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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE EUROPEAN UNION**

-- 2013 --

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## PART I

### Introduction - EU Competition Policy, a Tool to Regain European Competitiveness

1. In 2013, there have been encouraging signs that an economic recovery is underway in Europe. Policy actions undertaken at EU level contributed to start restoring confidence and creating the basis for returning to a growth path. However, efforts should not be relaxed. If the EU wants to leave the legacy of the crisis behind and re-launch the European economy, it needs to go further. What Europe needs are structural adjustments, an efficient allocation of resources, and productivity growth. Smart, sustainable and inclusive growth remains at the core of Europe's policy agenda for the decade. Boosting competitiveness across the EU is paramount for reaching that objective.

2. Competitiveness is a composite and multi-dimensional concept. The Global Competitiveness Report of the World Economic Forum defines competitiveness as "the set of institutions, policies, and factors that determine the level of productivity of a country".<sup>1</sup> According to the European Competitiveness Report of the European Commission, at the roots of competitiveness are the institutional and microeconomic policy arrangements that create conditions under which businesses can emerge and thrive, and individual creativity and effort are rewarded.<sup>2</sup> Competition policy instruments fully fit both descriptions.

3. Moreover, the European Parliament's 2013 study<sup>3</sup> on competition policy concluded: "Competition plays a crucial role in promoting productivity and innovation as drivers of economic growth. This means that competition policy, which intensifies competition, will stimulate growth."

4. It applies to all the instruments of competition policy. Antitrust enforcement can thwart dominant companies' attempts to keep new entrants away from the market and prevent them from competing effectively with them. It can also create the conditions for lower input prices for EU industry. Merger control can keep markets open and efficient. State aid policy protects the internal market from distortions and helps to steer public resources towards competitiveness-enhancing objectives.

5. In addition, competition and competition policy are part and parcel of the general conditions required for innovation to flourish. They provide incentives to innovative enterprises and start-ups, they encourage companies to become more efficient, and they promote subsidies designed to stimulate R&D and innovation.

6. Competition policy fosters competitiveness in a global context. Healthy competition in the Single Market prepares European companies to do business on global markets and succeed. It also underpins a modern industrial policy, as reflected in the Lisbon Treaty's provisions on industry (Article 173 TFEU) which states that action taken by the EU and the Member States shall be "in accordance with a system of open and competitive markets".

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<sup>1</sup> World Economic Forum: The Global Competitiveness Report 2013-2014, available at [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf)

<sup>2</sup> SEC(2011) 1188 final Part 1: Commission Staff Working Paper, European Competitiveness Report 2011.

<sup>3</sup> The Contribution of Competition Policy to Growth and the EU2020 Strategy, IP/A/ECON/ST/2012-25, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON\\_ET\(2013\)492479\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON_ET(2013)492479_EN.pdf)

7. Furthermore, competition policy is the necessary counterpart of Single Market regulation. The impact of the regulatory measures on firms' strategies and investment can be undermined if Single-Market and competition rules are not properly enforced.

8. State aid rules and competition enforcement have also a significant role to play in the EU2020 strategy and in the achievement of its Flagship Initiatives. In particular, competition policy actions are contributing to "Innovation Union", "An industrial policy for the globalization era", "Resource-efficient Europe" and "A Digital Agenda for Europe"..

9. In 2013, all competition-enforcement instruments have contributed to promote growth and competitiveness across the European economy. Antitrust enforcement has deterred and punished the artificial fragmentation of the internal market. State aid Modernisation has been developed to encourage the design of growth-enhancing public spending. Important decisions have been taken in sectors of strategic importance such as financial services, telecoms, the digital economy, and energy. International co-operation in competition policy-making and enforcement helped to tackle the challenges posed by the growing internationalisation of business.

10. Finally, 2013 saw two important milestones for EU competition policy. Firstly, Regulation 1/2003,<sup>4</sup> when adopted, ushered in a new era in the enforcement of EU antitrust rules and has now, a decade later, led to a stocktaking and reflection for further improvements. Secondly, on 11 June, the Commission adopted a Proposal for a Directive on antitrust damages actions<sup>5</sup> – a long-awaited measure by stakeholders and a policy priority for the current Commission. The debate about those issues – and those that this Report will address – have animated the continuous structured dialogue between the Commission and the European Parliament throughout the year (see section 8 on Competition Dialogue with Other Institutions and, for further detail, the Commission Staff Working Document (SWD) accompanying this Report).

## **1. Promoting Competitiveness by Fighting Against Cartels**

11. The success of European companies strongly depends on competitive prices. Input costs that are artificially inflated by anti-competitive conducts and market structures have detrimental effects on Europe's competitiveness on global markets and on its overall growth prospects. Needless to say, higher input costs also translate into higher final prices for European consumers.

12. Robust cartel enforcement is vital in that context. Cartels often concern input and intermediate goods and the Commission has focused its enforcement efforts on this area. In recent years, several successful investigations have broken up cartels that had inflated input prices and severely harmed EU competitiveness.<sup>6</sup>

13. The Commission also concluded such a case in 2013. In July, the Commission fined five car part suppliers, Sumitomo, Yazaki, Furukawa, S-Y Systems Technologies (SYS) and Leoni a total of € 141 791

<sup>4</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>5</sup> COM(2013) 404 final: Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

<sup>6</sup> Notable examples in the past include the fines imposed on producers of car glass, DRAMs (memory chips used in PCs, servers and workstations), and synthetic rubber.

000 for their participation in one or more of five cartels for the supply of wire harnesses to Toyota, Honda, Nissan and Renault. The cartels covered the whole European Economic Area (EEA).<sup>7</sup> Wire harnesses represent an assembly of cables transmitting signals or electric power linking computers to various components built in a car and they are often described as the 'central nervous system' of the car.

**Box 1. Cartel Enforcement Leading to a More Transparent Financial Services Sector: The Interest Rates Derivatives Cases**

Interest rate derivatives are financial products used by banks or companies for managing the risk of interest rate fluctuations. They derive their value from the level of a benchmark interest rate, such as the London Interbank Offered Rate (LIBOR) – used for various currencies including the Japanese yen (JPY) - or the Euro Interbank Offered Rate (EURIBOR), for the euro.

The Euro interest rate derivatives (EIRD) cartel operated between September 2005 and May 2008. The settling parties are Barclays, Deutsche Bank, RBS and Société Générale. The cartel sought to distort the normal course of pricing components for those derivatives. Traders of different banks discussed their bank's submissions for the calculation of the EURIBOR as well as their trading and pricing strategies. Proceedings were also opened against Crédit Agricole, HSBC and JPMorgan and the investigation in relation to the conduct of these three companies will continue under the standard cartel procedure.

In the Yen interest rate derivatives (YIRD) sector, the Commission uncovered 7 distinct bilateral infringements lasting between 1 and 10 months in the period from 2007 to 2010. The collusion included discussions between traders of the participating banks on certain JPY LIBOR submissions. The traders involved also exchanged, on occasion, commercially sensitive information relating either to trading positions or to future JPY LIBOR submissions (once also relating to certain future submissions for the Euroyen TIBOR – Tokyo interbank offered rate). The banks involved in one or more of the infringements are UBS, RBS, Deutsche Bank, Citigroup and JPMorgan. The broker RP Martin facilitated one of the infringements by using its contacts with a number of JPY LIBOR panel banks that did not participate in the infringement, with the aim of influencing their JPY LIBOR submissions. In the context of the same investigation, the Commission has also opened proceedings against the cash broker ICAP. That investigation continues under the standard cartel procedure.

Those decisions send a clear message that the Commission is determined to fight and punish such cartels in the financial sector. Healthy competition and transparency are crucial for financial markets to work properly, at the service of the real economy rather than for the interests of a few.

14. Another trend in recent years has been the uncovering of cartels in services sectors. The Commission is currently dealing with a number of cases in the area of financial services. On 4 December, the Commission fined 8 banks a total of € 1 712 468 000 for participating in cartels in markets for financial derivatives covering the EEA.<sup>8</sup> Four of them participated in a cartel relating to interest rate derivatives denominated in the euro currency. Six of them participated in one or more bilateral cartels relating to interest rate derivatives denominated in Japanese yen. Those collusions are prohibited by Article 101 of the Treaty on the Functioning of the European Union. Both decisions were adopted under the settlement procedure, and the fines imposed on the parties were reduced by 10% given their agreement to settle.

15. The Commission also has several ongoing cases in the food sector, an area of direct concern to consumers. In November, the Commission fined four European North Sea shrimps traders - Heiploeg, Klaas Puul, Kok Seafood (all established in the Netherlands) and Stührk (established in Germany) - a total of EUR 28 716 000 for operating a cartel.<sup>9</sup> Between June 2000 and January 2009 Heiploeg and Klaas Puul

<sup>7</sup> Case AT.39748 – Automotive wire harnesses.

<sup>8</sup> Case 39861 – Yen Interest Rate Derivatives (YIRD) and Case 39914 – Euro Interest Rate Derivatives

<sup>9</sup> Case AT.39633 – Shrimps

agreed to fix prices and share sales volumes of North Sea shrimps in Belgium, France, Germany and the Netherlands.

16. In addition to those decisions, in April the Commission sent a Statement of Objections to a number of suppliers of smart-card chips for their alleged participation in a cartel.<sup>10</sup> Smart-card chips have countless applications, such as SIM cards, bank cards, identity cards, and many more devices. It is the Commission's preliminary view that certain suppliers may have co-ordinated their behaviour in the EEA to prop up prices. The Commission initially pursued settlement discussions with certain undertakings regarding their alleged participation. However, it eventually reverted to the normal antitrust procedure due to lack of progress.

17. Finally, it should be recalled that cartels can fragment the internal market and hamper the adjustment of industry to changes in market conditions. Therefore the harm they cause is not limited to the markets on which the companies involved operate but may affect the competitiveness of the whole economy.

## **2. Ensuring Effective Antitrust Enforcement and Merger Control in the Interest of Businesses and Consumers**

18. Regulation 1/2003, the main procedural instrument for the enforcement of Articles 101 and 102 TFEU, entered into force on 1 May 2004. The regulation marked a turning point as it empowered all enforcers in the EU (the Commission, national competition authorities, and national courts) to apply EU antitrust rules to agreements and practices liable of affecting trade between Member States, while at the same time respecting fundamental rights of the stakeholders affected, as protected by the European Charter of Fundamental Rights.

19. The European Competition Network (ECN) was created and co-operation tools were introduced to ensure the effective and coherent application of the common rules. On that basis, the Commission and the national Competition Authorities (NCAs) jointly have a considerable enforcement record, underpinned by a wide range of policy work. Since May 2004, the Commission has looked into potentially anti-competitive practices in virtually every economic sector, adopting over 120 decisions. NCAs, on their part, have investigated over 1,600 cases in the same period, giving rise to more than 600 enforcement decisions.

20. In 2013 the Commission started to look back at the experience of those ten years to analyse the work of the EU competition authorities in the different sectors and types of infringement. Taking stock of past priorities and achievements will help to strengthen the already excellent co-ordination between the Commission and the NCAs.

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<sup>10</sup> Case 39574 – Smart card chips

**Box 2. Regulation 1/2003 in Action**

*Structures of national competition authorities*

EU law relies on the Member States to ensure that there are effective and well-equipped national competition authorities and leaves largely to them the design of the national competition-enforcement regimes. The only explicit requirement is that Member States designate their respective authorities responsible for the application of Article 101 and 102 TFEU in such a way that the provisions of the Regulation are effectively complied with. In recent years, structural reforms have taken place in many Member States. Structures of NCAs in the European Competition Network (ECN) have generally evolved towards greater autonomy and effectiveness. Nevertheless, questions have arisen as to the independence and resources of some NCAs. A roll-back of achievements must be prevented.

*Convergence of enforcement powers*

The regulation left Member States the freedom to determine their own procedures and sanctions for the application of the EU competition rules in the Member States. Apart from a general obligation on Member States to ensure effective enforcement, in particular through the application of the principles of effectiveness and equivalence, these matters are not regulated or harmonised by EU law. As a result, the Commission and NCAs apply the same substantive rules according to different procedures and sanctions. Convergence of enforcement powers has been a focus of ECN work for several years. The ECN has notably produced detailed comparative reports on investigation and decision-making powers as well as a set of ECN Recommendations on investigation and decision-making powers. As regards sanctions for breaches of competition law, most NCAs can impose deterrent civil/administrative fines and apply a similar basic methodology when setting fines. Reforms leading to the increased convergence of procedures have been encouraged by country-specific recommendations in the framework of the Europe 2020 strategy (European Semester) and in the context of Economic Adjustment Programmes.

*Leniency convergence and interface with other areas of law*

Leniency programmes are generally recognised as an important tool to detect secret cartels. From the outset, fostering convergence and smooth interaction in that area has been a priority within the ECN. Notably the ECN Model Leniency Programme (MLP), developed in the ECN, provides Member States / NCAs with a cohesive set of model rules and procedures from which they are able to draw inspiration when drafting national measures. As a result, virtually all Member States have introduced leniency programmes and a significant process of alignment with the MLP has taken place. Refinements to the MLP were endorsed in late 2012.

The Commission will continue to pay close attention to the functioning of the overall framework for public enforcement of the EU competition rules.

21. The Commission adopted in 2013 an additional key initiative for the antitrust regulatory environment: the proposal for a Directive on how citizens and companies can claim damages when they are victims of infringements of the EU antitrust rules, such as cartels and abuses of a dominant market position.<sup>11</sup> The proposal is set to remove a number of practical difficulties which victims frequently face when they try to obtain fair compensation for the damage they have suffered as a consequence of infringements of EU competition law.

<sup>11</sup> COM(2013) 404 final: Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

### **Box 3. Removing Obstacles to Effective Compensation for Victims of Antitrust Infringements**

#### *The legislative proposal*

On 11 June, the Commission adopted a Proposal for a Directive on antitrust damages actions for breaches of EU competition law. Under EU law, any person or company who suffered harm because of an infringement of EU competition law has a right to full compensation. The proposal has two complementary goals. First, to make that EU right to compensation a reality in all Member States by removing key practical difficulties which consumers and companies frequently face when they seek redress. Second, the proposal aims at optimising the interplay of such private damages claims with the public enforcement by the Commission and national competition authorities, to safeguard strong public enforcement and to achieve a more effective enforcement overall.

To achieve those goals, the proposal includes substantive and procedural rules on crucial aspects of antitrust damages actions, such as access to evidence, limitation periods for bringing an action, standing, and the burden of proof with regard to compensation for overcharges passed on along the distribution chain. The proposal seeks to create or provide legal certainty as to the admissibility/disclosure of evidence produced for the purposes of public enforcement. For instance, in order to safeguard the attractiveness of leniency programmes, it provides that corporate leniency statements should never be disclosed in private damages litigation. The proposal facilitates follow-on damages claims by stipulating that final infringement decisions by national competition authorities have probative effect.

#### *Flanking measures*

In parallel to the proposal, the Commission adopted a Communication on quantifying antitrust harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union to provide guidance to courts and the parties in damages actions. The Communication is accompanied by a more comprehensive Practical Guide drawn up by the Commission's services and translated in all official EU languages. Finally, the proposal is complemented by the Commission Recommendation on collective redress, which recommends that all Member States introduce collective redress mechanisms to facilitate the enforcement of the rights that all Union citizens have under Union law, including the right to compensation for antitrust harm.

22. Furthermore, on 5 December the Commission adopted the 'merger simplification initiative' package. The package includes the amendment of the Merger Implementing Regulation<sup>12</sup> and the adoption of a new Notice on Simplified Procedure.<sup>13</sup> As a result, it is expected that the ratio of cases dealt with in simplified procedure will be substantially increased.

23. The simplification initiative is a concrete example of the Commission's commitment towards the goals of the Regulatory Fitness and Performance (REFIT) programme,<sup>14</sup> which aims at promoting growth and competitiveness by reducing regulatory burdens for EU businesses and citizens.

<sup>12</sup> Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

<sup>13</sup> Notice on a simplified procedure for treatment of certain mergers under the Merger Regulation.

<sup>14</sup> COM(2013) 685 final: Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, Regulatory Fitness and Performance (REFIT): Results and Next Steps, available at <http://ec.europa.eu/refit>.

### **3. State Aid Modernisation to Steer Public Resources Towards Competitiveness-Enhancing Objectives**

24. Like anti-competitive business practices such as cartels, unlawful government subsidies can tilt the level playing field, erect unnecessary barriers and squander the growth potential of the internal market. However, government support can also have a positive impact when it is well-targeted, tackles market failures, and creates incentives for investments and ventures that would not take place otherwise. 'Good' State aid can stimulate innovation and human-capital development. EU State aid policy can also help national authorities make the most of dwindling resources in times of budget constraints. Promoting public spending on growth-oriented policies is a key priority for the EU in this economic context and the main rationale of the State aid Modernisation strategy.<sup>15</sup> The strategy's reform process is being completed; below are the main elements the Commission worked on in 2013.

#### ***3.1 Tackling competitiveness gaps across the EU with targeted regional aid***

25. In June 2013 the Commission adopted the new Regional Aid Guidelines for the period 2014-2020.<sup>16</sup> The adoption followed extensive consultations with stakeholders (Member States, regional and local authorities, business associations, interest groups, individual companies and citizens), the European Parliament, the Committee of the Regions, and the European Economic and Social Committee. The Regional Aid Guidelines help reduce competitiveness gaps across the EU by supporting productive investments in value-added projects, especially in Europe's most disadvantaged regions.

#### ***3.2 Adapting to the challenges of broadband infrastructure development: new Broadband State Aid guidelines***

26. In January, the revised guidelines for the application of EU State aid rules to the broadband sector<sup>17</sup> entered into force. The guidelines help Member States achieve the objectives of the Digital Agenda for Europe, reinforce open access obligations, improve transparency and facilitate well-targeted aid, while simplifying the rules to allow for faster decisions.

27. In addition, the adoption of a revised Enabling Regulation<sup>18</sup> introduces certain broadband infrastructure among the new categories of aid that the Commission may decide to exempt from the obligation of prior notification, contributing to facilitate the implementation of broadband projects.

#### ***3.3 Promoting a sound and stable financing framework: New State aid rules for access to finance***

28. Small and medium-sized enterprises (SMEs) are the back-bone of Europe's economy: two out of three jobs in the private sector as well as more than half of the total value added created by businesses in the EU come from SMEs. They are also an engine of European competitiveness with a key role in innovation. But those firms often find it difficult to gain access to finance.

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<sup>15</sup> COM(2012)209 final: Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM).

<sup>16</sup> Guidelines on regional State aid for 2014-2020, (2013/C 209/01).

<sup>17</sup> EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01)

<sup>18</sup> Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid.

29. Against that background, the Commission reviewed the State aid guidelines devoted to the promotion of risk-capital investments in SMEs. The Risk Finance Guidelines set out the conditions that Member States must meet when they grant support to promote access to risk capital of SMEs in their early development stages, particularly to ensure that such aid targets a proven equity gap and does not crowd out financial operators. The new Risk Finance Guidelines were adopted in January 2014, following two public consultations, a workshop and a multilateral meeting with Member States.

### ***3.4 Rescue and restructuring State aid guidelines to support firms in temporary difficulties***

30. In November, the Commission launched a public consultation in view of the revision of the State aid guidelines for the support of troubled non-financial firms. The new rules on rescue and restructuring will be adopted in 2014 and will preserve the delicate balance between limiting the capacity reduction caused by the difficulties and minimising the economic damage caused by keeping unviable firms on the market. Keeping inefficient companies on life support has a negative impact on public budgets and can severely hinder competitiveness and economic growth. The principles inspiring the new guidelines aim to protect the jobs and know-how of companies that are viable once restructured and to provide them with the support they need to wind down non-viable operations.

### ***3.5 Stimulating innovative growth: New State aid guidelines for R&D&I***

31. The Commission is also in the process of revising the State aid guidelines for research, development and innovation (R&D&I), with a view to adopting new rules in 2014. R&D investment is crucial for competitiveness and is one of the headline targets of the Europe 2020 strategy.

32. The level of research and development in Europe remains constrained by market failures: the revised R&D&I framework will help translate State aid measures into higher levels of research and innovation, bringing more flexibility and less red tape for Member States when implementing R&D&I aid. In particular, more emphasis will be put on close-to-the-market activities, such as experimental development (including pilots and demonstrators), research infrastructure and innovation (including non-technological innovation). Since 2007, the Commission has approved over 200 national schemes in research, development and innovation.

### ***3.6 The future State aid guidelines for energy and environment***

33. State aid policy contributes to the EU long-term strategy for energy and climate change based on security of supply, sustainability and competitiveness. It does so by opening energy markets, keeping a level playing field, and creating incentives and an appropriate framework for the significant investments that are needed over the coming decades. The Commission's current review of the State aid guidelines on energy and environment looks at adopting new rules in 2014. The new guidelines will complement the ETS State aid guidelines of May 2012.

34. While traditional elements of environmental aid will be maintained in the new guidelines, the State Aid Modernisation process is seeking to ensure close synergy with the Europe 2020 strategy and its flagship initiatives.

35. The overall strategic goal of the review is to help EU countries invest better to meet the goals of EU energy policy and to facilitate efficient support to attain a higher level of environmental protection. It entails promoting investments in energy efficiency, better targeting public support to renewable energy sources, and promoting the use of subsidies to improve interconnections and develop cross-border networks. Those last two points are among the main innovations of the new guidelines.

36. The new guidelines will aim at minimising the competition distortions of environmental and energy state aid measures, in particular by limiting the aid to the minimum and incentivising market friendly instruments. The new guidelines will be fully consistent with the EU climate-change and energy objectives in line with the Europe 2020 Strategy and will support Member States in their efforts to reach them.

#### **4. Fostering Fair and Stable Financial Sector to Support the Real Economy**

37. The economic crisis originating from the financial sector has dented confidence in financial markets. However, financial markets that are stable, safe, open, competitive and fair are absolutely necessary to maintain a balanced and sustainable phase of economic expansion. The Commission has engaged in wide-ranging regulatory efforts to reduce systemic risks and to increase the transparency of financial markets. The root causes of the crisis and the challenges posed by the current economic juncture cannot be addressed without combining different policy instruments. In that context, antitrust enforcement to promote a fair and competitive financial sector operates in conjunction with State aid control on bank restructuring. Besides competition enforcement, there are legislative proposals which have the objective of improving the regulatory environment.

##### ***4.1 Commission's competition policy efforts for a more transparent financial sector: Focus on derivatives and benchmark rates***

38. A great deal of effort has been directed towards the derivatives market, given its size and its role in hedging the risk exposure for institutions such as banks, pension funds, and industrial firms. The European Market Infrastructure Regulation (EMIR), which entered into force last year, requires the standardised derivative contracts to be centrally cleared.<sup>19</sup> In the review of the Markets in Financial Instruments Directive (MIFID) the Commission proposed that those derivatives should be traded on transparent and organised trading platforms.<sup>20</sup> The Commission's antitrust tools are complementary to those regulatory measures. This means, in particular, that companies that plan to provide exchange trading should not be prevented to do so by the anti-competitive behaviour of others. It is particularly important for credit default swaps (CDS), given the role that those products play in the financial sector: in 2013, the gross notional value of the almost 2 million active CDS contracts exceeded € 10 trillion.

39. The Commission began an investigation on the CDS market in 2011, which resulted in a Statement of Objections being issued on 1 July 2013. The Statement of Objections was addressed to Bank of America Merrill Lynch, Barclays, Bear Stearns, BNP Paribas, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Morgan Stanley, Royal Bank of Scotland, UBS as well as to the International Swaps and Derivatives Association (ISDA) and data service provider Markit.<sup>21</sup> Following the investigation, the Commission reached the preliminary conclusion that those companies and associations may have co-ordinated their behaviour to jointly prevent exchanges from entering the CDS market between 2006 and 2009, thereby breaching EU antitrust rules that prohibit anti-competitive agreements, concerted practices and decisions of associations of undertakings.

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<sup>19</sup> [http://ec.europa.eu/internal\\_market/financial-markets/derivatives/index\\_en.htm](http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm)

<sup>20</sup> [http://ec.europa.eu/internal\\_market/securities/isd/mifid/index\\_en.htm](http://ec.europa.eu/internal_market/securities/isd/mifid/index_en.htm)

<sup>21</sup> Case AT.39745 – CDS – Information market

40. In parallel, in December, the Commission concluded the investigation of the antitrust cases relating to the Libor, Euribor and Tibor benchmark rates as regards the settling parties (see above on page 4). The investigations started in 2011 and were treated as a top priority by the Commission.<sup>22</sup>

41. Those antitrust cases highlight both the importance and the vulnerability of benchmarks. Benchmarks affect the value of many financial instruments, such as interest-rate swaps and forward rate agreements as well as of commercial and non-commercial contracts such as supply agreements, loans and mortgages. They also play an important role in risk management. In September, the Commission proposed a draft Regulation to restore confidence in those benchmarks.<sup>23</sup> The ultimate goal of the proposal is to ensure the integrity of benchmarks by guaranteeing that they are not subject to conflicts of interest, that they reflect the economic reality they are intended to measure, and that they are used appropriately.

#### ***4.2 State aid policy shaping disciplined restructuring and balance-sheet adjustments in the banking sector***

42. In the absence of the EU recovery and resolution rules, which are now set out in the Bank Recovery and Resolution Directive,<sup>24</sup> State aid rules for the banking sector effectively determined the conditions for the resolution of banks at EU level. Since the onset of the crisis, EU governments responded to threats to financial stability by providing massive public support to their respective banking institutions. For the past five years, State aid policy has been used to co-ordinate the response of Member States, preserve the level playing field in the banking sector, and make sure that bail-outs were carried out according to similar conditions across the Union. The main elements of the restructuring decisions were to return beneficiary banks to long-term viability, ensure burden-sharing, and eliminate competition distortions.

43. The Banking Communication revamped these State aid rules as of 1 August.<sup>25</sup> Until further notice, the new rules will continue to ensure a consistent policy response to the financial crisis throughout the EU and limit competition distortions in the internal market.

44. In the course of the year, the Commission adopted several decisions on bank restructuring under the new rules. On 6 September, the Commission temporarily approved as rescue aid, under new State aid rules, State guarantees on newly issued liabilities of the two Slovenian banks Factor banka d.d. and Probanka d.d. On 18 December, the Commission approved decisions on State aid measures in favour of five Slovenian banks. The Commission approved the restructuring plans of Nova Ljubljanska banka d.d. (NLB) and of Nova Kreditna Banka Maribor d. d. (NKBM), in particular because they enable the banks to become viable in the long term without unduly distorting competition. The Commission also approved aid for the orderly winding down of Factor Banka d.d. and Probanka d.d., in particular because the distortions of competition created by the aid will be minimised by the complete market exit of the two banks. Finally, the Commission temporarily approved rescue aid in favour of Abanka Vipava d.d., for reasons of financial stability. In the context of the Macroeconomic Imbalances Procedure, Slovenia had to carry out an asset quality review and a stress test of the Slovenian banking sector (AQR/ST). The assessment of the results of the AQR/ST, published by Slovenia on 12 December, was incorporated in the Commission's five decisions adopted on 18 December.

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<sup>22</sup> Case 39861 – Yen Interest Rate Derivatives (YIRD) and Case 39914 – Euro Interest Rate Derivatives

<sup>23</sup> The proposal covers a broad variety of benchmarks, not just interest rate benchmarks such as LIBOR, but also commodity benchmarks, benchmarks used to reference financial instruments such as energy and currency derivatives, benchmark used in financial contracts, and benchmarks used to measure the performance of investment funds.

