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Highlights

— *Pometon v. Commission*: The Court of Justice Sheds Light On The Principle Of Equal Treatment And The Presumption Of Innocence In Hybrid Cartel Settlements

— The Court of Justice's *Lundbeck* Ruling Finds Nothing New Under The Sun For By-Object Restrictions

— Transforming European Merger Control: The Commission Specifies When It Will Seek To Review Mergers That Are Not Subject To Any Filing Requirements

Pometon v. Commission: The Court of Justice Sheds Light On The Principle Of Equal Treatment And The Presumption Of Innocence In Hybrid Cartel Settlements

On March 18, 2021, the Court of Justice ruled on Pometon SpA ("Pometon")'s appeal against the General Court's judgment in the steel abrasives[1] hybrid cartel settlement case. The Court of Justice ruled that the General Court had breached the principle of equal treatment when recalculating the fine imposed on Pometon by the Commission in 2016, the only non-settling party in this case. The Court of Justice therefore further reduced Pometon's fine to €2.6 million, imposing an approximate 60% discount on the original fine calculated by the Commission.[2]

The Court of Justice however dismissed the remainder of Pometon's appeal, notably agreeing with the General Court that the Commission had not breached the presumption of innocence. In this context, the Court of Justice further clarified how the Commission ought to balance the efficiencies of the settlement process with the presumption of innocence of non-settling parties in hybrid cartel settlements.

[1] Steel abrasives are loose steel particles produced from steel scrap. They are mainly used in the steel, automotive, metallurgy, petrochemical, and stone-cutting industries.

[2] *Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214. *See also Pometon SpA v. Commission* (Case C-440/19 P), Opinion of Advocate General Hogan of October 8, 2020, EU:C:2020:816 (the "Opinion"). For reporting on the Opinion, *see*, our October 2020 EU Competition Law Newsletter.

Background

In June 2010, the Commission launched an investigation and conducted dawn raids at the premises of five steel abrasives producers in the EEA.[3] In January 2013, the Commission initiated proceedings against them for allegedly agreeing on a common scrap surcharge calculation formula for steel abrasives' sales.

In April 2014, the Commission adopted a settlement decision concerning all producers under investigation except for Pometon, the only non-settling party, finding that these four settling parties had coordinated steel abrasives prices throughout the EEA.[4]

Critically, the Commission published—"unintentionally," as the Commission later asserted—a provisional non-confidential version of its 2014 settlement decision, prior to concluding the Pometon proceedings, and without redacting references to Pometon. Pometon claimed that, by doing so, the Commission had breached the principle of professional secrecy. Pometon further claimed that the Commission had violated its rights of defense and presumption of innocence because the settlement decision mentioned Pometon when describing the events of the case. This arguably showed that the Commission had already formed a view on Pometon's involvement in the cartel before its 2016 decision.

The Commission continued its investigation into Pometon, the only non-settling party, under the standard cartel procedure, turning the process into a so-called "hybrid" cartel settlement procedure (*i.e.*, a situation in which some parties allegedly involved in a cartel choose to settle with the Commission, while others opt to contest the Commission's allegations under the standard cartel administrative process).[5]

In May 2016, the Commission fined Pometon c. €6.2 million for its participation in the steel abrasives cartel.[6] Pometon received a 10% fine discount because its participation in the cartel was not as extensive as that of other parties. In its decision, the Commission rejected all of Pometon's arguments regarding a breach of the principle of professional secrecy, Pometon's rights of defense, and the presumption of innocence.[7]

The General Court judgment

In August 2016, Pometon brought an action to annul the Commission decision before the General Court. Pometon notably claimed that the Commission had breached the principles of impartiality of the procedure, as well as Pometon's presumption of innocence and rights of defense, by referring to Pometon's conduct in the 2014 settlement decision. Pometon also asked for an annulment or otherwise reduction of its fine because the Commission had failed to state reasons and breached the principles of proportionality and equal treatment when calculating its fine.

In March 2019, the General Court dismissed all of Pometon's grounds of appeal, but still annulled the Commission's fine and set it at c. €3.9 million. The General Court ruled that the Commission had not evidenced to the requisite legal standard the reasons for calculating the amount of Pometon's fine, and it was not possible to discern if the principles of proportionality and equal treatment had been respected.[8] Pometon appealed the General Court's judgment in June 2019.

The Court of Justice judgment

The Court of Justice held that the General Court had breached the principle of equal treatment when it recalculated Pometon's fine, but rejected

[3] These producers were Pometon, Ervin Industries Inc. and its subsidiary Ervin Amasteel, WHA Holding SAS and its subsidiary Winoa SA ("Winoa"), Metalltechnik Schmidt GmbH & Co. KG, and Eisenwerk Würth GmbH.

[4] *Steel Abrasives* (Case COMP/AT.39792), Commission decision of April 2, 2014.

[5] Based on publicly available information, approximately 21% of cartel settlements are hybrid cases, with the number of "hold-outs" typically being one, except for the three "hold-outs" in the *EIRD* investigation (*see also Icap v. Commission* (Case T180/15) EU:T:2017:795, as reported in our European Competition Report Q4 2017, and our May 2019, and July 2019 EU Competition Law Newsletters, respectively).

[6] *Steel Abrasives* (Case COMP/AT.39792), Commission decision of May 25, 2016.

[7] For further reporting on the 2016 Commission decision on *Pometon*, *see*, our European Competition Report Q4 2016.

[8] *Pometon SpA v. Commission* (Case T-433/16) EU:T:2019:201.

Pometon's other grounds of appeal, including its claims that the General Court had erred in law when finding that the Commission had not breached its presumption of innocence.

Equal treatment. Pometon claimed that the General Court treated two different situations identically when (re)calculating its fine, without objective justifications, thus breaching the principle of equal treatment. The Court of Justice agreed, finding that the General Court had failed to state why it applied the same fine reduction rate to Pometon as to another cartel participant, Winoa, even though Pometon's infringement was less serious than Winoa's, as the General Court itself had concluded.[9] Based on the General Court's own findings, the Court of Justice pointed out that "it was for the General Court to set out the reasons why, despite the difference in situation, it was consistent with the principle of equal treatment to grant Pometon a rate of reduction identical to that granted to Winoa."[10]

Presumption of innocence. While the Court of Justice dismissed the remainder of Pometon's claims,[11] its analysis relating to the presumption of innocence is instructive for hybrid cartel settlement proceedings. The Court of Justice confirmed that while "it may be objectively necessary" for the Commission's hybrid cartel settlement decision to mention "certain facts and behaviour" related to non-settling parties, it must nonetheless "preserve [the non-settling parties'] presumption of innocence."[12]

