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EU Competition Law Newsletter

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- The General Court Rejects Appeals In The Optical Disc Drive Cartel
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The Commission Grants An Exceptional 50% Fine Reduction To Compensate For Protracted Cartel Proceedings

On July 4, 2019, following two losses at the EU Courts, the Commission re-adopted its decision to fine five Italian manufacturers of reinforcing steel bars for a price-fixing cartel. The Commission reduced the fines by an unprecedented 50% due to the length of proceedings spanning almost two decades.

Background

On December 17, 2002, the Commission fined 11 Italian companies a total of €85 million for a price-fixing cartel for reinforcing steel bars between December 1989 and July 2000 (the “2002 Decision”). On October 25, 2007, the General Court annulled the 2002 Decision because its legal basis (Article 65 of the Treaty constituting

the European Coal and Steel Community) was no longer in force when the decision was adopted.

The Commission re-adopted its decision on September 30, 2009 based on corresponding provisions of Regulation 1/2003.¹ The re-adopted decision confirmed the Commission's original findings, and re-imposed near-identical fines (the “2009 Decision”). All 11 companies appealed to the General Court again. On December 9, 2014, the General Court handed down a series of judgments that upheld the 2009 Decision. Five of the companies appealed to the Court of Justice. On September 21, 2017, the Court of Justice set aside the General Court judgment and annulled the 2009 Decision on the ground that the

¹ See Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, Article 7(1) and Article 23(2).

Commission had infringed the appellants' rights of defense by not granting an Oral Hearing for the Statement of Objections (the "SO") preceding the 2009 Decision.

On July 4, 2019, the Commission re-adopted its decision (presumably following an Oral Hearing), citing "public interest in pursuing an effective and deterrent enforcement against cartels."² It granted the five companies an exceptional 50% fine reduction (from €32 million to €16 million) due to the excessive length of proceedings caused by appeals to the EU courts as a result of procedural errors of the Commission.

An unprecedented fine reduction

The 50% fine reduction is unprecedented. In previous cartel cases, fine reductions due to length of proceedings were significantly lower: a 1% discount to makers of heat stabilizers (2009); 10% for a member of a smart-chip card makers cartel (2014); and 5% for members of a seatbelt systems cartel (2019).³ The Commission's willingness to compensate for long proceedings is also notable in the context of the recent Court of

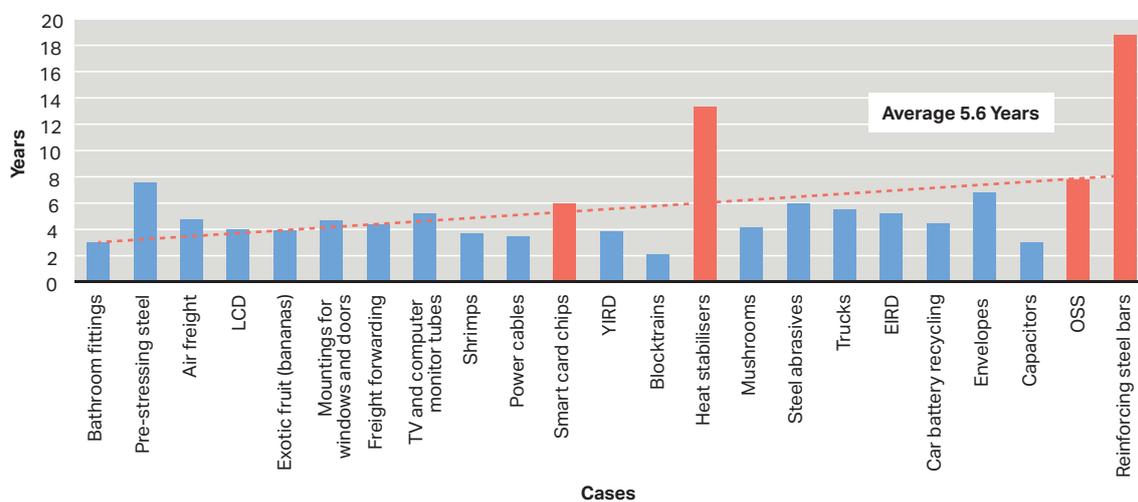
Justice judgment in *Gasgogne* that set a high bar for recovery of damages in cases involving protracted judicial proceedings.⁴

Implications

The Commission's willingness to compensate for protracted proceedings may therefore further motivate companies to litigate, in particular, in circumstances where the Commission has committed a procedural error. Indeed, it is notable that the average length of proceedings in cartel investigations is around 5.6 years.