<sup>24</sup> [http://ec.europa.eu/internal\\_market/bank/crisis\\_management/#maincontentSec2](http://ec.europa.eu/internal_market/bank/crisis_management/#maincontentSec2)

<sup>25</sup> [http://europa.eu/rapid/press-release\\_IP-13-672\\_en.htm](http://europa.eu/rapid/press-release_IP-13-672_en.htm)

**Box 4. Decisions on bank restructuring notified before 1 August 2013**

In the case of Hypo Alpe Adria Group (HGAA) the Commission approved in August 2013 a plan according to which the operative parts of the bank in Austria and South-Eastern Europe will be sold by mid-2015, at the latest, while the non-viable remainder is put into an orderly wind-down process. Until the sales process is complete, Austria commits to a number of restrictions for new business, in particular relating to risk control, thus ensuring that the marketability of the subsidiaries is enhanced and that competition distortions are kept to a minimum.

In the case of Banca Monte dei Paschi di Siena (MPS), the Italian government provided €2 billion to cover a capital shortfall coming from the December 2011 European Banking Authority stress test. After ensuring that the bank's business model is less risky and provides for long-term viability, the Commission approved MPS' restructuring plan in November 2013.

45. In addition, State aid control is an important tool to help to ensure that banks revert to their core economic function as lenders to the real economy, through conditionality in restructuring decisions.

46. In Spain, 2013 was the first full year of implementation of the various restructuring plans approved for the banks that received State aid under the eighteen-month financial-assistance programme granted in July 2012. The restructuring plans aimed at refocusing banks from riskier activities towards SME and other corporate lending. During the first half of 2013, the so-called subordinated liability exercises for the banks that received State aid were completed, generating almost €13 billion of capital in those banks and reducing the need for additional public funds.

47. In 2013 the Commission, together with the ECB and the IMF, also kept providing financial assistance to Member States that had requested it. State aid control contributed to the economic adjustment programmes in Ireland, Greece, Portugal, and Cyprus. The restructuring of the banking sectors, including extensive financial-sector conditionality, was one of the main policy requirements addressed to those countries.

**4.3 An open, efficient and secure Single Market for payments**

48. The Commission also focused its enforcement and regulatory efforts in the payments area. An example is the antitrust investigation opened in September 2011 to examine the standardisation process for payments over the internet carried out by the European Payments Council (EPC) and closed in June 2013.<sup>26</sup>

**Box 5. Taking Action to Ensure that Standardisation Processes do not Affect Market Entry And Innovation**

The EPC is the decision-making and co-ordination body of the European banking industry in relation to payments. The Commission had concerns that through its work on standards for e-payments, and in particular the e-Payments Framework, the EPC could exclude non-bank internet providers from the e-payments market. Internet payments are vital for the development of e-commerce and the good functioning of the EU internal market.

In the course of the investigation, the EPC announced its decision to stop the development of the e-Payments Framework and any other standardisation initiatives that would have the same object or effect. As a result, the complainant in that case, Sofort AG, withdrew its complaint. Under those circumstances the Commission decided to close its investigation.

<sup>26</sup> Case AT.39876 – EPC online payments

49. The revised Payment Services Directive<sup>27</sup> would explicitly allow non-bank players to operate in competition with banks in internet and card payments. In that instance, regulation effectively complemented antitrust enforcement.

50. Another example of synergy between ex-ante regulation and ex-post competition enforcement is the Proposal for a Regulation on interchange fees for card-based payments,<sup>28</sup> which takes account of two decades of competition proceedings involving card companies. Interchange fees have often been under the scrutiny of competition authorities and regulators. The Commission has adopted several decisions under EU antitrust rules, including the MasterCard decision of December 2007.<sup>29</sup> There have also been a number of national proceedings, including in Poland, Hungary, Italy, Latvia, the UK, Germany and France. Nevertheless, the European card-payments market remains rather fragmented and interchange fees vary widely. To address that issue, the Commission proposed the adoption of the interchange-fees Regulation. The proposal aims at developing an EU-wide market for payments, which will enable consumers, retailers and other businesses to enjoy the full benefits of the EU internal market, including in e-commerce, in line with Europe 2020's Digital Agenda.

51. The ban foreseen by the revised Payments Services Directive on the collection of payment card surcharges for the interchange fee-regulated cards complements the provisions of the Consumer Rights Directive,<sup>30</sup> which should become applicable across the EU from 13 June 2014. The new rules will prevent traders from applying payment surcharges for any means of payment that exceed the cost borne by the trader for the use of such means.

## 5. Energy: the Sector where “More Europe” is Most Needed

52. Energy is one of the sectors in which completing the Single Market will bring the greatest benefits to Europe's businesses and citizens. However, reform efforts designed to complete an internal market for energy, including the third Energy Package launched in 2007<sup>31</sup> are taking longer than expected to have an impact on the ground. Three key challenges identified in 2013 are the EU's increasing dependence on imported energy, increasing energy prices and lack of investment.<sup>32</sup> Renewable energy will play a key role in the transition towards a competitive, secure and sustainable energy system.

53. Energy markets play a crucial role in Europe's economy. Energy is a key input for industry and touches upon almost every aspect of consumers' daily life. Energy costs have a considerable impact on economic activity. The price of energy is a major source of concern for European competitiveness, especially in energy-intensive industries, and threatens Europe's ten-year lead in decarbonisation.

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<sup>27</sup> COM(2013) 547 final: Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC.

<sup>28</sup> COM(2013) 550 final: Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions.

<sup>29</sup> Case AT.34579 – MasterCard I

<sup>30</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

<sup>31</sup> The third energy package adopted in 2007 identified specific anti-competitive behaviours to be addressed under the EU competition rules.

<sup>32</sup> See *Commission contribution to the European Council of 22 May 2013*, available at [http://ec.europa.eu/europe2020/pdf/energy2\\_en.pdf](http://ec.europa.eu/europe2020/pdf/energy2_en.pdf)

54. There is, however, a broad consensus as to what is required to tackle those challenges: providing the EU with a common framework for energy, investing in infrastructure, increasing energy efficiency, and encouraging more efficient and better market-integrated aid to renewables.

55. Competition is part of the policy mix that can address those challenges. EU energy legislation has contributed to the dismantling of legal monopolies, the harmonisation of rules, and has introduced measures to support market integration and liberalisation. Competition policy, for its part, seeks to ensure that companies do not maintain or reinstate barriers to competition. Hence competition enforcement, regulation and liberalisation measures all contribute to the three pillars of EU energy policy: sustainability, competitiveness and security of supply.

56. Still, in some Member States competition in the gas and electricity markets remains limited not only due to the slow implementation of the legislation, but also due to the nature of those sectors which are characterised by high entry-level investment and by limited physical-infrastructure capacity. Although EU energy markets remain largely national or regional in nature, their integration has increased. Further integration could mitigate price fluctuations and improve overall efficiency and competition.

57. In that sense, the robust enforcement of antitrust rules underpins the effectiveness of ex-ante regulation and State intervention should be well-designed in order to limit the impact on energy prices.

58. Since 1 January, the new State aid guidelines on the Emissions Trading Schemes (ETS) are applicable. The new framework allows Member States to relieve energy-intensive industries from indirect costs of CO<sub>2</sub> in their electricity price and addresses the risk of relocation to countries outside the EU where environmental regulation is less strict.<sup>33</sup> In 2013 the Commission approved such schemes in five Member States: Belgium, Germany, the Netherlands, Spain and the UK.<sup>34</sup> On the other hand, plans of the German authorities to grant such support to certain non-ferrous metals producers have been declared incompatible, as it would have implied serious distortions of competition to the detriment of producers in other Member States.<sup>35</sup>

### ***5.1 Promoting Open and Competitive Energy Markets by Ensuring Non-Discriminatory Access and a Level Playing Field***

59. In 2013, antitrust enforcement actions have contributed or will contribute in the future to curbing energy prices by combatting abusive or collusive behaviour leading to segmentation of markets and inefficient allocation of energy. Cases currently under investigation by the Commission have examined the behaviour of companies active in the crude oil, refined oil products and biofuel sectors;<sup>36</sup> Gazprom, in relation to the supply of gas to Central and Eastern Europe;<sup>37</sup> BEH, in relation to the supply of electricity in Bulgaria;<sup>38</sup> and power exchanges.<sup>39</sup>

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<sup>33</sup> Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post 2012, OJ C158, 5.6.2012, p. 4.

<sup>34</sup> Case numbers SA.37017, SA.36103, SA.37084, SA.36650 and SA.35543.

<sup>35</sup> Case SA.30068 – Aid to non-ferrous metals producers for CO<sub>2</sub> costs of electricity.

<sup>36</sup> Case AT.40054 – Oil and Biofuel Markets, see MEMO/13/435 of 14 May 2013 [NB: case number and name not yet public on website]

<sup>37</sup> Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe, see MEMO/12/937 of 4 September 2012

<sup>38</sup> Case AT.39767 – BEH electricity, see IP/121307 of 3 December 2012.

60. In April, the Commission accepted and adopted a decision that renders legally binding commitments from ČEZ, the Czech electric incumbent.<sup>40</sup> An in-depth investigation into the Czech electricity sector was opened in June 2011, following unannounced inspections in 2009. After ČEZ offered commitments to address the Commission's concerns, a market test was carried out in July 2012 and its outcome was considered satisfactory. ČEZ will divest from about 800 to 1,000 MW of its generation capacity. That divestiture will allow a new player to enter the Czech electricity market and compete with the incumbent.

61. The Commission also initiated formal proceedings against the Romanian power exchange OPCOM,<sup>41</sup> which, together with its parent company CNTEE Transelectrica, received a Statement of Objections in May. The Commission found on a preliminary basis that OPCOM, the operator of the only power exchange in Romania, is discriminating against companies on the basis of their place of establishment. Power exchanges have an important role in providing public price information: restrictive business practices, by increasing foreign traders' costs to do business, limit the liquidity and efficiency of electricity markets. Access to energy markets is crucial to achieving transparent and reliable electricity prices on the wholesale and retail markets.

62. As to State aid control, the Commission opened an in-depth inquiry into water-resources concessions to Electricidade de Portugal (EDP) for electricity generation, to verify whether the price paid by the Portuguese electricity incumbent EDP in 2007 for the extension of its right to use public water resources for electricity generation was in line with EU State aid rules.<sup>42</sup> The Commission has started inquires about the rules and practices governing the granting or extension of similar concessions in other Member States too.

## **6. Competition Enforcement in the Digital Economy to Underpin the Digital Agenda for Europe**

63. The digital revolution has taken almost every sector of the economy by storm, shaping the way individuals and companies live and do business, bringing a large variety of digital goods and services, and offering other sectors essential inputs, prospective savings, novel information and distribution channels. The digital sectors are major drivers of creativity and innovation, boosting competitiveness across the economy. Although it is extremely difficult to identify reliable measures to capture the size of the digital economy, its contribution to GDP growth in recent years has become more and more significant. With this in mind, the Commission launched in 2010 its Flagship Initiative "A Digital Agenda for Europe",<sup>43</sup> which was reviewed with an updated set of priorities in December 2012.

64. Although the basic principles and objectives of competition policy remain the same across all sectors, a number of features are quite specific to the digital economy. A faster churning process is one of them. Another feature of digital markets is the rapid pace of technological change, which constantly brings new devices and immaterial goods, such as services, applications, and ecosystems to the market. Finally, business models and sources of revenue change faster in digital markets than elsewhere.

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<sup>39</sup> Case AT.39952 – Power Exchanges, see MEMO12/78 of 7 February 2012.

<sup>40</sup> Case AT.39727 – ČEZ

<sup>41</sup> Case AT.39984 – OPCOM / Romanian Power Exchange

<sup>42</sup> Case SA.35429 – Extension of use of public water resources for hydro electricity generation

<sup>43</sup> COM(2010) 245 final/2: Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, A Digital Agenda for Europe.

### 6.1 *Combining Competition-Policy Instruments to Address the Challenges of Fast-Moving Market*

65. In fast-moving markets such as ICT and e-communication, the joint application of ex-ante regulation and ex-post competition enforcement is necessary to safeguard the proper functioning of the sector and help it deploy its growth potential in full. Effective scrutiny of the behaviour of dominant firms, as well as quick reaction in case of abuses, is particularly important, since illegal practices may cause the early exit from the market of small and innovative competitors.

66. Facilitating the dissemination of intellectual property and knowledge is also important in the digital industries. To that end, the Commission is reviewing its antitrust-policy framework on technology-transfer agreements. Efficiency-enhancing technology-transfer agreements between competitors or non-competitors promote innovation and competitiveness. Dissemination of technology can favour competition and increase follow-on innovation. A public consultation on the revision of the existing guidelines and the block exemption regulation for technology transfer agreements (TTBER) took place between February and May, in view of adopting final texts in the spring of 2014.

#### **Box 6. Enforcing Antitrust Rules in the Fast Moving Digital Market: The Google Case**

The Commission had concerns that Google may be abusing its dominant position in the markets for web search, online search advertising and online search advertising intermediation in the EEA. The Commission considered that such practices could harm consumers by reducing choice and stifling innovation in the fields of specialised search services and online search advertising. To address Commission's competition concerns, Google submitted a first set of commitments in April and a revised set of commitments in October. The Commission sought feedback on Google's revised commitments through formal requests for information. In light of the feedback it received, the Commission came to the conclusion that the revised commitments still fell short of adequately addressing the competition concerns the Commission expressed in its Preliminary Assessment. The Commission informed Google that if it wished to submit a further revised set of commitments that adequately addressed the Commission's concerns, it had only a very limited amount of time to do so, failing which the Commission would revert to the procedure under Article 7 of Regulation 1/2003.

### 6.2 *Promoting Connectivity and Tackling Single Market Fragmentation in the Telecoms Sector*

67. The absence of a real Single Market for electronic communications hinders the development of new services accessible throughout the internal market to the disadvantage of European consumers.

68. Completing the Single Market for electronic communications would bring significant benefits to Europe's businesses and citizens. On 11 September, the Commission adopted a legislative package for a "Connected Continent: Building a Telecoms Single Market". This package comprises a Communication on the Telecoms Single Market, a proposal for a Regulation laying down measures concerning the European single market for electronic communications as well as measures to achieve a Connected Continent; it also includes a Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.<sup>44</sup>

69. In 2013 competition enforcement has been quite active in the telecoms sector, preventing incumbents from protecting their business through illegal practices and ensuring that mergers would not lead to higher prices, poorer quality and lower levels of innovation.

<sup>44</sup> <https://ec.europa.eu/digital-agenda/en/connected-continent-single-telecom-market-growth-jobs>

70. Under the Merger Regulation, the Commission is in the process of reviewing a number of major deals, including two proposed transactions that would consolidate Mobile Network Operators in Ireland and Germany respectively. On 1 October, Hutchison 3G UK notified to the Commission its intention to acquire sole control over Telefónica Ireland and on 6 November the Commission opened an in-depth investigation into that merger.<sup>45</sup> Similarly on 31 October, Telefónica Deutschland notified to the Commission its intention to acquire sole control over KPN's mobile operations in Germany known as E Plus and on 20 December the Commission opened an in-depth investigation in to the transaction.<sup>46</sup> As both those transactions would result in fewer players on wholesale and retail markets that are already very concentrated, they will have to be reviewed in-depth in the course of 2014.

71. The Commission also analysed and cleared unconditionally in Phase I Liberty Global's US\$ 23.3 billion acquisition of Virgin Media<sup>47</sup> – the largest cable operator in the UK – and Vodafone's €8 billion acquisition of Kabel Deutschland, the largest cable operator in Germany.<sup>48</sup>

72. On the antitrust side, on 23 January the Commission imposed a fine of €66.894.000 on Telefónica and of €12.290.000 on Portugal Telecom, for agreeing not to compete with each other on the Iberian telecommunications markets.<sup>49</sup> By preserving the status quo in Spain and Portugal, the agreement contributed to maintaining partitioning in the EU telecoms sector. Non-compete agreements are one of the most serious violations of EU competition rules, as they potentially result in higher prices and less choice for consumers. That specific decision is especially relevant, since it concerned a cross-border market-sharing agreement.

### **6.3 *Removing Obstacles to Innovation in the Knowledge Economy***

73. In 2013, the Commission has been active in relation to standard-essential patents (SEPs). SEPs are patents protecting a technology which is essential for the implementation of an industry standard developed by a standard-setting organisation. It is technically impossible to make a standard-compliant product without using the technology protected by the SEPs.

74. In May, the Commission sent a Statement of Objections to Motorola Mobility on potential misuse of SEPs for mobile phones.<sup>50</sup> The seeking of an injunction before a national court is generally a legitimate remedy for a SEP holder in case of patent infringements. However, where a successful standard comprises patented technologies, access to the corresponding SEPs is a precondition for any company to sell standard-compliant products on the market. The Commission has therefore reached the preliminary conclusion that the seeking of an injunction may constitute an abuse of a dominant position, where SEPs are concerned and the potential licensee is willing to enter into a licence on FRAND (Fair, Reasonable and Non-Discriminatory) terms. In such a situation, the Commission considers that SEP holders should not have recourse to injunctions, which generally involve a prohibition to sell the product infringing the patent. SEPs holders retain the right to seek injunctions where potential licensees refuse licenses that have been deemed to be FRAND.

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<sup>45</sup> Case number M.6992 – Hutchison 3G UK / Telefónica Ireland.

<sup>46</sup> Case M.7018 – Telefónica Deutschland / E-Plus.

<sup>47</sup> Case M.6880 – Liberty Global / Virgin Media.

<sup>48</sup> Case M.6990 – Vodafone / Kabel Deutschland.

<sup>49</sup> Case AT.39839 Telefónica and Portugal Telecom.

<sup>50</sup> Case AT.39985 – Motorola - Enforcement of GPRS standard essential patents.

75. Efforts in the SEPs area have also involved Samsung.<sup>51</sup> In September, Samsung offered commitments to address the competition concerns identified by the Commission in its Statement of Objections of December 2012. Under the proposed commitments, Samsung proposes for a period of five years not to seek injunctions on the basis of any of its SEPs, present and future, that relate to technologies implemented in smartphones and tablets against any company that agrees to comply with a specified process for determining appropriate FRAND royalty rates by either a court or arbitral tribunal.

## **7. International Co-operation in Competition Policy to Tackle the Challenges of Globalisation**

76. The increasing interdependence of world economies is an irreversible trend: foreign direct investment had risen to over 30% of world GDP before the crisis, while world trade has grown on average by 5.3% a year for the past two decades. New economic giants have appeared while the major players in the global environment have made significant investments in each other's economies.

77. The globalisation of the economy calls for closer co-operation among competition authorities not only in Europe, but also across the globe. International co-operation between competition agencies assists with the effective management of the challenges of globalisation and promotes convergence on competition-policy principles and practices implemented throughout the world. It is essential to ensure co-operation among different authorities and consistency in the outcome of their enforcement activities. As encouraged by the European Parliament, the Commission continued to engage in multilateral and bilateral policy dialogues with the authorities in a number of other jurisdictions so as to promote convergence on both substantive and procedural competition rules. The Commission also continued to co-operate closely with many competition agencies in day-to-day enforcement activities.

### **7.1 Bilateral and Multilateral Co-operation for More Effective Competition Enforcement**

78. The EU launched negotiations with the US on a Transatlantic Trade and Investment Partnership Agreement (TTIP) on 8 July and with Japan on a Free Trade Agreement on 25 March. Both negotiations include provisions related to competition that the Commission follows closely.

79. As to bilateral relations with non-EU competition-enforcement bodies, in 2013 the Commission focused its efforts mainly on the EU's main trading partners – both traditional trading partners and major emerging economies. In that respect, high-level dialogues were held in 2013 with representatives of some competition agencies with which the EU has concluded a co-operation agreement or a Memorandum of Understanding.

80. In the margin of the BRICS Conference on 22 November in Delhi, DG Competition signed a Memorandum of Understanding for Co-operation in the area of competition law with the Competition Commission of India. On 17 May, the Co-operation Agreement between the EU and Switzerland was signed. An innovative feature of the latter and the reason why it is called a second-generation agreement is that it will enable both competition agencies to exchange information they have obtained in their respective investigations. The agreement will enter into force once it has been approved by the European Parliament and the Swiss Parliament.

81. Negotiations on a similar agreement between the EU and Canada have been progressing well. In addition, the Commission continued to engage in technical co-operation activities with other non-EU competition authorities, in particular of China and India.

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<sup>51</sup> Case AT.39939 – Samsung - Enforcement of UMTS standards essential patents.

82. The Commission continued to monitor closely the implementation of the provisions of the steel and shipbuilding annexes included in the Act of Accession for Croatia<sup>52</sup> – and on 1 July Croatia became a member of the EU. As to accession negotiations with candidate countries, significant progress was made in 2013 with the screening of Montenegro legislation and the identification of opening benchmarks for negotiations of the competition chapter.

83. The Commission also continued its active engagement with international competition-related fora such as the Competition Committee of the OECD, the International Competition Network (ICN), and Unctad. In 2013, it continued to co-chair the Mergers Working Group of the International Competition Network and one of the Sub-Groups of the Cartel Working Group. In 2013 the Commission was also the project leader (together with US Federal Trade Commission) for the ICN Steering Group projects on investigative processes in competition enforcement activities.

## **8. Competition Dialogue with the Other Institutions**

### **8.1 *Structured Dialogue with the European Parliament***

84. DG Competition engages in a continuous structured dialogue on competition issues with the European Parliament, and its Economic and Monetary Affairs (ECON) Committee in particular.

85. Vice-President Almunia visited ECON twice in 2013 in the context of the structured dialogue: on 28 May for the presentation of the Annual Report on Competition 2012, and on 26 November for an update on key decisions and policy developments in 2013, looking ahead to the results of the Parliament's work in the area of competition in 2014.

86. The Vice-President also attended the Regional Policy committee on 30 May to talk about the Regional Aid guidelines, which the committee was examining.

87. Two Resolutions on the Annual Reports on Competition were adopted in 2013. In June, Parliament adopted its Resolution on the Sanchez Presedo report, covering the 2011 ACR. The 2012 Annual Report on Competition was sent to the ECON committee on 14 May, to enable MEPs to prepare for the dialogue with the Commissioner. The Resolution on the Tremosa i Balcells report was adopted on 10 December.

88. In recent years, Parliament has raised concerns about the subject of fines for competition infringements: the Commission holds the view that the Fining Guidelines provide sufficient legal certainty for companies and flexibility for the Commission if modification is required; this structure has been upheld on many occasions by the European Courts.

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<sup>52</sup> Act of Accession to the Accession Treaty for Croatia.

### **Box 7. Structured Dialogue with the European Parliament on State Aid Modernisation**

The Parliament was formally consulted by the Council in the process of adopting the Enabling and Procedural Regulations, cornerstones of the State Aid Modernisation, which was a priority for DG Competition throughout 2013. The Parliament adopted its two Resolutions in July, following in-depth work on the two proposals. As well as the ECON committee, the TRAN committee contributed an opinion on the Enabling Regulation. As well as its formal role in the legislative process, the key messages made by the Parliament were taken into account by the Commission in its revision of the guidelines in the State aid area. As Vice-President Almunia informed MEPs during the 26 November structured dialogue, the SAM process shall be completed in 2014 with the adoption of the rest of the State aid guidelines.

In parallel to and following the adoption of the Enabling and Procedural Regulations in July, work to revise and update the raft of State aid legislation continued. There was a third public consultation on the draft Cinema Communication on 6 May, followed by the final text of the Communication on 14 November. ECON was informed of that initiative, as well as the launch of the public consultation on the guidelines on State aid to airports and airlines (Aviation Guidelines) on 3 July, the De Minimis consultation on 17 July, the public consultation on the General Block Exemption Regulation on 29 July, the Rescue & Restructuring guidelines on 14 November.

A background paper on the Regional Aid Guidelines was sent to ECON on 16 May.

It was another area for which COMP staff briefed MEP and Parliamentary staff. The REGI committee tabled an Oral Question with debate on the RAG, in the context of parallel debates on the new Regional aid maps and next programming period for the Structural Funds.

## **8.2 Damages actions<sup>53</sup>**

89. Vice-President Almunia chose to first present the Commission proposal on Damages to ECON MEPs at an open co-ordinators' meeting in Strasbourg on 11 June, immediately following adoption by the College. The Commission adopted the proposal on the basis of both Articles 103 and 114 TFEU that led the Commission to transmit the proposal to the European Parliament and the Council under the ordinary legislative procedure. The services of the Commission attended the workshop on the proposal on 18 September hosted by the ECON rapporteur, and the first exchange of views held on 17 October to answer questions.

## **8.3 Swiss Agreement**

90. The services of DG Competition first informed the European Parliament about the negotiations with the Swiss competition authority on a second-generation agreement in November 2010. In June 2013, the Council formally requested the Parliament to give its consent to that agreement. DG Competition has worked with the rapporteur, participating in a workshop for assistants, a public hearing, and a meeting with representatives of the parliamentary groups.

## **8.4 Continuing to strengthen DG Competition's communication with the ECON Committee**

91. As in previous years, DG Competition organised a seminar for ECON assistants and political advisers covering the main themes in the 2012 Annual Report on Competition and which was held on 17 May at DG Competition's premises. It was followed by an in-depth briefing for the rapporteurs' assistants

<sup>53</sup> COM(2013) 404 final: Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

on antitrust and State aid enforcement in the transport sector and on State aid to banks, and by a high level briefing for the ECON competition working group MEPs on the main policy themes.

92. In July, the Commission adopted a new Banking Communication to update the guidelines published in 2008 at the start of the financial crisis and to reflect the experience gained in the interim period. The Commission also prepared an issues paper for the Economic and Financial Committee (EFC), which was sent to the ECON Chair.

93. DG Competition continued the practice of regularly informing the relevant Parliamentary committees of public consultations and the adoption of new guidelines and policy documents.

94. DG Competition staff met many MEPs on a bilateral basis in 2013, relating to Parliament's work on the various competition files. The Commission services prepared replies to 366 written Parliamentary questions, and to 21 petitions in respect of which DG Competition was chef de file.

95. DG Competition and the ECON committee continued their exchange of information with regard to studies; DG Competition services informed the ECON secretariat in July of the studies commissioned by the DG in 2013.

96. DG Competition's engagement with the EESC and the CoR

97. The Commission also informed the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR) about major policy initiatives. It also participated in study group and section meetings. On 1 February, Vice-President Almunia attended the plenary meeting of the CoR on State Aid reform and the revision of the Regional Aid Guidelines 2014-2020.

## PART II

### A. LEGISLATION AND POLICY DEVELOPMENTS

#### 1 EU Competition Policy as the Driver of European Competitiveness

98. European institutions, governments and all stakeholders in the economy have continued to work hard on bringing Europe out of the economic crisis. This year we have seen the first signs of these common efforts bearing fruit. The Europe 2020 strategy for smart, sustainable and inclusive growth provides guidance on the path to follow: building on the EU's key asset, the Single Market, we have to reinforce European competitiveness. Competition policy has a major and clear role in that process. It protects and strengthens the Single Market, it ensures a level playing field for businesses and it supports innovation. As the European Parliament's 2013 study<sup>54</sup> on competition policy has concluded: "*Competition plays a crucial role in promoting productivity and innovation as drivers of economic growth. This means that competition policy, which intensifies competition, will stimulate growth.*" In that spirit, the Commission has continued to consistently enforce all instruments of competition policy and to keep the legislative framework for those instruments up to date with the changing economic reality.

