Major Events and Policy Issues in EU Competition Law 2017–2018: Part 2

John Ratliff[*]
WilmerHale, Brussels

Abuse of dominant position; Anti-competitive practices; Cartels; Competition law; Competition policy; EU law; Resale price maintenance; Sector inquiries

Abstract

John Ratliff and his colleagues summarise various European Commission decisions on art.101 TFEU issues, including: (1) various cartel decisions relating to car industry supply; (2) the EC's decision on the International Skating Union's rules banning skaters from participating in non-authorised events; and (3) online resale price maintenance by electronics manufacturers, involving EC fine reductions for co-operation outside cartel leniency. They then summarise the EC's decisions applying art.102 TFEU to the Digital Economy, including a €977 million fine on Qualcomm re requirements agreements; and a €4.34 billion fine on Google re practices to reinforce the position of Google Search in smartphones using the Android operating system. They also note the EC's decision accepting commitments by Gazprom as regards gas supply to Central and Eastern Europe. Finally, they outline three leading policy issues: "fairness" in competition; developing EU policy on digital economy issues; and a recent report on competition and agriculture in the EU.

This is the second and final part of the overview of "Major Events and Policy Issues in EU Competition Law 2017–2018", following on from Part 1 published in last month's journal.[1] The reference period is from November 2017 until the end of October 2018.[2]

[*] With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article, and to my other Brussels colleagues for their more specific contributions, which are indicated with the appropriate sections.

[1] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017–2018: Part 1" [2019] I.C.C.L.R. 121. "TFEU" is the abbreviation for Treaty on the Functioning of the European Union; "TEU" is Treaty on European Union; "EC" stands for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court, "ECJ" for the European Court of Justice and "CJEU" for the overall Court of Justice of the European Union; "AG" stands for Advocate-General; "NCA" is the abbreviation for National Competition Authority; "SO" is the abbreviation for Statement of Objections; "BE" is the abbreviation for Block Exemption; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights 1950 and references to the "CFR" are to the EU Charter of Fundamental Rights 2000.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 6 February 2019]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.

This article has been edited by John Ratliff and written by Geoffroy Barthet, Itsiq Benizri, Virginia Del Pozo, Katrin Guéna, Álvaro Mateo Alonso, Cormac O'Daly, John Ratliff, Jessy Siemons, Lukas Šimas, Yujin Suga, Maria Tsoukala and Georgia Tzifa.

The first part of the article summarises: EU legislative developments, European Court judgments on general competition issues, and cartel appeals.

This second part summarises: European Commission decisions on art.101 TFEU, including cartels, issues such as competition and sport, and resale price maintenance. We then summarise EC decisions applying art.102 TFEU to the Digital Economy, including a €977 million fine on Qualcomm and a €4.34 billion fine on Google. We also note the commitments from Gazprom which the EC has accepted. Finally, we outline three selected policy issues: "fairness" in competition law; developing EU policy on digital economy issues; and a recent report on competition and agriculture in the EU.

European Commission decisions

Cartels—new

Box 7

New Cartel Fines

(November 2017–October 2018)

Total fines		**Highest company fine(s)**	
Car safety equipment	*€34 million*	*Takata*	*€12.7 million*
Maritime car carriers	*€395.3million*	*WWL-Eukor*	*€207.3 million*
Spark plugs	*€76.1 million*	*Bosch*	*€45.8 million*
Braking systems	*€75.4 million*	*Continental*	*€44 million*
Capacitors	*€253.9 million*	*Nippon Chemi-Con*	*€97.9 million*
TOTAL	**€834.7 million**		

Car safety equipment

In November 2017, the EC fined five suppliers of car safety equipment some €34 million for participating in one or more of four cartels for the supply of car seatbelts, airbags and steering wheels to Japanese car manufacturers in the European Economic Area (EEA).[3] The five suppliers are Tokai Rika, Takata, Autoliv, Toyota Gosei and Marutaka.

The EC found that the suppliers co-ordinated prices or markets and exchanged sensitive information on the supply of these products to Toyota, Suzuki and Honda in the EEA. The co-ordination to form and run the cartel took place outside the EEA, notably in Japan. The EC found that collusion generally intensified when

[3] Decision relating to proceedings under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39881—*Occupant Safety Systems supplied to Japanese Car Manufacturers*), EC Press Release IP/17/4844, 22 November 2017. The EC summary is in [2018] OJ C135/5. The EC's settlement decision is available on the EC's website.

specific requests for quotations (RFQs) were launched by the car manufacturers. The focus was to achieve respect for the "incumbency principle" so that, if a car company supplied a particular product in the past to a car manufacturer, it would continue to do so for that car model and a new model.[4]

The EC's investigation revealed four separate cartels of varying durations from 2004 to 2010.

Takata received full immunity for revealing three of the cartels. Tokai Rika received full immunity for revealing one cartel. Tokai Rika, Takata, Autoliv and Toyota Gosei had fine reductions for co-operation ranging from 28% to 50%. All companies had 10% fine reductions for settling.

One company, Marutaka, was fined €156,000 as a facilitator of one of the cartels. Marutaka did not have any EEA sales as it is Takata's distributor in Japan. The EC assessed its fine as facilitator in respect of the cartel for the supply of seatbelts to Toyota. The EC compared the average ratio of the other parties' sales in the EEA of such products and their global turnover. The result was divided by four for the number of participants in the infringement and reduced by a further one-third, in view of Marutaka's more limited role as facilitator.[5]

Maritime car carriers

In February 2018, the EC issued three separate decisions, by which it sanctioned several European and non-European companies for taking part in cartels. All companies acknowledged their involvement and agreed to settle the cases.[6]

In the first case, the EC fined maritime car carriers a total of €395 million for participating in a cartel concerning intercontinental maritime transport of vehicles.[7] In particular, the EC found that, from October 2006 to September 2012, the five carriers in question, i.e. the Chilean maritime carrier CSAV, the Japanese carriers "K" Line, MOL and NYK, and the Norwegian/Swedish carrier WWL-EUKOR, formed a cartel in the market for deep sea transport of new cars, trucks and high and heavy vehicles, such as combine harvesters and tractors, on various routes between Europe and other continents.[8]

The EC found that the parties engaged in various types of contacts, during which they, to varying degrees:

- co-ordinated rates for certain routes and for certain customers, except for CSAV that was engaged in this type of conduct only as of June 2011 onwards;
- were engaged in co-ordination concerning the BAF (Bunker Adjustment Factor) and CAF (Currency Adjustment Factor) for certain routes and for certain customers, except for CSAV;

[4] See *Occupant Safety Systems* Decision, paras 34–36.
[5] *Occupant Safety Systems* Decision, para.112.
[6] EC Press Release IP/18/962, 21 February 2018.
[7] With thanks to Georgia Tzifa. Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.40009—*Maritime Car Carriers*). The EC's summary is in [2018] OJ C314/8; the provisional non-confidential version of the decision is available on the EC's website.
[8] *Maritime Car Carriers*: Provisional non-confidential decision, para.3. The EC pointed out that not all parties were necessarily active in the deep-sea carriage of all types of vehicles. In addition, not all parties participated in conduct concerning high and heavy vehicles.

- allocated various RFQs, and the business of certain customers (including agreements on which party should win the RFQ or business or a certain share thereof and the details of the offers), as well as replies submitted in the framework of contract renewals and annual price negotiations;
- discussed and co-ordinated capacity reductions through scrapping of vessels, except for CSAV; and
- exchanged commercially sensitive information as a means to support the conduct described above.[9]

The conduct followed the so-called "rule of respect". According to that principle, shipments of new motor vehicles related to already existing businesses on certain routes for certain customers would continue to be carried by the undertaking traditionally carrying it (the incumbent).[10]

The parties co-ordinated through various multilateral and bilateral contacts, in which the carriers' sales managers would meet at each other's offices, in bars, restaurants or other social gatherings. These managers were also in contact over the phone on a regular basis. CSAV only participated in bilateral contacts.[11]

The fines were calculated on the basis of the EC's 2006 Fining Guidelines.[12]

Under the EC's 2006 Leniency Notice, MOL received full immunity for revealing the existence of the cartel. The other carriers benefitted from varied fine reductions: 50% ("K" Line), 25% (CSAV) and 20% (NYK and WWL-EUKOR) for their co-operation with the EC.[13] Pursuant to para.28 of the EC Fining Guidelines, the EC applied a 20% reduction to the basic amount of the fine for CSAV, to reflect its limited role and its lack of awareness of the whole extent of the infringement.[14] All carriers were also granted a 10% fine reduction, under the EC's 2008 Settlement Notice.[15]

The fines ranged from some €207 million on WWL-EUROR to some €7 million on CSAV.

Spark plugs

In a second decision, the EC found that the German company Bosch and the Japanese companies Denso and NGK participated in a cartel concerning supplies of spark plugs to car manufacturers in the EEA and imposed a total fine of some €76 million.[16]

Spark plugs are automotive electric devices built into petrol engines of cars, delivering electric sparks to the combustion chamber. Bosch, Denso and NGK customers are car manufacturers with production facilities in the EEA.[17]

[9] *Maritime Car Carriers*: Provisional non-confidential decision, para.34.
[10] *Maritime Car Carriers*: Provisional non-confidential decision, paras 30, 32.
[11] *Maritime Car Carriers*: Provisional non-confidential decision, paras 35–40. See also EC Press Release IP/18/962, 21 February 2018.
[12] *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003* [2006] OJ C210/2.
[13] *Maritime Car Carriers*: Provisional non-confidential decision, paras 122–135.
[14] *Maritime Car Carriers*: Provisional non-confidential decision, paras 103–121, in particular, para.119.
[15] *Maritime Car Carriers*: Provisional non-confidential decision, paras 136–137.
[16] With thanks to Georgia Tzifa. Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.40113—*Spark Plugs*). The EC's summary is in [2018] OJ C111/26; the non-confidential version of the decision is available on the EC's website.
[17] *Spark Plugs* Decision, paras 4–5.

The EC found that the cartel aimed to avoid fierce competition by respecting each supplier's traditional markets and to maintain the existing status quo in the spark plugs industry in the EEA. The distribution channels concerned were suppliers to both the Original Equipment Manufacturers (OEMs) and Original Equipment Spare Parts (OESs).[18]

The co-ordination took place through bilateral contacts between Bosch and NGK, and between Denso and NGK. It lasted from 2000 to 2011.[19] In particular, the companies exchanged commercially sensitive information and, in some instances, agreed on the prices to be quoted to certain customers, the share of supplies to specific customers and the respect of historical supply "rights".[20]

The EC found that the bilateral contacts occurred either in person or via telephone calls. When the bilateral contacts occurred in person, they took place in Japan or in Germany, either at the headquarters of Bosch, Denso and NGK or in restaurants near their headquarters.[21]

Denso was not fined since it revealed the existence of the cartel to the EC. Bosch and NGK benefitted from fine reductions for leniency co-operation: respectively 28% and 42%.

The EC applied a 10% reduction on the basic amount of the fine for Bosch and Denso, to take into account their lesser involvement in the infringement.[22] In other words, insofar as it was not clear that each had been aware or could have reasonably foreseen the other's contacts with NGK.

All companies were also granted a 10% fine reduction for settling. As a result, Bosch was fined €45.8 million and NGK €30.2 million.[23]

Braking systems

In a third decision, the EC found two cartels relating to braking systems.[24] The first concerned the supply of hydraulic braking systems and involved US company TRW (now ZF TRW, based in Germany) and German companies Bosch and Continental. The second cartel concerned the supply of electronic braking systems and involved Bosch and Continental. The EC imposed a total fine of €75 million.[25]

The first cartel consisted in the exchange of sensitive business information (sales conditions, including pricing elements) with a view to co-ordinating the market conduct of the participants and reducing competitive uncertainty for their supplies of hydraulic braking systems to Daimler and BMW.

