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

--2015--

**29-30 November 2016**

*This report is submitted by the European Union to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 29-30 November 2016.*

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*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

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***Note by Turkey***

*The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.*

***Note by all the European Union Member States of the OECD and the European Union***

*The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.*

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## PART 1

### 1. Introduction

1. Strong and effective EU competition policy has always been a cornerstone of the European project. Now that sustaining the recovery and boosting economic growth are at the top of EU agenda, competition policy is more important than ever.

2. Competition policy keeps markets efficient and open. For European consumers, this translates into better market outcomes such as lower prices, better quality products and services, and greater choice. In addition, healthy competition gives companies fair chances to do business and to achieve their commercial goals, which in turn encourages growth, job creation and prosperity. When companies are able to compete on their own merits, businesses and households benefit from a wide range of good quality, innovative products and services at competitive prices. Increased competition also drives companies to invest and to become more efficient. These efficiency gains are then passed on to the wider economy. The ultimate aim of competition policy is to make markets work better – to the advantage of households and businesses.

3. At the beginning of his mandate, the President of the European Commission, Jean-Claude Juncker, said that his Commission will focus on the key challenges facing European society and the economy. Competition policy has an important role to play in tackling those challenges. The work carried out in the field of competition in 2015 made a significant contribution to a number of Commission's key political priorities, namely boosting jobs, growth and investment, and creating a connected Digital Single Market, a resilient Energy Union, and a deeper and fairer single market.

4. The Commission is also committed to fostering a competition culture – both in the EU and beyond – by promoting closer dialogue with Member States<sup>1</sup> and with the other EU institutions, as well as extensive international cooperation.

5. The guiding principles of competition enforcement are to safeguard impartiality, enforce the rule of law and serve the common European interest. EU competition policy also centres around the values of fairness, political independence, transparency and due process.

### 2. Competition policy boosts innovation and investment across the EU

6. Europe's economy is slowly turning a corner after the recent economic and financial crisis. In order to build a sound basis for sustainable growth and the creation of quality jobs, the EU needs to restore its investment levels, especially in strategic areas such as research, development and innovation. Europe's future should, in particular, be based on innovation. Competition policy can help achieve this by creating an environment that encourages investment and innovation.

7. Competitive pressure creates incentives for firms to invest, becoming more efficient, developing new technologies and creating better products. Enabling more effective competition helps stimulate investment by keeping markets open and ensuring that action is taken if a market leader abuses its position to prevent its competitors from growing and innovating. Econometric model simulations show that the

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<sup>1</sup> See for example Competition Policy Brief Issue 2015-05, *Improving competition in the Member States to boost growth*.

Commission's merger and cartel decisions lead to a 0.7 % increase investment after five years.<sup>2</sup> In addition, EU State aid rules steer public resources towards mobilising new investment, ensuring that public funding incentivises private investments which would not have been made otherwise.

8. The Investment Plan for Europe<sup>3</sup> was launched in November 2014 with the aim of boosting investment. A key part of the plan is the European Fund for Strategic Investment<sup>4</sup> (EFSI), which became operational in late 2015. With the help of the European Investment Bank (EIB), EFSI provides financing backed by an EU budget guarantee, unlocking strategic investments which the market could not finance alone.

9. EFSI-supported project funding provided by the EIB does not fall under State aid rules. However, projects may also receive financial support ('co-financing') from the Member States (including from the European structural and investment funds) which is subject to State aid rules. This funding must be approved by the Commission unless it is granted on market terms. To support the EFSI, the Commission assesses the co-financing from Member State as a matter of priority. State aid rules go hand in hand with the Investment Plan's aim of addressing market failures and mobilising private investment. State aid control ensure that public investment projects address real needs, keep costs under control and guarantee that public money is genuinely needed to get projects off the ground.

### **2.1 Revamped State aid rules to encourage growth-enhancing aid measures**

10. State aid rules have been overhauled in the context of the State aid modernisation (SAM) initiative.<sup>5</sup> The initiative helps Member States to better target aid measures towards economic growth, job creation and social cohesion. As part of SAM, the Commission is reinforcing its partnership with the Member States on the implementation of the new rules, as they have now increased responsibility to grant aid without prior notification to the Commission.

11. This strengthened partnership approach aims to ensure that greater flexibility for Member States to grant aid is balanced by better cooperation, diligent national controls and increased transparency. The Commission will support strategic investments by working with Member States on how to design growth-enhancing aid measures that promote a strong, integrated and dynamic single market.

12. The new State aid framework will ensure that public funding helps mobilise private investment to contribute to important objectives of common interest, without distorting competition. In this respect, in addition to the rules in the expanded General Block Exemption Regulation (GBER) adopted in 2014,<sup>6</sup> three areas are especially important to boost innovation and investment across the EU. The Research, Development and Innovation (R&D&I) framework<sup>7</sup> facilitates the granting of aid measures for

<sup>2</sup> Dierx A., Ilzkovitz, F., Pataracchia, B., Ratto, M., Thum-Thysen, A., Varga, J., 'Distributional macroeconomic effects of EU competition policy – a general equilibrium analysis', *Competition Policy and Shared Prosperity* (forthcoming), World Bank.

<sup>3</sup> See [http://ec.europa.eu/priorities/jobs-growth-investment/plan/index\\_en.htm](http://ec.europa.eu/priorities/jobs-growth-investment/plan/index_en.htm).

<sup>4</sup> See [http://ec.europa.eu/priorities/jobs-growth-investment/plan/efsi/index\\_en.htm](http://ec.europa.eu/priorities/jobs-growth-investment/plan/efsi/index_en.htm).

<sup>5</sup> See [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html).

<sup>6</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.187.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.187.01.0001.01.ENG)

<sup>7</sup> Communication from the Commission, *Framework for State aid for research and development and innovation*, OJ C 198, 27.6.2014, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.198.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.198.01.0001.01.ENG)

research, development and innovation activities, to complement private funding. The Risk Finance State aid guidelines<sup>8</sup> permit a more rapid and generous distribution of risk finance aid to innovative and growth-oriented small and medium-sized businesses (SMEs) and mid-caps. The Broadband Guidelines<sup>9</sup> support Member States in tackling funding gaps and market failures when it comes to providing adequate broadband coverage, especially in rural areas.

#### Aid measures enabling ground-breaking research

State aid rules help to encourage and spread innovation in the EU, by supporting cutting-edge projects in the most advanced technological fields.

In April, for example, the Commission assessed a GBP 50 million (around EUR 71 million) grant that the UK authorities intended to provide for designing a SABRE space launcher engine, and found it was in line with EU state aid rules. SABRE is a research and development project carried out by UK company Reaction Engines Limited, which aims to develop an engine that would significantly reduce the cost of launching satellites into a low Earth orbit. The Commission assessed the project under its R&D&I State aid framework, and concluded that the funding raised from private equity sources would not be enough to complete the project. Research in this area could lead to significant technological advances that would benefit consumers using products and services that derive from low Earth orbiting satellites, such as mobile communications

### 3. Seizing the opportunities of the Digital Single Market

13. Turning the Digital Single Market into a reality has been a Commission priority since the start of its mandate. The expansion of the digital economy, besides transforming our world and way of living, is one of the main drivers of economic growth. A thriving Digital Single Market would fuel innovation, create new jobs and also build new opportunities for European start-ups and small and medium-sized businesses (SMEs) to reach out to a market of over 500 million people. The Commission has estimated that creating a EU Digital Single Market by breaking down regulatory barriers, as well as moving from 28 national markets to a single one, could contribute EUR 415 billion per year to our economy and create hundreds of thousands of new jobs<sup>10</sup>.

14. In May 2015, the Commission adopted its Digital Single Market Strategy.<sup>11</sup> The strategy includes a set of 16 targeted actions, built around **three pillars**: (1) better access for consumers and businesses to digital goods and services across Europe; (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; (3) maximising the growth potential of the digital economy.

<sup>8</sup> Communication from the Commission, *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.1.2014, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122\(04\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122(04)).

<sup>9</sup> Communication from the Commission, *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ 2013 C 25, 26.1.2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:en:PDF>.

<sup>10</sup> See [http://ec.europa.eu/priorities/digital-single-market\\_en](http://ec.europa.eu/priorities/digital-single-market_en).

<sup>11</sup> Communication of 6 May 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>.

15. Digital markets are also a main priority in the competition policy field. Open and fair digital markets will boost innovation and bring benefits to both consumers and businesses. The Digital Single Market must be a place where all players — large and small — can develop innovative products and compete on their merits. In addition, competition policy tackles existing barriers online which are limiting the investment horizons of internet companies and start-ups, and preventing businesses, citizens and governments to fully benefit from digital tools.

### **3.1 Ensuring undistorted competition on the web: Tackling online barriers and obstacles to innovation**

16. Rapid developments in the digital economy pose several challenges for policymakers, but do not require an overhaul of competition law and tools: competition policy instruments are adapting quickly to the specific features of the digital markets.<sup>12</sup>

#### **The e-commerce sector inquiry – deepening market knowledge to tackle cross-border barriers**

In May 2015, the Commission launched an antitrust sector inquiry into the e-commerce sector in the EU. In 2014, around half of all EU consumers shopped online, but only around 15 % of them bought online from a seller based in another EU Member State. This suggests that significant cross-border barriers to e-commerce still exist within the EU. The sector inquiry will focus in particular on potential barriers created by companies to the cross-border online trade in goods and services where e-commerce is most widespread, such as electronics, clothing and shoes, and digital content.

The sector inquiry will support the measures that the Commission and EU national competition authorities take against restrictions on online sales. Knowledge gained from the sector inquiry will contribute to better enforcement of competition law in the e-commerce sector.

17. One of the primary aims of competition enforcement is to encourage all industry participants to innovate, whether they are start-ups or have a dominant market share. The aim is to ensure that European consumers have as wide a choice as possible of innovative products. For example, in the online search market, the Commission is conducting an antitrust investigation into Google's practices.

18. In April, the Commission sent a Statement of Objections to Google, alleging that the company has abused its dominant position in the market for online search services in the European Economic Area by systematically favouring its own comparison shopping product in its general search results.<sup>13</sup> The Commission is concerned that the search results users receive are not always the most relevant to their queries. The Commission's preliminary view is that Google's behaviour infringes EU antitrust rules because it stifles competition and therefore harms consumers.

19. The Commission has previously outlined four concerns about Google's conduct, and the Statement of Objections described above relates to the first of those concerns (comparison shopping). The Commission is also actively investigating Google's conduct in relation to the other three concerns: copying of rivals' web content, advertising exclusivity, and undue restrictions on advertisers. The Statement of Objections in relation to comparison shopping does not in any way prejudice the outcome of the Commission's investigation into the other three concerns.

<sup>12</sup> See recent study from the European Parliament at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL\\_STU%282015%29542235\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf)

<sup>13</sup> Case AT.39740 *Google search*, see IP/15/4780 of 15 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4780\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4780_en.htm).

20. Another investigation in the digital sector concerns Amazon. In June, the Commission opened a formal antitrust investigation into some of Amazon's business practices in the distribution of e-books.<sup>14</sup> In particular, the investigation is focusing on clauses which appear to protect Amazon from competition from other e-book distributors, for example clauses granting it the right to be informed of more favourable or alternative terms offered to its competitors, and/or the right to terms and conditions at least as good as those offered to its competitors.

21. The Commission has concerns that such clauses may disrupt the level playing field and potentially decrease competition in the market to the detriment of consumers, making it more difficult for other e-book distributors to compete with Amazon by developing new and innovative products and services. Such behaviour, if confirmed, would violate EU antitrust rules that prohibit abuses of a dominant market position and restrictive business practices. The Commission's goal is to ensure healthy inter-platform competition and make sure that market players do not abuse their position to obtain contractual terms and conditions that may act as an obstacle to innovation in the market.

### 3.2 *Promoting a wider choice in access to media for EU citizens*

22. A strong and swift competition enforcement is a key tool in effectively addressing issues that arise in the new and rapidly evolving sectors of the digital economy. However, ensuring vibrant competition in more traditional markets, such as broadcast television, is equally important for European citizens. The Commission is keen to ensure that consumers can choose between TV distributors who are competing on a fair and equal footing.<sup>15</sup>

#### **Protecting innovation incentives in the media sector**

In February 2015, the Commission cleared, under the EU Merger Regulation, Liberty Global's acquisition of a stake in the Belgian media company De Vijver Media NV ('De Vijver'), subject to commitments. The Commission's decision followed an in-depth investigation.

The Commission had concerns that, after the transaction, De Vijver would refuse to license its channels to TV distributors that are in competition with Telenet, a cable company controlled by Liberty Global. The commitments address these concerns by obliging De Vijver to license its channels – Vier, Vijf and any other similar channel it may launch – to TV distributors in Belgium under fair, reasonable and non-discriminatory terms. Without these commitments, the transaction could have translated in less competition in the TV distribution market and ultimately higher prices and less innovation for consumers.

In addition, the Commission authorised in April the proposed acquisition of the Portuguese telecommunications operator PT Portugal by the multinational cable and telecommunications company Altice. The decision is conditional on Altice's commitment to sell its two subsidiaries in Portugal.

PT Portugal is a telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal. The Commission was concerned that the merger, as initially notified, would have reduced competition in a number of telecommunications markets in Portugal. The merger would have removed a strong competitor from these markets, and this may have led to higher prices and less competition for Portuguese consumers. In order to remove these concerns, Altice offered to remove the overlap between the activities of Altice and PT Portugal by selling its Portuguese businesses Cabovisão and ONI. The Commission worked closely with the Portuguese competition authority when assessing the proposed transaction.

<sup>14</sup> Case AT.40153 *E-book MFNs and related matters*, see IP/15/5166 of 11 June 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5166\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5166_en.htm).

<sup>15</sup> See Cases M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, Commission Decision of 24 February 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7194](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7194), and M.7499 *Altice / PT Portugal*, Commission decision of 20 April 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7499](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7499).

23. Another antitrust investigation concerns the cross-border provision of pay-TV services in the United Kingdom and Ireland. In July, the Commission sent a Statement of Objections to Sky UK and six major US film studios: Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.<sup>16</sup> The Commission's investigation, which was opened in January 2014, identified clauses in licensing agreements between the six film studios and Sky UK which require Sky UK to block access to films through its online pay-TV services or through its satellite pay-TV services to consumers outside its licensed territory (UK and Ireland). Certain agreements also contain clauses requiring the film studios to ensure that, in their licensing agreements with broadcasters other than Sky UK, these broadcasters are prevented from making their pay-TV services available in the United Kingdom and Ireland.

24. This situation affects European consumers who want to watch the pay-TV channels of their choice, regardless of where they live or travel in the EU. The Commission's preliminary view is that, in the absence of convincing justification, such clauses would constitute a violation of EU rules that prohibit anticompetitive agreements.

### 3.3 *Improving the functioning of innovative markets – mobile devices*

25. Mobile devices, such as smartphones and tablet computers, are now part of the everyday life of the majority of European citizens. 2015 was a milestone for European mobile communication users – the European Parliament and the Council adopted Regulation (EU) 2015/2120,<sup>17</sup> which will put an end to roaming charges in the EU from 15 June 2017. The aim of antitrust enforcement, together with legislation, is to protect competition in the area of mobile devices to ensure continued innovation to the benefit of European consumers.

26. Following the opening of two separate antitrust investigations in December, the Commission sent two Statements of Objections to Qualcomm, the world's largest supplier of baseband chipsets, which are used in consumer electronic devices. Baseband chipsets process communication functions in smartphones, tablets and other mobile broadband devices. They are used for both voice and data transmission.

27. The Commission's preliminary view is that the company has abused its dominant position in the worldwide markets for 3G (UMTS) and 4G (LTE) baseband chipsets, in breach of EU antitrust rules.<sup>18</sup> The first investigation is examining whether Qualcomm has abused its dominant market position by offering financial incentives to a major smartphone and tablet manufacturer on condition that it exclusively use Qualcomm baseband chipsets in its smartphones and tablets. Such conduct would have reduced the manufacturer's incentives to source chipsets from Qualcomm's competitors, harming competition and innovation in the markets for UMTS and LTE baseband chipsets. The second investigation is looking into whether Qualcomm engaged in predatory pricing by charging prices below cost with a view to forcing its competition out of the market.

<sup>16</sup> Case AT.40023 *Cross-border access to pay-TV content*, see IP/15/5432 of 23 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5432_en.htm).

<sup>17</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, pp. 1-18, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>.

<sup>18</sup> Cases AT.40220 *Qualcomm (exclusivity payments)* and AT.39711 *Qualcomm (predation)*, see IP/15/6271 of 8 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6271\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6271_en.htm).

28. The market for the supply of hardware, however, is only one side of the coin – the software running on smartphones and tablets must also be subject to undistorted competition. The mobile applications and services on smartphones, tablets and other mobile devices are based on the device's operating system. Google Android has become the leading operating system for smart mobile devices in the European Economic Area, to the extent that Android is now used on the majority of smart mobile devices in Europe.

29. In April, the Commission opened formal proceedings against Google to investigate into whether the company's conduct in relation to Android may have breached EU antitrust rules.<sup>19</sup> Android is an open-source mobile operating system which is predominantly developed by Google. In principle, anyone can freely use and further develop Android. The majority of smartphone and tablet manufacturers, however, use the Android operating system in combination with a range of Google's proprietary applications and services, and therefore need to enter into certain agreements with Google.

30. The Commission is assessing if, by entering into anticompetitive agreements and/or by abusing a possible dominant position, Google has illegally hindered the development and market access of rival mobile operating systems, mobile communication applications and services in the European Economic Area. This investigation is distinct and separate from the Commission's investigation into Google's behaviour in relation to internet searches.

### **3.4 *Effective merger control to safeguard investment in the telecoms sector***

31. Effective competition in the telecoms sector is a key driver of investment and better market outcomes for consumers and businesses. Competition is the driving force that will attract the investment to develop the high-speed broadband networks that Europeans need. Consumers do not benefit from investment as such – they benefit from the impact of investment on the parameters of competition such as choice, quality and price.

32. Besides keeping the telecoms market open and competitive, competition enforcement remains a key tool in tackling market fragmentation in the EU.<sup>20</sup> Competition policy also complements the review of the telecoms regulatory framework, one of the main measures planned under the Digital Single Market Strategy.

33. In addition, merger control in this area plays a crucial role, by assessing whether a proposed merger would lead to increased investment to the benefit of consumers, for example in terms of increased network coverage.

34. In May, the Commission approved, under the EU Merger Regulation, the proposed acquisition of Jazztel, a telecommunications company registered in the UK but mainly active in Spain, by rival Orange SA of France.<sup>21</sup> The approval is conditional upon the full implementation by Orange of a number of commitments that will ensure effective competition in the fixed internet access services markets after the takeover.

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<sup>19</sup> Case AT.40099 *Google Android*, see MEMO/15/4782 of 15 April 2015, available at [http://europa.eu/rapid/press-release MEMO-15-4782\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4782_en.htm) .

<sup>20</sup> See for example Slovak Telecom decision (case AT.39523) of 15 October 2014, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39523](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39523) .

<sup>21</sup> Case M.7421 *Orange / Jazztel*, Commission decision of 19 May 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7421](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7421) .

35. The Commission had concerns that the takeover, as initially notified, could have led to higher prices for fixed internet access services for consumers in Spain. To address these concerns, Orange submitted commitments to ensure that a new player may enter the retail market for fixed internet access services, and compete as strongly as Orange and Jazztel. The commitments remove the Commission's initial concerns.

36. The Commission has also opened two in-depth investigations into mergers in the telecoms sector. First, it is looking into the proposed acquisition of Telefónica UK by Hutchison,<sup>22</sup> to assess whether the transaction would harm competition. The Commission is concerned that the transaction could lead to higher prices, less choice and reduced innovation for customers of mobile telecommunications services in the United Kingdom. The Commission has also conducted an in-depth investigation into the takeover of BASE Belgium by Liberty Global<sup>23</sup> to make sure that consumers in Belgium do not suffer higher prices and reduced choice as a result of the proposed transaction.

37. Furthermore, the Commission reviewed the proposed merger of the Danish businesses Telenor and TeliaSonera.<sup>24</sup> The Commission had concerns that the merger would have created the largest mobile network operator in Denmark and would have resulted in a highly concentrated market structure, leading to price increases for customers and reduced investment incentives. In September 2015, after submitting two sets of remedies that appeared to be insufficient to address the competition concerns, the parties abandoned the transaction.

#### 4. Building an integrated and climate-friendly European Energy Union

38. The creation of an Energy Union is a big step towards an integrated, interconnected and resilient energy market, to the benefit of consumers, companies and the environment. Businesses and households, which are at the core of the Energy Union, should be able to pay affordable and competitive prices. At the same time, EU energy policy is based on the three pillars of sustainability, competitiveness and security of supply. Creating a strong Energy Union with an ambitious climate policy will require a fundamental transformation of Europe's energy system. In 2015, the Commission began delivering on this key priority.

39. In February, the Commission unveiled its Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy.<sup>25</sup> The Framework Strategy sets out, in five interrelated policy dimensions ('Energy security, solidarity and trust', 'Fully integrated European energy market', 'Energy efficiency contributing to moderation of demand', 'Decarbonisation of the economy', and 'Research, Innovation and Competitiveness'), the goals of Energy Union – and the steps the Commission will take to achieve it.

40. The EU needs to move away from an economy driven by fossil fuels, which is reliant on old technologies and outdated business models. The current fragmented system, characterised by

<sup>22</sup> Case M.7612 *Hutchison 3G UK / Telefónica UK*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7612](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7612).

<sup>23</sup> Case M.7637 *Liberty Global / BASE Belgium*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7637](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7637).

<sup>24</sup> Case M.7419 *TeliaSonera / Telenor / JV*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7419](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7419).

<sup>25</sup> Communication of 25 February 2015 from the Commission to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM(2015) 080 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A80%3AFIN>.

uncoordinated national policies, market barriers and energy-isolated areas, must be overcome. Empowering consumers, by giving them information and choice, is also crucial.

41. Integrating energy markets is a key objective of the Energy Union. If gas and electricity flowed freely around the EU, this would be more economically sustainable, environmentally friendly, and socially inclusive.

**4.1 Antitrust enforcement to make energy more secure, affordable and sustainable.**

42. Antitrust enforcement plays a key role in fostering market integration in the Energy Union by tackling market distortions originating from the behaviour of dominant market players. The antitrust investigation into Gazprom's conduct in central and eastern Europe is a prime example of this.<sup>26</sup>

**Ensuring that dominant gas suppliers play by the rules – the Gazprom investigation**

In April, the Commission sent a Statement of Objections to Gazprom stating that some of its business practices in central and eastern European gas markets may constitute an abuse of its dominant market position, in breach of EU antitrust rules. Gas is an essential commodity in the daily life of most EU citizens, and the Commission's preliminary view is that Gazprom may be hindering competition in the gas supply markets in eight central and eastern European Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia). Gazprom is the dominant natural gas supplier in those countries, with market shares well above 50 % in most, and in some cases up to 100 %.

On the basis of its investigation, the Commission's preliminary view is that Gazprom may be breaking EU antitrust rules by pursuing an overall strategy to partition central and eastern European gas markets, for example by reducing its customers' ability to resell the gas cross-border. This may have enabled Gazprom to charge unfair prices in certain Member States. Gazprom may also have abused its dominant market position by making the supply of gas dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure.

43. Antitrust enforcement supports the creation of a single market for energy, also by breaking up anticompetitive market sharing agreements<sup>27</sup> and by keeping infrastructure accessible. Access to infrastructure is important for preventing market foreclosure and maintaining investment incentives. Important actions in this area include the Statement of Objections sent in March to Bulgarian Energy Holding (BEH), its gas supply subsidiary, Bulgargaz and its gas infrastructure subsidiary, Bulgartransgaz.<sup>28</sup>

44. BEH is the incumbent state-owned energy company in Bulgaria. It is vertically integrated, meaning that BEH supplies gas and its subsidiaries own or control the domestic Bulgarian gas transmission network, the only gas storage facility in Bulgaria, and the capacity on the main gas import pipeline into Bulgaria. The Commission has concerns that BEH and its subsidiaries may be abusing their dominant market position on the Bulgarian gas market, by preventing competitors from gaining access to the infrastructure they need in order to successfully compete on the country's gas supply market. Such conduct would violate EU antitrust rules, and result in less competition in the market and poorer market outcomes for the affected consumers.

<sup>26</sup> Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*, see IP/15/4828 of 22 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4828\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4828_en.htm).

<sup>27</sup> See for example case AT.39952 *Power Exchanges*, Commission decision of 5 March 2014, see IP/14/215 available at [http://europa.eu/rapid/press-release\\_IP-14-215\\_en.htm](http://europa.eu/rapid/press-release_IP-14-215_en.htm)

<sup>28</sup> Case AT.39849 *BEH gas*, see IP/15/4651 available at [http://europa.eu/rapid/press-release\\_IP-15-4651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4651_en.htm).

45. The Commission has also concluded a separate antitrust investigation into BEH's behaviour on the non-regulated wholesale electricity market in Bulgaria.<sup>29</sup> The Commission had concerns that BEH had set up artificial barriers between national markets. In particular, BEH had been selling electricity to traders using contracts which prohibited them from reselling the electricity outside Bulgaria. BEH offered to address the Commission's concerns by setting up an independent power exchange in Bulgaria, through which electricity can be traded anonymously with no possibility of checking where it is resold. On 10 December 2015, the Commission made the commitments offered by BEH legally binding.

#### **4.2 State aid control to ensure a climate-friendly and resilient energy market without undue competition distortions**

46. To accompany the transition to a green economy, another important focus of competition policy is ensuring that markets work properly and that government support – including support to facilitate the drive towards renewable energy sources – does not create imbalances.

47. Through its Energy and Environmental State Aid Guidelines,<sup>30</sup> the Commission is promoting the integration of renewable energy sources into the market to avoid distortions to competition. From 2016, generators using renewables have to sell their electricity directly on the market. Public support may only be granted as a premium on top of the market price. In addition, from 2017, Member States will have to grant operating aid through a competitive bidding process.

48. Furthermore, the guidelines have been designed to contribute to bringing innovative low-carbon energy technologies to market, allowing State aid to be granted in cases where market failures are present. The guidelines also encourage EU Member States to cooperate with each other and take into account the electricity supply from other Member States.

49. In addition, State aid control is helping to create a connected, integrated and secure energy market in Europe by assessing national measures to ensure electricity supply (known as 'capacity mechanisms').

#### **The capacity mechanisms sector inquiry – delivering on the Energy Union objectives**

In April, the Commission launched a State aid sector inquiry to gather information on existing or planned capacity mechanisms, i.e. measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. The sector inquiry aims at examining, in particular, whether such measures ensure security of electricity supply without distorting competition between electricity suppliers or hindering cross-border trade.

This sector inquiry is the first under EU State aid rules and covers a representative sample of Member States that have capacity mechanisms in place or are considering them, namely: Belgium, Croatia, Denmark, France, Germany, Ireland, Italy, Poland, Portugal, Spain and Sweden. While governments have a legitimate interest in ensuring that there is sufficient electricity supply to avoid blackouts, competition policy should make sure that public measures underpin investments in electricity supplies, are consistent with policy instruments aimed at fostering decarbonisation, and do not unduly favour particular producers or technologies.

<sup>29</sup> Case AT.39767 *BEH Electricity*, see IP/15/6289 of 10 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6289\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6289_en.htm)

<sup>30</sup> Communication from the Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ C 200, 28.6.2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628%2801%29>.

#### **4.3 Keeping Europe an attractive place for investment – merger control in the energy sector**

50. For network industries such as the energy sector, it is essential to prevent the creation of market structures which could impede effective competition, thereby reducing the incentives to invest and innovate. EU merger control continued to be an effective tool for keeping the EU energy market open and ensuring that investment translates into better market outcomes for EU businesses and households.

51. Following an in-depth review and very close cooperation with the Antitrust Division of the US Department of Justice, the Commission approved, under the EU Merger Regulation, the proposed acquisition of the energy businesses of Alstom of France by US-based General Electric (GE).<sup>31</sup> The transaction is a good example of how EU-based technology can thrive and attract foreign investment.

52. The approval is conditional on the divestiture of central parts of Alstom's heavy duty gas turbine business, which are mainly used in gas-fired power plants, to Ansaldo of Italy. The Commission had concerns that the transaction would have eliminated one of GE's main global competitors in the heavy duty gas turbines market, in which GE is the world's largest manufacturer and Alstom is one of the global top players. This would have led to less innovation and higher prices. The commitments offered by GE address these concerns. Furthermore, advanced heavy duty gas turbine technology is especially important for meeting climate change goals and modernising the EU's energy supply.

### **5. Towards a deeper and fairer EU Single Market**

53. In times of increasing globalisation, a deeper and fairer single market is a central asset for building a stronger EU economy that drives jobs and growth. This is the reason why advancing the integration of the single market remains at the top of the Commission's agenda. The Commission's goal is to open up new opportunities for citizens and businesses by allowing people, goods, services and capital to move more freely within the single market's borders.

#### **5.1 Enhancing tax transparency and ensuring a fair tax burden for all**

54. A fully functioning single market requires that all market players – whether large or small, local or global – pay their fair share of tax. Therefore, the fight against tax evasion and tax fraud is one of the main priorities of the Juncker Commission, and one of the most important initiatives for advancing the completion of the EU single market.

55. In March, the Commission unveiled a Tax Transparency Package,<sup>32</sup> aimed at ensuring that Member States are equipped with the information they need to protect their tax bases and effectively target companies that try to avoid paying their fair share of tax. In June, the package was followed by the Commission's Action Plan for Fair and Effective Taxation.<sup>33</sup> The action plan sets out a series of initiatives to tackle tax avoidance, secure sustainable revenues and strengthen the single market for businesses. Collectively, these measures will significantly improve the corporate tax environment in the EU, making it fairer, more efficient and more growth-friendly.

56. Competition policy plays a key role in tackling this challenge. Following in-depth investigations which were launched in June 2014, the Commission concluded that Luxembourg and the Netherlands have

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<sup>31</sup> Case M.7278 *General Electric / Alstom (Thermal power – Renewable power & Grid Business)*, Commission decision of 8 September 2015, 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>32</sup> See IP/15/4610 of 18 March 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-4610\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4610_en.htm).

<sup>33</sup> See IP/15/5188 of 17 June 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-5188\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5188_en.htm).

granted selective tax advantages (illegal under EU State aid rules) to Fiat Finance and Trade<sup>34</sup> and Starbucks.<sup>35</sup> For each of these companies, a tax ruling issued by the respective national tax authority artificially lowered the tax paid by the company.<sup>36</sup> Under EU State aid rules, tax rulings cannot use methods, no matter how complex, to establish transfer prices with no economic justification and which unduly shift profits to reduce the taxes paid by the company. Such practices would give the company concerned an unfair competitive advantage over other companies, typically SMEs that are taxed on their actual profits because they pay market prices for the goods and services they use.

#### **Tackling unfair tax advantages – The Starbucks and Fiat Finance & Trade decisions**

Tax rulings as such are perfectly legal. In the Starbucks and Fiat Finance & Trade cases, however, the two tax rulings under investigation endorsed artificial and complex methods to establish taxable profits for the companies. Such methods set prices for goods and services sold between companies in the Fiat and Starbucks groups (so-called 'transfer prices') that did not correspond to market conditions and thus did not reflect the economic reality.

EU State aid rules require that incompatible State aid is recovered in order to reduce the distortion of competition created by the aid. In its two decisions, the Commission has set out the methodology for calculating the value of the undue competitive advantage enjoyed by Fiat and Starbucks, i.e. the difference between what the company paid and what it would have paid without the tax ruling. This amount ranges from around EUR 20 30 million for each of Fiat and Starbucks, but the precise amounts of tax to be recovered will be determined by the Luxembourg and Dutch tax authorities on the basis of the methodology established in the Commission decisions. In addition, the companies will no longer benefit from the advantageous tax treatment granted by these tax rulings.

57. In December, the Commission opened a formal probe into Luxembourg's tax treatment of McDonald's.<sup>37</sup> The Commission's preliminary view is that a tax ruling granted by Luxembourg may have selectively derogated from the provisions of its national tax law and the Luxembourg-US double taxation treaty, granting McDonald's an advantage not available to other companies in a comparable factual and legal situation.

58. The Commission also raised concerns that tax rulings may entail State aid issues in relation to Apple in Ireland<sup>38</sup> and Amazon in Luxembourg.<sup>39</sup> An additional in-depth investigation into the Belgian 'excess profit' ruling system was launched in February 2015.<sup>40</sup> On 11 January 2016, the Commission issued a negative decision with recovery, concluding that selective tax advantages granted by Belgium

<sup>34</sup> Case SA.38375 *Alleged aid to FFT- Luxembourg*, Commission decision of 21 October 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38375](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375).

<sup>35</sup> Case SA.38374 *Alleged aid to Starbucks*, Commission decision of 21 October 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38374](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38374).

<sup>36</sup> See IP/15/5880 of 21 October 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-5880\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5880_en.htm).

<sup>37</sup> Case SA.38945 *Alleged aid to Mc Donald's – Luxembourg*, Commission decision to initiate formal investigation procedure of 3 December 2015, see IP/15/6221 available at [http://europa.eu/rapid/press-release\\_IP-15-6221\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6221_en.htm).

<sup>38</sup> Case SA.38373 *Alleged aid to Apple*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38373](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38373).

<sup>39</sup> Case SA.38944 *Alleged aid to Amazon*, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38944](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38944).

<sup>40</sup> Case SA.37667 *Excess Profit exemption in Belgium*, Commission decision to initiate the formal investigation procedure of 3 February 2015, see IP/15/4080 available at [http://europa.eu/rapid/press-release\\_IP-15-4080\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4080_en.htm).

under its ‘excess profit’ tax scheme are illegal under EU State aid rules and ordering their recovery.<sup>41</sup> At the same time, the Commission continues to pursue its inquiry into tax rulings practices in all EU Member States.<sup>42</sup>

### **5.2 *Enabling EU national competition authorities to be more effective enforcers***

59. Another essential aspect for creating a truly level playing field for companies across the single market is making sure that businesses can rely on the consistent application of EU competition rules, regardless of the Member State in which they operate. In this respect, the role of national competition authorities is crucial. The entry into force of Regulation 1/2003<sup>43</sup> in 2004 transformed the competition enforcement landscape, giving national competition authorities and national courts a key role in enforcing EU antitrust rules alongside the Commission. EU competition rules are now being applied on a scale that the Commission could never have achieved on its own, and in a more thorough and effective way than would otherwise have been possible.

