

Competition & Regulatory Newsletter

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European merger control and cartel trends in 2017

The European Commission publishes [cartel enforcement](#) and [merger control](#) statistics at regular intervals. This article looks back at the Commission’s activities in these two areas of competition law in 2017 and discusses recent trends.

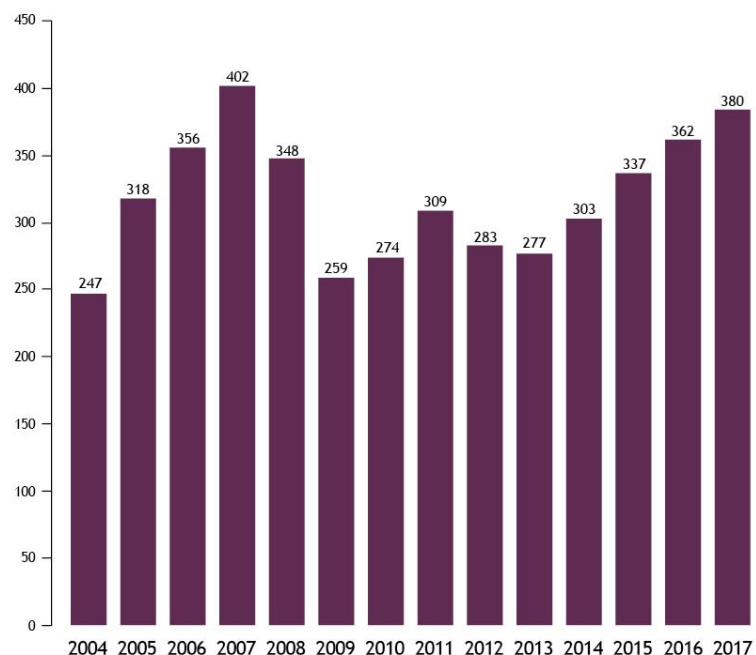
Merger control - notifications

In 2017 the Commission has seen the highest number of notifications in a decade, with 380 cases having been notified under the Merger Regulation. This represents a continuous upward trend which was initiated in 2013, reflecting a significant increase in the level of merger activity in Europe. However, it is still below the pre-financial crisis peak in 2007 (402 cases).

Further information (including statistics) can be found in the January 2018 editions of our relevant client publications: [The EU Merger Regulation](#) and [The EU competition rules on cartels](#).

Chart 1

Cases notified to the Commission (2004-2017)