One aspect was exchanges concerning willingness to accept the policies of Daimler and BMW, whereby a supplier would have to give a price commitment for after-series components (i.e. holding the component's price at the same price as during active series production for a period). The exchanges concerning Daimler

[18] *Spark Plugs* Decision, para.12.
[19] *Spark Plugs* Decision, paras 33, 39–41.
[20] *Spark Plugs* Decision, paras 34–35.
[21] *Spark Plugs* Decision, para.36.
[22] *Spark Plugs* Decision, paras 19, 105.
[23] *Spark Plugs* Decision, paras 110–121.
[24] With thanks to Georgia Tzifa. Decision relating to a proceeding under Article 101 of the TFEU of the EU and Article 53 of the EEA Agreement (Case AT.39920—*Braking Systems*). The EC's summary is in [2018] OJ C143/4; the non-confidential version of the decision is available on the EC's website.
[25] *Braking Systems* Decision, paras 24–25.

also related to raw material cost compensation, cost transparency and volume reductions.[26] The cartel lasted from February 2007 to March 2011.[27]

The second cartel related to one specific tender for electronic braking systems for Volkswagen. Following the customer's RFQ, the parties discussed their interest in the contract, disclosed their intentions to each other and exchanged information on their respective offers. This cartel lasted from September 2010 to July 2011.[28]

In both infringements, the conduct took place in the form of meetings and phone conversations and largely involved the same employees within the companies. The participants in the first cartel had also exchanged emails.[29]

TRW received full immunity for revealing the first cartel.[30] As for the other companies, the EC applied a 50% increase on the basic amount of the fine for Continental for recidivism, given that it had previously participated in another cartel infringement.[31] Continental also received partial immunity, for being the first party to submit compelling evidence within the meaning of para.25 of the Leniency Notice, as well as a 20% reduction of its fine for co-operating with the EC. Bosch was similarly granted a reduction of 35%.[32]

The second cartel was revealed to the EC by Continental, which received full immunity. Bosch was granted a 30% fine reduction for its co-operation.[33]

Finally, the fines imposed on all parties for both infringements were further reduced by 10%, in application of the Settlement Notice.[34]

Ultimately, Continental had to pay some €44 million for the first cartel and Bosch had to pay some €31.4 million for the two cartels.

Capacitors

In March 2018, the EC fined eight Japanese companies a total of some €254 million for their participation in a cartel for the supply of aluminium and tantalum electrolytic capacitors.[35] Capacitors are electrical components used in electric and electronic products to store energy. The companies involved are Sanyo Electric, Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con and Rubycon.

Senior managers and occasionally company presidents met to exchange supply and demand information and pricing intentions. The overall cartel lasted from 1998 to 2012 and concerned the whole of the EEA.

Sanyo and its parent company Panasonic were not fined because they revealed the cartel. Hitachi, Rubycon, Elna and NEC Tokin received reductions of between 15% and 35% for having co-operated with the EC. Rubycon received an additional

[26] *Braking Systems*: EC summary, para.10; Decision, para.28.
[27] *Braking Systems* Decision, paras 27–29, 31.
[28] *Braking Systems* Decision, paras 32–33, 35.
[29] *Braking Systems* Decision, paras 29–30, 33–34.
[30] *Braking Systems* Decision, para.113.
[31] *Braking Systems* Decision, para.107. Continental was an addressee of Decision relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/39406—*Marine Hoses*). The EC's summary is in [2009] OJ C168/6. The 50% increase of the basic amount in *Braking Systems* concerned both infringements; however, as Continental was granted full immunity for the electronic braking systems cartel, it ultimately received no fine for that cartel.
[32] *Braking Systems* [2018] OJ C143/4, paras 115–118.
[33] *Braking Systems* [2018] OJ C143/4, paras 114, 117.
[34] *Braking Systems* [2018] OJ C143/4, paras 119–120.
[35] With thanks to Katrin Guéna. EC Press Release IP/18/2281, 21 March 2018.

reduction for being the first to submit information which allowed the EC to determine a longer duration for the infringement.

The highest fine was imposed on Nippon Chemi-Con and amounted to €97.9 million. The other fines ranged from €782,000 to €72.9 million.

Box 8

- **Cartels**
  - — Not a huge amount of fines this year.
  - — In general, the EC is wrapping up the "car industry supply cartels".
  - — There are two particular hallmarks of these cases: the "naming of customer names" and the "ripple effect", as one case led to another.
  - — *Car Battery Recycling* Decision: EC's reasoning for increasing the fines by 10% because based on purchase prices.
  - — *Envelopes* Amendment Decision: detailed EC reasoning on para.37 of the EC Fining Guidelines.

Cartels—old

In the course of the year, the EC has also published summaries of "old" cases, and non-confidential versions of some very old cases, presumably after extensive debate on confidentiality claims.

The main points of interest are as follows:

Car Battery Recycling

In November 2017, the EC published its decisions in this case together with its summary.[36]

It may be recalled that the case is interesting because it involves a purchasing cartel: collusion on the prices to be paid for scrap lead-acid automotive batteries in Belgium, Germany, France and the Netherlands, used for the production of recycled lead. The parties therefore co-ordinated to reduce or maintain prices offered at a certain level, or to reduce them over time.[37]

Insofar as this was a purchasing cartel, the EC increased the amount of the fine by 10%, on the basis that its standard approach, geared to *sales* prices, might underestimate the economic significance of the infringement.[38]

Otherwise, it appears that Campine's application for leniency was rejected because the EC found that its evidence had not added significant value and because it had not disclosed its participation in the cartel. However, it was given a 5% fine reduction for its limited role in the infringement.[39]

[36] With thanks to Geoffroy Barthet and Virginia Del Pozo. Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.40018—*Car Battery Recycling*). The summary is in [2017] OJ C396/17. There are two decisions: the non-confidential decision in February 2017 and a correcting decision in April 2017.

[37] *Car Battery Recycling*: EC summary, para.8.

[38] *Car Battery Recycling*: EC summary, para.14; Decision, paras 363–365.

[39] *Car Battery Recycling* Decision, paras 355, 404–411.

Predictably, there is some discussion about the fine increase in the decision[40] since some argue that, in effect, the EC is increasing the fine on the basis that the cartel was successful in reducing purchase prices.

The EC's position is to note that its Fining Guidelines were drafted with cartel sales in mind and that it had not taken into account the particularity that the more successful a purchase cartel is, the lower the amount of the value of purchases, and therefore the amount of the fine. The EC then states:

> "It is thus inherent to the fact that the cartel in the present case is a purchase cartel that the value of purchases in itself is unlikely to be an appropriate proxy for reflecting the economic importance of the infringement. This is because, normally in an operating company, purchases are lower than sales in value terms, giving therefore a systematic lower starting point for the calculation of a fine."[41]

However, the EC states that its finding of infringement is based on a restriction by object,[42] not a finding of effect.[43]

Envelopes

In February 2018, the EC published its amended decision in the *Envelopes* cartel case.[44] The key point here is that the EC had to amend its earlier decision as regards Printeos (formerly Tompla) insofar as the GC had annulled the fine imposed for lack of sufficient reasoning.[45] The EC has explained its methodology in more detail accordingly, while imposing the same fine as in its 2014 decision.[46]

In its amended decision, the EC states[47] that it applied para.37 of the Fining Guidelines to the situation where most parties' sales were generated mainly on one market, in which they participated in a cartel for several years. The EC therefore sought to ensure that penalties were specific to the offence and the offender, applying *Putters International*.[48]

The EC needed to adapt the fines because one company's fine reduction for lesser involvement would not be reflected because its fine was ultimately set by the legal maximum (the 10% ceiling in art.23(2) of Regulation 1/2003).[49]

The EC therefore brought the basic amounts of *all parties* below their respective 10% legal maximum ceilings. Not by a uniform amount but by an amount reflecting the parties' involvement in the infringement.

The EC considered that, if all fines for all parties were uniformly reduced to the level required to bring the party whose basic amount exceeded the 10% legal

[40] *Car Battery Recycling* Decision, paras 367–377.
[41] *Car Battery Recycling* Decision, para.364.
[42] *Car Battery Recycling* Decision, para.238.
[43] *Car Battery Recycling* Decision, paras 373, 376.
[44] Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39780—*Envelopes*). The amending decision from June 2017 is also available on the EC's website with related summary in [2018] OJ C39/10.
[45] *Envelopes*: EC summary, para.8; *Printeos SA v European Commission* (T-95/15) EU:T:2016:722; [2017] 4 C.M.L.R. 9.
[46] *Envelopes*: EC summary, paras 13, 20.
[47] *Envelopes*: EC summary, paras 10–22, 59.
[48] *Putters International NV v European Commission* (T-211/08) EU:T:2011:289; [2013] 4 C.M.L.R. 22.
[49] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

maximum by the largest amount, the EC would give an unjustifiable benefit to all in terms of fines not reflecting the gravity of the infringement and the need for deterrence.[50]

So the EC adapted the basic amount for each party by the ratio of the worldwide cartelised turnover in 2012 to the party's total turnover in that year (called the "product/turnover ratio").[51]

The EC then determined the minimum reduction required to bring down the turnover of the company whose turnover exceeded the 10% ceiling by the most.

All the parties received smaller reductions set *individually*, reflecting their product/turnover ratio and the relative weight of their basic amounts.[52] The EC emphasised that a *linear reduction* automatically reducing the companies' basic amounts by their product/turnover ratio would have led to an unjustified result, where the fines would have been a function of those ratios, not the relative weight of the basic amounts (reflecting the individual involvement of the companies in the infringement). The individual reductions sought therefore to restore the balance on equitable grounds.[53]

Finally, as regards one company with a much lower product/turnover ratio, the EC considered it necessary to adjust its fine also to reflect the fact that its role in the cartel was similar to that of the other parties.[54] Otherwise, its fine would be disproportionately high compared with that of Printeos.

During the procedure for the amending decision, Printeos reiterated its view that it should also have had a reduction in fine because it had been fined already for an envelopes cartel in Spain by the Spanish Competition Authority.[55] The EC therefore set out its position that this was not correct because in its decision the EC had not covered the cartel in the Spanish market but had imposed fines on another cartel.[56]

Further, the EC did not consider that a reduction was justified on the basis of the exceptional cumulative impact of multiple fines on Printeos, distinguishing the *Speciality Graphite* case.[57]

All this is interesting. Not only for the *Printeos* case itself but also for other cases where the GC has found recently that the EC had insufficiently explained its reasoning under para.37, i.e. *ICAP* and *Stuhrk Delikatessen Import*, described in Part 1 in last month's journal, in the "Cartel appeals" section.[58]

[50] *Envelopes*: EC summary, para.14.
[51] *Envelopes*: EC summary, para.15.
[52] *Envelopes*: EC summary, para.17.
[53] *Envelopes*: EC summary, para.18.
[54] *Envelopes*: EC summary, paras 19–20.
[55] *Envelopes*: EC summary, para.23.
[56] *Envelopes*: EC summary, paras 46–48, 51–56.
[57] *Envelopes*: EC summary, paras 49–50. Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.667—*Speciality Graphite*).
[58] *ICAP Plc v European Commission* (T-180/15) EU:T:2017:795; [2018] 4 C.M.L.R. 8; *Stuhrk Delikatessen Import GmbH & Co KG v European Commission* (T-58/14) EU:T:2018:474.