60. The 2014 Commission Communication on Ten Years of Regulation 1/2003<sup>44</sup> identified a number of concrete areas of action to boost the enforcement powers of national competition authorities and increase convergence between national systems. The Commission is now reflecting on whether the toolbox available to national competition authorities can be further improved. In November 2015, the Commission launched a dedicated public consultation, inviting general public and stakeholders to share their experience and provide feedback on potential EU legislative action to further strengthen the enforcement and sanctioning tools of national competition authorities.

### **5.3 *Empowering EU consumers by breaking up cartels***

61. Keeping the single market fair, transparent, and open is good for EU businesses and Member States’ economies, but first and foremost it is important for European citizens. A clear example is the Commission’s work on anti-cartel enforcement. In a well-functioning single market, companies are encouraged to be more efficient and inventive than their rivals, and this ends up benefiting EU consumers through better products and lower prices. Cartels harm consumers and the economy as a whole, when companies set prices instead of the market.

62. In June, the Commission fined eight manufacturers and two distributors of retail food packaging trays a total of over EUR 115 million for having participated in at least one of five separate cartels.<sup>45</sup> The eight manufacturers were Huhtamäki of Finland, Nespak and Vitembal of France, Silver Plastics of Germany, Coopbox, Magic Pack and Sirap-Gema of Italy and Linpac of the UK. The two distributors were Ovarpack of Portugal and Propack of the UK.

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<sup>41</sup> See IP/16/42 of 11 January 2016, available at [http://europa.eu/rapid/press-release\\_IP-16-42\\_en.htm](http://europa.eu/rapid/press-release_IP-16-42_en.htm).

<sup>42</sup> See IP/14/2742 of 17 December 2014, available at [http://europa.eu/rapid/press-release\\_IP-14-2742\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2742_en.htm).

<sup>43</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, OJ L 1, 4.1.2003, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001>.

<sup>44</sup> Communication of 9 July 2014 from the Commission to the European Parliament and the Council, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM(2014) 453, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0453>.

<sup>45</sup> Case AT.39563 *Retail Food Packaging*, Commission decision of 24 June 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39563](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39563).

63. Rather than competing on their merits, the companies fixed prices and allocated customers of polystyrene foam or polypropylene rigid trays, in breach of EU antitrust rules, affecting millions of consumers buying food. Polystyrene foam and polypropylene rigid trays are used for packaging food sold in shops or supermarkets, for products such as cheese, meat, fish or cakes.

64. The Commission also fined eight optical disc drive suppliers a total of EUR 116 million for having coordinated their behaviour in relation to procurement tenders organised by two computer manufacturers, Dell and Hewlett Packard.<sup>46</sup> The suppliers on which a fine was imposed were Philips, Lite-On, their joint venture Philips & Lite-On Digital Solutions, Hitachi-LG Data Storage, Toshiba Samsung Storage Technology, Sony, Sony Optiarc and Quanta Storage. Although the cartel contacts took place outside of the European Economic Area (EEA), they were implemented on a worldwide basis including in the EEA.

65. Optical disc drives are used, for example, in personal computers, CD and DVD players and video games consoles to read or record data stored on optical discs, such as CDs, DVDs or Blu-ray discs. The cartel concerned optical disc drives for desktops and laptops. Making sure these types of markets remain competitive is especially important to guarantee fair prices for today's consumers, and innovative products for the consumers of the future.

66. Dismantling cartels is like repealing a hidden tax that millions of unsuspecting consumers in Europe were forced to pay. Moreover, cartels remove the incentives for business to innovate, severely hampering EU dynamism and future growth.

#### ***5.4 Making financial services markets work better – competition policy developments in the financial and payment sectors***

67. The Commission also adopted a cartel decision in the financial sector, one of the Commission's priority areas for achieving a fairer and more integrated single market. In February, the Commission fined the UK-based broker, ICAP, around EUR 15 million for having breached EU antitrust rules by facilitating several cartels in the sector of yen interest rate derivatives (YIRD).<sup>47</sup> In this respect, in December 2013, fines were imposed on a number of major banks following the adoption of a settlement decision.

68. The YIRD investigation is just one example of the Commission's efforts to fight anticompetitive practices in the financial markets. The payment sector offers another relevant example. In July 2015, the Commission sent a Statement of Objections to MasterCard, for having allegedly raised the costs of card payments, thereby harming consumers and retailers in the EU.<sup>48</sup> Payments by card play a key role in the single market, both for domestic and cross-border purchases, including online purchases. European consumers and businesses carry out over 40 % of their non-cash payments each year using payment cards.

69. The Statement of Objections outlines the Commission's preliminary view that MasterCard's rules prevent banks from offering lower interchange fees to retailers based in another country in the European Economic Area, where interchange fees may be higher. As a result, retailers cannot benefit from lower fees elsewhere and cross-border competition between banks may be restricted, in breach of European antitrust

<sup>46</sup> Case AT.39639 *Optical Disc Drives*, Commission decision of 21 October 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39639](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39639).

<sup>47</sup> Case AT.39861 *Yen Interest Rate Derivatives (YIRD)*, Commission decision of 4 December 2013, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39861](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39861).

<sup>48</sup> Case AT.40049 *Mastercard II*, see IP/15/5323 of 9 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5323\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5323_en.htm).

rules. The Statement of Objections also alleges that MasterCard's interchange fees for transactions in the EU using MasterCard cards issued in other regions of the world breach European antitrust rules by setting an artificially high minimum price for processing these transactions.

70. One of the two issues in the current investigation concerns inter-regional transactions, which are not covered by the Interchange Fee Regulation<sup>49</sup> that was adopted in April 2015. Building on almost ten years of antitrust case-law in the payment sector, the Regulation has put a cap on interchange fees for cards issued and used in the EU, benefiting consumers and businesses and encouraging growth and innovation. As cards are the most widely used method of online payment, the Regulation is also an important building block for completing the Digital Single Market.

### **5.5 State aid rules in the banking sector – supporting the economic recovery and minimising distortions of competition**

71. In the banking sector, State aid control continued to limit distortions of competition and ensure a level playing field, while at the same time reducing the use of taxpayers' money to the minimum necessary. In addition, in January 2015 the Bank Resolution and Recovery Directive (BRRD)<sup>50</sup> entered into force, setting out the rules for the resolution of banks and large investment firms in all Member States. State aid to failing banks notified to the Commission after 1 January 2015 can only be granted if the bank is put into resolution, in compliance with the provisions of the BRRD in addition to EU State aid rules.

72. In November, the Commission found the resolution plans of Banca delle Marche, Banca Popolare dell'Etruria e del Lazio, Cassa di Risparmio di Ferrara and Cassa di Risparmio della Provincia di Chieti (combined market share of about 1 % in Italy) to be in line with EU State aid rules.<sup>51</sup> The four banks, all of which had already been under special administration, were put into resolution by the Bank of Italy in line with the BRRD. The Commission found that Italy's plans to use the national resolution fund minimised the use of public funds and any distortions to competition resulting from the measures, while preserving financial stability.

73. In addition, State aid rules played a key role in supporting the efforts of the four largest Greek banks to address capital shortfalls identified by the European banking supervisor.<sup>52</sup> Between November

<sup>49</sup> Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123, 19.5.2015, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2015.123.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.123.01.0001.01.ENG).

<sup>50</sup> European Parliament and Council Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427289116879&uri=CELEX:32014L0059>.

<sup>51</sup> Cases SA.39543 *Resolution of Banca delle Marche S.p.A.*, Commission decision of 22 November 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39543](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39543); SA.41134 *Resolution of Banca Popolare dell'Etruria e del Lazio - Soc. Coop.*, Commission decision of 22 November 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41134](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41134); SA.41925 *Resolution of Cassa di risparmio di Ferrara S.p.A.*, Commission decision of 22 November 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41925](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41925); and SA.43547 *Resolution of Cassa di risparmio della Provincia di Chieti S.p.A.*, Commission decision of 22 November 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43547](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43547).

<sup>52</sup> See <https://www.bankingsupervision.europa.eu/press/pr/date/2015/html/sr151031.en.html>.

and December, the Commission approved State aid measures for the recapitalisations of Piraeus Bank<sup>53</sup> and the National Bank of Greece.<sup>54</sup> *The banks submitted restructuring plans aimed at ensuring their long-term viability, which would allow them to refocus on lending to Greek businesses and support the recovery of the Greek economy.*

74. The Commission is also ensuring the consistent application of State aid rules to the banking sector under the Economic Adjustment Programme in Cyprus. In particular, in December 2015 the Commission found a capital injection of EUR 175 million in favour of the Cypriot Cooperative Central Bank Ltd and its subsidiaries to be in line with EU State aid rules.<sup>55</sup> The Commission concluded that the restructuring measures that the bank committed to implementing would minimise competition distortions while ensuring that the bank becomes viable in the long-term.

75. In the post-programme context in Portugal,<sup>56</sup> the Commission approved under EU State aid rules a prolongation of Portuguese state guarantees on bonds issued by Novo Banco,<sup>57</sup> and State aid measures to cover the funding gap in the resolution of Banif.<sup>58</sup> The proposed aid measures aimed, respectively, to ensure the maintenance of adequate liquidity for Novo Banco and enable Banif's orderly exit from the market, helping to underpin the financial stability of the Portuguese banking sector.

## **6. Promoting fruitful international cooperation and a constructive inter-institutional dialogue in the competition area**

76. The Commission, and in particular the Commissioner for Competition, Margrethe Vestager, is fully committed to an open and constructive exchange on competition issues globally and with other EU institutions.

### **6.1 Stepping up international cooperation with traditional and emerging economic players**

77. The progressive integration of the world economies has important implications on the work of competition enforcers – globalisation is mainly about interdependence. In the past 25 years, the number of competition regimes around the world has increased dramatically from around 20 at the beginning of the 1990s to around 130 in 2015, embracing 85 % of the world's population. While the increase in the number of antitrust agencies is a sign that competition culture is further developing around the world, the Commission's efforts are also addressing the challenges that come with it.

<sup>53</sup> Case SA.43364 2015 *additional restructuring aid to Piraeus Bank*, Commission decision of 29 November 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43364](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43364).

<sup>54</sup> Case SA.43365 2015 *additional restructuring aid to National Bank of Greece (NBG)*, Commission decision of 4 December 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43365](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43365).

<sup>55</sup> Case SA.43367 2015 *additional restructuring aid to the Cooperative Central Bank*, Commission decision of 18 December 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43367](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43367).

<sup>56</sup> Portugal successfully exited its three years Economic Adjustment Programme in June 2014.

<sup>57</sup> Case SA.43976 *Amendment of the 2014 Resolution of Banco Espirito Santo S.A. (Novo Banco S.A.)*, Commission decision of 19 December 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43976](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43976).

<sup>58</sup> Case SA.43977 *Resolution of Banif - Banco Internacional do Funchal, S.A.*, Commission decision of 21 December 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43977](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43977).

78. To this end, the Commission is actively engaging in international cooperation on competition matters, both bilaterally and multilaterally in competition fora such as the Competition Committee of the OECD, the United Nations Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN).

79. As co-chair of the ICN Merger Working Group, the Commission contributed to developing the Practical Guide to International Enforcement Cooperation in Mergers, adopted in 2015. The Practical Guide provides direct and case-based guidance for ICN members on how agencies can align timetables, share information and cooperate, both on substance and on remedies so to avoid inconsistencies.

80. Successful cooperation in merger control in 2015 also encompassed bilateral relations. In October, the Commission and the Ministry of Commerce of the People's Republic of China (MOFCOM) signed a Practical Guidance for Cooperation on Reviewing Merger Cases. The Practical Guidance will allow for greater transparency on the timing and content of discussions between the Commission and MOFCOM, leading to more efficient, consistent and non-conflicting reviews where a merger is to be assessed by both authorities. It represents a further element of cooperation between the EU and China, in addition to the technical cooperation activities currently being developed as part of a dedicated cooperation programme (EUCTP II<sup>59</sup>).

81. The Commission is continuing its work on including competition and State aid provisions in the negotiations on Free Trade Agreements (FTAs). In 2015, significant progress was made on competition provisions in the FTAs with Japan and Vietnam. The Commission also made progress on its negotiations with the US on a Transatlantic Trade and Investment Partnership Agreement (TTIP), which will include a competition chapter.

## **6.2 Structured dialogue with the European Parliament**

82. In 2015, the Commission continued its successful working relationship with the European Parliament, in particular the Economic and Monetary Affairs (ECON) Committee.

83. As part of her structured dialogue with Parliament, Commissioner Vestager visited the ECON Committee in July and November. She welcomed the opportunity to attend the Committee and engage with the members of Parliament on a constructive debate on competition policy.

84. Commissioner Vestager also attended the Competition Working Group of the ECON Committee in April and the Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE) in May and September. In June, she attended the Agriculture and Rural Development (AGRI) Committee to discuss the draft Guidelines for joint selling in the beef and veal, olive oil, and arable crops sectors.

### **Boosting Parliament's involvement in competition policy initiatives**

Following its 'Communication on Ten Years of Council Regulation 1/2003', the Commission is reflecting on how to empower the National Competition Authorities to be more effective enforcers of EU antitrust rules. The ECON Committee was informed about the public consultation launched in November 2015, with a view to obtaining feedback from a wide range of stakeholders. Furthermore, Commissioner Vestager committed to encouraging Parliament's full involvement in this initiative, to the extent the concrete content of the proposal will allow for it.

<sup>59</sup> EU-China Trade Project II.

### **6.3 *Continuing to improve DG Competition's communication with the European Parliament***

85. DG Competition's regular briefing seminar for assistants and political advisers from the ECON Committee covering the main themes in the 2014 Report on Competition Policy took place in July 2015. Similarly, DG Competition provided background briefings on State aid policy and procedures for members of TAXE and associated staff.

86. DG Competition worked with the Competition Working Group to prepare a workshop in May 2015 on international cooperation in competition enforcement and EU-US relations in this area. Moreover, DG Competition's newly appointed Director-General, Johannes Laitenberger, became the first Director-General to attend Parliament's Working Group on Competition Policy in December 2015.

87. DG Competition was the lead DG for 331 written Parliamentary questions and 7 petitions prepared by Commission services.

### **6.4 *DG Competition's engagement with the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR)***

88. The Commission informed the EESC and the CoR about major policy initiatives and participated in study groups and section meetings. Accordingly, the former Director-General of DG Competition, Alexander Italianer, attended the EESC Single Market, Production and Consumption Section meeting on 14 July. In turn, the EESC issued opinions on 'State aid to firms: is it effective and efficient' (own-initiative opinion) on 16 September and on the 2014 Report on Competition Policy on 9 December. The CoR issued an opinion on financial instruments in support of territorial development on 14 October.

## PART 2: LEGISLATION AND POLICY DEVELOPMENTS

### Competition policy boosting innovation and investment across the EU

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

90. Competition can make a real difference by keeping the single market open and turning it into a driver of innovation and growth in Europe. Competition policy enables competitors to cooperate on innovation without misusing such cooperation to anti-competitive ends. In this way it ensures that mergers do not reduce or harm innovation and it enables EU governments to contribute to private-sector investments in innovation. In addition, competition-friendly regulation and competition culture create favourable conditions for investments and innovation, which enhances consumer welfare and efficiently functioning markets, enable growth and contribute towards more convergence. A competitive EU internal market also prepares European companies to succeed on global markets.

### 7. State Aid

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

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

91. The objectives of the Commission's control of State aid are to ensure that aid is growth-enhancing, efficient and effective, and better targeted in times of budgetary constraints and where aid is granted; it does not restrict competition but addresses market failures to the benefit of society as a whole. In addition to this, the Commission is actively engaged in preventing and recovering incompatible State aid.

#### 7.1 . *State Aid Modernisation: Implementation phase*

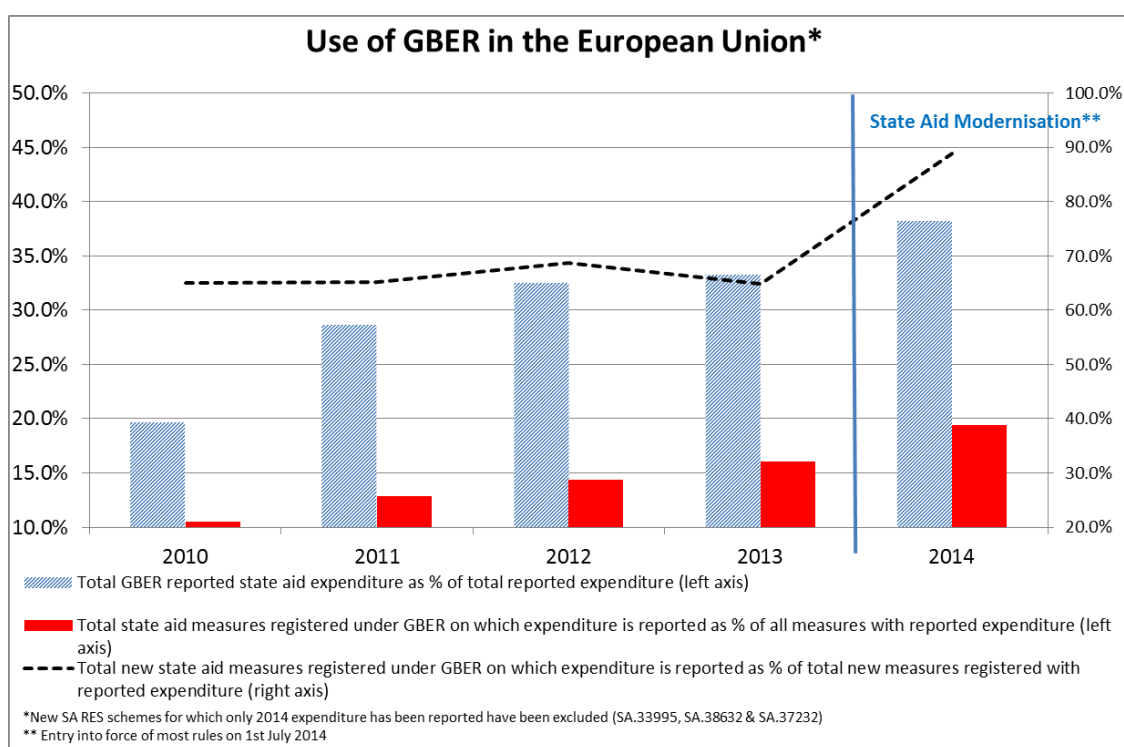
92. In 2014 the Commission largely completed its ambitious State Aid Modernisation (SAM) reform.<sup>60</sup> The reform, which was launched in 2012,<sup>61</sup> aimed at promoting good aid that supports investments and spurs growth while contributing to Member States' efforts towards budgetary consolidation. In 2015, work continued on the remaining item of the reform, namely the guidance on the notion of aid.

<sup>60</sup> For a comprehensive overview of State Aid Modernisation see DG Competition webpage: [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html)

<sup>61</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.

93. SAM provides for more efficient decision-making and procedures for granting growth-supporting aid that is not distortive to market functioning in the EU. Among the key objectives of the reform are: tangible cuts in red tape, the promotion of a better use of limited public resources by Member States and of a higher contribution of aid measures to investment and growth. For instance, the new State aid rules under the research, development and innovation (R&D&I) framework encourage and contribute the spread of innovation in the EU for the benefit of businesses and consumers.

94. One of the cornerstones of the State Aid Modernisation reform was the new General Block Exemption Regulation (GBER)<sup>62</sup>, which simplifies aid granting procedures for Member States by authorising without prior notification a wide range of measures fulfilling horizontal common interest objectives. Only cases with the biggest potential to distort competition in the single market will still face ex ante assessment (notification). As a result of the reform, a significantly larger number of smaller and unproblematic measures are exempted from prior notification, in exchange for strengthened controls at Member State level, greater transparency and better evaluation of the impact of aid.



95. Following the State Aid modernisation and the entry into force of the new GBER, Member States made extensive use of the possibilities offered by the comprehensive modernisation of State aid rules. Notably, a surge in aid excluded from prior Commission scrutiny indicates an important reduction of red tape. Indeed, the above chart highlights the fact that about 90 % of new measures in 2014 were registered as exempted from prior notification according to GBER. As regards the share of GBER expenditure in total aid measures, this amounted to approximately 40 % in 2014, and is expected to increase even further in 2015.

- Partnership with Member States

<sup>62</sup>

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

96. To facilitate the implementation of SAM, the Commission is supporting Member States in various ways and has started a closer cooperation with them. Under the new partnership arrangements with Member States, the Commission provides pro-active support of Member States by the Commission through advocacy work and trainings. The Commission services have also set up a High Level Group (HLG) together with Member States and some other dedicated working groups to oversee implementation and facilitate compliance with the new requirements for transparency and evaluations. To facilitate the work of the central authorities in Member States, the Commission services have in place a network of State aid country coordinators. The coordinators help to address systemic issues in State aid enforcement at Member State level, help Member States prioritise their portfolio of cases and assist with providing training and guidance. The Commission services have also provided further guidance on the interpretation of the GBER<sup>63</sup>.

97. Collaboration with Member States takes multiple forms. One fruitful form of the multilateral partnership is the project between the Commission services and the Member States to facilitate compliance with the new transparency provisions of SAM. All Member States have committed to participating in the development of the Transparency Award Module – an IT platform that will facilitate data collection, storage and visualisation. Meanwhile, the discussions with Member States are ongoing about the institutional set up of granting authorities, national information systems for State aid, and methodology used for encoding information required by the transparency provisions of GBER (Article 9 and Annex III).

- Evaluation

98. Evaluation of aid schemes is a new requirement introduced by SAM. The aim is to gather the necessary evidence to better identify impact, improve enforcement and inform future policy-making by Member States and the Commission.

99. Evaluation also complements the major expansion of the GBER and represents a necessary ex post safeguard, alongside transparency and monitoring, to promote quality and effectiveness of aid policies. Since 1 July 2014, evaluation is required for large GBER schemes in certain aid categories<sup>64</sup> as well as for some schemes notified under the new generation of State aid guidelines<sup>65</sup>.

100. By the end of 2015, the Commission had approved evaluation plans covering 17 large State aid schemes submitted by 10 Member States<sup>66</sup>; most of these decisions concerned either regional or R&D&I aid schemes. These schemes account in total for about EUR 10 billion of the annual State aid budget.

- General State aid scrutiny supporting innovation and growth

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<sup>63</sup> *General Block Exemption Regulation (GBER) Frequently Asked Questions* of July 2015, prepared by the Commission services available at [http://ec.europa.eu/competition/state\\_aid/legislation/practical\\_guide\\_gber\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf)

<sup>64</sup> Schemes with an average annual State aid budget above EUR 150 million in the fields of regional aid, aid for SMEs and access to finance, aid for research and development and innovation, energy and environmental aid and aid for broadband infrastructures.

<sup>65</sup> Evaluation might apply to notified aid schemes with large budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen.

<sup>66</sup> Czech Republic, Germany, Spain, France, Hungary, Austria, Poland, Portugal, Finland, and United Kingdom.

101. More flexible rules following the finalisation of SAM made it easier in 2015 for Member States to implement R&D&I projects, risk finance schemes and other aid measures, as well as enabled the Commission to focus on projects with an important impact on competition.

- Aid for research, development and innovation

102. One of the headline targets of Europe 2020 Strategy<sup>67</sup> is for R&D&I investments in the EU to reach 3 % of GDP. However, R&D spending in Europe has been lagging behind major global competitors, now standing a touch above 2 % of GDP, compared with around 3 % in the United States of America and Japan. This is mainly the result of lower levels of private investment.

103. The State aid rules for R&D&I aim to ensure that public funding goes to research projects that would not have happened otherwise, i.e. projects that truly go beyond the state of the art and which bring innovative products and services to the market and ultimately to consumers.

104. The new State aid rules, which entered into force on 1 July 2014 aim at market efficiency and mobilising private investment in projects that would have not been implemented due to market failures. The rules also set the ground for EU companies to combine their efforts with Member States and invest further in R&D&I as a gateway for sustainable growth and job creation in Europe. The enlarged scope of the rules, as well as more flexible and simpler criteria under which the State aid is more likely to be found compatible with the internal market, facilitate the implementation of R&D projects by Member States.

#### **Aid measures enabling ground-breaking research**

In 2015, using the new rules the Commission approved ambitious projects in areas such as satellite launchers (i.e. access to space), electricity transportation and aeronautics. For instance, the SABRE project (United Kingdom) can lead to significant technological advances that would benefit consumers using products and services that depend on low Earth orbiting satellites, such as mobile communications and other services. Similarly the Supergrid project (France) has put in place a framework for collaboration between academia and industry over innovation in the field of technology for long-distance electricity transportation. Finally, the TS 3000 project (France) will encourage research in the field of aeronautics while putting in place higher standards for performance, environment and new materials. Nonetheless, the Commission has remained vigilant and decided to investigate further the impact on competition of a project establishing a test facility in the railway industry in Spain.

According to the information submitted by the Member States to the Commission in 2015, the Member States implemented 603 R&D&I schemes covered by the new GBER (Articles 25 to 30), with an estimated annual expenditure of EUR 18.8 billion. Finally, in 2015 the Commission also approved eight evaluation plans covering research and development measures with an overall annual budget in excess of EUR 150 million.

<sup>67</sup> Communication of 3 March 2010 from the Commission, *Europe 2020 A Strategy For Smart, Sustainable And Inclusive Growth*, COM(2010) 2020 final available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427303331326&uri=CELEX:52010DC2020>

- Aid to risk finance

105. In addition to the new R&D&I State aid rules, the Commission has put in place a simpler, more flexible and generous State aid framework for risk finance for SMEs and mid-caps. The new rules, contained in the new Risk Finance Guidelines and in the new GBER, entered into force on 1 July 2014.<sup>68</sup>

106. SMEs across the EU remain heavily dependent on traditional bank lending, which is still limited by banks' refinancing capacity, risk appetite and capital adequacy. The financial crisis has exacerbated the problem with approximately one third of SMEs being unable to receive the necessary finance in recent years. Given the pivotal importance of SMEs and midcaps for the whole EU economy, the situation has a significant negative impact on growth and job creation. The new rules aim to offer better incentives for private sector investors - including institutional ones – to increase their funding activities in the critical area of SME and midcaps financing. The rules also mirror other EU initiatives designed to promote wider use of financial instruments in the context of new support programmes such as Horizon 2020 or COSME (the Programme for the Competitiveness of Enterprise and SMEs)<sup>69</sup>.

107. The new risk finance regime provides the framework for seamless support for new ventures from their creation to their development into global players. The aim is to help new ventures to get past the critical stages, namely the “valley of death”, where private financing is either unavailable or not available in the necessary amount or form.

**Aid measures encouraging investment and innovation**

In 2015, under the new Risk Finance Guidelines, the Commission adopted several decisions on schemes aimed at encouraging investment in innovative SMEs and midcaps. It approved one scheme in the United Kingdom (the EIS-VCT scheme, targeting innovative SMEs and midcaps) and two schemes in France (Amortissement exceptionnel des investissements des entreprises dans les PME innovantes and ISF-PME schemes). Taking the view that these measures covered a real gap in the market, the Commission worked together with the Member States on solutions to limit the impact on competition in the single market. The Commission considered that the risks inherent to the activities of these young firms and innovative companies (i.e. products/technologies not yet proven to be economically viable) and the lack of financial guarantees limited their capacity to access funding. In addition, their small size meant that they were not in a position to employ staff specifically dedicated to financial management. The in-depth analysis was performed on the basis of substantiated economic ex-ante assessment provided by the Member States to demonstrate the market failure affecting these specific categories of companies. The assessment showed that there are still specific funding needs for certain innovative SMEs beyond the criteria set out in the GBER (i.e. wider range of financial instruments, risk finance measure of up to EUR 15 million, possibility of capital replacement, tailored private participation ratio). The examination showed the existence of a funding gap for certain innovative SMEs and that the aid was necessary to stimulate investment that would not have been provided by the market unprompted.

According to the information submitted by the Member States to the Commission, the Member States, implemented 161 measures, under Articles 21 to 24 of the new GBER to help SMEs to access finance. The measures had an estimated annual budget of EUR 7.015 million. Finally, in 2015 the Commission also approved four evaluation plans covering risk finance measures with an overall annual budget in excess of EUR 150 million.

- Regional aid

<sup>68</sup> Communication from the Commission, *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.1.2014, p. 4 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122\(04\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122(04))

<sup>69</sup> For an overview on the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises available at [http://ec.europa.eu/enterprise/initiatives/cosme/index\\_en.htm](http://ec.europa.eu/enterprise/initiatives/cosme/index_en.htm)

108. Regional aid is an important instrument in the EU's toolbox to promote greater economic and social cohesion. The 2014-2020 regional aid framework has been fully in place since July 2014, following the adoption in June 2013 of the revised Regional Aid Guidelines for the period between July 2014 and 31 December 2020 (RAG 2014-20), the adoption of the regional aid provisions in the GBER and the approval of the 28 regional aid maps in 2014.

109. The new GBER has extended the range of regional aid measures, enabling Member States to put in place aid schemes and individual aid measures without having to notify them to the Commission. Examples of these are ad hoc regional investment aid measures below the notification thresholds, transport aid schemes and operating aid schemes for outermost regions. In 2015 the Commission advised Member States' authorities on how to interpret and implement the new regional aid provisions of GBER, thus helping them to make a success of the reforms introduced under SAM. Since its adoption in June 2014, the Commission services have answered some 120 sets of questions on how to interpret the regional aid provisions in GBER, and have provided guidance on how to implement of GBER measures as part of numerous pre-notification contacts.

#### Regional aid measures

In 2015, the Commission adopted several decisions on regional aid measures under the new provisions, e.g. on investment aid schemes<sup>70</sup>, operating aid schemes in the outermost regions<sup>71</sup>, and on evaluation plans for exempted large regional aid schemes<sup>72</sup>. The Commission also adopted several decisions on regional aid measures to support large investment projects under the preceding rules: in particular, it took a final decision authorising regional aid for investments by Volkswagen in Portugal (cars) and approved aid for Nexen in the Czech Republic (tyre production), for Nitrogénművek in Hungary and for Duslo in Slovakia (both in the fertiliser sector).

- European Fund for Strategic Investments

110. In November 2014, President Juncker announced the creation of the European Fund for Strategic Investments (EFSI), with the objective to generate EUR 315 billion in investment in Europe. The Regulation setting up the EFSI was adopted in July 2015. In that context the Commission has put in place an accelerated procedure for approving within six weeks Member State co-financing constituting notifiable State aid. This process should contribute to the necessary public and private financing to reach concrete infrastructure and innovation projects as quickly as possible.

<sup>70</sup> Case SA.39869 *Corporate tax exemption scheme* (BG), Commission decision of 14 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39869](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39869)

<sup>71</sup> Cases SA.38536 *Aide fiscale à l'investissement outre-mer*, Commission decision of 2 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38536](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38536) and SA.38823 *Reduced rate of excise duty applied to rum and liqueurs produced and consumed in Madeira (2014-2020)*, Commission decision of 2 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38823](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38823)

<sup>72</sup> Cases SA.39460 *Evaluation plan for the block exempted large aid scheme "Bund-Länder-Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur - Gewerbliche Wirtschaft"* (DE), Commission decision of 22 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39460](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39460); SA.39669 *Evaluation plan of the Development Tax Benefit Scheme* (HU), Commission decision of 16 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39669](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39669); SA.38830 *Evaluation plan Polish SEZ scheme* (PL), Commission decision of 16 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38830](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38830) and SA.42136 *Evaluation Plan: Inovação Empresarial* (PT), Commission decision of 19 August 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42136](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42136)

## 7.2 *State Aid Modernisation continues*

### 7.2.1 *Notion of aid / effect on trade*

111. One building block of SAM still needs to be put in place, namely a Commission guidance document on the notion of State aid in the light of important changes in case law and enforcement practice.

112. Given the high level of economic integration achieved within the EU, aid that distorts competition between companies will in most cases also have an impact on intra-EU trade.

113. However, if State support is granted to an activity which has a purely local impact, there may not be an effect on intra-EU trade, e.g. where the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States. Moreover, the measure should have no - or at most marginal – foreseeable effects on cross-border investments in the sector or the establishment of firms within the EU's internal market.

114. In this context, the European Commission has concluded on 29 April that seven measures granting public support to purely local operations did not involve State aid within the meaning of the EU rules, since they were unlikely to have a significant effect on trade between Member States. The decisions concerned the Czech Republic, Germany, the Netherlands and the United Kingdom<sup>73</sup>.

115. These decisions provide Member States and stakeholders with additional guidance to determine which cases do not need to be cleared by the Commission under EU State aid rules. They complement the Commission's revised GBER.

116. To provide further guidance to Member States, the Commission services have updated the analytical grids on the financing of infrastructure projects<sup>74</sup>. The grids explain when, in view of the Commission services, no State aid is involved and when notification for State aid clearance is needed. They also explain the framework for services of general economic interest.

117. The analytical grids explain the current rules and the Commission's decisional practice on the application of State aid rules to the public financing of infrastructure projects. The grids were updated following the State aid modernisation. The previous grids dated from 2012 and followed the *Leipzig-Halle*<sup>75</sup> judgment.

<sup>73</sup> Cases SA.37432 *Hradec Králové public hospitals* (CZ), Commission decisions of 29 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37432](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37432); SA.37904 *Medical centre in Durmersheim* (DE) available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37904](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37904); SA.33149 *Städtische Projektgesellschaft "Wirtschaftsbüro Gaarden - Kiel"* (DE) available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_33149](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33149); SA.38035 *Landgrafen-Klinik* (DE); SA.39403 *Investment aid for Lauwersoog port* (NL) available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38035](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38035); SA.37963 *Glenmore Lodge* (UK), available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37963](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37963) and SA.38208 *Member-owned golf clubs* (UK) available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38208](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38208)

<sup>74</sup> For further information see analytical grids on the financing of infrastructure projects available at [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/state\\_aid\\_grids\\_2015\\_en.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/state_aid_grids_2015_en.pdf)

<sup>75</sup> Joined cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission*, judgment of the General Court of 24 March 2011 [2011] ECR II-1311.

### 7.2.2 Further extension of the scope of the GBER

118. Recital 1 of the GBER already announced that the Commission planned to propose criteria for exempting port and airport infrastructure provided that sufficient case experience was developed. The first public consultations will take place early 2016.

## 7.3 Monitoring, recovery and cooperation with national courts

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

119. Over the years, the architecture of State aid control has evolved. Today, 32 % of aid is granted under block-exempted schemes which are not examined by the Commission before entering into force<sup>76</sup>. Overall, 88 % of aid is granted on the basis of previously approved aid schemes or Block Exemption Regulations<sup>77</sup>. In that context, it is essential for the Commission to verify that Member States apply the schemes correctly and that they only grant aid when all required conditions are met.

