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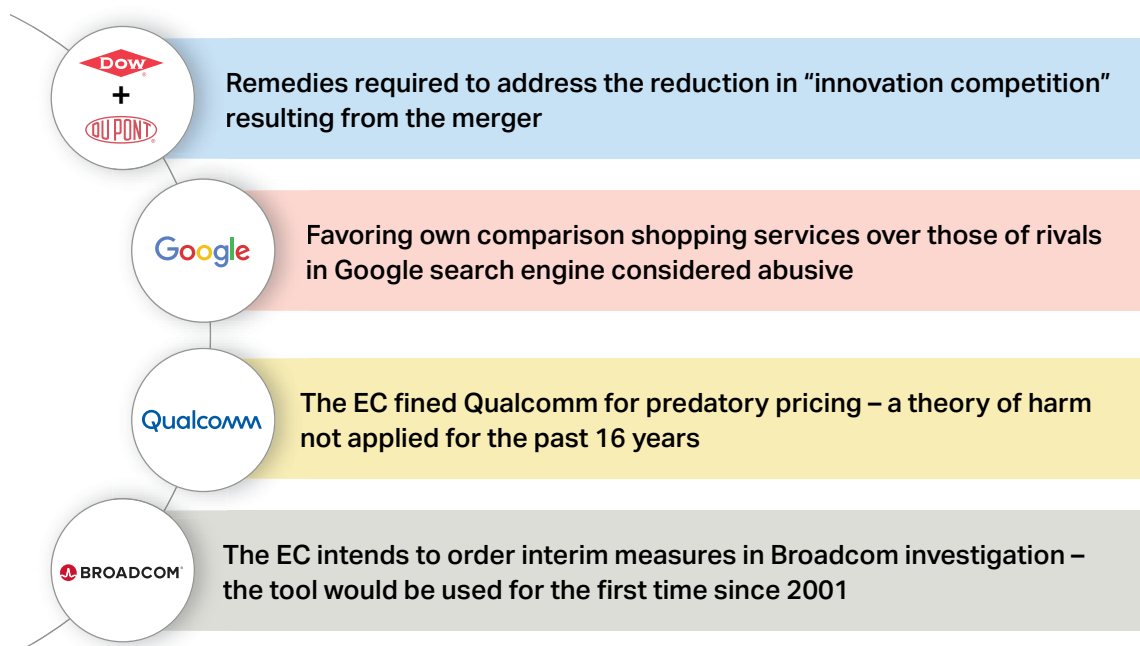
EU Competition Law Newsletter

Vigorous Antitrust Enforcement Likely To Continue During Margrethe Vestager’s Second Term As Competition Commissioner

Margrethe Vestager has been re-appointed as Commissioner for Competition for a second term. If her appointment is approved by the European Parliament, as is expected, she would be in line for a combined 10-year term, which would make her the longest-serving Competition Commissioner. In addition to the competition portfolio, Ms. Vestager will also take on responsibility for the “a Europe fit for the digital age” agenda, and has been designated as one of the executive vice-presidents of the Commission.

High-profile cases likely to continue

During her first term, Commissioner Vestager drew attention in particular for bringing high-profile abuse of dominance cases against U.S. tech companies. The most well-known are perhaps the abuse of dominance cases against Google, where the Commission levied fines against Google totaling a record-breaking €8.2 billion for abusing its market dominance as a search engine, as well as its abusive practices regarding online advertising and Android mobile devices. During Vestager’s first term, the Commission also imposed fines totaling €1.2 billion on Qualcomm, one of which was for predatory pricing, a practice which the Commission has not penalized in over a decade.



There is also every indication that the Commissioner will continue to target perceived abusive practices in the tech sector using the full range of competition tools at her disposal. In a speech following her nomination, Ms. Vestager noted that “as competition authorities, we need to keep a close eye on the way that digital platforms deal with data [and] be prepared to take action if we find that they’re using their control of data to undermine competition.”¹ The Commission has recently opened separate antitrust probes into Amazon’s collection and use of sensitive data of third party sellers that use Amazon’s online marketplace, and Broadcom’s allegedly exclusionary practices on the market for TV and modern chipsets. It is also considering a probe into Libra, Facebook’s cryptocurrency,² and an investigation into Google’s practices in the online job-search market is rumored to be underway.³ During her hearing at the European Parliament, Commissioner Vestager referred to the *Google/AdSense* case and said that despite Google stopping its behavior when the Commission issued a Statement of Objections (“SO”), “the market hasn’t picked up” and advocated for remedies that are “even stronger” and “much more far-reaching.”

