

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

Annual Report on Competition Policy Developments in the European Union

-- 2019 --

This report is submitted by the European Union to the Competition Committee FOR INFORMATION.

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European Union

1. Changes to competition laws and policies, proposed or adopted

1.1. Summary of new legal provisions of competition law and related legislation

1.1.1. Evaluation of vertical supply and horizontal cooperation agreements to reflect evolving markets

1. In 2019, the Commission started the evaluation¹ of the rules exempting certain horizontal agreements² from the EU's general competition rules. The EU competition rules on horizontal agreements include two Block Exemption Regulations for horizontal cooperation agreements that exempt, respectively, certain research and development, as well as specialisation agreements from Article 101 TFEU. The accompanying Guidelines on horizontal cooperation agreements (Horizontal Guidelines) provide further guidance to help companies in their efforts to engage in competition law compliant cooperation agreements, giving also detailed recommendations on topics such as the competitive assessment of information exchanges, joint purchasing, joint commercialisation and standardisation. The two Horizontal Block Exemption Regulations (HBERs) will expire on 31 December 2022. While the Horizontal Guidelines do not have an expiry date, they will be evaluated together with the HBERs.

2. The Commission made considerable progress in its evaluation³ of the Vertical Block Exemption Regulation (VBER)⁴ and of the accompanying Guidelines on Vertical Restraints. The Commission launched the evaluation in October 2018, in view of the VBER's expiry on 31 May 2022. In February 2019, the Commission launched a three-month public stakeholder consultation, followed by a study in August 2019 on market trends on distribution models and strategies. Furthermore, in November 2019, the Commission held an evaluation workshop with the active participation of stakeholders, discussing more in depth on areas of particular interest for the evaluation of the VBER, with a focus on how the rules benefit consumers.

3. In February 2019, the Commission published the evaluation roadmap⁵ of the Motor Vehicle Block Exemption Regulation (MVBER)⁶. The roadmap triggered a four-week

¹ See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393/public-consultation_en.

² Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335, 18.12.2010, p. 36; Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43.

³ See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en.

⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

⁵ See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6188380_en.

⁶ Commission Regulation 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129, 28.5.2010, p. 52.

online consultation of stakeholders. In addition, a study was commissioned to allow for a better understanding of how market conditions have evolved in the motor vehicle sector over the past decade. The MVBER expires in May 2023.

4. The purpose of these evaluations is to allow the Commission to decide whether to let the rules lapse, prolong their duration, or revise them.

1.1.2. Revision of the Market definition notice

5. In December 2019, Executive Vice-President Vestager announced the planned review of the Commission Notice on the definition of relevant market for the purposes of Community competition law (Market Definition Notice)⁷, which provides guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of EU competition law. The main reason for launching this review is to ensure that the Notice reflects how the Commission’s practice in defining markets has evolved over the past twenty years and that it is fit for a world that is changing fast and becoming increasingly digital.

1.1.3. “Fitness check” of State aid rules

6. In May 2012, the Commission launched a major reform package, the State Aid Modernisation, resulting in the revision since 2013 of a large number of State aid rules. This comprehensive reform package has allowed Member States to implement swiftly State aid measures that foster investment, economic growth and job creation.

7. In January 2019, the Commission launched a process aimed at evaluating the rules under the State Aid Modernisation package⁸ in line with the Commission’s Better Regulation Guidelines, and consequently prolonging the validity of those State aid rules that would otherwise expire by the end of 2020. This so-called fitness check will prepare a revision of the relevant guidelines in light of the policy objectives of the European Green Deal.

Box 1. The fitness check of the State aid modernisation package, railways guidelines and short-term export credit insurance

The aim of the fitness check is to analyse the relevance, effectiveness, efficiency, coherence and EU-added value of these State aid rules, while at the same time providing a basis for decisions by the Commission regarding the potential further prolongation or possibly updating of the rules.

The fitness check covers two Regulations and nine Guidelines:

- the General block exemption and De minimis Regulations,
- the Regional aid Guidelines,
- the Research and Development Framework,
- the IPCEI Communication,

⁷ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–130.

⁸ See: https://europa.eu/rapid/press-release_IP-19-182_en.

- the Risk finance Guidelines,
- the Airport and Aviation Guidelines,
- the Environmental and Energy Guidelines, as well as
- the Rescue and Restructuring Guidelines.

The Railways Guidelines and Short-term export credit Communication, which did not form part of the 2012 State Aid Modernisation package, are also included in the ongoing fitness check.

8. Furthermore, in February 2019, the Commission launched public consultations to evaluate and prepare the revision of the existing Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 (ETS Guidelines)⁹. The ETS Guidelines, adopted in 2012 and based on the 2005 EU Greenhouse Gas Emission Trading Scheme, set out the conditions under which Member States can compensate some companies in certain sectors with high electricity consumption for part of the higher electricity costs arising from the EU emissions trading scheme, in the period 2013-2020. At their expiry on 31 December 2020, the 2012 ETS Guidelines will be updated to ensure that they are adapted to the EU's new emissions trading scheme for 2021-2030¹⁰.

9. In June 2019, the Commission launched an evaluation of the State aid rules for health and social Services of General Economic Interest (SGEI) and the SGEI de minimis Regulation¹¹, which expire in December 2020. As part of this evaluation, a public and a targeted consultation were carried out between July and December 2019, which will be duly considered in the evaluation exercise.

1.2. Other relevant measures, including new guidelines

1.2.1. Upgrading the EU leniency programme

10. In order to improve further the effectiveness of its procedures, the Commission launched in March 2019 its “eLeniency” online tool.¹² Under the EU leniency programme, companies or their lawyers can already submit their leniency statements to the Commission either by email to a functional mailbox or through the oral procedure. The eLeniency tool offers a third option to submit leniency statements online, as part of leniency applications (to receive immunity or a reduction of fines), as part of cartel settlement procedures, or as part of cooperation in non-cartel cases. It therefore reduces the costs and the burden for companies and their legal representatives involved in such proceedings, with the same guarantees applying in terms of confidentiality and legal protection. Since its launch, the Commission has received a high number of statements and documents through eLeniency.

⁹ See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6600267_en.

¹⁰ Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, OJ L 76, 19.3.2018, pp. 3–27.

¹¹ See: https://ec.europa.eu/competition/state_aid/modernisation/evaluation_sgei_en.html.

¹² See: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_1594.

2. Enforcement of competition laws and policies

2.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1. Summary of activities in antitrust enforcement

Antitrust decisions

11. This is a non-exhaustive summary of activities undertaken by the Commission in the field of antitrust over the year 2019. Additional and more detailed information can be found in the Report on Competition Policy 2019 and its accompanying Commission Staff Working Document, as well as on the website of the Competition Directorate-General¹³.

12. In 2019, the Commission decided on 20 cartel and abuse of dominance cases. The Commission's strong enforcement record against hard-core cartels continued in 2019 with five decisions and fines in excess of EUR 1.4 billion. Four of the five decisions issued in 2019 came under the settlement procedure. The Commission adopted five major abuse of dominance decisions in 2019. The five decisions imposed fines of some EUR 2.8 billion in total.