120. To that end, the Commission introduced in 2006 a regular, *ex post*, sample-based control of existing aid schemes ("monitoring"). After a modest start covering about 20 schemes and 10 Member States in each monitoring cycle, the Commission has considerably stepped up monitoring since 2011. Building on the Court of Auditors recommendations<sup>78</sup> and anticipating future changes in how State aid is controlled, the Commission has substantially increased the size of the monitoring sample in the last three annual cycles to 96 schemes in the current 2015 review. It also extended the scope of its control.

121. The 2015 cycle covered all Member States, all main types of aid approved as well as block-exempted schemes. Furthermore, the sample contained a number of block-exempted schemes under the new GBER<sup>79</sup>. Also, the Commission carried out two pilot projects on targeted monitoring. First, the Commission assessed aid schemes in one particular Member State<sup>80</sup> in order to examine whether accumulation rules were correctly observed when aid for the same project was granted under different schemes. Second, the Commission monitored a number of large investments projects in order to assess whether they had been correctly implemented.

122. The Commission follows up systematically on all irregularities and uses the means at its disposal, as appropriate, to address the competition distortions that these may have caused. In some cases, Member States offer to voluntarily redress the problems detected, for example to amend national legislation or to recover the excess aid granted. In other cases, the Commission may need to take formal action. In 2015, the Commission adopted two final decisions in cases where it had opened a formal investigation procedure in 2013. In those cases, the Member States provided additional information that removed the Commission's

<sup>76</sup> This percentage concerns aid in terms of volume. Banking schemes are not considered here. See latest publicly available figures (2012), Scoreboard, EU 27 (2006-2012) available at [http://ec.europa.eu/competition/state\\_aid/scoreboard/graph8.jpg](http://ec.europa.eu/competition/state_aid/scoreboard/graph8.jpg)

<sup>77</sup> See previous footnote.

<sup>78</sup> In its 2011 report on the efficiency of State aid procedures, the Court of Auditors considered that, in view of the importance of aids granted under existing aid schemes, the Commission's monitoring activity should be reinforced. See the recommendation n° 1 of the Court of Auditors Report recital 96, p. 41, publicly available at <http://eca.europa.eu/portal/pls/portal/docs/1/10952771.PDF>

<sup>79</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU; OJ L 187, 26.6.2014, p. 1.

<sup>80</sup> United Kingdom.

concerns that the schemes had been misapplied<sup>81</sup>. It also adopted one final decision, after the Member State concerned, France, committed itself to making an incompatible aid scheme compatible with the State aid rules<sup>82</sup>.

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

123. To ensure the integrity of the single market, the Commission has the power and the duty to request that Member States recover unlawful and incompatible aid which has unduly distorted competition and trade between Member States. In 2015, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

124. By 31 December, the amount of illegal and incompatible aid recovered from beneficiaries had increased to EUR 13.5 billion<sup>83</sup>, from EUR 8.5 billion in December 2004<sup>84</sup>. This means that the percentage of illegal and incompatible aid still to be recovered fell slightly from 74 % at the end of 2004 to around 55 % at the end of 2015.

125. In 2015, the Commission adopted 17 new recovery decisions and EUR 6.1 million was recovered by the Member States. As of the end of December, the Commission had 54 pending recovery cases.

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Recovery decisions adopted in 2015	17
Amount recovered in 2015 (EUR million)	6.1
Pending recovery cases on 31 December 2015	54

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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 2015, the Court of Justice condemned two Member States under Article 108(2) TFEU<sup>85</sup> (France and Germany)<sup>86</sup> and one Member State under Article 260(2) TFEU (Italy)<sup>87</sup>.

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<sup>81</sup> Cases SA.15373 *Enterprise Capital Funds*, Commission decision of 9 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_15373](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_15373) and SA.20326 *Mesures de dispense partielle de précompte professionnel en faveur de la R&D*, Commission decision of 23 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_20326](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_20326)

<sup>82</sup> Case SA.14551 *Taxation au tonnage*, Commission decision of 4 February 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_14551](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_14551) For further information see IP/15/4105 of 4 February 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4105\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4105_en.htm)

<sup>83</sup> The reference period is 1 January 1999 to 31 December 2015.

<sup>84</sup> The reference period is 1 January 1999 to 31 December 2005.

<sup>85</sup> Consolidated version of the Treaty on the Functioning of the European Union, 2008 OJ C 115, 9.5.2008, p.47.

<sup>86</sup> Cases C-63/14 *Commission v France*, judgment of the Court of 9 July 2015, ECLI:EU:C:2015:458 and C-674/13, *Commission v Germany*, judgment of the Court of 6 May 2015, ECLI:EU:C:2015:302.

<sup>87</sup> C-367/14 *Commission v Italy*, judgment of the Court of 17 September 2015, ECLI:EU:C:2015:611, and C-302/09 *Commission v Italy*, judgment of the Court of 6 October 2011, ECLI:EU:C:2011:634.

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

127. The Commission continued its cooperation with national courts under the Commission Notice on the enforcement of State aid law by national courts of 2009<sup>88</sup> (the "Enforcement Notice"). This cooperation includes direct case-related assistance to national courts when they apply EU State aid 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 at its own initiative.

128. In 2015, the Commission responded to two requests for information and two requests for an opinion under Article 29 of the Procedural Regulation<sup>89</sup>. The requests for information were issued by a Spanish and a German court. They concerned the state of the proceedings before the Commission of a complaint and the transmission of documents in the possession of the Commission as well as questions on how to interpret the notion of State aid. The requests for an opinion came from two German courts: one related to the aid element in a bank guarantee and the other to the existence of alleged State aid.

129. The Commission received also questions from third parties bringing cases to the attention of the Commission and asking the Commission to submit observations as *amicus curiae*. However, under the Procedural Regulation, the Commission has the duty to reply only to requests made by national courts, not to requests made by third parties. This provision is intended to preserve the independence of the national courts, even though requests made by third parties can be a useful tool to inform the Commission about ongoing cases where the submission of observations *ex officio* can be presented.

130. As a result of the 2013 amendment to the Procedural Regulation, the Commission has the possibility to submit *amicus curiae* observations on its own initiative before national courts. Article 29 of the Procedural Regulation mirrors in that respect Article 15 (3) of Regulation 1/2003 in the field of antitrust. In 2015, the Commission submitted observations before a French court on questions related to the execution of recovery decisions and observations were submitted to various courts in Romania, a court in Belgium and in the United States concerning the recognition and enforcement of an arbitration award, the implementation of which the Commission deems to constitute the grant of State aid. Further observations regarding the recognition and enforcement of that award will be submitted, in France, the United Kingdom and Luxembourg, but these were not yet filed in 2015.

131. The Commission intends to publish its opinions and *amicus curiae* observations on its website as soon as it receives approval from the courts concerned<sup>90</sup>.

132. The Commission also continued its advocacy efforts. In 2015, the Commission was actively involved in evaluating the financing of training programmes for national judges and in assessing judges' needs. It also sent officials to teach at such workshops and conferences<sup>91</sup>.

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<sup>88</sup> Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1.

<sup>89</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU, OJ L 248 of 24.9.2015, p. 9–29.

<sup>90</sup> Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 22, paragraph 98.

<sup>91</sup> See also the dedicated section *Cooperation with national courts*, Antitrust and Cartels Section, item 7.

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

133. In 2015, the EU Courts adopted a number of important judgments in the State aid area in particular on the concept of State resources, advantage and selectivity. The following overview is based on a selection of Court judgments.

##### 7.4.1 *State resources and effect on trade*

134. By judgment of 14 January in *Eventech*,<sup>92</sup> the Court of Justice rendered a preliminary ruling in response to a reference by the Court of Appeal of England & Wales by which it concluded that the policy by which London taxis (black cabs) were allowed to drive in publicly funded bus lanes, but minicabs were excluded, did not give rise to State aid. The Court of Justice ruled, first, that the policy did not involve State resources because, black cab's use of those lanes being permitted by law, their "exemption" from fines did not involve additional burdens on the public authorities which could entail a commitment of such resources.

135. The Court of Justice ruled, next, that since roads and bus lanes are not operated commercially by the public authorities the policy does not entail forgoing revenues they would have otherwise received in the absence of that policy. The Court of Justice further elaborated that where the State grants a right of privileged access to public infrastructure that is not operated commercially by the public authorities to users of that infrastructure in order to pursue the realisation of an objective laid down by that State's legislation, the State does not necessarily confer an economic advantage on those users. On selectivity, the Court of Justice ruled that black cabs and minicabs were not in a comparable factual or legal situation on the basis of physical and licensing characteristics, so that the permission of one and the exclusion of the latter from the bus policy did not constitute State aid. Finally, the Court of Justice upheld the *Altmark* case law on the effect on trade between Member States, although invited by the Advocate General and the ESA to revisit that case law, by concluding that it was feasible that the policy was liable to affect such trade since it could render less attractive the provision of minicab services in London.

##### 7.4.2 *The concept of advantage and quantification*

136. As regards the concept of advantage, the Court of Justice ruled in *OTP Bank Nyrt*<sup>93</sup> on the basis of another reference for a preliminary ruling that a Hungarian aid scheme to facilitate access to housing via banks provided an advantage to credit institutions established in Hungary. This enabled the banks to conclude loan agreements without having to assume the financial risk. The Court of Justice also ruled that in addition to the fact that the scheme enabled banks to conclude loans, it allowed them to provide additional services against remuneration, such as the opening of a current account. Such advantage was also selective as it concerned the economic sector of credit establishments (to the exclusion of other economic sectors).

137. Also as regards the concept of advantage and in particular the issue of quantification of advantage, the General Court handed down two judgments (*Aer Lingus v Commission*<sup>94</sup>, *Ryanair v*

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<sup>92</sup> Case C-518/13 *The Queen, on the application of Eventech Ltd, v The Parking Adjudicator*, judgment of the Court of 14 January 2015, ECLI:EU:C:2015:9

<sup>93</sup> Case C-672/13 *OTP Bank Nyrt v Magyar Állam, Magyar Államkincstár*, judgment of the Court of 19 March 2015, ECLI:EU:C:2015:185.

<sup>94</sup> Case T-473/12 *Aer Lingus Ltd v Commission*, judgment of the General Court of 5 February 2015, ECLI:EU:T:2015:78. The judgment is under appeal before the Court of Justice (cases C-164/15 P and C-165/15).

*Commission*<sup>95</sup>) on a Commission decision declaring the application by Ireland of differentiated air travel tax rates as illegal State aid. The General Court confirmed the assessment of the Commission that had found the higher rate of EUR10 per passenger as the normal tax rate and the lower tax rate of EUR 2 per passenger travelling to destinations located at maximum 300 km from Dublin the exception from the normal rate, constituting State aid to certain airlines. However, the General Court found that the Commission was wrong in quantifying the economic advantage as the difference between the two rates, since it should have taken into account the degree to which the airlines could have fully or partially passed on the advantage to the passengers. Thus, the advantage actually obtained by the airlines did not necessarily consist in the difference between the two rates, but rather in the possibility of offering more attractive prices and thereby increasing the turnover. Recovery should therefore also be limited to what was actually withheld by the airlines.

#### 7.4.3 *Market economy investor principle*

138. As regards the application of the market economy investor principle, the General Court ruled in a judgment of 2 July in joined cases *France and Orange (former France Télécom) v Commission*<sup>96</sup>, following a referral from the Court of Justice that the Commission was wrong to consider that the offer of a loan made to Orange was a State aid and thereby annulled the Commission decision. The General Court held that the relevant moment at which the Commission must apply the "Market Economy Investor Principle" (MEIP) is when the State financial support measure that may be characterised as State aid is adopted (i.e. December 2002) and not to the situation as it existed before July 2002 when the French Minister publicly stated that the French State would take the appropriate measures to rescue France Télécom.

139. While the General Court accepted that it is possible to take account of prior events and objective facts, it did not consider that those earlier events and facts alone can conclusively form the relevant reference framework for the purposes of applying the MEIP. As for the July 2002 ministerial statement, the General Court noted that the Commission did not succeed in proving that the intention of the French authorities was sufficiently genuine, reliable, specific and unconditional for them to be legally bound by such statements.

#### 7.4.4 *The concept of selectivity*

140. On the concept of selectivity, the Court of Justice in *Commission v MOL Nyrt*<sup>97</sup> upheld the judgment of the General Court that had annulled a Commission decision concerning State aid granted to the oil and gas company MOL. The Commission had considered that the agreement between the Hungarian government and MOL which provided for a prolongation of the mining authorisation and a 2008 amendment to the Mining Act constituted a selective aid measure. This prolongation significantly increased the mining fees for all mining companies except for those which had already signed a prolongation agreement, i.e. in practice only MOL.

141. With reference to the 2005 agreement between the Hungarian government and MOL, the Court of Justice concluded that, firstly, the selectivity requirement differs depending on whether the measure in

<sup>95</sup> Case T-500/12 *Ryanair Ltd v Commission*, judgment of the General Court of 5 February 2015, ECLI:EU:T:2015:73.

<sup>96</sup> Joined cases T-425/04 *RENV* and T-444/04 *RENV France and Orange v Commission*, judgment of the General Court of 2 July 2015, ECLI:EU:T:2015:450.

<sup>97</sup> Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt*, judgment of the Court of 4 June 2015, ECLI:EU:C:2015:362.

question constitutes a scheme or individual aid. In the case of individual aid, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. In the case of a scheme, it is necessary to identify whether the measure in question, notwithstanding the fact that it confers an advantage, does so to the exclusive benefit of certain undertakings or certain sectors of activity.

142. Secondly, there is a fundamental difference between the assessment of the selectivity of general schemes for exemption or relief, which, by definition, confer an advantage, and the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose additional charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited discretion, cannot be sufficient to establish that the corresponding scheme is selective. As regards both the 2005 agreement and the 2008 amendment taken together, the Court of Justice concluded that there was no chronological and/or functional link between the 2005 agreement and the 2008 amendment and could therefore not be considered as a single aid measure.

#### 7.4.5 *The concept of Services of General Economic Interest*

143. The EU Courts also handed down two important judgments on the concept of Services of General Economic Interest (SGEI). In *TV2/Denmark v Commission*<sup>98</sup> and *Viasat v Commission*<sup>99</sup>, the General Court confirmed the Commission's assessment that the *Altmark*<sup>100</sup> conditions were not fulfilled with respect to the financing of the Danish public broadcaster but disagreed with the Commission that the second *Altmark* condition requires the beneficiary of the SGEI compensation to be operating efficiently.

144. According to the General Court, this would lead to confusion between the second and the fourth *Altmark* conditions. In addition, the notion of a typical well-run company as stated in the fourth *Altmark* condition requires the beneficiary of the compensation to be compared with another company which is not a beneficiary. It is not sufficient for that purpose to argue that there is no comparable company because of the specific public service task entrusted to the beneficiary and on that basis argue that the beneficiary itself constitutes such a typical well-run company. Finally, as regards the question whether advertising revenue generated by commercials broadcast by TV2 but channelled to a fund and consequently disbursed back to TV2 constitute State resources, the General Court held that the State's intervention was limited to the fixing of amounts to be channelled to TV2. Thus, the State could only decide that TV2 would not receive all of the funds, but only a certain part of it, which is not sufficient to find that they constitute State resources. The funds keep their character as income generated by commercial activities of TV2.

#### 7.4.6 *Social housing constitute an existing aid scheme*

145. Finally, in an order of 12 May in *RENV Stichting Woonlinie v Commission*<sup>101</sup>, the General Court confirmed the Commission's decision of 15 December 2009 which found the Dutch social housing scheme to constitute an existing aid scheme compatible with the EU State aid rules on SGEI further to

<sup>98</sup> Case T-674/11 *TV2/Denmark v Commission*, judgment of the General Court of 24 September 2015, ECLI:EU:T:2015:684.

<sup>99</sup> Case T-125/12 *Viasat Broadcasting UK Ltd v Commission*, judgment of the General Court of 24 September 2015, ECLI:EU:T:2015:687.

<sup>100</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, judgment of the Court of 24 July 2003, ECLI:EU:C:2003:415.

<sup>101</sup> Case T-202/10 *Stichting Woonlinie v Commission*, judgment of the General Court of 12 May 2015, ECLI:EU:T:2015:287. The judgment is under appeal before the Court of Justice (case C-414/15 P).

commitments by the Netherlands. The General Court gave its decision by reasoned order which is available only in cases where the action is manifestly lacking any foundation in law (or manifestly inadmissible). The General Court rejected all the arguments put forward that were mainly directed against the changes in the Dutch social housing scheme, in particular an income limit in order to benefit from social housing.

## 8. Antitrust and cartels

### Articles 101, 102 and 106 TFEU

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

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

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

### 8.1 Guidance in antitrust and cartel proceedings

146. In 2015, in order to further increase transparency and to offer guidance to parties and practitioners the Commission published a number of guidance documents on its procedures:

147. Based on the experience gained in the past years, the purpose of the *Best Practices on the disclosure of information in data rooms*<sup>102</sup> in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation is to provide practical guidance on when and how to use data rooms to disclose in a restricted manner business secrets and other confidential information obtained during antitrust and merger proceedings.

148. *Guidance on the preparation of public versions of Commission Decisions*<sup>103</sup> was also adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003. It sets out how the Commission prepares the public version of antitrust decisions. It describes (i) what information undertakings can claim should be redacted and how they should substantiate their claims; (ii) what the Commission redacts on its own initiative and (iii) the procedure that is followed to settle confidentiality claims.

<sup>102</sup> Commission guidance (2015) *Best Practices on the disclosure of information in data rooms* available at [http://ec.europa.eu/competition/mergers/legislation/disclosure\\_information\\_data\\_rooms\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf)

<sup>103</sup> Commission guidance (2015) *Guidance on the preparation of public versions of Commission Decisions* available at [http://ec.europa.eu/competition/mergers/legislation/guidance\\_on\\_preparation\\_of\\_public\\_versions\\_mergers\\_26052015.pdf](http://ec.europa.eu/competition/mergers/legislation/guidance_on_preparation_of_public_versions_mergers_26052015.pdf) and [http://ec.europa.eu/competition/antitrust/guidance\\_on\\_preparation\\_of\\_public\\_versions\\_antitrust\\_04062015.pdf](http://ec.europa.eu/competition/antitrust/guidance_on_preparation_of_public_versions_antitrust_04062015.pdf)

The guidance paper titled *Recommendations for the Use of Electronic Document Submissions in Antitrust and Cartel Case Proceedings*<sup>104</sup> contains guidance in particular on how to submit documents electronically to the Commission (either by e-mail, via eTrustEx or by e-questionnaire), their format and size, protection, encryption, naming, languages, and non-confidential versions.

## 8.2 Significant judgments by the EU Courts in antitrust and cartels

- Article 101 TFEU

### 8.2.1 Communications between competitors, single and continuous infringement

149. In the *Dole* judgment<sup>105</sup>, pertaining to the bananas cartel, the Court of Justice entirely dismissed the appeal brought by banana importer Dole against the General Court judgment. The Court of Justice confirmed that communications between competitors leading to horizontal price-fixing are anti-competitive by their very object and amount to a violation of EU antitrust rules, without requiring an analysis of their effect on competition in the market. The Court of Justice agreed with the Commission that the cartelists' communications before setting the quotation prices for bananas reduced uncertainty for each of the participants as to the conduct of their competitors. This had the objective of creating competitive conditions that did not correspond to the normal conditions on the market without such collusive contacts and therefore gave rise to a concerted practice between the companies with the object to restrict competition.

150. In the *Del Monte* judgment<sup>106</sup>, also pertaining to the bananas cartel, the Court of Justice dismissed the appeal brought by Del Monte against the General Court judgment and accepted the appeal of the Commission brought against the same judgment. The judgment of the Court of Justice gives an important precedent clarifying aspects of the case law concerning the concept of a single continuous infringement. The Court of Justice confirmed that parties' unawareness of certain elements of a cartel does not alter the finding of a single and continuous infringement. The Court of Justice upheld the Commission's appeal against the fine reduction for cooperation awarded by the General Court and found that a reply to a simple request for information is not sufficient for a fine reduction.

### 8.2.2 Liability of facilitator

151. In *AC-Treuhand* judgment<sup>107</sup> the Court of Justice confirmed the General Court's judgment and thus, the Commission's decision to hold AC-Treuhand liable as a cartel facilitator under Article 101 TFEU. In its decision, the Commission fined AC-Treuhand because it played an essential role in the two infringements (ESBO/esters - Heat Stabilisers). It organised a number of meetings at its Zürich premises in which it actively participated, collecting from and supplying to the producers of heat stabilisers data on

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<sup>104</sup> Commission guidance (2015) *Recommendations for the Use of Electronic Document Submissions in Antitrust and Cartel Case Proceedings* available at [http://ec.europa.eu/competition/contacts/electronic\\_documents\\_en.pdf](http://ec.europa.eu/competition/contacts/electronic_documents_en.pdf)

<sup>105</sup> Case C-286/13 P *Dole v European Commission*, judgment of the Court of 19 March 2015, ECLI:EU:C:2015:184.

<sup>106</sup> Joined cases C-293/13 P and 294/13 P *Del Monte e.a. v European Commission*, judgment of the Court of 19 March 2015, ECLI:EU:C:2015:416.

<sup>107</sup> Case C-194/14 P *AC-Treuhand v Commission*, judgment of the Court of 22 October 2015, ECLI:EU:2015:717.

sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration.

152. In the judgment the Court of Justice interpreted Article 101 TFEU as referring to all agreements and concerted practices which distort competition, irrespective of the markets the parties operate on. The Court of Justice held that to be held liable for an infringement of Article 101 TFEU, it is not required to restrict one's freedom of action on a particular market and that the effectiveness of Article 101 TFEU would be endangered if undertakings such as AC-Treuhand were allowed to escape liability simply because they do not contribute actively to the restriction of competition in a particular market. On fines, the Court of Justice agreed that the Commission was entitled to deviate from the usual calculation method and to impose a lump sum on AC-Treuhand.

### 8.2.3 Parental liability, fines calculation

153. On 9 September, the General Court handed down five judgments<sup>108</sup> in the TV and Computer monitor tubes cartel involving seven undertakings which participated in either one or both of two distinct cartels in the cathode ray tubes sector. The General Court found that the Commission had jurisdiction notwithstanding the fact that the cartels were formed outside the EEA. The cartel arrangements directly influenced the setting of prices and of volumes delivered to the EEA either as direct sales or as products processed by vertically integrated companies.

154. On substance, the General Court upheld the majority of the Commission's findings with the exception of the individual participation of Toshiba in the early period of the cartel, for which the General Court found that that Commission had not sufficiently established its awareness of the overall cartel.

155. The judgments also upheld the Commission's decision regarding parental liability. In particular, the General Court confirmed, in line with established case law, that parent companies were liable for the illegal anti-competitive behaviour of joint ventures irrespective of the ownership shares (regarding both the Philips/LG Electronics and the Toshiba/Panasonic joint ventures).

156. The General Court also upheld the fines methodology and confirmed by reference to the Innolux judgment<sup>109</sup> of the Court of Justice the Commission's right to consider sales of finished products sold to third parties in the European Economic Area (EEA) in which a vertically integrated cartel had incorporated cathode ray tubes into its finished products outside the EEA. Finally, the General Court decided to reduce the fines for Panasonic, Toshiba and MTPD as it had found that the companies provided a more detailed value of sales figures than what the Commission had used. The fine, however, set at just over EUR 1.4 billion, remains the highest ever total fines imposed in a cartel case.

### 8.2.4 Calculation of fines

157. In its *LG* judgment<sup>110</sup> of 23 April, the Court of Justice upheld the judgment of the General Court concerning the *LCD panels* cartel<sup>111</sup>. The main issue at stake was whether sales to parents of a joint

<sup>108</sup> Cases T-82/13 *Panasonic/MTPD*, T-84/13 *Samsung SDI*, T-91/13 *LG Electronics*, T-92/13 *Philips* and T-104/13 *Toshiba*, judgments of the General Court of 9 September 2015, ECLI:EU:T:2015:612

<sup>109</sup> See section *Calculation of fines* below.

<sup>110</sup> Case C-227/14 P *LG Display and LG Display Taiwan v Commission*, judgment of the Court of 23 April 2015, ECLI:EU:C:2015:258.

<sup>111</sup> Case AT.39309 *LCD – Liquid Crystal Displays*, Commission decision of 8 December 2010 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39309](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39309)

venture could be taken into account in the calculation of fines. The Court of Justice held that the Commission was entitled to take into account such sales. This was because even if these sales were made at a preferential price (and might therefore not be influenced by the cartel), they were made on the market affected by the infringement and should be included to correctly reflect the importance of the parties on that market. The Court of Justice further held that these sales must be regarded as sales made to independent third parties (external sales) since the joint venture and its parent companies did not constitute a single undertaking.

158. In another judgment<sup>112</sup> in the *LCD panels* case adopted on 9 July, the Court of Justice upheld the fine imposed on another cartel (Innolux). The main issue at stake was whether the intra-group sales of cartelised products (LCD panels) outside the EEA which were incorporated into the finished products (TVs) within the group to which the producer belongs and then sold in the EEA can be taken into account when calculating the fine (direct sales through transformed products). The Court of Justice concluded that when the goods concerned by the cartel were incorporated into finished products by a vertically integrated undertaking outside the EEA, the Commission may take into account, for the purposes of calculating the fine to be imposed on that undertaking and up to the value of the incorporated panels, the sales of its finished products in the EEA to independent third-party undertakings.

#### 8.2.5 *Single and continuous infringement, agent as economic unit*

159. In 10 judgments handed down on 15 July<sup>113</sup>, the General Court dismissed nearly all actions brought against the Commission's Pre-stressing Steel cartel decision of 30 June 2010<sup>114</sup>. The General Court upheld entirely the Commission's finding that the cartel involving 17 undertakings and lasting for more than 18 years constituted a single and continuous infringement of EU competition law. The cartel consisted of a complex set of arrangements at European (Club Zurich/Club Europe) and regional (Club Italia/Club Spain) level, involving quota fixing, client sharing, price fixing and exchange of sensitive commercial information on pricing, customers and volume/shares in nearly the whole EEA.

<sup>112</sup> Case C-231/14 P *InnoLux Corp. v European Commission*, judgment of the Court of 9 July 2015 ECLI:EU:C:2015:451.

<sup>113</sup> Cases T-406/10 *Emesa-Trefilería and Industrias Galycas v. Commission*; ECLI:EU:T:2015:499; T-436/10 *HIT Groep v. Commission*; ECLI:EU:T:2015:514; T-391/10 *Nedri Spanstaal BV v. Commission*; ECLI:EU:T:2015:509; T-389/10 *SLM v. Commission*; ECLI:EU:T:2015:513; T-419/10 *Ori Martin v. Commission*; T-422/10 (ex EMME) now: *Trafilerie Meridionali SpA, già Holding SpA v. Commission*; ECLI:EU:T:2015:512; T-423/10 *Redaelli Tecna v. Commission*; ECLI:EU:T:2015:511; T-393/10 *Westfälische Drahtindustrie and Others v. Commission*; ECLI:EU:T:2015:515; T-418/10 *voestalpine and voestalpine Austria Draht v. Commission*; ECLI:EU:T:2015:516; T-398/10 *Fapricela - Indústria de Trefilería v. Commission*; ECLI:EU:T:2015:498; T-413/10, T-414/10 and T-409/13 *Socitrel + Companhia Previdente v. Commission*, ECLI:EU:T:2015:500, judgments of the General Court of 15 July 2015. T-388/10 *Proderac v. Commission* was closed for reasons of bankruptcy. No judgments rendered yet in cases T-429/10, T-578/10 and T-438/12 *Global Steel Wire, SA v. Commission*; and T-427/10, T-576/10 and T-439/12 *Trefilerías Quijano, SA v. Commission* and; T-428/10, T-577/10 and T-441/12 *Trenzas y Cables de Acero PSC, SL v. Commission*; and T-426/10 and T-575/10 and T-440/12 *Moreda-Riviere Trefilerías, SA v. Commission*.

<sup>114</sup> Case AT.38344 *Pre-stressing Steel*, Commission decision of 30 June 2010, amended by Commission decision of 30 September 2010 and Commission decision of 4 April 2011 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_38344](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38344) For further information see IP/ 11/403 of 4 April 2011 available at [http://europa.eu/rapid/press-release\\_IP-11-403\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-403_en.htm?locale=en)

160. In *voestalpine* and *voestalpine Austria Draht*<sup>115</sup>, the General Court not only confirmed established case law (notably *Suiker unie*<sup>116</sup>) that an agent and its principal can be regarded as an economic unit in analogy with an employee. It also brought a novel finding, acknowledging that an agent acting for two principals at the same time (both involved in the cartel) can be an economic unit with each principal and thus the latter can be held liable for the conduct of the agent, despite the non-exclusive relationship with each of them. The General Court clarified that such liability was to be found as long as the commercial agent was acting within his authority: in those cases, he had to be regarded as forming part of the undertaking. On the other hand, the General Court took the view that the liability for that agent's anti-competitive actions outside his mandate could not be imputed to *voestalpine Austria Draht* and reduced the fine imposed jointly and severally on those two companies for those conducts.

#### 8.2.6 *Inconsistency between reasoning of decision and operative part*

161. In 13 judgments handed down on 16 December 2015<sup>117</sup> relating to the *Airfreight* decision the General Court found an inconsistency between the reasoning of the contested decision and its operative part. On the one hand, the reasoning describes a single and continuous infringement in which all of the addressees of that decision participated. On the other hand, the first four articles of the operative part do not each set out all of the addressees of the contested decision. The General Court therefore fully annulled the decision for all but one party which lodged an appeal<sup>118</sup>. The General Court did not take a position on whether the Commission could prove the infringement or not.

- Article 102 TFEU

#### 8.2.7 *Action for injunction constituting an abuse of a dominant position*

162. In a judgment adopted following a preliminary reference, the Court of Justice provided legal clarity on certain controversial aspects of licensing of standard-essential patents<sup>119</sup>. It concluded that the bringing of an action for an injunction for prohibition against an alleged infringer by the proprietor of a standard-essential patent holding a dominant position may constitute an abuse of that dominant position under certain circumstances

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<sup>115</sup> Case T-418/10 *voestalpine and voestalpine Wire Rod Austria*. Note that *voestalpine Austria Draht* is now called *Voestalpine Wire Rod Austria*.

<sup>116</sup> Case 40/73 et alia *Suiker Unie et alia*, judgment of the Court of 16 December 1975, ECLI:EU:C:1975:174.

<sup>117</sup> Cases T-9/11 *Air Canada v Commission*, ECLI:EU:T:2015:994, T-28/11 *KLM v Commission*, ECLI:EU:T:2015:995, T-36/11 *Japan Airlines v Commission*, ECLI:EU:T:2015:992, T-38/11 *Cathay Pacific Airways v Commission*, ECLI:EU:T:2015:985, T-39/11 *Cargolux Airlines v Commission*, ECLI:EU:T:2015:991, T-40/11 *Latam Airlines Group and Lan Cargo v Commission*, ECLI:EU:T:2015:986, T-43/11 *Singapore Airlines and Singapore Airlines Cargo PTE v Commission*, ECLI:EU:T:2015:989, T-46/11 *Deutsche Lufthansa and Others v Commission*, ECLI:EU:T:2015:987, T-48/11 *British Airways v Commission*, ECLI:EU:T:2015:988, T-56/11 *SAS Cargo Group and others v Commission*, ECLI:EU:T:2015:990, T-62/11 *Air France – KLM v Commission*, ECLI:EU:T:2015:996, T-63/11 *Air France v Commission*, ECLI:EU:T:2015:993 and T-67/11 *Martinair Holland v Commission*, ECLI:EU:T:2015:984, judgments of the General Court of 16 December 2015.

<sup>118</sup> For *British Airways*, only part of the findings and the whole fine are annulled for procedural reasons. See Case C-122/16 P, pending.

<sup>119</sup> Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, judgment of the Court of 16 July 2015, ECLI:EU:C:2015:477.

163. The judgment is important because it confirms that competition policy has an important role to play in the standardisation arena. It also confirms the Commission's approach in the *Motorola*<sup>120</sup> and *Samsung*<sup>121</sup> cases. According to this approach, seeking injunctions based on Standard-Essential Patents (SEPs), where a commitment to license on Fair, Reasonable and Non-Discriminatory (FRAND) terms has been given, can be an abuse of a dominant position where the prospective licensee is willing to enter into a licensing agreement on FRAND terms.

#### 8.2.8 *Standardised retroactive rebate scheme under Article 102 TFEU*

164. In *Post Danmark II*<sup>122</sup> the Court of Justice gave a preliminary ruling on questions concerning the criteria for assessing standardised retroactive rebate schemes under Article 102 TFEU. In particular, the Court of Justice was asked to provide guidance on what relevance should be attached to the fact that the rebate scheme is applicable to the majority of customers in the market and also to the "as efficient competitor test".

165. The Court of Justice reiterated that the assessment of such rebate scheme should be carried out in the light of all relevant circumstances, including the rules and the criteria governing the grant of the rebates, the number of customers concerned and the characteristics of the market in which the dominant undertaking operates. The fact that the rebate scheme concerns a large proportion of customers may constitute a useful indication as to the extent and impact of the practice and thus to the likelihood of an anti-competitive exclusionary effect, but it is not a necessary condition for the finding of an abuse. Such an assessment seeks to determine whether the conduct of the dominant undertaking is capable of producing an actual or likely exclusionary effect to the detriment of competition, and, thereby of consumers' interest.

166. The Court of Justice also made clear that the "as efficient competitor test" is not relevant for finding a rebate scheme abusive in the context such as that of the main proceeding, but made clear that the application of the test is not excluded on principle and that the test must be regarded as one tool amongst others for the purpose of assessing whether there is an abuse in the context of rebate schemes.

167. The Court of Justice also took a position on whether there is an appreciability (de minimis) threshold in the application of Article 102 TFEU. The Court of Justice ruled that if a dominant position is present, competition in the market is already restricted and therefore abuses should be considered by their very nature liable to give rise to an appreciable restriction of competition.

- Article 106 TFEU

168. On 25 March the General Court in its judgment in *Slovenská pošta*<sup>123</sup> rejected an application for annulment brought against a Commission decision concerning the application of Article 86(1) EC.

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<sup>120</sup> Case AT.39985 *Motorola Mobility*, Commission decision of 29 April 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39985](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39985)

<sup>121</sup> Case AT.39939 *Samsung*, Commission decision of 29 April 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39939](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39939)

<sup>122</sup> Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, judgment of the Court of 6 October 2015, ECLI:EU:C:2015:651.

