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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Report on Competition Policy 2019

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Report on Competition Policy 2019

Table of Contents

I. LEGISLATION AND POLICY DEVELOPMENTS 2

1. Antitrust and cartels 2

1.1. Guidance in antitrust and cartel proceedings 3

1.2. Important judgments by the European Union Courts 6

1.3. The fight against cartels remains a top priority 12

1.4. Continuing close cooperation within the European Competition Network and with national courts 14

2. Merger control 17

2.1. Recent enforcement trends 18

2.2. Increased relevance of digital issues 20

2.3. The ongoing evaluation of EU merger control 20

3. State aid control 22

3.1. Uptake of the State Aid Modernisation 22

3.2. State Aid Modernisation continues 30

3.3. Monitoring, recovery, evaluation and cooperation with national courts 32

3.4. Significant judgments by the European Union Courts in the State aid area 34

4. Developing the international dimension of EU competition policy 39

5. External Communication 42

6. The Single Market Programme 43

II. SECTORAL OVERVIEW 44

1. Energy & environment 44

2. Information and Communication Technologies and media 50

3. Financial services 59

4. Taxation and State aid **65**

5. Basic industries and manufacturing **69**

6. Agri-food industry **73**

7. Pharmaceutical and health services sectors **75**

8. Transport and postal services **77**

This Staff Working Document (SWD) accompanying the 2019 Annual Competition Report reflects the main developments in EU competition policy during the year 2019 and contains a number of analyses and assessments of challenges in specific industries or for particular enforcement instruments. Consequently, the SWD does not cover the disruptive economic developments caused by the Covid-19 pandemic that broke out in early 2020, and their impact on EU competition policy.

I. LEGISLATION AND POLICY DEVELOPMENTS

Competition policy empowering citizens and businesses for the benefit of all

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

DG Competition's competition policy activities in 2019 targeted a wide range of sectors in the EU economy, thereby promoting open and efficient markets so that both businesses and citizens can get a fair share of the benefits of economic growth. Moreover, EU competition policy continued to support key political priorities of the Commission, in particular its objectives linked to the internal market, digitalisation, fair taxation, as well as energy and climate as set out in the Commission President's Political Guidelines and the Commission Work Programme. The present Staff Working Document is composed of two parts, the first part presents the main legislative and policy developments in 2019 across the three competition instruments (antitrust, including cartels, mergers and State aid), while specific actions are detailed in the sectoral overview part.

1. ANTITRUST AND CARTELS

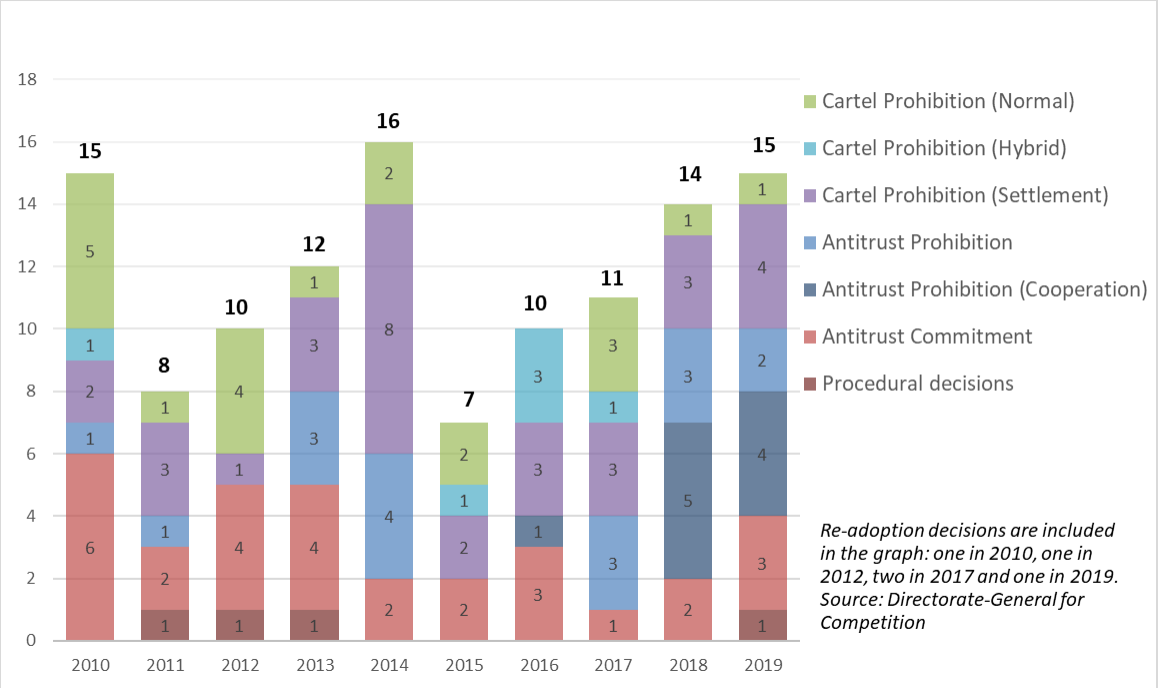
Articles 101, 102 and 106 TFEU

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

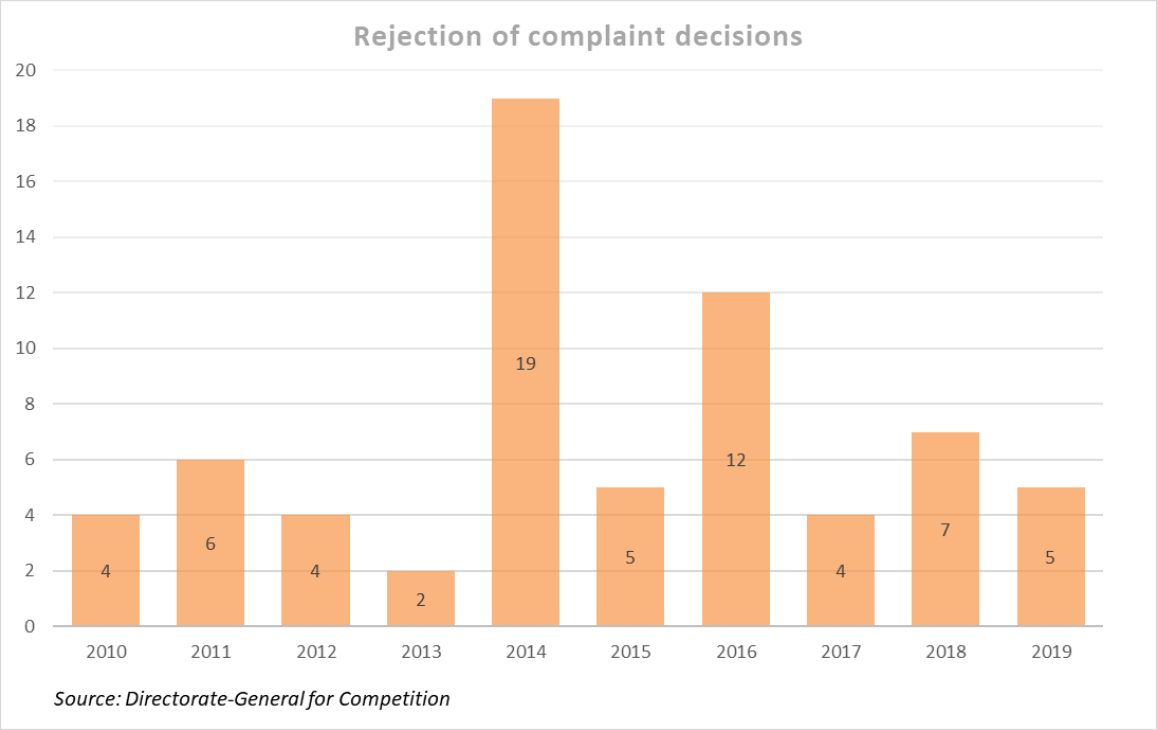
Article 102 TFEU prohibits abuse of a dominant position. It is not in itself illegal for an undertaking to be in a dominant position or to acquire such a position. Dominant undertakings, as any other undertaking in the market, are entitled to compete on the merits. However, Article 102 TFEU prohibits the abusive behaviour by dominant undertakings that, for example, directly or indirectly impose unfair purchase- or selling prices or other unfair trading conditions.

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

Antitrust and cartel decisions 2010-2019



Re-adoption decisions are included in the graph: one in 2010, one in 2012, two in 2017 and one in 2019. Source: Directorate-General for Competition



Source: Directorate-General for Competition

1.1. Guidance in antitrust and cartel proceedings

The Commission's enforcement in 2019 demonstrated its continued intention to strictly enforce competition rules to fight collusive agreements between undertakings and avoid that companies abuse their dominant positions to the detriment of consumers. While in parallel engaging in a thorough reflection process to assess how to boost enforcement with the tools available to it, throughout 2019 the Commission adopted a total of 15 decisions sanctioning

anticompetitive conduct. This is the highest number of sanctions since Margrethe Vestager took office as Commissioner for Competition in 2015.

Importantly, 2019 also marked the Commission's continued efforts to make competition policy more efficient, effective and responsive to the needs of modern society. In this respect, throughout 2019 the Commission successfully pursued four antitrust cases on the basis of cooperation procedures.[1] This voluntary practice – similar to cartel settlement but outside the context of a cartel – has proven very successful in a number of recent fining decisions. The four cases of 2019 brought the number of this type of cases to a total of ten since the first time it was used in 2016[2] and allowed the Commission to levy fines of almost EUR 1 billion. The use of cooperation procedures allows both the companies investigated and the Commission to substantially increase administrative efficiencies while preserving the supervisory role inherent to competition law enforcement. By voluntarily engaging in a cooperation procedure, companies benefit from fine reductions in exchange for the acknowledgment of the infringement. Moreover, companies may merit additional reductions in their fines if they also provide evidence with significant value for the investigation or design and implement remedies contributing to the improvement of competitive conditions and the good functioning of the European Single Market. The individual reductions granted so far in this type of procedures have ranged between 10% and 50%, depending on the timing of the cooperation (both in terms of the acknowledgement of liability and the evidence) as well as the extent to which the evidence provided strengthened the Commission's case. The use of cooperation procedure also results in speedier and better targeted fining decisions.

In an additional attempt to improve the effectiveness of its procedures, the Commission launched in March 2019 its "eLeniency" online tool.[3] eLeniency is designed to make it easier for companies and their legal representatives to submit statements and documents as part of leniency and settlement proceedings in cartel cases, as well as non-cartel cooperation cases. eLeniency allows companies and their lawyers to submit these documents – including leniency applications and settlement submissions – with the same guarantees in terms of confidentiality and legal protection as under the traditional procedure. These safeguards include the protection against discovery in civil litigation of corporate statements made under the Leniency Notice.

As regards the speed of investigations, 2019 also saw the Commission impose interim measures on chipset manufacturer Broadcom.[4] Designed to target "the risk of serious and irreparable damage to competition"[5], interim measures had not been used for eighteen years. The interim measures decision ordered Broadcom to (i) unilaterally cease to apply certain anticompetitive provisions identified by the Commission and to inform its customers that it would no longer apply such provisions; and (ii) refrain from agreeing or enforcing the same provisions or provisions having an equivalent object or effect in other agreements with its

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1 Case AT.40049, *MasterCard II*. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_582), Case AT.40436, *Ancillary sports merchandise* (ex. *Licensed merchandise – Nike*.
See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1828), Case 40134 – *AB InBev Beer Trade Restrictions*
See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2488) and Case AT.40432 – *Character merchandise* (ex. *Licensed merchandise – Sanrio.* See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3950.

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

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

4 Case AT.40608 – *Broadcom.* See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109). The decision imposing interim measures is currently under appeal before the General Court of the Court of Justice of the EU.

5 Article 8(1) of 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, p. 1–25.

customers. In its decision, the Commission obliged Broadcom to comply with these measures within 30 days or face a penalty of up to 10% of its total turnover.

During 2019 the Commission made substantial progress in its evaluations of the rules exempting certain vertical[6] and horizontal agreements[7] from the EU's general competition rules. In line with the Better Regulation requirements, the Commission is following the same thorough process for the evaluation of both sets of rules. They are made up by one or two Block Exemption Regulations and a set of accompanying Guidelines.[8] The two workstreams have so far included the publication of the roadmaps for each review and their respective calls for contributions from stakeholders. The purpose of these evaluations is to allow the Commission to decide whether to let the rules lapse, prolong their duration or revise them. Stakeholders will be able to provide further comments at subsequent stages of the review process. The vertical and horizontal rules expire in May and December 2022, respectively. The rules applicable to categories of technology transfer agreements will also be up for review in the coming years.[9]

The Commission also launched the review of the Motor Vehicle Block Exemption Regulation (MVBER)[10] which will expire in May 2023 and mandates the production of an evaluation report by May 2021. In February 2019, an evaluation roadmap was published,[11] followed by a four-week online consultation with stakeholders. In parallel, a fact-finding study has been commissioned, to allow for a better understanding of how market conditions have evolved in the motor vehicle sector over the last decade. The study, which is expected to be delivered by mid-summer 2020, will then feed into the public consultation with stakeholders, currently scheduled for late 2020.

On 9 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"),[12] 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 and the European courts' practice in defining markets has evolved over the past twenty years. The main objective of the review is to give guidance that remains accurate and up-to-date, setting out a clear and consistent approach to both antitrust and merger cases across different industries, in a way that is easily accessible.

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6 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.

7 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.

8 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. Commission Notice - Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, p. 1 and Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements , OJ C11, 14.1.2011, p. 1.

9 Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L93, 28.03.2014, p. 17.

10 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.

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

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

1.2. Important judgments by the European Union Courts

Preliminary rulings

Ne bis in idem

The case *Powszechny Zakład Ubezpieczeń na Życie*[13] concerns a request for a preliminary ruling about the interpretation of the principle of ne bis in idem, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union,[14] in the area of EU competition law. According to established case law, 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.

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 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.

The Polish Supreme Court asked: (i) whether Article 50 of the Charter of Fundamental Rights of the European Union, could be interpreted as meaning that the application of the *ne bis in idem* principle presupposes not only that the offender and the facts are the same but also that the legal interest protected is the same and (ii) whether Article 3 of Regulation 1/2003[15], read in conjunction with Article 50 of the Charter of Fundamental Rights of the European Union, was to be interpreted as meaning that the rules of EU competition law and of national competition law which are applied in parallel by the competition authority of a Member State protect the same legal interest.

The Court of Justice of the European Union considered the two questions together and 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 afford against 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, as in the *Toshiba*[16] case, that competition rules at EU and national level view restrictions on competition from different angles and their areas of application do not coincide. The Court finally stated that where a national competition authority imposes two fines in a single decision in respect of an infringement of national competition law and an

[13] Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie*, Judgement of the European Court of Justice of 3 April 2019, EU:C:2019:283.
[14] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
[15] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pp.1-25.
[16] Case C-17/10 *Toshiba Corporation e.a*, Judgment of the European Court of Justice of 14 February 2012, ECLI:EU:C:2012:72.

infringement of Article 102 TFEU, that authority must ensure that, taken together, the fines are proportionate to the nature of the infringement.

Review of cartel decisions

In 2019, the European Courts confirmed the Commission's cartel enforcement activities across 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

In *Bio-ethanol*[17], the Court of Justice rejected Alcogroup's appeal against the General Court's 2018 judgment, where the General Court rejected as inadmissible an action for annulment against (i) an inspection decision and (ii) a subsequent letter refusing the applicant's request to suspend the investigation. 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. Finally, the Court of Justice considered that the right to the protection of confidentiality of correspondence between a lawyer and his client must in principle be respected by the Commission and its inspectors, irrespective of the scope of the mandate given to them by the inspection decision. As regards the Commission's rejection letter, the Court of Justice held that, contrary to the *Akzo* jurisprudence[18], 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

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*[19] 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, which opted out of the settlement procedure. Pometon had 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 and showing bias against it in the standard proceedings leading to adopting the contested decision. The General 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 as alleged. This judgment thus confirms the possibility for the Commission to pursue a staggered hybrid settlement if one party drops from the settlement.

[17] 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.

[18] Case C- 550/07 P – *Akzo Nobel and Others v Commission*, judgment of September 2010, ECLI:EU:C:2010:512.

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

In *Retail Food Packaging*[20], the General Court confirmed the Commission's discretion in conducting its adversary proceedings against a suspected cartelist. Silver Plastics alleged an infringement of its procedural rights to equality of arms and to a fair trial in that examination of witnesses named by Silver Plastics and the adversarial examination of a witness used against them was, following several requests, 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 – a right to confront a key witness supporting the Commission's findings, however, was not part of an undertaking's rights of defence.

In *Power Cables*[21], 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 the infringement

In all but one judgment, the General Court confirmed that the Commission acted within the boundaries of existing case law when holding undertakings liable for participating in a single and continuous infringement.

In *Optical Disk Drives (ODD)*[22], 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 summarised its position concerning the existence of the single and continuous infringement by recalling that the very concept of a single and continuous infringement presupposes a complex of practices. Furthermore, the General Court confirmed that the Commission has 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.

Moreover, the General Court confirmed in two judgments relating to *Retail Food Packaging*[23] 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.[24] In particular, the General Court confirmed that a single and continuous infringement might concern several products belonging to distinct product markets. The General Court, therefore, fully confirmed the finding of the infringement in the decision.

In the case of *Car Battery Recycling*[25], the General Court confirmed the Commission's findings that the addressees of the infringement decision were engaged in a purchasing cartel

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

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

[22] 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.

[23] Cases T-530/15 *Huhtamaki Oyj et al. v Commission*, judgment of 11 July 2019, ECLI:EU:T:2019:498 and T-582/15, *Silver Plastics and Johannes Reifenhäuser v Commission*, judgment of 11 July 2019, ECLI:EU:T:2019:497.

[24] Case T-530/15 *Huhtamaki Oyj et al. v Commission*, judgment of 11 July 2019, ECLI:EU:T:2019:498 and T-582/15, paragraphs 144-156.

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

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.

In *Power Cables*[26], 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.

Also in *Power Cables*[27], the Court of Justice partially annulled the Commission's decision against ABB (the immunity applicant) based on the finding that the General Court failed to have regard to the evidential requirements in 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 effectively relied on an unsubstantiated presumption in that regard, while leaving it to the appellants to rebut that presumption in respect of those accessories.

Reasoning for fines

In 2019, EU courts provided further guidance for the reasoning required by the Commission to impose fines on cartelists on the basis of the 2006 Guidelines on fines.[28]

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*[29] 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. Exercising its power of full jurisdiction, the General Court decided to reduce the fine while confirming the infringement and Pometon's participation in the cartel.

In relation to the imposition of fines against cartel facilitators applying point 37 of the Commission's 2006 Guidelines on Fines, the Court of Justice upheld in the *Yen Interest Rate Derivatives (YIRD)*[30] case the General Court 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 a five-step process used to calculate the fine was not explained in the decision, but only disclosed during the court proceedings. The Commission had considered it necessary

[26] Case C-599/18 P *Silec Cable and General Cable Corp v Commission*, judgment of 14 November 2019, ECLI:EU:C:2019:966; Case C-596/18 P *LS Cable & System Ltd. v Commission*, judgment of 28 November 2019, ECLI:EU:C:2019:1025.

[27] Case C- 593/18 P *ABB Ltd and ABB AB V Commission*, judgment of 28 November 2019, ECLI:EU:C:2019:1027.

[28] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5.

[29] Case T-433/16 *Pometon v Commission*, judgment of 28 March 2019, ECLI:EU:T:2019:201.

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

to establish such a methodology for the setting of the fine, instead of imposing a lump sum like in previous cases involving a facilitator, in order to ensure that the same approach was taken with regard to ICAP (non-settling) and the other settling facilitator fined in this case. The Court of Justice considered that, although the Commission is not required to provide all of the figures concerning each of 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. The Court of Justice also distinguished ICAP from *AC-Treuhand*[31] by pointing out that in *AC-Treuhand* the Commission had defined the basic amount as a lump sum and that AC-Treuhand was the sole facilitator in the cartel.

The General Court, furthermore dealt with the reasoning for an adaptation of the value of sales in its *HSBC* judgment in the *Euro Interest Rate Derivatives (EIRD)*[32] case, a cartel case concerning the financial sector. 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. In its judgment, while confirming the infringement and accepting the proxy for value of sales retained by the Commission, the General Court annulled the fine imposed on HSBC due to insufficient reasoning of the basis for the reduction factor of 98.849%. According to the General Court, the reasoning must be sufficient to enable the undertakings concerned to understand how the Commission arrived at this specific reduction factor. The General Court must be able to carry out an in-depth review, in law and in fact, of this factor as a part of a full judicial review.

As for the application of inability to pay (ITP) principles under point 35 of the Commission's 2006 Guidelines on Fines, the General Court annulled in one of the appeals relating to *Retail Food Packaging*[33] the fine imposed on CCPL due to an insufficient reasoning of the Commission setting out the exact level of the 25% ITP reduction granted. The Commission's infringement decision explained the elements, which led to a reduction by 25%, but did not sufficiently quantify them, which made it impossible to assess the method used to calculate the reduction and to establish whether this reduction was proportionate.

Calculation of fines

In addition to analysing the Commission's reasoning, the General Court also exercised in the *Steel Abrasives*[34] case its unlimited jurisdiction concerning fines. In doing so, 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. As a result, while confirming the infringement, the General Court increased the fine reduction for Pometon from 60% to 75%.

In the *Envelopes Cartel*[35], the General Court, in the exercise of its unlimited jurisdiction, confirmed the fine re-imposed on Printeos for its participation in the cartel, dismissing

[31] Case C-194/14 *AC-Treuhand v Commission*, judgment of 22 October 2015, ECLI:EU:C:2015:717.
[32] Case T-105/17 *HSBC v Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:675.
[33] Case T-522/15 *CCPL et al. v Commission*, judgment of 11 July 2019, ECLI:EU:T:2019:500.
[34] Case T-433/16 *Pometon v Commission*, judgment of 28 March 2019, ECLI:EU:T:2019:201.
[35] Case T-466/17 *Printeos and Others v Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:671.

Printeos' pleas concerning non-discrimination and breach of the principle of equal treatment. In doing so, the General Court made a full comparison between Printeos and each one of the other parties. The General Court concluded that the Commission had respected the principle of equal treatment. Although it clarified that in the case of one other party the Commission had not correctly applied the fining methodology, 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. However, for equity reasons, the Court decided to award the costs of the appeal of Printeos to the Commission.

The General Court confirmed the Commission's method for calculating the fine imposed against Sony Optiarc in the *Optical Disk Drives* case[36]. In particular, 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*"[37]. It also confirmed the fines imposed on all the participants for their participation in the cartel.

In *Power Cables*[38], the Court of Justice found that the General Court had not erred in law when refusing to qualify an undertaking's individual involvement in the cartel as a "fringe" player, thus confirming the original fine calculation by the Commission, which did not reduce the undertaking's fine by an additional 5% because Silec's participation was not comparable to that of the fringe players in the cartel. This refusal to grant an additional 5% reduction did not discriminate against the undertaking.

Furthermore, the Court of Justice confirmed the Commission's application of point 18 of the Fining Guidelines, which allow for an adjustment of the value of sales used for calculating the basic amount of a fine in case of a cartel whose geographic scope goes beyond the EEA in order to properly reflect the undertaking's participation in the infringement.[39] In addition, the Court of Justice confirmed the Commission's methodology to set the value of one undertaking's sales based on an apportionment of sales between two companies belonging to the same group.[40]

Finally, the General Court also confirmed the Commission's approach to increase the value of purchases in the *Car Battery Recycling*[41] purchasing cartel by 10% under point 37 of the 2006 Guidelines on Fines. This uplift was aimed at taking 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. The General Court also found that the 10% uplift was sufficiently reasoned in the decision and that the fact that the Commission did not announce the intended fine increase in the Statement

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36 Case T-763/15 *Sony Optiarc and Others v Commission*, judgment of 12 July 2019, ECLI:EU:T:2019:517.
37 Case T-763/15 *Sony Optiarc and Others v Commission*, judgment of 12 July 2019, para. 245.
38 Case C-599/18 P *Silec Cable and General Cable Corp v Commission*, judgment of 14 November 2019, ECLI:EU:C:2019:966.
39 Cases C-582/18 P – *Viscas v Commission* (ECLI:EU:C:2019:1133), C-589/18 P – *Furukawa Electric v Commission* (ECLI:EU:C:2019:1134), and C-590/18 P – *Fujikura v Commission* (ECLI:EU:C:2019:1135), judgments of 19 December 2019.
40 Case C-589/18 P – *Furukawa Electric v Commission* (ECLI:EU:C:2019:1134), judgment of 19 December 2019 .
41 Cases T-222/17 *Recylex and Other v Commission*, judgment of 23 May 2019, ECLI:EU:T:2019:356. and T-240/17 *Campine and Campine Recycling v Commission*, judgment of 7 November 2019, ECLI:EU:T:2019:778.

of Objections, but in a letter sent to the parties after the adoption of the Statement of Objections, did not infringe the parties' rights of defence or the principle of good administration. The General Court also confirmed the Commission's decision to grant Eco-Bat a 30-50% reduction under point 26 of the Leniency Notice and Recylex a 20-30% reduction, because Recylex had only been the second undertaking to provide evidence that had significant added value.[42]

1.3. The fight against cartels remains a top priority

Cartels are secret agreements between sellers or buyers of the same product or service. They are made with the objective of fixing prices, limiting output or allocating clients and suppliers. Cartels harm the consumers at all levels of the value chain and the economy as a whole. Cartelists charge inflated prices, limit the choice of the consumers and block innovation. Only undistorted competition guarantees that scarce resources are used in the most efficient way. The Commission's action to stop hard core cartels prevents companies from continuing to profit from illegal overcharges and thereby contributes to fair and balanced business relationships. The significant sanctions imposed by the Commission deter companies from entering into cartels or from remaining in cartels, sending a clear signal that operating a cartel will ultimately not pay off.

The Commission's strong enforcement record against hard-core cartels continued in 2019 and remains strong and effective with five decisions and fines in excess of EUR 1.4 billion. The Commission adopted cartel decisions in important sectors, which directly affected EU consumers and EU business, notably in car parts and food products. Four of the five decisions issued in 2019 came under the settlement procedure, which again proved to be a successful and efficient tool to resolve cartel cases.

The Commission fined two producers of car safety equipment[43] – *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.

