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EU Competition Law Newsletter

Highlights

— Update on Europe's Digital Regulations – What's Next For Big Tech?

— Airfreight Cartel: General Court Partially Annuls Commission Decision and Reduces Fines

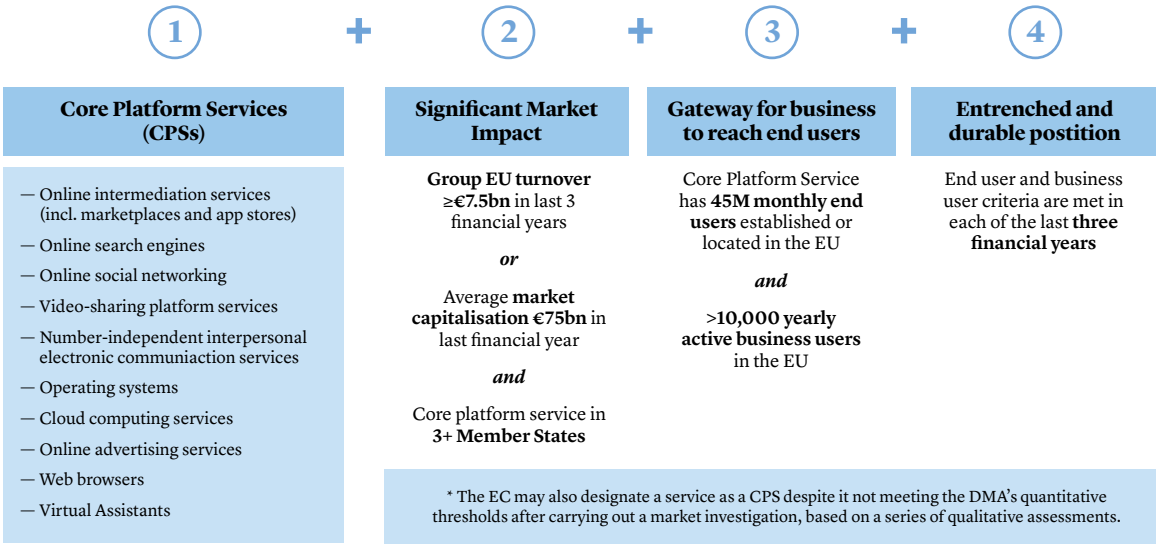
Update on Europe's Digital Regulations – What's Next For Big Tech?

On March 24, 2022, the European Parliament, the Commission and the EU Member States reached an agreement on the text of the Digital Markets Act ("DMA"). And on April 23, 2022, the same set of EU bodies reached political agreement on the final text of the Digital Services Act ("DSA"). The new legislations will now make their way through the final procedural hurdles over the summer. Once these are cleared, the texts will come into force, creating a slate of new obligations that are designed to shape digital content and competition in Europe. Meanwhile, the Commission is progressing the text of a third law – the Data Act – that is expected to soon follow the same legislative process. This article provides an overview of the purpose and status of these three legislative pillars of the Union's increasingly active approach to digital regulation.

Digital Markets Act (DMA)

The most significant of these three pillars—at least from a competition perspective—is the DMA. The DMA marks a paradigm shift in the regulation of digital markets. Designed to increased their contestability with more alacrity than traditional antitrust intervention, it provides the Commission unprecedented powers to regulate leading digital platforms and sets a global standard for other jurisdictions that are developing similar rules.

The DMA applies to platforms that are said to be "gatekeepers" between businesses and users. To be considered a gatekeeper, a firm must operate at least one "Core Platform Service" or CPS. CPSs include services such as an app store, operating system, social network, search engine, online marketplace, browser, video-streaming platform, ad service, or voice assistant. If a firm operates a CPS and meets a set of quantitative assessment criteria – detailed in the graphic below – it will qualify as a "gatekeeper." The law's ambit is therefore relatively narrow: it is expected to apply to the CPSs operated by each of Facebook, Apple, Google, Amazon, and Microsoft. Popular services that may be qualified as CPSs therefore include Facebook, Instagram, WhatsApp, Android OS, Search, Apple App Store, Siri, Safari, iMessage, Amazon Marketplace and AWS.



The determination and definition of a CPS is important because the core rules of the DMA apply to CPSs, not the gatekeeper company as a whole. In particular, the DMA establishes a set of categorical rules (do's and don'ts) that gatekeepers' CPSs must comply with. The first set of obligations are presented as being "specific" (Article 5), while the second are described as being open-ended and capable of further adaptation by the Commission (Article 6). In practice, the difference between the Article 5 and 6 obligations is likely to be minimal: both sets of rules will apply directly and will be self-executing. None of the rules require the Commission to show that they will result in anti-competitive effects. The rules they establish are rigid: the obligations are set out as categorical imperatives, leaving—at least on their face—little scope for justifications on the basis of consumer benefits. And while the DMA does provide for an exemption to the application of the rules, it is limited to instances of overriding reasons of public interest.

In terms of the specific obligations, the DMA is clearly inspired by recent antitrust cases, like *Google Shopping*[1] and the *EPIC/Apple*[2] litigation. The rules therefore pick up on and address specific theories of harm. For example:

— Article 6(1) prohibits a gatekeeper platform from using businesses' non-public data to compete against them (a theory explored in the *Amazon Marketplace* case).

