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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**

on Competition Policy 2014

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I. LEGISLATION AND POLICY DEVELOPMENTS

EU competition policy's contribution to growth and jobs

The European Union is the world's largest economic and trading area. The EU's unique asset and distinct comparative advantage on the global scene is its internal market, which encompasses over half a billion consumers and more than 20 million companies. Since its inception, the on-going process of improving and expanding the Single Market has gone hand in hand with the development of EU competition policy.

Efficiently functioning markets in the EU will bring economic opportunities, improve productivity, drive down costs and boost competitiveness for companies of all sizes. This is key to creating growth and jobs in Europe. In addition, competition-friendly regulation and competition culture create favourable conditions for investments and innovation, which enhances consumer welfare and efficiently functioning markets, enables growth and contributes towards more convergence. Undistorted competition also fosters competitiveness in a global context. A competitive internal market also prepares European companies to succeed on global markets.

State aid

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 (Art. 107(1)). However, State aid, which contributes to well-defined objectives of common European interest without unduly distorting competition between undertakings and trade between Member States, may be considered compatible with the internal market (under Art. 107(3)).

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

1. State Aid Modernisation: reform in support of growth and jobs

In 2014 the Commission completed its ambitious State Aid Modernisation (“SAM”) reform¹, which was launched in 2012² and aimed at promoting good aid that supports growth while contributing to Member States' efforts towards budgetary consolidation. Only one building block of SAM still needs to be put in place, namely a Commission's guidance on the notion of State aid, following important evolutions in case law and enforcement practice.

SAM provides for more efficient decision making and procedures for granting growth-supporting aid that is not distortive to market functioning in the EU. Among the key

¹ For a comprehensive overview of State Aid Modernisation see DG Competition webpage: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

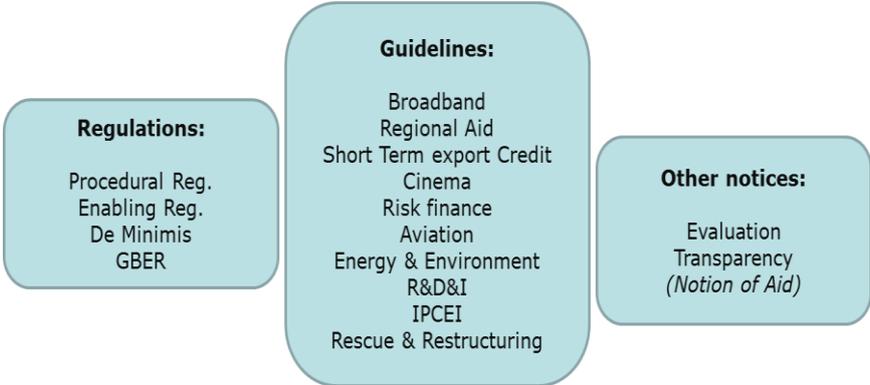
² Communication of 8 May 2012 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU State Aid Modernisation (SAM)*, COM(2012) 209 final.

objectives of the reform are tangible cuts in red tape, the promotion of a better use of limited public resources by Member States and of a higher contribution of aid measures to growth. If successfully implemented, the reform will contribute to better allocation of public resources and promote higher efficiency and better quality of policy interventions.

As a result of the reform, a significantly larger number of smaller and unproblematic measures should be exempted from prior notification, in exchange for strengthened controls at Member State level, greater transparency and better evaluation of the impact of aid.

Obtaining these results will not happen automatically, but requires significant efforts by the Commission and Member States.

Chart 1. Overview of the SAM package



Main changes: less administration and more flexibility and clarity for granting aid

One of the cornerstones of the State Aid Modernisation reform was the new General Block Exemption Regulation (GBER)³, which simplifies aid granting procedures for Member States by authorising without prior notification a wide range of measures fulfilling horizontal common interest objectives. According to Commission's estimates, three-quarters of today's State aid measures and some two-thirds of aid amounts could be covered by the new GBER. That proportion could increase to 90% of all aid measures provided Member States use the GBER to the full extent. This means that only cases with the biggest potential to distort competition in the Single Market will remain for ex ante assessment (notification).

That increased scope of the GBER will have a strong impact on aid beneficiaries and on granting authorities, leading to faster access to the aid (through avoidance of the notification process) and reduction of administrative burden (simpler conditions, e.g. for demonstrating the incentive effect).

Throughout the State Aid Modernisation process, the Commission followed a consistent approach in establishing new Guidelines containing the criteria for assessing State aid compatibility. A key objective was to encourage Member States to ensure that aid granted is addressing the key market failures and bottlenecks. The common approach to compatibility helps to ensure that aid is well designed to meet its objective and that competition distortions remain limited. The main principles behind the common approach:

³ 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, p. 1.

- *"Big on big, small on small"* as SAM introduced higher thresholds for notifying aid aimed at addressing the well-known market failures (R&D&I aid, SME access to finance, regional aid). New categories of aid have been exempted from notifications, such as culture, sports, natural disasters, local infrastructures.
- *Focus on criteria that matters.* The new guidelines provide for effect-based analysis of large projects, bringing public intervention closer to best market practices. The guidelines also include criteria for supporting large infrastructure projects in the common EU interest, in a way that they do neither crowd-out private investments, nor result in undue distortions of competition and trade in the Single Market.

What makes an aid measure compatible with the internal market?

State aid modernisation clarifies the criteria for finding that an aid measure is compatible and hence can be approved:

- 1) the aid measure must aim at an objective of common interest;
- 2) it must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;
- 3) it must be an appropriate policy instrument to address the objective of common interest;
- 4) the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity that it would not carry out without the aid, or it would carry it out in a restricted or different manner or location;
- 5) the aid amount must be limited to the minimum needed to induce the additional investment or activity;
- 6) negative effects on competition and trade between Member States must remain sufficiently limited;
- 7) the relevant acts and pertinent information about aid awards must be transparent (public).

Partnership, transparency and evaluation as key institutional pillars of modern state aid control

The SAM programme also implies a greater role for Member States in State aid control, including in designing State aid measures to fit the rules (particularly the GBER), taking responsibility for compliance of the aid they grant, and making the transparency and evaluation requirements work.

Partnership

Implementing SAM requires Member States to take responsibility for ensuring compliance with the State aid rules and for limiting the use of notifications to those cases where they are really necessary. It also requires Member States and the Commission to work together more closely to improve the efficiency of procedures. The new partnership arrangements with Member States are built on a pro-active support of Member States by the Commission through advocacy work and trainings. To oversee implementation and facilitate compliance with the new requirements for transparency and evaluations, the Commission has set up a High Level Group (HLG) with Member States as well as some dedicated working groups. The HLG looks at best practices in ensuring compliance and common challenges with regard to SAM implementation. Alongside that process and to facilitate the work of the central authorities in Member States, DG Competition's newly created State aid country co-ordinators network helps to address systemic issues in State aid enforcement at Member State level, works to help Member States prioritise their portfolio of cases and assists with providing training and guidance.

Transparency

A way to ensure greater flexibility and responsibility of Member States for compliance with State aid rules is to put emphasis on transparency. By providing third parties access to information about aid granted, transparency empowers markets and civil society to monitor the compliance, challenge poorly designed aid measures and signal breaches of the rules. Under SAM, the transparency requirement mandates Member States, as a condition for granting aid, to establish comprehensive State Aid websites containing information on aid measures and their beneficiaries, in a format that allows information to be searched, downloaded and easily used. Member States must publish full information on individual aid awards above EUR 500 000. The requirement will become mandatory gradually: there is a transition period until mid-2016 to ensure compliance. In order to guarantee tax confidentiality, the aid granted under fiscal schemes will only be published in ranges to prevent breaches of tax confidentiality, since knowledge of the exact amount of tax relief may allow a company's tax base to be reconstructed.

Evaluation

Evaluation of aid schemes is a new requirement introduced by State aid modernisation with the aim to gather the necessary evidence to better apprehend impact, improve enforcement and inform future policy-making by Member States and the Commission. It is also a complement to the major expansion of the General Block Exemption Regulation (GBER) and represents a necessary ex post safeguard, alongside transparency and monitoring, to promote quality and effectiveness of aid policies. Since 1 July 2014, evaluation is required for large GBER schemes in certain aid categories⁴ and is also provided for some notified schemes under the new generation of State aid guidelines⁵.

Better targeted growth-fostering aid addressing market failures (R&D&I aid, SME access to finance, regional aid)

One of the headline targets of Europe 2020 Strategy⁶ is for R&D&I investments in the EU to reach 3% of GDP. As smart and sustainable growth depends on firms' ability to innovate, State aid rules have been deeply revised with a view to unleashing the EU's potential to invest in more and better R&D&I. More precisely, the Commission has adopted a new R&D&I Framework and new provisions for R&D&I aid under the General Block Exemption Regulation (GBER)⁷, both of which entered into force on 1 July. In total, R&D&I State aid awarded under the previous rules amounts to an estimated EUR 62.4 billion for the period 2008-2013. Nevertheless, R&D spending in Europe has been lagging behind major global competitors, as it now stands a touch above 2% of GDP, compared to around 3% in the US and Japan. This is mainly the result of lower levels of private investment. The new rules on

⁴ 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.

⁵ Evaluation might apply to notified aid schemes with large budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen.

⁶ Communication of 3 March 2010 from the Commission, *Europe 2020 A Strategy For Smart, Sustainable And Inclusive Growth*, COM(2010) 2020 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427303331326&uri=CELEX:52010DC2020>

⁷ Communication from the Commission, *Framework for State aid for research and development and innovation*, OJ C 198, 27.6.2014, p. 1, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.198.01.0001.01.ENG

R&D&I aid are aimed at enhancing market efficiency and mobilising private investment in projects that would otherwise not be implemented due to market failures (notably in the form of knowledge spill-over effects, imperfect information on the risks and benefits of R&D&I activities and coordination problems for cooperative research). The new rules are therefore designed to go hand in hand with other EU initiatives aimed at promoting R&D&I activities, such as Horizon 2020⁸.

New R&D&I State aid rules: main features

The Commission has cut red tape by allowing Member States more flexibility in implementing R&D&I aid. In particular, a new category of aid for research infrastructure is covered by both the new GBER and the new R&D&I Framework, while the scope for aid for pilot projects and prototypes has been expanded. Moreover, aid for innovation clusters has been made more flexible. Notification thresholds have been doubled for aid for R&D projects and re-doubled for EUREKA projects and projects carried out in the context of EU Joint Undertakings.

The new R&D&I Framework increases legal certainty, for instance the general non-economic activities of research organisations and the limits of certain ancillary economic activities for which public funding falls outside State-aid rules have been explained in more detail. A comprehensive guidance has been given for the first time on how to avoid State aid in the area of public procurement of R&D services.

To help industry overcome financing gaps, the new rules on R&D&I aid establish more flexible and simpler criteria under which the aid is more likely to be found compatible with the internal market. Under the new R&D&I Framework, the allowed aid intensities have been increased in particular for close-to-the-market aid categories (applied research, including demonstrators and pilots, ranging from 60-90%, and innovation aid in general set at 50%, including for innovation clusters).

In addition to the new R&D&I State aid rules, the Commission has set up a simpler, more flexible and generous State aid framework for the provision of risk finance to SMEs and mid-caps. Following extensive consultations with Member States and stakeholders, the new rules, contained in the new Risk Finance Guidelines and in the new GBER, entered into force on 1 July⁹.

SMEs across the EU remain heavily dependent on traditional bank lending which is still limited by the refinancing capacity, risk appetite and capital adequacy of banks. The financial crisis has exacerbated the problems with approximately one third of SMEs being unable to receive the necessary finance in recent years. Given the pivotal importance of SMEs and mid-caps for the whole EU economy, that situation has a significant negative impact on growth and job creation. The new rules aim to enhance the incentives of private sector investors - including institutional ones - to increase their funding activities in this critical area of SME and mid-caps financing, mirroring other EU initiatives designed to promote wider use of financial instruments in the context of new support programmes such as Horizon 2020 or the Programme for the Competitiveness of Enterprise and SMEs (COSME)¹⁰.

In sum, the new risk finance regime will provide the framework for seamless support of new ventures from their creation to their development into global players, so as to help them overcome the critical stages - the so-called "valley of death" - where private financing is either unavailable or not available in the necessary amount or form.

State aid framework for the provision of risk finance to SMEs and mid-caps: main features

⁸ For an overview on Horizon 2020, the EU Framework Programme for Research and Innovation, see <http://ec.europa.eu/programmes/horizon2020/>

⁹ Communication from the Commission, *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.1.2014, p. 4, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122\(04\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0122(04))

¹⁰ For an overview on the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises, see http://ec.europa.eu/enterprise/initiatives/cosme/index_en.htm

The new block exemption provide a radically enlarged scope, covering a much wider range of companies, irrespective of their location in assisted or non-assisted areas, including SMEs in later growth stages. Furthermore the new rules allow for a wider range of financial instruments (equity, quasi-equity, loans, guarantees or hybrid instruments) and funding structures whereas before they required 70% of the budget to be provided in the form of equity via private/public investment funds.

Risk finance measures of up to EUR 15 million per SME are now block-exempted (compared to the previous annual tranches of maximum EUR 1.5 million in GBER and EUR 2.5 million in the Guidelines). In addition, the new Guidelines set out compatibility conditions for amounts above EUR 15 million, without imposing any specific cap, as long as the aid measure is granted in cases where market failures have been convincingly demonstrated. Also, the new regime is a better reflection of market practices as it allows capital replacement operations as long as they are combined with the injection of new fresh capital into the company

Finally, the new risk finance regime tailors the private participation ratio according to the inherent riskiness of the development stage of the final investee whereas the previous GBER required a private participation rate of least 50% in non-assisted areas and 30% in assisted areas. Moreover, while the previous GBER did not cover fiscal incentives to private investors the new regime has introduced more flexibility by bringing tax incentives to natural persons (including business angels) under the scope of the block exemption and by setting out detailed rules for fiscal incentives to corporate investors under the new Guidelines.

Regional aid is an important instrument in the EU's toolbox to promote greater economic and social cohesion, Following the adoption in June 2013 of the revised regional aid guidelines for the period 2014-2020 the Commission took the necessary measures to ensure the continuity of the regional support systems of the 28 Member States after the expiry of the regional aid maps on 30 June 2014. By 16 September, the Commission had adopted approval decisions on the 28 regional aid maps covering the period between 1 July 2014 and 31 December 2020.

With the adoption of the new General Block Exemption Regulation in May 2014, the full set of rules applicable to regional aid to be granted in the period 2014-2020 was in place. The new regulation further extended the range of regional aid measures which are exempted from the notification obligation (from 1 July 2014, the exemption also applied to ad hoc regional investment aid measures below the notification thresholds, transport aid schemes and operating aid schemes for Outermost Regions). Those changes will enable the Commission to focus its future enforcement activities on the potentially most distortive regional aid measures.

In 2014, the Commission also adopted several decisions on a number of regional aid measures to support large investment projects. It took final decisions approving regional aid for investments by Porsche (cars) and Propapier (paper) in Germany. Regional aid to BMW (electric cars) in Germany was partially approved, partially prohibited and another formal investigation into aid for Ford Spain (cars) could be closed as Spain decided to withdraw the notification. The Commission also decided to open formal investigations into aid for Audi in Hungary and for Autoeuropa in Portugal (both the car sector). Following a preliminary examination, the Commission approved aid for Hankoog and Apollo in Hungary (both tyre production), for Premursa (theme park) in Spain and Baltic New Technologies (refinery) in Latvia. Finally, the Commission adopted a decision on the Bulgarian forest land swap case in which it ordered the recovery of all illegal and incompatible aid granted in the context of the land swap transactions concerned.

2. Monitoring, recovery and cooperation with national courts

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

Over the years, the architecture of State aid control has evolved. Today, 32% of aid is granted under block-exempted schemes which are not examined by the Commission prior to their entry into force¹¹. Overall, 88% of aid is granted on the basis of previously approved aid schemes or Block Exemption Regulations¹². In that context, it is essential for the Commission to verify that Member States apply the schemes correctly and that they only grant aid when all required conditions are met.

To this end, the Commission introduced in 2006 a regular, ex post, sample-based control of existing aid schemes ("monitoring"). After a modest start covering about 20 schemes and 10 Member States in each monitoring cycle, the Commission considerably stepped up monitoring since 2011. Building on the Court of Auditors recommendations¹³ and anticipating the further evolution of the State aid control architecture, the Commission practically almost quadrupled the size of the monitoring sample in the last three annual cycles to 75 schemes in the current 2014 review. It also extended the scope of its control. The 2014 cycle covered all Member States, all main types of aid approved as well as block-exempted schemes.

The Commission follows-up systematically all irregularities and uses the means at its disposal, as appropriate, to address the competition distortions that these may have induced. In some cases, Member States offer to voluntarily redress the problems detected (to amend national legislation, to recover the excess aid granted etc.). In other cases, formal action may be necessary. In 2014, the Commission adopted two final decisions in cases where it had opened a formal investigation procedure in 2013, considering that the additional information provided by the Member States set aside the doubts on the misapplication of the schemes that had triggered their monitoring¹⁴. Four other formal investigation procedures relating to issues detected in the context of monitoring were still ongoing in 2014¹⁵.

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

To ensure the integrity of the Single Market, the Commission has the power and the duty to request Member States to recover unlawful and incompatible aid which has unduly distorted competition and trade between Member States. In 2014, further progress was made to ensure that recovery decisions are enforced effectively and immediately.

¹¹ This percentage concerns aid in terms of volume. Banking schemes are not considered here. See latest publicly available figures (2012), Scoreboard, EU 27 (2006-2012) available at http://ec.europa.eu/competition/state_aid/scoreboard/graph8.jpg

¹² See previous footnote.

¹³ In its 2011 report on the efficiency of State aid procedures, the Court of Auditors considered that, in view of the importance of aids granted under existing aid schemes, the Commission's monitoring activity should be reinforced. See the recommendation n° 1 of the Court of Auditors Report (recital 96, p. 41, publicly available under <http://eca.europa.eu/portal/pls/portal/docs/1/10952771.PDF>

¹⁴ Case SA.18042 *Tax Exemption for biofuels*, Commission decision of 9 July 2014; case SA.18832, *Bio fuel Environmental protection*, Commission decision of 12 June 2014.

¹⁵ Cases SA.14551 *Taxation au tonnage*, Commission decision of 6 November 2013; SA.15373 *Enterprise Capital Funds*, Commission decision of 20 November 2013; SA.20326 *Mesures de dispense partielle de précompte professionnel en faveur de la R&D*, Commission decision of 4 December 2013; SA.27573 *Programmes de formation continue pour des entreprises individuelles en Chypre*, Commission decision of 4 February 2014.

Continued efforts to recover illegal aid

By 31 December 2014, the amount of illegal and incompatible aid recovered from beneficiaries had increased to EUR 9.6 billion¹⁶, from EUR 7.3 billion in December 2004¹⁷. This means that the percentage of illegal and incompatible aid still to be recovered fell from 75% at the end of 2004 to around 52% at the end of 2014.

In 2014, the Commission adopted 18 decisions ordering recovery of incompatible aid. As of the end of December, the Commission had 57 pending recovery cases. In the same year, Member States recovered a total amount of approximately EUR 301 million from beneficiaries.

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| Recovery decisions adopted in 2014 | 18 |
| Amount recovered in 2014 (in EUR million) | 301 |
| Pending recovery cases on 31 December 2014 | 57 |

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 2014, the Court of Justice condemned two Member States pursuant to Article 108(2) TFEU (Italy and Germany)¹⁸ and one Member State pursuant to Article 260(2) TFEU (Spain)¹⁹.

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

The Commission continued its cooperation with national courts under the notice on the enforcement of State aid law by national courts of 2009²⁰ (the 'Enforcement Notice'). That cooperation includes direct case-related assistance to national courts when they apply EU state aid law. The courts can ask the Commission to provide case related information, or to provide an opinion on the application of the competition rules. The Commission may also submit *amicus curiae* observations on its own initiative.

In 2014, the Commission responded to three requests for information and four requests for an opinion pursuant to Article 23(1) of the Procedural Regulation²¹. The requests for information were all issued by German courts and concerned the state of the proceedings before the Commission or the transmission of documents in the possession of the Commission. The requests for an opinion came from Finnish, Croatian, German and Dutch courts and concerned the application of Article 107 TFEU, in particular the notion of aid, the application of the market economy operator test and the applicability of the General Block

¹⁶ Reference is the period from 1 January 2000 until 31 December 2014.

¹⁷ Reference is the period from 1 January 2000 until 31 December 2004.

¹⁸ Cases C-547/11, judgment of the Court of 5 June 2014, concerning the decisions 2006/323/EC and 2007/375/EC (SA.12186 *Exemption from excise duty for the production of aluminium in Sardinia, Italy*); C-527/12, judgment of the Court of 11 September 2014, concerning the decision 2011/471/EU (SA.16212 *Biria Gruppe, Germany*).

¹⁹ C-184/11, judgment of 13 May 2014, concerning the continuous failure to implement the Commission's recovery decision, and after the court judgments C-485/03 joined C-486/03, C-487/03, C-488/03, C-489/03 and C-490/03 (judgments on 14 December 2006) in regard of Article 108(2) TFEU.

²⁰ Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1.

²¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.3.1999, p. 1, amended by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 204, 31.7.2013, p. 15.

Exemption Regulation.

With the 2013 amendment to the Procedural Regulation, the Commission has the possibility to submit *amicus curiae* observations on its own initiative before national courts. Article 23a(2) of the Procedural Regulation mirrors in that respect Article 15 (3) of Regulation 1/2003 in the field of antitrust²². To date, the Commission submitted observations before a French court on questions related to the definition of a service of general economic interest (SGEI) and the tender procedure for the selection of an SGEI provider and in Romania concerning the implementation of an arbitration award.

The Commission intends to publish its opinions and *amicus curiae* observations on its website as soon as it receives approval from the courts concerned²³.

Furthermore, the Commission's advocacy efforts continued. In 2014, the Commission was actively involved in financing training programmes for national judges following an annual call for projects, and also sent trainers to teach at such workshops and conferences²⁴.

3. Significant judgments by EU Courts in the State aid area

In 2014, the EU courts handed down a number of important judgments in particular as regards the existence of State aid pursuant to Article 107(1) TFEU. The judgments, shortly presented in the following, clarify among others the notions of transfer of state resources, advantage and selectivity and the definition of a service of general economic interest.

On 11 December, the General Court rendered a judgment on the issue of transfer of State resources in the context of a financing mechanism to support green electricity in Austria.

In 2008, Austria amended its Green Electricity Act guaranteeing each green electricity producer the possibility of disposing of green electricity at a fixed price. The purchases were made by a public limited company under the supervision of the State. Given that the price was higher than the market price, the extra costs incurred by the public limited company were reimbursed by the final consumers. It was also planned that the purchase obligation of green electricity for energy-intensive businesses would be capped. The Commission declared the measure to constitute State aid and the General Court confirmed that finding. In particular it held that the mandatory surcharge for green electricity laid down by the Green Electricity Act amounted to a parafiscal levy under the control of the public limited company supervised by the State. The aid mechanism for green energy and the exemption mechanism for energy-intensive businesses were established by law and therefore attributable to the State. In addition, the partial exemption for energy-intensive users resulted in a loss of State revenue which selectively favoured energy-intensive businesses active in a limited number of sectors²⁵. The General Court has upheld the Commission's decision and confirmed previous jurisprudence, notably the Court of Justice's judgments in *Essent*²⁶ and *Vent de Colère*²⁷.

Regarding the application of the private investor test, the Court of Justice confirmed the General Court's partial annulment of the Commission decision relating to aid granted to the

²² See Antitrust and Cartels Section, item 7.

²³ Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 22, paragraph 98.

²⁴ See also the dedicated section *Cooperation with national courts*, Antitrust and Cartels Section, item 7.

²⁵ Case T-251/11 *Austria v Commission*, judgment of the Court of 11 December 2014.

²⁶ Case C-206/06 *Essent Netwerk Noord and Others*, judgment of the Court of 17 July 2008.

²⁷ Case C-262/12 *Vent de Colère and Others*, judgment of the Court of 19 December 2013.

Dutch bank ING because of the financial crisis. In the context of the restructuring of ING, the Dutch State had amended the repayment terms of the original capital injection. This amendment had been considered by the Commission to constitute aid, over and above additional to the restructuring aid that had already been granted, without applying the market economy operator test to that amendment. The Court disagreed with the Commission stating that the Commission was required to apply the private investor test to the amendment of the repayment terms. The Court held that where it appears that the private investor test may be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information as regards the applicability and the application of the private investor test. When applying the test, what is decisive is whether the amendment to the repayment terms satisfies an economic rationality test so that a private investor may also be in a position to accept such an amendment²⁸.

