



Council of the
European Union

Brussels, 27 June 2018
(OR. en)

10582/18

RC 18

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	18 June 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2018) 482 final
Subject:	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 2017

Delegations will find attached document COM(2018) 482 final.

Encl.: COM(2018) 482 final



Brussels, 18.6.2018
COM(2018) 482 final

**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 2017

{SWD(2018) 349 final}

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 2017

1. Introduction

2017 marked the 60th anniversary of the signature of the Treaty of Rome, which laid the foundations for today's European Union. That means that EU competition policy, too, has now been in place for over sixty years. Indeed, from the very first day of its existence, the EU has had rules that defend fair, undistorted competition.

In the past decades, competition policy has made a big difference in people's lives: European citizens may not always be familiar with competition rules, but they deal with the market every single day. Competition drives businesses to compete on the merits – on prices, quality and innovation – and to meet consumers' needs. By pushing companies to do better, competition puts power in the hands of consumers.

Also, through the decades, all companies active in the single market have been able to rely on a stable set of rules and on their impartial implementation. Robust, consistent and predictable enforcement sends the clear message that every company is granted equal conditions to operate and equal chances to succeed.

Competition enforcement ensures that a world of global trade, and global businesses, can be a world that gives small business and individuals a fair chance. Also, competition rules guarantee that all companies doing business in the single market play by the same rules – whether they're big or small, and wherever in the world they come from.

Competition policy is also an essential player in supporting the Commission's political priorities. In 2017, competition policy actions contributed to bringing the Commission's agenda to life, delivering in those areas that matters to European citizens. The digital economy, energy, the pharmaceutical and agro-chemical sector, the network industries and the financial markets are among the sectors where competition policy efforts kept making a difference for European consumers.

The Commission works hand in hand with Member States' national competition authorities, so that the benefits of competition can be multiplied and spread to every Member State in the EU. At the same time, the Commission is joining forces with competition agencies all over the world to achieve a truly global level playing field.

For the last sixty years, EU competition policy has been empowering businesses and consumers, by making sure that every company and every citizen can feel the benefits that come from fair competition.

This report is a non-exhaustive summary of activities undertaken by the Commission in the field of competition policy over the year 2017. Further information can be found in the

accompanying Commission Staff Working Document and on the website of the Competition Directorate-General¹.

2. Enhancing the effectiveness of competition enforcement

Effective competition enforcement enables EU consumers to have access to better products and wider choice. Tackling anticompetitive practices also ensures that open markets work for the benefit of all. But for that to happen, it is essential to make sure that every European benefits from the same protection.

For more than ten years, the Commission and Member States' national competition authorities have been working closely on enforcing the EU antitrust rules in the framework of the European Competition Network (ECN)². This network underpins the coherent application of the EU antitrust rules by all enforcers: It should not matter where a company is based within the single market when it comes to competition enforcement.

In March 2017, the Commission proposed new rules to enable Member States' competition authorities to be more effective enforcers of EU antitrust rules³ (the so-called "ECN+"). The proposal seeks to further empower Member States' competition authorities and make sure they have all the tools they require to achieve this.

ECN+: how the proposed Directive will strengthen EU national competition authorities

The proposed rules, once adopted, will provide the national competition authorities with a minimum common toolkit and effective enforcement powers, making sure that they will:

- a) act independently when enforcing EU antitrust rules and work in a fully impartial manner, without taking instructions from public or private entities;
- b) have the necessary financial and human resources to do their work;
- c) have all the powers needed to gather all relevant evidence, such as the right to search mobile phones, laptops and tablets;
- d) have adequate tools to impose proportionate and deterrent sanctions for breaches of EU antitrust rules. The proposal ensures that the concepts of undertaking, parental liability and succession are applied in line with the case law of the European Court of Justice, so that companies cannot escape fines through corporate re-structuring. National competition authorities will also be able to enforce the payment of fines against infringing companies that do not have a legal presence on their territory, an important feature since an increasing number of companies operate internationally;
- e) have harmonised core conditions for leniency programmes and a common system of summary applications, which encourage companies to come forward with evidence of illegal cartels. This will increase the overall incentives for companies to participate in leniency programmes and report their participation in a cartel.

¹ http://ec.europa.eu/competition/index_en.html

² See Communication of 9 July 2014 from the Commission to the European Parliament and the Council, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM(2014) 453, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0453>.

³ 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, COM/2017/0142 final, available at http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf.

The Commission's proposal underlines the importance of companies' fundamental rights and requires authorities to respect appropriate safeguards for the exercise of their powers, in accordance with the EU Charter of Fundamental Rights and general principles of EU law.

The proposal for new rules takes the form of a Directive that will allow national specificities to be respected. The Directive has been transmitted to the European Parliament and Council for adoption, in line with the normal legislative process. Once adopted, Member States have to transpose the provisions of the Directive into national law.

A new whistleblower tool

Until now, most cartels have been detected through the Commission's leniency programme, which allows businesses to report their own involvement in a cartel in exchange for a reduction of the fine imposed on them. In March 2017, the Commission launched a new anonymous whistleblower tool, which gives an opportunity also to individuals who have knowledge of the existence or functioning of a cartel, or other types of antitrust violations, to help end such practices⁴.

If people are concerned by business practices that may be in violation of competition law, this new tool can help put things right by providing information, while maintaining anonymity. Inside knowledge can be a powerful tool to help the Commission uncover cartels and other anti-competitive practices. The new system increases the likelihood of detection and prosecution and so stands to further deter businesses from entering or remaining in cartels, or carrying out other types of illegal anti-competitive behaviour. Information can contribute to the success of Commission's investigations quickly and more efficiently, to the benefit of consumers and the EU's economy as a whole.

The figures after the first months of use are positive and show that the new channel has been taken up by whistleblowers. Messages arrive on a regular basis.

"Small on small" - towards a more effective State aid policy

In line with the Commission's "big on big, small on small" approach, a significantly larger number of smaller and unproblematic State aid measures are now exempted from prior notification through the General Block Exemption Regulation, in exchange for strengthened controls at Member State level, greater transparency and better evaluation of the impact of aid.⁵ On 17 May the Commission extended the scope of the General Block Exemption Regulation to ports and airports and included further simplifications in other areas, such as cultural projects and multi-purpose sport arenas and compensation for companies operating in the EU's outermost regions.⁶ This is expected to facilitate public investment in support of the Commission's common goals on jobs and growth, climate, innovation and social cohesion.

The Commission continued providing guidance to the Member States' authorities by way of so-called "analytical grids" on the application of State aid rules to the public financing of

⁴ See <http://ec.europa.eu/competition/cartels/whistleblower/index.html>.

⁵ See 2017 Scoreboard confirms benefits of modernisation leading to quicker implementation on the ground of public support by Member States, IP/18/263 of 16 January 2018 available at http://europa.eu/rapid/press-release_IP-18-263_en.htm.

⁶ Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs – available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1497952641554&uri=CELEX:32017R1084>.

infrastructure projects, which were revised in the light of the adoption of the Commission Notice on the notion of State aid in 2016.⁷ The amended General Block Exemption Regulation and the analytical grids make it easier to implement infrastructure investments quicker and with full legal certainty for project developers and aid-granting authorities.

The Commission services facilitated compliance with the transparency provisions of the State aid Modernisation (SAM) by developing, in cooperation with Member States, the Transparency Award Module – a new informatics tool for submission and publication of data on State aid.⁸ As of end October 2017, 24 Member States have joined the Transparency Award Module. Approximately 15 000 aid awards have been published by 22 Member States.

The Commission also supports Member States in the framework of a multilateral partnership such as the Working Group on the implementation of the State aid Modernisation . The Group allows Member States to exchange best practices on their systems for State aid control, and acts as a network for the informal discussion of State aid issues among Member States and with the Commission.

