Does EU competition law favor particular countries?

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1. History of the paper

This paper is an academic version of a study prepared by the author for the "Pomyśl o Przyszłości" (Think about the Future) foundation in 2017. The study was submitted by the foundation to the Polish government. It was handed over by the Polish deputy prime minister Mateusz Morawiecki (current Poland's prime minister) to the European Commission's Commissioner for Competition, Margrethe Vestager during a meeting in which the report was discussed between the two politicians. This was followed by two discussion sessions (moderated by the author) between Directorate-General for Competition's (DG COMP) and the Polish Government's representatives which took place in second half of 2017. The author presented the study in June 2016 together with then deputy prime minister Mateusz Morawiecki to eight EU ministers of economy during the Visegrad group's (countries of Middle and Eastern Europe) Warsaw summit in June 2017. It was also presented and discussed in the European Parliament by a couple of Polish MPs. In general, the study brought about a discussion in several EU countries (Poland especially) on whether and to which extent the EU DG COMP enforcement priorities might be affected by national self interest of several (mainly western, such as Germany and France) EU member states.

The study and the draft paper below discusses a potential "national" capture of a transnational competition authority. Therefore, it seems to fit the 2018 ASCOLA conference. After all, this year's conference is dedicated i.a. to "effects of nationalism on competition law".

2. Executive summary

A quantitative analysis of the decisions of DG COMP points to the possibility of unequal treatment of the "old" Member States (which acceded to the Community before 2004) and the countries of the "new" EU as well as firms originating from these countries. 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 seem to be trying to use EU anti-monopoly law to stop competitors from "abusing their dominant position" more than do companies from the old EU. DG COMP, however, rejects their complaints. 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 COMP 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 seem to be given preference when it comes to the EU's state aid policy, the responsibility of the European Commission's DG COMP. 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 seems to apply a unique legal instrument, an injunction – an order suspending aid – only to the new countries of the EU.

3. Research hypothesis

The aim of this paper is to analyze the activities of DG COMP in terms of the "geographical" spread of the cases it tackles. The paper 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 analyzed in the paper does not include the latter (see: *Methodological appendix*).

Since DG COMP has the power to initiate legal proceedings both against countries (state aid rules) as well as against companies (anti-monopoly regulations), the author analyzes 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 paper arises from the allegations of unequal treatment meted out to the new countries of the EU and the treatment of firms from these countries by DG COMP. In chapters 4 and 5 of the paper, the author presents a quantitative analysis of issues that may be indicative of unequal treatment. Chapter 4 discusses unilateral dominance cases handled by the DG COMP, chapter 5 relates to the EU state aid (anti-subsidies) enforcement. Anti-cartel enforcement is to discussed in this paper (for reasons set out in its paragraph 4.1.1.). In the concluding chapter 5 the author draws conclusions from the 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 categorizing 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 the author is 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 paragraph 5.2. of this paper). In a globalized world it is difficult to define the "nationality" of a company clearly, but the author tries to "assign" it (see Methodological appendix). This paper does not discuss merits of the Commission's decisions in specific cases, and only evaluates their "geographic" allocation (also in terms of procedural solutions applied by the Commission – see. paragraph 5.2 of this paper).

4. Unilateral antitrust cases: Does Brussels favor companies from the old EU

4.1. Commission's decisions in cases involving abuse of a dominant position

4.1.1. 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 paper, the author only analyzes 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 practice, consumers usually suffer in the end too).

In light of the Council Regulation No. 1/2003[1], 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

[1] 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.

prohibit a dominant undertaking from engaging in certain market practices and impose a penalty on it (Table 1).

TABLE 1: Penalties imposed by the European Commission for abuse of a dominant position (2005-2016, data as of September 2017)

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)	USA	approx. EUR 1,060 million	USA	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)	USA	lack of penalty	USA	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

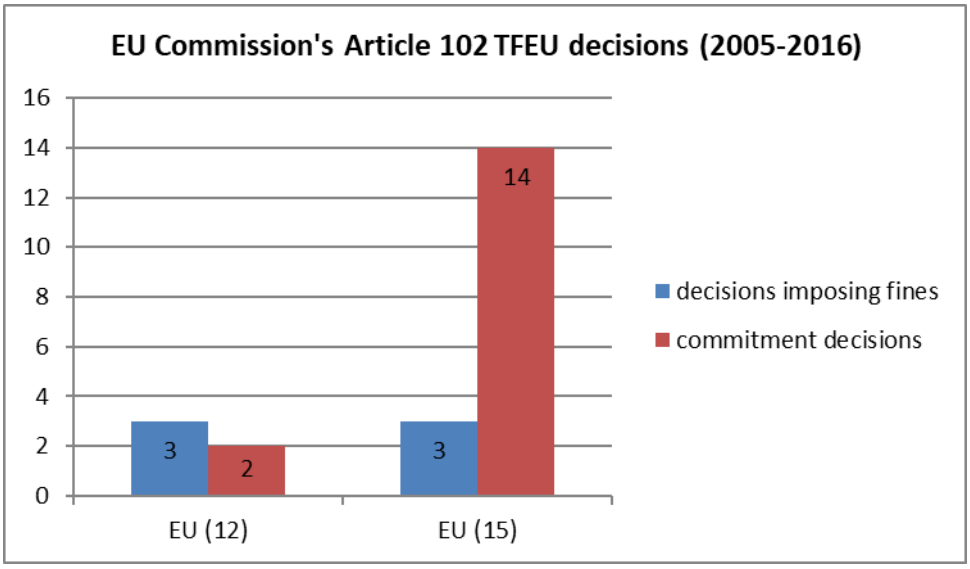
During 2005-2016, the Commission issued eight decisions that found abuse of a dominant position. The total penalties amounted to EUR 1.4 billion; on one occasion the Commission decided to waive the penalty. Companies from countries of the old Union have been fined three times, and the new EU countries – 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[2]. 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 from 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.