#### 2. State aid

99. 2013 brought not only the first signs of recovery for the European economy but also results for the stabilisation efforts in the banking sector. However, those first positive signs need to be underpinned by further measures to ensure sustainability. State aid policy can support recovery by ensuring a better and more effective use of scarce public resources. At the same time State aid policy maintains undistorted competition in the Single Market, thereby contributing to the competitiveness of European companies and EU economy as a whole. Crisis related State intervention in support of the financial sector has been essential in saving the European banking system from an uncontrolled collapse. State intervention continues to be essential in some Member States. The unprecedented amount of public funds spent on stabilisation of the financial sector posed a high risk of market distortions. The Commission's reformed guidance for aid to the financial sector continues to guarantee compliance with competition rules.

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<sup>54</sup> The Contribution of Competition Policy to Growth and the EU2020 Strategy, IP/A/ECON/ST/2012-25, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON\\_ET\(2013\)492479\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON_ET(2013)492479_EN.pdf)

**Box 8. The latest figures on the scale of crisis and non-crisis State aid**

Between October 2008 and 31 December 2012 Member States provided assistance to the financial sector amounting to EUR 591.9 billion (4.6 % of EU 2012 GDP) for capital support (recapitalisation and asset relief measures).

Liquidity support (provided in the form of guarantees and other liquidity measures) reached its peak in 2009 with an EU 27 outstanding amount of EUR 906 billion (7.7 % of EU 2012 GDP). The crisis intensity has gradually weakened in many EU countries since then, and the outstanding amount of liquidity support has dropped down by more than a half to EUR 534.5 billion (4.14 % of EU 2012 GDP) in 2012. The temporary crisis rules for support of the real economy expired in 2011 and the aid granted under those provisions in 2012 amounted only to EUR 63 million.

In 2012, non-crisis State aid increased by roughly EUR 3 billion compared to 2011 and reached EUR 67.2 billion or 0.52% of EU GDP (an increase by 0.01%). Member States mainly sponsored aid measures for regional development, research, environmental protection and providing risk capital to SMEs, all of which contribute to the Europe 2020 strategic objectives of smart, sustainable and inclusive growth.

## **2.1 State Aid Modernisation: continued reform in support of growth and jobs**

100. Following the launch of an ambitious State Aid Modernisation programme ("SAM") in May 2012<sup>55</sup>, the Commission made major progress in translating the main reform principles into legislation and guidelines during 2013.

101. SAM aims at directing scarce public funds towards growth- and competitiveness-enhancing measures and turning State aid policy into a smart and efficient tool to help Member States "achieve more with less". The programme has three key objectives, which aim to create a State aid control system that supports growth policies, preserves the integrity of the Single Market and works together with Member States and European businesses. The SAM objectives have also been recognised and supported by the European Parliament in its January 2013 resolution<sup>56</sup>. The progress achieved under each objective is outlined in turns below.

### *2.1.1 Foster growth in a strengthened, dynamic and competitive internal market*

102. The Europe 2020 Strategy<sup>57</sup> focuses on creating the conditions for smart, sustainable and inclusive growth. One of the key goals of the SAM programme is to support the strategy and its flagship initiatives by facilitating well-designed aid targeted at market failures and objectives of common European interest ('good aid').

103. The Digital Agenda flagship initiative sets ambitious goals for broadband infrastructure development to support growth in Europe. New guidelines aligning the State aid rules on aid for broadband with the objectives of the Digital Agenda came into force in January, marking the first concrete application of the SAM principles.

104. In June, the Commission adopted new regional aid guidelines<sup>58</sup> for the period 2014-2020. The new guidelines seek to help Europe's governments spend better, by ensuring that aid goes to investments

<sup>55</sup> Communication of 8 May 2012 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM), COM(2012) 209 final

<sup>56</sup> European Parliament resolution of 17 January 2013 on State aid modernisation (2012/2920(RSP))

<sup>57</sup> COM(2010) 2020 final of 3.3.2010

<sup>58</sup> OJ C209, 23.07.2013

that would not take place without the aid, and that therefore bring real value added for regional development.

105. Well-targeted aid can also help European competitiveness by stimulating innovation. The rules on research, development and innovation (R&D&I) and risk finance aid are particularly important in that respect: the Europe 2020 Strategy identifies R&D as a key driver to achieve the objectives of smart, sustainable and inclusive growth. The design of EU Financial Instruments, such as the Financial Instruments in Horizon 2020 or the Programme for the Competitiveness of Enterprises and SMEs (COSME), also needs to be co-ordinated with State aid law.<sup>59</sup> The Commission conducted public consultations on new guidelines on R&D&I and risk finance aid in the second half of 2013, with a view to their adoption in 2014.<sup>60</sup>

106. Finally, the Europe 2020 Strategy sets headline targets for climate change and energy sustainability. In that light, a clear framework is needed for State aid in the field of energy and environment. The Commission launched a consultation on guidelines in that field in the second half of 2013, following a workshop that took place in April.

### *2.1.2 Focusing on cases with the biggest impact on the Single Market*

107. Simplified and proportionate rules for cases with limited effect on trade also have a role to play in helping direct scarce public resources towards 'good aid'. The key tools in that respect are the Enabling Regulation and the General Block Exemption Regulation.

108. The amended Enabling Regulation<sup>61</sup>, adopted by the Council in July, is a cornerstone of the SAM programme. It makes a proportionate approach possible by adding new categories of aid that can be exempted from prior notification to the Commission. At the same time, it ensures that the exemption supports the objectives of SAM by covering only measures where distortions of competition are limited, the aid is 'good aid' and the Commission has sufficient case experience to be able to set appropriate conditions in advance.

109. The General Block Exemption Regulation<sup>62</sup> (GBER) sets out the detailed terms on which aid covered by the Enabling Regulation is exempt from prior notification. The changes to the Enabling Regulation make it possible to extend the horizontal and vertical scope of the GBER. At the same time, the review of the GBER gives the opportunity to support competitiveness by simplifying and clarifying the rules and going further in promoting 'good aid' to facilitate growth, while boosting transparency to help ensure that aid remains properly targeted even in the absence of notification to the Commission.

110. The new GBER will have a significantly extended scope and simplified conditions. 75% of today's State aid measures and around 66% of aid amounts would be covered by the new GBER. If Member States focus their aid policy on the GBER then some 90% of measures could be covered in the future. The Commission proposes to closely work with Member States to achieve that goal; inter alia by setting up a dedicated network of State aid country desks and preparing new guidelines. They should also help Member States to ensure better respect of the GBER conditions when designing their aid measures. To complement that significant shift in the exercise of prior controls, the Commission will monitor aid granted under the GBER. It will also evaluate the effect of the aid together with Member States.

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<sup>59</sup> In accordance with Article 140. 2. (c) of Regulation (EU, EURATOM) No 966/2012 of 25 October 2012

<sup>60</sup> Risk finance guidelines were adopted on 15 January 2014. See [http://europa.eu/rapid/press-release\\_IP-14-21\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-14-21_en.htm?locale=en).

<sup>61</sup> Council Regulation (EU) No 733/2013 of 22 July 2013

<sup>62</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008

111. Following the amendment of the Enabling Regulation, six new categories of aid previously not covered will be included in the GBER: innovation aid to large enterprises, certain aid to broadband infrastructures, aid for culture and heritage conservation, including audio-visual works, aid for sport and multifunctional recreational infrastructures, aid to make good the damage caused by natural disasters and social aid for transport for residents of remote regions. In addition, new forms of exempted aid will be introduced for existing categories, such as: a wider concept of risk finance aid, investment aid for research infrastructures, a new category on start-up aid, new possibilities for energy and environmental aid (e.g. aid for remediation of contaminated sites, operating aid for renewables, energy efficiency schemes), enlargement of the notion of disadvantaged workers for employment aid to the youngest, and regional aid for outermost regions and for urban development schemes.

112. Moreover, the revised GBER provides for a significant increase in the notifications thresholds in key areas linked to the Europe 2020 agenda, such as R&D&I and risk finance.

113. Finally, the proportionate approach is also supported by the *de minimis* Regulation<sup>63</sup> that sets out the conditions on which small amounts of State support (up to EUR 200 000) do not constitute aid. After a careful review of the available evidence and in view of the support fiscal consolidation and the redirection of scarce public funds towards objectives of common interest in line with the Europe 2020 agenda, the Commission decided not to change the *de minimis* threshold. However, a number of simplifications and clarifications have been introduced in the new Regulation that was adopted on 18 December. Those changes will facilitate access to this instrument for all firms when they need it.

### 2.1.3 *Better targeting and improved ex-post controls*

114. Enlargement of the GBER should not be confused with softening control. In the present economic conditions it is even more important than ever that aid is well-targeted and addresses real market failures and cohesion needs. For that reason, aid to large firms in assisted regions should be primarily reserved to green-field investments, RDI and energy and environmental objectives, if necessary with higher intensities to compensate for regional handicap (regional bonuses). Support to ailing firms should only be granted under conditions that ensure their ability to come back to viability: the new GBER will consider a single and more precise definition of firms in difficulty, based on clearer and simpler criteria established in consultation with financial experts and practitioners so as to reflect market practices.

115. Such an important enlargement and simplification of the GBER has to be balanced by improved ex-post controls. They will be based on greater transparency of aid awards at the individual level, more systematic monitoring of compliance with the formal conditions for exemption and by introducing ex-post evaluation, notably for the largest schemes in key areas relevant for the internal market. Ex-post evaluation will ensure a more solid and effective method to ensure good aid with incentive effect, and it will help designing better schemes with more limited impact on competition and trade. Predefined thresholds will provide predictability and legal certainty as to the schemes to be evaluated. In order to ensure a common guidance and the same treatment to all, the Commission launched a public consultation on a common methodology for ex post evaluation in the summer of 2013. It aims to adopt the revised regulation in the first half of 2014.

### 2.1.4 *Streamlined and clearer rules and faster decisions increase the efficiency of aid distribution*

116. The SAM programme also involves streamlining the rules, to allow the Commission to adopt faster and better decisions and concentrate its resources on the most important cases.

<sup>63</sup> Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013. p. 1

117. To that end, the Council adopted the new Procedural Regulation<sup>64</sup> in July. The regulation allows the Commission to improve the handling of complaints. In particular, it introduces new requirements designed to improve the quality of information received from complainants and clarifies the requirements to lodge them. For example, a mandatory complaints form is introduced and the complainant must show the existence of an interest to act, in order to be able to file a formal complaint. Moreover, a complaint will be considered withdrawn in case the complainant does not provide meaningful information or fails to cooperate.

118. The amended Procedural Regulation also gives the Commission the power to collect the appropriate information on a case within business-relevant deadlines. In particular, the Commission can obtain information directly from market participants and conduct sector inquiries.

119. Lastly, the regulation will facilitate coherent application of State aid rules across Member States through its provisions on co-operation with national courts. The role of the national courts has been reinforced. On the one hand, national courts can now obtain information from the Commission for the purpose of applying Article 107(1) and 108 of the Treaty on the Functioning of the European Union (TFEU). Courts can also ask the Commission for an opinion on a concrete case. On the other hand, the Commission can make oral or written submissions to national courts in the EU public interest (*amicus curiae*).

## **2.2 Monitoring, recovery and co-operation with national courts**

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

120. Over the years, the architecture of State aid control has evolved significantly. Today, roughly 85% of aid granted to industry and services is not individually examined by the Commission, but is granted on the basis of previously approved aid schemes or under block exemption regulations<sup>65</sup>. DG Competition monitors the way in which Member States apply existing aid schemes by doing regular, sample based, ex-post checks.

121. To further improve the effectiveness of that control which is relevant to the proper functioning of the Single Market, DG Competition decided in 2011 to significantly enlarge the scope of those sample checks (from 20 to 30 cases reviewed per "monitoring exercise", to more than 50). In the context of the 2012/2013 monitoring exercise DG Competition examined a sample of 63 existing aid schemes involving all Member States, all main types of aid and covering 33% of Member States expenditure under existing schemes. The investigation of a number of cases is still on-going, but it can already be noted that issues or at least questions are raised in several cases. These issues are of varying types and gravity e.g. non-notified modification of schemes, individual aids exceeding the maximum thresholds, compatibility conditions not properly reflected in the national legal basis etc.

122. The fact that irregularities are detected in a number of cases is obviously a source of concern. However, it must be noted that the detection of an irregularity does not necessarily mean that incompatible aid was granted and that competition was distorted. For example an individual aid that did not meet the conditions of the scheme under which it was granted, although in principle problematic, could be found compatible on another basis (e.g. as *de minimis*). Therefore, while monitoring shows that Member States

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<sup>64</sup> Council Regulation (EU) No 734/2013 of 22 July 2013, OJ L 204 31 July 2013, p.15, available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2013:204:SOM:EN:HTML>

<sup>65</sup> See the State Aid scoreboard, available at [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html)

are not always abiding by the rules and there is scope for improvement in terms of compliance, at the same time the actual impact of the detected irregularities on the market should not be overestimated.

123. The Commission follows-up systematically all irregularities and uses the means at its disposal, as appropriate, to address the competition distortions that these may have induced. In some cases, Member States offer to voluntarily redress the problems detected (amend national legislation, recover the excess aid granted etc.). In other cases, formal action may be necessary to tackle the detected irregularities. In 2013, the Commission opened the formal investigation procedure in 2 cases where, in the context of the monitoring, doubts were raised on the correct implementation of the examined schemes. The formal investigation procedure is on-going.

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

124. To ensure the integrity of the Single Market, the Commission has the power and the duty to request Member States to recover unlawful and incompatible aid which has unduly distorted competition and trade between Member States. In 2013, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

#### **Box 9. Continued efforts to recover illegal aid**

The most recent figures show that Member States recover illegal aid much faster in recent years. 69% of incompatible aid has been recovered (around EUR 13.5 billion since January 2004) thanks to the Commission's action, probably facilitated by the pressure to consolidate public finances. The percentage of illegal and incompatible aid still to be recovered has therefore fallen from 75% at the end of 2004 to around 21% on 31 December 2013.

125. In 2013, the Commission adopted nine decisions ordering recovery of incompatible aid, ensuring the recovery of over EUR 726 million by the Member States. As of the end of December 2013, the Commission had 52 pending active recovery cases (compared to 94 cases at the end of 2004).

Recovery decisions adopted in 2013	9
Amount recovered in 2013 (in EUR million)	726
Pending active recovery cases on 31 December 2013	52

126. 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 2013, the Court of Justice condemned three Member States pursuant to Article 108(2) TFEU (Italy four times, Spain and Greece).

127. Moreover, in 2013, the Commission adopted for the first time a decision fixing an amount to be paid by a Member State in implementation of a Court ruling requiring that Member State to make penalty payments, following its failure to implement recovery.

128. The case in relation to which that decision was adopted concerns an employment aid scheme which was introduced by Italy in 1984 and involved employers' exemption from social security contributions for certain types of contracts. In its decision adopted on 11 May 1999, the Commission found that part of the aid was incompatible with the internal market and ordered its recovery. On 1 April 2004, the Court of Justice found that Italy had failed to comply with the Commission's decision ordering the recovery<sup>66</sup>. Despite the Court's judgement, little progress was made; therefore the Commission referred

<sup>66</sup> Case C-99/02 *Italy v Commission*, judgment of 1 April 2004

Italy to the Court for the second time under Article 260 TFEU<sup>67</sup>. By judgment of 17 November 2011, the Court of Justice found that Italy had failed to implement both the Commission's decision and the Court's 2004 judgment. The Court therefore ordered Italy to pay a lump sum (EUR 30 million) and periodic penalty payments, depending on the recovery progress achieved every 6 months by reference to the outstanding aid on the date of the judgement. The Commission will continue to enforce the Court's ruling as regards the penalty payments, until Italy fully implements recovery of the illegal and incompatible aid.

### 2.2.3 *Co-operation with national courts to ensure the effectiveness of State aid rules on the ground*

129. The Commission continued its co-operation with national courts under the Notice on the Enforcement of State Aid Law by National Courts of 2009 (the 'Enforcement Notice'). While (so far) no requests for information were received, the Commission received one request for an opinion from the Oberverwaltungsgericht Berlin-Brandenburg. The request concerned the calculation of the net grant equivalent of an approved grant (regional aid) and was treated during 2013. Furthermore, as a follow-up to the Enforcement Notice, the Commission's advocacy efforts continued. In 2013, the Commission was actively involved in financing training programmes for national judges following an annual call for projects, and also sent trainers to teach at such workshops and conferences (see also section 6 of the Antitrust & cartels title, on the Co-operation with National Courts).

## 2.3 *Significant judgments by EU Courts in the State aid area*

130. The EU courts clarified certain aspects of key State aid concepts in a number of significant judgments in 2013.

131. In the so-called France Télécom judgment<sup>68</sup> the Court of Justice clarified in an appeal the link between the conditions of State resources and advantage needed for State aid to be present. The Court overruled the General Court's judgment and confirmed that the Commission was correct in finding that the announcement of State support on 4 December 2002 and a shareholder loan offer, taken together, constituted State aid in favour of France Télécom ("FT"). The Court of Justice clarified that for establishing the existence of State aid, several State interventions might, depending on their links with one another and their effects, be regarded as a single intervention. The Court noted that it was clear in that case that the announcement was inseparable from the shareholder loan offered.

132. The General Court, in its judgment on nature conservation areas<sup>69</sup>, upheld the Commission's decision stating that aid was involved in German measures to support large-scale nature conservation projects and the transfer of natural heritage sites to environmental protection organisations free of charge. The Court clarified that although the environmental protection tasks entrusted to the organisations did not constitute an economic activity, the environmental protection organisations had to be considered as undertakings to the extent that they offered goods and services in competitive markets, namely sales of wood, granting of hunting and fishing leases and touristic services. As those activities could be dissociated from their non-economic activities, the organisations qualified as undertakings when carrying out those economic activities.

133. Regarding the market economy creditor test, the General Court confirmed<sup>70</sup> the Commission's decision concerning Rouse Industry, a Bulgarian enterprise. The Commission refused the authorisation of

<sup>67</sup> Case C-469/09 *Italy v Commission*, judgment of 17 November 2011

<sup>68</sup> Joined Cases C-399/10P and C-401/10P *Bouygues SA, Bouygues Télécom SA v Commission*, judgment of 19 March 2013

<sup>69</sup> Case T-347/09 *Germany v Commission*, judgment of 12 October 2013

<sup>70</sup> Case T-489/11 *Rouse Industry AD v Commission*, judgment of 20 March 2013

an agreement on rescheduling a debt in favour of Rouse Industry pre-dating Bulgaria's accession and ordered recovery of illegal aid. The judgment clarified the application of the market economy creditor test in cases of default on debt rescheduling agreements by a debtor in difficulty without clear prospects of return to viability. In such situations, a private creditor would not limit itself to 'soft' recovery actions, but would rather take decisive action, i.e. proceed at least to the forced execution of the pending debt. It also established that lack of recovery action following a failure to comply with a debt-rescheduling agreement constitutes a substantial modification of the initial debt rescheduling agreement. The judgment recalled the distinction between the general concept of existing aid in the Procedural Regulation and the specific application of the concept of 'existing' aid for the new member States. For the new Member States, the Accession Treaties define a more restrictive concept of 'existing aid', which covers only: a) aid put into effect before a specified cut-off date (in the case of Bulgaria, 10 December 1994); b) aid specifically listed in the annex to the Accession Treaty as 'existing aid', and c) aid that was approved by the national State aid authority prior to accession and in respect to which the Commission had not raised objections.

134. The Court of Justice confirmed<sup>71</sup> the negative decision with recovery adopted by the Commission as regards the incompatible aid granted to the Greek shipyard Ellinika Nafpigeia throughout the period 1985-2005 in the context of its liquidation and successive privatisation. The judgment is important for underlining, once again, that the scope of the exemption from the EU State aid discipline foreseen by Article 346(1)(b) TFEU for military/defence measures must be strictly interpreted. In particular, a clear distinction must be made between the production and commercialisation of military material, on the one hand, and any other economic activity on the other hand, especially in cases where the beneficiary undertaking is engaged in both types of activities. Undertakings which engage in both types of activities cannot invoke the military defence exemption for the whole of their production/activities, i.e. including the civil part, by arguing that the civil production is necessary for the viability of the military/defence activity and indissolubly linked to it.

135. The General Court handed down two judgments that address the question of the application in time of State aid rules. In Case T-92-11 – Andersen v Commission, judgment of 20 March ("Danske Statsbaner"), the General Court partially annulled a Commission decision declaring the State aid contained in the public service transport contract between the Danish Ministry of Transport and Danske Statsbaner (the incumbent Danish railway company) compatible with the internal market. It ruled that the Commission had erred in law in applying Regulation no 1370/2007 instead of Regulation No 1191/69, the latter being the substantive rule at the time when the aid had been paid. It considered that as a general principle, aid notified but not paid out should be assessed under the substantive rules in force at the date on which the Commission takes its decision. Aid which has been paid out without notification has in principle to be assessed under the substantive rules in force at the time the aid was paid out, unless exceptional conditions for retroactive application of the new legal basis are fulfilled.

136. In Case T-570/08 RENV - Deutsche Post v Commission, judgment of 12 November, the General Court found, however, that aid which has been paid out without prior notification constitutes an on-going situation, and not a definitive situation, and that for that reason, new rules of compatibility apply with immediate effect to the assessment of aid paid out without prior notification. Such aid therefore has to be assessed on the basis of the rules in force at the time the Commission adopts its decision.

137. The Commission has lodged an appeal against the ruling of the General Court in Danske Statsbaner, inviting the Court of Justice to review the findings of the General Court with respect to the application in time of substantive State aid rules. This will be an opportunity to clarify this important question on which the case law has so far taken different positions, and provide legal certainty.

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<sup>71</sup> Case C-246/2012 P Ellinika Nafpigeia AE v. Commission, judgment of 28 February 2013

138. In its judgment of 24 October in Joined Cases C214/12 P, C215/12 P and C223/12 P – Land Burgenland v Commission, the Court of Justice dismissed the appeals against a ruling of the General Court which had confirmed the Commission's decision on the privatisation of Bank Burgenland by the Province of Burgenland through a tender procedure. In the final phase of the tender two bids were made, one by the Austrian company GRAWE (EUR 100.3 million), and a much higher one by a Ukrainian Consortium (EUR 155 million). The tender was awarded to GRAWE. The Commission found that the sale constituted State aid for GRAWE because, by not taking the highest bid, the Province of Burgenland did not behave like a private seller operating in a market economy. The Court of Justice confirmed that existing public guarantees should not be taken into account in the evaluation of the bids because the guarantees concerned constituted State aid (i.e. by definition granted by the State exercising its prerogatives as a public authority), and a private investor would not grant aid. When there is an open, transparent and unconditional tender procedure, it can be presumed that the highest bid corresponds to the market price if the bid is binding and credible and the consideration of economic factors other than the price is not justified. In such a case the Commission is not obliged to look at other methods, such as independent studies, to establish the market price. In addition, the reasons of a potential buyer for submitting a bid are not relevant from the perspective of a private vendor.

139. Finally, the Court of Justice held in Case C284/12 – Lufthansa v Flughafen Frankfurt Hahn<sup>72</sup> that when the Commission has opened a formal investigation procedure, the national courts are required to enforce the obligation to suspend the implementation of the relevant aid measure. If the national court has doubts about whether the measures constitute State aid, it may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, it may or must refer a question to the General Court for a preliminary ruling.

140. The Court acknowledges that the assessment in the opening decision is preliminary in nature, but considers that the effectiveness of the stand-still obligation in Article 108(3) TFEU and the preventive character of State aid control require the national courts to take measures to suspend the implementation of the measure even if the Commission's final decision were later on to conclude that there were no aid elements. In addition, the Court refers to the principle of sincere co-operation (Article 4(3) TEU), from which it derives that national courts must refrain from taking decisions which conflict even with a provisional Commission decision.

### **3. Antitrust and Cartels**

#### **3.1 Technology Transfer Agreements – on-going review**

141. The EU aims to achieve a more competitive, connected, greener, knowledge-based and inclusive society. In particular, innovation and competitiveness are fundamental to the Commission's Europe 2020 Strategy.<sup>73</sup> Innovation often results in greater prosperity and a more efficient use of scarce resources, with knowledge as the key input.

142. Efficiency enhancing technology transfer agreements between competitors or non-competitors promote innovation and competitiveness in Europe by ensuring that technologies are disseminated to also other companies than the original inventor. Dissemination of technology enables more competition and can also increase follow-on innovation.

<sup>72</sup> Case C284/12 – Lufthansa v Flughafen Frankfurt Hahn<sup>72</sup>, judgment of 21 November 2013.

<sup>73</sup> Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, (COM) 2010 2020, available at <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>

143. The review of the existing guidelines and the block exemption regulation for technology transfer (TTBER) continued in 2013. The goal of that revision is to strengthen incentives for research and innovation, facilitate the diffusion of intellectual property and stimulate competition.

144. A draft TTBER and draft Guidelines were published for public consultation on 20 February. The public consultation ran until 17 May. The Commission received 58 replies from stakeholders<sup>74</sup>.

145. Stakeholders seem, in general, to be more comfortable in self-assessing the compliance of their technology transfer agreements with Article 101 TFEU. They support the current effects-based approach to enforcement that the Commission has been promoting since modernisation of EU competition law in 2004. The overall majority of stakeholders indicate that the current system has given them flexibility to organise their co-operation, notably through the so called "safe harbours" provided for in the TTBER and the Guidelines. Therefore, companies welcome that the Commission is keeping the overall structure of the regime. As regards specific proposed changes in the draft TTBER and Guidelines, most of the submissions focused on proposed changes as regards market share thresholds, termination clauses, exclusive grant-back clauses and patent pools.

146. The Commission is now in the process of reviewing the draft TTBER and Guidelines in light of the input received in the public consultation and aims at adopting final texts in spring 2014.

### 3.2 *Notice on Agreements of Minor Importance – on-going review*

147. Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements that aim at, or result in, *appreciable* restrictions of competition. The current Notice on Agreements of Minor Importance (De Minimis Notice)<sup>75</sup>, adopted in 2001, creates a market-share based safe harbour for agreements that the Commission considers as having a non-appreciable effect on competition. Agreements between competitors are deemed not to have an appreciable effect on competition if the aggregate market share of the companies involved does not exceed 10%. For agreements between non-competitors the relevant market share is 15%. However, if an agreement, be it between competitors or non-competitors, contains a particularly serious restriction of competition, known as hardcore restriction, it will not be able to benefit from the safe harbour.

148. In July, following a consultation of the Member States, the Commission launched a public consultation on a revised draft of the De Minimis Notice. The proposed revision of the Notice seeks to reflect the ruling of the European Court of Justice in the Expedia case<sup>76</sup>, which clarified that an agreement that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition. Accordingly, the revised draft Notice provides that agreements containing a restriction by object will always constitute an appreciable restriction of competition if they affect trade between Member States. Secondly, the revised draft proposes technical changes to ensure that the De Minimis Notice is consistent with other recently amended competition rules, in particular the 2010 Vertical and Horizontal Block Exemption Regulations.

149. The public consultation on the revised draft Notice was closed in October. The Commission is currently reflecting on the implications of the responses received and is working towards adopting a revised Notice in 2014.

<sup>74</sup> The replies are available on the Commission's website at [http://ec.europa.eu/competition/consultations/2013\\_tech\\_nology\\_transfer/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_tech_nology_transfer/index_en.html)

<sup>75</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), Official Journal C 368, 22.12.2001, p.13-15

<sup>76</sup> Case C-226/11 *Expedia v Autorité nationale de la concurrence*, Judgement of 13 December 2012

### 3.3 *Proposal for a Directive on antitrust damages actions adopted*

150. On 11 June, the Commission adopted a Proposal for a Directive on antitrust damages actions<sup>77</sup>, an initiative which has long been awaited by stakeholders and which is a policy priority for the current Commission. Under EU law, any person or company who suffered harm because of an infringement of EU competition law has a right to full compensation. The proposal has two complementary goals. First, the proposal aims at optimising the interplay of private damages claims with the public enforcement by the Commission and national competition authorities, to safeguard strong public enforcement and to achieve a more effective enforcement overall. Second, to make the EU right to compensation a reality in all Member States, by removing key practical difficulties which consumers and companies frequently face when they seek redress.

