Follow up to the European Parliament non-legislative resolution on the Annual Report on Competition Policy

1. **Rapporteur:** Michel REIMON (Greens/EFA / AT)

2. **EP reference number:** 2018/2102 / A8-0474/2018 / P8_TA-PROV(2019)0062

3. **Date of adoption of the resolution:** 31 January 2019

4. **Competent Parliamentary Committee:** Committee on Economic and Monetary Affairs (ECON)

5. **Brief analysis/ assessment of the resolution and requests made in it:**

The resolution covers the Annual Report on Competition Policy 2017 (COM(2018) 482 final) that the Commission adopted on 18 June 2018 and the accompanying Commission Staff Working Document (SWD(2018) 349 final), generally referred to as the Annual Competition Report (ACR) 2017. The ACR 2017 presents how during 2017, the Commission used competition policy towards a fairer economy and society for the European Union.

The resolution confirms the global support of the Parliament for EU competition policy and enforcement actions of the Commission. It mentions that effective competition above all benefits consumers and particularly recognises the crucial role of competition policy in the further development of the Digital Single Market and of the Energy Union.

The resolution welcomes in particular the Commission's actions on tackling selective tax advantages, and the Commission's on-going reflections on future challenges of digitalisation for competition policy. The resolution encouraged the Commission to analyse carefully the significant potential harmful impact of the proposed merger of Siemens/ Alstom rail businesses on the European rail market and its adverse effects on rail users and engages in broad discussion on how EU policies can work together to make EU industries flourish.

The resolution welcomes the Commission's decision to fine Google for illegal practices on Android mobile devices, while calling for the Commission to conclude the Google Shopping case and to reflect on the duration of digital antitrust investigations. The resolution invites the Commission to reflect in general on the suitability of traditional market models in the fast-developing Digital Single Market. The resolution calls on the Commission to take further steps to remove remaining barriers to e-commerce and telecommunications across the Union. At the same time, it welcomes the adoption of the Directive (EU) 2019/1 empowering the competition authorities of Member States to be more effective enforcers of competition law and to ensure the proper functioning on the internal market, also in the digital space.

The resolution expresses concern for the recently approved merger between Bayer and Monsanto, and calls on the Commission to revise the Merger Regulation to take better account of environmental protection and other principles in the Treaty on the Functioning of the European Union. At the same time, it already recognises the conclusion of the truck cartel investigation where the Commission sanctioned truck-makers not only for working together to increase prices for trucks but also to delay the introduction of cleaner technologies.

Furthermore, the resolution asks the Commission to consider whether any updates to its Banking Communication for State aid to banks are needed.

In terms of general State aid policy, the resolution calls for the launch of a roadmap for

better targeted State aid rules, while welcoming the clarifications brought by the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).

The resolution stresses the utmost importance of the independence of the Commission's Directorate-General for Competition and calls on the Commission to re-allocate sufficient financial and human resources to Directorate-General for Competition, particularly in view of modernising its electronic and informatics tools needed to complete investigations swiftly. The resolution welcomes the establishment of a permanent unit on tax planning practices in the Directorate-General for Competition and the use of an anonymous tool for whistle-blowers to alert enforcement authorities to possible distortion of competition.

The resolution supports the Commission's permanent engagement in multilateral fora, the inclusion of ambitious competition chapters in trade and investment agreements, and calls on the Commission to increase its efforts in opening up international public procurement markets and in combating unfair trading practices. The resolution calls for subsequent negotiations between the European Union and the United Kingdom to include the respect of fair competition.

Finally, the resolution welcomes the consistent dialogue between the Parliament and the Competition Commissioner, and considers that all current forms of dialogue with the competent committees and the Working Group on Competition Policy should be continued as a key exercise of democratic scrutiny. The resolution welcomes the Commission's feedback on all specific requests by the Parliament.

6. Response to requests and overview of actions taken, or intended to be taken, by the Commission:

The Commission welcomes the Parliament's support for a strong and effective competition policy and for the directive aimed at strengthening the capacity of National Competition Authorities to ensure more effective enforcement of EU competition law (**paragraph 59**), the so-called ECN+ Directive[1].

Remarks concerning the Directorate-General for Competition

The Commission welcomes the continuous strong support received from the Parliament to secure sufficient resources and adequate tools to target its investigations and bring them to the end speedily, also in connection to the Single Market Programme within the framework of the upcoming Multiannual Financial Framework (**paragraph 56**).

The Digital Single Market

The Commission shares the Parliament's view that competition policy should play an important role in further developments of the Digital Single Market (**paragraph 11**). The digital era brought entirely new market players to the fore, some of which have grown very rapidly and risen to become major technology providers. To ensure that markets serve people and not the contrary, some regulation already exists or is in the making, including rules[2] that make sure that online platforms operate in a transparent way. Data protection rules, in particular the "General Data Protection Regulation"[3] (GDPR), protect fundamental

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

2 See the Commission proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services

3 See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of

rights and freedoms of individuals, empower them to understand the processing of personal data and ensure the free movement of personal data within the Union (**paragraph 13**). Under EU data protection rules, transfer of data from the EU to third countries are subject to strict conditions. In particular, continuity of protection must be ensured by one of the transfer tools available under the GDPR (adequacy decisions, standard contractual clauses, binding corporate rules etc.).