4.1.2. 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 favorable 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.

CHART 1



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 (Charts 2a and 2b). Thirdly, the Commission has not issued a single decision that rules in favor of a complaint from the new Union country against a company from the old Union.

CHART 2a

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

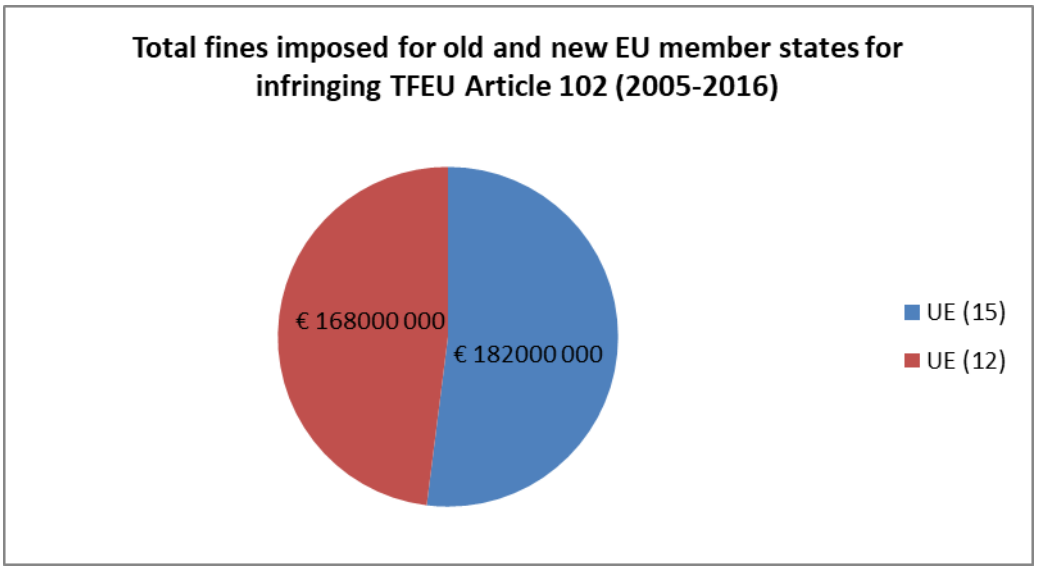
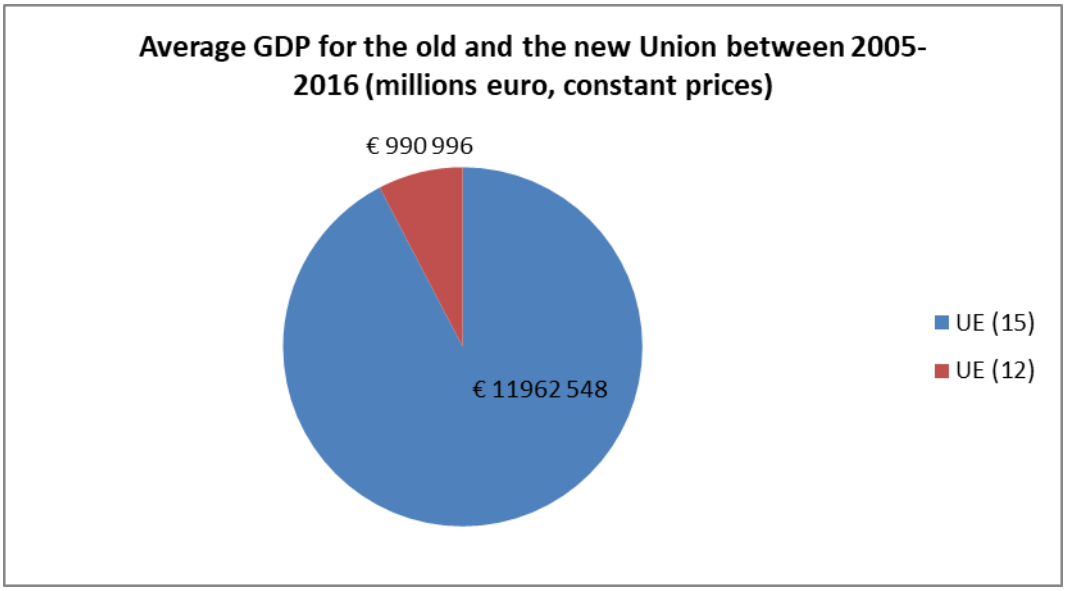


CHART 2b



Since 2004, the Directorate General for Competition has never issued an Article 102 decision in which it sided with a complaint of a business originating in the "new" Union against a company form the "old" Union. 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.

