

# Competition & Regulatory Newsletter

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## European Commission publishes Report on Competition Policy 2016

On 31 May 2017 the European Commission published its [Report on Competition Policy 2016](#) which covers the Commission's competition policy actions, legislative initiatives and enforcement decisions in the previous year, along with a [Staff Working Document](#) which sets out in greater detail the issues covered by the Report. The documents together set out key developments, including in State aid, the Digital Single Market, competition law enforcement and international co-operation.

### State aid

The Commission reports that the completion of the State Aid Modernisation (SAM) initiative<sup>1</sup> has led to increased transparency and legal certainty in the State aid sphere. In particular, transparency is promoted by the new rules requiring Member States to provide information on individual beneficiaries of State aid awards exceeding €500,000 within six months from the date of grant. In addition, in May 2016 the Commission published the "[Notice on the notion of aid](#)" as one of the last building blocks of the SAM. The Notice provides guidance to help public authorities and companies determine whether public spending falls within the scope of the EU State aid rules or not. This is intended to facilitate public investment, by assisting stakeholders in designing public funding that does not distort competition in the Single Market or crowd out private investment.

Another key cornerstone of the SAM - the new [General Block Exemption Regulation \(GBER\)](#) - was introduced in 2014 to simplify the procedures for granting aid by authorising without prior notification a wide range of unproblematic measures. The 2016 State Aid Scoreboard indicates that over 96 per cent of new measures (for which expenditure was reported for the first time in 2015) were covered by the GBER, representing an increase of around 24 percentage points compared to 2013. According to the Commission, the surge

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<sup>1</sup> The SAM initiative was launched in 2012 in order to (i) foster growth in the internal market, (ii) focus on enforcement in cases with the biggest impact on the internal market, and (iii) introduce more streamlined rules and faster decision-making.

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in aid exempted under the GBER demonstrates “an important reduction of red tape”.

The Commission also highlights that it has been active in taking action against illegal State aid granted by means of selective tax advantages. High-profile cases have included alleged aid granted by Ireland to Apple, by the Netherlands to Starbucks and by Luxembourg to McDonald’s, Amazon and GDF Suez (now Engie).

## The Digital Single Market

The Commission has in the past year taken various steps to boost competition and innovation across the Digital Single Market.

One development that the report discusses is the Commission’s [preliminary findings](#) in the e-commerce sector inquiry, which were published in September 2016. The [final report](#), which has since been published in May 2017, largely follows the Commission’s initial conclusions. Following an extensive fact gathering exercise, the Commission has confirmed the growing significance of e-commerce, but has also identified certain business practices that may limit competition in this area, in particular in relation to online sales of consumer goods and copyright licensing agreements. As part of its sector inquiry, the Commission investigated the practice of ‘geo-blocking’.<sup>2</sup> In March 2016 the Commission published its [initial findings](#) on geo-blocking, which found that the practice is widespread in e-commerce throughout the EU, especially for digital content, and in May 2016 it adopted a [proposal for a Regulation](#) intended to address geo-blocking and related practices.

In addition, the Commission flags that it considers preserving competition and innovation in the search engine market to be one of its enforcement priorities.

## Enforcement of EU competition law

In December 2016 the Commission adopted a [Communication](#) on “EU law: Better results through better application” aimed at ensuring the effective application, implementation and enforcement of EU law across all policy areas. In its Report, the Commission highlights several areas where it has recently taken enforcement measures, including:

- (i) The transport sector. Examples include: (i) a Statement of Objections in October 2016 to Brussels Airlines and TAP Portugal in relation to their codeshare agreement on passenger services between Brussels and Lisbon; (ii) an investigation beginning in November 2016 into whether the Czech railway incumbent České dráhy, a.s. charged prices below costs with the aim of shutting out competition; and (iii) fining truck producers in July 2016 a record of €2.9 billion for co-ordinating the prices of heavy and medium trucks;
- (ii) Concentrated markets, including the crop protection market. In 2016 the Commission opened two in-depth investigations into proposed mergers in this sector: Dow/DuPont and

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<sup>2</sup> Geo-blocking refers to business practices whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper’s location or country of residence.