The aim of competition policy is to ensure, also in the digital sphere, that consumers are treated fairly and that powerful businesses are prevented from conduct that raise prices, suppress innovation or limit consumers' choice. Whilst the principles of competition policy are constant, its tools are flexible and can adapt to analyse the specificities of different markets, including digital ones. Nonetheless, the Commission started a reflection process about how competition policy can best serve European consumers in a fast-changing world. In March 2018, the Commission appointed three Special Advisers to provide input on the future challenges of digital economy[4] affecting markets and consumers and on their implications for competition policy. In 2018, the Commission conducted a public consultation in this context and on 17 January 2019, it hosted a conference on the interaction of competition policy and three digital themes: data, platforms' market power and innovation. The report of the Special Advisors was published[5] on 4 April2019.

The Commission agrees with the Parliament that price is one of a number of parameters of competition (**paragraph 10**). The Commission points to other parameters, which include choice, quality, innovation and data. The Commission stresses that EU competition law is well able to deal with cases where products are or appear to be free.

The Commission agrees that interim measures (**paragraph 18**) could be a key tool for competition authorities to ensure that competition is not harmed while an investigation is ongoing. With a view to enabling national competition authorities to deal more effectively with developments in fast-moving markets, the Commission committed to undertake an analysis of whether there are means to simplify the adoption of interim measures within the European Competition Network within two years from the date of transposition of the new ECN+ Directive. The Commission agreed to present the results to Parliament and Council.

The Commission is closely monitoring Google's compliance with its obligations under the June 2017 Google Shopping Decision[6]. On 18 July 2018, the Commission took a decision in the Android case[7] finding that Google had abused its dominant position and fined the company EUR 4.34 billion for anticompetitive restrictions it had imposed, since 2011, on mobile device manufacturers and network operators to cement its dominant position in general internet search (**paragraphs 24, 25 and 48**). The Commission is closely monitoring compliance with this decision as well. On 20 March 2019, the Commission fined Google EUR 1.49 billion for breaching EU antitrust rules. Google abused its market dominance by imposing a number of restrictive clauses in contracts with third party websites, which prevented Google's rivals from placing their search adverts on these websites (AdSense[8]).

The Commission notes that it can and does incorporate the role of data in its case-by-case competition analysis (**paragraph 14**), including in the role that it can play in terms of market power. While the implication of interoperability for privacy should always be

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such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88

4 The three special advisers are Heike Schweitzer, a German law professor; Jacques Crémer, a French professor of economics; and Yves-Alexandre de Montjoye, a Belgian assistant professor of data science

5 See http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

6 http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

7 Case AT.40099 *Google Android*, Commission decision of 18 July 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099

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

assessed, as far as the competition assessment is concerned, the Commission analysed interoperability aspects in the past and intervened in a number of competition cases. The Digital Transformation of our economy and our society could involve new risks because cartel conduct could be implemented and concealed more effectively using the opportunities provided by new digital tools like algorithms. The Commission's main principle is that conducts that are illegal offline are equally illegal online when carried out through algorithms and companies cannot hide behind them. Companies must ensure that the algorithms are not used to engage in illegal behaviour, configuring them to be compliant by design. Furthermore, as regards algorithms, the GDPR prohibits in principle the use of automated decision-making, including profiling, which produces legal effects concerning the individuals or similarly significantly affects them, except where this is done based on a law, is necessary for entering into or performance of a contract, or with the explicit consent of the individuals concerned. In such cases, the individuals have the right to receive meaningful information about the logic involved in the automated decision-making and about the significance and envisaged consequences of the processing for them.

The Commission takes note of the Parliament's call to reflect on the length of (digital) antitrust investigations (**paragraph 24**). Speed and efficiency, relevance and quality are key values driving the Commission's daily work. Investigations must be quick, but decisions must be based on established facts and solid evidence and respect the rights of defense, good administration and transparency. In line with the Parliament's position, the Commission is making increased use of confidentiality rings and data rooms to speed up its access to file procedures. The Commission also provides the opportunity for settlement and cooperation cases for appropriate cartel and antitrust files, where companies agree to the facts, the legal qualification of their conduct and their liability in return for a reduction of their fine, thus allowing the Commission to shift its focus to more controversial cases. The introduction of mandatory deadlines, however, would likely have a negative impact on the effectiveness of its enforcement of the EU antitrust rules since they could result in the Commission eventually not being able to conclude complex investigations. As the Union Courts recognised[9], undertakings subject to antitrust proceedings enjoy broad procedural rights for the purposes of their defence, and often exploit those rights in a way that leads to considerable delays in the administrative procedure, notably in the field of abuse control where the undertakings subject to an investigation have typically little interest in cooperating with the Commission.

The Commission takes note of the Parliament's opinion that the Commission should incorporate behavioural economics as a supporting discipline (**paragraph 26**). The Commission considers behavioural economics when relevant for the theory of harm.

In several cases, the Commission accepted remedies where behavioural biases were taken into account, such as the 2009 decision involving Microsoft[10]. In a similar vein, in the Google Android antitrust case the Commission devoted particular attention to the effect of various default placement settings on consumer switching behaviour. In its antitrust decision in the Google Shopping case, the Commission assessed in detail how imperfectly informed consumers search for information and may take different decisions depending in how search results are presented to them. In the Vodafone/ Liberty Global[11] and Liberty Global/ BASE

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9 See: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=183148&occ=first&dir=&cid=47429

10 See: http://europa.eu/rapid/press-release_IP-09-1941_en.htm?locale=en and http://europa.eu/rapid/press-release_IP-13-196_en.htm

11 Case M.8864 Vodafone / certain Liberty Global assets, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8864

Belgium[12] merger cases, the Commission addressed insufficient switching by customers by ensuring that customer contracts were transferred to a rival as part of the divestiture remedy.