4.2. Commission's decisions on complaints against abuse of a dominant position

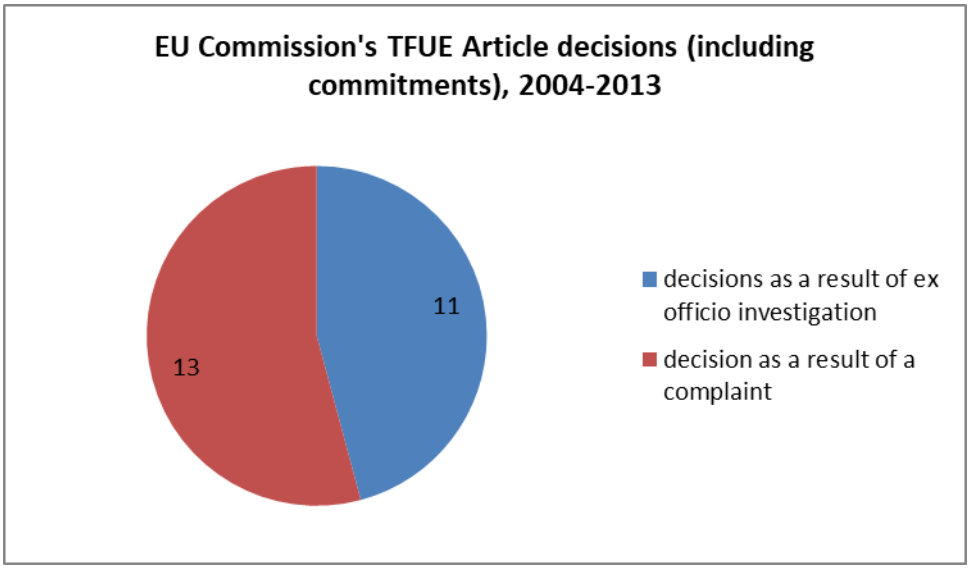
4.2.1. Analysis

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[3]. 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 com-plaint, 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 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 COMP – referring to the case law of the ECJ[4]– also recognizes that it may reject a complaint before the formal initiation of the procedure because of "different degrees of case priority"[5].

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 the author with this data under access to documents procedures[6], so the latest data covers the period from 1 May 2004 to 31 December 2013 (Chart 3).

CHART 3



DG COMP 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).

[3] 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.
[4] E.g. ECJ judgement of 09.18.1992, case T-24/90.
[5] Notice on handling complaints.
[6] See more in Methodological appendix.

TABLE 2: Decisions of the European Commission to reject complaints filed on the basis of the TFEU Article 102 (2005-2016, data as of September 2017)

Date of complaint / date and no. of the decision	**The company--addressee of the complaint from**	**The complainant company from**	**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
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)	USA	Romania	software	ccomplaint of a Romanian supplier of enterprise resource planning software against Microsoft
2009/2014 (39779)	Italy	India	motorcycling production	none
2010/2012 (39771)	USA, the UK (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, USA)	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)	telecommunications	consumer complaint against a dominant cable provider
2011/2014 (39921)	USA (several companies)	Iceland	payment services	application technology provider of payment against MasterCard, Visa and American Express

2011/2014 (39899)	Italy, football supranational organizations	the UK	football cards	complaint against discrimination of a football cards' supplier by FIFA and UEFA
2012/2014 (40080)	many countries (including Germany, France, USA)	Romania	retail	complaint of a local supplier against western FMCG producers and retail chains
2012/2014 (40104)	many companies from different countries	entrepreneur from France	electronic appliances	refusal of agreement
2013/2014 (40072)	Japan, Hungary	Slovakia	automotive	complaint of a distributor against a Hungarian daughter company of Suzuki (Magyar Suzuki Corporation)
2013/2014 (40105)	supranational organisation	Belgium (application of a natural person)	sport	footballer complaint against UEFA
2013/2014 (40166, 40165)	Germany/Japan/the UK	Swiss entrepreneur	car sales	allegation of territorial markets' partitioning
2013/2016 (40169)	Germany	Slovakia	construction industry	abuse of dominance and RPM complaint of a Slovakian wholesaler of components for the production and sale of peripheral fittings for doors and windows against a German supplier
2014/2016 (40251)	Poland	unidentifiable company	freight rail transport	discrimination of competitors by refusal to cooperate
2015/2016 (40291)	Poland[7]	Slovakia	industrial technologies	complaint of a water treatment technology recipient against the termination of the contract by the Polish supplier

In total for 2005-2016, DG COMP received 22 complaints that were subsequently rejected by the Commission. In 19 cases, the complainants were businesses[8]. 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 fifteen cross-border cases: four businesses came from the old EU, the five were from new states, four from non-EU countries (Australia, Iceland, India, Switzerland), the origin of one case should be treated as Austrian-Polish (case 39864) while one of the complainant anonymized its data.

[7] Surprisingly, although released before the first publication of the study on which this paper is based, the non-confidential versions of the last two decisions were published shortly after DG COMP learnt about the study. This brings the question of, whether the study prompted the publication of these decisions (after all, complaints dealt by the last two decisions were directed against Polish companies which – to some extent – goes against the main findings s of the study and the paper).

[8] This includes athletes, although in exceptional cases they can be treated as businesses.

With regard to the nationality of the companies against which complaints were directed, in fifteen cross-border cases, two companies came from the new EU (both from Poland). In one case, the author 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.

4.2.2. 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. Overrepresentation 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 4a and 4b[9]). 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.