Not all cartel participants benefited from a fine reduction. Lucchini was one of the companies that did not appeal the December 2014 General Court judgment. After the Court of Justice's annulment of the Commission's 2009 Decision, however, Lucchini appealed to the General Court to request reimbursement of its €14.3 million fine. On May 8, 2019, the General Court confirmed that the fine imposed on Lucchini was final because Lucchini was not a party to the Court of Justice judgment finding the Commission's procedural errors.⁵

Average length of proceedings in selected Article 101 cases since 2010



² Commission Press Release MEX/19/3709, "Antitrust: Commission re-adopts decision and fines five producers of reinforcing steel bars €16 million for price-fixing cartel," July 4, 2019.

³ *Heat Stabilisers* (Case COMP/AT.38589), Commission decision of June 29, 2016; *Smart Card Chips* (Case COMP/AT.39574), Commission decision of September 3, 2014; and *Occupant Safety Systems* (Case COMP/AT.40481), Commission decision of March 5, 2019.

⁴ *European Union v. Gasgogne Sack Deutschland and Gasgogne* (Joined Cases C-138/17 P and C-146/17 P) EU:C:2018:1013. The Court of Justice dismissed Gasgogne's claim for damages resulting from additional bank guarantee costs incurred by the excessive length of proceedings (more than 14 years), on the grounds that there was no causal link between the injury and the length of proceedings.

⁵ *Lucchini v. Commission* (Case T-185/18) EU:T:2019:298.

Court of Justice Annuls ICAP's Cartel Fine Due To The Commission's Failure To Sufficiently Explain Fine Calculation Methodology

On July 10, 2019, the Court of Justice upheld the General Court's partial annulment of the Commission's 2015 decision to fine the UK-based broker, ICAP, €14.9 million for facilitating a cartel in the Yen Interest Rate Derivatives ("YIRD") market between 2007 and 2010, confirming that the Commission had failed to adequately explain its fine calculation.⁶ The partial annulment concerned the fine calculation (resulting in the entire fine being annulled) while the Commission's substantive finding that ICAP infringed Article 101 was upheld. The judgment confirms that the Commission may be justified in departing from its fining methodology as set out in its Fining Guidelines.⁷ This does not relieve the Commission from having to sufficiently explain any deviation to ensure the companies' rights of defense.

Background

The Commission's YIRD cartel investigation led to a "hybrid" outcome, in which five cartel members and one cartel facilitator decided to settle in December 2013, while ICAP was the only company that opted out of the settlement procedure. On February 4, 2015, the Commission issued a decision finding that ICAP facilitated the cartel, imposing a fine of €14.9 million.⁸

On November 10, 2017, the General Court confirmed that ICAP had facilitated the cartel, but annulled the fine because the Commission had failed to adequately explain its fine calculation method.⁹ Five cartel members directly active on the YIRD market received fines based on the standard methodology for calculating fines

in cartel cases, which takes into account the value of sales of the products concerned by the infringement.¹⁰ The Commission departed from this methodology in the case of the cartel facilitators, ICAP and R.P. Martin, who acted as brokers that were not directly active on the affected YIRD market. The Commission did not consider brokerage fees an appropriate measure for the fine calculations, because the sale of brokerage services was not affected by the infringements on the YIRD market. Consequently, using brokerage fees to calculate the fines would not reflect the gravity and nature of the infringements, nor produce a sufficiently deterrent effect.

While R.P. Martin nonetheless decided to accept the fine and settle, ICAP appealed. The General Court found that the Commission must give reasons for its departure from the standard approach.¹¹ Moreover, the Commission must outline the basis for the alternative fining approach, which it failed to do. The Commission had merely given a general assurance that the basic amount of the fine reflected the gravity, duration, and nature of ICAP's involvement, without providing any details of the specific method applied.

Court of Justice appeal

On appeal to the Court of Justice, the Commission claimed that it was not required to provide the figures used for its calculations, citing the *AC-Treuhand* precedent related to cartel facilitators.¹² The Court of Justice dismissed this argument because (i) unlike the present case, *AC-Treuhand* only involved one facilitator and

⁶ *Commission v. Icap* (Case C-39/18 P) EU:C:2019:584.

⁷ See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210/2 ("Fining Guidelines").

⁸ *Yen Interest Rate Derivatives (YIRD)* (Case COMP/AT.39861), Commission decision of February 4, 2015.

⁹ *Icap and Others v. Commission* (Case T-180/15) EU:T:2017:795.

¹⁰ See Fining Guidelines, para. 12.

¹¹ *Pometon SA v. Commission* (Case T-433/16) EU:T:2019:201, paras. 333-364; and *Printeos v. Commission* (Case T-95/15) EU:T:2016:722, paras. 43-58.