In an interesting case dealing with the question whether certain companies benefit from a State aid relevant advantage derived from their special status under national law, the Court of Justice upheld a previous ruling by the General Court confirming a Commission decision finding that French La Poste's status as an EPIC (*établissement public à caractère industriel et commercial*) resulted in an advantage to the undertaking in the form of an implicit unlimited guarantee. That guarantee derives from the fact that the EPIC is not subject to the ordinary compulsory administration and winding-up procedures under national law. It thereby grants an immediate advantage to that undertaking which enjoys lower interest rates or a lower level of security when it has to refinance itself on the market. With respect to the burden of proof on the Commission as regards the existence of that implicit guarantee, the Court confirmed that the Commission may rely on the method of a firm, precise and consistent body of evidence (*faisceau d'indices*) to determine whether the State is required under national law to use its own resources to cover the losses of an EPIC and thereby giving rise to a sufficiently concrete economic risk of a burden on the State's budget²⁹.

In the context of selectivity of an aid measure, the General Court rendered two important judgments, both dealing with the correct definition of the (group of) companies that are allegedly favoured as compared to another (group of) companies. In a judgment of 9 September, the General Court held, contrary to the assessment of the Commission, that unless the airport operator and the airline concluded a specific agreement, a schedule of airport charges applied to all airline companies using the Lübeck airport did not constitute a selective aid measure. The General Court considered that airlines departing from other airports than Lübeck are not in a comparable legal and factual situation and that the test to be applied is to verify whether the schedule of charges discriminates between the actual and potential users of the airport in question and not with respect to users of other airports that cannot or do not want to use that airport³⁰.

In the so-called Spanish Goodwill judgment of 7 November, the General Court annulled two Commission decisions which had found tax rules allowing for the deduction of shareholdings in foreign companies to be incompatible State aid. The Commission had concluded that the scheme amounted to incompatible State aid since it treated more favourably foreign acquisitions as opposed to domestic transactions without any objective reason. The General Court did not agree as it found that the Spanish regime was not aimed at favouring any

²⁸ Case C-224/12P *Commission v Netherlands and Others*, judgment of the Court of 3 April 2014.

²⁹ Case C-559/12P *France v Commission*, judgment of the Court of 3 April 2014.

³⁰ Case T-461/12 *Hansestadt Lübeck v Commission*, judgment of the General Court of 9 September 2014.

particular category of undertakings but a category of economic transactions. However, the application of Article 107(1) TFEU requires that a measure "favours certain undertakings or the production of certain goods". It thereby also rejected the Commission's approach that had limited the selectivity test to establishing the existence of a derogation from the reference framework, i.e. without identifying a specific group of companies that were selectively favoured³¹.

As regards the notion of services of general economic interest (SGEI), the General Court clarified in two important judgments the manifest error test that the Commission should apply to verify whether the Member State correctly defined the service as a SGEI.

In the German Land Rhineland-Palatinate, the disposal of animal carcasses is carried out by a public law body (*Zweckverband Tierkörperbeseitigung*). The service is set-up as a SGEI and compensated accordingly. The Commission in its final negative decision with recovery considered, *inter alia*, that the SGEI in the form of the disposal of animal carcasses contravened the polluter pays principle and that the German authorities had therefore committed a manifest error. According to the polluter pays principle, it is the owners or producers of animal by-products that are responsible for the proper disposal and not another entity such as the *Zweckverband*. The General Court agreed with the Commission and confirmed that Germany had indeed committed a manifest error in defining the service as a SGEI³².

In a second judgment on the notion of SGEI rendered on 3 December, the General Court was asked to verify whether the Commission had correctly considered that security of supply concerns on the Spanish electricity market justified the putting in place of a SGEI in the form of a preferential dispatch mechanism according to Art. 11(4) of Directive 2003/54/EC. This mechanism provided that electricity produced by power plants using indigenous (i.e. Spanish) coal must be bought in preference to electricity produced by power plants using imported coal or other fuels. The power plants benefitting from the measure received compensation related to their additional production costs. The General Court concluded that the Commission had not committed a manifest error when recognizing the justified and proportionate nature of the measure. In addition, when assessing the measure, the Commission was not required to verify that the measure did not infringe EU provisions relating to the protection of the environment given that the aid measure did not pursue an environmental objective³³.

Antitrust & Cartels

1. Technology Transfer Agreements

On 21 March, the Commission adopted new rules for the assessment of technology transfer agreements under EU antitrust rules. It consists of a revised Technology Transfer Block

³¹ Cases T-219/10 *Autogrill España, SA v Commission*, judgment of the General Court of 7 November 2014; T-399/11 *Banco Santander, SA and Santusa Holding, SL v Commission*, judgment of the General Court of 7 November 2014.

³² Cases T-295/12 *Germany v Commission*, judgment of the General Court of 16 July 2014; T-309/12 *Zweckverband Tierkörperbeseitigung v Commission*, judgment of the General Court of 16 July 2014.

³³ Case T-57/11 *Castelnou Energía, SL v Commission*, judgment of the General Court of 3 December 2014.

Exemption Regulation (TTBER)³⁴, which exempts certain licensing agreements from Article 101 TFEU, and the Technology Transfer Guidelines³⁵, which provide further guidance on the application of the rules.

Licensing helps to spread innovation and allows companies to offer new products and services. It also strengthens incentives for research and development by creating additional revenue streams to recoup costs. Licensing therefore plays an important part in economic growth and consumer welfare. In the knowledge-based sectors, vibrant competition is essential to stimulate innovation and allow more and more citizens to benefit from technological development.

The revised regime continues to reflect that licensing is in most cases pro-competitive. The Commission has made incremental improvements to the current regime, which overall received positive feedback from stakeholders in the two public consultations. The revised rules facilitate licensing of intellectual property rights, including through patent pools, and provide clearer guidance to firms on licensing agreements that stimulate competition and innovation as well as preserve a level playing field in the internal market.

2. Notice on Agreements of Minor Importance and accompanying Staff Working Document on Restrictions by Object

On 25 June, the Commission adopted a revised Notice on Agreements of Minor Importance (De Minimis Notice)³⁶ accompanied by a Staff Working Document providing guidance on restrictions of competition by object³⁷.

The 2014 De Minimis Notice, like the 2001 De Minimis Notice, defines what the Commission considers not to be an *appreciable* restriction of competition under Article 101 TFEU by reference to market share thresholds. The main novelty in the 2014 De Minimis Notice, which reflects the ruling in the *Expedia* case³⁸, is the clarification that any agreement which has an anticompetitive object constitutes, by its nature and independently of any concrete effects it may have, an appreciable restriction of competition. Such agreements can therefore never benefit from the de minimis safe harbour. Unlike the 2001 De Minimis Notice which listed specific severe restrictions that did not benefit from the safe harbour, the 2014 De Minimis Notice states that the Commission will not apply the safe harbour to agreements containing any restriction "by object" or any of the restrictions that are listed as "hardcore restrictions" in current or future Commission block exemption regulations. In that context it is clarified that "hardcore restrictions" are considered by the Commission to generally constitute restrictions by object.

³⁴ 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 L 93, 28.3.2014, p. 17.

³⁵ Communication from the Commission, *Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements*, OJ C 89, 28.3.2014, p. 3.

³⁶ Communication from the Commission, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*, OJ C 291, 30.8.2014, p. 1.

³⁷ Commission Staff Working Document, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, SWD(2014) 198 final, available http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf

³⁸ Case C-226/11 *Expedia v Autorité nationale de la concurrence*, judgment of 13 December 2012.

To facilitate companies' assessment of whether their agreements benefit or not from the safe harbour set out in the De Minimis Notice, the Commission also published a Guidance on what agreements or practices constitute restrictions of competition "by object" and lists the types of restrictions that have been regarded as by object restrictions or hard core restrictions in the case law of the Union courts, Commission practice, block exemption regulations and guidelines. This guidance paper is intended to serve as a practical check-list for companies and to reduce their costs for complying with EU competition rules. The Guidance is without prejudice to any developments in case law and in the Commission's decisional practice. DG Competition will regularly update the examples listed in the document in the light of such developments.

3. Directive on antitrust damages actions

The Directive on antitrust damages actions³⁹ was adopted and entered into force in 2014. Member States are required to implement it by 27 December 2016. The Commission will proactively assist Member States in their implementation efforts.

The Directive aims to help citizens and companies claim damages if they are victims of an infringement of the EU antitrust rules, such as cartels or abuses of dominant market positions. For instance, claimants will be able to rely on a final decision of a national competition authority finding an infringement as such decisions will constitute proof before courts of the same Member State that the infringement occurred, thus preventing the issue of an infringement being reargued.

The Directive is also designed to fine-tune the interplay between damages actions and public enforcement preserving the attractiveness of EU and national public enforcement tools. For example, to maintain the incentive for companies to cooperate with competition authorities in the context of their leniency programme – a key instrument without which many cartels would never be discovered in the first place – leniency statements can never be disclosed in damages actions.

The Directive includes other substantive and procedural rules on crucial aspects of antitrust damages actions, such as limitation periods for bringing an action, joint and several liability of the infringers, and the burden of proof with regard to compensation for overcharges passed on along the distribution chain.

4. Evaluation of access to file and complaints

In 2014, DG Competition also launched, in partnership with external consultants, the evaluation of the procedural rules on access to file and on complaints in order to assess whether they efficiently meet the need they are supposed to address and the objectives they must achieve.

With regard to access to file, this evaluation aims to provide DG Competition with better information on the respective costs and benefits of the access-providing methods set out in the

³⁹ European Parliament and Council Directive 2014/104/EU 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, p. 1 available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_349_R_0001&from=EN

Notice on the rules for access to the Commission file⁴⁰ and in the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU⁴¹, concerning the disclosure of information in data rooms and confidentiality rings.

With regard to complaints, this evaluation aims to assess whether the current system of antitrust complaints, in particular the procedure for rejecting such complaints, meets the needs of, on the one hand, the complainants by allowing them to effectively draw DG Competition's attention to alleged infringements and, on the other hand DG Competition's need to optimally allocate resources with a view to detecting cases that could lead to final decisions.

5. Significant judgments by EU Courts in antitrust and cartels

Greek Lignite

On 17 July, the Court of Justice upheld a Commission decision applying Article 106 TFEU together with Article 102 TFEU to state measures. The case is commonly referred to as *Greek lignite*⁴². In 2008 the Commission found that the Hellenic Republic violated these treaty provisions because the Hellenic Republic had maintained a quasi-exclusive right of access to domestic lignite (often referred to as brown coal) in favour of the incumbent electricity provider PPC⁴³. Given that lignite was the cheapest source of production of electricity available in Greece, the Commission considered that this access distorted competition and protected the dominant position of PPC on the Greek electricity wholesale market. The General Court considered in 2012 that the Commission was wrong to make such a finding⁴⁴: according to the General Court the Commission should have identified an abuse that PPC was led to, or could have been led to commit, as a result of the state measures. The Court of Justice, however, annulled the General Court ruling and considered that it was sufficient that the Commission proves that the measures have "an anti-competitive effect" such as reinforcing the dominant position of a public undertaking as in the case at hand.

Intel

On 12 June, in the *Intel* judgment⁴⁵, the General Court upheld entirely the Commission's prohibition decision finding that Intel had abused its dominant position by making rebates to PC and server manufacturers conditional on those customers obtaining all, or almost all, of their supplies from Intel and by making direct payments to one retailer conditional on it only selling computers containing Intel's products, confirming in particular the legal assessment of the exclusionary rebates at issue⁴⁶. The General Court held that three categories of rebates can be identified: (i) quantity rebates, (ii) exclusivity rebates, and (iii) rebates where the financial incentive is not directly linked to quasi-exclusivity (e.g. individualized retroactive rebates). The General Court confirmed established case law (notably Case 85/76 *Hoffman La Roche*)

⁴⁰ Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7.

⁴¹ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6.

⁴² Case C-553/12 P *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*, judgment of the Court of 17 July 2014.

⁴³ Case AT.38700 *Greek lignite and electricity markets*, Commission decision of 4 August 2009.

⁴⁴ Case T-169/08 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission*, judgment of the General Court of 20 September 2012.

⁴⁵ Case T-286/09 *Intel Corp. v European Commission*, judgment of the General Court of 12 June 2014.

⁴⁶ Case AT.37990 *Intel*, Commission decision of 13 May 2009.

and held that Intel's rebates were inherently abusive (since they fall into the category of exclusivity rebates). The General Court found that such rebates, when applied by a dominant firm, are incompatible with the objective of undistorted competition as they are designed to prevent customers from obtaining their supplies from competing producers. There is therefore, in the General Court's view, no need to undertake an economic analysis of an exclusivity rebate in order to find that it infringes Article 102 TFEU. However, the General Court also clarified that exclusivity rebates do not constitute an abuse under Article 102 TFEU if they are objectively necessary or if they bring about efficiencies that outweigh the negative effects. Intel did not, however, seek to show that its practices resulted in such efficiencies.

EnBW

In the *EnBW*⁴⁷ judgment of 27 February, the Court of Justice endorsed the general presumption that documents in an ongoing cartel investigation should not be disclosed to the public. In this judgment the Court of Justice confirmed that the principles for State aid⁴⁸ and mergers⁴⁹ in this area apply also to antitrust cases. The Court of Justice held that, according to a coherent interpretation, based on the interaction between specific competition legislation (on the access to file for parties) and Regulation 1049/2001 (on public access to documents), granting public access to documents in an ongoing cartel investigation would undermine the balance of interests in antitrust legislation. *EnBW* considered itself affected by the practices covered by the Commission's decision regarding a cartel in respect of the gas insulated switchgear. While the decision was being challenged before the European Courts, *EnBW* asked for access to documents in the Commission's file with a view to substantiating its damages claims. The Court of Justice emphasised that the investigation is not considered closed as long as the contested decision is not definitive and that therefore all documents in the file remain covered by the presumption of non-disclosure. The Court of Justice noted that this general presumption does not exclude the possibility of demonstrating that disclosure of a specific document is not covered by that presumption, or that there is an overriding public interest in that document being disclosed. However, in the absence of any evidence capable of rebutting that presumption, the Commission is not under an obligation to carry out a specific, individual examination of each document in the file, in order to ascertain whether, in the light of its specific content, it should be protected from disclosure.

Groupement des Cartes Bancaires

In *Groupement des Cartes Bancaires* judgment⁵⁰ of 11 September, the Court of Justice annulled the decision of the General Court⁵¹ (which had upheld the Commission's decision⁵²) and held that it erred in law when accepting that a series of measures introduced by an association of French banks were to be seen as restrictions of competition by object. The

⁴⁷ Case C-365/12P, *European Commission v EnBW Energie Baden-Württemberg AG*, judgment of the Court of 27 February 2014.

⁴⁸ Case C-139/07P, *European Commission v Technische Glaswerke Ilmenau GmbH*, judgment of the Court of 29 June 2010.

⁴⁹ Cases C-404/10P, *European Commission v Éditions Odile Jacob SAS*, judgment of the Court of 28 June 2012 and C-477/10P, *European Commission v Agrofert Holding a.s.*, judgment of the Court of 28 June 2012.

⁵⁰ Case C-67/13P *Groupement des cartes bancaires (CB) v European Commission*, judgment of the Court (Third Chamber) of 11 September 2014.

⁵¹ Case T-491/07 *Groupement des cartes bancaires "CB" v European Commission*, judgment of the General Court of 29 November 2012.

⁵² Case AT.38606 *Groupement des Cartes Bancaires "CB"*, Commission decision of 17 October 2007.

Court of Justice stressed that the concept of restriction by object should be interpreted restrictively. The Court of Justice re-affirmed the settled case law that a restriction by object applies only to a form of coordination between undertakings that reveals in itself a sufficient degree of harm to competition based on an examination of the content, objectives and context of the behaviour. In particular the Court of Justice pointed out that, in the case at hand, the two-sided nature of the market was not adequately taken into account by the General Court. The Court of Justice found that the General Court was entitled at the most to infer that the measures at issue had as their object the imposition of a financial contribution on the members of the Cartes Bancaires but that such an object cannot be regarded as being, by its very nature, a restriction of competition. Furthermore, in the Court of Justice's view, the General Court (when confirming that the measures were to be seen as restrictions by object), had in fact assessed the potential effects of the measures. The Court of Justice said that this indicated that the measures at issue could not be considered "by their very nature" harmful to the proper functioning of normal competition. Therefore, the Court sent the case back to the General Court. In particular, the General Court now needs to examine the part of the Commission's decision alleging that the measures were likely to restrict competition by effect. This was not addressed in the General Court's judgment since it confirmed the decision on the basis of the Commission's finding of a restriction by object.

MasterCard

In the *MasterCard* judgment of 11 September⁵³, the Court of Justice upheld the General Court's judgment which concluded that MasterCard's multilateral interchange fees ("MIFs") had the effect of restricting competition⁵⁴. The Court of Justice thereby fully confirmed the Commission's prohibition Decision on MasterCard of 2007. The Court of Justice found that MasterCard could be classified as an association of undertakings even after it was listed on the stock exchange. Regarding the issue whether MIFs could be seen as objectively necessary to operate the MasterCard system (and therefore not necessarily contrary to Article 101(1)) the Court of Justice held that the MIF was not objectively necessary, since the system was capable of functioning without these fees. Finally, the Court of Justice found that in the absence of any proof of the existence of appreciable objective advantages attributable to the MIF in the acquiring market and enjoyed by merchants, the General Court did not need to examine the advantages flowing from the MIF for cardholders, since such advantages cannot compensate for the disadvantages resulting from those fees.

Parker

In the *Parker* judgment⁵⁵, concerning the Marine Hoses cartel, the Court of Justice followed the Commission's appeal on questions of principle related to liability due to economic succession in case of transfer of activities within a group of companies. In particular the Court of Justice confirmed that for the purpose of establishing the existence of economic continuity, the relevant date for assessing whether the transfer of activities is within a group or between independent undertakings, must be the date of the transfer itself. The purpose of the transfer and the period after the transfer of assets are irrelevant for the purposes of economic succession for past acts of the undertaking. In respect of the structural links, the Court of

⁵³ Case C-382/12P *MasterCard Inc. and Others v European Commission*, judgment of the Court of 11 September 2014.

⁵⁴ Case T-111/08 *MasterCard, Inc. and Others v European Commission*, judgment of the General Court of 24 May 2012.

⁵⁵ Case C-434/13P *Commission v Parker*, judgment of the Court of 18 December 2014.

Justice considered the ownership links between a parent and a 100% subsidiary a relevant criterion. It then confirmed that the Commission lawfully relied on a presumption of decisive influence in this regard during the administrative procedure. However, since the General Court failed to assess the arguments of the parties on the possible rebuttal of the presumption of decisive influence with regard to the transferor and the recipient of the assets, the case was sent back to the General Court for it to rule on the merits.

YKK

In the *YKK (Hard Haberdashery: Fasteners)*⁵⁶ the Court of Justice ruled that the 10% turnover cap on the part of the fine for which a company is held solely liable must be determined only by reference to that company's turnover and not that of the group that subsequently acquired the company and participated in the same cartel. For the part of the fine imposed jointly on both the parent and subsidiary, the parent's 10% cap applies.

CEEES

This case concerns a complaint about a possible breach of an Article 9 commitment decision⁵⁷. According to the General Court, the principles set out in established case-law on the Commission's margin of discretion to reject complaints also apply to complaints about an alleged breach of commitments made binding by means of an Article 9 decision. Further, the General Court concluded that the parallel competence of national competition authorities to apply Articles 101 and 102 TFEU is not pre-empted by the adoption of a commitment decision by the Commission. In the case at hand the General Court did not consider the exercise of the Commission's margin of discretion to contain a manifest error of assessment.

Nexans

The Court of Justice confirmed the investigation powers of the Commission. With regard to inspection decisions, in *Nexans*⁵⁸ (*Power cables*), the Court of Justice rejected an appeal by considering that a Commission inspection decision can by its very nature not be as detailed and precise as other Commission legal acts. The Commission is not required to communicate to the addressee all the information at its disposal when adopting the inspection decision. Therefore, it is not required to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were committed, provided however that the Commission inspection decision clearly indicates the essential elements, i.e. the presumed facts which the Commission intends to investigate, the subject matter and the purpose of the investigation⁵⁹.

Cement judgments

With regard to a request for information adopted under Article 18 of Regulation 1/2003 in the form of a decision referring solely to a potential infringement, in the *Cement judgments*⁶⁰, the

⁵⁶ Case C-408/12P *YKK*, judgment of the Court of 4 September 2014.

⁵⁷ Case T-342/11 *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio v European Commission*, judgment of the General Court of 6 February 2014.

⁵⁸ Case C-37/13P, *Nexans SA and Nexans France SAS v European Commission*, judgment of the Court of 25 June 2014.

⁵⁹ Case C-37/13P, *Nexans SA and Nexans France SAS v European Commission*, paras 32-40.

⁶⁰ Cases T-292/11 *Cemex e.a v Commission*; T-293/11 *Holcim (Deutschland) and Holcim v Commission*; T-296/11 *Cementos Portland Valderrivas v Commission*; T-297/11 *Buzzi Unicem v Commission*; T-302/11

General Court took the view that such level of motivation is in line with the minimum standard of reasoning of Commission acts. It is also held that requests for information by decision are not subordinated to the previous sending of a simple request (without binding effect), however, remain subject to the General Court's scrutiny under the principle of proportionality. The General Court concluded that given the fact that the information requested related to several undertakings and considering the significant amount of data to be collected and processed, it was not disproportionate to adopt a decision in order to assure that the Commission would obtain complete and comparable information within the set time frame.

Cartel judgments: fine for breach of Article 101 TFEU in case of joint and several liability

With regard to the question of fixation of a fine for breach of Article 101 TFEU in case of joint and several liability, the General Court had criticised the Commission not to have defined the concrete method of internal allocation of the fine.

In *Siemens Österreich*⁶¹ and *Areva*⁶² (*Gas Insulated Switchgear*), the Court of Justice reversed the General Court judgment as regards the internal allocation of a fine imposed jointly and severally to a number of companies by holding that it is for national courts to decide on the shares of companies in a fine for which they are held jointly and severally liable by the Commission.

The Commission has no power, notes the Court, when holding companies jointly and severally liable for a fine, to determine their respective shares in the fine imposed. Indeed, the fact that that share is not determined in the Commission's decision imposing joint and several liability for payment of a fine cannot constitute an infringement of legal certainty or any unlawful delegation of its powers⁶³.

Deltafina

The Commission leniency program is crucial to detect cartels, given their secret nature. Therefore, its efficiency depends on a very important feature of it, namely the obligation of cooperation of the leniency applicant with the Commission on a continuous basis and expeditiously, until the end of the Commission procedure. The obligation of cooperation was infringed by the immunity applicant by having disclosed its immunity application to the other cartel participants in a meeting with the latter before the Commission carried out unannounced inspections. In *Deltafina*⁶⁴ (*Italian Raw tobacco*), the Court of Justice endorsed this view and confirmed the General Court's judgment upholding the Commission's decision which refused to grant immunity and only granted a 50% fine reduction outside of the leniency program.

6. Fight against cartels remains a top priority

2014 continued DG Competition's strong enforcement record against hard core cartels. In 2014, the Commission continued to receive a constant flow of immunity and leniency applications, close to the long term trend for applications of around 2 applications per month.

Heidelberg Cement v Commission; T-305/11 *Italmobiliare v Commission*; T-306/11 *Schwenk Zement v Commission*, judgment of the General Court of 14 March 2014.

⁶¹ Joined cases C-231/11P, C-232/11P and C-233/11P, *European Commission v Siemens AG Österreich and Others*, judgment of the Court of 10 April 2014.

⁶² Joined cases C-247/11P and C-253/11P, *Areva SA and Others v European Commission*, judgment of the Court of 10 April 2014.

⁶³ Joined cases C-247/11P and C-253/11P, *Areva SA and Others v European Commission*, paras 143-158, especially paras 151-152, and joined cases C-231/11P, C-232/11P and C-233/11P, *European Commission v Siemens AG Österreich and Others*, paras 56-62.

⁶⁴ C-578/11P, *Deltafina SpA v European Commission*, judgment of the Court of 12 June 2014.

The leniency system destabilises cartels in that a Commission investigation of a cartel may through internal audits conducted by the cartelists lead to uncover other cartel activity. This may lead to further immunity applications. As indicated in the 2013 Report on Competition Policy, this led to a range of cases in the car parts sector.

Bearing case in the car parts sector

The *Bearings* case is part of a major investigative effort into suspected cartels in the sector of car parts. The Commission already found cartels for wire harnesses in cars and for flexible foam used in car seats and conducted inspections *inter alia* into thermal systems, occupant safety systems, lighting systems and exhaust systems.

