POLITYKA INSIGHT | RESEARCH

(Un)Fair competition

Does EU competition law favour particular countries?

Key points

- The aims and values of the EU's competition policy cannot simply be equated with consumer welfare. In applying the Community's anti-monopoly law, the European Commission has to keep the broader objectives of the EU economic policy in mind, for example the building of a common market. Another element of the EU economic policy should also be cohesion, or levelling out the socio-economic differences between regions. To maintain cohesion and create a common market, the EU's competition policy must provide companies from the new EU countries with access to foreign markets. If the Directorate General for Competition [DG Competition] does not change its policy towards these countries, the disparity in wealth of the Member States will grow, which will translate into a decline in the competitiveness of the EU as a whole.

- A quantitative and qualitative analysis of the decisions of DG Competition points to the possibility of unequal treatment of the old Member States (which acceded to the Community before 2004) and the new EU, and their firms. The differentiation concerns the application of the EU rules on state aid and anti-monopoly law (prohibiting abuse of a dominant position).

- Companies from the countries which joined the EU after 2004 are trying to use thew EU anti-monopoly law to stop competitors from "abusing their dominant position" more than do companies from the old EU. DG Competition, however, rejects their complaints. This trend seems to be increasing – the last four failed complaints against abuse of a dominant position all came from the new EU countries. Taking the size of the economies of the Member States into account, the number of decisions finding an abuse of a dominant position by firms from the new Union, and the fines imposed, appears to be disproportionate to the number of decisions made against companies from the old EU. Since 2004, DG Competition has never sided with a company from a new member state where the case was about abuses by a firm from the old EU.

- The countries of the old EU are also given preference when it comes to the EU's state aid policy, the responsibility of the European Commission's DG Competition. Subsidies given by the old EU states go unchallenged by the Commission significantly more often than in the case of the new EU countries – both in terms of sums involved and the number of the Commission's recovery decisions. Where the Commission does challenge aid given by the old EU states, its decisions are enforced less rigorously than against new EU countries and the subsidies challenged by the Commission are less efficiently recovered. In addition, for reasons that are not clear, the Commission applies a unique legal instrument, an injunction – an order suspending aid – only to the new countries of the EU.

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1 | Research hypothesis

» The aim of this report is analysing the activities of DG Competition in terms of the "geographical" spread of the cases it tackles. The report is an attempt to answer the question of whether the old countries of the Community are privileged over the new EU countries. The "new" Member States are: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia (joined in 2004), Bulgaria and Romania (2007) and Croatia (2013). Most of the data analysed in the report does not include the latter (see: Methodological appendix).

» Since DG Competition has the power to initiate legal proceedings both against countries (state aid rules) as well as against companies (anti-monopoly regulations), we analyse these two aspects of the Commission's work. The year 2005 is taken as the starting point of the study – one year after the accession of ten of the new countries.

» This report arises from the evidence of unequal treatment meted out to the new countries of the EU and the treatment of firms from these countries by DG Competition. We start by setting out the main aims and values which guide the EU's economic policy. In chapters 3 and 4 of the report, we present a quantitative analysis of issues that may be indicative of unequal treatment. In chapter 5 we make a qualitative analysis of selected cases. In the concluding chapter 6 we draw conclusions from the analysis of qualitative and quantitative analyses and set these against the stated aims and values of the Union.

» A division between the "old" and "new" EU may be imperfect, but among the many possible ways of categorising the states, it was the most natural and precise – the structure and stage of development of the economies among most of the countries of the new EU are similar. At the same time we are aware that the states within these two groups can differ from one another – France, Germany and the UK are significantly different from Italy or Belgium in terms of the average proportion of aid granted to aid "recovered" (see. 4.2). In a globalised world it is difficult to define the "nationality" of a company clearly, but we try to "assign" it (see Methodological appendix). With the exception of "quality" (see chapter 5) we do not discuss the validity of the Commission's addressing specific cases, and only evaluate their "geographic" allocation (also in terms of procedural solutions applied by the Commission – see. 4.2).

2 | What is EU competition policy about?

2.1 | Aims of EU economic policy

Combating trade barriers

Ever since the setting up of the European Coal and Steel Community in 1951, the primary method of integration of the European countries was the building of a common market. According to the founders of the European Union, the building of economic entities as connected vessels would lead to political integration and to prevent another armed conflict between European countries. Initially, the authorities in the Community (from 1993 – the European Union) focused on removing barriers to trade between countries, primarily customs duties. Gradually, the European Commission and the European Court of Justice developed other principles on which the common market could rely. For it to work, it was not enough to eliminate customs duties, members of the Community ought also to remove non-tariff barriers to trade – such as hygiene regulations and quality specifications as well as taxes which discriminated against foreign companies.

Access to market as the key concept

It turned out over the years that in the fight against economic protectionism, the concept of "market access" was more useful than the prohibition of discrimination against foreign goods and services. Catherine Barnard notes that basing the EU common market rules on a discrimination test could be misleading – it assumed that citizens and firms from other countries were in "a similar position, whereas by definition they were not"[1]. Thus, for instance, in 1995 the European Court of Justice noted that a lawyer who wants to do business in another EU Member State does not have to meet all the criteria that are required from lawyers of the host country (such as a professional examination). The Court emphasised that the imposition by the host country of specific requirements for a foreign company may not be discriminatory in comparison with companies from that country, but they can still restrict access to the market in a manner contrary to the EU rules[2].

Economic cohesion

With the signing of the Single European Act in 1986, the "social and economic cohesion"[3] principle was introduced into the Community law. The development of the common market was to be "harmonious" and the Communities should reduce the socio-economic "disparities" between regions. The need to strengthen the economic cohesion of the EU is now underlined in art. 174 of the Treaty on the Functioning of the European Union (TFEU). Economic and social differences were offset primarily by financial transfers to the less developed countries and regions of the EU. However, success in the referendum on the UK's exit from the EU has raised questions about the effectiveness of the EU cohesion policy – according to many authors, social and economic inequalities are the main cause for increased populist sentiment in the Union[4].

2.2 | Aims of competition policy

EU has been protecting competition for sixty years

Anti-monopoly rules emerged in Europe at a relatively early stage in the development of the EU, and were already present in the Treaty establishing the European Economic Community in 1957. This Act delegalized agreements between private companies restricting competition (Article 85) and taking improper advantage of a dominant position (Article 86). The same prohibitions are currently incorporated in Articles 101 and 102 of the TFEU. EU competition protection is not a European novelty – anti-monopoly standards have a long-history starting with the American Sherman

1 Barnard, p. 19.

2 Judgment, 30.11.1995, case C-55/94.

3 Article 21, Single European Market Act, Official Journal of the European Communities, L 169/1.

4 De Grauwe.

KEY EVENTS

1890 passing the American Sherman Act in the US

1951 establishment of the European Coal and Steel Community

1957 establishment of the European Economic Community

1964 decision of the EC Commission in the case of Consten and Grundig

1976 first edition of the "Antitrust Law" by Richard Posner

1986 signing of the Single European Act

1993 entering into force of the Maastricht Treaty, establishment of the European Union

1997 the European Commission publishes Green Paper on vertical restriction

2004 ten new Member States join the European Union

2009 the European Commission publishes Commission's Article 82 Guidance

2014 Jean-Claude Juncker appointed chairman of the European Commission and Margrethe Vestager appointed competition commissioner

Act of 1890. Anti-monopoly regulations are currently in force in most countries in the world. Despite the prevalence of regulations, there has been an intense debate among economists and lawyers over the years about the aims and values they should serve.

Neo-classical competition policy

Over recent years the neo-classical school of competition policy, known also as the Chicago School, has been most popular. The name derives from the University of Chicago, where from the early 1970s the school's most prominent representative was Richard Posner. According to Posner, the ultimate goal of competition policy should be "to protect the long-term interests of consumers"[5]. Monopolies and cartels are detrimental if their functioning leads to lower total production and higher prices for goods or services. If the functioning of monopolies contributes to increased efficiency, competition policy should not protect less effective competitors. The concept of "consumer welfare" as the ultimate goal of law and anti-monopoly policy began to penetrate in the 1990s from the United States into the strategic documents of DG Competition. It appeared for the first time in the Green Paper on vertical restriction[6] in 1997, and in the 2009 Commission's Article 82 Guidance[7]. The latter document is still the main intellectual foundation for the Commission in cases against alleged monopolies.

Alternative aims of anti-monopoly policy

The Chicago School does not exhaust the spectrum of views on the aims and values that should guide competition laws and policies. Many authors stress that main purpose of competition should be to prevent monopoly abuse against smaller businesses. This was in fact the original purpose of the American Sherman Act: it was primarily intended to protect the proprietors of small businesses against the widely understood economic power of monopoly, which in the period of the industrial revolution "tended to be used in the interest of the favoured few rather than of the public"[8]. More recently, it has also been increasingly emphasised that competition law exists in order for consumers to choose between differentiated goods or services[9]. Some authors even argue that the purpose of anti-monopoly regulation can be to protect "competition itself" because its existence is conditioned by the proper functioning of liberal democracy[10].

2.3 | Aims of EU competition policy

The EU is not a state but rather an organisation whose basic objective is to overcome national barriers to the development of the single market. Therefore, the EU anti-monopoly policy should not be identified only with values which are guided by national competition rules. Authors who deal with the EU anti-monopoly law emphasise that it has to be interpreted primarily from the point of view of the common market. In this context one speaks of the "single market imperative"[11], which should always be present in discussions of the objectives of the EU anti-monopoly law. Furthermore, articles 101 and 102 of the TFEU, which prohibit anti-competitive agreements and abuse of a dominant position, explicitly state that these practices are contrary to the EU law only in so far as they may affect trade between Member States.

5 See Posner.
6 Green Paper on Vertical Restraints, 1997.
7 Article 82 Guidance, 2009.
8 Thorelli.
9 See Nihoul.
10 See Andriychuk, p. 11-26.
11 See Bailey, Whish, p. 51.