¹² *AC-Treuhand v. Commission* (Case C-194/14 P) EU:C:2015:717; and *Quimitécnica.com and de Mello v. Commission* (Case C-415/14 P) EU:C:2016:58. The Court of Justice found that the Commission "fulfils its obligation to state reasons when it indicates the factors, which enabled it to determine the gravity of the infringement and its duration and it is not required to indicate the figures relating to the method of calculating the fines," see *AC-Treuhand*, para. 68.

therefore, there was no risk of unequal treatment as between facilitators; and (ii) while the Commission is not required to provide precise figures, it is clear from case law that the Commission must explain the weighting and assessment of the relevant factors for determining the fine.¹³

The Court of Justice found that it was insufficient for the Commission to explain its methodology to ICAP in “exploratory and informal discussions,” without giving ICAP a formal opportunity to comment. Nor did this “relieve the Commission of its obligation to explain, in the contested decision, the methodology.”¹⁴ The Commission’s belated disclosure, during the judicial procedure, of the “complex five-stage test” used to calculate ICAP’s fine did not rectify the deficiencies in the Commission’s decision. The use of a five-stage test

(the details of which are not publicly available) also distinguishes the case from *AC-Treuhand*, where the Commission’s methodology was “a simple setting of a lump sum amount.”¹⁵ Accordingly, unlike in *AC-Treuhand*, the Commission’s reliance on a complex test to calculate the fine necessitated disclosure to safeguard ICAP’s rights of defense. The Court of Justice did not, however, explain the level of detail required to fulfil this obligation.

The procedural breach, resulted in the annulment of ICAP’s fine in its entirety. However, since the Commission’s substantive finding of infringement was upheld, it is expected that the Commission will re-open proceedings to impose a new fine, presumably providing ICAP with an opportunity to comment on the five-stage test.

General Court Rejects Appeals In The Optical Disc Drive Cartel

On July 12, 2019, the General Court rejected five appeals against a 2015 Commission decision imposing a total fine of €116 million on five cartel participants for colluding to rig optical disc drive (“ODD”) procurement tenders organized by Dell and Hewlett-Packard (“HP”).¹⁶ The judgment serves as a reminder of the discretion the Commission enjoys when imposing cartel fines, and the General Court’s tendency to defer to the Commission’s cartel policy.

Background

On October 21, 2015, the Commission fined Hitachi-LG Data Storage (“HLDS”), Toshiba Samsung Storage Technology (“TSST”), Sony, Sony Optiarc and Quanta Storage (Philips, Lite-On and its joint venture PLDS jointly received full immunity) for engaging in parallel bilateral contacts that pursued a single plan to avoid competition in Dell’s and HP’s ODD procurement

tenders for end-use in desktops and laptops. All five companies appealed to the General Court.

General Court appeal

The General Court dismissed the appellants’ claims. Most notably, the General Court rejected Sony Optiarc’s argument that the Commission had double-counted its revenues in the calculation of the value of sales. Sony Optiarc was selling the ODDs produced by Quanta Storage and passed-on all revenues (save for a small sales fee) obtained from Dell to Quanta Storage. The Commission has accounted for the entirety of the passed-on revenues in the value of sales of both Sony Optiarc and Quanta Storage. Sony Optiarc claimed that this approach effectively amounted to double-counting, and thus, a breach of the principle of equal treatment and proportionality (Sony raised the same claim vis-à-vis revenue pass-on under a separate agreement with Lite-On). Indeed, the

¹³ *Chalkor v. Commission* (Case C-386/10 P) EU:C:2011:815, para. 61.

¹⁴ *Commission v. Icap* (Case C-39/18 P) EU:C:2019:584, para. 40.

¹⁵ *Commission v. Icap* (Case C-39/18 P), opinion of Advocate General Tanchev, EU:C:2019:359, para. 1.

¹⁶ *Sony and Sony Electronics v. Commission* (Case T-762/15) EU:T:2019:515; *Sony Optiarc Inc. and Sony Optiarc America Inc v. Commission* (Case T-763/15) EU:T:2019:517; *Quanta Storage Inc v. Commission* (Case T-772/15) EU:T:2019:519; *Hitachi-LG Data Storage Inc. and Hitachi-LG Data Storage Korea Inc. v. Commission* (Case T-1/16) EU:T:2019:514; and *Toshiba Samsung Storage Technology Corp. and Toshiba Samsung Storage Technology Korea Corp. v. Commission* (Case T-8/16) EU:T:2019:522.

Commission expressly deducted intra-cartel sales from the calculation of the value of sales in the *Shrimps*¹⁷ and *Retail Food Packaging*¹⁸ cartels, but it did not address the issue in this case nor state the reasons for its departure from past practice.

The General Court held that deducting the passed-on revenues from Sony Optiarc's value of sales "would undermine the effectiveness of the prohibition on cartels" by allowing participants to reduce their amount of fines by simply associating themselves with another cartel participant.