On 19 March, the European Commission found that two European companies (SKF and Schaeffler) and four Japanese companies (JTEKT, NSK, NFC and NTN with its French subsidiary NTN-SNR) operated a cartel in the market for automotive bearings and imposed a total fine of EUR 953 million⁶⁵. Automotive bearings are supplied to automotive Original Equipment Manufacturers ("OEMs"), which are car, truck and automotive component manufacturers. Cars and trucks contain numerous bearings, for example wheel bearings, bearings for gearbox, transmission, alternator or air conditioning systems. The companies involved in the bearings cartel coordinated the passing-on of steel price increases to their automotive customers, colluded on Requests for Quotations and for Annual Price Reductions from customers and exchanged commercially sensitive information for more than seven years, from April 2004 until July 2011, in the whole European Economic Area (EEA).

The Commission's investigation in the bearings industry started with unannounced inspections in November 2011. The bearings decision is adopted under the settlement procedure with all parties involved. JTEKT received full immunity under the Commission's Leniency Notice for revealing the existence of the cartel and therefore avoided a fine of EUR 86 million.

More recently, the Commission has dealt with a number of cases in financial services, and in particular in relation to the fixing or alleged fixing of benchmark rates for various currencies based derivatives and for foreign exchange transactions. On 21 October, two further decisions concerning the financial sector were adopted via the settlement route⁶⁶, highlighting the continued success of this instrument, even in complex areas⁶⁷.

Two other cases highlight that the Commission is fully prepared to bring contested cases to a successful conclusion via the normal cartel procedure if the settlement discussions cannot be successfully concluded like on 2 April, when the Commission adopted a decision against a long running cartel in respect of power cables⁶⁸ and on 3 September in the *Smart Card Chips* case⁶⁹.

The power cables case

On 2 April, the Commission adopted a decision against a long running cartel in respect of power cables, fining the companies involved a total of over EUR 302 million. The cartel concerned an almost worldwide market and customer allocation scheme amongst the major power cables producers that lasted for almost a decade (1999 to 2009). Several European, Japanese and Korean producers of submarine and underground power cables agreed to stay out of each other's home territories and allocated projects amongst themselves based on the geographic region or customer. The cartel included cables used for the transmission and distribution of electrical power such as the connection of wind farms and power grids in different Member States. The decision was also addressed to several companies that did not directly participate in the infringement but, as parent companies, exercised a decisive influence over the direct participants. This included companies that participated in the cartel in the early

⁶⁵ Case AT.39922 *Automotive bearings*, Commission decision of 19 March 2014.

⁶⁶ Case AT.39924 *Swiss Franc Interest Rate Derivatives*, Commission decisions of 21 October 2014. See IP/14/1189 available at http://europa.eu/rapid/press-release_IP-14-1189_en.htm and IP/14/1190 available at http://europa.eu/rapid/press-release_IP-14-1190_en.htm

⁶⁷ See further section 3 Financial Services.

⁶⁸ Case AT.39610 *Power cables*, Commission decision of 2 April 2014.

⁶⁹ Case AT.39574 *Smart card chips*, Commission decision of 3 September 2014.

period and later merged their activities into joint ventures (who continued the cartel activities) as well as to the investment company Goldman Sachs, which is a former owner of one of the cartelists.

The Commission remains committed to pursuing all cartels across all sectors where it has sufficient evidence of an infringement (more information on the cartel decisions is available in the sectoral overview). 2014 was another very effective year of enforcement as illustrated by the record number of cartel decisions adopted.

A number of statements of objections were also adopted by the Commission, such as against the non-settling parties in the *Yen Libor*⁷⁰, *Euribor*⁷¹ and *Steel Abrasives*⁷² cases for their alleged participation to a possible cartel and against a number of truck producers⁷³.

With 10 decisions, fines totaling approximately EUR 1.69 billion, and solid work for enforcement in future years, the Commission's cartel enforcement record remains strong and effective.

| Case name | Adoption date | Fine imposed EUR | Undertakings concerned | Procedure |
|---|----------------------|-------------------------|-------------------------------|------------------|
| PU Foam | 22/01/2014 | 114 077 000 | 5 | settlement |
| Power exchanges | 05/03/2014 | 5 979 000 | 2 | settlement |
| Automotive bearings | 19/03/2014 | 953 306 000 | 6 | settlement |
| Steel abrasives | 02/04/2014 | 30 707 000 | 4 | settlement |
| Power cables | 02/04/2014 | 301 639 000 | 18 | normal |
| Mushrooms | 25/06/2014 | 32 225 000 | 3 | settlement |
| Smart card chips | 03/09/2014 | 138 048 000 | 4 | normal |
| Swiss Franc Interest rates derivatives (spreads) | 21/10/2014 | 32 355 000 | 4 | settlement |
| Swiss Franc Interest rates derivatives (derivatives) | 21/10/2014 | 61 676 000 | 2 | settlement |
| Paper envelopes | 10/12/2014 | 19 485 000 | 5 | settlement |

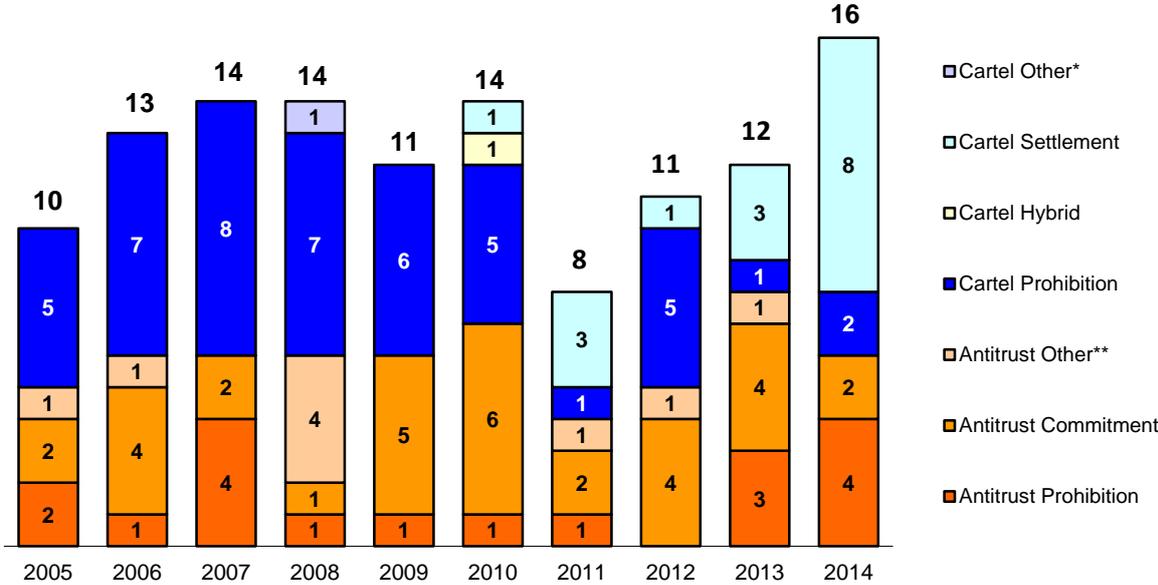
⁷⁰ See IP/14/656 of 10 June 2014 available at http://europa.eu/rapid/press-release_IP-14-656_en.htm

⁷¹ See IP/14/572 of 20 May 2014 available at http://europa.eu/rapid/press-release_IP-14-572_en.htm

⁷² See IP/14/2361 of 4 December 2014 available at http://europa.eu/rapid/press-release_IP-14-2361_en.htm

⁷³ See IP/14/2002 of 20 November 2014 available at http://europa.eu/rapid/press-release_IP-14-2002_en.htm

Antitrust and cartel output



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

7. Continuing the close cooperation within the European Competition Network (ECN) and with national courts

Regulation 1/2003 empowers the Commission, National Competition Authorities (NCAs) and national courts to apply Articles 101 and 102 TFEU to agreements and practices that are capable of affecting trade between Member States. Since May 2004, the Commission has investigated potential antitrust infringements across almost all sectors of the economy and has adopted over 130 decisions, many of which landmark precedents. NCAs have investigated more than 1800 cases in this period, giving rise to enforcement decisions in more than 800 cases. DG Competition and the NCAs continued to coordinate competition enforcement in the ECN in 2014.

Convergence of enforcement powers

In 2014, ECN activities focused on enhancing the functioning and convergence of the enforcement frameworks in the Member States. On 9 July, the Commission adopted a Communication on "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives"⁷⁴. This Communication took stock of the enforcement record by the Commission and the NCAs. Furthermore, it calls upon creation of a truly common competition enforcement area in the EU, building on the current achievements. It identifies the need for appropriate initiatives in a number of areas: to further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources; to ensure that NCAs have a complete set of effective investigative and decision-making powers at their disposal; to ensure that powers to impose effective and proportionate fines and well-

⁷⁴ Communication from the Commission of 9 July 2014, *Ten Years Of Antitrust Enforcement Under Regulation 1/2003: Achievements And Future Perspectives*, COM/2014/0453 available at http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf

designed leniency programmes are in place in all Member States and to consider measures to avoid disincentives for corporate leniency applicants.

Cooperation with national courts

Regulation 1/2003 empowers national courts to apply Articles 101 and 102 TFEU and to ask the Commission to provide case-related information or an opinion on the application of EU competition rules (Art. 15(1)). The Commission may also submit *amicus curiae* observations to national courts on its own initiative when the coherent application of EU competition law is at stake (Art. 15(3)).

In 2014, the Commission responded to three requests for transmission of documents by Spanish, Belgian and United Kingdom courts. The Commission also replied to four requests for opinions: two on the protection of confidential information in damage actions to the United Kingdom High Court of Justice; one on certification agreements to a Belgian Court of First Instance; and one on the abuse of dominant position in the form of discrimination to a French Court of Appeal⁷⁵. In addition, the Commission submitted *amicus curiae* observations in three cases pending at the Supreme Courts of Spain, United Kingdom and Germany concerning respectively the concept of infringement and the interpretation of one of the Block Exemption Regulations in relation to practices on the insurance market, limitation periods for damages actions and succession of companies that are subject to fines⁷⁶.

Cooperation with national courts also includes the Grant Programme "Training of National Judges in EU Competition Law" aimed at promoting the convergence of competition law enforcement by national courts throughout the EU and boosting cross-border exchanges. In 2014, fourteen projects were funded for about EUR 1 million, including: training activities for around 1000 judges of more than 20 nationalities; the creation of websites, a database and an enforcement observatory; and the drafting of manuals and other publications.

| |
|-----------------------|
| Merger control |
|-----------------------|

Merger control makes an essential contribution to growth and jobs in the European economy. Effective control of mergers maintains competitive pressure on market participants, which stimulates innovation and efficient distribution of scarce resources. It also ensures that European industries maintain access to critical input at competitive prices. Swift approval of mergers that do not raise competition concerns, as well as the approval of effective, tailor-made remedies to remove such concerns, where needed, enable industries to restructure and adapt to new market challenges.

As highlighted in the 2013 Annual Competition Report, the Commission continuously evaluates the substantive and procedural rules in force for merger control and, if necessary, launch policy changes.

⁷⁵ Commission's opinions are available at http://ec.europa.eu/competition/court/antitrust_requests.html

⁷⁶ Commission's observations are available at http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html

1. The White Paper "Towards more effective EU merger control"

In July, the Commission launched a public consultation putting forward proposals to improve merger control at EU level outlined in a White Paper "Towards More Effective EU Merger Control"⁷⁷.

The White Paper takes stock of the working of the Merger Regulation 10 years after the last reform in 2004. It discusses ways to enhance cooperation and convergence of the different merger control systems in the European Union at the EU and national level, following suggestions made in 2010 by Mario Monti in his report to President Barroso on the internal market⁷⁸ and in 2013 by the French Autorité de la Concurrence⁷⁹ to create a "European Merger Area" in which both the Commission and national competition authorities (NCAs) would review mergers under the same substantive rules.

The key proposals of the White Paper include the following: (i) policy choices and proposals for a light and tailor-made review of acquisitions of non-controlling minority shareholdings – these do not currently fall under the EU Merger Regulation but can cause significant harm to competition and consumers; (ii) making case referrals between Member States and the Commission more business-friendly and effective; (iii) making procedures simpler – this can be achieved for example by exempting certain non-problematic transactions from the notification obligation, or by excluding the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets from the scope of the EU merger review; and (iv) fostering coherence and convergence – the White Paper takes stock of the use of current EU merger control rules and proposes to reflect on ways to foster convergence between Member States and the Commission as well as among Member States with a view to creating a truly level playing field and to avoid inconsistent outcomes.

2. Simplification Package successfully implemented

The Merger Simplification Package adopted in December 2013 became applicable as of 1 January 2014. The package widened the scope of the simplified procedure to review unproblematic mergers, thus significantly reducing the administrative burden for parties notifying mergers to the Commission. Streamlining of notification forms in cases of candidates for simplified procedure, which represented nearly 70% of all mergers notified to the Commission in 2014, resulted in DG Competition being able to devote more resources to problematic merger cases.

3. Recent enforcement trends

The number of notified mergers increased in 2014 compared to the last four years. Overall, 338 transactions were notified, including 35 referrals from Member States. In eight cases, the Commission opened in-depth investigations (second phase). These cases concerned media, basic industries, pharmaceuticals and energy sectors.

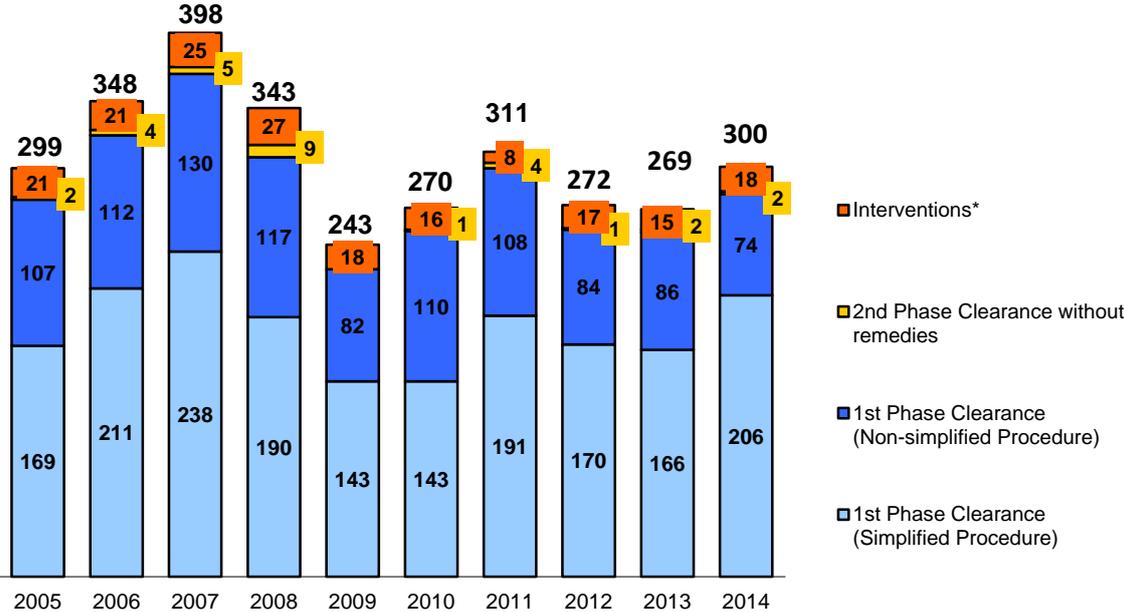
⁷⁷ White Paper "Towards more effective EU merger control", COM(2014) 449 final available at http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf

⁷⁸ M. Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society*, Report to the President of the European Commission José Manuel Barroso, 9 May 2010.

⁷⁹ Autorité de la concurrence, *Pour un contrôle des concentrations plus simple, cohérent et stratégique en Europe*, Rapport au Ministre de l'Economie et des Finances, 16 December 2013.

In 2014 the Commission took 300 decisions. The number of interventions⁸⁰ remained stable at 18 compared with the average of the last four years. 13 mergers out of them were cleared subject to commitments in first phase and five in second phase⁸¹. There was no case where the Commission had to prohibit a notified transaction. In one case, the Commission fined a notifying party for having implemented the transaction before it was notified to and cleared by the Commission⁸². The breach of those obligations is considered to be serious by its nature in so far as the ex ante notification system and the prohibition of implementing a concentration without prior approval from the Commission ensure that the Commission can assess mergers before they are implemented – a key safeguard that protects direct customers and final consumers from the harm that anticompetitive mergers could create.

Merger decisions



* Includes prohibitions: one in 2007, 2011 and 2012 and two in 2013
 Source: Directorate-General for Competition

Merger cases have remained complex in 2014. Second phase investigations involve sophisticated qualitative and quantitative analyses. In some cases, complex remedies packages including far-reaching divestitures have been needed to allow a merger to go ahead while keeping markets competitive and protecting industries downstream from price rises for critical inputs.

4. Significant judgments by EU Courts in mergers

In 2014 the EU Courts handed down two judgments in the field of merger control.

⁸⁰ Interventions in merger cases include prohibition decisions and mergers cleared subject to commitments.
⁸¹ Cases M.6905 *Ineos/Solvay/JV*, Commission decision of 8 May 2014; M.6992 *Hutchison 3G UK/Telefónica Ireland*, Commission decision of 28 May 2014; M.7018 *Telefónica Deutschland/E-Plus*, Commission decision of 2 July 2014; M.7061 *Huntsman/Rockwood*, Commission decision of 10 September 2014; M.7000 *Liberty Global/Ziggo*, Commission decision of 10 October 2014.
⁸² Case M.7184 *Marine Harvest/Morpol*, Commission decision of 23 July 2014.

On 3 July the Court of Justice⁸³ rejected Electrabel's appeal against the General Court judgment⁸⁴ confirming the legality of the EUR 20 million fine imposed by the Commission in 2009 for early implementation of the acquisition of Compagnie Nationale du Rhône⁸⁵. This judgment sends an important message that the stand-still obligation is an essential element of the EU merger control process and breaches of that obligation should be treated as serious offences even in cases where ultimately no competition concerns arise.

On 5 September⁸⁶ the General Court rejected an action brought by Editions Odile Jacob against a Commission decision of May 2011 approving the purchaser of the business that Lagardère had to divest as a condition for clearance of its acquisition of Vivendi Universal Publishing in 2004⁸⁷. The Commission had already approved the purchaser in 2004 but that decision was annulled by the General Court on formal grounds in 2010⁸⁸. The Court's new judgment confirms that the Commission had taken the necessary action in order to comply with that first judgment.

Developing the international dimension of EU competition policy

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

1. Bilateral relations

One of DG Competition's important field of activity at the international level is constituted by the negotiations on Free Trade Agreements (FTAs) aiming to include competition and State aid provisions in those agreements. In 2014 the negotiations with the US on a Transatlantic Trade and Investment Partnership Agreement (TTIP), launched in 2013, were one of the priorities for DG Competition's international efforts. Another important agreement being negotiated is the FTA with Japan. The proposed agreement includes competition provisions which DG Competition is following closely. In 2014 DG Competition also focused its efforts on intensive negotiations with Vietnam as the competition provisions in this free trade agreement might help to set a new standard for the region or even wider.

The Cooperation Agreement with Switzerland in competition matters was signed in May 2013⁸⁹. An innovative feature of that agreement is that it will enable both competition agencies to exchange evidence they have obtained in their respective investigations. In 2014

⁸³ Case C-84/13P *Electrabel v Commission*, judgment of the Court of 3 July 2014.

⁸⁴ Case T-332/09 *Electrabel v Commission*, judgment of the General Court of 12 December 2012.

⁸⁵ Case M.4994 *Electrabel/Compagnie Nationale du Rhône*, Commission decision of 10 June 2009.

⁸⁶ Case T-471/11 *Editions Odile Jacob v Commission*, judgment of the General Court of 5 September 2014.

⁸⁷ Case M.2978 *Lagardère/Natexis/VUP*, Commission decision of 7 January 2004.

⁸⁸ Case T-452/04 *Editions Odile Jacob v Commission*, judgment of the General Court of 13 September 2010. An appeal brought by the Commission against this judgment was rejected by the Court of Justice by judgment of 6 November 2012 in Joint cases C-553/10 and 554/10 *Commission and Lagardère v Editions Odile Jacob*.

⁸⁹ For further information see IP/13/444 of 17 May 2013 available at http://europa.eu/rapid/press-release_IP-13-444_en.htm

both sides completed their internal approval processes and ratified the agreement in October 2014. The Agreement entered into force on 1 December. Negotiations between the Commission and its Canadian counterparts to include provisions on exchange of evidence into the existing EU-Canada Cooperation Agreement have been progressing well.

Another key area of activity of DG Competition at the international level is technical cooperation with main trading partners which are developing their competition policy and enforcement regime and with which DG Competition has signed Memoranda of Understanding (MoUs). DG Competition has signed MoUs with most BRICs countries in recent years and has engaged in technical cooperation with these countries to varying degrees⁹⁰. DG Competition's technical cooperation activities with the Chinese competition authorities are most notable and will continue under the on-going cooperation programme (EUCTP II⁹¹). A significant programme for technical cooperation with the Indian competition authorities, CITD⁹², took off in 2014 and will run until 2018.

As to the accession negotiations with candidate countries, the main policy objective, in addition to fostering a competition culture, is to further assist the candidate countries and potential candidate countries in building up a proper legislative framework and developing well-functioning competition authorities and an efficient enforcement practice in order for them to meet the conditions for EU accession in the competition policy field. In 2014, the screening of the Serbian legislation took place. DG Competition also assisted Montenegro to fulfil the Opening benchmarks of the Competition negotiations. The negotiations for a Stabilisation and Association Agreement with Kosovo⁹³ were successfully concluded, and the Agreement was initialled by the Chief Negotiators in July 2014.

2. Multilateral cooperation

The Commission also continued to participate actively in international fora such as the Competition Committee of OECD, International Competition Network (ICN) and the United Nations Conference on Trade and Development (UNCTAD). In relation to ICN, in 2014 DG Competition continued co-chairing the Mergers Working Group of ICN and one of the Sub-Groups of the Cartel Working Group. It was also, together with US Federal Trade Commission (FTC), the project leader for the Steering Group project on investigative processes in competition enforcement activities and on the Merger Working Group International Merger Enforcement Cooperation Project.

In OECD, DG Competition maintained its leading role together with the US DoJ and US FTC in setting the agenda of the OECD Competition Committee, contributed to the long term strategic OECD projects on evaluation and international cooperation, leading to the adoption of a Recommendation on International Cooperation and manuals on ex ante and ex post evaluation in 2014. In addition, DG Competition continued to submit written submissions for OECD Roundtable discussions on a wide variety of competition related issues and actively participate in OECD discussions on other competition related or multidisciplinary topics.

⁹⁰ See for instance the MoU with the Competition Commission of India available at http://europa.eu/rapid/press-release_IP-13-1143_en.htm

⁹¹ EU-China Trade Project II.

⁹² Capacity Building Initiative for Trade Development programme.

⁹³ This designation is without prejudice to position on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

In UNCTAD, DG Competition will continue to participate actively in competition related activities by sharing its experience with other delegates (by means of written contributions and its participation in oral discussions) and by being actively involved in country peer reviews.

II. SECTORAL OVERVIEW

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

1. ENERGY & ENVIRONMENT

Overview of key challenges in the sector

In its Political Guidelines, the Commission President called for a reform of EU energy policy into a new European Energy Union⁹⁴. Competition is part of the policy mix that can address this challenge. The EU energy policy pursues the triple objective of sustainability, competitiveness and security of supply. These objectives have been once more reiterated in the Commission's Communication *A policy framework for climate and energy in the period from 2020 to 2030*⁹⁵. This framework has been endorsed in the Council conclusions⁹⁶, which include a political commitment to a binding Union target of at least 40% reduction of greenhouse gas emissions, a Union target of at least 27% share of renewable energy in final gross energy consumption and the completion of the internal market, including an objective to reach 15% level of interconnection by 2030. As energy is a key input across all economic sectors, affordable energy prices and security of supply are vital for a competitive European industry.

General challenges to reach the pillars of competitiveness, sustainability and security of supply

Reducing greenhouse gas emissions to combat climate change, maintaining secure and reliable provision of energy at competitive prices and improving interconnection between European gas and electricity grids remain a challenge also for the coming years. Given the Union's growing dependence on energy imports and the lack of sufficient diversification of supplies in particular for gas in certain areas of the Union, in 2014, a particular emphasis was put on energy security. The Commission's Communication *European Energy Security Strategy*⁹⁷ provided a comprehensive plan for the reduction of EU energy dependence and highlighted the need to perform risk assessments at regional and at Union level, to strengthen solidarity mechanisms, deepen market integration and improve diversification among others by accelerating the construction of key infrastructure projects and to increasingly focus on indigenous resources. Energy efficiency remains a cornerstone of the Union's energy and

⁹⁴ Jean-Claude Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change" Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session, 15 July 2014, available at http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf

⁹⁵ Communication of 22 January 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A policy framework for climate and energy in the period from 2020 to 2030*, COM(2014) 15, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0015>

⁹⁶ European Council (23 and 24 October 2014) – Conclusions.