Access to foreign markets for entrepreneurs

A traditional – albeit partially forgotten – goal of the EU competition law was the opening up of national markets to the goods and services of entrepreneurs from other Member States. It was not by chance that one of the first cases under Article 101 TFEU concerned the opening of the French market to German electronic products (radios, televisions, dictaphones). In 1964, the Commission of the European Communities found an agreement between Grundig, the German electronics manufacturer, and Consten its sole French distributor, contrary to the Community anti-monopoly law. Both businesses wanted to prevent the French company UNEF from buying products in Grundig's German shops and selling them in France at prices lower than those offered by Consten. In 1966, the Court of Justice of the European Union[12] accepted the Commission's argument. Today it is emphasised[13], that the decision of the Commission and of the Court reflected not so much a desire to provide French consumers with cheaper products but rather the necessity of opening up French distributors to the German wholesale electronics market. The findings of the Commission and of the Court would not be changed by the argument that the agreement between the French and German companies was beneficial for consumers[14].

12 Judgment, 13.06.1966, joined cases 56 and 58-64.
13 See Fox, Crane, pages 200-206.
14 Consten claimed that without the guarantee of being the sole distributor of Grundig's products in France, it would not have the economic incentive to invest in its distribution network and promote the products so that this would ultimately hurt consumers.

Industrial policy and prohibition of public aid

Some authors point to another difference between American and European competition policy. In Europe, unlike the USA, one of the competition law's objectives is to "support and protect the small business sector, while protecting small businesses is seen as creating a competitive industrial environment"[15]. The EU's competition policy has an additional feature that makes it unique – article 107 of the TFEU prohibits Member States from subsidising firms operating in their territory. The law prohibiting public aid makes the Union a global phenomenon – one looks in vain for similar regulations in the United States, where the federal government cannot interfere with subsidies given to firms by individual states. The EU law on public aid serves primarily to build a single market, including the opening up of domestic markets to products and services from other Member States. The prohibition against subsidising indigenous companies does not allow them to strengthen their competitive advantage and thus opens up the markets to competition from other countries. Recently, the European Commission has also used its state aid competences to target tax avoidance by multinational corporations. In August 2016, Brussels decided that Apple's individual tax treaties with Ireland were illegal public aid. The Commission is also examining similar agreements which Starbucks and Amazon entered into with the Luxembourg government. Jean-Claude Juncker, chairman of the Commission, commented on this "social" role when he said it was "not right that one company can evade taxes that could have gone to Irish families and businesses, hospitals and schools"[16].

15 Jurczyk, p. 34.
16 Juncker.

3 | Does Brussels favour companies from the old EU?

3.1 | Commission's decisions in cases involving abuse of a dominant position

Analysis

According to the TFEU, anti-competitive practices of undertakings can consist in the use of "agreements that restrict competition" (Article 101 of the TFEU) or "abuse of a dominant position" (Article 102). In this report, we only analyse matters relating to Article 102 of the TFEU. The victims of anti-competitive agreements are primarily consumers rather than companies (of course when a company is a victim of an anti-competitive practise, consumers usually suffer in the end too).

In light of the Council Regulation No. 1/2003[17], in cases involving abuse of a dominant position, the Commission can conclude that there has been a violation of Article 102 of the TFEU and prohibit a dominant undertaking from engaging in certain market practices and impose a penalty on it ◎ (Table 1).

During 2005-2016, the Commission issued eight decisions that found abuse of a dominant position. The total penalties amounted to EUR 1.4 billion; on one occasion the Commission decided to waive the penalty. Companies from countries of the old Union have been fined three times, and the new EU countries – once (Romania). In two cases, penalties were imposed on companies registered and operating in the new EU (Poland, Slovakia) but controlled by the group based in a country of the old EU (France and Germany). In both cases, they were the dominant telecommunications companies belonging respectively to Orange and Deutsche Telekom. The penalties were primarily borne by the budgets of local telecommunications companies, so it is appropriate to state that they affected businesses in the new Union.

The Commission may also decline to make a finding that a company has infringed Article 102 of the TFEU and impose "commitments" if "the undertakings concerned offer commitments to meet the concerns expressed by the Commission in its preliminary assessment" (Article 7 of the Regulation 1/2003). For example, commitments on a dominant company may consist of providing infrastructure to competitors, licensing intellectual property rights or selling part of the dominant company's assets. During 2005-2016, the Commission issued 26 decisions imposing commitments[18]. In 14 cases, the decisions were addressed to companies from the old EU and 13 from non-EU countries (including 10 from the United States). In two cases, the Commission imposed commitments on companies in the new EU countries – in 2013 on the Czech energy company CEZ, in 2015 on the Bulgarian company BEH Fuel and Gas. Both of these cases were conducted by the Commission on ex officio basis.

Conclusions

Given the relative size of the economies of the old and the new Union, this analysis of the Commission's Article 102 TFEU decisions indicate an imbalance between the above two groups of countries. First, the ratio of the decision numbers adopting the sanction to impose commitments is definitely more favourable for the old EU countries ◎ (Chart 1). Assuming that dominant companies prefer that the Commission impose commitments and not a penalty, it appears easier for companies from the old EU to convince the Commission to resolve matters amicably.
Secondly, in light of the size of the economies of the old and the new Union, penalties on companies from the new Union seem to be disproportionately higher than those for businesses from the old Union ◎ (Chart 2). Thirdly, the Commission has not issued a single decision that rules in favour of a complaint from the new Union country against a company from the old Union.

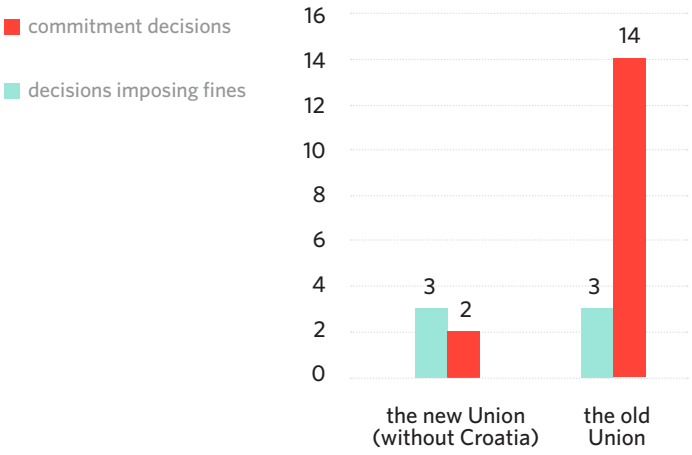
17 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

18 Analysis of the Commission's own decisions available on its website (see Methodological appendix).

TABLE 1: PENALTIES IMPOSED BY THE EUROPEAN COMMISSION FOR ABUSE OF A DOMINANT POSITION (2005-2016)

Date and decision number	„Origin" country of the dominant	Penalty amount	„Origin" country of complainant	Industry	Comments
2006 (38113)	Norway	EUR 24 million	Germany	waste recycling	exclusivity agreement of Tomra – supplier of machinery for the recycling of beverage packaging
2009 (37990)	United States	approx. EUR 1,060 million	United States	microprocessors	record penalty against Intel for using loyalty rebates
2007 (38784)	Spain	EUR 152 million	Spain, France	telecommunications	penalty against Telefonica for "margin squeeze" strategy
2011 (39525)	Poland, France	EUR 128 million	many countries, complainants were anonymous companies	telecommunications	obstructing competitors' access to the network by Telekomunikacja Polska (Orange Group)
2014 (39523)	Slovakia, Germany	EUR 39 million	many countries, including Slovakia, France	telecommunications	obstruction of access to the network by Slovak Telekom (Deutsche Telekom Group)
2014 (39984)	Romania	EUR 1 million	Germany	energy	penalty against Romanian Power Exchange for hindering access by the E.ON Group
2014 (39985)	United States	lack of penalty	United States	new technologies / telecommunications	Motorola patent abuse against Apple
2016 (39759)	Austria	EUR 6 million	Austria	waste management	obstruction by Alstoff of market access to the packaging waste recycling market

CHART 1: EU COMMISSION'S DECISIONS ON THE BASIS OF TFEU ARTICLE 102 (2005-2016)



Since 2004, the Directorate General for Competition has never sided with a business from a new member state. At the same time, the Commission sided with an undertaking from the old EU – in 2014, it punished the Romanian Power Exchange following a complaint lodged by the German energy company E.ON. However, it should be noted that it is not always possible to clearly determine whether Commission decisions have been issued as a result of a complaint or as the result of ex officio proceedings.