Commission Fines Qualcomm €242 Million In Its First Predatory Pricing Decision In Almost Two Decades

On July 18, 2019, the Commission fined Qualcomm €242 million for abusing its dominance in the global market for broadband chipsets by selling below cost to "strategically important" customers, to force a competitor out of the market.¹⁹ This is the first time in 16 years that the Commission has fined a company for predatory pricing after the *Wanadoo* decision of 2003.²⁰

Predatory pricing

Baseband chipsets enable smartphones and tablets to connect to cellular networks for voice and data transmission. The Commission concluded that Qualcomm was dominant in the global market for Universal Mobile Telecommunications System ("UMTS") baseband chipsets between 2009 and 2011, based on its considerable market shares (c. 60%, almost three times ahead of its closest competitor) and the high entry barriers to the R&D-intensive industry.

The Commission found that Qualcomm abused its dominance by selling UMTS chipsets below cost to Huawei and ZTE to foreclose Icera, a U.K. startup that was establishing itself as a viable

Implications

The judgment serves as a reminder of the discretion the Commission enjoys when imposing cartel fines and the General Court's tendency to defer to the Commission's cartel policy. It remains to be seen how the General Court's judgment would fare in the event of an appeal to the Court of Justice.

alternative, but ultimately left the market in 2015. The Commission's theory of harm was supported by a price-cost analysis (based on long-run average incremental cost representing the sum of average variable costs and fixed costs specific to the chipsets at issue) as well as a "broad range of qualitative evidence" demonstrating Qualcomm's intent to force Icera out of the market by deliberately adopting a below-cost pricing strategy without any efficiency justifications. Importantly, unlike in the U.S., the Commission is not under an obligation to demonstrate a serious probability of recoupment to establish a predatory pricing theory of harm.²¹ The Commission's rare intervention on account of predatory pricing may well have been motivated by the fact that the targeted competitor has ultimately been forced out of the market.

What's next?

The case is noteworthy for the "targeted nature" of Qualcomm's practices relating to key contracts with "strategically important" customers to maximize the damage on its competitor's business, while ensuring minimal impact on its own revenues. The decision is binding on national

¹⁷ *Shrimps* (Case COMP/AT.39633), Commission decision of November 27, 2013.

¹⁸ *Retail Food Packaging* (Case COMP/AT.39563), Commission decision of June 24, 2015.

¹⁹ *Qualcomm (predation)* (Case COMP/AT.38711), decision not yet published.

²⁰ *Wanadoo Interactive* (Case COMP/AT.38233), Commission decision of July 16, 2003.

²¹ See *France Telecom v. Commission* (Case C-202/07 P) EU:C:2009:214, para. 37.

courts, paving the way for NVIDIA (who acquired Icera in 2011, prior to Icera's partial wounding down in 2012 and ultimate exit from the market at issue in 2015) to seek compensation for Icera's demise, although Qualcomm is expected to appeal before the General Court.

A separate but related appeal by Qualcomm relating to a Request for Information ("RFI") it received as part of the investigation is pending

before the Court of Justice, following the General Court's dismissal of allegations that the Commission failed to state reasons and infringed the principle of necessity by sending an extensive RFI to Qualcomm a year and a half after the SO in the aforementioned investigation. In addition, the Commission recently fined Qualcomm €997 million for exclusivity payments to Apple,²² and Qualcomm has also been subject to increased antitrust scrutiny in the U.S.²³

News

Hello Kitty Joins The Vertical Restraints Club

On July 9, 2019, the Commission fined Sanrio, a Japanese company that designs, produces and sells "Hello Kitty" products, €6.2 million for breaching Article 101 TFEU by imposing territorial restrictions on cross-border and online sales of merchandising products featuring Hello Kitty and other Sanrio-owned characters. The Commission granted Sanrio a 40% fine reduction in return for its cooperation.²⁴

Direct restrictions in Sanrio's agreements included express prohibitions on licensees from selling outside of their assigned territory within the EEA. Indirect restrictions were aimed at encouraging compliance with territorial restrictions, and included the refusal to renew licensees' contracts if they sold out-of-territory, and audits to check compliance. The Commission found that the restrictions prevented licensees in Europe from selling products cross-border—one of the main benefits of the EU Single Market—resulting in

less choice and inflated prices for merchandising products to the detriment of European consumers. The restrictions were in place between 2008 and 2018.

The case is part of the Commission's recent enforcement efforts against vertical restraints, and in particular, restrictions against cross-border and online sales contained in distribution/licensing agreements, stemming from the Commission's e-commerce sector inquiry.²⁵ So far, this has led to fines against *Guess* (€40 million)²⁶ and *Nike* (€12.5 million),²⁷ and a pending investigation against Universal Studios.²⁸

The decision also reinforces the Commission's willingness to reduce fines in return for cooperation in non-cartel cases, following similar precedents in *Nike* (40%), *Guess* (50%), *Consumer Electronics* (Asus, Denon & Marantz, and Philips 40%, and Pioneer 50%),²⁹ and *ARA* (30%),³⁰ and the issuance of a road map for cooperation in non-cartel cases.³¹

²² See *Qualcomm (exclusivity payments)* (Case COMP/AT.40220), Commission decision of January 24, 2018.