⁹⁷ Communication of 28 May 2014 from the Commission to the European Parliament and the Council, *European Energy Security Strategy*, COM(2014) 330 final, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0330>

climate policy. The 2014 Energy Efficiency Communication took stock of the effectiveness of measures to reach the 20% reduction objective by 2020⁹⁸.

Contribution of EU competition policy to tackling the challenges

The main challenges identified in 2014 are increasing energy prices⁹⁹, the slow pace of investment in the energy sector and security of supply concerns which result from a lack of competition and in particular the insufficient diversification of gas supplies in Eastern Europe, as highlighted in the "stress tests"¹⁰⁰. 2014 has seen a substantial progress in the integration of the electricity market, as sixteen Member States have adopted the so-called "day-ahead market coupling" which provides for the most efficient use of cross-border infrastructures and facilitates price convergence. Nevertheless, more investment in cross-border infrastructures is needed to fully exploit the benefits of market integration.

In 2014, EU competition policy contributed to tackling those challenges in several ways. Antitrust and mergers enforcement have notably contributed by lifting obstacles to competition and barriers to trade between Member States and by ensuring that investments in the energy sector do not impede competition. In State aid, the new Guidelines on State aid for environmental protection and energy¹⁰¹ (EEAG) foresee new assessment criteria aiming at bringing renewable energy electricity generation into the market and at preventing the fragmentation of the internal market by nationally conceived, uncoordinated generation adequacy measures. At the same time, the EEAG as well as the General Block Exemption Regulation also introduce new categories to facilitate and accelerate investment in the field of energy efficiency and energy infrastructures, making thus a concrete contribution to the energy and climate agenda.

Enhancing competitiveness across the energy sector

Competition enforcement and advocacy contribute to competitiveness of EU industry and the integration of the internal market by opening markets, creating a level playing field between competitors, preventing collusion and abuses of dominant positions, ensuring that mergers do not impede effective competition and creating a framework for investment that avoids distortions and ensures the efficient allocation of public resources. In 2014, antitrust enforcement actions have contributed to tackling this by combatting segmentation of markets and abusive or collusive behaviour, which all contribute to high energy prices.

On 5 March, the Commission adopted two decisions concerning power exchanges: a decision under Article 101 TFEU fining two electricity power exchanges for agreeing not to compete with each other and allocating European territories amongst themselves¹⁰², and a decision under Article 102 TFEU fining the Romanian power exchange OPCOM for discriminating

⁹⁸ Communication of 23 July 2014 from the Commission to the European Parliament and the Council, *Energy Efficiency and its contribution to energy security and the 2030 Framework for climate and energy policy*, COM(2014) 520 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0520>

⁹⁹ The Communication of 29 January 2014 from the Commission "*Energy prices and costs in Europe*" highlights that while electricity wholesale prices have fallen thanks to increased competition, this often did not result in a decrease in the overall price levels to final consumers.

¹⁰⁰ Communication of 16 October 2014 from the Commission to the European Parliament and the Council *on the short term resilience of the European gas system*, COM(2014) 654 final, available at [http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:52014DC0654R\(01\)&qid=1427283917286](http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:52014DC0654R(01)&qid=1427283917286)

¹⁰¹ OJ C 200, 28.6.2014, p. 1.

¹⁰² Case AT.39952 *Power Exchanges*, Commission decision of 5 March 2014.

against electricity traders based in other EU Member States¹⁰³. On 12 August, the Commission issued a Statement of Objections against the Bulgarian energy company BEH relating to territorial restrictions on the resale of electricity in Bulgaria¹⁰⁴.

On the State aid side, the new EEAG makes it possible to safeguard a sufficient financing base for support to energy from renewable sources to reach the EU targets while maintaining the competitiveness of electro-intensive users, some targeted reductions from the financing of renewable energy support may be given for energy-intensive industries. During 2014, the Commission has approved three such schemes¹⁰⁵.

Contributing to sustainability

Sustainable development is the long term use of resources to meet human needs for energy, while preserving the environment. With the rising share of energy from renewable sources within the energy mix, it becomes more and more important that it gradually integrates the market with a view to functioning on a normal market basis. The new EEAG therefore requires direct selling of electricity from renewable sources in the market, on top of which Member States may grant a premium to cover for the extra-costs where the technologies are not yet competitive towards conventional generation. Furthermore, energy from renewable sources will underlie standard balancing responsibilities and its production should not be incentivised when wholesale prices turn negative. The Commission approved several support schemes which follow already these market-based assessment criteria¹⁰⁶. Actions for sustainability are also reflected in on-going anti-trust investigation in relation to Austrian waste management markets¹⁰⁷.

Contributing to security of supply

In the gas sector, lack of diversification and consequently competition in sources of supply is a concern for the security of supply in the EU, which is increasingly dependent on imports. Some Member States continue to rely on one single supplier and often on one single supply route for 80%-100% of their gas consumption¹⁰⁸, whereas those Member States with a diverse portfolio of gas suppliers and supply routes and with well-developed gas markets reap the benefit of paying less for imports. In the electricity sector, there are increasing concerns about generation adequacy. The new provisions under the State aid General Block Exemption Regulation (GBER) and the Environmental and Energy State Aid Guidelines (EEAG) greatly contribute to encourage investment in gas and electricity infrastructure in a manner which

¹⁰³ Case AT.39984 *OPCOM / Romanian Power Exchange*, Commission decision of 5 March 2014.

¹⁰⁴ Case AT.39767 *BEH electricity*, see IP/14/922 of 12 August 2014 available at http://europa.eu/rapid/press-release_IP-14-922_en.htm

¹⁰⁵ Cases SA.38632 *Germany – EEG 2014*, see IP/14/867 of 23 July 2014 available at http://europa.eu/rapid/press-release_IP-14-867_en.htm; SA.39042 *Romania – RES support reduction for energy-intensive users*, see IP/14/1157 of 15 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1157_en.htm; SA.33995 *Germany – EEG 2012*, see IP/14/2122 of 25 November 2014, available at http://europa.eu/rapid/press-release_IP-14-2122_en.htm

¹⁰⁶ For instance, cases SA.38632 *Germany – EEG 2014*; SA.36023 *Estonia – Support scheme for electricity produced from renewable sources and efficient co-generation*; SA.36196 *UK – Contract for Difference for renewables in UK*; SA.35177 *Czech Republic – Promotion of electricity production from renewable energy sources*.

¹⁰⁷ Case AT.39759 *ARA foreclosure*, see IP/13/711 of 18 July 2013 available at http://europa.eu/rapid/press-release_IP-13-711_en.htm

¹⁰⁸ See Commission contribution to the European Council, *Energy challenges and policy*, available at http://ec.europa.eu/europe2020/pdf/energy2_en.pdf

minimises market distortions. In the electricity sector Member States are considering measures to ensure medium and long-term security of supply. The EEAG assessment criteria on generation adequacy strive to ensure a level playing field between different generation technologies, including interconnectors or cross-border generation, as well as the demand-side. A first decision in this field was the approval of the UK capacity market¹⁰⁹. Furthermore, the Commission positively concluded the formal investigation into the aid destined to the construction of the new Hinkley point nuclear power generation¹¹⁰.

In the field of merger control, the trend towards investments into European energy infrastructure by investment companies persisted¹¹¹. Moreover, in 2014 a number of companies invested into "green" electricity such as wind parks¹¹², solar parks¹¹³, pellet production¹¹⁴ as well as in energy saving measures¹¹⁵ and the marketing of green electricity¹¹⁶. The Commission will also continue to ensure that input products for the energy sector will be sold on competitive markets¹¹⁷.

In addition, the Commission is conducting an in-depth investigation into the proposed acquisition of DESFA, the Greek transmission system operator in charge of the high-pressure pipeline grid and the only Greek LNG Terminal, by SOCAR, the Azeri State-owned gas producer. SOCAR is also a member of the Shah Deniz consortium that will sell natural gas to Europe as of 2019/2020. Due to this potential combination of a gas supplier and infrastructure operator, the investigation focuses on the possibility of network foreclosure, which would distort competition and ultimately lead to higher natural gas prices for Greek consumers.

Similarly, the Commission's antitrust enforcement can help to resolve security of supply issues by facilitating access to the market and encouraging investment. Ongoing Commission investigations under Article 102 TFEU include the potential abuse by Gazprom of its dominant position in the supply of natural gas in Central and Eastern Europe¹¹⁸ and the possible foreclosure of gas markets in Bulgaria by the Bulgarian incumbent BEH as a result of obstacles to access to gas transport and storage infrastructure¹¹⁹. The Commission also continued its investigation into potential distortions of price reporting in relation to oil and

¹⁰⁹ Case SA.35980 *UK – UK Capacity market*, see IP/14/865 of 23 July 2014 http://europa.eu/rapid/press-release_IP-14-865_en.htm

¹¹⁰ Case SA.34947 *UK – Support to Hinkley Point C Nuclear Power Station*, see IP/14/1093 of 8 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1093_en.htm

¹¹¹ Cases M.7095 *Socar / Defsa*; M.7390 *Ofi Infravia / Gdf Suez / Pensiondanmark / Ngt*; M.7148 *Borealis European Holdings / First State Investments / Fortum Distribution Finland* and M.7254 *Letterone / Rwe Dea*.

¹¹² Cases M.7295 *Parkwind / Aspiravi Offshore / Summit Renewable Energy Northwind / Northwind*; M.7121 *E.On Sverige / Seas-Nve Holding / E.On Vind Sverige* and M.7108 *Axpo Group / Edp Group / JV*.

¹¹³ Case M.7352 *Gdf Suez / Soper / Natixis / LCS1 / LCS2 / LCS5 / LCS9 / LCSgo*.

¹¹⁴ Case M.7185 *Rgi / Neova Pellets / JV*.

¹¹⁵ Case M.7145 *Veolia Environnement / Dalkia International*.

¹¹⁶ Case M.7098 *Sales & Solutions / Verbund / JV*.

¹¹⁷ Cases M.7083 *John Wood Group / Siemens / JV* and M.7284 *Siemens / John Wood Group / Rolls-Royce Combined Adgt Business / RWG*.

¹¹⁸ Case AT.39816 *Upstream Gas Supplies in Central and Eastern Europe*, see IP/12/937 of 4 September 2012 available at http://europa.eu/rapid/press-release_IP-12-937_en.htm?locale=en

¹¹⁹ Case AT.39849 *BEH Gas*, see IP/13/656 of 5 July 2013 available at http://europa.eu/rapid/press-release_IP-13-656_en.htm

biofuels products price benchmarks established by a Price Reporting Agency, where inspections were carried out in 2013 and 2014¹²⁰.

2. INFORMATION AND COMMUNICATION TECHNOLOGIES (ICT) AND MEDIA

Overview of key challenges in the sector

Information and Communication Technologies (ICT) are of paramount importance for Europe's future growth, competitiveness and job creation. The importance of ICT reaches far beyond the sector as such because ICT increasingly pervade all segments of society and the economy. They are a driver for innovation and growth in many other sectors, such as energy, transportation, public services, health and education¹²¹.

The role of ICT for achieving the European Union's objectives under the Europe 2020 Strategy has been, *inter alia*, recognised by the Digital Agenda for Europe (Digital Agenda) flagship initiative¹²². It is estimated that the full implementation of the Digital Agenda would increase European GDP by 5% until 2020 and ensure that 900 000 digital jobs will get filled (resulting in a total of up to 3.8 million new jobs throughout the economy in the long term)¹²³.

As stressed by President Juncker in his political guidelines for the next European Commission, the creation of a Digital Single Market alone is expected to generate up to EUR 250 billion of additional growth within the next five years and to create hundreds of thousands of new jobs, notably for younger job-seekers¹²⁴. One of the essential drivers of the digital economy is media content. The main trend observed in the media sector concerns technological convergence, i.e. the blurring of traditional lines existing in the analogue world between different media (broadcasting, paper, audio, internet) and increasing availability of online distribution.

Contribution of EU competition policy to tackling the challenges

Policy initiatives

Competition policy played an important role in shaping the Commission's legislative proposals in the telecom and media sectors in the course of 2014. On 4 February, the

¹²⁰ Case AT.40054 *Oil and Biofuel Markets*, see MEMO/13/435 of 14 May 2013 available at http://europa.eu/rapid/press-release_MEMO-13-435_en.htm and MEMO/14/581 of 9 October 2014 available at http://europa.eu/rapid/press-release_MEMO-14-581_en.htm

¹²¹ See, e.g., the study "*Unlocking the ICT Growth Potential in Europe: Enabling people and businesses*" (2013) prepared by The Conference Board for the European Commission, available at <http://ec.europa.eu/digital-agenda/en/news/new-study-unlocking-ict-growth-potential-europe-enabling-people-and-businesses>

¹²² Communication of 26 August 2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Digital Agenda for Europe*, COM(2010) 245 final/2, available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0245R\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0245R(01)) as revised in 2012, see *The Digital Agenda for Europe - Driving European growth digitally*, 18 December 2012, COM(2012) 784 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0784&qid=1427286095939> As to barriers for the Digital Single Market that must be overcome, in particular with respect to online access to content, see e.g. "*Streaming and Online Access to Content and Services*," study prepared for the European Parliament's Committee on the Internal Market and Consumer Protection, 2014, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/492435/IPOLIMCO_ET\(2014\)492435_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/492435/IPOLIMCO_ET(2014)492435_EN.pdf)

¹²³ See <https://ec.europa.eu/digital-agenda/digital-agenda-europe>

¹²⁴ Jean-Claude Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change" Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session, 15 July 2014: http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf

European Parliament and the Council adopted Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market¹²⁵. The Directive aims to further enhance the grant by collecting societies of multi-territorial licenses for the provision of on-line services, but also introduces some mechanisms to ensure better governance and greater transparency in authors' rights' management. The Directive contains a number of important competition law safeguards aimed at ensuring compliance with EU competition law in the collective management of copyright.

In 2014, the Commission also continued its broad effort to review and modernise EU copyright rules. In December 2013, it launched a consultation, where it invited stakeholders to share their views on areas that include, *inter alia*, territoriality in the Single Market and fragmentation of the EU copyright market. A Report on the responses was published in July¹²⁶. The review exercise is currently on-going and DG Competition is actively contributing to the discussion.

Enforcement action against telecommunication operators

In 2014, the Commission continued to pursue enforcement actions against telecommunication operators suspected of engaging in anti-competitive conduct.

On 15 October, the Commission adopted a prohibition decision imposing a fine of EUR 38.83 million jointly and severally on Slovak Telekom and its parent company, Deutsche Telekom¹²⁷. The Commission concluded that Slovak Telekom refused to supply unbundled access to its local loops to competitors and imposed a margin squeeze on alternative operators. Deutsche Telekom was found to have exercised decisive influence over Slovak Telekom and was thus held to be jointly and severally liable for Slovak Telekom's fine. Deutsche Telekom received an additional fine of EUR 31.07 million to ensure sufficient deterrence as well as to sanction its recidivism.

Enforcement in technology markets

In 2014, the Commission's enforcement action in technology markets mainly focused on unilateral conduct falling under Article 102 TFEU¹²⁸.

On-going investigation in the markets for internet search and advertising (Google)

In its on-going investigation of Google's business practices, the Commission is investigating four of Google's business practices that raise concerns: (i) Google's preferential treatment of results from its own specialised search services to the detriment of results from competing specialised search services (including on mobile devices); (ii) copying of third party content for use in Google's own specialised search services; (iii) exclusivity

¹²⁵ OJ L 84, 20.3.2014, p. 72.

¹²⁶ See http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

¹²⁷ Case AT.39523 *Slovak Telekom*, Commission decision of 15 October 2014.

¹²⁸ In June the General Court confirmed the Commission's 2009 decision against Intel (Case T-286/09 *Intel v Commission*). In this decision the Commission found that Intel had illegally granted rebates to PC manufacturers under the condition that they would exclusively or quasi-exclusively source computer chips from Intel. The Court fully confirmed the Commission's assessment of the abusive nature of such exclusivity rebates. The Court also clarified the legal standard for such assessment, which will have implications for future cases.

agreements with publishers for search advertising; and (iv) restrictions on the portability and management of search advertising campaigns across search advertising platforms¹²⁹.

The Digital Agenda identifies improved standard-setting procedures and increased interoperability as keys to success. Against this background, the Commission provided guidance by adopting two decisions¹³⁰ in April (*Motorola* and *Samsung*). These decisions relate to the enforcement of standard essential patents (SEPs) and set limits on the use of these kinds of patents in what some observers have called the "smartphone patent wars". SEPs are patents essential for the implementation of an industry standard and it is technically impossible to make a standard-compliant product, such as a smartphone, without using the technology protected by SEPs. As a *quid pro quo* for the inclusion of their patents into the respective standards, Motorola and Samsung had committed to license them on fair, reasonable and non-discriminatory (FRAND) terms.

In its prohibition decision against Motorola, the Commission held that Motorola abused its dominant position by seeking an injunction in Germany against Apple on the basis of a SEP, although Apple was willing to take a license and have the licensing terms be determined by a German court.

In a similar case, the Commission rendered legally binding commitments offered by Samsung to address the competition concerns identified by the Commission in a Statement of Objections of December 2012. Under the commitments, Samsung agrees for a period of five years not to seek injunctions in the EEA on the basis of any of its SEPs, present and future, that relate to technologies implemented in smartphones and tablets against any company, if potential licensees agree to comply with a specified process for determining appropriate FRAND royalty rates by an independent third party¹³¹.

Enforcement linked to media, sports and digitalisation

The Commission continued in 2014 to pursue enforcement actions in the media and the sport sectors.

In the broadcasting sector, the Commission, having initiated formal proceedings¹³² in January, continues to investigate certain restrictions in licensing agreements for satellite broadcast and online distribution between several major US film studios and some of the EU's largest pay-TV broadcasters. Popular audiovisual content is licensed on a territorial basis by means of contracts that may impose "absolute territorial exclusivity" on broadcasters. In these proceedings, the Commission is examining whether certain clauses concerning satellite pay-TV broadcasting and online pay-TV services are in breach of Article 101 TFEU as they may prevent consumers from cross-border access to pay-TV content.

¹²⁹ For more details on substance and procedure of the Google investigation, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

¹³⁰ Cases AT.39985 *Motorola - Enforcement of GPRS standard essential patents*; AT.39939 *Samsung - Enforcement of UMTS standard essential patents*, Commission decisions of 29 April 2014.

¹³¹ The question as to whether the seeking of an injunction by the holder of a FRAND-encumbered SEP can amount to an abuse of a dominant position pursuant to Article 102 TFEU has also been brought before the Court of Justice in Case C-170/13 *Huawei v ZTE* and on 20 November 2014, Advocate General Wathelet published his opinion, which is essentially in line with the Commission's position, see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=159827&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=560757>

¹³² Case AT.40023 *Cross-border access to pay-TV content*, see IP/14/15 of 13 January 2014 available at http://europa.eu/rapid/press-release_IP-14-15_en.htm

In the publishing sector, the Commission continued to closely follow the development of the EU e-book distribution markets, including monitoring the compliance of the commitments made binding on Simon & Schuster, HarperCollins, Hachette Livre, Verlagsgruppe Georg von Holtzbrinck, Apple and Penguin Random House by the Commission's Article 9 decisions in December 2012¹³³ and July 2013¹³⁴ respectively.

In the sports sector, the Commission continued to focus on competition issues related to revenue-generating activities. On 15 July, the Commission rejected a complaint from Topps, a producer of football collectibles against FIFA, UEFA, four national football federations and Panini, Topps' competitor. Topps alleged *inter alia* that the football federations license their right for the World Cup and EURO football tournaments to Panini in an anti-competitive way. However, on the basis of priority settings the Commission decided not to open an in-depth investigation in this matter, in view of the limited likelihood of establishing the existence of an infringement. Topps has brought an action before the General Court challenging the rejection decision¹³⁵.

On 24 October, the Commission rejected a complaint against UEFA's Financial Fair Play Regulations submitted by a players' agent. The complainant claimed that the "break-even requirements", which in principle mean the clubs cannot spend more than they earn, were in violation of EU competition law. In parallel, the complainant has launched a civil action before the Court of First Instance of Brussels. The Commission decided to reject the complaint on the basis that there was an on-going procedure before a national court and this procedure could provide an effective remedy for the complainant. The decision did not take a view on the merits of the complaint.

The Commission also continued in 2014 to pursue enforcement actions related to the impact of the transition to digital networks. In this context, the Commission is closely monitoring the criteria and procedures used by Italy *inter alia* for granting new digital frequencies (multiplexes) to new entrants or smaller TV operators with a view to resolving the infringement procedure. The case concerning Bulgaria's assignment of digital broadcast spectrum is still pending before the Court of Justice¹³⁶.

ICT and media in the context of the Merger Regulation

2014 saw the continuation of merger activity in the EU mobile telecommunications sector. In summer, following the in-depth phase II investigations, the Commission conditionally approved two mergers between mobile network operators in Ireland (Hutchison 3G UK/Telefónica Ireland)¹³⁷ and Germany (Telefónica Deutschland/E-Plus)¹³⁸. These mergers reduced the number of mobile network operators in those national markets from four to three. While neither transaction created or strengthened dominance, the Commission nevertheless concluded that each merger would significantly impede effective competition. This conclusion was justified *inter alia* on the grounds that both mergers led to the elimination of an important competitive force from an already highly concentrated market and lower incentives to compete of the parties and other operators. The Commission ultimately cleared the two mergers subject to remedies which (i) were designed to allow mobile virtual network

¹³³ See IP/12/1367 of 13 December 2012 available at http://europa.eu/rapid/press-release_IP-12-1367_en.htm

¹³⁴ See IP/13/746 of 25 July 2013 available at http://europa.eu/rapid/press-release_IP-13-746_en.htm

¹³⁵ Case T-699/14 *Topps Europe v Commission*.

¹³⁶ See IP/13/46 of 24 January 2013 available at http://europa.eu/rapid/press-release_IP-13-46_en.htm

¹³⁷ Case M.6992 *Hutchison 3G UK / Telefónica Ireland*, Commission decision of 28 May 2014.

¹³⁸ Case M.7018 *Telefónica Deutschland / E-Plus*, Commission decision of 2 July 2014.

operators to launch retail services by purchasing certain capacity of the merged entity's network upfront (potentially, up to 30% of the merged entity's total capacity), thus incentivising to compete strongly to fill this capacity, (ii) kept the door open for a new network operator to enter the market in the future; and (iii) as for Germany, were designed to allow non-network operators hosted on the merged entity's network to continue to effectively compete on the market.

In fixed-line telecommunications, the Commission approved the combination of two regional cable networks of Liberty Global (UPC) and Ziggo¹³⁹ into one near nationwide network in the Netherlands. The approval was subject to conditions aimed at preserving sufficient competition in the Dutch market for the wholesale supply of FTA/Basic Pay TV channels and of Premium Pay TV channels and ensuring that TV broadcasters' ability to deliver audio visual content directly to consumers via the Internet (OTT) would not be negatively affected – either by contractual or technical means. Furthermore, the Commission granted unconditional clearance to the acquisition by Vodafone, of cable operator ONO in Spain¹⁴⁰, since the parties' business activities were largely complementary. Also in Spain, the Commission is currently carrying out an in-depth investigation of the proposed merger between Orange and Jazztel¹⁴¹, two of the four providers of nationwide fixed telephony and internet access.

In the IT sector, the Commission scrutinised the acquisition of WhatsApp by Facebook¹⁴², which both offer communications applications for smartphones. This merger was approved without conditions, in particular in light of the dynamic nature of the market, low entry barriers and sufficient remaining competition.

Finally, in the media sector, the Commission is currently continuing its in-depth investigation of the proposed acquisition by Liberty Global, which controls cable operator Telenet, the leading TV retailer in Flanders, of De Vijver Media¹⁴³, a Belgian TV broadcasting and production company.

State aid enforcement in ICT and media

One of the major building blocks for a well-functioning Digital Single Market is a high-speed communication infrastructure. To realise the growth potential of the sector, the EU has set itself ambitious targets. By 2020, the Digital Agenda aims at achieving (i) full coverage of 30 Mbps services (fast broadband) and (ii) adoption of 100 Mbps services (ultra-fast broadband) by 50% of Europeans.

Achieving these objectives is challenging¹⁴⁴. The estimated costs of those objectives could reach up to EUR 60 billion for the first one and up to EUR 270 billion for the second¹⁴⁵. An obstacle to achieve these objectives is the significant "funding gap": investments of private

¹³⁹ Case M.7000 *Liberty Global / Ziggo*, Commission decision of 10 October 2014.

¹⁴⁰ Case M.7231 *Vodafone / Ono*, Commission decision of 2 July 2014.

¹⁴¹ Case M.7421 *Orange / Jazztel*.

¹⁴² Case M.7217 *Facebook / Whatsapp*, Commission decision of 3 October 2014.

¹⁴³ Case M.7194 *Liberty Global / Corelio / W&W / De Vijver Media*.

¹⁴⁴ According to the DAE scoreboard, at the end of 2013 Next Generation Access fixed-line technologies capable of providing at least 30 Mbps were available to 62% of EU households. About 20% of all EU subscriptions were at least 30 Mbps and only 5.3% at least 100 Mbps (European Commission, Digital Agenda Scoreboard 2014).