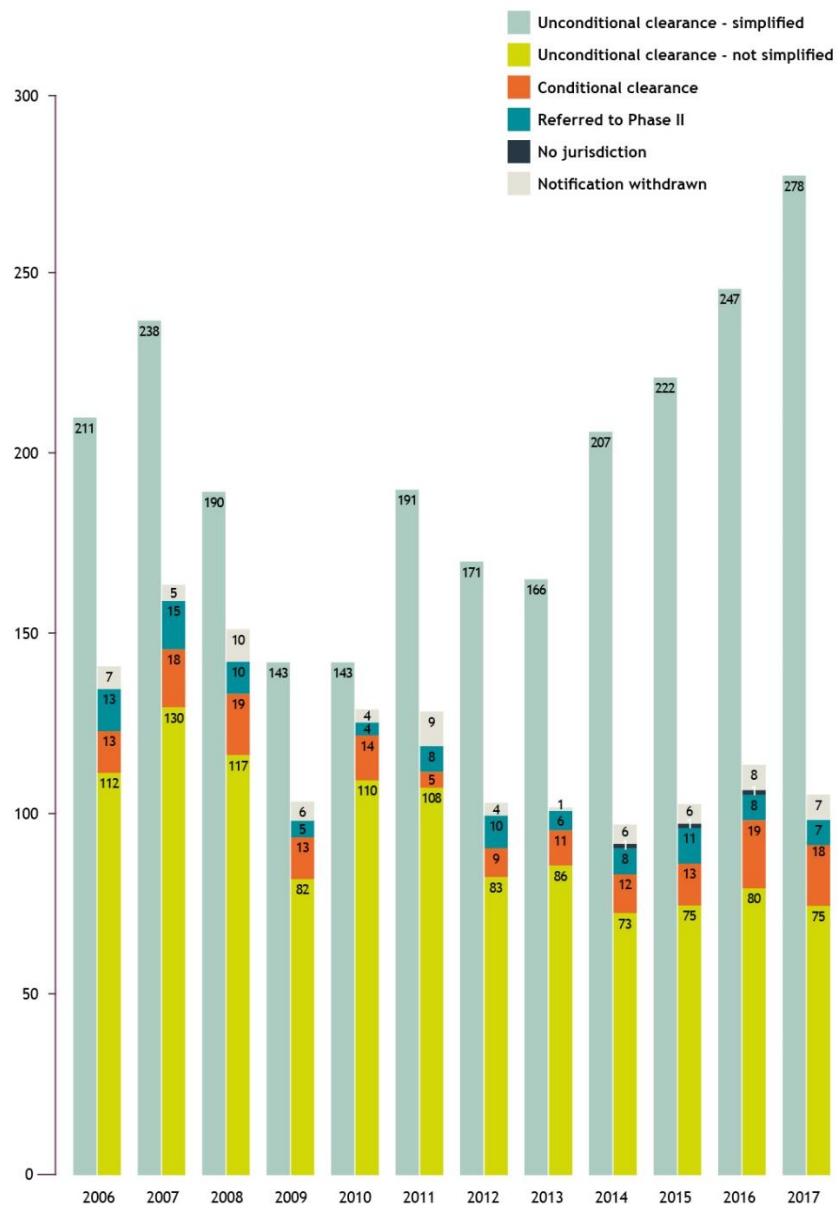
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Merger control - Phase I

There were 378 Phase I decisions in 2017. Of these, 93 per cent (353 decisions) were unconditional clearances, 5 per cent (18 decisions) were conditional clearances and 2 per cent (seven decisions) resulted in a Phase II investigation. A record number of 278 unconditional clearances used the simplified procedure, significantly more than in 2007 (238 cases); by contrast only 75 unconditional clearances were adopted under the non-simplified procedure, substantially down from 2007 (130 cases).

Chart 2
Phase I decisions (2006-2017)



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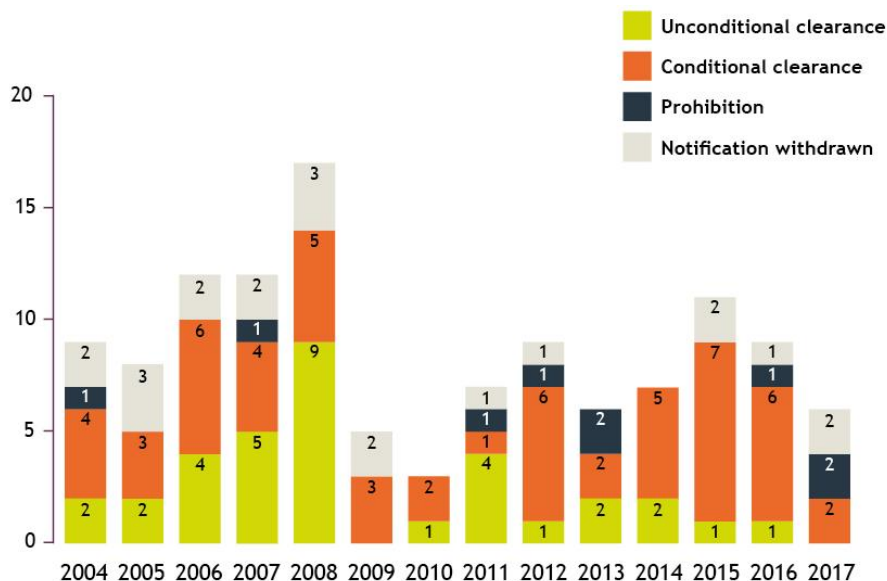
Merger control - Phase II

The seven transactions for which the Commission opened in-depth Phase II investigations were:

- *Monsanto/Bayer* (agrochemicals);
- *Knorr-Bremse/Haldex* (car parts - brake systems);
- *Qualcomm/NXP* (semiconductors);
- *Essilor/Luxotica* (optics);
- *ArcelorMittal/Ilva* (steel);
- *Tronox/Cristal* (chemicals - titanium dioxide); and
- *Celanese/Blackstone* (chemicals - acetate filter tow).