Other

In November 2017, the EC published a summary of its amending decision in *Euro Interest Rate Derivatives* as regards the fine on Société Générale.[59] It will be recalled that this reflected a correction in Société Générale's value of sales. Société Général's fines were reduced from €445.8 million to €227.7 million.

In December 2017, the EC published its summary of its amending decision in *Spanish Raw Tobacco*.[60] It may be recalled that in this amending decision the EC applied a 35% leniency reduction to two companies which were jointly and severally liable for a fine with a third company since that third company's fine reduction had been reduced in that way as a result of European Court judgments. The amount of the reduction was €243,000.

In February 2018, the EC put on its website the non-confidential version of its 2008 decision in *Carglass*.[61]

In May 2018, the EC put on its website the detailed non-confidential version of its 2015 decision in *Retail Food Packaging*.[62] Also in May 2018, the EC put on its website the provisional non-confidential version of its 2015 decision in *Optical Disk Drives*.[63]

In July 2018, the EC put on its website the non-confidential version of the *Power Cables* decision.[64] A provisional text was available before. In February 2018, publication of a version containing material contested by Nexans was suspended.[65] The related appeals to the GC are described above in Part 1 in last month's journal in the "Cartel appeals" section.

Article 101 TFEU

Box 9

- **EC decisions—Article 101 TFEU**
  - — *International Skating Union*:
    - * Rules banning skaters from participation in events organised by third parties unlawful.
    - * Not inherent to the organisation of sport (*Meca-Medina* case).

[59] Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39914—*Euro Interest Rate Derivatives*). The EC's summary is in [2017] OJ C404/5. The non-confidential version of the decision is on the EC's website.

[60] Decision relating to a proceeding under Article 81(1) of the EC Treaty (Case AT.38238—*Spanish Raw Tobacco*). The summary is in [2017] OJ C425/12. The non-confidential version of the decision is on the EC's website.

[61] Decision relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (Case COMP/39.125—*Carglass*). The EC's summary is in [2009] OJ C173/13. This was described in John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2" [2010] I.C.C.L.R. 149, 150.

[62] Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39563—*Retail Food Packaging*). The EC's summary is in [2015] OJ C402/8. This was described in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 2)" [2016] I.C.C.L.R. 99, 111.

[63] Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39639—*Optical Disk Drives*). The EC's summary is in [2016] OJ C484/27. This was described in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 2)" [2016] I.C.C.L.R. 99, 112.

[64] Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39610—*Power Cables*), EC Press Release IP/14/358, 2 April 2014. The EC's summary is at [2014] OJ C319/10. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 129–130.

[65] See *Nexans France and Nexans v European Commission* (C-65/18 P(R)-R) Order of the Vice-President of the CJEU 2 February 2018 EU:C:2018:426.

Box 9 continued

* Disproportionate sanctions (could be lifetime bans).
* Prevented alternative "Icederby" formula.
* Issue of link to economic interests of the ISU.

— *Electronics Manufacturers*:

* Various companies sanctioned for enforcing resale price maintenance.
* BUT given 40% or 50% fine reductions for co-operation.
* One supplier monitoring online comparison websites, and using software to monitor prices, then intervening.

International Skating Union

In December 2017, the EC found that the International Skating Union's (ISU) rules preventing skaters that participated in its events from participating in events organised by third parties were in breach of art.101 TFEU. The EC did not impose a fine but set a 5% of turnover periodic penalty payment if the ISU did not amend its rules to remove the infringement within 90 days.[66] In March 2018, the EC published the provisional non-confidential version of the decision on the EC's website.

This decision has several important points of interest:

- the EC adopted for the first time an infringement decision concerning the organisational rules of a sports governing body (SGB);
- the EC applied the test established by the ECJ in *Meca-Medina*[67] to determine whether the organisational rules of a SGB were subject to EU competition law; and
- the EC also considered that the ISU appeal rules, including appeals to the Court of Arbitration for Sport (CAS), reinforced the restriction of competition, by protecting potential anti-competitive decisions from the reach of EU competition law.[68]

All of this is highly topical both in itself and insofar as there are many cases at national level on similar issues.

Background The ISU is the sole international sport federation recognised by the International Olympic Committee to administer speed skating and figure skating on ice through national ice-skating associations. These national associations are typically composed of skating clubs, while athletes are individual members of those clubs.[69] The ISU organises the most prominent speed skating on ice competitions, such as those at the Winter Olympics and the European and World Championships.[70]

[66] With thanks to Álvaro Mateo Alonso. Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.40208—*International Skating Union's Eligibility Rules*), EC Press Release IP/17/5184, 8 December 2017. The EC's summary is available in [2018] OJ C148/9.

[67] *Meca-Medina v Commission of the European Communities* (C-519/04 P) EU:C:2006:492; [2006] 5 C.M.L.R. 18, Judgment of 18 July 2006.

[68] *International Skating Union* Decision, para.6.

[69] *International Skating Union* Decision, para.7.

[70] *International Skating Union* Decision, para.4.

In 2014, the ISU adopted Eligibility rules (2014 Eligibility rules) clarifying the Eligibility rules that were already in place since 1998. According to those rules, if a speed skater were to participate in any speed skating event not authorised by ISU or one of the national associations, he or she would become ineligible to participate in ISU's competitions for a period up to a lifetime.[71]

In 2016, ISU adopted new Eligibility rules (2016 Eligibility rules), whereby participation in non-authorised events was subject to sanctions ranging from a warning to periods of ineligibility from an unspecified minimum to a maximum of a lifetime ban.[72] Although envisaging a scale of sanctions, as explained further below, the EC still considered these to be severe.

Prior to 2015, there were no pre-established criteria to authorise third-party events. In 2015, ISU introduced such criteria but the EC also found that they were not objective, transparent or non-discriminatory and that they went beyond what was necessary to protect legitimate aims.[73]

In addition, ISU's Appeal Arbitration rules granted exclusive jurisdiction to the CAS as regards ISU's decisions of ineligibility of skaters and officials, and provided that CAS decisions "shall be final and binding".[74]

In 2011, Icederby International (Icederby), a Korean private company, informed the ISU of its intention to organise a new type of skating event in a new format and where betting would be allowed if legal in the country concerned. Such events would be organised during the ISU off season. In 2012, ISU issued an amended Code of Ethics including an obligation "to refrain from participating in all forms of betting or support for betting or gambling related to any event/activity under the jurisdiction of the ISU".[75]

In 2014, Icederby informed the ISU that there would not be onsite betting in the Dubai Icerderby Grand Prix which it was organising because betting was illegal in Dubai.[76] However, the ISU adopted Communication 1853, noting that Icederby's competitions would not be authorised since they were possibly "closely connected to betting". The ISU reminded its members that participating in ISU events would result "in the loss of ISU eligibility for participants" and the risk of a lifetime ban.[77]

In June 2014, two professional Dutch speed skaters lodged a complaint with the EC against the ISU's 2014 Eligibility rules establishing a lifetime ban for participating in competitions not sanctioned by ISU. In particular, they argued that such rules prevented them from participating in Icederby's competitions offering significant prize money and the opportunity of other sources of revenue such as sponsoring.[78]

In October 2015, the EC initiated proceedings and in September 2016 sent an SO to the ISU.

[71] *International Skating Union* Decision, para.3.
[72] *International Skating Union* Decision, para.3.
[73] *International Skating Union* Decision, para.3.
[74] *International Skating Union* Decision, para.5.
[75] *International Skating Union* Decision, paras 64–65.
[76] *International Skating Union* Decision, para.66.
[77] *International Skating Union* Decision, paras 67, 73–76.
[78] *International Skating Union* Decision, paras 22, 162.

EC decision The EC defined the market as the worldwide market for the organisation and commercial exploitation of international speed skating events.[79]

The EC considered that the ISU was an undertaking since it conducts economic activities (e.g. the licensing of broadcasting rights and sponsorship agreements), even if secondary to its primary objectives of regulating the sport. The ISU generated a worldwide turnover in 2016 of some €31.7 million.[80] Further, the EC considered that the ISU was an *association of undertakings* composed of individual national associations which also had economic activities. As a result, the EC considered that the contended Eligibility rules were a decision of an association of undertakings.[81] Interestingly therefore, the EC's case was based on art.101 TFEU, rather than art.102 TFEU, despite the ISU's apparently unique position controlling international skating.

The EC considered that the severe sanction of a life-time ban for participating in non-ISU sanctioned events was not directly linked to legitimate objectives, such as the protection of the integrity of sport, athletes' health and safety or the organisation and proper conduct of sport. Rather, the EC found that it was related to the "protection of the economic and other interests of the ISU", quoting the 2014 Eligibility rules.[82]

The changes introduced in 2016 to the Eligibility rules did not change the EC's views. The EC found that they were not directly linked to legitimate objectives. Further, the sanctions for participating in unauthorised events were still very severe: lifetime ban in case these endangered the "ISU jurisdiction"; a ban of up to 10 years for "knowingly participating"; and five years for "negligent participation". The EC took into account the fact that the athletes' average career span is about eight years. The EC noted that, even if these new rules no longer expressly referred to the protection of the ISU's economic interest, they still made reference to financial aspects.[83]

The EC took into consideration that the ISU (and in general, international sports federations) have *regulatory functions* and at the same time exercise *economic activities*. However, the EC noted that, where an international sport federation is active in the

> "organisation and commercial exploitation of [sport] events, but at the same time, through its regulatory function, has the power to authorise sport events organised and commercially exploited by other, independent service providers, this may lead to a conflict of interest".[84]

Such an exercise of regulatory powers "should therefore be subject to restrictions, obligations and review to avoid a distortion of competition by favouring its own events … above those of third part[ies]".[85]

Moreover, the EC considered that how the ISU had implemented the Eligibility rules in practice showed that the ISU's intention was to foreclose competitors.

The EC pointed to three facts:

[79] *International Skating Union* Decision, para.115.
[80] *International Skating Union* Decision, para.12.
[81] *International Skating Union* Decision, paras 146–153.
[82] *International Skating Union* Decision, paras 162–167.
[83] *International Skating Union* Decision, paras 184–187.
[84] *International Skating Union* Decision, para.173.
[85] *International Skating Union* Decision, para.173.

- since the entry into force of the Eligibility rules in 1998, the ISU had not authorised any third-party commercial event. In 2016, ISU authorised the Dutch Grand Prix, organised by an ISU member (the Dutch federation, KNSB) and Icederby. However, the application was submitted by KNSB, i.e. an ISU member;
- the ISU's intention was illustrated by the fact that it issued Communication 1853 after being contacted by Icederby; and
- ISU's intention was demonstrated by its behaviour towards the World Skating Federation (WSF). In 2003, a group of former figure skating champions who were coaches, judges and referees, amongst others, announced their intention to create a new international governing body for figure skating, the WSF. The ISU saw this as a "'clear threat against the ISU's existence and its jurisdiction', opening proceedings against six officials involved in the WSF initiative, who lost their eligibility to participate in ISU events".[86]

The EC concluded that the Eligibility rules restricted competition by object in the worldwide market for the organisation and commercial exploitation of international speed skating events within the meaning of art.101(1) TFEU, "even though the Eligibility rules may at the same time also pursue other objectives such as protecting the integrity of the sport".[87]

The EC also assessed whether the Eligibility rules had an anti-competitive effect and concluded that they did. First, owing to the risk of being banned from participating in events such as the Olympic Games or the World and European Championships, athletes were prevented from participating in unauthorised events. Secondly, as a result, new entrants were unable to attract athletes in order to be able to organise new events. This was confirmed by the fact that no other organisers of events than the ISU were present in the market and that a potential entrant (Icederby) was prevented from entering the market, even if its events were planned during the off-season of ISU skaters. Thirdly, the Eligibility rules had a negative impact on output, consumer choice and innovation. Notably, Icederby had intended to offer a new format of speed racing.[88]

Interestingly, the EC also set out in its decision why the Eligibility rules were subject to EU competition law based on the criteria in *Meca-Medina*, cited above. The EC carried out a detailed threefold analysis of essentially three questions[89]:

- Looking at the overall context, do the rules pursue legitimate objectives?
- Is the restriction of competition concerned inherent in the pursuit of legitimate objectives?
- Is the restriction of competition proportionate to those objectives?