The General Court had examined two elements to determine whether the Commission had breached Pometon's presumption of innocence: (i) whether the Commission took "sufficient drafting precautions" in its decision to avoid a "premature judgment as to Pometon's participation in the cartel" and (ii) whether references to Pometon in its decision were necessary.[13]

The General Court had replied to both questions in the affirmative and the Court of Justice confirmed this reasoning:

— The Commission's settlement decision had explicitly stated that Pometon was not an addressee, that it was subject to separate proceedings, and that references to Pometon served the sole purpose of establishing the settling parties' liability.[14]

— References to Pometon when describing the facts of the case in the settlement decision were necessary to accurately describe the events establishing the cartel and to examine the full extent of the settling parties' liability.[15]

A demoralizing outcome for non-settling parties in hybrid cartel settlement proceedings

The Court of Justice's ruling that the Commission had not breached Pometon's presumption of innocence must be a welcome result for the Commission. In contrast, the Commission was found to have breached the presumption of innocence in another recent hybrid cartel settlement case by the General Court in *Icap v. Commission* ("*Icap*")—on which Pometon tried to rely before the Court of Justice.[16]

This feeds into a broader debate: in hybrid cartel settlement cases, should the Commission adopt settlement and non-settlement decisions

[9] *Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214, para. 150.

[10] *Ibid.*, para. 151.

[11] The Court of Justice rejected Pometon's grounds of appeal claiming that the General Court erred in law when it found that the Commission had not breached the principle of impartiality and the presumption of innocence, that the General Court erred in law on the application of rules related to the burden of proof and the presumption of innocence, and that the General Court erred in law on the application of the burden of proof and presumption of innocence related to the duration of Pometon's participation in the infringement.

[12] *Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214, para. 65.

[13] *Ibid.*, para. 68.

[14] *Ibid.*, paras. 69–74.

[15] *Ibid.*, paras. 75–84.

[16] The General Court's *Icap* ruling was also upheld by the Court of Justice. *See Icap v. Commission* (Case T180/15) EU:T:2017:795 (as reported in our European Competition Report Q4 2017, and our May 2019, and July 2019 EU Competition Law Newsletters respectively). *See also Commission v. Icap* (Case C-39/18 P) EU:C:2019:584. In *Pometon*, the Court of Justice distinguished Pometon's case from the General Court's ruling in *Icap* and confirmed that a case-by-case analysis of whether the Commission has respected the presumption of innocence is appropriate; *see Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214, para. 86.

simultaneously to avoid breaching the non-settling parties' presumption of innocence? While the Commission followed this approach in its first hybrid cartel settlement procedure,[17] the Commission seems to have favored a staggered approach towards decisions in hybrid cartel settlement cases ever since.

Icap reignited this debate when the General Court suggested that one of the steps for the Commission to safeguard all parties' presumption of innocence in a hybrid cartel settlement could be to simultaneously adopt both decisions.[18]

The General Court and the Court of Justice's judgments in *HSBC Holdings plc v. Commission*[19] and *Pometon* respectively, however, did not repeat this thought.

While the jury is still out on HSBC's appeal to the Court of Justice, for now, the Court of Justice's *Pometon* ruling seems to favor the Commission's preference for a speedy resolution of cartel settlement cases, and supports follow-on damages applicants in bringing their actions against the settling parties sooner rather than later.

The Court of Justice's *Lundbeck* Ruling Finds Nothing New Under The Sun For By-Object Restrictions

On March 25, 2021, the Court of Justice dismissed the appeals of H. Lundbeck A/S and Lundbeck Limited ("Lundbeck"), as well as of certain generic drugmakers ("generics"),[20] against the General Court judgments upholding the first-ever so-called pay-for-delay Commission decision.

The Court of Justice confirmed the General Court's conclusion that Lundbeck's patent settlement agreements with four generics aimed at preventing generic market entry for Lundbeck's best-selling antidepressant drug citalopram and restricted competition by object. While the judgment came out as expected given the Court of Justice's ruling in *Generics (UK)*,[21] it leaves one wondering whether it struck the right balance between IP and competition law and if it will increase the already expected chilling effect on innovation in the European pharmaceutical sector and on out-of-court patent settlements.

Background

In the 1970s, Lundbeck developed a widely successful antidepressant containing the active pharmaceutical ingredient ("API") citalopram

[17] *Animal feed phosphates* (Case COMP/AT.38866), Commission decision of July 20, 2010.

[18] *See Icap v. Commission* (Case T-180/15) EU:T:2017:795, para. 268 ("in circumstances where the Commission considers that it is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement, it is for the Commission to take the necessary measures—including possible adoption on the same date of the decisions relating to all the undertakings concerned by the cartel, as it did in the case which gave rise to the judgment of 20 May 2015, *Timab Industries and CFPR v. Commission* (Case T-456/10) EU:T:2015:296—enabling that presumption of innocence to be safeguarded").

[19] *HSBC Holdings plc v. Commission* (Case T-105/179) EU:T:2019:675 (the "HSBC" case, as reported in our August/September 2019 EU Competition Law Newsletter). On December 3, 2019, HSBC appealed to the Court of Justice, with the following first plea: "the General Court erred in law as regards the effects of the Commission's infringement of essential procedural requirements, namely HSBC's right to the principles of the presumption of innocence, good administration and the rights of defence" (Case C-883/19 P). This appeal is currently pending before the Court of Justice, along with the Commission's appeal to the Court of Justice on the same case.

[20] The generics were Merck KGaA and Generics UK Ltd, Arrow Group ApS and Arrow Generics Ltd, Sun Pharmaceutical Industries Ltd (formerly Ranbaxy Laboratories Ltd) and Ranbaxy (UK) Ltd, and Xellia Pharmaceuticals ApS and Alpharma LLC (later renamed to Zoetis Products LLC). These four drug makers develop and market generic pharmaceutical products, *i.e.*, drugs that are created to be the same as existing and approved branded drugs. Lundbeck, on the other hand, is an "originator" drug maker, as its activities focus on researching and bringing new medicines to the market. *See also H. Lundbeck A/S and Lundbeck Ltd v. Commission* (Case C-591/16 P) EU:C:2021:243, para. 6; *Xellia Pharmaceuticals ApS and Alpharma LLC v. Commission* (Case C-611/16) EU:C:2021:245; *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd, and Ranbaxy (UK) Ltd v. Commission* (Case C-586/16) EU:C:2021:241; *Arrow Group ApS and Arrow Generics Ltd v. Commission* (Case C-601/16) EU:C:2021:244; *Generics (UK) Ltd v. Commission* (C-588/16) EU:C:2021:242; and *Merck KGaA v. Commission* (Case C-614/16) EU:C:2021:246.