<sup>123</sup> Case T-556/08 *Slovenská pošta a.s. v European Commission*, judgment of the General Court of 25 March 2015, ECLI:EU:T:2015:189. Article 86 EC has since become Article 106 TFEU, without material changes. The judgment is under appeal before the Court of Justice (case C-293/15P).

169. The General Court dismissed all the pleas of the applicants. Most importantly the General Court found that an infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU may be established irrespective of whether any abuse actually materialises. All that is necessary is for the Commission to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measure at issue affects the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend the dominant position over another, but neighbouring market, without objective justification.

- Procedural issues

#### 8.2.9 *Rejection of complaints*

170. In its judgments in *Si.mobil* and *EasyJet* the General Court interpreted Article 13 of Regulation (EC) No 1/2003 for the first time. This provision allows the Commission and National Competition Authorities (NCAs) to reject a complaint on the grounds that another NCA "is dealing" or "has dealt" with the same case.

171. In *Si.Mobil* the General Court held that the Commission can reject a complaint solely on the basis of Article 13, without the need to also show a lack of EU interest in the case. Moreover, the General Court emphasised that Article 13 does not create individual rights for companies to have their case dealt with by a particular authority. The General Court further clarified that for the purpose of Article 13; "the same case" means the same infringement, in the same market and within the same time frame. The condition "dealing with" the same case is met when the NCA has taken follow-up steps, but not when the NCA has merely received the complaint or has decided to open an investigation.

172. In *EasyJet*, the General Court clarified that the Commission can reject a complaint on the grounds that an NCA has dealt with the same case, even if the NCA has rejected the complaint on priority grounds and/or has not adopted a formal decision in the meaning of Article 5 of Regulation 1/2003.

#### 8.2.10 *Inspections*

173. The Court of Justice confirmed in its *Deutsche Bahn*<sup>124</sup> judgment the Commission's position that inspections may be carried out based solely on a Commission decision and do not require a prior judicial authorisation. This does not infringe the rights of defence or the protection of the home as safeguarded in the European Charter of Human Rights.

174. The Court of Justice annulled the second and third inspection decisions. These two decisions were based on information found during the first inspection at Deutsche Bahn. However, this information was outside the scope of the first inspection decision. The Commission can actively search only for information that falls within the scope of the inspection decision. If the Commission happens to obtain information which is outside the scope of the inspection decision, it can use this information to justify a further inspection in order to verify or supplement this information. In this specific case the Court of Justice found that the Commission had informed its inspectors prior to the first inspection about another complaint lodged against Deutsche Bahn without referring to it in the first inspection decision. The Commission thereby infringed the obligation to state reasons and the rights of defence of Deutsche Bahn

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<sup>124</sup> Case C-583/13 P *Deutsche Bahn e.a. v Commission*, judgment of the Court of 18 June 2015, ECLI:EU:C:2015:404.

and was barred from using the information found outside the scope of the first inspection decision to justify a further inspection.

#### 8.2.11 *Publication of Commission decisions*

175. The publication of cartel decisions is an important element in the Commission's enforcement activities. On 28 January, the General Court handed down two judgments<sup>125</sup> concerning a more extensive publication of a 2006 cartel decision of the Commission<sup>126</sup>. For the first time, the General Court provided guidance on the application of Article 30 of Regulation 1/2003 on the publication of Commission decisions and the publication of certain leniency information. Both applicants had appealed the Hearing Officer's decisions in which most of their confidentiality claims had been rejected.

176. The General Court dismissed both applications in their entirety and found that the disputed information, which was based on material voluntarily provided by the applicants in order to benefit from the leniency programme, was not confidential. The General Court confirmed that the publication of this information would not result in the communication to third parties of the leniency material provided by the parties. The General Court further confirmed that the applicants cannot legitimately oppose the publication by the Commission of information revealing the details of their participation in the infringement penalised in the decision on the ground that such publication would expose them to increased risk of civil liability. It highlighted the wide discretion of the Commission to decide whether to publish information which does not benefit from the protection of professional secrecy.

177. The July judgments in the *Carglass* case<sup>127</sup> also confirm the Commission's right to publish its decisions, including information received in the context of leniency applications, as well as names of customers and models exchanged by the cartel, pricing information and the number of parts and shares of customers' business allocated among the members of the cartel. The General Court dismissed almost entirely the action brought by Pilkington and entirely dismissed the action brought by AGC against the Hearing Officer's decisions of 6 August 2012 concerning the publication of a detailed version of the Commission's cartel decision of 12 November 2008 in *Carglass*.

178. The General Court ruled, *inter alia*, that the publication of facts on AGC's and Pilkington's participation in the *Carglass* cartel did not breach the Commission's obligations of professional secrecy or the various rights of defence invoked by the applicants, such as the rights to equal treatment and legitimate expectations. The General Court also confirmed that the Commission is entitled to publish the information acquired from leniency applications in its cartel decisions.

#### 8.2.12 *Public access to table of contents*

179. The AXA<sup>128</sup> judgment of 7 July is closely related to the *Carglass* decisions and is of importance to the Commission's policy on publications. In this case, AXA requested, under Regulation (EC) No

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<sup>125</sup> T-341/12 *Evonik Degussa GmbH v Commission*, judgment of the General Court of 28 January 2015, ECLI:EU:T:2015:51 and T-345/12 *Akzo Nobel NV and others v Commission*, judgment of the General Court of 28 January 2015, ECLI:EU:T:2015:50.

<sup>126</sup> Case AT.38620 *Hydrogen Peroxide and Perborate*, Commission decision of 3 May 2006 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_38620](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38620)

<sup>127</sup> Cases T-462/12 *Pilkington v Commission*, judgment of the General Court of 15 July 2015, ECLI:EU:T:2015:508 and T-465/12 *AGC v Commission*, judgment of the General Court of 15 July 2015, ECLI:EU:T:2015:505.

<sup>128</sup> Case T-677/13 *Axa Versicherung AG v Commission*, judgment of the General Court of 7 July 2015, ECLI:EU:T:2015:473.

1049/2001, access to: (i) the table of contents (TOC); and (ii) a large number of documents contained in the *Carglass* file. The Commission gave access to a version of the TOC in which, inter alia, all items with leniency-related information had been redacted. It based its decision on a general presumption of non-disclosure accepted by the EU Courts for documents in the case file and performed no individual analysis of the entries in question. The Commission also refused access to the documents requested by AXA, based on the same general presumption.

180. According to the General Court, the Commission applied correctly the general presumption that disclosure of the documents in its file would undermine the protection of the purpose of inspections. However, the General Court annulled the part of the Commission's decision that rejected AXA's request for access to references to leniency documents in the TOC of the *Carglass* file. The TOC was not part of the case file and was, therefore, not covered by the general presumption. The General Court, meanwhile, did uphold the Commission's refusal, when making an individual examination, to disclose information on the identity of physical persons, the names of third-party undertakings and sensitive commercial information contained in the TOC.

### 8.2.13 *Hybrid settlement in cartels*

181. The judgment in *Timab*<sup>129</sup> was the first time the General Court reviewed a Commission decision in the context of a hybrid settlement procedure. This is the first "hybrid" cartel case, in which both the settlement procedure and the standard procedure were used, in this case in parallel. *Timab* was the only undertaking that decided not to make a settlement submission after having participated in settlement talks and the case reverted to the ordinary procedure as regards *Timab*.

182. The General Court held that in the ordinary procedure, the Commission was not bound by the fines ranges discussed during settlement discussion, especially since the Commission must establish the liabilities of the undertakings concerned while taking account of new arguments on evidence brought to its attention (which may have an impact on the size of the fine to be imposed). The General Court also rejected *Timab*'s claims that the Commission penalised them with a higher fine because they did not settle. The General Court reviewed in detail how the fines were calculated in both procedures, checked that the Commission had not discriminated compared with other companies in the same cartel case and concluded that the Commission had applied the Fines Guidelines correctly.

### 8.3 *Fight against cartels remains a top priority*

183. Well-functioning, competitive markets give rise to innovation and investment because companies are forced to innovate and to use their resources in the most efficient way. Collusive arrangements may have the effect of preventing the restructuring of economic sectors, thereby reducing innovation. The surplus paid by the cartel victims also reduces the victims' ability to invest in new areas or purchase other products. As the object of cartels is precisely to eliminate differences between competitors in critical parameters of competition such as prices, the Commission's anti-cartel enforcement has positive effects on differentiation between companies.

184. The Commission's strong enforcement record against hard core cartels continued in 2015. As in preceding years, the Commission adopted cartel decisions in important sectors for innovation and investment, such as the financial markets and the automotive industry.

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<sup>129</sup> Cases T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission*, judgment of the General Court of 20 May 2015, ECLI:EU:T:2015:296 and T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission*, judgment of the General Court of 20 May 2015, ECLI:EU:T:2015:296.

185. Settlement cases have accounted for a significant proportion of the decisions adopted this year, confirming that this instrument is now fully established. As discussed above, it is of major importance for the Commission's enforcement practice that the General Court confirmed in *Timab* the legality of "hybrid" cases in which both ordinary and settlement decisions are adopted in the same investigation. This is because some parties do not wish to follow the settlement route.

186. The flow of immunity and leniency applications continues to be substantial in a large number of economic sectors. The Antitrust Damages Directive that entered into force on 26 December 2014 endorsed the effectiveness of the public enforcement system by setting out that leniency statements and settlement submissions can never be disclosed in the context of private damages litigation.

187. This year, the Commission adopted two settlement decisions against all of the participants in the cartels concerning *Parking Heaters*<sup>130</sup> (17 June) and *Blocktrains*<sup>131</sup> (15 July).

#### The Blocktrains settlement case

The Blocktrains case is the first cartel case in the rail cargo transport services sector.

The Commission imposed fines of EUR 49.1 million on three companies for operating a cartel for so-called cargo "blocktrain" services. "Blocktrains" are a rail shipping system to transport cargo from one hub to another without wagons being split up or stored on the way. This saves time and money for customers from a wide range of industries, in particular those with large volumes to transport. In principle, blocktrains are economically more efficient than traditional rail cargo transport, particularly for single commodity shipping.

The "blocktrains" covered by the cartel, named "Balkantrain" and "Soptrain", were jointly operated by Kühne+Nagel, Express Interfracht and Schenker and connect central Europe with south eastern Europe.

The three undertakings fixed prices and allocated customers of their "Balkantrain" and "Soptrain" services in Europe between July 2004 and June 2012. The infringement concerned the down-stream sales of cargo transport services in connection with the blocktrains mentioned above.

The Commission's investigation in this case started with unannounced inspections in June 2013. The Blocktrains decision was adopted under the settlement procedure concerning all three parties. Kühne+Nagel received full immunity under the Commission's Leniency Notice for revealing the existence of the cartel, while the two other undertakings received fines reductions as leniency applicants.

188. On 4 February, the Commission completed its investigation of seven cartels in the *Yen interest rate derivatives* (YIRD) sector by adopting an ordinary decision against the UK-based broker ICAP, who acted as a facilitator in six of those collusions<sup>132</sup>. In December 2013, the Commission imposed fines on a number of major banks that decided to settle the case with the Commission.

<sup>130</sup> Case AT.40055 *Parking Heaters*, Commission decision of 17 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40055](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40055) For further information see IP/15/5214 of 17 June 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5214\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5214_en.htm) and Section 5 "Basic industries and Manufacturing".

<sup>131</sup> Case AT.40098 *Blocktrains*, Commission decision of 15 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40098](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40098) For further information see IP/15/5376 of 15 July 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-5376\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5376_en.htm)

<sup>132</sup> Case AT.39861 *Yen Interest Rate Derivatives*, Commission decision of 4 February 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39861](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39861) For further information see IP/15/4014 of 4 February 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4104\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4104_en.htm) and Section 3 "Financial Services".

189. Ordinary procedures remain significant because not all investigations may be eligible for settlement discussions. Relevant factors include the number of parties, the proportion of leniency applicants in relation to the total number of parties, the degree of contestation, conflicting positions between the parties and the existence of novel features or aggravating circumstances in the investigated practices.

190. When the right circumstances are not met, the Commission will apply the ordinary procedure. Two ordinary decisions were adopted in 2015: *Retail Food Packaging*<sup>133</sup> (24 June) and *Optical Disc Drives*<sup>134</sup> (21 October).

#### **The Optical Disc Drives (ODDs) case**

ODDs are devices where optical discs (such as CDs, DVDs or Blu-ray) are inserted in order to read and/or record data. They are used for instance in personal computers, CD and DVD players or even video game consoles.

In this case, the cartel related to ODDs used for laptops and desktops. Leading suppliers of ODDs (Philips, Lite-On, their joint venture Philips & Lite-On, Hitachi-LG Data Storage, Toshiba Samsung Storage Technology, Sony, Sony Optiarc and Quanta Storage) manipulated the procurement events organised by two major customers, Dell and Hewlett-Packard. The investigation revealed that between June 2004 and November 2008, the companies discussed their intentions regarding bidding strategies, shared the results of procurement events, and exchanged other commercially sensitive information. The cartel consisted of a network of parallel bilateral contacts, which pursued a single plan of avoiding aggressive competition.

The ODD decision was adopted in ordinary (non-settlement) procedure on 21 October. The aggregate fine imposed amounted to EUR 116 million. Philips, Lite-On and Philips & Lite-On jointly received full immunity from fines as they were the first to reveal the cartel to the Commission, thereby avoiding a total fine of EUR 63.5 million. No inspections were conducted in this case because the participants were based outside the EU.

191. The Commission remains committed to pursuing all cartels across all sectors where it has sufficient evidence of an infringement (more information on the cartel decisions is available in the sectoral overview). A number of statements of objections were also adopted by the Commission, such as against the non-settling parties in mushrooms<sup>135</sup>, in car battery recycling<sup>136</sup> and capacitors<sup>137</sup>.

192. The Commission's cartel enforcement record remains strong and effective, with five decisions, fines totalling approximately EUR 365 million and solid work for enforcement in future years.

<sup>133</sup> Case AT.39563 *Retail Food Packaging*, Commission decision of 24 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39563](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39563) For further information see IP/15/5253 of 24 June 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5253\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5253_en.htm) and Section 5 "Basic industries and Manufacturing".

<sup>134</sup> Case AT.39639 *Optical Disc Drives*, Commission decision of 21 October 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39639](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39639) For further information see IP/15/5885 of 21 October 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5885\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5885_en.htm)

<sup>135</sup> For further information see IP/15/5065 of 28 May 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5065\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5065_en.htm)

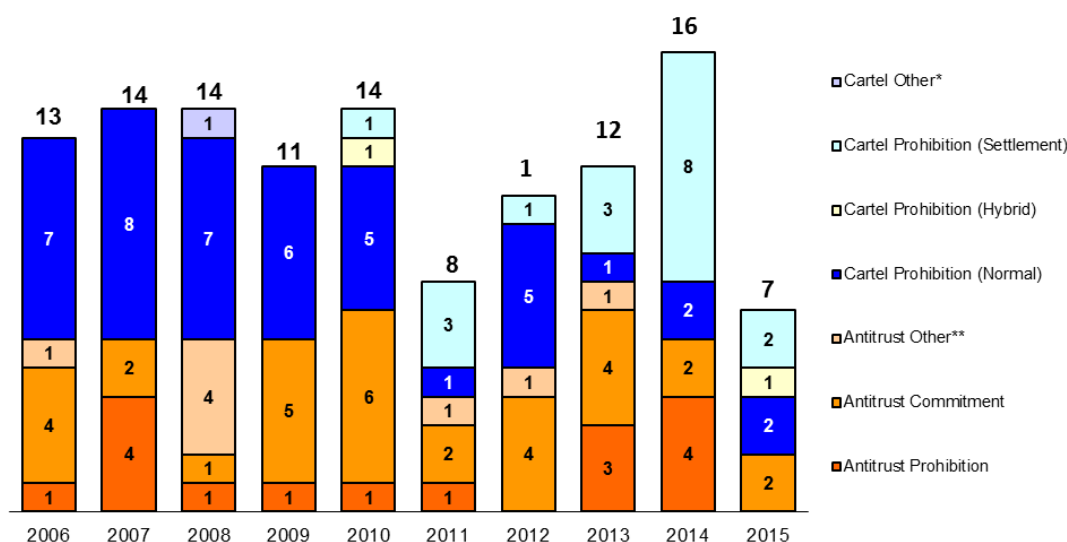
<sup>136</sup> For further information see IP/15/5254 of 24 June 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5254\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5254_en.htm)

<sup>137</sup> For further information see IP/15/5980 of 4 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5980\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5980_en.htm)

Case name	Adoption date	Fine imposed EUR	Undertakings concerned	Prohibition Procedure
Yen interest rates derivatives	04/02/2015	14 960 000	1	Hybrid*
Parking heaters	17/06/2015	68 175 000	2	Settlement
Retail food packaging	24/06/2015	115 865 000	10	Normal
Blocktrains	15/07/2015	49 154 000	3	Settlement
Optical disc drives	21/10/2015	116 377 000	7	Normal

\*normal procedure part of a hybrid case with a settlement decision in December 2013

**Antitrust and cartel output**



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

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

193. The national competition authorities (NCAs) are essential partners of the Commission for enforcing the EU competition rules. Since the entry into force of Regulation 1/2003 in 2004, NCAs are empowered to apply the EU competition rules in full alongside the Commission. This is done in close cooperation in the European Competition Network (ECN). Together the Commission and the NCAs have adopted more than 1000 decisions in antitrust cases of which 85 % have been taken by NCAs. Through their enforcement work, the NCAs play a key role in making sure that the single market works well and fairly for the benefit of consumers and businesses and driving economic growth. However, while Regulation 1/2003 focused on giving the NCAs the power to co-enforce the EU competition rules, the 2014 Commission *Communication on Ten Years of Regulation 1/2003*<sup>138</sup> identified a number of areas of action to strengthen the enforcement powers of NCAs. It showed that there is still room for improvement to further boost competition enforcement in Europe, make markets more competitive and give consumers a better choice of goods and services at lower prices.

<sup>138</sup> Communication from the Commission of 9 July 2014, *Ten Years Of Antitrust Enforcement Under Regulation 1/2003: Achievements And Future Perspectives*, COM/2014/0453 available at [http://ec.europa.eu/competition/antitrust/legislation/antitrust\\_enforcement\\_10\\_years\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf)

194. Therefore, in November the Commission launched a public consultation on empowering the NCAs to be more effective enforcers<sup>139</sup>. The Commission invites feedback from a broad range of stakeholders on potential improvements to guarantee that NCAs (i) have the right tools to detect and sanction violations of the EU competition rules; (ii) have effective leniency programmes that encourage companies to come forward, possibly in several jurisdictions, with evidence of illegal cartels; and (iii) have adequate resources and are sufficiently independent when enforcing EU competition law. The Commission will carefully review all input received in the public consultation before deciding whether and to what extent it should take further action, possibly including an EU legislative initiative.

#### 8.4.1 Cooperation with national courts

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

196. In 2015, the Commission thus replied to one request for information and four requests for opinion from NCs under Article 15(1) of Regulation 1/2003. The request for information was combined with one of the requests for an opinion and was issued by a United Kingdom court in a case relating to financial services. One of the remaining three requests for opinion was issued by a Hungarian court and related to the notion of anti-competitive effects of an infringement and the extent to which they have to be proven in order to serve as evidence. Another request for opinion was submitted by a Latvian court and related to the question of interaction between the EU antitrust rules (Article 102 TFEU) and the State aid rules (Article 107 TFEU). The remaining request for opinion was issued by a Romanian court and concerned potential infringements in the framework of *Buy Back* campaigns under the Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment.

197. In 2015, the Commission also intervened as *amicus curiae* in two court proceedings:

198. One of the interventions related to the application of the EU competition rules in the fruit and vegetables sector. In the underlying case, the French NCA had imposed fines on several chicory producer organisations and associations of producer organisations for an infringement of Article 101 (1) TFEU and the equivalent national rules. The Court of Appeal quashed the NCA decision based, *inter alia*, on the ground that fixing minimum prices and volumes and exchanging commercially sensitive information by chicory producers does not constitute an infringement of competition rules.

199. According to the Court of Appeal, the NCA had failed to demonstrate that the producers exceeded the scope of the legal missions conferred on them by the EU and/or national agricultural rules. The applicable agricultural legislation had therefore authorised the practices of chicory producers and Article 101(1) TFEU was inapplicable to the behaviour at hand. The case was appealed before the French Court of Cassation.

200. In its observations, the Commission rebutted the claim of non-applicability of competition rules in the agricultural sector by referring in general terms to the existence of general and specific derogations from EU competition rules. It also underlined that both derogations from EU competition rules should be interpreted in a restrictive manner and be limited to the specific activities described in the derogations. The Commission also pointed out that it had held exclusive competence for allowing a general derogation from

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<sup>139</sup> For further information see IP/15/5998 of 4 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5998\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5998_en.htm)

the EU competition rules (e.g. Article 2(2) of Council Regulation No 26/1962) at the time of the facts of the case, but had not granted such derogation at the time. The Court of Cassation suspended the proceedings and asked for a preliminary ruling from the Court of Justice under Article 267 TFEU.

201. The second *amicus* intervention took place in a transport case before the Spanish Supreme Court and related to the interpretation of the national provisions on the 10 % cap on fines and in particular on the notion of "sales volumes" and "total turnover". Although the calculation of fines imposed by NCAs is not regulated or harmonised in EU legislation, the Commission underlined in its observations the need for imposing effective sanctions. This is ensured, among others, through the deterrent character of the fines imposed.

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

## 9. Merger Control

### EU merger control

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

203. Competition is one of the key drivers for innovation and investment. In protecting competitive market structures, EU merger control also contributed to innovation and investment across Europe in 2015. The substantive test for assessing mergers under the current legal framework is based on a significant impediment of effective competition. This test covers all aspects of a loss of competition, including harm to innovation. Moreover, EU merger control takes into account efficiencies brought about by mergers, which bring positive effects on innovation provided they are verifiable, merger-specific and likely to be passed on to consumers. The Commission's enforcement practice in 2015 shows that it considers innovation and investments as important aspects of competition (see section below on recent enforcement trends).

204. As highlighted in previous reports on competition policy, the Commission continuously evaluates the substantive and procedural rules that make up the legal framework, in force for merger control. In this context, the Commission also assesses concerns voiced by industry representatives and other stakeholders and checks that its policies and enforcement practices do not unduly create red-tape for companies and thereby hamper innovation and investment. If necessary, policy changes are proposed (see points 1 to 3 below).

### 9.1 Geographic market definition in European Commission merger control

205. In recent years, some stakeholders have raised concerns that the Commission fails to take due account of increasing globalisation and therefore assesses mergers using too narrowly defined geographic markets. Some stakeholders have also claimed that when the Commission defines the relevant geographic market for the purpose of assessing mergers notified to it, it does not sufficiently take into account that potential competitors who were previously not active in a specific market may start supplying that market following a merger ("supply-side substitution").

206. Responding to these views, the Commission published a policy brief entitled "*Market definition in a globalised world*" in March<sup>140</sup>. The brief sets out the Commission's principles for determining the geographic area affected by a merger. It also analyses how globalisation affects how the relevant geographic market is defined.

207. The Commission also commissioned an independent economic report on the topic of "*Geographic Market Definition in European Commission Merger Control*". The authors, Professors Lyons and Fletcher, were asked to evaluate the Commission's approach to geographic market definition on the basis of a sample of 10 recent decisions in merger cases. In their report, the authors largely confirm the Commission's approach to geographic market definition and found that the Commission's geographic market definition practice took sufficient account of globalisation. They also disagreed with the specific suggestions to strengthen the weight of supply side factors in defining relevant geographic markets. The report also made some technical recommendations on how the Commission could further improve its assessment of the relevant geographic dimensions for a notified transaction. The authors recommend in particular that the Commission adopts an even stricter approach to supply-side substitutability at the market definition stage, applies greater flexibility in the use of non-political geographic market boundaries, such as isochrones, and adopts a formal methodology for the treatment of transport costs.

#### 9.1.1 *The White Paper "Towards more effective EU merger control"*

208. In the White Paper "*Towards more effective EU merger control*" adopted in July 2014<sup>141</sup>, the Commission made some concrete proposals to improve the Merger Regulation in a few areas. Those mainly concern the possible extension of the EU Merger Regulation to minority shareholdings and a proposed streamlining of the referral system and other procedures.

209. In light of the views expressed by stakeholders during the public consultation on the White Paper, the proportionality of a possible review system for minority shareholdings will be further assessed. For this purpose, the Commission engaged in further discussions with relevant stakeholders on how to design an effective system for reviewing minority shareholdings that would pose as little administrative burden as possible on companies.

## 9.2 *Guidance on merger control proceedings*

210. In 2015, the Commission published two guidance documents on procedural aspects of EU merger control, which make the Commission's proceedings more transparent for companies and their legal representatives and thereby increase predictability and efficiency:

- The Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation, published on 26 May<sup>142</sup>; and

<sup>140</sup> Commission policy brief *Market definition in a globalised world* (March 2015) available at [http://ec.europa.eu/competition/publications/cpb/2015/002\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2015/002_en.pdf)

<sup>141</sup> White Paper *Towards more effective EU merger control*, COM(2014) 449 final available at [http://ec.europa.eu/competition/consultations/2014\\_merger\\_control/mergers\\_white\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf)

<sup>142</sup> Guidance from the Commission of 26 May 2015, *Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation* (2015) available at [http://ec.europa.eu/competition/mergers/legislation/guidance\\_on\\_preparation\\_of\\_public\\_versions\\_mergers\\_26052015.pdf](http://ec.europa.eu/competition/mergers/legislation/guidance_on_preparation_of_public_versions_mergers_26052015.pdf)

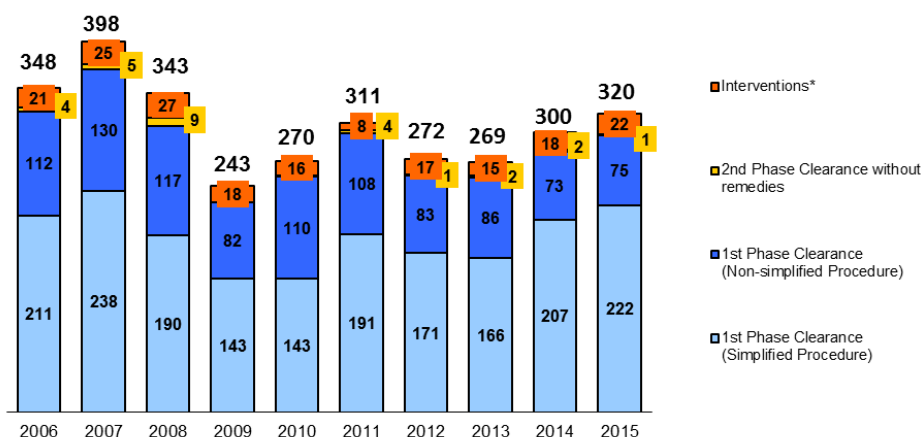
- The Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation<sup>143</sup>, published on 2 June.

### 9.3 Recent enforcement trends

211. The number of notified mergers increased significantly in 2015 compared with the previous six years. Overall, 360 transactions were notified, including 33 reasoned pre-notification submissions by the notifying parties to request the referral of a case from the Commission to a Member State or from a Member State to the Commission. In 11 cases, the Commission opened in-depth investigations (second phase). These cases concerned various industry sectors, including the manufacture of engines and turbines, energy production, telecoms, music rights management, the manufacture of paper and packaging material, the distribution of office products, the manufacture of beverage cans and aluminium bottles, food & beverages and small package delivery services.

212. In 2015 the Commission took 318 final decisions in merger cases<sup>144</sup>. In two cases, the parties abandoned a transaction during the in-depth investigation. The number of 22 interventions in 2015 was significantly higher compared with the average of the last six years, which amounted to around 15 interventions per year. In 2015, 13 mergers were cleared subject to commitments in first phase and seven in the second phase. There was no case where the Commission had to prohibit a notified transaction.

**Merger decisions:**



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

Source: Directorate-General for Competition

<sup>143</sup> Guidance from the Commission of 2 June 2015, *Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation* available at [http://ec.europa.eu/competition/mergers/legislation/disclosure\\_information\\_data\\_rooms\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf)

<sup>144</sup> For the purposes of this report, decisions based on Articles 6(1)b, 6(1)b in combination with 6(2), 8(1), 8(2) and 8(3) of the Merger Regulation are considered as final decisions. Commission interventions in merger cases include prohibition decisions and mergers cleared subject to commitments, as well as withdrawals during second phase in-depth investigation.

#### 9.4 Significant judgments by the EU Courts in mergers

213. On 9 March, the General Court dismissed the action for annulment brought by Deutsche Börse against the Commission decision of February 2012<sup>145</sup> declaring the proposed merger between Deutsche Börse and NYSE Euronext incompatible with the internal market<sup>146</sup>. The General Court's judgment is of general interest in relation to the Commission's assessment of efficiencies submitted by the notifying party. The General Court supported the Commission's analytical framework for efficiencies as set out in the Horizontal Merger Guidelines and explicitly stated that the burden of proof for efficiency claims is on the notifying party.

214. On 13 May, the General Court dismissed the action for annulment brought by Niki Luftfahrt against the Commission decision of August 2009<sup>147</sup> declaring the proposed acquisition of Austrian Airlines by Deutsche Lufthansa AG compatible with the internal market subject to conditions and obligations<sup>148</sup>. The judgment follows the line of the previous case law regarding airline mergers. It confirmed the methodology for defining markets (according to the origin & destination approach), the competitive assessment (focused on individual routes but also taking into account network effects) and the design of remedies in the industry (in particular slot remedies).

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

215. The globalisation of the economy calls for closer cooperation among competition authorities not only in Europe, but also across the globe. International cooperation between competition agencies helps to ensure that the challenges of globalisation are managed in an effective manner and promotes convergence on competition policy principles and practices implemented throughout the world. This is why the Commission is seeking to strengthen the role of competition policy in international negotiations and in international organisations and cooperates with competition agencies globally. Such regulatory and enforcement cooperation helps to ensure effective enforcement and a level playing field for European companies active on global markets.

#### 10.1 Bilateral relations

216. At the international level, the Commission is holding negotiations on Free Trade Agreements (FTAs) with the aim to include competition and State aid provisions in such agreements. In 2015 Commissions international priorities included the negotiations with the United States on a Transatlantic Trade and Investment Partnership Agreement (TTIP), launched in 2013. In addition, significant progress was made during in 2015 on another important agreement currently being negotiated, namely the FTA with Japan. In 2015 the Commission also focused its efforts on negotiating the competition provisions included in the FTA with Vietnam. The competition provisions in this FTA on which an agreement in principle was reached, might help to set a new standard for the region or even further afield.

<sup>145</sup> Case M.6166 *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6166](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6166)

<sup>146</sup> Case T-175/12 *Deutsche Börse v Commission*, judgment of the General Court of 9 March 2015, ECLI:EU:T:2015:148.

<sup>147</sup> Case M.5440 *Lufthansa/Austrian Airlines*, Commission decision of 28 August 2009 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_5440](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5440)

<sup>148</sup> Case T-162/10 *Niki Luftfahrt GmbH v Commission*, judgment of the General Court of 13 May 2015, ECLI:EU:T:2015:283.

217. The Commission also assists in the implementation of the competition provisions included in recent FTAs with neighbouring countries. It is involved in negotiating the necessary implementing rules to this effect with Tunisia and Morocco, as well as monitoring the implementation of the EU competition acquis, including the State aid rules, in countries such as Ukraine and Moldova. Moreover, in September a first meeting took place with Korea on the implementation of the chapter on competition of the EU-Korea FTA. The discussion in particular covered progress on the implementation of the provisions on subsidies and an exchange of experiences.

218. Negotiations between the Commission and its Canadian counterparts to include provisions on the exchange of information into the existing EU-Canada Cooperation agreement have made good progress. The present agreement does not make provision for the Commission and the Canadian Competition Bureau to exchange evidence collected in the course of their respective proceedings. The possibility to exchange such evidence would improve cooperation between both competition authorities in all competition cases which affect both markets and would lead to more effective and more efficient competition law enforcement.

219. Another key area of Commission activity at the international level is technical cooperation with main trading partners that are developing their competition policy and enforcement regime and with which the Commission has signed Memoranda of Understanding (MoUs). The Commission has signed MoUs with most BRICS countries in recent years and has engaged in technical cooperation with these countries to varying degrees. The Commission's technical cooperation activities with the Chinese competition authorities is particularly noteworthy and continued throughout 2015 under the cooperation programme (EUCTP II<sup>149</sup>). On enforcement, on 15 October the Ministry of Commerce of the People's Republic of China and the Commission signed a Practical Guidance for Cooperation on Reviewing Merger Cases with a view to making cooperation on merger review more efficient. Finally, the programme for technical cooperation with the Indian competition authorities, CITD<sup>150</sup>, continued and will run until 2018.

## **10.2 Enlargement**

220. The Commission's main policy objective in the accession negotiations with candidate countries, in addition to fostering a competition culture, is to further help candidate countries and potential candidate countries to build up a proper legislative framework, well-functioning competition authorities and an efficient enforcement practice in order for them to meet the conditions for EU accession in the competition policy field.

221. The opening benchmarks for negotiations of the competition chapter with Serbia are identified in the 2015 Serbia Report<sup>151</sup>. The Stabilisation and Association Agreement with Bosnia and Herzegovina entered into force on 1 June. The European Union concluded a Stabilisation and Association Agreement with Kosovo in October 2015, The agreement is expected to enter into force in the first half of 2016 after ratification by the European Parliament.

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<sup>149</sup> EU-China Trade Project II.

<sup>150</sup> Capacity Building Initiative for Trade Development programme launched in 2014.

<sup>151</sup> See Report on Serbia (2015), Chapter 8 on Competition available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf)

### 10.3 *Multilateral cooperation*

222. 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), the World Bank and UNCTAD.

223. Three major work streams of the OECD to which the Commission contributed in 2015 were ex post evaluation, competitive neutrality and disruptive innovation. On ex post evaluation, the Commission contributed to the drafting of a practical OECD Guide. Also, at the particular initiative of the Commission, the OECD organised a hearing and roundtable discussion on different aspects of competitive neutrality. This discussion resulted in an OECD advocacy document, informing other policy communities how competition law can level the competitive field and serve other policies, and in an inventory on competitive neutrality frameworks and provisions under national law. On disruptive innovation, the Commission contributed to three dedicated OECD sessions addressing the enforcement and specific sectorial aspects of this topic.