The Commission also continued its work against cartels in the financial sector. In two settlement decisions[44] it fined five banks at total of EUR 1.07 billion for taking part in two cartels in the Spot Foreign Exchange (Forex) market for eleven currencies, including the Euro, British pound, US dollar and Japanese yen. The first decision (the so-called '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 second decision (the so-called 'Essex Express' cartel) imposed a total fine of just under EUR 258 million on *Barclays, RBS* and *MUFG Bank* (formerly Bank of Tokyo-Mitsubishi). The investigation revealed that individual traders in

[42] Case T-222/17 *Recylex and Other v Commission*, judgment of 23 May 2019, ECLI:EU:T:2019:356.
[43] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1512.
[44] 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.

charge of Forex spot trading (where transactions are executed on the same day at the prevailing exchange rate) had, on behalf of their respective banks, exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies through various online professional chatrooms. With the adoption of these decisions, eight decisions in total were adopted in the financial sector. This illustrates the cyclical nature of cartel enforcement where cases in a particular sector can come in waves.[45]

In the agri-food sector, the Commission imposed a total fine of EUR 31.7 million on *Coroos* and *Groupe CECAB*[46] (*Bonduelle* received immunity). The three parties were involved for more than 13 years in a cartel for the supply of certain types of canned vegetables to retailers and/or food service companies in the EEA. The three companies admitted their involvement in the cartel and agreed to settle the case. The cartel lasted from 2000 to 2013 and was composed of three agreements: one covering private label sales of canned vegetables such as green beans, peas, peas-and-carrots mix, vegetable macedoine to retailers in the EEA; a second one covering private label sales of canned sweetcorn to retailers in the EEA; and a third one covering both own brands and private label sales of canned vegetables to retailers and to the food service industry specifically in France. The nature of the product, the long duration and the EEA wide scope meant that the cartel had a direct and significant impact on EU consumers.

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.*[47] 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.

Also in 2019, the Commission revealed greater details of the recent steps it has taken to reinforce its *ex officio* policy in the detection and fight against cartels. The enhanced risk of detection will not only lead to more *ex officio* cases but will also serve to encourage leniency applications. Three key measures were put in place. First, the development of new digital investigation methodologies, which allow enhanced intelligence gathering and improved investigative data analysis. A dedicated unit in DG Competition was set up, staffed by professionals specialised in such practices. Second, the creation and the management of a centralised intelligence network from multiple information channels - other Commission DGs, other EU institutions and other non-competition national enforcers. Third, the launching of the anonymous whistle-blower tool[48], which encourages informants to come forward safely knowing that their identities will be protected.

Moreover, the Commission launched on 19 March 2019 eLeniency[49] in order to streamline the way leniency materials can be submitted to it. This new and modern tool reduces the costs and the burden of doing so. Under the EU leniency programme, companies or their lawyers

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45 When companies form a cartel covering a particular good or service, the cartel is sometimes extended to additional goods or services in the same industry. When one cartel is detected in a particular industry, additional cartels in the same industry may be detected as well.

46 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.

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

48 https://ec.europa.eu/competition/cartels/whistleblower/index.html.

49 See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1594.

can approach the Commission either by email to a functional mailbox or through the oral procedure to submit their leniency statements. While the email is user-friendly but not secure, the oral procedure ensures a high protection against discovery but is costly, time consuming and burdensome for both the law firms and the Commission.

eLeniency is a third way to deliver the leniency submissions and offers the same high level of protection as the oral procedure but in an user friendly manner from the company's or the law firm's computer directly in the Commission's server. This tool can be used as well for documents submitted in the context of the settlement or cooperation procedures. Since the launch of eLeniency the Commission has received a high number of statements through it.

Cartel decisions 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

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

Cooperation with national competition authorities within the European Competition Network

Since 2004, the Commission and the national competition authorities in all EU Member States cooperate with each other in the European Competition Network (ECN).[50] The objective of the ECN is to build an effective legal framework to enforce European competition law against companies who engage in cross-border business practices which restrict competition.

In 2019, the Commission continued to ensure the coherent application of Articles 101 and 102 through the ECN. Two of the key supporting cooperation mechanisms in Regulation 1/2003[51] are the obligation on national competition authorities to inform the Commission about a new investigation at the stage of the first formal investigative measure and to consult the Commission on envisaged decisions. In 2019, 138 new investigations were launched within the network and 95 envisaged decisions were submitted, compared to 165 new investigations and 75 envisaged decisions in 2018. These figures include Commission investigations and decisions, respectively.

[50] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, pp. 43-53 and OJ C 374, 13.10.2016, p. 10.

[51] 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, pp. 1–25.

On top of the cooperation mechanisms set out in Regulation 1/2003, other ECN cooperation work streams ensure a coherent enforcement of the EU competition rules. The network meets regularly to discuss cases, policy issues, as well as matters of strategic importance. In 2019, 28 meetings across horizontal working groups and sector-specific sub-groups were organised, where competition authorities' officials exchanged views.

Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

The ECN+ Directive[52] empowering Member States' competition authorities to be more effective enforcers of EU competition rules in the field of antitrust entered into force on 4 February 2019. The Directive is based on the Commission proposal of March 2017[53] following a public consultation between November 2015 and February 2016.

The ECN+ Directive will ensure that when applying the same legal provisions – the EU antitrust rules – national competition authorities have the effective enforcement tools and the resources necessary to detect and sanction companies that infringe Articles 101 and 102 TFEU. It will also ensure that they can take their decisions in full independence, based on the facts and the law. The new rules contribute to the objective of a genuine single market, promoting the overall goal of competitive markets, jobs and growth.

The Commission will monitor the transposition process and assist the Member States in incorporating the Directive into national law by 4 February 2021.

Empowering NCAs to become more effective enforcers

Once transposed by Member States into national law, NCAs will:

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

The importance of companies' fundamental rights is underlined: appropriate safeguards will be in place for the exercise of NCAs' powers, in accordance with the EU Charter of Fundamental Rights and general principles of EU law.

Cooperation with national courts

[52] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, pp. 3–33.

[53] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0114.

Effective overall enforcement of antitrust rules in the EU, for the benefit of both EU households and businesses, requires interplay between public and private enforcement. In addition to its cooperation with NCAs in the context of the ECN, the Commission also continued its cooperation with national courts under Article 15 of Regulation 1/2003. The Commission helps national courts to enforce the EU competition rules in an effective and coherent manner by providing case-related information or an opinion on matters of substance or by intervening as *amicus curiae* in proceedings pending before the national courts.

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

Private enforcement

Directive 2014/104/EU on antitrust damages actions (Damages Directive)[54] aims at ensuring that anyone harmed by infringements of the EU competition rules can effectively avail itself of the right to compensation before national courts.

The deadline to implement the Damages Directive in Member States' legal systems expired on 27 December 2016. All Member States had transposed the Directive by the end of the 2nd quarter 2018 and the Commission could close all the infringement proceedings previously opened for non communication of implementing measures. The Commission is currently assessing the implementing measures.

In addition, as foreseen in Article 16 of the Damages Directive and following a targeted consultation of stakeholders, the Commission adopted in August 2019 guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser ("Passing-on Guidelines").[55]

Furthermore, between July and October 2019 the Commission consulted stakeholders on a draft communication on the protection of confidential information for the private enforcement of EU competition law by national courts.[56] The Commission is in the process of assessing the contributions received during the consultation period.

Finally, as foreseen in Article 20 of the Damages Directive, by the end of 2020, the Commission will submit a report about the implementation of the Damages Directive to the European Parliament and the Council.

2. MERGER CONTROL

EU merger control

The purpose of EU merger control is to ensure that market structures remain competitive while enabling smooth restructuring of the industry. This applies not only to EU-based companies, but also to any company active on

[54] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1-19.

[55] See: Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, OJ C 267, 9.8.2019, pp. 4-43.

[56] See: https://ec.europa.eu/competition/consultations/2019_private_enforcement/index_en.html.

the EU markets. Industry restructuring is an important way of fostering efficient allocation of production assets. However, there are also situations where industry consolidation can give rise to harmful effects on competition, taking into account the merging companies' degree of market power and other market features. EU merger control ensures that changes in the market structure which lead to harmful effects on competition do not occur.

EU merger control seeks to maintain open and competitive markets, which is the best way to ensure that businesses and final consumers obtain fair outcomes. It strives to protect all aspects of competition. As a result, merger control helps to preserve market structures, in which companies compete not only on price, but also on other competitive parameters such as quality and innovation. Moreover, the Commission takes due account of the increased digitisation of our economies.

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

In its assessments, the Commission also takes into account efficiencies brought about by mergers, which may have positive effects on costs, innovation and other aspects, provided that such efficicencies are verifiable, merger-specific and likely to be passed on to consumers.[57]

As highlighted in previous reports on competition policy, the Commission continuously evaluates the substantive and procedural rules that make up the legal framework for merger control. Such reflections are conducted both internally, based on experience, and by using external input. In this context, the Commission regularly assesses concerns and suggestions for further improvements expressed by stakeholders.

EU merger control, and more generally EU competition policy, significantly contributes to the competitiveness of the EU economy and of EU companies. Competition enables growth, promotes efficiency and stimulates innovation. It ensures that EU companies have the incentive to invest more, to innovate, to limit their costs, to offer better products. This contributes to their success – at home as well as globally.

1.5. Recent enforcement trends

In 2019, 382 mergers were notified to the Commission. After years of continuous and significant increase in the number of notifications received (including an all time record in 2018 with the highest number of notifications ever 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.*

Like in the 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

[57] See: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C-31, 05.02.2004, p.5.

transactions in 2019, showing the continuous positive impact of the simplification package adopted by the Commission in December 2013. The proportion of simplified cases in the period 2004-2013 was substantially lower, at 59%.

Nevertheless, 2019 involved intensive work by the Commission both due to the large number of notified transactions and the complexity of a significant number of cases. An increasing number of notified transactions concerned already concentrated industries, such as basic industries (steel, copper or aluminium) or the railway sector. This required the Commission to carefully assess their potential impact on competition, employing sophisticated quantitative techniques and comprehensive qualitative investigations.

In 2019, 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.

The Commission adopted 362 merger decisions in 2019,[58] and intervened in 19 cases, a slightly lower number than previous years but that remains in the 5-7% range (out of total decisions adopted) of previous years.[59] 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.

Most remedies accepted by the Commission in 2019 consisted of divestitures of tangible or intangible assets.[60] This confirms the Commission's general preference for structural remedies in merger cases as best suited to address in a durable manner competition concerns arising from a concentration. The prohibition decisions adopted in 2019 are a good illustration of the need for sound and solid remedies to solve the important competition concerns that some transactions give rise to. For instance, in *Siemens/Alstom* the parties chose to propose a remedy package which was inadequate in scope, very complex and gave rise to significant dependencies and implementation risks.[61] This proposal failed to address the competition concerns, and the Commission had no choice but to prohibit the merger. This is in contrast with other cases such as *Harris/L3*[62] where the parties offered straightforward divestitures of a viable business which fully alleviated the competition concerns. In a few cases in 2019, the Commission accepted non-divestiture remedies,[63] where they were considered to solve

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

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

[60] Case M.8674 *BASF/SOLVAY'S EP AND P&I BUSINESS*, Commission decision of 18 January 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8674; Case M.9076 *NOVELIS / ALERIS*, Commission decision of 1 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9076; Case 9014 *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.

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

[62] Case M.9234 *HARRIS CORPORATION / L3 TECHNOLOGIES* Commission decision of 21 June 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9234.

[63] For example, 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.

effectively the underlying competition concerns.

Moreover, in 2019 the Commission continued its efforts to enforce procedural obligations under the EU Merger Regulation.[64] In 2019 the Commission imposed a fine of EUR 52 million on General Electric for providing incorrect information during the review of its acquisition of LM Wind,[65] and a fine of EUR 28 million on Canon for partially implementing its acquisition of Toshiba before notification and approval by the Commission (so-called gun jumping).[66] These decisions follow the fine of EUR 110 million imposed on Facebook in 2017 for providing misleading information during the review of its acquisition of WhatsApp[67], and the fine of EUR 124.5 million imposed on *Altice*[68] in 2018 for implementing its acquisition of PT Portugal before notification or approval by the Commission (so-called gun jumping).

Two other procedural infringement cases were under investigation in 2019. One against *Merck GmbH* (including *Sigma-Aldrich*)[69] concerning their alleged provision of incorrect and/or misleading information during the Commission's merger review, and one against *Telefonica*[70] for breach of the commitments given in relation to its acquisition of E-Plus in 2014.

64 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1-22.

65 Case M.8436 *GENERAL ELECTRIC COMPANY / LM WIND POWER HOLDING* (Art. 14.1 proc.), Commission decision of 8 April 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8436.

66 Case M.8179 *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* (Art. 14.2 proc.), Commission decision of 27 June 2019. https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8179.

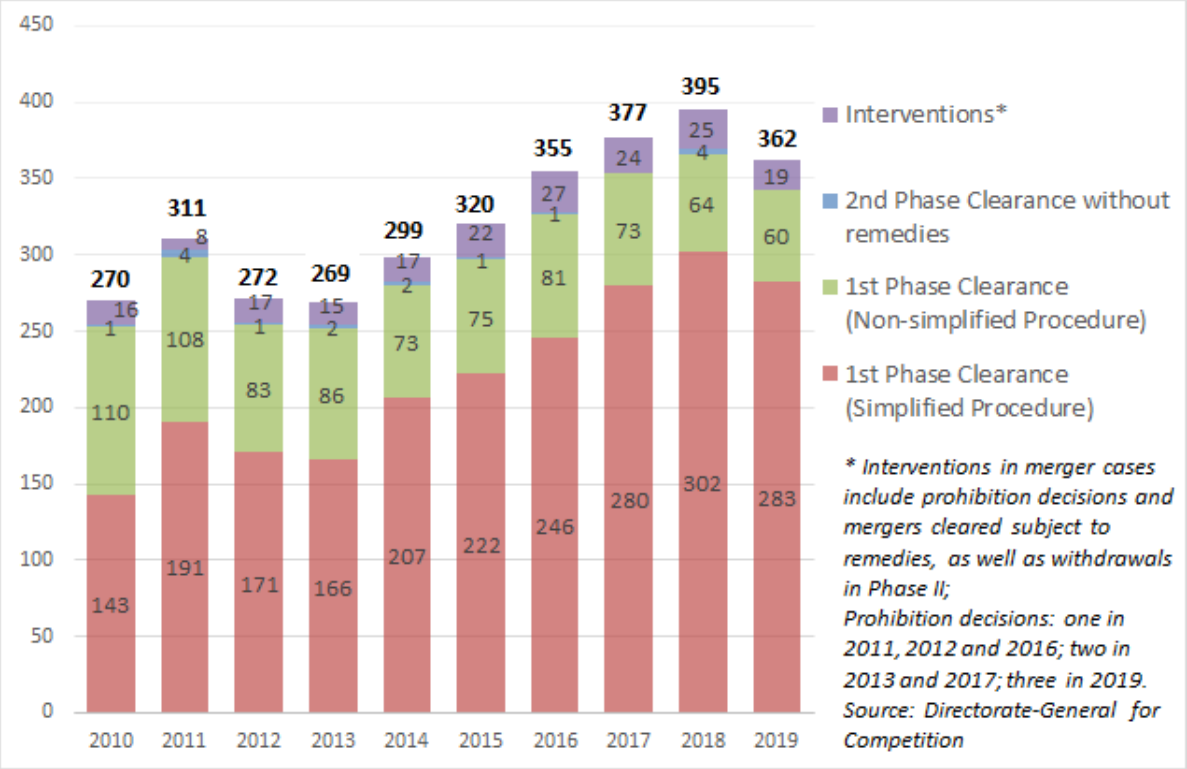
67 Case M.8228 *Facebook/ WhatsApp*, Commission decision of 27 June 2019. See:https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8228.

68 Case M.7993. *ALTICE / PT PORTUGAL (Art. 14.2 proc.)*, Commission decision of 24 April 2018. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7993.

69 Case M.8181 *Merck /Sigma-Aldrich* (Article 14.1). See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1924.

70 See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1371.

Merger cases 2010-2019



1.6. Increased relevance of digital issues

The Commission increasingly has to assess mergers involving digital issues, both in the digital and traditional industries, and their number is likely to continue growing. That is why the Commission welcomed the input provided by the three independent Special Advisers in their report of April 2019 on digitisation and competition law.[71] The report contained specific analysis and suggestions on merger control issues, both from a jurisdictional and a substantive perspective.

The Special Advisors believe that a change to the EU Merger Regulation is not necessary at this point in time. Regarding jurisdiction, the Special Advisers consider it premature to amend the notification thresholds of the Merger Regulation to cater for acquisition of small but valuable start-ups. As regards substantive merger assessment, the Special Advisers find that the current test remains a sound basis for assessing mergers in the digital economy. However, they propose to revisit certain theories of harm, to assess acquisitions of small start-ups by dominant platforms or ecosystems, in particular where such acquisition can eliminate a potential competitive threat and further lock users within their ecosystem. The conclusions and recommendations in the report will be duly considered in the ongoing reflection process how to address competition aspects in the digital economy.

1.7. The ongoing evaluation of EU merger control

EU merger control has three main objectives: i) to ensure that the Merger Regulation covers all types of concentrations that may significantly affect the internal market; ii) to deal as efficiently as possible with those types of cases which typically are unlikely to raise

[71] "Competition Policy in the Digital Era", 2019: See: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

competition concerns, cutting red tape where possible for undertakings, and iii) to allow investigating efficiently and comprehensively those cases that may bring competitive harm, adopting sound decisions grounded on facts, evidence and economic analysis; where concerns are confirmed, they need to be fully and effectively solved before letting the merger go ahead.

In 2016, the Commission launched an evaluation of selected procedural and jurisdictional aspects of EU merger control. This evaluation, which is still ongoing, seeks to explore two areas where there may be some scope for improvements of EU merger rules. The evaluation builds notably upon the results of the public consultation on the 2014 Commission White Paper "*Towards more effective EU merger control*",[72] and focusses on four topics, namely (i) possible further simplification of EU merger control, (ii) the functioning of the jurisdictional thresholds, (iii) the functioning of the referral system, and (iv) specific technical aspects.

Two public consultations were held in 2017[73] and 2018 whose results will feed into the evaluation together with the findings in the Special Advisers' 2019 Report.[74] Moreover, the Commission is monitoring, as part of its evaluation, the experience of the Austrian and German jurisdictions where additional jurisdictional thresholds were introduced in their merger control systems in 2017. The Commission is currently carrying out further research on the different topics covered by the evaluation.

2.4. Significant judgments by the European Union courts in merger control

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

In its judgment of 16 January 2019,[75] the Court of Justice upheld the General Court's judgment annulling the Commission's decision prohibiting the acquisition of TNT Express by UPS due a to 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.

In its judgment of 23 May 2019,[76] the General Court dismissed KPN's action for annulment of the Liberty Global/Vodafone/Dutch JV conditional clearance decision. 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.

[72] See: http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.
[73] See: http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.
[74] See: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.
[75] C-265/17 P *Commission v United Parcel Service*, judgment of the Court of Justice of 16 January 2019, ECLI:EU:C:2019:23.
[76] Case T-370/17 *KPN v Commission*, judgment of the General Court of 23 May 2019.

3. STATE AID CONTROL

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

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

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

1.8. Uptake of the State Aid Modernisation

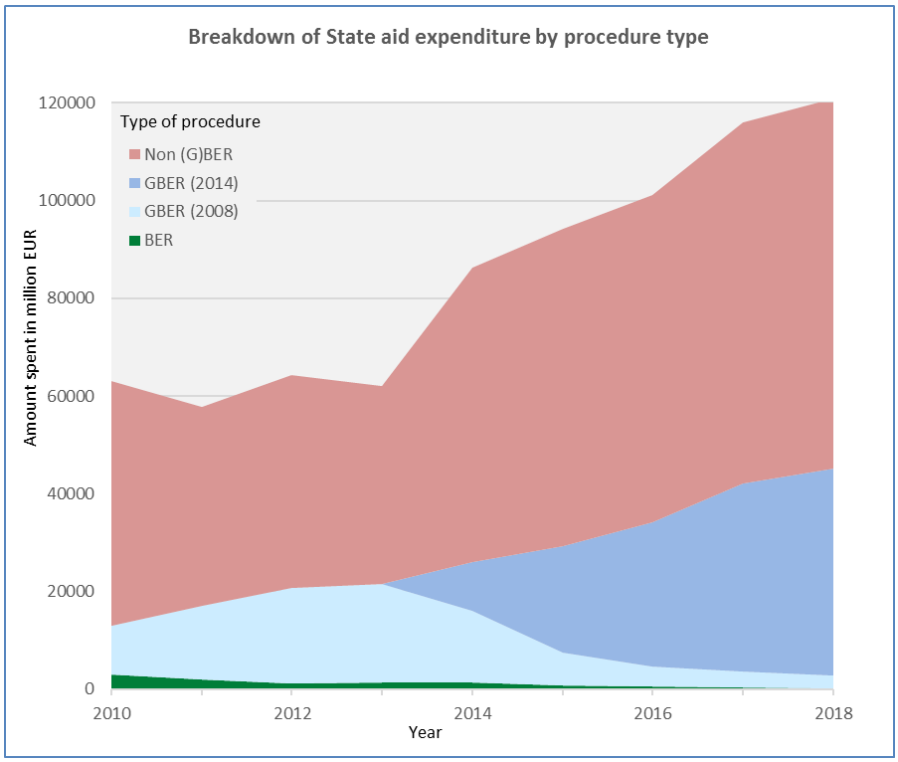
Since 2014, as part of the State Aid Modernisation (SAM), there has been a surge in State aid granted without prior notification to the Commission, indicating an important reduction in red tape. The 2019 State Aid Scoreboard[77] confirms that modernisation has led to quicker implementation of public support by Member States. This is possible due to the General Block Exemption Regulation (GBER)[78], adopted in the context of the State aid reform, which simplifies the aid-granting procedure for Member States by authorising - without prior notification - a wide range of measures fulfilling certain criteria and specific EU objectives in the common interest. For the aid categories covered by the GBER, only cases with the largest potential to distort competition in the single market have to be notified.

As shown in the graph below,[79] expenditure under GBER represented in 2018 approximately 45 billion EUR, entailing an increase of some 123% compared to 2013. Approximately 89% of all measures with reported expenditure (that is to say not only new measures), fell under the block exemption in 2018.

[77] The 2018 State Aid Scoreboard comprises aid expenditure made by Member States before 31 December 2017 and which falls under the scope of Article 107(1) TFEU. The data is based on the annual reporting by Member States pursuant to Article 6(1) of Commission Regulation (EC) 794/2004. See: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

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

[79] Figures from the 2019 State Aid Scoreboard. See: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

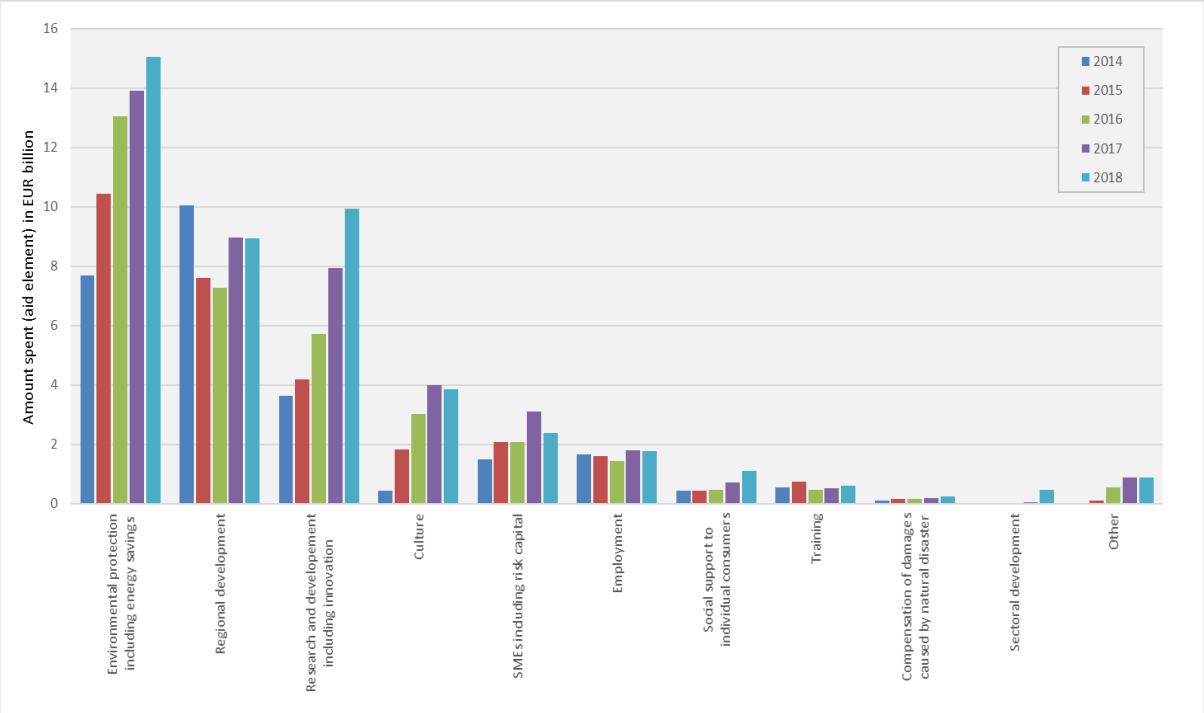


The 2014 GBER introduced new aid categories[80] and to a large extent, the reported increase in expenditure of GBER measures reflects the impact of the new Regulation. In 2018, as compared to 2014, total GBER spending for aid to culture and heritage conservation has increased dramatically(+ 805%). Large increases were also recorded for environmental protection and energy savings (+95.7%), for research, development and innovation (+74.3%) and for aid to compensate damages caused by natural disasters (+130.7%). However, the GBER expenditure has decreased for regional development (- 11.1%). The GBER was further extended in 2017, especially as regards aid to ports and airports (included in the category Sectoral development).[81] It is therefore to be expected that block-exempted aid as a share of total aid granted by Member States will increase even further in the coming years.

[80] Aid to innovation clusters and aid to process and organisational innovation, aid schemes to make good the damage caused by natural disasters, social aid for transport residents of remote regions, aid for broadband infrastructure, aid for culture and heritage conservation, including aid schemes for audio-visual works, aid for sport multifunctional recreational infrastructures, as well as investment aid for local infrastructure; the new GBER also broadened categories of aid already covered by the previous (2008) GBER.