The Commission takes note of the Parliament's call to reflect on a possible revision of the EU Merger Regulation to ensure that the regulation remains appropriate in the digital economy and in markets driven by innovation, and ready to face challenges of common ownership (**paragraphs 17, 31, and 47**). The Commission regularly assesses the functioning of different aspects of EU merger control and identifies possible areas for refinement, improvement and simplification. The Commission is currently reflecting – also taking into account the replies to the public consultation organised in this context a summary of which is available on the website of the Directorate General for Competition[13] – whether potential improvements merit proposing any legislative changes to the EU Merger Regulation. The evaluation is ongoing.

On the Parliament's calls to take more ambitious steps to boost barrier-free intra-EU online shopping **(paragraph 19),** the Commission launched and completed several antitrust investigations in relation to restrictive practices in cross-border selling, including via internet, of merchandised products[14].

The Commission agrees that the international tax system needs to be adapted to the new realities of the digital economy and that finding international solutions is crucial (**paragraph 20**). It will continue its efforts to support such an agreement. The Commission welcomes the Parliament's support of its proposal on the digital services tax (**paragraph 21**), which has already helped to accelerate discussions at the level of the Organisation for Economic Cooperation and Development (OECD)

Completion of the Single market

The Commission agrees that EU competition policy aimed at ensuring a level playing field in all sectors is a cornerstone of the European project and the European social market economy, and a key factor in guaranteeing the proper functioning of the internal market, including for small and medium-sized enterprises (**recital A and paragraph 1**). The Commission welcomes the Parliament's support that whilst its decisions in the competition field are often the subject of political discussion, it is the Commission's responsibility as guardian of the Treaties to decide when competition law is not being followed (**paragraph 3**).

The Commission assures Parliament that it will continue using all competition policy tools to make the EU internal market work better to the benefit of European households and businesses.

This was the Commission's approach when it assessed the proposed merger of Siemens/ Alstom's rail businesses (**paragraph 4**). The Commission carried out an in-depth investigation into the effects of the transaction to determine whether its competition concerns were confirmed. The Commission considered that the merger would have harmed competition in markets for railway signalling systems and very high-speed trains. The parties did not offer remedies sufficient to address these concerns. On 6 February 2019, the Commission prohibited Siemens' proposed acquisition of Alstom under the EU Merger

[12] Case M.7637 Liberty Global / BASE Belgium, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7637

[13] The summary of the submissions and their non-confidential versions are available at http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

[14] Case AT.40436 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40436; Case AT.40432, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40432; and Case AT.40433, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40433

Regulation[15].

Strategy for European industry

The Commission welcomes Parliament's engagement in a broad discussion on how different EU policies can work together to make European industries flourish. The Commission's Communication on Important Projects of Common European Interest (IPCEI)[16] aims at encouraging the Member States to support projects that make a clear contribution to economic growth, jobs and the competitiveness of Europe. The IPCEI framework complements other State aid rules such as the General Block Exemption Regulation[17] and the Research, Development and Innovation Framework[18], which allows supporting innovative projects whilst ensuring that potential competition distortions are limited. In December 2018, the Commission found that an integrated project jointly notified by France[19], Germany[20], Italy[21] and the United Kingdom[22] for research and innovation in microelectronics is in line with EU State aid rules and contributes to a common European interest. The four Member States will provide up to EUR 1.75 billion in funding for this project.

The Commission welcomes the Parliament's support for the proposed regulation establishing a framework for the screening of Foreign Direct Investments into the European Union[23], which was adopted by the Parliament with a broad majority on 14 February 2019 (**paragraph 64**). The new framework will enhance the ability of the European Union and its Member States to identify and to address those foreign direct investments that threaten security and public order.

The Commission agrees with the Parliament that the EU should help our companies to protect and enforce their rights in the event of unfair commercial practices by non-EU countries, such as dumping and subsidisation (**paragraphs 65 and 69**). It must be ensured that businesses can take advantage of existing commitments at international level (**paragraph 67**). Along with the sharper focus on the implementation of trade agreements, this is why the Commission in its "Trade for All" strategy has made enforcement of trade agreements a top priority. The European Union has the tools and uses them effectively to eliminate trade barriers, bring dispute settlement action, and impose trade defence measures in cases of unfair trade practices by non-EU countries. By working together with EU institutions and stakeholders in the Market Access Partnership, the Commission identifies and brings down barriers to trade, one by one. This work has delivered concrete results for EU exporters as 122 barriers have been removed since the start of the Juncker Commission. Bringing down these barriers creates billions of Euros in additional exports for EU companies every year. This is equivalent to the benefits of many of our free trade agreements. As protectionism rises, so does enforcement by the European Union.

The Commission is taking into account the needs of small and medium-sized enterprises

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15 See http://europa.eu/rapid/press-release_IP-19-881_en.htm

16 Communication from the Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.6.2014, pp. 4–12

17 See http://ec.europa.eu/competition/state_aid/legislation/block.html#gber

18 Communication from the Commission - Framework for State aid for research and development and innovation, OJ C 198, 27.6.2014, pp. 1–29

19 Case SA.46705 *IPCEI on Microelectronics – France*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46705

20 Case SA.46578 *IPCEI on Microelectronics - Germany*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46578

21 Case SA.46595 *IPCEI on Microelectronics - Italy*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46595

22 Case SA.46590 *IPCEI on Microelectronics - UK*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46590

23 COM(2017) 487 of 13 September 2017

(SME) in all new trade negotiations since 2015 (**paragraph 69**). A specific SME chapter has been agreed with Japan, Mexico and Mercosur with the objective that SMEs can benefit fully from all chapters of the trade agreement. SME chapters will be put forward for all future free trade agreements (FTA), if the FTA partner agrees.