Commissioner Vestager also gained a reputation for targeting selective tax deals struck by Member States with prominent international companies using state aid enforcement measures, a policy that has drawn the ire of the U.S. government for perceived anti-U.S. bias, and has led to several Member States accusing her of infringing national sovereignty on taxation matters. Notably, the Commission ordered several Member States to recover illegal state aid from (mostly U.S.) firms including Apple, Amazon, Starbucks, and Fiat. Most prominently, Ireland was ordered to recover €14.3 billion (€13.1 billion plus interest of €1.2 billion) of illegal tax benefits granted to Apple, which is by far the largest state aid recovery order the Commission has made.



In her second term, Ms. Vestager will seek to cement her legacy by defending appeals of her most high-profile decisions before the EU courts, including the Apple state aid decision and the Google and Qualcomm abuse of dominance decisions, which are currently pending before the General Court.

Pressure for reform of antitrust rules

Commissioner Vestager is likely to face pressure to reform the current antitrust framework during her new mandate. After the Commission blocked the *Siemens/Alstom* merger, despite significant political pressure to approve the deal, there were calls from the French and German governments to change EU antitrust rules to introduce greater flexibility, including the ability to consider factors such as European industrial policy (which may involve permitting or encouraging consolidation in the EU industry, and even the creation of “European champions,” to help stave off non-EU rivals, notably from China). Ms. Vestager has

¹ Margrethe Vestager, Security and trust in a digital world, Speech to CCBE Standing Committee, September 13, 2019, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/security-and-trust-digital-world_en.

² Bloomberg, Facebook’s Libra Currency Gets European Union Antitrust Scrutiny, August 20, 2019, available at: <https://www.bloomberg.com/news/articles/2019-08-20/facebook-s-libra-currency-gets-european-union-antitrust-scrutiny>.

³ Reuters, Exclusive: Google’s jobs search draws antitrust complaints from rivals, August 13, 2019, available at: <https://uk.reuters.com/article/us-eu-google-antitrust-exclusive/exclusive-googles-jobs-search-draws-antitrust-complaints-from-rivals-idUKKCN1V3oIX>.

cautioned against such approach, noting that applying less stringent rules (*e.g.*, considering markets to be worldwide in scope) would weaken the Commission's ability to enforce competition rules, would likely have undermined its cases against Google, and would ultimately have a negative impact for EU consumers.⁴ During her hearing at the European Parliament, Commissioner Vestager indicated that she stands by the *Siemens/Alstom* decision and reiterated the support for the current framework. This policy debate may come to a head when Germany takes up the six-month rotating presidency of the Council of the EU in July 2020.

Other aspects of EU antitrust legislation are also set to come under scrutiny. The Commission is already reviewing the current state aid rules with the intention of updating and aligning them with the new political priorities.⁵ It will also have to evaluate the functioning of the Vertical Block Exemption Regulation,⁶ which is due to expire during Commissioner Vestager's second term. The Commission is also likely to reassess the guidelines for the assessment of horizontal cooperation agreements⁷ that include *e.g.*, rules on research and development "which play a key role in European competitiveness and the development of technology-driven markets."⁸ Finally, the Commission's leniency program might need revisions to increase its attractiveness, as the number of leniency applications has been steadily declining in recent years.⁹

New digital policy agenda

In addition to her role as Competition Commissioner, Ms. Vestager will now also be in charge of setting EU policy in the digital sector—an appointment which has raised eyebrows in Silicon Valley, in particular in light of the tough line she has taken on tech companies in her first term. Ms. Vestager has already signaled that her policy will draw on the insights gained from the Commission's antitrust enforcement when considering regulations for the digital sector. Speaking to the press on September 10, 2019 following her nomination, Ms. Vestager said that the Commission had gained "insight from specific cases" during her first term, noting that "in a number of cases ... the case work itself cannot do it." She predicted that these insights would lead the Commission to "consider more regulation."¹⁰ Ms. Vestager may seek to draw on the Commission's experience in reducing interchange fees charged to merchants by Visa and MasterCard, which involved a series of fining and commitment decisions for breaches of competition rules, as well as the Interchange Fee Regulation,¹¹ which capped interchange fees across the EEA.