224. In 2015 the Commission continued co-chairing the Mergers Working Group of ICN and one of the sub-groups of the Cartel Working Group. It also organised a Merger Working Group workshop which took place in Brussels (24-25 September) and which was used to road-test the Merger Working Group's Practical Guide for International Merger Enforcement Cooperation, adopted in May, for which the Commission was the project leader<sup>152</sup>. As co-chair of the ICN Cartel Working Group's Subgroup I on Legislation, the Commission contributed to developing a Catalogue on investigative powers and the organisation of several webinars on different aspects of anti-cartel enforcement.

225. The Commission participated in the Inaugural Conference on Competition Policy, Shared Prosperity and Inclusive Growth organised by the World Bank<sup>153</sup> in partnership with the OECD. The paper it presented illustrated the redistributive effects of competition policy in favour of poorer households. The same issue was discussed at the OECD Global Competition Forum<sup>154</sup> held later in the year.

226. The Commission also participated in the seventh UNCTAD Review Conference on competition in Geneva in July 2015. The conference included discussion of the benefits and the role of competition for consumers in the pharmaceutical sector and the role of international cooperation in merger cases as a tool for effective enforcement of competition law. The Commission submitted written contributions to both discussions.

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<sup>152</sup> See International Competition Network (ICN) (September 2015), *Merger Working Group's Practical Guide for International Merger Enforcement Cooperation* available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>

<sup>153</sup> See Inaugural Conference on Competition Policy (2015), *Shared Prosperity and Inclusive Growth* organised by the World Bank available at <http://www.worldbank.org/en/events/2015/06/23/promoting-effective-competition-policies-for-shared-prosperity-and-inclusive-growth>

<sup>154</sup> See OECD Global Competition Forum (2015) available at <http://www.oecd.org/competition/globalforum/links-drivers-competition-employment.htm>

## SECTORAL OVERVIEW

227. This section provides an overview of policy developments and enforcement activities in a number of selected sectors that the Commission particularly focused on in 2015. These were energy and environment, ICT and media, financial services, tax planning practices, basic industries and manufacturing, pharmaceutical and health services and transport and postal services.

### 11. Energy & environment

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

228. On 25 February the Commission published a new energy policy framework entitled "the Energy Union framework strategy"<sup>155</sup>. The strategy addresses three long-standing challenges in the energy sector: security of supply, sustainability and competitiveness. To address these challenges, the Energy Union Strategy focuses on five mutually supportive dimensions:

- energy security, solidarity and trust;
- the internal energy market;
- energy efficiency as a contribution to the moderation of energy demand;
- decarbonisation of the economy and;
- research, innovation and competitiveness.

229. The European Council endorsed this framework in its conclusions of 19-20 March<sup>156</sup>.

#### **Key figures to illustrate the challenges to reach a low-carbon, secure and competitive EU energy system<sup>157</sup>**

The EU is the largest energy importer in the world, importing 53 % of its energy, at an annual cost of around EUR 400 billion. A few Member States are dependent on one single external supplier for all their gas imports. Almost half of the Member States do not meet the EU's minimum interconnection target for at least 10 % of installed electricity production capacity to be able to "cross borders". An appropriately interconnected European energy grid could save consumers up to EUR 40 billion a year. Over EUR 1 trillion needs to be invested into the EU energy sector by 2020 alone in order to achieve the EU climate and energy targets. Wholesale electricity prices in Europe are 30 % higher and wholesale gas prices over 100 % higher than in the United States. By 2030, the EU aims to cut greenhouse gas emissions by at least 40 % compared to 1990, boost renewable energy to achieve the target of at least 27 % of renewables in its energy mix, and improve energy efficiency by at least 27 %.

<sup>155</sup> Communication of 25 February 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM/2015/080 final available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015DC0080>

<sup>156</sup> Conclusions of the European Council from 19 and 20 March 2015, EUCO 11/15.

<sup>157</sup> For further information see IP/15/4497 of 25 February 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4497\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4497_en.htm)

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

230. The main challenges in 2015 continued to be high energy prices, the slow pace of investment in the energy sector and security of supply concerns stemming from i) lack of competition; and ii) insufficient diversification of gas supplies in eastern Europe.

231. In 2015, EU competition policy contributed to tackling those challenges in several ways. Antitrust and mergers enforcement contributed by lifting obstacles to competition and barriers to trade between Member States and by ensuring that investments in the energy sector do not hamper competition.

### 11.2.1 *Improving competitiveness across the energy sector*

232. Competition enforcement and advocacy play a key role in making the internal energy market work. Competition enforcement leads to opening markets, creating a level playing field between competitors and ultimately promoting investment and innovation. Competition enforcement sanctions collusion and abuses of dominant positions, ensures that mergers do not hamper effective competition and creates a framework for investment that avoids distortions and ensures the efficient allocation of public resources. In 2015, antitrust enforcement actions have challenged practices that partition the internal markets and practices that prevent new entrants from accessing the market. These behaviours lead to higher energy prices.

233. On 10 December, the Commission accepted<sup>158</sup> the commitments offered by the Bulgarian Energy Holding (BEH) to solve competition concerns in the wholesale electricity markets in Bulgaria. The Commission was concerned that BEH had been selling electricity to traders using contracts which prohibited them from reselling the electricity outside Bulgaria. As a result BEH was hindering the resale of electricity and abusing its dominance by imposing territorial restrictions on traders. BEH has committed to solving these concerns by setting up an independent and liquid power exchange in Bulgaria through which electricity can be traded anonymously, with no possibility of checking where it is resold.

234. On 22 October, the Commission sent a Letter of Formal Notice to France setting out its concerns that France may be in breach of EU antitrust rules by having granted to state-owned Electricité de France (EDF) most of the country's concessions for exploiting hydropower<sup>159</sup>. The Commission is concerned that granting most of the country's hydropower concessions to EDF at preferential financial conditions, without a tendering procedure and for very long periods has maintained or strengthened EDF's dominance in the French electricity markets possibly counter to Article 106 TFEU in conjunction with Article 102 TFEU.

235. A key principle underlying the Commission's State aid policy is that public support should result in a positive balance between the objectives achieved and the potential negative effects of State intervention on the European energy market. In this context the Commission pays special attention to any market distortions that may arise as a result of public financing, such as the crowding out of investment, negative effects on upstream or downstream markets and excessive profits which may lead to strengthened market positions, deterrence of new entrants and ultimately market foreclosure. To ensure that such market distortions are avoided the Commission launched two formal investigation procedures– the first

<sup>158</sup> Case AT.39767 *BEH Electricity*. For further information see IP/15/6289 of 10 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6289\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6289_en.htm)

<sup>159</sup> Infraction number 20152187 *Concessions hydroélectriques en France*.

into public measures taken by the United Kingdom in favour of the Lynemouth power plant<sup>160</sup> and the second into the project to build the new Paks II<sup>161</sup> nuclear power plant in Hungary.

### 11.2.2 *Contributing to a low-carbon economy*

236. The EU is committed to reducing by at least 40 % its greenhouse gas emissions compared with 1990. The EU has also set a target that by 2030 renewable energy will account for at least 27 % of the energy consumed in the EU. This will require significant investment and the progressive integration of renewables into a market that promotes competitive renewables and drives innovation.

237. The rules passed in July 2014 (*Guidelines on State aid for environmental protection and energy*<sup>162</sup>) require renewable electricity producers to sell the electricity directly on the market. In addition, Member States may grant a premium to compensate for the extra costs of those technologies that are not yet able to compete with conventional generation technologies. Furthermore, renewable electricity producers will be subject to standard balancing responsibilities and production should not be incentivised when wholesale prices turn negative. The Commission approved several support schemes which follow already these market-based assessment criteria.

238. In 2015 the Commission adopted a number of decisions aimed at incentivising investment in renewable energy sources while applying the requirements for a market-based approach to the selection of beneficiaries and the form of aid. Among the support measures approved in 2015 for renewable generation the ones that stand out are the aid to 20 individual offshore wind farms<sup>163</sup> in Germany, the support scheme to renewable energy sources in Croatia<sup>164</sup> and the amendments to the Romanian green certificates support system for promoting renewable electricity<sup>165</sup>.

239. The Commission strives to ensure that public support is granted in a way that fosters investments in new and innovative technologies that will not only make the European energy sector more competitive but will also spur research and innovation in clean and sustainable generation. During 2015, the

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<sup>160</sup> Case SA.38762 *UK - Lynemouth Biomass Conversion*. For further information see IP/15/4456 [of 19 February 2015 available at http://europa.eu/rapid/press-release\\_IP-15-4456\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4456_en.htm)

<sup>161</sup> Case SA.38454 (2015/N) *Hungary – Possible aid for the construction of Paks nuclear power station*. For further information see IP/15/6140 of 23 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6140\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6140_en.htm)

<sup>162</sup> Communication from the Commission — *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ C 200, 28.6.2014, p.1-55 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628(01))

<sup>163</sup> Cases SA.39723, SA.39724, SA.39725, SA.39726, SA.39731, SA.39732, SA.39733, SA.39735, SA.39738, SA.39739, SA.39741, SA.39742, SA.39722, SA.39727, SA.39728, SA.39729, SA.39730, SA.39734, SA.39736, SA.39740 *Germany – Support to 20 large offshore wind farms under the EEG Act 2014*, OJ C 292, 4.9.2015, p.9. For further information see IP/15/4788 of 16 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4788\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4788_en.htm)

<sup>164</sup> Case SA.38406 *Renewables support scheme in Croatia 2014-2015*, Commission decision of 1 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38406](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38406)

<sup>165</sup> Case SA.37177 *Romania - Amendments to the green certificates support system for promoting electricity from renewable sources*, Commission decision of 4 May 2015, OJ C 343, 16.10.2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37177](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37177)

Commission adopted two decisions on support measures aimed at developing ocean energy and offshore power generation technologies in experimental or pre-commercial stage<sup>166</sup>.

240. The new Guidelines on State aid for environmental protection and energy 2014-2020 also bring under the scope of the Guidelines support for Carbon Capture and Storage (CCS) and infrastructure.

241. Finally, the new Framework for State aid for R&D&I offers important opportunities as it allows tailored support to projects which are not, in themselves, profitable but might generate beyond R&D specific externalities, important environmental benefits to society.

242. Furthermore, the Commission approved State aid for the deployment of publicly available charging infrastructure for electrical vehicles<sup>167</sup>, which will also increase sustainability and reducing emissions.

243. The Commission's antitrust enforcement is also contributing to the objective of a low carbon economy. The Commission is investigating whether ethanol producers may have colluded to manipulate ethanol benchmarks published by the price reporting agency Platts, for example by agreeing between each other to submit or support bids with a view so as push benchmarks upwards and thus drive up ethanol prices<sup>168</sup>. Such practices, if confirmed, harm competition and undermine EU energy objectives by increasing prices for renewable energy, in this case biofuels used for transport. This could lead to a reduction of the use of biofuels as an alternative to fossil fuels, with negative consequences both for consumers and the objective of a low-carbon economy. The on-going antitrust investigation into Austria's waste management markets also feeds into action to achieve greater sustainability<sup>169</sup>.

### 11.2.3 Contributing to security of supply

244. In the gas sector, lack of diversification and consequently of competition in sources of supply is a concern for the security of supply in the EU. Some Member States continue to rely on one single supplier and often on one single supply route for 80 % to 100 % of their gas consumption<sup>170</sup>, whereas those Member States with a diverse portfolio of gas suppliers and supply routes and with well-developed gas markets reap the benefit of paying less for imports.

<sup>166</sup> Cases SA.39347 *Portugal - Support scheme for experimental and pre-commercial renewable technologies*, and SA.40227 *Portugal - Windfloat Project*. For further information see IP/15/4836 of 23 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4836\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4836_en.htm)

<sup>167</sup> Case SA.38769 *Netherlands - Green Deal for Electric Vehicle Charging Infrastructure*, Commission decision of 11 August 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38769](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38769) For further information see IP/15/5441 of 27 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5441\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5441_en.htm)

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

<sup>169</sup> Case AT.39759 *ARA*. For further information see IP/13/711 of 18 July 2103 available at [http://europa.eu/rapid/press-release\\_IP-13-711\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-13-711_en.htm?locale=en)

<sup>170</sup> See Commission's 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)

245. In 2015 the Commission adopted a decision on public support for nine gas infrastructure projects in Poland<sup>171</sup>, which will help diversification of gas supplies. In addition to strengthening the security of supply in central Europe, the decision to support the realisation of the nine gas projects also incentivised investment in gas infrastructure which would not have been possible without the State aid contribution.

#### **Nine gas infrastructure projects in Poland**

The Commission found that Poland's plans to grant aid of PLN 3,13 billion (EUR 758 million) for nine gas projects in Poland are compatible with EU State aid rules.

Five of the nine gas infrastructure projects will connect European gas supply sources from the Baltic, Adriatic and the Black Sea to the rest of Europe via Poland (as part of the "North-South gas interconnection priority corridor") thus increasing the diversification of gas supply in Poland. The rest of the projects will contribute to an increase in the overall level of security of supply in Poland by eliminating bottlenecks and providing additional capacity to the existing gas networks.

246. The Commission's antitrust enforcement can also help to solve security of supply issues by facilitating access to the market and encouraging investment. On 22 April, the Commission sent a Statement of Objections to Gazprom for allegedly abusing its dominant position in the supply of natural gas in central and eastern Europe<sup>172</sup>. The Commission considers that Gazprom is abusing its dominant position *inter alia* by imposing territorial restrictions in its supply agreements with wholesalers and with some industrial customers. The Commission has concerns that this market segmentation may also have enabled Gazprom to charge unfair prices in several of the countries concerned.

247. On 23 March, the Commission sent a Statement of Objections to BEH<sup>173</sup>, and its gas supply and gas infrastructure subsidiaries, Bulgargaz and Bulgartransgaz over a possible abuse of dominant position on the Bulgarian natural gas markets. The Commission is concerned that BEH and its subsidiaries have refused to give competitors access to the Bulgarian gas transmission network and the only gas storage facility in Bulgaria and may have booked capacity they do not need on Bulgaria's only viable gas import pipeline.

248. In the electricity sector, there are increasing concerns about generation adequacy and insufficient investment in new capacity due to market uncertainties and regulatory interventions. An increasing number of Member States are introducing capacity mechanisms to encourage investment in new capacity e.g. power plants or to provide incentives that power plants to continue to operate, so that the supply of electricity meets demand at all times. In April, the Commission launched a State aid sector inquiry into existing and planned capacity mechanisms in the EU. The purpose of the inquiry is to analyse the need for such mechanisms and to identify design features that distort competition between capacity providers or hinder cross-border electricity trade.

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<sup>171</sup> Case SA.39050 *Aid to gas infrastructure in Poland*, Commission decision of 17 July 2015, OJ C 325, 2.10.2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39050](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39050)  
For further information see IP/15/5403 of 17 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5403\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5403_en.htm)

<sup>172</sup> Case AT.39816 *Upstream Gas Supplies in central and eastern Europe*. For further information see IP/15/4828 of 22 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4828\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4828_en.htm)

<sup>173</sup> Case AT.39849 *BEH gas*. For further information see IP/15/4651 of 23 March 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4651_en.htm)

### State aid sector inquiry – Existing and planned capacity mechanisms in the EU<sup>174</sup>

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

The Commission sent different sets of questions to selected public authorities and market participants in 11 Member States - Belgium, Croatia, Denmark, France, Germany, Ireland, Italy, Poland, Portugal, Spain and Sweden. It assessed the replies and invites comments on its preliminary findings in early 2016. The final results will be published by the end of 2016.

The sector inquiry will supplement and support the implementation of the Guidelines on State aid for environmental protection and energy<sup>175</sup> that entered into force in July 2014. Moreover, the sector inquiry will contribute to the Commission's legislative proposal on electricity market design under the EU's Energy Union Strategy.

#### 11.2.4 Merger control

249. In the field of merger control, the trend for investments in European energy infrastructure by investment companies persisted<sup>176</sup>. In 2015, as in the previous years, a number of companies invested in development<sup>177</sup> and production from renewable sources<sup>178</sup> such as wind parks<sup>179</sup>, solar parks<sup>180</sup> and waste-to-energy plants<sup>181</sup>.

250. The Commission also observed that some oil and gas markets players reorganised their business by streamlining their activities in the upstream segment of exploration and development of reservoirs<sup>182</sup>

<sup>174</sup> For further information see IP/15/4891 of 29 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4891\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4891_en.htm)

<sup>175</sup> See footnote 162 **Digital Single Market** OJ C 200, 28.6.2014, p.1-55

<sup>176</sup> Cases M.7840 *Letterone Holdings/E.On E&P Norge*; Commission decision of 2 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7840](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7840); M.7490 *Macquarie/ Wren House/ E.On Spain*; Commission decision 2 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7490](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7490); M.7608 *Borealis Siegfried Holdings/Fortum Distribution Ab*, Commission decision of 8 May 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7608](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7608) and M.7633 *Kia/Gas Natural Fenosa/Gpg*, Commission decision of 11 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7633](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7633)

<sup>177</sup> Case M.7539 *Gip Ii/ Acs/ Devco*, Commission decision of 27 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7539](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7539)

<sup>178</sup> Case M.7633 *Kia/ Gas Natural Fenosa/ Gpg*, Commission decision of 11 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7633](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7633)

<sup>179</sup> Case M.7609 *Omnis Capital/ Predica Prevoyance/ Quadran/ Quadrica*, Commission decision of 8 May 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7609](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7609)

<sup>180</sup> Case M.7816 *EGP / F2I / JV*, Commission decision of 7 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7816](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7816)

<sup>181</sup> Case M.7745 *Fortum / Lietuvos Energija / JV*, Commission decision of 23 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7745](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7745)

<sup>182</sup> Cases M.7631 *Royal Dutch Shell / BG Group*; Commission decision of 2 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7631](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7631), M.7519 *Repsol/ Talisman Energy*, Commission decision of 7 April 2015 available at

while partially divesting their presence in the downstream/retail segment to other oil companies, traders or financial investors<sup>183</sup>. The upstream segment for the exploration and development of reservoirs is fragmented, with a significant number of players competing and with national oil companies playing a significant role.

## 12. Information and communication technologies (ICT) and media

### 12.1 Overview of key challenges in the sector

251. ICT and media are key sectors for the EU economy. As well as being important consumer businesses, they play a critical role as inputs to the wider economy. They are a driver for innovation and growth in many other sectors, such as energy, transportation, public services, health and education<sup>184</sup>.

252. The nature of these industries presents both opportunities and challenges. If the right framework conditions are in place, including appropriate competition rules, these sectors can make a decisive contribution to growth and employment. In the period 2005-2010, ICT investment accounted for one-third of EU growth<sup>185</sup>. However, the importance of these sectors and the very rapid pace of change also create challenges for regulators in ensuring that regulatory rules and enforcement keep pace with technological change.

253. One of the 10 political priorities of the present Commission is to complete a Digital Single Market in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Bringing down barriers within the Digital Single Market could contribute an additional EUR 415 billion to EU GDP<sup>186</sup>.

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[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7519](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7519) and M.7840 *Letterone Holdings/ E.On E&P Norge*, Commission decision of 2 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7840](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7840)

<sup>183</sup> Cases M.7508 *Dcc Energy / Esso Saf*, Commission decision of 12 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7508](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7508); M.7579 *Royal Dutch Shell/Keele Oy/Aviation Fuel Services Norway*, Commission decision of 19 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7579](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7579) and M.7694 *World Fuel Services/ BB Aviation Fuel Divestment Business*, Commission decision of 6 August 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7694](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7694)

<sup>184</sup> See, e.g., the study *Unlocking the ICT Growth Potential in Europe: Enabling people and businesses* (2013) prepared by the Conference Board for the European Commission available at <http://ec.europa.eu/digital-agenda/en/news/new-study-unlocking-ict-growth-potential-europe-enabling-people-and-businesses>

<sup>185</sup> See Koutroumpis, Leiponen and Thomas, *ICT innovation in Europe: Productivity gains, start-up growth and retention*, Imperial College Business School, p. 2.

<sup>186</sup> Communication of 6 May 2015 from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *A Digital Single Market Strategy for Europe*, COM(2015) 192 final available at <https://ec.europa.eu/digital-agenda/en/news/digital-single-market-strategy-europe-analysis-and-evidence-swd2015-100-final>

### **Digital Single Market (DSM)**

The Commission adopted its Digital Single Market (DSM) strategy in May. The strategy comprises 16 actions under three pillars: (1) better access for consumers and businesses to online goods and services across Europe; (2) creating the right conditions for digital networks and services to flourish; and (3) maximising the growth potential of our European Digital Economy. Competition policy is directly involved through the e-commerce sector inquiry, which is one of the 16 actions. Reaching the goals of the DSM also requires competition enforcement to help ensure competitive markets for ICT and media services.

In order to fully benefit from the deployment of new innovative digital services, consumers in all Member States need to have access to high performance networks. By 2020, the Digital Agenda for Europe (DAE) aims at achieving (i) full coverage of 30 Mbps services (fast broadband) and (ii) provision of 100 Mbps services (ultra-fast broadband) to 50 % of Europeans. Building on the results of its public consultation on the needs for internet speed and quality beyond 2020 and in order to ensure that everyone can reap the benefits of the DSM, the Commission is developing broadband vision beyond 2020.

One of the key actions under the second pillar of the DSM strategy is the review of the telecoms regulatory framework, the preparatory work for which has already started.

In addition, on 25 November, the European Parliament and the Council adopted a Regulation laying down measures concerning open internet access and roaming on public mobile communication networks<sup>187</sup>.

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

### **12.2.1 E-commerce sector inquiry**

254. Eurostat figures for 2014 show that while 50 % of Europeans had shopped online in the past year, only 15 % had done so cross-border<sup>188</sup>. There are indications that one of the reasons for the lack of cross-border online trade is the existence of contractual barriers, particularly distribution agreements which may restrict the cross-border sale of goods and digital content. For example, 22 % of wholesale and retail trade companies say the fact that their suppliers restrict or forbid them to sell abroad is a problem<sup>189</sup>. It is estimated that welfare gains from e-commerce in goods in an integrated DSM could reach over EUR 200 billion, with two thirds of these gains coming from increased online choice<sup>190</sup>.

<sup>187</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.10.2015, p.1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>

<sup>188</sup> Eurostat ICT survey of households and businesses.

<sup>189</sup> Flash Eurobarometer 413, 2015.

<sup>190</sup> Civic Consulting for the European Commission, Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retail of goods, 2011 – the consumer welfare gains from an integrated EU market for e-commerce in goods assuming 15 % share of internet retailing was estimated at EUR 204.5 billion per year (EUR 70.4 billion from lower online prices and EUR 134.1 billion from increased choice).

### E-commerce sector inquiry

The Commission launched a sector inquiry into e-commerce markets in May<sup>191</sup>. The inquiry aims to gather market information in order to better understand the nature, prevalence and effects of barriers to online trade erected by companies, and to assess them in light of EU antitrust rules. If, after analysing the results, the Commission identifies specific competition concerns, it may open individual investigations to enforce the competition rules and provide guidance to businesses on the types of restrictions that are permissible online. The results may also be useful as inputs into the other actions within the DSM strategy.

The Commission expects to publish a preliminary report for consultation in mid-2016. The final report is expected to follow in 2017.

#### 12.2.2 *Antitrust enforcement linked to media and sports.*

255. In the broadcasting sector, the Commission adopted a Statement of Objections in July against six major United States film studios<sup>192</sup> (Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.) and Sky UK. The Commission's preliminary view is that clauses in licensing agreements between the studios and Sky UK that restrict, e.g. through geo-blocking, cross-border access to films, thereby limit Sky UK's ability to accept unsolicited requests for its pay-tv services from consumers located outside the United Kingdom and Ireland (so-called "passive sales"). Certain agreements also contain clauses requiring the film studios to ensure that, in their licensing agreements with broadcasters other than Sky UK, these broadcasters are prevented from making their pay-tv services available in the United Kingdom and Ireland.

256. In April, the Court of Justice confirmed the Commission's findings on the assignment of broadcasting authorisations for digital terrestrial television in Bulgaria. In January 2013, the Commission referred Bulgaria to the Court of Justice considering that the procedure followed by Bulgaria was based on disproportionately restrictive award conditions, leading to the exclusion of potential candidates and hampering competition.

257. In the publishing sector, the Commission opened a formal investigation into some of Amazon's e-book distribution arrangements in June. The Commission will, in particular, investigate clauses in Amazon's contracts with publishers requiring them to inform Amazon about more favourable or alternative terms offered to Amazon's competitors and/or offer Amazon similar terms and conditions to its competitors. The Commission has concerns that such clauses may make it more difficult for other e-book distributors to compete with Amazon.

258. In the sports sector, the Commission opened a formal antitrust investigation in October into the International Skating Union's (ISU) rules that permanently ban skaters from certain competitions if they take part in events not approved by the ISU. The Commission considers that ISU rules may create disproportionate and unjustified obstacles for companies not linked to the ISU that want to organise alternative ice-skating events, which would prevent them from entering the market or driving them out of business.

<sup>191</sup> For further information see IP/15/4921 of 6 May 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4921\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4921_en.htm)

<sup>192</sup> Case AT.40023 *Cross-border access to pay-tv content*. For further information see IP/15/5432 of 23 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5432_en.htm)

### 12.2.3 *Antitrust enforcement in technology markets*

259. The Commission's enforcement action in technology markets focused on cases where dominant companies may have used their position in the market to restrict competition in an anti-competitive manner. Taking action against such conduct helps to keep markets competitive, and therefore to maintain incentives to innovate.

260. Search engines are of central importance to a well-functioning Internet. In April, the Commission sent a Statement of Objections to Google<sup>193</sup> alleging that the company had abused a dominant position in the markets for general internet search services by systematically favouring its own comparison shopping product in its general search results pages. The Commission continues to investigate Google's conduct with regard to other specialised search services as well as: (i) the copying of third-party content for use in Google's own specialised search services; (ii) exclusivity agreements with publishers for search advertising; and (iii) restrictions on the portability and management of search advertising campaigns across search advertising platforms.

261. Access to the internet increasingly takes place through mobile devices, including smartphones and tablets<sup>194</sup>. A lack of competition for the supply of hardware and software for those devices could have important effects in terms of continued innovation. Therefore, in April, the Commission opened formal proceedings to examine in-depth Google's conduct as regards the mobile operating system, Android. The investigation is focusing on whether Google has breached EU antitrust rules by hindering the development and market access of rival mobile operating systems, applications and services, to the detriment of consumers and developers of innovative services and products.

262. In the area of baseband chipsets, which process the core communication functions in smartphones, tablets and other mobile broadband devices, the Commission opened formal proceedings in July, to examine in-depth Qualcomm's conduct in two regards: (1) financial incentives to a major smartphone and tablet manufacturer on condition that it exclusively uses Qualcomm baseband chipsets in its smartphones and tablets; and (2) whether Qualcomm engaged in "predatory pricing" by charging prices below costs with a view to forcing its competition out of the market. Statements of Objections were sent to the company on 8 December<sup>195</sup>.

### 12.2.4 *ICT and media in the context of the Merger Regulation*

263. The Commission's merger review activities ensure that mergers do not result in less competition. By safeguarding competition, merger review in turn contributes to maintaining an environment conducive to innovation and investments.

264. 2015 saw significant merger activity in the EU's telecommunications sector.

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<sup>193</sup> Case AT.39740 *Google*. For further information see IP/15/4780 of 15 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4780\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4780_en.htm)

<sup>194</sup> Eurostat figures for 2014 show that 51 % of Europeans used the Internet on mobile devices. For these purposes "mobile" Internet usage includes all use while away from home or work, including access through a laptop computer.

<sup>195</sup> Cases AT.39711 and AT.40220 *Qualcomm*. For further information see IP/15/6271 of 8 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6271\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6271_en.htm)

265. In April, the Commission conditionally cleared the merger between Altice and PT Portugal<sup>196</sup>. Altice operated via two subsidiaries in Portugal, Cabovisão and ONI. Cabovisão provided pay-tv, fixed internet access and fixed telephony services essentially to residential customers. ONI provided services to business customers, including fixed telecommunication services, in particular voice, data and internet access services as well as IT services. PT Portugal, a telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal, offered fixed, mobile voice and data services; broadband internet access services and pay-tv services to residential customers. PT Portugal's offer for business customers included fixed and mobile voice services data services and IT services, comprising data centre solutions, virtualisation services, cloud, business outsourcing process and other additional value-added services. The Commission was concerned that the merger, as initially notified, would have reduced competition in a number of telecommunications markets in Portugal and that the merger would have removed a strong competitor from these markets, with the risk of leading to higher prices and less competition in Portugal. To remove these concerns, Altice offered to sell its Portuguese subsidiaries Cabovisão and ONI. These clear-cut commitments completely removed the overlap between the activities of Altice and PT Portugal within Portugal and ultimately the merger was cleared by the Commission.

266. In May, the Commission conditionally cleared the merger between Orange and Jazztel, two of Spain's four providers of nationwide fixed telephony and internet access<sup>197</sup>. The two companies had been the most dynamic fixed internet providers in Spain in recent years and both were investing in their own high-speed Fibre-To-The-Home (FTTH) network. The Commission was concerned that the merger would reduce competition in the market for fixed internet access because the competitive constraints which Orange and Jazztel exerted on each other would be lost. Ultimately, the merger was cleared based on remedies that ensured the entry of a new nationwide player, able to replicate Jazztel's competitive pressure.

267. The Commission reviewed the proposed merger of the Danish businesses of Telenor and TeliaSonera<sup>198</sup>. The merger would have combined the second and third largest operators in the Danish mobile retail market, leading to the creation of the largest mobile player both in terms of revenue and subscribers. The Commission had concerns that the merger would have led to higher prices, loss of innovative offers and lower quality. The remedies submitted by the parties to the transaction fell short of addressing these concerns. However, before any decision was taken, the parties abandoned the transaction.

268. The Commission is reviewing the merger between Liberty Global and BASE<sup>199</sup>. Liberty Global operates a cable network in Belgium and is also a mobile virtual network operator (MVNO). BASE is one of Belgium's three mobile network operators. The merger therefore combines a mobile network operator with a fixed network operator which is also an MVNO. The review continues in 2016.

269. In addition, the Commission is reviewing the merger between two of the United Kingdom's four mobile network operators, namely Hutchison and Telefónica UK<sup>200</sup>. In October 2015, it opened an in-

<sup>196</sup> Case M.7499 *Altice/PT Portugal*, Commission decision of 20 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7499](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7499)

<sup>197</sup> Case M.7421 *Orange / Jazztel*, Commission decision of 19 May 2015 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7421\\_3082\\_3.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7421_3082_3.pdf)

<sup>198</sup> Case M. 7419 *TeliaSonera / Telenor / JV*, Commission decision of 11 September available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7419](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7419)

<sup>199</sup> Case M. 7637 *Liberty Global / BASE Belgium* available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7637](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7637)

<sup>200</sup> Case M.7612 *Hutchison 3G UK / Telefónica UK* available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7612](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7612)

depth investigation into the transaction, based on concerns that the merger could lead to higher prices, less choice and reduced innovation. The review continues in 2016.

270. In the IT sector, the Commission dealt with a series of multi-billion mergers in the semiconductor industry. In September, it cleared NXP's acquisition of Freescale, subject to remedies aimed at preserving competition in the market for radio frequency power transistors<sup>201</sup>. These transistors are used in the base stations of mobile networks and are used to make radio frequency signals more powerful. Other transactions in the semiconductor sector were unconditionally cleared since they did not raise competition concerns. This was the case for Intel's acquisition of Altera<sup>202</sup>, cleared in October, and Avago Technologies' acquisition of United States chipmaker Broadcom<sup>203</sup>, cleared in November.

271. In the media sector, the Commission conditionally cleared the acquisition by Liberty Global of a stake in De Vijver Media<sup>204</sup>, a Belgian TV broadcasting and production company in February. The commitments ensure that TV distributors that compete with Liberty Global's Belgian operation Telenet will still have access to the two TV channels broadcast by De Vijver Media. The commitments can be invoked not only by existing players but also by new players who want to offer TV services to consumers in novel ways. In June, the Commission conditionally approved the creation of a joint venture for cross-border licensing of online music<sup>205</sup>, set up by three music collecting societies from the United Kingdom, Sweden and Germany. The joint venture will allow online music platforms such as Spotify and iTunes to obtain a single music licence for the entire EU.

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

272. The achievement of the Digital Agenda targets for broadband coverage, despite substantial progress, represents a significant challenge, in particular for the second objective<sup>206</sup>. According to the Commission's analysis on the funding gap to meet the EU broadband targets by 2020, in the most optimistic scenario, the coverage target of 30 Megabits per second (Mbps) for all European households will be reached only if an additional EUR 34 billion are invested<sup>207</sup>. The further investment to reach the take-up target (half of the European households with 100 Mbps subscription) is estimated at EUR 92.4 billion.

273. The broadband sector is highly commercial and most of the financing for the upgrade and deployment of next-generation networks comes from the private sector. State aid control seeks to ensure

<sup>201</sup> Case M. 7585 *NXP Semiconductors / Freescale Semiconductor*, Commission decision of 17 September 2015 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7585\\_20150917\\_20212\\_4572466\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7585_20150917_20212_4572466_EN.pdf)

<sup>202</sup> Case M.7688 *Intel / Altera*, Commission decision of 14 October 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7688](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7688)

<sup>203</sup> Case M.7686 *Avago / Broadcom*, Commission decision of 23 November available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7686](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7686)

<sup>204</sup> Case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*, Commission decision of 24 February 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7194](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7194)

<sup>205</sup> Case M.6800 *PRSfM / STIM / GEMA / JV*, Commission decision of 16 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_6800](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6800)

<sup>206</sup> In January 2014, about 20 % of all EU subscriptions were at least 30 Mbps and only 5.3 % at least 100 Mbps (European Commission, Digital Agenda Scoreboard 2014).

<sup>207</sup> This estimate is based on Fibre-to-the-Cabinet (FTTC) coverage as a proxy for the achievement of universal coverage by 2020 in the EU 28 (on top of FTTC already in place).

that publicly funded networks do not crowd out private investments. Private companies tend to invest mostly in urban, highly populated areas which can assure rapid return on investment. As a result, in certain areas - in particular rural - public funds are needed to ensure investment supporting the deployment of broadband networks, within the broader objectives of inclusion and economic development. State involvement (via State aid and regulation) has been very important in this regard<sup>208</sup> and will continue to be needed in the coming years.

274. With a view to stimulating overall investment in next-generation access (NGA) infrastructure and ensure that customers benefit from State intervention, where a broadband infrastructure is built using State aid, operators must fulfil a number of conditions which include measures to ensure third parties' effective wholesale access to the subsidised broadband infrastructure as specified in the Broadband State Aid Guidelines<sup>209</sup>. This helps to ensure that the positive effects of the aid measure outweigh its potential negative effects and minimises any distortive effect.