Important cartel cases

13. The Commission fined two producers of car safety equipment¹⁴ – Autoliv and TRW (Sanyo received immunity) – a total of EUR 368 million for participating in a cartel. It was the second time that car safety equipment suppliers were fined for entering into illegal cartel arrangements. On this occasion the parties exchanged commercially sensitive information and coordinated their market behaviour for the supply of seatbelts, airbags and steering wheels. All three parties acknowledged their involvement in cartel conduct and agreed to settle. The cartel is likely to have hurt EU consumers and had an adverse impact on the competitiveness of the EU automotive sector. This case represents the 11th decision in the car parts sector and shows the Commission is able to produce the ‘domino effect’ of successive cases within its existing framework.

14. In two settlement decisions, the Commission fined five banks EUR 1.07 billion for taking part in two cartels in the Spot Foreign Exchange (Forex) market for eleven currencies.¹⁵ The first decision (the “Three-Way Banana Split” cartel) imposed a total fine of EUR 811 million on Barclays, the Royal Bank of Scotland (RBS), Citigroup and JPMorgan. The infringement started on 18 December 2007 and ended on 31 January 2013. The second decision (the “Essex Express” cartel) imposed a fine of EUR 258 million on Barclays, RBS and MUFG Bank (formerly Bank of Tokyo-Mitsubishi). The infringement started on 14 December 2009 and ended on 31 July 2012. Union Bank of Switzerland (UBS) was an addressee of both decisions, but was not fined as it revealed the existence of the cartels to the Commission.

¹³ See http://ec.europa.eu/competition/index_en.html.

¹⁴ See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1512.

¹⁵ Case AT.40135 FOREX, Commission decision of 16 May 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40135

15. In the agri-food sector, the Commission imposed a total fine of EUR 31.7 million on Coroos and Groupe CECAB (Bonduelle received immunity).¹⁶ For more than 13 years, the three firms were involved in a cartel for the supply of certain types of canned vegetables to retailers and/or food service companies in the EEA. The companies set prices, agreed on market shares and volume quotas, allocated customers and markets, coordinated their replies to tenders, and exchanged commercially sensitive information. The infringement covered the entire EEA and lasted from 19 January 2000 to 11 June 2013 for Bonduelle, and to 1 October 2013 for Coroos and Groupe CECAB. The three companies admitted their involvement in the cartel and agreed to settle the case.

16. The Commission also re-adopted a cartel decision against five Italian manufacturers of reinforcing steel bars for concrete, namely AlfaAcciai, Feralpi Holding, Ferriere Nord, Partecipazioni Industriali (Riva Fire) and Valsabbia Investimenti / Ferriera Valsabbia.¹⁷ The Commission imposed total fines of EUR 16.074 million for the companies' participation in a price fixing cartel between December 1989 and July 2000. The case demonstrates the Commission's practice of re-adopting decisions when annulled on procedural grounds in order to ensure proper enforcement of the competition rules and appropriate deterrence.

Table 1. Cartel Decision 2019

Case name	Adoption date	Fine imposed EUR	Undertakings concerned	Prohibition Procedure
Occupants Safety Systems (II)	05/03/2019	368 277 000	3	Settlement
Forex (Three Way Banana Split)	16/05/2019	811 197 000	5	Settlement
Forex (Essex Express)	16/05/2019	257 682 000	4	Settlement
Reinforcing steel bars re-adoption	04/07/2019	16 074 000	5	Prohibition
Canned Vegetables	27/09/2019	31 647 000	3	Settlement

Important abuse of dominance cases

17. In July 2019, the Commission fined Qualcomm¹⁸ EUR 242 million for abusing its market dominance, through predatory pricing, in the worldwide market for chipsets complying with the Universal Mobile Telecommunications System (UTMS), the third generation standard (3G), in breach of EU antitrust rules. The decision established that between mid-2009 and mid-2011, Qualcomm supplied certain quantities of three of its UMTS chipsets to two of its key customers, Huawei and ZTE, below cost, with the aim of forcing its competitor Icera out of the market. Icera was a UK-based start-up and Qualcomm's main competitor at the time in the leading edge segment of the UMTS chipset market.

¹⁶ Case AT.40127 *Coroos and Groupe CECAB*, Commission decision of 13 May 2019. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5911.

¹⁷ See: https://ec.europa.eu/commission/presscorner/detail/en/MEX_19_3709.

¹⁸ Case AT. 39711 *Qualcomm (predation)*, Commission decision of 18 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39711.

18. In March 2019, the Commission fined Nike¹⁹ EUR 12.5 million for preventing traders from selling merchandising products carrying logos or images of some of the EU's best-known football clubs and federations to other countries within the EEA. In its investigation, the Commission found that Nike's non-exclusive licensing and distribution agreements breached EU competition rules, among other things, because of clauses explicitly prohibiting active and passive, online and offline, sales to EEA countries not specifically allocated to the licensees. Nike also enforced certain measures to indirectly implement those sales restrictions, for instance by threatening licensees with ending their contract and by carrying out audits to ensure compliance with the restrictions.

19. In July 2019, Sanrio²⁰ was fined EUR 6.2 million for restrictions concerning products featuring Hello Kitty and other characters owned by the company. Notably, Sanrio limited the languages that licensees could use on the merchandising products. Sanrio's illegal practices lasted approximately 11 years.

20. In May 2019, the Commission fined AB InBev²¹, the world's largest brewing company, EUR 200 million for abusing its dominant market position. Between 2009 and October 2016, AB InBev pursued a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands and to import it into Belgium. AB InBev's most popular beer brand in Belgium is Jupiler, which represents approximately 40% of the total Belgian beer market in terms of sales volume. AB InBev also sells Jupiler beer in other EU Member States, including the Netherlands and France. The Commission decision also ensures that AB InBev will provide on its product packaging mandatory food information in both French and Dutch for the next five years.

21. In April 2019, the Commission concluded its investigation into Mastercard's cross-border acquiring rules²², which prevented merchants located in countries with high interchange fees to seek lower-priced services from acquirers established in Member States with lower interchange fees. When a consumer uses a debit or credit card in a shop or online, the retailer's bank pays an interchange fee to the cardholder's bank. The bank of the retailer passes this fee on to the retailer who includes it, like any other cost, in the final prices for all consumers. Mastercard's cross-border rules obliged retailers' banks to apply the interchange fees of the country where the retailer was located. These rules made retailers pay more in bank services to receive card payments than if they had been free to shop around for lower-priced services. The cross-border rules equally led to higher prices for retailers and consumers, limited cross-border competition and an artificial segmentation of the Single Market. The Commission imposed a fine of EUR 570 million on Mastercard.

¹⁹ Case AT.40436 *Ancillary sports merchandise - Nike*, Commission decision of 25 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40436

²⁰ Case AT.40432 *Licensed Merchandise - Sanrio*, Commission decision of 9 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40432

²¹ Case AT40134 *AB InBev Beer Trade Restrictions*, Commission decision of 13 May 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40134.

²² Case AT.40049 *MasterCard II*, Commission decision of 29 April 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40049.

Figure 1.