3. Tapping the full potential of the Digital Single Market

Digital technology is now an integral part of EU citizens' life at home, at work, while studying or when travelling. 360 million Europeans use the internet every day, with almost 60% of them getting access through a mobile or smart phone. To make the most of the new opportunities this brings, Europe needs a genuinely connected Digital Single Market. Competition policy is an integral part of the Commission's strategy to improve and strengthen the Digital Single Market, creating new growth and generating hundreds of thousands of new jobs⁹.

Antitrust enforcement to uphold innovation in the online markets

In the digital sector, it is crucial that successful companies, which dominate the market, are prevented to use their power to shut down competition, because that can end up severely harming innovation.

In June 2017, the Commission found that Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results¹⁰.

The "Google Shopping" case: widening choice for consumers

Google's flagship product is the Google search engine, which provides search results to consumers, who pay for the service with their data. In 2004, Google entered the separate market of comparison shopping in Europe, with a product now called "Google Shopping". From 2008, Google began to implement in European markets a strategy to favour its comparison shopping service which relied on Google's dominance in general internet search, instead of competition on the merits in comparison shopping markets. Google systematically gave prominent placement to its own comparison shopping service, and demoted rival comparison shopping services in its search results. Evidence showed that even the most highly ranked rival service appeared on average only on page four of Google's search

⁷ OJ C 262, 19.7.2016 p. 1

⁸ For further information see the Transparency Award Module available at <https://webgate.ec.europa.eu/competition/transparency/public/search/chooseLanguage>.

⁹ For further information, see https://ec.europa.eu/commission/priorities/digital-single-market_en.

¹⁰ Case AT.39740 *Google search (Shopping)*, see IP/17/1784 of 27 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

results, and others appeared even further down. Google's own comparison shopping service was not subject to Google's generic search algorithms, including such demotions. Consequently, Google's

comparison shopping service was much more visible to consumers in Google's search results, compared to rival comparison shopping services.

The evidence shows that consumers click far more often on results that are more visible, i.e. the results appearing higher up in Google's search results. As a result of Google's illegal practices, traffic to Google's comparison shopping service increased significantly, whilst rivals suffered very substantial losses of traffic on a lasting basis.

The Commission fined Google EUR 2.42 billion for breaching EU antitrust rules. The Commission's decision also ordered Google to comply with the principle of giving equal treatment to rival comparison shopping services and its own service.

Market dominance is, as such, not illegal under EU antitrust rules. However, dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate, but linked, markets. Google's behaviour denied other companies the chance to compete on the merits and to innovate and was therefore in breach of EU antitrust rules. Most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation.

The Commission continues investigating Google's possible abuses of dominant position in two other cases, concerning mobile apps and services (Android¹¹) and Google search advertisements that appear on other websites (AdSense¹²).

The Commission also looked into Amazon's distribution agreements with e-book publishers in Europe¹³. The Commission opened an investigation because it had concerns about clauses included in Amazon's e-books distribution agreements that could have breached EU antitrust rules. These clauses, sometimes referred to as "most-favoured-nation" clauses, required publishers to offer Amazon similar, or better, terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors. The Commission considered that such clauses could make it more difficult for other e-book platforms to develop innovative services for e-books and compete effectively with Amazon.

Amazon sought to address the Commission's concerns by offering not to enforce, introduce or to change the terms of its agreements with publishers. Amazon's originally proposed commitments were amended following feedback received from interested parties. In May, the Commission concluded that the amended final version of the commitments offered a timely, effective and comprehensive solution to the competition concerns it had identified¹⁴. The commitments will help ensure innovation and fair competition in Europe's e-books market worth more than EUR 1 billion, and increase choice and competition to the benefit of European consumers.

Antitrust enforcement in sports markets

¹¹ Case AT.40099 *Google Android*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099.

¹² Case AT.40411 *Google Search (AdSense)*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411.

¹³ Case AT.40153 *E-book MFNs and related matters*, Commission decision of 4 May 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40153

¹⁴ See IP/17/1223 of 4 May 2017, available at http://europa.eu/rapid/press-release_IP-17-1223_en.htm.

On 8 December 2017, the Commission adopted a decision finding that the International Skating Union (ISU)'s eligibility rules were in breach of Article 101 TFEU¹⁵. The rules concerned imposed severe penalties on athletes participating in speed skating competitions that were not authorised by the ISU, even when such competitions posed no risk to legitimate sports objectives, such as the protection of the integrity and proper conduct of sport, or the health and safety of athletes.

The Commission found that, as a result of the ISU eligibility rules, athletes were not allowed to compete in skating events not organised by the ISU and could be deprived of additional sources of income during their relatively short speed skating careers. Further, the ISU eligibility rules made it difficult for independent organisers to put together their own speed skating competitions because they were unable to attract top athletes. This limited the development of alternative and innovative speed skating competitions, to the detriment of fans and spectators.

While the Commission considered that its intervention was necessary in the circumstances of the case, the decision does not mean that the Commission is aiming to be the referee in every dispute about sport.

The Commission's e-commerce sector inquiry

E-commerce should give consumers a wider choice of goods and services, as well as the opportunity to make purchases across borders. However, despite more and more goods and services traded over the internet worldwide, cross-border online sales within the EU are only growing slowly. In 2015, the Commission launched a sector inquiry to identify possible competition concerns in European e-commerce markets¹⁶. During the inquiry, the Commission gathered evidence from nearly 1 900 companies operating in e-commerce of consumer goods and digital content, and analysed around 8 000 distribution and license contracts. In May 2017, the Commission published the sector inquiry's final report¹⁷, taking account of comments received on the preliminary report of September 2016. The findings are already helping the Commission to better target the enforcement of EU competition rules in e-commerce markets. Furthermore, the sector inquiry has prompted a number of companies to review their commercial practices on their own initiative.

Tackling price restrictions and geo-blocking practices

In February 2017, the Commission launched three separate investigations to assess if certain online sales practices prevent consumers from enjoying cross-border choice and being able to buy consumer electronics, video games and hotel accommodation at competitive prices¹⁸. The three investigations aim to tackle the specific issues of retail price restrictions, discrimination on the basis of location and geo-blocking included in vertical agreements among companies. The preliminary results of the Commission's competition's e-commerce sector inquiry show that the use of these restrictions is widespread throughout the EU.

¹⁵ Case AT.40208 *International Skating Union's Eligibility rules* available at http://ec.europa.eu/competition/ejojade/isef/case_details.cfm?proc_code=1_40208.

¹⁶ For further information, see http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

¹⁷ Report from the Commission to the Council and the European Parliament, *Final report on the E-commerce Sector Inquiry*, COM(2017) 229 final, available at http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

¹⁸ See IP/17/201 of 2 February 2017, available at http://europa.eu/rapid/press-release_IP-17-201_en.htm.

In addition, in June 2017, the Commission opened a formal antitrust investigation into the distribution agreements and practices of clothing manufacturer and retailer Guess¹⁹. The Commission has also launched three separate antitrust investigations to assess whether Nike, Sanrio and Universal Studios are restricting cross border and online sales of merchandising products²⁰. The Commission is examining whether the licensing and distribution practices of these companies may be denying consumers access to wider choice and better deals in the single market.

One of the main goals of the Commission's Digital Single Market strategy²¹ is to grant better access for consumers and businesses to goods and services, for example by ensuring compliance with EU competition rules, ending unjustified geo-blocking²² and enabling cross-border portability of online content services.

Ensuring vibrant competition in the media sector

The media sector is vital for the progress of information and communication technologies, as well as to develop and preserve culture, information, education and democracy. As digital content is increasingly available and distributed across various platforms (digital terrestrial, cable, satellite, Internet, mobile networks), firms tend to engage to combine production of content and its distribution. When assessing mergers in the media sector, one of the Commission's main concerns is that access to key elements - whether content, technology or interconnection - is not negatively affected.

In April 2017, the Commission cleared under the Merger Regulation the proposed acquisition of Sky by Twenty-First Century Fox, a United States of America-based diversified global media company²³. Sky is the leading pay-TV operator in Austria, Germany, Ireland, Italy and the United Kingdom, whereas Twenty-First Century Fox is one of the six major Hollywood film studios, and a TV channel operator. Fox and Sky are mainly active in different markets in Austria, Germany, Ireland, Italy and the United Kingdom. The Commission concluded that the transaction would not raise competition concerns in Europe.