The Commission shares the view of the Parliament on the importance of effective implementation of sustainable development provisions in its Trade Agreements with aim to improve living and working conditions for the people in its partner countries, at the same time contributing to a more level playing field for EU companies and workers (**paragraph 70**). To this end, the Commission started to implement the 15 Point Action Plan as a matter of priority following its presentation in February 2018.

The Commission takes note of the Parliament's opinions regarding the external dimensions of public procurement (**paragraph 62**). It is already committed to opening up international public procurement markets and in increasing European companies' access to public-private partnerships in third countries, and can point to considerable achievements in this regard (for example in the Comprehensive Economic and Trade Agreement - CETA and the recently concluded EU/ Japan Economic Partnership Agreement). The Commission considers the Parliament's request to "step up" these efforts to be intended as an encouragement to continue seeking similarly good negotiation outcomes in all bilateral trade negotiations it is currently pursuing. In this context, the Commission agrees that the renewed discussion on the International Procurement Instrument (IPI) is necessary and calls on the co-legislators to adopt swiftly this efficacious tool, which will increase the European Union's bargaining power in this specific domain.

The Commission welcomes the Parliament's support for public country-by-country reporting and the common consolidated corporate tax base and fully agrees with the Parliament that the adoption of those measures would ensure fairer competition within the Single market and solve the issue of transfer pricing (**paragraph 36**).

The Commission welcomes the Parliament's support to evaluate harmful tax measures in the context of the European Semester (**paragraph 37**). In the 2019 cycle of the European Semester, the Commission has been looking at the issue of aggressive tax planning, in line with what was done in the 2018 cycle. The recently published country reports, and the recommendation for the Euro area, assess challenges at national level but also account for the spill over effects and impact on competition of aggressive tax planning practices.

The Commission takes note of the Parliament's call to propose a regulatory framework for initial coin offerings (ICOs) (**paragraph 44**). The Commission has a stated interest in block chain, which is why it has been following the crypto-asset market closely throughout last year and mandated the European Supervisory Authorities with exploring the applicability and suitability of the existing financial services regulatory framework to crypto-assets and ICOs. The European Banking Authority and the European Securities and Markets Authority provided their advice in early 2019, calling on the Commission to undertake a holistic analysis to assess possible EU regulatory action. The Commission is currently determining the best way forward to mitigate the risks stemming from both crypto-assets and ICOs, while reaping the benefits.

Connectivity in the European Union

The Commission agrees that the deployment of very high capacity networks is essential to meet the social and economic connectivity needs of the Digital Single Market (**paragraph 22**). The Commission recalls that it proposed in its Communication "Towards a European Gigabit Society"[24] strategic objectives for broadband connectivity, including 5G, to be met

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Connectivity for a Competitive Digital Single

by 2025. To achieve these goals, it is essential to encourage both efficient investment and competition. Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services. The new European Electronic Communications Code[25] seeks to provide a right balance through appropriate incentives for investment in new very high capacity networks, while safeguarding competition to eliminate bottlenecks and barriers to entry that remain at the infrastructure level.

Although we expect the market to provide the majority of the investment for the very high capacity networks, which are essential for the delivery of new digital services, in areas where the market would not deliver, the use of a number of public policy tools is foreseen to support their roll out. These measures range from the possibility to attach coverage obligations to rights of use for radio spectrum to the use of public funding, especially in less densely populated or remote areas. The European Union is already providing financial support to broadband projects and schemes using different instruments ranging from grants (almost EUR 6 billion under the European Structural and Investment Funds) to the Connecting Europe Broadband Fund and the European Fund for Strategic Investment (EFSI). In the next programming period, the Commission has proposed to support connectivity with a new Connecting Europe Facility Digital Programme, centrally managed by the Commission that will create synergies with other programmes such as InvestEU and will be complemented by the European Structural and Investment Funds.

A substantial number of decisions have been adopted in notified cases including a State aid component. The Commission has also approved a decision[26] declaring compatible with the TFEU for the first time public investment supporting the roll out of a very high capacity network bringing a significant improvement towards very high capacity infrastructure. In addition, granting State aid to broadband projects has been greatly simplified thanks to the "General Block Exemption Regulation" (GBER). A growing number of projects meeting the conditions predefined in GBER are eligible to and receive State aid without being notified but simply reported to the Commission.

EU funds managed centrally by the Commission that are not subject to any discretion by the Member States do not constitute State aid. The Commission has also requested the empowerment to modify the GBER[27]. This would enable the Commission to make targeted modifications of current State aid rules so that national money – including from the European Structural and Investment Fund under shared management – and EU funds managed centrally by the Commission can be combined as seamlessly as possible, without distorting competition in the Single market under the InvestEU fund.

Regarding intra-EU calls, the Commission recalls that following the adoption of Regulation (EU) 2018/1971[28], from 15 May 2019 on, EU consumers will be able to make calls from their domestic EU country to another EU country for a maximum of 19 cents per minute plus VAT, and send an SMS for a maximum 6 cents plus VAT.