Chart 3

Phase II decisions (2004-2017)



2017 saw the adoption of only four Phase II decisions compared with seven the previous year. Two of those decisions were conditional approvals, namely *Dow/DuPont* (cleared on 27 March 2017) and *ChemChina/Syngenta* (cleared on 5 April 2017), which both involved the chemicals sector and which both required the divestment of certain European pesticide assets. The other two decisions led to prohibitions. In *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (prohibited on 5 April 2017), the Commission was concerned that the proposed transaction would reduce competition in the Croatian markets for grey cement. In *Deutsche Börse/London Stock Exchange Group* (prohibited on 29 March 2017), which would have created the world's largest stock exchange by total income, equities listings and derivatives trades, the Commission concluded the merger would have created a *de facto* monopoly in the markets for clearing fixed income instruments.

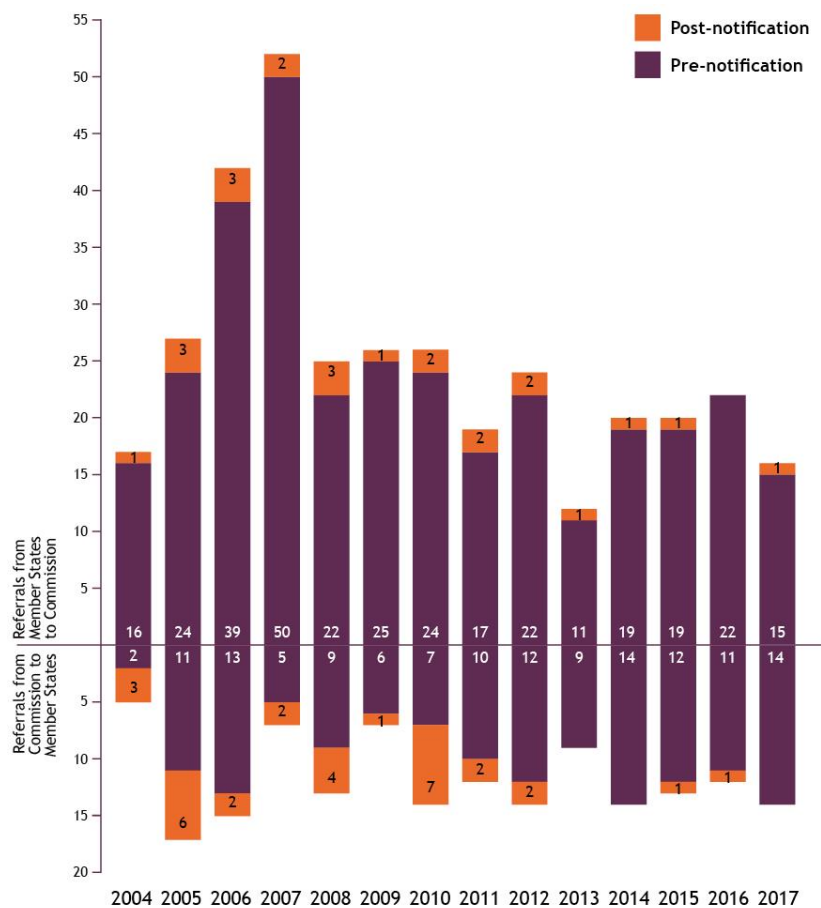
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Merger control withdrawals and referrals

Nine cases were withdrawn in 2017 - seven in Phase I and two in Phase II - which confirms the tendency of notifying parties to abandon their transaction rather than be subject to an adverse or unfavourable Commission decision.