¹⁴⁵ Communication of 20 September 2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European broadband: investing in digitally driven growth*, COM(2010) 472 final, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0472>

operators alone will not yield the desired results. Although the broadband sector is highly commercial, State involvement (via State aid and regulation) remains essential to extend broadband coverage in areas where there is no incentive for commercial operators to invest in and accelerate the deployment of next generation access networks¹⁴⁶.

As the Digital Agenda objectives can only be achieved by combining private and public investment, State aid control has a crucial role to play for a co-ordinated investment strategy. It has to ensure that publicly funded networks do not crowd out private investments. State aid contributes to develop a more competitive environment. Competition stimulates overall investment into NGA infrastructure and it ensures that consumers benefit from State intervention. In this context, the recently adopted 2013 Broadband Guidelines which aligned the State aid rules on aid for broadband with the objectives of the Digital Agenda have and will continue to have an essential role to play¹⁴⁷, together with the new GBER¹⁴⁸, which includes certain aid to broadband infrastructures. The new Broadband Guidelines were, for example, applied in the *NGA Bayern* decision¹⁴⁹.

Reaping the "digital dividend" is an important element of the Digital Single Market initiative. In 2014, the Commission therefore focused its enforcement actions in relation to digital networks on ensuring that Member State respect EU State aid law when in the process of realising the digital dividend. This process generates transition costs for terrestrial broadcasters, while the benefits accrue to mobile operators. Such costs can include simulcast, reconfiguring the broadcasting network or adapting transmission and compression technologies to maintain as much as possible the broadcasting capacity.

The Commission also adopted a second negative decision with recovery obligation concerning the public financing of the transition to digital terrestrial television in remote areas in Spain, this time concerning the autonomous community of Castilla-La Mancha¹⁵⁰. As in the previous case, also here the Commission found that the Spanish measure unduly distorts competition between the digital terrestrial platform and operators using other technologies. It was therefore declared incompatible with EU State aid rules.

3. FINANCIAL SERVICES

Overview of the key challenges in the sector

Financial services represent about 5% of the EU's 2013 GDP but, more importantly, they play an essential role in providing access to finance to the real economy. In 2014, the situation of financial markets improved as banks were able to raise significant amounts of capital through various means. Due to its systemic importance, the Commission will remain active in the financial services sector. In 2014 the Commission has continued to apply its State aid regime

¹⁴⁶ Since 2003, the Commission adopted over 130 decisions approving more than EUR 13 billion of State subsidies across Europe.

¹⁴⁷ 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, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:en:PDF>

¹⁴⁸ As regards State aid for media, the entry into force of the revised General Block Exemption Regulation on 1 July 2014 has increased the categories of aid that can benefit from an exemption of notification. They now include several aid measures affecting the media sector, including aid for culture and heritage conservation as well as aid schemes for audiovisual works.

¹⁴⁹ Case SA.38690 *Germany – NGA Bayern Abänderung*, Commission decision of 9 July 2014.

¹⁵⁰ Case SA.27408 *Aid for the deployment of digital terrestrial television (DTT) in Castilla-La Mancha*, Commission decision of 1 October 2014.

for the financial sector with the aim to ensure that aided financial institutions restructure adequately or exit the market in an orderly way, and to limit competition distortions between beneficiary financial institutions within the internal market, while limiting the use of taxpayers' money to the minimum necessary. At the same time, the Commission continued its antitrust enforcement investigating anti-competitive behaviours in the financial markets.

Since its launch in June 2012 achieving the Banking Union is a key priority on the EU agenda¹⁵¹. 2014 has seen its major building blocks agreed.

A new European directive on Banking Recovery and Resolution (BRRD) that provides a common toolbox for resolving banks in difficulties was adopted by the European Parliament on 15 May and is now being transposed by Member States¹⁵². That legislation aims at better protecting taxpayers from having to bail-out banks in distress. In addition, as from January 2014, European banks apply the new rules set out in the CRD¹⁵³ IV package, which implements Basel III. Insufficient level of capital – both in quantity and in quality – was one of the vulnerabilities shown by banking institutions during the crisis; the new capital adequacy rules of the CRD IV will address that shortcoming. As of June, a revised EU directive on Deposit Guarantee Schemes ("DGS")¹⁵⁴ came into force, aiming to harmonise the set-up and functioning of the Member States' national deposit guarantee schemes and to ensure they are provided with adequate funds.

Mirroring the Single Supervisory Mechanism (SSM)¹⁵⁵ for euro-area banks, which became operational on 4 November, the Single Resolution Mechanism, applicable to the euro area and to other countries willing to join, will enter into force on 1 January 2015¹⁵⁶. The provisions relating to the cooperation between the Single Resolution Board and the national resolution authorities for the preparation of the banks' resolution plans will apply from 1 January 2015 while the Single Resolution Mechanism should be fully operational as of 1 January 2016.

¹⁵¹ President Barroso described it as "*the first and most urgent phase on the way to deepen our economic and monetary union*" in his annual State of the Union speech to the European Parliament on 11 September 2013.

¹⁵² Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014, p. 190, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427289116879&uri=CELEX:32014L0059>

¹⁵³ Capital Requirements Directive. See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ L 176, 27.6.2013, p. 338, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0036>

¹⁵⁴ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0049>

¹⁵⁵ The European Central Bank became the single banking supervisor for the euro countries and for all those that decide to join the Banking Union. Prior to assuming its tasks the SSM has conducted a Comprehensive Assessment ('ECB Comprehensive Assessment'), consisting of an Asset Quality Review (AQR) and a stress test exercise (the latter under the coordination of the European Banking Authority, EBA) to obtain a full picture of the banks coming under its supervision. See http://ec.europa.eu/finance/general-policy/banking-union/single-supervisory-mechanism/index_en.htm

¹⁵⁶ See http://ec.europa.eu/finance/general-policy/banking-union/single-resolution-mechanism/index_en.htm

Contribution of EU competition policy to tackling the challenges

Contributing to seamless, efficient and innovative payment markets

Payments are important economically: they generate approximately EUR 130 billion per year (ca. 1% of EU GDP according to ECB figures) of income for the banks. The ECB estimates that this represents a quarter of total bank revenues. Even more importantly, a well-functioning payments market is essential for the Single Market in all goods and services. The aim is to create a genuine internal market where cross-border payments in euros are as cheap and easy as domestic payments.

Payments are also an important element of the Digital Single Market. In order to optimise the potential of *e-commerce*, secure and efficient *e-* and *m-*payments are essential. Today, consumers expect smartphones to provide access to a range of services, including the possibility to pay for products and services, on-line and in shops, with only one swipe. Consumers want to be able to pay "person-to-person" with their phones, or pay with a finger print. The technology in question is readily available. However, the industry has so far not succeeded in making it widely available to EU consumers, largely due to the lack of clarity on permissible business models. The traditional way in which consumers "pay for paying" with cards is through hidden inter-bank fees ("interchange fees") that banks impose collectively on retailers, which they in turn pass on to consumers in the form of higher prices. Neither retailers nor consumers can influence these fees and over the years, in spite of the spectacular growth of card payments, the fees have gone up rather than down. The wide range of different inter-bank fees expected by banks when they give their green light for a payment has been in the way of integration and innovation of the EU payments market.

The Commission and national competition authorities have condemned these hidden fees under the European competition rules. The Commission set out its analysis of such fees in its 2007 decision on MasterCard's multilateral interchange fees (MIFs) for cross border consumer card transactions¹⁵⁷. In September, the Court of Justice irrevocably confirmed that assessment¹⁵⁸. At the same time, Council and Parliament worked on legislation creating clarity on fee models, business rules and on facilitating market entry by non-banks on the basis of two Commission proposals: one for a Regulation on Interchange Fees for card based payments¹⁵⁹ and a proposal to revise the Directive on Payment Services (PSD)¹⁶⁰. After the adoption by the European Parliament of its reports on both proposals in April, the Council adopted its general approach on both texts at the end of 2014. Due to the earlier date of adoption of the Council's general approach to the regulation, Trilogues took place under the Italian Presidency. The Trilogues resulted into a positive outcome with the final text being very close to the original Commission proposal. Pending technical finalisation and language editing, the final version is expected in

¹⁵⁷ Cases AT.34579 *Mastercard*, AT.36518 *Eurocommerce* and AT.38580 *Commercial cards*, Commission decision of 19 December 2007, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf

¹⁵⁸ Case C-382/12 P *MasterCard Inc. and Others v European Commission*, judgment of the Court of 11 September 2014. See also Memo/14/528 of 11 September 2014 available at http://europa.eu/rapid/press-release_MEMO-14-528_en.htm

¹⁵⁹ Commission Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM(2013) 550 final, 2013/0265 (COD) of 24 July 2013 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:HTML>

¹⁶⁰ Commission Proposal for a Directive on Payment Services in the Internal Market, COM(2013) 547 final of 24 July 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427290049713&uri=CELEX:52013PC0547>

2015. As regards PSD II, a political agreement under the Trilogues is also expected to be reached in 2015.

In July, updated rules for markets in financial instruments (MIFID II/MIFIR) entered into force¹⁶¹. They represent a key part in the Financial Services Regulation Package adopted by the EU over the last Commission mandate reforming the EU financial sector and delivering on the G20 commitments to tackle the less regulated parts of the financial system. The rules seek to make financial markets more efficient, resilient and transparent as well as support growth across the EU. From the competition perspective the harmonised EU regime for non-discriminatory access to trading venues, central counterparties (CCPs) and benchmarks for trading and clearing purposes is crucial. The obligation to licence for benchmarks will be embodied in legislation with effect from 2019, so that in the future it might not be necessary to tackle cases like the CDS case with enforcement measures. Following their adoption, the work on MIFID II/MIFIR continued throughout 2014 to empower the European Securities and Markets Authority (ESMA) and the Commission to develop many Level 2 measures that will define the implementation of the principles established in those regulations. These measures need to ensure fair competition in trading/post trading.

Antitrust and cartel investigations in the financial services sector

In February, the Commission declared binding commitments offered by Visa Europe on interchange fees for cross-border and domestic consumer credit card transactions and rules hindering cross border acquiring¹⁶²; this led to the closure of the proceedings against Visa Europe. The proceedings against Visa Inc. and Visa International as regards their interchange fees for transactions in the EEA with cards issued outside the EEA (inter-regional transactions) continue as well as the proceedings opened in April 2013 against MasterCard's fees for inter-regional transactions and rules preventing cross border acquiring¹⁶³.

On 19 February, DG Competition presented the preliminary results of the data collection regarding merchants' costs of accepting cash and card payments¹⁶⁴, work which was done in the context of the Commission's competition enforcement cases in payments. The preliminary results did not exceed the benchmarks proposed in the draft Interchange Fee Regulation published in July 2013¹⁶⁵. The Commission expects to publish the final, more comprehensive report in 2015.

On 23 July, the Commission rejected a complaint submitted by the Icelandic company DataCell alleging that Visa Europe, MasterCard (and American Express) infringed EU competition law by preventing DataCell from accepting payments by cards¹⁶⁶. However, the Commission found that the suspension of services by the card schemes to DataCell affected DataCell's services only to one client, WikiLeaks, and that it could continue to offer other services also to other clients.

¹⁶¹ See http://ec.europa.eu/internal_market/securities/isd/mifid2/index_en.htm

¹⁶² Case AT.39398 *Visa MIF*, Commission decision of 26 February 2014, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf

¹⁶³ See IP/13/314 of 9 April 2013 available at http://europa.eu/rapid/press-release_IP-13-314_en.htm?locale=en

¹⁶⁴ See http://ec.europa.eu/competition/sectors/financial_services/presentation_results_en.pdf

¹⁶⁵ Commission Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM(2013) 550 final, 2013/0265 (COD) of 24 July 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0550&from=EN>

¹⁶⁶ Case AT.39921 *Refusal to provide payment services*, Commission decision of 23 July 2014.

The investigative efforts into the credit default swaps (CDS) market continued to complement the regulatory measures in the financial sector throughout 2014. In its Statement of Objections of July 2013¹⁶⁷, the Commission had preliminarily concluded that the addressee companies and associations coordinated their behaviour to prevent exchanges from entering the CDS market between 2006 and 2009, thereby breaching EU antitrust rules. In 2014, the Commission continued the investigation.

In 2014, the Commission also continued to monitor commitment decisions adopted in the financial services sector in previous years. This concerns the commitments given by Standard and Poor's in 2011 to provide US International Securities Identification Numbers (US ISINs) unbundled from other additional data. Following discussions between the Commission, Standard and Poor's and US ISINs' users, Standard and Poor's introduced measures to facilitate and simplify access to US ISINs in August. First results show improved effectiveness of the commitments. The Commission also continued monitoring the commitments given by Thomson Reuters in 2012 that create new licences to enable customers using Reuters Instruments Codes (RICs) to switch to competing providers of consolidated real-time datafeeds. The decision was appealed by a competitor. The proceedings at the General Court are ongoing¹⁶⁸.

Restoring confidence in the financial sector – elimination of the interest rate derivatives cartels

In December 2013 the Commission adopted two settlement decisions relating to cartels in the Euro and Yen interest rate derivatives sectors concerning a number of major international banks. This year, in October, the Commission adopted two further decisions concerning the financial sector more particularly in the sector of Swiss Franc interest rate derivatives¹⁶⁹. These two decisions were adopted via the settlement route. Interest rate derivatives (such as forward rate agreements, swaps, futures and options) are financial products used by banks or companies for managing the level of risk fluctuations, which derive their value from the level of a benchmark rate such as the London interbank offered rate (Libor), which is used for various currencies. The benchmark reflects an average of quotes submitted daily by a number of banks who are members of a panel.

In the first decision, the Commission found that two international banks – RBS and JP Morgan – had participated in an illegal cartel aimed at influencing the Swiss Franc Libor benchmark interest rate between March 2008 and July 2009. They discussed the future Swiss Franc Libor rate submissions of one of the banks and at times exchanged information concerning trading positions and intended prices. The infringement covered the whole of the European Economic Area. RBS was not fined as it benefitted from immunity under the Commission's 2006 Leniency Notice for revealing the existence of the cartel to the Commission and thereby avoided a fine of around EUR 110 million. JP Morgan received a reduction of its fine for its cooperation in the investigation under the Commission's leniency programme. Both banks agreed to settle the case with the Commission, leading to a further 10% reduction in fines, and the resulting fine for JP Morgan was over EUR 61 million.

In the second decision in the sector, this time for an infringement not linked to the collusion on a benchmark, the Commission fined four banks – RBS, JP Morgan, UBS and Credit Suisse - a total of over EUR 32 million for their participation in a cartel on bid-ask spreads on Swiss Franc interest rate derivatives. The bid-ask spread is the difference between the price at which a market maker in interest rate derivatives is prepared to buy and the price at which he is prepared to sell, and thus is an element of the price paid by customers of the product. The Commission found that between May and September 2007, the four banks agreed to quote to all third parties wider, fixed bid-ask spreads whilst maintaining narrower spreads for trades amongst themselves. The aim of the agreement was to lower the parties' own transactions costs and maintain liquidity between them whilst seeking to impose wider spreads on third parties and prevent other market players from competing on the same terms.

¹⁶⁷ See IP/13/630 of 1 July 2013 available at http://europa.eu/rapid/press-release_IP-13-630_en.htm

¹⁶⁸ Case T-76/14 *Morningstar v Commission*.

¹⁶⁹ Case AT.39924 *Swiss Franc Interest Rate Derivatives*, Commission decision of 21 October 2014. See IP/14/1189 of 21 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1189_en.htm and IP/14/1190 of 21 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1190_en.htm

RBS benefitted from immunity and thus avoided a fine of around EUR 5 million. UBS and JP Morgan received a reduction of their fines for cooperation in the investigation and all parties received a further 10% reduction in their fines for agreeing to settle the case with the Commission. This decision did not involve manipulation of a benchmark interest rate but represents a further significant decision in the financial sector.

Review of the Insurance Block Exemption Regulation

The review of the Insurance Block Exemption Regulation (EU) No. 267/2010 (IBER)¹⁷⁰, which will expire in March 2017, is subject to an Impact Assessment Procedure. The IBER exempts from the prohibition of restrictive business practices (Article 101 TFEU) certain cooperation agreements between insurers, in particular: the exchanges of statistical information for the calculation of risk premiums, and the creation of insurance pools. The Commission must submit to the Parliament and Council a report on the future of the IBER by March 2016. The Commission started the review process in August with a public consultation and is now assessing the replies obtained¹⁷¹.

Merger investigations in the financial sector

In 2014, the Commission continued to ensure that concentrations in the financial services sector do not lead to market distortions. The Commission assessed several mergers in the banking, insurance and financial intermediation sectors (e.g. the acquisition by BNP Paribas of equity derivatives and structured investment products business of the Royal Bank of Scotland authorised in April 2014)¹⁷². As these transactions did not raise competition concerns, they were cleared in the first phase and without the need to require remedial action.

State aid investigations in the financial sector

The special EU State aid crisis rules, first adopted in 2008 and 2009 and amended in 2010 and 2011 were materially revamped in August 2013¹⁷³. Those rules are largely in line with the BRRD¹⁷⁴. They also allow State aid control to continue to ensure a consistent policy response to the financial crisis throughout the EU and play an important role in limiting distortions of competition in the internal market. In addition, they contribute to the restoration of confidence in the European banks so that they can again provide affordable lending to the real economy and support growth. As of 1 January 2015, those State aid rules will apply alongside the provisions of the Bank Recovery and Resolution Directive¹⁷⁵.

Over the past six years, the Commission has analysed the restructuring of 111 banks – equivalent to around one quarter of Europe’s banking sector in terms of assets. Of those banks, 66 were deemed viable (of which 52 were restructured) and 33 were orderly liquidated. As of December 2014, nine cases are still pending.

¹⁷⁰ OJ L 83, 30.3.2010, p. 1.

¹⁷¹ See http://ec.europa.eu/competition/consultations/2014_iber_review/index_en.html

¹⁷² Case M.7151 *BNP Paribas/Royal Bank of Scotland*, Commission decision of 10 April 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7151

¹⁷³ Communication from the Commission of 30 July 2013 on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1, available at [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730(01))

¹⁷⁴ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014, p. 190, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0059>

¹⁷⁵ See previous footnote.

Between 1 October 2008 and 1 October 2014 the Commission took more than 470 decisions (i.e. schemes and individual decisions) authorising State aid measures to the financial sector. In the period 2008-2013, the overall volume of aid used for capital support (recapitalisation and asset relief measures) amounted to EUR 636 billion (4.5 % of EU 2013 GDP). The guarantees and other form of liquidity supports reached its peak in 2009 with an outstanding amount of EUR 906 billion (7.6 % of EU 2009 GDP). Since then, the crisis has gradually weakened in many EU countries, and the outstanding amount of liquidity support has dropped to EUR 387 billion (3% of EU 2013 GDP) in 2013.

The bulk of support provided by Member States to their respective banking systems was in the form of guarantee measures. In 2013, EUR 352 billion of State guarantees were still outstanding compared to the peak of EUR 836 billion (7 % of EU 2009 GDP). In addition to guarantees on liabilities, some Member States provided a direct short term liquidity support to banks and other troubled financial institutions. The outstanding liquidity measures reached their peak of EUR 70.1 billion (0.6 % of EU 2009 GDP) in 2009. The EU 28 outstanding amount in 2013 dropped to EUR 34.5 billion (0.3 % of EU 2013 GDP). For the period 2008-2013, Member States recapitalised their respective banks for EUR 448 billion (or 3.4% of EU GDP in 2013) and provided asset relief measures for a total of EUR 188 billion (1.4 % of EU 2013 GDP).

State aid rules ensure that Member States are remunerated appropriately for the support they give. For the massive guarantees provided during the past five years, Member States have received EUR 38 billion in guarantee fees (against EUR 3.2 billion of guarantees invoked).

In 2014, the Commission continued to assess a number of development banks, which in the aftermath of crisis, have gained importance in view of the lending constraints of the commercial banks. State aid rules aim to ensure that development banks will fulfil their role of contributing to the EU growth agenda without unduly distorting competition. For instance, in the case of the *British Business Bank* (BBB)¹⁷⁶, the Commission approved an integrated entity for managing SME access to finance programmes in the United Kingdom. In Portugal, the Commission approved the establishment of the *Instituição Financeira de Desenvolvimento* (IFD)¹⁷⁷, the Development Finance Institution, and the first phase of its operations. The IFD will manage and channel European Structural and Investment Funds (ESIF) allocated to Portugal for the 2014-2020 financing period, as well as reimbursements from ESIF-funded programmes. In practice, the IFD will manage funds, with co-investment from private investors, with the objective to address market failures hampering SMEs' access to debt, equity and quasi-equity funding; activities beyond the management of ESIF programmes will have to be notified.

In 2014, the Commission also adopted a number of decisions on individual banks as well as guarantee and liquidity support schemes. For example, on 29 June, the Commission approved a BGN 3.3 billion liquidity support scheme for Bulgarian banks¹⁷⁸, following a notification by Bulgaria on the same day. That urgent decision served as response to the liquidity crisis that emerged in the Bulgarian banking system in June caused by non-bank related events, i.e.

¹⁷⁶ Case SA.36061 *UK Business Bank*, Commission decision of 15 October 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36061

¹⁷⁷ Case SA.37824 *Portuguese Development Financial Institution*, Commission decision of 28 October 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37824

¹⁷⁸ Case SA.38994 *Liquidity scheme in favour of Bulgarian Banks*, Commission decision of 29 June 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38994

through speculative attacks against the banks in the media. The scheme provided the necessary and proportionate liquidity to the Bulgarian banking system to reassure the markets and to restore the confidence of the depositors. First Investment Bank (FIB), which was subject to a massive deposit run in June, received liquidity support under the Bulgarian liquidity scheme. In line with the terms of the scheme, the Commission approved in November the restructuring plan of FIB, which ensures the viability of the bank and addresses its liquidity problems¹⁷⁹.

The specific situation of Programme Countries

Together with the European Parliament and the Council, the Commission continued in 2014 to collaborate with the IMF and the ECB on the financial sector programs in the Programme Countries. The Commission aims to ensure that the massive public support provided to the banks in the difficult macroeconomic environment does not result in undue distortions of competition.

In Greece, a new stress test exercise was carried out beginning 2014 by the Bank of Greece, which identified additional capital needs for the four pillar banks¹⁸⁰. All of them were able to raise sufficient capital on the markets. Between April and July, the Commission approved the restructuring plans of these banks¹⁸¹ and is now monitoring their implementation. The plans focus on increasing the efficiency and on restoring profitability of the Greek banking operations, notably by achieving the synergies made possible thanks to the recent acquisitions of the medium-sized and small banks. Foreign operations should be restructured and their size reduced over time. Some non-banking subsidiaries should be sold. All these measures should restore the viability of the four banks and allow them to finance on a sustainable basis the Greek economy. Thanks to the new private capital raised in spring 2014, none of the four banks need additional State support in the aftermath of the ECB Comprehensive Assessment, disclosed on 26 October¹⁸².

Ireland exited its EU-IMF programme on 15 December 2013 without the need for a pre-arranged backstop. The Irish Economy is recovering, showing better than expected macroeconomic figures. The Commission adopted a restructuring decision for Allied Irish Bank in May¹⁸³, which confirmed the exit. In October, the Commission approved an Irish

¹⁷⁹ Case SA.39854 *Restructuring plan of First Investment Bank*, Commission decision of 25 November 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39854

¹⁸⁰ Three of them - Piraeus Bank, National Bank of Greece and Alpha Bank raised the capital needed directly on the markets and did not need the support of the Hellenic Financial Stability Fund (HFSF). Eurobank Ergasias benefitted from the backstop of the HFSF, although the full amount of capital was eventually raised from private sources.

¹⁸¹ Cases SA.34825 *Recapitalisation and restructuring of Eurobank Ergasias S.A.*, Commission decision of 29 April 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34825; SA.34823 *Recapitalisation of Alpha Bank by the Hellenic Financial Stability Fund*, Commission decision of 9 July 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34823; SA.34824 *Recapitalisation of National Bank of Greece by the Hellenic Financial Stability Fund*, Commission decision of 23 July 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34824; SA.34826 *Recapitalisation of Piraeus Bank Group by the Hellenic Financial Stability Fund*, Commission decision of 23 July 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34826

¹⁸² European Central Bank, *Aggregate Report On The Comprehensive Assessment*, 26 October 2014, available at <http://www.ecb.europa.eu/pub/pdf/other/aggregatereportonthecomprehensiveassessment201410.en.pdf>

¹⁸³ Case SA.29786 *Restructuring of Allied Irish Banks plc and EBS Building Society*, Commission decision of 7 May 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_29786

scheme for the restructuring and consolidation of the Irish credit union sector¹⁸⁴. The 2013 Banking Communication¹⁸⁵ foresees schemes for smaller financial institutions and the Irish scheme was the first adopted under this framework. The results of the ECB Comprehensive Assessment showed no additional capital needs for Bank of Ireland and Allied Irish Bank. Permanent TSB (PTSB) had a capital shortfall of EUR 0.85 billion in the adverse scenario of the exercise, and plans to cover more than 80% of this amount with a Convertible Contingent instrument and management actions. The remaining amount is expected to be covered with private investors' capital. The assessment of PTSB's restructuring plan is ongoing.