CHART 2A: AVERAGE GDP FOR THE OLD AND THE NEW UNION BETWEEN 2005-2015 (EUR BILLIONS, 2010 CONSTANT PRICES)

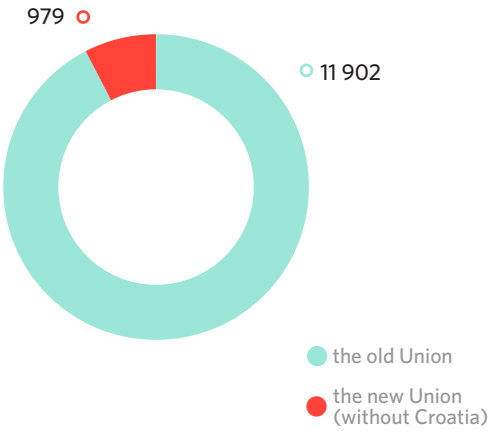
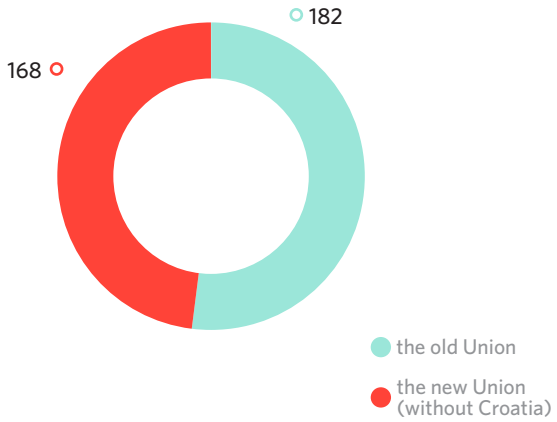


CHART 2B: TOTAL FINES IMPOSED ON THE OLD AND NEW EU MEMBER STATES FOR INFRINGING TFEU ARTICLE 102 (2005-2016, EUR MILLIONS)



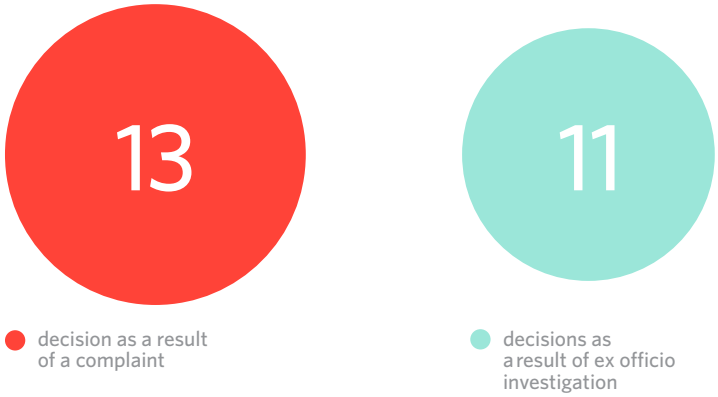
3.2 | Commission's decisions on complaints against abuse of a dominant position

Analysis

Unlike some (e.g. Polish) competition authorities, the European Commission can initiate a case not only ex officio, but also based on complaints brought by private entities. In cases involving abuse of a dominant position, these will mainly be complaints by competitors of the allegedly dominant firms. The legal framework for complaints against the violation of Article 101 of the TFEU (prohibited agreements) or Article 102 (abuse of a dominant position) is set forth in the Council Regulation No. 1/2003 and the Commission Regulation No. 773/2204[19]. Since the Commission acknowledges in the preamble to its regulation that complaints are the "fundamental source of information for detecting infringements of competition rules" – the Commission cannot ignore complaints, although it is not bound by any deadlines, when it comes to their resolution. To file a complaint, the company must demonstrate "legitimate interest" and in practice this is a formality. If the Commission does not agree with the complaint, it issues a decision to reject it, which can then be appealed to the Court of Justice of the European Union. Article 7 of the Regulation 773/2004 allows the Commission to "deem the complaint to have been withdrawn" if the complainant has not

19 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

CHART 3: EU COMMISSION'S DECISIONS ON THE BASIS OF THE ARTICLE 102 OF THE TFEU (INCLUDING COMMITMENTS), MAY 2004 – 2013



submitted its "views" to the Commission within the specified deadline. In practice, the request by the Commission to the complainant to submit an opinion is preceded by an exchange of correspondence. The Commission frequently suggests negative content of the planned decision to the complainant, thus exerting pressure on him to refrain from further communication, resulting in recognition of the complaint having been withdrawn. The DG Competition – referring to the case law of the ECJ[20]– also recognises that it may reject a complaint before the formal initiation of the procedure because of "different degrees of case priority"[21].

The Commission does not publish comprehensive data with the number of decisions taken as a result of complaints or as a result of ex officio proceedings. The Commission also did not want to provide us with this data under access to documents procedures[22], so the latest data covers the period from 1 May 2004 to 31 December 2013 ◎ (Chart 3).

DG Competition does not provide a comprehensive data on the number of rejected cases. Information on this subject can be obtained on the basis of the Commission's decision search engine located on its website ◎ (Table 2).

In total for 2005-2016, DG Competition received 17 complaints that were subsequently rejected by the Commission. In 14 cases, the complainants were businesses[23]. Four of the cases were intra-national disputes in which the complainant and the addressee of the complaint were from the same country (Spain, France, the UK, Ireland). In other cross-border cases: two businesses came from the old EU, the five were from new states, two from non-EU countries (Australia, Iceland), the origin of one case should be treated as Austrian-Polish (case 39864).

With regard to the nationality of the companies against which complaints were directed, in ten cross-border cases, only one company came from the new EU (Poland). In one case, we can point to some relationship with the new EU (Hungarian subsidiary of a Japanese corporation). In six out of ten cases involving cross-border businesses that avoided responsibility, the companies were based in the old member states.

20 E.g. ECJ judgement of 09.18.1992, case T-24/90.
21 Notice on handling complaints.
22 See more in Methodological appendix.
23 This includes athletes, although in exceptional cases they can be treated as businesses.

◎ **TABLE 2:** DECISIONS OF THE EUROPEAN COMMISSION TO REJECT COMPLAINTS FILED ON THE BASIS OF ARTICLE 102 OF THE TFEU (2005-2016)

Date of complaint / date and no. of the decision	"Origin" country of the company-addressee of the complaint	"Origin" country of the complainant company	Industry	Comments
2006/2011 (39461)	Spain	Spain	fuels	complaint of the association of petrol stations against too low fuel prices charged by suppliers
2007/2009 (39471)	several sports supranational organizations	unidentifiable natural person	sport	complaint against tennis player sports organisations (including ATP)
2007/2014 (39594)	France	Italy	electricity	wholesale power seller complaint against EDF
2009/2011 (39596)	the UK	the UK	air transport	Virgin Airline complaint against the incumbent carriers
2009/2010 (39653)	France	France	telecommunications	Vivendi's complaint against France Telecom alleging discrimination

Date of complaint / date and no. of the decision	"Origin" country of the company-addressee of the complaint	"Origin" country of the complainant company	Industry	Comments
2009/2011 (39732)	many countries (including Italy, Japan, Germany)	Australia	sport	complaint of a engine technology supplier against car manufacturers in Formula 1
2009/2010 (39784)	United States	Romania	software	see paragraph 5.3 of the report
2010/2012 (39771)	United States, United Kingdom (several companies)	Greece	book sales	distributor complaint against the British publishers of books (including Oxford University Press, Pearson)
2010/2015 (39864)	many countries (including Germany, the United States)	Poland and Austria	chemicals	complaint of a seller of plant protection alleging harassment in courts and offices by dominant competitors
2011/2014 (39886)	Ireland	Ireland	airports and air transport	Ryanair's complaint against Aer Lingus and Dublin airport
2011/2012 (39892)	France	Luxembourg (application of a natural person)	telecommuni-cations	consumer complaint against a dominant cable provider
2011/2014 (39921)	United States (several companies)	Iceland	payment services	application technology provider of payment against MasterCard, Visa and American Express
2013/2014 (40072)	Japan, Hungary	Slovakia	automotive	complaint of a distributor against a Hungarian daughter company of Suzuki (Magyar Suzuki Corporation)
2012/2014 (40080)	many countries (including Germany, France, United States)	Romania	retail	complaint of a local supplier against western FMCG producers and retail chains
2013/2014 (40105)	supranational organisation	Belgium (application of a natural person)	sport	footballer complaint against UEFA
2013/2016 (40169)	Germany	Slovakia	construction industry	see paragraph 5.2 of the report
2015/2016 (40291)	Poland	Slovakia	industrial technologies	complaint of a water treatment technology recipient against the termination of the contract by the Polish supplier

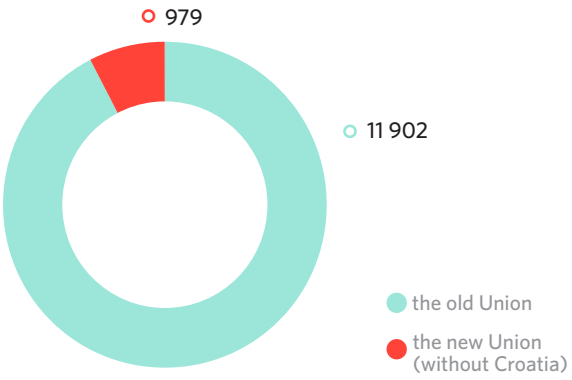
Conclusions

Businesses from the new EU countries complained unsuccessfully more often than those from the old EU countries against the abuse of a dominant position by competitors. Over-representation of complaints from member states which acceded after 2004 among the rejected claims is particularly evident if one takes into account the respective size of the national economies of the old and the new Union ◎ (Charts 4[24]). Moreover, the last four of rejected complaints came from the new EU countries, which may indicate an intensification of the trend described. In addition, information about the rejected complaints may be incomplete, since some of Commission decisions can still be edited (removal of company secrets). It should also be noted that part of the complaints have been "considered withdrawn" – so over-representation of companies from the new EU countries among the rejected complaints might be further underestimated.

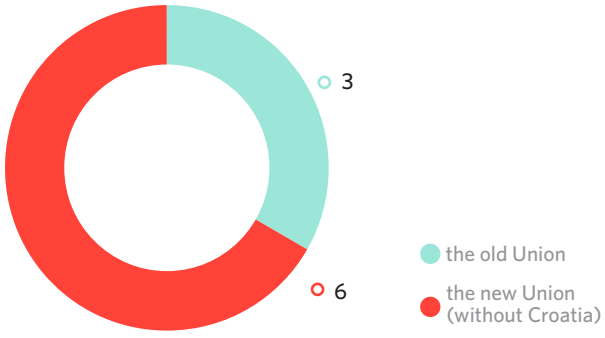
The analysis of cases in which the Commission rejected the complaints of companies from the new member states suggests that the Commission has relied on its Notice on handling complaints – that is, without a full examination of the complaint. In none of these cases did the Commission utilise its investigatory tools (such as inspections of documents or premises of the alleged dominant), although it has the right to do so before rejecting a complaint.