CHART 4a

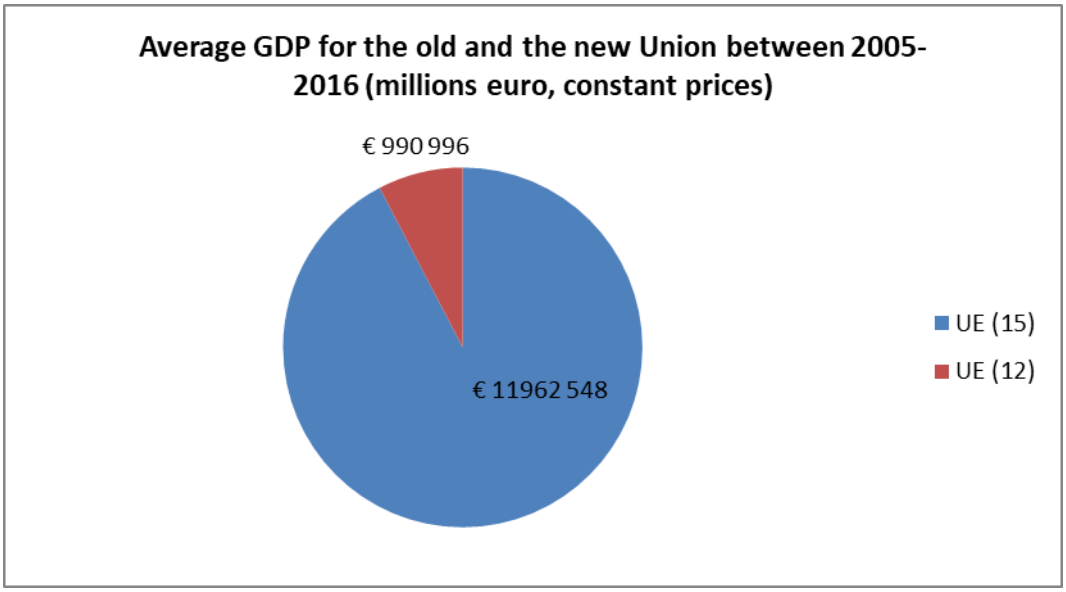
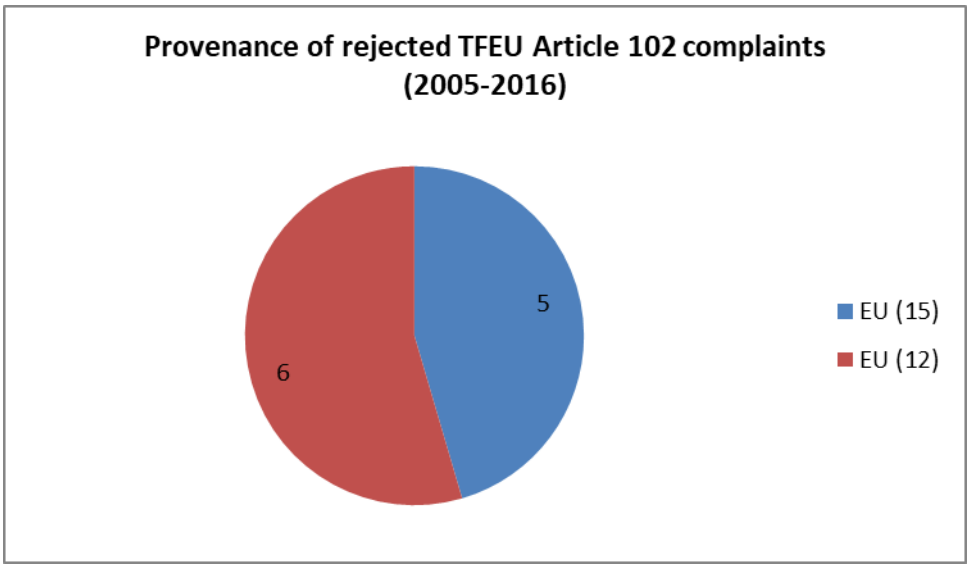


CHART 4b

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



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 utilize 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.

5. Do the countries of the old Union more easily subsidize their companies?

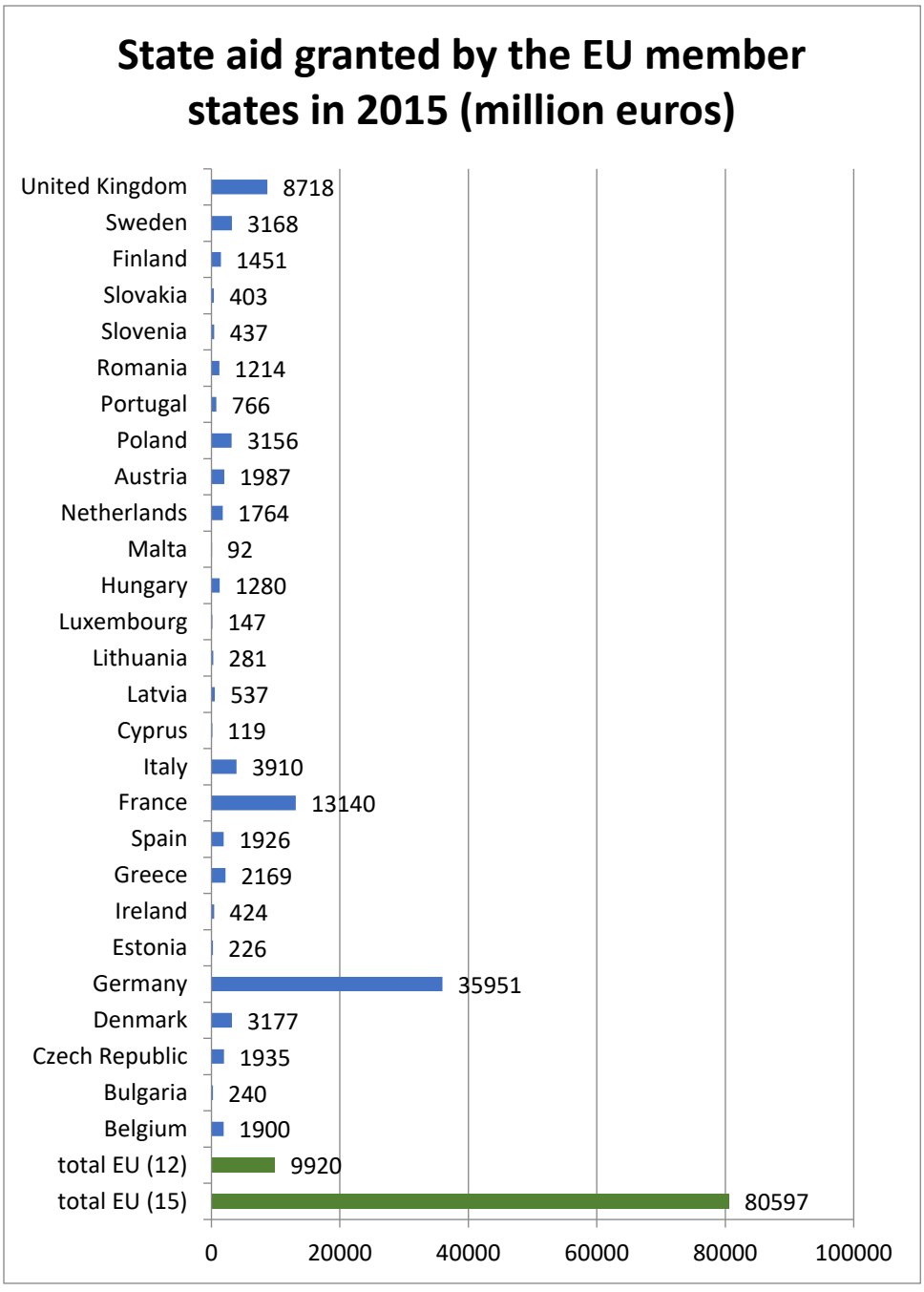
5.1. Which country provides the largest subsidies?