Spain exited the financial assistance programme in January, based on signals of a slow pickup of economic activity and renewed confidence in financial markets and Spanish banks. A post-programme surveillance is in place until 75% of the amounts disbursed under the programme are reimbursed. The effective implementation of the restructuring plans of State-aided banks continued with banks adjusting their balance sheets and credit portfolios in order to reach a balanced and sustainable business structure. Spain also made significant progress in the restructuring of aided banks under its control with the sale of NCG Banco to Banesco Group (revised restructuring plan approved by the Commission in June 2014)¹⁸⁶ and the sale of Catalunya Banc to BBVA (revised restructuring plan approved by the Commission in December)¹⁸⁷. In addition, Spain started the re-privatisation of Bankia in February, with 7.5% of the shares held in Bankia by BFA sold on the market through an accelerated book building exercise.

With regard to Portugal, in August, the Commission adopted a decision regarding Banco Espírito Santo SA (BES)¹⁸⁸, finding the bank's resolution plan in line with EU State aid rules. The measures included the immediate creation and capitalisation of a temporary credit institution taking on all BES's sound business activities. All shareholders and subordinated creditors remained in BES which will be wound-down, ensuring a full contribution of shareholders and subordinated creditors in accordance with the burden-sharing rules set out in the Banking Communication. Furthermore, the Commission continued to monitor the implementation of already adopted restructuring decisions concerning Portuguese banks¹⁸⁹.

As regard Cyprus, in February, the group of Cypriot Cooperative Credit Institutions benefited from a EUR 1.5 billion capital injection, out of the EUR 10 billion assistance programme. The

¹⁸⁴ Case SA.36262 *Restructuring and stabilisation scheme for the Credit Union Sector in Ireland*, Commission decision of 16 October 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36262

¹⁸⁵ Communication from the Commission of 30 July 2013 on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1.

¹⁸⁶ Case SA.38143 *Restructuring of NCG through its acquisition by the Banesco Group*, Commission decision of 20 June 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38143

¹⁸⁷ Case SA.39402 *Restructuring of Catalunya Bank*, Commission decision of 17 December 2014, not yet published.

¹⁸⁸ Case SA.39250 *Resolution of Banco Espírito Santo*, Commission decision of 3 August 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39250

¹⁸⁹ Cases SA.26909 *Restructuring of Banco Português de Negócios (BPN)*, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_26909; SA.34724 *Restructuring of Banco Comercial Português (BCP) Group*, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34724; SA.35062 *Restructuring of Caixa Geral de Depósitos*, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35062; SA.35238 *BPI restructuring*, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35238

Commission approved the measure based on the commitment of thorough restructuring measures to be undertaken by the group for the restoration of its viability¹⁹⁰.

Overview of key challenges on tax avoidance and fiscal aid

In the context of the current economic crisis and the fiscal issues faced by EU Member States, and against the background that around one trillion euros is lost to tax evasion and avoidance every year in the EU¹⁹¹, fighting tax fraud, tax evasion and tax avoidance has been recognized as one of the major priorities of President Juncker for the years to come. The fight against tax evasion has also been established as a priority in the mission letter for Commissioner Vestager.

Tax evasion and tax avoidance can be the result of aggressive tax planning, which is a means of reducing tax liability by shifting profits to a jurisdiction where they are not or only to a limited extent subject to tax. Aggressive tax planning can be pursued *inter alia* by making use of preferential tax schemes, for example coordination centers¹⁹², 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 created but not taxed, and in Europe as a whole because the tax eventually paid is less than it would be at the place where the economic value is created. This presents a social equity issue, as the revenues foregone from untaxed multinationals need to be compensated, which normally increases the burden on less mobile income of SMEs and from labour.

Furthermore, from the perspective of the dislocation of activities, aggressive tax planning can present a threat to the sustainable growth of the internal market if some Member States were to offer exit points for the entirety of European profits of multinationals in exchange for the creation of some jobs on their territory and a limited tax payment.

Both collecting taxes and combating tax evasion are normally competences of EU Member States. However, even in this area of exclusive competence, Member States have to abide by competition rules. On that basis, the Commission has pursued a number of tax schemes in the past¹⁹³.

State aid investigations in the fight against tax avoidance

In 2014, the Commission has increased its activity in the area of fiscal State aid control by using EU competition tools to fight against tax evasion through the State aid instrument. After aggressive tax planning has been brought to the attention of the public by public hearings like the US Senate on Apple and others and the enquiry in the UK House of Commons, DG Competition notably set up in mid-2013 a special Task Force focusing on tax planning practices.

¹⁹⁰ Case SA.35334 *Recapitalisation and Restructuring of Cypriot Cooperative Central Bank Ltd and of the Cooperative Credit Institutions*, Commission decision of 24 February 2014, available at http://ec.europa.eu/competition/ejojade/isef/case_details.cfm?proc_code=3_SA_35334

¹⁹¹ See IP/12/1325 of 6 December 2012 available at http://europa.eu/rapid/press-release_IP-12-1325_en.htm

¹⁹² See for instance Commission Decision 2003/757/EC of 17 February 2003, *Belgian Coordination centres*, (OJ L 282, 30.10.2003). The Commission announced in 2014 its intention to replace the guidelines in the consolidated notion of aid communication.

¹⁹³ See for instance Commission Decision 2003/757/EC of 17 February 2003, *Belgian Coordination centres*, (OJ L 282, 30.10.2003, p. 7) and Commission Decision 2005/261/EC of 30 March 2004 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform (OJ L 85, 2.4.2005, p. 1).

DG Competition started in 2013 and continued in 2014 to gather information from certain Member States where allegations of preferential treatment through tax rulings have been drawn to its attention, concentrating on Luxembourg, Ireland and the Netherlands.

Overall in the context of the rulings enquiry Member States have shown good cooperation, except for Luxembourg, which refused for many months to provide part of the requested information. Therefore, on 24 March, following the failure of Luxembourg to adequately reply to the requests for information, the Commission has adopted two information injunctions ordering Luxembourg to deliver the information the Commission needs in order to assess whether certain tax practices favour certain companies, in breach of EU state aid rules¹⁹⁴. Luxembourg appealed those injunctions but on 22 December Luxembourg provided the information and withdrew its applications to the court.

On 11 June, the Commission opened formal investigations in three cases: Apple in Ireland¹⁹⁵, Starbucks in the Netherlands¹⁹⁶ and Fiat Finance & Trade in Luxembourg¹⁹⁷. Another investigation regarding Amazon in Luxembourg¹⁹⁸ was opened on 7 October. The Commission raised doubts that the tax rulings constitute State aid pursuant to Article 107(1) TFEU. It recalled that in line with the case-law of the Court of Justice of the European Union (Joined Cases C 182/03 and C 217/03 *Forum 187*), tax rulings can provide an advantage to the undertaking to which they are granted if those rulings approve of a transfer pricing arrangement which departs from conditions which would have been set between independent market operators. In parallel to the four formal investigations, the Commission will continue its wider inquiry into tax rulings practices in general, which now covers all Member States.

Still regarding tax schemes, the Commission in case SA.34914, Gibraltar corporate tax regime, extended on 1 October the scope of an ongoing in-depth investigation opened in October 2013 to verify whether the new corporate tax regime selectively favours certain categories of companies, in breach of EU State aid rules¹⁹⁹.

State aid investigation of sector specific tax issues - investigation into corporate taxation of ports

The focus on aggressive tax planning has however not reduced the work done by DG Competition in other areas of fiscal aid. For example, the Commission remained committed to ensuring a level playing field in the ports sector, where it found significant tax exemptions. Already in 2013 the Commission sent a questionnaire to all Member States to obtain a better overview of the corporate tax systems applicable to ports. In its investigation, the Commission has become aware of possible corporate tax advantages for publicly and privately owned ports in several Member States.

¹⁹⁴ See IP/14/304 of 24 March 2014 available at http://europa.eu/rapid/press-release_IP-14-304_en.htm

¹⁹⁵ Case SA.38373 *Alleged aid to Apple*, Commission decision to initiate the formal investigation procedure on 11 June 2014.

¹⁹⁶ Case SA.38374 *Alleged aid to Starbucks*, Commission decision to initiate the formal investigation procedure on 11 June 2014.

¹⁹⁷ Case SA.38375 *Alleged aid to FFT*, Commission decision to initiate the formal investigation procedure on 11 June 2014.

¹⁹⁸ Case SA.38944 *Alleged aid to Amazon – Luxembourg*, Commission decision to initiate formal investigation on 7 October 2014.

¹⁹⁹ Case SA.34914 *Alleged aid granted to offshore companies – Gibraltar Income Tax Act 2010*, Commission decision to extend proceedings on 1 October 2014.

On 9 July, the Commission sent letters to Belgium and France as first steps to ensure that ports in these countries do not benefit from unjustified corporate tax advantages. The letters, sent as part of the cooperation procedure applicable to existing aid, outline the Commission's concerns and give Belgium and France an opportunity to respond. In Germany, ports appear to be subject to corporate tax but the Commission has asked for further information regarding certain ports to ensure they do not receive undue competitive advantages through other State measures. The Commission is also continuing its investigation into the functioning and taxation of ports in other Member States and will take the necessary steps to ensure fair competition between all ports in the EU.

Also on 9 July, the Commission opened a formal investigation to verify whether exemptions from corporate tax granted under Dutch law to public companies, including port operators, are in line with EU State aid rules²⁰⁰. The Commission has concerns that these provisions selectively favour public companies over their private competitors, in breach of EU state aid rules. In May 2013, following complaints, the Commission asked The Netherlands to abolish the tax exemption. Given that the Dutch authorities have not fully accepted the measures proposed by the Commission to end the distortions of competition, the Commission has now opened a formal investigation procedure.

State aid investigation of sector specific tax issues - Spanish Goodwill III decision

On 15 October, the Commission adopted a negative decision with recovery on a new interpretation by Spain of a tax scheme benefitting companies acquiring foreign shareholdings. The Spanish tax administration had adopted a new administrative interpretation concerning the tax measure in question, which allowed the deduction of the financial goodwill deriving from indirect acquisitions of shareholdings through a non-resident holding company. The Commission in its decision took the view that the new administrative interpretation enlarged the scope of application of the measure, which was already declared illegal and incompatible aid in earlier decisions. In addition, the Commission considered that the legitimate expectations recognized in the earlier decisions could not be extended to situations (indirect shareholding acquisitions that result from the acquisition of a holding company) which were not covered by the scope of application of the measure at the time of the adoption of the earlier decisions.

4. BASIC INDUSTRIES AND MANUFACTURING

Overview of key challenges in the sector

Manufacturing industry remains of key importance to European economy, even though statistically it contributes slightly less to it than it did before²⁰¹. The restructuring of past decades that resulted in the downsizing of the traditional manufacturing base has also led to a refocusing on higher value-added activities with a greater accent on innovation and on interrelationships with the service sector²⁰². Manufacturing now accounts for 65% of Europe's

²⁰⁰ Case SA.25338 *Corporate tax exemption of Dutch public undertakings*, Commission decision of 9 July 2014, available at http://ec.europa.eu/competition/ejojade/isef/case_details.cfm?proc_code=3_SA_25338

²⁰¹ André Sapir and Reinhilde Veugelers (2013), *Manufacturing Europe's growth – policies should focus on high-end industries driving productivity growth*, Brussel Opinions, available at <http://www.bruegel.org/nc/blog/detail/article/1185-manufacturing-europes-growth>

²⁰² Stehrer, R., Baker, P., Foster-McGregor, N. et al., *Study on the relation between industry and services in terms of productivity and value creation*, Report to the European Commission, October 2014.

business R&D and 60% of its productivity growth²⁰³ as well as a large percentage of the higher-skilled and better-paid positions that are at the centre of the EU's strategy for growth and jobs. Nearly one in four private sector jobs is in the industry, while each additional job in manufacturing creates up to two jobs in other sectors. Industry accounts for over 80% of Europe's exports and 80% of private research and innovation²⁰⁴.

Contribution of EU competition policy to tackling the challenges

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

Antitrust investigations in basic industries

Basic manufacturing and consumer goods industries continue to represent a significant share of DG Competition's enforcement practice. In 2014, DG Competition further consolidated its lines of action (including individual case work, market surveillance and advocacy) in these sectors, with a particular focus on possible anticompetitive conduct as regards aftermarkets and commodities.

In many mature industries, manufacturers no longer make comfortable margins on their primary markets for the sale of their products, and they therefore seek additional revenues in other parts of the product life cycle, such as in the provision of repair and maintenance services and the supply of spare parts. This is of course not necessarily problematic, but some practices may foreclose competitors or raise their costs, raise barriers to entry into the aftermarkets and ultimately result in consumer harm, in terms of higher prices or reduced choice. In this regard, a key issue is whether enough end users will be able to react to rising aftermarket costs by threatening to switch supplier on the primary market. This in turn depends on factors such as whether consumers can predict overall lifecycle costs at the time of purchase.

In 2014, the Commission rejected a complaint regarding allegations of anti-competitive conduct in relation to the supply of spare parts for luxury/prestige watches –watches which are typically worth repairing and maintaining, in particular those sold above a certain retail price²⁰⁵. The Commission concluded that there was limited likelihood of finding an infringement.

In 2014, DG Competition also actively monitored the car sector, in which aftermarket costs are particularly significant and may not be transparent. It focused notably on the application of warranties, spare parts supply, access to technical information and access to authorised repair networks.

²⁰³ See footnote 201.

²⁰⁴ Communication of 22 January 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *For a European Industrial Renaissance*, COM(2014) 14 final.

²⁰⁵ Case AT.39097 *Watch Repair*, see Commission web statement of 29 July 2014 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39097/39097_3089_3.pdf

As far as commodities are concerned, in 2014, DG Competition continued to monitor the commodities and raw material sectors, including the on-going reform of the London Metal Exchange (LME) rules on warehousing²⁰⁶.

Moreover, in the Refrigerants case, the Commission issued a Statement of Objections to Honeywell International Inc. and E.I. du Pont de Nemours and Company regarding their cooperation on the production of R-1234yf, the new low global warming potential refrigerant used in car air conditioning systems²⁰⁷. These undertakings are the only two suppliers of R-1234yf, which is currently the sole commercially available refrigerant complying with the requirements of Directive 2006/40/EC on harmful emissions from air conditioning systems in motor vehicles²⁰⁸. The Commission has concerns that a series of agreements concluded between Honeywell and DuPont in 2010 may have resulted in restrictive effects on competition on the market for R-1234yf.

Cartel investigations in basic industries

As far as cartel enforcement is concerned, on 29 January the Commission adopted a settlement decision against four major producers of flexible Polyurethane Foam – Vita, Carpenter, Recticel and Eurofoam – and fined them a total of EUR 114 million for their participation in a cartel from October 2005 to July 2010²⁰⁹. Flexible polyurethane foam can be divided into comfort foam, used in household furniture such as mattresses and sofas, and technical foam used in the automotive and other sectors. The four companies colluded in order to coordinate the sales prices of various types of foam in ten Member States – Austria, Belgium, Estonia, France, Germany, Hungary, the Netherlands, Poland, Romania and the UK. Their aim was to pass on raw material price increases to customers and to avoid aggressive price competition with each other. Under the Commission's 2006 Leniency Notice, Vita received full immunity for revealing the existence of the cartel and therefore avoided a fine of EUR 61.7 million. Eurofoam (a joint venture of Recticel and an Austrian packaging company, Greiner AG), Recticel and Greiner AG received reductions of 50% in their fines for their cooperation in the investigation. Since all four companies agreed to settle the case, their fines were further reduced by 10%. This case was one of several involving the automotive sector as flexible foam applications in the automotive sector (including foam for car seats) account for around one quarter of the total flexible polyurethane foam market.

On 2 April, the Commission adopted a decision holding Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth liable for the participation in the EEA-wide cartel on steel abrasives and imposing fines totalling over EUR 30 million²¹⁰. Steel abrasives are loose metal particles that are used in various industries for cleaning or surface preparation of metal (e.g. before painting or coating) or for stone cutting by propelling them at high speed.

The overall aim of the cartel was to coordinate prices of steel abrasives and to restrict price competition. For more than 6 years, with varying durations from autumn 2003 until the

²⁰⁶ For further details about the twelve elements of the LME warehousing reform package, see <http://www.lme.com/trading/warehousing-and-brands/warehousing/warehouse-consultation>

²⁰⁷ Case AT.39822 *Refrigerants*, see IP/14/1186 of 21 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1186_en.htm

²⁰⁸ Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air conditioning systems in motor vehicles, OJ L 161, 14.6.2006, p. 12 available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0040>

²⁰⁹ Case AT.39801 *Polyurethane Foam*, Commission decision of 29 January 2014.

²¹⁰ Case AT.39792 *Steel Abrasives*, Commission decision of 2 April 2014.

Commission carried out unannounced inspections in June 2010, the cartelists had contacts on a bilateral and multilateral basis to discuss key price components (scrap surcharge and energy surcharge) of their sales in the whole EEA. In addition, the cartelists agreed not to compete against each other on price with respect to individual customers. Ervin was not fined as it benefited from immunity under the Commission's Leniency Notice for revealing the existence of the cartel to the Commission. Since all four undertakings agreed to settle the case with the Commission, their fines were reduced by 10%. In the context of the same investigation, the Commission had also opened proceedings against Pometon S.p.A. and the investigation against it continues under the standard (non-settlement) procedure.

On 3 September, the European Commission adopted a decision against Infineon, Philips, Samsung and Renesas for their participation in a cartel in the smart card chips sector²¹¹. Smart card chips are used in mobile telephone SIM cards, bank cards, identity cards and passports, pay TV cards, and various other applications. The companies involved in the cartel colluded through a network of bilateral contacts in the period between September 2003 and September 2005. They discussed and exchanged sensitive commercial information on pricing, customers, contract negotiations, production capacity or capacity utilisation and their future market conduct. Collusion of this type breaches Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the European Economic Area (EEA), which prohibit cartels and restrictive business practices. The Commission imposed fines totalling just over EUR 138 million. Under the Commission's 2006 Leniency Notice, Renesas (and its joint venture parent companies Hitachi and Mitsubishi) received full immunity, as it was the first to reveal the existence of the cartel to the Commission, avoiding a fine of more than EUR 51 million for its participation in the infringement. Samsung received a reduction of 30% of its fine for cooperating with the investigation. The Commission had initially explored the possibility of settling this case with some of the companies involved under the Commission's 2008 Settlement Notice. However, in 2012 the Commission decided to discontinue the settlement discussions and to revert to the normal procedure because of the clear lack of progress of these discussions.

On 10 December, the Commission adopted its 17th settlement decision against five major European envelope manufacturers, imposing a total fine of almost 20 million euro²¹². The cartel concerned a price-fixing and customer allocation scheme between Bong, GPV, Hamelin, Mayer-Kuvert and Tompla for certain types of envelopes and lasted for more than four years (October 2003 to April 2008). The investigation started at the Commission's own initiative, following a tip from a whistle-blower. All companies except Bong cooperated with the Commission under the Leniency Notice and received fine reductions between 10-50%, in addition to the 10% fine reduction granted under the Settlement Notice. No company benefited from immunity since the Commission had sufficient information to carry out inspections on the basis of the information provided by the whistle-blower.

Merger investigations in basic industries

Through the application of the merger regulation, which marked its 10th anniversary in 2014 in its current form, the Commission has continued to safeguard consumers' interests across a number of sectors that are of vital importance to the European economy.

²¹¹ Case AT.39574 *Smart card chips*, Commission decision of 3 September 2014.

²¹² Case AT.39780 *Envelopes*, Commission decision of 10 December 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39780

In the cement sector, for example, where demand in many Member States has yet to regain the levels observed before the economic downturn, the Commission carried out two in-depth investigations into a series of transactions involving Holcim of Switzerland and Cemex of Mexico^{213,214}. Whilst the Commission ultimately cleared each case without conditions, it considered possible coordinated effects at length in each decision. These cases were soon followed, however, by one of the largest transactions reviewed by the Commission in 2014, namely the merger of equals between Holcim and its French rival, Lafarge²¹⁵. The Commission approved the merger subject to substantial divestments including operations of both merging companies in seven Member States.

In other sectors, such as steel, which is important to a range of downstream industries, the Commission made its approval of a number of proposed concentrations subject to commitments. For example, in SSAB/Rautaruukki²¹⁶ which brought together the two leading players in Sweden and Finland respectively, the Commission's clearance decision was conditional upon the divestment of five businesses in Finland, Sweden and Norway. Through these divestments, the Commission ensured that the creation of a European, if not world leader in specialty carbon steel, would not harm consumers in the Nordic region.

In the field of space, the Commission approved the creation of a joint venture between Airbus and Safran²¹⁷ aiming to ensure Europe's long-term presence and competitiveness in launchers. The Commission however ensured competitors in satellites would not be shut out from access to some components.

In 2014, the Commission also reviewed several transactions in the chemical industry. Following an in-depth investigation focusing on the market for polyvinyl chloride (PVC) resins, the Commission conditionally cleared the chlor-alkali joint venture between INEOS and Solvay on 8 May. INEOS and Solvay committed to divest almost the entire commodity Suspension PVC overlap - by capacity - brought about by the transaction²¹⁸. The acquisition of Rockwood's performance additives and pigments business by Huntsman also led to an in-depth investigation into the titanium dioxide, a white pigment used to opacify a large range of consumer products (plastics, coatings, inks, paper, etc.). The case was cleared in September subject to commitments in the area of titanium dioxide for printing ink applications, a high-end application in which the merged entity would have had a dominant position in Europe²¹⁹.

²¹³ Case M.7009 *Holcim / Cemex West*, Commission decision of 5 June 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7009

²¹⁴ Case M.7054 *Cemex / Holcim Assets*, Commission decision of 9 September 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7054

²¹⁵ Case M.7252 *Holcim / Lafarge*, Commission decision of 15 December 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7252

²¹⁶ Case M.7155 *SSAB / Rautaruukki*, Commission decision of 14 July 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7155

²¹⁷ Case M.7353 *Airbus / Safran / JV*, Commission decision of 26 November 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7353

²¹⁸ Case M.6905 *INEOS / Solvay / JV*, Commission decision of 8 May 2014, available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

²¹⁹ Case M.7061 *Huntsman Corporation / Equity interests held by Rockwood Holdings*, Commission decision of 10 September 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7061

State aid investigations in basic industries

In the manufacturing sector, one of the most notable State aid cases in 2014 concerned a Slovak chemical company Novácke chemické závody a.s. (NCHZ)²²⁰. Following an in-depth investigation, the Commission concluded that NCHZ benefitted from incompatible State aid during its bankruptcy procedure and this aid has to be paid back.

In October 2009, NCHZ filed for bankruptcy. In November 2009, Slovakia adopted a law requiring administrators to ensure the continued operation of strategic companies during bankruptcy proceedings. In December 2009, NCHZ was proclaimed to be a strategic company. The law expired in December 2010 and NCHZ is the only company to which it ever applied. Under the special law from December 2009 to December 2010, NCHZ was only required to pay social security and health insurance contributions in part and therefore received an undue advantage over competitors who had to meet their obligations in full. That aid amounts to around EUR 4.8 million.

Following the expiry of the law, from January 2011 to July 2012, the NCHZ continued its operations based on the decision of the creditors. As regards this period the Commission found that the State entities represented in the creditors' bodies behaved as any private creditor would have done in the same circumstances in accordance with the market economy investor principle. For that reason the continued operation of NCHZ during this period did not involve State aid. NCHZ was sold to an investor who took over the large majority of the employees and continued the same business strategy as NCHZ. The buyer, Fortischem, is thus the economic successor of NCHZ and also benefitted from the aid. Therefore, both NCHZ and Fortischem are liable to pay back the aid.

In addition in 2014, the Commission investigated several measures (mostly loans) provided by France as part of an exceptional and temporary support package to help viable intermediate-sized enterprises experiencing economic difficulties and undergoing collective proceedings. The package was based on the Economic and Social Development Fund (FDES), whose financial allocation was increased by EUR 300 million in 2014. The Commission is currently investigating several cases of application of the FDES. Among them, three formal investigation proceedings were opened concerning public support measures in favour Mory-Ducros and FagorBrandt²²¹ as well as Kem One²²².