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

GBER State aid expenditure by objective in the EU, excluding aid for agriculture, fisheries and railways



The growing share of spending falling under the GBER and registered by the Commission implies that on average the Member States implement State aid measures much more quickly than in the past. The average time to implement State aid measures decreased from about 2.2 months in the pre-SAM period to 0.6 months in the post-SAM period. However, notified measures that are still subject to scrutiny tend to cover bigger budgets and spending than in the past, in line with the Commission's approach to be 'big on big things and small on small things'.[82] The median annual budget for notified measures is higher than for GBER measures. Since 2014, it has increased from around 12 million EUR to more than 17.5 million EUR in 2018. Median annual budgets of GBER measures have increased even more significantly, from around 6 million EUR in 2014 to almost 12 million EUR in 2018 growing by around 100% in 4 years.

Cooperation with Member States

The SAM Working Group met three times in 2019, with France chairing until June 2019 and then co-chaired by Hungary and Denmark. The SAM Working Group addressed several policy and compliance topics related to SAM implementation, such as specific aspects related to aid to innovation clusters and important projects of common European interest. The SAM Working Group reported to the High Level Forum (held in June 2019) the main topics discussed during the past year and on the follow-up to recommendations made by past chairs (Finland, Sweden and the United Kingdom). The High Level Forum also endorsed the work plan submitted by the co-chairs for the period 2019-2020.

[82] Speech by European Commission President-elect on 10 September 2014, See: http://europa.eu/rapid/press-release_SPEECH-14-585_en.htm.

In 2019, the Commission continued its bilateral cooperation with the Member States. Launched in 2015, the overall objective of this process is to achieve both good State aid policy and effective State aid control at the national level. Tailored to each Member State's specific needs, bilateral cooperation generally deals with horizontal cross-cutting State aid issues, such as country-specific compliance and implementation issues, governance issues and issues concerning State-owned enterprises, as well as cases in problematic sectors. Each Member State also has a dedicated State Aid Country Coordinator at the Commission, who acts as a first entry point for this Member State's horizontal State aid questions. The Commission conducts periodic country visits to the Member States in order to assess specific bilateral cooperation issues.

Transparency Award Module

The transparency provisions currently part of SAM are in force since 1 July 2016 and require Member States to publish information about the beneficiaries of aid awards above EUR 500 000.[83] Member States have six months starting from the date of granting to provide the required aid awards' data, with the exception of awards in the form of fiscal aid for which the information needs to be provided within one year from the date of granting. The Commission facilitated compliance with this requirement by developing, in cooperation with Member States, the Transparency Award Module (TAM) – an informatics tool for submission and publication of data required under the transparency provisions[84].

The TAM ensures that information submitted by granting authorities is consistent and comparable across Member States. In addition, the associated transparency public search page provides all stakeholders, i.e. citizens, competitors and researchers, with a single entry point allowing them to make comparable extractions and analysis. For these reasons, the Commission pursues efforts to improve the user friendliness and the interoperability capabilities of the tools, to incentivise those Member States already having National State Aid Registries in place to use the TAM as well. At the end of 2019, 25 Member States have joined the TAM and more than 73 000 aid grants to more than 33 000 individual beneficiaries have been published by 25 Member States and Iceland.

The Commission services support the implementation of the TAM by organizing annually and facilitating, together with Member States' representatives, the Transparency Steering Group and by organising dedicated training courses upon request. The last Transparency Steering Group was held on 11 October 2019 in Brussels and focused on the use of TAM data to support State aid monitoring and control.

In addition, the Commission conducts annual compliance checks to verify the completeness and accuracy of the information published by Member States under the transparency requirements through either the TAM or National State Aid Registries. After a first round carried out in 2018, in 2019 the Commission launched a second exercise that enlarged the scope of the analysis by including State aid awards from 2016 to 2017. The second round of compliance checks launched at the end of May 2019 is expected to be completed during the first half of 2020.

[83] Competition Policy Brief 4/2016. See: http://ec.europa.eu/competition/publications/cpb/2016/2016_004_en.pdf.
[84] the Transparency Award Module (TAM). See: https://webgate.ec.europa.eu/competition/transparency/public/search.

Evaluation of aid schemes

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

Since 1 July 2014, evaluation is required for large GBER schemes in certain aid categories[85] as well as for a selection of notified schemes under the new generation of State aid guidelines.[86]

By the end of 2019, the Commission had approved evaluation plans covering 45 State aid schemes. Three additional schemes are currently under analysis, covering a total of 15 Member States.[87] Most of these decisions concerned either large regional aid projects or Research, Development and Innovation (RDI) aid schemes under the GBER or notified energy and broadband schemes. These schemes account, in total, for over EUR 54 billion of annual State aid budget. By the end of 2019, the Member States had delivered to the Commission 16 interim and four final evaluation reports, which were assessed by the Commission services and considered to be of average to good quality.[88]

In 2019, the Commission also outsourced a fact-finding study to assess the implementation of the evaluation requirement as foreseen by the GBER and relevant guidelines.

The Commission has continued to accompany the implementation of the evaluation requirement by publishing policy briefs[89] and by organising dedicated workshops with Member States' representatives and evaluation experts. The current priority of the Commission concerns the comprehensive assessment of evaluation reports, both intermediate and final, to: i) give appropriate feedback to Member States, ii) make sure that results are effectively used for better policy-making, and iii) provide relevant evidence to accompany the reflections for future legal developments.

Aid for research, development and innovation

While one of the headline targets of the Europe 2020 Strategy is for Research, Development and Innovation (RDI) investments in the EU to reach 3% of EU GDP, RDI spending in the EU has been lagging behind major global competitors, mainly due to lower levels of private investment. To achieve the greatest possible impact with the available budgets RDI aid measures should not replace or crowd out private financing. On the contrary, efforts should be directed at encouraging more private investments. RDI aid can help where market forces alone do not deliver necessary investments in promising but high-risk innovative projects. Therefore, the State aid rules for RDI help ensure that public funding goes to projects that otherwise would not be realised due to market failures. In particular, this includes projects

[85] 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.

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

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

[88] All the submitted evaluation reports are reviewed by the JRC within the framework of the Administrative Arrangement established between DG Competition and the JRC on the: "Support to the quality assessment of evaluation reports in the area of State Aid, 2018-2020".

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

that truly go beyond the state of the art, and which bring innovative products and services to the market and ultimately to consumers. These State aid rules provide for flexible and simple criteria for assessing the compatibility of State aid. Therefore, they facilitate the implementation of support for RDI projects by Member States.

The very purpose of RDI aid is that it should bring added value where markets and companies do not deliver the investments for promising but highly risky innovative projects. Therefore, the State aid rules for RDI help ensure that public funding goes to research projects that would not otherwise be realised due to market failures, that is to say projects that truly go beyond the state of the art and which bring innovative products and services to the market and ultimately to consumers. The RDI Framework, using flexible and simple criteria for assessing the compatibility of State aid, facilitate the implementation of support for RDI projects by Member States.

In 2019, the Commission continued to ensure that aid schemes and individual measures notified or pre-notified under the RDI Framework were well targeted to projects enabling ground-breaking research and innovation activities. Its State aid control activities covered a variety of sectors including the aeronautic, virtual research and technology infrastructures, as well as innovation clusters.

In a significant number of cases the Commission cooperated with Member States with a view to enabling them to adjust certain envisaged RDI measures and bring them in line with the GBER. This way, aid measures could be granted swiftly without having to be notified to the Commission, thereby speeding up public support for RDI. It is noteworthy that following the State Aid Modernisation in 2014, 96% of all RDI measures (84% in value terms) in the Union are implemented under the GBER.

The Commission also proposed in 2019 the RDI related amendments to its General Block Exemption Regulation to facilitate and simplify the way in which the centrally managed funding from Horizon Europe can be combined or, in cases of projects having received a Seal of Excellence, substituted by national funding. The proposed amendments align certain aspects of State aid rules on the one hand and Horizon Europe rules on the other. This should allow to prevent potential discrepancies causing delays or difficulties in the roll-out of RDI funding under the next Multiannual Financial Framework (MFF). More concretely, the GBER proposal provides for exemptions from the notification obligation and from the requirement to carry out at national level an assessment of the quality of a RDI project already assessed as excellent under Horizon rules in the following areas:

- Aid for SMEs for research and development projects as well as for Marie Skłodowska-Curie actions awarded a Seal of Excellence quality label under Horizon 2020 or Horizon Europe (Article 25a);

- Aid provided to co-funded projects, which have been independently evaluated and selected following transnational calls under Horizon Europe (Article 25b);

- Aid provided to Teaming actions, which have been independently evaluated and selected following transnational calls under Horizon Europe. This includes the possibility to provide State aid for project-related infrastructure investments under such Teaming actions (Article 25b).

Finally, in the area of State aid rules for RDI, the Commission contracted a study to provide an independent evidence-based evaluation on the implementation of the State aid rules for RDI in force since 2014, as well as of their effects on RDI investments and competition within the internal market. The objective of the study is to assess whether the current State aid rules in the area of RDI are fit for purpose taking into account the general State Aid Modernisation objectives, the specific objectives of the legal framework and the current and future challenges (also considering the EU research and innovation policy). This study is expected to be finalised in the first trimester of 2020 and its results will be publicly available.

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

In June 2014, the Commission adopted a Communication on Important Projects of Common European Interest (IPCEI).[90] The Communication establishes the conditions under which Member States can support projects making a clear contribution to economic growth, jobs and the competitiveness of the EU. The IPCEI Communication complements other State aid rules such as the General Block Exemption Regulation and the RDI Framework, and allows support of large and integrated transnational innovative projects while ensuring that potential competition distortions are limited. The rules therefore promote ground-breaking research and innovation and sharing of the results widely, whilst ensuring that the support by taxpayer money truly serves EU citizens.

In December 2019, the Commission found that an integrated project jointly notified by seven Member States (Belgium, Finland, France, Germany, Italy, Poland and Sweden) for research and innovation covering the whole strategic value chain (from materials to recycling and re-use) of batteries for e-mobility and energy storage, is in line with EU State aid rules and contributes to a common EU interest. The seven Member States will provide in the coming years up to approximately EUR 3.2 billion in funding for this project, which is expected to unlock an additional EUR 5 billion in private investments. The Commission has identified batteries as one of the key enabling technologies and strategic value chains deemed to be crucial for future industrial development. This second case of an IPCEI in the area of RDI demonstrates that the instrument can deliver intra-EU RDI cooperation and coordination for key enabling technologies and strategic value chains, including investment into first industrial deployment.

[90] Communication from the Commission — Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C-188, 20 June 2014, p. 4–12

During the second half of 2019, in line with the Commission's battery alliance initiative, discussions with a group of Member States and companies for a possible second IPCEI in the area of batteries for e-mobility and energy storage have intensified. This is in line with the Commission's policy for a shift from the use of environmentally harmful fossil fuels to alternative fuel technologies.

In addition, during 2019, in line with the recommendations of the strategic forum for IPCEI, discussions with a group of Member States and companies for a possible IPCEI in the area of hydrogen technologies and systems and in the area of low carbon industry were initiated. This is in line with the environmental and climate targets of the EU and the Commission's Green Deal.

Regional aid

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

In 2019, the Commission continued advising Member States' authorities on how to interpret and implement the regional aid provisions of the GBER, thus helping them to make a success of the reforms introduced under SAM to the benefit of both consumers and businesses.

In 2019, the Commission outsourced a study aiming to provide an evidence-based assessment of the implementation of the regional aid framework[91] applicable since 2014, which will constitute the basis for the retrospective evaluation of the current regional aid rules. In parallel, from June to July 2019, the Commission ran a targeted public consultation to gather stakeholder opinions on the application of the regional aid framework 2014-2020 with a view to assessing whether the rules are still fit for purpose.

The Commission adopted several decisions on notified regional investment aid measures under the Regional Aid Guidelines. It authorised regional investment aid for two large investment projects, namely aid to LG Chem (for electric vehicles batteries production in Poland)[92] and aid to Navigator Tissue Cacia (for production of sanitary goods in Portugal)[93]. It approved three evaluation plans for large block-exempted regional aid schemes in Hungary[94], Italy[95] and Poland[96], the extension of a French scheme[97] providing support for productive investments in outermost regions, and the revision of the regional aid map for France[98].

Finally, the Commission initiated formal investigation procedures in relation to three large investment projects. The first project is Samsung SDI's expansion of its existing electric

[91] This framework consists of the Regional Aid Guidelines for 2014-2020, the regional aid maps, and the GBER provisions applicable to regional aid.

[92] Case SA.47662 *LIP Aid to LG Chem Wrocław Energy Sp. z o.o.* – Poland. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47662.

[93] Case SA.49461 *Regional investment aid to Navigator Tissue Cacia S.A. – LIP – Portugal*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49461.

[94] Case SA.52527 *Evaluation Plan for the aid scheme "Aid for regional investment from the Economic Development and Innovation Operational Program (EDIOP)"*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52527.

[95] Case SA.53192 *Evaluation plan: SME investment aid scheme for purchase of new machinery and equipment 2019-2020*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53192.

[96] Case SA.52028 *Evaluation plan: Regional aid program granted to some entrepreneurs for the implementation of a new investment*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52028.

[97] Case SA.50299 *Aide fiscale à l'investissement outre-mer (investissements productifs).* See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50299.

[98] Case SA.53541 *Carte française des zones d'aides à finalité régionale (décision SA 38182 (2014 N)) - 3ème utilisation de la réserve*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53541.

vehicles battery production facility in Hungary, for which the Hungarian authorities intend to grant aid[99]. The second project is Peugeot's investment in its existing car plant in Spain, for which the Spanish authorities plan to provide public support[100]. The third project is PCC's investment in Poland into a new plant to produce ultra-pure monochloroacetic acid that already benefitted from two different support measures[101]. Poland considered both support measures to be covered by the 2008 General Block Exemption applicable at the time and therefore did not notify the measures to the Commission. However, after receiving a complaint from a competitor, the Commission decided to open an in-depth investigation to assess whether the respective measures are in line with applicable State aid rules.

Infrastructure

On 28 February 2019, the Commission opened an in-depth investigation to assess whether Danish and Swedish public support for the Øresund[102] fixed rail-road link is in line with EU State aid rules. Moreover, in June 2019, the Commission opened an in-depth investigation to determine whether the public financing model of the Fehmarn Belt[103] fixed rail-road link, between Denmark and Germany, is in line with EU State aid rules. Both in-depth investigations follow the General Court's annulment of previous Commission decisions approving the respective support.

1.9. State Aid Modernisation continues

Further extension of the scope of the GBER

The General Block Exemption Regulation (GBER) allows Member States to implement a wide range of public support measures without prior notification to the Commission, in areas such as research and development, environmental protection or support to SMEs. This reduces the administrative burden for public authorities and speeds up delivery of public support, including support granted via EU structural funds.

To ensure that national and EU funds can be combined seamlessly under the new Multiannual Financial Framework without undermining competition in the internal market, the Commission aims to improve the interplay between EU funding rules and State aid rules and streamline State aid control of national funds, including EU shared management funds, combined with EU programmes managed centrally by the Commission.

To this end, the Commission launched a targeted review of the General Block Exemption Regulation (the GBER) which extends the GBER to national funds, including EU shared management funds, combined with EU programmes managed centrally by the Commission in the following three areas:

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99 Case SA.48556 *Regional investment aid to Samsung SDI – Hungary*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48556.

100 Case SA.49579 *Regional aid to PCAE (Peugeot Citroën Automóviles España S.A.) – Spain*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49579.

101 Case SA.38330 *Alleged unlawful regional investment aid to PCC MCAA sp. Zo.o (PCC) – Poland*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38330

102 Cases SA.52162 and SA.52617 *State aid in favour of the Oresund Bridge Consortium*. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1468.

103 Case SA.39078 Financing of the Fehmarn Belt Fixed Link project, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39078.

1. Financing and investment operations supported by the InvestEU Fund;
2. RD&I projects having received a Seal of Excellence under Horizon2020 or Horizon Europe as well as co-funded projects independently evaluated and selected following transnational calls under the Horizon Europe programme including under Teaming actions;
3. European Territorial Cooperation projects (ETC, also called Interreg).

This targeted revision of the GBER will be aligned with the MFF process. The GBER revision includes two public consultations, giving Member States and other stakeholders the opportunity to comment. The first public consultation closed on 27 September 2019. A first draft text was discussed with the Member States in an advisory committee on 10 September 2019. The second consultation is planned to take place in 2020.

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

In 2012, the Commission launched the State aid Modernisation (SAM) considering that a more focused framework for the assessment of State aid measures would allow Member States to better contribute to the implementation of the Europe 2020 strategy. The Commission thus revised several State aid rules in 2013 and 2014.

A number of the State aid rules adopted as part of the State Aid Modernisation are due to expire by the end of 2020, while others adopted as part of the Modernisation process have no fixed expiry date.

To provide predictability and legal certainty, whilst preparing for a possible future update of the State aid rules adopted as part of the State Aid Modernisation, the Commission will take two steps.

1. In line with the Commission's Better Regulation Guidelines, the Commission is evaluating those rules. The assessment takes the form of a Fitness check. It will provide a basis for decisions by the Commission, about whether to further prolong or possibly update the rules. The current Fitness check covers the General Block Exemption and De Minimis Regulations, Regional Aid Guidelines, Research and Development Framework, the IPCEI Communication, Risk Finance, Airport and Aviation Guidelines, Environmental and Energy Guidelines, Rescue and Restructuring Guidelines, as well as the Railways Guidelines and Short-Term Export Credit Communication (the latter two were not included in the 2012 SAM package).
2. To allow the necessary time for a comprehensive evaluation, the Commission launched in 2019 the process to prolong the validity of those State aid rules, which would otherwise expire by the end of 2020.

Member States and other stakeholders had the opportunity to provide their input and comments to the fitness check during a public consultation in the form of a comprehensive online questionnaire on SAM as a whole as well as specific, targeted questionnaires for the individual rules concerned. With the exception of the IPCEI questionnaire which was open until the end of October, the consultations ended in July. A series of studies is also under way.

The aim is to analyse the relevance, effectiveness, efficiency, coherence and EU-added value of these State aid rules, and to evaluate and assess their contribution to achieving the EU

policy objectives. In doing so, the fitness check will assess if these State aid rules are "fit for purpose" and whether the objectives of SAM have been met.

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

The Commission published in January 2020 for public consultation the draft ETS State aid guidelines for the period 2021-2030. The contributions received will feed into the impact assessment the Commission is preparing for the revision of these Guidelines. Two public consultations were also launched in 2019 to evaluate the existing ETS Guidelines and prepare their revision. The core principle of the ETS is that polluters should pay for their carbon emissions. However, outside of the EU, not all countries apply this principle. If enterprises were to delocalise some of their production outside the EU as a result of carbon costs, this would result in an increase of global carbon emissions. Because electricity generators do not receive free allowances, they have to buy them, thereby increasing the electricity price for consumers. To this end, Member States may partially compensate electricity-intensive consumers for the indirect costs resulting from the ETS.

The new revised ETS Guidelines will set the conditions under which Member States can grant such partial compensation in the future. The guidelines will ensure that the compensation is limited to what is strictly necessary to minimize competition distortions and maintain the incentives for a cost-effective decarbonisation of the economy.

1.10. Monitoring, recovery, evaluation and cooperation with national courts

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

Over the years, the architecture of State aid control has evolved. Today, a substantial part of aid is granted under block-exempted schemes which are not examined by the Commission before entering into force. Overall, roughly 80% of aid measures were granted on the basis of previously approved aid schemes or block exemption regulations.[104] in that context, it is essential for the Commission to verify that Member States apply State aid rules for the schemes correctly and that they only grant aid when all required conditions are met.

To that end, the Commission introduced in 2006 a regular, *ex post*, sample-based control of existing aid schemes ("monitoring"), which comprises a monitoring sample of approximately 50 schemes per year.

The 2019 cycle covered 19 Member States, all main types of aid both approved and block-exempted. Since 2018, Member States have to report on individual aid exceeding EUR 500,000 that is subsequently published by the Commission in the Transparency Award Module[105]; the Commission verified the reporting for the schemes monitored.

The Commission follows up on irregularities and uses the means at its disposal to address the competition distortions that these irregularities 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.

[104] State Aid Scoreboard 2019. See: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.
[105] See: https://webgate.ec.europa.eu/competition/transparency/public/search/home/.

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

To ensure the integrity of the single market, the Commission has the power and the duty to request that Member States recover unlawful and incompatible aid which has unduly distorted competition and trade between Member States. The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. This is necessary to ensure that competition in the internal market can take place on fair and equal terms. In 2019, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

By 31 December 2019, the sum of illegal and incompatible aid recovered from beneficiaries amounted to EUR 37.1 billion.[106] At the same point in time, the outstanding amount pending recovery was EUR 5.5 billion[107].

In 2019, the Commission adopted four new recovery decisions and an amount of EUR 159 million was recovered by the Member States. As of the end of December, the Commission had 42 pending recovery cases.

Recovery decisions adopted in 2019	4
Amount recovered in 2019 (EUR million)	159
Pending recovery cases on 31 December 2019	42

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 2019, the Commission did not launch any infringement procedures before EU Courts.

In July 2019, the Commission published a new Notice on the implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (the "Recovery Notice")[108]. The new Recovery Notice replaces the 2007 Recovery Notice. It consolidates the case law developments established since the adoption of the 2007 Notice. It also includes more information on the infringement procedures, both under Article 108(2) TFEU and 260 TFEU, as well as established new practices in the cooperation between the Commission and the Member State concerned by a recovery decision.

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

The Commission continued its cooperation with national courts and tribunals under Article 29 of the Procedural Regulation.[109] This cooperation includes direct case-related assistance to national courts when they apply EU State aid law. The courts and tribunals can ask the Commission to provide case related information, or to provide an opinion on the application of State aid rules. The Commission may also submit *amicus curiae* observations at its own

[106] The reference period is 1 January 1999 to 31 December 2019.
[107] The amount is composed of EUR 2.6 billion from 42 pending cases and EUR 2.9 billion where the aid amount has been registered in insolvency proceedings that are still pending.
[108] Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247 of 23.7.2019, p. 1–23.
[109] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU, OJ L 248 of 24.9.2015, pp. 9-29.

initiative.

In July 2019, DG COMP has published a study on the state of play of the enforcement of State aid rules by national courts of the 28 Member States [110], identifying emerging trends and challenges, and presenting best practices. It also reflects the opinion of national courts regarding the cooperation tools (Article 29 of the Procedural Regulation (Council Regulation (EU) 2015/1589), i.e. request for opinion, request for information and the Commission's intervention as *amicus curiae*). The study includes a database with national rulings. The correct application of State aid rules is a shared responsibility between the national authorities, national courts and the Commission. The role of national courts is essential to protect the direct effect of Article 108(3) TFEU (standstill obligation). In light of the results of the study, the Commission will decide whether and to which extent to review the 2009 Commission notice on the enforcement of State aid law by national courts.

In 2019, the Commission received one request for information. The request by a Romanian Court concerned a status of proceeding in a pending complaint case. Furthermore, a Romanian court requested an opinion from the Commission to clarify an envisaged investment into a state-owned enterprise on whether it would give raise to State aid concerns. Two further requests for opinion came from courts in Estonia seeking the Commission's opinion on existing renewable energy schemes and the interpretation on some of the conditions contained therein.

The possibility for the Commission to submit *amicus curiae* observations before national courts on its own initiative was introduced in the 2013 amendment to the Procedural Regulation. In this respect, Article 29 of the Procedural Regulation mirrors Article 15(3) of Regulation 1/2003 in the field of antitrust. In 2019, the Commission intervened in proceedings before the courts in one Member State and in arbitral proceedings where State aid issues were considered.[111] To make its views publicly known, the Commission publishes its opinions and *amicus curiae* observations, as well as observations to others, on its website.[112]

In 2019, the Commission continued its advocacy efforts. It was actively involved in evaluating the financing of training programmes for national judges and in assessing their needs. The Commission staff also provided training during workshops and conferences.[113]

1.11. Significant judgments by the European Union Courts in the State aid area

In 2019, the EU Courts adopted a number of important judgments in the State aid area. The following overview is based on a selection of court judgments, notably on issues related to the concept of advantage and selectivity assessment and on a number of procedural points.

[110] See: https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf.
[111] The Commission submitted written submissions in one case before a Romanian court. The Commission also submitted an amicus curiae brief in recognition and enforcement proceedings before the U.S. District Court of the District of Columbia in three cases.
[112] See: http://ec.europa.eu/competition/court/overview_en.html.
[113] See also the dedicated section *Cooperation with national courts*, Antitrust and Cartels Section, see I. Antitrust, chapter 4.

Advantage

Two relevant judgments as regards advantage in fiscal measures are *Fiat*[114] and *Starbucks*[115]. In *Fiat*, the General Court upheld the Commission's decision of 21 October 2015; in *Starbucks*, the General Court annulled the Commission's decision of 21 October 2015 on the grounds that it did not demonstrate the existence of an advantage. In both judgments, the General Court stated that, "*where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices.*"[116] Therefore, to assess whether a fiscal measure granted to an integrated undertaking constitutes an advantage, the Commission may compare the fiscal burden of such integrated undertaking with the fiscal burden of an undertaking carrying out its activities under market conditions. The arm's length principle is a tool for making that determination, since it is a 'benchmark' for establishing whether an integrated company is receiving an advantage within the meaning of Article 107(1) TFEU. In order to apply the arm's length principle, the Commission can rely on the OECD Transfer Pricing Guidelines, which, although non-binding, reflect the international consensus achieved with regard to transfer pricing and have therefore a real practical significance in the interpretation of issues relating to transfer pricing. Furthermore, in order for an advantage to be proved, the errors identified in the calculation of a transfer price must go beyond inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome.

In *Micula*[117] (under appeal by the Commission) the General Court found that the arbitral award did not compensate the applicants for the withdrawal of unlawful or incompatible State aid, but constituted a mere compensation for damages, which does not constitute an advantage for the purposes of Article 107(1) TFEU.

In *Fútbol Club Barcelona*[118] (under appeal by the Commission) the General Court rejected the Commission's assessment of the advantage by stating that the examination of the nominal preferential tax rate cannot be dissociated from that of the other components of the tax regime of non-profit organisations.

As regards the application of the Market Economy Operator Principle (MEOP),[119] in *Real Madrid*[120] the General Court upheld the Commission's findings on the need for Municipality of Madrid to obtain independent legal advice before concluding the 2011 settlement

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114 Joined Cases T-755/15 and T-759/15, *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:670.

115 Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Others v European Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:669.

116 Joined Cases T-755/15 and T-759/15, *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:670, para. 141; Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Others v European Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:669, para. 149.

117 Joined cases T-624/15, T-694/15 and T-704/15, *European Food SA and others v Commission*, judgment of the General Court of 18 June 2019, ECLI:EU:T:2019:423.