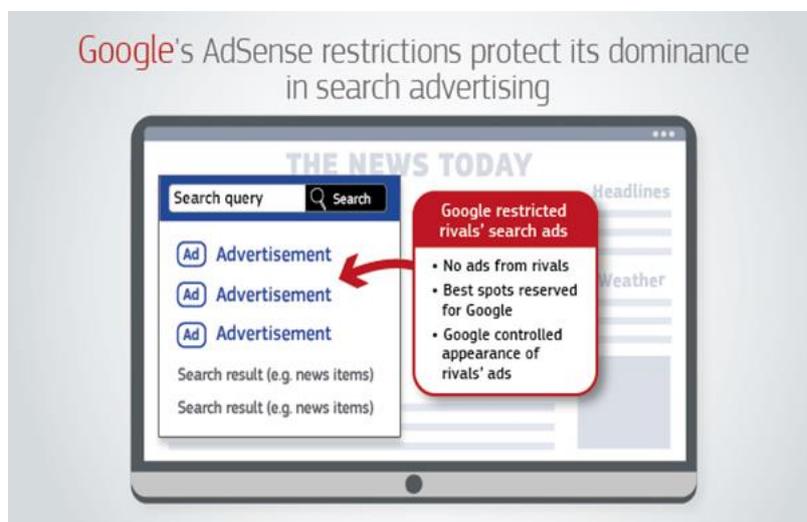
22. In addition, the Commission concluded separate antitrust investigations into Mastercard's, Visa Inc.'s and Visa International's multilateral interchange fees (MIFs).²³

23. In March 2019, the Commission fined Google²⁴ EUR 1.49 billion in the so-called AdSense case. The Commission found that Google had abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites. This misconduct lasted over ten years and denied Google's rivals from placing their search adverts on these websites. Google is by far the strongest player in online search advertising intermediation in the EEA with a market share above 70% during the period relevant for this case, 2006 to 2016. Through “AdSense” for Search, Google functions as an intermediary between advertisers and owners of publisher websites. In 2006, Google introduced exclusivity clauses in its contracts, prohibiting publishers from placing any search adverts from competitors on their search results pages. As of 2009, Google gradually began replacing the exclusivity clauses with “Premium Placement” clauses. As a result, Google's competitors were prevented from placing their search adverts in the most clicked on parts of the websites' search results pages. From 2009, Google also included clauses requiring publishers to seek written approval from Google before making changes to the way in which any rival adverts were displayed. This allowed Google to control how attractive competing search adverts could be. Google ceased the illegal practices a few months after the Commission issued its Statement of Objections in 2016. Google's practices amounted to an abuse of Google's dominant position in the online search advertising intermediation market by preventing competition on the merits. Moreover, Google's behaviour denied European consumers the benefits of effective competition in the online search advertising market.

²³ These proceedings were closed as regards Visa Europe following its commitments, Case AT.39398 *VISA MIF*, Commission decision of 26 February 2014. See: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf.

²⁴ Case AT.40411 *Google Search (AdSense)*, Commission decision of 20 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411.

Figure 2.



Interim measures

24. In October 2019, the Commission issued a decision pursuant to Article 8 of Regulation 1/2003 ordering Broadcom²⁵ to stop applying certain provisions contained in agreements with six of its main customers. The decision is the first interim measures decision since 2001 and the first one adopted under Regulation 1/2003. The decision concerns systems-on-a-chip for TV set-top boxes and modems located at customer premises.

2.1.2. Important judgments by the European Union Courts

Preliminary rulings

Ne bis in idem

25. The case *Powszechny Zakład Ubezpieczeń na Życie*²⁶ concerns a request for a preliminary ruling about the interpretation in the area of EU competition law of the principle of ne bis in idem, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union. The principle of ne bis in idem precludes an undertaking being found liable or proceedings being brought against it again on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged.

26. The request was made by the Polish Supreme Court in its proceedings concerning a decision of the Polish Office of Competition and Consumer Protection (“UOKiK”) to fine *Powszechny Zakład Ubezpieczeń na Życie S.A.*, a Polish insurance company, for abusing its dominant position on the market for group life insurance for employees in Poland by

²⁵ Case AT. 40608 *Broadcom*, Commission decision of 16 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40608.

²⁶ Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie*, Judgement of the European Court of Justice of 3 April 2019, EU:C:2019:283.

taking measures to prevent the creation or development of competition. The UOKiK imposed a fine both based on national law and on the basis of Article 102 TFEU in the same decision. The part of the fine that was based on national law covered the period of the infringement prior to Poland's accession to the EU up to the date of UOKiK's decision and the part of the fine based on Article 102 TFEU covered the period post accession up to the date of UOKiK's decision.

27. The Court of Justice concluded that the principle of *ne bis in idem* did not apply in the particular case because the UOKiK had taken a single fining decision on the basis of a concurrent application of national and EU competition law. Consequently, the "bis" component was missing. The Court stated that the protection which the principle of *ne bis in idem* aims to prevent the repetition of prosecution leading to a criminal sentence bore no relation to the situation in which national and EU competition law are applied in parallel in a single decision. The Court also stated that competition rules at EU and national level view restrictions on competition from different angles and their areas of application do not coincide.

Review of cartel decisions

28. In 2019, the European Courts confirmed the Commission's cartel enforcement activities in most areas: the use of the Commission's investigative powers in inspections, the way in which the Commission conducts its cartel investigation proceedings and the use of evidence for proving infringements of EU competition law and in relation to certain aspects of the Commission's fine calculations.

Inspections

29. In *Bio-ethanol*²⁷, the Court of Justice confirmed that the General Court was correct to conclude that (i) the validity of an inspection decision cannot be affected by acts subsequent to its adoption, in this case by the conduct of that inspection; and that (ii) the Commission's rejection letter could not be challenged, because this was only a preliminary act. As regards the Commission's rejection letter, the Court of Justice held that this could not constitute a formal decision rejecting a request for confidentiality or a decision confirming an implied decision rejecting such a request.

Rights of defence

30. Pleas by Pometon alleging a violation of the principles of impartiality and presumption of innocence in the staggered hybrid settlement proceedings relating to the *Steel Abrasives*²⁸ case were rejected by the General Court. In this case, the Commission adopted first a decision following the settlement procedure with the settling parties, and later on a decision following the standard procedure against Pometon. The company alleged that the Commission had acted partially and violated the presumption of innocence by referring to Pometon in the description of the facts in the settlement decision. The General

²⁷ Case C-403/18 P *Alcogroup and Alcodis v Commission*, The Commission's antitrust investigation concerning Bio-ethanol sales (Case AT.40244) was closed in April 2017, while the investigation into Ethanol benchmarks (Case AT.40054) is still pending. According to the Court of Justice, a potential infringement decision in the latter investigation could be challenged in court to challenge the alleged violation of legal privilege during the inspection in the former investigation.

²⁸ Case T-433/16 – *Pometon v Commission*, judgement of 28 March 2019, ECLI:EU:T:2019:201.

Court held that the settlement decision did not contain any legal assessment concerning Pometon's participation in the infringement. The references to Pometon were limited to a description of the facts. It did therefore not consider that there was a violation of the presumption of innocence. This judgment thus confirms the possibility for the Commission to pursue a staggered hybrid settlement if one party drops out of the settlement.

31. In *Retail Food Packaging*,²⁹ the General Court confirmed the Commission's discretion in conducting its adversary proceedings against a suspected cartel. Silver Plastics alleged an infringement of its procedural rights because the company's request to examine a witness used against them was refused. According to the General Court, an undertaking's right to be heard was sufficiently protected by responding to the Commission's Statement of Objections.