DG COMP 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 "legalizing" 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[10]). 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[11] is reported under a simplified procedure. In 2012, the Commission proposed[12] 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 modernization). Based on Article 6 of the EC Regulation No. 794/2004[13]

[10] 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.
[11] 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.
[12] EU State Aid Modernisation.
[13] 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.

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).

CHART 5: STATE AID GRANTED BY THE EU MEMBER STATES IN 2015 (EUR BILLIONS)



5.2. 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[14]. 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 COMP, 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). 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 6

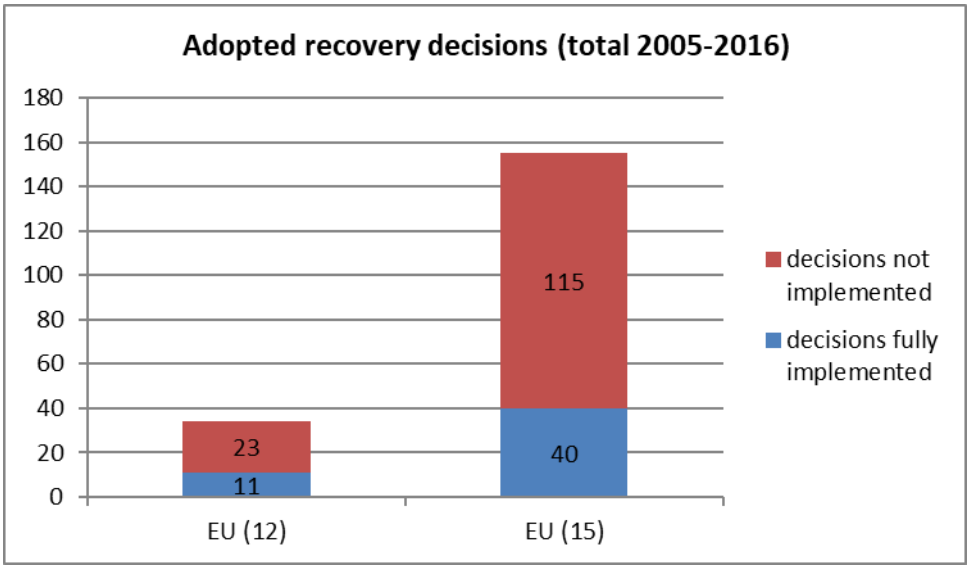
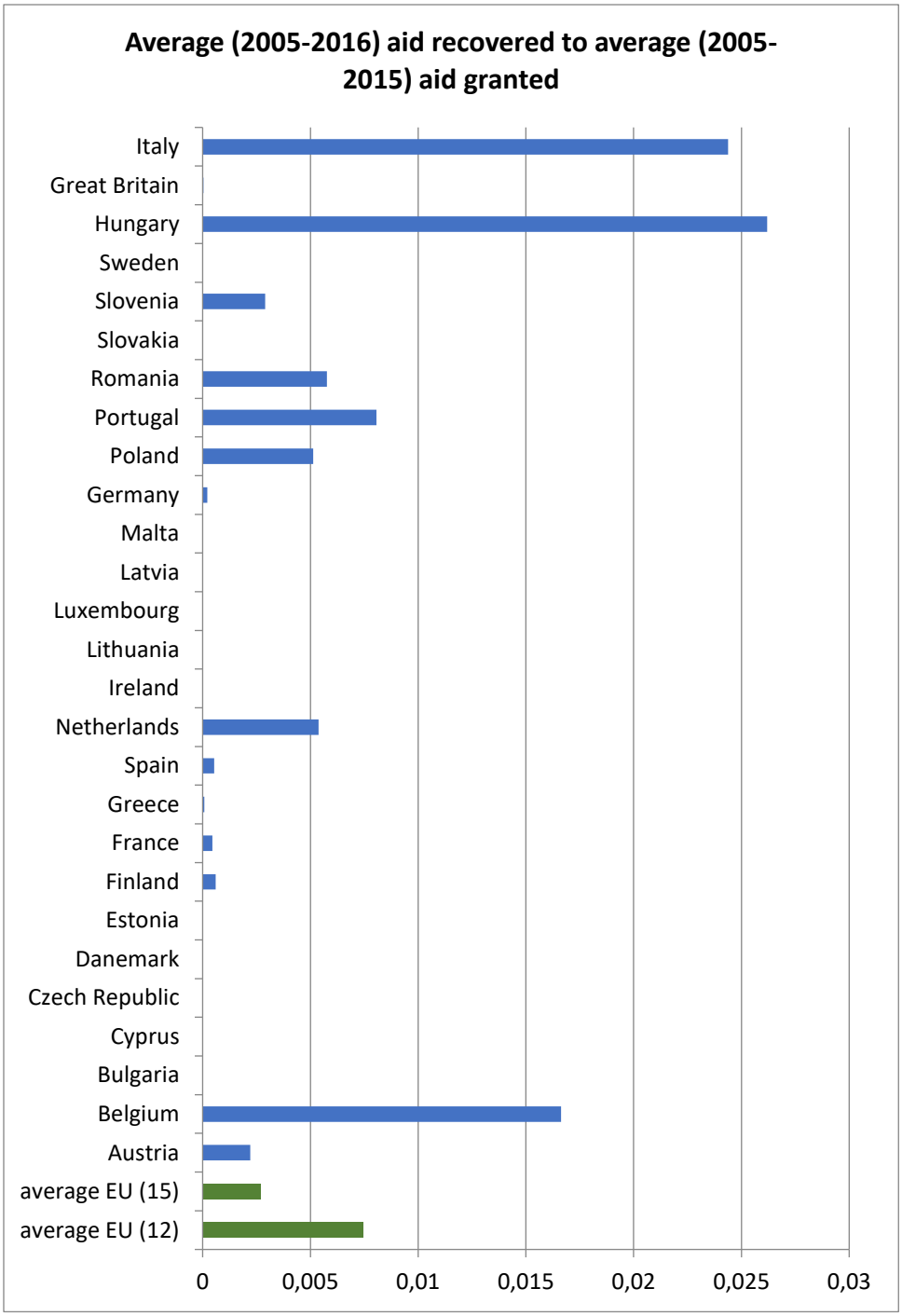