24 The data shown in the chart takes into account the average GDP for Romania and Bulgaria, but not for Croatia.

◎ **CHART 4A:** AVERAGE GDP FOR THE OLD AND THE NEW UNION BETWEEN 2005-2015 (EUR BILLIONS, 2010 CONSTANT PRICES)



◎ **CHART 4B:** ORIGIN OF THE REJECTED COMPLAINTS ON THE BASIS OF TFEU ARTICLE 102 (2005-2016)

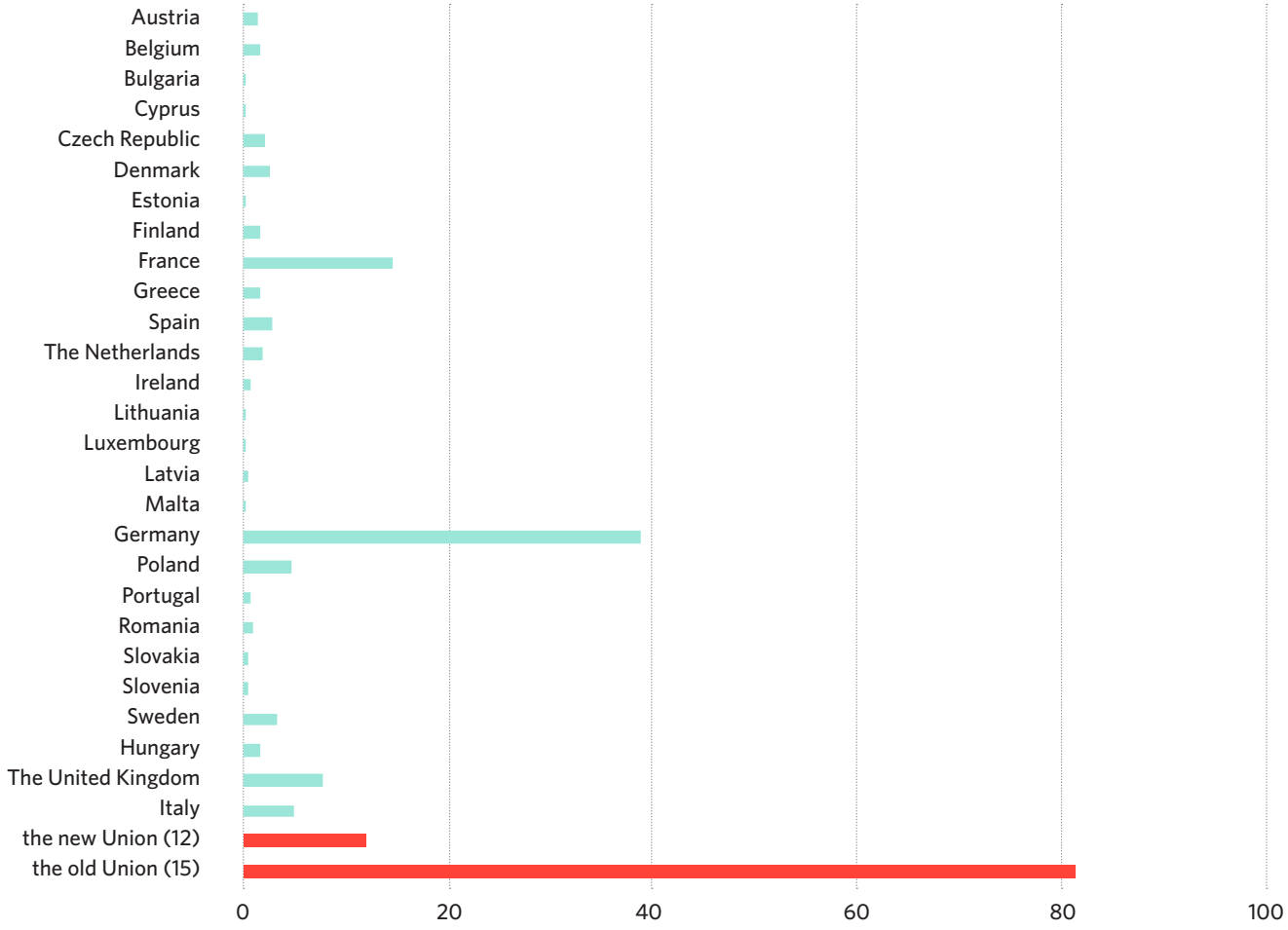


4 | Do the countries of the old Union more easily subsidise their companies?

4.1 | Which country provides the largest subsidies?

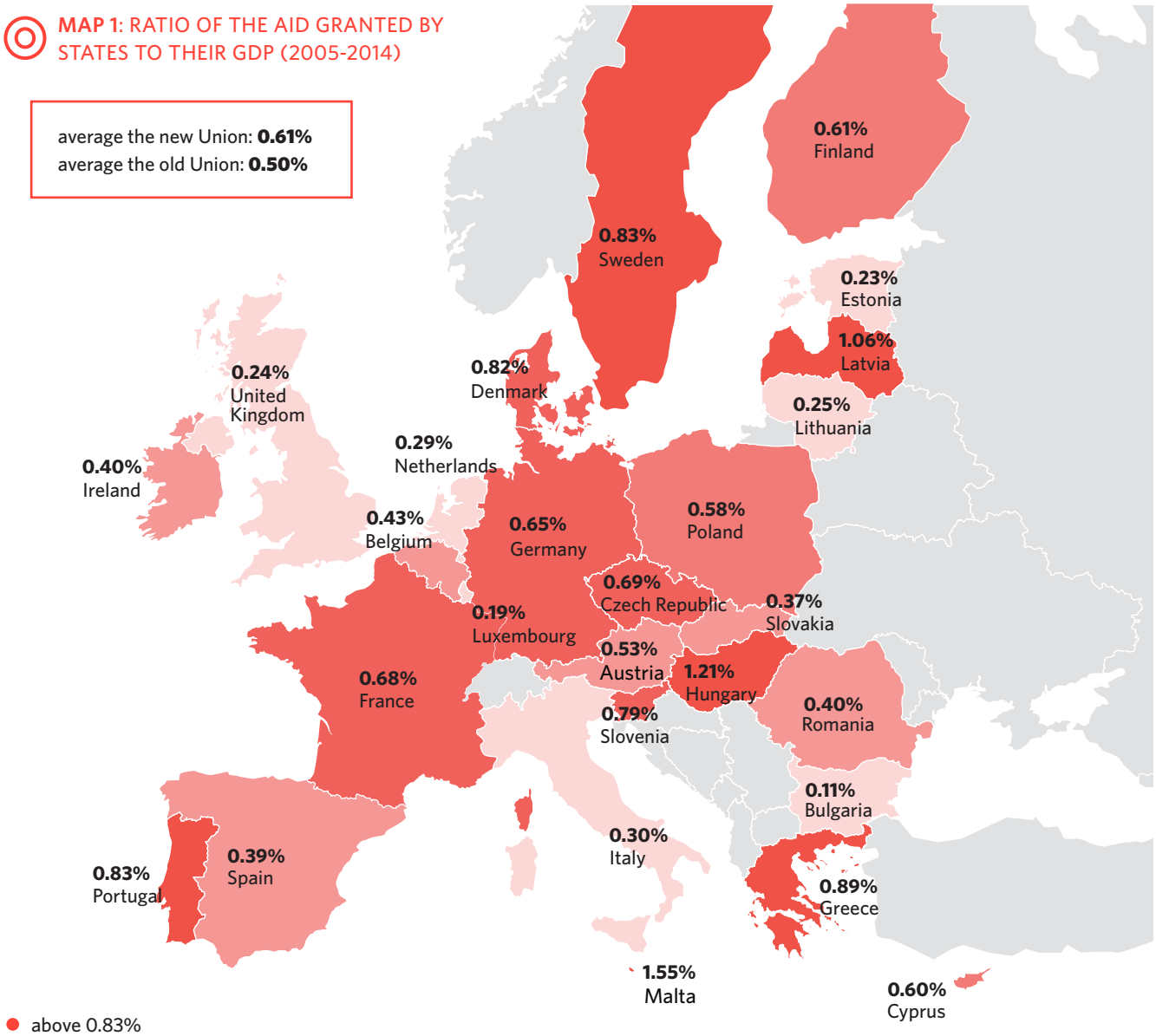
The DG Competition also verifies whether the member states grant businesses illegal subsidies – state aid. In the ban on aid set forth in Article 107 of the TFEU, public assistance is defined broadly: direct transfers of funds from the state budget to the company, state guarantees, selective tax exemptions and even capital involvement in an unprofitable company. Community provisions introduce, however, a number of exceptions "legalising" aid granted due to its purpose (regional aid for small- and medium-sized enterprises, environmental protection and research and development) or the value of aid (under the de minimis principle, aid is compatible with the EU law if the sum of subsidies for a company does not exceed EUR 200,000 over three years[25]).

CHART 5: STATE AID GRANTED BY THE EU MEMBER STATES IN 2014 (EUR BILLIONS)



25 Commission Regulation (EU) No. 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector, OJ L 352.

MAP 1: RATIO OF THE AID GRANTED BY STATES TO THEIR GDP (2005-2014)



Countries should notify the Directorate General for Competition on the intention to grant aid (Article 108 of the TFEU) – then the state should refrain from granting a subsidy until the approval of the Commission. Countries notify assistance in individual cases or the aid schemes. They do not have to report de minimis assistance or individual aid under an approved assistance scheme. Aid that meets the conditions for block exemptions[26] is reported under a simplified procedure. In 2012, the Commission proposed[27] a number of actions that would simplify the EU law and policy regarding state subsidies and to adapt it to contemporary conditions (the so-called state aid modernisation).

Based on Article 6 of the EC Regulation No. 794/2004[28] member states shall provide annual data on the aid granted to businesses. The Commission collates this data, adding information about the non-notified aid and publishes reports on the aid granted in the Union. Among the EU Member States, the greatest amount of aid in nominal terms is given by Germany ◎ (Chart 5). Taking into account the ratio of the aid to GDP in 2005-2014 ◎ (Map 1) the new countries of the Union provided companies with slightly more subsidies (0.61 percent) than the old EU member states (0.5 percent)[29].