Market - Towards a European Gigabit Society - COM(2016)587 and Staff Working Document - SWD(2016)300

[25] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018

[26] Decision in case SA.48418 Bayerisches Gigabit Pilot project

[27] Council Regulation amending Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid, OJ L 311, 7.12.2018

[28] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, Text with EEA relevance

General State aid policy

The Commission takes note of Parliament's call to launch a roadmap for better targeted State aid, including concerning the delivery of services of general economic interest. (**paragraph 39**). The Commission shares the Parliament's view that, after having given further concrete guidance on its own interpretation of the concept of economic activity and other elements of the notion of State aid, it is ultimately for the European Court of Justice to interpret this objective notion. The Commission considers that the notion of economic activity in State aid is consistent with the application of this notion in other parts of EU law. The 2016 Notice on the notion of State aid gives the Member States and other stakeholders clear and concrete guidance on how the Commission interprets this concept. The Commission continuously ensures, through the application of its State aid rules, that the risk of market distortions is limited to the minimum. This applies as well to services of general economic interest, which are of particular importance to citizens and which, the Commission believes, constitute a key pillar for the promotion of social and territorial cohesion.

The fight against tax avoidance

The Commission welcomes Parliament's support and engagement on tax rulings and fair taxation (**paragraph 40**). Since 2013, the Commission has been investigating individual tax rulings of the Member States under EU State aid rules. Recent decisions in 2018 include Luxembourg's tax ruling on Engie[29] and Gibraltar's[30] tax advantages to multinational companies. The Member States have achieved significant progress in implementing the Commission decisions to recover unpaid taxes, which *de facto* prevents companies from continuing to benefit from illegal advantages. Moreover, Gibraltar, Luxembourg and Cyprus amended their tax rules following exchanges with the Commission in order to avoid undue advantages to financing companies. In April 2019, the Commission found that a United Kingdom tax scheme[31] is partly justified and does not constitute State aid, insofar as it ensures the proper functioning and effectiveness of the relevant tax rules. The Commission equally found that the scheme unduly exempted certain multinational groups from the United Kingdom rules targeting tax avoidance, which is illegal under EU State aid rules, and the United Kingdom must now recover the illegal State aid from the multinational companies that benefitted from it.

The Commission continues formal investigations in other alleged cases of selective aid, such as the Netherlands' tax treatment of Inter IKEA[32]. In January 2019, the Commission opened a formal investigation on tax rulings granted by the Netherlands to Nike[33]. In its recent ruling on Belgian tax exemptions for excess profits of multinationals, the EU General Court confirmed that the Commission enjoys the competence to examine whether tax measures adopted by the Member States comply with the EU State aid rules. According to the Court, the fiscal autonomy of the Member States in direct taxation does not prevent the Commission from examining whether their tax measures comply with the State aid rules. However, the General Court annulled the Commission's decision on the Belgian tax exemptions, since it did not share the Commission's assessment that they were granted under a scheme. According to the General Court the Belgium tax authorities enjoyed

[29] Case SA.44888 Aid to Engie, Commission decision of 20 June 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44888

[30] Case SA.34914 UK - Gibraltar Corporate Tax regime (ITA 2010), Commission decision of 19 December 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34914

[31] Case SA.44896 Potential State aid scheme regarding United Kingdom CFC group financing exemption, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44896

[32] Case SA.46470 Potential aid to IKEA – NL, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46470

[33] Case SA.51284 Alleged aid to Nike, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51284

discretion when deciding whether to grant the exemption and under which conditions. The Commission is considering the next steps after this judgment. In the other State aid decision regarding tax rulings, the Commission assessed each ruling individually.

Pharmaceutical sector

The Commission welcomes the Parliament's recognition of the importance of on-going investigations in the pharmaceutical sector, notably the Aspen case (**paragraph 52**). The Commission wants to ensure that anticompetitive practices do not render medicines inaccessible or unaffordable to patients or unreasonably burdensome for the health systems. At the same time, competition policy is mindful to preserve incentives for pharmaceutical companies to innovate and bring new products to the market. The Commission's ongoing investigation in the Cephalon case builds on earlier Commission decisions on Lundbeck (2013), Johnson & Johnson/ Novartis (2013), and Servier (2014). These investigations tackled patent settlements between originator and generic companies aimed at delaying the arrival into the market of cheaper generic medicines (sometimes also referred to as "pay-for-delay" settlements). The Commission actively monitors the market to detect possible new infringements.

Collective redress

The Commission welcomes Parliament's call to ensure the proper functioning of collective redress mechanisms (**paragraph 15**). With the 2014 Damages Directive[34], a specific private enforcement system is already in place to ensure that consumers across the EU can effectively enforce their rights in mass harm situations and the rules of the Damages Directive apply to collective damage actions as well. However, neither the Damages Directive nor the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law require the Member States to introduce a collective redress mechanism for antitrust damages actions. Therefore, the Damages Directive renders collective redress more effective in those countries where collective redress exists. For example, through its disclosure rules, it ensures that a consumer representative gets access to the necessary data to make its case before the national judge. In June 2018, all the Member States completed the transposition process of the Damages Directive. Once sufficient experience of the implementation of the directive has been gained, the Commission may take stock of the existence and effectiveness of collective redress mechanisms for competition law infringements in the various Member States to assess the need to take further action in this specific field.