32. In *Power Cables*³⁰, the Court of Justice confirmed that the rights of defence and the right to a fair trial were not infringed by addressing requests for information and a statement of objections to a German-operating company in Switzerland in English (as opposed to in German). Furthermore, the Court of Justice confirmed in the same judgment that addressees of a Statement of Objections do not have the automatic right to access other parties' responses to the same Statement of Objections. It is for the addressee to give a first indication how access to these responses would be useful for the exercise of their rights of defence.

Finding of an infringement

33. In *Optical Disk Drives (ODD)*³¹, the General Court confirmed the qualification of the cartel – consisting of a set of predominantly bilateral contacts – as a single and continuous infringement of Article 101 TFEU. The General Court concluded that the very concept of a single and continuous infringement presupposes a complex of practices. Furthermore, the General Court confirmed that the Commission had demonstrated to the requisite standard that all parties were aware or could reasonably have foreseen the conduct planned or put into effect by the other cartel participants and could therefore also be held liable for that conduct.

34. The General Court confirmed in two judgments relating to Retail Food Packaging that the Commission had fulfilled the standard of proof and correctly applied the criteria for qualifying anti-competitive conduct as a single and continuous infringement. The General Court confirmed that a single and continuous infringement might concern several products belonging to distinct product markets.

²⁹ Case T-582/15, *Silver Plastics and Johannes Reifenhäuser v Commission*, judgment of 11 July 2019, ECLI:EU:T:2019:497.

³⁰ Case C-591/18 P *Brugg Kabel and Kabelwerke Brugg v Commission*, judgment of 28 November 2019, ECLI:EU:C:2019:1026.

³¹ Cases T-762/15 *Sony and Sony Electronics v Commission*, judgment of 12 July 2019, ECLI:EU:T:2019:515, T-763/15 *Sony Optiarc and Sony Optiarc America v Commission*, judgment of 12 July 2019, ECLI:EU:T:2019:517, T-772/15 *Quanta Storage v Commission*, judgment of 12 July 2019, ECLI:EU:T:2019:519, T-1/16 *Hitachi-LG Data Storage et Hitachi-LG Data Storage Korea v Commission*, judgment of 12 July 2019, ECLI:EU:T:2019:514, T-8/16 *Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea v Commission*, judgment of 12 July 2019, ECLI:EU:T:2019:522.

35. In *Car Batteries*³², the General Court confirmed the Commission's findings that the addressees of the infringement decision were engaged in a purchasing cartel violating Article 101(1) TFEU. The General Court confirmed that the Commission had proven to the requisite legal standard the anticompetitive nature of the six collusive contacts in which Campine was found to have been involved. However, the General Court upheld Campine's claim concerning a lack of proof for the entire duration of its participation in the infringement and partially annulled the Commission's infringement decision in this respect.

36. In *Power Cables*, the Court of Justice confirmed that the General Court had not erred in law when confirming the Commission's position that - based on the evidence available - companies had participated in the infringement and had failed to fulfil the criteria for applying the open and public distancing test. The Court of Justice also confirmed that the General Court had correctly observed that the Commission had relied not just on the absence of public distancing, but also on other factors when establishing the participation in the cartel.

37. Also in *Power Cables*, the Court of Justice partially annulled the Commission's decision against ABB (the immunity applicant). The Court of Justice found that the General Court failed to fulfil the evidential requirements when finding that the collective refusal to supply the power cable accessories also covered accessories for underground power cables with voltages from 110 kV and below 220 kV. The Court of Justice found that the General Court relied on an unsubstantiated presumption, while leaving it to the appellants to rebut that presumption in respect of those accessories.

Reasoning for fines

38. Point 37 of the 2006 Guidelines on fines state that the Commission may depart from its standard fining methodology if it is justified by the particularities of a given case or if there is a need to achieve deterrence in that particular case. In *Steel Abrasives*, the General Court recalled that when basing itself on point 37, the Commission's motivation should be all the more precise as it benefits from considerable discretion, and it should not discriminate in determining the fines applicable to the various participants in the same cartel. In this respect, the General Court found that the contested decision was insufficiently motivated, as it did not allow assessing whether the applicant had been treated equally to the settling parties. The General Court reduced the fine while confirming the infringement and Pometon's participation in the cartel.

39. In relation to the imposition of fines against cartel facilitators applying point 37 of the 2006 Guidelines on Fines, in *Yen Interest Rate Derivatives (YIRD)*³³ the Court of Justice upheld the General Court's judgment annulling the fine imposed on broker ICAP for facilitating several infringements that formed part of the YIRD cartel. While the Court of Justice accepted the characterisation of ICAP as a cartel facilitator, it was critical of the fact that the five-step process used to calculate the fine was not explained in the decision, but only disclosed during the court proceedings. The Court of Justice considered that, although the Commission is not required to provide all of the figures concerning each of

³² Case T-240/17, *Campine and Campine Recycling v Commission*, judgment of 7 November 2019, ECLI:EU:T:2019:778.

³³ Case C-39/18 P *Commission v ICAP (now NEX)*, judgment of 10 July 2019, ECLI:EU:C:2019:584.

the steps relating to the method of calculating the fine, it has a duty to explain the weighting and the assessment of the factors taken into account.

40. In *Euro Interest Rate Derivatives (EIRD)*³⁴ the General Court furthermore dealt with the Commission's reasoning for adapting the value of sales in its judgment against HSBC. In this particular case, the Commission could not use value of sales in the traditional sense as the starting point for calculating the basic amount of the fine, because the trading activity in question did not produce sales as such. Instead, the Commission chose a proxy based on another metric (cash receipts), resulting in very high starting amounts. These high starting points were then reduced by a significant reduction factor (98.849%) in view of combining deterrence and proportionality of the fine. While confirming the infringement and accepting the proxy for value of sales the General Court annulled the fine imposed on HSBC due to insufficient reasoning of the basis for the reduction factor of 98.849%.

Calculation of fines

41. In *Steel Abrasives*, the General Court compared the situation of the appellant, Pometon, with that of the other parties in view of its involvement in the infringement, value of sales and total turnover in the last year of the infringement. While confirming the infringement, the General Court increased the fine reduction for Pometon from 60% to 75%.

42. In *Envelopes*³⁵, the General Court confirmed the fine re-imposed on Printeos by the Commission for its participation in the cartel, dismissing Printeos' pleas concerning non-discrimination and breach of the principle of equal treatment. The General Court considered that in the case of one other party the Commission had not correctly applied the fining methodology. However, this fact did not justify reducing the fine for Printeos, because on the one hand, Printeos confirmed in its appeal that it did not dispute the fines imposed on the other parties and, on the other hand, the fines imposed on the other parties were final and binding.

43. In *Optical Disk Drives (ODD)*, the General Court confirmed the Commission's method for calculating the fine imposed against Sony Optiarc. The General Court rejected Sony Optiarc's argument that the Commission had double-counted its sales by not deducting revenues passed on to Quanta (another addressee of the Commission's infringement decision) under a revenue-sharing arrangement between the two addressees. Deducting such sales "would undermine the effectiveness of the prohibition on cartels, since it would then be sufficient for undertakings to associate themselves with a participant in the cartel in order to reduce the amount of their fine".