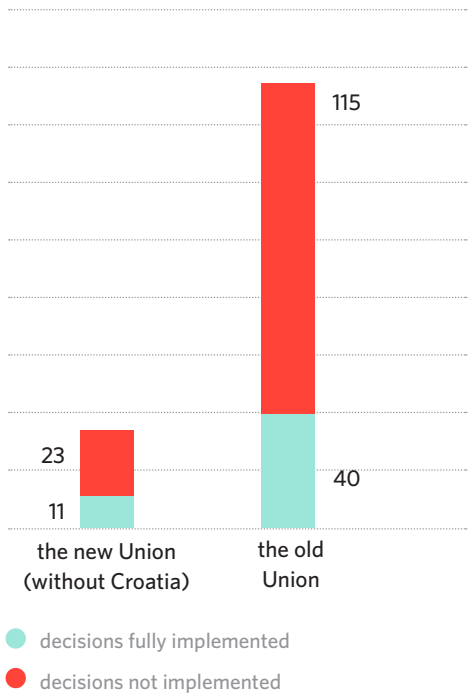
26 These conditions are mainly due to the Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187.

27 EU State Aid Modernisation.

28 Commission Regulation (EC) No. 794/2004 of 21 April 2004 implementing Council Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140.

29 Keep in mind that since 2014, data published by the Commission also includes subsidies paid under the EU funds, which are proportionately higher in the new EU countries (see Methodological appendix).

CHART 6: ADOPTED AID RECOVERY DECISIONS (TOTAL 2005-2016)



4.2 | Is the Commission more lenient towards countries of the old Union?

Member states do not always comply with their obligations under the EU state aid law. If the Commission determines that the country granted illegal aid, it may order a subsidy recovery. The basis for this action is the Council Regulation No. 2015/1589[30]. Recovery may involve, inter alia, charging a company the tax from which it was originally exempted or ordering repayment of a direct financial subsidy. In practice, recovery decisions are issued in two situations: when the state does not notify aid which is subject to notification to DG Competition, or when the aid is reported, but the state does not refrain from granting it while the Commission is reviewing the notification and in the end the Commission determines that the subsidy was contrary to the EU legislation.

Chart 6 shows the ratio of the total (2005-2016) number of recovery decisions issued by the Commission against various member states to the decisions fully implemented. Not complying with a decision is associated most commonly with filing proceedings against the Commission's decision to the ECJ or revocation of the decision by the Court, more rarely when a decision is ignored by the state. (Chart 6).

30 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248.

CHART 7: RATIO OF AVERAGE ANNUAL AID RECOVERED (2005-2016) TO AVERAGE ANNUAL AID GRANTED (2005-2014)

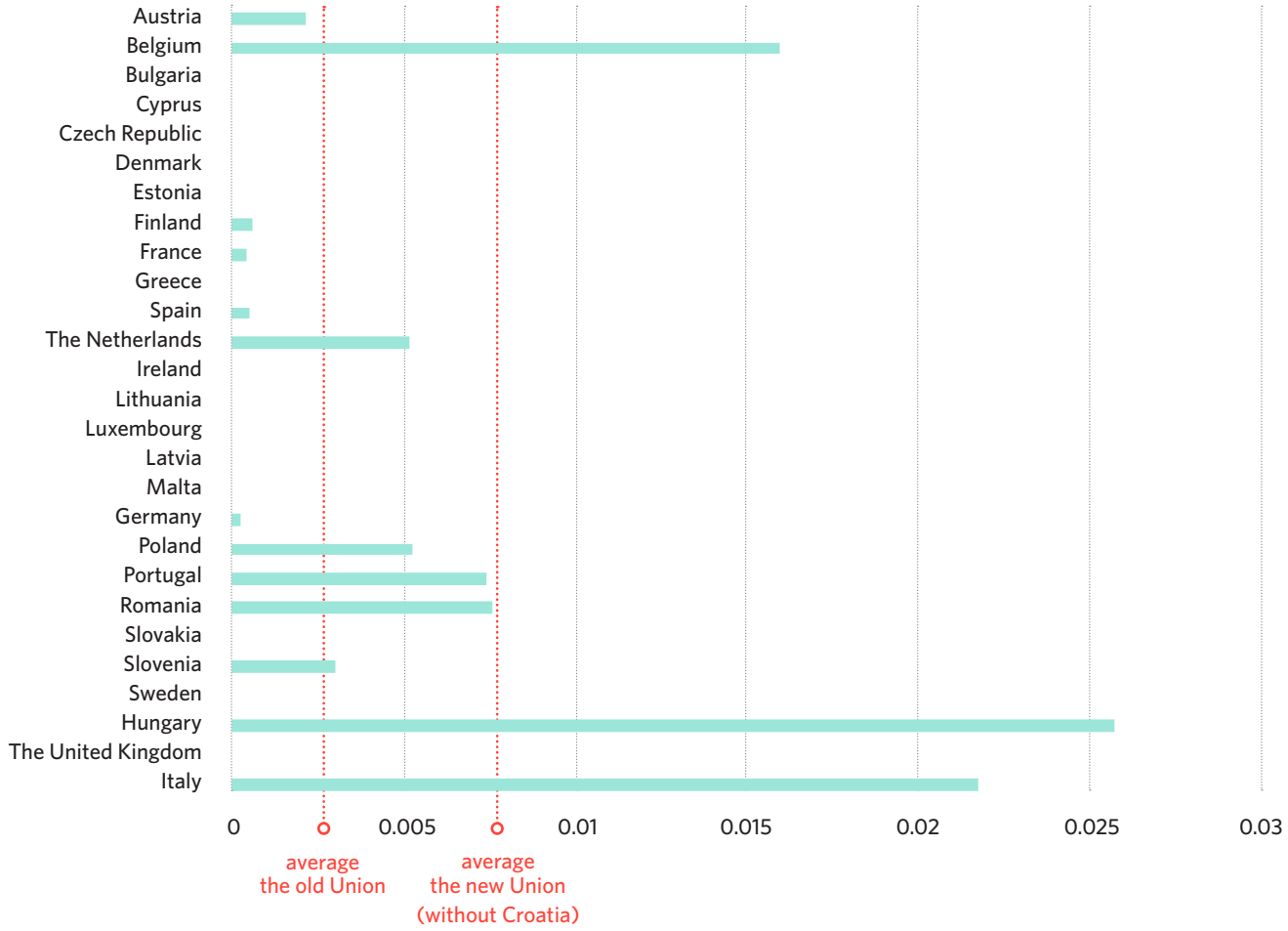


CHART 8: AID RECOVERED BY THE COMMISSION AND AID EFFECTIVELY REPAID BY UNDERTAKINGS (2005-2015, EUR MILLIONS)

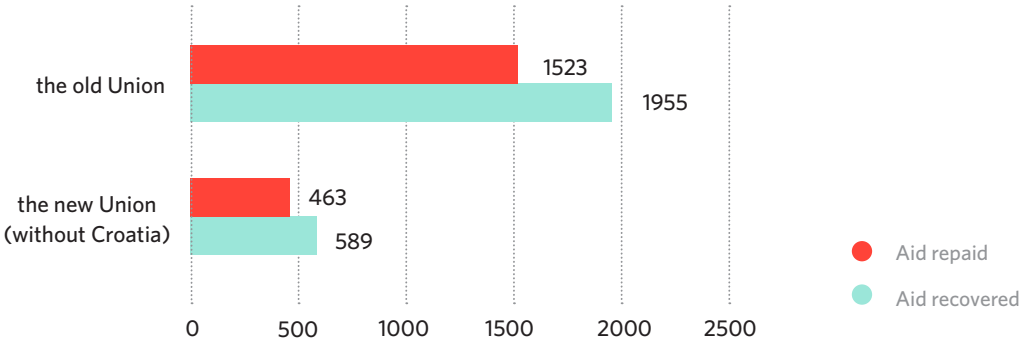


TABLE 3: SUSPENSORY INJUNCTIONS ISSUED BY THE EUROPEAN COMMISSION IN STATE AID CASES (2005-2016)

Date and decision number	State addressee of the decision	The beneficiary of the potential aid	Industry	Comments
2007 (41/2007)	Romania	Tractorul	agricultural machinery	too low price obtained by the Romanian government in respect of privatisation (in return, the investor has committed to continue operations for 10 years)
2014 (SA.38517)	Romania	Ion Micula (natural person) and SC European Food, Starmill, Multipack	food	see paragraph 5.5 of the report
2015 (SA.39235)	Hungary	medium-sized media companies	media	see paragraph 5.4 of the report
2016 (SA.44351)	Poland	small and medium traders	retail industry	see paragraph 5.4 of the report

While recovering the aid, national legal instruments are used and the Commission is interested only in the aid being repaid. Governments can challenge recovery decisions with an appeal to the ECJ. Chart 7 shows the ratio of aid effectively challenged by the Commission (average for 2005--2016) to aid granted by member states (average for 2005-2014). The data is related to aid effectively challenged – that is, the ECJ or national courts have no proceedings under way, in which an attempt is being made to challenge the Commission's decision (Chart 7).

Governments cannot always recover the assistance that they granted. Often, full recovery is not possible, since the time of possible recovery is delayed by many years and those who received the aid may have already bankrupted. Chart 8 shows the total amount of aid effectively repaid to the amounts of aid recovered. (Chart 8).

The Commission may order the state aid "suspended" – i.e. issue a suspensory injunction regarding assistance, even before a full resolution of the case. However, according to the Article 13 of Regulation 2015/1589, this is an exceptional measure that can be used only if "urgent action is required" and "there is a serious risk of a competitor suffering serious and irreparable damage". Since 2005, suspensory injunctions were issued by the Commission only four times, in each instance – with respect to a new country of the Union (Table 3).

4.3 | Conclusions

From 2005 onwards, member states of the old Union granted about ten times more aid (on average EUR 61 billion per year) than the new EU countries (EUR 6.4 billion). The amount of assistance relative to GDP is slightly higher in the new EU (0.61 percent of GDP) than in old EU countries (0.5 percent of GDP). However, after aid granted to financial institutions (old EU member states granted substantially more such assistance) is added, this share would be on a similar level.