151. To achieve these goals, the proposal includes substantive and procedural rules on crucial aspects of antitrust damages actions, such as access to evidence, limitation periods for bringing an action, standing and the burden of proof with regard to compensation for overcharges passed on along the distribution chain. The proposal seeks to create legal certainty as to the accessibility of evidence produced for the purposes of public enforcement. For instance, in order to safeguard the attractiveness of leniency programmes, it provides that leniency corporate statements should never be disclosed in private damages litigation. The proposal facilitates follow-on damages claims by stipulating that final infringement decisions by national competition authorities have probative effect.

152. The legislative proposal has been submitted to the European Parliament and the Council under the ordinary legislative procedure. On 2 December, the Competitiveness Council adopted a General Approach on that initiative.<sup>78</sup> In the European Parliament, the file is shared between three Committees: Economic and Monetary Affairs (ECON), Legal Affairs (JURI) and Internal Market and Consumer Protection (IMCO). The latter adopted an opinion on the proposal on 17 December.

153. In parallel to the proposal, the Commission adopted a Communication on quantifying antitrust harm in actions for damages based on breaches of Article 101 or 102 TFEU, to provide guidance to courts and to the parties in such actions.<sup>79</sup> This is accompanied by a more comprehensive Practical Guide drawn up by the Commission's services<sup>80</sup> and available in all official EU languages. Finally, the proposal is complemented by the Commission Recommendation on collective redress<sup>81</sup>, which recommends that all Member States introduce collective redress mechanisms to facilitate the enforcement of the rights that all Union citizens have under Union law, including the right to compensation for antitrust harm.

<sup>77</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>

<sup>78</sup> The General Approach is available at <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2017317%202013%20INIT&r=http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F13%2Fst17%2Fst17317.en13.pdf>

<sup>79</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ 2013/C 167/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF>

<sup>80</sup> Practical Guide: Quantifying harm in actions for damages, Commission Staff Working Document, C(2013) 3440, [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_guide\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf)

<sup>81</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ 2013 L 201/60, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:201:0060:0065:EN:PDF>

### 3.4 Significant judgments by EU Courts in antitrust and cartels

#### 3.4.1 *Deutsche Bahn*

154. In *Deutsche Bahn*<sup>82</sup>, the General Court confirmed the legality of the Commission's unannounced inspections at the premises of the German railway incumbent Deutsche Bahn in 2011. The Court ruled that inspections may be carried out based solely on a Commission decision and do not require prior authorisation by a judge. The Court also confirmed that the rules on inspections set out in Regulation no. 1/2003 do not violate fundamental rights, as protected by the European Charter of Fundamental Rights, as the Regulation and the system of remedies in the Treaty provide for sufficient safeguards to protect the company's rights of defence and right to effective judicial protection. The Court further confirmed that inspectors cannot be expected to be able to immediately assess whether certain documents are within the scope of the inspection decision, but they must be able to read the documents to make that assessment. The applicants have appealed the judgment before the Court of Justice.

#### 3.4.2 *Schindler*

155. In *Schindler*<sup>83</sup>, the Court of Justice dismissed an appeal against a 2011 judgment of the General Court upholding the Commission decision<sup>84</sup> from 2007 fining Schindler and various subsidiaries for their participation in the "Elevators and escalators" cartel. With reference to the 2011 Menarini judgment of the European Court of Human Rights<sup>85</sup>, the Court confirmed that the current EU antitrust enforcement system – in which the Commission as administrative agency imposes fines subject to judicial review – does not violate fundamental rights and in particular the principle of effective judicial protection established by Article 6 of the European Convention on Human Rights. It stated that in view of Menarini, the review court must have "the power to quash [the decision] in all respects, on questions of fact and law"<sup>86</sup>. In particular, the Court of Justice held that the notion of full jurisdiction requires an examination of "all questions of fact and law relevant to the dispute". The Court of Justice went on to hold that the judicial review exercised by the EU courts in competition cases meets that standard because: (a) within the sphere of "review of legality", the EU courts carry out a "full and unrestricted review"; and (b) within the sphere of "unlimited jurisdiction", the EU courts can substitute their own appraisal for the Commission's and consequently, to cancel, reduce or increase the fine.

#### 3.4.3 *CISAC*

156. In a series of 22 judgments the General Court ruled<sup>87</sup> on the appeals brought by 21 collecting societies and the International Confederation of Societies of Authors and Composers ("CISAC") against the Commission Decision of 16 July 2008<sup>88</sup>.

<sup>82</sup> Joined cases [T-289/11](#), T-290/11 and T-521/11, *Deutsche Bahn AG and Others v European Commission*, judgment of the General Court of 6 September 2013

<sup>83</sup> Case C-501/11 *P Schindler Holding and Others v Commission*, judgement of Court of Justice of 18 July 2013.

<sup>84</sup> Case COMP/E1/38.823 PO/Elevators and Escalators, Commission Decision of 21 February 2007, C (2007) 512 final

<sup>85</sup> Case 43509/08 *A. Menarini Diagnostics S.R.L v Italy*, judgment of the European Court of Human Rights of 27 September 2011

<sup>86</sup> Case C-501/11 *P Schindler Holding and Others v Commission*, judgement of Court of Justice of 18 July 2013, paragraph 35.

<sup>87</sup> Cases T-392/08, T-398/08, T-401/08, T-410/08, T-411/08, T-413/08 to T-422/08, T-425/08, T-428/08, T-432/08, T-433/08, T-434/08, T-442/08, T-451/08, judgments of the General Court of 12 April 2013.

157. The Commission found in the CISAC decision that Art. 101 TFEU prohibits certain provisions in reciprocal representation agreements among collecting societies in the EEA, which have the effect of restricting competition among them by limiting their ability to offer their services to authors and commercial users (such as RTL or Apple) outside their domestic territory. In the case at hand, authors were forced by virtue of membership clauses to enrol with the society of their own State, while collecting societies could not provide their services outside their own allocated territory due to exclusivity restrictions. The Decision also found that the collecting societies co-ordinated their bilateral arrangements to ensure that commercial users only obtained licenses limited to the domestic territory of each collecting society.

158. The Court gave guidance with regard to the required standard to prove concerted practices and with respect to the concepts used to establish the existence of concertation and those used to establish the existence of a restriction of competition. It endorsed the findings of the Commission in relation to the "membership clauses" and has also upheld the principle that collecting societies must be able to provide services outside their territory. In the judgment on the appeal by the Swedish collecting society (STIM) the Court addressed the issue of the relationship between Article 101 and Article 167 TFEU (on cultural aspects), as well as the treatment of cultural claims under Article 101 TFEU. However, the General Court found that the Commission had failed to adduce sufficient evidence of a concerted practice whereby each collecting society was alleged to have limited, in its reciprocal representation agreements, the right to grant licences relating to its repertoire in the territory of another collecting society party to the agreement.

**Box 10. Cartel Judgments: the Courts Confirm the Commission's Approach to Parental Liability**

The Courts have continued to clarify and confirm the Commission's practice on parental liability. In *Portielje* the Court of Justice sided with the Commission and reversed the finding of the General Court, which had concluded that the presumption had been successfully rebutted. The Court of Justice clarified that parental liability has to be assessed on the basis of all relevant factors relating to the economic, organisational and legal links and not only those related to company law. In the same judgment, the Court of Justice also clarified that the fact that the parent company itself does not have any economic activity is irrelevant, as long as it constitutes a single undertaking with the entity that directly participated in the infringement.

In two judgments relating to the Chloroprene Rubber cartel, the Court of Justice confirmed the Commission's findings on the imputation of parental liability in a joint venture constellation for a 50/50 joint venture between Dow and DuPont.

The General Court also further clarified the application of parental liability by confirming in the *Bananas* cases that *Del Monte* was liable as a parent company for a limited partnership under German law (*Kommanditgesellschaft*), although *Del Monte* was only the limited partner in that relationship (case T-587/08, *Del Monte*).

3.4.4 *Del Monte and Dole*

159. In *Del Monte*<sup>89</sup> and *Dole*<sup>90</sup> the Court also confirmed the Commission's finding that the bilateral exchange of not publicly available "pre-pricing" information, relating to the fixing of quotation prices, constituted a concerted practice that had the object to restrict competition.

<sup>88</sup> Case COMP/C2/38.698 CISAC, Commission Decision of 16 July 2008, C(2008) 3435 final

<sup>89</sup> Case T-587/08 *Fresh Del Monte Produce v Commission*, judgment of the General Court of 14 March 2013

<sup>90</sup> Case T-588/08 *Dole Food and Dole Germany v Commission*, judgment of the General Court of 14 March 2013

### 3.4.5 *Marine hoses*

160. In the Marine Hoses cartel case, the General Court delivered three judgments<sup>91</sup> in which it upheld for the most part the Commission's 2009 decision<sup>92</sup> that a number of companies active in the business of marine hoses (used to transport crude oil to and from ships) participated in a world-wide cartel. The General Court endorsed point 18 of the 2006 Fines Guidelines and the method used to calculate the fines in situations where the EEA sales would not be representative for example because of the existence of a 'home market' protection rule.

161. The General Court partly annulled the Commission's decision in the Parker case.<sup>93</sup> The General Court found that the Commission has wrongly interpreted the concept of economic continuity to the infringing undertakings. The Commission has appealed the judgment at the Court of Justice.

162. The General Court also provided guidance on the notion of repeated infringement in the MRI case<sup>94</sup>. The Court found in particular that if an undertaking's participation in the infringement was interrupted and that the infringement committed by the undertaking before and after that period has the same features, the infringement in question must be characterised as a single infringement and as a repeated infringement. In that case, the Commission cannot impose a fine in respect of the period during which the infringement was interrupted.<sup>95</sup>

### 3.4.6 *Bathroom fittings*

163. In the Bathroom fittings cartel case, the General Court confirmed<sup>96</sup> the Commission's finding of a single overarching cartel, which affected six Member States, lasted from 1992 to 2004, and covered three product groups (ceramics, taps and fittings, shower enclosures). The co-ordination took place during meetings of national trade associations and in bilateral contacts and it consisted of fixing price increases, minimum prices, rebates, and exchanging sensitive business information.

## 3.5 *A top priority in the fight against cartels – making use of leniency and settlement*

164. DG Competition's strong enforcement record against hard core cartels continued in 2013. The Commission continued to receive a constant flow of immunity and leniency applications, close to the long term trend of around two applications per month. Although the total number is lower than for 2011 and 2012, those years were exceptional, given the large number of applications in the car parts sector, where one application and investigation quickly spurred additional immunity applications.

165. The wire harnesses decision<sup>97</sup> is the first decision in the car parts sector; more are likely to follow. It is the seventh cartel settlement decision adopted by the Commission demonstrating the increasing success of the settlement system which gives companies a 10% reduction in the fine if they accept liability for the infringement and do not contest the Commission's findings. Settlement is used if the Commission considers after screening that a case is suitable for settlement and the parties are willing to co-

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<sup>91</sup> Case T-146/09 *Parker v Commission*, judgment of the General Court of 17 May 2013; Joined Cases T-147/09 and T-148/09 *Trelleborg v Commission*, judgment of the General Court of 17 May 2013; and Case T-154/09 *MRI v Commission*, judgment of the General Court of 17 May 2013

<sup>92</sup> Case COMP/39406 - Marine Hoses, Commission Decision of 28 January 2009

<sup>93</sup> Case T-146/09 *Parker v Commission*, judgment of the General Court of 17 May 2013

<sup>94</sup> Case T-154/09 *MRI v Commission*, judgment of the General Court of 17 May 2013

<sup>95</sup> Case T-154/09 *MRI v Commission*, judgment of the General Court of 17 May 2013, paragraphs 199, 200.

<sup>96</sup> Case T-411/10 *Laufen Austria v Commission*, judgment of the General Court of 16 September 2013

<sup>97</sup> See the section on basic industries and manufacturing

operate in the procedure. It is an effective resolution tool of cartel proceedings since it allows freeing up resources more quickly to fight other cartels and therefore contributes to further deterrence in that respect.

166. Although settlements can lead to quicker decisions, the Commission will not pursue settlements at any cost. It has a responsibility as a public enforcer to take decisions in the public interest; if companies and the Commission cannot reach a common understanding on the existence and the characteristics of a cartel, then settlements will not be available. In the smart card chips case<sup>98</sup> the settlement route was abandoned due to lack of progress.

167. The domino effect of the leniency system and the successful use of the settlements procedure were both further confirmed by the two cartel cases in the interest rates derivatives industry, EIRD<sup>99</sup> and YIRD<sup>100</sup>. Additional ongoing cases linked to the sector will be treated as a priority.

168. In a smaller case, but one that was also uncovered thanks to the leniency system, the Commission fined four North Sea Shrimps traders a little under €30 million in November for operating a multi-year cartel in North-Western Europe.

169. More information on the cartel decisions mentioned above is available in the sections below, describing the relevant sectors. At the same time, the Commission has begun a number of other investigations and laid the groundwork for future enforcement. In addition to the Statements of Objections in wire harnesses and the EIRD and YIRD cases, which led to the prohibition decisions mentioned above, the Commission also sent a Statement of Objections to the smart card chips producers<sup>101</sup> and conducted a number of inspections.

170. With four decisions, fines totaling EUR 1 882 975 000, and solid work for enforcement in future years, the Commission's cartel enforcement record remains strong and effective.

Case name	Adoption date	Fine imposed EUR	Undertakings concerned	Procedure
Automotive wire harnesses	10/07/2013	141 791 000	5	settlement
Shrimps	27/11/2013	28 716 000	4	normal
EIRD	04/12/2013	1 042 749 000	4	settlement
YIRD	04/12/2013	669 719 000	6	settlement

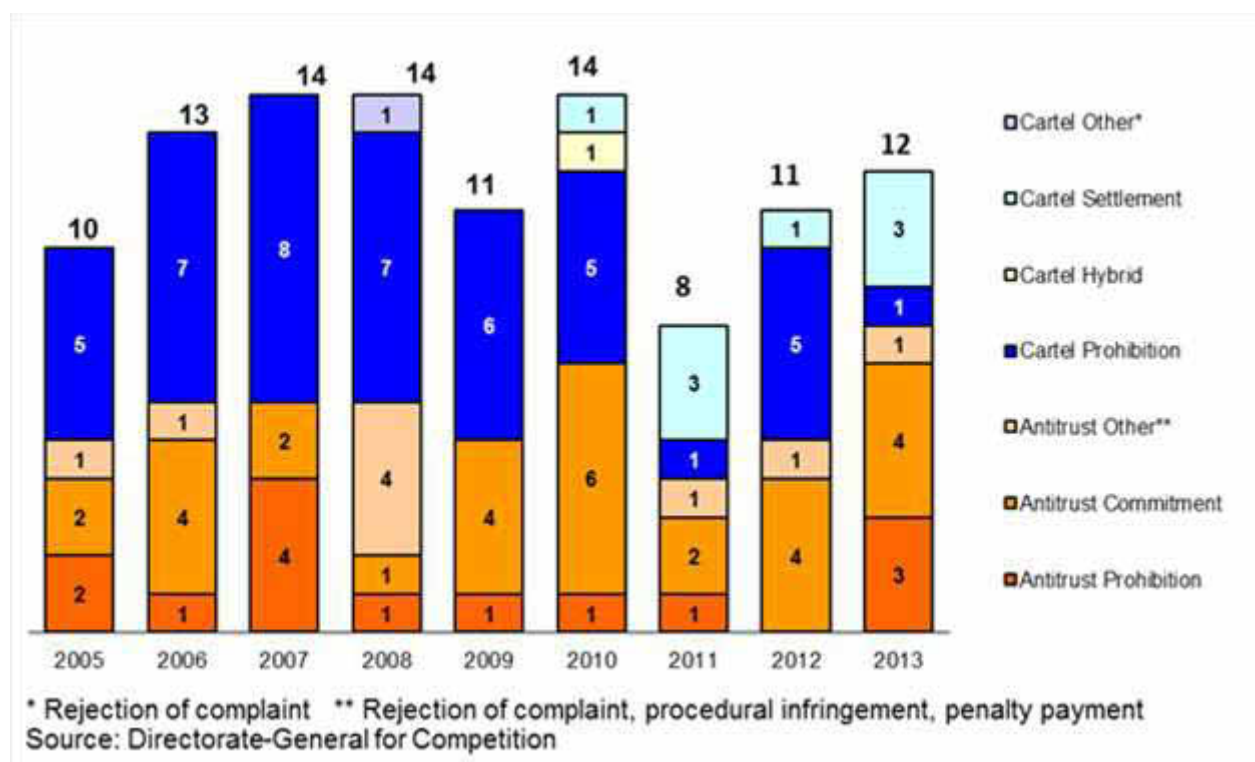
<sup>98</sup> See the section on enforcement in technology markets

<sup>99</sup> Case 39914 *Euro Interest Rate Derivatives (EIRD)*, Commission decision of 4 December 2013, See MEMO/13/1090 of 4 December 2013

<sup>100</sup> Case 39861 *Yen Interest Rate Derivatives (YIRD)*, Commission decision of 4 December 2013, See MEMO/13/1090 of 4 December 2013

<sup>101</sup> For further information, see the section on Information and Communication Technologies (ICT) and Media

Figure 1. Antitrust and Cartel Output



### 3.6 Continuing the Close Co-operation within the European Competition Network (ECN) and with National Courts

171. Regulation 1/2003 empowers the Commission, National Competition Authorities (NCAs) and national courts to apply Articles 101 and 102 TFEU to agreements and practices that are capable of affecting trade between Member States. Since May 2004, the Commission has investigated potential antitrust infringements across almost all sectors of the economy and has adopted over 120 decisions, many of which landmark precedents. NCAs have investigated more than 1600 cases in this period, giving rise to enforcement decisions in more than 600 cases. DG COMP and the NCAs continued to co-ordinate competition enforcement in the ECN in 2013.

#### 3.6.1 Convergence of enforcement powers

172. In 2013 the ECN discussed the need to further improve the procedural framework for the enforcement of Articles 101 and 102 TFEU. Procedures and sanctions for the application of the EU competition rules in the Member States are not harmonised by EU law. The Commission and NCAs apply the same substantive rules according to different procedures and sanctions based on national legislation. Convergence of enforcement powers has been a focus of horizontal ECN work for several years. The ECN has notably produced detailed comparative reports on investigation and decision making powers<sup>102</sup> in 2012. On that basis, a set of ECN Recommendations on investigation and decision-making powers were adopted in December 2013<sup>103</sup>. As regards sanctions for breaches of competition law, most NCAs can impose deterrent administrative fines and calculate those fines based on a similar methodology. Reforms

<sup>102</sup> The reports are available at [http://ec.europa.eu/competition/ecn/investigative\\_powers\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf) and [http://ec.europa.eu/competition/ecn/decision\\_making\\_powers\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf)

<sup>103</sup> The ECN recommendations are available at <http://ec.europa.eu/competition/ecn/documents.html>

leading to more convergence of procedures have been encouraged by country specific recommendations in the framework of the Europe 2020 strategy (European Semester) and in the context of Economic Adjustment Programmes.

### 3.6.2 *Leniency convergence and interface with other areas of law*

173. Leniency programmes are generally recognised as an important tool to detect secret cartels. From the outset, the ECN has given priority to fostering convergence and smooth interaction in that area. The ECN notably developed the ECN Model Leniency Programme (MLP)<sup>104</sup>, providing Member States and NCAs a cohesive set of rules and procedures from which to inspire themselves. Refinements of the MLP were endorsed in late 2012. As a result, virtually all Member States have introduced leniency programmes and a significant process of alignment with the MLP has taken place by 2013.

174. The question of the disclosure of leniency material in the context of civil damages actions<sup>105</sup> was addressed in the Commission's Proposal for a Directive on Actions for Damages of 11 June 2013. Some stakeholders pointed out that sanctions on individuals, including classical criminal sanctions, applied by a number of MS have an adverse effect on the efficiency of the leniency policies. Particular concerns are that leniency does not always apply to individuals, or that the leniency options available for businesses and for individuals are not harmonised. There is a growing awareness of this issue which has been explicitly addressed by some Member States in their legislation or leniency policies.

### 3.6.3 *Co-operation with national courts*

175. National courts apply national and EU competition rules in a variety of scenarios. Certain national courts have jurisdiction over lawsuits between private parties (e.g. actions for damages). Some national courts act as review courts, hearing appeals which are brought against decisions of the national competition authorities. There are also courts that act as public enforcement authorities. Finally, if national courts apply national competition law, they are also required to apply Article 101 TFEU and Article 102 TFEU, where there is an effect on trade between Member States.

176. Efficient implementation of competition policy requires coherent and consistent judicial interpretation. The Commission therefore continues to support the coherent application of competition rules through co-operation with national courts. This co-operation includes direct case related assistance to national courts when they apply EU competition law. The courts can ask the Commission to provide case related information, or to provide an opinion on the application of the competition rules. The Commission may also submit amicus curiae observations on its own initiative.

177. In 2013, the Commission responded to five requests for information and one request for an opinion pursuant to Article 15(1) of Regulation 1/2003. The requests for information were issued by courts in Spain, the United Kingdom and Belgium. They concerned the state of the proceedings before the Commission or the transmission of documents in the possession of the Commission. The request for an opinion came from a Spanish court and concerned the application of Articles 101 and 102 TFEU to vertical

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<sup>104</sup> The model set of rules and procedures developed within the ECN are available at [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf)

<sup>105</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:F IN:EN:PDF>

agreements. DG Competition publishes opinions issued to national courts as soon as it receives approval from the requesting court.<sup>106</sup>

178. Co-operation on a more general level includes DG Competition's Grant Programme on the "Training of National Judges in EU Competition Law". The main aim of the Programme is to promote the convergence of competition policy and of enforcement by national courts throughout the EU and to boost cross-border exchanges between national judges. In 2013, nine projects were awarded totalling almost EUR 800 000. These projects make provision for the training of around 720 judges of 26 nationalities in EU competition law and are intended to enhance co-operation between them.

#### **4. Merger control**

179. Merger control is an essential component of competition policy enforcement in Europe. Efficient merger control contributes to the maintenance of competitive pressure on market participants, which stimulates innovation and efficient distribution of scarce resources. In order to maintain the recognised high standard of controlling merger transactions, the Commission continuously evaluates the substantive and the procedural rules in force. Where the Commission identifies room for improvement, it does not hesitate to launch policy changes. In 2013 work has progressed on two major policy initiatives in merger control, the review of the Merger Regulation and the simplification initiative.

##### **4.1 *Towards more effective merger control – on-going review***

180. On 20 June, the Commission published a Staff Working Paper "Towards more effective EU merger control"<sup>107</sup> in order to seek the views of interested parties on a possible modification of the Merger Regulation.

181. First, the initiative considers whether to apply merger control rules to deal with the anti-competitive effects stemming from a new category of transactions, namely acquisitions of non-controlling minority shareholdings (hereafter "structural links"). Effective competition policy requires having the appropriate means to tackle all sources of harm to competition and consumers. Significant harm to competition and consumers can occur not only from acquisitions of control, but also from structural links, in particular if minority shareholdings are acquired in a competitor or in a vertically related undertaking.

182. Until now the Merger Regulation has been limited to "concentrations" defined as acquisitions of control and the Commission has only had the possibility to take pre-existing minority shareholdings into account if it is competent to analyse the effects of a separate acquisition of control. Austria, Germany and the United Kingdom currently have national merger control rules that also give them the competence to review structural links. In addition, in a number of other countries outside the EU, such as Canada and the United States, structural links are also subject to competition review under national merger control rules.

183. The Staff Working Paper discusses options to extend EU merger control to the acquisition of non-controlling minority shareholdings without creating an undue burden for businesses. This could be done either by extending the current ex-ante notification system for "full" mergers to minority shareholdings or through a more selective system, whereby the Commission may "pick and choose" cases that are most likely to raise competition issues.

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<sup>106</sup> The Commission's opinions are available at [http://ec.europa.eu/competition/court/antitrust\\_requests.html](http://ec.europa.eu/competition/court/antitrust_requests.html)  
<sup>107</sup> See Commission Staff Working Document: "Towards more effective EU merger control", SWD(2013) 239 final, available at [http://www.acceptance.ec.europa.eu/competition/consultations/2013\\_merger\\_control/index\\_en.html](http://www.acceptance.ec.europa.eu/competition/consultations/2013_merger_control/index_en.html)

184. Second, this initiative aims at assessing whether the Merger Regulation should be amended to improve the effectiveness and smoothness of the case referral system without fundamentally reforming the basic features of this system or the allocation of competences between the Commission and Member States. The 2009 Report to the Council on the operation of the Merger Regulation<sup>108</sup> found that although the existing thresholds and referral mechanisms lead to an appropriate allocation of cases in most instances, a significant number of cross border cases are still subject to multiple review in several Member States (240 cases in 2007). In some cases, where the Commission might have been the more appropriate authority, companies may also have opted against a referral to the Commission in order to avoid the Commission's jurisdiction for reasons of "forum shopping". To render the case referral system between the Member States and the Commission more effective and business-friendly, the Staff Working Paper discusses options to streamline pre-notification referrals to the Commission under Article 4(5) and post-notification referrals to the Commission under Article 22.

185. Finally, this initiative also aims to implement, if need be, several possible further technical improvements to the Merger Regulation.

186. The consultation period ended on 12 September. The Commission received a large number of replies from various groups of stakeholders (namely businesses and business associations, law firms, lawyers' and other law associations, academia, economic consultancies, international organisations, NCAs, national governments and private citizens). The Commission's services also met with representatives from EU and EFTA Member States during various meetings and conferences. Further progress is envisaged for this initiative in 2014 through the publication of a White Paper.

#### **4.2 Simplifying merger procedures further – on-going review**

187. On 5 December, the Commission adopted the 'merger simplification' package. The package includes the amendment of the Merger Implementing Regulation<sup>109</sup> and the adoption of a new Notice on Simplified Procedure<sup>110</sup>. In parallel, the Commission has updated its model texts for divestiture commitments. The Commission's decision followed a public consultation earlier in 2013.

188. The changes aim to make the EU merger review procedures simpler and lighter for stakeholders and to save costs. They will also allow the Commission to better focus its resources on those merger cases which merit a more intense review. These objectives are achieved in three main ways. First, the Commission has extended the scope of application of the simplified merger review procedure to cover more cases which are generally unlikely to raise competition concerns. In particular, the Commission has raised the market share thresholds under which cases qualify for a simplified merger review. Furthermore, it has introduced a new category mergers eligible to be considered under the simplified procedure, namely those mergers between competitors which result in small increments in market share.

189. Second, the Commission has updated and streamlined the information that notifying parties are required to include in merger notifications and in pre-notification case referral requests. The required information is now more tailored to the particular type of case being notified. Third, the Commission has made provision for more focused pre-notification contacts.

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<sup>108</sup> See Communication of the 18 June 2009 from the Commission to the Council: "Report on the functioning of Regulation No 139/2004, COM(2009) 281 Final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0281:FIN:EN:PDF>

<sup>109</sup> Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

<sup>110</sup> Notice on a simplified procedure for treatment of certain mergers under the Merger Regulation

190. Significant net benefits are expected to ensue for businesses and their external advisors in terms of costs and resources. It is expected that the ratio of cases dealt with in simplified procedure will be increased by around 10%. That means that approximately 70% of all cases will be simplified (on the basis of the current data).