Importantly, the EC rejected the argument that the ISU's economic activities were a legitimate objective, even if revenues were redistributed to its members. In part,

[86] *International Skating Union* Decision, paras 59–61, 174–179.
[87] *International Skating Union* Decision, paras 158, 188.
[88] *International Skating Union* Decision, paras 194–209.
[89] *International Skating Union* Decision, paras 138, 210–267.

at least this was for member associations to organise international competitions putting third-party event organisers at a disadvantage.[90]

The EC also challenged the idea that the ISU's authorisation system for third-party events was inherent in the pursuit of legitimate objectives. In any event, the EC considered that it was disproportionate to those objectives.[91]

As noted above, one of the ISU's main arguments was that the rival events organised by Icederby would be connected with betting. However, the EC considered that the real issue was match-fixing related to betting, and that excluding athletes from participating in such events was not a legitimate and proportionate way to deal with that issue.[92]

The EC's conclusion was that the effects of the rules, i.e. the restriction of the athletes' commercial freedom and the foreclosure of potential competitors, were "in part not inherent in the pursuit of legitimate objectives, and, in any event, not proportionate to them".[93]

Another important aspect of this decision is that, according to the EC, the fact that the CAS, based in Switzerland, was the only appeal body for the ISU's decisions to sanction a skater for participating in unauthorised events reinforced the restriction of competition caused by the Eligibility rules.[94] The decision's provisional decision is currently redacted on this point.

The EC required the ISU to put an end to the infringement within 90 days. The ISU had the choice between abolishing its Eligibility rules or modifying them so that:

- they pursue legitimate objectives (ISU's financial and economic interests not being considered to be such objectives);
- they provide for objective, transparent, proportionate, and non-discriminatory sanctions and authorisation criteria; and
- they provide an objective, transparent and non-discriminatory procedure for the adoption and effective review of decisions re the ineligibility of skaters and the authorisation of speed skating events.[95]

The EC stated that it did not impose a fine for three reasons. This was the first infringement case on the rules set by SGBs. The rules were in place since 1998 and were publicly known. The ISU not only had commercial activities but also promoted sports with such revenues.

The decision is a key precedent for sports federations, dealing with a number of important issues. The question of exclusion from events, called here "Ineligibility", resulting from participation in other "non-official" events, is an old one but still current in many sports. As is the question of funding sports organisation through the grant of broadcasting rights to authorised sports events and seeking to protect the related exclusivity.

[90] *International Skating Union* Decision, para.220.
[91] *International Skating Union* Decision, para.254.
[92] *International Skating Union* Decision, paras 226–238.
[93] *International Skating Union* Decision, paras 225–266.
[94] *International Skating Union* Decision, para.6.
[95] *International Skating Union* Decision, paras 338–342.

Electronics manufacturers

In July 2018, the EC announced four decisions concerning resale price maintenance (rpm) by electronics manufacturers.[96] The cases concerned *Denon & Marantz*,[97] *Asus*,[98] *Pioneer*[99] and *Philips*.[100]

Denon & Marantz (DM) was fined some €6.3 million for an infringement in Germany and some €1.4 million for an infringement in the Netherlands. Asus was fined some €58 million for an infringement in Germany and some €5.3 million for an infringement in France. Philips was fined some €29.8 million for an infringement in France. Pioneer was fined some €10.1 million for an infringement concerning some 12 EEA countries to different extents; and involving some measures against parallel trade as well as resale price maintenance (rpm).

Interestingly, in all four cases, after onsite inspections either at the company's premises or those of one of its online retailers, *the companies sought to co-operate with the EC*, making formal offers to do so. They were granted fine reductions of 40% or 50% based on para.37 of the EC Fining Guidelines.

The EC found that each company had been monitoring resale prices and applying pressure on the lower priced retailers to increase prices. In one case, *Asus*, the EC noted that such monitoring was done by observing price comparison websites and, for some product categories, using internal software monitoring tools to identify which retailers were selling below the desired price level.[101]

The EC considered rpm to be unlawful by its very nature and set the gravity of the infringement at 7% or 8% of value of sales.

This is the first EC rpm case for many years. Perhaps not the last, given that online pricing effects may be wider and therefore come to EC level. After the fine reductions in the *ARA Foreclosure* (art.102 TFEU) case,[102] this is an interesting development, showing that fine reductions for co-operation can be achieved *outside* the EC's cartel leniency programme, now in vertical restraints cases.

Brussels Airlines/TAP Air Portugal

In October 2018, the EC decided to close its investigation into a codeshare agreement between Brussels Airlines and TAP Air Portugal relating to the Brussels–Lisbon route.[103]

In October 2016, the EC had adopted an SO against the two airlines, raising preliminary concerns that their codeshare cooperation on passenger services between Brussels and Lisbon might have restricted competition between them.

[96] EC Press Release IP/18/4601, 24 July 2018. With thanks to Maria Tsoukala.

[97] Decision relating to a proceeding under Article 101 of the TFEU (Case AT.40469—*Denon & Marantz*). The EC's summary of its decision is in [2018] OJ C335/5.

[98] Decision relating to a proceeding under Article 101 of the TFEU (Case AT.40465—*Asus*). The EC's summary is in [2018] OJ C338/13.

[99] Decision relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.40182—*Pioneer*). The EC's summary is in [2018] OJ C338/19.

[100] Decision relating to a proceeding under Article 101 of the TFEU (Case AT.40181—*Philips*). The EC's summary is in [2018] OJ C340/10.

[101] See *Asus*: EC summary, para.13.

[102] Decision relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement (Case AT.39759—*ARA Foreclosure*). The EC's summary is in [2016] OJ C432/6; the non-confidential version of the decision is available on the EC's website.

[103] *EU Daily News*, 30 October 2018.

In light of its review of all relevant evidence, and the responses of the airlines to the SO, the EC concluded that the evidence collected was not sufficient to confirm its initial concerns and closed its investigation. The EC emphasised that its concerns related to certain specific features of this particular codeshare, rather than to codeshares in general. Further, since 2014, new airlines have begun to compete with the code-sharing airlines on the Brussels–Lisbon route.

Article 102 TFEU

Box 10

- **EC decisions—Article 102 TFEU and the Digital Economy**
  - — *Qualcomm*:
    - * €997 million fine for agreeing with Apple that it would buy all its requirements of LTE baseband chipsets from Qualcomm.
  - — *Google Android*:
    - * Huge fine—€4.34 *billion*.
    - * EC found tying of Google Play Store, Search and Chrome Browser to reinforce Google's dominant position on general internet search, as regards smartphones with the Android operating system.
    - * Also, payments conditional on pre-installation of Google Search on Android devices.
    - * Preventing manufacturers using Android "forks", which could have allowed other apps and services to enter the market.
    - * Various Google objective justifications, including that financing the open source Android system thereby improves competition with Apple.
  - — *Google Search* Decision published.

Qualcomm

In January 2018, the EC adopted a decision fining Qualcomm some €997 million for abusing its dominant position, as a supplier of LTE baseband chipsets, by making significant payments to Apple on condition that it would not buy from rivals.[104]

The EC found that Qualcomm was in a dominant position on the worldwide market for these chipsets, which are used to enable smartphones and tablets to connect to cellular networks for both voice and data transmission. "LTE" stands for "Long Term Evolution" and is a standard.

The EC found that the infringement had lasted from 2011 to 2016 (five and a half years). It appears that Qualcomm entered into an agreement with Apple, which was extended. The agreement provided for payments to Apple on condition that Apple would obtain all its requirements from Qualcomm. The agreement was to run until December 2016, but was terminated in September 2016 when Apple launched the iPhone 7 incorporating Intel LTE chipsets.

[104] With thanks to Geoffroy Barthet. Decision relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement (Case AT.40220—*Qualcomm (Exclusivity Payments)*), EC Press Release IP/18/421, 24 January 2018. The EC's summary is in [2018] OJ C269/25.

The EC found that the payments were exclusive and had potential anti-competitive effects. Notably:

- the EC appears to have reviewed Apple's internal documents, suggesting that Qualcomm's payments reduced Apple's incentive to switch to a competing supplier;
- Qualcomm's exclusivity payments covered a large share of the worldwide LTE chipsets market (since Apple accounted for a significant share of demand (on average one third)); and
- given its importance on the LTE chipsets market, Apple is a key customer for entry or expansion of LTE chipsets suppliers in the market.

Qualcomm had submitted a critical margin analysis to the EC in order to show that the exclusivity payments were not capable of having anti-competitive effects. However, the EC found that such evidence failed to support Qualcomm's claim. €997 million was 4.9% of Qualcomm's turnover in 2017.

Google Android

In July 2018, the EC fined Google €4.34 billion for infringing art.102 TFEU. Put shortly, the EC found that Google abusively reinforced its market dominance in general internet search by:

- illegally tying Google's Search and browser apps;
- making illegal payments conditional on exclusive pre-installation of Google Search; and
- obstructing the development and distribution of competing Android operating systems.[105]

It may be recalled that proceedings in this case were opened in April 2015 and that the EC had sent an SO to Google in April 2016.

Background Google bought the original developer of the Android mobile operating system in 2005 and then continued to develop the system. Google publishes online the source code whenever it develops a new version of Android. This source code, which includes the smart mobile operating system's basic features, could be downloaded and modified by third parties to create alternative versions of Android that have not been approved by Google ("Android forks").

The openly accessible Android source code covers the basic features of a smart mobile operating system but not Android's apps and services. If a device manufacturer wanted to obtain them, they needed to sign a contract with Google in which a number of restrictions were imposed. A similar situation occurred with certain large mobile network operators. The EC's case focused on three types of these contract restrictions.

The EC found that some 80% of smart mobile devices in Europe and worldwide run on Android.

[105] EC Press Release IP/18/4581, 18 July 2018. Case AT.40099—*Google Android*. The EC's decision is not yet available.

The EC found that Google has a dominant position in the following markets: (1) general internet search services; (2) licensable smart mobile operating systems; and (3) app stores for the Android mobile operating system.

In the market for general internet search services, the EC found that Google was dominant in all 31 EEA Member States with more than 90% market share in most of these countries. The EC also noted that the barriers to entry in this market are high.

In the market for smart mobile operating systems available for licence, the EC found that Google, through its control over Android, has a worldwide (excluding China) market share higher than 95%. The EC noted that, given network effects, among other things, the barriers to entry were high.

In the market for app stores for the Android mobile operating system, the EC found that Google was dominant worldwide (excluding China) and that its app store, the Play Store, accounted for more than 90% of apps downloaded on Android devices. The EC further noted that this market had high barriers to entry and that Apple's App Store did not compete with the Play Store.

The EC emphasised that in the market for licensable smart operating systems, vertically integrated developers, such as Apple iOS or Blackberry, did not compete in the same market as Android because third-party device manufacturers could not license them.