44. In *Car Batteries*, the General Court confirmed the Commission's approach to increase the value of purchases by 10% in the car battery recycling purchasing cartel under point 37 of the 2006 Guidelines on Fines. This increase was taken into account the specific nature of a purchasing cartel. In such a case, the value of purchases was likely to underrepresent the economic significance of the infringement. This is because the more successful a purchasing cartel is in lowering prices, the lower its fines would be under the standard approach.

³⁴ Case T-105/17 *HSBC v Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:675.

³⁵ Case T-466/17 *Printeos and Others v Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:671.

2.2. Mergers and acquisitions

2.2.1. *Statistics on mergers notified and/or controlled under competition laws*

45. This is a non-exhaustive summary of activities undertaken by the Commission in the field of merger control over the year 2019. Additional and more detailed information can be found in the Report on Competition Policy 2019 and its accompanying Commission Staff Working Document, as well as on the website of the Competition Directorate-General.

46. In 2019, 382 mergers were notified to the Commission. After years of continuous and significant increase in the number of notifications received, the number of notifications remained in 2019 at a very high level despite a small decrease compared to 2018. While in the period 2010-2014, the Commission received on average 290 notifications per year, in the period 2015-2019 the yearly average increased to 375. Moreover, there were 28 reasoned pre-notification submissions by notifying parties, requesting referral of a case from the Commission to a national competition authority or vice versa.

47. Like in previous years, most mergers notified in 2019 did not raise competition concerns and could be processed speedily. The simplified procedure was used in 77% of all notified transactions in 2019, showing the continuous positive impact of the simplification package adopted by the Commission in December 2013. The Commission opened in-depth investigations (second phase) in eight cases. These cases concerned diverse sectors such as plane manufacturing, fuel and other petroleum products, TV distribution and ship building.

48. The Commission adopted 362 merger decisions in 2019, and intervened in 19 cases, which remains in the 5-7% range (out of total decisions adopted) of previous years. In 2019, three mergers were prohibited, ten mergers were cleared subject to commitments in first phase and six were cleared with remedies after a second phase. In 2019 the Commission did not adopt any unconditional clearance decision after a second phase investigation. In three cases the Commission had to adopt prohibition decisions since the remedies proposed by the Parties were unsuitable to address the significant competition concerns identified by the Commission. Finally, in 2019, no case was abandoned during the in-depth investigation.

2.2.2. *Summary of significant cases.*

Commission Decisions

49. The prohibition decisions adopted in 2019 are a good illustration of the need for sound and solid remedies to solve the competition concerns that some transactions raise.

50. In July 2018, the Commission opened an in-depth investigation of the proposed acquisition of Alstom by Siemens.³⁶ The Mobility Division of Siemens offers a broad portfolio of trains (rolling stock), rail automation and signalling equipment, as well as rail electrification systems. Alstom is active worldwide in the rail transport industry, offering a wide range of rolling stock (from high-speed trains to metros and trams) as well as signalling and rail electrification systems. In February 2019, the Commission prohibited the proposed transaction under the EU Merger Regulation. The proposed transaction would

³⁶ Case M.8677 *Siemens/Alstom*, Commission decision of 6 February 2019. See: http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8677.

have combined the two largest suppliers of trains and signalling solutions in the EEA, not only in terms of size of the combined operations, but also in terms of their geographic footprint. The merging parties proposed a remedy package that was inadequate in scope, very complex and gave rise to significant dependencies and implementation risks. The proposed remedies did not resolve the Commission's concerns for the very-high speed rolling stock market and the mainline signalling markets. The Commission concluded that the merger would have led to higher prices, reduced choice for suppliers and fewer innovative products, to the detriment of train operators and rail infrastructure managers.

51. In *Tata Steel/ThyssenKrupp/JV*³⁷, the Commission prohibited the creation of a joint venture where the parties were not able to offer adequate remedies to address the competition concerns caused by the merger. It would have reduced competition, reduced choice in suppliers and resulted in higher prices for EU customers for different types of steel.

52. Moreover, the Commission prohibited Wieland's proposed acquisition of Aurubis Rolled Products and Aurubis' stake in *Schwermetall*.³⁸ The merger would have reduced competition and increased prices for rolled copper products. The proposed remedies did not effectively address the identified competition concerns.

53. In *RWE/E.ON Assets*³⁹, the Commission examined the competitive impact of RWE's acquisition of the majority of E.ON's renewable and nuclear generation assets (as well as a 16.67% minority interest in E.ON) on the market for electricity generation in Germany. The transaction was ultimately considered as unproblematic because the additional generation capacity acquired by RWE was limited and largely composed of nuclear assets which are due to be decommissioned by 2022. The *RWE/E.ON Assets* case was part of a complex asset swap where, in exchange for its generation assets, E.ON acquired *Innogy*⁴⁰, an RWE subsidiary active in the distribution and retail sales of gas and electricity. To obtain the Commission's approval, E.ON committed to divest some of its energy retail businesses in Czechia, Germany and Hungary.

54. In the telecommunications sector, the Commission cleared the acquisition of DNA by Telenor⁴¹. DNA provides mobile and fixed communications services, broadband internet services and TV distribution services in Finland, while Telenor is active in mobile and fixed telecommunications services and TV distribution services in the Nordic region. There were very limited overlaps between the companies' activities and a number of strong players remain after the merger. The Commission did not identify any competition concerns regarding the vertical links between certain affected markets.

³⁷ Case M.8713. *Tata Steel / ThyssenKrupp / JV*, Commission decision of 11 June 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8713.

³⁸ Case M.8900 *Wieland / Aurubis Rolled Products / Schwermetall*, Commission decision of 6 February 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8900.

³⁹ Case M.8871 *RWE/E.ON Assets*, Commission decision of 26 February 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8871.

⁴⁰ Case M.8870 *E.ON/INNOGY*, Commission decision of 17 September 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8870

⁴¹ Case M.9370 *Telenor / DNA*, Commission decision of 15 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9370.

55. In 2019, the Commission approved, after an in-depth investigation, the acquisition by Vodafone of Liberty Global's cable business in Czechia, Germany, Hungary and Romania⁴², subject to remedies. Vodafone and Liberty Global's subsidiary (Unitymedia) offer fixed broadband services in Germany based on their own non-overlapping cable networks. The transaction would have eliminated an important competitive constraint. In addition, the merged entity's increased market power could have endangered the TV broadcasters' market positions. To address the competition concerns, Vodafone submitted a comprehensive set of remedies.

56. In 2019, the Commission approved the acquisition of Red Hat by IBM⁴³, both providers of IT solutions to business customers. The Commission found that the merged entity would continue to face significant competition from other players on the markets for middleware and system infrastructure software. There was no risk that the merged entity would exclude or marginalise its competitors by bundling or degrading interoperability with Red Hat's flagship product Red Hat Enterprise Linux.

57. The Commission also approved the acquisition of Symantec's Enterprise Security Business (SESB) by Broadcom⁴⁴. SESB offers advanced threat protection and information protection solutions. Broadcom supplies semiconductors as well as infrastructure software solutions. The proposed acquisition would not raise any competition concerns given the limited horizontal overlaps between the two firms' activities. The Commission also excluded any competition concerns due to the vertical or conglomerate relationships between the companies.