191. For the remaining cases which are reviewed under the normal procedure, the Commission has clarified, updated and significantly streamlined the information that the parties need to compile for notification. Additionally, the information required from parties requesting a referral of a case from the Commission to Member States or vice-versa (the Form RS) has been reduced to a strict minimum.

192. The streamlining of the information requirements for notification described above is also expected to make pre-notification processes in both simplified and non-simplified cases even more focused. In individual cases, the information requirements can be further reduced at the request of the parties by waivers. The amended texts clarify that waiver requests will be assessed within the 5-working day timeframe set out in DG Competition's Best Practices on the handling of merger cases<sup>111</sup>. This is a clear signal of the Commission's willingness to adopt a non-formalistic approach in its review and grant such waivers in cases that merit them.

193. The simplification initiative is a concrete example of the Commission's commitment towards the goals of the Regulatory Fitness and Performance (REFIT) programme<sup>112</sup>. It makes rules and administrative procedures simpler and less burdensome for business, thereby stimulating growth and making Europe more competitive.

#### **4.3 The number of merger interventions remain stable**

194. The number of merger notifications in 2013 reflects the average of the last four years. Overall, 300 cases were notified to the Commission in 2013, including 23 referrals. The Commission opened six new in-depth (i.e. second phase) investigations covering several sectors such as IT, mobile telephony, air transport and basic industries.

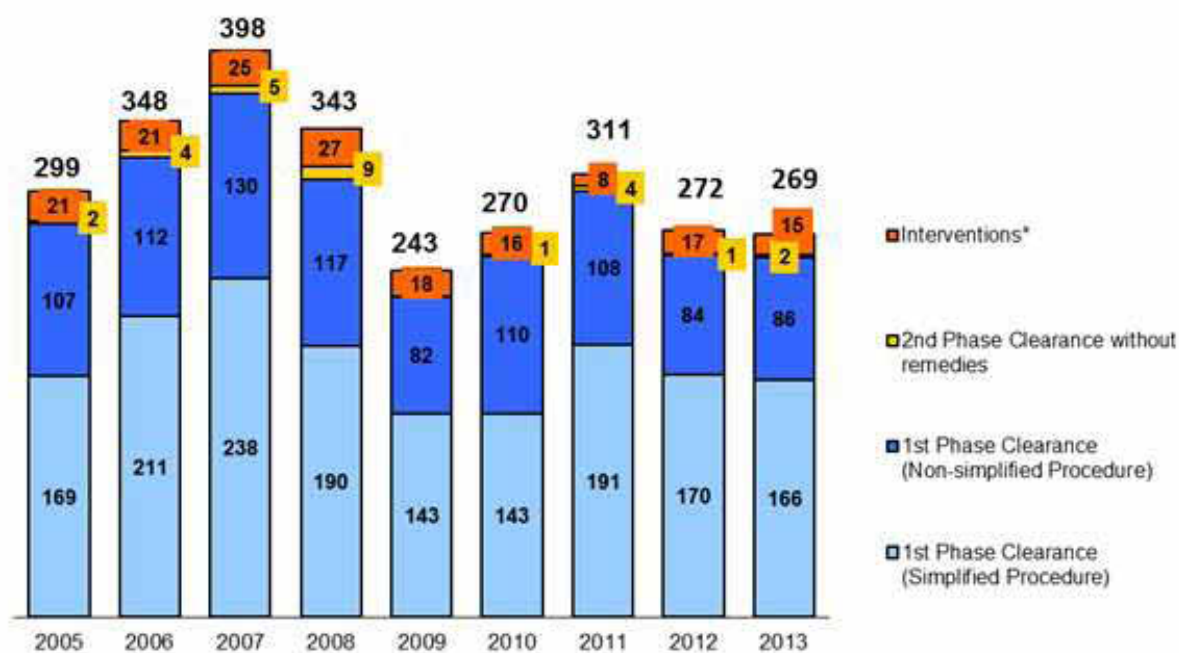
195. The number of decisions and the number of interventions<sup>113</sup> remains stable (at 15 in 2013) compared with the average of the last four years. The number of prohibition decisions increased to two in 2013<sup>114</sup> compared with only one in 2012<sup>115</sup>. In 2013, two decisions<sup>116</sup> were concluded in second phase with commitments, compared with six in 2012. The number of clearance decisions adopted in first phase with commitments remained stable, with eleven in 2013 compared with nine in 2012.

196. The recent trend that transactions become more complex has continued in 2013. Second phase investigations in particular generally require sophisticated quantitative and qualitative analyses involving large amounts of data.

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<sup>111</sup> The Best Practices are available at: <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>  
<sup>112</sup> Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, Regulatory Fitness and Performance (REFIT): Results and Next Steps, Brussels, 2.10.2013, COM(2013) 685 final, available at <http://ec.europa.eu/refit>  
<sup>113</sup> The term "interventions" in mergers cover prohibition decisions and decisions with commitments.  
<sup>114</sup> Case COMP M.6570 *UPS / TNT EXPRESS*, decision of 30 January 2013 and Case COMP M.6663 *RYANAIR / AER LINGUS III*, decision of 27 February 2013  
<sup>115</sup> Case COMP/M.6126 *Deutsche Börse/NYSE Euronext*, decision of 1 February 2012  
<sup>116</sup> Cases COMP/M.6576 *Munksjö / Ahlstrom*, decision of 24 May 2013 and M.6690 *Syniverse / Mach*, decision of 29 May 2013

Figure 2. Merger Decisions



\* Includes one prohibition in 2007

Source: Directorate-General for Competition

#### 4.4 Significant judgments by EU Courts in mergers

197. In 2013 there was one judgment by EU Courts in the area of merger control. On 11 December, the General Court dismissed Cisco Systems' appeal of a Commission decision of October 2011<sup>117</sup> to clear the acquisition of Skype by Microsoft<sup>118</sup>. The judgment confirmed the Commission's assessment of new markets and technologies under the EU Merger Regulation. The Commission's decision to clear the transaction did not put the development of innovative products and services at risk. The Commission will continue to ensure that competition in nascent and fast evolving markets is maintained.

### 5. Developing the international dimension of EU competition policy

198. The proliferation in recent years of jurisdictions with competition legislation and enforcement mechanisms is on the one hand a positive development. On the other hand diverging competition regimes present a challenge to businesses acting on an international level. The Commission seeks to reinforce the role of competition policy in international economic co-operation and co-operates with competition agencies globally. Such regulatory and enforcement co-operation helps to ensure a level playing field for European companies active on global markets.

<sup>117</sup> Case M.6281 *Microsoft / Skype*, Commission decision of 7 December 2011, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6281](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6281)

<sup>118</sup> Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v Commission*, judgment of 11 December 2013

## 5.1 *Bilateral relations*

199. The EU launched negotiations with the US on a Transatlantic Trade and Investment Partnership Agreement (TTIP) on 8 July. The agreement has a competition chapter that will include provisions covering antitrust, mergers, State-owned enterprises, and subsidies. The high-level bilateral policy dialogue in the framework of the co-operation agreement<sup>119</sup> continued in 2013. Discussions with the US federal competition authorities aim, among other things, to improve co-operation in the area of unilateral conduct, mergers and airline alliances.

200. Negotiations on a Free Trade Agreement were also started with Japan on 25 March. The proposed agreement includes competition provisions which DG Competition is following closely. DG Competition also met representatives of the Japanese competition agency in accordance with the existing co-operation agreement<sup>120</sup>.

201. On 17 May, the EU signed a second generation Co-operation Agreement with Switzerland<sup>121</sup>. It includes an innovative feature that will enable the competition agencies to exchange information they have obtained in their investigations. Negotiations on a similar agreement between the EU and Canada have been progressing well.

202. A new Memorandum of Understanding for Co-operation in the area of competition law (MoU) was signed on 22 November with the Competition Commission of India.<sup>122</sup> The MoU sends a positive signal for intensified co-operation on competition matters between the EU and India.

203. The European Commission continued negotiating Free Trade Agreements with a large number of third countries, all of which include a chapter on competition. In addition, the Commission continued to engage in technical co-operation activities with other non-EU competition authorities, in particular with the Chinese and Indian competition authorities.

204. In the framework of the accession negotiations, significant progress was made in 2013 with the screening of Montenegrin legislation and the identification of opening benchmarks for negotiations of the competition chapter. The Commission continued to closely monitor the implementation of the steel and shipbuilding protocol included in the Accession Treaty for Croatia.

## 5.2 *Multilateral co-operation*

205. The Commission also continued its active engagement in competition related international fora such as the Competition Committee of the OECD, the International Competition Network (ICN) and Unctad. In 2013, it continued co-chairing the Mergers Working Group of ICN and one of the Sub-Groups of the Cartel Working Group. In 2013, the Commission was the project leader (together with US FTC) for the Steering Group projects on investigative processes in competition enforcement activities

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<sup>119</sup> Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, OJ L 095, 27.04.1995, p. 47

<sup>120</sup> Agreement between the European Community and the Government of Japan concerning co-operation on anti-competitive activities, OJ L 183, 22.7.2003, p. 12

<sup>121</sup> For further information see press release: IP/13/444 of 17/5/2013, available at [http://europa.eu/rapid/press-release\\_IP-13-444\\_en.htm](http://europa.eu/rapid/press-release_IP-13-444_en.htm)

<sup>122</sup> For further information see press release: IP/13/1143 of 21/11/2013, available at [http://europa.eu/rapid/press-release\\_IP-13-1143\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1143_en.htm)

## B. SECTORAL OVERVIEW

206. This section provides an overview of policy developments and enforcement activities in a number of selected sectors, which the Commission particularly focused on in 2013: energy and environment, ICT and media, financial services, manufacturing, the agri-food industry, pharmaceutical and health services and transport.

### 1. Energy & Environment

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

207. The energy sector is of significant importance to the EU, as energy is a key input across all economic sectors. Affordable energy prices and security of supply are vital for a competitive European industry. While some progress has been made towards the three central goals of the European energy policy, that is competitiveness, sustainability and security of supply, several challenges remain.

#### **Box 11. Challenges Facing European Competitiveness, Sustainability and Security of Supply**

The Commission's communication "A policy framework for climate and energy in the period from 2020 to 2030" is a comprehensive framework aiming to make the European Union's economy and energy system more competitive, secure and sustainable. The most important challenges include the reduction of greenhouse gas emissions, the combat against climate change, maintaining secure and reliable provision of energy at competitive prices, reducing our dependence on energy imports and improving interconnection between European gas and electricity grids. The Commission's Communication "Energy 2020 – A strategy for competitive, sustainable and secure energy" calls for action in several areas, such as energy efficiency, infrastructure, choice and security for consumers, energy technology and the external dimension of the internal energy market. The Commission's Communication "Energy Technologies and Innovation" calls for particular actions to bring new, high performance low-cost, low-carbon sustainable energy technologies to the sector. Competition enforcement and advocacy, along with sector-specific legislative proposals, constitute the main tools the Commission has at its disposal to achieve these goals and create a single European energy market by the 2020 target date. Given the strategic importance of the energy sector, the European Parliament, in its Resolution on the 2012 report on competition policy (the Tremosa i Balcells report) continued to request that the Commission actively monitors the degree of competition on the market.

208. The three key challenges identified in 2013 are the EU's increasing dependence on imported energy, increasing energy prices and lack of investment.<sup>123</sup> EU energy markets still do not function efficiently, as markets remain segmented along national borders, investments in infrastructure is lacking and access to networks remains difficult for new entrants. In 2013, EU competition policy contributed to tackling those challenges in several ways.

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

##### 1.2.1 *Enhancing competitiveness across the energy sector*

209. Competition enforcement and advocacy in the energy sector contribute to competitiveness of EU industry in general and the completion of the Single Market. It does so in particular by opening energy markets, creating a level playing field between competitors, preventing incumbents from reinforcing their dominant positions and creating a framework for investment that avoids distortions and ensures the efficient allocation of public resources.

<sup>123</sup> See *Commission contribution to the European Council of 22 May 2013*, available at [http://ec.europa.eu/europe2020/pdf/energy2\\_en.pdf](http://ec.europa.eu/europe2020/pdf/energy2_en.pdf)

210. The competitiveness of European industry is affected by energy prices that are higher in the EU than in other major trading partners. Antitrust enforcement actions have contributed to curbing energy prices by combatting the segmentation of markets, inefficient allocation of energy and abusive or collusive behaviour. Cases investigated in 2013 include an examination of the behaviour of companies active in the crude oil, refined oil products and biofuel sectors;<sup>124</sup> Gazprom, in relation to the supply of gas to Central and Eastern Europe<sup>125</sup>; BEH, in relation to the supply of electricity in Bulgaria<sup>126</sup>; and power exchanges<sup>127</sup>.

211. Industrial competitiveness is also addressed by the State aid *Guidelines on the Emissions Trading Scheme* (ETS) which entered into force on 1 January 2013. Member States can relieve energy-intensive industries from indirect costs of CO<sub>2</sub> in their electricity price. Such measures address the risk of relocation of energy-intensive industries to countries outside the EU where environmental regulation is less strict.<sup>128</sup> During 2013, the Commission approved such schemes in five Member States.<sup>129</sup> On the other hand, plans of the German authorities to grant such support to certain non-ferrous metals producers have been declared incompatible, as it would have entailed serious distortions of competition to the detriment of producers in other Member States.<sup>130</sup>

212. Furthermore, to enhance competition and ensure a level playing field in the energy sector, the Commission has initiated several in-depth investigations in State aid. The cases concern either electricity generators or selective and potentially distortive advantages to electricity consumers. In particular, the Commission has launched an investigation to examine the role of aid in preventing market opening in the Portuguese electricity generation market<sup>131</sup> and it re-opened an inquiry into certain tax measures granted by the French State to Electricité de France (EDF)<sup>132</sup>. In-depth probes were also launched in Germany<sup>133</sup>, Denmark<sup>134</sup> and the UK<sup>135</sup>.

### 1.2.2 Contributing to sustainability

213. Sustainable development is the long-term use of resources to meet human needs, while preserving the environment. Sustainability was at the heart of the measures reviewed under the State aid rules, under which the Commission authorised aid that supports renewable energy sources and environmentally friendly businesses.

<sup>124</sup> Case AT.40054 *Oil and Biofuel Markets*, see MEMO/13/435 of 14 May 2013

<sup>125</sup> Case AT.39816 *Upstream Gas Supplies in Central and Eastern Europe*, see MEMO/12/937 of 4 September 2012

<sup>126</sup> Case AT.39767 *BEH electricity*, see IP/121307 of 3 December 2012

<sup>127</sup> Case AT.39952 *Power Exchanges*, see MEMO12/78 of 7 February 2012

<sup>128</sup> *Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post 2012*, OJ C154, 5 June 2012, p. 4

<sup>129</sup> Belgium, Germany, the Netherlands, Spain and the UK, respectively case numbers SA.37017, SA.36103, SA.37084, SA.36650 and SA.35543

<sup>130</sup> SA.30068 *Aid to non-ferrous metals producers for CO<sub>2</sub> costs of electricity*, see IP/13/704 of 17 July 2013

<sup>131</sup> SA.35429 *Extension of use of public water resources for hydro electricity generation*, see IP/13/842 of 18 September 2013

<sup>132</sup> SA.13869 *EDF: Requalification en capital des provisions comptables en franchise d'impôt pour le renouvellement du Réseau d'Alimentation Générale*. This followed a judgment handed down by the Court of Justice of the European Union in Case C-124/10 P.

<sup>133</sup> SA.34045 *Exemption from network charges for large electricity consumers (\$19 StromNEV)* and SA.33995 *Reduction of the EEG-surcharge for energy intensive users and support of RES electricity*

<sup>134</sup> SA.32184 *Alleged State aid to an electricity supplier* and SA.32669 *Aid granted to CHP plants and an electricity supplier which affect the market for regulation power*

<sup>135</sup> SA.34947 *Electricity Market Reform – Investment Contract (early Contract for Difference) for the Hinkley Point C New Nuclear Power Station*

214. During 2013, based on the provisions of the *Environmental Aid Guidelines*<sup>136</sup>, the Commission issued a great number of approval decisions for the promotion of renewable energy.<sup>137</sup> The Commission is currently revising those Guidelines, with a view of adopting modernised rules in 2014. The revision will adapt the rules in light of their application and market developments. It will allow Member States to design support schemes to reach the EU objectives and help companies to better bear the costs relating to the support of electricity from renewable energy sources and contribute to increased environmental protection and growth. The revised guidelines will therefore also consider negative impacts of environmentally harmful subsidies, while taking into account the need to address trade-offs between different areas and policies as recognised by the flagship initiative for "Resource-efficient Europe".

215. The Czech Republic notified five individual aid measures in the steel sector within an overall aid scheme for improving air quality in the Moravia-Silesia Region. The Commission came to the conclusion that the measures proposed would increase the level of environmental protection by going beyond the mandatory obligation that can be imposed on the beneficiary based on applicable Community standards under Directive 2010/75/EU on industrial emissions and they were approved on this basis.<sup>138</sup>

216. Enforcement actions supporting sustainability include the on-going anti-trust investigation in relation to the Austrian waste management markets<sup>139</sup>. The Commission's intervention will contribute to achieving more efficient ways of collecting and recovering packaging waste and help achieving environmental targets.

### 1.2.3 *Contributing to security of supply*

217. The EU energy sector is increasingly dependent on imports and dependency is expected to grow to more than 80% in the case of oil and gas by 2035. However, energy dependency differs greatly among Member States. Some Member States rely on one single supplier and often on one single supply route for 80%-100% of their gas consumption,<sup>140</sup> whereas Member States with a diverse portfolio of gas suppliers and supply routes and with well-developed gas markets reap the benefit by paying less for imports. The EU energy sector is also characterised by a significant need for investments, e.g. in electricity generation infrastructure, given the trend for gas and renewables to contribute more to electricity generation in the EU.

<sup>136</sup> *Community guidelines on State aid for environmental protection*, OJ C 82, 1.4.2008, p. 1.

<sup>137</sup> For instance, SA.35073 – Belgium - *Reduced excise duties for sustainable biofuels*; SA.35089 – Denmark - *Supplement for electricity from new wind turbines*; SA.33567 – Finland - *Production aid for electricity from renewable energy sources in Åland*; SA.34889 – Germany - *Scheme for the promotion of energy-efficiency and the use of renewable energy in the sectors of commerce and industry*; SA.35767 – Hungary - *Replacing the existing excise duty exemption for biofuel E85 with an excise duty reduction*; SA.35079 – Ireland - *RES-E Support Programme*; SA.36516 – the Netherlands - *Aid for wind farm Zuidermeerdijk*; SA.35414 – Sweden - *Changes in the Swedish Energy taxation regarding biofuels for low-blending*; SA.35565 – UK - *Amendments to the Renewables Obligation scheme*.

<sup>138</sup> SA.35597 – Czech Republic - *Reduction of emissions by up-grading dedusting system of sinter plant south of ArcelorMittal Ostrava a.s.*; SA.35598 – Czech Republic - *Reduction of fugitive emissions from sinter handling and cooling at sinter plant south of ArcelorMittal Ostrava a.s.*; SA.35599 – Czech Republic – Arcelor Mittal Ostrava a.s. – *Reduction of fugitive emissions from VP3 foundries*; SA.35600 – Czech Republic – Třinecké železářny, a.s. – *De-dusting of waste gases and de-dusting of junctions at sintering plant 2* and SA.35600 – Czech Republic – Třinecké železářny, a.s. – *De-dusting of waste gases and de-dusting of junctions at sintering plant 2*

<sup>139</sup> Case AT.39759 *ARA foreclosure*, see IP/13/711 of 18 July 2013

<sup>140</sup> See Commission contribution to the European Council, *Energy challenges and policy*, available at [http://ec.europa.eu/europe2020/pdf/energy2\\_en.pdf](http://ec.europa.eu/europe2020/pdf/energy2_en.pdf)

218. With the aim of encouraging investment, the Commission authorised in 2013 State aid for a number of gas infrastructure projects (in Greece<sup>141</sup> and Poland<sup>142</sup>) as well as investments into Liquefied Natural Gas (LNG) infrastructure (in Greece and Lithuania<sup>143</sup>). At the same time, in the field of merger control, the Commission cleared a number of transactions involving investments into European energy infrastructure by companies which are new to this market (e.g. investment funds, trading companies and industry conglomerates). Many of these investments focussed on the production of electricity from renewable energy sources (e.g. wind parks<sup>144</sup>, solar parks<sup>145</sup>, waste-to-energy<sup>146</sup> or biodiesel<sup>147</sup>) as well as on investments into transmission systems (e.g. off-shore electricity transmission,<sup>148</sup> off-shore gas transmission<sup>149</sup> and on-shore gas-transmission<sup>150</sup>).

219. Similarly, the Commission's anti-trust enforcement aims at resolving security of supply issues by facilitating access to the market and encouraging investment. That is illustrated by the decision regarding CEZ electricity<sup>151</sup>, the investigations into BEH in relation to Bulgarian gas market<sup>152</sup>, into the Romanian power exchange<sup>153</sup> and into Gazprom<sup>154</sup> in relation to the partitioning of markets and the prevention of diversification of the supply of gas.

220. The Commission has also remained vigilant to maintain competitive market structures when it assessed proposed merger transactions. In that spirit the Commission cleared the acquisition of joint control over WINZ and Wintershall Services of the Netherlands and sole control over Wingas and WIEH of Germany by the Russian energy company Gazprom<sup>155</sup>. The Commission assessed the potential impact of the transaction on competition in the markets for the sale of gas in Germany, Austria and the Czech Republic, where Gazprom sells gas to downstream wholesalers and retailers, including Wingas which is both wholesaler and retailer. The Commission also assessed the potential effects of the acquisition on competition in the markets for the storage of gas in Germany and Austria. The Commission concluded that the transaction would not raise competition concerns as it would not allow Gazprom to restrict customers' access to gas supplies.

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<sup>141</sup> SA.35164 *Compressor Station in Nea Messimvria*; SA.35166 *High pressure natural gas pipeline to Aliveri*; SA.35167 *High pressure natural gas pipeline to Ag Theodori – Megalopoli*; and SA.35976 *Metering/Regulating stations*

<sup>142</sup> SA.34982 *Individual aid to Gas-System S.A.*; SA.34235 *Gas pipeline Rembelszczyzna-Gustorzyn*; SA.34938 *Gas storage Husów*

<sup>143</sup> SA.35165 *1st upgrade LNG terminal at Revithoussa* and SA.35977 *2nd Upgrade of LNG Terminal in Revithoussa* and SA.36740 *“Klaipėdos nafta“ (hereinafter – „KN“)*

<sup>144</sup> Case M.6870 *GE / Munich RE / Iberdrola Renovables France*; M.7046 *Parkwind / Summit Renewable Energy Belwind 1 / Belwind*

<sup>145</sup> Case M.6864 *DSE/INCJ/Solar Ventures/JV*

<sup>146</sup> Case M.6820 *Eqf Infrastructure II/E.On Energy From Waste*

<sup>147</sup> Case M.6807 *BUNGE GROUP / MBF / NOVAOL AUSTRIA*

<sup>148</sup> Case M.6875 *TENNET OFFSHORE / MITSUBISHI CORPORATION / TENNET OFFSHORE 8*

<sup>149</sup> Case M.7039 *PGGM / GDF SUEZ / EBN / NOGAT*

<sup>150</sup> Case M.6887 *SNAM / GICSI / TIGF*; M.6925 *ALLIANZ GROUP / OMERS GROUP / NET4GAS*

<sup>151</sup> Case AT.39727 *CEZ*, see IP/13/320 of 10 April 2013

<sup>152</sup> Case AT.39849 *BEH Gas*, see IP/13/656 of 5 July 2012

<sup>153</sup> Case AT.38884 *OPCOM/Romanian Power Exchange*, see IP/13/486 of 30 May 2013

<sup>154</sup> Case AT.39816 *Upstream Gas Supplies in Central and Eastern Europe*, see MEMO/12/937 of 4 September 2012.

<sup>155</sup> Case M.6910 *GAZPROM / WINTERSHALL / TARGET COMPANIES*, decision of 4 December 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6910](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6910)

## 2. Information and Communication Technologies (ICT) and Media

### 2.1 Overview of key challenges in the sector

221. Information and Communication Technologies (“ICT”) play a key enabling role for Europe to achieve its strategic objectives under the Europe 2020 Strategy, in particular, as regards the objectives under the Digital Agenda flagship initiative<sup>156</sup> and the revised priorities adopted in December 2012<sup>157</sup>. That role is also recognised in the Communication on e-commerce and other online services.<sup>158</sup> Creative content is an essential input into the digital economy and a key driver of consumer demand for digital services. Europe’s sustainable competitiveness largely depends on its ability to absorb the potential benefits of the rapid progress in ICT.

222. ICT increasingly affects all segments of society and the economy. It is estimated that half of all productivity growth derives from investment in ICT<sup>159</sup>. There is a very considerable growth potential in those sectors. In mature economies, internet-related expenditure and consumption accounted for 21% of GDP growth during the past five years.<sup>160</sup> There are more than 4 million ICT workers across many sectors in Europe and their number is growing by 3% annually despite the crisis. The internet is empowering people to create and share their ideas, giving rise to new content, entrepreneurs and markets. ICT is the essential transformative technology that supports structural change in sectors like health care, energy, public services, and education.

223. In light of the rapid technological developments which characterise those sectors, effective competition policy and enforcement are essential to address potential malfunctioning in the ICT and media sectors.

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

#### 2.2.1 Competition policy contributed to key initiatives to boost a European single market for electronic communication and proposals in the media sector

224. Competition policy played an important role in shaping the Commission’s legislative proposals in the telecom and media sectors in the course of 2013.

225. On 11 September, the Commission adopted a legislative package for a "Connected Continent: Building a Telecoms Single Market". This package comprises a proposal for a Regulation laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent and a Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, as

<sup>156</sup> A Digital Agenda for Europe, Brussels, 26 August 2010, COM(2010) 245 final/2., available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245R%2801%29:EN:NOT>

<sup>157</sup> The Digital Agenda for Europe - Driving European growth digitally, Brussels, 18 December 2012, COM(2012) 784 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0784:FIN:EN:PDF>

<sup>158</sup> A coherent framework for building trust in the Digital Single Market for e-commerce and online services, Brussels, 11 January 2012, COM (2011) 942 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF>

<sup>159</sup> The Digital Agenda for Europe - Driving European growth digitally, Brussels, 18.12.2012, COM(2012) 784 final.

<sup>160</sup> McKinsey Global Institute, “Internet Matters: The Net’s Sweeping Impact on Growth, Jobs, and Prosperity” (May 2011) as quoted in an Issues Note on the Digital Economy by the OECD Secretariat (Competition Committee) (DAF/COMP(2011)16)

well as a Communication on the Telecoms Single Market. The package contains a number of safeguards aimed at ensuring compliance with EU competition law.

226. On 5 November, the European Parliament and the Council agreed in principle on the Commission's proposal for a Directive on collective rights management. The proposed measures aim to modernise collecting societies that are responsible for the licensing of copyright-protected music for online use on behalf of the authors. The proposal also contains a number of important competition law safeguards, built on the Commission's enforcement experience, including the CISAC decision, which was largely upheld by the General Court in April.<sup>161</sup> The safeguards aim at ensuring compliance with EU competition law in the collective management of copyright.

227. Moreover, on 13 November, the Commission adopted a new Communication on State aid for films and other audio-visual works.<sup>162</sup> This new Communication extends the scope of the preceding Cinema Communication. In particular, it allows aid for a wider scope of activities, reinforces Member States' discretion in defining cultural activities worthy of support, introduces a higher aid intensity level for cross-border productions and promotes film heritage. The new Communication also ensures that territorial obligations imposed on film producers, which are in potential conflict with internal market principles, are more proportional to the aid granted.