Ms. Vestager will share the EU digital policy agenda with the Commissioner for the internal market, France's Sylvie Goulard, and one of their major tasks will be the preparation of the new Digital Services Act, which should set out rules for digital platforms, services and products. In particular, the legislation should clarify websites' liability for published content, and subject algorithms used by big tech platforms to

⁴ Financial Times, Vestager: French-German antitrust push would have cleared Google, March 31, 2019, available at: <https://www.ft.com/content/676e24c6-509a-11e9-b401-8d9ef1626294>.

⁵ GCR, Mosso: DG Comp will "rethink" state aid rules, September 17, 2019, available at: <https://globalcompetitionreview.com/article/1197711/mosso-dg-comp-will-%E2%80%99Crethink%E2%80%99D-state-aid-rules>.

⁶ Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1.

⁷ Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 11/1.

⁸ European Parliamentary Research Service Briefing, Margrethe Vestager – Vice-President: A Europe fit for the digital age, September 2019, available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640171/EPRS_BRI\(2019\)640171_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640171/EPRS_BRI(2019)640171_EN.pdf).

⁹ *Ibid.*

¹⁰ MLex, Tech giants face antitrust and regulatory tag-team, EU's Vestager says, September 1, 2019, available at: <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1127400&siteid=190&rdir=1>.

¹¹ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 concerning interchange fees for card-based payment transactions, OJ L 123/1.

regulatory scrutiny.¹² In a further indication of the possible legislative agenda, Ms. Vestager pointed out that existing data protection rules do not prevent data from being used to “to undermine democracy,” a reference to the Facebook/Cambridge Analytica scandal in 2018, and noted that “we may also need broader rules to make sure that the way companies collect and use data doesn’t harm the fundamental values of our society.”¹³

Conclusion and outlook

Commissioner Vestager’s first term has been largely perceived as progressive and bold, with

that same trend set to continue in her second term. She is likely to retain her focus on big tech and platforms, and look carefully at their use of data, while complementing the competition enforcement toolkit with new rules for the digital sector.

It remains to be seen how Ms. Vestager will balance her two roles of overseeing competition enforcement and digital policy in the EU, but we can expect that after an anticipated 10-year term, she will leave a lasting imprint on the EU competitive landscape in general, and on competition in the digital sector in particular.

News

Court Updates

The General Court Renders Two Rulings Relating To The Transparency Of The Commission-Imposed Cartel Fines

On September 24, 2019, the General Court annulled a €33.6 million fine imposed on HSBC for its participation in the euro interest rate derivatives cartel,¹⁴ and on the same day the General Court rejected Printeos’ appeal against the re-imposed fine for its participation in the envelope cartel.¹⁵ Both cases relate to the methodology the Commission applied in calculating the fines and its transparency in that regard. While the General Court found that the Commission provided insufficient reasoning for the applied methodology in calculating the amount of fine it imposed on HSBC, it rejected Printeos’ argument that the Commission breached the right to equal treatment because it applied a different methodology in calculating the fines imposed on the envelope cartel participants.

HSBC and Others v. Commission

In December 2016, the Commission fined Crédit Agricole, HSBC, and JP Morgan Chase with a combined total of over €485 million for their participation in the euro interest rate derivatives cartel.¹⁶ The Commission found that HSBC had a “more peripheral role” in the cartel than other main players, and thus imposed a significantly lower fine on HSBC than on other companies. For this reason, the General Court considered that the Commission should have sufficiently explained why it applied a 98.849% reduction rate to the HSBC’s fine. However, the Commission decision only incidentally, in a few recitals, mentions why the reduction factor had to be greater than 90%, without providing any further details.¹⁷ The General Court found that the Commission did not provide a sufficient explanation that would enable HSBC or the General Court to understand why the reduction rate was set at that particular level, and not at a higher one. Consequently, the General Court annulled the imposed fine.¹⁸

¹² Financial Times, EU draws up sweeping rules to curb illegal online content, July 24, 2019, available at: <https://www.ft.com/content/e9aa1ed4-ad35-11e9-8030-530adfa879c2> <https://www.ft.com/content/e9aa1ed4-ad35-11e9-8030-530adfa879c2>.