Analysis of data on the amounts of aid to be recovered indicates that the DG Competition challenged the aid granted by countries of the old Union much less frequently than assistance to the new EU countries (if we take into account the proportion of successfully challenged aid to total subsidies). Especially favoured are large countries: Germany, France and the United Kingdom. In 2005-2016, the countries of the old Union regained 0.27 percent of aid granted in 2005-2014. This ratio for the twelve countries of the new Europe (excluding Croatia) amounted to 0.77 percent, which means that these countries recovered about three times the amount of aid (in relation to the assistance granted) than the old EU member states [31] (Charts 9).

Although the old EU countries provide ten times more aid than the new EU countries, the Commission issued only five times as many recovery decisions (115), compared to the new EU countries (23)[32]. In addition, the old EU members execute Commission decisions less frequently – for 2005-2016, the ratio of the number of recovery decisions resulting in actual implementation to the total number of decision issued amounted to 37 per cent. In the case of the new EU countries, this was 48 percent. Probably, the old EU countries more often or more effectively challenge the decisions of the Commission in the CJEU.

New Union countries are slightly more effective at recovering the amount of assistance challenged by the Commission. In 2005--2016, they in fact recovered EUR 463 million from EUR 589 million in aid challenged, or 79 percent. For the old EU countries, this ratio was 78 percent – EUR 1.5 billion of aid recovered from the EUR 2 billion challenged. This ratio for the new EU countries would however amount to up to 100 percent, had it not been the case in 2008, where the Commission ordered Poland to recover EUR 146 million, and the government effectively recovered only EUR 20 million (public aid for shipyards in Gdynia and Szczecin). In addition, for unclear reasons, the Commission has only applied the unique legal instrument of suspensory injunction to the new countries of the Union.

31 For Romania and Bulgaria, data on aid granted and actually recovered encompasses the period of 2008-2014..

32 It should also be remembered that Bulgaria and Romania were not members of the Union in 2005 and 2006.

CHART 9A: AVERAGE ANNUAL AID VINDICATED (2005-2016, EUR MILLION)

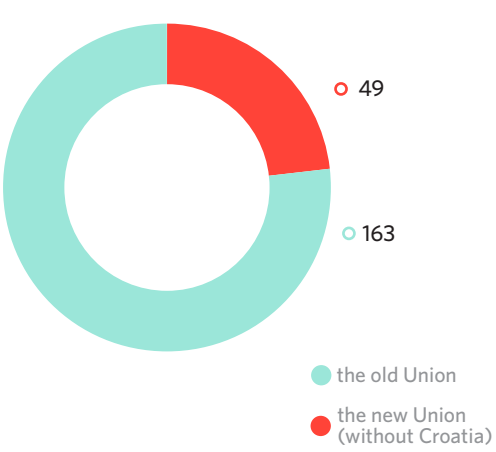
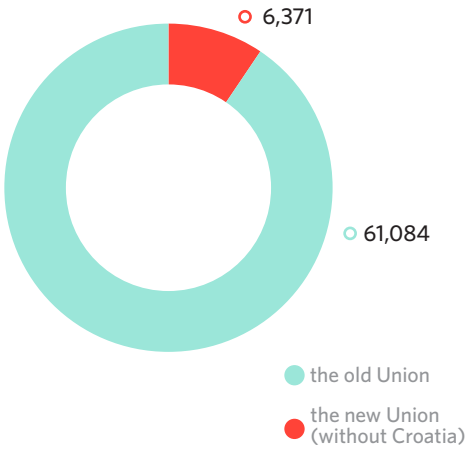
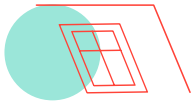


CHART 9B: AVERAGE ANNUAL AID GRANTED (2005-2014, EUR MILLION)



5 | Case studies

5.1 Poland: roof windows [33]



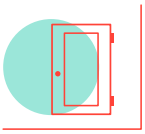
Fakro, a company based in Nowy Sącz, is the leader on the Polish roof window market. Most of its production is exported, which comprises 70 percent of the company's revenues. In the EU, the Polish company's market share is significantly lower than its main competitor – the Danish company Velux, which controls 70 percent of the European market, while Fakro's market share is 10 percent. For many years, the Polish manufacturer has been trying to increase its sales in Western European countries. The Polish company believes that the Danes block its access to the markets of roof windows and sealing collars in Germany and France, where Fakro only has a few percentage points of the market share. According to the Poles, the Commission should take into account the entire European market to assess the dominant position of Velux. Danes claim that their position should be assessed separately for each national market.

In July 2012, Fakro submitted a complaint to the European Commission arguing that Velux is abusing its dominant position, thus infringing Article 102 of the TFEU. The Polish company accused the Danes of offering loyalty rebates, the aim of which is to discourage distributors from purchasing Fakro products. In addition, the Polish company alleged that Velux had introduced so-called fighting brands (including RoofLITE) which do not generate profits, and their sole purpose is to undercut the market share of the competition. Fakro also said that in some European countries, Velux has applied prices that are lower than production costs – the so-called predatory pricing. To support the latter allegation, Fakro provided the expert opinion of one of the consulting companies, which on the basis of publicly available financial data and Velux pricing found that the Danish company charges prices that are below the average total costs in Bulgaria, Estonia, Great Britain, Poland, Lithuania, Slovakia and Hungary. In addition, Fakro accused Velux of concluding exclusivity agreements with some of its distributors. For nearly three years, the Commission's activity was limited to mediating an exchange of correspondence between the Polish and Danish companies. In December 2015, the Commission sent Fakro a letter of "intention to reject the complaint". Such a letter usually precedes a formal decision rejecting the complaint (see paragraph 3.2).

In their letter of 2015, officials of the Directorate General did not determine whether the relevant market for competition is the European market or the national markets. The Commission admitted that it "cannot exclude dominant position of Velux on one or more relevant markets" – but one cannot clearly determine its dominant position solely on the basis of market share, outside the "need to consider other factors". With respect to the allegation of applying loyalty rebates, the Commission considered it unlikely, because "in the member states where [the Danes] operate, the company has essentially the same discounts and bonuses". With regard to the accusations of the use of predatory pricing, the Commission referred to the lack of publicly available data. However, the DG Competition has not asked Velux to provide financial documents that would allow comparison of price and costs. The officials confined their analysis only to final comparative data prepared by the Danes. The Commission has acknowledged that prices below average total cost can be abusive, but only as "part of a plan to eliminate competitors". In the opinion of the Commission, Fakro did not provide, however, any evidence of a strategy to exclude competitors by Velux. Officials in Brussels did not specify how Fakro would get the evidence – in cases where the Commission considers that the actions of the dominant businesses are part of a „plan to exclude competition" appropriate evidence (e.g. internal e-mails) can be obtained through inspecting the offices and computers of the allegedly dominant company. In the described case, the Commission did not carry out such an inspection.

33 Case No. AT. 40026..

5.2 Slovakia: door fittings[34]



Hasta is a small Slovak company based in Žilina, where it is a wholesaler of components for the production and sale of peripheral fittings for doors and windows. In 2013, it filed a complaint against its main supplier – the German company Mayer & Co Beschläge. Hasta accused it of abusing its dominant position in the Czech, Polish and Slovak markets.

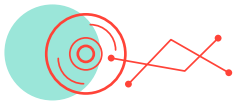
The Slovaks accused the Germans of the three categories of business practices that violate the EU competition law. First, Hasta claimed that Mayer forced it to apply resale price maintenance to its customers. In anti-monopoly law theory, use of such prices may have anticompetitive effects, because it prevents price competition between distributors, which translates into higher prices for consumers. Economists and lawyers discuss only whether maintaining resale prices should be illegal in all cases[35] or whether the illegality of such practices should be limited to situations in which the share of the supplier in the relevant product market exceeds a certain threshold – usually it is said to be about 30 percent[36]. Mayer applied rigid resale prices by a specific system of accounting for its distributors: wholesale price was higher than the resale price and the margin paid to distributors based on a "credit notes" issued by them at certain intervals. Through this mechanism, Mayer controlled distribution resale prices.

Another complaint of Hasta was its alleged discrimination by Mayer with respect to competing distributors – wholesale prices charged by the Germans to Hasta were higher than those charged to other distributors. In competition law, a business with a dominant position on the market cannot discriminate against its customers.

Finally, Hasta accused Mayer of territorially dividing the Central European markets. The Slovaks claimed that the German company has offered Hasta the status of Polish distributor, provided that it not distribute products to customers to which Mayer brand goods were sold by other Polish distributors. Obtaining the status of Polish distributor would also be dependent upon it refraining from re-export of these goods outside Polish territory. The division of markets between its distributors by a dominant undertaking, especially if it coincides with the territories of the member states, is a particularly sensitive breach of the EU competition law. It results in higher prices being paid by consumers and negates the very idea of opening and integrating national markets (see paragraph 2.3).

In March 2016, the Commission rejected the complaint of Hasta, relying primarily on the lack of priority given to the case (see paragraph 3.2). For Brussels, the decisive argument was a letter from the German company, which assured that its participation in the relevant market does not exceed 15-25 percent – so there is no dominant position. Officials of DG Competition had not conducted their own market research; in particular, they did not check whether the market dimension was European or national. The allegation of resale prices maintenance was found by the Commission as being unlikely. The heaviest allegation regarding market allocation was refuted by the Commission referring to the German company's statement that it most certainly does not have a dominant position.

5.3 Romania: software [37]



Omnis provides systems supporting business management (enterprise resource planning, ERP) and its headquarters is located in Bucharest. Omnis customers are primarily real estate companies, hotels and dining establishments (including the Bucharest branch of the „Hard Rock Café" restaurant)[38].