The EC noted that it also assessed whether (downstream) competition for end-users between, in particular Apple and Android devices, could have an impact on Google's (upstream) market power for the licensing of Android to device manufacturers. According to the EC's investigation, this was not the case. The end-user's decision to buy a mobile device is influenced by a variety of factors independent from the mobile operating system. Apple's devices typically have higher prices which make them inaccessible for a large part of the Android device user base and the switching costs to an Apple device are high.

Furthermore, even if end-users switch from Android to Apple devices, this would have a limited impact on Google's core business, Google Search. The EC states that the reason for this is that Google Search is set as the default search engine on Apple devices and its users are likely to continue using it for their queries. As a result, the EC concluded that competition for end-users did not sufficiently constrain Google's market power.

Specific issues The EC found three specific types of contractual restriction imposed on Android device manufacturers and mobile network operators which infringed art.102 TFEU, reinforcing Google's dominant position in general internet search by ensuring that traffic on Android devices went to the Google Search engine.

First, the EC found that Google used two types of illegal tying: (1) tying of the Google Search app to the Google Play Store; and (2) tying of the Google Chrome browser to the Google Play Store.

Google offered to device manufacturers its mobile apps and services as a package that included, among others, Google Play Store, the Google Search app and the Google Chrome browser. The licensing conditions offered by Google prevented device manufacturers from choosing which apps to pre-install. Moreover, the EC

found that the Google Play Store is a "must-have" app because end-users expect to find it when they buy an Android device. By selling all three apps as a bundle, the EC considered that Google ensured that its search app and its browser were pre-installed on practically all Android devices sold in the EEA, and denied two entry points for search queries for competitors.

In addition, the EC highlighted that pre-installation could create a "status quo bias", whereby users finding search and browser apps pre-installed on their devices are likely to continue using these apps. Consequently, the EC found that this tying practice reduced not only the manufacturers' incentive to pre-install competing search and browser apps but also the users' incentives to download competing apps. This resulted in a reduction of the competitors' ability to compete effectively with Google.

Google argued that it needed to tie its Google Search app and Chrome browser in order to monetise its investment in Android. However, the EC rejected these arguments based on Google's annual revenues with the Google Play Store, the amount of valuable data collected from Android devices and revenues from search advertising without the restrictions.

Secondly, the EC concluded that Google granted significant financial incentives to certain device manufacturers and mobile network operators on condition that they exclusively pre-install Google Search in their entire portfolio of Android devices.

In this regard, the EC stated that if a rival search engine was pre-installed in only one device, the competitor would have had to compensate the manufacturer or the network operator for a loss of revenue share from Google across all devices. This made it impossible for a competitor both to pay for compensation and to make profits. Consequently, competition was harmed by reducing the incentives of the device manufacturers and the mobile network operators to pre-install competing search apps. The EC noted, however, that Google terminated this conduct at the end of 2013.

Google argued that the financial incentives granted were necessary to convince device manufacturers and mobile network operators to produce devices for the Android ecosystem. The EC rejected those arguments.

Thirdly, the EC concluded that Google prevented device manufacturers from creating/using "Android forks".

Device manufacturers willing to pre-install Google's proprietary apps had to commit not to develop or sell a device running on Android forks. The EC found that this resulted in the obstruction of the development and distribution of competing Android operating systems, such as Amazon's "Fire OS". As a result, the EC found that this blocked an important channel for competitors to introduce apps and services which could have been pre-installed on Android forks. This denied users access to further innovation and smart mobile devices based on alternative versions of the Android operating system.

Google argued that the restriction on manufacturers using Android forks was needed to avoid a "fragmentation" of the Android ecosystem. The EC rejected this argument on the basis that there was no credible evidence that Android forks would fail to support apps. Moreover, the EC considered that Google could have ensured

that Android devices using Google proprietary apps and services were in compliance with Google's technical requirements without imposing this restriction.

Given the above, the EC found that the three types of contractual restrictions imposed on device manufacturers and mobile network operators were part of Google's overall strategy to protect and strengthen its dominance in general internet search. In particular, Google's practices mainly:

- denied rival search engines the possibility to compete on the merits; ensuring that Google's Search and Chrome Browser were pre-installed on almost all Android devices;
- obstructed the development of Android forks, which could have provided a platform for rival search engines to gain traffic; and denied them data to compete with Google Search;
- harmed competition and further innovation in the wider mobile area, beyond internet search by preventing competition from other browsers; and
- obstructed the development of Android forks, which could have provided a platform also for other app developers to compete.

In addition to the fine, the EC required that Google stop its illegal practices within 90 days and refrain from any measure that has the same or an equivalent object or effect. If not, Google faced daily penalty payments of 5% of the average daily turnover of Alphabet (Google's parent).

The EC stated that its decision does not prevent Google from introducing another "reasonable, fair and objective" system to ensure the functioning of its Android devices using Google apps and services, without however preventing device manufacturers producing devices based on Android forks.

In October, Google filed an appeal before the GC challenging this decision.[106]

Google Search decision

It may be recalled that, in June 2017, the EC fined Google €2.42 billion for infringing art.102 TFEU.[107] The EC found that Google abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.

In December 2017, the EC published the non-confidential version of its decision. The main aspects of that decision have been described already.[108] In addition, we note as follows:

First, the EC stated that the provision of general search services constitutes an economic activity. Even though users do not pay a monetary consideration for the use of general search services, they contribute to the monetisation of the service by providing data with each query.

The EC noted that, in most cases, a user entering a query enters into a contractual relationship with the operator of the general search service. Apart from that, offering

[106] *Google and Alphabet v Commission* (T-604/18) unreported.

[107] With thanks to Georgia Tzifa. Decision relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement (Case AT.39740—*Google Search (Shopping)*). The EC's summary is in [2018] OJ C9/11; the non-confidential version of the decision is available on the EC's website.

[108] See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016–2017: Part 2" [2018] I.C.C.L.R. 227, 259.

a service free of charge can be an advantageous commercial strategy, in particular for two-sided platforms, such as a general search engine platform, that connect distinct but interdependent demands. Even though general search services do not compete on price, there are other relevant parameters of competition, such as the speed and relevance of results, the attractiveness of the user interface and the depth of indexing of the web.[109]

Secondly, the provision of comparison shopping services was found to constitute a distinct relevant product market. The EC stated that comparison shopping services are not interchangeable with search services specialised in different subject-matters (e.g. flights, hotels, restaurants, news), online search advertising platforms, online retailers, merchant platforms and offline comparison shopping tools.[110]

The main point of interest here relates to the limited finding of substitutability between comparison shopping services and merchant platforms/online marketplaces such as Amazon and eBay. In the EC's view, these two serve a different purpose for users. In contrast to merchant platforms, comparison shopping services:

- act as intermediaries between users and online retailers/merchant platforms, allowing users to compare offers from different online retailers/merchant platforms in order to find the most attractive offer;
- do not offer users the possibility to purchase a product directly on their websites but rather seek to refer users to third-party websites where they can buy the relevant product;
- do not offer after-sale support, including product return functionality; and
- typically list offers only from professional sellers for new products.[111]

The EC noted that this distinction between the two is recognised by Google, which allows merchant platforms, but not competing comparison shopping services, to participate in Google Shopping. It is also evidenced by the replies to an EC request for information (RFI): a majority of comparison shopping services and online marketplaces indicated that they consider themselves as business partners in a vertical relationship, rather than competitors. Various internal Google and Amazon documents pointed in this direction also.[112]

Comparison shopping services and merchant platforms also serve a different purpose for online retailers. Comparison shopping services offer online retailers the opportunity to promote their offerings to a large audience of users in search of a specific product. This allows these retailers both to increase brand awareness and to attract user traffic to their own websites, while retaining full control over their retail activities. By contrast to merchant platforms, comparison shopping services therefore tend to list offers from larger retailers that do not want to cede the customer interaction and data about their business and customers to merchant platforms which they view as competitors, such as Amazon. This was evidenced, among others, by internal Google documents, as well as replies to the EC's RFIs.[113]

[109] *Google Search* Decision, paras 157–160.
[110] *Google Search* Decision, paras 163–183.
[111] *Google Search* Decision, paras 216–219.
[112] *Google Search* Decision, para.220.
[113] *Google Search* Decision, paras 221–223.

Thirdly, as regards Google's conduct, the EC cited internal Google documents to demonstrate that the company was aware that its comparison shopping service would not rank highly in its general search pages if it were subject to the same ranking mechanisms that apply to competing comparison shopping services.

The EC stated that other internal documents showed Google's awareness of the link between visibility in the general search results and user traffic: the company knew that a positioning of Google's service in the middle or at the bottom of the general search results page would result in a loss of traffic.[114] In the EC's view, Google's rationale for the prominent positioning of its comparison shopping service on this page was to leverage universal search initiatives to drive the bulk of the increase of traffic to its product.[115]

Fourthly, the EC analysed the potential anti-competitive effects of Google's conduct in the national markets for comparison shopping services. It found that this conduct had the potential to foreclose competing comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers and less innovation.[116]

The conduct was also described as likely to reduce the ability of consumers to access the most relevant comparison shopping services. The EC pointed out that users tend to consider that highly-ranked search results are the most relevant for their queries and click on them irrespective of whether other results would be more relevant in reality.

The EC noted that Google did not inform users that it prominently positions its own product by using different underlying mechanisms than those used to rank generic search results. Apart from that, even though a "sponsored" label appears in the Shopping Unit (where results from Google's comparison shopping service appear), that information is, in the EC's view, likely to be understandable only by the most knowledgeable users.[117]

The EC found that these conclusions were not called into question by Google's claims that the EC did not identify any competing comparison shopping service that has ceased to offer its service. The EC's view was that it is not required to prove that the conduct had actually led certain competing comparison shopping services to cease offering their services; rather, it was sufficient to demonstrate that it is capable of having, or likely to have, such an effect. Likewise, the absolute number of comparison shopping services that remain active was irrelevant. The EC noted that, in any event, it had produced evidence to show that Google's conduct decreases traffic to competing comparison shopping services and increases traffic to Google's own comparison shopping service.[118]

Fifthly, the EC rejected the objective justifications argued by Google. The EC stated that Google is not prevented from applying adjustment mechanisms to preserve the usefulness of its generic search results: the abuse concerns the fact that Google does not apply these mechanisms *in the same way* to its own comparison shopping service and to competing comparison shopping services. Neither did Google provide evidence to demonstrate that users do not expect search

[114] In particular, *Google Search* Decision, paras 381, 382, 389.
[115] *Google Search* Decision, para.386.
[116] *Google Search* Decision, paras 592–593.
[117] *Google Search* Decision, paras 594–600.
[118] *Google Search* Decision, paras 601–607.

services to provide results from other services. Apart from that, a requirement on Google to treat competing comparison shopping services no less favourably than its own comparison shopping service within its general search services did not generally prevent it from monetising its general search results pages.[119]

Finally, as regards the remedies, the EC stated that Google and its parent company, Alphabet, should be required to bring the infringement to an end. It was for the companies to decide in which way to do that. Any measure chosen by Google and Alphabet should, however, ensure that Google treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages.[120] In particular, any such measure should:

- apply to all devices, irrespective of the type of device on which the search is performed;
- apply to all Google users in the 13 EEA countries in which the EC had found that the abusive conduct takes place, irrespective of the Google domain that they use (including *Google.com*);
- subject Google's own comparison shopping service to the same underlying processes and methods for the positioning and display in Google's general search results pages as those used for competing comparison shopping services; and
- not lead to competing comparison shopping services being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement in question.[121]

Box 11

- **EC decisions—Article 102 TFEU and energy**
  - — *Greek Lignite and Electricity*:
    - * EC approves revised commitments to give competitors several lignite-fired units with related mines and personnel from PPC, instead of exploitation rights for four lignite deposits.
    - * In line with Greek environmental targets and EU targets to reduce CO_2 emissions.
  - — Revised *Gazprom* commitments approved:
    - * Far-reaching obligations on swaps and delivery point transfer between CEE countries (in the absence of linking pipelines).
    - * Far-reaching obligations on pricing, linking CEE prices to competitive benchmarks/ liquid hubs.
  - — *TenneT*—Proposal:
    - * Obligation not to discriminate against imports in electricity interconnector to favour domestic wind-based electricity.
  - — *Transgaz*—Proposal:
    - * Obligation to achieve infrastructure works at interconnection points to enable exports (and not discriminate on tariffs).