¹³ Margrethe Vestager, Security and trust in a digital world, Speech to CCBE Standing Committee, September 13, 2019, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/security-and-trust-digital-world_en.

¹⁴ *HSBC Holdings and Others v. Commission* (Case T-105/17) EU:T:2019:675.

¹⁵ *Printeos and Others v. Commission* (Case T-466/17) EU:T:2019:671.

¹⁶ *Euro Interest Rate Derivatives* (Case COMP/AT.39914), Commission decision of December 7, 2016.

¹⁷ *HSBC Holdings and Others v. Commission* (Case T-105/17) EU:T:2019:675, paras. 346–354.

¹⁸ The General Court largely upheld the Commission decision in relation to the HSBC’s infringement of competition law.

Printeos and Others v. Commission

In December 2014, the Commission imposed a €4.7 million fine on Printeos for participation in the paper envelope cartel.¹⁹ Printeos appealed the Commission's decision. In December 2016, the General Court upheld the appeal, concluding that the Commission failed to give adequate reasons for applying different adjustments to the basic amount of the fines imposed on the cartel participants, and accordingly annulled the Commission's decision.²⁰

The Commission decided to re-open the case following the judgment, and by its decision of June 6, 2017, re-imposed the €4.7 million fine. Printeos again appealed to the General Court, arguing that the Commission breached its right to equal treatment by applying a different methodology in calculating the amount of fine imposed on the different cartel participants. This time, the General Court disagreed with Printeos, and found that the application of a different methodology does not give rise to the breach of the right to equal treatment. In particular, the General Court clarified that when the Commission imposes, on participants involved in a single infringement, fines which are individually justified, the principle of equal treatment is not violated because for some of the participants, the amount of the fine is greater than for others.²¹ The General Court also rejected Printeos' argument that the Commission, by re-imposing the fine, breached its right not to be tried twice for the same offence (*ne bis in idem* doctrine).

The two judgments come in a year marked by the Commission's continued anti-cartel enforcement, and may serve as additional guidance on the calculation of fines imposed on cartel participants. Earlier this year, on January 31, 2019, the Commission issued a SO alleging that eight banks participated in a cartel in the European government bonds sector,²² while on February 19, 2019, the Commission carried out unannounced inspections in various Member States at premises of companies active in the farmed Atlantic salmon sector.²³ On July 4, 2019, the Commission re-adopted the decision against Italian manufacturers of reinforcing steel bars for concrete imposing total fines of €16 million for participation in a price fixing cartel.²⁴

The General Court Rules On Two Commission State Aid Tax Decisions: Annuls Decision Against Starbucks, Upholds Decision Against Fiat

On September 24, 2019, the General Court ruled on the appeals against two of the Commission's decisions ordering recovery of illegal state aid in back taxes that the Netherlands and Luxembourg allegedly provided to Starbucks Manufacturing EMEA BV ("Starbucks") and Fiat Chrysler Finance Europe ("Fiat") respectively.²⁵ These judgments follow the General Court's ruling in February 2019, in which it annulled a similar Commission decision which found that a Belgian tax scheme for multinational companies constituted state aid.²⁶ The decisions are anticipated to provide an insight into how the General Court is expected to scrutinize other similar cases currently pending before the General Court.²⁷

¹⁹ *Envelopes* (Case COMP/AT.39780), Commission decision of December 10, 2014.

²⁰ *Printeos and Others v. Commission* (Case T-95/15) EU:T:2016:722.

²¹ *Printeos and Others v. Commission* (Case T-466/17) EU:T:2019:671, paras. 95–98.

²² Commission Press Release IP/19/804, "Antitrust: Commission sends Statement of Objections in European government bonds cartel," January 31, 2019

²³ Commission Statement 19/1310, "Antitrust: Commission confirms unannounced inspections in the farmed Atlantic salmon sector," February 19, 2019.

²⁴ *Reinforcing steel bars* (Case COMP/AT. 37956), Commission decision of July 4, 2019.

²⁵ *Aid to Amazon – Luxembourg* (Case COMP/SA. 38944), Commission decision of October 4, 2017; *Aid to Apple* (Case COMP/SA.38373), Commission decision of August 30, 2016. The Commission also previously conducted an investigation against Luxembourg for allegedly providing state aid to McDonald's, but concluded that the reduced tax base did not constitute state aid. See *Alleged aid to Mc Donald's – Luxembourg* (Case COMP/SA.38945), Commission decision of September 19, 2018.