118 T-865/16, *Fútbol Club Barcelona v Commission*, iudgment of the General Court of 26 February 2019, ECLI:EU:T:2019:113.

119 The Market Economy Operator Principle (MEOP) is a concept developed by the Commission to determine whether a transaction entered into by a public body gives an advantage to a particular undertaking with the potential of distorting competition and trade between Member States.

120 T-791/16, *Real Madrid Club de Fútbol v European Commission*, judgment of the General Court of 22 May 2019, ECLI:EU:T:2019:346.

agreement with Real Madrid and that the value of the compensation agreed under that agreement was above market terms. However, the General Court found that the Commission was wrong to have limited its analysis of that agreement only to whether the compensation granted by Municipality of Madrid to Real Madrid was on market terms. The Commission should have inquired whether the value of the plots of land Real Madrid received as a payment in kind for part of the compensation granted as a result of the 2011 settlement agreement were in fact worth the value that Real Madrid had accepted they were worth in 2011.

As regards applicability of the MEOP, in *Mytilinaios*[121] the Court of Justice found the MEOP not to be applicable, since the measure consisted in an order for interim measures by a national court, which cannot be assimilated to an action of an market economy operator. Also, in *Arriva Italia*,[122] the Court of Justice concluded that the MEOP was not applicable. The Court of Justice observed that the Italian State did not carry out an *ex-ante* assessment of the profitability of the measure in point (the transfer of the shareholding in the capital of FSE). Moreover, the Court of Justice noted that: (a) it was apparent from the national legislation that such transfer of shareholding sought, in particular, to ensure the continuity of employment and transport services provided by FSE; (b) such transfer also pursued the objective of maintaining public sector shareholding in the capital of FSE. However, such considerations are not taken into account by a private investor.

Selectivity

The *Fiat* judgment is also relevant as concerns selectivity. The General Court confirmed that the contested tax ruling related exclusively to Fiat and that therefore the Commission was correct in considering that ruling as an individual measure, and not as a measure granted on the basis of a scheme, as Luxembourg argued. In this regard, the General Court recalled that the assessment of the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, as established by the *MOL*[123] case law, the identification of the economic advantage is, in principle, sufficient to support the presumption that the individual measure is selective. Based on this presumption, the General Court concluded that, since the Commission had established that the contested tax ruling granted an advantage, that advantage should in priciple be considered selective, without the need to apply the three-step test.

In the *Polish and Hungarian progressive tax cases*[124] (under appeal by the Commission) the General Court found that these taxes were not selective because small and large undertakings were not in a comparable factual and legal situation in light of the redistributive purpose of the progressive turnover taxes. Therefore, the tax was not considered as discriminatory.

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121 C-332/18 P, *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon v Commission*, judgment of the Court of Justice of 11 December 2019, ECLI:EU:C:2019:1065.

122 C-385/18, *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti*, judgment of the Court of Justice of 19 December 2019, ECLI:EU:C:2019:1121.

123 C- 15/14 P *Commission v MOL*, Judgement of 4 June 2015, ECLI:EU:C:2015:362, paragraph 60.

124 Joined cases T-836/16 and T-724/16, *Poland v Commission*, judgment of the General Court of 16 May 2019, ECLI:EU:T:2019:338 . T-20/17, *Hungary v Commission*, judgement of the General Court of 27 June 2019, ECLI:EU:T:2019:448.

Definition of economic activity

On the definition of economic activity, the Court of Justice held in case *Aanbestedingskalender and Others v Commission*[125] that if an economic activity carried out by a public entity cannot be separated from other activities connected with the exercise of public powers, the activities of that entity as a whole must be regarded as being connected with the exercise of public powers. In the *French ports litigation cases*[126] the General Court confirmed that the ports carry out an economic activity, in addition to their public power activities. Assessing whether these economic activities could be considered ancillary to the non-economic ones, the General Court hast taken the view that there is no threshold below which all the activities of an entity would be considered non-economic if the economic ones represent a minority. If the economic activity of a given entity is separable from the exercise of public power, that entity must be classified as an undertaking for this part of its activities.

State resources and imputability

On State resources, in *Germany v Commission (EEG 2012),*[127] the Court of Justice held that the General Court was wrong to find that the funds generated by the EEG surcharge constituted State resources.[128] On the one hand, the EEG surcharge cannot be assimilated to a levy, on the other hand, the General Court failed to establish that the State held a power of disposal over the funds generated by the EEG surcharge or even that it exercised public control over the Transmission Systems Operators responsible for managing those funds. In *Achema and Others,*[129] the Court distinguished between a system financed by a mandatory charge and administered by an entity directly or indirectly controlled by the State, which involves State resources, and a system of mere price regulation where private operators must finance a purchase obligation on their own resources. In *FVE Holýšov I,*[130] (under appeal by the applicant) the General Court confirmed that it is sufficient to establish the presence of a mandatory charge (the levy at stake had a compulsory nature) to establish the existence of State resources.

As regards imputability and State resources, in the *Tercas litigation cases*[131], (under appeal by the Commission) the General Court considered that the Commission has to have sufficient evidence to prove that measures taken by private entities were taken under the actual influence or control of the State.

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125 C-687/17P, *Aanbestedingskalender BV and Others v European Commission* , judgment of the Court of Justice of 7 November 2019, ECLI:EU:C:2019:932.

126 T-754/17, *Chambre de commerce and d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission,* judgment by the general court of 30 April 2019, ECLI:EU:T:2019:270. T-747/17, *Union des Ports de France - UPF v European Commission,* judgment of the General Court of 30 April 2019, ECLI:EU:T:2019:271.

127 C-405/16P, *Germany v Commission,* Judgment of the Court of Justice of 28 March 2019, ECLI:EU:C:2019:268.

128 EEG: Erneuerbare-Energien-Gesetz (Law on Renewable Energy). In 2012, Germany introduced a scheme to support undertakings producing electricity from renewable energy sources and mine gas. That law guaranteed those producers a price higher than the market price. To finance the support measure, the law imposed an EEG surcharge on the suppliers which in practice, not by law, was passed on to the final customers. However, certain electricity-intensive undertakings , were eligible for a cap on the EEG surcharge to maintain their international competitiveness.

129 C-706/17, *Achema AB and Others v Valstybinė kainų ir energetikos kontrolės komisija (VKEKK),* judgment of the Court of Justice of 15 May 2019, ECLI:EU:C:2019:407.

130 T-217/17, *FVE Holýšov I s. r. o. and Others v Commission*, judgment of the General Court of 20 September 2019, ECLI:EU:T:2019:633.

131 Joined cases T-98/16, T-196/16 and T-198/16, *Italy and Others v Commission,* judgment of the General Court of 19 March 2019, ECLI:EU:T:2019:167.

Recovery

On recovery, in *Eesti Pagar*[132] the Court of Justice concluded that any national authority having granted unlawful State aid is under an obligation to recover that aid. It also recognized, in case of recovery of unlawful aid, the need of the principle of effectiveness to be respected, even if interest is to be calculated based on national law.

In relation to the consequences to be drawn by the national judge in case of violation of the obligation to notify a measure (ex art 108(3) TFEU), in *Arriva Italia*,[133] the Court of Justice stated that it is for the national courts to draw all the necessary inferences from such an infringement, in accordance with domestic law, with regard both to the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision. In particular, as regards the transfer of the shareholding of a company, the Court of Justice clarified that restoring the previous situation will entail, as the case may be, the reversal of that transfer by reassigning that shareholding to the original owner, and the neutralisation of the effects of that transfer.

Procedural issues

In the *Belgian Excess Profit* judgment,[134] the General Court annulled the Commission's 2016 decision which held that Belgium had granted selective tax advantages under its "excess profit" tax scheme. The Court did not take a position on whether or not the scheme analysed gave rise to illegal State aid but found that the Commission had failed to establish the existence of an aid scheme. According to the General Court, when granting an excess profit ruling the Belgian tax authorities had a margin of discretion that necessitates a case-by-case assessment and which undermines an alleged systematic approach by the Belgian tax authorities, required for the existence of an aid scheme. This means that, according to the General Court, the tax rulings need to be assessed individually under EU State aid rules.

Following this judgment, the Commission opened in 2019 separate in-depth investigations into the 39 individual tax rulings granted by Belgium to multinational companies. In parallel, the Commission has appealed the judgment of the General Court to the European Court of Justice to seek further clarity on the existence of an aid scheme. These proceedings are ongoing.

In the *BMW* judgment[135], the Court of Justice confirmed the *Eesti Pagar* judgment[136] in stating that national authorities can only check compliance of the aid measure with the GBER requirements, which entails procedural consequences on the obligation to notify or not. A finding of compliance with the GBER by a Member State offers at most a presumption of compatibility of the aid with the internal market.

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132 C-349/17. *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, judgment of the Court of Justice of 5 March 2019, ECLI:EU:C:2019:172.

133 C-385/18, Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasportirriva, Judgment of the Court of Justice of 19 December 2019, ECLI:EU:C:2019:1121.

134 Joined Cases T-131/16 and 263/16 *Belgium and Magnetrol International v European Commission*, judgment of the General Court of 14 February 2019, ECLI:EU:T:2019:91.

135 C-654/17P - Bayerisch Motoren Werke AG and Freistaat Sachsen v European Commission, judgment of the Court of 29 July 2019.

136 C-349/17. *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, judgment of the Court of Justice of 5 March 2019, ECLI:EU:C:2019:172.

4. DEVELOPING THE INTERNATIONAL DIMENSION OF EU COMPETITION POLICY

The main objective of the Commission's international activities in the competition field is to advocate a global competition culture, promoting competition conditions allowing companies to compete on the merits on fair and equal terms across the world. The Commission also seeks to reinforce the role of competition policy in international organisations and cooperates with agencies globally. Such regulatory and enforcement cooperation helps to ensure an effective enforcement and competition on fair and equal terms for EU companies active on global markets.

Multilateral relations

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. Moreover, in 2019 the Commission was engaged in several sectoral initiatives addressing subsidies in the international context, for example the G20 Global Forum on steel excess capacity. Finally, the Commission continued the work with EU Member States in the International Subsidy Policy Group, exchanging views and coordinating initiatives concerning international subsidy policies at multilateral and bilateral level.

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 United Nations Conference on Trade and Development (UNCTAD).

At the OECD Competition Committee meeting in June 2019, the Commission contributed to the discussions on licensing of IP rights[137], disruptive innovation in financial markets[138], judicial review in competition cases[139] and on vertical mergers in the technology, media and telecom sector[140]. In December 2019, the Commission contributed to the Competition Committee's deliberations on access to the case file and protection of confidential information[141], hub-and-spoke arrangements in competition[142], competition provisions in trade agreements[143] and on merger control in dynamic markets.[144]

In the ICN, following the Cartagena Annual Conference, which took place in May 2019, the Commission took up a three-year co-chair role of the Unilateral Conduct Working Group, which it currently shares with the Italian and South African Competition Authorities. The Commission helped organising the ICN Unilateral Workshop on digital matters in competition law, held in Mexico City in November 2019, and started a new, multi-annual project on the "assessment of dominance and market power in digital", resulting - in a first

[137] See: http://www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm.
[138] See: www.oecd.org/daf/competition/digital-disruption-in-financial-markets.htm.
[139] See: www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm.
[140] See: www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm.
[141] See: www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm.
[142] See: www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm.
[143] See: http://www.oecd.org/daf/competition/competition-provisions-in-trade-agreements.htm.
[144] See: http://www.oecd.org/daf/competition/merger-control-in-dynamic-markets.htm.

step - in a survey on the ICN members' experience in this matter. Moreover, the Commission continued chairing the ICN Cartel Working Group until summer 2019 and during this period contributed to "Good Practices for Incentivizing Leniency Applications"[145] and to a new chapter "Development of Private Enforcement of Competition Law"[146] in the ICN Anti-Cartel Enforcement Manual. The Commission continues to contribute to the Cartel Working Group's ongoing projects on "Enhancing Coordination on Leniency Matters" and the "Big Data Project". The Commission is also an active member in the other ICN Working Groups; the Merger Working Group, the Advocacy Working Group, and the Agency Effectiveness Working Group.

The Commission participated in the 18th meeting of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, held in Geneva in July 2019. The conference included discussions on competition issues in the digital economy and in healthcare markets, international cooperation of competition authorities in the fight against cross-border anticompetitive practices and mergers, and capacity-building and technical activities in competition law and policy.[147]

In 2019, the Commission 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.[148] Under the French G7 Presidency, the common understanding was presented at the meeting of the G7 Finance Ministers in Chantilly on 17 and 18 July 2019.

Bilateral relations

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.

The Commission's negotiations on a Comprehensive Investment Agreement with China are still ongoing. 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[149] and the Memorandum of Understanding on a dialogue in the area of the State aid control regime and the Fair Competition Review System[150]. In addition, the Commission confirmed the cooperation on competition cases with China by signing the Practical guidance for cooperation on reviewing merger cases[151] and the Practical guidance for cooperation on investigating anti-monopoly cases.[152]

As regards the draft Second Generation Cooperation Agreement between the Commission and Canada, the Commission is in regular contacts with the Competition Bureau Canada in view of finding a solution on data protection in Canada lining up to the standards established by the

145 See: https://ec.europa.eu/competition/cartels/icn/good_practices_for_incentivising_leniency_applications_2019.pdf.
146 See: https://ec.europa.eu/competition/cartels/icn/private_enforcement_chapter_en.pdf.
147 See: https://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1895.
148 See: https://www.tresor.economie.gouv.fr/Articles/5f8c26f2-a2cd-4685-ba82-fa9e4d4e5d67/files/d3ec7ade-4c85-4a5f-9caa-a19ab9725d95.
149 See: https://ec.europa.eu/competition/international/bilateral/agreement_tor_china_2019.pdf.
150 See: https://ec.europa.eu/competition/international/bilateral/mou_china_2019.pdf.
151 See: https://ec.europa.eu/competition/international/bilateral/practical_guidance_merger.pdf.
152 See: https://ec.europa.eu/competition/international/bilateral/practical_guidance_antimonopoly.pdf.

Opinion of the Court of Justice on the 2014 EU Canada Passenger Name Record Agreement[153]. Moreover, the Commission continued the negotiations with Japan on a Second Generation Agreement with a view to updating the existing cooperation agreement from 2003.[154]

Another key area of the Commission's activities is technical cooperation on competition policy and enforcement with the EU's main trading partners. To frame this cooperation, the Commission has signed a number of Memoranda of Understanding (MoUs). The Commission has signed MoUs with the BRICS[155] countries and Mexico, and it has engaged in technical cooperation with these countries to varying degrees. The Commission also assists neighbouring countries. For example, in 2019 the Commission was monitoring the implementation of the EU competition acquis in countries such as Ukraine.

In negotiations with candidate countries and potential candidate countries, the Commission's main policy objective - in addition to advocating a competition culture - is to help these countries to create legislative frameworks with well-functioning operationally independent competition authorities that build up a solid enforcement record. To meet the conditions for EU accession in the competition policy field, these requirements must be fulfilled. In 2019, the Commission continued to monitor candidate countries' compliance with their commitments under the Stabilisation and Association agreements.

The Commission also engaging with several African national and regional authorities to develop cooperation in the competition field. In the ongoing negotiations for the future Agreement for ACP countries (the Cotonou Agreement)[156] and the related Economic Partnership Agreements (EPAs), the Commission proposal includes competition and State aid control provisions.

In 2019, the Commission continued to prepare for the withdrawal of the United Kingdom from the EU, including the competition and State aid related aspects of that withdrawal. The draft Withdrawal Agreement between the EU and the United Kingdom as endorsed by the European Council on 17 October 2019 sets out the continued application of the EU acquis during the transition period until end 2020. It includes amongst others provisions for State aid and competition cases which are ongoing at the end of the transition period. In addition, this Agreement sets out how aid having an effect on trade between Northern Ireland and the EU will be treated after the end of the transition period. The Commission also continued to prepare for a no deal scenario, and issued, amongst others, a no deal Brexit competition law guidance.[157]

In March 2019, the Commission adopted a Communication on 'EU-China strategic outlook'[158], which proposes ten actions that were endorsed by the March European Council. One of these actions relates to distortive effects of foreign state ownership and state financing in the internal market. In 2019, therefore, the Commission started an analysis of how the current EU toolbox addresses the distortive effects of foreign subsidies and state ownership.

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153 See: http://curia.europa.eu/juris/liste.jsf?pro=AVIS&num=C-1/15.
154 See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22003A0722(01).
155 BRICS is an acronym used to denote the countries Brazil, Russia, India, China and South Africa.
156 See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5913.
157 See: https://ec.europa.eu/info/sites/info/files/file_import/eu-competition-law_en.pdf.
158 See: https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf.

5. EXTERNAL COMMUNICATION

The Directorate-General for Competition's external communication is focussed on the use of mass media to reach a variety of audiences, including businesses, lawyers, researchers, academics, students and the general public. This is achieved principally via the Commissioner's press conferences, press releases and speeches, as well as social media. In addition, the Directorate-General issues newsletters and other publications aimed at stakeholders and the general public, as well as participation by staff in stakeholder conferences.

The Directorate-General for Competition produced 525 press releases related to competition cases during 2019. Of these, 120 were longer, multilingual, press releases while a further 415 were shorter and monolingual ("midday express"). Some of the cases generated broad media coverage, such as the prohibition of Siemens' proposed acquisitiong of Alstom, the Google Adsense antitrust decision (online search adverts) and the decision to imposes interim measures on Broadcom. All of these cases were covered by TV, radio, print and internet media around the globe.

Throughout 2019, Commissioner Vestager delivered around 67 speeches to a variety of audiences. The Director-General and Acting Director-General delivered 25 speeches at a variety of international events.

A highlight in 2019 was the Commission's 17th January conference "Shaping competition policy in the era of digitisation": 490 people from 27 countries attended in person and there were more than 35,000 connections to the live stream from 60 countries. We had 209,000 impressions and interaction generated by the tweets from EU_Competition over two days. The #EUcompdigit hashtag was the second most tweeted topic trending in Belgium in the morning of 17 January. A Student Challenge followed the conference, receiving 80 submissions from 21 countries. The winning entries were displayed on the Commission's website, and the winners - designated by almost 2,000 popular votes over the internet - had the opportunity to meet Commissioner Vestager in Brussels in March.

On social media, the Directorate General for Competition was active on Twitter during 2019. Throughout the year, around 590 tweets from the Directorate-General's account achieved more than 3.5 million impressions (i.e. the number of times a tweet appears in someone's feed). The Foreign Exchange (FOREX) Cartels Decisions announcing fines against five international banks achieved the most impressions (75,600 in 24 hours). Other popular Tweets included those on the Decision to fine Google for illegal practices regarding Android Mobile Devices and the opening of our investigation into Amazon's use of sensitive data. The number of followers on the COMP Twitter account rose by 3,480 to a total of 15,800.

The number of subscribers to the Directorate General's electronic newsletters was 22,000 subscribers in 2019 (+5%), while its publications in the EU Bookshop were viewed,downloaded or ordered as paper copies 6,200 (+3%) times.

6. THE SINGLE MARKET PROGRAMME

Adapting to an increasingly digital and globalised environment is a major challenge for the enforcement of EU competition policy. New sophisticated IT tools and algorithms used by economic operators combined with an exponential increase in electronic communications, quantity of data and the number of documents on case files make many competition investigations increasingly complex and burdensome. The Commission's proposals for the next Multiannual Financial Framework (2021-2027) included – for the first time - a Competition Programme within the Single Market Programme that includes. Negotiations on the Single Market Programme with the co-legislators, the European Parliament and the Council, were launched in October 2019. If adopted, the Single Market Programme, with an indicative budget of EUR 140 million for the seven-year period dedicated to the Competition Programme, would enable the Commission to directly support competition policy development and to ensure efficient, effective and relevant competition enforcement.

The Competition Programme would enable the Commission to modernise EU competition policy enforcement by investing in state-of-the-art IT tools (including AI), to better deter and detect any wrongdoings. Moreover, the Competition Programme would allow to invest in knowledge and expertise, to strengthen the cooperation between the Commission and the Member States' competition authorities in all areas of EU competition law, to ensure strong global presence, and to raise stakeholder awareness of EU competition policy.[159]

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

II. SECTORAL OVERVIEW

The Commission's competition policy activities in 2019 covered a wide range of areas, with the common objective of making markets work better. EU competition policy supported several key EU policies and initiatives, including a connected Digital Single Market, an integrated and climate-friendly Energy Union, a Deeper and Fairer Internal Market as well as taking action against selective tax advantages. This section provides a sector-by-sector overview of competition policy developments and enforcement activities that the Commission engaged in during the year 2019.

1. ENERGY & ENVIRONMENT

Overview of key challenges in the sector

Energy is an essential input to all sectors of the economy, and one of the largest single items of expenditure for households in the EU. The EU is heavily dependent on imports of fossil fuels, in particular oil and gas products.

The adoption[160] of the Clean Energy for all Europeans Package in 2019 is an important milestone towards the creation of the Energy Union, which aims at providing EU citizens and businesses access to affordable, secure, and sustainable energy.

Competition policy is essential to make the Energy Union function properly. Competition policy plays a key role in removing obstacles to the free flow of gas and electricity across Member States, promoting interconnectivity and avoiding artificial market partitioning. Competition enforcement contributes to market opening and ensures that all market players participates in the market on fair and equal terms, regardless of their nationality.

In addition, competition policy contributes to the EU's environmental objectives and climate targets, including the decarbonisation of the power sector and other sectors of the economy, and the shift, in the transport sector, from polluting fossil fuels to alternative fuels in accordance with the Commission's mobility policy. To this end, the Commission authorises State aid measures promoting the deployment of renewables, improving energy efficiency, stimulating demand for low emission vehicles for public and private transport, and reducing CO_2 emissions. In addition, the Commission authorises intermediate measures reducing nitrogen oxides (NO_X) emissions by allowing the retrofitting of polluting vehicles used in public transport.

Promoting competition in the energy sector empowers consumers, whether they are energy-intensive users such as big manufacturing plants, small companies or households. Well-functioning competition gives energy consumers the confidence that the EU energy markets are working well. Ultimately, consumers throughout the EU will benefit from an integrated European Energy market that guarantees security of energy supply at affordable prices and a cleaner environment.

In December 2019, the Commission adopted the "European Green Deal" Communication, outlining policy initiatives to reach by 2050 net-zero greenhouse gas emissions in the EU and

[160] See: https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans.

to tackle other environment-related challenges.[161] Reaching these objectives require a combination of multible policy instruments. A strong competition policy in the energy and environmental sectors is crucial to support a cost-effective decarbonised energy transition.

The Commission is currently reviewing the ETS State aid Guidelines[162] to ensure that they are adapted to EU's new emissions trading scheme for 2021-2030 as set out in the 2018 ETS Directive.[163] Furthermore, the Commission launched the evaluation of the 2014 Guidelines on State aid for environmental protection and energy as part of a broader Fitness check of the State aid modernisation package.[164] A public consultation has been conducted and the responses have been published.[165] To allow a proper revision of the guidelines their validity will be extended beyond 2020. The review should reflect the policy objectives of the European Green Deal, in particular supporting a cost-effective transition to climate neutrality by 2050 by facilitating the phasing out of fossil fuels, in particular those that are most polluting.

Effective competition in the green economy

In 2019, competition enforcement contributed to the EU environmental objectives by applying the State aid, antitrust, and merger rules.

The enforcement of State aid rules in the renewable energy, energy efficiency, and low-emission mobility fields remained high. Moreover, the Commission pursued an investigation on the conduct of ethanol producers and adopted several merger decisions concerning joint ventures that were set up to develop and/or operate renewable energy assets.[166]

Renewable energy and energy efficiency

In 2019, the Commission adopted twenty decisions concerning renewables and combined heat and power support schemes.[167] As a result, almost all Member States have now received State aid clearance for their renewables and combined heat and power support schemes and brought them in line with the 2014 Guidelines on State aid for environmental protection and energy.[168] An increasing number of Member States grant support for the production of renewable energy through competitive and technology-neutral tenders and by integrating renewables installations in the electricity market. This has resulted in lower cost for consumers in the electricity system as a whole.

Antitrust enforcement also contributes to the objective of a low-carbon economy. After sending a Statement of Objections in 2018, the Commission continued in 2019 its

[161] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions *The European Green Deal*, COM/2019/640 final. See: https://ec.europa.eu/info/publications/communication-european-green-deal_en.

[162] Communication from the Commission — Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 (SWD(2012) 130 final) (SWD(2012) 131 final), OJ C 158, 5.6.2012, p. 4–22. See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6600267/public-consultation_en.

[163] 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, p. 3-27.

[164] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55.

[165] See: https://ec.europa.eu/competition/consultations/2019_eeag/index_en.html.

[166] For instance, case M.9106 *REDEN H2 / BERROUTE*, Commission decision of 29 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9106 and case M.9438 *ENGIE/BPCE GROUP/PSFV PALMA DEL RIO*, Commission decision of 23 August 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9438.

[167] Cases SA.55761, SA.50920, SA.45765, SA.48601, SA. 51190, SA.49673, SA.49674, SA. 52085, SA. 52960, SA. 50807, SA. 49672, SA. 53347, SA. 54949, SA. 50199, SA. 55100, SA. 51192, SA. 52530, SA. 54375, SA. 54376, and SA. 51614.

[168] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628%2801%29.

investigation of ethanol producers suspected of having colluded to manipulate ethanol benchmarks published by the price reporting agency Platts.[169] If confirmed, such practices harm competition and undermine EU energy objectives by increasing prices for renewable energy, in this case biofuels used for transport.

IPCEI for batteries

On 9 December 2019, the Commission approved an Important Project of Common European Interest (IPCEI) concerning innovations in the batteries value chain (from materials, chemicals, cells, modules and packs to recycling and reuse), with seven participating Member States (Belgium, Finland, France, Germany, Italy, Poland and Sweden).[170] The project involves 17 direct participants, mostly industrial actors, including small and medium-sized enterprises. The direct participants will closely cooperate with each other and with over 70 external partners. Total State aid approved is nearly EUR 3.2 billion, with approximately EUR 5 billion in additional private investments. The completion of the overall project is planned for 2031 (with differing timelines for each sub-project).[171]

E-mobility

A competitive market for charging stations is important to ensure the take-up of electric vehicles and encourage the move away from fossil fuels.