The Commission is in particular examining the conditions of the remuneration of FDES loans. If the market economy creditor principle is not respected, the loans would involve state aid within the meaning of EU rules. In all cases, the beneficiary firms were undergoing insolvency proceedings and thus qualify as firms in difficulty, to which aid can only be granted under limited and strict conditions pursuant to the EU Guidelines on Rescue and Restructuring of non-financial undertakings²²³. The Commission may thus need also to

²²⁰ Case SA.33797 *Alleged aid to NCHZ*, see IP/14/1155 of 15 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1155_en.htm

²²¹ Cases SA.38545 *Dispositif exceptionnel et temporaire d'accompagnement des restructurations - Mory Ducros*; SA.38644 *Dispositif exceptionnel et temporaire d'accompagnement des restructurations - FagorBrandt*, see IP/14/1008 of 16 September 2014 available at http://europa.eu/rapid/press-release_IP-14-1008_en.htm

²²² Case SA.38544 *Dispositif exceptionnel et temporaire d'accompagnement des restructurations - KEM ONE SAS*, see IP/14/1070 of 1 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1070_en.htm

²²³ OJ C 249, 31.7.2014, p. 1, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0731\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0731(01)&from=EN)

examine whether the public support, if found to amount to State aid, meets the requirements of the rules on State aid to firms in difficulty.

5. THE AGRI-FOOD INDUSTRY

Overview of key challenges in the sector

New landscape for competition policy following 2013 CAP reform

The 2013 Common Agricultural Policy (CAP) reform, effective as of 1 January, has modified the antitrust rules for the agricultural sector. While declaring the general application of Articles 101 to 106 TFEU to agricultural markets the new Regulation establishing a Common Market Organisation for agricultural products (CMO)²²⁴ maintained the general derogations already present in the preceding legislation and introduced individual derogations for specific markets, adopting a market based approach for three sectors: arable crops, olive oil and beef and veal. With respect to those markets, the new rules are aimed at strengthening the competitiveness of producers, including producers' bargaining power towards their buyers while preserving a market-based approach to the sector. To do so, the new regulation allows joint-selling by producers organisations (POs) subject to certain conditions and the integration of other activities such as storage and distribution²²⁵. More particularly, the volume of production covered by such negotiations should not exceed certain thresholds so as to avoid creating excessive market power. Furthermore, benefiting farmers also need to engage in joint activities other than joint-selling within the POs concerned so that activities of the POs overall contribute to the achievement of the CAP objectives. This second condition is designed to encourage farmers to take concrete steps to increase their economies of scale and scope. They can do so by, for instance, pooling together at the appropriate scales their input procurement, investments in storage facilities, transport or distribution systems. This would enable them to improve their bargaining power and at the same time reduce their overall production and supply costs, thus enhancing their competitiveness.

The primary basis for such derogations is Article 42 TFEU which provides that the competition rules apply to the production and trade of agricultural products only to the extent determined by the Council and (with the Lisbon Treaty) the Parliament, "account being taken of the objectives" set out in Article 39 TFEU. Therefore, those derogations are aimed at achieving the CAP objectives laid down in Article 39 TFEU.

Furthermore, as explained below, special importance needs to be attached to the food supply chain that connects three important sectors of the European economy: (1) agricultural production (2) food processing and (3) distribution (wholesale and retail). Unlike the last two levels of the supply chain, the agricultural production level is highly atomised and dispersed: farmers are organised in small structures and do not achieve economies of scale in procurement, storage or selling while they are (often) facing large buyers. The question of the farmer's position in the value chain and particularly their lack of bargaining power vis-à-vis their buyers was at the heart of the 2013 reform of the CAP.

²²⁴ 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, OJ L 347, 20.12.2013, p. 671.

²²⁵ Articles 169, 170 and 171 of the CMO Regulation.

Antitrust guidelines on articles 169, 170 and 171 of the CMO Regulation:

In the legislative process, the Council and the Parliament asked for guidelines on competition rules in the agricultural sector in order to create legal certainty for the undertakings and producers involved and to ensure that the National Competition Authorities and courts apply the new rules of cooperation coherently. Further, Article 206 of the Common Market Organisation (CMO) Regulation sets out that the Commission shall adopt guidelines to assist National Competition Authorities as well as undertakings in order to ensure consistency across the Member States in the application of competition rules.

As a consequence, the Commission has started in 2014 the work on drafting guidelines on the application of the specific rules laid down in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors. In addition to coherent application among the Member States, these guidelines aim to help producers implement the new rules by providing technical and practical details for assessing compliance with the rules.

During 2014, the Commission has consulted the Member States through their National Competition Authorities and Ministries of Agriculture in the process of drafting guidelines. The Commission will hold a public consultation in the beginning of 2015 inviting all stakeholders to give comments on a draft text of the guidelines. The replies to the public consultation will be published by the Commission. The Commission aims to publish the guidelines by the end of 2015.

Contribution of EU competition policy to tackling the challenges

Competition in the food retail sector and the Commission's "modern retail study"

The increased share of modern retail (including supermarkets, hypermarkets and hard discounters; excluding traditional retail shops) for the distribution of food products, together with the increasing success of buying alliances and private labels, has raised concerns about the increasing purchasing power of food retailers in their commercial relationships with their suppliers.

The European Parliament has called on the Commission to investigate the functioning of competition in the food supply chain, in particular at the retail level of the chain²²⁶. This has led the Commission to initiate a review of unfair trading practices and fair trading laws which produced a Communication on Unfair Trading Practices in the food supply chain in July 2014²²⁷. In addition, the Commission has received complaints (from members of the High Level Forum for a Better Functioning Food Supply Chain²²⁸ and some operators in the food chain) that the trading practices of large operators (mainly retailers) in the chain could reduce choice and innovation in food products. National Competition Authorities have investigated such "commercial practices" and in most cases have found that they do not impact negatively on the consumer in the short run. However, in their monitoring reports, some authorities were

²²⁶ European Parliament Resolution of 19 January 2012 on the imbalances in the food supply chain, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0012&language=EN&ring=B7-2012-0013>

²²⁷ COM(2014) 472 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427299859753&uri=CELEX:52014DC0472>. The Communication acknowledges the potential of voluntary frameworks, in particular the Supply Chain Initiative launched in September 2013, and encourages all market operators to join the initiative and its national platforms. The Communication also encourages Member States to examine whether their current national regulatory frameworks are appropriate to address UTPs and to assess the effectiveness and credibility of their available mechanisms for the enforcement of rules against UTPs.

²²⁸ The High Level Forum for a Better Functioning Food Supply Chain was set by the Commission to implement a roadmap of initiatives to improve the competitiveness of the agro-food industry in cooperation with the stakeholders. See: Commission Decision 2010/C 210/03 of 30 July 2010, amended by Commission Decision 2012/C 396/06 of 19 December 2012.

concerned that these practices might have a potential negative impact on choice and innovation in the long run²²⁹.

The Commission did not receive evidence supporting the concerns that choice and innovation in food products decreased and that this was due to the practices of large operators in the chain. In December 2012, the Commission therefore launched a comprehensive study on the modern retail sector to measure how choice and innovation on shop shelves have evolved over the last decade. The study further measures the evolution of a number of factors affecting food and food retail markets and attempts to identify which of these factors may have driven choice and innovation. The study was finalised in 2014 and the report published on 2 October 2014²³⁰. The results were presented in a conference and all stakeholders were invited to provide written comments on the study by the end of January 2015.

The Modern Retail Study, managed by the Food Task Force of DG Competition

The study investigates choice and innovation in product on the shelves of 350 shops in nine Member States over the period 2004-2012. It includes 23 product categories, covering more than 100 000 different products. The results were published on 2 of October and the Commission is inviting stakeholder to give their views in a public consultation which is open until the end of January 2015.

The study found no evidence substantiating the concerns about choice, but found that the rate of innovation is decreasing, particularly since 2008. The econometric analysis showed that this decrease in innovation is largely related to the economic environment, which deteriorated since the crisis of 2008. In fact, an increase in the relative concentration of retailers vis-à-vis their suppliers is associated with *more* innovation according to the econometric analysis. These results are therefore hard to reconcile with the claims that the high concentration of retailers and their stronger bargaining power could lead to less choice and innovation in food products. This result holds for Member States which experience moderately concentrated national retail markets (where the HHI of modern retail is at most 2 000), that is most Member States, including the larger markets. The result does not hold however for the few highly concentrated national retail markets such as the Nordic countries and the Baltics because the study could not cover these States due to a lack of available data.

The study also made some other interesting findings which are relevant for merger and antitrust policy. The econometric analysis showed that private label penetration has a negative and non-linear effect on innovation. In other words, the higher the share of private label products on the shop shelf, the lower the amount of innovation, and moreover the decrease in innovation is larger at higher levels of private label penetration. The relationship between private label penetration and choice was not significant. The negative relationship between private labels and innovation requires further investigation.

Further noteworthy results of the study were that a high level of supplier concentration appears to have a negative impact on innovation, while the opening of new shops in a local area appears to have a positive effect on choice and innovation in products on the shelves of competing stores. Both findings call renewed scrutiny of mergers between brand manufacturers and between retailers in local areas. The finding that the opening of new shops in a local area is the main local market driver of innovation also supports the Commission's action under the European Retail Action Plan²³¹ to facilitate the opening of new shops.

Antitrust and cartel investigation in the sector

On 25 June, the Commission adopted a cartel decision²³², following the settlement procedure, where it found that Lutèce, Prochamp and Bonduelle participated in a cartel to coordinate prices

²²⁹ ECN Activities in the Food Sector, *Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*, May 2012, available at http://ec.europa.eu/competition/ecn/food_report_en.pdf

²³⁰ The study is available at http://ec.europa.eu/competition/sectors/agriculture/retail_study_report_en.pdf

²³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Setting up a European Retail Action Plan*, COM(2013) 36 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0036&from=EN>

²³² Case AT.39965 *Canned Mushrooms*, Commission decision of 25 June 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39965

and allocate customers of canned mushrooms in Europe during more than a year and imposed fines totalling over EUR 32 million.

Canned mushrooms are mushrooms sold in tins and jars, except fresh mushrooms or frozen mushrooms. The cartel covered the sales of private label canned mushrooms via tender procedures to retailers and food wholesalers such as cash and carry companies and professional customers such as catering companies in the European Economic Area (EEA). The overall aim of the cartelists was to stabilise the market shares of the companies involved and stop the decline of prices. To achieve this aim, the cartel members exchanged confidential information on tenders, set minimum prices, agreed on volume targets and allocated customers. The cartel was a non-aggression pact with a compensation scheme in case of customer transfer and application of minimum prices which had been agreed beforehand.

In the context of the same investigation, proceedings were opened against Riberebro and the investigation will continue under the standard (non-settlement) cartel procedure.

Merger investigations in the sector

Merger control in the agri-food business has an important role in protecting the choice and the quality of the food that European consumers enjoy today. In 2014, the Commission examined a number of merger transactions concerning the production of agricultural or fisheries products as well as the trading of such goods.

Whilst the majority of cases did not raise competition concerns, the Commission did intervene in the *Chiquita Brands International / Fyffes* case which, had it been implemented, would have brought together the number 1 and 2 suppliers of bananas in Europe. In that case, the Commission was concerned that the merged entity would be able to shut out its competitors at the shipping level. It therefore made its clearance decision conditional upon Fyffes releasing the shipping company Maersk from an exclusivity clause and upon both Chiquita and Fyffes refraining in the future from agreeing similar exclusivity provisions with shipping companies or incentivising shipping companies to refuse to provide services to other banana companies²³³.

The Commission also intervened in *Crown Holdings/Mivisa* where it made its approval conditional upon the divestment of a number of plants in Spain and the Netherlands used to produce metal food cans destined for the food industry²³⁴.

2014 also saw the notification of a joint venture intending to combine the coffee businesses of Douwe Egberts and Mondelez, two of the world's largest coffee companies, alongside Nestlé. The Commission was concerned that the merger would remove significant competition in a number of EEA countries in traditional roast and ground filter coffee as well as in so-called single serve portion coffee where the parties own Senseo and Tassimo, two of the four most popular single serve machines systems (the other two being Nestlé's Nespresso and Dolce Gusto systems) and compete with each other in the sale of consumables that are compatible with a number of these systems. The companies offered remedies at the end of Phase 1 and the Commission market tested those remedies. However, the Commission considered that the

²³³ Case M.7220 *Chiquita Brands International/Fyffes*, Commission decision of 3 October 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7220

²³⁴ Case M.7104 *Crown Holdings / Mivisa*, Commission decision of 14 March 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7104

remedies offered were ultimately not sufficient to remove all of its concerns and opened an in-depth investigation on 15 December²³⁵.

The Commission has also taken additional enforcement action in a recent merger case where it found that the parties had implemented the transaction without notifying to the Commission and without obtaining the Commission's prior approval. Under the Merger Regulation, concentrations with an EU dimension (in particular because they meet certain turnover thresholds) must be notified to and authorised by the Commission before they are implemented. These so-called "notification" and "standstill" obligations are the cornerstone of the EU merger control system, as they allow the Commission to identify whether the concentration raises competition concerns and, if the companies do not submit commitments that address them, to prohibit the transaction and prevent it from taking place. In its decision, imposing a fine of EUR 20 million on the Norwegian fish farming company Marine Harvest, the Commission concluded that the company should have been aware of its obligations to notify and await clearance from the Commission before proceeding with the acquisition of the salmon producer and processor Morpol in a transaction that was approved by the Commission in 2013 subject to substantial divestments²³⁶.

6. THE PHARMACEUTICAL AND HEALTH SERVICES SECTOR

Overview of key challenges in the sector

The well-functioning of the pharmaceutical and health care sectors is key to inclusive growth in Europe. EU competition policy can contribute to competitive outcomes, cost-containment and innovation in that important area.

The pharmaceutical sector is highly regulated and R&D driven. On the supply side, originator companies aim to bring innovative products to the market. The patent system provides the legislative framework allowing companies to reap the benefits of their successful R&D activities. During patent protection, competition mainly takes place on innovation between originator companies. Upon the expiry of the patent, generic companies typically enter the market with much lower priced bio-equivalent or bio-similar versions of the originator products. Generic entry therefore contributes to cost-containment in view of strained public budgets. Competition by generics is also a dynamic force that incentivises originator companies to continue investing in R&D in order to bring innovative medicines to the market. Thus, it is important that European citizens are not deprived of the benefits of having cheaper generic products and innovation from originator companies by anticompetitive practices of pharmaceutical companies²³⁷.

²³⁵ Case M.7292 *DEMB / MONDELEZ / CHARGER OPCO*, Commission decision of 15 December 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7292

²³⁶ Cases M.6850 *Marine Harvest / Morpol*, Commission decision of 30 September 2013; M.7184 *Marine Harvest / Morpol*, Commission decision of 23 July 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6850 and http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7184

²³⁷ For more information regarding market features of the pharmaceutical sector, see *Executive Summary of the Report on the pharmaceutical sector inquiry* of 8 July 2009 available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf

Contribution of EU competition policy to tackling the challenges

In view of these challenges, and in a follow-up to last year (decisions in *Lundbeck* and *Fentanyl*)²³⁸, the Commission's enforcement focused in 2014 on agreements concluded between originator and generic companies, in particular pay-for-delay deals between competitors, but also on unilateral practices by the originator company aiming at delaying generic entry. On 9 July, the Commission adopted a prohibition decision in the *perindopril (Servier)* case²³⁹.

Antitrust enforcement action in 2014

The *perindopril (Servier)* case concerns unilateral behaviour of the French pharmaceutical company Servier as well as agreements concluded in the period from 2005 to 2007 between Servier and a number of generic companies (Niche/Unichem, Matrix – which is now part of Mylan –, Teva, Krka and Lupin). The settlement agreements were concluded at a time when the compound patent for perindopril, a cardiovascular medicine and Servier's then best-selling medicine, had expired in most EU Member States. Servier held a number of patents relating to processes and forms which provided a more limited protection than a compound patent. In view of this, several producers of generic versions of perindopril were intensively preparing their entry on the market.

In 2004, Servier acquired an advanced source of non-infringing technology for generic companies. Afterwards, settlement agreements were concluded, whereby the generic companies agreed to abstain from competing in exchange for significant inducements by Servier. In fact, Servier transferred more than EUR 100 million to the generic companies, and in one case offered a licence for seven markets to a generic company in exchange for the "sacrifice" by that company of its entry on all other EU markets.

Part of Servier's broader anti-generic strategy, namely the settlement agreements together with the 2004 acquisition of technology, was found to constitute an abuse of a dominant position under Article 102 TFEU. The settlement agreements were also found to constitute infringements of Article 101 TFEU. The Commission imposed a fine of EUR 330.9 million on Servier and fines totalling EUR 96.6 million on the generic companies for the infringement of EU competition rules. The *perindopril (Servier)* decision is currently under appeal before the General Court.

Besides the decision that was issued in the *perindopril (Servier)* case, the Commission continued monitoring patent settlements between originator and generic companies. The fifth report published on 5 December confirmed the continued use of settlement agreements which reached 146 in total in 2013, the year covered by the fifth monitoring exercise. The B.II settlements (i.e. those containing a limitation on generic entry and a value transfer from the originator to the generic company) have stabilised at a low level, constituting 8% of all settlements concluded in 2013²⁴⁰.

Pay-for-delay deals have also been investigated by national competition authorities. The Competition and Markets Authority (CMA) in the United Kingdom issued a Supplementary Statement of Objections in the *Paroxetine* case in October 2014²⁴¹.

²³⁸ In 2013, the Commission had issued Decisions in the *Lundbeck* and *Fentanyl* case (for further information, see Annual Competition Report of 2013).

²³⁹ Case AT.39612 *Perindopril (Servier)*, Commission decision of 9 July 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39612.

²⁴⁰ For further information on the monitoring exercise, please see http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report5_en.pdf

²⁴¹ For more information, see <https://www.gov.uk/government/news/cma-takes-further-procedural-step-in-paroxetine-investigation>. The OFT (now called CMA) had issued a statement of objections on 19 April 2013. See press release available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/news-and-updates/press/2013/36-13>

Merger investigations in the sector

2014 witnessed a surge in pharmaceutical and medical devices merger activity. Already by the end of August, healthcare merger activity topped around EUR 260 billion, more than 60% ahead of the EUR 160 billion figure recorded in the same period in 2013²⁴².

Several trends appeared through these cases, such as portfolio rationalisation in pharmaceuticals (e.g. *GSK/Novartis/Eli Lilly* three way deal) and ambition to provide "one-stop-shop" offering of complementary products in medical devices (e.g. *Medtronic/Covidien*). Most of these transactions have been cross-border in nature while some of them are driven by tax inversion considerations. The size of the deals implies multijurisdictional filings and a close cooperation with the US FTC and other competition agencies worldwide.

While the Commission started looking at several transactions in the industry in 2014, only two were completed in 2014. Specifically, in October the Commission cleared unconditionally *Eli Lilly / Novartis Animal Health Business*²⁴³, while *Medtronic / Covidien*²⁴⁴ was cleared in November subject to conditions and obligations following a phase I investigation. In September, the Commission opened an in-depth review of another medical device merger, *Zimmer/Biomet*²⁴⁵.

State aid actions in the health services sector: investigations and decisions in the areas of hospitals and health insurance

The Commission's State aid actions in the health services sector mainly concern hospitals, related services (such as ambulance transport and medical laboratories) and health insurance. In this context, it must be noted that the Commission decision of 20 December 2011 (based on Article 106(2) TFEU)²⁴⁶ specifies the conditions under which compensation to companies for the provision of public services is compatible with the EU State aid rules and does not have to be notified to the Commission in advance. Compensation granted to hospitals, including emergency services and ancillary services, for services of general economic interest benefits from the decision irrespective of the amounts involved provided that the conditions are met.

During 2014, the Commission continued examining a number of complaints lodged by private health service providers against their allegedly unfair treatment or against potential excessive compensation of publicly-owned hospitals. Those complaints usually came from operators in Member States with health care markets more open to competition (e.g. Belgium, France, and Germany). In response to one of those complaints, the Commission had taken a positive decision in 2009²⁴⁷ finding that the specific deficit financing measures granted by the Brussels public authorities only to the public IRIS hospitals in the Brussels Capital region and not to

²⁴² <http://www.reuters.com/article/2014/08/24/intermune-roche-idUSL5N0QU10720140824>

²⁴³ Case M.7277 *Eli Lilly /Novartis Animal Health*, Commission decision of 3 October 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7277

²⁴⁴ Case M.7326 *Medtronic / Covidien*, Commission decision of 28 November 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7326

²⁴⁵ Case M.7265 *Zimmer / Biomet*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7265

²⁴⁶ Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3.

²⁴⁷ Case SA.19864 *Financing of public hospitals of IRIS network in the region Brussels-Capital*, Commission decision of 28 October 2009.

private hospitals in the region was in line with EU State aid rules. That decision was however annulled in 2012 by the General Court²⁴⁸, ruling that the Commission should have opened an in-depth investigation to gather additional information because the complainants' arguments raised doubts as to the compatibility of the deficit financing. Therefore, on 1 October²⁴⁹, the Commission opened an in-depth investigation to ascertain whether that financing is in line with EU State aid rules and to give all interested parties the opportunity to submit their comments. The opening of that investigation does not prejudice the final outcome of the investigation. In addition, it has to be noted that the compatibility with EU State aid rules of those public financing sources, which are applicable to both public and private hospitals, and which constitute more than 95% of the IRIS hospitals' public financing, is not being put into doubt.

In its decision of 15 October²⁵⁰ following an in-depth investigation, the Commission has concluded that the Slovak system of compulsory health insurance does not contain elements of State aid. In particular, the Commission has found that the State-owned health insurers SZP/VZP are not undertakings because they do not carry out an economic activity within the meaning of EU rules. Their activity is therefore outside the scope of EU State aid control. Following a complaint from a competitor, the Commission opened an in-depth investigation in July 2013²⁵¹ to assess whether a number of State measures in favour of the publicly-owned health insurers SZP/VZP, including capital increases and debt discharges, were in line with EU State aid rules. The Commission conducted a comparative assessment of the presence and relative weightings of different features of the Slovak compulsory health insurance system. On this basis, the Commission's investigation has found that social objectives are predominant in the Slovak health insurance system and that it is centrally based on the solidarity principle. The Commission therefore concluded that the activities concerned are not of an economic nature and that the public funding of health insurers operating in that system therefore does not amount to State aid. This conclusion relates to the specific way in which that activity is organised and carried out in Slovakia and is therefore specific to the system in the Slovak Republic.

7. TRANSPORT AND POSTAL SERVICES

Overview of key challenges in the sector

Industrial consolidation in transport and the competitiveness of European industry

Transport makes an important contribution to the competitiveness of European industry. It is one of the sectors where increased competition would have beneficial spill-over effects on many other downstream sectors. Indeed, transport and storage account for no less than 10-15% of the cost of a finished product. Therefore concentration on such a sector aims at maximising the contribution of competition policy towards the EU's overall objectives. Transport services are very sensitive to overall economic developments. The uncertain economic environment in 2014 has meant continued overcapacity in many areas. In air

²⁴⁸ Case T-137/10 *CBI v Commission*, judgment of the General Court of 7 November 2012.

²⁴⁹ Case SA.19864 *Public financing of Brussels public IRIS hospitals*, Commission decision of 1 October 2014, not yet published.

²⁵⁰ Case SA.23008 *Alleged State aid to SZP and VZP (Slovak health insurance)*, Commission decision of 15 October 2014, not yet published.

²⁵¹ Case SA.23008 *Alleged State aid to SZP and VZP (Slovak health insurance)*, Commission decision of 2 July 2013.

transport, in particular, pressure remained on many airlines to restructure or consolidate, whilst many smaller regional airports remained unprofitable.

Contribution of EU competition policy to tackling the challenges

Antitrust actions in air transport

The Commission continued its work on the assessment of transatlantic alliances between airlines, which already led to the adoption of commitment decisions in the *Oneworld* case²⁵² and in the *Star Alliance* case²⁵³ respectively in July 2010 and May 2013. In October, the Commission published a market test notice, asking any interested parties to comment upon the commitments offered by the relevant Skyteam parties²⁵⁴. With the proposed commitments, the parties claim that they would address the Commission's competition concerns. In its preliminary assessment, the Commission took the view that the Joint Venture Agreement has eliminated the competition which existed between the parties before their cooperation on three routes (from Amsterdam, Paris and Rome, to New York). The Commission preliminarily concluded that this competition was unlikely to be replaced by competition from existing competitors or from likely, timely and sufficient new entry or expansion, because there are significant barriers to entry and expansion in these markets. These barriers include, in particular, slot constraints at the airports concerned, the parties' frequency advantage and hub dominance, as well as network effects resulting from the parties' frequent flyer programmes. On Paris-New York, the Commission's concerns are limited to the premium passenger market, whereas on the other two routes, the competition concerns relate to both the premium and non-premium markets.

The proposed commitments are meant to facilitate entry on the routes in question. They include an obligation to make landing and take-off slots available to competitors on the Rome and Amsterdam to New York routes. These proposed commitments also include for instance the parties entering into agreements allowing competitors to get better access to the parties' connecting traffic, with specific proposals in relation to the Paris/New York route.