²⁶ *Belgium v. Commission* (Cases T-131/16 and T-263/16) EU:T:2019:91, appeal pending.

²⁷ See, e.g., *Apple Sales International and Apple Operations Europe v. Commission* (Case T-892/16) EU:T:2017:925, case pending; *Ireland v. Commission* (Case T-778/16) EU:T:2018:1019, case pending; *Luxembourg v. Commission* (Case T-816/17), case pending; *Amazon EU and Amazon.com v. Commission* (Case T-318/18), case pending.

Starbucks

The General Court overturned the Commission's decision²⁸ ordering Starbucks to repay up to €30 million in back taxes to the Netherlands. The Commission found that the corporate tax regime to which Starbucks was subject in the Netherlands constituted state aid on the basis that it resulted in Starbucks' tax liability being lower than that of companies in a similar situation. In particular, the Commission considered that the Dutch authorities' tax ruling endorsing a methodology of allocation of profits between the companies within the same group which was not in line with the arm's length principle,²⁹ reduced Starbucks' taxable profit under the Dutch corporate income tax system and conferred an advantage to it compared to domestic stand-alone companies.³⁰

Consequently, the Commission ordered Starbucks to repay the amount of the reduced tax burden, namely €30 million, to the Dutch State.³¹ Starbucks and the Dutch government appealed to the General Court, which annulled the Commission's decision on the basis that the Commission failed to adequately state its reasons for finding that the Dutch tax measure provided a selective economic advantage to Starbucks. The General Court endorsed the Commission's use of the arm's length principle however, ruling that "Article 107(1) TFEU allows the Commission to check whether that pricing [internally within a corporate group] corresponds to pricing under market conditions [*i.e.*, arm's length pricing]... thus conferring on that undertaking an advantage within the meaning of [Article 107(1)]."³²

Fiat

On the same day, the General Court issued another ruling in a similar case upholding the Commission's decision and thus ordering Fiat to repay illegal state aid of up to €30 million in back taxes to Luxembourg.³³ Contrary to the *Starbucks* case, the General Court found that the Commission appropriately used the arm's length principle, in determining that as a result of a tax measure adopted by Luxembourg, Fiat was given a selective economic advantage compared to similarly situated companies.³⁴

Conclusion

It remains to be seen if either judgment will be appealed to the Court of Justice of the European Union ("Court of Justice"). These judgments also come in the wake of hearings in the *Apple* case, in which Apple and Ireland appealed the Commission's decision ordering Apple to repay €13 billion (plus interest) in back taxes to Ireland deemed to be illegal state aid.³⁵ These judgments, in which Ireland intervened alongside the Netherlands and Luxembourg, may shed light on the General Court's much-anticipated ruling in the *Apple* case, which is expected in the course of 2020.³⁶

The Court Of Justice In Tibor-Trans Expands Forum Options For Cartel Damages Claimants

On July 29, 2019, the Court of Justice confirmed that the Hungarian courts had jurisdiction to rule on damages claims brought by Tibor-Trans Fuvarozó és Kereskedelmi Kft. ("Tibor-Trans"), a Hungarian logistics company, against DAF Trucks N.V. ("DAF"), one of the members of the EU-wide

²⁸ *Starbucks and Starbucks Manufacturing Emea v. Commission* (Joined Cases T-760/15 and T-636/16) EU:T:2019:669, paras. 559–561.

²⁹ This "arm's length principle" aims to ensure that all economic operators are treated in the same manner when determining their taxable base for corporate income tax purposes, regardless of whether they form part of an integrated corporate group or operate as standalone companies on the market. See DG Competition Working Paper on State Aid and Tax Rulings of June 3, 2016, para. 3.

³⁰ *State aid implemented by the Netherlands to Starbucks* (Case COMP/SA.38374), Commission decision of October 21, 2015, para. 377.

³¹ *State aid implemented by the Netherlands to Starbucks* (Case COMP/SA.38374), Commission decision of October 21, 2015, para. 449.

³² *Starbucks and Starbucks Manufacturing Emea v. Commission* (Joined Cases T-760/15 and T-636/16) EU:T:2019:669, para. 151.