In May, the Commission approved the acquisition of de facto control over Telecom Italia by Vivendi²⁴. Both Telecom Italia (Italy) and Vivendi (France) are active in the market for the wholesale access to digital terrestrial networks for the broadcast of TV channels, through their respective stakes in two other companies, Persidera and Mediaset. The Commission found that, post-transaction, Vivendi would have had an incentive to raise prices charged to TV channels in the market for wholesale access to digital terrestrial television networks. In order to address the competition concerns identified by the Commission, Vivendi committed to divest Telecom Italia's stake in Persidera. The Commission's decision is conditional upon full compliance with the commitments.

¹⁹ Case AT.40428 *Guess*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40428.

²⁰ Case AT.40432 *Licensed merchandise – Sanrio*, AT.40433 *Licensed merchandise – Universal Studios*, AT.40436 *Licensed merchandise – Nike*, see IP/17/1646 of 14 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1646_en.htm.

²¹ See <https://ec.europa.eu/digital-single-market/>.

²² See Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, p. 1.

²³ Case M.8354 *Fox / Sky*, Commission decision of 7 April 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8354.

²⁴ Case M.8465 *Vivendi / Telecom Italia*, Commission decision of 30 May 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8465.

The Commission has exclusive jurisdiction to assess the impact of the proposed transactions on competition in the various markets affected within the European Economic Area (EEA). However, the EU Merger Regulation recognises that Member States may take appropriate measures, including prohibiting proposed transactions, to protect other legitimate interests, such as media plurality. In this regard, the United Kingdom Secretary of State for Culture Media and Sport is currently considering whether to take appropriate measures to protect media plurality in the United Kingdom in relation to the proposed acquisition of Sky by Twenty-First Century Fox.

The Commission also approved two aid schemes supporting the development and the promotion of educational and culturally valuable digital video games in Germany²⁵ and Denmark²⁶.

Merger control and the importance of providing correct information

When assessing a proposed merger transaction, the Commission must be able to take decisions in full knowledge of accurate facts. The EU Merger Regulation obliges companies in a merger investigation to provide correct information that is not misleading, as this is essential for the Commission to review mergers and takeovers in a timely and effective manner. This obligation applies, regardless of whether the information has an impact on the ultimate outcome of the merger assessment.

When Facebook notified the acquisition of WhatsApp in 2014²⁷, it informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, later on, the Commission found out that, contrary to Facebook's statements in the 2014 merger review process, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook was aware of such a possibility. Following a Statement of Objections, in May 2017 the Commission imposed a fine of EUR 110 million on Facebook for providing incorrect or misleading information²⁸. The decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information.

Supporting connectivity across the EU

Internet connections and coverage are a precondition for digital development and innovation. As part of its Digital Single Market strategy, the Commission aims to encourage broadband roll-out, especially in underserved areas, and to ensure a high level of connectivity in the EU. The Commission has set a target of internet connections with download/upload speeds of 1 Gigabit of data per second by 2025 for all schools, transport hubs and main providers of public services, as well as digitally intensive enterprises. In addition, all European households should have access to networks offering a download speed of at least 100 Mbps, which can be

²⁵ State aid cases SA.46572 – Germany – Bavarian games support measure, Commission decision of 4 September 2017 available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

²⁶ SA.45735 – Denmark - Scheme for the development, production and promotion of cultural and educational digital games, Commission decision of 12 May 2017 available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3.

²⁷ Case M.7217 *Facebook / Whatsapp*, Commission decision of 3 October 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7217.

²⁸ Case M.8228 *Facebook / Whatsapp (Art. 14.1 proc.)*, see IP/17/1369 of 18 May 2017, available at http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

upgraded to 1 Gigabit by 2025²⁹. Finally, also by 2025, all urban areas and all major terrestrial transport paths should have uninterrupted 5G coverage.

The General Block Exemption Regulation (GBER) which is intended particularly for underserved areas and allows Member States to deploy broadband networks without State aid notification and the Commission's Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks³⁰ offer stability and legal certainty for broadband investment. Those rules encourage the rapid roll-out of publicly funded broadband infrastructure with public funds whilst minimising the risk of crowding out of private investments or of creating monopolies. All Member States have now adopted and/or updated national and/or regional broadband strategies and are progressively adapting them to the new connectivity strategic objectives for 2025. Extensive national and regional broadband schemes have been approved by the Commission during 2017, in particular for Lithuania, Croatia, Austria, Germany and Poland. The planned measures will bring faster internet to consumers and businesses. In 2017, Directorate-General for Competition actively contributed with its expertise on competition law, in particular State aid rules, to the new European network of Broadband Competence Offices³¹ and the Toolkit for Rural Broadband³². Both initiatives aim at building up capacities (legal, technical or financial) and dissemination of knowledge in broadband, including the exchange of current best practices for a fast implementation of broadband plans in Europe.

4. Promoting fair competition in concentrated markets, to the benefit of citizens and businesses

High market concentration means that a few companies have high market shares in a particular sector. Rigorous competition enforcement ensures that large and powerful companies are prevented from misusing their market power to the disadvantage of their customers and the rest of the economy. The Court of Justice has in September clarified the framework for assessing the legality of exclusivity rebates applied by dominant companies. It confirmed that such rebates are as a starting point illegal and that anticompetitive effects can be shown through many different means.³³ From a procedural perspective, the Court also sent a reminder about the importance of keeping records of contacts with companies and other parties involved in competition investigations, which is fully in line with the Commission's emphasis on fairness and respect for companies' rights of defence.

Antitrust enforcement in the pharmaceutical sector

European citizens need access to innovative, safe and affordable pharmaceutical products. When pharmaceutical companies, medical device companies or other health-related companies are deterred from unfair practices, citizens win. New, better products are

²⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society* - COM(2016)587 and Staff Working Document - SWD(2016)300, available at <https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society>.

³⁰ Communication from the Commission, *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ 2013 C 25, 26.1.2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:en:PDF>.

³¹ For further information see <https://ec.europa.eu/digital-single-market/en/broadband-competence-offices>.

³² For further information see <https://ec.europa.eu/digital-single-market/en/news/european-commission-joins-forces-help-bringing-more-broadband-rural-areas>.

³³ C-413/14 P *Intel v Commission*, judgment of the European Court of Justice of 6 September 2017, ECLI:EU:C:2017:632.

developed, prices go down and health budgets are spared. In the EU, each Member State has different pharmaceutical pricing and reimbursement policies, adapted to its own economic and health needs; nonetheless, all pharmaceutical companies operating in the EU single market must respect competition rules.

In May 2017, the Commission opened a formal investigation into concerns that Aspen Pharma has engaged in excessive pricing concerning five life-saving cancer medicines³⁴. The Commission is investigating whether Aspen has abused a dominant market position in breach of EU antitrust rules. The Commission will now carry out its in-depth investigation as a matter of priority. The opening of formal proceedings does not prejudice the outcome of the investigation.

The Commission is looking into pricing practices for life-saving medicines: the Aspen case

Aspen is a global pharmaceutical company headquartered in South Africa, with several subsidiaries in the EEA. The investigation concerns Aspen's pricing practices for niche medicines used for treating cancer, such as hematologic tumours. The medicines are sold with different formulations and under multiple brand names. Aspen acquired these medicines after their patent protection had expired.

The Commission is investigating allegations indicating that Aspen has imposed very significant and unjustified price increases of up to several hundred percent, so-called 'price gouging'. To impose such price increases, Aspen has threatened to withdraw the medicines in question in some Member States and has actually done so in certain cases. The investigation covers all of the EEA except Italy, where the Italian competition authority already adopted an infringement decision against Aspen in September 2016.

This is the Commission's first investigation into concerns about excessive pricing practices in the pharmaceutical industry.