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ChemChina/Syngenta (each cleared subject to conditions in March 2017 and April 2017 respectively);<sup>3</sup>

- (iii) The financial sector, with examples including (i) the ongoing investigation into MasterCard's and Visa's inter-bank fees in relation to payments made by cardholders from non-EEA countries; (ii) the prohibition of the proposed merger between Deutsche Börse and the London Stock Exchange in March 2017; and (iii) the €485 million total fine imposed on three banks in December 2016 for participating in a euro interest rate derivatives cartel; and
- (iv) Energy and waste management markets. Examples include: (i) an in-depth investigation beginning in January 2016 into Halliburton's acquisition of oilfield service provider Baker Hughes (the transaction was abandoned in May 2016); (ii) the continued investigation into the potential abuse by Gazprom of its dominant position in the supply of natural gas in Central and Eastern Europe; and (iii) fining Altstoff Recycling Austria in September 2016 for abusing its dominant position by blocking competitors from entering the Austrian market for management of household packaging waste (the first time under the current regime that the level of a fine was reduced as result of a party's co-operation in a non-cartel antitrust case).

## International co-operation

In order to ensure that companies encounter a stable, consistent and transparent competition enforcement landscape no matter where they conduct their business, the Commission continues to engage with competition authorities in Europe and across the globe.

Building on its [Communication](#) on "Ten Years of Antitrust Enforcement under Regulation 1/2003", the Commission has been looking at whether EU national competition authorities have all the power, resources and independence they need to effectively enforce EU competition law. In March 2017 the Commission published a [proposal](#) for a Directive (the so-called 'ECN+ Directive') to further empower national authorities and ensure consistency and effectiveness in their enforcement of EU antitrust rules. Amongst other things, the proposed Directive seeks to (i) provide national authorities with a set of core minimum investigative and enforcement powers; (ii) set a common legal maximum for fines for breaches of EU antitrust rules; and (iii) create a set of common leniency rules in order to encourage infringing companies to co-operate with the authorities.

At a global level, the Commission actively participates in competition-related international bodies such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN). The results of the Commission's engagement with the ICN in 2016 include the Merger Remedies Guide and the Cartel Working Group's Catalogue on Investigative Powers, aimed at ensuring effective international enforcement of competition law. The Commission also continues to negotiate at a bilateral level on competition and State aid provisions in Free Trade Agreements (FTAs). For example, in 2016 the Commission entered into negotiations on FTAs with Armenia, Mexico, Indonesia and the

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<sup>3</sup> A third major agrochemicals transaction, Bayer's proposed acquisition of Monsanto (announced in September 2016), is expected to be formally notified to the Commission in the near future.

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Philippines, re-opened negotiations with Mercosur<sup>4</sup> and made progress on negotiations with Canada and Japan to upgrade existing co-operation agreements with provisions for the exchange of information. The Commission also engages in technical co-operation with emerging economies that are developing their competition policy and enforcement regimes. For example, in June 2016 it entered into a Memorandum of Understanding with South Africa, which adds to those signed with all other BRICS countries in recent years.

## Other developments

### Antitrust

#### CAT issues fast track judgment against The Law Society for abusing its dominant position

On 26 May 2017 the Competition Appeal Tribunal (CAT) handed down its [judgment](#) in a damages claim brought by Socrates Training Limited, a provider of online training to law firms, against The Law Society of England and Wales. The case concerned The Law Society's Conveyancing Quality Scheme (CQS), an accreditation scheme for firms conducting residential conveyancing. In April 2016 Socrates filed a claim alleging that The Law Society had breached Chapter I and Chapter II of the Competition Act 1998 by requiring firms to obtain training for certain mandatory CQS modules exclusively from itself. On 16 May 2016 the CAT assigned the case to the fast-track procedure.

As regards dominance, the CAT found that although The Law Society was not considered to be dominant when the CQS was launched in October 2010, it came to hold a dominant position by the end of April 2015 after Nationwide Building Society joined a number of other mortgage lenders in making CQS accreditation a pre-condition for their panel firms. The CAT noted that once the CQS became a must-have product, potential competition from other suppliers of such training was actually or potentially impaired, and that this could discourage entry by other suppliers into this segment of the market. By mandating CQS member firms to obtain the training in mortgage fraud and anti-money laundering (AML) required for CQS accreditation exclusively from The Law Society, the CAT concluded that The Law Society had engaged in an abuse of its dominant position which could not be objectively justified. It reached the same conclusion in relation to the equivalent requirements for training in Financial Crime when this was introduced by The Law Society in April 2016. The CAT also concluded that the obligation to obtain the training required under the CQS in mortgage fraud, AML and, subsequently, Financial Crime, only from The Law Society breached the Chapter I prohibition as from the end of April 2015.