58. The Commission authorised Telia's acquisition of Bonnier Broadcasting⁴⁵ subject to commitments. The Commission had concerns that the transaction would have reduced competition in Finland and Sweden. To address the identified competition concerns, Telia offered a package of commitments for Finland and Sweden. The package includes a commitment to license free-to-air channels, and basic and premium pay-TV channels on fair, reasonable and non-discriminatory terms. Telia also committed to license standalone OTT rights to secure competition in TV distribution over the internet. Finally, Telia committed to provide access to the merged entity's streaming services for end users, access to TV advertising space for rival telecom providers and TV distributors.

59. In March 2019, the Commission cleared the proposed merger between two leading insurance brokers, Marsh and Jardine Lloyd Thompson⁴⁶, subject to commitments. The two companies were market leaders in the provision of services to airline companies and aerospace manufacturers needing to insure highly complex risks. The Commission required

⁴² Case M.8864 *Vodafone / Certain Liberty Global Assets*, Commission decision of 18 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8864.

⁴³ Case M.9205 *IBM / Red Hat*, Commission decision of 27 June 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9205.

⁴⁴ Case M.9538 – *Broadcom / Symantec's Enterprise Security Business*, Commission decision of 30 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9538.

⁴⁵ Case M.9064 – *Telia Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9064.

⁴⁶ Case M.9196 *Marsh & McLennan Companies / Jardine Lloyd Thompson Group*, Commission decision of 22 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9196.

the divestment of Jardine Lloyd Thompson's activities in the areas of concern, maintaining the competitive environment.

60. In July 2019, the Commission approved the acquisition of Pfizer's Consumer Healthcare business by GlaxoSmithKline,⁴⁷ subject to the divestment of Pfizer's ThermoCare-branded products, designed for the treatment of topical pain. The Commission had identified the risk that GlaxoSmithKline, a leading supplier of products for the treatment of topical pain with its Volta-branded products, could have increased prices for topical pain management products sold over-the-counter in a number of EEA countries.

61. In air transport, the Commission cleared in 2019 the acquisition of a 31% joint-controlling interest of Air France-KLM in Virgin Atlantic Limited⁴⁸. The acquisition led to joint control over Virgin Atlantic by Air France-KLM, Delta Air Lines Inc. and Virgin Group. None of the overlapping routes raised competition concerns. Virgin Atlantic, Delta and Air France-KLM are not close competitors and face competition from other carriers on the overlap routes. It is unlikely that the companies' combined slot portfolios would prevent competitors from entering or expanding at these airports.

62. The Commission also cleared subject to commitments the acquisition of Flybe by Connect Airways, a consortium by Virgin Atlantic, Stobart Aviation and Cyrus⁴⁹. The transaction would have led to quasi-monopolies on two direct EU routes, namely Birmingham-Amsterdam and Birmingham-Paris. To address these competition concerns, Connect Airways committed to release five daily slot pairs at Amsterdam Schiphol and three daily slot pairs at Paris Charles de Gaulle airport.

63. In maritime transport, the Commission assessed the acquisition of CEVA Logistic by CMA CGM⁵⁰. The Commission analysed whether the vertically integrated entity would have the ability and incentive to engage in input or customer foreclosure, and concluded that it was not the case. Moreover, since CEVA's demand represented a very small percentage of the total demand in the EEA, CEVA was not considered as a customer with a significant degree of market power.

Judgments by the European Union Courts

64. In 2019, the EU Courts adopted two judgments in the field of merger control.

65. In January 2019, the Court of Justice upheld the General Court's judgment annulling the Commission's decision prohibiting the acquisition of *TNT Express* by *UPS*⁵¹

⁴⁷ Case M.9274 *GlaxoSmithKline / Pfizer Consumer Healthcare Business*. Commission decision of 10 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9274.

⁴⁸ M.8964 *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, Commission decision of 12 February 2019. See:

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8964

⁴⁹ M.9287 *Connect Airways/Flybe*, Commission decision of 5 July 2019. See:

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9287

⁵⁰ Case M.9221 *CMA CGM/CEVA*, Commission decision of 6 February 2019. See:

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9221.

⁵¹ C-265/17 P *Commission v United Parcel Service*, judgment of the Court of Justice of 16 January 2019, ECLI:EU:C:2019:23

due to a procedural irregularity. The Court concluded that the General Court was entitled to find that UPS's rights of the defence had been infringed in so far as the Commission had not disclosed, during the administrative procedure, the amendments introduced in an econometric model it later relied upon in its merger decision

66. In May 2019, the General Court dismissed KPN's action for annulment of the *Liberty Global/Vodafone/Dutch JV* conditional clearance decision⁵². The General Court considered that the Commission's approach not to further segment the market for premium pay TV sports channels was correct. The General Court also validated the Commission's assessment concluding that the merged entity would not have the ability to engage in input foreclosure, based on the lack of significant market power in the upstream market.

3. The role of competition authorities in the formulation and implementation of other policies

3.1. Supporting the EU's energy and environment objectives

3.1.1. State aid underpinning EU's zero pollution ambition and resource efficiency

67. In October 2019, the Commission approved EUR 195 million of additional public support until the end of 2022 for electric buses and charging infrastructure in Germany⁵³. In addition, the Commission approved EUR 430 million in public support to retrofit diesel vehicles used in municipalities where the limits for NOX emissions were exceeded in 2017⁵⁴. Both types of measures are in line with EU's environmental goals, as well as with the European Strategy for low-emission mobility, and its support for the move towards zero-emission vehicles in cities and for creating a market for such vehicles.

68. The Commission also approved in September 2019 a Czech scheme⁵⁵ providing aid to installations generating electricity from waste heat and from mining gases. The scheme contributes to resource efficiency by reducing the consumption of primary energy sources used for electricity production.

⁵² Case T-370/17 *KPN v Commission*, judgment of the General Court of 23 May 2019.

⁵³ Budget increase and prolongation of scheme SA.48190 Germany - *Support scheme for the acquisition of electric buses for urban public transport*, Commission decision of 26 February 2018, available at:

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48190.

⁵⁴ SA.53054 *Scheme for retrofitting heavy municipal vehicles*, SA.53055 *Scheme for retrofitting heavy commercial vehicles* and SA.53056 *Scheme for retrofitting light commercial and municipal vehicles*. Germany notified an amendment to those schemes, which the Commission approved on 25 October 2019 under SA.55230, SA.55231 and SA.55232 respectively. The amendment introduced, inter alia, a more flexible concept of eligible municipalities.

⁵⁵ Case SA.35179 Czech Republic – *Promotion of electricity from secondary sources*, Commission decision of 26 September 2019, available at:

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35179

69. In November 2019, the Commission approved EUR 93.8 million to support the construction and operation of a high-efficient cogeneration plant in Bulgaria⁵⁶. The plant will produce heat and electricity using fuel derived from unrecyclable municipal waste.

70. In January 2019, the Commission approved EUR 36 million investment aid to chemical company LG Chem⁵⁷ for a new electric vehicle batteries plant in Poland. The new plant is expected to supply batteries for more than 80 000 electric vehicles per year and create more than 700 direct jobs, contributing to the Dolnośląskie region's development whilst preserving competition. This project could not have been carried out without public funding.