Chart 7 shows the ratio of aid effectively challenged by the Commission (average for 2005-2016) to aid granted by member states (average for 2005-2014). The data is related to aid effectively challenged – that is, the ECJ or national courts have no proceedings under way, in which an attempt is being made to challenge the Commission's decision (Chart 7). This provision is important as it excludes from the analysis inter alia the recent decision of the Commission against Apple – in that case the US producer were obliged o return approx. EUR 13 billion to the Irish government. Dublin challenges that decision in the EU tribunals.

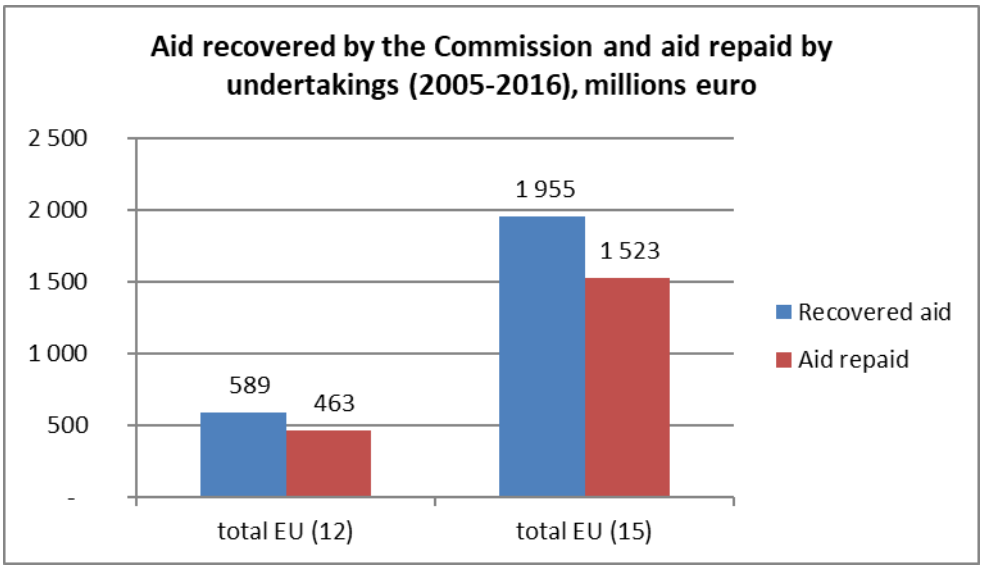
CHART 7: RATIO OF AVERAGE ANNUAL AID EFFECTIVELY CHALLENGED BY THE COMMISSION (2005-2015) TO AVERAGE ANNUAL AID GRANTED (2005-2015)

[14] 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.



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 recovered to the amounts of aid challenged. (Chart 8).

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).