In 2009, Omnis filed a complaint against the US computer giant Microsoft, accusing it of a series of practices that were aimed at excluding Omnis from the Romanian market and gaining customers. The Americans had allegedly abused their dominant position against Omnis by denying access to software and intellectual property rights, discrimination of Omnis as compared to other Microsoft

34 Case No AT.40169.
35 The best legal and economic arguments for and against outlawing resale price maintenance were expounded by judges of the Supreme Court of the US in their decision of 2007 in Leegin Creative Leather Products v. PSKS (551 US 877). The Supreme Court departed from an absolute prohibition against resale price maintenance.
36 Such a presumption of legality for resale prices maintenance was introduced both by the EU law (Commission Regulation of 2010) and by Polish law (Council of Ministers Regulation of 2011).
37 Decision No. 39784.
38 http://www.omnis.ro/.

partners, and above all, entering into an agreement with the Romanian government, under which the Americans gained a monopoly on the Romanian market and could exclude competing ERP vendors.

In their response to December 2010 Romanian complaint, the Commission concluded that Microsoft's share of the ERP vendor market was so low that the company probably does not have a dominant position and is competing with companies such as SAP or Oracle. Brussels officials were not convinced by the Romanian claim that the market data relied on by Microsoft is unreliable because the company „hides" its domination and provides sales data that is not credible. The Commission did not examine the Romanian software market and restricted its research to the global and European market. DG Competition also briefly addressed the allegation that the agreement between Microsoft and the Romanian Government was contrary to the EU competition law. On the basis of this agreement, Microsoft obtained the status of the government's „strategic partner" – which meant the exclusive right to sell the software to state institutions. The Commission maintained that the allegation of the Romanian company, claiming the illegality of the agreement between Microsoft and the government should be reviewed under Romanian and EU government procurement law, not anti-monopoly law. This argument, however, is unconvincing, because in the theory of anti-monopoly law there is no doubt that winning a government tender may in some cases contribute to the strengthening of market power of the dominant company. Such strength can be subsequently transferred to other neighbouring markets[39].

5.4 Poland and Hungary: progressive turnover-based taxes [40]

In July 2016, the Polish Sejm passed a law on taxation of retail sales which was to be calculated from the amount of retail turnover and to become effective on 1 September 2016. The new law introduced a tax-free amount of PLN 17 million and had two rates: 0.8 percent for PLN 17-170 million monthly turnover and 1.4 percent for more than PLN 170 million. The tax was to be imposed on most retail stores: food, furniture, electronics and construction materials. Before the Polish tax offices were to have collected the first instalment of this levy in September 2016, the European Commission issued an injunction that suspended its implementation. The Commission claimed that the tax infringes EU rules on state assistance. According to Brussels, the progressive structure of the planned levy and the amount of exemption that smaller companies qualify for will result in their paying relatively less tax than large corporations and that "thousands of local stores" would be completely exempted. One of the government's arguments for the introduction of the tax was that it was needed to finance the 500+[41] social programme. The Commission concluded that Poland had not demonstrated that tax revenue would be allocated as payments under the 500+ programme. Moreover, the Polish government had not established a "link between childcare and the retail sector".

The Commission's intervention in the case of the Hungarian advertisement tax was of a similar nature. This tax was introduced in June 2014 and it was imposed on revenues of media companies derived from advertising. The tax was calculated on the basis of five rates (1, 10, 20, 30, 50 percent) and the taxpayers were permitted to deduct any losses incurred in previous years. In March of 2015, the Commission ordered Hungary to suspend the tax. It claimed that it may constitute illegal state aid, as it imposed higher rates on big media companies. In practice, by far the biggest taxpayer was to have been the German group Bertelsmann[42]. The Commission was not convinced by the arguments of the Hungarians, the progressive structure of the tax is justified by the greater „ability to pay" of large corporations. In the Commission's opinion, such arguments could justify a linear and not the progressive nature of the tax.

39 Sánchez Graells, p. 10.
40 Decisions No. SA39235 and No. SA44351.
41 According to the programme, a support in the amount of PLN 500 is given for every second and subsequent children.
42 We do not evaluate the policy of the Hungarian government under the rule of law standards. If the Hungarian tax advertising was motivated by a desire to harm media groups critical of the Hungarian government; the European Commission has other (legal and political) instruments in this area than competition policy.

The Commission's intervention in both Polish and Hungarian tax was precedential. Brussels ordered the suspension of the alleged aid on the basis of preliminary objections, without a full examination of the case, which is extremely rare (see paragraph 4.2). The Commission's argument is also of questionable validity, because it challenges one of the key elements of the state tax policy, i.e. the possibility of imposing progressive taxes, depending on the size of the taxpayer. Tax progression can be justified by redistributive goals. In the past, even before its enlargement in 2004, the Commission admitted that some provisions to mitigate the taxation of small- and medium-sized enterprises may have a similar basis as traditional tax progression. The Commission's questioning of tax progression[43] is paradoxical, because it is at odds with efforts of the current Competition Commissioner Margrethe Vestager, who is attempting to utilise competition regulations to fight income tax evasion by large corporations[44]. One could argue that with regard to sectors, which due to their international structure pay little income tax (e.g. companies operating in the Polish retail sector) a turnover assessment may increase tax collection.

5.5 Romania: predictability of investment [45]

In 1998, the Romanian government decided to encourage companies to invest in the „disadvantaged" regions of the country. In a special regulation, it decided that businesses operating in such areas will be exempt from some of forms of taxation, first of all import duties. In 1999, the list of disadvantaged regions included the mining area of Ștei-Nucet in the county of Bihor, which had companies operating in the production of food and juices. These businesses belonged to the Romanian brothers Micula and were registered in Sweden. According to the government decision of 1999, the tax incentives in the Ștei-Nucet region were to apply for at least ten years. As a result of the expected and received relief from customs duty, the Micula brothers made new investments in their plants. However, in 2004 Romania repealed the regulations introduced in 1998 and as a result, all exemption from public taxes for companies in backward regions. In cancelling the previous legislation, Romania cited, inter alia, EU law on state aid. In 2005, the Micula brothers and their company filed a suit against Romania in international investment tribunal, where they accused the Government of violating the Romanian-Swedish bilateral investment treaty. In 2013, the tribunal agreed with them and stated that Romania violated a clause of the Romanian-Swedish agreement, which requires fair and equitable treatment. At the same time, the court ordered payment by Romania of EUR 178 million in compensation for firms controlled by the brothers.

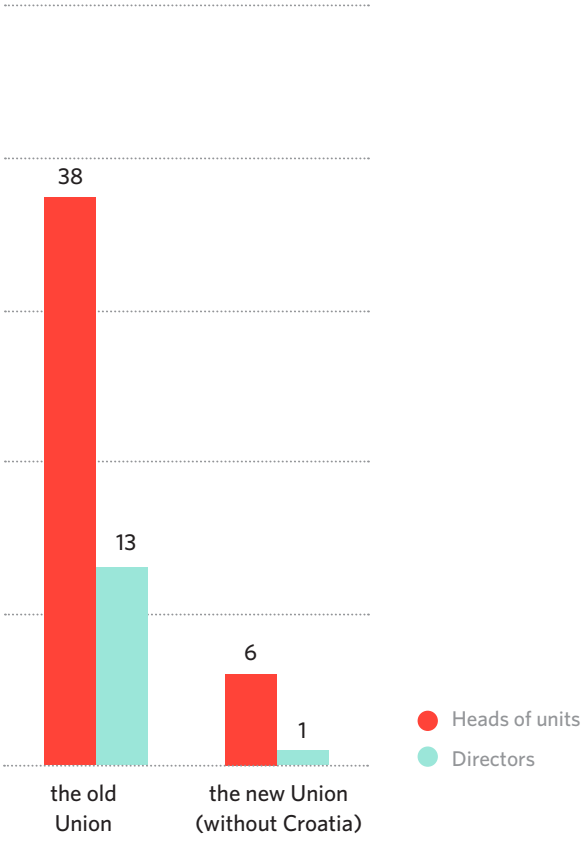
Romania has complied with part of the judgement of the arbitration tribunal (including the release of certain tax arrearages by Micula brothers' companies). However in January 2014, the Commission informed the Romanian government that the payment of compensation may constitute state aid incompatible with the EU law. In October, DG Competition prohibited Romania from implementing the arbitration award and issued an injunction to suspend aid. The Commission contested the legality of investment agreements entered into between member states. It deemed that the conclusion of such agreements is the exclusive competence of the Union. In March 2015, the Commission issued the final decision in which determined that the compensation constituted illegal state aid and ordered the Romanian government to recover it.

In November 2015, the Micula brothers appealed the Commission's decision to the EUCJ[46]. They claimed that Romania violated the rule of confidence in the state. According to the complaint, the investor should be certain that he would receive compensation if the government withdrew from the promised incentives. According to the brothers, the intervention of the Commission resulted from a dispute between it and the international arbitration community – Romanian businesses have suffered losses, because the Commission has tried to expand its powers.

43 See the Commission Notice on the application of the state aid rules to measures relating to direct business taxation, paragraph 27.
44 In August 2016, the European Commission concluded that the individual tax treaties of the Irish government with an American corporation Apple constitute illegal state aid. Proceedings in similar cases are also being conducted by Margethe Vestager against corporations such as Starbucks and Amazon.
45 Case SA.38517.
46 Action against the Commission decision of 30.11.2015, Micual v. Commission, Case No. T-694/15.

6 | Summary and recommendations

CHART 10: MANAGERS IN THE DIRECTORATE GENERAL FOR COMPETITION (FEBRUARY 2016)



6.1 | Summary

Our analyses demonstrate that DG Competition may treat countries of the old and the new Union and their companies unequally. Such differentiation refers to both the application of the rules on state aid and anti-monopoly provisions (prohibition against abuse of a dominant position).