The Commission has also been vigilant to tackle attempts by originator companies to delay or hamper the introduction of generic medicines into the market. In July 2017, the Commission sent a Statement of Objections to pharmaceutical company Teva³⁵. The Commission informed Teva of its preliminary view that an agreement concluded with its competitor Cephalon was in breach of EU antitrust rules. Under the agreement, Teva committed not to market a cheaper generic version of Cephalon's drug for sleep disorders, modafinil.

Market entry and competition by generic drugs is an essential element to improve the affordability of healthcare. The Statement of Objections alleges that the patent settlement agreement between Cephalon and Teva may have delayed the entry of a cheaper generic medicine, leading to higher prices for modafinil and causing substantial harm to EU patients and health service budgets. The companies have now the opportunity to respond to the Commission's concerns. The sending of a Statement of Objections does not prejudice the outcome of the investigation.

The key merger operations in the pharma sector

In June, the Commission approved the acquisition of Actelion by Johnson & Johnson³⁶, subject to remedies. While the activities of the two companies were largely complementary,

³⁴ Case AT.40394 *Aspen*, see IP/17/1323 of 15 May 2017, available at http://europa.eu/rapid/press-release_IP-17-1323_en.htm.

³⁵ Case AT.39686 *Cephalon*, see IP/17/2063 of 17 July 2017, available at http://europa.eu/rapid/press-release_IP-17-2063_en.htm.

³⁶ Case M.84401 J&J/Actelion. For further information, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8401.

they were both working on a treatment for insomnia, based on a novel way to cure this condition. The Commission's market investigation indicated that the transaction as notified would give Johnson & Johnson the ability and incentive to rationalise its competing insomnia research and development programmes by either delaying or discontinuing one of them. In order to address these competition concerns Johnson & Johnson offered remedies to ensure that it cannot influence negatively the development of either insomnia research programme.

The key merger operations in the agro-chemical sector

Seeds and pesticide products are essential for farmers and ultimately consumers. The Commission ensures effective competition in this sector, so that farmers can have access to innovative products, better quality and competitive prices. In this market, the Commission assessed under the EU Merger Regulation the recent mergers between Dow and Dupont and between Syngenta and ChemChina, as well as Bayer and Monsanto. Both decisions followed an in-depth review of the proposed transactions.

The conditional approval of the Dow and DuPont merger and of ChemChina acquisition of Syngenta

In March 2017, the Commission approved the merger between US-based chemical companies Dow and DuPont, subject to conditions on the divestiture of major parts of DuPont's global pesticide business, including its global Research & Development organisation³⁷. The Commission had concerns that the merger as notified would have reduced competition on price and choice in a number of markets for existing pesticides. Furthermore, a detailed investigation of the effects of the merger on innovation competition in a number of innovation spaces in which the R&D efforts of the parties were competing against each other as well as on pesticides innovation competition overall showed that the merger would also have significantly reduced innovation. The commitments submitted by Dow and DuPont addressed all these concerns in full.

In April 2017, the Commission cleared ChemChina's acquisition of Syngenta (based, respectively, in China and Switzerland), subject to conditions³⁸. The Commission had concerns that the transaction as notified would have reduced competition in a number of existing markets for pesticides within the European Economic Area. Furthermore, the Commission had concerns that the transaction could reduce competition for plant growth regulators. The approval was therefore conditional on the divestiture of significant parts of ChemChina's European pesticide and plant growth regulator business. The Commission's investigation focused on competition for existing pesticides, since ChemChina does not compete with Syngenta for the development of new and innovative pesticides.

In August, the Commission opened an in-depth investigation to assess the proposed acquisition of Monsanto (US) by Bayer (Germany) under the EU Merger Regulation³⁹. The merged entity would hold both the largest portfolio of pesticides products and the strongest global market positions in seeds and traits, making it the largest integrated company in the industry. The Commission had preliminary concerns that the proposed acquisition could reduce competition in a number of different markets resulting in higher prices, lower quality, less choice and less innovation. In particular, the initial market investigation identified preliminary concerns in the areas of pesticides, seeds and traits, as well as digital agriculture.

³⁷ Case M.7932 *Dow / DuPont*, Commission decision of 27 March 2017, available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_7932.

³⁸ Case M.7962 *ChemChina / Syngenta*, Commission decision of 5 April 2017, available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_7962.

³⁹ Case M.8084 *Bayer / Monsanto*, see IP/17/2762 of 22 August 2017, available at http://europa.eu/rapid/press-release_IP-17-2762_en.htm. The final decision was taken on 21 March 2018, available at http://europa.eu/rapid/press-release_IP-18-2282_en.htm.

The Commission also investigated whether competitors' access to distributors and farmers could become more difficult if Bayer and Monsanto were to bundle or tie their sales of pesticide products and seeds, notably with the advent of digital agriculture. Digital agriculture consists in the collection of data and information about farms with the aim of providing tailored advice or aggregated data to farmers. Both Bayer and Monsanto have been investing in this emerging technology. Given the worldwide scope of Bayer and Monsanto's activities, the Commission has cooperated closely with other competition authorities, notably with the Department of Justice in the United States of America and the antitrust authorities of Australia, Brazil, Canada and South Africa.

Securing competitive input prices for European industries

In April 2017, the Commission prohibited the proposed takeover of Cemex Croatia by HeidelbergCement and Schwenk under the EU Merger Regulation⁴⁰. The Commission had strong concerns that the takeover would have significantly reduced competition in grey cement markets and increased prices in Croatia.

The takeover would have eliminated competition between companies that were competing head-to-head for the business of Croatian cement customers and could have led to a dominant position in the market. The combined market shares of the parties would have been around 45-50% and reached more than 70% in parts of the country. Following an in-depth investigation, the Commission concluded that the proposed remedy wasn't sufficient to replace the competition that would disappear with the merger.

Cement is an important input to the building industry, which delivers many jobs in Croatia and which has been suffering in recent years. The Commission took action to protect customers and prevent the negative effects from higher input prices to this important sector.

5. Boosting growth by protecting competition in network industries

In the energy sector, the Commission continues working towards a European Energy Union in which clean energy can flow freely and securely. Reliable energy supplies, at reasonable prices for businesses and consumers and with the minimum environmental impact, are crucial to the European economy.

State aid measures to ensure security of energy supply for European citizens and businesses

The Commission's 2016 sector inquiry into capacity mechanism⁴¹ has formed the basis for a close cooperation between the Commission and the EU Member States to ensure that capacity mechanisms are well-designed and fit for purpose. In 2017, the Commission started its enforcement actions based on the findings of the Report and took a final decision on a capacity mechanism in France.⁴² In addition, the first joint capacity mechanism for Ireland and Northern Ireland was approved.⁴³ This

⁴⁰ Case M.7878 *HeidelbergCement / Schwenk / Cemex Hungary / Cemex Croatia*, Commission decision of 5 April 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7878.

⁴¹ On 16 November 2016, the Commission published the final report of its capacity mechanism sector inquiry, see IP/2016/4021 of 16 November 2016 http://europa.eu/rapid/press-release_IP-16-4021_en.htm.

⁴² Case SA.40454 Tender for additional capacity in Brittany, for further information see IP/17/1325 of 15 May 2017 available at http://europa.eu/rapid/press-release_IP-17-1325_en.htm.

⁴³ Case SA.44464 *Irish Capacity Mechanism: reliability option scheme*, Commission decision of 24 November 2017 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44464, and SA.44465 *Northern Irish Capacity Mechanism: reliability option scheme*, Commission decision of 24 November 2017 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44465. For further information see IP/17/4944 of 24 November 2017 available at http://europa.eu/rapid/press-release_IP-17-4944_en.htm.

capacity mechanism is open to all potential types of capacity providers, including demand response, in the 'all-island market'. Furthermore, in close cooperation with the relevant national authorities, the Commission continued to ensure that six further capacity mechanisms⁴⁴ in Belgium, France, Germany, Greece, Italy and Poland - which concern more than half of EU's population - are well-designed and meet the strict criteria under EU State aid rules, in particular the Commission's 2014 Guidelines on State Aid for Environmental Protection and Energy.⁴⁵ In particular, the award of the aid takes place through competitive tenders, open to all technologies capable of providing the desired services, including the demand response. These enforcement activities complement the Commission's Energy Union Strategy⁴⁶ to delivery secure, sustainable and competitive energy in Europe.