275. An example of a case where these principles have been enforced is the NGA Germany case. In 2015, the Commission approved Germany's federal State aid scheme for NGA deployment<sup>210</sup>. The EUR 3 billion plan aims to fill the gaps in NGA coverage, achieving full coverage with connection speeds of preferably 50 Mbps (but at least 30 Mbps). To support the goals of the programme, Germany intends to employ "vectoring" technology, which can boost connection speeds for subscribers in a very cost-efficient way, while also inhibiting open access and multi-operator competition at the same. Therefore the Commission approved the scheme on the condition that vectoring would only be deployed once Germany demonstrated to the Commission a way (either regulatory or technological) to remedy its anti-competitive effect.

276. The principle of technological neutrality is important in various areas including platforms for transmission of television signals. In November, the General Court dismissed several actions for annulment of a Commission decision on the deployment of digital terrestrial television in remote and less urbanised areas of Spain<sup>211</sup>. The General Court concluded that public funding granted by Spain to facilitate the transition from analogue to digital television in remote and less urbanised areas provided a selective advantage to terrestrial platform operators over competitors using other transmission technologies, in breach of EU State aid rules. Moreover, the General Court confirmed that the Commission was correct in

<sup>208</sup> Since 2003, the Commission adopted over 130 decisions approving more than EUR 13 billion of State subsidies across Europe.

<sup>209</sup> Communication from the Commission *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ C 25, 26.1.2013, p.1 available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF>

<sup>210</sup> Case SA.38348 *NGA Germany*, Commission decision of 18 February 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38348](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38348)

<sup>211</sup> Case SA.28599 *Aid for the deployment of digital terrestrial television (DTT) – Spain*, Commission decision of 19 June 2013 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_28599](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_28599); Cases T-461/13 *Spain v Commission*, judgment of the General Court of 26 November 2015, ECLI:EU:T:2015:891; T-462/13 *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, judgment of the General Court of 26 November 2015, ECLI:EU:T:2015:902; and Joined Cases T-463/13 and T-464/13 *Comunidad Autónoma de Galicia v Commission and Retegal v Commission*, judgment of the General Court of 26 November 2015, ECLI:EU:T:2015:901 and in Cases T-465/13 *Comunidad Autónoma de Cataluña and CTII v Commission*, judgment of the General Court of 26 November 2015, ECLI:EU:T:2015:900; T-487/13 *Navarra de Servicios y Tecnologías v Commission*, judgment of the General Court of 26 November 2015, ECLI:EU:T:2015:899; and T-541/13 *Abertis Telecom and Retevisión I v Commission*, judgment of the General Court of 26 November 2015, ECLI:EU:T:2015:898.

holding that the aid was incompatible with the single market, in particular as it did not respect the principle of technological neutrality. These judgments confirm the Commission's analysis of how Member States can support the transmission of TV coverage in line with EU law in a technologically neutral way.

## 13 Financial services

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

277. Financial services represent about 5 % of the EU's GDP but, more importantly, they play an essential role in providing access to finance for the real economy. In 2015, the situation of financial markets improved as the situation of the banks is normalising in several Member States, with banks returning to decent profitability levels and being able to raise new private capital when needed.

278. Due to its systemic importance, the Commission has remained very active in the financial services sector also in 2015. It continued to enforce State aid rules for the financial sector with the aim of ensuring that aided financial institutions restructure adequately or exit the market in an orderly way, and limiting competition distortions from State aid within the internal market, while limiting the use of taxpayers' money to the minimum necessary. At the same time, the Commission continued its role in merger control as well as in antitrust enforcement, investigating anti-competitive behaviours in the area of financial services.

279. Since its launch in June 2012, completing the Banking Union remains a key priority on the EU agenda<sup>212</sup>. Progress continued in 2015:

- The Bank Recovery and Resolution Directive (BRRD) entered into force on 1 January 2015<sup>213</sup>. It sets out the resolution rules for banks and large investment firms in all Member States and aims to better protect taxpayers from having to bail out banks in distress. The Member States had to transpose the directive into national law by 31 December 2014. 17 Member States have complied with this deadline. On 28 May, the European Commission issued a reasoned opinion to request the full implementation of the directive by the remaining 11 Member States<sup>214</sup>.
- The members of the Single Resolution Board<sup>215</sup> were appointed by the Council on 19 December 2014 and took up their posts in March 2015. As of 2016, the Single Resolution Board will be the resolution authority for the significant and cross-border banking groups established within participating Member States in the Single Resolution Mechanism (SRM). It will enable the formulation of resolutions plans for the banks within their responsibility, and calculate the annual contributions of all institutions authorised in the Member States participating in the Single Supervisory Mechanism (SSM) and the SRM. In the context of the SRM it will work in close cooperation with the national resolution authorities.

<sup>212</sup> President Barroso described it as "*the first and most urgent phase on the way to deepen our economic and monetary union*" in his annual State of the Union speech to the European Parliament on 11 September 2013.

<sup>213</sup> European Parliament and Council Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427289116879&uri=CELEX:32014L0059>

<sup>214</sup> Bulgaria, Czech Republic, France, Italy, Lithuania, Luxembourg, the Netherlands, Malta, Poland, Romania and Sweden. A reasoned opinion is the second stage of the EU infringement procedures.

<sup>215</sup> Members of the SRB are the Chair, the Vice-Chair and four other permanent members.

- In November, the Commission put forward a proposal for a European Deposit Insurance Scheme (EDIS)<sup>216</sup>, aiming to provide a stronger and more uniform degree of insurance cover for all retail depositors in the banking union.

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

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

280. The European payments market is developing rapidly with lots of innovation and investments; there were 26 deals raising USD 417.9 million in venture capital up to September 2014, an increase that surpassed the dot-com levels and showed a faster pace in Europe than worldwide.

281. 2015 has been an important year for this market, with the adoption and entry into force of a legislative "payment package". These new rules will profoundly change the way payment providers can operate in the EU.

282. In April, the Interchange Fee Regulation was adopted. It introduced, as of 9 December, EEA wide harmonised caps on inter-bank fees for the most-used credit and debit cards<sup>217</sup>. The Regulation will generate substantial savings for retailers and consumers, as it is expected to reduce hidden fees on card payments by EUR 6 billion annually. It will also make business practices fairer and more transparent and allow competition to be more effective<sup>218</sup>.

283. 2015 also saw the publication of the revised Payment Services Directive (PSD II)<sup>219</sup>. This Directive will allow regulated access to the internet payments market by non-banks to the benefit of retailers and consumers<sup>220</sup>.

284. In most Member States credit cards are the main means of internet payment. But card payments over the internet are cumbersome, expensive to merchants (with traditionally very high interchange fees for

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<sup>216</sup> For further information see MEMO/15/6153 of 24 November 2015 available at [http://europa.eu/rapid/press-release\\_MEMO-15-6153\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6153_en.htm)

<sup>217</sup> European Parliament and Council Regulation (EU) No 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123, 19.5.2015, p.1 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.123.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.123.01.0001.01.ENG)

<sup>218</sup> The Interchange Fee Regulation was preceded by extensive legal action by the Commission challenging the interchange fees applied by MasterCard and Visa, including in particular the prohibition of MasterCard's intra-regional MIFs in 2007 and commitments from Visa Europe in 2010 and 2014 to reduce significantly all the MIFs it fixes in the EU. In September 2014 the Court of Justice endorsed the Commission's decision in the MasterCard case. For further information see Case C-382/12 P - *MasterCard and Others v Commission*, judgment of the Court of 11 September 2014, ECLI:EU:C:2014:2201.

<sup>219</sup> European Parliament and Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35 available at [http://ec.europa.eu/finance/payments/framework/index\\_en.htm#151008](http://ec.europa.eu/finance/payments/framework/index_en.htm#151008)

<sup>220</sup> The Directive was preceded by competition enforcement action against the European Payments Council ('EPC'), the coordination and decision-making body of the European banking industry for payments. For further information see memo for Commission decision of 13 June 2013 available at [http://europa.eu/rapid/press-release\\_MEMO-13-553\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-553_en.htm). The Commission then proposed PSD II which provided a clear legal basis for such bank-independent players, who will become Payment Institutions and be regulated by financial supervisors.

card transactions over the internet) and insecure with high levels of fraud<sup>221</sup>. Moreover, only 60 % of EU citizens possess such cards. The PSD II will open the market for (bank-owned and non-bank owned) regulated third-party players who offer alternative means of internet payments (e.g. through credit transfers via the consumer's bank's website, including most importantly the Single Euro Payment Area (SEPA) Credit Transfer system).

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

286. The "payment package" therefore opens the door for innovation and investment in the payments sector.

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

287. In 2015, the Commission continued its antitrust investigations in the financial sector, one of the Commission's priority areas to achieve a fairer and more integrated internal market.

288. In July, a Statement of Objections was sent to MasterCard<sup>222</sup> in the proceedings against its interchange fees for transactions in the EEA made with cards issued outside the EEA ("inter-regional transactions") and rules hindering cross-border acquiring, which allegedly artificially segments the internal market and prevents the usual competitive process in acquiring. The proceedings against Visa Inc. and Visa International as regards their fees for inter-regional transactions also continue<sup>223</sup>. The inter-regional interchange fees of Visa and MasterCard together represent about EUR 1 billion each year. The Commission is concerned that they increase prices for EEA retailers and may in turn lead to higher prices for products and services for all consumers. Linked to these proceedings, the Commission had commissioned a detailed study into the cost for merchants of receiving payments by card and by cash. This was carried out by Deloitte. Initial results were published in 2014 about the costs for the merchants that took part in the study. A final report was published in March<sup>224</sup> estimating these costs for merchants in the whole of the EU.

289. The investigative efforts into the credit default swaps (CDS) market continued throughout 2015. On 4 December, the Commission decided to partially close the proceedings against all banks involved in the investigation. The investigation continued against the International Swaps and Derivatives Association (ISDA) and data provider Markit.

<sup>221</sup> Estimated by the ECB to represent about two-thirds of total card fraud in the EU, worth €800 million in 2014.

<sup>222</sup> Case AT.40049 *MasterCard II*. For further information see IP/15/5323 of 9 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5323\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5323_en.htm)

<sup>223</sup> These proceedings were closed as regards Visa Europe following its commitments, Case AT.39398 *VISA MIF*, Commission decision of 26 February 2014 available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39398/39398\\_9728\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf)

<sup>224</sup> See, e.g. the *Survey on merchants' costs of processing cash and card payments*, (March 2015) prepared by Deloitte available at [http://ec.europa.eu/competition/sectors/financial\\_services/dgcomp\\_final\\_report\\_en.pdf](http://ec.europa.eu/competition/sectors/financial_services/dgcomp_final_report_en.pdf)

### YIRD (ICAP)

On 4 February, the Commission fined the UK-based broker ICAP EUR 14,96 million for facilitating six cartels in the sector of Yen interest rate derivatives between 2007 and 2010. In this sector, the Commission had already uncovered several distinct bilateral infringements and imposed fines on the banks UBS, RBS, Deutsche Bank, Citigroup, JPMorgan and on the broker RP Martin in December 2013.

These companies had admitted their involvement in one or more cartels in the YIRD sector, which allowed the Commission to settle the case with them. ICAP chose not to settle the case and proceedings continued against it under the normal procedure. The investigation uncovered that ICAP had facilitated six out of the seven cartels in the YIRD sector through various actions that contributed to the anti-competitive objectives pursued by the cartelists and in particular by: disseminating misleading information to certain JPY Libor panel banks which were portrayed as "predictions" or "expectations" of where the JPY LIBOR rates would be set. This misleading information was aimed at influencing certain panel banks (which were not participating in these infringements) to submit JPY LIBOR rates in line with the adjusted "predictions" or "expectations"; using its contacts with several JPY LIBOR panel banks (which were not participating in the infringements) with the aim of influencing their JPY LIBOR submissions; and serving as a communications channel between a trader of Citigroup and a trader of RBS and thereby enabling the anti-competitive practices between them.

#### 13.2.3 *Review of the Insurance Block Exemption Regulation*

290. The Commission continued in 2015 with the Impact Assessment procedure for the review of the Insurance Block Exemption Regulation (EU) No. 267/2010 (IBER)<sup>225</sup>. It assessed the replies to targeted questionnaires<sup>226</sup> received following the public consultation in 2014 and took further stakeholder contacts. Preparatory steps were taken for the Report<sup>227</sup> on the functioning and future of the regulation, which has to be submitted to Parliament and Council by March 2016. To gain additional input for the forthcoming Impact Assessment the Commission commissioned two studies on issues regarding the functioning of the regulation raised by stakeholders in the context of the consultation process. The studies will be undertaken in the first half of 2016.

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

291. The Commission continued to ensure that concentrations in the financial services sector do not lead to market distortions. The Commission assessed several mergers in the banking, insurance and capital markets sectors. For example, the acquisition of Istituto Centrale delle Banche Popolari Italiane by Advent International and Bain Capital, involving markets related to payment cards<sup>228</sup> or the acquisition by Aviva of Friends Life and Tenet which affected the United Kingdom life insurance market<sup>229</sup>. As these transactions did not raise competition concerns, they were cleared in the first phase investigation and without the need for remedial action to be ordered.

<sup>225</sup> Insurance Block Exemption Regulation (EU) No. 267/2010 (IBER), OJ L 83, 30.3.2010, p. 1. The regulation contains a sunset clause which foresees expiry in March 2017.

<sup>226</sup> Targeted questionnaires were sent to pools, customers, insurance intermediaries federations/brokers and mutual insurance associations.

<sup>227</sup> The report will present the Commission's preliminary views on the functioning and future of the IBER at this stage and will not prejudice the final decision that the Commission will take on its future once the Impact Assessment is completed.

<sup>228</sup> Case M.7711 *Advent International / Bain Capital / Icbpi*, Commission decision of 16 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7711](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7711)

<sup>229</sup> Case M.7478 *Aviva / Friends Life / Tenet*, Commission decision of 13 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7478](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7478)

### 13.2.5 State aid investigations in the financial sector

292. The special EU State aid crisis rules, first adopted in 2008 and amended in 2010 and 2011, were restructured in the Banking Communication<sup>230</sup> that was adopted on 1 August 2013. Those rules, in line with the BRRD, allow State aid control to continue to ensure a consistent policy response to the financial crisis throughout the EU. They also played an important role in limiting distortions of competition in the internal market. Furthermore, they contribute to the restoration of confidence in the European financial sector so that it can again provide affordable lending to the real economy, including SMEs, and support economic growth.

293. Until 31 December, the Commission has analysed 117 banks, or around one quarter of Europe's banking sector by assets, under the special crisis rules. Of those banks, 61 were restructured and 41 were orderly liquidated. As of 31 December, one case is still pending.

294. It is important to note that only a part of approved State aid to the financial sector has actually been used. In particular, only around a third of the guarantees approved by the Commission were eventually necessary to be provided to banks by the respective Member States.

295. In the period of 2008 until 2014, the volume of aid in the form of capital (i.e. recapitalisations and asset relief measures) amounted to EUR 617 billion (4.4 % of EU 2014 GDP). More specifically, recapitalisations totalled EUR 432 billion (3.1 % of EU GDP), whilst asset relief measures amounted to EUR 185 billion (1.3 % of EU GDP).

296. The volume of guarantees and other liquidity support reached its peak in 2009, with the outstanding amount of EUR 906 billion (7.4 % of EU 2009 GDP). Since then the crisis has gradually receded in many Member States, and the outstanding amount of liquidity support dropped to EUR 215 billion (1.5 % of EU 2014 GDP) in 2014. That year the outstanding amount of guarantees was EUR 186 billion, whilst other outstanding liquidity measures amounted to EUR 28 billion (0.2 % of EU GDP).



297. State aid rules ensure that banks remunerate Member States for aid and that this aid is repaid. For aid in the form of capital, Member States have received EUR 15 billion in dividends and other remuneration by end-2014. During the same period, Member States have received EUR 40 billion in

<sup>230</sup>

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

guarantee fees, compared to EUR 4 billion of guarantees actually called. For liquidity support in the form of loans, Member States had received EUR 68 billion in interest by end-2014.

298. Data on aid repayments in 2015 will include a repayment by KBC in Belgium and partial re-privatisations of such banks as Deutsche Pfandbriefbank in Germany, ABN Amro in the Netherlands, as well as Lloyds and Royal Bank of Scotland in the United Kingdom and if those Member States recouped some of the funds provided during the financial crisis.

#### Non-performing loans (NLP)

A dominant topic in the Commission's discussions with Member States is the management of non-performing loans (NPLs). As a result of the economic recession or bursting of real estate bubbles, many banks throughout Europe have large volumes of NPLs on their books. However, the legal framework for dealing with these is very different in each Member State. In some Member States, strong creditor protection prevents banks from managing their NPL effectively, e.g. by seizing collateral. Consequently, some national administrations have tried to devise other ways to reduce the burden of NPL on their banks' balance sheets so that these banks can better fulfil their role of lenders to the real economy. Currently, the Commission is discussing this topic with Italy and Hungary. Both States have decided to set up asset management companies (AMC) which should take over NPL from existing banks. While discussions on Italy's plans are still ongoing, Hungary has already begun to set up an AMC in 2014.

In general, AMC give rise to a number of questions from a State aid perspective. The most important question is at what price the transfer of an NPL from a bank to a State-funded AMC takes place. In principle, a transfer at market value does, in all likelihood, not entail State aid. However, if the transfer is conducted at a price above the market value of the NPL, the transferring bank receives State aid amounting to the difference between the market value of the loan and the transfer price.

It is important to highlight that this selective economic advantage to the bank in question comes at the expense of the taxpayer, who is buying the defaulted loans at a price considered by the private investors to be too high compared to the risk of losses. Under State aid rules, such type of aid has to be strictly limited to distressed banks and given only under the condition that the banks in question are restructured. In other words, under State aid rules, it is not allowed that, when creditors default on their loans, the banks are able to sell these loans to the State at inflated prices without having to restructure. Consequently, the Commission will keep monitoring Member States' plans for AMC closely in order to protect the European taxpayers from unnecessary burdens and to avoid undue advantages to banks. No decisions have been taken on AMC in 2015.

299. On 9 April, the Commission approved under State aid rules the restructuring plan of Permanent TSB<sup>231</sup>. The third-largest domestically owned Irish bank received a significant capital injection from the Irish State in 2011 and benefited from various asset relief measures and guarantee schemes. These measures had been temporarily approved by the Commission subject to the submission of a restructuring plan. The initial plan submitted by Ireland was subsequently adjusted and updated several times to account for changing market conditions, the results of the October 2014 comprehensive assessment conducted by the ECB, and difficulties to agree on terms to ensure the bank's long-term viability. The restructuring plan includes a set of commitments that Permanent TSB will respect until the end of 2018, including commitments to deleverage and reduce costs.

300. On 2 July, the Commission took an amendment decision on Österreichische Volksbanken AG (ÖVAG) and the Austrian Volksbanken sector, a network of cooperative banks<sup>232</sup>. ÖVAG, the central institution of the Volksbanken sector, had already received State aid in 2009 and was subsequently been

<sup>231</sup> Case SA.33442 *Restructuring of Irish Life and Permanent Group Holdings plc*, Commission decision of 9 April 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/241557/241557\\_1662492\\_396\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/241557/241557_1662492_396_2.pdf)

<sup>232</sup> Case SA.31883 *Restructuring of Österreichische Volksbanken AG*, Commission decision of 2 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_31883](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_31883)

put under restructuring through a Commission decision<sup>233</sup>. In October 2014, the ECB stress test revealed a capital shortfall of EUR 865 million for the Volksbanken sector including ÖVAG. To make up for the shortfall the bank and the Austrian authorities proposed to transfer ÖVAG's functions as a central institution to another Volksbank and to put ÖVAG itself in wind-down. The Commission agreed to this plan on condition that the Volksbanken sector repays EUR 300 million to the Austrian State which Austria had given to ÖVAG as part of an injection of EUR 1 billion in participation capital in 2009. Previously, the Austrian State had already lost EUR 700 million of this sum due to ÖVAG's continued loss-making.

301. On 22 November, the Commission found the resolution plans for four small Italian banks<sup>234</sup> to be in line with State aid rules<sup>235</sup>. The four institutions constitute around 1 % of the Italian banking sector. All of them had already been placed under special administration between 2013 and 2015. Under the decisions a bridge bank will be created for each bank. These bridge banks are to be sold in a profit-maximising way at a later stage. The Italian national resolution fund will provide EUR 3.6 billion to the bridge banks, minimising the need for State aid and consequently the burden for the Italian taxpayer. On 23 December, the Commission found that the support granted by the Italian mandatory deposit guarantee scheme to Banca Tercas, a small Italian bank with a market share of about 0.1 % of total banking assets in Italy, constitutes incompatible State aid<sup>236</sup>. This decision followed the opening of an in-depth probe into the support measures in February 2015. The decision exemplifies the Commission's continued vigilance regarding State aid rules in the European financial sector – including the requirement that State aid must be kept to the necessary minimum.

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

302. In Greece, the situation of the banking sector deteriorated dramatically over the first half of 2015 amid uncertainties about the financing of the Greek State, which eventually led to a new European Stability Mechanism (ESM) support programme for Greece agreed in August 2015. In that context, the European Central Bank's Single Supervisory Mechanism (SSM) carried out a comprehensive assessment of the four systemic Greek banks, to ensure that they are adequately capitalised. This revealed - on 31 October - large capital shortfalls. The banks aimed to cover their capital needs from private sources (existing creditors, voluntary exchange of their bonds for new shares, and new investors). Two of the banks succeeded in doing so fully, while the other two raised significant amounts of private capital and received capital injections from the State for the difference. All of them benefited from an aid measure in the form of a Hellenic Financial Stability Fund commitment to cover any capital needs not covered from private sources. The Commission found the aid measure provided by the Fund and the capital injections, to be in line with State aid rules, on the basis of amended restructuring plans submitted for the banks, which included new restructuring measures and commitments, proportional to the amount of aid received by each of the banks.

<sup>233</sup> Case SA.31883 *Restructuring of Österreichische Volksbanken AG*, Commission decision of 19 September 2012 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_31883](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_31883)

<sup>234</sup> Banca delle Marche, Banca dell'Etruria e del Lazio, Cassa di Risparmio di Ferrara, and Cassa di Risparmio della Provincia di Chieti.

<sup>235</sup> Cases SA.39453, SA.41134, SA.41925 and SA.43547, Commission decision of 22 November 2015. The non-confidential versions of the four decisions will be published in the State aid register on the competition website under the case numbers SA.39453, SA.41134, SA.41925 and SA.43547 once potential confidentiality issues have been resolved.

<sup>236</sup> Case SA.39451 *Banca Tercas*, Commission decision of 23 December 2015. For further information see IP/15/ 6395 of 23 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6395\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6395_en.htm). The non-confidential version of the decision will be published in the State aid register on the competition website under the case number SA.39451 once potential confidentiality issues have been resolved.

303. In Cyprus, the Single Supervisory Mechanism concluded two assessments with respect to the Cypriot Central Cooperative Banks (CCB) in 2015. The first, a Supervisory Review Evaluation Process (SREP), led to a decision that CCB must at all times have an overall capital ratio equal in quality to Common Equity Tier 1 (CET1). The second assessment was related to an on-site inspection that identified a shortfall in provisioning. As a result of both reviews, the CCB needed additional capital. Since their legal structure did not allow them to raise the new capital from private sources, the Commission received a request for new State aid. The new capital injection was approved subject to significant additional restructuring of the CCB. Further operational integration was demanded, including further centralisation of employees to allow for their easier redeployment and the governance structure of the group was further simplified as well as the centralisation of ownership and control of physical assets. In order to restore market access of the CCB, a progressive divestment by the State has been demanded to start before the end of the restructuring period – before 2018.

304. In May, Portugal successfully exited a financial assistance programme, during which a large part of the banking sector had been subject to restructuring decisions under State aid rules. State aid control in the financial sector continues to play a relevant role in the post-programme context.

305. In December, the Commission took decisions on two Portuguese banks, Novo Banco and Banif. Novo Banco, which was established following the resolution of BES in August 2014<sup>237</sup>, had to be sold by August 2016 in a transaction that was to be approved by the Commission. A sales process run in 2015 did not find a buyer. At the same time, the European Central Bank's Single Supervisory Mechanism carried out a comprehensive assessment of the bank, revealing on 14 November a shortfall of EUR 1.4 billion in the adverse stress test scenario, adding to the complexity of the bank's situation. In December, the Commission adopted a decision<sup>238</sup>, amending the BES resolution, postponing the deadline to sell and declaring the prolongation of existing Government Guarantee Bank Bonds to be compatible, based on a strengthened set of commitments by the Portuguese authorities and an increased focus by Novo Banco on its core activities. The Commission did not approve any other measures for Novo Banco.

306. In December, the Commission also adopted a decision<sup>239</sup> approving the resolution of Banif, through the sale of assets to Banco Santander Totta and a transfer of assets to an asset management vehicle (Oitante). The resolution strategy was chosen by the Portuguese authorities, who notified it to the Commission. The transfer of assets to the asset management vehicle was only approved on a temporary basis under the State aid framework, a final decision is expected in 2016.

307. In the case of Banif, on 24 July the Commission opened an in-depth investigation to assess whether EUR 1.1 billion of State aid, granted by Portugal to the bank in January 2013 under a temporary Commission approval<sup>240</sup>, was compatible with EU State aid rules. Several amended versions of the restructuring plan for Banif had been submitted to the Commission since the 2013 rescue decision. However, the opening of the investigation was necessary because of the doubts about the viability of the

<sup>237</sup> Case SA.39250 *Resolution of Banco Espírito Santo*, Commission decision of 3 August 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39250](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39250)

<sup>238</sup> Case SA.43976 *Amendment to the resolution of Banco Espírito Santo*, Commission decision of 19 December 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43976](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43976)

<sup>239</sup> Case SA.43977 *Resolution of Banif – Banco Internacional do Funchal SA*, Commission decision of 21 December 2015, available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43977](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43977)

<sup>240</sup> Case SA.34662 *Rentipar/BANIF – Rescue decision – PT*, Commission decision of 21 January 2013 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_34662](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34662)

bank and on the measures proposed to ensure adequate burden sharing and limitation of competition distortions. On 21 December, the Commission approved a series of State aid measures by Portugal amounting to up to EUR 3 billion to put Banif into resolution. The viable parts of Banif were sold to Santander Totta. The rest of the bank will be wound down and cease to compete on the market. The State support therefore preserves financial stability and preserves the lending capacity to the Madera region but without artificially keeping alive non-viable activities. Hence the Commission concluded that this aid does not lead to undue distortions of competition and is compatible with the internal market.

## 14. Taxation and State aid

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

308. The focus the Commission has put on fighting tax evasion and tax avoidance echoes the priorities set by President Juncker upon taking office in November 2014, and is also underscored in Commissioner Vestager's Mission Letter. This is also in line with efforts at international level, namely by the OECD, to tackle tax base erosion and profit shifting to better align rights to tax with economic activity<sup>241</sup>. State aid investigations into Member States' tax ruling practices, which began in 2013, before the Luxleaks revelations, are one of the tools the Commission has to ensure companies pay the taxes they owe in the Member States where they generate economic value.

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

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

311. Both collecting taxes and combating tax evasion are normally competences of the Member States. However, even in this area where the Member States enjoy fiscal autonomy, any national tax measures adopted have to comply with internal market rules and, amongst others, abide by competition law<sup>242</sup>.

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<sup>241</sup> OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing, Paris.

<sup>242</sup> The Commission work in the area of tax rulings was closely followed by the European Parliament's Special Committee on Tax Rulings and Measures Similar in Nature or Effect (TAXE). On 25 November, European Parliament adopted a Report on tax rulings and other measures similar in nature or effect prepared by the TAXE Committee, which viewed positively the contribution of State aid control to tax fairness in Europe. In fact, it "*strongly welcomes and supports the key role of the Commission as the competent competition authority in the ongoing State aid inquiries dealing with tax rulings*" (para. 130). On 25 November, the Committee issued a report which broadly endorsed the Commission's approach on State aid.

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

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

312. Since 2013, the Commission has been looking into tax planning practices via its dedicated Task Force.

313. Throughout 2014 and 2015, the Commission has continued to gather information on tax planning practices. At an initial stage, relevant information was requested from certain Member States where allegations of preferential treatment through tax rulings had been drawn to the Commission's attention, notably Luxembourg, Ireland and the Netherlands. In addition to the above, requests for information on tax planning practices were sent to Cyprus, Malta and the United Kingdom.

314. In December 2014<sup>243</sup>, the Commission extended its State aid enquiry to include all Member States. The enquiry is aimed at clarifying allegations that tax rulings may constitute State aid and to allow the Commission to take an informed view of the practices of all Member States. On the basis of the information received, in June, the Commission requested 15 Member States to provide a substantial number of individual tax rulings<sup>244</sup>. Requesting these tax rulings does not prejudice whether this will lead to individual State aid investigations concerning the recipients of these tax rulings.

315. Overall, in the context of the rulings enquiry, Member States have shown good cooperation, except for, initially, Estonia and Poland. Therefore, in June, the Commission adopted two information injunctions ordering Estonia and Poland to deliver the information the Commission needs to assess whether certain tax practices favour certain companies, in breach of State aid rules. After the injunctions, the Member States submitted the requested information.

### **14.3 Specific cases**

316. In 2014, the Commission opened four formal investigations where it raised concerns that tax rulings may entail State aid issues. These investigations concern rulings for Apple in Ireland<sup>245</sup>, Starbucks in the Netherlands, Fiat Finance & Trade in Luxembourg, and Amazon in Luxembourg<sup>246</sup>. Two of these cases were concluded on 21 October with negative decisions with recovery<sup>247</sup>.

317. Both of those decisions find that by issuing tax rulings in favour of integrated group companies that endorse a method allowing those companies to determine their taxable profit in a manner that deviates from a reliable approximation of a market-based outcome, the Member States in question confer a selective advantage on those companies and the multinational corporate groups to which they belong. That is because those tax rulings allow those group companies to reduce their taxable profit and thus their tax liability under the ordinary rules of taxation of corporate profits in the Member State concerned, as

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<sup>243</sup> For further information see IP/14/2742 of 17 December 2014 available at [http://europa.eu/rapid/press-release\\_IP-14-2742\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2742_en.htm)

<sup>244</sup> For further information see IP/15/5140 of 8 June 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5140\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5140_en.htm)

<sup>245</sup> Case SA.38373 *Alleged aid to Apple*, Commission decision of 11 June 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38373](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38373)

<sup>246</sup> Case SA.38944 *Alleged aid to Amazon*, Commission decision of 7 October 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38944](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38944)

<sup>247</sup> For further information see IP/15/5880 of 21 October 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5880\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5880_en.htm)

compared to independent standalone companies, whose taxable profits are the result of prices negotiated at arm's-length and thus determined by the market. That the method for determining an integrated group company's taxable profit for corporate taxation purposes should comply with this "arm's-length" principle flows from Article 107(1) TFEU, as interpreted by the case law of the Union Courts<sup>248</sup>.

#### 14.3.1 Luxembourg - Fiat Finance and Trade (FFT)

318. One of the decisions adopted by the Commission in 2015<sup>249</sup> concerns the intra-group treasury company of Fiat Chrysler Automobile. Its Luxembourg subsidiary Fiat Finance and Trade (FFT) provides financial services, such as intra-group loans, to other Fiat group car companies in Europe, excluding Italy. The tax ruling issued by Luxembourg to that company endorsed an artificial and extremely complex transfer pricing methodology that the Commission did not find appropriate for determining that company's taxable profits in manner that reliably reflects market conditions. As a result, FFT's tax base was significantly reduced as compared to independent standalone companies in a comparable factual and legal situation.

319. The Commission concluded that because FFT's activities can (as also claimed by the company and Luxembourg) be compared to those of a bank, the taxable profits of FFT could in order to be at arm's length, be determined in a similar way as for a bank, which means a calculation of return on capital deployed by the company for its financing activities. This requires, as a matter of principle that if the taxable profits are calculated based on capital, the level of capitalisation in the company has to be adequate compared to financial industry standards. Additionally, the remuneration applied has to correspond to market conditions. The Commission's assessment showed that, in the case of FFT, if the estimations of capital and remuneration applied had corresponded to market conditions, the taxable profits declared in Luxembourg would have been 20 times higher.

#### 14.3.2 The Netherlands - Starbucks Manufacturing EMEA BV (Starbucks Manufacturing)

320. The other decision adopted by the Commission in 2015<sup>250</sup> concerns a Dutch-based subsidiary of the Starbucks Corporation. The Dutch subsidiary Starbucks Manufacturing EMEA BV (Starbucks Manufacturing) is the only coffee roasting company of the Starbucks group in Europe. It sells and distributes roasted coffee and coffee-related products (e.g. cups, pastries, etc.) to Starbucks outlets in Europe, the Middle East and Africa.

321. A tax ruling issued by the Dutch tax authorities in 2008 significantly lowered Starbucks Manufacturing's tax base as compared to its accounting profit. The core of the Commission's decision concerned the payment of a substantial royalty fee to another Starbucks group subsidiary based in the United Kingdom for the use of coffee-roasting IP and know-how, which is not liable for corporate tax in either the United Kingdom or the Netherlands. Moreover, the company also paid an inflated price for green coffee beans to a Switzerland-based Starbucks group company.

322. The Commission's investigation established that the tax ruling endorsed a transfer pricing methodology that did not produce a reliable approximation of a market-based outcome, since it did not properly examine or price the royalty paid by Starbucks Manufacturing for the coffee-roasting IP and

<sup>248</sup> Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission*, judgment of the Court of 22 June 2006, ECLI:EU:C:2006:416.