²³ In May 2019, the U.S. Federal District Court for the Northern District of California found that Qualcomm's standard essential patent licensing terms infringed federal antitrust laws. Qualcomm's appeal against the judgment is pending, with the DoJ filing a statement of interest to pause the ruling on national security grounds.

²⁴ *Character merchandise* (Case COMP/AT.40432), decision not yet published.

²⁵ See Final Report on the E-commerce Sector Inquiry, COM/2017/0229, of May 10, 2017; and Commission Sector Inquiry into E-commerce, available at: http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

²⁶ *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018.

²⁷ *Ancillary sports merchandise* (Case COMP/AT.40436), Commission decision of March 25, 2019.

²⁸ *Licensed merchandise - Universal Studios* (Case COMP/AT.40433), decision not yet published.

²⁹ See *Asus* (Case COMP/AT.40465); *Denon & Marantz* (Case COMP/AT.40469); *Philips* (Case COMP/AT.40181); and *Pioneer* (Case COMP/AT.40182), Commission decisions of July 24, 2018.

³⁰ *ARA Foreclosure* (Case COMP/AT.39759), Commission decision of September 20, 2016.

³¹ See http://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

The Commission Is Investigating Amazon's Use Of Retailer Data

On July 17, 2019, the Commission announced the opening of a formal investigation into Amazon's use of sensitive independent retailer data that may potentially breach Article 101/102 TFEU.³²

The Commission's probe is likely focusing on Amazon's dual role. On one hand, Amazon acts as host to third-party merchants who sell directly to consumers through Amazon's marketplace. On the other hand, Amazon sells its own products on the same marketplace in competition with the third-party merchants. While publicly available information is currently scarce, the Commission preliminarily concluded that Amazon appears to be using retailer data collected on Amazon's marketplace platform to boost its own sales. If Amazon's conduct is found to be anticompetitive, Amazon might receive a substantial fine and will be required to change its business practices.³³

The case is one of multiple Commission investigations against U.S. tech companies, including Google, Apple, Qualcomm, and reportedly also Facebook.³⁴ It follows public remarks from U.S. President Donald Trump against Commissioner Vestager alleging an aggressive EU antitrust enforcement policy against U.S. tech giants.³⁵

In addition, Amazon has also faced a number of investigations at Member State level. On July 17, 2019, the Bundeskartellamt and the Austrian Federal Competition Authority closed their respective investigations into potentially

abusive, discriminatory, and/or unfair provisions in Amazon's agreements with marketplace sellers after securing modifications to Amazon's terms.³⁶ In April 2019, the Italian Competition Authority announced that it was investigating whether Amazon abused its dominance in the market for "e-commerce platform intermediary services" by discriminating against sellers that use third-party logistics providers rather than Amazon's logistics services, by demoting the position of their products in search results.³⁷

In April 2019, the Luxembourg Competition Council also opened an investigation following complaints regarding an international company with European headquarters established in Luxembourg that offers its website and platform services to third-party merchants. Although unconfirmed (and without further public details about the substance of the complaints), this likely relates to Amazon.³⁸ In addition, in July 2019, the Luxembourg Competition Council rejected an abuse of dominance complaint and an application for interim measures by a retailer that was excluded from Amazon's marketplace, including because there was insufficient evidence that Amazon held a dominant position.³⁹

European Champions Debate Continues

On July 4, 2019, France and Germany, joined by Poland, issued a joint call to modernize European competition rules ("Joint Statement").⁴⁰ This follows the publication in February 2019 of a Franco-German Manifesto for a European

³² *Amazon Marketplace* (Case COMP/AT.40462), decision not yet published.

³³ See <https://www.businessinsider.com/amazon-eu-launches-antitrust-investigation-2019-7?r=US&IR=T>.

³⁴ *Google Search (AdSense)* (Case COMP/AT.40411), decision not yet published; *Google Android* (Case COMP/AT.40099), decision not yet published; *Google Search (Shopping)* (Case COMP/AT.39740), Commission decision of June 27, 2017; *Aid to Apple* (Case COMP/SA.38373), Commission decision of August 30, 2016; and *Qualcomm (predation)* (Case COMP/AT.39711), decision not yet published. The Commission is investigating Facebook's sales platform and app data sharing methods. See <https://www.bloomberg.com/news/articles/2019-07-02/facebook-is-latest-to-come-under-eu-s-antitrust-scrutiny>.

³⁵ See <https://www.euractiv.com/section/global-europe/news/trump-takes-aim-at-vestager-she-hates-the-us/>.

³⁶ Bundeskartellamt Press Release, July 17, 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html?sessionid=B281975501DCD8E72D1C24565336D969.2_cid362?nn=3591568. See also Austrian Federal Competition Authority Press Release, July 17, 2019, available at: https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/.