In 2019, the Commission approved E.ON's acquisition of Innogy subject to E.ON discontinuing the operation of charging stations located on German motorways where the merger would otherwise have removed one of the few alternatives available to drivers. [172]

In 2019, the Commission approved EUR 195 million of additional public support until the end of 2022 for electric buses and charging infrastructure in Germany.[173] Moreover, the Commission approved EUR 430 million in public support to retrofit diesel vehicles used in municipalities where the limits for NO_X emissions were exceeded in 2017.[174] Both types of measures are in line with the EU 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.

Addressing the costs of climate policies for energy-intensive users

State aid policy also addresses the cost that ambitious climate policies create for energy-intensive users and allows Member States to alleviate EU industries' loss of competitiveness resulting from such costs.

In 2019, the Commission approved five schemes in Belgium, Lithuania, Poland, Slovakia and

[169] Case AT.50054 – Abengoa Alcogroup.

[170] See: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705.

[171] IPCEIs are large cross-border, integrated projects that often entail significant risks, which private investors are not willing to take on by themselves. In such cases, public support from several EU Member States may be necessary to fill the financing gap to overcome market failures and allow such projects to see the light of day. Crucially, these projects must generate positive spillover effects across the entire EU, not limited to the participating countries.

[172] 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.

[173] Budget increase and prolongation of scheme SA.48190 (2017/N) *Germany - Support scheme for the acquisition of electric buses for urban public transport*, Commission decision of 26 February 2018. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48190.

[174] 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. The amendment introduced, inter alia, more flexible concept of eligible municipalities.

Slovenia, which partially exempt energy-intensive users from electricity charges aimed at financing renewables or combined heat and power support schemes. Furthermore, the Commission opened a formal investigation into Poland's plan to partially exempt energy-intensive users from the charges used to finance the energy capacity mechanism introduced in 2018.

Reduction of environmental emissions

On 5 April 2019, the Commission sent a Statement of Objections to *BMW*, *Daimler* and *VW* (Volkswagen, Audi, Porsche) informing them of its preliminary view that they have breached EU antitrust rules from 2006 to 2014 by colluding to restrict competition on the development of technology to clean the emissions of petrol and diesel passenger cars.[175] The Commission's preliminary view was that BMW, Daimler and VW participated in a collusive scheme, in breach of EU competition rules, to limit the development and roll-out of emission cleaning technology for new diesel and petrol passenger cars sold in the EEA. If confirmed, the car manufacturers' behaviour aimed at restricting competition on innovation for two types of emission cleaning systems and in doing so, denied consumers the opportunity to buy less polluting cars, despite the technology being available to the manufacturers. The collusion is suspected to have occurred in the framework of the car manufacturers' "circle of five" technical meetings.

On 26 September 2019, the Commission approved a Czech scheme providing aid to installations generating electricity from waste heat and from mining gases.[176] The scheme contributes to resource efficiency by reducing the consumption of primary energy sources used for electricity production. Furthermore, without their utilisation for the production of electricity, the energy potential of both mining gases and waste heat would remain unused and by-products of other economic activities (in particular mining and industrial processes) would be released in the atmosphere. Moreover, on 25 November 2019 the Commission approved a scheme supporting the construction and operation of a high-efficient cogeneration plant in Bulgaria.[177] The plant will produce heat and electricity using fuel derived from unrecyclable municipal waste.

Ensuring reliable energy supplies

Capacity mechanisms are measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. Capacity mechanisms are designed to support investment to fill expected capacity gaps and ensure security of supply. Typically, on top of income obtained by selling electricity on the market, capacity mechanisms offer capacity providers additional rewards in return for maintaining existing capacity or investing in new capacity needed to guarantee security of electricity supply.

However, capacity mechanisms cannot substitute electricity market reforms at national and EU levels. The new electricity market regulation[178] requires Member States planning to introduce capacity mechanisms to present a market reform plan to address regulatory and other failures that undermine investment incentives in the electricity sector. The regulation

[175] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008.

[176] Case SA.35179 Czech Republic – *Promotion of electricity from secondary sources,* Commission decision of 26 September 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35179.

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

[178] Regulation (EU) 2019/943 of the European Parliament and the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.06.2019, p.54.

will also prevent high-emission generation capacity from participating in capacity mechanisms.

In 2019, the Commission issued two decisions related to capacity mechanisms in Italy[179] and the UK,[180] which take into account the provisions of the electricity market regulation on capacity mechanisms.

Italy decided to implement the CO_2 emission limits prescribed by the regulation before they become compulsory. Moreover, Italy introduced measures aimed at fostering new entry to allow greener generation capacity and other technologies, such as demand response and storage, to gradually replace existing and more polluting power plants. The Commission concluded that the measure would continue to ensure security of supply and further increase the level of environmental protection without unduly distorting competition in the Single Market.

In addition, the Commission assessed a number of improvements to the UK capacity mechanism for the future, considering recent market and regulatory developments (including the entry into force of the new electricity market regulation), and other issues identified during the UK's five-year review of the capacity market. These improvements include notably the lowering of the minimum-capacity threshold for participating in the auctions, the access to long-term contracts to all capacities meeting certain investments thresholds, as well as direct participation of foreign capacity. The British capacity mechanism originally received State aid clearance in 2014. In 2018, the General Court annulled the 2014 Commission decision on procedural grounds. The Commission appealed the General Court's judgment, but this appeal did not suspend the effects of the ruling. In order to give effect to the judgment and since the UK expressed its intention to maintain the scheme, the Commission, in February 2019, opened an in-depth investigation to reassess the compatibility of the scheme with EU State aid rules. The Commission's investigation confirmed that the British Capacity Market scheme complies with EU State aid rules.

Finally, in 2019 the Commission adopted three decisions concerning aid measures granted to LNG terminals in Croatia,[181] Lithuania[182] and Poland[183], which will greatly contribute to the security and diversification of gas supplies in the EU.

Effective competition in energy markets

The objective of competition law enforcement in the energy sector is to strengthen and integrate the principles outlined in sector-specific regulation to create a well-functioning unified market, where energy can be exchanged freely and securely across the EU, and where all related services are provided at competitively.

In 2019, antitrust enforcement in the energy sector focused on the further investigation of a range of cases, as well as monitoring the implementation of commitments in a number of cases adopted in 2018.

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179 Case: SA.53821 (2019/N) *Italy - Modification of the Italian capacity mechanism*, Commission decision of 21 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53821.

180 Case: Aid SA.35980 (2018/C) *United Kingdom - Electricity Market Reform: Capacity Mechanism* Commission decision of 15 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35980.

181 Case SA.51983 *Krk LNG Terminal/Croatia*, Commission decision of 31 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51983.

182 Case SA.53074 *Klaipėda LNG terminal*, Commission decision of 19 September 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53074.

183 Case SA. 50905 *Extension of the LNG Terminal in Swinoujscie*, Commission decision of 18 March 2019.

The Commission further assessed commitments proposed by *Transgaz*, the Romanian gas network operator to ensure that commercially meaningful capacities of gas produced in Romania could be freely exported to other Member States.[184] The commitments, originally proposed and market tested in 2018, aim to address the Commission's concerns that Transgaz hindered the free flow of natural gas from Romania to other Member States. Romania has considerable gas production and is centrally located in the region. The Commission preliminary concluded in 2018 that Transgaz' behaviour may have artificially segmented the internal market in contravention of Article 102 TFEU.

Competition enforcement in 2019 also focused on ensuring that all market players can compete on fair and equal terms and that alternative suppliers are not subject to abusive conduct by incumbent operators. State-owned energy provider *Bulgarian Energy Holding (BEH)*, active in the gas supply market and controlling the Bulgarian gas transmission network, was fined for blocking competitors' access to key gas infrastructure in Bulgaria.[185] The aim of the Commission's intervention was to enable competitors to enter the Bulgarian gas supply market and compete with BEH, bringing gas prices down and ensuring the integration of the Bulgarian gas market with neighbouring markets. On 1 March 2019, BEH appealed against the Commission decision.[186] The proceedings before the General Court are pending.

In the *LNG markets* case[187], the Commission opened a formal investigation in June 2018 to assess whether the long-term agreements of Qatar Petroleum, the largest supplier of LNG to the EU, contain territorial restrictions. Whilst LNG cargos can in theory move freely on a world-wide basis, the Commission continues to investigate whether market segmentation occurs that could prevent the full use of LNG terminals.

In the electricity markets, issues arose in particular with regard to the curtailment of interconnector capacity for cross-border flows following increased domestic electricity production from renewable sources. This was addressed in the decision adopted in the *DE-DK Interconnectors case* late in 2018,[188] which required the German network operator *TenneT* to enable imports of electricity from Denmark into Germany via interconnectors linking the two countries. In 2019, the Commission monitored the implementation of the commitments guaranteeing that 75% of the electricity interconnectors' capacity are available for trade.

The energy sector has also seen intense mergers and acquisition activity in 2019. In the case *RWE/E.ON Assets*,[189] 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 in scope and largely composed of nuclear assets which are due to be decommissioned by 2022.

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184 Case AT.40335 *Romanian gas interconnectors*, Commission decision of 1 June 2017. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1501.

185 Case AT.39849, BEH Gas. For further information see IP/18/6846, Commission decision of 17 December 2018. See: https://ec.europa.eu/commission/presscorner/detail/fr/IP_18_6846.

186 Case AT.39849 *BEH gas.* See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39849.

187 Case AT. 40416 *LNG supply to Europe*, Commission decision of 21 June 2018. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40416.

188 Case AT. 40461 DE/DK Interconnector, For further information see IP/18/6722 of 7 December 2018. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40461.

189 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.

The *RWE/E.ON Assets* case was part of a complex asset swap where, in exchange for its generation assets, *E.ON* acquired *Innogy*,[190] an RWE subsidiary active in the distribution and retail sales of gas and electricity. The Commission reviewed the proposed merger, which could potentially have lessened competition in a number of Member States. To obtain the Commission's approval, E.ON committed to divest some of its energy retail businesses in Czechia, Germany and Hungary. These commitments will preserve competition and ensure a genuine choice and fair energy prices for households as well as businesses.

On 7 August 2019, the Commission opened an in-depth investigation to assess the proposed acquisition of *Grupa Lotos* by *PKN Orlen*[191] under the EU Merger Regulation. The Commission is concerned that the merger may reduce competition in the supply of fuels and related markets in Poland and neighbouring countries. PKN Orlen and Grupa Lotos are two large Polish integrated oil and gas companies. They are both mostly active in Poland, where they own the only two existing refineries, but they also have activities in several other Central and Eastern European countries as well as in the Baltic states.

2. INFORMATION AND COMMUNICATION TECHNOLOGIES AND MEDIA

Overview of key challenges in the sector

In 2019, competition policy enforcement continued to contribute to the implementation of the Digital Single Market Strategy[192] by carrying out a number of investigations in the information, communication and media sectors.

Contribution of EU competition policy to tackling the challenges

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

On 5 April 2019, the Commission addressed a Statement of Objections to *Valve* – owner of *Steam*, the world's largest PC video game distribution platform – and five PC video game publishers – *Bandai Namco*, *Focus Home*, *Koch Media*, *Capcom* and *ZeniMax* – concerning potentially illegal bilateral agreements.[193] The Commission is concerned that Valve and the five PC video game publishers agreed, in breach of EU antitrust rules, to use geo-blocked activation keys to prevent cross-border sales, including in response to unsolicited consumer requests (so-called passive sales) of PC video games from several Member States (that is to say Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and in some cases Romania). These agreements may have prevented consumers from buying cheaper games available in other Member States. In addition, four of the video game publishers may have infringed EU competition rules by including contractual export restrictions in their agreements with a number of distributors other than Valve. These distributors were prevented from selling the relevant PC video games outside the allocated territories, which could cover one or more Member States. These practices may have prevented consumers from purchasing and playing PC video games sold by these distributors either on physical media, such as DVDs or through downloads.

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190 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.

191 Case M.9014 *PKN ORLEN/GRUPA LOTOS*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9014.

192 Communication of 6 May 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015)192 final. See: https://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com2015-192-final.

193 Cases AT.40413 - *Focus Home*, AT.40414 - *Koch Media*, AT.40420 - *ZeniMax*, AT.40422 - *Bandai Namco* and AT.40424 - *Capcom*. See: https://europa.eu/rapid/press-release_IP-19-2010_en.htm.

On 17 July 2019, the Commission opened a formal antitrust investigation to assess whether *Amazon*'s use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.[194] Amazon has a dual role as a platform: (i) the company sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers. When providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information about marketplace sellers, their products and transactions on the marketplace. The Commission is currently carrying out its in-depth investigation as a matter of priority to determine whether there has been a breach of EU competition rules by Amazon.

In March 2019, the Commission fined *Nike* EUR 12.5 million for preventing traders from selling merchandising products (e.g. mugs, clothing, etc.) carrying logos or images of some of the EU's best-known football clubs and federations to other countries within the EEA.[195] 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.

In July 2019, *Sanrio* was fined EUR 6.2 million for restrictions concerning products featuring Hello Kitty and other characters owned by the company.[196] Sanrio used a similar but distinct combination of direct and indirect measures to restrict cross-border sales. Notably, Sanrio limited the languages licensees could use on the merchandising products.

The *Nike* and *Sanrio* decisions confirm that, in principle, non-exclusive licensees cannot be prevented from selling licensed products in a different country. Consumers should be able to shop around the EEA for the best deals. Nike and Sanrio both acknowledged their respective infringements and to a large extent cooperated with the Commission beyond their legal obligation to do so. The cooperation led to a 40% reduction of their respective fines. A third investigation, also launched in 2017, concerning the licensing practices of *Universal Studios*, owner of among others the rights for the Minions and Jurassic World film series, was concluded by a decision fining NBC Universal EUR 14.3 million for contractual restrictions in non-exclusive licensing agreements regarding the sale of merchandise products featuring NBC Universal's films.[197]

The pay-TV investigation, opened in 2014, was closed in 2019.[198] The investigation related to certain contractual clauses in the licensing agreements concluded between *Sky UK* and six major film studios (*Disney*, *Fox*, *Paramount*, *NBC Universal*, *Sony* and *Warner Bros*). In a Statement of Objections addressed to Sky and the six Hollywood film studios in 2015, the Commission took the preliminary view that such clauses restricted Sky UK's (and in some

[194] Case AT.40462 - *Amazon Marketplace*, Commission decision of 17 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40462.

[195] 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.

[196] 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.

[197] Case AT.40433 *Licensed merchandise Universal Studios*, Commission decision of 25 March 2019. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1646.

[198] Case AT. 40023 *Cross-border access to pay-TV - NBC Universal / Paramount Pictures C / SKY (UK) / Sony Pictures Entertainment / The Walt Disney Company / Twentieth Century Fox Int Ltd / Warner Bros Entertainment UK Ltd*, Commission decision of 7 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023.

cases other broadcasters') ability to accept unsolicited requests from consumers located outside the UK and Ireland and, therefore, violate EU antitrust rules.

In 2016, Paramount offered commitments, which the Commission accepted and made legally binding in the same year. The commitments provide that throughout the EEA Paramount shall remove the contractual restrictions from existing pay-TV licensing agreements and not (re)introduce them for a period of at least five years. Canal+, a French pay-TV broadcaster, appealed against this decision. In December 2018, the General Court[199] dismissed the appeal and held that the Commission acted within the limits of Article 9 of Regulation 1/2003 and that the Commission's decision respected the principle of proportionality. Furthermore, the General Court concluded that the passive sales restrictions in Paramount's licensing agreements constituted competitive restrictions by object. According to the judgment, the removal of these restrictions is consistent with the essential EU objective of creating an internal market. In February 2019, Canal+ appealed the judgment of the General Court. The proceedings before the Court of Justice are pending.

In November and December 2018, Sky UK and four US film studios, namely *Disney*, *NBC Universal*, *Sony*, and *Warner Bros*., also offered commitments to address the Commission's concerns. Like in the Paramount commitments, the five companies offered to remove throughout the EEA the contractual restrictions from existing pay-TV licensing agreements and not to (re)introduce them for a period of five years. The commitments cover all future and current subsidiaries of the companies concerned[200]. On 7 March 2019, after having conducted a market test, the Commission adopted a decision making the commitments legally binding on Sky, Disney, NBC Universal, Sony, and Warner Bros[201]. Following the completion of Fox's acquisition by Disney, on 20 March 2019, Fox is bound by the commitments as well.

Antitrust enforcement in technology markets

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

[199] Case T-873/16 *Groupe Canal + v Commission*, judgment of 12 December 2018, ECLI:EU:T:2018:904. See: http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-873/16.

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

[201] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1590.

The Google Search (AdSense) case

On 20 March 2019, the Commission fined *Google* EUR 1.49 billion for breaching EU antitrust rules.[202] Google abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites ("publishers") which prevented Google's rivals from placing their search adverts on these websites.

Through *AdSense for Search*, Google provides search adverts to owners of "publisher" websites, such as newspaper websites, blogs or travel sites aggregators. Google is an intermediary, like an advertising broker, between advertisers and owners of publisher websites that want to profit from the space around their search results pages. Therefore, AdSense for Search works as an online search advertising intermediation platform.

Google is by far the strongest player in online search advertising intermediation in the EEA, with a market share above 70% from 2006 to 2016. In 2016 Google also held market shares generally above 90% in the national markets for general search and above 75% in most of the national markets for online search advertising, where it is present with its flagship product, the Google search engine, which provides search results to consumers.

It is not possible for competitors in online search advertising such as Microsoft and Yahoo to sell advertising space in Google's own search engine results pages. Therefore, third-party publisher websites represent an important entry point for these other suppliers of online search advertising intermediation services to grow their business and try to compete with Google.

Google's provision of online search advertising intermediation services to the most commercially important publishers took place via agreements that were individually negotiated. Following an in-depth analysis of hundreds of such agreements, the Commission concluded that Google infringed EU competition law by abusing its dominant position in the market for online search advertising intermediation in the EEA by:

a) requiring publishers not to source online search ads from Google's competitors ("exclusivity");

b) requiring publishers to reserve the most prominent space on their search results pages for a minimum number of search ads from Google and preventing them from placing competing search ads above or next to Google search ads ("premium placement/minimum Google ads");

c) requiring publishers to obtain Google's approval before making any change to the display of competing search ads ("authorising equivalent ads").

Based on a broad range of evidence, the Commission found that Google's conduct harmed competition and consumers, and stifled innovation. Google's rivals were unable to grow and offer alternative online search advertising intermediation services to those of Google. As a result, owners of publisher websites had limited options for monetizing space on these websites and were forced to rely almost solely on Google.

Google ceased the illegal practices a few months after the Commission issued in July 2016 a Statement of Objections concerning this case. The decision requires Google to, at a minimum, stop its illegal conduct, to the extent it has not already done so, and to refrain from any measure that has the same or equivalent object or effect.

The Commission also continued monitoring compliance with its decisions in the *Google Android*[203] and *Google Search (Shopping)*[204] cases. Moreover, the Commission continued to investigate the other vertical cases concerning the company, *Google Local*[205] and *Google Jobs*.[206]

The Commission's decision in the Google Search (Shopping) case required Google to apply the same processes and methods to position and display rival comparison shopping services in

[202] 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.
[203] Case AT.40099 *Google Android*, Commission decision of 18 July 2018. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099.
[204] Case AT.39740 *Google Search (Shopping)*, Commission decision of 27 June 2017. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.
[205] Case AT.40585 *Google Local*.
[206] Case AT.40592 *Google Jobs*.

Google's search results pages as for its own comparison shopping service. To comply with the decision, Google put in place a mechanism where the Shopping Unit displayed on Google's general search results pages is maintained and both rival comparison shopping services and Google Shopping Europe are allowed to participate in the Shopping Unit based on an auction mechanism. Google Shopping now also holds separate accounts in Europe.

The take-up of the compliance mechanism has substantially increased. In June 2018, only one third of Shopping Units included at least one of rival comparison shopping service, and around 6% of clicks in the Unit went to one of those rivals. In November 2019, about 81% of Shopping Units include at least one of rival comparison shopping services, and about 46% of clicks go to one of those rivals. Google also implemented several changes aimed at improving the effectiveness of the mechanism. The company tightened the conditions for participating in the auction, to require comparison shopping services to have a sufficient range of merchants, and a set of core comparison functions.

Another important issue with the compliance mechanism raised by market participants was that it did not give sufficient prominence to the comparison function of comparison shopping services. As the most prominent links in the Shopping Unit lead directly to the websites of merchants, rival comparison shopping services had difficulties to show their main benefit to users. To address this, and preserve the incentives of merchants to work with rivals, Google introduced a comparison shopping toggle in the Shopping Unit, which allows switching between links going to websites of merchants and links going to websites of rival comparison shopping services.

The Commission is also monitoring compliance with the decision in the Google Android case in relation to a choice screen for search engines and browsers on Android devices. In April 2019, Google implemented a choice screen for existing devices, shown to users the first time they open the Play Store, allowing the user to install additional search and browser apps. Later in 2019 Google announced that, as of 1 March 2020, it will put in place a choice screen for new devices that will let consumers choose which search provider they want on their Android phone. The consumer's selection will replace Google Search on key entry points on the mobile phone.

The Commission's experience shows that a choice screen can be an effective way to ensure competition. In the Google Android case, it would have the potential to give users a real choice of how they search on Android devices and to allow Google's rivals to be chosen upfront by users in cases where Google has been pre-installed on a smart mobile device. The Commission will continue to actively monitor Google's compliance with the decision.

Antitrust enforcement in the telecommunications sector

On 18 July 2019, the Commission fined *Qualcomm* EUR 242 million for abusing its dominant position in the worldwide market for UMTS (so-called 3G) compliant chipsets, in breach of EU antitrust rules.[207] In the decision, the Commission 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 long-run average incremental costs (LRAIC), with the intention of eliminating Icera. Icera was a UK-based start-up and Qualcomm's main competitor at the time in the relevant segment of the UMTS chipset market. The

[207] 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.

Commission's findings were based on the so-called AKZO II-test[208], according to which prices above average variable cost but below average total cost are anticompetitive if they are part of a plan to eliminate a competitor.

The Commission's investigation confirmed the existence of predatory sales on the basis of (i) a price-cost test based on prices effectively paid by Huawei and ZTE as well as a cost benchmark based on LRAIC, and (ii) contemporaneous internal evidence demonstrating Qualcomm's exclusionary intent vis-à-vis Icera. The internal evidence showed that Qualcomm's predatory pricing practices took place when Icera was increasing its market traction as a viable supplier of UMTS chipsets. Qualcomm's predatory sales were targeted at two strategically important customers, Huawei and ZTE. The predation also aimed at protecting Qualcomm's strong position in the high-volume segment of chipsets for use in mobile phones, which Icera was planning to enter once it had gained a foothold in the market. The Commission concluded that Qualcomm did not provide a valid objective justification or efficiency defence for its conduct.

The Broadcom case

On 16 October 2019, the Commission issued a decision pursuant to Article 8(1) of Regulation 1/2003 ordering Broadcom to stop applying certain provisions contained in agreements with six of its main customers.[209] The decision constitutes 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. The Commission concluded that, *prima facie*, Broadcom abused its dominant position in the markets of systems-on-chip for (i) TV set-top boxes, (ii) fibre modems, and (iii) xDSL modems by entering into agreements with manufacturers of TV set-top boxes and modems that contain exclusivity-inducing provisions. Furthermore, it concluded that serious and irreparable damage to competition would have likely materialised in the absence of interim measures. In particular, the Commission concluded that an urgent intervention was warranted to prevent competitors from being marginalised or exiting the markets.

In 2019 the Commission continued its investigation into a mobile network-sharing agreement between the two largest operators in Czechia, *O2/CETIN* and *T-Mobile*. On 7 August 2019, the Commission adopted a Statement of Objections against these operators.[210] The Commission preliminary view is that the network-sharing arrangement is anti-competitive because it is likely to remove the incentives of the two mobile operators to improve their networks and services. The Commission assessed a number of specific circumstances in the Czech case: (i) the Czech mobile communication market is highly concentrated with no likely market entry, (ii) the sharing parties are the two largest operators with their networks serving approximately 75% of the subscribers and (iii) the network sharing is very far-going in terms of technology covered (2G, 3G and 4G), duration, territorial scope (nationwide with the exception of Prague and Brno) and population covered (83%). The Commission's preliminary analysis is in line with the principles applied by the Body of European Regulators for Electronic Communications (BEREC) in its common position on mobile infrastructure sharing of 13 June 2019.[211] The network sharing discussed in the Statement of Objections does not concern the 5G technology.

In its judgments of 28 June 2016[212] the General Court confirmed the unlawfulness of the non-

[208] Case C-62/86, *Akzo v Commission*, judgment of 3 July 1991, ECLI:EU:C:1991:286.
[209] 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.
[210] Case AT. 40305 *Network sharing – Czechia*, Commission decision of 7 August 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40305.
[211] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5110.
[212] Cases T-208/13, *Portugal Telecom SGPS, SA v Commission* and T-216/13, *Telefónica, SA v Commission*, judgments of 28 June 2016, ECLI:EU:T:2016:368 and ECLI:EU:T:2016:369.

compete clause between *Telefónica* and *Portugal Telecom* (currently *Pharol*) and upheld the Commission's reasoning in its decision of 23 January 2013.[213] However, the General Court annulled the fines. In accordance with the judgments the Commission needs to assess whether there were any services for which potential competition between the parties was ruled out due to insurmountable barriers to entry and exclude these services from the calculations. Telefónica appealed the parts of the General Court's judgment which did not concern the fine. On 13 December 2017, the Court of Justice issued its judgment rejecting Telefónica's appeal, thereby implicitly confirming the Commission's decision. In 2019, the Commission continued its investigation started after the judgment with the intention to adopt a new decision with recalculated fines.

Merger review in ICT and media

In the telecommunications sector, the Commission cleared on 15 July 2019 the acquisition of *DNA* by *Telenor*.[214] 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 the upstream markets for wholesale international roaming and wholesale mobile and fixed call termination services on the one hand, and the downstream markets for retail mobile and fixed telecommunications services on the other.

The Commission approved on 18 July 2019, after an in-depth investigation, the acquisition by *Vodafone* of *Liberty Global's cable business* in Czechia, Germany, Hungary and Romania, subject to remedies.[215] Vodafone and Liberty Global's subsidiary (Unitymedia) offer fixed broadband services in Germany based on their own non-overlapping cable networks. Vodafone also serves areas served by Unitymedia, via wholesale access to Deutsche Telekom's network and the transaction would have eliminated that important competitive constraint. In addition, the merged entity's increased market power could have hindered the TV broadcasters' position, leading to quality degradation of the TV offer to final viewers in Germany and hindering the broadcasters' ability to provide additional, innovative services and advanced functionalities. To address these concerns, Vodafone committed to grant Telefónica access to the merged entity's cable network in Germany. Moreover, Vodafone committed not to contractually restrict the possibility for broadcasters to distribute their content via streaming over the internet (known as over-the-top or OTT services), not to increase the feed-in fees paid by Free-to-Air (FTA) broadcasters for the transmission of their linear TV channels via Vodafone's cable network in Germany. Finally, Vodafone committed to continue carrying the Hybrid Broadcast Broadband TV-signals (HbbTV) signal of FTA broadcasters. This signal allows TV customers to directly connect to the broadcasters' interactive services.