### 2.2.2 *Enforcement action in the telecoms sector*

228. The Commission continued to pursue enforcement actions against telecommunication operators suspected of engaging in anti-competitive conduct.

229. On 23 January, the Commission imposed fines of EUR 66 894 000 on Telefónica and EUR 12 290 000 on Portugal Telecom<sup>163</sup>, as it concluded that their agreement not to compete in the Iberian telecommunications markets was in breach of Article 101 TFEU. This case is a good example of the Commission's tough stance against anti-competitive agreements having as their object or effect the compartmentalisation of the internal market along national borders.

230. The Commission continued to advance its case against Slovak Telekom and its parent company, Deutsche Telekom<sup>164</sup>, following the Statement of Objections (SO) issued in May 2012. In the SO, the Commission took the preliminary view that Slovak Telekom may have abused its dominant position in certain wholesale broadband markets in Slovakia. In particular, Slovak Telekom may have refused to supply unbundled access to its local loops and wholesale services to competitors, and may have imposed a margin squeeze on alternative operators. Broadband access plays a key role in the competitiveness of the European digital economy.

### 2.2.3 *Enforcement linked to digitisation*

231. The Commission continued in 2013 to pursue enforcement actions related to the impact of the transition to digital networks.

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<sup>161</sup> Commission Decision C(2008) 3435 final of 16th July 2008 in case COMP/C2/38.698 – CISAC; and judgments of the General Court of 12 April 2013, in Cases T-392/08, T-398/08, T-401/08, T-410/08, T-411/08, T-413/08 to T-422/08, T-425/08, T-428/08, T-432/08, T-433/08, T-434/08, T-442/08, T-451/08, not yet reported.

<sup>162</sup> Communication from the Commission on State aid for films and other audiovisual works, OJ 2013 C 332 of 15 November 2013, p. 1-11

<sup>163</sup> Case AT-39839 *Telefónica and Portugal Telecom*, decision of 23 January 2013.

<sup>164</sup> Case AT.39523 *Slovak Telekom*

232. The transition from analogue to digital terrestrial broadcasting has a positive digital dividend. To ensure that this dividend leads to new entry and broader viewer choice it has to be allocated subject to specific conditions (e.g. open, transparent and non-discriminatory procedures), required by EU law<sup>165</sup>. In 2013, following interventions by the Commission, France amended its broadcasting regulations. By contrast, the Commission considered measures proposed by Bulgaria to address the distortions as insufficient and on 24 January decided to refer Bulgaria to the Court.<sup>166</sup> The Commission is also closely monitoring steps taken by Italy to assign new digital frequencies (multiplexes) to new entrants or smaller TV operators.

233. In June, the Commission concluded its investigation in relation to the public financing of the digital terrestrial infrastructure in Spain. The measures at stake included granting State aid for the transition to digital terrestrial television in remote areas. The public financing also encompassed aid for the operation and maintenance of the digital terrestrial infrastructure. However, those subsidies worth EUR 260 million went exclusively to terrestrial operators and alternative digital transmission platforms, such as satellite, cable or the Internet, could not effectively benefit from the subsidies. Therefore, the Spanish measure unduly distorts competition between DTT players and operators using other technologies. As a result, the Commission concluded that aid was incompatible with EU State aid rules and adopted a final negative decision<sup>167</sup> with recovery obligation.

234. The Commission also completed its antitrust proceedings into alleged anti-competitive practices by five international publishers and Apple affecting the sale of e-books in the EEA, by adopting a second<sup>168</sup> Article 9 commitment decision addressed to Penguin Random House. The Commission suspected that, by jointly switching the sale of e-books from a wholesale model to an agency model with the same key terms on a global basis (first in the US and then in the EEA), the publishers, together with Apple, may have engaged in a concerted practice with the object of raising retail prices of e-books in the EEA or preventing the emergence of lower prices in the EEA for e-books. The Commission closed its proceedings against Penguin after the latter proposed essentially the same commitments as the other four publishers, i.e. (a) the termination of agency agreements, (b) a 5 year ban on price MFN (most-favoured-customer) clauses, and (c) a 2 year "cooling-off" period during which retailers will have the right to discount e-books even if under an agency arrangement. With the commitments the potential infringement ended and conditions were created to allow for a competitive reset as quickly as possible in that nascent and fast-moving market.

235. Finally, the Commission continued to advance its 2012 fact-finding investigation to examine whether licensing agreements for pay-TV content contain absolute territorial protection clauses. Such clauses may breach Article 101 TFEU by preventing consumers from accessing content across borders.<sup>169</sup>

#### 2.2.4 *Enforcement in technology markets*

236. The Commission's enforcement action in technology markets is mainly focused on unilateral conduct, potentially in breach of Article 102 TFEU.

<sup>165</sup> Including Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L249, 17 September 2002, p. 21.

<sup>166</sup> See IP/13/46 of 24 January 2013.

<sup>167</sup> Case SA.28599 – Aid for the deployment of digital terrestrial television (DTT) - Spain, decision of 19 June 2013.

<sup>168</sup> Case AT.39847 *Ebooks*, decision of 25 July 2013. The decision follows the first Article 9 commitment decision of December 2012, by which the Commission made legally binding commitments offered by Apple and the other four international publishers involved, namely, Simon & Schuster, HarperCollins, Hachette and Holtzbrinck/Macmillan

<sup>169</sup> The fact-finding followed the *Premier League/Murphy* judgment, Joined Cases C-403/08 and C-429/08, judgment of 4 October 2011.

**Box 12. Protecting consumer's interest on the Internet**

One of the key Commission enforcement actions in the ICT sector is the on-going investigation concerning Google's business practices in the markets for online search, online search advertising (Google's relationship with advertisers) and online search advertising intermediation (Google's relationship with website owners, known as "publishers"). The Commission has identified four business practices by Google that may constitute an abuse of a dominant position: (i) the preferential treatment of Google's own vertical search services to the detriment of competing vertical search services (including on mobile devices); (ii) the copying of third party content for use in Google's own vertical search services; (iii) exclusivity agreements with publishers for search advertising; and (iv) restrictions on the portability and management of search advertising campaigns across search advertising platforms. Google submitted a first set of commitments in April and a revised set of commitments in October. The Commission sought feedback on Google's revised commitments through formal requests for information. In light of the feedback it has received, the Commission has come to the conclusion that the revised commitments still fall short of adequately addressing the competition concerns the Commission expressed in its Preliminary Assessment and has informed Google of this conclusion. The Commission has also informed Google that if it wishes to submit a further revised set of commitments that adequately addresses the Commission's concerns, it has only a very limited amount of time to do so, failing which the Commission will revert to the procedure under Article 7 of Regulation 1/2003.

237. The Commission continued in 2013 its investigations in relation to the enforcement of standard essential patents ("SEPs") in the Samsung and Apple/Motorola cases. SEPs are patents essential for the implementation of an industry standard and for which companies committed to license the patents on fair, reasonable and non-discriminatory ("FRAND") terms.

238. The Samsung case concerns the compatibility with Article 102 TFEU of Samsung's enforcement of its mobile communications SEPs by means of injunctions against Apple before various national courts in the EEA. Following the issuance of a Statement of Objections in December 2012, in September 2013 Samsung offered commitments to address the competition concerns identified by the Commission. Under the proposed commitments, Samsung essentially commits not to seek injunctions in the EEA on the basis of its smartphone and tablet SEPs for a period of five years if potential licensees agree to comply with a specified process for determining appropriate FRAND royalty rates. The Commission has market-tested these commitments and is taking account of the feedback it has received in discussing with Samsung possible improvements to the commitments. If at the end of these discussions, the Commission reaches the conclusion that Samsung's commitments adequately address the Commission's competition concerns, the Commission may make the commitments binding on Samsung by the adoption of a decision under Article 9 of Regulation 1/2003.

239. The Motorola case concerns the compatibility with Article 102 TFEU of Motorola Mobility's seeking an enforcement of an injunction in Germany against Apple on the basis of one of Motorola's mobile communications SEPs. The Commission issued a Statement of Objections in May and is currently examining the observations received on the Statement of Objections.

240. The Commission continues to be vigilant in other areas of the IT and internet sector as well. On 6 March, the Commission adopted a decision imposing a EUR561 million fine on Microsoft for failing to comply with its commitment to offer users a browser choice screen enabling them to easily choose their preferred web browser. That commitment had been made legally binding on Microsoft in December 2009 to address competition concerns related to the tying of Microsoft's web browser, Internet Explorer, to its dominant client PC operating system, Windows. Microsoft committed to make available for five years (i.e. until 2014) in the European Economic Area a "choice screen". This screen would allow users of Windows to choose in an informed and unbiased manner which web browser(s) they wanted to install in addition to, or instead of, Microsoft's web browser. The Commission found that Microsoft failed to roll out the browser choice screen with its Windows 7 Service Pack 1 from May 2011 until July 2012. As a consequence, at least 15 million Windows users in the EU did not see the choice screen during this period.

Microsoft has acknowledged that the choice screen was not displayed during that time and has not appealed the decision.

241. The Commission also sent a Statement of Objections regarding an alleged cartel in smart card chips. The Commission initially explored the possibility of a settlement with certain companies allegedly involved in the cartel but discontinued the talks due to lack of progress. Therefore, the normal antitrust procedure will now run its course. Almost everybody uses smart card chips, be it in mobile phone SIM cards, bank cards, passports, identity cards, Pay TVs or in numerous other applications. The Commission has concerns that certain chips suppliers may have agreed or co-ordinated their behaviour in the European Economic Area (EEA) in order to keep prices up.

#### 2.2.5 *ICT in the context of merger control*

242. Finally, through the Merger Regulation, the Commission ensures that the ICT and media sectors remain competitive and open for new entrants, and that access to key elements (whether content, technology or interconnection) is not denied. The Commission also aims at ensuring that consumers do not suffer from higher prices, less choice, poorer quality and limited innovation as a result of mergers in that sector.

243. Significant merger activity in the telecommunication sector continued in 2013. The Commission reviewed a number of high profile transactions in this sector, including Liberty Global's USD 23.3 billion acquisition of Virgin Media<sup>170</sup>, the largest cable operator in the United Kingdom and Vodafone's EUR 8 billion acquisition of Kabel Deutschland<sup>171</sup>, the largest cable operator in Germany. Both these transactions were ultimately cleared unconditionally by the Commission in phase I. The Liberty/ Virgin case is a cross-border expansion by one telecom operator in another Member State (indeed, Liberty Global was essentially not present at the retail level in the United Kingdom prior to the Virgin Media acquisition). The Vodafone/ Kabel Deutschland case is an expansion by one operator into one or more sectors in which its activities were previously limited within the same Member State (indeed, prior to the Kabel Deutschland acquisition, Vodafone's activities in Germany were mainly focused on mobile communications).

244. Another significant transaction in the telecoms industry was the acquisition of most of Nokia's devices & services business (D&S) by Microsoft. The D&S business mainly produces and sells smartphones and feature phones. The Commission concluded that the transaction would not raise any competition concerns, in particular because there are only modest overlaps between the parties' activities and the links between Microsoft's mobile operating systems, mobile applications and enterprise mail server software with Nokia's smart mobile devices are unlikely to lead to competitors being shut out from the market.

245. The Commission, however, is in the process of reviewing two transactions entailing a four-to-three consolidation between Mobile Network Operators ("MNOs"). They are active within the same Member States, namely Ireland and Germany. In the first case, on 1 October, Hutchison 3G UK notified to the Commission its intention to acquire sole control over Telefónica Ireland<sup>172</sup> and on 6 November, the Commission opened an in-depth investigation into that transaction. In the second case, on 31 October, Telefónica Deutschland notified to the Commission its intention to acquire sole control over KPN's mobile operations in Germany (trading as E-Plus)<sup>173</sup> and on 20 December, the Commission opened an in-depth investigation of the transaction. As those cases would result in the reduction in the number of players in

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<sup>170</sup> Case M.6880 *Liberty Global / Virgin Media*, decision of 15 April 2013

<sup>171</sup> Case M.6990 *Vodafone / Kabel Deutschland*, decision of 20 September 2013

<sup>172</sup> Case M.6992 *Hutchison 3G UK / Telefónica Ireland*, decision of 6 November 2013

<sup>173</sup> Case M.7018 *Telefónica Deutschland / E-Plus*, decision of 20 December 2013

markets (both the wholesale access market and the retail market) that are already very concentrated, the Commission will carry out in-depth investigations in the course of 2014.

### 3. Financial Services

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

246. Financial services represent about 5% of the EU's GDP but, more importantly, they play an essential role in the economy in transforming short-term savings into long-term lending and directing capital where it is most needed. In 2013, for the first time since the outset of the financial and economic crisis, the instability surrounding the financial sector showed signs of improvement across the EU. The Commission has continued to apply its State aid regime for the financial sector with the aim to ensure that aided financial institutions restructure adequately to become viable again, to deal with the distortions of competition created by the aid received while at the same time maintaining financial stability, safeguarding the internal market and protecting the interests of taxpayers. At the same time, the Commission continued its antitrust enforcement action, with the aim of making the financial services markets function better.

247. Furthermore, since its launch in June last year, the project to achieve a "Banking Union" is right on top of Europe's agenda<sup>174</sup>. While it is still incomplete to date, progress is moving fast on different fronts:

- As from January 2014, European banks will apply the new rules set out in the so-called CRD (Capital requirements Directive) IV package, which implements Basel III. Insufficient level of capital – both in quantity and in quality – was one of the vulnerabilities shown by banking institutions during the crisis; the new capital adequacy rules of the CRD IV will address that shortcoming.
- In December 2013, the EU co-legislators reached a political agreement to revise the EU directive on Deposit Guarantee Schemes ("DGS") with the aim to harmonise the set-up and functioning of the Member States' national deposit guarantee schemes and to ensure they are provided with adequate funds.
- As of November 2014, a Single Supervisory Mechanism ("SSM") for euro-area banks will be fully operational. The European Central Bank will become the single banking supervisor for the euro area countries and for all those that decide to join the Banking Union.
- In December 2013, co-legislators also agreed on a text of a new European directive on Banking Recovery and Resolution which will provide a common tool-box for resolving banks in difficulties. This legislation aims at better protecting taxpayers from having to bail-out banks in distress.
- A Single Resolution Mechanism applicable to the euro area and to other countries willing to join will, in all likelihood, be adopted by the time the SSM becomes fully operational.

248. To prepare for those changes, the Commission reviewed its State aid banking guidelines<sup>175</sup> in 2013, updating the crisis framework put in place five years before. This update of the State aid crisis rules intends to ensure that future State interventions are consistent with the key principles of the Banking Union.

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<sup>174</sup> In his annual State of the Union speech to the European Parliament on September 11, President Barroso described it as "*the first and most urgent phase on the way to deepen our economic and monetary union*".

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

#### 3.2.1 *Contributing to seamless, efficient and innovative payment markets*

249. Competition policy contributes to the well-functioning of financial markets with incentives for market participants to improve efficiency and meet consumer needs. Combined with well-designed regulation, enforcement of competition policy enhances transparency and reduces entry barriers for new technology and new players.

250. Seamless, efficient and innovative payment markets are essential for the internal market. Regulation, self-regulation and competition enforcement must work together to create SEPA ("Single Euro Payments Area"), with open, efficient and innovative market structures. In 2013, the Commission has continued to make significant progress in all three areas.

251. As a follow up to the Green Paper on cards, internet and mobile payments published for consultation in early 2012, at the end of July the Commission adopted a regulatory package including a proposal to revise the Directive on Payment Services ("PSD")<sup>176</sup> and a proposal for regulation on interchange fees for card based payments.<sup>177</sup> In both cases, legislation follows in the footsteps of antitrust enforcement. Both proposals are aimed at addressing the barriers to the proper functioning of the Single Market and to competition in payments. The proposed revised PSD will cater for non-bank players in internet and card payments to operate in competition with banks by providing for regulated access to information on availability of funds in the bank account, while at the same time ensuring security and data protection by all players. The proposal for regulation on interchange fees includes caps on interchange fees for consumer credit and debit cards and measures to increase transparency and to empower consumer and retailers to make informed choices.

252. Self-regulation has played an important role in payments: the European Payments Council, which consists of credit and payment institutions and the SEPA Council, created to represent all stakeholders, are engaged in that field. However, the roles and decision-making powers of EPC and SEPA Council remain controversial. In the SEPA Regulation<sup>178</sup>, the European Parliament required a review of the governance arrangements. It has been much discussed during 2013, including from a competition perspective.

253. Concerning antitrust enforcement in card payments, the Commission found in 2007 that MasterCard's Multilateral Interchange Fees (MIFs) for card payments were a restriction under Article 101(1) TFEU and that MasterCard had not demonstrated that the MIFs were justified on efficiency grounds under Article 101(3) TFEU. On 24 May 2012 the General Court fully upheld the Commission's 2007 decision. MasterCard appealed against that ruling and proceedings continued before the European Court of Justice in 2013. The Opinion of the Advocate-General was delivered on 30 January 2014.

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<sup>175</sup> 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 ('Banking Communication'),

<sup>176</sup> Commission proposal for a Directive of the European Parliament and the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EE and 2009/110/EC and repealing Directive 2007/64/EC, Brussels 24 July 2013, COM(2013) 547 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF>

<sup>177</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM/2013/0550 final – 2013/0265 (COD) of 24 July 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:HTML>

<sup>178</sup> Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) N° 260/2012 as regards the migration to Union-wide credit transfers and direct debits, Brussels, 9 January 2014, COM(2013) 937 final, available at [http://ec.europa.eu/internal\\_market/payments/docs/sepa/1401069\\_proposal\\_en.pdf](http://ec.europa.eu/internal_market/payments/docs/sepa/1401069_proposal_en.pdf)

254. As for the on-going proceedings against VISA<sup>179</sup>, in May, Visa Europe offered commitments to the Commission concerning its MIFs for credit card payments and the limitations it imposed on cross-border acquiring; a market test was conducted during May and June. The investigation of the EPC's work on standardisation for e-payment systems was closed in June<sup>180</sup>, following the announcement by the EPC that it would stop its work on the e-Payments Framework and following the withdrawal of the complaint by Sofort AG. The Commission, in close co-operation with national competition authorities, will continue to monitor that market closely.

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

255. Since 2011, the Commission has been carrying out an investigation on the credit default swaps (“CDS”) market. As a result of that investigation, on 1 July, the Commission issued a Statement of Objections (“SO”), addressed to 13 investment banks, the International Swaps and Derivatives Association (“ISDA”) and the data service provider Markit.<sup>181</sup> In the SO the Commission preliminarily concluded that between 2006 and 2009 the 13 investment banks, ISDA and Markit acted collectively to prevent two exchanges (Eurex in 2007 and CMDX in 2008) from entering credit derivatives trading by collectively denying various inputs necessary to launch exchange trading. Compared to OTC trading, exchange trading is more efficient, less expensive and less prone to systemic risks. Therefore, if proven, such behaviour of the above named institutions could, according to the Commission, constitute a serious breach of competition law and be subject to sanctions.

256. In 2013, the Commission has also taken a close look at the implementation of the commitment decisions it adopted in previous years in the financial data markets. As part of a reinforced policy of compliance monitoring, the Commission is monitoring the implementation of the commitments Standard and Poor's offered in 2011 under which it supplies the International Securities Identification Numbers (US ISINs) unbundled from additional data. Equally, the Commission started to monitor the compliance by Thomson Reuters with the commitments adopted by the Commission in 2012 to licence usage rights of the Reuters Instruments Codes (RICs) to its customers for the purpose of retrieving data provided by other competing financial data providers.

257. The Commission also took steps in 2013 to acquire more in-depth knowledge of the markets where it granted certain exemptions from the application of general competition rules, such as risk sharing by insurers. The work preceding leading up to the most recent renewal of the Insurance Block Exemption Regulation (EU) No. 267/2010<sup>182</sup> as well as the conclusions of the Business Insurance Sector inquiry published in 2007<sup>183</sup> showed the need for the Commission to both collect empirical information on the functioning of the insurance markets and to carry out a continuous monitoring of the BER application. For that purpose, in February the Commission published a study on co(re)insurance pools and on ad-hoc

<sup>179</sup> See Memo/13/431 of 14 May 2013, available at [http://europa.eu/rapid/press-release\\_MEMO-13-431\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-13-431_en.htm?locale=en)

<sup>180</sup> See Memo/13/553 of 13 June 2013, available at [http://europa.eu/rapid/press-release\\_MEMO-13-553\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-553_en.htm)

<sup>181</sup> See IP/13/60 of 1 July 2013, available at [http://europa.eu/rapid/press-release\\_IP-13-630\\_en.htm](http://europa.eu/rapid/press-release_IP-13-630_en.htm)

<sup>182</sup> See IP/12/777 of 12 July 2012, available at [http://europa.eu/rapid/press-release\\_IP-12-777\\_en.htm](http://europa.eu/rapid/press-release_IP-12-777_en.htm)

<sup>183</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance (Final Report), Brussels, 25 September 2007, COM(2007) 556 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0556:FIN:EN:PDF>

co(re)insurance agreements prepared by Ernst & Young.<sup>184</sup> That study presents an overview of the functioning of subscription markets across the European Union, as part of the preparation for the review of the Insurance Block Exemption Regulation (EU) No. 267/2010, which will expire on 31 March 2017. The results of the study were presented to and discussed with market participants and stakeholders in a workshop organised by the Commission in March 2013.

**Box 13. Restoring confidence in the financial sector – elimination of the financial derivatives cartels**

On 4 December, the Commission fined 8 banks a total of EUR 1,7 billion for participating in cartels in markets for financial derivatives covering the EEA. Four of them participated in a cartel relating to interest rate derivatives denominated in the euro currency. Six of them participated in one or more bilateral cartels relating to interest rate derivatives denominated in Japanese yen. These collusions are prohibited by Article 101 TFEU. As both decisions were adopted under the settlement procedure, fines were reduced by 10%.

The Euro interest rate derivatives (EIRD) cartel operated between September 2005 and May 2008. The settling parties are Barclays, Deutsche Bank, RBS and Société Générale. The cartel aimed at distorting the normal course of pricing components for those derivatives. Traders of different banks discussed their bank's submissions for the calculation of the EURIBOR as well as their trading and pricing strategies.

The investigation started with unannounced inspections in October 2011 while the opening of proceedings took place in March 2013. Barclays was exempted from the fine that otherwise would have been imposed on it as it benefited from immunity for revealing the cartel. Deutsche Bank, RBS and Société Générale received a reduction of fines for their co-operation.

Proceedings were also opened against Crédit Agricole, HSBC and JPMorgan and the investigation in respect of those three companies will continue under the standard cartel procedure.

In the Yen interest rate derivatives (YIRD) sector, the Commission uncovered 7 distinct bilateral infringements lasting between 1 and 10 months in the period from 2007 to 2010. The collusion included discussions between traders of the participating banks on certain JPY LIBOR submissions. The traders involved also exchanged, on occasions, commercially sensitive information relating either to trading positions or to future JPY LIBOR submissions (once also relating to certain future submissions for the Euroyen TIBOR – Tokyo interbank offered rate). The banks involved in one or more of the infringements are UBS, RBS, Deutsche Bank, Citigroup and JPMorgan. The broker RP Martin facilitated one of the infringements by using its contacts with a number of JPY LIBOR panel banks that did not participate in the infringement, with the aim of influencing their JPY LIBOR submissions.

The Commission opened proceedings in February 2013. UBS received full immunity for revealing the infringements. Citigroup also benefited from full immunity for its participation in one bilateral infringement. For their co-operation, the Commission granted fine reductions to Citigroup, Deutsche Bank, RBS and RP Martin.

In the context of the same investigation, the Commission has also opened proceedings against the cash broker ICAP. This investigation continues under the standard cartel procedure.

*3.2.3 Merger investigations in the financial sector*

258. In the area of merger control the Commission continued to ensure that concentrations in the financial services sector do not lead to market distortions. The Commission looked for example into the acquisition of NYSE Euronext by the InterContinental Exchange (both operating exchanges providing trading and clearing services, particularly in the field of derivatives) and found that the transaction would not raise competition concerns as the two parties are not direct competitors in the markets concerned and would continue to face competition from a number of other competitors.

<sup>184</sup> Ernst & Young, "Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market" (February 2013), available at [http://ec.europa.eu/competition/sectors/financial\\_services/insurance.html](http://ec.europa.eu/competition/sectors/financial_services/insurance.html)

#### Box 14. The same acquisition target, a different outcome

The Commission investigated two proposed mergers involving NYSE Euronext in 2012 and 2013. The proposed merger between Deutsche Börse and NYSE Euronext (DB/NYSE) was prohibited in February 2012 while the acquisition of NYSE Euronext by InterContinental Exchange (ICE/NYSE) was cleared in June 2013.

In the 2012 case the merger would have created a monopoly, whereas in the 2013 case the merged entity would continue to face a number of other competitors. The DB/NYSE decision set a precedent for the analysis of the markets concerned. The ICE/NYSE Euronext deal was assessed in light of this precedent. However, every transaction is analysed on its own merits and the factual differences between the two cases explain the different outcomes.

In both cases, the Commission's assessment focused on the impact that each deal would have on the trading and clearing of derivatives. The core derivative business of both Deutsche Börse and NYSE Euronext – the companies involved in the 2012 transaction – were European financial derivatives. The Commission's investigation showed that each exerted a strong competitive constraint on the other. Hence, the merger would have led to a near-monopoly in European financial derivatives worldwide which could not be remedied by the commitments submitted by the parties. Therefore, the Commission had no alternative than to block it.

In contrast, the contracts offered by ICE and NYSE Euronext meet different trading needs. ICE's core derivatives businesses are in energy. Therefore, the ICE/NYSE transaction did not lead to a significant impediment of effective competition and it was authorised.

Investing in derivative products is an important risk management tool for companies. Competitive pricing for derivative products helps keep the costs of companies down and contributes to their competitiveness.

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

259. The special EU State aid crisis rules, first adopted in 2008 and 2009 and amended in 2010 and 2011 were materially revamped in August 2013.<sup>185</sup> Those rules are also largely in line with the Commission's proposal for a directive on Banking Recovery and Resolution<sup>186</sup>. They also allow State aid control to continue to ensure a consistent policy response to the financial crisis throughout the EU and played an important role in limiting distortions of competition in the internal market.

260. Over the past five years, the Commission has analysed the restructuring of 68 banks – equivalent to around one quarter of Europe's banking sector in terms of assets. Of those banks, 23 were resolved. Today, 27 cases are still pending.

261. Between 1 October 2008 and 1 October 2013 the Commission took more than 400 decisions authorising State aid measures to the financial sector. However, only part of this aid was actually used. In particular, only around one-third of the guarantees approved by the Commission have been provided by Member States eventually.

<sup>185</sup> Communication from the Commission of 30 July 2013 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 ("Banking Communication", OJ C 216, P. 1-15, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:216:0001:01:EN:HTML>).

<sup>186</sup> Commission Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, Brussels, COM(2012) 280/3, available at [http://ec.europa.eu/internal\\_market/bank/docs/crisis-management/2012\\_eu\\_framework/COM\\_2012\\_280\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/crisis-management/2012_eu_framework/COM_2012_280_en.pdf)

262. In the period 2008-2012, the overall volume of aid used for capital support (recapitalisation and asset relief measures) amounted to EUR 591.9 billion (4.6 % of EU 2012 GDP). The guarantees and other form of liquidity supports reached its peak in 2009 with an outstanding amount of EUR 906 billion (7.7 % of EU 2012 GDP). The crisis intensity has gradually weakened in many EU countries since then, and the outstanding amount of liquidity support has dropped to EUR 534.5 billion (4.14 % of EU 2012 GDP) in 2012.