<sup>249</sup> Case SA.38375 *Alleged aid to FFT*, Commission decision of 21 October 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38375](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375)

<sup>250</sup> Case SA.38374 *Alleged aid to Starbucks*, Commission decision of 21 October 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38374](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38374)

know-how to a Starbucks subsidiary in the United Kingdom and the price paid by Starbucks Manufacturing for green coffee beans to a Starbucks subsidiary in Switzerland. The Commission further found that the royalty fee in question cannot be justified since it did not reflect a reliable approximation of a market price. In particular, the Commission noted that Starbucks does not charge a royalty for the use of its coffee-roasting IP and know-how when that IP is licensed to third parties that do not exploit the finished product on the market. In addition, the Commission found that certain competitors of Starbucks do not charge a royalty for the use of their coffee-roasting IP and know-how when this is licensed to a coffee roasting toll manufacturer. The Commission therefore concluded that, by allowing Starbucks Manufacturing as a result of the tax ruling to shift a considerable portion of its accounting profit to another Starbucks group entity in the guise of a royalty which was not justified by the market, the Dutch tax authorities conferred a selective advantage upon that company in the form of a reduction of its taxable profit and thus its corporate income tax liability under the ordinary rules of corporate taxation in the Netherlands as compared to independent companies whose taxable profits are the result of prices negotiated at arm's-length and thus determined by the market. In the case of Starbucks Manufacturing, however, the existence and level of the royalty means that a large part of its taxable profits are unduly shifted out of the country. In addition, the Commission's investigation found that Starbucks Manufacturing's tax base was also unduly reduced by the inflated price it pays for green coffee beans to a Starbucks subsidiary based in Switzerland. The investigation concluded that by the tax ruling issued in 2008, the Netherlands gave a selective advantage to Starbucks Manufacturing, which has unduly reduced Starbucks Manufacturing's tax burden since 2008 by EUR 20 - EUR 30 million.

323. The two afore-mentioned decisions do not question the practice of issuing tax rulings as such, in so far as they are used to obtain clarity on how corporate tax will be calculated or on the use of special tax provisions. The two decisions expose two tax rulings endorsing artificial and unnecessarily complex transfer pricing methods to establish taxable profits for the companies in question, which did not reflect economic reality and in no way corresponded to market conditions. Member States have to scrutinise requests for tax rulings and not accept the establishment of transfer prices with no economic justification and which unduly shift profits to reduce the taxes paid by companies in their jurisdictions. Otherwise the beneficiaries of the ruling will obtain an unfair competitive advantage over other companies (in particular independent stand-alone companies, typically SMEs) that are taxed on their actually recorded profits which are determined by prices negotiated at arm's length on the market for the goods and services they use.

#### 14.3.3 *Belgian excess profit system*

324. In February, the Commission launched an in-depth investigation into the Belgian excess profit system<sup>251</sup>. The scheme provides certain Belgian entities that are part of a multinational group with a reduction of their tax base. The tax base reduction concerns a part of an entity's actually recorded profit which exceeds the alleged hypothetical average profit of a stand-alone entity (i.e. not part of a group) deemed to be comparable. Belgium deems that part of the profit "excess profit". This unilateral downward adjustment of the tax base, is claimed to be granted to prevent double taxation, but it applies irrespective of any risk of double taxation. The benefits of the scheme are available subject to an advance ruling issued by a special ruling commission. On 11 January 2016, the Commission adopted a negative decision with recovery<sup>252</sup>, concluding that selective tax advantages granted by Belgium under its "excess profit" tax

<sup>251</sup> For further information see IP/15/4080 of 3 February 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4080\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4080_en.htm) and Case SA.37667 *Excess profit tax ruling system in Belgium*, Commission decision of 11 January 2016 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37667](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37667)

<sup>252</sup> For further information see IP/16/42 of 11 January 2016 available at [http://europa.eu/rapid/press-release\\_IP-16-42\\_en.htm](http://europa.eu/rapid/press-release_IP-16-42_en.htm)

scheme are illegal under EU State aid rules. The scheme has benefited at least 35 multinationals mainly from the EU, who must now return unpaid taxes to Belgium.

#### 14.3.4 Luxembourg - McDonald's

325. Finally, on 3 December the Commission opened a formal probe into Luxembourg's tax treatment of McDonald's<sup>253</sup>. Its preliminary view is that a tax ruling granted by Luxembourg may have granted McDonald's an advantageous tax treatment in breach of EU State aid rules. In particular, the Commission will assess whether Luxembourg authorities selectively derogated from the provisions of their national tax law and the Luxembourg-United States Double Taxation Treaty and thereby gave McDonald's an advantage not available to other companies in a comparable factual and legal situation.

#### 14.4 State aid investigation of sector specific tax issues - investigation into three Hungarian schemes with progressive tax rates

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

327. In March and July, the Commission launched formal investigations<sup>254</sup> into these measures, (combined with suspension injunctions), considering the progressivity of the tax rates grants a selective advantage to undertakings with low turnover and constitutes State aid, which does not appear compatible with the internal market. In reaction, on all three measures Hungary signalled its willingness to abolish the progressive elements and either abolish the measures or transform them into flat-rate measures compatible with the State aid rules.

## 15. Basic industries and manufacturing

### 15.1 Overview of key challenges in the sector

328. Manufacturing is key to the European economy, though it contributes slightly less in terms of GDP than it has in the past<sup>255</sup>. However, the economic importance of industrial activity is much greater than bare GDP figures may suggest. Industry accounts for over 80 % of Europe's exports and 80 % of

<sup>253</sup> For further information see IP/15/6221 of 3 December 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6221\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6221_en.htm)

<sup>254</sup> Cases SA.39235 *Hungarian advertisement tax*, Commission decision of 12 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39235](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39235); SA.40018 *Amendment to the Hungarian food chain inspection fee*, Commission decision of 15 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_40018](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40018) and SA.41187 *Hungarian health contribution of tobacco industry businesses*, Commission decision of 15 July 2015 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>255</sup> André Sapir and Reinhilde Veugelers (2013), *Manufacturing Europe's growth – policies should focus on high-end industries driving productivity growth*, Brussel Opinions available at <http://www.bruegel.org/nc/blog/detail/article/1185-manufacturing-europes-growth>

private research and innovation. Nearly one in four private-sector jobs are in manufacturing, while each additional manufacturing job creates up to two jobs in other sectors<sup>256</sup>.

329. Recognising the central importance of industry for boosting competitiveness and sustainable growth in Europe, the Commission has signalled its commitment to industrial modernisation and promoting a competitive framework for EU industry through investments in innovation, resource efficiency, new technologies, skills and access to finance to increase the industry's share of EU GDP to as much as 20 % by 2020<sup>257</sup>.

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

330. Healthy and vigorous competition enhances the incentives for innovation, and therefore sets the scene for economic growth and job creation. The Commission must therefore be vigilant to ensure that Europe's future prospects are not harmed by anti-competitive practices which introduce rigidities, push prices up and reduce the competitiveness of EU companies and the real income of EU consumers. By maintaining a level playing field, EU competition policy contributes to Europe's growth agenda and underpins the international competitiveness of the European manufacturing sectors.

### *15.2.1 Antitrust investigations in basic industries*

331. Basic manufacturing and consumer goods industries continue to represent a significant share of the Commission's enforcement practice. In 2015, the Commission continued its lines of action (including individual case work, market surveillance and advocacy) in these sectors,

332. EU value-added industry requires access to basic materials at affordable prices that reflect international cost conditions. In 2015, the Commission actively monitored the markets for these inputs to ensure there is adequate access in a healthy and competitive environment. In particular, the Commission continued to monitor the ongoing reform of the London Metal Exchange rules on warehousing<sup>258</sup>, while also focusing on other commodities such as chemicals.

### *15.2.2 Cartel investigations in basic industries*

- Parking Heaters

333. On 17 June, the Commission adopted its 18<sup>th</sup> settlement decision, imposing a total fine of more than EUR 68 million<sup>259</sup> on two Germany-based undertakings, Webasto and Eberspächer that had coordinated prices and allocated customers with regard to fuel-operated parking heaters (which heat parked cars or trucks) and auxiliary heaters (which support the heating system of a running car or truck) between September 2001 and September 2011. The cartel covered supplies of parking heaters to major manufacturers of both cars and trucks across the EEA as well as the aftermarket sales in Germany and Austria.

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<sup>256</sup> Communication of 22 January 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *For a European Industrial Renaissance*, COM(2014) 14 final.

<sup>257</sup> See previous footnote.

<sup>258</sup> For further details about the 12 elements of the LME warehousing reform package, see <http://www.lme.com/trading/warehousing-and-brands/warehousing/lme-warehouse-reform/>

<sup>259</sup> Case AT.40055 *Parking Heaters*, Commission decision of 17 June 2015 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)

334. The parties formed a "basic understanding" according to which competition between them should primarily focus on quality and technology, rather than price. They also agreed to comply with the incumbent supplier principle, which meant that they would not aggressively pursue individual customers or specific models supplied historically by the other undertaking. The ultimate aim of the agreement was to generate reasonable margins by limiting price competition. For 10 years, Webasto and Eberspächer engaged into regular bilateral contacts, during which they coordinated prices and exchanged other commercially sensitive information.

335. The investigation started with an immunity application submitted by Webasto which was followed by an unannounced inspection at Eberspächer's premises in July 2013. Shortly after, Eberspächer applied for leniency. Eberspächer benefited from a reduction of its fine under the 2006 Leniency Notice for its cooperation as well as a further reduction of 10 % for agreeing to settle the case with the Commission. Webasto received full immunity for revealing the existence of the cartel.

- Retail Food Packaging

336. On 24 June, the Commission adopted a decision<sup>260</sup> against 10 companies (Linpac, Vitembal, Coopbox, Sirap-Gema, Huhtamäki, Silver Plastics, Nespak, Magic Pack, Ovarpack and Propack) for their participation in one or more cartels within the retail food packaging sector. The products concerned were polystyrene plastic trays ("foam trays") and, in respect of one of the cartels, also polypropylene plastic trays ("rigid trays") - both used for retail packaging of fresh food such as meat, poultry, fruits and fish.

337. The Decision concerns five cartels which each took place in a different geographical region within the EEA, namely Italy, south-west Europe (covering Spain and Portugal), France, central-eastern Europe (covering Poland, Slovakia, Czech Republic and Hungary) and north-west Europe (covering Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands, Norway and Sweden). The cartels were undertaken in different periods and with varying durations between March 2000 and February 2008 by tray manufacturers and, in relation to south-west Europe and central-eastern Europe, also by distributors.

338. With some differences between the five cartels, the cartel participants engaged in price fixing, customer allocation and market sharing, exchange of price-sensitive information and bid-rigging, mainly with the objectives of maintaining high prices, passing on raw material price increases in a coordinated manner and preserving the status quo with regard to the historically allocated clients and markets. The Commission imposed fines amounting to a total of EUR 115 865 000 for the five cartels. Under the Commission's 2006 Leniency Notice, Linpac received full immunity for revealing the existence of the cartels and avoided fines of totalling of EUR 145 065 000. Vitembal, Sirap-Gema, Coopbox, Magic Pack, Silver Plastics and Ovarpack were all granted reductions of their fine/fines on the basis of their cooperation in the Commission's investigation providing information on one or more cartels. Finally, all the undertakings were exceptionally granted a 5 % reduction of their fines to reflect the considerable duration of the proceeding (seven years) and the special circumstances<sup>260</sup> of the case.

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<sup>260</sup> Case AT.39563 *Retail food packaging*, Commission decision of 24 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39563](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39563)

15.2.2 *Merger investigations in basic industries*

- GE/Alstom

339. In 2015, the Commission cleared the acquisition of the Thermal Power, Renewable Power and Grid businesses of Alstom by General Electric (GE), subject to conditions (GE/Alstom<sup>261</sup>). Following an in-depth investigation, the Commission found that the transaction, as initially notified, would have created significant horizontal overlaps in the gas-related part of Alstom's Thermal Power business, mainly in relation to the supply of Heavy Duty Gas Turbines (HDGTs), where the global market leader GE would have acquired the third largest competitor in the EEA.

340. HDGTs are the prime mover of gas fired power plants, which are expected to play an important role in the European energy mix in the coming decades as a flexible complement to electricity generation from renewable energies. Moreover, it is likely that HDGTs will be important in the possible phasing out of less energy-efficient and more polluting coal-fired plants.

341. The Commission found that already before the transaction the choice of many HDGT customers appeared to be limited to two or three options at most because of the (1) the highly concentrated market structure, with only four full technology competitors, Alstom, GE, MHPS and Siemens, (2) the high degree of product differentiation and (3) the high barriers to entry. The Commission's investigation which, among other evidence, was based on a detailed analysis of tenders over a five-year period, further showed that Alstom was, in particular in Europe, an important HDGT competitor, and in both Europe and in the worldwide 50Hz markets, a close competitor of GE for HDGTs. Therefore, further to the transaction, customers would have suffered a significant reduction of choice, likely resulting in significant price increases. Moreover, in the course of the Commission's investigation, Alstom emerged as one of the most innovative OEMs in the HDGT market and, thus, the transaction would also have significantly reduced innovation competition.

342. The commitments consisted in the divestment of the HDGT business of Alstom to the number five player in the world, Ansaldo. The objective of the remedy is not only to guarantee the continued availability of choice in the market for HDGTs, but also to replicate Alstom's innovation capabilities. The divestiture therefore includes Alstom's technology for its most advanced HDGTs, existing upgrades and pipeline technology for future upgrades, R&D engineers, testing facilities, Alstom's servicing subsidiary PSM and servicing contracts for some of the largest and most recent Alstom HDGTs.

343. The remainder of the transaction was cleared without commitments, as the Commission found that GE's activities were largely complementary to Alstom's Grid and Renewables businesses from a product and geographic point of view. The same applied to the coal-fired and nuclear-related parts of Alstom's Thermal Power business.

- State aid investigations in basic industries

344. Two notable State aid cases in manufacturing, in 2015 concerned measures (mostly loans) provided by France as a part of an exceptional and temporary support package to help viable intermediate-sized companies experiencing economic difficulties and undergoing collective proceedings. The package was based on the French Economic and Social Development Fund (FDES).

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<sup>261</sup> Case M.7278 *General Electric/ALSTOM (Thermal Power — Renewable Power & Grid business)*, Commission decision of 8 September 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7278](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7278)

345. As regards the application of the FDES on 28 July, following an in-depth investigation, the Commission approved EUR 125 million in restructuring aid to Kem One<sup>262</sup>. Kem One is a French chlorochemicals and PVC producer which encountered severe financial difficulties that led to the opening of a court-supervised administration procedure in March 2013. In July, to help the company to survive, France notified a restructuring plan involving three types of support measure: (i) a loan of EUR 30 million from the FDES, (ii) a grant of EUR 15 million and (iii) repayable advances of EUR 80 million. During its in-depth investigation, the Commission confirmed that the notified measures constituted State aid conferring an economic advantage on Kem One because they had not been granted on the same terms as a market operator would have required. However, the Commission found the aid to be compatible with State aid rules for rescue and restructuring. In order to reach such conclusion after having carefully examined the competitive situation in the increasingly concentrated market for S-PVC in Europe, the Commission imposed three types of conditions: (i) the freezing of Kem One's current nominal production capacities of chlorine (and thus of PVC for which chlorine is an essential input), (ii) to cap Kem One's expected market share on the S-PVC market in northwest Europe, and (iii) an acquisition ban for Kem One and its controlling shareholders on other businesses active on the same northwest European market as Kem One. All conditions are limited in time and will be closely monitored in their market context.

346. On 6 November, the Commission concluded<sup>263</sup> that a EUR 17.5 million loan as well as the partial financing of the social plan through specific social measures, both granted by the French State constituted incompatible State aid in favour of Mory-Ducros and its post-insolvency successor Mory Global (both active in the market for supply of transport and logistic services). Despite Mory-Ducros being the number two provider of logistic services in France, artificially maintaining a failed business model (Mory-Ducros has been wound up and Mory Global is currently facing a receivership procedure) would have prevented more efficient competitors from growing and, over time, increased costs to customers. The French State will have to claim recovery of the undue aid in the receivership procedure.

347. In addition, on 12 June, the Commission adopted a decision as regards the main Romanian electricity generator Hidroelectrica, which is majority owned by the State. On 25 April, the Commission opened formal proceedings<sup>264</sup> in relation to sale of electricity by Hidroelectrica to several industrial buyers (e.g. aluminium, steel, graphite electrode producers) at prices allegedly set below market level. Following an in-depth investigation of market conditions and prices in Romania, the Commission concluded that the contracts concluded by Hidroelectrica with the alleged beneficiaries did not constitute State aid. By contrast, also following an in-depth investigation, the Commission found that the contracts concluded by Hidroelectrica with Electrocentrale Deva and Termoelectrica contained in years 2010 and 2011 preferential electricity tariffs in favour of the latter companies, and so constituted incompatible State aid. Therefore, both beneficiaries (or their legal and economic successors) were held liable to pay back the aid.

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<sup>262</sup> Case SA.38544 *Dispositif exceptionnel et temporaire d'accompagnement des restructurations - KEM ONE SAS*, Commission decision of 28 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38544](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38544)

<sup>263</sup> Case SA.38545 *Aide en faveur de Mory Ducros et Mory Global – prêt et mesures sociales*, Commission decision of 6 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38545](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38545)

<sup>264</sup> Case SA.33451 *Alleged preferential tariffs in contracts of Hidroelectrica SA with electricity traders*, Commission decision of 12 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_33451](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33451)

## 16. Agri-food industry

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

348. EU agricultural markets have certain structural characteristics that contribute to create difficult conditions for farmers placing them in a disadvantaged economic position in the food chain. Agricultural producers tend to be highly atomised with many small holdings serving the market, while their inputs suppliers and customers (processors, wholesalers and retailers) are often much larger and more concentrated. Agricultural producers therefore typically have very little bargaining power in their negotiations vis-à-vis large suppliers and buyers. In addition, farmers face sustained and increased competition from non-EU producers.

349. To redress this situation, the 2013 Common Agricultural Policy reform, while maintaining the application of competition laws to agriculture, set out derogations to antitrust rules for certain agricultural sectors, in particular olive oil, beef and veal, and arable crops (cereals, oilseeds etc.)<sup>265</sup>. The aim of these new rules is to increase the competitiveness and sustainability of EU farmers (i.e. producers) in those sectors as well as strengthening their bargaining power vis-a-vis their buyers, while preserving a market-oriented approach. The new rules allow joint selling by producer organisations provided that the amounts sold remain at moderate levels in the relevant market (15 % or 20 %), the producer organisation integrates other activities than selling (for instance, storage or distribution) and that such integration between producers creates significant efficiencies.

350. In November 2015, the Commission adopted new Guidelines on the application of Articles 169, 170 and 171 of *Regulation 1308/2013 establishing a Common Market Organisation for agricultural products* (CMO Regulation) for the olive oil, beef and veal and arable crops sectors<sup>266</sup>. The Guidelines are intended to ensure the new derogations are applied consistently, helping farmers and other market operators to understand how to apply such derogations and how to obtain efficiencies in joint activities. In addition, the Commission has set up a task force of experts, whose mandate is to take a thorough look at the challenges faced in EU agricultural markets.

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

351. In light of the continuing difficult situation in several agricultural sectors, the Commission continued its work throughout 2015 in order to address the main challenges arising out of the supply chain, in particular the competitive position of the farmers and the practices of large retailers and manufacturers. The sector faced particular difficulties in the spring and summer of 2015. Dairy farmers and pork producers were strongly hit by a number of factors, including weakening demand, increased production in all major producing regions (Europe, United States, New Zealand and Australia), the Russian ban on agricultural products and ongoing export bans linked with African swine fever in parts of the EU. As a consequence, prices fell sharply due to a worsening of oversupply in the market.

352. Given these difficult market conditions, farmers demonstrated across France, Belgium and other Member States throughout the summer against the low farm-gate prices. The protests were largely targeted at retailers, arguing that price competition between retailers drives retail prices down and that retailers are

<sup>265</sup> European Parliament and Council Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R1308>

<sup>266</sup> Commission notice *Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors*, OJ C 431, 22.12.2015, p.1

able to use their superior bargaining power to bring down the price paid to farmers. In response to the summer's agricultural crisis, the Commission focused on addressing the underlying structural issues in the market rather than adopting "sticking-plaster" solutions. Many market operators responded to the low prices in the agricultural sector by taking initiatives that favour national production. Such initiatives may be incompatible with the goals of a single market for food products since they can hinder imports from other Member States and raise concerns under competition rules. The Commission intervened in several such cases, demonstrating its stance regarding conduct that segments the market along national borders and ensuring that farmers in all Member States have fair access to the market.

353. In early 2015, the Commission initiated an investigation into an agreement between the French retailer, Carrefour, and the main French federation of vegetable growers, Les Producteurs de Légumes de France (Légumes de France). The agreement aimed to restrict most of Carrefour's procurement of certain seasonal vegetables in France to the members of Légumes de France, excluding vegetable producers from other Member States from the French market. The agreement, which was the first of its kind and was only limited to one retailer (Carrefour), was renounced by the retailer after the Commission initiated its investigation. The investigation was therefore closed without a finding of an infringement.

354. In the aftermath of the agricultural crisis in summer 2015, a number of market participants at various levels of the supply chain in France and Belgium agreed on initiatives aiming at improving the remuneration of producers of milk and pork. At the end of 2015 the Commission started to collect information in order to assess complaints that the alleged agreements could potentially restrict competition from farmers from other Member States exporting their products to those national markets.

#### *16.2.1 Prevention of parallel trade by food manufacturers and processors*

355. The Commission has also been looking into consumer price differences among Member States for identical food products. This is not in itself a breach of the EU competition rules, and can be explained by several factors. First, there are regulatory factors including differences in fiscal and labour market policies which differ across Member States. Shop opening regulations can also in some cases limit competition and raise prices. Second, product markets and supply chains operate differently in each Member State. For example, consumers can have different purchasing powers and price sensitivity, and the levels of competition at retail and wholesale levels differ between Member States.

356. However, these factors may only explain a part of retail price differences between Member States. Another possible reason can be that suppliers can charge different prices in different markets and prevent retailers from bringing products from lower-priced markets to higher-priced markets. In 2015 the Commission started looking into instances of possible restrictions by suppliers of the cross-border distribution of food products by retailers from one Member State to another Member State (so-called "parallel trade").

#### *16.2.2 Issues concerning modern retail*

357. In October 2014 the Commission published its study, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector*. Throughout 2015, the Commission conducted its follow up to the study, engaging with industry stakeholders to analyse the results.

358. A key question raised by the study is the decrease in innovation and in particular whether the position of retailers as both customers and competitors of brand manufacturers simultaneously through their offer of Private Label (retailer own brand) products can be used to their advantage, creating an uneven playing field in the wholesale market. Brand manufacturers argue that certain retailer practices concerning their Private Labels reduces incentives to innovate. As part of the follow-up to the study, in

2015 the Commission started looking into whether such practices can reduce innovation available to consumers at the market level.

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

- DEMB/Mondelez/Charger Opco

359. In May, the Commission cleared, subject to remedies<sup>267</sup>, the creation of a joint venture between Mondelēz (United States) and DEMB (Netherlands) - two of the world's leading manufacturers of branded coffee products available on retailers' shelves. In addition to investigating traditional Roast and Ground ('R&G') and instant coffee products, the Commission also took a close look at the effects of the transaction in respect of innovative single-serve coffee products. Mondelēz produces and markets T-discs, which are consumables for the Tassimo single-serve machines, while DEMB manufactures and sells filter pads, which are consumables for Senseo single-serve machines. Due to IPR protection, T-discs can only be manufactured by Mondelēz whilst all coffee companies (including Mondelēz) and retailers can manufacture filter pads in competition with DEMB. Although neither Mondelēz nor DEMB manufactures and sells single-serve machines (this is done by their partners Bosch and Philips), they are able, and have the incentive, to influence the prices of these machines by using coupons, cash-backs and other promotional levers to increase sales, and thus penetration, of these systems.

360. The Commission conducted an in-depth investigation on whether the combination of Senseo and Tassimo would lead to higher prices and less innovation. Ultimately, the Commission concluded that due to the dynamic and growing nature of single-serve coffee machines and their consumables, the joint venture would have no incentives to raise prices of the Senseo and Tassimo machines through reduced subsidies. On the contrary, the incentive would be to increase penetration of the machines in order to ensure continued and increased sales of corresponding filter pads and T-discs, which is where the joint venture would make its profits. Competitive pressure from Nestlé, which owns the other two single-serve systems – Dolce Gusto and Nespresso, was also taken into account.

361. The Commission did raise concerns in respect of the combination of leading consumer brands in R&G coffee in France, Denmark and Latvia as well as in the filter pads (compatible with the Senseo system) markets in Austria and France. To alleviate these concerns, the parties sold their Carte Noire and Merrild businesses and, in Austria, granted a licence for the Senseo brand, to Lavazza.

### **16.4 State aid enforcement in the agricultural and forestry sectors and rural areas**

362. In 2014 the Commission adopted a block exemption regulation<sup>268</sup> and Guidelines on State aids in the agricultural and forestry sectors and rural areas<sup>269</sup> as part of the SAM initiative. In 2015, the Commission dealt with more than 700 cases in these fields, about 90 % of which were block exemptions. Many of the cases related to the rural development measures providing State aid clearance for the

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<sup>267</sup> Case M.7292 *DEMB/Mondelēz/Charger OpCo*, Commission decision of 5 May 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7292](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7292)

<sup>268</sup> Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union European Parliament, OJ L 193, p.1.

<sup>269</sup> Commission notice *Guidelines on State aids in the agricultural and forestry sectors and rural areas*, OJ C 204, 1.7.2014, p.1.

implementation of Rural Development programs of the Member States. Thus, it contributed to the growth in the rural economy and the improvement of the business and living conditions in the rural areas.

## 17. Pharmaceutical and health services sector

### 17.1 Overview of key challenges in the sector

363. A key feature of the pharmaceutical and health services sector in the EU is the high degree of regulation at Member State level which leads to significant national variations of medicine pricing and wholesale and pharmacy margins. Nevertheless, EU competition policy in this sector can contribute to promoting innovation, R&D and growth while providing access to cheaper medicines for European citizens.

364. The legislative framework, including the patent system, has a special significance in allowing pharmaceutical companies to reap the benefits of their successful R&D activities. Upon the expiry of data exclusivity and patent protection, generic and bio-similar companies typically enter the market with much lower priced versions of the originator's product. Generic entry therefore contributes to cost-containment. Competition by generics is also a dynamic force that incentivises originator companies to continue investing in R&D to bring innovative medicines to the market. Competition in innovation is also crucial between originator medicines, particularly during the period when these medicines are protected by data exclusivity and/or patents. EU competition policy aims to protect European citizens from anti-competitive practices of pharmaceutical companies in order to support innovation and facilitate access to cheaper medicines<sup>270</sup>.

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

365. In 2015, the Commission published the non-confidential version of its decisions in the Lundbeck<sup>271</sup>, Fentanyl<sup>272</sup> and Servier<sup>273</sup> investigations, which provide a detailed legal and economic analysis of agreements between originator and generic pharmaceutical companies that delayed the market entry of cheaper generic medicines. Such practices were deemed to harm patients, national health systems and taxpayers because prices for the originator medicines could remain artificially high. In the Servier case, the Commission also assessed an abuse of dominance by Servier which consisted in using methods others than those of competition on the merits to delay and prevent generic entry. While the Lundbeck and Servier decisions are under appeal, a fourth investigation by the Commission in relation to the market entry of generic *modafinil* (sleeping disorder medicine) in the EEA is currently ongoing<sup>274</sup>.

<sup>270</sup> For more information regarding market features of the pharmaceutical sector, see *Executive Summary of the Report on the pharmaceutical sector inquiry* of 8 July 2009 available at [http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication\\_en.pdf](http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf)

<sup>271</sup> Case AT.39226 *Lundbeck*, Commission decision of 19 June 2013 available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39226/39226\\_8310\\_11.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39226/39226_8310_11.pdf)

<sup>272</sup> Case AT.39685 *Fentanyl*, Commission decision of 10 December 2013 available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39685/39685\\_1976\\_7.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39685/39685_1976_7.pdf)

<sup>273</sup> Case AT.39612 *Perindopril (Servier)*, Commission decision of 9 July 2014 available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39612/39612\\_11972\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39612/39612_11972_5.pdf)

<sup>274</sup> Case AT.39686 *Cephalon*. For further information see IP/11/511 of 28 April 2011 available at [http://europa.eu/rapid/press-release\\_IP-11-511\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_IP-11-511_en.htm?locale=fr)

366. Pay-for-delay deals have also been investigated by national competition authorities and courts. For example, in France, the Paris Court of Appeal has rejected Reckitt Benckiser's appeal of the French Competition Authority's decision to fine Reckitt Benckiser for its agreement with Schering-Plough to delay the entry of generic *subutex* (anti-heroin addiction medicine)<sup>275</sup>. The Commission continued monitoring patent settlements between originator and generic companies. The sixth report published on 2 December 2015 confirmed the continued use of settlement agreements which reached 76 in total in 2014, the year covered by the sixth monitoring exercise. The portion of B.II settlements (i.e. those containing a limitation on generic entry and a value transfer from the originator to the generic company) remained low, constituting 12 % of all settlements concluded in 2014<sup>276</sup>.

*17.2.1 Recent enforcement trends: Merger enforcement practice focused on innovation and investments as important competitive dimensions*

367. The Commission's enforcement practice in 2015 shows, that the likely impact on innovation and investment plays an important role in the Commission's assessment of mergers.

368. In March, the Commission conditionally approved the acquisition of Biomet Inc. by Zimmer Holdings Inc.<sup>277</sup>, both companies producing orthopaedic implants and related surgical products. The Commission had concerns that the merger could have resulted in price increase for a number of orthopaedic implants in the EEA. Therefore, the Commission made its clearance decision conditional upon Zimmer divesting its knee implant business across the EEA and its system for primary and revision implants in Denmark and Sweden, granting non-exclusive licenses to the rights and know-how currently used and needed to manufacture, market and sell an identical knee implant (including appropriate intellectual property, technology and know-how) and a transitional period to supply the divestment businesses' product lines at reasonable conditions. This remedy will preserve the future competition and innovation in orthopaedic implants and related surgical products.

369. The proposed acquisition of Hospira by Pfizer, both players in the pharmaceutical industry, concerned bio-similar medicines. Bio-similar medicines are those that have the same therapeutic mechanism as originator's biological medicine, which may be patented, but are expected to significantly lower prices for patients. Similarly to what has been the case for mergers between originators and generic businesses, the Commission found that following the merger, Pfizer would be likely to either delay or discontinue the development of its own bio-similar medicine in order to focus on Hospira's product, leading to the net loss of future competition. Therefore, the Commission made its clearance decision of 4 August<sup>278</sup> conditional upon Pfizer fully divesting the development, manufacturing and EEA-wide marketing rights of its relevant bio-similar medicine currently under development (including appropriate intellectual property, technology and know-how). This remedy will preserve future innovation in bio-similar medicines.

370. The consolidation trend affecting the pharmaceutical industry continued over the course of 2015, and the Commission had adopted 15 decisions covering the sector by the end of the year, with more to

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<sup>275</sup> For more information see [http://www.autoritedelaconcurrence.fr/doc/ca\\_subutex\\_13d21.pdf](http://www.autoritedelaconcurrence.fr/doc/ca_subutex_13d21.pdf)

<sup>276</sup> For more information on the 6<sup>th</sup> monitoring exercise see [http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent\\_settlements\\_report6\\_en.pdf](http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report6_en.pdf)

<sup>277</sup> Case M.7265 *Zimmer / Biomet*, Commission decision of 30 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7265](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7265)

<sup>278</sup> Case M.7559 *Pfizer / Hospira*, Commission decision of 4 August 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7559](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7559)

come in 2016. In the four cases which raised competition concerns (*Novartis / GSK Oncology*<sup>279</sup>, *GSK / Novartis Vaccines and Consumer Health*<sup>280</sup>, *Mylan / Abbott-EPD-DM*<sup>281</sup> and *Pfizer / Hospira*<sup>282</sup>); the transaction was cleared subject to remedies, following a phase I investigation. This illustrates the Commission's ability to clear complex cases, often involving novel product markets in a challenging industry, without opening in-depth investigations.

371. The main change in the Commission's practice regarding pharmaceutical mergers is the deepening of its impact assessment on innovation competition, including for medicines that are yet to be approved. In *Novartis / GSK Oncology*, the Commission extended its analysis of pipeline pharmaceutical products beyond those that are in advanced stages of development, in order to fully assess the impact of the merger on clinical research programs. The Commission found that the acquisition of GlaxoSmithKline's oncology business by Novartis entailed the risk that Novartis would likely stop developing two innovative medicines that show great promise for the treatment of skin cancer, because Novartis would acquire similar medicines from GlaxoSmithKline. Therefore, the Commission insisted on remedies which ensured effective competition in the development of medicines against cancer post transaction and made its clearance decision of January conditional upon compliance of the merged entity with those remedies<sup>283</sup>. In *Pfizer / Hospira*, the Commission investigated markets for bio-similar medicines, and found that they present some features that distinguish them from markets for generics medicines. This led to the divestment of a bio-similar medicine that was still under development.

372. Accordingly, the Commission's assessment of pharmaceutical mergers to ensure not only that a healthy price competition is maintained for the benefit of payers and healthcare services, but also that research and development efforts are not diminished for the benefit of patients and healthcare providers.

### 17.3 State aid actions in the health services sector

373. The Commission's State aid actions in the health services sector mainly concern hospitals, related services (such as ambulance transport and medical laboratories) and health insurance. The Commission decision of 20 December 2011 (based on Article 106(2) TFEU<sup>284</sup>) specifies the conditions under which compensation to companies for providing public services is compatible with the EU State aid rules and does not have to be notified to the Commission in advance. Compensation granted to hospitals, including emergency services and ancillary services, for services of general economic interest, benefits from the decision irrespective of the amounts involved provided that the conditions are met. Accordingly, the Commission very rarely takes decisions on financing covered by this exemption decision.

<sup>279</sup> Case M.7275 *Novartis / GlaxoSmithKline Oncology Business*, Commission decision of 28 January 2015 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7275\\_20150128\\_20212\\_4158734\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7275_20150128_20212_4158734_EN.pdf)

<sup>280</sup> Case M.7276 *GlaxoSmithKline / Novartis Vaccines Business (excl. Influenza) / Novartis Consumer Health Business*, Commission decision of 28 January 2015 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7276\\_3115\\_2.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7276_3115_2.pdf)

<sup>281</sup> Case M.7379 *Mylan / Abbott EPD-DM*, Commission decision of 28 January 2015 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7379\\_2336\\_2.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7379_2336_2.pdf)

<sup>282</sup> Case M.7559 *Pfizer / Hospira*, Commission decision of 4 August 2015 available at [http://ec.europa.eu/competition/mergers/cases/decisions/m7559\\_20150804\\_20212\\_4504355\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7559_20150804_20212_4504355_EN.pdf)

<sup>283</sup> Case M.7275 *Novartis / GlaxoSmithKline's oncology business*, Commission decision of 28 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7559](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7559)

<sup>284</sup> Commission decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p.3.