On 20 August 2019, the Commission cleared the acquisition of *Kathrein's* antenna and filter assets by *Ericsson*.[216] Kathrein is a global provider of communication technologies solutions

[213] Case AT. 39839 *Telefónica/Portugal Telecom*, Commission decision of 23 January 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39839.
[214] 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.
[215] 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.
[216] Case M.9332 *Ericsson / Kathrein Antenna and Filter Assets*, Commission decision of 20 August 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9332.

while Ericsson is a global provider of network equipment and software, as well as services for network and business operations. The transaction raised no competition concerns neither in relation to the bundling of passive antennas and filters, and radio access network (RAN) equipment to mobile network operators, nor in relation to the supply of antenna modules procured by RAN equipment suppliers.

In the IT sector, on 27 June 2019, the Commission approved the acquisition of *Red Hat* by *IBM*, both providers of IT solutions to business customers.[217] Red Hat's main activities relate to open-source software and support services. IBM is active in a wide variety of IT solutions, namely enterprise IT software, hardware and services. 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.[218] Moreover, the Commission concluded that there would be no risk that the merged entity would shut out or marginalise its competitors by bundling or degrading interoperability with Red Hat's flagship product Red Hat Enterprise Linux. The Commission found that any strategies by the merged entity to degrade access to Red Hat's source code and/or influence the development of specific open source projects would trigger strong adverse counter-reactions from the open source community of developers that would negatively affect Red Hat's products. Finally, IBM's intention to use Redd Hat's the complementary capabilities further develop and offer open hybrid cloud solutions would increase choice for enterprise customers who could more easily shift workloads between on-premise servers and multiple public and private clouds.

On 30 October 2019, the Commission approved the acquisition of *Symantec's Enterprise Security Business (SESB)* by *Broadcom*.[219] SESB offers a mix of products, services and solutions to provide enterprises with advanced threat protection and information protection. Broadcom is a technology company that designs, develops and supplies a broad range of semiconductors as well as infrastructure software solutions. The Commission concluded that the proposed acquisition would not raise any competition concerns given the limited horizontal overlaps between the merging firms' activities. The Commission excluded any competition concerns arising from vertical or conglomerate relationships between the companies.

On 19 December 2019, the Commission cleared the acquisition of *Mellanox* by *NVIDIA*.[220] Mellanox supplies network interconnect products and solutions that facilitate efficient data transmission within datacentres, based on the Ethernet and InfiniBand protocols. NVIDIA supplies visual computing based on graphics processing unit (GPU), as well as accelerated computing platforms for gaming, professional visualisation, datacentre and automotive applications. The Commission concluded that the proposed acquisition would raise no competition concerns, because the companies mainly supply complementary products and they will not be able to leverage their respective positions into neighbouring markets.

In the media sector, on 12 November 2019, the Commission authorised *Telia's* acquisition of *Bonnier Broadcasting*. [221] The approval is conditional on full compliance with commitments

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[217] 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.

[218] Middleware is software used for making and operating enterprise application software, i.e. business-oriented tools, such as online payment processing. System infrastructure software allows companies to configure, control, automate and share the use of hardware resources (e.g. servers) across enterprise application software.

[219] 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.

[220] Case M.9424 – *NVIDIA / Mellanox*, Commission decision of 19 December 2019. See: https://ec.europa.eu/competition/mergers/cases/decisions/m9424_778_3.pdf.

[221] Case M.9064 – *Telia Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019. See:

offered by Telia. Following an in-depth investigation, the Commission had concerns that the transaction would have significantly reduced competition in Finland and Sweden. Telia's competitors in TV distribution risked being shut out from the market by not having access to the merged entity's free-to-air (FTA) TV channels, basic pay-TV channels, and premium pay-TV sports channels. Furthermore, competitors in telecom services risked being excluded from the market by not gaining access to the merged entity's streaming services, namely advertising video on demand (AVOD) and subscription video on demand (SVOD). Finally, Telia's competitors in telecom and TV distribution risked being shut out from the market by not gaining access to advertising space on the merged entity's TV channels. To address these concerns, Telia offered a package of commitments applicable in Finland and Sweden. The package includes a commitment to license free-to-air channels, basic pay-TV channels, and premium pay-TV sports channels on fair, reasonable and non-discriminatory (FRAND) terms. Telia also committed to license standalone OTT rights to preserve 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 and the protection of confidential information concerning rival TV broadcasters, TV distributors and telecom providers.

State aid enforcement in ICT and media

In its policy initiative "*A Europe fit for the digital age*", the Commission defines digital developments as one of its main priorities for the next Commission mandate.[222] To achieve technological leadership and strategic autonomy, an integrated EU-wide digital eco-system is necessary for the Single Market to deliver its full benefits for firms and citizens. In this process, digital infrastructure is a key digitalisation driver. It is therefore essential to invest in an appropriate broadband infrastructure that meets the new needs for very high digital speeds, capacities, and quality. The Commission anticipated these developments in its "Gigabit Communication"[223] of 2016, in which the roll-out of very high capacity networks was set as one of the Commission's strategic priorities. Private funding may be expected to cover most investments in broadband infrastructure. Public funding will be required to ensure that rural, remote and other underserved areas, where private providers are unlikely to invest, can also benefit from new technologies. However, it must be ensured that public subsidies do not crowd out private investment and that distortion of competition is limited to a minimum.

In 2019 the Commission adopted a number of cases authorising State aid for broadband measures[224] which take into account recent developments and recognise the need for very high capacity network infrastructure.

3. FINANCIAL SERVICES

Overview of key challenges in the sector

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9064.

222 See: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_273.

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

224 Case SA.49935 Superfast Broadband (SFBB) Project – Greece, Commission decision of 7 January 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49935. Case SA.54472 National Broadband Plan – IE, Commission decision of 15 November 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54472. Case SA.53925 Broadband Scheme for NGA White and Grey Areas – Spain, Commission decision of 10 December 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53925. Case SA.54668 Bavarian gigabit scheme – DE, Commission decision of 29 November 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54668.

EU competition policy with its three enforcement instruments – antitrust, merger and State aid control – plays an important role in ensuring that competition takes place on fair and equal terms throughout the financial sector and that disruptive technologies are developed and applied for the benefit of consumers and businesses alike. Innovative technology should never be used to erect barriers in emerging markets.

Financial services is a sector undergoing rapid and profound change. New players in financial services like Apple Pay have already entered payments markets and a number of companies providing FinTech services[225] are gaining ground in many areas. Nevertheless, established players like card schemes in payments, banks for deposits and credit services, as well as traditional insurers are still indispensable. In 2019, the Commission continued to ensure fair competition in all these markets for the benefits of consumers and businesses.

Beyond traditional financial services, disruptive change may be just around the corner. Although some of the entries of digital enterprises in the financial services markets may have positive effects for competition in the internal market, important risks may arise. To this end, the Commission has started investigations into possible anti-competitive conduct related to restrictions on key technologies on mobile devices crucial for new digital payment solutions. Key concerns relate to the possibility of large technology companies that could use their data-based market power in some markets to act as gate keepers restricting access for potential competitors in emerging markets.

The development of cryptocurrencies and the announcement by Facebook and others of plans to develop a new private digital currency (Libra stablecoins) raises a number of regulatory challenges, including possible competition issues. DG Competition is therefore closely analysing developments in this area, and works in cooperation with other services of the Commission to make sure that new technologies will be used for the benefit of all citizens and businesses and without jeopardising financial stability.

While new entrants challenged established players, the banking sector in the EU stabilised further in 2019. The implementation of the legislative initiatives to increase financial stability, including the gradual phase-in of minimum requirement for banks' own funds and eligible liabilities (MREL),[226] is ongoing and capital buffers of banks are generally increasing, but the process will only be fully completed in a few years' time.

Banks have to cope with a variety of challenges. On top of new competitors and disruptive technologies, profitability in the sector is still low and many players are affected by the current interest rate environment and tight margins. In some Member States, high levels of non-performing loans (NPL) are also still an issue for certain banks. The Commission has constructively worked with several Member States in developing solutions and has taken several decisions to improve the situation while at the same time minimising potential negative impact on competition. However, NPL levels are still not back to pre-crisis levels in all Member States.

The further stabilisation of the banking sector can also be derived from the fact that Member States are increasingly working towards market-conform solutions for banks with capital needs. The Commission has to remain neutral as regards ownership and as long as

[225] Fintech refers to the integration of technology into offerings by financial services companies to improve their use and delivery to consumers. Fintech primarily works by unbundling offerings by such firms and creating new markets for them.

[226] Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms OJ, L 173/190, 12.6.2014 ("BRRD").

transactions are conducted in line with normal market practice no State aid issues arise. Economic activities of Member States that do not provide a selective advantage to individual players do not raise competition concerns. Overall, the application of State aid rules equally across all Member States has contributed to safeguarding the Union's financial stability and protection of competition at the same time.

Contribution of EU competition policy to tackling the challenges

Contribution of EU competition policy to innovation and fairness in payments

The Commission is currently assessing the implementation of the 2015 Interchange Fee Regulation (IFR).[227] To this end, the Commission commissioned a study in 2018. The study was finalised in December 2019.[228] The study collected and analysed comprehensive market information from all Member States. The study will serve as input in 2020 when the Commission will submit a Report to the European Parliament and to the Council on the application of the IFR.[229]

Antitrust and cartel investigations in the financial services sector

In 2019, the Commission concluded its investigation into Mastercard's cross-border acquiring rules, 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. On 22 January 2019, the Commission concluded that Mastercard's rules prevented retailers from benefitting from lower fees and restricted competition between banks cross border, in breach of EU antitrust rules. The infringement ended when Mastercard amended its rules in view of the entry into force of the Interchange Fee Regulation in December 2015. Since Mastercard cooperated with the Commission by acknowledging the facts and the infringements of EU competition rules following the Statement of Objections, the Commission granted Mastercard a 10% fine reduction. The Commission imposed a fine of EUR 570 million on Mastercard.[230]

In addition, the Commission concluded separate antitrust investigations into *Mastercard's, Visa Inc.'s* and *Visa International's multilateral interchange fees* (MIFs) applied to transactions in the EEA made with consumer debit and credit cards issued outside the EEA (inter-regional MIFs).[231] The Interchange Fee Regulation did not cap these MIFs. The Commission concluded that they represented a significant burden for merchants in the EU, increasing retail prices for all consumers.

Both Mastercard and Visa offered to reduce the current level of inter-regional MIFs to or below binding caps. For card payments carried out by the cardholder in a shop (card-present transactions), Mastercard and Visa committed to reduce inter-regional MIFs to 0.2% of the value of the transaction for debit cards and 0.3% of the value of the transaction for credit cards. For online payments (card-not-present transactions) the two companies offered to

[227] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (Text with EEA relevance), OJ L 123, 19.5.2015, pp. 1–15.
[228] See: https://ec.europa.eu/competition/publications/reports/kd0120161enn.pdf.
[229] See Article 17 of Regulation (EU) 2015/751.
[230] 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.
[231] 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.

reduce inter-regional MIFs to 1.15% of the value of the transaction for debit cards and 1.50% of the value of the transaction for credit cards. Moreover, Mastercard and Visa agreed to publish all inter-regional MIFs covered by the commitments in a clearly visible manner on their respective websites. To verify the appropriateness of the proposed commitments, the Commission consulted market participants between December 2018 and January 2019.[232] On 29 April 2019, the Commission adopted two decisions making the commitments offered by Mastercard and Visa legally binding under EU antitrust rules to address the Commission's competition concerns, effective within six months.[233]

In 2019, the Commission monitored and scrutinised Facebook's ongoing preparations for introducing the Libra stablecoin and the company's plans to introduce mobile wallets for payments and money transfers. The objective was to assess the risks Libra and stablecoins may pose for financial security and stability. The Commission also closely followed developments in mobile payment solutions, including mobile payments for physical goods and services in stores and online, to ensure that companies do not breach EU competition rules. These activities will continue in 2020.

The Commission continued to monitor in 2019 competition in capital markets, in particular focussing on the markets for market data where informal complaints regarding abusive licensing terms and high fees/prices persist. In 2019, the Commission also continued its monitoring of competition in the insurance sector.

In the field of motor insurance, the Commission opened a formal antitrust investigation to assess whether the conditions of access to the *Insurance Link* data pooling system administered by the association of undertakings, Insurance Ireland breach Articles 101 TFEU.[234] The Commission does not question that data pooling arrangements can contribute to effective competition. Participation in and access to a data pool by insurance service providers may directly benefit consumers in terms of ensuring more suitable products and competitive prices. The Commission's investigation in this case will assess, in particular, whether the conditions imposed on companies wishing to participate in and access the Insurance Link database may have had the effect of placing these companies at a competitive disadvantage on the Irish motor insurance market in comparison to companies already having access to the database.

As regards the credit sector, the Commission published a report on EU loan syndication and its impact on competition in credit markets.[235] The report explains how such syndicates are formed and operates. Given the importance of such syndicated loans in financing major infrastructure and innovative projects, the Commission closely monitored this market in 2019. The monitoring will continue in 2020.

On 16 May 2019, the Commission adopted two decisions concerning separate cartels in the Spot Foreign Exchange (FX) markets, imposing a total of EUR 1.07 billion in fines, accounting for nine settlements.[236] Both cartels concerned the trading of the eleven most liquid and traded world currencies (Euro, British Pound, Japanese Yen, Swiss Franc, US, Canadian, New Zealand and Australian Dollars, and Danish, Swedish and Norwegian

[232] See: http://europa.eu/rapid/press-release_IP-18-6655_en.htm.
[233] See: https://europa.eu/rapid/press-release_IP-19-2311_en.htm.
[234] Case AT. 40511 *Insurance Ireland: Insurance claims database and conditions of access*, Commission decision of 14 May 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40511.
[235] See: https://ec.europa.eu/competition/publications/reports/kd0419330enn.pdf.
[236] 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.

crowns). The Commission's investigation revealed that some individual traders in charge of Forex spot trading of these currencies at their respective banks exchanged commercially sensitive information such as outstanding customer orders, bid-ask spreads (that is to say prices) applicable to specific transactions, open risk positions and other details of their current or planned trading activities. The information exchanges, following the tacit understanding reached by the participating traders, enabled them to make informed decisions whether to sell or buy the currencies they had in their portfolios and when.

Moreover, these information exchanges allowed the traders to identify opportunities for coordination. All banks involved cooperated under the Commission's 2008 Settlement Notice. The decision *"Forex - Three Way Banana Split"* is addressed to five banks (*UBS, Barclays, RBS, Citigroup and JPMorgan)* and imposed a total fine of EUR 811,197,000 for an infringement which started on 18 December 2007 and ended on 31 January 2013. In that case, all banks cooperated both under the Settlement Notice and under the Leniency Notice qualifying either for a reduction of fines or (UBS) for immunity from fines.

The decision *"Forex- Essex Express"* is addressed to four banks (*Barclays, RBS, MUFG Bank* and *UBS)* and imposed a total fine of EUR 257,682,000 for an infringement which overall started on 14 December 2009 and ended on 31 July 2012. All banks involved in this case cooperated under the Settlement Notice, while three out of the four (UBS, RBS and Barclays) cooperated with the investigation under the Leniency Notice. Accordingly, RBS and Barclays benefited from reductions of their fines, while *UBS* qualified for immunity.

Merger investigations in the financial sector

The Commission continued to ensure that concentrations in the financial services sector do not lead to consumers paying higher prices or being offered less choice. In March 2019, the Commission intervened in the proposed merger between two leading insurance brokers, *Marsh* and *Jardine Lloyd Thompson*. The two companies were market leaders in the provision of services to airline companies and aerospace manufacturers that need to insure highly complex risks related to their activities; and the merger was likely to result in higher prices and reduced choice, which would ultimately have affected consumers. The Commission required the divestment of Jardine Lloyd Thompson's activities in the area of concern, ensuring the maintainance of the competitive environment.[237] Several other cases in insurance, banking and payments were deemed as not detrimental to competition and could be approved without requiring remedies.

[237] 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.

State aid investigations in the financial sector

The EU financial sector has largely overcome the financial crisis and overall, EU banks are in a more stable situation today. This development is reflected in the reduced number of State aid cases for banks. In 2019, there was only one direct support measure for a commercial bank in the EU that contained State aid, while other direct support measures were free of State aid.

The fact that State aid provided by Member States to banks is going down is a positive development. The one case that involved State aid in 2019 was liquidity support provided by Italy to *Cassa di Risparmio di Genova e Imperia* ("Banca Carige") in form of guarantees to newly issues liabilities.[238] Banca Carige pays a fee to the Italian State for the guarantee. The Commission's assessment showed that the measure is targeted, proportionate and limited in time and scope. The Commission has therefore concluded that this liquidity support is in line with EU rules, in particular its 2013 Banking Communication.

Certain banking cases the Commission assessed did not contain State aid.

On 5 December 2019, the Commission adopted a decision concluding that the recapitalisation of *German NordLB* was market conform. The Commission found that Germany's plans to strengthen the capital position of state-owned Norddeutsche Landesbank – Girozentrale (NordLB) did not include any State aid. The measures involved a direct investment of EUR 2.8 billion. In addition, the State of Lower Saxony plans to provide asset guarantees expected to result in EUR 0.8 billion capital relief for the bank, in return for corresponding market conform remuneration. The measures strengthen the bank's capital position and allow the investments needed to make the necessary structural changes and to downsize the bank, thereby ensuring that NordLB continues to operate profitably on the market. The Commission found that the planned measures were carried out on market terms, meaning that the State received a remuneration in line with what a private operator would also accept in the same circumstances. Therefore, the measures involve no State aid within the meaning of EU rules. The European Central Bank, as responsible supervisor, gave its approval to the plan on 29 November 2019. [239]

A second case of direct capital support for an individual bank involved the investment of *Romania in CEC Bank*.[240] Also in this case, the Commission found that the State, as the sole owner of CEC Bank, would carry out a capital injection in the bank at the same conditions that a private market operator would accept. Under EU State aid rules, interventions of a Member State on market terms does not constitute State aid and therefore fall outside of EU State aid control.

In addition, the Commission still deals with a very limited number of older cases such as *Dexia*.[241] In 2012, the Commission approved State aid to enable Dexia's orderly exit from the market while at the same time protecting financial stability. The decision ensured full-burden sharing of the existing shareholders and prevented a negative impact on competition because

[238] Case SA.52917(2019/N) *Liquidity support to Banca Carige - Cassa di Risparmio di Genova e Imperia*, Commission decision of 18 January 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52917.

[239] Case SA.49094(2019/N) *Market-conform measures for strengthening capital and restructuring of Norddeutsche Landesbank*, Commission decision of 5 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49094.

[240] SA.53869(2019/N) *Market-conform recapitalisation of CEC Bank*, Commission decision of 29 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53869.

[241] SA.33760 *Additional measures to restructuring of Dexia - by France - Guarantee (C)*, Commision decsion of 31 May 2012. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33760.

Dexia will not conduct any new business while running down its portfolio. Given the long duration of some of the remaining assets, the Commission allowed in 2019 that senior debt guarantees by France and Belgium may be prolonged beyond 2021 while ensuring that there would be full burden sharing of subordinated debtholders.[242]

In addition to cases involving individual support for banks, the Commission has decided to prolong a number of schemes set up to ensure orderly liquidation of small banks, credit unions or other credit institutions in Croatia,[243] Denmark,[244] Greece,[245] Ireland,[246] and Poland.[247] The objective of these schemes is to safeguard financial stability when a covered institution that does not fall within the scope of the EU Bank Recovery and Resolution Directive [248] becomes unable to meet regulatory requirements. The terms under which these kind of schemes have been accepted ensure that the aid is limited to the minimum necessary for an orderly winding-up, and that no buyer gains an undue economic advantage through the acquisition of under-priced assets and liabilities.

In spite of an overall positive lookout for the financial sector, high levels of non-performing loans (NPL) is a legacy problem especially in some Member States. In 2019 the Commission approved the *Hellenic Asset Protection Scheme* ("Hercules") as free of State aid which is targeted to address the NPL issue in Greece.[249] This scheme is an example of how Member States can help banks clean up their balance sheets without granting aid or distorting competition. Such State guarantees apply only to senior tranches under certain conditions which are remunerated on market terms. The Commission also approved a scheme to support households at risk of losing their home due to difficulties in mortgage repayments.[250] This scheme sets strict eligibility criteria in terms of the value of the primary residence and income of the borrower to ensure it is targeted at those in need.

In 2019, the Commission also prolonged the Italian guarantee scheme for the securitisation of non-performing loans (*Fondo di Garanzia sulla Cartolarizzazione delle Sofferenze* – "GACS").[251] By assisting banks to securitise and move non-performing loans off their balance sheets, the scheme is an important component of Italy's strategy to tackle banks' asset-quality problems. Between February 2016 and November 2018, the scheme has been accessed seventeen times, removing EUR 51 billion of non-performing loans from the Italian banking system, which corresponds to almost two thirds of the total reduction of non-performing loans in Italy during that period.

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242 SA.53554(2019/N) and SA.53592(2019/N) *Renouvellement de la garantie de refinancement de Dexia au-delà du 31 décembre 2021*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53554.

243 SA.51814 *Reintroduction of the resolution scheme for small credit institutions with total assets below EUR 1,5 billion*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51814.

244 SA.54807 *Prolongation of the winding-up scheme for small banks* . See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54807.

245 SA.54332 *Prolongation of the Greek State Guarantee Scheme for banks*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54332.

246 SA.55542 *10th prolongation of the Credit Union restructuring and stabilisation scheme*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55542; and SA. 54244 *15th prolongation of the Credit Union Resolution Scheme 2019-2020*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54244.

247 SA.54463 *Third prolongation of the resolution scheme for cooperative banks and small commercial banks*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54463.

248 Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ, L 173/190, 12.6.2014 ("BRRD").

249 SA.53519(2019/N) *Hellenic Asset Protection Scheme ('Hercules')*. Commission decision of 15 November 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53519.

250 SA.53520(2019/N) *Primary Residence Protection Scheme*. Commission decision of 22 November 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53520.

251 SA.53518(2019/N) *Third prolongation of the Italian guarantee scheme for the securitisation of non-performing loans*. Commission decision of 16 August 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53518.

These two schemes contribute to further improve the situation of the financial sector in two of the Member States mostly affected by the long-term effects of the financial crisis. The improvements achieved by NPL reduction should enable banks to continue their role as a positive contributor for economic growth.

Additional direct support for specific situations involve Member States' possibilities to provide aid to young SMEs and start-ups that typically suffer from limited access to finance. These measures can either be directly implemented by Member States if they fall under the General Block Exemption Regulation (GBER)[252], or structured as notifiable schemes under the Risk Finance Guidelines.[253] In 2019, the Commission approved two schemes that incentivise private investors to invest in SMEs that struggle to receive adequate financing. The Austrian risk finance scheme provides tax incentives to mid-sized financing companies to increase their funding of SMEs[254] and the Italian scheme provides specific tax advantages for investments in innovative start-ups and SMEs.[255]

Finally, as part of a wider Fitness Check of State aid rules, the risk finance rules, as well as the Communication on short-term export-credit insurance,[256] are undergoing an evaluation in line with the Better Regulation Framework.[257] As part of this evaluation, the Commission launched targeted consultations with Member States and directly affected stakeholders. It also commissioned an external expert report to better understand how the existing rules could improve SMEs' access to finance. The results of the evaluation will be published as a Staff Working Document on the Fitness Check.

4. TAXATION AND STATE AID

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

The Commission's enforcement activities in this area tackle tax-base erosion and profit-shifting to better align the right to tax with economic activity. State aid investigations into Member States' tax ruling practices are one of the tools the Commission has at its disposal to ensure that companies pay the taxes they owe in the Member States where they generate economic value.

Tax evasion and avoidance can be the result of aggressive tax planning strategies, in so far as they shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. Aggressive tax planning can be pursued by using 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 the EU as a whole because the tax eventually paid is less than it would have been if the profits had not been shifted.

The side effects of aggressive tax planning for the EU are particularly negative. First, it results in undue tax reliefs that distort competition by leading to advantages for certain companies or groups of companies. Second, it involves an issue of social fairness as the

[252] OJ L 187 26.6.2014, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014R0651-20170710.
[253] OJ C19, 22.1.2014, p. 4, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014XC0122%2804%29.
[254] Case SA.45840 *Tax Incentives for Mid-Sized Business Financing Companies*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45840.
[255] Case SA.48570 (2018/N) *Italy – Fiscal incentives for investments in innovative start-ups and innovative SMEs.* Commission decision of 15 February 2019 See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48570.
[256] Case OJ C392, 19.12.2012, p. 1.
[257] See: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en.

revenues foregone from untaxed multinationals need to be compensated, which normally shifts the burden to the less mobile income of SMEs and labour. Third, from the perspective of the delocalisation of activities, aggressive tax planning can present a threat to the sustainable growth of the internal market.

Although, in the absence of harmonisation, direct taxation is a competence of the Member States, national tax measures have to comply with internal market rules and be in line with EU competition rules. The recent judgments of the General Court have confirmed that Article 107 TFEU allows the Commission to determine whether a tax measure confers on undertakings an economic advantage which places the beneficiaries in a more favourable position than other taxpayers. In particular, the General Court considered that the Commission can assess under State aid rules whether the transfer pricing method validated by a tax ruling leads to an outcome which is established in conformity with the arm's length principle.[258]

Contribution of EU competition policy to tackling the challenges

State aid investigations and decisions concerning aggressive tax planning

In the period 2014-2018, the Commission gathered information on tax planning practices, enquiring into the tax rulings practice and possible fiscal aid schemes of all Member States for the years 2010 to 2013. This enquiry was aimed at clarifying allegations that tax rulings may constitute State aid and to allow the Commission to take an informed view of the practices of all Member States. Overall the Commission looked into more than a thousand rulings.

However, Member States have moved on since 2013 both in terms of tax legislation and of ruling practice. In order to take an informed view of this evolution, the Commission requested at the end of 2019 all Member States to provide an update of their legislative and administrative practices and a list of tax rulings for the years 2014 to 2018. In 2019, the Commission continued to review tax rulings and tax measures based on complaints and market information. This review will continue in 2020.