³³ *State aid which Luxembourg granted to Fiat* (Case COMP/SA.38375), Commission decision of October 21, 2015.

³⁴ *Luxembourg v. Commission* (Case T-755/15) EU:T:2019:670, paras. 359–367.

³⁵ *Aid to Apple* (Case COMP/SA.38373), Commission decision of August 30, 2016.

³⁶ *Apple Sales International and Apple Operations Europe v. Commission* (Case T-892/16) EU:T:2017:925, case pending; *Ireland v. Commission* (Case T-778/16) EU:T:2018:1019, case pending.

trucks cartel.³⁷ The Court of Justice clarified that cartel victims may claim damages in any Member State affected by a cartel, even where they had no direct contractual relationship with the cartelists.

Background

In a June 2016 decision, the Commission fined five international trucks manufacturers (including DAF) €2.96 billion for price fixing and other anticompetitive behavior over a 14-year time-period.³⁸ Tibor-Trans, which purchased DAF trucks during that time period, brought a follow-on damages claim against DAF in Hungary, even though the cartel discussions took place outside Hungary and Tibor-Trans never had a direct contractual relationship with DAF, as it bought its trucks from local Hungarian dealerships.

After the Hungarian lower court refused jurisdiction, the appeal court referred a preliminary question to the Court of Justice, asking if the Hungarian courts have jurisdiction based on Article 7(2) of the Brussels I Recast Regulation, which provides that “[a] person domiciled in a Member State may be sued in another Member State [...] in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.”³⁹

Court of Justice judgment

The Court of Justice, referring to its previous decision in *flyLAL-Lithuanian Airlines*, noted that the “place where the harmful event occurred” cannot be interpreted so widely as to encompass any place where the adverse consequences of an event can be felt.⁴⁰

The Court of Justice held that the damage alleged by Tibor-Trans resulted from the additional costs passed on to Tibor-Trans by Hungarian dealerships that purchased directly from the cartelists, and was therefore “the immediate consequence of [the cartel] and thus constitutes direct damage which, in

principle, provides a basis for the jurisdiction of the courts of the Member State in which it occurred.”⁴¹

The Court of Justice observed that it was clear from the Commission decision that the trucks cartel had distorted competition across the entire EEA, of which Hungary is a member. It concluded on this basis that Hungary “must be regarded as the place where the damage occurred for the purposes of applying Article 7(2) of [the Brussels I Recast Regulation].”⁴²

In other words, the Court of Justice confirmed that an indirect purchaser of a cartelized product may sue the cartelists directly before the courts of the Member State where the product was purchased—assuming the prices in that Member State were affected by the cartel.

General Court Upholds Poland’s Challenge To OPAL Pipeline Decision

On September 10, 2019, the General Court annulled a European Commission decision concerning the Ostseepipeline-Anbindungsleitung (“OPAL”) gas pipeline for breaching the principle of energy solidarity. The decision approved raising a cap on Gazprom’s use of the pipeline.

OPAL is a southwestern spur of Nord Stream 1, a gas pipeline owned and operated by Gazprom, running from northeastern Germany to the Czech Republic. The German energy regulator initially exempted the pipeline from EU rules on third-party access and tariff regulation,⁴³ subject to certain conditions. One of these conditions—imposed by the Commission in 2009—stipulated that dominant undertakings (such as Gazprom) could not reserve more than 50% of OPAL’s cross-border capacity without offering at least 3 billion cubic meters of gas per year on the market. OPAL’s capacity remains at 50%, as Gazprom has not

³⁷ *Tibor-Trans v. DAF* (Case C-451/18) EU:C:2019:635.

³⁸ *Trucks* (Case COMP/AT.39824), Commission decision of July 19, 2016.

³⁹ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1.

⁴⁰ *flyLAL-Lithuanian Airlines* (Case C-27/17) EU:C:2018:533, para. 32.

⁴¹ *Tibor-Trans v. DAF* (Case C-451/18) EU:C:2019:635, para. 31.

⁴² *Tibor-Trans v. DAF* (Case C-451/18) EU:C:2019:635, para. 33.

⁴³ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57. Replaced by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94.

met these conditions. In 2016, the Commission approved the German energy regulator's decision to replace the 50% capacity restriction with an obligation to offer through auction a total of 12.3 billion cubic meters of gas per year.