TABLE 3: Suspensory injunctions issued by the European Commission in state aid cases (2005-2016, data as of September 2017)

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	as a result of an investment tribunal, Romania was required to pay EUR 178 million compensation, DG COMP challenged the award as illegal state aid
2015 (SA.39235)	Hungary	medium-sized media companies	media	DG COMP challenges as discriminatory Hungarian tax on revenues of media companies derived from advertising
2016 (SA.44351)	Poland	small and medium traders	retail industry	EU Commission challenges progressive nature and tax-free amounts of retail turnover tax imposed by both countries

5.3. 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).

Analysis of data on the amounts of aid to be recovered indicates that DG COMP 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 favored 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 0.74 percent, which means that these countries recovered about three times more the amount of aid (in relation to the assistance granted) than the old EU member states[15] (Charts 9a and 9b). 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)[16]. 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 percent. 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.

CHART 9a

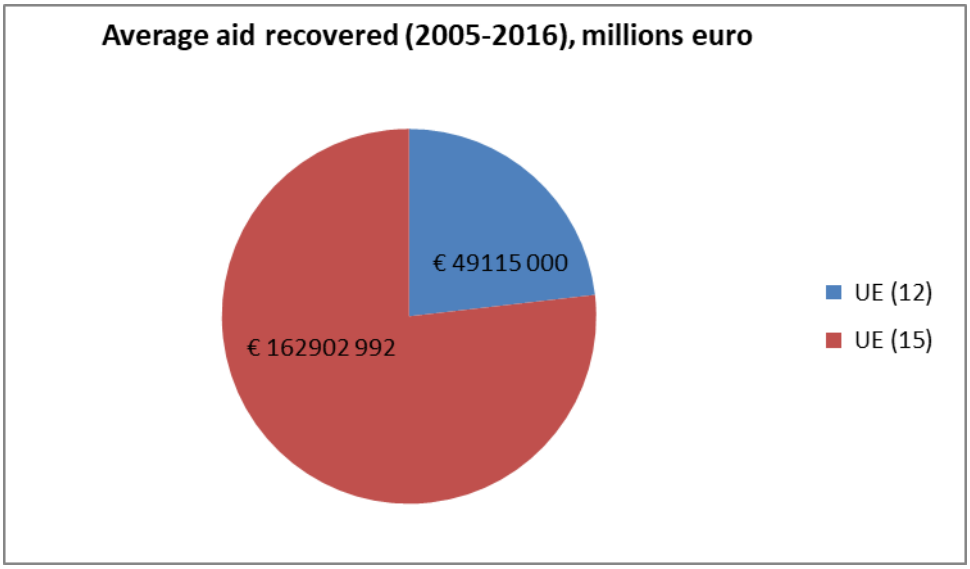
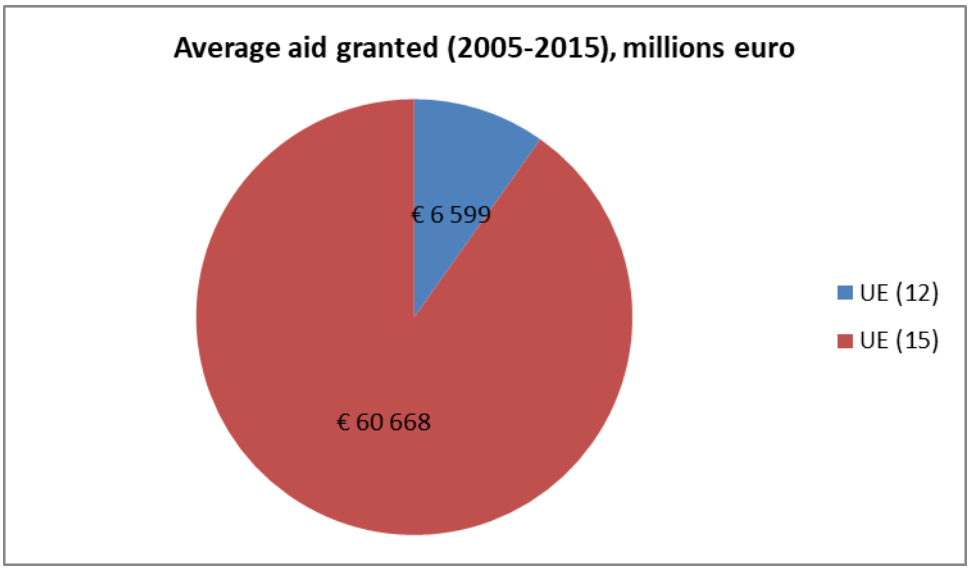


CHART 9b

[15] For Romania and Bulgaria, data on aid granted and actually recovered encompasses the period of 2008-2014.
[16] It should also be remembered that Bulgaria and Romania were not members of the Union in 2005 and 2006.



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.

6. Summary and recommendations

6.1. Summary

The analysis contained in this paper demonstrates that DG COMP 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).