Promoting an open and integrated market for gas

In 2017, the Commission continued investigating the business practices of Gazprom in Central and Eastern Europe⁴⁷. According to the Commission's preliminary assessment, Gazprom had been breaking EU antitrust rules by pursuing an overall strategy to partition Central and Eastern European gas markets.

Gazprom has offered commitments to resolve the Commission's competition concerns. The Commission found that the commitments offered by Gazprom covered its competition concerns, and decided to submit them to a market test. In March 2017, the Commission invited all interested parties to submit their views on the commitments offered by Gazprom, receiving a significant number of comments and submissions⁴⁸. In light of the comments received in the market test, the Commission may ask for modifications to the commitments and then adopt a decision making the commitments legally binding on Gazprom. If a company breaks such commitments, the Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of the EU antitrust rules.

The Commission also continued its investigation into the possible foreclosure of gas markets in Bulgaria by the Bulgarian incumbent, Bulgarian Energy Holding ("BEH")⁴⁹.

Competition on equal ground across the European energy markets

State aid rules also play a key role in meeting the EU's ambitious energy and climate targets at the least possible cost for taxpayers and without undue distortions of competition in the single market. In particular, the Commission's Guidelines on State Aid for Environmental Protection and Energy⁵⁰ require competitive auctions for renewables support since 2017. The auctions are to be based on clear, transparent and non-discriminatory criteria. This requirement ensures that the use of public funds is limited and there is no overcompensation.

⁴⁴ See IP/18/682 of 7 February 2018 available at http://europa.eu/rapid/press-release_IP-18-682_en.htm.

⁴⁵ See IP/14/400 of 9 April 2014 available at http://europa.eu/rapid/press-release_IP-14-400_en.htm.

⁴⁶ For further information see https://ec.europa.eu/commission/priorities/energy-union-and-climate_en.

⁴⁷ Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39816.

⁴⁸ See IP/17/555 of 13 March 2017, available at http://europa.eu/rapid/press-release_IP-17-555_en.htm.

⁴⁹ Case AT.39849 *BEH gas*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39849.

⁵⁰ Communication from the Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ C 200, 28.6.2014, p. 1, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01)).

For example, in July the Commission approved under EU State aid rules the new Hungarian support scheme for renewable electricity⁵¹. Under this scheme, several technologies and plant sizes are eligible. Installations with a capacity above 1 megawatt and wind installations will be selected in a technology-neutral competitive bidding process.

In September, the Commission approved under EU State aid rules four schemes to support electricity production from onshore wind and solar on buildings and on the ground in France⁵². The schemes will allow France to develop over seven additional gigawatts in renewable energy, helping it achieve its 2020 target of producing 23% of the energy needs from renewable sources. Also, in November the Commission found a Spanish scheme for renewable electricity to be in line with EU State aid rules⁵³. The scheme supports electricity generation from renewable energy sources, high efficiency cogeneration of heat and power and waste, and contributes to Spain's transition to a low carbon, environmentally sustainable energy supply.

All those schemes are accompanied by a detailed evaluation plan to assess their impact. The final results of the evaluations will have to be submitted to the Commission.

A sound Energy Union requires strong and innovative technology providers which should be able to compete on equal grounds. A case in point is the restructuring of the French nuclear technology provider Areva⁵⁴. In January 2018, Areva changed its name to Oreno.

The Areva restructuring

In 2016, France notified the Commission of a restructuring plan to restore Areva's competitiveness and improve its financial position. The plan included State aid in the form of a public capital injection of over EUR 4 billion.

Companies in financial difficulty can receive State aid only for the objective of restoring their long-term viability. Aid granted to companies in difficulty is highly distortive as it artificially keeps a company in the market that would otherwise have left it. It can therefore only be granted under strict conditions.

The Commission analysed whether the planned injections of public capital into the company would not unduly favour Areva over its competitors, by giving it access to finance at terms not available on the market. In January 2017, the Commission adopted two decisions, one approving the rescue aid (in Case SA.46077) and another on the restructuring aid (Case SA.44727) to the Areva group. The Commission concluded that the French plans are in line with EU State aid rules, allowing the company to become viable without unduly distorting competition in the single market. The French authorities will submit regular monitoring reports to the Commission, to ensure that the restructuring plan is implemented in full and in line with the Commission's decision, until the restructuring period of Areva comes to an end in 2019.

⁵¹ SA.44076 *RES support scheme – METÁR*, Commission decision of 11 July 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44076.

⁵² Cases SA.46552, SA.47753, SA.48066 and SA.48238, see IP/17/3581 of 29 September 2017, available at http://europa.eu/rapid/press-release_IP-17-3581_en.htm.

⁵³ Case SA.40348 *Support for electricity generation from renewable energy sources, cogeneration and waste*, Commission decision of 10 November 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_40348.

⁵⁴ Case SA.44727 *Restructuring aid to Areva*, Commission decision of 10 January 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44727 and M.7764 *EDF / Areva reactor business*, Commission decision of 29 May 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7764.

The plan included the divestiture of Areva's reactor business to the French energy company EDF, subject to the Commission's review of the planned transaction under EU merger control rules. In May 2017, the Commission found that the transaction did not raise competition concerns under the Merger Regulation.

In such complex restructurings, competition tools such as merger and State aid control contribute to ensuring that markets continue delivering incentives for companies to be efficient and innovative, to the benefit of EU households and businesses.

In addition, in March 2017 the Commission approved under State aid rules Hungary's support for the construction of two new nuclear reactors in Paks (Paks II)⁵⁵. The new reactors will replace the four reactors currently operating at the Paks site, which were constructed in the 1980s and currently account for approximately 50% of Hungary's domestic electricity production. Under the EU Treaties, Member States are free to determine their energy mix and have the choice to invest in nuclear technology. The Commission's role is to ensure that the distortion of competition on the energy market as a result of the State support is limited to a minimum. During the investigation carried out by the Commission, the Hungarian Government made substantial commitments, which allowed the Commission to approve the investment.

Fostering a competitive and efficient transport sector

The transport sector represents a key sector for European households: transport-related goods and services are the second biggest household budget item after house-related expenditure⁵⁶. Competitive prices for transport services are directly important for millions of Europeans. The Commission is active to promote vibrant competition and tackle competition distortions across all transport modes.

The air transport sector is still very fragmented in the EU and the need for further consolidation was underpinned by the insolvency of a number of EU airlines in 2017. Against this background, the Commission reviewed the acquisition of certain Air Berlin assets by Lufthansa⁵⁷ and easyJet⁵⁸. While the Commission's investigation was still on-going, Lufthansa rescinded the NIKI transaction on 13 December, leading to NIKI filing for insolvency on the same day.⁵⁹ The Commission eventually approved, subject to appropriate remedies, the remaining part of the transaction between Lufthansa and Air Berlin on 21 December.⁶⁰ In this context it is important that creditors' committees and insolvency administrators do not underestimate the risk that a transaction may not be implemented on regulatory grounds (including, but not limited to, State aid and merger control rules). While the potential acquirer

⁵⁵ Case SA.38454 *Possible aid to the Paks nuclear power station*, Commission decision of 6 March 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38454.

⁵⁶ Source: Eurostat. See http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Household_consumption_expenditure_-_national_accounts

⁵⁷ Case M.8633 *Lufthansa/certain Air Berlin assets*. Further information available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8633.

⁵⁸ Case M.8672 *easyJet/ certain Air Berlin assets*. Further information available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8672.

⁵⁹ Following a decision of NIKI's creditors committee, the assets of NIKI were sold in January 2018 to its founder, Mr Niki Lauda, and rebranded as Laudamotion.

⁶⁰ Case M.8633 *Lufthansa/certain Air Berlin assets*, Commission decision of 21 December 2017 pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area, available at http://europa.eu/rapid/press-release_IP-17-5402_en.htm.

of the insolvent company may take certain interim measures to preserve the viability of the latter, these measures must be subject to compliance with the Merger Regulation.