Merger review in air transport

Many of the EU's airlines are unprofitable, in particular because they have inherited rigid high cost structures from the past and do not have the scale, a sufficiently large domestic market or the network that would allow them to become profitable in a competitive environment. There is therefore a tendency of these airlines to either merge with a rival or seek investment, to some extent also from outside the EU. Airlines are particularly close when they share the same airport as their home base, as in *Cesky Aeroholding/Travel Services/ Ceske Aerolinie (CSA)*²⁵⁵. This case brought together the Czech national carrier CSA and the low cost carrier Smart Wings which both have their base at Prague airport. The Commission's investigation focused on those routes where both airlines were operating services in competition with each other. However, the Commission concluded that sufficient competition would remain on all

²⁵² Case AT.39596 *BA/AA/IB*, Commission decision of 14 July 2010; see IP/10/936 available at http://europa.eu/rapid/press-release_IP-10-936_en.htm

²⁵³ Case AT.39595 *Continental/United/Lufthansa/Air Canada*, Commission decision of 23 May 2013; see IP/13/456 available at http://europa.eu/rapid/press-release_IP-13-456_en.htm?locale=en

²⁵⁴ OJ C 376, 23.10.2014, p. 10.

²⁵⁵ Case M.7270 *Cesky Aeroholding/Travel Services/ Ceske Aerolinie*, Commission decision of 19 December 2014.

routes on which the two carriers had overlapping services and unconditionally approved the merger on 18 December.

Since a number of European carriers are struggling financially, some non-EU carriers provide investments in those airlines. This was the case in *Alitalia/Etihad*²⁵⁶. Etihad Airways of the United Arab Emirates acquired 49% and joint control over Alitalia in the meaning of the Merger Regulation. In its investigation, the Commission took into account the interests held by Etihad in other European airlines, notably airberlin, Air Serbia, Darwin Airline (of Switzerland), as well as Jet Airways (of India). The Commission's investigation indicated that the transaction would not lead to competition concerns with the exception of the Rome–Belgrade route, where Alitalia and Air Serbia, controlled by Etihad, would have been the only carriers offering direct flights post transaction. Consequently, the transaction was cleared subject to commitments by Alitalia and Etihad, including *inter alia* the commitment to release up to two daily slot pairs at Rome-Fiumicino and Belgrade airports to one or more interested new entrants²⁵⁷.

Rescue and restructuring aid in air transport

Aid measures granted directly to airlines in difficulty and in need of restructuring remained in the focus of the Commission's attention. The Commission approved restructuring aid for LOT Polish Airlines²⁵⁸. It also concluded that the public measures concerning SAS - Scandinavian Airlines did not involve State aid²⁵⁹. Furthermore, the Commission found that a number of measures granted by Latvia in the context of the restructuring of the airline Air Baltic²⁶⁰ and by Slovenia in favour of the national airline Adria Airways²⁶¹ were in line with EU State aid rules. The Commission continued the inquiry opened in 2013 into a number of public support measures in favour of Estonian Air²⁶². Similarly, it continued the in-depth inquiries concerning Cyprus Airways²⁶³.

State aid to airports and airlines

Despite their positive effects on regional development and accessibility, regional airports present a dilemma. First, public funding to airport infrastructure has resulted in duplication of (unprofitable) airports in the same catchment area, creating ghost airports and overcapacity at regional airports, while leaving the congestion problem of main airports unsolved. Second, the vast majority of regional airports do not generate sufficient revenue to even cover their

²⁵⁶ Case M.7333 *Alitalia/Etihad*, Commission decision of 14 November 2014.

²⁵⁷ The merger has been cleared under the Merger Regulation, but the concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation. This can concern for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation.

²⁵⁸ Case SA.36874 *Restructuring aid for LOT Polish Airlines S.A.*, Commission decision of 27 July 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36874

²⁵⁹ Case SA.35668 *SAS new Revolving Credit Facility*, Commission decision of 9 July 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35668

²⁶⁰ Case SA.34191 *Alleged aid to airBaltic*, Commission decision of 9 July 2014, not yet published, see IP/14/789 of 9 July 2014 available at http://europa.eu/rapid/press-release_IP-14-789_en.pdf

²⁶¹ Case SA.32715 *Alleged aid to Adria Airways*, Commission decision of 9 July 2014, not yet published, see IP/14/788 of 9 July 2014, available at http://europa.eu/rapid/press-release_IP-14-788_en.pdf

²⁶² Case SA.36868 *Restructuring aid to Estonian Air*, see IP/14/106 of 4 February 2014 available at http://europa.eu/rapid/press-release_IP-14-106_en.pdf

²⁶³ Case SA.37220 *Restructuring aid for Cyprus Airways (Public) Ltd*, see IP/14/107 of 4 February 2014 available at http://europa.eu/rapid/press-release_IP-14-107_en.pdf

costs. Regional airports sharing the same catchment area may suffer from a cannibalisation effect, i.e. a split of traffic among several underutilised airports, which prevents all of them from growing to become more attractive, and results in higher costs as density/scale economies are not realised. Subsidies are then used to pay for investments, to cover operating losses and to attract price-sensitive airlines. Mainly low-cost carriers receive a mixture of discounts, success fees and marketing payments to stimulate traffic. In certain circumstances, those arrangements may constitute State aid to the airlines concerned. Therefore the Commission adopted new guidelines which entered into force on 4 April²⁶⁴.

The key reforms under the new guidelines for a more competitive airports and airlines

The following reforms in particular are important:

- (1) flexible investment aid to regional airports ensuring accessibility and regional development
- (2) a transition period for operating aid, to allow unprofitable airports to adjust gradually to changing markets whilst preserving services of general economic interest,
- (3) better targeted investment aid, to ensure that public support targets cases where it is truly needed,
- (4) simplified rules for start-up aid, to attract airlines to fly to new destinations and start using new and untested airports, and
- (5) clear rules for the assessment of airport-airline agreements, to ensure that they are aid-free and contribute to the profitability of the airports concerned.

During the year, the Commission also adopted 25 decisions concerning investment and operating aid to airports or airlines (excluding rescue or restructuring aid)²⁶⁵. In particular, the Commission closed all the complex cases opened before 2011 relating to large airports such as Frankfurt-Hahn, Dortmund, Berlin-Schönefeld, Leipzig-Halle and Alghero. The Commission also adopted two negative decisions regarding aid to Gdynia-Kosakowo airport in Poland and Zweibrücken airport in Germany, because in both cases it was not possible to justify major public investments in an airport located only around 30 kilometres from an existing uncongested airport. The Commission also adopted a partially negative decision concerning operating aid received by Charleroi airport, in view of the proximity of an uncongested airport while taking into account at the same time the positive contribution of that aid to the economic development of the Walloon Region. In addition, the Commission adopted six negative decisions regarding aid received by several airlines (Ryanair, Germanwings, Transavia, TuiFly, Meridiana) through their arrangements with three French airports (Pau, Nîmes and Angoulême), two German airports (Zweibrücken and Altenburg) and one Italian airport (Alghero), ordering recovery of EUR 12.3 million in total.

In March the UK notified a project aimed at modernising the infrastructure of St. Mary's airport on the Isles of Scilly. The Commission's investigation showed that the EUR 7.9 million investment project had no effect on competition because St. Mary's was the only airport on the archipelago and no similar transport services were available for reaching the mainland. Moreover, due to the short runways on the island, only very small aircraft with a

²⁶⁴ Communication from the Commission, *Guidelines on State aid to airports and airlines*, OJ C 99, 4.4.2014, p. 3, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.099.01.0003.01.ENG

²⁶⁵ Berlin Schönefeld (IP/14/173), Aarhus (IP/14/174), Marseille (IP/14/175), Ostrava (IP/14/176), Groningen (IP/14/403), Stretto (IP/14/660), Isles of Scilly (IP/14/533), Canary Islands (IP/14/401), Verona (IP/14/402), Gdynia (IP/14/138), Dubrovnik (case SA.38168), Dortmund, Leipzig Halle, Niederrhein-Weeze, Pau, Angoulême, Nîmes (see IP/14/863 and MEMO/14/498), Frankfurt Hahn, Saarbrücken, Zweibrücken, Charleroi, Alghero and an airport in Västerås (see IP/14/1065 and MEMO/14/544), and Altenburg-Nobitz airport (see IP/14/1153).

small operating range are able to land on the airport. The public financing therefore did not involve State aid in the meaning of the EU rules.

Maritime transport

In June, the Commission decided to prolong for five more years the antitrust block exemption regulation on maritime consortia²⁶⁶.

The antitrust block exemption regulation on maritime consortia

Regulation 697/2014 allows shipping lines with a combined market share of below 30% to enter into cooperation agreements to provide joint cargo transport services (so-called "consortia"). Such agreements usually allow liner shipping carriers to rationalise their activities and achieve economies of scale. If consortia face sufficient competition and are not used to fix prices or share the market, users of services provided by consortia are usually able to benefit from improvements in productivity and service quality. The Commission has therefore exempted such agreements from the prohibition of anticompetitive agreements contained in Article 101(1) TFEU. On the basis of its experience in applying the block exemption, the Commission found that the justifications for a block exemption for consortia are still valid and that the conditions on the basis of which the scope and content of Regulation (EC) No 906/2009, the block exemption previously in force, were determined not to have substantially changed. Considering that this previous block exemption already simplified and introduced substantial modifications to the rules applicable to consortia until then, the Commission concluded that no further changes were necessary.

The maritime freight transport sector recorded poor financial results over the year, mostly due to overcapacity, and tried to cooperate and consolidate to improve results. In September the Commission cleared a joint venture between Hapag Lloyd, a German shipping company with worldwide activities, and rival Compañía Sud Americana de Vapores S.A. ("CSAV") of Chile²⁶⁷. The combined Hapag Lloyd and CSAV will be the new number four worldwide in the container shipping sector, after Maersk, MSC and CMA CGM. The clearance was conditional upon the withdrawal of CSAV from two consortia on the trade between Northern Europe and the Caribbean, and between Northern Europe and South America's West Coast, where the merged entity would have otherwise faced insufficient competitive constraint.

State aid enforcement in port infrastructure

Under the current legal framework, where there are no specific instruments regarding State aid to ports, the Commission assesses notifications and complaints in the field of aid for port infrastructure directly under Article 107(3)(c) TFEU. In 2014, the Commission continued its case by case approach and adopted six decisions on State aid for port infrastructure, which have clarified a number of points²⁶⁸. In particular, with the decision in the case SA.38478

²⁶⁶ Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, OJ L 184, 25.6.2014, p. 3.

²⁶⁷ Case M.7268 CSAV / HGV / Kühne Maritime / Hapag-Lloyd AG, Commission decision of 11 September 2014, available at http://ec.europa.eu/competition/mergers/cases/decisions/m7268_20140911_20212_3869708_EN.pdf

²⁶⁸ Cases SA.38478 *Development of the Győr-Gönyű National Public Port*, Commission decision of 1 October 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38478; SA.38771 *Investment aid to the Ventpils Free Port Authority - soil stabilisation*, Commission decision of 7 August 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38771; SA.38048 *Upgrading of the Port of Patras (5th pier)*, Commission decision of 25 June 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38048; SA.38048 *Upgrading of the Port of Patras (5th pier)*, Commission decision of 25 June 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38048; SA.37322 *Alternative power supply for cruise ships in the Hamburg City Port (Altona – HafenCity)*, Commission decision of 9 April 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37322; SA.35720

Development of the Győr-Gönyű National Public Port²⁶⁹, the Commission considered that if future port concessionaires are chosen on the basis of public, open and non-conditional tenders, any economic advantage for them is excluded because they offer a market price and, therefore, they do not benefit from State aid for the construction or modernisation of the infrastructure.

Antitrust enforcement in rail sector

In 2014 the Commission monitored the commitments made binding upon Deutsche Bahn by the Commission decision adopted in December 2013²⁷⁰.

State aid enforcement in rail sector

The EU and many Member States actively promote railway transport because it has a number of advantages over alternative means of transport. In particular, railways are environmentally friendly, safe and contribute to the territorial and social cohesion to ensure safe, efficient and high-quality passenger transport services.

However, investing in infrastructure and compensating the costs of passenger transport will not per se improve Europe's competitiveness. It is necessary to ensure that railway operators are efficient to boost a more dynamic competition in better-functioning, effective and open railway markets.

In March, the Commission clarified in a Communication²⁷¹ the rules on the compensation of public service obligations set out in the Regulation 1370/2007. This will improve the clarity and transparency and limit thereby possible overcompensations paid to the current providers of passenger transport services, which are in most of the Member States mainly the national incumbent companies.

Still in March, the Commission opened an in-depth investigation²⁷² to examine whether certain public service compensations and free transfers of infrastructure asset benefitted companies within the Ferrovie dello Stato group - the Italian railway incumbent – in particular its subsidiaries Trenitalia SpA and FS Logistica SpA. The Commission will examine whether these measures gave an undue advantage to the incumbent transport company to the detriment of its competitors.

During 2014, the Commission approved a number of individual aid as well as aid schemes that favour the multimodal transport by supporting some costs of the rail transport part (e.g. a scheme for the promotion of multimodal transport in Belgium²⁷³ and a similar scheme in

Liverpool City Council Cruise Liner Terminal, Commission decision of 11 March 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35720

²⁶⁹ Case SA.38478 *Development of the Győr-Gönyű National Public Port*, Commission decision of 1 October 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38478

²⁷⁰ Case AT.39678/AT.39731 *Deutsche Bahn III*, Commission decision of 18 December 2013.

²⁷¹ Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, OJ C 92, 29.3.2014, p. 1; see IP/14/290 of 21 March 2014 available at http://europa.eu/rapid/press-release_IP-14-290_en.htm

²⁷² Cases SA.32953 and SA.32179 *State aid measures in favour of Trenitalia SpA and FS Logistica SpA*, Commission decision of 27 March 2014 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32179

²⁷³ Case SA.38611 *Promotion du transport combiné ferroviaire (unités de transport intermodal) et au trafic diffus*, Commission decision of 7 October 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38611

France²⁷⁴) and thereby increasing its competitiveness. This will bring a part of the cargo currently transported by road to the rail and diminish thereby the external costs of transport that are born by the society.

On 15 October the Commission concluded that public financing granted by the Swedish and Danish States to the Øresund fixed rail-road link infrastructure project and hinterland connections on both sides of Øresund was in line with EU State aid rules. The Commission found in particular that the measures for the construction and operation of the Øresund link through premium-free State guarantees as well as through a special carry-forward regime and special rules on depreciation of assets procured a selective advantage to the link, which is operated on a commercial basis. However the Commission's investigation showed that the measures were necessary to realise that project of common European interest and did not unduly distort competition in the Single Market. The Commission also found that the financing of the hinterland road and rail connections in Sweden and Denmark involved no State aid within the meaning of the EU rules²⁷⁵.

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

While the postal sector evolved very substantially in the last decade, postal services have retained a very significant economic and social value. The example of the recent unprecedented growth of e-commerce, which necessitates a well-functioning parcel delivery market, illustrates the key role of efficient postal services in promoting growth and jobs. The postal sector is also an area where the Commission has traditionally been very active through the adoption of numerous, very significant State aid decisions. Through State aid control, the Commission seeks to ensure a level playing field between the postal incumbents – which are often supported by the State but also entrusted with costly public service obligations and burdened by legacy costs inherited from the past – and new entrants, which rarely benefit from State support.

On 26 May, the Commission approved compensation to La Poste to finance the public service of delivering press items to citizens (EUR 597 million for the 2013-2015 period) and the provision of postal services in remote areas (EUR 850 million for the 2013-2017 period)²⁷⁶. The Commission was satisfied that La Poste would not be overcompensated for the two measures in question. The measures were assessed under the 2012 SGEI Framework²⁷⁷; however, since the part concerning the press delivery was granted before the entry into force of the Framework, certain provisions (such as compliance with public procurement rules) did not apply.

²⁷⁴ Case SA.37881 *Aide à l'exploitation de services réguliers de transport combiné de marchandises alternatifs au mode tout routier pour la période 2013-2017*, Commission decision of 19 June 2014 available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

²⁷⁵ Cases SA.38371 *Tax advantages for the construction and operation of the Oresund Fixed Link*; SA.36558 and SA.36662 *State Aid granted to Øresundsbro Konsortiet*, Commission decisions of 15 October 2014; see IP/14/1156 of 15 October 2014 available at http://europa.eu/rapid/press-release_IP-14-1156_en.htm

²⁷⁶ Case SA.36512 *Des dispositifs compensatoires des missions d'aménagement du territoire, de transport et de distribution de la presse dévolues à La Poste*, Commission decision of 26 May 2014, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36512

²⁷⁷ 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, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012XC0111\(03\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012XC0111(03))

On 1 August, the Commission adopted a decision opening the formal investigation procedure regarding a five year compensation fund mechanism to finance the Universal Postal Service provided by ELTA in Greece for the years 2015-2019 or 2016-2020²⁷⁸. Without prejudice to the outcome of the final decision, the opening decision is emblematic of the application of the stricter compatibility conditions introduced by the 2012 SGEI Framework, and in particular of the additional requirements necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union. The Commission expressed its doubts as to whether the compensation fund mechanism envisaged by the Greek authorities, and in particular the level of the financial contributions requested from competitors of the incumbent ELTA, would not be potentially disproportionate and discriminatory, and would not excessively distort competition. Indeed, the Commission considers that, if the contributions requested from postal operators competing with ELTA are too high, it may either draw some competitors out of the market or deter companies from entering the market, leading to a foreclosure of the postal market.

²⁷⁸ Case SA.35608 *Hellenic Post (ELTA) - Compensation fund for the financing of the universal postal service*, Commission decision of 1 August 2014, see [OJ C 348, 3.10.2014](#), p. 48.

Annexes

State aid banking cases: Decisions adopted by the Commission in 2014

| Member State | Case number/Title | Type of Decision | Date of adoption 2014 |
|--------------|---|---|--------------------------|
| Austria | SA.37076 (2013/N) – Short Term export credit insurance scheme | No objection | 20 February |
| Belgium | SA.30962 (2014/N) – Amendment to the restructuring plan Ethias | No objection IP/14/672 | 12 June |
| Belgium | SA.33927 (2012/C) – ARCO | Final IP/14/773 | 3 July |
| Bulgaria | SA.38994 (2014/N) – Liquidity scheme in favour of Bulgarian Banks | No objection IP/14/754 | 29 June |
| Bulgaria | SA. 39358 (2014/N) – First Investment Bank – Restructuring Plan | No objection IP/14/2124 | 25 November |
| Cyprus | SA.35334 (2014/N) – Restructuring of Cypriot Cooperative credit institutions | No objection IP/14/186 | 24 February |
| Cyprus | SA.38867 (2014/N) - Fourth prolongation of Cypriot guarantee scheme for banks H2 2014 | No objection | 25 June |
| Denmark | SA.38216 (2014/N) – Prolongation of winding-up | No objection MEX/14/0130 | 29 January |
| Denmark | SA.34445 (2012/C) – Transfer of property related asset from FIH to the FSC | Final – No objection IP/12/723 | 11 March |
| Germany | SA.28487 (C16/2009) – Bayern LB Rejection of confidentiality | Rejection of confidentiality | 24 July |
| Greece | SA.37958 (2013/N) – | No objection | 14 January |

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| | Prolongation of the Guarantee Scheme and the Bond Loan Scheme | | |
| Greece | <p>SA.34823 (2012/C), SA.34825 (2014/NN), SA.36006 (2013/NN), SA.34488 (2012/C) (ex 2012/NN), SA.31155 (2013/C) (2013/NN) (ex 2010/N)</p> <p>Recapitalisation and Restructuring of Eurobank Ergasias S.A.;</p> <p>Restructuring aid to Proton bank through creation and capitalisation of Nea Proton and additional recapitalisation of New Proton Bank by the Hellenic Financial Stability Fund;</p> <p>Resolution of Hellenic Postbank through the creation of a bridge bank</p> | <p>Final Decision</p> <p>IP/14/495</p> | 29 April |
| Greece | SA.38857 (2014/N) – Prolong of Guarantee scheme & Bond Loan scheme for Credit Institutions | No objection | 26 June |
| Greece | SA.34823 (2012/C) – SA.37965 (2013/N) – SA.37966 (2013/NN) – SA.37967 (2013/N) – Recap of Alpha Bank, Resolution of three cooperative banks | <p>Final and no objection</p> <p>IP/14/790</p> | 9 July |
| Greece | SA.34824 (2012/C) – SA.36007 (2013/NN) – SA.36658 (2014/NN) – SA.37156 (2014/NN) – SA.34534 (2012/NN) – NBG, First Business Bank, Probank + 3 cooperative banks | <p>Final</p> <p>IP/14/869</p> | 23 July |
| Greece | SA.34826 (2012/C) – SA.36005 (2013/NN) – Piraeus Bank Group | <p>Final</p> <p>IP/14/870</p> | 23 July |

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| Ireland | SA.37984 (2013/N) – Prolongation of Credit union Resolution Scheme | No objection MEX/14/0116 | 16 January |
| Ireland | SA.29786 (N633/2009) – Allied Irish Bank | Final decision IP/14/524 | 07 May |
| Ireland | SA.38985 (2014/N) – Fifth prolongation of the Credit Union Resolution Scheme H2 2014 | No objection | 17 July |
| Ireland | SA.38562 (2014/N) – Transfer of the last tranches of assets to NAMA | No objection | 29 July |
| Ireland | SA.36262 (2014/N) – Restructuring and stabilisation scheme for the Credit Union in Ireland | No objection IP/14/1167 | 16 October |
| Latvia | SA.36612 (2014/C) (ex 2013/NN) - Aid granted by Latvia to AS Citadele banka and AS Reverta (formerly known as AS Parex banka) as well as misuse of aid | Opening IP/14/454 | 16 April |
| Latvia | SA.36612 (2014/C) – Parex | Final IP/14/793 | 9 July |
| Lithuania | SA.38664 (2014/N) – Liquidation aid for resolution of AB Ukio Bankas | No objection | 17 July |
| Poland | SA.38023 (2013/N) – Prolongation of Polish Bank Guarantee Scheme | No objection | 03 February |
| Poland | SA.37425 (2013/N) – Resolution scheme for Credit Unions | No objection MEX/14/0218 | 18 February |
| Poland | SA.38747 (2014/N) – Prolongation of the Polish liquidation scheme for Credit Unions | No objection | 1 July |
| Poland | SA.39015 (2014/N) – Tenth prolongation of the Polish | No objection | 29 July |

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| | bank guarantee scheme | | |
| Portugal | SA.39250 (2014/N) – Resolution of Banco Espirito Santo | No objection IP/14/901 | 3 August |
| Portugal | SA.38900 (2014/N) – Tenth prolongation of the Portuguese Guarantee Scheme | No objection | 30 July |
| Portugal | SA.38778 (2014/N) – Second prolongation of the Portuguese Guarantee scheme on EIB lending | No objection | 30 July |
| Portugal | SA.37824 (2014/N) – Portuguese Development Financial Institution | No objection IP/14/1214 | 28 October |
| Romania | SA.38347 (2014/N) – Short term export credit scheme | No objection | 05 August |
| Slovenia | SA.38228 (2014/N) – Restructuring of Abanka Vipa Group | No objection IP/14/926 | 13 August |
| Slovenia | SA. 38522 (2014/N) – Restructuring aid for Banka Celje/Abanka | No objection IP/14/2700 | 16 December |
| Spain | SA.36663 (2014/NN) – Restructuring of SGR | No objection MEX/14/0213 | 13 February |
| Spain | SA.36249 (2014/N-3) – CEISS | No objection IP/14/262 | 12 March |
| Spain | SA.38143 (2014/N) – Restructuring of NCG – acquisition by Banesco Groupe | No objection | 20 June |
| Spain | SA. 39402 (2014/N)- Restructuring of Catalunya Bank | No objection IP/14/2741 | 17 December |
| United Kingdom | SA.38304 (2014/N) RBS amendment to the restructuring plan | No objection IP/14/410 | 09 April |

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| United Kingdom | SA.29834 (2014/N-2) Amendment to the Restructuring plan of Lloyds Banking Group | No objection IP/14/554 | 13 May |
| United Kingdom | SA.37554 (2014/N) – Extension to Green Investment Bank (Amendment) | No objection | 15 May |
| United Kingdom | SA.29731 (2014/N) & SA.30326 (2014/N) – Amendments of commitments Northern Rock & Bradford & Bingley | No Objection | 22 September |
| United Kingdom | SA.36061 (2014/N) – UK (British) Business Bank | No objection IP/14/1160 | 15 October |

Cases currently under formal investigation procedure

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

| Country | Type of measure / Beneficiary | Date of decision regarding the opening of formal investigation | |
|---------|-------------------------------|--|------------------------------|
| Germany | SA.29338 - HSH Nordbank AG | 21 June 2013 IP/13/589 | <i>Case under assessment</i> |