[21] A preliminary reference made by the UK Competition Appeals Tribunal resulted in the *Generics (UK)* preliminary ruling, which involved patent settlement agreements between GlaxoSmithKline and generics manufacturers that delayed sales of generic versions of paroxetine, an antidepressant medicine. *See Generics (UK) Ltd v. Commission* (Case C-307/18) EU:C:2020:52 ("*Generics (UK)*"), also reported in our December/January 2020 EU Competition Law Newsletter.

and subsequently obtained patents protecting the citalopram API as well as processes for producing citalopram (so-called "process patents").

In 2002-2003, Lundbeck initiated litigation against generics that it claimed were infringing some of its patents. Lundbeck obtained preliminary relief in over half of these proceedings and settled several other cases through what later came to be coined as pay-for-delay arrangements. In 2013, the Commission found that six of these patent settlement agreements[22] restricted competition by object within the meaning of Article 101 TFEU, and aimed at delaying the entry of cheaper generic versions of Lundbeck's—then best-selling—citalopram.[23] The Commission fined Lundbeck and the generics a combined €146 million.

The Court of Justice confirms the General Court's conclusion that pay-for-delay agreements restrict competition by object

Lundbeck's main substantive points of contention when it applied for annulment of the Commission's decision to the General Court in 2013 and lodged an appeal against the General Court's judgment before the Court of Justice in 2016, were that the contested agreements did not restrict competition by object and that there was no actual or potential competition between it and the generics.

General Court judgment. On September 8, 2016, the General Court dismissed Lundbeck's appeal in its entirety and thus confirmed, for the first time, that pay-for-delay agreements constitute a restriction of Article 101 TFEU by object.[24]

— First, the General Court upheld the Commission's finding that Lundbeck and the generics were actual or potential competitors at the time of the agreements. The generics had "real concrete possibilities" to enter the market—even by launching their product risking litigation from Lundbeck,[25] and it was not relevant that the generics did not yet have marketing authorizations.[26]

— Second, the General Court confirmed that the pay-for-delay agreements at issue were by-object restrictions of competition, because the size of Lundbeck's payments provided an incentive for the generics to accept restrictions on their commercial behavior that they would otherwise not have accepted. Agreements restrict competition by object if "having regard to the content of their provisions, their objectives, and the economic and legal context of which they form part," they harm competition "by their very nature," without the need to examine their effects.[27]

Court of Justice judgment. The Court of Justice dismissed Lundbeck's appeal in its entirety and sided with the General Court.[28] The judgment was long-awaited but not surprising. It relies heavily on the Court of Justice's *Generics (UK)* preliminary reference ruling of January 2020, which is repeatedly quoted in the *Lundbeck* judgment.

— When confirming that Lundbeck and the generics were potential competitors, the Court of Justice observed, in line with *Generics (UK)*, that potential competition exists as soon as a company has (i) "a firm intention and an inherent ability to enter the market" and (ii) where there are no "insurmountable" barriers to entry. An originator holding a valid

[22] Reverse payment settlement agreements, also known as pay-for-delay agreements, are settlements entered into during patent infringement suits brought by branded pharmaceutical companies—the so-called originators—against generics. In these instances, the originator pays the generic to agree not to enter the market until the settlement agreement expires.

[23] *H. Lundbeck A/S and Lundbeck Ltd* (Case COMP/AT.39226), Commission decision of June 19, 2013.

[24] *H. Lundbeck A/S and Lundbeck Ltd v. Commission* (Case T-472/13) EU:T:2016:449. For reporting on the General Court's judgment, *see* our European Competition Report Q3 2016.

[25] *H. Lundbeck A/S and Lundbeck Ltd v. Commission* (Case T-472/13) EU:T:2016:449, para. 128.

[26] *Ibid.*, paras. 117–133, 157–167, 170–182.

[27] *H. Lundbeck A/S and Lundbeck Ltd v. Commission* (Case C-591/16 P) EU:C:2021:243, para. 112.

[28] *See also H. Lundbeck A/S and Lundbeck Ltd* (Case C-591/16 P), opinion of Advocate General Kokott, EU:C:2017:351 (the "Opinion"). For reporting on the Opinion, *see* our June 2020 EU Competition Law Newsletter.

patent was not considered an insurmountable barrier to entry.[29]

The Court of Justice also deemed immaterial whether the generics held a marketing authorization at the time of the agreements. It is sufficient that the generics have taken preparatory steps to enter the market—and it is not relevant whether market entry actually happens or not in the end.[30] The Court of Justice therefore also dismissed Lundbeck's counterfactual analysis, based on events post-dating the agreements,[31] that the generics would not have entered the market. Evidence relating to events subsequent to the conclusion of the agreements and, therefore, unknown to the parties at the time of those agreements are "not capable of having influenced their conduct on the market" and, thus, are not relevant for the assessment of potential competition.[32]

— The Court of Justice also confirmed that the agreements' object was to prevent generic entry and therefore restrict competition. The Court of Justice held, again in line with *Generics (UK)*, that patent settlement agreements involving large enough payments to incentivize generics not to enter the market can restrict competition by object. It added that "there is no requirement that the net gain should necessarily be greater than the profits which that manufacturer of generic medicines would have made if it had been successful in the patent proceedings."[33] The Court of Justice also considered irrelevant the fact that, as Lundbeck claimed, the agreements imposed restrictions on the generics that were within the scope of Lundbeck's patents and that—contrary to such "no-challenge clauses" in the *Generics (UK)* case—they did not preclude the generics from challenging Lundbeck's patents.[34]

The Court of Justice further noted that the generics could not have concluded the agreements mainly because they thought that Lundbeck's patents constituted insurmountable barriers to entry, as they were still disputing the strength of Lundbeck's patents at the time, and that the generics had taken significant steps to enter the market before the agreements, despite Lundbeck's patents. The size of Lundbeck's payment, therefore—which corresponded roughly to the profit the generics expected to make during the agreements' term if they had entered the market—must have been the determinative factor inducing the generics to enter into the pay-for-delay agreements. Lundbeck in turn had not shown any outweighing procompetitive effects of the agreements.[35]

The new normal

Unlike the sentiment that the "by-object box" was enlarging, which prevailed at the time of the Commission's *Lundbeck* decision in 2013, the possibility that patent dispute settlements can infringe competition by object is now a given.

According to the *Lundbeck* judgment, a patent holder can challenge alleged infringements, and may or may not be successful in litigation, but cannot enter into agreements—even if within the scope of its patent rights—that breach Article 101 TFEU. What is more, a generic can be a potential competitor of an originator, even when its only way to enter the market is by infringing the originator's patent.