[119] In particular, *Google Search* Decision, paras 660–664. Google's arguments are set out in paras 654–659.
[120] *Google Search* Decision, paras 697–699.
[121] *Google Search* Decision, para.700.

Greek Lignite and Electricity

In April 2018, the EC made binding the commitments proposed by Greece to ensure sufficient access to lignite-fired electricity generation capacity for the competitors of Public Power Corporation (PPC), the state-owned electricity incumbent.[122]

Background It may be recalled that, in March 2008, the EC found that Greece had infringed arts 106(1) and 102 TFEU, by granting and maintaining in favour of PPC privileged access rights to lignite.[123] By the same decision, the EC called on Greece to propose measures to correct the anti-competitive effects of that infringement. The EC listed some examples but ultimately left it to Greece to select the measures to be adopted.[124] It also specified that if Greece revised its policy of allowing further exploitation rights on lignite deposits with a view to taking into account EU environmental policies as regards CO_2 emissions, the measures would have to be aligned with that revised policy.[125]

On receipt of that decision, Greece communicated a number of measures intended to ensure access by competitors of PPC to lignite and lignite-fired generation in the Greek electricity market. Those measures were made binding by an EC decision in August 2009.[126] However, owing to subsequent litigation before the GC and the ECJ, they were never implemented.[127]

This litigation came to an end with two GC judgments in December 2016, which upheld the 2008 and 2009 EC decisions.[128] As there were no appeals, these judgments became final and binding. After more than eight years, therefore, Greece still had to implement structural measures to address the competition concerns arising from the 2008 EC decision.

[122] With thanks to Georgia Tzifa. Decision establishing the specific measures to correct the anti-competitive effects of the infringement identified in the Decision on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation SA for extraction of lignite (Case AT.38700—*Greek Lignite and Electricity Markets*). EC Press Release IP/18/3401, 17 April 2018. The EC's summary is in [2018] OJ C245/3; the non-confidential version of the decision is available on the EC's website.

[123] Decision relating to a proceeding under Article 86(3) of the EC Treaty on the maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation SA for the extraction of lignite (case COMP/B-1/38.700—*Greek Lignite*). The EC's summary is in [2008] OJ C93/3; the non-confidential version of the decision is available on the EC's website.

[124] *Greek Lignite* Decision, para.248.

[125] *Greek Lignite* Decision, para.249.

[126] Decision relating to a proceeding under Article 86(3) of the EC Treaty establishing the specific measures to correct the anti-competitive effects of the infringement identified in the Decision on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for the extraction of lignite (Case COMP/B-1/38.700). The EC's summary is in [2009] OJ C243/5; the non-confidential version of the decision is available on the EC's website.

[127] PPC, supported by Greece, brought actions for annulment of both EC decisions in 2008 and 2009, which were upheld by the GC in *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (T-169/08) EU:T:2012:448; [2012] 5 C.M.L.R. 21, Judgment of 20 September 2012; and *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (T-421/09 RENV) EU:T:2012:450, Judgment of 20 September 2012. The EC then appealed and both judgments were set aside by the ECJ in *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* (C-553/12 P) EU:C:2014:2083; [2014] 5 C.M.L.R. 19, Judgment of 17 July 2014 and *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* (C-554/12 P) EU:C:2014:2085, Judgment of 17 July 2014. See also John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 123.

[128] *Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission* (T-169/08 RENV) EU:T:2016:733; [2018] 4 C.M.L.R. 26, Judgment of 15 December 2016; and *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (T-421/09 RENV) EU:T:2016:748, Judgment of 15 December 2016, in which the GC ruled on the remaining issues that had been referred back to it by the ECJ. See also John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016–2017: Part 2" [2018] I.C.C.L.R. 227, 228.

The 2018 EC decision In light of changes in its environmental policy since 2008–09 in line with EU requirements, Greece considered that it was no longer appropriate to resolve the market distortions created by the infringement with the measures accepted by the 2009 EC decision, which would lead to an increase in the use of lignite and the likely construction of new plants, besides those already operating and/or licensed.

For that reason, Greece officially proposed to the EC a new set of remedies (the "new remedies") in December 2017, aimed at replacing the measures in the 2009 EC decision. Consistent with the 2008 EC decision, these remedies aimed at opening the Greek wholesale market to competition *by divesting part of PPC's lignite-fired generation capacity*, so as to allow existing competitors or potential new entrants to compete with PPC on a level playing-field.[129]

Under the new remedies, Greece committed to procure PPC to divest *two divestment businesses*: the Megalopoli Divestment Business and the Meliti Divestment Business. To enlarge the number of potentially interested third parties, the new remedies foresaw that the two Divestment Businesses could be sold separately to different purchasers.[130]

Each Divestment Business comprised two lignite-fired electricity generation units, which would be divested together with all associated assets, licences and contracts (more specifically, three existing generation units, plus an option and licences to build a fourth). The personnel employed within the units would be transferred to the new owner. The Divestment Businesses also included the relevant mining exploration and exploitation rights on certain lignite mines, together with the associated mining infrastructure, the personnel employed in these mines at the time, and the main associated assets and contracts.[131]

In addition, to ensure that the purchaser of the Meliti Divestment Business would have sufficient lignite supply to operate the units, Greece committed to carrying out an appropriate procedure for the granting of mining, exploration and exploitation rights for part of certain lignite deposits that remained at the State's disposal. This Divestment Business also included PPC's lignite supply contracts with third-party mines.[132]

Overall, in terms of divested lignite-fired capacity, these Divestment Businesses represented, on average, up to 35.6% of PPC's total forecasted lignite-fired capacity over the period 2018–2035.[133]

In order to carry out the divestiture, PPC would have to design and run, based on a fair valuation, an international open tender procedure, under the supervision of a monitoring trustee and through means of an official publication of a call for tender by May 2018. To ensure a fair valuation of the Divestment Businesses, PPC would appoint an independent valuer subject to prior approval by the EC.

The appointed valuer would have to assess the value of each of the Divestment Businesses separately in the last phase of the tender process with a view to determining a fair value range for both of them. For the valuation of each Divestment Business, the valuer would also have to consider similar transactions

[129] *Greek Lignite and Electricity Markets* Decision, Recitals 18–21.
[130] *Greek Lignite and Electricity Markets* Decision, para.23.
[131] *Greek Lignite and Electricity Markets* Decision, paras 24, 26–27, 29, 31.
[132] *Greek Lignite and Electricity Markets* Decision, paras 32–33.
[133] *Greek Lignite and Electricity Markets* Decision, paras 28, 34–35.

which had happened in the last years and that PPC would carry a proportionate part of the decommissioning costs.[134]

By May 2018, Greece committed to procure that PPC would effectively implement all the necessary corporate measures and/or resolutions and that it would carry out the actual carve-out and/or spin-off of the Divestment Businesses. In addition, Greece committed to take all the necessary steps for the effective preparation of the divestment, including the adoption of all the necessary legislative, regulatory and corporate measures and/or resolutions as well as the official launch of the tender, including the adoption of special legislation to that end.[135]

The initial remedies were then market tested, with the EC sending a questionnaire on the viability and attractiveness of the Divestment Businesses and the market conditions in Greece to more than 80 potentially interested third parties, including companies operating outside Europe. It received 30 replies. 15 companies expressed an interest to buy one or both of the Divestment Businesses.[136]

The large majority of the responses were favourable to the new remedies. Some of the respondents also submitted comments aimed at improving their effectiveness, notably with regard to the management of potential congestion issues in the Megalopoli/Peloponnese area, the transfer of certain mining, exploration and exploitation rights, as well as the sharing of personnel and common infrastructure between a lignite-fired unit to be divested and a gas-fired unit to be retained by PPC.[137]

Following the market test, Greece submitted *revised remedies* in January 2018. In order to avoid congestion issues, the revised remedies foresaw that PPC's gas-fired unit Megalopoli 5 would operate at limited capacity until the completion of the first high-voltage corridor in the Peloponnese, which is expected to occur in 2019. The remedies also included more detailed provisions on the transfer of mining, exploration and exploitation rights and the sharing of personnel and common infrastructure between the lignite and gas-fired units in question.[138]

In its assessment, the EC noted that the revised remedies were appropriate and sufficient to address the competition concerns identified in the 2008 EC decision. The fact that they provided for the divestiture of part of the existing lignite-fired generation capacity instead of the opening of new lignite mines meant that PPC's competitors would have access to lignite-fired capacity in a relatively short timeframe. While the divested capacity available for third parties was below the 40% target established in the 2008 EC decision, the lignite-fired units included in the remedies had low variable costs and were among the most competitive ones on the Greek wholesale electricity market. In terms of efficiency and average emissions, these units were very close to the ones retained by PPC.[139]

The remedies were also considered to be proportionate vis-à-vis Greece and PPC.

As regards Greece, the proportionality of the 40% divestment target had been confirmed by the GC. That target still allowed PPC access to approximately 60%

[134] *Greek Lignite and Electricity Markets* Decision, para.36.
[135] *Greek Lignite and Electricity Markets* Decision, para.37.
[136] *Greek Lignite and Electricity Markets* Decision, paras 38–39.
[137] *Greek Lignite and Electricity Markets* Decision, paras 40–43.
[138] *Greek Lignite and Electricity Markets* Decision, paras 48–49.
[139] *Greek Lignite and Electricity Markets* Decision, paras 63–75, in particular, 64, 66–69. See also paras 25, 30.

of the exploitable lignite reserves in Greece. As noted above, the actual divestment share was lower. As for the legislative and regulatory measures that Greece had undertaken to adopt in relation to the divestment of the Divestment Businesses, these were strictly necessary to allow for the actual sale of the Businesses and, in the meantime, for the preservation of their economic viability, marketability and competitiveness.[140]

Finally, the proportionality of the remedies vis-à-vis PPC was ensured by their design, which preserved PPC's financial interests. Apart from the appointment of an independent valuer, the measures also provided that PPC may request improved financial offers from bidders and/or a fairness opinion by an independent party, so as to establish a fair market value.[141]

Gazprom

In April 2015, the EC sent an SO to Gazprom alleging that some of its business practices in eight countries in Central and Eastern Europe (CEE) (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia) constituted an abuse of its dominant market position.[142]

In March 2017, the EC published proposed commitments by Gazprom to address the EC's competition concerns, inviting third-party comments.[143]

After some negative comments, Gazprom offered revised commitments in March 2018. In May 2018, the EC adopted a decision, making Gazprom's revised commitments legally binding for eight years.[144]