263. The bulk of the support provided by Member States to their respective banking systems was precisely in the form of guarantee measures. In 2012, EUR 492 billion of State guarantees were still outstanding compared to the peak of EUR 835.8 billion (7.1 % of EU 2012 GDP). Less than 0.2% – that is, EUR 2 billion – of the total guarantees provided by the Member States has actually been called to date.

264. In addition to guarantees on liabilities, some Member States have been providing a direct short term liquidity support to banks and other troubled financial institutions. The outstanding liquidity measures reached their peak of EUR 70.1 billion (0.6 % of EU 2012 GDP) in 2009. The EU 27 outstanding amount in 2012 dropped down to EUR 42.2 billion (0.33 % of EU 2012 GDP).

265. As regards recapitalisation measures, over the same period Member States recapitalised their respective banks for EUR 413.2 billion (or 3.2% of EU GDP in 2012). The four countries that most supported their banks with capital measures during these years were the UK (EUR 82 billion), Germany (EUR 64 billion), Ireland (EUR 63 billion), and Spain (EUR 60 billion). The top receiving banks were RBS (EUR 46 billion), Anglo Irish Bank (EUR 32 billion), and Bankia (EUR 22 billion).

266. For the period 2008-2012 Member States provided asset relief measures for a total of EUR 178.7 billion (1.4 % of EU 2012 GDP).

267. However, it is important to point out that State aid rules ensure that Member States are remunerated for their aid. For the massive guarantees provided during the past four years, Member States have received EUR 33 billion in guarantee fees (against EUR 2 billion of guarantees invoked). As of end 2012, Member States have received a total of EUR 125 billion in revenue in exchange for their support to the banks.

**Box 15. The new rules introduce three main changes:**

- First, they establish the principle that before resorting to taxpayers' money, banks should bear the cost of their restructuring by going to the market, using internal resources, and asking for the contribution of shareholders, hybrids holders, and junior debt creditors. Moreover, junior creditors will be treated in the same way across the EU. Apart from strengthening the level playing field, it sends a clear message that depositors are protected. The new rules make sure that banks from stronger EU countries do not benefit from an implicit guarantee and thus enjoy cheaper funding costs.
- Second, no State aid in the form of recapitalisation or impaired-asset relief will in principle be approved before the burden sharing takes place and the restructuring plan is approved by the Commission. In the past, banks were rescued quickly, but the restructuring and stabilisation process often took a long time. Under the new system, the Commission will in principle adopt final restructuring decisions before any irreversible public funds are disbursed.
- Third, a cap on executive remuneration for all aided banks aims at setting the right incentives for the management to implement the agreed restructuring plans and have their organisations refund the money received from the public coffers as soon as possible.

268. In 2013, the Commission adopted a considerable number of decisions on individual banks. For example, in the case of *Banca Monte dei Paschi di Siena* ("MPS")<sup>187</sup>, the Italian government provided EUR 2 billion to cover a capital shortfall coming from the December 2011 EBA stress test. After Italy ensured that the bank's business model is less risky the Commission approved MPS' restructuring plan on 27 November.

269. In the case of *Hypo Alpe Adria Group* (HGAA)<sup>188</sup> the Commission approved in August a plan to sell the operative parts of the bank in Austria and South-Eastern Europe by mid-2015, at the latest. The bank's non-viable remainder is put into an orderly wind-down process. Until the sales process is complete, Austria commits to a number of restrictions for new business. Restrictions include risk control, thus ensuring that the marketability of the subsidiaries is enhanced and that competition distortions are kept to a minimum.

270. The Commission also monitored the implementation of a large number of restructuring decision. It demonstrated its commitment to that task in a number of amendment decisions. For example, in case of *German Landesbank HSH*<sup>189</sup>, the Commission reopened an approved restructuring case from spring 2012 after the owners of the bank, two German Länder had granted an additional State guarantee to the bank. The bank has now to prove afresh that it can restore its viability.

### 3.2.5 *The specific situation of Programme Countries*

271. As part of the Troika, the Commission continued in 2013 to collaborate with the IMF and the ECB on the financial sector programmes in the Programme Countries. The Commission aims to ensure that the massive public support provided to the banks in the difficult macro-economic environment does not result in undue distortions of competition.

272. The State recapitalisation of the Greek banking sector was completed in summer 2013. Three of the pillar banks (Piraeus Bank, Alpha Bank and National Bank of Greece - NBG) were successful in raising at least 10% of the required capital increase by private means. Eurobank was fully recapitalised by the Hellenic Financial Stability Fund (HFSF). Moreover, the consolidation of the Greek banking sector, which started in 2012, continued in 2013 and has almost been finalised. Two smaller banks, Probank and First Business Bank (FBB) were resolved and sold to NBG. Separately, Eurobank acquired the bridge banks New Hellenic Postbank and New Proton Bank. Following those developments, in the second half of 2013 the Commission services engaged with the Greek authorities and the banks on the discussions on their restructuring plans, which aim at ensuring that the banks improve their efficiency and focus their resources on their Greek banking operations, in line with State aid rules.

273. In Ireland, the Commission approved amendments to Bank of Ireland's second restructuring plan and continues to monitor the implementation of its commitments. The analysis of the restructuring plan of Allied Irish Banks progressed, and an updated restructuring plan was presented by permanent tsb bank in the summer. The plans for both banks were under assessment also taking into account the Asset Quality Review carried out by the Central Bank of Ireland towards the end of the year. The Irish credit union sector still has to undergo restructuring and consolidation to ensure the viability of that fragmented sector.

274. In 2011 the EU and the IMF agreed to a EUR 78 billion support package for Portugal. In order to strengthen confidence in the financial sector, the programme requires banks to achieve high levels of

<sup>187</sup> Case SA.36175 *MPS – Restructuring*, decision of 27 November 2013

<sup>188</sup> Case SA.32554 *Restructuring aid for Hypo Group Alpe Adria* of 3 September 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_32554](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32554)

<sup>189</sup> Case SA.29338 *€ - \$ - Increase of the ceiling amount of a second-loss guarantee for HSH Nordbank AG*, decision of 21 June 2013

capital which for the most part was completed in 2012. In 2013, the restructuring plans of Caixa Geral de Depósitos<sup>190</sup>, Millennium BCP<sup>191</sup>, Banco Português de Investimento<sup>192</sup> were approved by the Commission. Discussions continue with a fourth bank, Banco Internacional do Funchal.

275. In Spain, 2013 was the first full year of the implementation of the various restructuring plans approved for banks that received State aid in the context of the eighteen-month financial assistance programme which was granted in July 2012. Individual monitoring trustees reported regularly on the implementation of those plans. During the first half of 2013, the so-called subordinated liability exercises (“SLE”), for the banks that received State aid were completed, generating almost EUR 13 billion of capital in these banks and reducing the need for additional public funds. Finally, the restructuring of aided banks under the control of the State made significant progress with the sale of NCG Banco in December.

276. As regard Cyprus, the two largest domestic banks, Bank of Cyprus and LAIKI (Cyprus Popular Bank), have been resolved and the latter merged into the former. Both subordinated debt bond holders and uninsured depositors were bailed-in to recapitalise the banks, such that no State recapitalisation aid was necessary. Out of the EUR 10 bn programme assistance, EUR 1.5 billion was earmarked for the Co-operative Credit Institutions. The restructuring of the group was negotiated throughout 2013.

#### **4. Basic industries and Manufacturing**

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

277. The EU and the Member States shall, in accordance with Article 173 TFEU, ensure that the conditions necessary for the competitiveness of the Union's industry exist. For that purpose, in accordance with a system of open and competitive markets, their actions shall be aimed at, among other things, speeding up the adjustment of industry to structural changes as well as fostering better exploitation of the industrial potential of policies of innovation, research and technological development. Competition policy continues to play a key role in that context.

278. For decades, the share of industrial production in EU GDP has been declining but its importance far outweighs its share in GDP. Industry is the leading contributor to productivity and to research and innovation, where industry's share is four times higher than its GDP share. Industry also accounts for 80% of EU exports that is the main driver of the recovery that has started in 2013. The Commission's 2013 Competitiveness Report<sup>193</sup> found that the share of manufacturing has reached a critical threshold, below which the sustainability of the European economic and social model might be at risk. Industrial policy measures have to build on strengths and address weaknesses to support the reinforcement of the competitiveness of EU manufacturing. Competition policy underpins and reinforces the effects of industrial policy measures.

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<sup>190</sup> Case SA.35062 *Restructuring of CGD*, decision of 24 July 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35062](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35062)

<sup>191</sup> Case SA.34724 *Restructuring of Banco Comercial Português (BCP) Group*, decision of 30 August 2013, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result)

<sup>192</sup> Case SA.35238 *BPI Restructuring*, decision of 24 July 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35238](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35238)

<sup>193</sup> See Commission Staff Working Document: 'European Competitiveness Report 2013 – Towards a knowledge-driven reindustrialisation', SWD(2013)347 final, available at [http://ec.europa.eu/enterprise/policies/industrial-competitiveness/competitiveness-analysis/european-competitiveness-report/files/eu-2013-eur-comp\\_rep\\_en.pdf](http://ec.europa.eu/enterprise/policies/industrial-competitiveness/competitiveness-analysis/european-competitiveness-report/files/eu-2013-eur-comp_rep_en.pdf)

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

279. Competition policy continued to be applied in 2013 in line with industrial policy priorities. In particular, enforcement action in antitrust and cartels in basic industries helps to keep the prices of essential input material affordable.

### 4.2.1 *Antitrust investigations in basic industries*

280. In the markets for aluminium smelting technology and related equipment the Commission concluded its investigation in the Rio Tinto Alcan case. The Commission was concerned that Rio Tinto Alcan's practice of contractually tying the licensing of its leading smelting technology to the purchase of handling equipment from one of its subsidiaries could infringe EU competition rules and lead to higher prices, hamper innovation and foreclose competitors. In order to address these concerns, Rio Tinto Alcan committed to enable future licensees of its technology to purchase specialty cranes from any recommended supplier. The latter will be selected following an objective and non-discriminatory process, with Rio Tinto Alcan providing competing suppliers with the necessary technical specifications to ensure that their cranes are capable of operating in smelters using Rio Tinto Alcan's technologies. In December 2012, the Commission adopted a decision rendering legally binding Rio Tinto Alcan's commitments.<sup>194</sup> These commitments will open up the market for equipment used in aluminium smelters, increasing customers' choice.

281. Cartel enforcement investigations into car parts provide a good example of the strength of the immunity/leniency system. The system destabilises cartels through the potential domino effect of individual cases. After an investigation begins, companies that recognise they may have been involved in cartel activity frequently conduct internal audits. Were such audits to uncover other cartels, this may lead to further immunity applications often involving cartels that are otherwise stable. For instance following the wire harness inspection in February 2010, the Commission confirmed inspections in the occupant safety systems, bearings, lighting and thermal systems in 2011 and 2012.

#### **Box 16. The first domino in the car parts sector**

In July, the Commission adopted a decision in respect of automotive wire harnesses. The decision fined the car parts suppliers Sumitomo, Yazaki, Furukawa, S-Y Systems Technologies (SYS) and Leoni a total of EUR 141 791 000 for taking part in one or more of five cartels for the supply of wire harnesses to Toyota, Honda, Nissan and Renault. Wire harnesses represent an assembly of cables transmitting signals or electric power linking computers to various components built in a car. They are often described as the 'central nervous system' of the car. The cartels covered the whole European Economic Area (EEA).

The companies co-ordinated the prices and allocation of supplies of wire harnesses to the respective car manufacturers. The cartel contacts took place both in Japan and in the EEA:

The coming months and years are likely to lead to further decisions, bringing to an end an extensive network of anti-competitive practices in the car parts sector.

### 4.2.2 *Merger investigations in basic industries*

282. Through the merger control regulation, the Commission continued to safeguard consumers' interests in this vital sector for productivity, research, and innovation by making its approval of a number

<sup>194</sup> Case AT.39230 *Rio Tinto Alcan*, decision of 20 December 2013

of proposed concentrations subject to commitments. In case GE/Avio<sup>195</sup>, for example, the Commission's clearance decision was conditional upon the implementation of a series of measures designed to protect the important Eurojet military programme. In two cases in the paper industry, Munksjö/Ahlstrom<sup>196</sup> and Kinnevik/Billerud/Korsnäs<sup>197</sup> the divestiture of production lines was required to address the Commission's initial concerns. Divestitures were also necessary in two other cases that brought together two important players in their respective sectors, namely case Crane Co/MEI Group (unattended payments systems)<sup>198</sup> and Norsk Hydro/Orkla/JV (aluminium extrusions)<sup>199</sup>.

283. In the oil refinery and specialty oil products sector the Commission unconditionally cleared the acquisition of Shell's Harburg refinery by the naphthenic specialty oils producer, Nynas.<sup>200</sup> Although Nynas will remain the only naphthenic producer in the EEA, the acquisition was the only way to save the Harburg production plant from closure. Therefore, the transaction enables a higher production capacity and lower prices for naphthenic specialty products in Europe to be maintained.

#### 4.2.3 State aid investigations in basic industries

284. In the manufacturing sector, the most notable State aid case in 2013 concerned the rescue and restructuring of the PSA Peugeot Citroën group<sup>201</sup>. Following an in-depth investigation, the Commission concluded that restructuring aid of EUR 571.9 million granted by France to the PSA group is compatible with the internal market. The aid took form of a State guarantee covering bond issues by the Banque PSA Finance until 31 December 2016 up to a maximum of EUR 7 billion for the principal (a gross subsidy-equivalent of EUR 486 million) on the one hand, and a repayable advance of EUR 85.9 million for the implementation of the '50CO2Cars' R&D project on the other.

285. The updating of the group's restructuring plan based on recent trends on the vehicle market in Europe eased the Commission's initial concerns regarding the group's return to viability. Should the group's results be considerably below those envisaged by the plan, the group has undertaken to take additional corrective action so as not to exceed a certain level of net debt during the restructuring period. The group's return to viability will also help the situation of the Bank, whose present difficulties are due to its organic links with the rest of the group. The Commission also considered that the '50CO2Cars' R&D project to develop a 'mild-hybrid' diesel engine, which is part of the restructuring plan, will make a positive contribution to the viability of the group. In addition, France gave a number of commitments in relation to the price of the guarantee and the margin for loans granted by Banque PSA Finance to minimise the competition distortions created by the aid.

<sup>195</sup> Case M.6844 *GE / AVIO*, decision of 1 July 2013, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result)

<sup>196</sup> Case M.6576 *Munksjö / Ahlstrom*, decision of 4 May 2013, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result)

<sup>197</sup> Case M.6682 *Kinnevik/Billerud/Korsnäs*, decision of 27 November 2012, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result)

<sup>198</sup> Case M.6857 *Crane Co/MEI Group*, decision of 19 July 2013, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result)

<sup>199</sup> Case M.6756 *Norsk Hydro/Orkla/JV*, decision of 13 May 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6756](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6756)

<sup>200</sup> Case M.6360 *Nynas/Shell/Harburg Refinery*, decision of 2 September 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6360](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6360)

<sup>201</sup> Case SA.35611 *Aide à la restructuration du groupe PSA*, decision of 2 May 2013, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result)

## 5. The agri-food industry

### 5.1 Overview of key challenges in the sector

#### 5.1.1 New landscape for competition policy following CAP reform

286. The recently adopted reform of the Common Agricultural Policy significantly modified the framework for the application of competition rules in this sector, as new exemptions from the application of competition rules have been introduced. Article 42 TFEU provides that the competition rules apply to the production and trade of agricultural products only to the extent determined by the Council and (with the Lisbon Treaty) the Parliament, "account being taken of the objectives" set out in Article 39 TFEU.

287. Throughout the reform process, the EU competition authorities have strongly advocated for the enforcement of competition rules as this helps to ensure a productive, strong and effective agricultural sector. In that respect, the Heads of the European Competition Authorities adopted a resolution on 21 December 2012<sup>202</sup>. Ultimately, both legislators agreed with the Commission and the National Competition Authorities that the newly introduced exemptions from the application of competition rules should be accompanied by requirements to ensure not only the consolidation of farmers' position in the value chain but also the restructuring of the sector and increased efficiencies in farmers' activities.

288. The food supply chain connects three important sectors of the European economy: (1) agricultural production; (2) food processing and (3) distribution (wholesale and retail). Unlike the last two levels of the supply chain, the agricultural production level is highly atomised and dispersed: farmers are organised in small structures and do not achieve economies of scale in procurement, storage or selling while they are (often) facing large buyers. The question of the farmer's position in the value chain and particularly their lack of bargaining power vis-à-vis their buyers was at the heart of the recent reform of the Common Agricultural Policy ("CAP").

#### **Box 17. Result of the CAP reform:**

In the framework of the CAP reform, the European Parliament and the Council in their role as co-legislators decided to introduce an exemption from the application of competition rules in the new Common Market Organisation Regulation ("CMO"). The exemption benefits producers in the sectors for olive oil, beef and certain arable crops who are members of Producer Organisations (POs) and would like to engage in joint selling (including joint price negotiation) for part or all of their production through such POs.

This exemption is however subject to certain conditions. The volume of production covered by such negotiations should not exceed certain thresholds so as to avoid creating excessive market power. Furthermore, benefiting farmers also need to engage in joint activities other than joint-selling within the POs concerned so that activities of the POs overall contribute to the achievement of the CAP objectives.

This second condition is designed to encourage farmers to take concrete steps to increase their economies of scale and scope. They can do so by, for instance, pooling together at the appropriate scales their input procurement, investments in storage facilities, or distribution systems. This would enable them to improve their bargaining power and at the same time reduce their overall production and supply costs, thus enhancing their competitiveness.

<sup>202</sup> Resolution of the Meeting of the Heads of the European Competition Authorities of 21 December 2012, available at [http://ec.europa.eu/competition/sectors/agriculture/documents\\_en.html](http://ec.europa.eu/competition/sectors/agriculture/documents_en.html)

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

289. Retail distribution is characterised by an increased concentration of retailers, the existence of buying alliances and the rising success of private label products. These phenomena raise concerns about the unbalanced bargaining power of retailers in their commercial relationships with their suppliers. They also lead to a perceived existence of unfair trading practices within the framework of such relations. The European Parliament has called for the Commission to investigate the functioning of competition in the supply chain and in particular at the retail level of the chain<sup>203</sup>. In addition, members of the High Level Forum<sup>204</sup> and some operators in the food chain complained that unfair trading practices have negatively affected choice and innovation in the agri-food industry. National Competition Authorities have also found in their monitoring reports that "unfair commercial practices" might have a potential negative impact on choice and innovation in the long run.<sup>205</sup> On the basis of a Green Paper and a public consultation on unfair trading practices in the B2B food and non-food supply chain, the Commission is assessing whether action at EU level is required in this context. The analysis is now in its final stages. The Commission also launched a study in December 2012 managed by the Food Task Force<sup>206</sup>, to assess the economic impact of modern retail supply chains on choice and innovation in the EU food sector ("retail study")<sup>207</sup>.

290. The study will measure how choice and innovation in food products has evolved and identify the drivers of such evolution. In particular, it will aim to identify the impact of concentration in retail and manufacturing on choice and innovation in the food supply chain. That study will thus be able to answer the request of the European Parliament to analyse competition in the supply chain and will contribute economic evidence on investment in the chain to the discussion on unfair trading practices within the food supply chain. The final report of the study is expected by early 2014.

### 5.2.1 *Antitrust and cartel investigations in the sector*

291. In November, the Commission fined four European North Sea shrimps traders a total of EUR 28,7 million for operating a cartel in breach of EU antitrust rules<sup>208</sup>. The companies included Heiploeg, Klaas Puul, Kok Seafood (all of the Netherlands) and Stührk (of Germany). Between June 2000 and January 2009 Heiploeg and Klaas Puul agreed to fix prices and share sales volumes of North Sea shrimps in Belgium, France, Germany and the Netherlands. Kok Seafood participated at least from February 2005 and Stührk was involved in price fixing in Germany in the period from March 2003 to November 2007. Klaas Puul received full immunity from fines under the Commission's 2006 Leniency Notice, as it was the first to provide information and evidence about the cartel which enabled the Commission to find an infringement.

<sup>203</sup> European Parliament resolution of 19 January 2012 on the imbalances in the food supply chain, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0012&language=EN&ring=B7-2012-0013>

<sup>204</sup> The High Level Forum for a Better Functioning Food Supply Chain, was set by the Commission to implement a roadmap of initiatives to improve the competitiveness of the agro-food industry in co-operation with the stakeholders. See: Commission Decision 2010/C 210/03 of 30 July 2010, amended by Commission Decision 2012/C 396/06 of 19 December 2012

<sup>205</sup> ECN Activities in the Food Sector" – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, available at [http://ec.europa.eu/competition/ecn/food\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/food_report_en.pdf)

<sup>206</sup> On 1 January 2012 DG COMP set up a Food Task Force to better focus on the developments in the agri-food sector

<sup>207</sup> Study on "The economic impact of modern retail on choice and innovation in the EU food sector", COMP/2012/015, OJ/S S244 of 19 December 2012

<sup>208</sup> Case Comp 39633, Shrimps, decision of 27 November 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39633](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39633)

292. The purpose of the cartel was to freeze the market by stabilising the suppliers' market shares in order to facilitate price increases and stimulate profitability. The cartel affected the EU market and sales in Belgium, Germany, France and the Netherlands in particular.

293. The cartel took the form of a range of informal bilateral contacts primarily between Heiploeg and Klaas Puul but also involving Stührk and Kok Seafood. The discussions usually covered a wide range of aspects of their business, including their purchase prices from fishermen, conduct towards other traders on the market, market sharing, and prices charged to specific important customers that often set the benchmark price for other customers.

### 5.2.2 Merger investigations in the sector

294. Merger control in the agri-food business has an important role in protecting the choice and the quality of the food that European consumers enjoy today. In 2013, the Commission examined a number of merger transactions concerning the production of agricultural or fisheries products.

295. Whilst the Commission found that some transactions involving co-operatives in the dairy sector did not raise concerns (e.g. *Arla Foods/Milch Union Hocheifel*<sup>209</sup>) in others (e.g. *Arla Foods/Milk Link*<sup>210</sup> or *Friesland Campina/ Zijerveld&Veldhuyzen and Den Hollander*<sup>211</sup>) it found that the combination of certain activities of the merging parties would significantly reduce competition and therefore approved the transactions subject to modifications. In *Arla Foods/Milk Link* the parties committed to divest Milk Link's long-life milk and dairy drinks business, including the transfer of brands and the production facilities while in *Friesland Campina/ Zijerveld&Veldhuyzen and Den Hollander* the parties committed to modify semi-hard goat cheese production and supply arrangements and to make goat milk available to competitors.

296. Those cases demonstrate that consumers have preferences for dairy products produced from domestic milk. That market characteristic substantially limits the scope for competition by imports for some dairy products (e.g. long-life milk in the UK, semi-hard goat cheese in the Netherlands). These cases also show that the Commission allows the growth of farmers' co-operatives including across borders but carefully ensures that they do not significantly reduce competition where there is already concentration.

297. The Commission also approved three other cases in the food and drink sector subject to commitments. In *Marine Harvest/Morpol*<sup>212</sup>, the parties committed to divest a significant proportion of their salmon farming activities in Scotland. In *Refresco Group/Pride Foods*<sup>213</sup>, which concerned the manufacturing and bottling of non-carbonated soft drinks, the parties committed to sell a bottling plant in Germany. In *McCain Foods Group/Lutosa Business*<sup>214</sup> the parties committed to divest the retail business operated under the "Lutosa" brand in the EEA to a suitable purchaser.

<sup>209</sup> Case M.6627 *Arla Foods/Milch Union Hocheifel*, decision of 28 September 2012, IP/12/1039 available at [http://europa.eu/rapid/press-release\\_IP-12-1039\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1039_en.htm)

<sup>210</sup> Case M.6611 *Arla Foods/Milk Link*, decision of 27 September 2012, IP/12/1038 available at [http://europa.eu/rapid/press-release\\_IP-12-1038\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1038_en.htm)

<sup>211</sup> Case M.6722 *Friesland Campina/ Zijerveld&Veldhuyzen and Den Hollander*, decision of 12 April 2013, see IP/13/319 available at [http://europa.eu/rapid/press-release\\_IP-13-319\\_en.htm](http://europa.eu/rapid/press-release_IP-13-319_en.htm)

<sup>212</sup> Case M.6850 *Marine Harvest/Morpol*, decision of 30 September 2013, see IP/13/896 available at [http://europa.eu/rapid/press-release\\_IP-13-896\\_en.htm](http://europa.eu/rapid/press-release_IP-13-896_en.htm)

<sup>213</sup> Case M.6924 *Refresco Group/Pride Foods*, decision of 4 October 2013, see IP/13/913 available at [http://europa.eu/rapid/press-release\\_IP-13-913\\_en.htm](http://europa.eu/rapid/press-release_IP-13-913_en.htm)

<sup>214</sup> Case M.6813 *McCain Foods Group/Lutosa Business*, decision of 28 May 2013, see IP/13/470 available at [http://europa.eu/rapid/press-release\\_IP-13-470\\_en.htm](http://europa.eu/rapid/press-release_IP-13-470_en.htm)

## 6. The Pharmaceutical and health services sector

### 6.1 Overview of key challenges in the sector

298. The pharmaceutical and health care sectors are both fragmented by national regulations regarding authorisation, pricing and reimbursement status of the goods or services concerned. That fragmentation of the Single Market can give rise to artificial barriers to entry. EU competition policy has a key role to play in contributing to competitive outcomes, cost-containment and innovation in that important area.

299. The pharmaceutical sector is highly regulated and R&D driven. On the supply side, originator companies aim to bring innovative products to the market. The patent system provides the legislative framework allowing the companies to reap the benefits of their successful R&D activities. During patent protection, competition mainly takes place on innovation between originator companies. Upon the expiry of the patent, generic companies typically enter the market with much lower price bio-equivalent versions of the originator products. Generic entry on patent expiry entails savings for public budgets. The threat of generic entry also incentivises originator companies to pursue their R&D efforts to develop new and innovative proprietary medicines. Thus, at the point of loss of patent protection, competition on price is added to competition on innovation between originator and generic companies or between generic companies.

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

300. The Commission's Sector inquiry Report<sup>215</sup> published in 2009 highlighted a series of concerns in the European pharmaceutical sector. As a follow-up, the Commission's enforcement focused on agreements concluded between originator and generic companies, in particular pay-for-delay deals between competitors. Those agreements typically feature payments made by the originator to the generic company preparing its entry on the market in competition with the former. Instead of competing, however, the companies agree to delay generic entry to the detriment of consumers. In 2013, the Commission's enforcement action featured two pay-for-delay cases, Lundbeck and Fentanyl. In the Lundbeck case<sup>216</sup> a prohibition decision was adopted on 19 June. In the Fentanyl case<sup>217</sup>, further to a Statement of Objections in January, a prohibition decision was adopted on 10 December.