3.1.2. State aid in support of renewable energy

71. The objective of State aid control is to maximise environmental, social and economic benefits from limited public funds, by minimising costs for the State, industry and consumers, by ensuring public money does not crowd out private spending, as well as by contributing to competition on fair and equal terms in the Single Market. In 2019, the Commission continued to approve State aid schemes allowing Member States to meet their energy-efficiency targets and contribute to the reduction of carbon dioxide emissions in line with the EU's environmental objectives.

72. In June 2019, the Commission approved EUR 5.4 billion support for the production of electricity from renewable sources in Italy⁵⁸, to help it reach its renewable energy targets. The scheme will support electricity production from renewable sources, such as onshore wind, solar photovoltaic, hydroelectric and sewage gases and will be applicable until 2021.

73. In July 2019, the Commission approved support for six offshore wind farms in France⁵⁹. The construction is to start this year and they should be operational as of 2022. The support measures will help France boost its share of electricity produced from renewable energy sources to meet its climate targets, in line with EU's environmental objectives⁶⁰.

3.2. State aid supporting the development of broadband networks

74. In 2019, the Commission approved various broadband schemes under EU State aid rules. These concerned, in Greece, a EUR 50 million voucher scheme for faster broadband

⁵⁶ Case SA.54042 *Sofia waste-to-energy project/ cogeneration unit with recovery of energy from RDF-Bulgaria*, Commission decision of 25 November 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54042.

⁵⁷ Case SA.47662 *LIP – Aid to LG Chem Wrocław Energy Sp. z o.o.*, Commission decision of 28 January 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47662.

⁵⁸ Case SA.53347 *Italy - Support to electricity from renewable sources 2019-2021*, Commission decision of 14 June 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53347

⁵⁹ Case SA.45274 *France - Offshore wind park of Courseulles*, Commission decision of 26 July 2019, SA.45275 *France - Offshore wind park of Fécamp*, Commission decision of 26 July 2019, SA.45276 *France - offshore wind park of Saint-Nazaire*, Commission decision of 26 July 2019, SA.47246 *France - Offshore wind park in Islands of Yeu et Noirmoutier*, Commission decision of 26 July 2019, SA.47247 *France - Offshore wind park of Dieppe*, Commission decision of 26 July 2019, and SA.48007, *France - Offshore wind park of Saint-Brieuc* Commission decision of 26 July 2019. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4749.

⁶⁰ See: <https://ec.europa.eu/info/strategy/priorities-2019-2024>.

services⁶¹; in Ireland, EUR 2.6 billion public support for the Irish National Broadband Plan⁶²; in Spain, a EUR 400 million scheme for very high speed broadband networks⁶³; and in Germany, the approval in Bavaria of a scheme for very high capacity broadband networks, following an earlier gigabit pilot project involving six Bavarian municipalities and approved by the Commission in December 2018⁶⁴.

3.3. Supporting important projects of common European interest

75. In December 2019, the Commission approved a second Important Project of Common European interest jointly notified by Belgium, Finland, France, Germany, Italy, Poland and Sweden to support research and innovation in the common European priority area of batteries. The seven Member States will provide in the coming years up to approximately EUR 3.2 billion in funding, which is expected to unlock an additional EUR 5 billion in private investments. The completion of the overall project is planned for 2031 (with differing timelines for each sub-project). The project will involve 17 direct participants, mostly industrial actors, including small and medium-sized enterprises (SMEs). The project is part of the “European Battery Alliance” between the Commission, interested Member States and the companies that adopted a Strategic Action Plan for Batteries in May 2018.

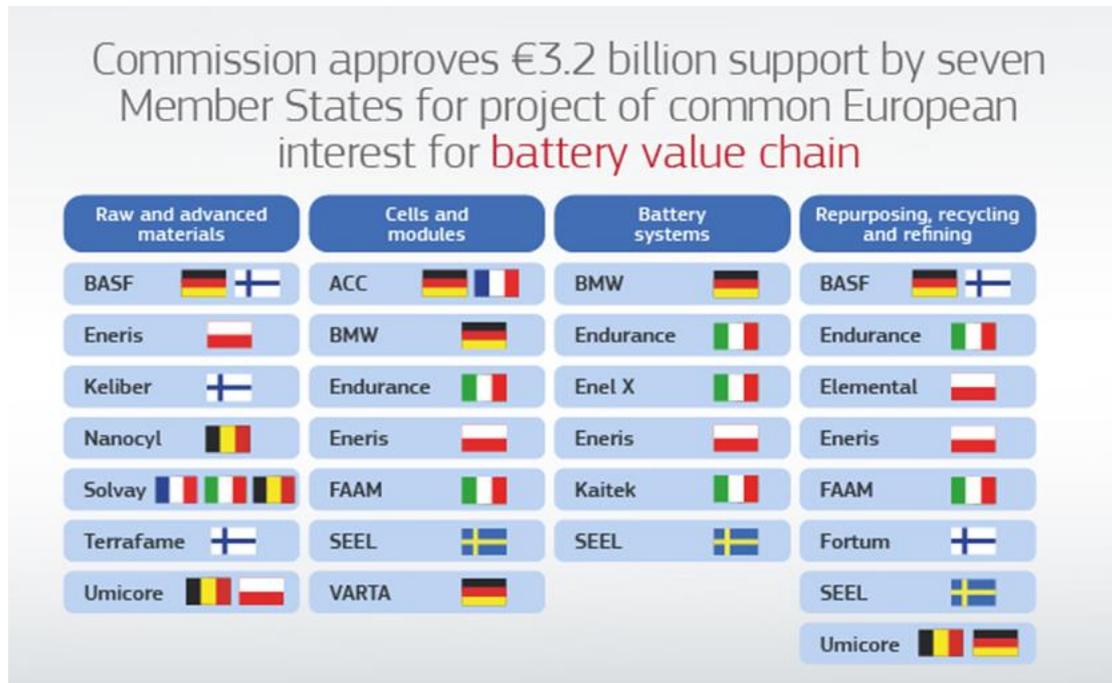
⁶¹ Case SA.49935 *Superfast Broadband (SFBB) Project – Greece*, Commission decision of 7 January 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49935.

⁶² Case SA.54472 *National Broadband Plan – IE*, Commission decision of 15 November 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54472.

⁶³ Case SA.53925 *Broadband Scheme for NGA White and Grey Areas – Spain*, Commission decision of 10 December 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53925.

⁶⁴ Case SA.54668 *Bavarian gigabit scheme – DE*, Commission decision of 29 November 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54668.

Figure 3.



3.4. Fighting against selective tax advantages

76. In 2019, the Commission continued to look at aggressive tax planning measures under EU State aid rules and to assess if they result in illegal State aid.