Poland, Latvia, and Lithuania appealed the Commission's approval to the General Court. They claimed that the decision breached the principle of energy solidarity. This principle requires, broadly speaking, EU Member States and institutions to avoid adopting measures that threaten each other's energy security. The General Court held that the Commission failed, however, to take Poland's interests into account, examining only security of supply for the EU in general, and annulled the Commission's decision. It remains to be seen whether the Commission will appeal the General Court's decision (or re-adopt a new decision).

Commission Updates

Commission Sends Statement Of Objections To The Czech Subsidiaries Of O2/CETIN And T-Mobile

On August 7, 2019, the Commission sent a SO⁴⁴ to Czech mobile telephony operators O2 CZ and T-Mobile CZ, and the network infrastructure company CETIN.⁴⁵ The Commission provisionally found that O2 CZ/CETIN and T-Mobile CZ's network sharing agreement, which dates back to 2011 and covers 2G, 3G, and 4G mobile services for 85% of the population of Czechia, is likely to remove their incentives to improve their own networks and services and therefore restricts competition.

Network sharing is a widespread practice in the mobile telephony industry. It can involve varying degrees of cooperation between operators, from sharing of infrastructure to national roaming arrangements.

As acknowledged by Commissioner Vestager, network sharing generally benefits consumers in terms of faster roll-out, cost savings and coverage in rural areas. In fact, the Commission has required such arrangements as remedies in telecom mergers, e.g., *T-Mobile/Orange*, *Telefónica Deutschland/E-Plus*, and *Hutchison 3G Italy/WIND/JV*.⁴⁶ The Commission also used network sharing as a counterfactual in telecom mergers and joint venture transactions, and found e.g., in *Hutchison 3G Italy/WIND/JV* and *Hutchison 3G Austria/Orange Austria* that network sharing was likely to create similar cost and revenue synergies through less anticompetitive means.⁴⁷ However, procompetitive effects of network sharing are not always obvious. Network sharing agreements may also lead to a restriction of competition and consumer choice if network sharing operators lose their autonomy to compete on price and quality as a result of common input costs from overlapping infrastructure. Additionally, they may facilitate the exchange of information between network sharing operators.

In this regard, under certain circumstances, network sharing agreements may be subject to investigation by the Commission and ultimately be found to infringe Article 101 TFEU. Indeed, the Commission found in 2003 in *T-Mobile Deutschland/O2 Germany* that "[n]ational roaming between network operators ... by definition restricts competition between these operators in all related network markets on key parameters such as coverage, quality and transmission rates."⁴⁸ The General Court nonetheless annulled this part of the Commission's decision because it found that it was not based on any specific evidence showing anticompetitive effects. Accordingly, network sharing can be found to infringe Art. 101 TFEU only if there is specific evidence showing anticompetitive effects, and therefore requires a case-by-case analysis.

⁴⁴ The Czech competition authority started the investigation in 2014. The Commission asked for the case to be transferred in 2015. In addition, Vodafone, O2's and T-Mobile's only significant competitor in Czechia, submitted a complaint to the Commission.

⁴⁵ CETIN belongs to the same corporate group as O2 CZ. See Commission Press Release IP/19/5110, "Antitrust: Commission sends Statement of Objections to O2 CZ, CETIN and T-Mobile CZ for their network sharing agreement," August 7, 2019.

⁴⁶ *T-Mobile/Orange* (Case COMP/M.5650), Commission decision of March 1, 2010; *Telefónica Deutschland/E-Plus* (Case COMP/M.7018), Commission decision of July 2, 2014; and *Hutchison 3G Italy/WIND/JV* (Case COMP/M.7758), Commission decision of September 1, 2016.

⁴⁷ *Hutchison 3G Italy/WIND/JV* (Case COMP/M.7758), Commission decision of September 1, 2016, paras. 1582-1594; and *Hutchison 3G Austria/Orange Austria* (Case COMP/M.6497), Commission decision of December 12, 2012, paras. 417-420.

⁴⁸ *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag* (Case COMP/38.369), Commission decision of July 16, 2003, para. 107.