There were also several referrals to and from Member States, including 29 under the pre-notification reallocation procedure (compared to 33 the previous year) and one under the post-notification reallocation procedure (the same as one in the previous year).

Chart 4
Referrals (2004-2017)



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Cartels

Since a peak of activity in 2014 (when 10 cartel cases were decided), the Commission in 2017 has maintained the same level of activity in cartel cases as in the previous year, taking a decision in seven cases against 31 undertakings.

Table 1
Cartel decisions (2017)

Date	Case name	Total fines
8 March 2017	<i>Thermal Systems</i>	€155 million
17 March 2017	<i>Airfreight</i>	€766 million
6 April 2017	<i>Car Battery Recycling</i>	€68 million
16 June 2017	<i>Paper Envelopes</i>	€4.7 million
21 June 2017	<i>Lighting Systems</i>	€27 million
27 September 2017	<i>Trucks</i>	€880 million
22 November 2017	<i>Occupant Safety Systems</i>	€34 million

Four of the decisions above - *Thermal Systems*, *Car Battery Recycling*, *Occupant Safety Systems* and *Lighting Systems* - are part of a series of major cartel investigations into the automotive parts sector, which so far have resulted in fines totalling €1.6 billion.

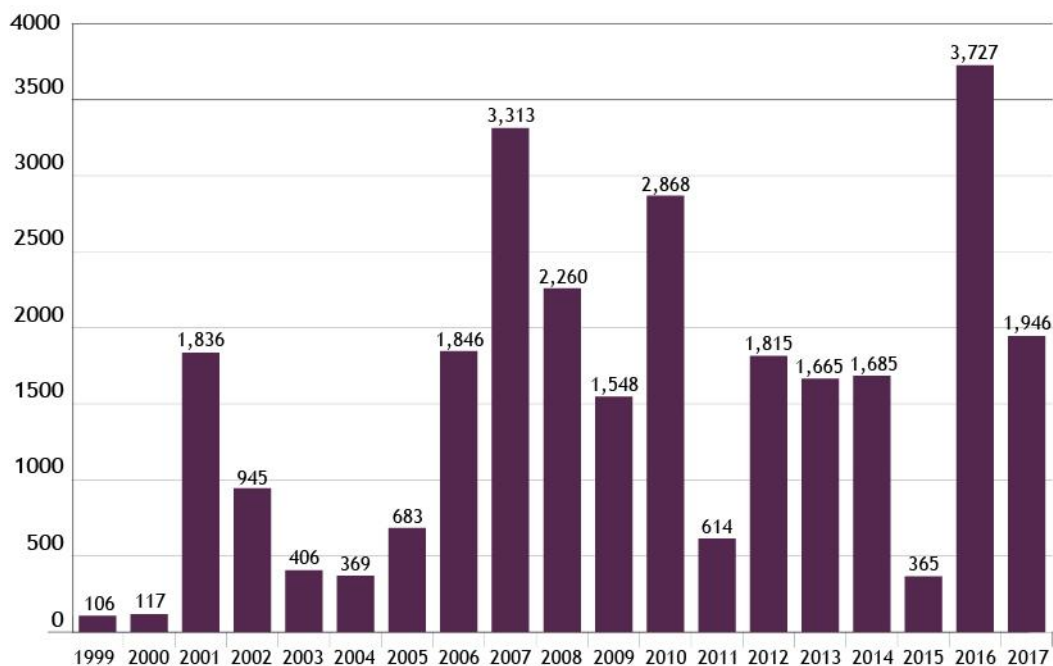
In 2017 the total amount of cartel fines amounted to €1.9 billion, down from the record high in 2016 (€3.7 billion).