77. In April 2019, the Commission adopted a decision concluding that the United Kingdom gave illegal tax advantages to certain multinational companies by granting them an exemption from a set of anti-avoidance rules known as Controlled Foreign Company (CFC) rules⁶⁵. CFC rules seek to prevent UK companies from artificially diverting profits arising from UK activities and assets to a subsidiary based in a low or no tax jurisdiction. UK CFC rules reallocate such artificially diverted profits back to the UK parent company and tax them accordingly. The Commission's in-depth investigation showed that the impugned exemption known as the Group Financing Exemption grants a preferential treatment to UK companies artificially diverting profits arising from UK activities or assets from foreign related companies via an offshore subsidiary, derogating from the UK CFC rules. The Commission concluded that the exemption is partially justified and accepted that a mechanical rule may avoid disproportionately burdensome intra-group tracing exercises to ascertain whether profits arise from UK connected capital, but it also declared the exemption partly to constitute unlawful state aid which needs to be recovered. The UK amended its CFC rules from 1 January 2019. The new CFC rules no longer raise a concern under State aid rules.

⁶⁵ Case SA.44896 *Aid implemented by the United Kingdom concerning CFC Group Financing Exemption*, Commission decision of 2 April 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44896.

78. In January 2019, the Commission opened an in-depth investigation to examine whether tax rulings granted by the Netherlands to Nike may have given the company an unfair advantage over its competitors, in breach of EU State aid rules⁶⁶. The Commission's formal investigation concerns the tax treatment in the Netherlands of two Nike group companies. From 2006 to 2015, the Dutch tax authorities issued tax rulings, which endorsed a method to calculate the royalties. As a result, these group companies were only taxed on a limited operating margin based on sales. The Commission is concerned that the royalty payments endorsed by the rulings may not reflect economic reality. They appear to be higher than what independent companies negotiating on market terms would have agreed between themselves in accordance with the arm's length principle.

79. In September 2019, following the General Court's judgment annulling the Belgian Excess Profit decision on grounds that the tax rulings needed to be assessed individually under EU State aid rules, the Commission opened separate in-depth investigations into 39 "excess profit" tax rulings granted by Belgium to multinational companies⁶⁷. At the same time, the Commission appealed the judgment of the General Court to the European Court of Justice to seek further clarity on the existence of an aid scheme. The proceedings are ongoing.

3.5. Fostering a global competition culture

80. The Commission continued to be at the forefront of international cooperation in the competition field, both on the multilateral and bilateral levels. In 2019, the Commission continued its active engagement in competition-related international fora such as the OECD Competition Committee, the International Competition Network (ICN), the World Bank, and the United Nations Conference on Trade and Development (UNCTAD). The Commission remains committed to fostering a far-reaching competition culture, as well as to promoting a global level playing field where companies can compete on their merits. In 2019, the Commission continued its endeavours to improve international rules for subsidies. Reforming the subsidy rules is one of the EU's main priorities for the modernisation of WTO trade rules. It also contributed to a common understanding reached with the competition authorities of the G7 countries regarding the challenges raised by the digital economy for competition analysis.

81. At bilateral level, the Commission aims at including provisions on competition and State aid control when negotiating Free Trade Agreements (FTAs). In 2019, the Commission continued FTA negotiations with Australia, Azerbaijan, Chile, Indonesia, New Zealand, Tunisia and Uzbekistan, and concluded the negotiations with Kyrgyzstan and Mercosur.

82. In 2019, the Commission also continued the cooperation in competition policy and in cases with China and reconfirmed the Terms of Reference of the EU-China Competition Policy Dialogue and the Memorandum of Understanding on a dialogue in the area of the

⁶⁶ Case SA.51284 *Netherlands – Potential Aid to Nike*, Commission decision of 11 January 2019. See: https://ec.europa.eu/commission/presscorner/detail/de/IP_19_322.

⁶⁷ Cases SA.53964 to SA.54002 *Belgium – Excess Profit Exemption*, decisions of 16 September 2019. See, for instance: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53964.

State aid control regime and the Fair Competition Review System . The Commission's negotiations on a Comprehensive Investment Agreement with China are still ongoing.

83. Furthermore, the Commission continued its technical cooperation on competition policy and enforcement with the European Union's main trading partners with which the Commission has signed Memoranda of Understanding. Regarding neighbouring countries, in 2019 the Commission was involved in monitoring the implementation of the EU competition acquis in countries such as Ukraine.

84. 85. Finally, the Commission continued to monitor EU accession candidate countries' compliance with their competition policy commitments under the Stabilisation and Association agreements

4. Resources of competition authorities

4.1. Resources overall (current numbers and change over previous year):

4.1.1. Annual budget

85. In 2019, the total budget for competition law enforcement remained at the same 110 million euro level as in 2017 and 2018.

Single Market Programme and the Multiannual Financial Framework

86. DG Competition awaits the outcome of co-legislators' work on the Commission Proposal for the Multiannual Financial Framework (MFF) for the period of 2021-2027. The proposal includes a Single Market Programme and within it a new Competition Programme. The programme would help the Commission to tackle new challenges for EU competition policy linked to the use of big data, algorithms and other developments in an increasingly digital environment and strengthen cooperation networks between Member States' competition authorities and the Commission to support fair competition in the single market. The indicative operational budget for the Competition Programme would amount to EUR 140 million over the period 2021-2027.

4.1.2. Number of employees (person-years):

87. On 1 July 2020, DG Competition employed 779 permanent staff members (officials and temporary agents) and 80 staff members on fixed-term compared to 759 and 87 staff members respectively at the end of 2019. Out of 779 permanent staff members, 516 officials and temporary agents (i.e. setting aside contractual agents) worked on competition enforcement compared to 494 at the end of 2019.

88. Within DG Competition, the following employee profiles are present: 50% of lawyers, 30% of economists, 10% of mixed profile lawyers and economists and, finally, around 10% have another education or background.

4.2. Human resources:

89. In 2019, 104 officials and temporary agents have worked on Dominance/antimonopoly; 41 worked on Anti-Cartel cases; 68 worked on Merger enforcement and 138 worked on State aid matters. Moreover, 144 officials and temporary agents worked on policy support for the different policy instruments (i.e. antitrust, merger

and state aid), on human resources, for senior management, the Chief Economist team or for the communication team.

5. References to new reports and studies on competition policy issues

5.1. Report on competition enforcement in the pharmaceutical sector (2009-2017)

90. In January 2019, the Commission published the report Competition enforcement in the pharmaceutical sector (2009-2017) - European competition authorities working together for affordable and innovative medicines.⁶⁸ The report provides a comprehensive overview and examples of how the Commission and the national competition authorities of the 28 Member States have enforced the EU antitrust and merger rules in the pharmaceutical sector in the period 2009-2017.

5.2. Report on competition policy for the digital era

91. In March 2018, the Commission appointed Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers on the future challenges of digitisation for competition policy. Their report “Competition policy for the digital era” was published in April 2019.⁶⁹ The report analyses the main characteristics of the digital economy, such as extreme returns to scale of digital services, network externalities and the importance of possessing very large volumes of data. These characteristics have given rise to a large number of digital markets with “super-dominant” incumbents.

92. 93. The Special Advisers consider that the basic competition law framework is fundamentally sound and sufficiently flexible to ensure efficient competition enforcement in the digital era. However, the specific characteristics of platforms, digital ecosystems, and the data economy should be better taken into account by competition enforcers and regulators. Moreover, the Special Advisers consider that digital markets require additional emphasis on theories of harm and identification of anti-competitive strategies. Concerning access to data, the authors state that competition law should not be regarded as a general panacea. Sector-specific regulation could provide solutions that are more effective.

⁶⁸ See: <http://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/index.html>.

⁶⁹ See: <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.