It remains to be seen whether the *Lundbeck* judgment struck the right balance between IP and competition law and if it might intensify the expected chilling effect that the *Lundbeck* case

[29] *H. Lundbeck A/S and Lundbeck Ltd v. Commission* (Case C-591/16 P) EU:C:2021:243, paras. 56 & 58.

[30] *Ibid.*, paras. 78, 83–86, 88. An important consideration was also the very fact that Lundbeck entered into agreements with the generics that were not yet present on the market.

[31] The validity of one of Lundbeck's process patents was confirmed in 2009, after the contested settlement agreements. According to the Court of Justice, this could not be taken into account to assess the parties' position at the time the agreements were signed.

[32] *H. Lundbeck A/S and Lundbeck Ltd v. Commission* (Case C-591/16 P) EU:C:2021:243, paras. 72.

[33] *Ibid.*, para. 115.

[34] *Ibid.*, para. 135.

[35] *Ibid.*, paras. 117–118.

brought about first in 2013, both on innovation in the European pharmaceutical sector and on out-of-court patent settlements. The upcoming Court of Justice and General Court rulings in the pending *Servier* appeal[36] and *Teva* action for annulment[37] will likely further cement the *Generics (UK)* and *Lundbeck* line of reasoning.

Transforming European Merger Control: The Commission Specifies When It Will Seek To Review Mergers That Are Not Subject To Any Filing Requirements

On March 26, 2021, the Commission adopted a Communication on the application of the referral mechanism pursuant to Article 22 of the EU Merger Regulation ("EUMR")[38] and announced a further simplification of merger control proceedings,[39] effective immediately.

Breaking away from its long-standing approach, the Commission now encourages national competition authorities ("NCAs") to refer transactions that do not meet EU or national notification thresholds to the Commission under certain circumstances, even where they have already been implemented. The stated goal of this significant policy change is to fill a perceived enforcement gap in respect of so-called "killer acquisitions."[40]

Towards a broader application of Article 22 EUMR

Article 22 EUMR has always enabled NCAs to refer to the Commission two types of transactions: (1) those that meet national filing thresholds but are more effectively dealt with at EU-level, and (2) those that meet neither national nor EU thresholds, provided they: (a) affect trade between Member States; and (b) threaten to significantly affect competition within the referring Member State(s).[41] The Commission's long-standing practice with respect to the second category of cases has been to discourage referrals,[42] as the Commission in the past considered that such cases are "not generally likely to have a significant impact on the internal market."[43]

The Commission, through this Communication, is now taking a different approach. It will "encourage

[36] *Servier SAS v. Commission* (Cases C-176/19 P and C-201/19 P) EU:T:2018:922.

[37] *Teva Pharmaceutical Industries and Cephalon v. Commission* (Case T-74/21) OJ 2021/C 98/39.

[38] Communication Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final of March 26, 2021 (the "Communication"). *See* our October 21, 2020 Alert Memorandum "European Commission Announces New Policy to Accept Member State Referrals for Merger Review Even if EC and National Thresholds Are Not Met."

[39] Commission Press Release IP/21/1384, "Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control," March 26, 2021. *See also* Commission Staff Working Document, Evaluation of procedural and jurisdictional aspects of EU merger control, SWD(2021) 66 final of March 26, 2021.

In the Staff Working document, the Commission observed the increased use of the simplified procedure. Nevertheless, it highlighted the room for improvement in this area, including a possible extension of the simplified procedure to cases that are *prima facie* unlikely to raise competition concerns and a further reduction of the information required for notifications.

The Commission consequently launched an impact assessment and opened a public consultation to gather feedback on and assess the possibility of: (i) expanding and clarifying the categories of simplified cases; (ii) streamlining the review of simplified cases; and (iii) making the electronic merger notification—introduced due to the COVID-19 restrictions—permanent. The Commission intends to publish a draft of the proposed revisions in the second half of 2021.

[40] The Commission defined these as acquisitions where "an incumbent acquires a potential competitor with an innovative project that is still at an early stage of its development and subsequently terminates the development of the target's innovation in order to avoid a replacement effect." *See* Competition policy for the digital era, April 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[41] The Communication provides further guidance on these two criteria. *See* Communication, paras. 13–15.

[42] *Ibid*, para. 8; Commission Notice on Case Referral in respect of concentrations, 2005/C 56/02 of March 5, 2005 ("Notice on Case Referral"), para. 45.

[43] Communication, para. 8.

and accept [such] referrals by NCAs in certain circumstances even where the proposed transaction does not meet any turnover thresholds. The decision to actually request a referral remains exclusively with the NCAs.[44]

With this, the Commission hopes to fill the perceived enforcement gap regarding transactions, usually in the tech and pharmaceutical sectors, "where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential."[45]

Senior Commission official Guillaume Loriot stressed that the shift in EU merger policy is not intended to be "an indiscriminate catch-all," but, rather, a "safety net" targeted at these specific types of cases.[46]

More specifically, the circumstances warranting a referral to the Commission pursuant to the Communication are cases where the target:[47]

— is a nascent competitor "with significant competitive potential" that has yet to develop "a business model generating significant revenues;"

— is an "important innovator or is conducting potentially important research;"

— is an "actual or potential important competitive force;"[48]

— has access to "competitively significant assets" (*e.g.*, raw materials, infrastructure, data, or intellectual property rights); and/or

— provides products or services that are "key inputs/components for other industries." Companies will need to consider these in their deal negotiations when assessing the risk of an Article 22 EUMR referral pursuant to the Communication.

In terms of procedural guidance, the Communication makes the following noteworthy points:

— NCAs have to request the referral of a transaction to the Commission within 15 working days of the date of notification or the date on which the transaction is "made known" to the NCAs.[49] "Made known" is interpreted as "implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral."[50] While merging parties may "voluntarily come forward with information" regarding an intended transaction to gain certainty over the possibility of referral, this may, however, delay the transaction's implementation "until it has been decided whether a referral request will be made."[51] "Gatekeeper" platforms would notably have to "inform the Commission of all of their intended and concluded acquisitions of [digital services providers]"—irrespective of whether the transaction is notifiable to the Commission or an NCA—pursuant to the Commission's separate but related proposal for a Digital Markets Act.[52]

— The Commission will inform the parties to the transaction of a referral request "as soon as possible."[53] Other NCAs may join the initial request within 15 working days of being

[44] *Ibid.*, paras. 11 and 26.

[45] *Ibid.*, paras. 10 and 19. This notably includes transactions where the target is a nascent competitor with significant competitive potential or is conducting potentially important R&D activities.