Energy sector

The Commission promotes the development of an open and competitive energy market to the benefit of consumers, in line with the Energy Union objectives. The Commission agrees with the Parliament that competition policy should act as a catalyst to help promote energy transition across the EU (**paragraph 9**). In May 2018, the Commission adopted a decision imposing on Gazprom[35] a set of comprehensive and forward-looking commitments aimed at addressing the Commission competition concerns. The Commission's overarching objective with the commitment decision is to ensure the free flow of gas at competitive prices across Central and Eastern European countries. The decision obliges Gazprom to take positive steps to further integrate gas markets in the region and to help realise a true internal market for energy in Europe. In particular, under the commitments Gazprom will take positive steps to make these gas markets function better which will directly benefit consumers and businesses across the region. The Commission is closely monitoring the implementation of

[34] Directive 2014/104/EU on Antitrust Damages Actions

[35] Case AT.39816 Upstream gas supplies in Central and Eastern Europe, Commission decision of 24 May 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39816

the commitments with the assistance of a trustee.

The free flow of gas across Europe is also the key factor that the Commission is pursuing in cases like the Germany-Denmark Interconnector case[36] and antitrust cases concerning Bulgargaz[37] and Transgaz. [38]

The Commission notes the Parliament's emphasis that any State aid approval for capacity mechanisms must be subject to a strict necessity test including an examination of alternative measures, notably more efficient use of existing interconnectors (**paragraph 50**). In its case-practice on capacity mechanisms, the Commission has carried out a thorough analysis of the necessity of the measures. In this context, the Commission has ensured that the introduction of capacity mechanisms went hand in hand with the implementation of the market reforms, including interconnection capacity, needed to alleviate the identified security of supply concern. Furthermore, where technically feasible, interconnectors either participate directly in capacity mechanisms or receive a share of the capacity remuneration. In any case, the design of all capacity mechanisms must ensure that they neither interfere with cross-border electricity trade nor provide incentives to invest in domestic capacity rather than in foreign capacity and/ or interconnectors.

State aid control equally plays a crucial role in promoting energy transition across the Union. It guarantees that the Member States can reach their renewables targets at the lowest cost for consumers and the electricity system as a whole. This, in turn, ensures the financial sustainability and publicly acceptance of decarbonisation policies.

Banking sector

The Commission takes note of Parliament's call to examine potential discrepancies (e.g. the notion of public interest) between the rules on State aid in the area of liquidation aid and the resolution regime under the Bank Recovery and Resolution Directive (BRRD), as well as to revise its 2013 Banking Communication (**paragraph 30**). The EU State aid rules on banks, in particular the 2013 Banking Communication, are temporary crisis rules under an exceptional legal basis of the Treaty, Article 107(3)(b).

The Commission maintains the view that in certain circumstances State aid may be needed as a last resort to preserve financial stability, also bearing in mind the key role of banks for a functioning financial sector and sustainable lending to the real economy. The State aid rules are needed to minimise distortions of competition and the cost to taxpayers, also in view of the residual legacy issues and pockets of vulnerability in the financial sector and the still on-going phase-in of Banking Union requirements, for example in relation to loss absorption buffers. The Commission agrees that it is essential to ensure coordination and consistency between the state aid rules and the provisions in the BRRD and the Single Resolution Mechanism Regulation (SRMR).

The Commission takes note of the Parliament's call to examine whether banking institutions have, since the onset of the crisis, benefited from implicit subsidies and State aid through the provision of liquidity support from central banks **(paragraph 32**). With respect to the European Central Bank's Corporate Sector Purchase Programme, the monetary policy of the European Central Bank as a rule does not fall within the scope of State aid rules. The ECB and the Commissioners with responsibility for monetary policy engage in regular discussions with Parliament on the implementation of that policy.

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[36] Case AT.40461 *DK/DE Interconnector*, Commission Decision of 7 December 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40461

[37] Case AT.39849 *BEH gas*, Commission decision of 17 December 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39849

[38] Case AT.40335 *Romanian gas interconnectors*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40335

The Commission agrees with the Parliament that strict and impartial adherence to State aid rules is important to protect taxpayers against the burden of bank rescues (**paragraph 33**).

The Commission assures Parliament that it continuously monitors market trends and the state of integration in the banking sector, including possible risks to financial stability. It analyses consolidation in banking markets at the level of Europe and the Eurozone, as well as at the level of the Member States (**paragraph 35).** In the specific field of competition, the Commission verifies that mergers that increase market concentration do not distort competition, and is ready to intervene and require remedial action if mergers threaten to harm consumers through price increases, reduced choice or lesser innovation.

Agriculture and food-supply chain

The Commission welcomes the political agreement reached on the Directive on unfair trading practices in the food supply chain. The directive protects EU farmers and a majority of EU agri-food companies against practices contrary to good faith and fair dealing. The Commission has been called upon by the European Parliament to conduct a study on retail alliances (**paragraph 74**).

The Commission agrees with the Parliament on the importance of taking action against companies in the agricultural production chain that distort agricultural markets to the detriment of farm incomes and consumer prices (**paragraph 46 and 71**). The report of the Commission on the application of competition rules to the agricultural sector[39] of October 2018 showed that competition law enforcement is safeguarding the internal market to the benefit of farmers. The report also showed that competition law enforcement could help farmers obtaining better conditions when selling their products to large buyers or cooperatives. As regards the marketing and distributions levels of the agricultural chain that the Parliament is concerned about, the report found that the level of the chain most frequently investigated and fined by European competition authorities from 2012 to 2017 was the level of processors and retailers. The Commission supports cooperation among farmers in producer organisations, which can help them to become more efficient, competitive and innovative in a globalised world and to capture more value in the food chain (**paragraph 72**). The activities of producer organisations, such as joint sales, contribute to strengthening the position of farmers in the food supply chain and the achievement of the objectives of the Common Agricultural Policy (CAP). In 2018, the Commission published the Study on Producer Organisations and their activities in the olive oil, beef and veal and arable crops sectors[40]. According to the study more than 90 % of the producer organisations that carry out joint sales and other commercialisation-related activities also carry out common efficiency-enhancing activities, such as quality control, distribution/transport, and procurement of inputs. The producers consider that these activities improve their position in negotiations with buyers and reduce their costs.