³⁷ AGCM Press Release, April 16, 2019, available at: <https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services>.

³⁸ See <https://conurrence.public.lu/dam-assets/fr/actualites/2019/2019-4-1-Communique-services-en-ligne-pdf>.

³⁹ See <https://conurrence.public.lu/fr/actualites/2019/decision-2019-MC-01.html>. The U.K. Competition and Markets Authority is also investigating Amazon's proposed acquisition of certain rights and a minority shareholding in Rooffoods Ltd. (Deliveroo), a UK-based food delivery company active in 14 countries. The investigation is being conducted under the U.K.'s merger control regime. See <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>.

⁴⁰ Joint Statement by the Ministries of the Economy of France, Germany and Poland, "Modernising EU Competition Policy," July 4, 2019.

industrial policy to foster the creation of European champions.⁴¹ The Joint Statement scales back some of the Manifesto's far-reaching ideas.

The Manifesto was published during the final stages of the Commission's investigation into the *Siemens/Alstom* merger.⁴² The Commission's subsequent prohibition of the deal was strongly criticized by the French and German governments: the French Minister for the Economy said the decision was a "political mistake,"⁴³ while his German counterpart called for the creation of "strong European champions"⁴⁴ to compete with China. While acknowledging that merger control rules are essential, the Franco-German Manifesto proposed three fundamental changes: (i) taking into account government control and subsidies of competing suppliers; (ii) assessing competition at global level and extending the timeframe for assessing potential future competition; and (iii) giving the EU Council a veto to override the Commission's decisions in certain (undefined) cases. The publication of the Manifesto was met with widespread skepticism from competition law experts, national antitrust authorities, and European industrial economists, who criticized the attempted politicization of the rules-based merger review system.

The Joint Statement signals a retreat from the hard line of the original Manifesto. The proposal to give politicians a veto over the Commission merger decisions is replaced by a more muted call to reinforce the role of national ministries in the merger control process through increased engagement of the Competitiveness Council and, at a technical level, the Advisory Committee. The new document seeks to integrate elements of industrial policy into existing competition rules by merely encouraging the Commission to take into account "the overall trade and industrial policy approach of third countries," including State interference in, and subsidization of, certain companies or industries.

New Guidelines On "Passing-On" Of Overcharge And Disclosure Of Confidential Information In Cartel Damages Claims

On July 1, 2019, following a one-year public consultation with national courts and other stakeholders, the Commission published new guidelines to assist national judges in estimating the "passing-on" of overcharge in cartel damages claims.⁴⁵ The guidelines are the latest step in efforts to develop a forum for antitrust damages litigation throughout Europe, given that these actions are, at present, typically confined to a small number of national jurisdictions (the U.K., the Netherlands, and Germany).

Three points are notable. First, particular emphasis is placed on the economic theory underlying the notion of passing-on, and the factors affecting the existence and magnitude of its effects. The guidelines explain that passing-on is more likely when the overcharge impacts the direct purchaser's variable costs, and, in particular its marginal cost, which typically has a considerable bearing on price-setting decisions. Second, the text provides guidance on the data and information required to quantify passing-on effects, and the use of economic experts in damages actions. Third, different methodologies for the quantification of passing-on effects are explained, such as the comparison with similar markets unaffected by the cartel, the analysis of historical changes in the cost of inputs and their impact on prices, and the development of simulations based on economic models.

In addition, the Commission has initiated a consultation on draft guidelines on the disclosure of confidential information. Under the Damages Directive, national courts have the power to order the disclosure of evidence containing confidential information. The draft communication clarifies that confidentiality of information does not stand

⁴¹ Joint Statement by the Ministries of the Economy of France and Germany, "A Franco-German Manifesto for a European industrial policy fit for the 21st Century," February 19, 2019.

⁴² *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019.

⁴³ See Financial Times, EU blocks Siemens-Alstom rail merger, Le Maire says, February 6, 2019.

⁴⁴ See EurActiv, German 2030 industrial strategy: Altmaier backs 'European Champions,' February 7, 2019.