The EU's rail freight market was liberalised in 2007. Since then, the Commission has been working to complete the single market for rail services, including by ensuring the independent management of rail infrastructure and fostering investment in tracks that interconnect Member States. In this context, the enforcement of EU competition rules is important to ensure that regulatory barriers are not replaced by anti-competitive behaviour of dominant rail companies, which would prevent the EU from achieving its goals for rail transport.

The Commission fined Lithuanian Railways for hindering competition on the rail freight market⁶¹

The Commission's investigation found that actions by the Lithuanian incumbent state-owned rail company responsible for both railway infrastructure and rail transport hindered competition on the rail freight market by dismantling a 19km long section of track connecting Lithuania and Latvia and thus preventing a major customer of Lithuanian Railways from using the services of another rail operator. Lithuanian Railways could not show any objective justification for the removal of the track.

The Commission decided to fine Lithuanian Railways for abusing its dominant position in the management of rail infrastructure in Lithuania an amount of EUR 27.9 million. The Commission also ordered Lithuanian Railways to rebuild the tracks.

In June, the Commission approved under State aid rules restructuring aid to Greek railway companies OSE and TRAINOSE.⁶² For the aid measures to OSE and TRAINOSE that the Commission found to be in line with EU state aid rules, the Commission took into particular account the difficulties the Greek railway sector is facing and the importance of a well-functioning railway service for the population. The measures have the legitimate objective of avoiding a serious disturbance of the Greek economy, without unduly distorting competition in the Single Market. The aid will also facilitate the future privatisation of TRAINOSE, which is expected to support the opening of the Greek railway market to competition and to have a positive impact on the quality of transport services. The Commission also took a decision finding that Bulgarian support measures in favour of the publicly-owned railway incumbent BDZ are in line with EU State aid rules.⁶³

Both the decisions concerning OSE and TRAINOSE and the decision on the Bulgarian support measures in favour of BDZ show how State aid control can help address the issues around debt levels that some incumbent rail operators are carrying. State aid rules allow Member States to help these companies avoid serious financial difficulties or having to significantly reduce staff, while easing the transition to an open and competitive rail market to the benefit of consumers and taxpayers alike.

⁶¹ Case AT.39813 *Baltic rail*, Commission decision of 2 October 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39813.

⁶² Case SA.32543 *Measures in favour of OSE group* and SA.32544 *Restructuring of the Greek Railway Group - TRAINOSE S.A.*, see IP/17/1661 of 16 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1661_en.htm.

⁶³ Case SA.31250 *Measure implemented by Bulgaria in favour of BDZ Holding EAD SA, BDZ Passenger EOOD and BDZ Cargo EOOD*, Commission decision of 16 June 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_31250.

Anti-cartel enforcement to underpin EU competitiveness

Road haulage is an essential part of the European transport sector and its competitiveness depends on truck prices.

The Commission fined Scania for participating in a cartel⁶⁴

In September, the Commission imposed a fine of EUR 880 million on Scania, for participating in a cartel in the market for the manufacturing of medium (weighing between 6 to 16 tons) and heavy trucks (weighing over 16 tons). In July 2016, the Commission had reached a settlement decision concerning the trucks cartel with MAN, DAF, Daimler, Iveco and Volvo/Renault⁶⁵. Scania decided not to settle this cartel case with the Commission, unlike the other five participants. As a result, the Commission's investigation against Scania was carried out under the ordinary cartel procedure.

In February⁶⁶, in what became the first cartel case in the circular economy, the Commission imposed a total fine of EUR 68 million on four European recycling companies of scrap lead-acid automotive batteries (Campine, Eco-Bat Technologies, Johnson Controls and Recylex) for having participated between 2009 and 2012 in a cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany and the Netherlands.

Furthermore, the Commission has been conducting a number of investigations in the car parts sector, sanctioning the undertakings involved in three cartels⁶⁷ with a total amount of fines amounting to EUR 220 million. Cartels for car parts increase the input costs for car manufacturers, thereby impair the competitiveness of the automotive sector and artificially raise the price paid by European consumers who buy cars.

Simplified rules for public investment in ports and airports, culture and the outermost regions

The Commission has been focusing its State aid control efforts on large cases that significantly impact competition in the single market, to the greatest benefit of consumers. In this spirit, the General Block Exemption Regulation⁶⁸, adopted in 2014 as part of the State Aid Modernisation initiative⁶⁹, enabled Member States to implement a wide range of State aid measures without prior Commission approval. In 2017, the Commission extended the scope of this Regulation to ports and airports.⁷⁰ It also included a number of new simplifications in

⁶⁴ See IP/17/3502 of 27 September 2017 available at http://europa.eu/rapid/press-release_IP-17-3502_en.htm.

⁶⁵ Case AT.39824 *Trucks*, Commission decision of 19 July 2016, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824.

⁶⁶ Case 40018 *Car battery recycling*, Commission decision of 8 February 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40018.

⁶⁷ Cases: AT.4000 *Thermal Systems*, Commission decision of 8 March 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39960; AT.40013 *Lighting systems*, Commission decision of 21 June 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40013; AT.39881 *Occupant Safety Systems*, Commission decision of 22 November 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39881.

⁶⁸ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.187.01.0001.01.ENG.

⁶⁹ For further information, see http://ec.europa.eu/competition/state_aid/modernisation/index_en.html.

⁷⁰ Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs., OJ L 156, 20.6.2017, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1497952641554&uri=CELEX:32017R1084>.

other areas. For example, the Commission will only look at bigger State aid cases that involve a higher amount of aid for culture projects.

New State aid measures: Commission simplifies rules for public investment in ports and airports, culture and the outermost regions

As regards airports, Member States can now make public investments in regional airports handling up to 3 million passengers per year with full legal certainty and without prior control by the Commission. This will facilitate public investment in more than 420 airports across the EU (which account for about 13% of air traffic). The Regulation also allows public authorities to cover operating costs of small airports handling up to 200 000 passengers per year. These small airports account for almost half of all airports in the EU, but less than 1% of air traffic. They may not always be as profitable as larger airports, but they can play an important role for the connectivity of a region and are unlikely to distort competition in the EU single market.

With regard to ports, Member States can now make public investments of up to EUR 150 million in sea ports and up to EUR 50 million in inland ports with full legal certainty and without prior control by the Commission. This includes dredging costs that certain ports need to incur to keep the waterway deep enough for ships to dock. For ports these costs are non-negotiable because of their geography, regardless of how efficient and competitive they are.

6. Tackling competition distortions in the taxation and financial sector for a fairer single market

Confidence in the EU single market depends on creating a level playing field for companies to compete on merit, also when it comes to taxation. For example, a Member State cannot give tax benefits to multinational groups which are not available to stand alone companies (often local businesses), since that would severely distort competition.

In October 2017, the Commission concluded that Luxembourg gave illegal tax benefits to Amazon⁷¹.

Putting a stop to selective tax advantages: The Amazon decision

Following an in-depth investigation launched in October 2014, the Commission concluded that a tax ruling issued by Luxembourg in 2003, and prolonged in 2011, lowered the tax paid by Amazon in Luxembourg without any valid justification.

The tax ruling enabled Amazon to shift the vast majority of its profits from an Amazon group company that is subject to tax in Luxembourg (Amazon EU) to a company which is not subject to tax (Amazon Europe Holding Technologies), without valid economic justification. Transactions between companies in a corporate group must be priced in a way that reflects economic reality. This means that the payments between two companies in the same group should be in line with arrangements that take place under commercial conditions between independent businesses (so-called "arm's length principle").

The Commission's investigation showed that the level of the royalty payments, endorsed by the tax ruling, was inflated and did not reflect economic reality. As a result, these profits were not taxed. In fact, the ruling enabled Amazon to avoid taxation on almost three quarters of the profits it made from all Amazon sales in the EU. On this basis, the Commission concluded that the tax ruling granted a selective economic advantage to Amazon.