The largest individual fine to be imposed last year was the €880 million fine against Scania, the only non-settling party in *Trucks*. Unusually, Scania chose not to cooperate with the Commission and did not receive a reduction in its fine under the Leniency Notice, nor under the settlement procedure. For more information about this case, see our [previous newsletter](#) on the subject. Four cases were settled in 2017 - *Occupant Safety Systems*, *Lighting Systems*, *Paper Envelopes* and *Thermal Systems* - bringing the total number of cases settled to 25 since this procedure was introduced in 2008.

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Chart 5¹

Total Commission fines imposed in cartels (€ millions) (1999-2017)



Looking ahead, a number of cartel investigations are ongoing. The Commission in October confirmed unannounced inspections concerning [online access to bank account information](#). Earlier in the year, it raided the premises of companies active in [ethylene purchasing](#), the manufacture of [kraft paper and industrial paper sacks](#) and [motor insurance in Ireland](#). However, investigations into [exhaust systems](#) and [bioethanol](#) were closed.

Competition Commissioner Vestager has signalled that the use of [algorithmic systems](#) to facilitate price collusion will be of interest to the Commission in the future. The Commission is also pressing forward with its [proposal for a directive](#) to make national competition authorities more effective enforcers by giving them a minimum common toolkit and effective enforcement powers. The proposed directive will, for example, enable national competition authorities to act independently without taking instructions from public or private entities and enhance their ability to impose fines and collect evidence. The proposal is now with the European Council and European Parliament for consideration.

¹ Amounts adjusted for changes following judgments of the General Court and Court of Justice.

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Antitrust

Singapore issues record fine to capacitor manufacturers

On 5 January 2018 the Competition Commission of Singapore (CCS) **imposed** a record-breaking fine of over SGD19.5 million (approximately £11 million) on five capacitor manufacturers (with one manufacturer receiving full immunity) for engaging in anti-competitive practices in the sale of aluminium electrolytic capacitors (AECs), including price-fixing and exchange of confidential information. AECs are electrical components used in electrical devices such as computers and other domestic appliances.

The manufacturers were respectively ELNA Electronics (S) Pte. Ltd., Nichicon Singapore Pte. Ltd., Panasonic Industrial Devices Singapore and Panasonic Industrial Devices Malaysia Sdn. Bhd, Rubycon Singapore Pte. Ltd. and Singapore Chemi-Con Pte. Ltd. (SCC). Panasonic was the leniency applicant and therefore received immunity from fines.

The CCS launched its investigation in May 2014 and found that, from 1997 to 2013, the parties systematically: (i) exchanged confidential and commercially sensitive information about the pricing of their products and future pricing intentions; (ii) discussed and agreed on sales prices, including various price increases; and (iii) agreed collectively to reject customers' requests for AEC price reductions. Such conduct reduced price competition between the parties (which together made up more than two-thirds of the Singaporean AEC sales market), limited customers' alternatives for AEC suppliers and allowed the parties to maintain their market share while sustaining price increases.

In imposing this record fine, the CCS took into account the parties' high combined market share, the homogenous nature of AECs and the long duration of the cartel. Since price is an important competitive element to homogenous products, the parties' conduct was considered to have had a significant adverse impact on consumers. Consistent with the CCS's Guidelines on the Appropriate Amount of Penalty (which came into effect in December 2016), each party's penalty consisted of (i) a base penalty, which reflects the seriousness of the infringement, multiplied by (ii) the number of years the party infringed the law.

This case provides useful insight into the practice of the CCS in determining financial penalties and is consistent with the current trend in competition authorities imposing increasing antitrust fines across Asia.

Court upholds Malaysia Competition Commission's first abuse of dominance decision

On 28 December 2017 the Malaysia Competition Appeal Tribunal (CAT) **upheld** the infringement decision by the Malaysia Competition Commission (MyCC) in June 2016, which marked MyCC's first abuse of dominance case since its establishment in 2012. The CAT upheld MyCC's financial penalty of RM2.27 million (approximately £420,000) and further increased this by RM4.14 million (approximately £760,000), taking the total fine to RM6.41 million (approximately £1.2 million). The increased penalty reflects the accumulated daily penalty for the continuation of the infringing conduct in the period from the date of MyCC's decision to the date of the CAT's judgment.