[46] Change in EU merger policy a 'safety net,' not 'indiscriminate catch-all,' Loriot says, MLex, April 8, 2021. G. Loriot is the Director responsible for Directorate C, dealing with information, communication, and media cases, at DG Competition.

[47] Communication, para. 19.

[48] *See* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03 of February 5, 2004, paras. 37–38.

[49] EUMR, Article 22(1), second sub-paragraph.

[50] Communication, para. 28.

[51] *Ibid*, paras. 24 and 27.

[52] Proposal for a Regulation on contestable and fair markets in the digital sector, COM(2020) 842 final of December 15, 2020, para. 31 and Article 12.

[53] Communication, para. 27.

informed by the Commission of the initial request.[54] The Commission may then accept the referral within 10 working days after the expiry of the 15-working day period for NCAs to join the referral request if it finds that the requirements of Article 22 EUMR are fulfilled based on the factors outlined above.[55]

— Once the Commission has accepted the referral, the regular pre-notification process, followed by Phase 1 (and potentially Phase 2) proceedings will begin. It remains to be seen whether the EU Courts will consider the Commission's decision to accept the referral request as a "reviewable act" under Article 263 TFEU, thus allowing parties to seek judicial review of the decision to accept a referral without having to wait for the Commission's decision on the merits of the concentration.[56]

— Pursuant to Article 7 EUMR, the parties may not close the transaction before the Commission's clearance decision.[57] This standstill obligation only applies "as of the date on which the Commission informs the undertakings concerned that a request has been made, to the extent that the concentration has not been implemented on that date" and ceases "if the Commission subsequently decides not to examine the concentration."[58]

— Notably, the Communication indicates that referrals will be possible even if a transaction has been implemented.[59] The Commission will "generally not consider" referrals of transactions that have been implemented more than six months ago—except in exceptional circumstances where there are serious potential competition concerns.[60] In the context of already closed transactions that are referred to the Commission, the standstill obligation of Article 7 EUMR does not apply.[61]

The Commission's new approach to referrals under Article 22 EUMR, effective immediately, creates significant legal uncertainty for pending and future transactions. Not only will the Commission now be able to examine transactions that do not meet EU or national notification thresholds, even if they have already been implemented, but it will enjoy ample discretion when deciding whether to accept a referral, due to the Communication's open-endedness (and its non-binding nature).[62]

[54] *Ibid.*, para. 29; EUMR, Article 22(2), first and second sub-paragraphs.

[55] See *supra*, circumstances warranting a referral; Communication, paras. 17 and 19.

[56] The General Court has held that Commission's decisions to refer a case to NCAs under Article 9 EUMR are reviewable acts. *See Royal Philips Electronics NV v. Commission* (Case T-119/02) EU:T:2003:101 and *Cableuropa and Others v. Commission* (Joined Cases T-346/02 and T-347/02) EU:T:2003:256.

[57] EUMR, Article 7(1).

[58] Communication, para. 31 and footnote 25; EUMR, Article 22(4), first sub-paragraph.

[59] Communication, para. 21.

[60] *Idem.*

[61] *Ibid*, para. 31.

[62] Communication, para. 19. The factors that the Commission will take into account to accept and review the transaction are non-exhaustive and broadly defined. Note, for instance, the reiterated use of the qualifiers "significant," "important," "key" and "particularly," when referring to the "competitive potential" or "force" of the target, as well as its innovative character, revenues, assets and outputs.

The Commission begun implementing its new approach even before it published the Communication. On February 19, 2021, the Commission invited NCAs to refer the *Illumina/Grail* transaction, which reportedly did not meet any national jurisdictional thresholds.[63] The Communication and its practical implications are further analyzed in our Alert Memorandum available here.

News

Commission Updates

Volvo Secures Unconditional Clearance Of Fuel-Cell Joint Venture With Daimler

On February 5, 2021, the Commission unconditionally cleared the creation of a joint venture ("JV") between the Volvo Group ("Volvo") and Daimler Truck AG ("Daimler").[64] The JV will be active in the relatively novel, but rapidly evolving, hydrogen fuel-cell technology sector, which promises a "green" future in particular for transport.[65]

The JV is set to develop, produce, and sell hydrogen fuel-cell systems ("FCS")—a key technology for enabling CO2-neutral transportation—primarily for use in heavy-duty trucks ("HDTs"). This partnership in FCS between two major European truck manufacturers constitutes "a major step towards climate-neutral and sustainable transportation by 2050," in line with the Paris Climate Agreement and hence the European Green Deal's objectives.[66]

The Commission's key observations while analyzing this deal were as follows:

— The Commission confirmed that FCS are "only at development stage" and left the precise market definition open.[67] The Commission has examined the market for the manufacture and supply of FCS before in *Faurecia/Michelin/Symbio/JV* in 2019.[68] Similar to the present transaction, *Faurecia/Michelin/Symbio/JV* did not raise serious competition concerns. The Commission therefore left the precise market definition open in both cases,[69] although in *Volvo/Daimler/JV* it considered the market's geographic scope to be "at least EEA-wide."[70]

— The Commission did not identify any vertical concerns regarding Volvo and Daimler's activities in the manufacture and sale of HDTs,

[63] On September 21, 2020, Illumina, a U.S.-based pharmaceutical company announced its intention to acquire Grail, a U.S. start-up that has developed multi-cancer early detection tests. The French and Dutch NCAs have positively responded to the Commission's invitation and requested a referral of the transaction, which was subsequently joined by Belgium, Greece, the Netherlands, Iceland, and Norway. Illumina appealed the French and Dutch NCAs' decision before national courts. Illumina's challenges were dismissed, on March 31, 2021 and April 1, 2021, in the Netherlands and France respectively.

In France, the *Conseil d'État* held that such a referral decision is "inseparable from the Commission's review of the transaction," which "falls under the control of the Court of Justice," and therefore concluded that it was not competent to rule on the referral request. *See Conseil d'État, Illumina-Grail v. Autorité de la concurrence*, order n°450878, 450881 of April 1, 2021.

In the Netherlands, the District Court of The Hague held that the EUMR enables NCAs to refer a case to the Commission even if they lack jurisdiction over the transaction. It also noted that it would be for the EU courts to rule on the legality of the Commission's decision to accept the referral. *See Rechtbank Den Haag, Illumina Inc.- Grail Inc. v. De Staat der Nederlanden*, judgment n°31C/09/609526 of March 31, 2021, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:3128&showbutton=true&keyword=illumina.