A stand-alone company, also based in Luxembourg and subject to the same national taxation laws, would have had to pay four times as much in tax as Amazon on the same profits. Thus, the tax ruling

⁷¹ Case SA.38944 *Alleged aid to Amazon*, Commission decision of 4 October 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38944.

gave Amazon a competitive advantage which was not available to comparable undertakings and gave rise to illegal State aid.

Luxembourg must recover about EUR 250 million in unpaid tax from Amazon, plus interest. This amount covers the eight year period during which Amazon relied on the tax ruling to determine its corporate income tax liability in Luxembourg. It is for the Luxembourg tax authorities to now determine the exact amount, based on the method set out in the Commission's decision.

On 26 October, the Commission opened an in-depth investigation into the United Kingdom scheme that exempts certain transactions by multinational groups from the application of national rules targeting tax avoidance.⁷² The United Kingdom's Group Financing Exemption exempts from reallocation of the Controlled Foreign Company (CFC) income received by the offshore subsidiary from another foreign group company. At this stage, the Commission has doubts whether this exemption is consistent with the overall objective of the United Kingdom CFC rules, which is to reallocate income artificially shifted to offshore subsidiaries of United Kingdom parent companies to the United Kingdom for taxation. The Commission does at this stage consider that the United Kingdom should apply the anti-abuse rule to all companies which artificially divert income, including those earning group financing income, since they all are in a comparable factual and legal situation with regard to the objective of that measure.

On 18 December, the European Commission opened an in-depth investigation into the Netherlands' tax treatment of *Inter IKEA*, one of the two groups operating the IKEA business.⁷³ Inter IKEA Systems, a Dutch entity part of the Inter IKEA group, records all revenues from franchise fees paid by IKEA shops worldwide. The Commission's investigation concerns two tax rulings, granted by the Dutch tax authorities in 2006 and 2011, which have significantly reduced Inter IKEA Systems' taxable profits in the Netherlands. The Commission considers at this stage that the treatment endorsed in the two tax rulings may have resulted in a selective advantage in favour of Inter IKEA Systems, which was not available to other companies subject to the same national taxation rules in the Netherlands.

Financing companies provide financial services intra-group and their profit is the remuneration for their financing activities. This remuneration has to be in line with the arm's length principle. This issue has been one of the Commission's key areas since it started looking into the tax ruling practices of Member States. The Working Paper published as part of this review in June 2016 indicated concerns that some tax rulings for financing companies endorse very low margins and a low taxable base.⁷⁴

DG Competition supported Luxembourg and Cyprus in their efforts to amend their tax rules in order to avoid undue advantages to financing companies. Luxembourg amended its rules on financing companies at the end of 2016, by way of a national administrative circular⁷⁵. These rules entered into effect as of 1 January 2017. Similarly, with a circular dated 30 June 2017,

⁷² State aid case SA.44896 – United Kingdom – *Potential State aid scheme regarding United Kingdom CFC group financing exemption*, Commission decision of 26 October 2017, the letter is available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1,2,3&case_title=cfc and the press release at http://europa.eu/rapid/press-release_IP-17-4201_en.htm.

⁷³ State aid case SA.46470 – Netherlands – *Potential State aid to Inter Ikea*, Commission decision of 18 December 2017 (to be available soon). For further information see IP/17/5343 of 18 December 2017 available at http://europa.eu/rapid/press-release_IP-17-5343_en.htm.

⁷⁴ DG Competition working paper on state aid and tax rulings, Internal Working Paper – Background to the High Level Forum on State Aid of 3 June 2016 available at http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf.

⁷⁵ Circular of the Director of Contributions, L.I.R. n° 56/1 – 56bis/1 of 27 December 2016 available at <http://www.impotsdirects.public.lu/content/dam/acd/fr/legislation/legi16/circulairelir561-56bis1-27122016.pdf>.

Cyprus introduced changes to their national rules to make them more stringent as regards the tax treatment of financing companies.

Merger control preventing a de-facto monopoly in the financial sector

The European economy depends on well-functioning financial markets. That is not just important for banks and other financial institutions. The whole economy benefits when businesses can raise money on competitive financial markets.

In March 2017, the Commission prohibited under the EU Merger Regulation the proposed merger between Deutsche Börse and London Stock Exchange Group⁷⁶. The proposed merger would have combined the activities of the two largest European stock exchange operators. They own the stock exchanges of Germany, Italy and the United Kingdom, as well as several of the largest European clearing houses. The Commission's investigation concluded the merger would have created a de facto monopoly in the markets for clearing fixed income instruments.

Clearing services essentially ensure the execution of trades made on stock exchanges. They are provided by clearing houses, which sit in between the two trading parties – the seller and the buyer - and assume the risk of default of each trading party vis-à-vis the other. Thus, clearing houses are essential for the stability of financial markets. They avoid a domino effect if one party defaults. The Commission's decision will therefore preserve effective competition in the market of financial infrastructure.

State aid control to protect the level playing field in the banking sector

Consumers and businesses alike use the financial services provided by the banking sector. Europe needs a robust banking system that can support growth for the long term, where banks with sound business models are able to lend to companies so that they can grow and create jobs.

The turmoil in the financial markets, which was triggered by the financial crisis in 2008, has called for government interventions to restore confidence in the financial sector and prevent a systemic crisis. The Commission applies State aid rules, together with the Banking Union rules. In order to protect the level playing field when assessing public support to the financial sector, the Commission carries out a thorough analysis of the impact of State aid ensuring that taxpayers do not have to contribute more than strictly necessary and addressing also undue competition resulting from the aid.

In June 2017, following the European Central Bank's decision to determine that Banca Popolare di Vicenza and Veneto Banca were failing or likely to fail, and the decision of the EU Single Resolution Board that resolution action under the Single Resolution Mechanism was not in the public interest for either bank, both banks had to be liquidated under Italian national insolvency procedures. In this context, Italy determined that the winding up of these banks had a serious impact on the real economy and decided to provide state support for the orderly liquidation.

Upon assessment of the Italian notification, the Commission approved, under State aid rules, the national support to facilitate the liquidation and the exit from the banking market of both

⁷⁶ Case M.7995 *Deutsche Börse / London Stock Exchange Group*, Commission decision of 29 March 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7995.

banks under national insolvency law⁷⁷. Outside the banking resolution framework, EU rules foresee the possibility to use national funds to facilitate the liquidation and to mitigate the above-mentioned economic effects, subject to the Commission's approval under State aid rules. Shareholders of Banca Popolare di Vicenza and Veneto Banca were wiped out and junior creditors fully contributed EUR 1.2 billion to the liquidation, reducing the costs to the Italian State, whilst depositors remained fully protected. As the aided banks have not been artificially kept alive but have exited the market, competition in the banking market has been preserved. Around EUR 17.8 billion (gross book value) in non-performing loans were removed from the Italian banking system.

EU rules, in particular the Bank Recovery and Resolution Directive, offer a possibility for the State to inject capital on a temporary basis into a solvent bank without triggering failing or likely to fail, provided that certain criteria are met (i.e. the so-called "precautionary recapitalisation"). In July, the Commission approved under State aid rules Italy's plan to provide a precautionary recapitalisation to the Italian bank Monte dei Paschi di Siena⁷⁸, on the basis of a detailed restructuring plan. Precautionary recapitalisation aid can only be granted to prepare a bank for unlikely capital needs that would only materialise if economic conditions were to substantially worsen. The restructuring measures ensure that the bank remains viable in the longer term, whilst limiting competition distortions. In line with burden-sharing requirements, shareholders were diluted and junior bondholders were converted into equity thereby reducing the capital needs by EUR 4.3 billion. Furthermore, the bank is in the process of selling non-performing loans with a gross book value of EUR 26.1 billion to a securitisation vehicle.

In October 2017, the Commission approved, under State aid rules, Portuguese aid for the sale of Novo Banco⁷⁹, the bridge bank that Portugal had created in 2014 in the framework of the resolution of Banco Espírito Santo⁸⁰. The aid approval was based on the viability of the sold entity ensured through a plan proposed by the buyer, which also contained measures to limit distortions of competition.