The reasons for which the Commission has been much less likely to challenge aid given by some countries of old Europe (especially the UK, Germany and France) can be numerous. It is simply possible that those states are less likely to provide illegal subsidies. However, this seems unlikely because in recent years, all member states provide "their" companies with a similar amount of aid, in relation to GDP. This suggests that the economic policy of countries of the old and the new Union is not different when it comes to subsidies granted[47]. A more likely reason is a higher effectiveness in convincing the Commission on the legality of state aid measures. This may be due to the stronger legal arguments and greater political influence in Brussels.

It is also possible that the Commission in enforcing EU law is closely watching subsidies granted by countries from certain regions of the Union (e.g. Central and Eastern Europe). The differentiation in „geographical allocation" of the Commission's activities might also be a result of the distribution of nationalities of individuals in managerial positions in DG Competition (Chart 10). Moreover, it is difficult to explain why the Commission orders suspension of aid only with regard to the new EU countries. In this way, it forces a temporary abandonment of the subsidy, even before a full adjudication of the case.

Similarly, different causes may be behind the policy of the Directorate General for Competition in cases involving abuse of a dominant position. The Commission has limited resources, so it needs to set priorities and cannot devote the same weight to every case. It is therefore understandable that the Commission (in its 2009 Article 82 Guidance) speaks about the possibility of a complaint being rejected because of its low „priority" (see paragraph 3.2) and that the 2009 Article 82 Guidance explicitly describes priorities, which the Commission will follow when applying Article 102 of the TFEU in relation to the harmful effects of exclusionary conduct (see paragraph 2).

However, official documents do not answer all the questions on the application of Article 102 of the EU Treaty. According to our information, the Directorate General for Competition is much

47 Alternatively, you can argue that the EU's right to public assistance is more suited to the economic policies of some countries of the old EU.

easier to be persuaded with respect to intervention in matters of attractive markets (e.g. digital services) rather than niche industries – e.g. roof windows (see paragraph 5.1) or door fittings (see paragraph 5.2). Our analysis also indicates geographical patterns in the proceedings of the Commission. For example, the analysis of the penalties imposed by the Commission shows that relatively lower fines are imposed on companies from large EU countries, e.g. Germany or France. The Commission tends to enforce Article 102 of the TFEU with respect to the United States companies operating in Europe (12 out of 35 cases with a decision finding a violation of Article 102 of the TFEU or imposing commitments from 2005 to 2016), as well as "natural" monopolies with a market infrastructure (energy, telecommunications). In the second group of cases during recent years, the Commission has focused on the infrastructure sectors of the new Union countries (Poland, Slovakia and Romania). Article 82 Guidance (currently Article 102 of the TFEU) do not also explain why companies from countries of the old Union more often than companies from the new EU manage to avoid penalties and to convince the Commission to issue a decision imposing commitments (see paragraph 3.1). Official Commission documents also do not mention why it is much more likely to reject complaints filed by companies from new EU countries than from the old (see paragraph 3.2).

6.2 | Recommendations

EU competition law should return to its roots and greater attention should be paid to the mutual opening of markets and integration of the member states, not merely to ensure the „welfare" of consumers (see paragraph 2.2). Otherwise, the EU will have difficulty in achieving economic and social cohesion, referred to in the treaties.

EU anti-monopoly law should provide businesses with access to the markets of other member states. So far, the Commission's priority has been to open markets in the new member states. First of all, the Commission should ensure fairness to companies from the new EU countries and provide them access to richer Western European markets. Without a pan-European expansion, such companies will not achieve economies of scale[48], – which will prevent their long-term development and adversely affect the economic and social cohesion of the Union.

As an example, the Directorate General for Competition could correct its policy for dealing with complaints addressed to it and – for at least some of them – try to independently obtain information about the activities of companies suspected of abusing their dominant position (e.g. by means of inspections). It is quite telling that during the period analysed in this report, before rejecting Article 102 complaint, the Commission had never conducted an independent analysis of the market practices of the company, against whom the complaint was addressed and each time relied on the ability to prioritise their activities (see paragraph 3.2).

The Commission could also verify the theoretical basis of cases accepted. The legal and economic communities have intensively discussed the assumptions of anti-monopoly policy. In recent years DG Competition has focused on protecting consumer welfare and „neoclassical" theories of anti-monopoly policy (see paragraph 2.2 and 2.3). Instead, the Commission could apply more flexible criteria for the definition of a dominant position – some of its decisions rejecting complaints arise precisely from the preliminary finding, determining that the addressee of the complaint probably does not have such a position. In its rejection decisions the Commission usually relies only on the market share data received from the business against whom the complaint is directed (see paragraph 5.2 and 5.3). However, the definition of a dominant position in the anti-monopoly law should not be limited to the examination of the market share, but also take into account other factors (e.g. the strength of the business brand[49]), which Commission itself admits in its policy papers.

Another example of the theoretical assumptions adopted by the Commission are the criteria for predatory pricing, which is one of the manifestations of abusing a dominant position. The Commission could more often recognise that the pricing policy of the parent companies may have anti-competitive effects, even if prices remain above their cost[50] (e.g. in cases of selective price cuts[51]). In particular, the Commission could take into account that international corporations benefiting from the effect of scale can "subsidise" their activities in some local markets from savings achieved in other high-margin markets. In this situation, even if the prices achieved on subsidised markets do not remain below cost, a business practice can still be predatory in nature, as the company sacrifices short-term profits in the subsidised markets in order to improve its „neighbouring" market position, with the goal of eliminating local competitors.

48 See. The report of the Foundation Think of the Future.

49 See. Këllezi.

50 Compare Baumol, Edlin, Semeniuk.

51 See. Bellamy & Child, pp. 964-965.

The European Commission should also reconsider its activity in matters of state aid. Its head emphasises the "social" dimension of the EU rules banning state subsidies (see paragraph 2.3). It is therefore even more apparent that the institution he leads should consider whether issues of state aid should be initiated, if the state trying to using tax policy to achieve certain social objectives – e.g. in the case of Polish tax on retail sales (see paragraph 5.4).

The Commission should also give a thought whether the geographical structure of its state aid cases does not perhaps favour subsidies granted by some countries of the old Union. A good practice for the Commission would be for example to review on annual basis data on the number of the initiated recovery cases in relation to the amount of the aid which was reported by individual countries. In the event of significant irregularities, DG Competition could then verify their geographical priorities.

The Commission should also refrain from issuing injunctions to suspend state aid in cases that are of precedent nature (see paragraphs 5.4 and 5.5), especially if this legal instrument will continue to be applied only to the new EU countries.

Methodological appendix

- Most of the data cited in the report comes from the website of the European Commission (the Directorate-General for Competition – http://ec.europa.eu/competition/) or Eurostat (http://ec.europa.eu/Eurostat) and from our own calculations as of end of February 2017. The analysis of the European Commission decisions issued on the basis of Article 102 of the TFEU was made based on the website search engine for decisions of the Commission (http://ec.europa.eu/competition/elojade/ISEF/). These sources have also served to analyse the cases in which the Commission adopted decisions involving injunctions to suspend state aid.

- In comparing the size of the economies of the old and the new Union with data on cases of violation of Article 102 of the TFEU, we took into account the GDP for the period 2005-2015 (constant prices in 2010 Euros) for the countries of the old and the new Union. The second group includes the average GDP of Romania and Bulgaria, but not Croatia, which joined the EU relatively recently. In calculating the average GDP of Romania and Bulgaria, we have also taken into account 2005 and 2006, when they did not yet belong to the Union. This is justified since in 2005 and 2006, companies from Romania and Bulgaria could not be parties in cases before the Directorate General for Competition, which could result in a smaller number of cases against companies from these countries.

- In determining the "origin" or "nationality" of companies, we relied primarily on the content of the decision of the European Commission in the specific case. The Commission often defines an undertaking as being "German", "French" or "Polish". Under circumstances when the Commission did not mention the "nationality" of the company, we adopted the office or country of registration as a starting point. We then took into account the actual place of business of the company, and at the end – the "nationality" of the entity (another company, individual or government) controlling this company. The last of these criteria was crucial, especially in cases where the registration of a company in the country (e.g. in Luxembourg) seemed to be dictated by fiscal reasons. In some cases, the entity ultimately controlling the firm was located in a country other than the country in which the company employed most of the workers. In such cases we provided more than one "nationality".

- Information about the amount of state comes from the State Aid Scoreboard database. The most recent data are for 2014 (as of the end of February 2017). According to information from the European Commission, total aid granted (Aid to Main Objectives) is expressed in constant prices as of 2014. This does not include some specific types of aid (including the rail sector), assistance granted in connection with the crisis in the financial markets and (until 2014) assistance granted from payments of the EU funds.

- In the case of data concerning the Commission's recovery decision, the primary source of information was the DG COMP's website: http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html. This website also describes in detail the methodology of compiling the above data by the European Commission.

- To illustrate the relation of granted aid to GDP, we used Eurostat data on GDP for individual countries in constant prices of 2010, adjusted by the appropriate factor to compare them with data from the European Commission on the state aid given in constant prices of 2014. The ratio of aid to GDP for new and old Union countries has been calculated, taking into account differences between the countries' GDP.

- In total, the Directorate General for Competition employed 14 people in „executive" positions (including the General Director and the Chief Economist) and 44 individuals in heads of units positions – see http://ec.europa.eu/dgs/competition/directory/organi_en.pdf (as of the end of February 2017). The European Commission has not shared data on their nationality. However, it is possible to determine from publicly available sources (e.g. biographies on the website regarding conferences, academic publications or on LinkedIn). The nationality of most of the „directors" is also indicated in the online press release of the Commission at the time of their appointment.

- We addressed two requests for public information to the Directorate-General for Competition. The first inquiry pertained to information about the total number of complaints against abuse of a dominant position, received by the Commission during the period 2005-2016 and the procedural stages of these complaints. In the second inquiry, we requested that the Commission provide copies of complaints filed by the Polish Association of Lighting Industry. The Commission denied both of these requests (the first – 26.01.2017, Case No. COMP/A1/ATH/da/2017/007689, the second – 02.07.2017, Case No. COMP/E2/PVL/pb/2017/011500).

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