Article 152 of the Common Market Organisation (CMO) Regulation[41], as amended by the co-legislators as of 1 January 2018 with the Omnibus Regulation[42] provides for an explicit

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39 Report from the Commission to the European Parliament and the Council on the application of the Union competition rules to the agricultural sector, available at http://ec.europa.eu/competition/sectors/agriculture/report_on_competition_rules_application.pdf

40 See http://ec.europa.eu/competition/publications/reports/kd0218732enn.pdf

41 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347, 20.12.2013, p. 671–854

42 Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No

derogation from the competition rules for certain activities of recognised producer organisations and associations of such producer organisations (e.g. joint sales) in all agricultural sectors, as long as the producer organisation carry out an activity aimed at economic integration, concentrate supply and place products of their members on the market.

The Commission notes the Parliament's recommendation that the Commission should create legal certainty on the conditions under which vertical and horizontal cooperation in the food supply chain, made for the purpose of sustainability and fair labour standards, would be assessed under competition law (**paragraphs 49 and 78**). The Parliament likewise recommends that the Commission clarify the application of Articles 219 and 222 of the CMO Regulation (**paragraph 82**). The Commission report on the application of competition rules to the agricultural sector[43] showed that European competition authorities from 2012 to 2017 had provided about 100 instances of formal guidance, advice and other monitoring activities to farmers, other operators and governments on how to interpret and apply competition rules in the sector. The Commission stands ready to help interpreting Articles 219 and 222 CMO. As regards Article 220 of the CMO regulation, the Commission underlines that currently it already provides for market withdrawal measures in crisis situations **(paragraph 75**), The Commission is also ready to provide its opinion, when requested, in the context of Article 209 of the CMO regulation to clarify whether a certain collective action is compatible with the objectives set out in Article 39 TFEU (**paragraph 80**). Interbranch organisations can use the possibility under Article 210 CMO Regulation to notify their agreements to the Commission for clearance under the Union rules, including the competition rules **(paragraph 74).**

On the concept of 'fair price' in the agricultural sector (**paragraph 79**), the Commission stresses the importance of a proper balance between the five objectives of the CAP in Article 39 of the TFEU - particularly ensuring a fair standard of living for the agricultural community and ensuring that supplies reach consumers at reasonable prices.

The Commission notes the Parliament's concerns on the mergers between some of the world's biggest agro-chemical and seeds companies (**paragraphs 45 and 83**), and it recognised the importance that the Parliament attaches to effective competition throughout the food chain. The Commission cleared the Bayer/ Monsanto[44] merger in the agro-chemical sector only on strict conditions that important parts of the relevant businesses were sold to a new buyer to ensure that farmers and consumers could continue to benefit from competition. The Commission took full account of the need to make markets deliver on innovative seeds, fertilisers and crop protection products that protect farmers and the environment. The sale commitments that the companies gave to preserve competition allow a strong competitor to deliver on these benefits for markets, the environment and public health. The Commission applied the same approach in 2017 to the merger between US-based chemical companies Dow and DuPont[45] and to ChemChina's acquisition of Syngenta[46], requiring substancial

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1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material, OJ L 350, 29.12.2017, p. 15–49

43 Report from the Commission to the European Parliament and the Council on the application of the Union competition rules to the agricultural sector, available at http://ec.europa.eu/competition/sectors/agriculture/report_on_competition_rules_application.pdf

44 Case M.8084 *Bayer / Monsanto*, Commission decision of 21 March 2018, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084

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

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

divestments of assets as a condition for clearing the transactions.

Similarly, the Commission took action against European truck-makers for working together not only to increase prices for trucks but also to delay the introduction of cleaner technologies. Within the boundaries of the Treaty, the Commission ensures that markets deliver, also for innovation and the environment.

The Commission shares the Parliament's view that, when it comes to seeds and pesticides, there are additional vital concerns that go beyond competition policy, including consumer protection, food safety and ensuring the highest standards for the environment and the climate. The existing national and European regulatory standards on these matters remain just as strict after these mergers as before it and continue to apply.

Regarding the imports from third countries, the Commission would like to point out that all imported products have to meet the applicable marketing and phytosanitary standards applicable in the EU (**paragraph 76**).

The Commission also shares the view of the Parliament that Smart Village initiatives can strengthen the capability of rural areas dwellers to participate actively in the single market, in particular through their integrated approach to improving the resilience of the rural economy and quality of life in those areas (**paragraph 43**).

As regards Brexit, upon a mandate from the European Council, the Commission has negotiated a Withdrawal Agreement and a Political Declaration setting out the framework for the future relationship between the EU and the UK. As set out in paragraph 22 of the political declaration, the Parties envisage a future trade relationship including comprehensive arrangements that will combine deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field and fair competition. As set out in paragraph 79 of the same declaration, provisions to ensure open and fair competition should build on the level playing field arrangements provided for in the withdrawal agreement and be commensurate with the overall economic relationship (**paragraph 76**).