⁴⁵ A communication from the Commission, on guidelines for national courts on how to estimate the share of overcharge passed on to the indirect purchaser.

in the way of its disclosure, and also sets out the following considerations to govern any disclosure request: (i) national courts must determine if the claim for damages is plausible, if the disclosure request concerns relevant evidence, and if the request is proportionate; (ii) disclosure requests must identify specific evidence “as precisely and as narrowly as possible;”⁴⁶ and (iii) when assessing proportionality, a national court must consider whether the request was formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority.⁴⁷

Vodafone Grants Telefónica Cable Access In Germany To Secure Clearance Of Liberty Global Acquisition

On July 18, 2019, the Commission conditionally approved Vodafone’s acquisition of Liberty Global’s cable networks business in Czech Republic, Hungary, Romania, and Germany, following a Phase II review.⁴⁸ This case is the latest in a wave of consolidation across the EEA’s telecommunications sector (such as *Liberty Global/Ziggo*, *Vodafone/Liberty Global/Dutch JV*, and *Altice/PT Portugal*).⁴⁹

The Commission identified horizontal concerns in the retail supply of fixed broadband services in Germany. The cable networks of Vodafone and Liberty did not overlap geographically, but Vodafone had wholesale cable access to Deutsche Telekom’s network in Germany, which enabled it to supply fixed broadband services in the same areas as Liberty’s Unitymedia.

To address the Commission’s concerns, Vodafone agreed to a fix-it-first remedy, offering cable access to the merged entity’s network in Germany to Telefónica DE on a long-term basis. Telefónica DE will be able to market broadband services

over the combined Vodafone and Unitymedia cable network in Germany, and become a strong competitor to the merged entity. While fix-it-first remedies are typically used only sporadically, there has been a clear uptick in their deployment under Commissioner Vestager (e.g., *Valeo/FTE Group*, *AB InBev/SABMiller*, *Boehringer Ingelheim/Sanofi Animal Health Business*, *Hutchison 3G Italy/Wind/JV*, and *Liberty Global/BASE*).⁵⁰

GSK’s Acquisition Of Pfizer’s Consumer Health Business Cleared Subject To Remedies

On July 10, 2019, the Commission conditionally cleared GlaxoSmithKline’s (“GSK”) acquisition of Pfizer’s Consumer Health Business following a Phase I review.⁵¹ The transaction forms part of GSK’s and Pfizer’s plan to contribute their respective consumer healthcare businesses to a new venture, over which GSK will have sole control.

GSK is a leading over-the-counter supplier for topical pain management with its *Volta* range, while Pfizer is active in the EEA with its *ThermaCare* product portfolio. The Commission found GSK and Pfizer’s products to be broadly substitutable, despite the different format and composition of the *Volta* (medicated gel, creams, and sprays as well as medicated and non-medicated patches) and *ThermaCare* ranges (non-medicated patches) and was concerned that the overlap would increase prices in Austria, Germany, Ireland, Italy, and the Netherlands.

To address the Commission’s concerns, GSK offered a global divestiture of Pfizer’s *ThermaCare* brand (including a US-based manufacturing facility) to a single purchaser to be approved by the Commission. These commitments remove almost the entirety of overlaps in the topical pain management category in the EEA and reflect

⁴⁶ Recital 16 and Article 5(2) of the Damages Directive.

⁴⁷ Article 6(4)(a) of the Damages Directive.

⁴⁸ *Vodafone/Certain Liberty Global Assets* (Case COMP/M.8864), decision not yet published.

⁴⁹ *Liberty Global/Ziggo* (Case COMP/M.7000), Commission decision of May 30, 2018; *Vodafone/Liberty Global/Dutch JV* (Case COMP/M.7978), Commission decision of August 3, 2016; and *Altice/PT Portugal* (Case COMP/M.7499), Commission decision of April 20, 2015.

⁵⁰ *Valeo/FTE Group* (Case COMP/M.8102), Commission decision of October 13, 2017; *AB InBev/SABMiller* (Case COMP/M.7881), Commission decision of May 24, 2016; *Boehringer Ingelheim/Sanofi Animal Health Business* (Case COMP/M.7917), Commission decision of November 9, 2016; *Hutchison 3G Italy/Wind/JV* (Case COMP/M.7758), Commission decision of September 1, 2016; and *Liberty Global/BASE* (Case COMP/M.7637), Commission decision of February 4, 2016.

⁵¹ *GlaxoSmithKline/Pfizer Consumer Healthcare Business* (Case COMP/M.9274), decision not yet published.

the Commission's preference for "clean-sweep" remedies of the entire EEA (or global) business, similar to recent cases such as *Energizer/Spectrum Brands*, *AB InBev/SABMiller*, or *Zimmer/Biomet*.⁵²

The Commission Appoints A New Chief Competition Economist

On July 3, 2019, the Commission announced the appointment of Dr. Pierre Régibeau as the new Chief Competition Economist, replacing Tommaso Valletti on September 1, 2019.

The announcement follows a six-month selection process, starting with the publication of the vacancy in the Official Journal of the EU, followed by the interview of potential candidates by a pre-selection panel, interview and assessment by the European Consultative Committee on Appointments, and finally an interview of shortlisted candidates by the Competition Commissioner.

Dr. Régibeau is currently a Vice-President at Charles River Associates, specializing in antitrust economics. He will be the first practitioner appointed to the role, as all of his five predecessors were academics.⁵³

Commission Publishes 2018 Annual Activity Report

On July 15, 2019, the Commission published its annual report on competition policy, setting out the Commission's main policy and legislative initiatives, and key decisions adopted in 2018.