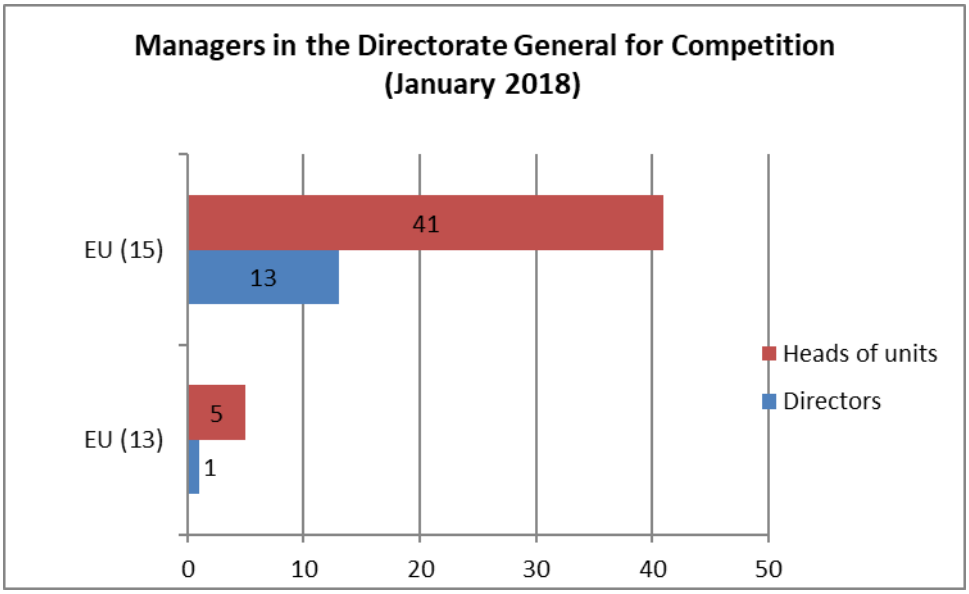
The reasons for which the Commission has been much less likely to challenge aid given by some countries of old Europe (especially the UK, Germany and France) can be numerous. It is simply possible that those states are less likely to provide illegal subsidies. However, this seems unlikely because in 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[17]. A more likely reason is a higher effectiveness in convincing the Commission on the legality of state aid measures. This may be due to better legal representation and greater political influence in Brussels.

It is also possible that the Commission in enforcing EU law is paying more attention to 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

[17] 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.

of the distribution of nationalities of individuals in managerial positions in DG COMP (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.

CHART 10



Similarly, different causes may be behind the policy of DG COMP 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[18]) speaks about the possibility of a complaint being rejected because of its low "priority" (see paragraph 4.2) 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.

However, official documents do not answer all the questions on the application of Article 102 of the EU Treaty. For example, one may argued that nowadays DG COMP might be more enthusiastic to intervene in matters of "attractive" digital markets. The analysis included in this paper 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 4.1). Official Commission documents also do not men-

[18] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

tion why it is much more likely to reject complaints filed by companies from the new EU countries than from the old (see paragraph 4.2).

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. 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 – which will prevent their long-term development and adversely affect the economic and social cohesion of the Union.

As an example, DG COMP 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 analyzed in this paper, 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 prioritize their activities (see paragraph 4.2).

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 COMP has focused on protecting consumer welfare and "neoclassical" theories of anti-monopoly policy. 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. 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[19]), 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 recognize that the pricing policy of the parent companies may have anti-competitive effects, even if prices remain above their cost[20] (e.g. in cases of selective price cuts[21]). In particular, the Commission could take into account that international "western"

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[19] See. e.g. Këllezi, P., Abuse below the Threshold of Dominance? Market Power, Market Dominanance, and Abuse of Economic Dependence, [in:] Mackenrodt, M.-O., Conde Galle, B., Enchelmaier, S. (ed.), Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?, Munich 2008.

[20] See e.g. Baumol, W. J., Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing. Yale Law Journal 89: 1–26 (1979); Edlin, A. S., Stopping Above-Cost Predatory Pricing, Yale Law Journal 111: 681-827 (2002).

[21] See. e.g. Bellamy & Child (ed. V. Rose, D. Bailey), European Union Law of Competition, 7th Edition, Oxford University Press 2013, pp. 964-965.

corporations benefiting from the effect of scale can “subsidize” their activities in some local (e.g. Eastern-European) markets from savings achieved in other high-margin markets. In this situation, even if the prices achieved on subsidized markets do not remain below cost, a business practice can still be predatory in nature, as the company sacrifices short-term profits in the subsidized markets in order to improve its “neighboring” market position, with the goal of eliminating local competitors.

The European Commission should also reconsider its activity in matters of state aid. For example, it might reconsider whether state aid proceedings should be initiated, if the state is trying to using tax policy to achieve certain social objectives – e.g. in the case of Polish tax on retail sales. The Commission should also give a thought whether the geographical structure of its state aid cases does not perhaps favor 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 COMP could then verify their geographical priorities. Lastly, the Commission should also refrain from issuing injunctions to suspend state aid in cases that are of precedent nature, 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 paper 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 the author's own calculations as of end of February 2017 (some recalculations were also made in September 2017 and January 2018). 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 analyze the cases in which the Commission adopted decisions involving injunctions to suspend state aid. The complaints regarding violation of Article 102 and suspensory injunctions in state aid cases were browsed via website search engine in September 2017; data associated with the Commission's decision imposing fines or commitments on the basis of Article 102 TFEU came from February 2017.

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, the author took into account the GDP for the period 2005-2016 (EUR constant prices in 2010) 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, the author of this paper has 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, the author 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, the author adopted the office or country of registration as a starting point. He 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 the author assigned more than one "nationality".

Information about the amount of state aid comes from the State Aid Scoreboard database. The most recent data are for 2015. According to information from the European Commission, total aid granted (Aid to Main Objectives) is expressed in prices as of the year when statistics were published. 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. In general, data regarding aid recovered by the Commission do not include cases proceeded by the ECJ or national courts. The data in question were browsed in February 2017.

In total, the Directorate General for Competition as of January 2018 employed 14 people in "executive" positions (including the General Director and the Chief Economist) and 46 individuals in heads of units positions and other quasi managerial positions (e.g. principal advisers, HR business correspondent) – see http://ec.europa.eu/dgs/competition/directory/organi_en.pdf. 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.

The author of the paper filed 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, he 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).