374. During 2015, the Commission continued examining a number of complaints lodged by private health service providers about their allegedly unfair treatment or potentially excessive compensation of publicly-owned hospitals. Those complaints usually came from operators in Member States with healthcare markets more open to competition (e.g. Belgium, France, and Germany<sup>285</sup>). On 29 April, as part of a larger package of cases, the Commission adopted three decisions concerning small-scale public support for specific health service providers, finding that in all three cases the particular circumstances were such that the measure in question had no effect on trade and thus did not constitute State aid<sup>286</sup>.

## 18. Transport and postal services

### 18.1 Overview of key challenges in the sector

375. Towards a competitive and innovate European industry : The transport and postal services sectors account for about 4.9 % of the EU economy<sup>287</sup>, and their performance can have many beneficial effects for other sectors of the European economy. In 2015, the emphasis was on how competition tools can help improve performance in these sectors, especially through innovation and improvements to infrastructure.

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

#### 18.2.1 Antitrust enforcement in air transport

376. The Commission continued its work on the transatlantic airline alliances.

377. In May, it adopted a decision<sup>288</sup> accepting commitments offered by SkyTeam alliance members Air France/KLM, Alitalia and Delta on three transatlantic routes. These commitments related to agreements these members signed in 2009 and 2010, establishing a transatlantic joint venture. The Commission had concerns that the extensive cooperation between the parties, involving profit-sharing and the joint management of schedules, pricing and capacity, might result in higher prices for premium passengers on the Paris-New York route and for all passengers on the Amsterdam-New York and Rome-New York routes. In this context the Commission initially concluded that the competition between the

<sup>285</sup> In 2014 the Commission opened the formal investigation procedure in one of these cases, and the investigation continued throughout 2015. See Case SA.19864 *Public financing of Brussels public IRIS hospitals*, Commission decision of 1 October 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_19864](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_19864)

<sup>286</sup> Cases SA.37432 *Funding to public hospitals in the Hradec Králové Region*, Commission decision of 29 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37432](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37432); SA.37904 *Alleged State aid to medical centre in Durmersheim*, Commission decision of 29 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37904](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37904) and SA.38035 *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery*, Commission decision of 29 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38035](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38035)

<sup>287</sup> See, *EU transport in figures Statistical pocketbook* (2015) available at <http://ec.europa.eu/transport/facts-fundings/statistics/doc/2015/pocketbook2015.pdf>, p.19, prepared by the Commission with around € 562 billion in Gross Value Added (GVA) at basic prices, the transport and storage services sector (including postal and courier activities) accounted for about 4.9 % of total GVA in the EU-28 in 2012 (or 4.4 % excluding postal and courier services).

<sup>288</sup> Case AT.39964 *Air France-KLM/Delta/Alitalia*, Commission decision of 12 May 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39964](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39964)

parties to the joint venture was unlikely to be replaced by competition from existing competitors or from likely, timely and sufficient new entry or expansion, because there are significant barriers to entry and expansion in these markets.

378. The commitment package seeks to address this problem by making landing and take-off slots available to new competitors thus facilitating entry on these routes. The parties also offered to enter into agreements allowing competitors to get better access to the parties' connecting traffic. The commitment package is legally binding on these airlines for 10 years.

379. As a result, the Commission concluded its investigation of the three transatlantic airline joint venture agreements within the major global alliances (Oneworld; Star; SkyTeam), which contributes towards a genuine level playing field in transatlantic aviation markets. The Commission adopted commitment decisions in the *Oneworld case*<sup>289</sup> and in the *Star Alliance case*<sup>290</sup> respectively in July 2010 and May 2013.

### 18.2.2 Merger review in air transport

380. The air transport sector is still very fragmented. In the EU there are more than 150 airlines offering scheduled air passenger transport. The five largest airlines in the EU (i.e. Lufthansa, AirFrance/KLM and International Consolidated Airlines Group (IAG, the holding company of British Airways and Iberia), Ryanair and EasyJet) account for only 50 % of the EU market. In contrast, in the United States, the three legacy carrier groups American Airlines, Delta and United together with low cost carrier Southwest jointly control more than 80 % of the United States market. The drive towards further consolidation of the EU market in 2015 was lessened by low fuel costs which had a positive impact on airline profitability.

381. In this context the Commission reviewed the acquisition of the Irish carrier Aer Lingus by IAG<sup>291</sup>. The Commission's investigation indicated that the merger would raise two types of competition concerns. Firstly, on certain routes where both the airlines operated there would not be sufficient competition. Secondly, the choices of airlines available for connecting long-haul flights would have decreased if Aer Lingus were to connect only to long-haul flights operated by IAG and vice versa - especially considering that before the merger Aer Lingus had agreements with a number of third-party carriers to bring passengers to their hubs for certain long-haul flights. Consequently, the transaction was cleared subject to (i) the release of five slots at London Gatwick Airport to entice new entrants on the Dublin-London and Belfast-London routes and (ii) IAG entering into agreements with competing airlines which operate long-haul flights out of London Heathrow, London Gatwick, Manchester, Amsterdam, Shannon and Dublin, so that Aer Lingus will continue to provide these airlines with connecting passengers. Passengers will therefore continue to have a choice of using other airlines than IAG when connecting at these airports, for instance when on routes such as Heathrow–New York, Gatwick–Las Vegas, Manchester–Orlando, Shannon–Chicago or Dublin–Chicago.

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<sup>289</sup> Case AT.39596 *BritishAirways/AmericanAirlines/Iberia*, Commission decision of 14 July 2010 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39596](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39596)

<sup>290</sup> Case AT.39595 *Continental/United/Lufthansa/AirCanada*, Commission 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>291</sup> Case M.7541 *IAG / AerLingus*, Commission decision of 14 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7541](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7541)

### 18.2.3 *Rescue and restructuring aid in air transport*

382. In 2015, the Commission adopted two negative decisions closing in-depth investigations concerning aid to Cyprus Airways and Estonian Air<sup>292</sup>. The Commission concluded that repeated public support granted by Cyprus and Estonia over many years to their ailing national flag carriers breached EU State aid rules, in particular the so called "one time, last time principle" providing that rescue and restructuring aid can be granted only once in a 10-year period. Furthermore, both airlines did not have credible restructuring plans capable of ensuring their long-term viability without continued State support. Cyprus Airways also did not provide a sufficient own contribution to the restructuring costs while Estonian Air did not offer sufficient measures to limit the distortions of competition caused by the aid. Consequently, the Commission ordered Cyprus and Estonia to recover the incompatible aid received by the airlines of around EUR 65 million and EUR 85 million, respectively. In addition, it continued to monitor the implementation of previously approved restructuring aid, notably to Adria Airways, airBaltic, Air Malta and LOT Polish Airlines.

### 18.3 *State aid to airports and airlines*

383. 2015 was the first full year of application of the Guidelines on State aid to airports and airlines, which entered into force on 4 April 2014<sup>293</sup>. Following the previous year's introduction of the guidelines, and the adoption of a large number of decisions on long-running investigations, 2015 was a rather more balanced year, for developing the new approach that the guidelines set out.

384. In this regard, the first national schemes to be adopted under the new guidelines aim to serve as a model of how the different categories of aid that can be authorised in the airports and airlines sector can be applied. In particular, France was authorised to have three separate national schemes (investment aid, operating aid for airport infrastructure<sup>294</sup>, and "start-up" aid for airlines operating from regional airports)<sup>295</sup>.

<sup>292</sup> Cases SA.35888 *Rescue aid for Cyprus Airways (Public) Ltd*, Commission decision of 9 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35888](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35888); SA.37220 *Restructuring aid for Cyprus Airways (Public) Ltd*, Commission decision of 9 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_37220](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37220); SA.38225 *Training aid for Cyprus Airways*, Commission decision of 9 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38225](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38225); SA.35956 *Rescue aid to Estonian Air*, Commission decision of 6 November 2015 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) and SA.36868 *Restructuring aid to Estonian Air*, Commission decision of 6 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_36868](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36868) For further information see IP/15/6023 of 7 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6023\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6023_en.htm).

<sup>293</sup> Communication from the Commission, *Guidelines on State aid to airports and airlines*, OJ C 99, 4.4.2014, p. 3 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.099.01.0003.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.099.01.0003.01.ENG)

<sup>294</sup> Cases SA.38937 *Régime d'aide à l'investissement des petits et moyens aéroports*, Commission decision of 8 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38937](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38937) and SA.38938 *Régime d'aide au démarrage des compagnies aériennes*, Commission decision of 8 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38938](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38938)

<sup>295</sup> Case SA.38936 *Régime d'aide à l'exploitation des petits et moyens aéroports*, Commission decision of 8 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38936](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38936)

The United Kingdom also had a national start-up aid scheme authorised<sup>296</sup>, and Ireland had a national scheme covering investment and operating aid for airport infrastructure authorised<sup>297</sup>.

385. The guidelines make it clear that both the Commission and Member States can achieve a lower administration burden by using schemes in this sector. However, decisions were also taken throughout the year on individual airports, either when such airports could not be covered by a national scheme, or when the Member State concerned had so far not put such a scheme into place<sup>298</sup>.

386. The application of the guidelines was also consolidated by opening of new investigations, notably two investigations were opened on the same day concerning two Romanian airports in relatively close proximity, as well as the airlines that operate from those airports<sup>299</sup>.

387. As an expected consequence of the very active 2014, a number of appeals were lodged in 2015 in the General Court by various parties against decisions taken in 2014, in particular against the negative decisions ordering the recovery of aid for airlines or airports. The Commission has begun its work to defend these decisions.

#### 18.4 *Maritime transport*

388. On State aid control, the emphasis in 2015 was on ensuring continued compliance with the Maritime State aid guidelines<sup>300</sup>. The most important decision in this respect requested appropriate measures regarding the existing Greek tonnage tax scheme<sup>301</sup>. Greece was requested to exclude from preferential tax treatment shareholders of shipping companies and wider maritime cluster companies (including insurance intermediaries). Similarly, Greece was asked to ensure that its shipping companies respect the obligation to keep or increase the share of the fleet under EU/EEA flags. The Commission also adopted final decisions in the French tonnage tax case, which concentrated on enforcing rules on time chartered fleet and the flag link<sup>302</sup>. More generally, in 2015 the Commission paid specific attention that

<sup>296</sup> Case SA.39466 *Start-up aid to airlines operating in the United Kingdom*, Commission decision of 31 July 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/258034/258034\\_1678164\\_84\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/258034/258034_1678164_84_3.pdf)

<sup>297</sup> Case SA.39757 *Ireland support scheme for aid for regional airports*, Commission decision of 31 July 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/258116/258116\\_1676549\\_114\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/258116/258116_1676549_114_2.pdf)

<sup>298</sup> For example, cases SA.39315 *Tallinn Airport airside area development project*, Commission decision of 10 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39315](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39315), and SA.40433 *Investitionsprogramm Flughafen Klagenfurt*, Commission decision of 6 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_40433](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40433).

<sup>299</sup> Cases SA.32963 *State aid to Wizz Air and Cluj-Napoca Airport*, Commission decision of 31 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_32963](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32963) and SA.33769 *Alleged aid to Târgu Mureş Transilvania Airport, Wizz Air, Ryanair and other airlines*, Commission decision of 31 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_33769](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33769)

<sup>300</sup> Commission Communication C (2004) 43 *Community guidelines on State aid to maritime transport*, OJ C 13, 17.01.2004, p.3.

<sup>301</sup> Case SA.33828 (2012/E) *Greek tonnage tax scheme and other State measure in favour of shipping companies*, Commission decision of 18 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_33828](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33828)

<sup>302</sup> Case SA.14551 *Taxation au tonnage*, Commission decision of 4 February 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_14551](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_14551)

maritime aid schemes, including the tonnage tax notifications that it handled<sup>303</sup>, excluded ship lessors, and that the maximum aid ceiling of the guidelines was not exceeded through e.g. transitional arrangements related to the switch from profit taxation to tonnage taxation.

389. In 2015, the Commission accepted start-up State aid to a new Franco-Spanish short-sea shipping route between Algeciras/Vigo and Havre/Nantes-Saint Nazaire, enabling a freight traffic shift from road to sea<sup>304</sup>.

390. In terms of merger review, maritime transport can be roughly divided into three segments: (1) transport on inland waterways (rivers, canals and lakes, etc.); (2) deep-sea shipping (intercontinental); and (3) short-sea shipping (between ports in the EU and other European ports on the Mediterranean or Black Sea).

391. Short-sea shipping plays a major role for many EU industries, which rely on it for their deliveries; for instance 58 % of total EU maritime transport of goods happened via short-sea shipping in 2013<sup>305</sup>. On certain routes short-sea shipping competes (or in some cases complements) multi-modal transport services such as rail and road transportation. The short-sea shipping sector enjoys healthy competition and low barriers to entry. Indeed when in June 2015 the Commission reviewed the acquisition of Oldenburg-Portugiesische Dampfschiffs-Rhederei (OPDR) of Germany by CMA CGM of France<sup>306</sup> it concluded that the acquisition would raise no competition concerns given the low switching costs for customers, who can also use alternative means of transport such as road or rail, and given the low barriers for competitors to enter or expand their services by adding new ships or new ports of call.

### 18.5 State aid enforcement in port infrastructure

392. Under the current legal framework, where there are no specific instruments regarding State aid to ports, the Commission assesses notifications and complaints in the field of aid for port infrastructure directly under Articles 107(3)(c) TFEU or 93 TFEU depending on the type of port (seaport or inland). In 2015, the Commission continued its case-by-case approach and adopted 16 decisions on State aid for port infrastructure, which have clarified a number of important points<sup>307</sup>. In particular, the Commission found

<sup>303</sup> Cases SA.37912 *Croatia - Tonnage Tax Scheme*, Commission decision of 1 April 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/251015/251015\\_1667829\\_98\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251015/251015_1667829_98_2.pdf) and SA.38085 *Italy - Prolongation of the tonnage tax scheme*, Commission decision of 13 April 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/251318/251318\\_1667835\\_99\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251318/251318_1667835_99_2.pdf)

<sup>304</sup> Cases SA.41620 and SA.41651 *Start-up aid for motorway of the sea between ports of Algeciras y Vigo in Spain and ports of Havre and Nantes-Saint Nazaire*, Commission decisions of 17 September 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/258208/258208\\_1699829\\_86\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/258208/258208_1699829_86_2.pdf) and [http://ec.europa.eu/competition/state\\_aid/cases/258252/258252\\_1699831\\_91\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/258252/258252_1699831_91_2.pdf)

<sup>305</sup> Eurostat Statistics Explained, *Maritime transport statistics – short sea shipping of goods* (April 2015) available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/Maritime\\_transport\\_statistics\\_-\\_short\\_sea\\_shipping\\_of\\_goods](http://ec.europa.eu/eurostat/statistics-explained/index.php/Maritime_transport_statistics_-_short_sea_shipping_of_goods).

<sup>306</sup> Case M.7523 *CMA CGM / OPDR*, Commission decision of 29 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7523](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7523).

<sup>307</sup> Cases SA.39403 *Investment in the port of Lauwersoog*, Commission decision of 29 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39403](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39403); SA.39637 *Cruise Ship Terminal in Wismar*, Commission decision of 30 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39637](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39637); SA.39608 *Sea port extension Wismar*, Commission decision of 30 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39608](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39608); SA.39542 *Dredging and disposal of dredged materials in the Port of Tarant*, Commission decision of 19 June 2015

that public funding of EUR 270 million to build a new cross-Channel terminal in the Port of Calais was in line with EU State aid rules<sup>308</sup>. The new infrastructure furthers EU transport policy objectives without unduly distorting competition in the internal market. In addition, with the decisions in the Lauwersoog<sup>309</sup> and Maasholm<sup>310</sup> cases, the Commission clarified that in some circumstances a potential effect on competition and trade may be excluded. The Commission also confirmed that the construction of access infrastructure to ports (e.g. public roads, rail connections, utilities etc.) which is made available free of charge to all users and is thus not commercially exploitable, may be regarded as non-economic, if it is not specifically dedicated to commercially exploited port infrastructure<sup>311</sup>.

393. Moreover, the Commission adopted a negative final decision as regards certain fiscal benefits granted by Greece in favour to port operator Piraeus Container Terminal S.A. and required recovery of the unjustified advantage to the Greek State<sup>312</sup>.

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available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39542](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39542); SA.39688 *Port of Calais*, Commission decision of 2 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39688](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39688); SA.41865 *Extension of the Port of Sassnitz*, Commission decision of 13 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41865](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41865); SA.40838 *Modification to the public support measures for the Port of Ventspils*, Commission decision of 22 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_40838](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40838); SA.41275 *Port of Mohacs*, Commission decision of 18 August 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41275](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41275); SA.39177 *The Intermodal development of the Port of Baja*, Commission decision of 21 August 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39177](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39177); SA.42219 *Refurbishment of the Schuhmacher-quay in the port of Maasholm*, Commission decision of 24 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42219](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42219); SA.42538 *Dredging in the Port of Ventspils*, Commission decision of 25 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42538](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42538); SA.43250 *Cruise ship terminal Porto de Leixões*, Commission decision of 26 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43250](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43250); SA.41734 *Dredging of Port of Liepaja*, Commission decision of 30 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_41734](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_41734); SA.39232 *Port of Mykonos*, Commission decision of 2 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39232](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39232); SA.43376 *Port of Rostock*, Commission decision of 16 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43376](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43376) and **SA.28876 Piraeus Container Terminal**, Commission decision of 23 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_28876](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_28876)

<sup>308</sup> Case SA.39688 *Port of Calais*, Commission decision of 2 July 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39688](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39688)

<sup>309</sup> Case SA.39403 *Investment in the port of Lauwersoog*, Commission decision of 29 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39403](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39403)

<sup>310</sup> Case SA.42219 *Refurbishment of the Schuhmacher-quay in the port of Maasholm*, Commission decision of 18 June 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_42219](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_42219)

<sup>311</sup> Case SA.39637 *Cruise Ship Terminal in Wismar*, Commission decision of 30 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39637](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39637) and SA.39608 *Sea port extension Wismar* Commission decision of 30 April 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39608](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39608)

<sup>312</sup> Case SA.28876 *Piraeus Container Terminal*, Commission decision of 23 March 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_28876](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_28876)

### 18.6 *Antitrust enforcement in the rail sector*

394. On 5 January, the Commission sent a Statement of Objections to the Lithuanian railway incumbent AB Lietuvos Geležinkeliai<sup>313</sup> in which it informed this company that it may have breached competition rules by removing a railway track connecting Lithuania with Latvia. The Commission is concerned that removing this track may have impeded customers from switching to other rail operators for transporting freight between Lithuania and Latvia. The Commission's investigation continues.

### 18.7 *Rail and intermodal State aid enforcement*

395. In 2015, the Commission approved a number of schemes supporting rail and intermodal transport, which aim to support the transfer of cargo from the road to the safer and more environmentally friendly rail transport mode<sup>314</sup>. The Commission also approved the financing of the Fehmarn Belt fixed rail-road link<sup>315</sup>, a key element for completing the main north-south route connecting central Europe and the Nordic countries. The costs of this project are estimated to be EUR 8.7 billion, part of which is funded by the EU through the Connecting Europe Facility<sup>316</sup>. The Commission approved this financing, as it was in line with State aid rules since the funding promotes the execution of an important project of common interest. The tunnel will be approximately 19 kilometres long and will consist of an electrified, double-track railway and a four-lane motorway with emergency lanes.

396. During 2015, the Commission closely followed the negotiations in the Council concerning the fourth railway package. This bundle of legislation should help further open up the railway sector to competition.

### 18.8 *Merger review in the rail sector*

397. Rail passenger transport in the EU has been on an upward trend since 2010<sup>317</sup> and over the last decade the share of rail passengers using high speed trains has also been growing; similarly, investments in

<sup>313</sup> Case AT.39595 *Baltic rail transport*. For further information see IP/15/2940 of 5 January 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-2940\\_en.htm](http://europa.eu/rapid/press-release_IP-15-2940_en.htm)

<sup>314</sup> See for example Cases SA.38229 *Régime d'aides luxembourgeoises au transport combiné*, Commission decision of 3 June 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/251592/251592\\_1663755\\_60\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251592/251592_1663755_60_2.pdf); SA.39883 *State aid scheme for RO-LA combined transport*, Commission decision of 22 April 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/255363/255363\\_1660684\\_121\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/255363/255363_1660684_121_2.pdf); SA.39606 and SA.40404 *Régime d'aide transitoire au service transitoire d'autoroute ferroviaire alpine*, Commission decisions of 26 May 2015 not yet published; SA.41100 *Special Guidelines for the Programme of Aid for Innovative Combined Transport for 2015-2020*, Commission decision of 11 August 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/257224/257224\\_1695429\\_150\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/257224/257224_1695429_150_2.pdf) and SA.41472 *Prolongation of a scheme to operate scheduled services of combined transport of goods*, Commission decision of 9 July 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/257959/257959\\_1695341\\_91\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/257959/257959_1695341_91_2.pdf)

<sup>315</sup> Case SA.39078 *Financing of the Fehmarn Belt Fixed Link project*, Commission decision of 23 July 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/256101/256101\\_1677572\\_164\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/256101/256101_1677572_164_2.pdf)

<sup>316</sup> For further information see IP/15/5433 of 23 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5433\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5433_en.htm)

<sup>317</sup> Eurostat Statistics Explained, *Railway passenger transport statistics – quarterly and annual data* (December 2015) available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/Railway\\_passenger\\_transport\\_statistics\\_-\\_quarterly\\_and\\_annual\\_data](http://ec.europa.eu/eurostat/statistics-explained/index.php/Railway_passenger_transport_statistics_-_quarterly_and_annual_data)

infrastructure such as high speed train tracks has been constantly expanding<sup>318</sup>. The fourth railway package aims to provide non-discriminatory access to the EU rail network<sup>319</sup>. In this context, the Commission cleared the acquisition of sole control of Eurostar by the French rail operator SNCF subject to commitments designed to facilitate the entry of new rail operators onto the London-Brussels and London-Paris routes<sup>320</sup>. The Commission was concerned that the deal as originally notified might hinder the entry of competitors on these routes, mainly as regards access to stations in France and Belgium and to maintenance centres in France, Belgium and the United Kingdom.

### 18.9 State aid review in the road sector

398. The Commission continued to enforce Regulation (EC) No 1370/2007 on public passenger transport services<sup>321</sup>. In two cases, the Commission took a negative decision on retroactive public service compensations awarded by judgments of Italy's *Consiglio di Stato* (Council of State)<sup>322</sup>. In one similar case the Commission opened a formal investigation procedure against Italy<sup>323</sup>. This was a continuation of a series of cases following the so-called *Simet* case<sup>324</sup>.

399. In addition, the Commission initiated a formal investigation procedure with respect to a set of measures implemented by a public bus company in Finland, raising concerns that the public authorities had acted as a private market investor would have done<sup>325</sup>.

### 18.10 Continuing to apply the new rules ensuring the viability of SGEIs and fair competition across the single market in postal services

400. The postal sector continues to evolve and traditional letter delivery, against the backdrop of electronic substitution, remains on a declining trajectory. Nevertheless, postal services have retained a very significant economic and social value. In a shrinking market of traditional letter delivery, many postal incumbents are being forced to diversify the portfolio of their activities and innovate in order to stay

<sup>318</sup> See, *EU transport in figures Statistical pocketbook* (2015) available at <http://ec.europa.eu/transport/facts-fundings/statistics/doc/2015/pocketbook2015.pdf>, p.19, prepared by the Commission.

<sup>319</sup> See, European Council press release 709/15 of 8 October 2015 available at <http://www.consilium.europa.eu/en/press/press-releases/2015/10/08-railway-market-opening-and-governance/>

<sup>320</sup> Case M.7449 *SNCF Mobilities/Eurostar International Limited*, Commission decision of 13 May 2015. For further information see IP/15/4976 of 13 May 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4976\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4976_en.htm)

<sup>321</sup> Regulation (EC) No 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

<sup>322</sup> Cases SA.35842 *PSO compensation for CST*, Commission decision of 19 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35842](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35842) and SA.35843 *PSO compensation for Buonotourist*, Commission decision of 19 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35843](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35843)

<sup>323</sup> Case SA.38132 *PSO compensation to ARFEA*, Commission decision of 23 February 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38132](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38132)

<sup>324</sup> For further information see IP/13/902 of 2 October 2013 available at [http://europa.eu/rapid/press-release\\_IP-13-902\\_fr.htm](http://europa.eu/rapid/press-release_IP-13-902_fr.htm)

<sup>325</sup> Case SA.33846 *Helsingin Bussiliikenne Oy*, Commission decision of 16 January 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_33846](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33846)

competitive. At the same time, the explosive growth of e-commerce necessitates a well-functioning parcel delivery market linking buyers and sellers. Efficient postal services are thus a key factor in allowing e-commerce to realise its potential in propelling growth and creating jobs.

401. Through State aid control in the postal sector, the Commission pursues multiple related goals. First, State aid control ensures that where a postal service provider – typically a postal incumbent – is entrusted with a costly public service obligation, any compensation paid to the provider does not undermine a level playing field between postal incumbents and new entrants. State aid should not relieve recipients of competitive pressures and market developments incentivising efficiency, propelling innovation and promoting investment. Second, where compensation for public service obligation is not funded directly from the State budget, but from contributions collected by all postal operators (a "compensation fund"), the Commission ensures that the contribution mechanism is designed in a way that does not disincentivise market entry and expansion of new entrants. Three examples can illustrate how the Commission strives to achieve both goals:

402. First, on 19 March, the Commission approved United Kingdom plans to grant GBP 640 million to the UK Post Offices Ltd for delivering a range of public services over three years<sup>326</sup>. In this case the Commission assessment showed that the compensation to Post Offices Ltd, paid directly from the State budget, was designed to ensure that it would not exceed the cost of the public service obligation. In particular, the payment depended on Post Offices Ltd reaching certain annual milestones, giving Post Offices Ltd a strong incentive to be efficient in providing the public services.

403. Secondly, on 26 November, the Commission approved compensation granted by Poland to Polish Post for the delivery of the universal postal service in 2013-15<sup>327</sup>. In this case, the compensation was partly funded from a compensation fund relying on contributions from all postal operators in Poland. The Commission thoroughly assessed every element of the design of the contribution mechanism before concluding that postal operators' contributions were neither discriminatory nor disproportionate. In consequence, it was concluded that the compensation fund did not lead to serious distortions of competition in the Polish postal market. The approval decision in this case was the Commission's second decision addressing the issue of compensation funds and the first one to approve a compensation fund mechanism<sup>328</sup>.

404. Third, on 4 December the Commission approved State financing for Poste Italiane's universal service obligation<sup>329</sup>. The Commission's assessment showed that the compensation to be granted to Poste Italiane is based on a conservative methodology, which ensures that it will not exceed the cost of the public service mission. In particular, all intangible benefits related to the status of being the provider of the universal service obligation, such as the synergies between postal and financial services, are taken into

<sup>326</sup> Case SA.38788 *Compensation to Post Office Limited for costs incurred to provide SGEIs 2015-2018*, Commission decision of 19 March 2015 available at [http://ec.europa.eu/competition/state\\_aid/cases/256622/256622\\_1651530\\_118\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/256622/256622_1651530_118_2.pdf)

<sup>327</sup> Case SA.38869 *Compensation of Poczta Polska for the net cost of USO 2013-2015*, Commission decision of 26 November 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38869](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38869)

<sup>328</sup> The first Commission decision addressing a compensation fund was a decision opening the formal investigation procedure: see case SA.35608 *Hellenic Post (ELTA) – Compensation fund for the financing of the universal postal service*, Commission decision of 1 August 2014 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35608](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35608)

<sup>329</sup> Case SA.43243 *State compensations granted to Poste Italiane SpA for the delivery of the universal postal service over the periods 2012-2015 and 2016 -2019*, Commission decision of 4 December 2015 available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_43243](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_43243)

account in the calculation. Furthermore, the amount of aid granted decreases significantly over time, taking account of significant efficiency gains that will be made over the period of entrustment of the universal service obligation.

### ***18.11 Merger review in postal services***

405. Postal services play a crucial role in allowing e-commerce to develop, the promotion of which is one of the goals of the Digital Single Market strategy. The Commission investigation of the acquisition of TNT Express by FedEx<sup>330</sup> focused on ensuring that prices for customers, including SMEs active in e-commerce, and ultimately consumers, would not rise for cross-border small package deliveries, and that the quality of service would not be degraded as a result of the merger.

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<sup>330</sup> Case M.7630 *FedEx / TNT*, notified to the Commission on 26 June 2015; in-depth investigation opened on 31 July 2015. Final decision planned for January 2016.

**ANNEX: BANKING STATE AID CASES:  
DECISIONS ADOPTED BY THE COMMISSION IN 2015 BY COUNTRY**

Member State	Case number/Title	Type of Decision	Date of adoption
Austria	SA.31883 – 2015/N, 2011/C – ÖVAG (amendment)	No objection <sup>331</sup>	02/07/2015
	State Aid SA.40965 (2015/N) Restructuring guarantee scheme for small undertakings in difficulty in Upper Austria	No objection	11/08/2015
Belgium	SA.43306 (2015/N) Amendment to the restructuring plan of Ethias –Approval of issuance of additional subordinated debt	No objection	23/10/2015
Cyprus	SA.40027 (2014/N) – Fifth prolongation of Cypriot guarantee scheme for banks H1 2015	No objection	14/01/2015
	SA.42080 (2015/N) – Sixth prolongation of Cypriot Guarantee Scheme for Banks H2 2015	No objection	13/07/2015
Denmark	SA.40029 (2014/N) – Reintroduction of the winding-up scheme, compensation scheme, Model I and Model II – H1 2015	No objection	13/02/2015
	SA.42405 (2015/N) Prolongation of the Danish winding-up scheme, compensation scheme, Model I and Model II – H2 2015	No objection	18/09/2015
France	SA.39690 (2015/N) – Extension du champ d'activité de SFIL-CAFFIL au financement des crédits à l'exportation	No objection – no aid	05/05/2015
Germany	SA.40836 (2015/N) Amendment to the methodology for calculating the aid element in guarantees (Germany)	No objections	27/07/2015
Greece	SA.40030(2014/N) – Prolongation of the Guarantee Scheme and Bond Loan Scheme for Credit Institutions in Greece	No objection	14/01/2015
	HT.4524 – STEC 2015	Communication	26/01/2015
	SA.41503 (2015/N) – Resolution of Panellinia Bank through a transfer order to Piraeus Bank	No objection <sup>332</sup>	16/04/2015
	SA.42215 (2015/N) – Prolongation of the Greek Financial Support Measure	No objection	29/06/2015
	HT.4524 – STEC 2015	Communication	30/06/2015

<sup>331</sup> For further information see IP/15/5302 of 2 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5302\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5302_en.htm)

<sup>332</sup> [http://europa.eu/rapid/press-release STATEMENT-15-4799\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-4799_en.htm)

Member State	Case number/Title	Type of Decision	Date of adoption
Greece	SA.43364 (2015/N) -Amendment of the restructuring plan approved in 2014 and granting of new aid to Piraeus	No objection <sup>333</sup>	29/11/2015
	SA.43366 (2015/N) -Amendment of the restructuring plan approved in 2014 and granting of new aid to Alpha Bank	No objection <sup>334</sup>	26/11/2015
	SA.43363 (2015/N) – Amendment of the restructuring plan approved in 2014 and granting of new aid to Eurobank	No objection <sup>335</sup>	26/11/2015
Ireland	SA.39837 (2014/N) – Sixth prolongation of the Credit Union Resolution Scheme H1 2015	No objection	29/01/2015
	SA.33442 (2011/N) – Restructuring of Irish Life & Permanent Group Holdings plc (PTSB)	No objection <sup>336</sup>	09/04/2015
	SA.41371 (2015/N) – First prolongation of the Credit Union restructuring and stabilisation scheme	No objection	05/05/2015
	SA.42083 (2015/N) – Seventh prolongation of the Credit Union Resolution Scheme H2 2015	No objection	02/07/2015
	SA.43423 (2015/N) - Ireland 2nd prolongation of the Credit Union restructuring and stabilisation Scheme	No objection	16/11/2015
Italy	SA.39451 (2015/C) ex 2015/NN – State support to Banca TERCAS	Opening	27/02/2015
	SA.43547 (2015/N) – Italy Resolution of Carichiati	No objection	22/11/2015
	SA.41925 (2015/N) – Italy - Resolution of Carife	No objection	22/11/2015
	SA.41134 (2015/N) – Italy - Resolution of Banca Etruria	No objection	22/11/2015
	SA.39543 (2015/N) – Italy - Resolution of Banca Marche	No objection	22/11/2015
Latvia	SA.36904 (2014/N) – MLB development segment & creation of the Latvian Single Development Institution	No objection	09/06/2015

<sup>333</sup> For further information see IP/15/6193 of 29 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6193\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6193_en.htm)

<sup>334</sup> For further information see IP/15/6181 of 26 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6184\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6184_en.htm)

<sup>335</sup> For further information see IP/15/6184 of 26 November 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-6184\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6184_en.htm)

<sup>336</sup> For further information see IP/15/4755 of 9 April 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-4755\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4755_en.htm)

Member State	Case number/Title	Type of Decision	Date of adoption
Poland	SA.40096 (2014/N) – Second prolongation of the Credit Unions Orderly Liquidation Scheme H1 2015	No objection	27/01/2015
	SA.40480 (2015/N) – Eleventh prolongation of the Polish Bank guarantee scheme – H1 2015	No objection	27/01/2015
	SA.37421 (2014/N) – Polish Guarantee Methodology	No objection	01/07/2015
	SA.42078 (2015/N) – Third prolongation of the Credit Unions Orderly Liquidation Scheme – H2 2015	No objection	06/07/2015
	SA.42560 (2015/N) – Poland - Twelfth prolongation of the Polish bank guarantee scheme	No Objection	24/08/2015
Portugal	SA.39991 (2014/N) – Eleventh Prolongation of the Portuguese Guarantee Scheme	No objection	04/02/2015
	SA.39958 (2014/N) – Third prolongation of the Portuguese Guarantee Scheme on EIB lending	No objection	06/02/2015
	SA.42156 (2015/N) – Fourth prolongation of the Portuguese Guarantee Scheme on EIB lending	No objection	15/07/2015
	SA.42404 (2015/N) – Twelfth Prolongation of the PT Guarantee Scheme	No objection	22/07/2015
United Kingdom	SA.36123 (2013/N) – Banif	No objection <sup>337</sup>	21/12/2015
	SA.38535 (2014/N) – State support to the flood reinsurance scheme	No objection	29/01/2015
	SA.40188 (2015/N) – UK – Green Investment Bank	No objection	16/11/2015

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For further information see IP/15/5439 of 24 July 2015 available at [http://europa.eu/rapid/press-release\\_IP-15-5439\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5439_en.htm)