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In Malaysia, online foreign workers permit (PLKS) renewal applications can only be processed if the foreign worker's employer purchases three mandatory insurance policies (the Mandatory Insurance Policies). My EG Services Bhd (My EG) was previously granted the sole right to renew PLKS and its subsidiary, My EG Commerce Sdn. Bhd. (My EG Commerce), sold insurance policies, including the Mandatory Insurance Policies.

The CAT agreed with MyCC's findings that My EG and My EG Commerce abused their dominant position by: (i) essentially obliging users to purchase the Mandatory Insurance Policies from My EG Commerce; and (ii) requiring users who purchase any Mandatory Insurance Policy from a provider other than My EG Commerce to undertake extra verification steps in order to obtain their PLKS renewals. Users who did not purchase Mandatory Insurance Policies from My EG Commerce were hence treated differently from those who purchased Mandatory Insurance Policies from My EG Commerce.

This CAT judgment is a good result for MyCC and serves as a reminder for business players with dominant positions to remain vigilant to their practices and to ensure that equal treatment is given to all counterparties. It is also interesting that the CAT increased the financial penalty for the 18 months whilst the appeal was pending. It remains to be seen whether this could have the unintended effect of serving as a disincentive for parties to appeal the decisions of MyCC, particularly by smaller companies (e.g. in the context of a cartel decision) for which a daily fine could have a significant impact on their financial position.

State aid

Court of Justice rules that France, Ireland and Italy must recover State aid to alumina producers

The Court of Justice of the EU (CJ) recently published its rulings in three linked appeals, upholding the European Commission's 2005 [decision](#) ordering the recovery by France, Ireland and Italy of tax exemptions granted to certain alumina producers between February 2002 and December 2003.² The Commission had found that exemptions from excise duty on mineral oils granted by the three Member States to each of their sole alumina producers (Aughinish in Ireland, Eurallumina in Italy and Alcan in France) constituted unlawful State aid.³ It held that the exemptions, "*financed through State resources...confer[red] an advantage on the beneficiaries which are placed in a more favourable financial position than other undertakings using mineral oils in other industries or regions.*"⁴

In the twelve years since 2005, France, Ireland, Italy, the three alumina producers and the Commission have been engaged in a long-running legal challenge regarding the decision's validity. This has involved the General Court (GC) annulling the Commission's decision twice and, on further appeal each time, the

² The three appeals are [Case C-369/16 P Ireland v Commission](#), [Case C-373/16 P Aughinish Alumina v Commission](#) and [Case C-323/16 P Eurallumina v Commission](#), judgments of 7 December 2017.

³ Mineral oil is a fuel used in alumina production which, in turn, is used principally for the production of aluminium.

⁴ Commission Decision of 7 December 2005, paras. 59 and 60.

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CJ referring the case back to the GC. In 2016 the GC, contrary to its two previous annulment decisions, upheld the Commission's original decision.⁵

On 7 December 2017 the CJ dismissed the appeals against the GC's 2016 ruling, bringing an end to the protracted legal dispute. The practical effect of this ruling is that France, Ireland and Italy must now seek repayment of the tax exemptions granted to the three alumina producers. In dismissing the appeals, the CJ confirmed that a European Council decision authorising a Member State to introduce tax exemptions does not prevent the Commission from determining independently whether those exemptions constitute State aid. Among other things, the CJ also confirmed the GC's judgment that the Commission's delay in adopting its decision regarding the lawfulness of the tax exemptions did not give the parties a legitimate expectation that the Commission would not object to them.

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⁵ Joined Cases T-50/06 RENV II *Ireland v Commission* and T-69/06 RENV II *Aughinish Alumina v Commission*, Case T-56/06 RENV II *France v Commission* and Joined Cases T-60/06 RENV II *Italy v Commission* and T-62/06 RENV II *Eurallumina v Commission*, judgments of 22 April 2016.