In antitrust enforcement, the Commission levied two fines (totaling €5.63 billion) on Google for abuse of dominance in general internet search (regarding online advertising and mobile operating systems); imposed a fine of €997 million on Qualcomm for

abuse of dominance in baseband chipsets; and accepted commitments from Gazprom and TenneT to remove obstacles in cross-border gas and electricity supplies respectively. The Commission released guidance on cooperation in non-cartel antitrust cases and reduced fines of several companies on account of their cooperation. The Commission also published updated guidance for companies on business secrets and other confidential information during antitrust proceedings.⁵⁴ The report also highlights the adoption of Directive (EU) 2019/1 to empower national competition authorities to become more effective enforcers of EU antitrust rules.

In cartels, the Commission announced three settlement decisions involving maritime transport of cars and supply of car parts and issued a decision fining eight producers for cartel conduct in the capacitors sector spanning 14 years. The Commission also emphasized its anonymous whistleblower tool as a useful element in cartel enforcement, noting that 75% of the Commission's 2018 decisions were adopted under the settlement procedure.

In mergers, the Commission adopted 393 decisions, intervened (*i.e.*, prohibition/case withdrawal or conditional approval) in 25 cases, and conducted in-depth investigations into 12 cases. The Commission did not prohibit any merger in 2018, though two cases were abandoned in Phase II (*Blackstone/Celanese/JV*; *Aperam/VDM*). Interestingly, the Commission quantified estimated customer savings from the Commission's merger interventions at €20 billion.⁵⁵ The Commission also issued a gun-jumping fine against Altice in relation to the acquisition of PT Portugal.⁵⁶

⁵² *Energizer/Spectrum Brands (Battery and Portable Lightning Business)* (Case COMP/M.8988), Commission decision of December 11, 2018; *AB InBev/SABMiller* (Case COMP/M.7881), Commission decision of May 14, 2016; and *Zimmer/Biomet* (Case COMP/M.7265), Commission decision of March 30, 2015.

⁵³ Tommaso Valletti (2016–2019), Massimo Motta (2013–2016), Kai-Uwe Kühn (2011–2013), Damien Neven (2006–2009; 2009–2011), and Lars-Hendrik Röller (2003–2006).

⁵⁴ Commission Guidance Paper on the use of confidentiality rings in antitrust access to file proceedings, available at: http://ec.europa.eu/competition/antitrust/conf_rings.pdf; and Commission Guidance Paper on confidentiality claims during Commission antitrust procedures, available at: http://ec.europa.eu/competition/antitrust/business_secrets_en.pdf.

⁵⁵ See Annual Activity Report 2018, footnote 24 ("[t]he approach followed to estimate customer benefits from Commission's interventions (a merger prohibition, a merger approval subject to conditions or a withdrawal of a merger notification in Phase II) takes into account (i) the likely price increase avoided (3% and 5% for the lower and upper boundary of the estimated customer benefits, respectively); (ii) the total size (by value) of the product market affected and (iii) the expected duration of the price increase avoided").

⁵⁶ *Altice/PT Portugal* (Case COMP/M.7993), Commission decision of April 24, 2018.

Upcoming Events

Date	Conference	Organizer	Location
05/09	Private Enforcement in German Courts	Concurrences	Düsseldorf
06-07/09	23rd Annual Competition Conference	IBA	Florence
09/09	7th Bill Kovacic Antitrust Salon	Concurrences + The George Washington University Law School	Washington, D.C.
10/09	Standard-Essential Patents Strategy Conference	ULB Solvay Brussels School of Economics & Management	Brussels
10/09	13th Annual Georgetown Antitrust Enforcement Symposium	Baker Botts	Washington, D.C.
11-13/09	46th Annual Conference on International Antitrust Law and Policy	Fordham	New York
17/09	Le rôle des autorités de concurrence se restreint-il aux seules sanctions ?	Concurrences + Fréget & Associés + Analysis Group	Paris
17/09	GCR Live 4th Annual State Aid	GCR	Brussels
19/09	Which competition policy for the new EU Commission?	Concurrences + Shearman & Sterling + Avisa	Brussels
20/09	Competition Litigation Conference	MLex + Freshfields + Brick Court Chambers	London
20/09	Innovation and Market Power in the Food Supply Chain: Challenges for Competition Policy and Regulation	European University Institute + Assonime	Florence
24/09	Antitrust Texas	Knect365	Houston
24/09	Les nouvelles lignes directrices en matière de contrôle des concentrations : Ce qu'il faut savoir	Concurrences + Friehe Associés + Analysis Group	Paris
26/09	Global Antitrust Hot Topics: EU, US & Global Perspectives	Concurrences + Baker Botts	Brussels

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