#### Box 18. Antitrust enforcement actions in 2013:

The Lundbeck case concerns agreements concluded in 2002 and 2003 between the Danish pharmaceutical company Lundbeck and a number of generic companies (Alpharma (now part of Pfizer), Merck KGaA/Generics UK (Generics UK is now part of Mylan), Arrow (now part of Actavis), and Ranbaxy). These agreements were concluded at a time when the compound patent for citalopram, an antidepressant and Lundbeck's then best-selling medicine, had expired. Lundbeck held a number of related process patents which provided a more limited protection than a compound patent. Producers of cheaper, generic versions of citalopram therefore had the possibility of entering the market. Indeed, several generic producers were preparing to enter the market and one of them had actually started selling its generic product elsewhere in the EEA. Instead of pursuing their efforts to enter the market, the generic companies agreed not to do so, in return for substantial payments from Lundbeck. Lundbeck paid significant lump sums, purchased generics' stock for the sole purpose of destroying it, and offered guaranteed profits in a distribution agreement. In exchange, Lundbeck obtained limitations on the generics' entry also going beyond what it could have obtained through enforcement of its process patents. The commitment by Lundbeck to refrain from infringement

<sup>215</sup> For further information see Commission communication of 8 July 2009, available at <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/>

<sup>216</sup> Case AT.39226 *Lundbeck*, decision of 19 June 2013, see press release IP/13/563 of 19 June 2013 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39226](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39226)

<sup>217</sup> Case AT.39685 *Fentanyl*, decision of 10 December 2013, see press release of 10 December 2013 available at [http://europa.eu/rapid/press-release\\_IP-13-1233\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1233_en.htm)

proceedings against the generic producers when they enter the market with generic citalopram after the expiry of the agreements was also part of the agreement. The Commission imposed a fine of EUR 93,8 million on Lundbeck and fines totalling EUR 52,2 million on the generic companies for violation of Article 101 TFEU. Currently, the Lundbeck decision is under appeal before the General Court.

The Fentanyl case concerns an agreement between Janssen-Cilag, the Dutch subsidiary of Johnson & Johnson, and its generic competitor, Sandoz, the Dutch subsidiary of Novartis, which delayed the entry of cheaper generic fentanyl on the Dutch market. Fentanyl is a pain-killer one hundred times more potent than morphine. In 2005, Sandoz was on the verge of launching its generic version of the product in the Netherlands. However, the parties concluded a so-called "co-promotion agreement" according to which Sandoz received monthly payments from Johnson & Johnson for as long as there was no generic entry. The agreement lasted from July 2005 to December 2006 and delayed the entry of a cheaper generic medicine for seventeen months, keeping prices for fentanyl in the Netherlands artificially high. Moreover, Janssen-Cilag did not consider any other existing potential partners for the "co-promotion agreement" but just focused on its close competitor Sandoz. Sandoz engaged in very limited or no actual co-promotion activities. The Commission imposed fines of EUR 10.8 million on Johnson & Johnson and EUR 5.5 million on Novartis for violation of Article 101 TFEU.

301. The Office of Fair Trading in the United Kingdom issued a Statement of Objections in the Paroxetine pay-for-delay case in April 2013<sup>218</sup>.

#### 6.2.1 *Merger investigations in the sector*

302. In the health sector increasing attention is paid to research and health service budgets. The Commission remained vigilant to the possible effects that the continued consolidation in the sector may have on competition. In a case concerning kidney dialysis<sup>219</sup>, the Commission's approval was made conditional on the divestment of Baxter's global continuous renal replacement therapy business thereby ensuring the emergence of a credible new player on the market.

303. In the neighbouring life science sector the Commission authorised the acquisition of Life Technologies Corp. by rival Thermo Fisher Scientific Inc.<sup>220</sup>, both US-based companies active in life science markets. Their activities overlap in the supply of laboratory instruments and consumables. The clearance was made conditional on divestments of businesses producing and supplying (i) media and sera for cell culture, (ii) gene silencing products and (iii) polymer-based magnetic beads. In those areas, the merger, as initially notified, would have significantly reduced competition.

304. That case is an example of international co-operation between competition authorities functioning well. Given the worldwide scope of the parties' activities, the Commission co-operated closely with the competition authorities of a significant number of countries outside the EU during the investigation. It involved a mutual exchange of views and evidence with the Federal Trade Commission in the US and with the Australian Competition and Consumer Commission. The Commission also co-operated with the Ministry of Commerce of China, the Japan Fair Trade Commission, the Competition Bureau of Canada and the Commerce Commission of New Zealand.

<sup>218</sup> See press release of 19 April 2013, available at <http://www.offt.gov.uk/news-and-updates/press/2013/36-13#Uqiob6uQzQM>

<sup>219</sup> Case M.6851 *Baxter International/ Gambro*, decision of 22 July 2013, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m6851\\_20130722\\_20212\\_3384737\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6851_20130722_20212_3384737_EN.pdf)

<sup>220</sup> Case M.6944 *Thermo Fisher Scientific/Life Technologies*, decision of 26 November 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6944](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6944)

## **7. Transport and postal services**

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

#### **7.1.1 Industrial consolidation in transport and the competitiveness of European industry**

305. The transport sector makes an important contribution to the competitiveness of European industry. If competition in transport is weak and prices are needlessly high, the international competitiveness of all of European industry will suffer. Transport and storage account for no less than 10-15% of the cost of a finished product. The Commission therefore closely tracks developments in the sector and intervenes where necessary.

306. Transport services are very sensitive to overall economic developments. The improvement in business sentiment and the increase in consumer confidence observed in 2013 have contributed to a gradual increase in GDP growth rates in the second half of the year. Consequently, growth perspectives in the transport sector have improved as well, providing new opportunities for investment and industrial restructuring.

307. As a result of the economic crisis, the industrial structure of the transport sector has been weakened. Overcapacity in air and maritime transport, in particular, has increased the pressure on companies to find ways to cut costs and raise additional revenues. In 2013, this has been reflected in a number of merger notifications, agreements between companies requiring a further investigation by competition authorities and requests for State support. While the Commission recognises that a further consolidation of supply in the sector may be necessary, such consolidation should not result in higher prices for customers and be detrimental to the competitiveness of European industry.

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

#### **7.2.1 Potential anticompetitive effects resulting from increased concentration in the air transport sector**

308. The recent trends in the transformation of the air transport sector continued in 2013. The decrease in air traffic linked to the economic and financial crisis still has a strong effect on the position of airports and airlines alike. Many regional airports in Europe continue to make losses and only survive thanks to the subsidies they receive from local authorities. The large European hub airports, on the other hand, remain congested. The long-term outlook indicates that the air transport will continue to grow and that more and more airports will become congested, at least during peak hours. Airlines as well, were strongly hit by the crisis. As a result some of the smaller and less efficient airlines have gone out of business, been restructured or merged into larger entities. At the same time the strongest airlines consolidated their position as market leaders. Most of the remaining European airlines have decided to join one of the three big alliances - Star, SkyTeam and oneworld - as national restrictions on ownership and control prevent cross-border consolidation through airline mergers.

309. The main competition concerns relate to the concentration of supply on certain routes resulting from airline mergers within the EU and the possible anticompetitive impact of different forms of collaboration within alliances, which range from bilateral codeshare<sup>221</sup> agreements to full-fledged joint ventures.

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<sup>221</sup> Agreement between two or more airlines to list certain flights in a reservation system under each other's names

310. An increase in air fares is particularly likely if the merging parties are close competitors based at the same airport, such as Ryanair and Aer Lingus at Dublin airport or Aegean Airlines and Olympic Air at Athens airport. In February, the Commission therefore prohibited Ryanair's third attempt to take over Aer Lingus<sup>222</sup>. The acquisition would have combined the two leading airlines operating from Ireland. The Commission concluded that the merger would have harmed consumers by creating a monopoly or a dominant position on 46 routes where, currently, Aer Lingus and Ryanair compete vigorously against each other. The remedies proposed by Ryanair during the course of the investigation fell short of addressing the competition concerns raised by the Commission. Ryanair appealed the Commission's decision at the General Court.<sup>223</sup>

311. However, when in October the Commission had to rule a second time on the proposed Aegean/Olympic merger, it decided to unconditionally approve the proposed transaction.<sup>224</sup> The reason for that decision was that the Commission's in-depth investigation had shown that Olympic Air would have been forced to exit the market in the near future due to financial difficulties if not acquired by Aegean. Once Olympic went out of business, Aegean would become the only significant domestic service provider in Greece and would capture Olympic's current market shares. Therefore, with or without the merger, Olympic would have soon disappeared as a competitor to Aegean. The Commission therefore concluded that the merger caused no harm to competition that would not have occurred anyway.

312. The Commission was also called upon to rule on the merger of US Airways and American Airlines<sup>225</sup>. The transaction would lead in particular to a monopoly on the London-Philadelphia route, where US Airways and American Airlines through its membership in a metal neutral<sup>226</sup> joint venture with British Airways and Iberia (the "Transatlantic Joint Business") are the only carriers offering non-stop flights (the route is de facto operated by British Airways). The clearance decision of 5 August was conditional upon the release of one daily slot pair at London Heathrow and of other commitments in order to induce entry on the London-Philadelphia route.

313. As part of its antitrust enforcement, the Commission continued its work on the transatlantic airline alliances. In May, the Commission adopted a decision accepting commitments offered by the Star Alliance members that operate a revenue-sharing joint venture on transatlantic routes<sup>227</sup>. The joint venture members<sup>228</sup> addressed with those commitments the Commission's concern that the parties' co-operation might harm premium passengers on the Frankfurt-New York route in particular. The commitment package facilitates entry to that route by making landing and take-off slots available to new competitors. The parties also offered to enter into agreements allowing competitors to get better access to the parties' connecting traffic.

<sup>222</sup> Case M.6663 *Ryanair / Aer Lingus III*, decision of 27 February 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6663](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6663)

<sup>223</sup> Case T-260/13 *Ryanair Holdings v Commission*

<sup>224</sup> Case M.6796 *Aegean / Olympic II*, decision of 9 October 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6796](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6796)

<sup>225</sup> Case M.6607 *US Airways / American Airlines*, decision of 5 August 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6607](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6607)

<sup>226</sup> "Metal neutral" refers to joint ventures where it doesn't matter which airline's plane, or "metal" in industry lingo, a passenger flies on because each carrier will get the same amount of revenue, and spend just as much to provide service on that route

<sup>227</sup> Case 39595 *Continental/Untied/Lufthansa/Air Canada*, decision of 23 May 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39595](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39595)

<sup>228</sup> Air Canada, United and Lufthansa

7.2.2 *State aid enforcement in air transport*

314. The Commission is equally concerned that certain State aid measures in favour of airlines or airport operators affect negatively the competitiveness of other airlines and airport operators that do not benefit from such measures. For instance, some of those measures may artificially deviate traffic from efficient airports to inefficient subsidised airports located in their vicinity.

**Box 19. Clarifying conditions of "good aid"**

As in any sector, State aid measures in the air transport sector can only be acceptable when their positive effects for European citizens outweigh their negative effects on competition and the internal market. This can be the case under certain circumstances, for example for aid measures in favour of airport operators when they increase the mobility of European citizens, combat air traffic congestion at major European hubs or facilitate regional development. The revision of the State aid guidelines for airports and airlines, which was in public consultation in July-September 2013, includes provision concerning:

- State aid for investment in airport infrastructure is allowed if there is a genuine transport need and the public support is necessary to ensure the accessibility of a region. In order to ensure the right mix between public and private investment, the maximum permissible aid intensity is larger for smaller airports.
- Start-up aid to airlines to launch a new air route is permitted provided it remains limited in time.
- Operating aid to airports is allowed for a transitional period of 10 years under certain conditions, thereby giving airports the time required to adjust their business model.

In response to the public consultation the Commission received more than 140 reactions from Member States and stakeholders. The Commission analysed the responses and took them into account for the finalisation of the new guidelines – covering both airlines and the financing of airport infrastructure.. The new guidelines will help level the playing field for airports and airlines and be instrumental in combatting harmful State aid to airlines in the future. Amongst other things, the guidelines will clarify which arrangements between airports and airlines are acceptable and which arrangements are not.

315. In that context, the Commission opened an in-depth investigation<sup>229</sup> in July to verify whether Polish plans to fund the conversion of the former military airport Gdynia-Kosakowo (Poland) into a civil aviation airport are in line with EU State aid rules. A priori, it would appear difficult to justify major public investments in an airport that is located at only 25 kilometres from the existing uncongested Gdansk airport.

316. The Commission has also opened in-depth investigations into a number of arrangements between airports and airlines with a view to establishing whether in those cases, airlines have benefited from incompatible State aid. Subject to final investigation, incompatible aid might be recovered from the airlines concerned. The experience gained in these on-going investigations fed into the adoption process for the new State aid guidelines for airports and airlines.

317. Aid measures granted more directly to airlines in difficulty and in need of restructuring also remained in the focus of the Commission's attention. The Commission opened an in-depth inquiry into a number of public support measures in favour of Estonian Air in February,<sup>230</sup> which was later extended in

<sup>229</sup> Case SA.35388 *Setting up the Gdynia-Kosakowo Airport*, decision of 2 July 2013, see IP/13/637 of 2 July 2013 available at [http://europa.eu/rapid/press-release\\_IP-13-637\\_en.htm](http://europa.eu/rapid/press-release_IP-13-637_en.htm)

<sup>230</sup> Case SA.35956 *Rescue aid to Estonian Air*, decision of 20 February 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35956](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35956)

April to cover other additional measures.<sup>231</sup> Similarly, the Commission opened in-depth inquiries into aid granted to Cyprus Airways<sup>232</sup> and possible State support to SAS - Scandinavian Airlines.<sup>233</sup> In May, the Commission temporarily approved rescue aid for LOT Polish Airlines<sup>234</sup>. In the previous November, the Commission had concluded<sup>235</sup> that the sale of three of LOT's subsidiaries to State-owned entities did not involve State aid.

### 7.2.3 *Overcapacity in maritime transport*

318. The maritime freight transport sector suffers from of overcapacity, like other transport sectors. In January the Commission concluded an investigation into two co-operative schemes bringing together owners of small container vessels operating in the North Sea. The Commission was concerned with two aspects of those schemes: (i) the compensation offered to owners laying up their vessels during periods of overcapacity; and (ii) the exchange of recommendations on vessel charter rates. Following discussions with the Commission, the co-operatives agreed to abandon those two aspects and the investigation was closed<sup>236</sup>.

#### **Box 20. Maritime transport – back to the general competition rules**

Competition enforcement in maritime transport had been for a long time based on the Liner Conference Block Exemption. The block exemption was repealed in 2008 and the Commission adopted Maritime Antitrust Guidelines to facilitate the transition from a specific to the general competition regime. These Guidelines expired in September, following a Commission decision in February not to prolong them. Therefore, since September maritime transport falls under general competition rules.

In November, the Commission opened formal antitrust proceedings against 14 container liner shipping companies. The companies have made regular public announcements of intended price increases through press releases on their websites and in the specialised trade press. The companies usually make the announcements following one another, a few weeks prior to the implementation date. The Commission has concerns that this practice may allow the companies to signal their future pricing intentions to each other. It may lead to higher prices and harm customers on the market for container liner shipping transport services on routes to and from Europe

319. In times of overcapacity it is all the more important that competitors do not gain an unfair advantage from State aid. In July, for example, the Commission concluded that a long-running Spanish aid scheme offering tax relief for the purchase of ships conferred a selective advantage to certain investors over their competitors<sup>237</sup>. The Spanish authorities must now determine the amounts of incompatible aid to be recovered.

### 7.2.4 *Enforcement actions in rail transport*

320. In order to improve the competitive performance of the rail transport sector and stimulate rail as a preferred mode of transport, the EU has adopted a number of 'railway packages'. In January, the

<sup>231</sup> See IP/13/332 of 16 April 2013.

<sup>232</sup> See IP/13/190 of 6 March 2013.

<sup>233</sup> See IP/13/567 of 19 June 2013.

<sup>234</sup> See IP 13/431 of 15 May 2013.

<sup>235</sup> See IP/12/1243 of 20 November 2012.

<sup>236</sup> See IP/13/82 of 31 January 2013. available at [http://europa.eu/rapid/press-release\\_IP-13-82\\_en.htm](http://europa.eu/rapid/press-release_IP-13-82_en.htm)

<sup>237</sup> Case SA. 21233 *Spanish Aid for the acquisition of ships – Spanish Tax Lease*, decision of 17 July 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_21233](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_21233)

Commission put forward the Fourth Railway Package<sup>238</sup>, which foresees the opening of the market for domestic rail passenger services to competition by 2019. The Package also aims to tackle the continued fragmentation of rail markets, strengthening the governance structure, as well as the high barriers to entry associated with the often special status of national rail incumbents.

321. In fact, some rail incumbents manage the rail infrastructure and are at the same time active on rail transport markets. Such vertically-integrated rail incumbents may leverage their position as infrastructure managers to raise their competitors' costs or delay their entry.

322. In the Deutsche Bahn case, the Commission investigated whether Deutsche Bahn's charges for traction current, i.e. the special electricity used to power locomotives, lead to a margin squeeze for its competitors in the rail freight and long distance passenger transport markets. In response to the Commission's concerns, Deutsche Bahn offered commitments opening up the market for the supply of traction current. These commitments were market tested by the Commission in August. Following amendments to the initial proposal, the Commission adopted a decision rendering the commitments legally binding on Deutsche Bahn on 18 December 2013.<sup>239</sup> In the Baltic Rail case, the Commission opened proceedings against the vertically-integrated Lithuanian rail incumbent, AB Lietuvos geležinkeliai ("LG") in March<sup>240</sup>. The on-going investigation concerns the removal of a track by LG connecting a refinery in Lithuania to the border with Latvia. The removal of that track could have prevented customers from using the services of other rail operators for the transport of freight between Lithuania and Latvia.

323. In order to increase the attractiveness of rail as a mode of transport the Commission approved a number of State aid measures. In Poland, for example, the budget of the aid scheme<sup>241</sup> supporting investments in intermodal transport infrastructure and equipment was increased, while in Slovakia the construction of an intermodal terminal was co-financed by public funds<sup>242</sup>. In both cases, the Commission made sure that a significant share of the costs was born by private investors, thereby ensuring the cost effectiveness of the projects.

#### 7.2.5 *Continuing to apply the new rules ensuring the viability of SGEIs and fair competition across the Single Market in postal services*

324. Postal services is a classic network industry crucial to the functioning of the Single Market. Many European companies rely increasingly on just in-time deliveries to keep inventory costs at an optimal level. They often use parcel express delivery services as part of their logistic chains, notably for cross-border shipments. From a growth perspective, it is essential that cross-border postal deliveries operate as efficiently as possible. Efficient postal services are also a tool to tap the growing potential of cross-border e-commerce. At the same time, the postal sector constitutes a fundamental service of general economic interest (SGEI) which may need State aid in situations where the market by itself would not guarantee universal and affordable services. EU competition and Single Market rules reconcile those two imperatives.

<sup>238</sup> See Communication from the Commission to the European Parliament, the Council, 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 of 30 January 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF>

<sup>239</sup> Case AT.39678 *Deutsche Bahn I*, see IP/13/1289 of 18 December 2013 available at [http://europa.eu/rapid/press-release\\_IP-13-1289\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1289_en.htm)

<sup>240</sup> See IP/13/197 of 6 March 2013, available at [http://europa.eu/rapid/press-release\\_IP-13-197\\_en.htm](http://europa.eu/rapid/press-release_IP-13-197_en.htm)

<sup>241</sup> Case SA.36485 *Investment aid for the development of intermodal transport under the Infrastructure and Environmental Operational Programme*, decision of 31 May 2013, see OJ C/204/2013 p. 6

<sup>242</sup> Case SA.34369 *Construction and operation of public intermodal transport terminals*, decision of 21 January 2013, see OJ C/45/2013 p. 13.

325. On 2 May, the Commission approved<sup>243</sup> EUR 900 million compensation to the Belgian bpost for delivering a series of SGEIs (mainly a press distribution SGEI consisting in delivering newspapers and periodicals under specific conditions) between 2013 and 2015. That decision is emblematic for the application of the stricter compatibility conditions introduced by the new SGEI Framework:

- The Belgian authorities had to organise a wide public consultation to demonstrate the importance of the compensated SGEIs for Belgian citizens;
- The amount of aid approved by the Commission is based on the new net avoided cost methodology and takes into account strict efficiency requirements;
- In order to comply with public procurement rules, Belgium committed to organise a competitive, transparent and non-discriminatory tender for the delivery of the press distribution SGEI in the future. The winning bidder will take over the delivery of the service on 1.1.2016.

326. Bpost was also ordered to repay a significant amount of overcompensation (approx. EUR 123 million) that it received in 2011-2012.

#### 7.2.6 *Protecting competition in the sector of delivery services through merger control*

327. On 30 January the Commission prohibited the proposed acquisition of TNT Express by UPS. The take-over would have restricted competition in 15 Member States in the express delivery of small packages to another European country. In these Member States, the acquisition would have reduced the number of significant players to only 3 or 2, leaving sometimes DHL as the only alternative to UPS. The concentration would therefore have likely harmed customers by causing price increases.

328. On 30 January 2013, the European Commission prohibited under the EU Merger Regulation the proposed acquisition of TNT Express by UPS.<sup>244</sup> TNT Express (the Netherlands) and UPS (USA) both provide small package delivery services.

329. The Commission found that the take-over would have restricted competition in 15 Member States when it comes to the express (i.e. within one day) delivery of small packages to another European country, namely Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia and Sweden.

330. In these Member States, the acquisition would have reduced the number of significant players to only 3 or 2, leaving sometimes DHL as the only alternative to UPS. The concentration would therefore have likely harmed customers by causing price increases. During the investigation, UPS offered to divest TNT's subsidiaries in these 15 countries and allow the buyer to access its intra-European air network for five years. The Commission carried out an in-depth assessment, including a market test where customers and other interested parties were consulted. However, these remedies proved inadequate to address the identified competition concerns.

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<sup>243</sup> Case [NI/2013](http://ec.europa.eu/competition/state_aid/cases/247935/247935_1463096_76_3.pdf) State compensations to bpost for the delivery of public services over 2013-2015, Decision of the Commission of 2 May 2013, available at [http://ec.europa.eu/competition/state\\_aid/cases/247935/247935\\_1463096\\_76\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/247935/247935_1463096_76_3.pdf)

<sup>244</sup> Case COMP M.6570 *UPS / TNT EXPRESS*, decision of 30 January 2013; see IP 13/68, available at [http://europa.eu/rapid/press-release\\_IP-13-68\\_en.htm](http://europa.eu/rapid/press-release_IP-13-68_en.htm)

## ANNEX

Table 1. State aid cases: Decisions adopted by the Commission in 2013

Member State	Type of measure / Beneficiary	Type of Decision	Date of adoption 2013
Austria	SA.32745 Run-off plan of Kommunalkredit	Decision not to raise objections EXME/13/19.07	19 July
Austria	SA.32554 - Liquidation of Hypo Group Alpe Adria	Final decision IP/13/811	3 September
Cyprus	SA.35852 - Prolongation	EXME/13/22.01	22 January
Cyprus	SA.36930 - Prolongation	EXME/13/25.07	25 July
Denmark	SA.36811 – Prolongation of the Danish winding-up and guarantee for merging banks schemes	EXME/13/11.07	11 July
France	SA.35389 - State Aid SA. 35389 (2012/N) Rescue aid in favour of Crédit Immobilier de France	Decision not to raise objections IP/13/148	21 February
France	SA.37075 - Crédit Immobilier de France – Prolongation of guarantees	Decision not to raise objections EXME/13/14.08	14 August
France	SA.37029 - Liquidation of Crédit Immobilier de France	IP/13/1173	27 November
Germany	SA.29338 - Amendment of HSH Nordbank AG Restructuring	Decision not to raise objections and opening of proceedings IP/13/589	21 June
Germany	SA.31646 - Amendment of the restructuring plan for Sparkasse Köln-Bonn		23 July
Germany	SA.34381 - Amendment of Restructuring Plan of NordLB	Decision not to raise objections IP/13/788	22 August
Germany	SA.30062 - Amendment of LBBW	EXME/13/1209	9 December 2013
Greece	SA.35460 – Liquidation of ATE	IP/13/401	3 May
Greece	SA.31155 - Resolution of Hellenic Postbank through the creation of a bridge bank	Decision not to raise objections	6 May
Hungary	SA.36088 - Prolongation	EXME/13/01.03	1 March
Hungary	SA.36087 - Prolongation	EXME/13/22.03	22 March
Ireland	SA.36944 - Prolongation		18 July
Ireland	SA.31286 (MC9/2010) - Bank of Ireland	Decision not to raise objections IP/13/669	9 July
Italy	SA.36175 - MPS - Restructuring	IP/13/1174	27 November 2013
Latvia	SA.30704 - Additional aid measures to the Latvian Mortgage and Land Bank	Final decision IP/13/705	17 July
Lithuania	SA.36248 -Resolution of AB Ukie Bankas	Decision not to raise objections EXME/13/14.08	14 August 2013
The Netherlands	SA.35382 - Rescue aid for SNS REAAL	IP/13/150	22 February
The Netherlands	SA.29832 - Amendment of ING		5 November 2013
The Netherlands	SA.29832 - Monitoring of ING	EXME/13/1211	11 December 2013
Poland	SA.35943 - Prolongation	EXME/13/11.02	11 February
Portugal	Rescue recapitalisation of Banif	Decision not to raise objections IP/13/31	21 January
Portugal	SA.36180 - Portuguese Guarantee Scheme on EIB lending		27 June
Portugal	SA.35338 - Restructuring of Caixa Geral de Depósitos, S.A. (CGD)	Final decision IP/13/738	24 July
Portugal	SA.36869 - Prolongation of the Portuguese guarantee scheme	EXME/13/01.08	1 August 2013

Member State	Type of measure / Beneficiary	Type of Decision	Date of adoption 2013
Portugal	SA.34724 - Restructuring of Millennium BCP / Portugal	Decision not to raise objections EXME/13/02.09	29 September 2013
Portugal	SA.37417 - Amendment of the Guarantee Scheme on EIB lending		7 October 2013
Slovenia	SA.37315 - Rescue aid in favour to Factor Banka	Decision not to raise objections IP/13/822	6 September
Slovenia	SA.37314 - Rescue aid in favour of Probanka	Decision not to raise objections IP/13/822	6 September
Spain	SA.36500 Restructuring of Banco Gallego	Decision not to raise objections IP/13/745	25 July
Spain	SA.36249 - CEISS – Amendment decision		25 July

**Table 2. Cases currently under formal investigation procedure**

(in-depth investigation under the rules of the Treaty on the Functioning of the European Union on State aid)

Country	Type of measure / Beneficiary	Date of decision regarding the opening of formal investigation	
Belgium	SA.33927 (2012/C) (ex 2011/NN) – Guarantee scheme protecting the shares of individual members of financial co-operatives	3 April 2012 IP/12/347	<i>Case under assessment</i>
Slovenia	SA.33229 - Restructuring of NLB	2 July 2012 IP/12/724	<i>Case under assessment</i>
Greece	SA.34488 - Restructuring aid to Proton bank through creation and capitalisation of Nea Proton	27 July 2012 IP/12/854	<i>Case under assessment</i>
Greece	SA.34823 - HFSF Recapitalisation commitment to Alpha Bank	27 July 2012 IP/12/860	<i>Case under assessment</i>
Greece	SA.34824 - HFSF Recapitalisation commitment to National Bank of Greece	27 July 2012 IP/12/860	<i>Case under assessment</i>
Greece	SA.34825 - HFSF Recapitalisation commitment to EFG Eurobank	27 July 2012 IP/12/860	<i>Case under assessment</i>
Greece	SA.34826 - HFSF Recapitalisation commitment to Piraeus Bank	27 July 2012 IP/12/860	<i>Case under assessment</i>
Greece	Resolution of Hellenic Postbank through the creation of a bridge bank	6 May 2013	<i>Case under assessment</i>
Germany	SA.29338 - HSH Nordbank AG	21 June 2013 IP/13/589	<i>Case under assessment</i>