Important cases

On 2 April 2019, the Commission concluded that the UK 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) rules.[259]

[258] Joined Cases T-755/15 and T-759/15, *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:670, paras. 159 and 160; Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Others v European Commission*, judgment of 24 September 2019, ECLI:EU:T:2019:669, para. 107; Joined Cases T-131/16 and 263/16 *Belgium and Magnetrol International v European Commission*, judgment of the General Court of 14 February 2019, ECLI:EU:T:2019:91, para. 67. See also section 3.4.

[259] 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.

United Kingdom – The CFC decision.

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.

On 11 January 2019, the Commission opened an in-depth investigation into the tax treatment granted by the Netherlands to *NEON* and *CN BV*, the Nike Group´s operating European headquarters for, respectively, Nike and Converse.[260] Both NEON and CN BV are Dutch entities and record all their revenues from sales paid by costumers in Europe, Middle East and Africa. The Commission's investigation concerns two tax rulings, granted by the Dutch tax authorities to NEON in 2006 and 2010, and two rulings, granted to CN BV in 2010 and 2015, which have significantly reduced Nike's taxable profits in the Netherlands.

On 7 March 2019, the Commission opened and in-depth investigation into the tax treatment by Luxembourg of *Huhtalux*, a company of the Huhtamäki group that carried out on-lending financing activities between group companies.[261] The investigation concerns tax rulings granted by the Luxembourg tax authorities to Huhtalux in 2009, 2012 and 2013, which allow this company to deduct each year since 2010 from its tax base a deemed interest – i.e. a remuneration for interest-free loans received from another group company – which does not correspond to the actual cost recorded in the company's commercial accounts. As a consequence of this deduction, Huhtalux's taxable profit is set in the form of a profit margin which may not correspond to the difference between the profit effectively realised by the company from its financing activity and the deemed interest.

Finally, following the General Court's judgment annulling the *Belgian Excess Profit* decision, the Commission opened on 16 September 2019 separate in-depth investigations into 39 "excess profit" tax rulings granted by Belgium to multinational companies.[262]

Fight against discriminatory tax schemes and measures sheltering national companies from competition in the internal market

Beyond the cases involving tax rulings, the Commission remains vigilant to ensure that Member States do not use fiscal tools to unduly favour certain companies/sectors and shelter national companies from competition in the internal market.

Ports are essential to the EU economy and the Commission does not prevent Member States from providing State aid to their ports, for instance when it is necessary to develop port infrastructure. However, corporate tax exemptions may provide a bigger advantage to the

[260] 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.

[261] Case SA.50400 *Luxembourg – Possible State aid in fabour of Huhtamäki*, decision of 7 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50400.

[262] 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.

most profitable beneficiaries. Such exemptions are neither transparent, nor limited or targeted at financing activities or investments which are necessary and justified by objectives of common interest.

With regard to the investigation into fiscal aid to ports, further to the negative decisions adopted in January 2016 (Dutch public undertakings[263]) and July 2017 (Belgian[264] and French[265] ports), the Commission proposed appropriate measures to Italy[266] and Spain[267] in January 2019. The two Member States were invited to abolish the corporate tax exemptions for port authorities from 1 January 2020. Spain accepted to take the appropriate measures. Italy did not. As a consequence, in November 2019, the Commission closed the investigation related to the Spanish ports and opened a formal investigation procedure for Italian ports. The Commission's action is consistent with the objective to ensure that all companies pay their fair share of taxes and that no sector or company unduly receives a more favourable corporate tax treatment than its competitors.

French and Belgian ports

After confirming in 2018 the approach adopted by the Commission in the Dutch case, the General Court upheld the Commission decision in the French and Belgian cases. In its judgments of 30 April 2019 and 20 September 2019, the General Court held that the Commission rightfully identified port authorities as "undertakings" that carry out economic activities, providing, for example access for ships to port infrastructure or renting land or conceding space to commercial or industrial companies against remuneration. With respect to such economic activities, the Court concluded that port authorities are subject to State aid rules even if they also carry out a public non-economic remit pursuing a general interest. The Court also stated that the notion of "economic activity" is a matter of facts – such as the existence of a market for the services concerned – and not a matter of appreciation by national authorities.

In April 2019, the Commission opened an in-depth investigation into a tax in the food retail sector in Slovakia.[268] The Commission also issued an injunction, requiring Slovakia to suspend the application of the measure until the Commission has concluded its assessment under EU State aid rules. Under the tax, food retailers were required to pay a quarterly tax amounting to 2.5% of their total turnover. However, the majority of food retailers in Slovakia were exempted from the tax, because they were covered by one of several exemptions concerning their size, geographic scope of operation or type of activities. The Commission had concerns that certain exemptions from the tax gave some retailers a selective advantage over their competitors, in breach of EU State aid rules. Following the Commission's decisions, Slovakia repealed the retail tax and no tax liability was incurred by any retailer. Therefore, by decision of October 2019, the Commission closed the in-depth investigation.

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

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

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

[266] Case SA.38399 *Ports taxation in Italy*, Commission decision of 8 January 2019. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38399.

[267] Case SA.38397 *Ports taxation in Spain*, Commission decision of 8 January 2019 and 7 March 2019. See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38397.

[268] Case SA.52194 *Slovak Retail Turnover Tax*, Commission decision of 2 April 2019 and 21 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52194.

5. BASIC INDUSTRIES AND MANUFACTURING

Overview of key challenges in the sector

Manufacturing is important to the EU economy as a driver of growth and employment. More than 20% of the EU workforce is active in the sector. Advances in automation and the growing use of robotics in many industries have led to substantial industrial restructuring and ensuing job losses across the EU. The manufacturing sector faces additional challenges due to the relocation of jobs to countries with lower labour costs and the rise of global supply chains. Moreover, high energy taxes and low productivity growth compared to the OECD average hamper the competitiveness of EU companies.

Enforcing the competition rules in the manufacturing sector contributes to these objectives, in particular by ensuring that firms can compete on fair and equal terms in the single market. In addition, the State aid rules are used to steer public funding towards research, training and energy efficiency. Only innovative companies with sustainable business plans can deliver smart goods and services at competitive prices for EU consumers and businesses. Improving EU firms' efficiency and long-term competitiveness in their respective home markets make these firms fit for competing in the global market place.

Contribution of EU competition policy to tackling the challenges

Antitrust investigations in basic industries

Basic manufacturing and consumer goods industries continue to account for a substantial share of the Commission's competition enforcement. The EU's high value-added manufacturing industry requires access to basic materials at affordable prices that reflect international cost conditions. In 2019, the Commission actively monitored the markets for these inputs to ensure that firms have adequate access in a healthy and competitive environment. The Commission also continued to monitor the aftermarkets in basic manufacturing, where increasing revenue streams are generated.

Merger investigations in basic industries

One of the most important cases of 2019 in the manufacturing sector was the German firm *Siemens* proposed acquisition of French company *Alstom*. Both firms are active in the rail transport industry.

The Siemens/Alstom merger

On 13 July 2018, the Commission opened an in-depth investigation of the proposed acquisition of Alstom by Siemens.[269] The Mobility Division of Siemens offers a broad portfolio of trains (rolling stock), rail automation and signalling equipment, as well as rail electrification systems. Alstom is active worldwide in the rail transport industry, offering a wide range of rolling stock (from high-speed trains to metros and trams) as well as signalling and rail electrification systems. On 6 February 2019, the Commission prohibited the proposed transaction under the EU Merger Regulation.[270] The proposed transaction would have combined the two largest suppliers of trains and signalling solutions in the EEA, not only in terms of size of the combined operations, but also in terms of their geographic footprint. The Commission considered that the merger would have reduced competition in the supply of several types of trains and signalling systems in the EEA. The merging parties proposed a remedy package which was inadequate in scope, very complex and gave rise to significant dependencies and implementation risks.

[269] See: http://europa.eu/rapid/press-release_IP-18-4527_en.htm.

[270] Case M.8677 *Siemens / Alstom*, Commission Decision of 6 February 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8677.

On 6 February 2019, the Commission also prohibited, under the EU Merger Regulation, *Wieland*'s proposed acquisition of *Aurubis Rolled Products* and Aurubis' stake in *Schwermetall*.[271] The Commission's concerns included reduced competition and increased prices for rolled copper products used by European manufacturers. A large number of European industrial customers also expressed concerns regarding both access to pre-rolled strip from Schwermetall, and price increases for rolled products. Wieland and Aurubis were two of the three biggest producers of rolled copper products in Europe. If their merger had gone through, Wieland would have become the dominant player in the market for rolled copper products, with a market share in the EEA of over 50%, and with only one other large competitor with a market share of circa 20%. As Wieland was not willing to comprehensively address the expressed concerns, the Commission prohibited the proposed transaction.

The steel sector is a key industry across the EEA. Preserving product innovation and a competitive European steel market supports, in its turn, the transition to more climate friendly and environmentally sustainable mobility.

On 11 June 2019, the Commission prohibited, under the EU Merger Regulation, the proposed joint venture between *Tata Steel* and *ThyssenKrupp*[272], which would have combined the flat carbon steel and electrical steel activities of ThyssenKrupp and Tata Steel in the European EEA. ThyssenKrupp, the second largest producer of flat carbon steel in the EEA, and Tata Steel, the third largest, are also significant producers of metallic coated and laminated steel for packaging applications and of galvanised flat carbon steel for the automotive industry. The Commission's concerns looked at reduced competition (less choice for steel customers) and increased prices for different types of steel. The parties did not offer adequate remedies to address these concerns. The Commission also sought the views of market participants about the proposed remedies, and their feedback was negative. As a result, the Commission prohibited the proposed transaction.

On 1 October 2019, following an in-depth investigation, the Commission approved the acquisition of aluminium player *Aleris* by rival *Novelis*[273] subject to conditions. The Commission had concerns that the transaction would have resulted in higher prices for European customers of aluminium automotive body sheets, which are used in the manufacturing of cars also with the aim to reduce fuel consumption and emissions. To address the Commission's concerns, the companies offered to divest Aleris' entire aluminium automotive body sheet business in Europe, including its production plant in Belgium. The divestiture includes R&D assets as well as funding for an investment to improve further its capabilities. Because the proposed divestiture would remove the entire overlap created by the transaction in aluminium automotive body sheets in Europe, the Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns. The approval is conditional on full compliance with the commitments.

The Commission also opened in-depth investigations into various proposed mergers in the manufacturing sector. The opening of in-depth investigations does not prejudge their outcomes. On 4 October 2019, the Commission opened an in-depth investigation to assess the proposed creation of two joint ventures by aircraft manufacturers *Boeing* and *Embraer*[274],

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

[272] 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.

[273] Case M.9076 *Novelis/Aleris*, Commission decision of 1 October 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9076.

[274] Case M.9097 *Boeing / Embraer*, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9097.

under the EU Merger Regulation. The Commission was concerned that the transaction would have resulted in higher prices and less choice as regards commercial aircraft.[275]

Furthermore, on 30 October 2019, the Commission opened an in-depth investigation to determine whether the proposed acquisition of *Chantiers de l'Atlantique* by *Fincantieri*[276] is likely to significantly reduce effective competition. Both shipbuilding companies are global leaders in an already concentrated and capacity constrained market. Moreover, on 17 December 2019, the Commission opened an in-depth investigation to assess the proposed acquisition of *Daewoo Shipbuilding & Marine Engineering CO. Ltd (DSME)* by another shipbuilding group, *Hyundai Heavy Industries Holdings (HHIH),*[277] under the EU Merger Regulation. The Commission is concerned that the merger may reduce competition in various global cargo shipbuilding markets. Cargo shipbuilding is an important industry for the EU. European shipping companies are major customers of DSME and HHIH and represent 30% of worldwide demand for cargo ships.

In 2019, the Commission continued its review of mergers in the chemicals sector, to ensure the continued availability of affordable and quality chemical products and services to the EU industry.

In the industrial lubricant industry, on 11 December 2018, the Commission approved the acquisition[278] of *Global Houghton* by *Quaker*, subject to the divestment of Global Houghton's EEA business for certain rolling oils, which are essential for the production of steel and aluminium, including the specific products' formulations and related assets. The Commission's investigation revealed that the transaction would otherwise likely have led to higher prices and lower quality products and services for customers of rolling oils. On 11 June 2019, the Commission approved Total as a suitable purchaser.

In the plastics industry, on 18 January 2019, the Commission, following an in-depth investigation, approved the acquisition of *Solvay's* polyamide (nylon) business by *BASF*, subject to the divestment of most of Solvay's relevant assets in the EEA.[279] The Commission identified the risk that the transaction as notified would likely have given rise to higher prices and/or less input available throughout the nylon 6.6 value chain, as well as higher prices to end customers. Nylon 6.6 products include specialty plastics used in the automotive, electronic or construction industries. They are often used as substitutes for heavier metal parts and to generate energy savings. On 26 November 2019, the Commission approved the purchase of the divested business by *Domo Chemicals*.[280]

State aid investigations in basic industries – rescue and restructuring of companies in difficulty

In February 2019, the Commission approved the budget increase of Ireland's scheme to provide restructuring aid as well as temporary restructuring support to SMEs in difficulty.[281]

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275 On 25 April 2020, Boeing withdrew its offer to acquire Embraer, and the notification to the Commission was withdrawn.

276 Case M.9162 *Fincantieri / Chantiers De L'Atlantique*, available at : https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9162.

277 Case M.9343 *Hyundai Heavy Industries Holdings / Daewoo Shipbuilding & Marine Engineering*, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9343.

278 Case M.8492 *Quaker / Global Houghton*. Commission Decision 11 June 2019 See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8492.

279 Case M.8674 *BASF / Solvay's EP and P&I Business*. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_522.

280 Case M.9553 *Domo Investment Group / Solvay Performance Polyamides Business in the EEA*. See: https://ec.europa.eu/commission/presscorner/detail/en/MEX_19_6354.

281 Case SA.53350 - Budget increase of R&R aid scheme (SA.49040 as amended to cover temporary restructuring support by SA. 50651). https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53350 .

Ireland justified the increase up to EUR 200 million of the EUR 20 million budget previously approved on grounds of preparation for the consequences of the United Kingdom leaving the EU. The ten-fold increase of the budget constituted new aid and was therefore notifiable to the Commission. The budget increase was the sole amendment to the previously approved aid scheme.[282] The Commission found that the budget increase did not affect the Commission's previous positive conclusion on the aid scheme's compatibility with the internal market.

In September 2019, the Commission authorised a rescue loan of a maximum amount of GBP 5 million (in up to 2 tranches of GBP 2.5 million) to the *Wrights Group*, provided by Invest Northern Ireland, a regional development agency.[283] The Wrights Group designs, manufactures and sells a range of diesel, hybrid, electric and fuel-cell powered buses in the United Kingdom. The Commission assessed the measure under the 2014 Rescue and Restructuring Guidelines.[284] In line with the Guidelines, the UK submitted a detailed liquidity plan, justifying the company's short-term liquidity needs. Moreover, the Commission noted that the rescue loan aimed to avoid a disruptive insolvency process in the short term, and that the UK undertook that Wrights reimburses the rescue loan or otherwise submits a restructuring plan or a liquidation plan within six months after disbursement of the aid. The Commission considered that the company had a good prospect to be sold to investors, so that there would be no immediate disruption of activities (including R&D) and no loss of know-how.

In June 2019, the Commission found that Finnish bus transport company Helsingin Bussiliikenne Oy ("HelB") had received EUR 54.2 million in incompatible State aid from Finland.[285] The Commission's investigation was opened on the basis of a complaint alleging that the loan granted by Finland to HelB, the lease of the Ruskeasuo bus depot and the underlying land was not in accordance with market terms. The investigation confirmed that given the company's financial difficulties no private market creditor would have granted the loans under these terms, which combined low interest rates and exemptions from the obligation to repay the outstanding part of the loans. Finland must now recover this aid from HelB, despite the fact that the assets and business operations of HelB were sold to a competitor after the opening of the formal investigation. The Commission found that the sale of HelB's assets and business operations did not ensure economic discontinuity.

In November 2019, the Commission approved a EUR 80 million rescue loan in favour of the Dutch waste-to-energy company AEB Holding.[286] The Amsterdam-based company experienced financial difficulties after four out its six incineration lines had to be temporarily shut down for safety purposes. The Commission assessed the measure under the 2014 Rescue and Restructuring Guidelines.[287] In line with the Guidelines, the Netherlands justified the proportionality of the aid amount based on the company's detailed liquidity plan and short-term needs and applied an adequate interest rate to the loan. The Commission found that the aid contributes to an objective of common interest. In this respect, by allowing AEB to meet its operating costs, the rescue loan would avoid disruptions in the provision of essential waste

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[282] Decision C (2017) 7927 final of 30 November 2017 in case SA.49040 (2017/N) and Decision C (2018) 7927 final of 4 May 2018 in case SA.50651 (2018/N)).

[283] Case SA.54766 *United Kingdom - Rescue aid to Wrights Group Ltd.* See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54766.

[284] See: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_473.

[285] Case SA. 33846 *Finland - Effective liberalisation of bus transport* See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33846.

[286] Case SA.55227 *the Netherlands - Rescue aid to AEB Holding N.V.* See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55227.

[287] See: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_473.

management services, which could lead to severe social and health consequences in the areas served by AEB. On this basis, the Commission concluded that the rescue loan was sufficiently limited in time and scope and that its positive effects outweigh any potential distortions of competition brought about by the public intervention. After six months, if the loan is not repaid and AEB continues operations, the Netherlands committed to restructuring the company to ensure its long-term viability.

6. AGRI-FOOD INDUSTRY

Overview of key challenges in the sector

While most firms in the EU food sector benefit from operating in the EU internal market, others face challenges operating in this market while simultaneously being active in world markets. EU farmers, food manufacturers and retailers should get more out of their access to the internal market and the ensuing possibility to buy and sell produce across EU borders. EU competition policy contributes to this objective.

Making farmers more competitive in the EU internal market

Farmers are particularly vulnerable to the challenges of globalisation and their role in the internal market; they are facing (i) more competition from farmers inside as well as outside of the EU, (ii) higher demand from end consumers in terms of quality, variety and traceability, and (iii) higher investment needs linked to initiatives towards a greener and more sustainable agriculture.

The EU agricultural sector has certain structural characteristics that make it more difficult to cope with these challenges. Agricultural production is the least concentrated level of the EU food supply chain. Farmers are mostly small enterprises or grouped into small cooperatives and other types of producer organisations. Their suppliers and customers (processors, wholesalers and retailers) are often much larger and more concentrated, giving them more bargaining power in negotiations with farmers.[288] Moreover, unforeseeable natural events (such as adverse weather conditions, pests and animal and plant diseases) can affect production significantly either of the EU or of trading partners, resulting in volatility of marketed quantities and prices.

EU farmers could manage these challenges better by integrating into larger producer organisations, which may aggregate supply (in terms of both volumes and variety of products), offer supporting services, and add value through processing. Such integration can provide more stability, better risk-management, scale to reach more customers, flexibility, more value, and more bargaining power. In 2018, the so-called Omnibus Regulation[289] explicitly allowed recognised producer organisations and their associations in all agricultural sectors to engage in practices such as production planning and contractual negotiations, by

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

[289] See: https://www.consilium.europa.eu/en/press/press-releases/2018/07/16/omnibus-regulation-simpler-rules-for-use-of-eu-funds-adopted/. Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material (OJ L 350, 29.12.2017, p. 15).

means of a derogation from Article 101 TFEU.

Moreover, the Omnibus Regulation introduced a procedure where farmer associations could request an opinion from the Commission to determine whether an agreement between farmers potentially restricting competition is in line with the objectives of the Common Agricultural Policy. The Commission received the first two requests in July 2019, pursuant to Article 209.2 subparagraph (2) and 209.2 subparagraph (3) of the Common Market Organisation (CMO) Regulation.[290]

Opportunities and challenges posed by increased retail concentration in the internal market

Chains of retailers have developed sophisticated distribution systems and varied store formats that supply wide arrays of products to customers. Many such chains have opened shops in other Member States than their home market bringing different business models and more competition to other markets. On the one hand, consumers value the offer of different products, a wider choice and variety of products coming from other markets, especially when this goes along with lower prices. On the other hand, the increasing concentration of retailers (through internal growth, mergers/acquisitions and/or the formation of buying alliances) continues to worry certain trading partners, especially smaller operators. In particular, they question whether large retail chains have obtained too much bargaining power (in the bilateral negotiations with their suppliers) and buyer power (in the market overall).

The main benefit expected from retailer buying alliances is to pass on to consumers (downstream) the better prices obtained from their suppliers (upstream). However, retailers joining forces in buying alliances may not deliver such lower prices if they do not keep competing on downstream markets. For this reason, the Commission continued in 2019 its investigation into the business practices of Casino and Les Mousquetaires/Intermarché. On 4 November 2019 the Commission opened formal proceedings against the two retailers.[291] The two firms are suspected of using their purchasing alliance as a vehicle to coordinate shop development and prices.

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

On 30 April 2019, the Directive on unfair trading practices in business-to-business relationships in the food supply chain entered into force.[292] The Directive is based on a 2018 Commission proposal aiming to tackle at EU level the imbalances of bargaining power throughout the food supply chain by banning the most damaging unfair trading practices imposed by buyers with strong bargaining power on small suppliers, in particular small farmers.

In line with the economic analysis[293] of the Impact Assessment, the list of unfair trading

[290] Regulation (EU) No 1308/2013 of the European Parliament and of the Council 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 *OJ L 347, 20.12.2013, p. 671–854*.

[291] Case AT.40466. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6216.

[292] See: http://europa.eu/rapid/press-release_IP-18-2702_en.htm.

[293] Commission Staff Working Document Impact Assessment, Initiative to improve the food supply chain (unfair trading practices) Accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on unfair trading practices in business-to-business relationships in the food supply chain, SWD/2018/092 final - 2018/082 (COD), see in particular, Annex H on the Economic impact of unfair trading practices regulations in the food supply chain (DG Competition), p.260.

practices in the UTP Directive is divided up in a black list (always prohibited) and a grey list (only prohibited if not agreed upfront between the trading partners) of practices in order not to discourage trading partners from engaging in efficiency-enhancing agreements or trading conditions.The scope of protection was designed to avoid protecting businesses that have sufficient bargaining power to fend for themselves.

Member States will be able to maintain or introduce stricter national rules because the proposed directive only introduces minimum harmonisation at EU level as long as such rules are compatible with the functioning of the internal market.

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

On 13 May 2019, the Commission fined *AB InBev*, the world's largest beer brewing company, EUR 200 million for abusing its dominant market position.[294] The Commission found that, from 9 February 2009 until 31 October 2016, AB InBev abused its dominant position by pursuing 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. The Commission decision equally made the remedy ensuring that AB InBev provides mandatory food information in both French and Dutch on the packaging of its products, legally binding for the next five years. The Commission reduced AB InBev's fine by 15% in light of AB InBev's acknowledgment of the infringement and of its implementation of remedies aimed towards favouring the cross-border trade of its products.

7. PHARMACEUTICAL AND HEALTH SERVICES SECTORS

Overview of key challenges in the sector

Citizens' access to innovative, high quality healthcare and medicines at affordable prices is of great societal relevance. By enforcing the competition rules in these sectors, the Commission contributes to this objective. Competition law complement the regulatory frameworks that exist in these sectors at national level. To this end, the Commission cooperates closely with the competition authorities of the Member States. Competition law enforcement on pharmaceutical and health markets fosters both dynamic competition, which leads to more innovative medicines, and effective price competition, which contributes to more affordable medicines and treatments.

Issues with the affordability of medicines have over the past years become an increased concern in the pharmaceutical sector. Innovation generates healthcare benefits when investments in R&D leads to the introduction of novel treatments. More efficient technologies may reduce treatment costs. For example, developing production processes may make it viable for cheaper medicines to be commercially produced.

On 28 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*.[295] 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

[294] 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.

[295] See: http://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/index.html.

period 2009-2017.

Contribution of EU competition policy to tackling the challenges in the sector

Antitrust enforcement in the pharmaceutical and health sevices sectors

The Commission and the competition authorities in the Member States monitor the pharmaceutical and health sevices sectors to identify potential competition issues. Where appropriate, investigations are initiated. In 2019, the Commission continued proceedings in two cases where it is investigating firms suspected of preventing or reducing consumers' access to effective, innovative and affordable medicines.

The first case concerns so-called pay-for-delay practices impeding the market entry of generic modafinil (a sleeping disorder medicine).[296] The Commission aims to conclude this investigation in the course of 2020. The second case concerns the ongoing formal antitrust proceedings against *Aspen Pharma*[297] for a suspected abuse of its dominant market position. The Commission investigates allegations that Aspen Pharma may have imposed unfair and excessive prices for a range of cancer medicines in all countries in the EEA except Italy.[298] The Commission aims to conclude this case in 2020.

Merger review in the pharmaceutical and health services sectors

In 2019, the Commission continued its thorough review of mergers and acquisitions in the pharmaceutical sector, to ensure the availability of diversified and affordable medicines and medical devices to patients and medical practitioners across the EU, and to protect innovation.

On 10 July 2019, the Commission approved the acquisition of *Pfizer's Consumer Healthcare business* by *GlaxoSmithKline*,[299] subject to the divestment of Pfizer's ThermaCare-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.

On 29 July 2019, the Commission unconditionally approved the acquisition of *Celgene* by *BMS*.[300] The Commission conducted a detailed assessment of the companies' products under development, primarily in the area of autoimmune diseases and oncology, but ultimately concluded that the transaction did not raise any competition concerns, because a large number of R&D organisations compete with the parties in the therapeutic areas where they have overlapping research programmes.

The European Commission approved, on 18 December 2019, the acquisition of *General Electric's Healthcare Life Sciences Biopharma Business* by *Danaher Corporation*.[301] The approval was conditional on the divestiture of a remedy package. Danaher and GE Biopharma are both active in the manufacturing of products and services used in the bioprocessing industries. Following its investigation, the Commission had serious doubts that the transaction

[296] Case AT.39686 Cephalon, see: IP/17/2063 of 17 July 2017: http://europa.eu/rapid/press-release_IP-17-2063_en.htm .
[297] Case AT.40394 *Aspen*. See: IP/17/1323 of 15 May 2017: http://europa.eu/rapid/press-release_IP-17-1323_en.htm and http://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_235_3.pdf.
[298] The Italian competition authority adopted an infringement decision against Aspen on 29 September 2016.
[299] 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.
[300] Case M.9294 *BMS / Celgene*. Commission decision of 29 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9294.
[301] Case M. 6809 Danaher / GE Biopharma. See: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6809.

as notified would have reduced competition and resulted in higher prices, less innovation and the risk of discontinuation of certain products in the markets for microcarriers, bioprocess filtration, chromatography and molecular characterisation. To address the Commission concerns, Danaher committed to divest five of its biopharma businesses. On this basis, the Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns.