The EC's preliminary view The EC's preliminary view is that Gazprom is a dominant gas supplier in markets for upstream wholesale supply of natural gas in these eight CEE countries, the relevant markets being defined as national. The EC found that there are barriers to entry, notably the barriers stemming from the available gas-connecting infrastructure which could give rivals market access. In addition, Gazprom's long-term contracts, together with take-or-pay obligations, may have reinforced Gazprom's dominant position.[145]

The EC's provisional conclusion was that Gazprom may have engaged in the overall strategy of fragmenting and isolating the CEE gas markets and restricting the free flow of gas across the CEE. According to the EC, such a restriction may have enabled Gazprom to charge higher prices since Russian-on-Russian gas competition was restricted.[146] Gazprom may also have abused its position by making gas supply conditional on investments in gas infrastructure.[147]

More specifically, the EC's preliminary view was that Gazprom implemented its strategy by imposing on its customers explicit contractual export bans and

[140] *Greek Lignite and Electricity Markets* Decision, paras 76–80.
[141] *Greek Lignite and Electricity Markets* Decision, paras 81–82.
[142] With thanks to Geoffroy Barthet and Álvaro Mateo Alonso. Article 27(4) Notice, para.2 [2017] OJ C81/9, 16 March 2017.
[143] These are available on the EC's website.
[144] EC Press Release IP/18/3921, 24 May 2018. Decision relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement (Case AT.39816—*Upstream Gas Supplies in Central and Eastern Europe*). The EC's decision of 24 May 2018 and the final commitments are available on the EC's website.
[145] *Upstream Gas Supplies* Decision, paras 34–36.
[146] *Upstream Gas Supplies* Decision, para.39.
[147] *Upstream Gas Supplies* Decision, para.3.

destination clauses as well as other contractual and non-contractual means having equivalent effect to territorial restrictions.[148] For example:

- expansion clauses stipulating that Gazprom had a right to increase the minimum annual quantity of gas in case a customer would re-export some of its annual gas quantity[149];
- in Bulgaria, a gas supply contract prevented re-exporting since the buyer was required to obtain Gazprom's agreement on the use of certain gas metering points each time gas would be exported from Bulgaria[150]; and
- Gazprom refused to change a gas delivery point on gas supply contracts which prevented the importation of gas into Poland during the 2009 gas crisis. The EC specified that the location of the contractual delivery point is important for a wholesaler's ability and business incentive to export gas to other countries. Hence, by refusing to change gas delivery points, Gazprom may have made it more difficult for wholesalers to bring gas to another gas market.

In its preliminary assessment, the EC also compared Gazprom's prices with its costs and noted that the Gazprom margin was large compared with competitive benchmarks.[151] The EC compared Gazprom's prices with prices quoted at liquid competitive Western European gas hubs (e.g. the Dutch TTF and German NCG hubs). The EC's preliminary finding was that Gazprom's prices may have significantly and persistently exceeded both hub prices. The EC also compared Gazprom's prices in the CEE with the prices provided in long-term contracts for the supply of gas in Germany where several upstream suppliers are present. The EC's preliminary finding was that Gazprom's prices in the CEE significantly exceeded the prices applied in Germany.[152]

Overall, the EC's preliminary view was that Gazprom may have pursued an unfair pricing policy under art.102(a) TFEU in the CEE by charging excessive prices compared with Western European price benchmarks. The EC further indicated that the oil price indexation formulae which were used by Gazprom to adjust prices in the CEE, and the absence of a clear reference to competitive price benchmarks in the price revision clauses, may have contributed to the unfairness of pricing.[153]

The EC's preliminary assessment was also that Gazprom may have been able to leverage its dominance to condition its gas supplies on it obtaining infrastructure advantages from its customers.[154] Notably, by imposing unconnected supplementary obligations on the Bulgarian gas incumbent, Gazprom may have acted in breach of art.102 TFEU. The EC's preliminary view was that the investment commitment imposed was neither necessary nor proportionate to achieve the objective of constructing the South Stream pipeline.[155]

[148] *Upstream Gas Supplies* Decision, para.40.
[149] *Upstream Gas Supplies* Decision, para.57.
[150] *Upstream Gas Supplies* Decision, para.58.
[151] *Upstream Gas Supplies* Decision, paras 69–70.
[152] *Upstream Gas Supplies* Decision, paras 72–74.
[153] *Upstream Gas Supplies* Decision, para.79.
[154] *Upstream Gas Supplies* Decision, paras 80–81.
[155] *Upstream Gas Supplies* Decision, para.86.

The EC further stated that the announced termination of South Stream changed neither Gazprom's past leveraging practice, nor the Bulgarian gas incumbent's potential liabilities, resulting from the obligation to participate in the project.[156]

The EC concluded that Gazprom may have leveraged its alleged dominant position on the wholesale gas supply market in Bulgaria in breach of art.102 TFEU.[157]

Proposed commitments in 2017 The main points of Gazprom's proposed commitments in 2017[158] were as follows:

While not agreeing with the EC's preliminary assessment, Gazprom committed:

- first, to remove: (1) all direct and indirect contractual restrictions that prevent its customers from reselling gas they have bought across borders; and (2) all clauses that reduce its customers' business incentives to resell gas, regardless of whether they make cross-border sales impossible or merely financially less attractive. Such clauses would not be reintroduced in the future[159];
- secondly, to ensure the introduction of reasonably required changes to its Bulgarian and Greek contracts, subject to the consent of its contractual counterparts, that are necessary for the conclusion of interconnection agreements between Bulgaria and other EU Member States[160];
- thirdly, to give relevant customers in Hungary, Poland and Slovakia the possibility of changing the delivery point of gas to Bulgaria and to the Baltic States, charging a fixed and transparent service fee. This is insofar as Bulgaria and the Baltic States lack access to interconnections with their EU neighbours[161];
- fourthly, to introduce competitive benchmarks, including Western European hub prices, into its price review clauses in contracts with customers in Bulgaria, Estonia, Latvia, Lithuania and Poland[162];
- fifthly, to increase the frequency and speed of price revisions[163];
- sixthly, not to seek any damages from its Bulgarian partners following the termination of the South Stream pipeline project[164]; and
- finally, as regards the Yamal Pipeline (between Western Siberia and Eastern Europe including Poland), the EC stated that the situation could not be changed by its antitrust procedure due to the impact of an intergovernmental agreement between Poland and Russia.[165]

[156] *Upstream Gas Supplies* Decision, para.87.
[157] *Upstream Gas Supplies* Decision, para.88.
[158] Case AT.39816, *Gazprom* Commitment proposal (14 February 2017); available on the EC's website.
[159] Commitment proposal s.II.1.
[160] Commitment proposal s.II.1.1, Article 27(4) Notice, para.9(b).b.
[161] Commitment proposal s.II.1.2, Article 27(4) Notice, para.9.c.
[162] Commitment proposal s.II.2.
[163] Commitment proposal s.II.2.
[164] Commitment proposal s.II.3, Article 27(4) Notice, para.9.e.
[165] EC Press Release IP/17/555, 13 March 2017.

Final commitments 2018 The final commitments involve many changes.[166] For example, as regards the commitment to facilitate gas flow to Bulgaria and the Baltic States:

- swaps are available on a *bi-directional* basis between Bulgaria and the Baltic States and a number of delivery points in the rest of the CEE;
- service fees for swaps have been reduced;
- Gazprom's customers can exercise these options for smaller quantities, i.e. 50 million m^3 (before, 100 million m^3); and
- the grounds for Gazprom to refuse a swap have been reduced to only if there is no free transmission capacity.[167]

As regards the commitment to introduce competitive benchmarks, the main modifications are:

- the commitment now covers contracts of *three years or more* (instead of four years or more) and contracts with *new customers*;
- customers can now request lower prices *immediately* after the introduction of the new price clause in their contracts;
- there is explicit reference to the price level of the *competitive Continental Western European* gas markets (e.g. the average weighted import border prices in Germany, France and Italy) and to the price level at the relevant, generally accepted, liquid hubs in Continental Europe (including the *TTF in the Netherlands* and *NCG in Germany*);
- new prices will apply *retroactively* from the date of the price revision request; and
- in case of disagreement, *arbitration must now take place in the EU* and take into account the Western European benchmarks described above.[168]

As regards Gazprom's commitment not to claim damages for Bulgaria's termination of the South Stream project (Bulgaria), this is legally binding for *15 years* (before, eight years).[169]

Gazprom also undertook obligations on gas quality to facilitate the integration of the Bulgarian Gas system with its EU neighbours.

Since the EC considered that Gazprom's revised commitments effectively removed its concerns, they were made binding.

TenneT—Proposed Commitments

In March 2018, the EC indicated that it had opened an investigation into the German high-voltage electricity grid operator TenneT, insofar as TenneT may have limited capacity in the electricity interconnector between Western Denmark and Germany,

[166] See generally, *Upstream Gas Supplies* Decision, paras 139–158. Case AT.39816, *Gazprom* Final commitments (15 March 2018); available on the EC's website.
[167] Final commitments s.II.1.2.
[168] Final commitments s.II.2.
[169] Final commitments s.II.4.

preventing Danish producers from selling electricity in Germany, contrary to art.102 TFEU.[170]

The EC preliminarily concluded that TenneT may have given priority access to its network to domestic electricity production, in particular, during hours when domestic wind-based electricity production is high, by limiting access to electricity coming via the interconnector with West Denmark (DK1) ("the DE-DK1 interconnector").

Then, shortly afterwards, the EC invited comments on commitments offered by TenneT to increase capacity on the electricity interconnector (while not agreeing with the EC's preliminary assessment).[171]

TenneT has proposed to ensure that the maximum capacity of the interconnector between Denmark and Germany would be made available to the market, while preserving the security of the German high-voltage electricity network. In particular, under the proposed commitments:

- TenneT would offer a minimum, guaranteed, hourly capacity of 1300 megawatts on the interconnector, corresponding to the capacity that can be made available on the interconnector under normal operating conditions;
- this minimum, guaranteed, hourly capacity would be reached following an implementation phase of up to six months;
- TenneT would only be able to reduce the capacity offered below the minimum guaranteed level in exceptional circumstances when required to ensure security of the high-voltage electricity network;
- these would be limited to: (1) outages of a critical network element; or (2) an emergency situation caused by insufficient countertrading or re-dispatch capacity to relieve network congestion or requests for assistance by another transmission system operator to maintain security of supply; and
- in such exceptional circumstances, the limitation should not exceed what is strictly necessary for TenneT to ensure security of supply.

The commitments would remain in force for nine years and a trustee would be appointed to monitor TenneT's compliance.

Transgaz—Proposed Commitments

In September 2018, the EC invited comments on proposed commitments by Transgaz, the State-controlled Romanian gas transport infrastructure operator, addressing concerns as regards *exports* of natural gas from Romania.[172]

The EC has concerns that Transgaz would have restricted exports of natural gas from Romania, in particular to Hungary and Bulgaria, by: (1) delaying construction

[170] Case COMP/AT.40461—*DE-DK Interconnector*. EC Press Release IP/18/2122, 19 March 2018.

[171] EC Press Release IP/18/2622, 27 March 2018; and Communication published pursuant to Article 27(4) Notice in Case AT.40461—*DE-DK Interconnector* [2018] OJ C118/20. The proposed commitments are available on the EC website.

[172] EC Press Release IP/18/5861, 21 September 2018; Communication published pursuant to Article 27(4) Notice in Case AT.40335—*Romanian Gas Interconnectors* [2018] OJ C342/2. The proposed commitments are available on the EC website.

of infrastructure for gas exports; and (2) making exports commercially unviable through increases in interconnection tariffs.