More recently, the Commission received a referral request to review Facebook's acquisition of Kustomer from the Austrian NCA, which has jurisdiction over the transaction, in contrast to the *Illumina/Grail* case. *See also* Kustomer To Join Facebook, Helping Brands Thrive In The Digital Economy with Modern Customer Service, available at: https://www.kustomer.com/blog/kustomer-to-join-facebook-helping-brands-thrive-in-digital-economy/.

[64] *See* Commission Daily News MEX/21/461, "Mergers: Commission clears creation of the joint venture Daimler Truck Fuel Cell by Volvo and Daimler," February 8, 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_461.

[65] Most notably, hydrogen fuel-cell technology is used to power vehicles and trains as a "green" alternative to the use of petrol and diesel.

[66] *See* Volvo's Press Release, February 11, 2020, available at: https://www.volvogroup.com/en-en/news/2020/nov/news-3817249.html; Commission, Climate Action, "Paris Climate Agreement," available at: https://ec.europa.eu/clima/policies/international/negotiations/paris_en#:-:text=The%20Paris%20Agreement%20sets%20out,support%20them%20in%20their%20efforts; Commission, The European Green Deal, "Sustainable Mobility," December 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/fs_19_6726.

[67] *Ibid.*

[68] *Faurecia/Michelin/Symbio/JV* (Case COMP/M.9474), Commission decision of November 12, 2019, para. 30.

[69] *Ibid.*, paras. 30 and 33; *Volvo/Daimler/JV* (Case COMP/M.9857), Commission decision of February 5, 2021, para. 23.

[70] *Volvo/Daimler/JV* (Case COMP.M.9857), Commission decision of February 5, 2021, paras. 24–32.

a downstream market to the FCS one. The Commission concluded that the transaction did not raise input or customer foreclosure concerns, notably because the JV 's market share is currently zero in the upstream FCS market and the JV's success "likely depend[s] much more on its technological skills than on a possible customer base."[71] The Commission reached this finding notwithstanding the JV partners' significant combined market shares in the manufacture and sale of HDTs, considering *inter alia* that original equipment manufacturers ("OEMs")—making up "[60-70]% of the EEA-wide market of FCS-sourced" HDTs—would remain available as potential customers, in addition to manufacturers of other vehicles/applications *e.g.*, marine, railway, aeronautics, to whom the JV can sell their FCS.[72]

Also, the fact that its parent companies are not themselves active in the FCS market facilitated the Commission's review.[73]

Pharma Still Under The Microscope: The Commission Investigates Potentially Abusive Patent Filing Strategies

On March 4, 2021, the Commission launched a formal in-depth investigation into Teva's patent filings conduct related to its blockbuster multiple sclerosis medicine, Copaxone.[74] This is reportedly the first time that the Commission investigates potential abuses relating to divisional patents filing strategies.[75] This announcement, together with the recent formation, on March 16, 2021, of a multilateral working group on pharmaceutical mergers with leading competition authorities, confirms the Commission's continued interest in the pharmaceutical sector.[76]

Background

The Commission's investigation aims to determine whether Teva's conduct relating to its best-selling Copaxone amounts to an abuse of a dominant position under Article 102 TFEU. In 2015, Teva's patent covering glatiramer acetate—the active ingredient used in Copaxone—expired, allowing generic versions of the medicine to enter the market. Many market players then accused Teva of misuses of patent procedures and exclusionary denigration to illegally block or delay the market entry of competitors' generic products. This led to several dawn raids at the premises of Teva's subsidiaries in the EEA in October 2019.

Abusive use of divisional patents

The Commission is investigating whether Teva may have artificially extended Copaxone's dominance by filing and withdrawing divisional patent applications, thereby forcing its competitors to file a new legal challenge each time. While divisional patents are commonly accepted by patent offices, the Commission noted that a repetitive filing of divisional patents could be a way for a patentee "to multiply the patent barriers that a generic competitor needs to overcome to enter the market."[77]

A 2009 report on European pharmaceutical practices already warned that divisional

[71] *Ibid.*, paras. 48–49, 60.

[72] *Ibid.*, paras. 56–57. In particular, the Commission emphasized at para. 59 the FCS market's strong dependency "on an overall hydrogen infrastructure," explicitly acknowledging that "companies providing such infrastructure will need a strong market penetration with fuel-cell equipped heavy-duty trucks, which is something that the JV will not be able to achieve without other competitors."

[73] *Volvo/Daimler/JV* (Case COMP/M.9857), Commission decision of February 5, 2021, para. 42 and fn. 15. For further reporting on the *Volvo/Daimler/JV* decision, as well as for an analysis of the current legal uncertainty and possible solutions as regards the relationship between the European Green Deal and EU competition law, *see* Antoine Winckler and Daniela Weerasinghe, "The EU Commission unconditionally clears a fuel-cell joint venture aiming to achieve climate-neutral and sustainable transportation (Volvo/Daimler)," Concurrences, March 24, 2021, available at: https://www.concurrences.com/en/bulletin/news-issues/preview/the-eu-commission-unconditionally-clears-a-fuel-cell-joint-venture-aiming-to-en?var_mode=calcul.

[74] Commission Press Release IP/21/1022, "Commission opens formal investigation into possible anticompetitive conduct of Teva in relation to a blockbuster multiple sclerosis medicine," March 4, 2021.

[75] Under the IP law principle of unity of invention, a patent application may only concern one invention or several inventions linked together in such a way that they form a single general inventive concept. Divisional patents enable the applicant to overcome the lack of unity of invention of an original or "parent" application, splitting the parent application into narrower patent applications, each covering a specific invention.

[76] Commission Press Release IP/21/1203, "The European Commission forms a Multilateral Working Group with leading competition authorities to exchange best practices on pharmaceutical mergers," March 16, 2021.

[77] Commission Press Release IP/21/1022.

applications "may in certain cases only be aimed at excluding competition."[78] But the Commission has so far not sanctioned these practices as abusive.

In June 2005, the Commission fined AstraZeneca €60 million for misusing the patent system to block market entry for generic competitors,[79] by providing misleading information to several national patent offices to obtain supplementary protection certificates, and selectively deregistering market authorizations. Teva's probe seems to go further than the AstraZeneca case, as it does not involve any allegations of misleading representations and thus focuses on conduct which is *prima facie* legitimate under intellectual property rules.