7. Joining forces for a far-reaching competition culture

As world markets continue to integrate and more and more companies rely on global value chains, competition agencies need to agree on common standards and procedures more than ever before. Effectively enforcing competition rules depends to a growing extent on co-operation with other enforcers. When business practices of a company harm competition in different countries and continents, fair and level market conditions can only be restored if enforcement authorities play as a team.

The Commission has been at the forefront of international cooperation in the competition field, both on the multilateral and bilateral levels. Back in 2001, the Commission was among

⁷⁷ Case SA.45664 *Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca - Liquidation aid*, Commission decision of 25 June 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45664.

⁷⁸ Case SA.47677 *New aid and amended restructuring plan of Banca Monte dei Paschi di Siena*, Commission decision of 4 July 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47677.

⁷⁹ Case SA.49275 *Sale of Novo Banco with additional aid in the in the context of the 2014 Resolution of Banco Espírito Santo, S.A.*, Commission decision of 11 October 2017, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_49275.

⁸⁰ Case SA.39250 *Monitoring of Banco Espírito Santo*, Commission decision of 3 August 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39250.

the founding members of the International Competition Network (ICN), which now counts more than 130 members. The Commission is also active in all international fora devoted to competition, including the OECD, UNCTAD, the WTO, and the World Bank.

At bilateral level, the Commission holds negotiations on Free Trade Agreements, with the aim to include competition and State aid provisions in such agreements. In 2017, the Commission continued negotiations with Mexico, Mercosur and Indonesia, and opened negotiations with Chile and Azerbaijan. Moreover, the Commission engages in a wide range of cooperation activities with competition authorities in a number of third countries, on the basis of agreements or memoranda of understanding. In June 2017, the Commission signed a Memorandum of Understanding with China's National Development and Reform Commission, to start a dialogue on State aid control⁸¹. Furthermore, the Commission is in the process of negotiating an Institutional Facilitation Agreement with Switzerland.

Decisions by one country to grant a subsidy to a company that operates globally may affect competition elsewhere. This new State aid cooperation dialogue will support EU's and China's mutual interest and joint work to promote fair global competition. The dialogue will enable sharing with China the EU experience in enforcing State aid control. It will also be used to learn more about the implementation of the newly adopted Fair Competition Review in China, which is designed to prevent public policies from distorting and restricting competition while maintaining fair market competition and promoting a unified market.

This work strand is part of the Commission's broader strategy to foster a global competition culture, as well as promote a global level playing field where companies can compete on their merits. To that end, the Commission is working to gather momentum in the World Trade Organisation to foster a global level playing field regarding subsidies. In addition, it continues engaging in sectoral initiatives to address subsidies in the international context, such as for steel (G20 Global Forum on steel excess capacity), for semiconductors (Regional support guidelines for the semiconductor industry), and for shipbuilding (OECD). Finally, the Commission has created a dedicated forum with EU Member States to raise awareness as regards international subsidy policies and to exchange views on ongoing developments at multilateral and bilateral level, as well as regards subsidies given by third countries.

Upholding a regular and constructive inter-institutional dialogue

The European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions are key partners in the Commission's efforts to explain the relevance of competition policy to European citizens and stakeholders.

In 2017, Commissioner Vestager exchanged views with various Committees in the Parliament: the Economic and Monetary Affairs Committee, the Regional Affairs Committee and the Committee for Agriculture and Rural Development.

As in previous years, the Parliament adopted a resolution on the Commission's annual report on competition policy. The Commission welcomes Parliament's endorsement that a robust competition policy is needed to preserve the integrity of the internal market and that competition empowers citizens by offering them competitive prices and a choice of innovative goods and services in the market place. In this spirit, the Commission will continue its work to tackle illegal cartels and abuse of dominant market positions by companies and to

⁸¹ See IP/17/1520 of 2 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1520_en.htm.

review mergers and state aid in our internal market so as to avoid reductions or distortions of competition.

The Commission welcomes Parliament's engagement in the fight against tax evasion and tax avoidance. State aid control has proven effective in tackling selective tax advantages for multinationals. In 2017, the Commission continued to take important actions in this area⁸² and it is systematically analysing the evidence on tax rulings from all Member States. In May, investigative journalists published the so-called 'Paradise Papers' that include details on the tax arrangements of various companies. The Commission will assess this information as it becomes available to verify whether it reveals any new facts on potential State aid to these companies.

The Commission welcomes the Parliament's support for its enforcement action in relation to "Google Shopping" and other initiatives in the digital economy. Following its e-commerce sector inquiry, the Commission has launched investigations to assess if certain sales practices hamper consumers' online access to goods and services at competitive prices in other Member States. The investigations cover consumer electronics, video games and hotel accommodation. The Commission is also assessing the importance of data, algorithms and other features of the digital economy in competition enforcement.

As reiterated previously by the Commission, the Commission would continue to play a key role in controlling State aid in the financial sector, to ensure that aid to banks is kept to the minimum necessary, and that adequate measures are taken to return banks to viability and to minimise distortions of competition in the internal market. The Commission shares the Parliament's goal of reducing State aid in the financial sector over time and stands ready to explain its actions in this field.

The Commission shares responsibility for enforcing the EU competition rules with national competition authorities, who take 85% of decisions based on EU antitrust rules. The Commission welcomes the support of both Parliament and Council for its proposal for a Directive to ensure that national competition authorities can be effective enforcers of EU competition rules. The Commission adopted the proposal on 22 March and both institutions are making very good progress towards adopting the proposed Directive within the current mandate of the Parliament.

The Commission recognises the importance that both Parliament and Council attach to effective competition throughout the food chain. In 2017, the Commission cleared two mergers in the agro-chemical sector but only on strict condition that important businesses and assets were sold to new buyers to ensure that farmers and consumers could continue to benefit from competition that brings affordable prices and innovation for crop protection products. In November, the Commission sent a Statement of Objections to AB InBev concerning restrictions of parallel imports of its beers into Belgium. In 2017, the co-legislators decided to amend the application of the competition rules to the agricultural sector by amending the Regulation on the common organisation in agricultural markets in the context of the so-called Omnibus Regulation. The modifications, which entered into force on 1 January 2018, introduced an explicit competition derogation for *inter alia* production planning and contractual negotiations (joint sales of the producer members via the producer organisations or associations of producer organisation) of recognised producer organisations or associations of producer organisation in all agricultural sectors under defined conditions. The Commission took note of those changes that the legislators made to competition rules in agriculture. In an

⁸² For detailed information, see Chapter 2 of this Report.

accompanying statement, the Commission expressed concern that some of the new provisions in favour of producers' organisations might have the effect of endangering the viability and wellbeing of small farmers and the interest of the consumers and lead to legal and procedural uncertainty. The Commission or national competition authorities may have to intervene if, for example, a producer organisation, which covers a large share of the market, seeks to restrict the freedom of action of its members.

The Commission also engaged actively with the Economic and Social Committee and the Committee of the Regions. In July, the Commission exchanged views with the Economic and Social Committee, in particular on State aid enforcement in the tax field and other decisions of interest to the Committee. The Commission is grateful for the Committee's support for the modernisation of State aid control and for more transparency in public spending across the EU. On 1 December, Commissioner Vestager discussed the impact of competition in our regions in the plenary debate of the Committee of the Regions. The Committee expressed strong support for competition enforcement across the economy and for the expanded General Block Exemption Regulation for state aid, and reiterated the importance of services of general economic interest.

Support to the Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

Following the Article 50 TEU notification by the United Kingdom, the Commission started preparing the withdrawal of the United Kingdom from the European Union. Directorate-General for Competition supports the Commission's Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (TF50) regarding the instruments in its portfolio (mergers, antitrust and State aid) in the context of the negotiations as regards the withdrawal agreement and the agreement governing the future relationship with the United Kingdom. As set out by the European Council, any future trade agreement should ensure a level playing field, notably in terms of competition and State aid.