Sanitary and phytosanitary matters and food safety standards

The Commission wishes to underline that the essential principle of the EU food legislation is that food has to be safe whatever its origin, domestic or imported (**paragraph 77**). This necessitates applying the same food safety rules, both for products originated in the EU and for imported products. As regards food safety standards, the EU is a member of the Codex Alimentarius Commission since 2003 and actively promotes EU standards. On animal health, the EU is also very proactive in the World Organisation for Animal Health (OIE). The standards produced by these two international organisations are essential as they are recognised as references for the World Trade Organisation (WTO) in the category of sanitary measures. The first OIE international standards on animal welfare were published in 2005 and new standards continue to be added. The OIE animal welfare standards have an important role in international trade because they are the only global, science-based standards on animal welfare agreed by the trading nations of the world.

The Commission uses all available instruments to prevent non-compliant imports into the EU in the context of WTO rules. Harmonisation of measures with international standards is a WTO principle to facilitate safe trade and avoid unnecessary trade barriers.

Transport sector

The Commission agrees that well-functioning transport services and infrastructure are important for territorial and social cohesion in Europe and for economic growth. The EU competition rules apply to all companies doing business in Europe to ensure high quality services at competitive prices to the benefit of consumers, and taking due account of the public interest and other EU objectives (**paragraph 55**).

The Commission agrees that there is a need to ensure a level playing field on a global level, in particular in aviation. The Commission is reviewing bilateral air service agreements between Member States and third countries to ensure compliance with EU law (**paragraph 53**).

While the Commission acknowledges the persistent fragmentation of the rail sector, it considers that the full and timely implementation of the fourth railway package will contribute to the achievement of an efficient and competitive rail market in the EU (**paragraph 54**).

International cooperation on competition policy

The Commission will continue reinforcing the role of competition policy in international cooperation, as well as spreading a global competition culture to ensure a level playing field for European companies on global markets (**paragraphs 58 and 60**). Multilaterally, the Commission will continue its active engagement in competition-related international fora such as the OECD, the International Competition Network (ICN), the World Bank and the United Nations Conference on Trade and Development (UNCTAD).

The Commission welcomes the Parliament's support for including strong competition and State aid provisions in Free Trade Agreements (**paragraphs 60, 61 and 63**). In 2018, the EU continued negotiations with Chile, Mexico, Mercosur, Azerbaijan, Tunisia and Indonesia, and opened negotiations with Australia, New Zealand, Kyrgyzstan and Uzbekistan. Moreover, the Commission engages in a wide range of cooperation activities with competition authorities in a number of third countries, on the basis of agreements or memoranda of understanding. In June 2018, the Commission signed an Administrative Arrangement with Mexico. At the end of 2018, the European Union and Switzerland negotiators agreed on the text of an Institutional Framework Agreement, which also includes State aid rules.

The Commission agrees with Parliament that the best way to improve competition rules worldwide is to engage in fair and transparent discussions with trade partners (**paragraph 58**). The Commission concurs with the Parliament that trade agreements should systematically address the challenge of unfair trade practices by third countries (**paragraph 63**). In 2017, for example, the Commission signed the Memorandum of Understanding on a dialogue about subsidies and fair competition with China (**paragraph 65)**. The Commission also continued negotiations with China regarding an Investment Agreement. The aim is to establish a level playing field between EU and Chinese investors, including State owned enterprises, for instance through enhanced transparency on subsidies[47].

Regarding subsidies (**paragraph 67**) in 2018 the Commission continued its endeavours to improve multilateral rules regarding subsidies, as part of the EU concept for WTO modernisation. The trilateral talks between the EU, the United States and Japan on subsidy rules aim at preparing the ground for a modernisation. Moreover, the Commission continued to engage in sectoral initiatives to address subsidies in the international context, such as for steel (G20 Global Forum on steel excess capacity), for semiconductors (Regional support guidelines for the semiconductor industry), and for shipbuilding (OECD). Finally, the Commission continues to work with the EU Member States in the International subsidy policy group to exchange views and coordinate initiatives on international policy subsidies at multilateral and bilateral level.

As stated in its concept paper of September 2018[48], the Commission shares the Parliament's concerns about the effectiveness of the current WTO rules to ensure a level playing field and address market-distorting subsidies (**paragraph 68**). The Commission is working

[47] http://ec.europa.eu/competition/international/bilateral/mou_china_2017.pdf
[48] http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

towards developing stronger rules to discipline such practices, with the EU-US-Japan trilateral cooperation process providing the framework for this work.

Dialogue with Parliament

The Commission is fully committed to a fruitful and constructive dialogue and information exchange with the Parliament on competition policy, legislation, and international agreements (**paragraph 2**). Commissioner Vestager and the Directorate-General for Competition regularly follow up on exchanges, in particular with the Committee on Economic and Monetary Affairs and its Competition Working Group. In April 2018, Commissioner Vestager exchanged views with Parliament's plenary session on on-going general achievements in competition policy. In October 2018, the Commissioner discussed the benefits of competition to boost the competitiveness of European industries. In November 2018, the Commissioner welcomed together with the Parliament the finalisation of the new ECN+ Directive to make national competition agencies more effective enforcers of the European competition rules. The Commissioner also had topical debates with parliamentary committees: the Economic and Monetary Affairs Committee in June and October 2018, and the Industry and Research Committee in July 2018. Director-General Johannes Laitenberger visited the dedicated Competition Working Group of the Economic and Monetary Affairs Committee in May 2018. In November 2018, Mr Laitenberger exchanged views with the full Economic and Affairs Committee, following Deputy Director-General Carles Esteva Mosso's preparatory debate in this committee in October 2018. On 17 January 2019, Commissioner Vestager hosted a one-day conference on *"Shaping competition policy in the era of digitisation"*[49].

[49] http://ec.europa.eu/competition/information/digitisation_2018/index_en.html