The Commission investigation follows similar cases in Italy and the United States. On January 11, 2012, the Italian Competition Authority fined Pfizer for exploiting the patent system by using divisional patents as part of a strategy to delay the launch of generic drugs competing with its Xalatan medicine (the decision was upheld in 2014 by the *Consiglio di Stato*). In the United States, the U.S. Court of Appeals for the Federal Circuit rejected Ritz Camera & Image's claim that SanDisk had violated antitrust law by filing divisional patent applications, due to lack of sufficient evidence.[80]

Disparaging

The Commission is also examining whether Teva conducted a disparaging communication campaign to hinder the use of rival generic medicines. While national authorities have already tackled similar conduct,[81] this is the Commission's first formal investigation into exclusionary disparagement. In *F. Hoffmann-La Roche*, the Court of Justice held that the coordinated dissemination of misleading safety claims about a medicine's off-label use, in a context of scientific uncertainty, qualifies as a by-object restriction of competition.[82]

Although this probe relates to an alleged abuse of dominance, and not an anticompetitive agreement, the Commission can be expected to rely on the Court of Justice's reasoning in *F. Hoffmann-La Roche*, especially because the disparagement was carried out "even following the approval of these medicines by competent public health authorities."[83]

Creation of cross-Atlantic pharmaceutical mergers working group

On March 16, 2021, the FTC initiated a multilateral working group for several agencies to update and align their approach to pharmaceutical mergers.[84] This working group will also include the European Commission, the Canadian Competition Bureau, the U.K. CMA, the U.S. DOJ, and three U.S. Offices of Attorneys General. It will notably consider theories of harm, effects on innovation, and appropriate remedies. The FTC acting chairwoman, Rebecca Kelly Slaughter, has already announced that the new approach will be "aggressive."[85]

Commission Says PPC Might Have Engaged In Predatory Bidding And Hindered Greece's Efforts To Go Green

On March 16, 2021, the Commission announced the opening of a formal investigation into Public Power Corporation ("PPC"), the largest wholesale

[78] See, European Commission, "Pharmaceutical Sector Inquiry – Final Report," July 8, 2009, para. 523.

[79] *AstraZeneca* (Case COMP/A.37.507/F3), Commission decision of June 15, 2005.

[80] U.S. Court of Appeals for the Federal Circuit, *Giuliano v. SanDisk LCC*, July 27, 2017, available at: http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/16-2166.Opinion.7-25-2017.1.PDF.

[81] In 2013, following a complaint from Teva Santé, the French Competition Authority fined Sanofi-Aventis €40.6 million for implementing a disparaging campaign targeting pharmacists and doctors regarding the quality and safety of generic products competing with its own Plavix drug. In 2014, the Italian Competition Authority fined F. Hoffmann-La Roche and Novartis over €180 million for a cartel that aimed to disseminate misleading safety claims against the cheaper ophthalmic drug Avastin, a competitor of the more expensive drug Lucentis. The Italian Council of State upheld the decision in 2019, but it also referred several questions to the Court of Justice. In 2020, the French Competition Authority also fined Genentech, Novartis, and Roche €444 million for having misled public authorities regarding the risks related to the use of Avastin. The decision is currently under appeal.

[82] *F. Hoffmann-La Roche and Others* (Case C-179/16) EU:C:2018:25, para. 95. Preliminary ruling requested by the *Consiglio di Stato* on December 3, 2015.

[83] Commission Press Release IP/21/1022.

[84] Commission Press Release IP/21/1203.

[85] Federal Trade Commission Press Release, "FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers," March 21, 2021.

and retail electricity supplier in Greece, and majority-owned by the Greek State, for allegedly abusing its dominance in the Greek wholesale electricity sector through predatory pricing strategies arising from its bidding behavior.[86]

PPC controls all of Greece's lignite and hydroelectric power plants as well as some natural gas plants and renewable energy installations. PPC also owns the electricity distribution network in Greece, supplying electricity to retail and business customers, through its wholly-owned subsidiary, the Hellenic Electricity Distribution Network Operator.

The Commission alleges that PPC may have abused its dominant position in the Greek wholesale electricity market through predatory bidding behavior, preventing other market players from competing effectively in the Greek wholesale and related electricity markets.

Predatory pricing comprises a dominant undertaking reducing prices below cost to exclude, or marginalize, a competitor (whether actual or potential) and then significantly raising its prices again to recoup its losses from the predation phase, thereby harming consumers.[87] Predatory pricing cases are rare. They are challenging for antitrust authorities because competition law supports low prices and dominant firms also have the right to compete on price.

Hence, there is a fine line between encouraging price competition and evidencing and condemning exclusionary predatory pricing. In fact, the Commission's 2019 *Qualcomm decision*[88] was the only Commission decision fining an undertaking for predatory pricing since its *Wanadoo* decision in 2003.[89] Some Member States, however, have also adopted predatory pricing decisions in recent years including in the pharmaceutical,[90] milk supply,[91] railway,[92] and energy[93] sectors.

But this investigation seems to be more than just another predatory pricing case. Commissioner Vestager said that PPC's conduct might have "slowed down investment into the generation of greener energy." In the context of the European Green Deal[94] and Greece's pledge to phase out power generation from lignite by 2028,[95] the Commission's focus on removing hurdles from the path of a climate-neutral Europe is not surprising. This is an example where the Green Deal seems to play a role regarding enforcement priorities.

The investigation comes almost simultaneously with the opening of a separate Commission investigation into EPEX Spot SE for possible anticompetitive behavior related to electricity intraday trading facilitation services. In the press release accompanying the opening decision, Commissioner Vestager stressed the importance of renewable technologies in the electricity mix.[96] It remains to be seen to what extent the Green

[86] Commission Press Release IP/21/1205, "Antitrust: Commission opens investigation into PPC's behaviour in the Greek wholesale electricity market," March 16, 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1205.

[87] *See AKZO Chemie BV v. Commission* (Case C-62/86) EU:C:1991:286, paras. 70–72; and *Tetra Pak International SA v. Commission* (*Tetra Pak II*) (Case C-333/94) EU:C:1996:436, para. 44.

[88] *Qualcomm (predation)* (Case COMP/AT.39711), Commission decision of July 18, 2019, as reported in our July 2019 European Competition Law newsletter. A related action for annulment is currently pending before the General Court in *Qualcomm v. Commission* (Case T-671/19).

[89] *Wanadoo Interactive* (Case COMP/AT.38233), Commission decision of July 16, 2003. *See also* the discussion on predatory pricing cases in the context of the Statement of Objections to České dráhy for alleged predatory pricing, as reported in our November 2020 European Competition Law newsletter.

[90] Austrian Federal Competition Authority, "Merck Sharp & Dohme GmbH and AFCA reach agreement before the Cartel Court on commitments to end proceedings on abuse of a dominant position in relation to the sale of a Temozolomide drug," April 6, 2021, available at: https://www.bwb.gv.at/en/news/detail/news/merck_sharp_dohme_gmbh_and_afca_reach_agreement_before_the_cartel_court_on_commitments_to_end_proc/.