While denying any infringement of art.102 TFEU, Transgaz has offered:

- to increase export capacities from 0.1 billion cubic metres to some 4 billion cubic metres per year at three interconnection points with Hungary and Bulgaria and to guarantee such capacities as minimum firm (uninterruptible) amounts. Importantly, Transgaz is therefore proposing to commit *to achieve infrastructure works* at the three interconnection points to enable these minimum firm capacities[173];
- to ensure that its tariff proposal to the Romanian national energy regulator (ANRE) will not discriminate between export and domestic tariffs[174]; and
- to refrain from using other means to hamper exports as regards gas produced in Romania or transiting through Romania.[175]

The commitments would remain in force until the end of 2025, supervised by a trustee.

Baltic Rail decision

In February 2018, the EC put its decision in the *Lithuanian Railways* case on its website. In November 2017, the EC also published its summary.[176] This is the unusual case concerning track apparently dismantled to raise barriers to a freight competitor's market entry, which was described in last year's article (complete with the EC's explanatory diagram).[177] It appears that Lithuanian Railways claims that a deformation (track buckling) which made the track unsafe was behind its actions. The EC rejected the arguments as "objective justification".[178]

Sectoral reviews

Patent settlements

In March 2018, the EC issued its eighth report[179] monitoring patent settlement agreements, for the period between January and December 2016. During that time, generic and originator companies entered into 107 settlement agreements.

As in previous years, the EC confirmed that pharmaceutical companies continue to settle their patent-related disputes despite the EC's decision to closely scrutinise so-called "problematic" agreements that may limit market entry for generic companies and involve a transfer of value.

[173] Article 27(4) Notice, para.7.
[174] Article 27(4) Notice, para.8.
[175] Article 27(4) Notice, para.9.
[176] Decision relating to a proceeding under Article 102 of the TFEU (AT.39813—*Baltic Rail*) [2017] OJ C383/7.
[177] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016–2017: Part 2" [2018] I.C.C.L.R. 227, 262.
[178] *Baltic Rail* Decision, para.357.
[179] With thanks to Katrin Guéna. EC, *8th Report on the Monitoring of Patent Settlements* (9 March 2018)—the report is available on the EC's website.

The EC recalled that while "problematic" agreements made up 22% of all settlements during the period covered by the sector inquiry (2000–2008), their number decreased and stabilised at a low level; i.e. at 11% for the year 2016.

The EC announced that it may decide to continue its monitoring exercise to follow any future developments regarding patent settlements.

Selected policy issues

Box 12

- **Selected policy issues**
  - — Fair competition.
  - — Developing digital policy and enforcement.
  - — Competition and agriculture.

Fair competition

Recently, there has been a growing focus on the concept of "fairness" in EU competition law. The discussion has been revitalised by numerous public interventions by the EU Competition Commissioner, Margrethe Vestager, with commentators noting that

> "fairness has been mentioned in one way or another in more than half of the Commissioner's public remarks since 2014, and in numbers that will most probably top her three predecessors combined, before the end of her mandate".[180]

Although this notion is enshrined in the TFEU,[181] its recent resurgence has raised a number of questions. For example, does it mean that the EC is advancing a new theory of harm or at least a novel approach to the existing legal tests? How can "fairness" arguments be considered in competition law enforcement? Is there even a place for "fairness" in competition law, insofar as it is focused on efficient resource allocation, promotion of innovation and protection of consumer choice?[182]

With this in mind, it may be useful to review what appear to be the main ideas in the interventions by the Commissioner and the Director-General for Competition:

First, the Commissioner has stated that "talking about fairness does not create a new theory of harm". That is because "it [fairness] can be linked to almost everything … in different theories of harm you see different ways of interpreting what is fair and what is not fair".[183]

A new theory of harm would mean that fairness "would translate into a new legal term and that is not the point".[184] In other words, "fairness" is a notion that underpins EU competition law and is already taken into account in the existing legal tests. The goal of EU competition law enforcement is to ensure that "markets

[180] With thanks to Georgia Tzifa. D. Gerard, "Fairness in EU Competition Policy: Significance and Implications" (2018) 9 *Journal of European Competition Law & Practice* 211.
[181] See, for example, the Preamble of the TFEU, as well as arts 101(3) and 102(2)(a) TFEU.
[182] S. Rab, "Competition and fair play", *Competition Law Insight*, 9 May 2017, p.6.
[183] "Vestager defends concept of fairness in antitrust–Chillin' Competition 2017", *PaRR*, 25 October 2017.
[184] "Vestager defends concept of fairness in antitrust–Chillin' Competition 2017", *PaRR*, 25 October 2017.

work more fairly for consumers", which, in the Commissioner's view, ultimately leads to a fairer society overall.[185] This result would not come about by substituting the current legal framework with a "self-sufficient, generic legal [fairness] test".[186] On the contrary, enforcers should apply the existing precedents. The principle of fairness applies within those precedents, but does not supplant it.[187]

Secondly, in a Global Competition Law Centre (GCLC) conference on the subject this year, two dimensions of fairness were singled out as examples of how this notion permeates EU competition law:

- there is a *procedural notion of fairness*, referring, among others, to the impartiality of the decision-making of DG COMP and the rights of defence of the parties to competition enforcement proceedings; and
- there is the *substantive notion of "fairness"* enshrined in the Treaties, for example, in the text of art.102 TFEU.[188]

Thirdly, the concept of "competition on the merits", understood as equality of opportunity, also carries fairness implications.[189] As explained above, fairness considerations are already taken into account in the existing legal tests, particularly in excessive pricing and abusive discrimination cases, as well as in the context of the "meeting competition" defence.[190]

Finally, "fairness" also functions as a framing device to explain the outcomes of competition law enforcement to the wider world. The Commissioner's emphasis on it can therefore be understood as part of the effort to present and justify the competition law portfolio to a broader audience. By setting competition law enforcement in a wider social context, the Commissioner can go beyond the EU competition law community and explain to EU citizens what competition law does for them.[191] This appears to be the main reason why "fairness" has come so much to the fore recently.

Developing digital policy and enforcement

Clearly, digital economy issues are everywhere at the moment, driven by interventions by multiple competition authorities, themselves driven by the importance of the growing digital economy. There are also many useful articles.[192]

At EU level, in addition to the Google cases, it may be useful to highlight that, in March 2018, the EC appointed a panel of three university professors to advise the EC on future digital changes and on how they will affect markets and

[185] M. Vestager, "Fairness and Competition", Speech (Brussels: GCLC Annual Conference, 25 January 2018). A transcript of the speech is available on the EC's website.

[186] J. Laitenberger, "Panel on 'Fairness in Unilateral Practice Cases'—Introductory Comments" (Brussels: GCLC Annual Conference, 25 January 2018). A transcript of the introductory comments is available on the EC's website.

[187] Vestager, "Fairness and Competition" (2018). See also A. Riley, "Fairness: Undermining or enhancing EU antitrust law?" *Competition Law Insight*, January 2018.

[188] Laitenberger, "Panel on 'Fairness in Unilateral Practice Cases'" (2018).

[189] Lamadrid de Pablo, "Competition Law as Fairness" (2017) 8 *Journal of European Competition Law & Practice* 147.

[190] Laitenberger, "Panel on 'Fairness in Unilateral Practice Cases'" (2018).

[191] *MLex*, 21 September 2017.

[192] See, e.g. A. Capobianco and A. Nyeso, "Challenges for Competition Law Enforcement and Policy in the Digital Economy" (2018) 9 *Journal of European Competition Law & Practice* 19.

consumers, and challenge current competition rules.[193] The professors lecture in law, economics and data science at universities in Germany, France and the UK. They were expected to publish a report before the end of March 2019.

The EC also announced the organisation of a conference in January 2019[194] on the challenges of digitalisation for competition policy and asked interested parties to submit contributions[195] by the end of September 2018 on three topics:

- *data, privacy and artificial intelligence (AI)*: how to deal with data bottlenecks, privacy concerns in competition assessments and the competitiveness of AI;
- *digital platforms*: how should competition rules deal with leveraging and lock-in concerns due to platforms' market power; and
- *digital innovation*: how to preserve innovation in applying competition rules.

It is also important to recall the way in which regulation is developing in e-commerce—for example, the Geo-Blocking Regulation, which entered into force on 3 December 2018.[196]

EC report on competition in the agricultural sector

Finally, we note that, in October 2018, the EC published an interesting report on this topic.[197] The EC indicates that it has to provide such a report to the European Parliament and the Council under art.225(d) of the Common Market Organisation Regulation.[198]

The report is based on: (1) input from NCAs and others; and (2) EC studies into the producer organisations (POs) in the olive oil, arable crops and beef and veal sectors; and interbranch organisations.

The report shows that there have been many investigations by NCAs, in many cases concerning agreements between competing processors to set wholesale prices, or between processors and retailers to set the retail price. Other infringements related to agreements on output, information exchange or sharing of markets. Some practices related to co-operation among buyers vis-à-vis suppliers/farmers.

The report also notes action by some Member States to restrict imports from other Member States and action by NCAs against collective agreements to hinder sales from farmers in other Member States.

Other interesting points are as follows:

[193] Announcement of 28 March 2018, available on the EC's website.

[194] EC, "Daily News", *Midday Express*, 6 July 2018.

[195] Call for contributions available on the EC's website.

[196] Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence, or place of establishment with the internal market and amending Regulations 2006/2004 and 2017/2394 and Directive 2009/22 [2018] OJ L60/1.

[197] EC Press Release IP/18/6182, 26 October 2018, with links to the report and the related Staff Working Document: *Report on The application of the Union competition rules to the agricultural sector* COM(2018) 706 final; Staff Working Document SWD(2018) 450 final.

[198] Regulation 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Regulations 922/72, 234/79, 1037/2001 and 1234/2007 [2013] OJ L347/671.

- a reminder that parties may produce or process products jointly and, if their combined market shares are below 20% for the processed products, sell jointly under the Specialisation Block Exemption[199];
- the report outlines the derogations to art.101(1) TFEU for recognised POs; farmers and farmers' associations; and vertical co-operation in the supply chain by interbranch organisations;
- the report notes the *French Endives* judgment, described in Part 1 in last month's journal, in the General European Court cases section,[200] noting, in particular, that the co-ordination of volume and pricing policies as well as the exchange of commercially sensitive information *between* POs and their associations (APOs) are prohibited. Further, in certain conditions, art.101 TFEU may not apply *within* recognised POs and APOs to activities carried out therein. Notably, the practices concerned must be strictly necessary and proportionate to the objectives in the POs/APOs;
- the report notes the rules in the sugar sector which allow sugar processors and beet growers to agree to share value and losses between them, under certain conditions. The value-sharing clause is optional and should only be agreed between *one* sugar processor (i.e. not several processors) and beet growers at the same time. The parties also cannot fix prices for beet[201];
- the report notes a Latvian Competition Authority case where a joint processing agreement by two dairy co-operatives that included raw milk price-fixing was exempted under the national equivalent to art.101(3) TFEU[202];
- the report also notes a French Competition Authority case where five pig slaughterers were fined for agreeing on quantities of pork to be bought from farmers to lower the prices paid[203]; and
- processors were the entities most often involved in competition authority investigations.[204]

[199] Regulation 1218/2010 on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements [2010] OJ L335/43.

[200] *President de l'Autorite de la concurrence v Association des producteurs vendeurs d'endives (APVE)* (C-671/15) EU:C:2017:860; [2018] 4 C.M.L.R. 6 (*French Endives*) at [14]–[15].

[201] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [30].

[202] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [34].

[203] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [35].

[204] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [41].