State aid initiatives in the health services sector

In accordance with the Better Regulation framework, the Commission launched in June 2019 an evaluation of the State aid rules for health and social Services of General Economic Interest (SGEI) and the SGEI de minimis Regulation,[302] which expires in December 2020. By carrying out the evaluation, the Commission aims to get a better and more detailed understanding of the potential issues that Member States may have had in implementing the rules. Moreover, the Commission will assess to what extent the current rules have encouraged and/or deterred Member States from designing new or adapting existing SGEI compensation measures for health and social services in line with the currently applicable SGEI rules.

As part of this evaluation, a public and a targeted consultation was carried out between July and December 2019. Furthermore, on 24 December 2019 a call for tender was published in the Official Journal for an external expert study with the aim to get a better insight in the development of health and social services in the Member States and the level of competition in these sectors. On the basis of the results of the consultations and the expert study, the Commission envisages to conclude the evaluation by the first quarter of 2021.

8. TRANSPORT AND POSTAL SERVICES

Overview of key challenges in the sector

The transport and postal services sectors account for approximately 5% of the EU economy, and their performance can have many beneficial effects for other sectors in the EU. Transport is the key to both an integrated internal market and to an open economy integrated into the world economy. In the postal sector, parcel services are supplied by competitive transnational suppliers while other services are mostly in the hands of incumbent postal operators which often depend on compensation from their governments for providing a universal postal service.

In 2019, the Commission used its competition tools to keep the transport and postal markets open and competitive, and to facilitate market entry. Moreover, the Commission continued to facilitate State aid enabling interoperability between different modes of transport and to stimulate a modal shift to more environmentally-friendly types of transport, as well as State aid for modernising infrastructure.

Contribution of EU competition policy to tackling the challenges

Merger review in air transport

The EU air transport sector is still fragmented. In the EU, there are more than 150 airlines

[302] See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-3777435_en.

offering scheduled air passenger transport. The five largest airlines in the EU - Lufthansa, Air France/KLM, the International Consolidated Airlines Group (IAG)[303], Ryanair and easyJet - account for around 50% of the EU market. A likely increase in consolidation in the EU aviation markets was demonstrated by the financial difficulties encountered by two medium-sized EU airlines. The German airline Germania went into bankruptcy while UK regional carrier Flybe was acquired by Connect Airways. Several small airlines like Aigle Azur and XL exited EU aviation markets.

The Commission reviewed the acquistion of a 31% joint-controlling interest of *Air France-KLM* in *Virgin Atlantic Limited*, an international airline with headquarters in the UK. The acquisition led to joint control over Virgin Atlantic by Air France-KLM, Delta Air Lines Inc. and Virgin Group.[304] The Commission found that none of the overlapping routes raised competition concerns, despite a small number of overlap routes with high combined market shares. The Commission concluded that Virgin Atlantic, Delta and Air France-KLM are not close competitiors and continue to face significant competition from other carriers on the overlap routes. The Commission also investigated whether the companies' combined slot portfolio post-transaction would prevent competitors from entering or expanding their presence at London Heathrow and Manchester airports and found that the increase in the slot portfolio of the merged entity was unlikely to have a negative effect on passengers. In addition, no serious doubts arose with regard to the effects of the transaction on the other markets investigated by the Commission, such as air cargo transport. The Commission therefore cleared the acquistion unconditionally on 12 February 2019.

The Commission also assessed the acquisition of *Flybe* by *Connect Airways*, a consortium by Virgin Atlantic, Stobart Aviation and Cyrus.[305] The Commission investigated the impact of the transaction on the market for air passenger transport on routes from British airports to other EU airports as well as some intra-UK routes. The Commission found that 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. These slots will be released to competing airlines that want to fly the Birmingham - Amsterdam and Birmingham-Paris routes. The Commission considered that the commitments fully addressed the competition concerns identified by the Commission regarding Connect Airways' acquisition of Flybe. The Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns and authorised it on 5 July 2019.

In the framework of commitments attached to previous clearance decisions in aviation markets, the Commission received in 2019 a number of new applications for slots. The Commission received requests for additional slots by Flybe on the routes connecting London Heathrow to Edinburgh and London Heathrow to Aberdeen.[306] Furthermore, Transavia requested additional slots at Ibiza and Paris airports for the city pair Paris-Ibiza in accordance with the commitments given when the Commission authorised Iberia's takeover of Clickair

[303] IAG is the parent company of Aer Lingus, British Airways, Iberia, and Vueling.

[304] 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.

[305] 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.

[306] Case M.6447 *IAG/bmi*, Commission decision of 11 November 2019 concerning the assessment of the viability of the Applicant and evaluation of its formal bid pursuant to Clause 1.4.9 of the Commitments attached to the Commission decision of 30 March 2012 in case M.6447 *IAG/bmi*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6447.

and Vueling.[307]

On 6 February 2019, the Commission accepted *KLM's* request for a waiver of the Commitments applying to the Amsterdam-New York route, considering that KLM has demonstrated the existence of exceptional circumstances.[308]

State aid to airports and airlines

The Commission's ongoing Fitness check in the State aid area includes the 2014 Guidelines on State aid to airports and airlines[309] and the relevant rules under the 2017 General Block Exemption Regulation (GBER).[310] The objective of the Fitness check is to determine whether the Aviation Guidelines fulfil their initial objectives of preventing undue distortions of competition while allowing airports to contribute to regional development and connectivity.

Following the adoption of the GBER concerning aid to airports in 2017, the Commission received few notifications of investment aid in 2019. Most of the notifications the Commission received concerned operating aid to airports[311], in most cases smaller regional airports with fewer than 700,000 passengers per year.

The majority of the Commission's State aid cases in the aviation sector examine possible illegal operating aid to airlines, often in the context of agreements concluded with airlines by airports or local authorities.[312]

After a formal investigation, the Commission's concluded that marketing agreements concluded by the French local authorities with *Ryanair* to promote *Montpellier airport* gave Ryanair an unfair and selective advantage over its competitors and caused harm to other regions and other regional airports.[313] On 2 August 2019, the Commission adopted a negative decision finding these marketing agreements to be illegal and incompatible State aid and ordered France to recover EUR 8.5 million from Ryanair.

The Commission adopted a no aid decision in the *Riga airport* case.[314] The operator of Riga international airport claimed it had granted illegal aid to Ryanair by signing an airport-airline agreement that was unprofitable for the airport. The Commission did not accept the re-constructed *ex-ante* profitability analysis submitted by the operator in support of its claim, but instead, on the basis of different assumptions as regards expected traffic development, costs and revenues, the Commission concluded that the agreement was in line with the market economy operator principle.

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[307] Case M.5364 *Iberia/Clickair/Vueling*, Commission decision of 12 November 2019 concerning the assessment of the Applicant pursuant to Clauses 3.3 and 3.4 of the Commitments attached to the Commission decision of 9 January 2009 in case M.5364 – *Iberia/Clickair/Vueling*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5364.

[308] Case M.3280 *Air France/KLM*, Commission decision of 6 February 2019 on Air France-KLM's request for a waiver of the Commitments applying to Amsterdam New York pursuant to Clause 14 of the commitments package annexed to the Commission decision of 11 February 2004 in case M.3280 *Air France/KLM*. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_3280.

[309] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0404%2801%29.

[310] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1497952641554&uri=CELEX:32017R1084.

[311] Case SA.45140 *Antwerp Airport*, Commission decision of 12 November 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45140.

[312] Case SA.38145 *Alleged illegal State aid to Ryanair*, Commission decision of 04 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38145.

[313] Case SA.47867 *Aide présumée en faveur de Ryanair à l'aéroport de Montpellier*, Commission decision of 2 August 2019. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4991.

[314] The Market Economy Operator Principle (MEOP) is a concept developed by the Commission to determine whether a transaction entered into by a public body gives an advantage to a particular undertaking with the potential of distorting competition and trade between Member States.

On 28 October 2019, the Commission opened a formal investigation in relation to plans by the Spanish region of Valencia to grant EUR 9 million to the regional airline *Air Nostrum* for the renewal of its fleet.[315] The Commission has doubts that the intended support constitutes aid for environmental protection in line with the GBER or the Guidelines on State aid for environmental protection and energy (EEAG).[316] In particular, the Commission doubts that the requirement of an incentive effect under both the GBER and the EEAG is met in this case. The beneficiary Air Nostrum is a large company and there is no evidence at this stage that without the aid, it would not have acquired the more fuel-efficient CRJ-1000 aircraft. It is worth noting that airlines have an economic interest in acquiring fuel-efficient aircraft to lower their operating costs.

On 22 February 2019, the Commission approved the EUR 25 million restructuring aid awarded to *Aerdorica S.p.A.*[317], the ailing operator of the Italian Aeroporto delle Marche, as it was compliant with the compatibility conditions under the 2014 Rescue and Restructuring Guidelines. A sound restructuring plan aiming at restoring the company's long-term viability was provided. The plan contained contributions from the company's own resources and private market players (including EUR 15 million of new capital by a new investor taking control of the company). The plan also laid down appropriate measures to limit distortions of competition arising from the public aid, in particular vis-à-vis airports in the same geographic catchment area.

On 14 October 2019, the Commission authorised a EUR 380 million rescue loan backed by a State guarantee in favour of the German airline *Condor*.[318] The airline faced an acute liquidity shortage after the entry into liquidation of its UK parent company, the Thomas Cook Group. Moreover, Condor had to write off significant claims against other Thomas Cook Group companies, which Condor was no longer able to collect. The Commission assessed the measure under the 2014 Rescue and Restructuring Guidelines. In line with the Guidelines, Germany submitted a detailed liquidity plan, justifying the company's short-term liquidity needs. Moreover, Germany committed that after six months, Condor would either repay the loan or carry out an in-depth restructuring to become viable in the long-term. The possible restructuring would be subject to the Commission's assessment and approval. The Commission concluded that the loan would help to ensure orderly air transport in the interest of passengers, while the stringent conditions attached to the loan and its limited duration would reduce to a minimum the distortion of competition potentially triggered by the State support.

On 28 October 2019, the Commission opened a formal investigation into various financing measures awarded to *Malév Ground Handling,* totalling some EUR 21 million, granted by Hungarian State-owned entities.[319] Malév Ground Handling provides ground handling services at Budapest airport and is a former subsidiary of Malév, the Hungarian flag carrier that went bankrupt in 2012. Currently owned by the State asset management company MNV, Malév Ground Handling has faced financial difficulties since Malév's bankruptcy. In August 2017, Budport, a private competitor and former subcontractor of Malév GH, lodged a

[315] Case SA.50707 *Air Nostrum fleet renewal*, Commission decision of 28 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50707.
[316] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628%2801%29.
[317] Case SA.49901 *Restructuring aid to Aerdorica S.p.A – Airport Marche/Ancona*, Commission decision of 22 February 2019 See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49901.
[318] Case SA.55394 *Germany - Rescue Aid to Condor*, Commission decision of 14 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55394.
[319] Case SA.49073 *Hungary- Alleged State aid to Malév GH*, Commission decision of 28 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49073.

complaint alleging that Malév Ground Handling had benefitted from State aid in the form of various capital injections, debt write-offs and loans. The opening decision reflects the Commission's doubts that these measures appear to constitute incompatible State aid within the meaning of article 107(1) TFEU. The financial support may have given Malév Ground Handling an unfair competitive advantage over other ground handling operators at Budapest airport.

Antitrust enforcement in maritime transport

The Commission has finalised its evaluation of the Consortia Block Exemption Regulation (CBER).[320] The Commission analysed responses received during a public consultation in 2018 and carried out its own assessment. The Commission published its findings in a Staff Working Document dated 20 November 2019. Based on the evaluation, the Commission proposed prolonging the CBER for four years. A roadmap of the initiative as well as a draft regulation prolonging the CBER were published for feed-back of interested stakeholders on 20 November 2019.

Merger review in maritime transport

The global container shipping industry is undergoing a period of change in reaction to the challenges it has been facing in recent years. The sector is characterised by overcapacity, resulting from several carriers' expansion and investment in ultra-large vessels in recent years as well as a slow recovery of demand following the economic crisis. To improve efficiency and reduce operating costs, container shipping companies do not only provide services individually, but also conclude operational agreements, such as consortia or alliances with other shipping companies. After a wave of consolidation between 2014 and 2017 the focus of the industry has shifted towards vertical integration. The carriers aim to become integrated logistics players offering not only deep-sea container services but also door-to-door transport services.

In this regard, the Commission assessed the acquisition of control by French group *CMA CGM* of Switzerland-based company Ceva Logistic. CEVA offers freight forwarding and contract logistics services. CMA CGM is active in freight forwarding services and container liner shipping services, the latter being inputs to the freight forwarding services. The Commission analysed whether the vertically integrated entity would have the ability and incentive to engage in input or customer foreclose. The Commission considered that, even if CMA CGM were to engage in an input foreclosure strategy by limiting its supply only to its downstream arm, competing carriers would start providing container liner shipping services to the other freight-forwarders on the downstream market. As regards customer foreclosure, the Commission concluded that the merged entity's market shares in the downstream markets for freight forwarding services were limited. Since CEVA's demand represented a very small percentage of the total demand in the EEA, CEVA could not be considered as an important customer with a significant degree of market power. The transaction was cleared without conditions in a decision adopted on 6 February 2019.[321]

State aid enforcement in the maritime transport sector

In 2019, the Commission approved a number of state aid schemes under the Maritime State

[320] Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

[321] 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.

aid Guidelines,[322] which allow tax reliefs for shipping companies. The aim of the Guidelines is to maintain the EU maritime sector's competitiveness in relation to third countries.

On 22 February 2019, the Commission approved the extension to new types of vessels of a Danish seafarer scheme.[323] Under the amended scheme, shipping companies opting for the Danish International Register of Shipping (DIS) scheme and employing seafarers aboard certain specialised vessels providing off-shore activities can benefit from an exemption from income taxes for their seafarers. The scheme, as extended, applies to the same types of vessels covered by the extension of the Danish tonnage tax scheme, which was approved by the Commission on 12 October 2018.[324]

On 26 July 2019, the Commission approved the prolongation of certain amendments to the Dutch tonnage tax scheme, subject to the implementation of certain changes to the tonnage tax law. The prolonged amendments concern a reduced tonnage tax rate for large vessels exceeding 50 000 net tons, a reduced tonnage tax base for ship management companies and the application of the tonnage tax schemes to cable-laying vessels, pipeline laying vessels, research vessels and crane vessels and were for the first time approved in 2009 and 2010.[325]

On 16 December 2019, the Commission adopted several decisions on tonnage tax schemes as well as seafarer schemes. First, the Commission approved the prolongation of the Cypriot tonnage tax and seafarer scheme for a ten-year period until 31 December 2029.[326] Second, the Commission adopted a decision covering a tonnage tax and a seafarer scheme for Estonia.[327] Both schemes will enter into force on 1 July 2020 and will have a duration of 6 years. Estonia does not have any maritime scheme in place at the moment and at present no cargo vessel engaged in international transport flies the Estonian flag. The schemes are thus expected to boost the competitiveness of Estonia as a maritime country. Third, the Commission adopted a Decision approving a 10-year prolongation of a Danish seafarer scheme for dredgers.[328] The scheme guarantees that seafarers on board dredgers benefit from similar exemptions to those foreseen by the Danish DIS scheme. Fourth, the Commission approved the introduction of a Polish scheme reducing the income tax for seafarers.[329] Finally, the Commission authorised the prolongation of a Swedish scheme reducing both income tax and social security contributions as well as a fee on wages of seafarers by 99%.[330] In both the Polish and Swedish case, the Commission ensured that the national scheme is applied in a non-discriminatory manner to all seafarers working on any EEA-flagged vessel and that it is not restricted to national vessels only.

State aid enforcement in the rail and intermodal transport sectors

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[322] Commission communication C(2004)43 – Community guidelines on State aid to maritime transport, OJ C 13, 17.1.2004, p. 3-12.

[323] Case SA.52069 *Prolongation of the Danish seafarer regime for dredgers,* Commission decision of 16 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52069 .

[324] Case SA.45300 *Amendment of the Danish Tonnage Tax scheme (Extension of the tonnage tax scheme to cover a number of specialized vessels),* Commission decision of 12 October 2018 See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45300.

[325] Case SA.51263 *Prolongation of the Dutch tonnage tax scheme for ship managers*, large vessels and service vessels, Commission decision of 26 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51263.

[326] Case SA.51809 *Prolongation of the Cyprus tonnage tax and seafarer scheme*. Commission decision of 16 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51809.

[327] Case SA.53469 *State aid in favour of maritime transport*, Commission decision of 16 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53469.

[328] Case SA.52069 *Prolongation of the Danish seafarer regime for dredgers* Commission decision of 16 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52069.

[329] Case SA.46380 *Poland – Reduction of income tax for seafarers*, Commission decision of 16 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46380.

[330] Case SA.46740 Sweden – *Tax deduction scheme for seafarers*, Commission decision of 16 December 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46740.

In 2019, the Commission approved numerous schemes supporting rail[331] and intermodal[332] transport on the basis of the 2008 State aid Guidelines.[333] Approved measures include for example aid for external costs, infrastructure aid, aid to support measures for noise reduction and aid to support research into environmentally-friendly rail transport and support for systems ensuring interoperability, in particular to enhance the deployment of ERTMS.[334] All these measures supports the shift of freight and passenger transport from road to rail, as the safer and more environmentally-friendly transport mode.

Moreover, in 2019, the Commission proceeded with the evaluation of the State aid rules in the railway sector, mainly laid down in the Community guidelines on State aid for railway undertakings adopted in 2008 in the framework of the State aid Fitness check. The exercise involved internal analyses and a public consultation to assess whether the rules fulfil their initial objective of enhancing a Single European Railway area by supporting the rail sector where needed while minimising competition distortions. The assessment aims to determine whether to prolong the rules in case they are still fit for purpose or to review them if the rules no longer meet their initial objectives. The results of the Fitness Check will be published in 2020.

State aid review in the road sector

The Commission continued to enforce Regulation No 1370/2007 on public passenger transport services. No decisions were adopted in 2019.

State aid review in the postal services sector

The postal sector continues to evolve and traditional letter delivery, due to electronic substitution, is declining. Nevertheless, postal services continue to have a significant

[331] *Cases SA.51714(Italy) and SA.51559 (France) Prolongation de l'aide au service transitoire d'autoroute ferroviaire alpine,* Commission decisions of 02 August 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51714 and https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51559; SA.52898 *Financial measure to stimulate rail freight,* Commission decision of 08 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52898; SA.54990 *Aid in favour of rail freight transport in Emilia-Romagna region*, Commission decision of 10 October 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54990; SA.55025 *Prolongation of Rail Freight Transport Scheme 2020-2022.* Commission decision of 15 November 2019, See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55025.

[332] Case SA.51613 *Combined transport aid scheme for Luxembourg 2019-2022*, Commission decision of 08 July 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51613; SA.52499 *Extension of the Integrated Transport Scheme in the Province of Trento, Italy*, Commission decision of 06 March 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52499; SA.52828 *Incentive scheme for combined cargo transport*, Commission decision of 04 February 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_52828; SA.53158 *Aide à l'exploitation de services réguliers de transport combiné de marchandises alternatifs au mode tout routier pour la période 2018-2022*, Commission decision of 29 October 2019, See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53158; Commission decision of 18 October 2019, SA.54860 *Mode Shift Revenue Support (MSRS) scheme*. See : https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_54860; SA.55507 *Austria - Support for rail transport in the mountainous regions*, Commission decision of 16 December 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55507; SA.55443 *Poland - Aid for the implementation of projects to reduce noise emissions by freight wagons*, Commission decision of 16 December 2019, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55443.

[333] Communication from the Commission: Community guidelines on State aid for railway undertakings, OJ of 22 July 2008, C 184, p. 13, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:184:0013:0031:EN:PDF.

[334] Commission decision of 05 November 2019, SA.55451 - The Netherlands - Support for ERTMS-upgrade, see: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_55451. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6223. The European Rail Traffic Management System ERTMS aims at ensuring interoperability of train control and command systems in the European Union.

economic and social value. In a shrinking market for traditional letter delivery, postal operators are diversifying their activities to stay competitive. At the same time, the explosive growth of e-commerce necessitates a well-functioning parcel delivery market linking buyers and sellers. Efficient postal services are a key factor in allowing e-commerce to realise its potential for growth and creating jobs.

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

On 19 March 2019, the General Court upheld the Commission Decision from 26 November 2015 on financing of *Polish Post's* universal service obligation via a compensation fund.[335] The judgment confirms the Commission's approach for the assessment of universal service compensations under the SGEI framework.[336] The judgment also clarifies the approach to be taken for compensation funds as well as the interplay between the Postal Directive[337] and the SGEI Framework. The judgment was appealed by InPost and the appeal is still pending.[338]

On 14 June 2019, the Commission opened an in-depth investigation to assess whether capital injections granted by Denmark and Sweden to *PostNord* and by *PostNord* to *Post Danmark* are in line with EU State aid rules.[339] Post Danmark is the national postal operator in Denmark and a wholly-owned subsidiary of PostNord, which is owned by the Danish (40%) and Swedish (60%) States.

On 22 July 2019, the Commission approved a EUR 171.74 million public service compensation granted by Italy to *Poste Italiane* for distributing, at reduced tariffs, newspapers and publications of book publishers and non-profit organisations for the period 2017-2019.[340]

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335 Case T-283/16 (Joined Cases T-282/16, T-283/16) Inpost Paczkomaty v Commission Judgment of the General Court (Third Chamber, Extended Composition) of 19 March 2019 Inpost Paczkomaty sp. z o.o. and Inpost S.A. v European Commission.

336 Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15-22.

337 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directives 2002/39/EC and 2008/6/EC, OJ L 15, 21.2.1998, p. 14-25. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01997L0067-20080227.

338 C-431/19 P - Inpost Paczkomaty v Commission, case pending.

339 Cases SA.49668 *Denmark - Alleged State aid to Post Danmark*, Commission decision of 14 June 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49668 and SA.53403 *Sweden - Alleged State aid to Danmark* Commission decision of 14 June 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_53403.

340 SA.48492 *Italy - Compensation to Poste Italiane for reduced tariffs for publishers and not-for profit organizations 2017-2019,* Commission decision of 14 June 2019. See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48492.

ANNEX

Banking State aid cases: Decisions adopted by the Commission in 2019

By country

	Member State	Case Number/Title		Type of Decision	Date of Adoption
1	Austria	SA.51650(2018/N) -	Sale of 25 % + 2 shares of Landes-Hypothekenbank Steiermark AG to Raiffeisen-Landesbank Steiermark AG	No aid	21.01.2019
2	Austria	SA.45840(2019/N) -	Tax Incentives for Mid-Sized Business Financing Companies	No objection	31.07.2019
3	Croatia	SA.51814(2018/N) -	Reintroduction of the resolution scheme for small credit institutions with total assets below EUR 1,5 billion	No objection	14.01.2019
4	Cyprus	SA.35534(2019/N) -	Second amendment to the liquidation aid for the orderly market exit of Cyprus Cooperative Bank Ltd	No objection	29.11.2019
5	Denmark	SA.54807(2019/N) -	Prolongation of the winding-up scheme for small banks	No objection	23.08.2019
6	France/ Belgium	SA.53554(2019/N) and SA.53592(2019/N -	Renouvellement de la garantie de refinancement de Dexia au-delà du 31 décembre 2021	No objection	27.09.2019
7	Germany	SA.49094(2019/N) -	Market-conform measures for strengthening capital and restructuring of Norddeutsche Landesbank	No aid	5.12.2019
8	Greece	SA.53123(2019/N) -	Pre-approval for Eurobank merger transaction with Grivalia in accordance with State aid commitments	No objection	07.02.2019
9	Greece	SA.43365 (2015/N) -	Amendment of the restructuring plan approved in 2014 and granting of new aid to National Bank of Greece	No objection	10.05.2019

10	Greece	SA.54332(2019/N) -	Prolongation of the Greek State Guarantee Scheme for banks (Art. 2 law 3723/2008)	No objection	11.06.2019
11	Greece	SA.53520(2019/N) -	Primary Residence Protection Scheme	No objection	19.09.2019
12	Greece	SA.53519(2019/N) -	Hellenic Asset Protection Scheme ('Hercules')	No aid	10.10.2019
13	Ireland	SA.54005(2019/N) -	Ninth prolongation of the Credit Union restructuring and stabilisation scheme	No objection	27.05.2019
14	Ireland	SA.54244(2019/N) -	15th prolongation of the Credit Union Resolution Scheme 2019-2020	No objection	24.06.2019
15	Ireland	SA.54724(2019/N) -	Limited extension of NAMA’s lifespan to work out residual loans	No objection	25.07.2019
16	Ireland	SA.55542(2019/N) -	10th prolongation of the Credit Union restructuring and stabilisation scheme	No objection	27.11.2019
17	Italy	SA.52917(2019/N) -	Liquidity support to Banca Carige - Cassa di Risparmio di Genova e Imperia	No objection	18.01.2019
18	Italy	SA.53518 (2019/N) -	Third prolongation of the Italian guarantee scheme for the securitisation of non-performing loans	No objection	27.05.2019
19	Italy	SA.21445(C42-2006) -	Poste Italiane SpA - BancoPosta: remuneration of current accounts deposited with the Treasury	No aid	02.08.2019
20	Italy	SA.55121(2019/N) -	Banca Monte dei Paschi di Siena - Amendments to the list of commitments of the Republic of Italy to the European Commission	No objection	12.09.2019
21	Poland	SA.54463(2019/N) -	Third prolongation of the resolution scheme for cooperative banks and small	No objection	29.10.2019

			commercial banks		
22	Poland	SA.54734(2019/N) -	Ninth prolongation of the Credit Unions Orderly Liquidation Scheme	No objection	13.08.2019
23	Romania	SA.53869(2019/N) -	Market-conform recapitalisation of CEC Bank	No aid	29.10.2019
24	The Netherlands	SA.47821(2019/N) -	Invest-NL	No objection	06.06.2019
25	United Kingdom	SA.54557(2019/N) -	Funding and remit of the British Business Bank 2020-2024	No objection	28.10.2019