In the case at hand, the Commission reached the preliminary conclusion that the agreement between O2 CZ/CETIN and T-Mobile CZ may have a restrictive effect on competition for two reasons. First, the Czech mobile communications market is highly concentrated. O2/CETIN and T-Mobile are the two largest operators in the country, with a combined share of approximately 75%, the only other significant competitor being Vodafone (with a share of approximately 25%). Second, the network sharing agreement between O2 CZ/CETIN and T-Mobile CZ is very wide in scope, covering all mobile technologies and the entire territory of Czechia with the exception of Prague and Brno. Therefore, the agreement covers some urban areas where it is more difficult to justify network sharing, as procompetitive effects are limited.⁴⁹

The outcome of the investigation may provide guidance on the antitrust limits of network-sharing agreements, especially as mobile telecommunications companies are expected to invest significantly in 5G in the near future.

Commission Approves The Acquisition Of Innogy By E.ON Subject To Commitments

On September 17, 2019, the Commission authorized E.ON's acquisition of Innogy's distribution and consumer solutions business and certain electricity generation assets.⁵⁰ This transaction is part of a broader asset swap deal between energy companies E.ON and RWE (Innogy's controlling company).

This part of the swap was authorized conditionally after an in-depth investigation by the Commission. The Commission was concerned that the acquisition would have reduced competition in various electricity and gas retail markets in Czechia, Germany, and Hungary because E.ON and Innogy were two of a very limited number of suppliers in

those markets. To address the Commission's concerns, E.ON offered extensive asset and customer divestitures and discontinued its operation of 34 electric-charging stations on German motorways. The Commission found that these divestitures were viable, and sufficient to remove its concerns.

The other part of the asset swap, *i.e.*, RWE's acquisition of E.ON electricity generation assets, was cleared unconditionally in Phase I in February 2019.⁵¹

Roadmap For The Evaluation Of The Horizontal Block Exemption Regulations Open For Comments

As of September 5, 2019, the Commission is inviting comments on the [roadmap](#) for the evaluation of the horizontal block exemption regulations on research and development agreements⁵² and specialization agreements⁵³ (the "Horizontal Block Exemption Regulations"). In the fourth quarter of 2019, the Commission intends to launch a public consultation with a view to determining whether to extend or update the Horizontal Block Exemption Regulations and the Guidelines on horizontal cooperation agreements or let them expire on December 31, 2022.⁵⁴ The roadmap is open for comments for four weeks, meaning that stakeholders may provide comments on the roadmap until October 3, 2019.

⁴⁹ See Commission Press Release IP/03/1026, "Commission approves 3rd Generation mobile network sharing in Germany," July 16, 2003 ("The investigation has also confirmed that national roaming between licensed network operators benefits consumers by allowing the operators involved to offer better and quicker 3G coverage. This is especially true for less built-up and rural areas of Germany.").

⁵⁰ *E.ON/Innogy* (Case COMP/M.8870), decision not yet published. See Commission Press Release IP/19/5582, "Commission clears E.ON's acquisition of Innogy, subject to conditions," September 17, 2019.

⁵¹ See Commission Press Release IP/19/1432, "Commission approves RWE's acquisition of E.ON electricity generation assets," February 26, 2019.

⁵² Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335/36 ("Regulation 1217/2010").

⁵³ Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335/43 ("Regulation 1218/2010").

⁵⁴ Regulation 1217/2010, Article 9; Regulation 1218/2010, Article 7.

Upcoming Events

Date	Conference	Organizer	Location
15/10	Big Data & Competition Law Conference	KNect365	Brussels
17-18/10	Competition Law Fall Conference	CBA	Ottawa
24/10	Dynamic Competition in Dynamic Markets: A Path Forward	CPI	Brussels
24/10	Competition Law Hotbeds: Platforms & Industrial Policy	ABA	Copenhagen
29/10	GCR Live 2nd Annual Merger Control	GCR	Brussels
01/11	Antitrust and Developing and Emerging Economies	Concurrences and NYU	New York
05/11	25th Annual Competition Law & Regulation in the Telecoms & Communications Sectors	KNect365	Brussels
06/11	Competition Law & Regulation in the Media, Broadcasting & Digital Sectors	KNect365	Brussels
12/11	GCR Live 3rd Annual Women in Antitrust	GCR	Washington, D.C.
14-15/11	Annual Conference on European State Aid Law 2019	ERA	Trier
19/11	GCR Live 4th Annual Düsseldorf	GCR	Düsseldorf
25-27/11	Advanced EU Competition Law	KNect365	Brussels

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