The CAT subsequently made an [order](#) granting Socrates capped costs and giving the parties two months to seek a settlement over the issue of quantum for damages. Separately, Socrates's application for indemnity costs to be awarded was [rejected](#) by the CAT.

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<sup>4</sup> Mercosur is South America's leading trading bloc. The EU is negotiating a trade agreement with its four founding members (Argentina, Brazil, Paraguay and Uruguay).

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This case is the first to be ruled on under the new ‘fast track’ competition disputes procedure, which came into force on 1 October 2015. The procedure was designed to be a quicker and cheaper option for resolving less complex private competition claims. Eligible cases allocated to the fast track procedure must be heard within six months of allocation and are subject to capped recoverable costs, with the CAT capping The Law Society’s and Socrates’s recoverable costs, at £350,000 and £200,000, respectively in [June 2016](#).

## State aid

### General Court rejects appeal against access to documents decision in Starbucks State aid case

The General Court has [dismissed](#) an appeal against the European Commission’s refusal to allow access to certain documents cited in its State aid decision against Starbucks in [October 2015](#). The applicant, Steven Verschuur, had previously applied to the Commission requesting access to various materials referred to in the decision, including observations provided by a competitor of Starbucks in response to an informal request by the Directorate-General for Competition (DG Competition) in the context of its State aid investigation. Mr Verschuur claimed access to these documents on the basis of a general [Regulation](#) granting public access to European Parliament, Council and Commission documents (Regulation (EC) No 1049/2001). Access under this regulation is, however, subject to certain limits based on public or private interest grounds, including refusal of access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits.

The General Court upheld the Commission’s refusal to provide the documents, concluding that these documents were covered by the general presumption, developed in European case law, that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities. In doing so it rejected the applicant’s contention that the competitor’s observations were not a response to the State aid opening decision and did not therefore come within the scope of this general presumption. The Court adopted a broad interpretation, holding that (i) the presumption covers access to ‘documents in the administrative file’ relating to a procedure reviewing State aid; (ii) it was therefore not restricted solely to responses to the State aid opening decision; and (iii) the documents supplied by the competitor “undoubtedly” formed part of the Commission’s administrative file within this meaning and were thus protected by the general presumption. Although the Court acknowledged that this presumption could be reversed by demonstrating a higher public interest that justified disclosure, in the present case the applicant had not put forward such arguments. The action was therefore dismissed as manifestly lacking any foundation in law.

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## General competition

### European Commission announces State aid dialogue and co-operation with Asian authorities

On 2 June 2017 the European Commission **announced** that DG Competition had signed a **Memorandum of Understanding** with China's National Development and Reform Commission (NDRC). The Memorandum is intended to start a dialogue between China and the EU on "how to best handle state intervention in the economy", with the Commission's press release stating that the dialogue creates a mechanism for "consultation, co-operation and transparency between China and the EU in the field of State aid control". Under the terms of the Memorandum, dialogues between senior officials are to be held at least once a year alternating between Brussels and Beijing, with the Memorandum set to run for an initial period of five years until June 2022. The announcement follows China's adoption of a Fair Competition Review System in June 2016, which aims to prevent the distorting impact of public policies on competition while maintaining fair market competition and promoting a unified market.

On the same day, the Commission also **announced** that it would be launching a wider technical co-operation programme with Asian competition authorities. The €5 million programme will address all areas of competition law and cover a number of countries in Asia, including China, India and the Association of Southeast Asian Nations (Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam). The Commission declared that the programme would allow the participating authorities to share experiences and best practice, with the aim of producing greater convergence in their approach to competition policy. It will fund a number of activities such as EU competition weeks held in Asian partner countries, competition summer schools in the EU and visits to DG Competition and national competition authorities in the EU Member States. Activities are expected to commence in the third quarter of 2017 and will run for an initial period of five years.

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