouvelle filiale	no-objection decision	26/09/2016

	Member State	Case number/Title	Type of Decision	Date of adoption
9.	Germany	SA.29338 (2013/C-30), SA.44910 (2016/N) - HSH Nordbank	positive final decision	02/05/2016
10.	Greece	SA.46955 (2016/N) – Greece - Prolongation of the State Guarantee Scheme (Art. 2 law 3723/2008)	no-objection decision	19/12/2016
11.	Greece	SA.46558(2016/N) - Liquidity support to Attica Bank	no-objection decision	07/10/2016
12.	Greece	HT.4524 – STEC - 2016 Greece	Communication	30/06/2016
13.	Greece	SA.45125 (2016/N) - Methodology to calculate the aid element in State guarantees to companies	no-objection decision	29/07/2016
14.	Greece	SA.45629 (2016/N) - Prolongation of the Greek financial support measures (Art. 2 law 3723/2008)	no-objection decision	29/06/2016
15.	Hungary	SA.38843 (2015/N) – HU - Asset purchase program MARK	no-aid decision	10/02/2016
16.	Ireland	SA.46951 (2016/N) - Ireland - 10th prolongation of the Credit Union Resolution Scheme H1 2017	no-objection decision	19/12/2016
17.	Ireland	SA.46437 (2016/N) - Ireland - Fourth prolongation of the Credit Union restructuring and stabilisation Scheme	no-objection decision	11/10/2016
18.	Ireland	SA.45522 (2016/N) - Ireland - 9th prolongation of the Credit Union Resolution Scheme H2 2016	no-objection decision	20/06/2016

	Member State	Case number/Title	Type of Decision	Date of adoption
19.	Ireland	SA.45129 (2016/N) - Ireland Third prolongation of the Credit Union restructuring and stabilisation Scheme	no-objection decision	04/05/2016
20.	Italy	SA.47082(2016/N) - IT - First prolongation of the Italian bank guarantee scheme	no-objection decision	29/12/2016
21.	Italy	SA.47081 (2016/N) - Italy -Liquidity support to MPS bank	no-objection decision	29/12/2016
22.	Italy	SA.39543 (2015/N), SA.41134 (2015/N), SA.41925 (2015/N), SA.43547 (2015/N) – Italy Second amendment to the Resolution of Banca delle Marche S.p.A., Banca Popolare dell'Etruria e del Lazio Soc. Coop., Cassa di Risparmio di Ferrara S.p.A. and Cassa di Risparmio della Provincia di Chieti S.p.A.	no-objection decision	07/10/2016
23.	Italy	SA.45753 Italian bank guarantee scheme	no-objection decision	26/06/2016
24.	Italy	SA.39543 (2015/N), SA.41134 (2015/N), SA.41925 (2015/N), SA.43547 (2015/N) Amendment to the Resolution of Banca delle Marche S.p.A., Banca Popolare dell'Etruria e del Lazio Soc. Coop., Cassa di Risparmio di Ferrara S.p.A. and Cassa di Risparmio della Provincia di Chieti S.p.A.	no-objections decision, amendment	29/04/2016
25.	Italy	SA.43296 (2015/N) – Italy - Italian methodology to calculate the Gross Grant Equivalent for aid in the form of State guarantees on loans to "mid-cap" companies	no-objection decision	28/04/2016

	Member State	Case number/Title	Type of Decision	Date of adoption
26.	Italy	SA.43390 (2016/N) – IT - Italian Securitisation Scheme	no-aid decision	10/02/2016
27.	Malta	SA.39793 (2016/N) - Malta Development Bank	no-objection decision Corrigendum	24/08/2016 18/10/2016
28.	Poland	SA.45857 (2016/N) – Poland - Second prolongation of aid-free guarantee scheme for export contracts	no-objection decision	19/12/2016
29.	Poland	SA.46871 (2016/N) – Poland - Fifteenth prolongation of the Polish bank guarantee scheme – H1 2017	no-objection decision	19/12/2016
30.	Poland	SA.46575 (2016/N) - Poland - Resolution scheme for cooperative banks and small commercial banks	no-objection decision	20/12/2016
31.	Poland	SA.45575 (2016/N) – Poland - Fourteenth prolongation of the Polish bank guarantee scheme – H2 2016	no-objection decision	01/07/2016
32.	Poland	SA.45517 (2016/N) - Fifth Prolongation of the Credit Unions Orderly Liquidation Scheme – H2 2016	no-objection decision	29/06/2016
33.	Poland	SA.43924 (2015/N) – Poland - Thirteenth prolongation of the Polish bank guarantee scheme – H1 2016	no-objections decision	01/02/2016
34.	Portugal	SA.42665 (2016/N) – Portugal - Extension of the remit of the Portuguese Development Financial Institution	no-objection decision	28/11/2016
35.	Portugal	SA.43977 (2015/N) * PT* Decision on the impaired asset measure in the resolution of Banif	no-objection decision	21/11/2016
36.	Portugal	SA.45761 (2016/N) - Fourteenth Prolongation of the Portuguese Guarantee Scheme	no-objection decision	29/07/2016

	Member State	Case number/Title	Type of Decision	Date of adoption
37.	Portugal	SA.45671 (2016/N) - Sixth prolongation of the Portuguese Guarantee Scheme on EIB lending	no-objection decision	28/07/2016
38.	Portugal	SA.44013 (2015/N) – Portugal - Fifth prolongation of the Portuguese Guarantee Scheme on EIB lending	no-objections decision	01/02/2016
39.	Portugal	SA.43996 (2015/N) - Thirteenth Prolongation of the Portuguese Guarantee Scheme	no-objections decision	13/01/2016
40.	United Kingdom	SA.44887(2016/N) - First Prolongation and Amendment of The Big Society Capital	no-objection decision	18/11/2016