[91] *Valio* (Case No. 2553/3/14), Finnish Supreme Administrative Court, December 29, 2016.

[92] Netherlands Authority for Consumers and Markets, "Dutch Railways NS abused its dominant position in regional tender process," June 29, 2017, available at: https://www.acm.nl/en/publications/publication/17397/Dutch-Railways-NS-abused-its-dominant-position-in-regional-tender-process. The decision was annulled in 2019 by the District Court of Rotterdam.

[93] *Engie*, Décision 17-D-16, French Competition Authority, September 7, 2017.

[94] Competition Policy contributing to the European Green Deal – Call for contributions, October 13, 2020; Results of the Call for contributions, January 20, 2021; and Conference on Competition Policy contributing to the European Green Deal, February 4, 2021, available at: https://ec.europa.eu/competition/information/green_deal/index_en.html#:~:text=The%20European%20Green%20Deal%20aims,resource%2Defficient%20and%20competitive%20economy.&text=Competitive%20markets%20encourage%20firms%20to,adopt%20more%20energy%2Defficient%20technologies. The Commission's call for contributions on the "Competition Policy Supporting the Green Deal" was discussed in our October 19, 2020 Alert Memorandum.

[95] Hellenic Republic, National Energy and Climate Plan, December 2019, available at: https://ec.europa.eu/energy/sites/default/files/el_final_necp_main_en.pdf.

[96] Commission Press Release IP/21/1523, "Antitrust: Commission opens investigation into possible anticompetitive behaviour by the power exchange EPEX Spot," March 30, 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1523.

Deal may also play a role in the Commission's competitive assessment.

Court Updates

Essential Facilities Doctrine: No Need To Prove Indispensability For Abuse Through Unfair Access Terms

On March 25, 2021,[97] the Court of Justice ruled that to demonstrate abuse, where a dominant undertaking has already offered access to its infrastructure but on unfair terms, it is not necessary to show that access to the infrastructure is indispensable within the meaning of the Court of Justice's *Bronner* essential facilities doctrine.

Background

Slovak Telekom, the incumbent telecoms operator in Slovakia and a former legal monopolist, offers retail broadband internet services through its own metallic pair network. In 2005, the Slovak telecoms regulator found that Slovak Telecom had "significant power" on the wholesale market for access to the local loop[98] network. As a result, it obliged Slovak Telekom *inter alia* to offer its competitors on the retail broadband market access to its local loop under transparent, fair, and non-discriminatory terms.[99]

In 2014, the Commission found that Slovak Telekom had abused its dominant position from 2005 to 2010, by setting unfair terms and conditions for the access to its network and for margin squeeze. The Commission imposed a joint fine of €38.8 million on Slovak Telekom and its 51% shareholder, Deutsche Telekom, and an additional fine of €31 million on Deutsche Telekom on account of recidivism[100] and high annual turnover.

In 2018, the General Court upheld the Commission's findings concerning the abuse of a dominant position.[101] Slovak Telekom appealed, arguing that the General Court had failed to require the Commission to prove that access to the local loop was indispensable within the meaning of the *Bronner* essential facilities doctrine.[102]

The *Bronner* essential facilities doctrine

In *Bronner*, the Court of Justice laid down the conditions under which a dominant undertaking's refusal to offer its competitors access to its infrastructure could constitute an abuse of dominance. The refusal must be likely to eliminate all competition on the market, without objective justification, and access must be indispensable to the business of the competing undertaking requesting access.[103]

The Court of Justice's assessment

In *Slovak Telekom*, the Court of Justice underlined that the specific circumstances of the *Bronner* case justified the conditions it had set for refusal to be abusive.[104] Forcing a company to contract with a competitor is "especially detrimental to the freedom of contract and the right to property of the dominant undertaking" and if access to a dominant undertaking's network were allowed too easily, "there would be no incentive for competitors to develop competing facilities."[105]

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[97] *Deutsche Telekom AG v. European Commission* (Case C-152/19 P) EU:C:2021:238; and *Slovak Telekom a.s. v. European Commission* (Case C-165/19 P) EU:C:2021:239.

[98] The portion of the metallic pair network connecting the subscriber's telephone jack with the main distribution frame of the fixed telephone network.

[99] In accordance with the EU regulatory framework, including Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

[100] The Commission had already fined Deutsche Telekom in 2003 for operating a margin squeeze in the German broadband market. See *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579), Commission decision of May 21, 2003.

[101] *Deutsche Telekom v. Commission* (Case T-827/14) EU:T:2018:930; and *Slovak Telekom v. Commission* (Case T-851/14) EU:T:2018:929. The General Court however reduced the fines to €38 million for the joint fine and to €19 million for the additional fine imposed on Deutsche Telekom, considering that its high annual turnover did not justify the original penalty.

[102] *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* (Case C-7/97) EU:C:1998:569. In *Bronner*, the owner of a newspaper and of Austria's only nationwide newspaper home-delivery scheme refused to allow a rival newspaper to access its home-delivery scheme.

[103] *Ibid.*, para. 41.

[104] *Slovak Telekom a.s. v. European Commission* (Case C-165/19 P) EU:C:2021:239, para. 45.

[105] *Ibid.*, para. 47.

The Court of Justice then ruled that, absent an outright refusal to access infrastructure, the *Bronner* conditions, and indispensability of access in particular, did not apply.[106] In that regard, practices such as conditioning access to infrastructure on unfair terms, while capable of constituting an abuse, could not be equated to the practice at issue in *Bronner*.[107]

Because the practices at issue in *Slovak Telekom* did not constitute refusal of access but related to terms of access, the *Bronner* conditions did not apply, and the Commission was not required to demonstrate indispensability of access to establish an abuse of dominance.[108]

Slovak Telekom distinguishes refusal to offer access to infrastructure on the one hand from subjecting access to infrastructure under unfair conditions on the other. While both practices can be abusive, they require distinct standards of proof. Refusal to grant access requires the higher indispensability of access standard set out in *Bronner*, because remedying this practice (forced access) is especially detrimental to freedom of contract. By contrast, where a dominant company has already offered access to its infrastructure, demonstrating indispensability of access is not required to prove an abuse of dominance in the form of unfair access terms.

The Court of Justice did not deal with (and implicitly rejected) the Commission's position that offering access only at unfair conditions constituted a "constructive refusal to supply." In the future, the abuse question in such cases will be limited to whether access terms are unfair and abusive. It will not matter whether the terms have the effect of discouraging access.

[106] *Ibid.*, para. 50.

[107] *Ibid.*, paras. 51–52.

[108] *Ibid.*, paras. 60–61.

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