— Article 6(5) forbids gatekeepers from ranking their first-party products more favorably than competing third-party products (*Google Shopping* case).

— Article 5(3) bans gatekeeper app store owners from restricting app developers from promoting offers to users through alternative sources and from contracting with users outside the app store (*Apple App Store/Spotify* case).

Compliance with these rules will be required from around January 2024. Failure to comply exposes gatekeepers to stiff punishment. The DMA, which will be enforced by the Commission,[3] enables penalties modelled on the existing penalties under competition law, but that also step beyond them: non-compliance can lead to fines of up to 10% of a gatekeeper's annual global turnover, which rises to up to 20% for repeated infringements. The law also establishes that the Commission will have the power to impose a structural remedy in the face of systematic non-compliance.

[1] *Google and Alphabet v. Commission* (Case T-612/17) EU:T:2021:763.

[2] *Epic Games, Inc. v. Apple Inc.* (20-cv-05640-YGR).

[3] National competition authorities will have an advisory role. Private parties may also potentially be able to invoke the DMA directly in actions before national courts.

Digital Services Act

On April 23, 2022, the European institutions reached a political agreement on the DSA.[4] This text will likely be adopted this summer and will enter into force in September 2022. The DSA's rules will kick in 15 months later, likely by the end of 2023.

The DSA focuses on the distribution of online content. Contrary to the DMA, which seeks to ensure the contestability of digital markets, the DSA seeks to improve user safety online and ensure accountability of platforms for content that they transmit, host or publicly disseminate. The DSA plans to do so through a multi-layered regime of obligations, where all intermediary services will be subject to a common base of obligations and further obligations will apply cumulatively to certain types of services. While some of the rules are still being finalized, the DSA most centrally formulates rules for digital intermediaries specifying the exemption from liability for content, setting out due diligence obligations for the content they host, and establishing oversight of content moderation activities.

Enforcement of the DSA is less centralized than that of the DMA. The DSA leaves it to EU Member States to appoint a Digital Services Coordinator, an independent authority which will identify breaches and determine the penalties applicable in case of infringement. In doing so, Member States must ensure such penalties are effective, proportionate, and dissuasive, though they cannot exceed 6% of the company's annual worldwide turnover in the preceding financial year.

The Data Act

On February 23, 2022, the Commission published a proposal for a Data Act.[5] The proposal, which was open for stakeholder feedback until May 13, 2022, will now go through the legislative process for the negotiation and ultimate adoption into law, although the precise timeline for this adoption remains unclear.

The Data Act seeks to address legal, economic, and technical issues that have led to a perceived underuse of industrial data. The new rules are designed to answer the question: "who can create value from data and under which conditions?" The hope is that a clear answer will help companies and individuals unlock the potential of their datasets in a broad range of products and services across all economic sectors in the EU.

To create this framework for data usage, the Data Act formulates new rules on: (i) Business-to-Consumer and Business-to-Business data sharing (*e.g.*, user rights to access data and share that data with third parties); (ii) data access conditions (*e.g.*, specifying the conditions for access and the approach to compensation for companies of various sizes); (iii) prohibition of unfair terms in data sharing contracts; (iv) Business-to-Government sharing (in exceptional circumstances, such as public emergencies or if data is otherwise not available); and (v) portability and standard-setting (*e.g.*, allowing users to effectively switch between data-processing services providers).[6]

The rules set out in the Data Act would come to complement the requirements of the Data Governance Act,[7] agreed upon by the European co-legislators in November 2021, which seeks to create processes and structures to facilitate data sharing. The Data Act would also complement, and be interpreted in light of, the existing rules under the GDPR.

Under the current draft, data protection supervisory authorities—the bodies currently responsible for the implementation of the GDPR—will be responsible for monitoring the application of the Data Act.

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[4] Commission Press Release IP/22/2545, "Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment," March 23, 2022. The text of the most current draft of the Act can be found at: https://digital-strategy.ec.europa.eu/en/library/data-act-proposal-regulation-harmonised-rules-fair-access-and-use-data.

[5] Commission Press Release IP/22/1113, "Data Act: Commission proposes measures for a fair and innovative data economy," February 23, 2022.

[6] *See* Proposal for a Regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (Data Act), COM(2022) 68 final of February 23, 2022.

[7] *See* Proposal for a Regulation of the European Parliament and of the Council European data governance (Data Governance Act), COM(2020) 767 final of November 25, 2020.

Conclusion

The recent adoption of the final texts of the DMA and DSA, and the proposal for a Data Act, are important milestones in Europe's digital regulatory strategy. Attention will now increasingly turn to their enforcement. The significant powers created by these legislations will lead to scrutiny as to whether they are being enforced in an effective but proportionate manner.

Airfreight Cartel: General Court Partially Annuls Commission Decision and Reduces Fines

On March 30, 2022, after a decade of litigation in over a dozen separate cases, the General Court partially annulled the Commission's March 17, 2017 decision imposing a €776 million fine on air carriers for coordinated practices and agreements relating to air freight transport between 1999 and 2006.[8] The General Court upheld the Commission's decision although, in six of 13 appeals lodged against the decision,[9] the Court found that the Commission had infringed procedural rights and/or failed to establish the participation of certain air carriers in certain parts of the infringement. The General Court reduced the corresponding fines and dismissed the remaining seven appeals in their entirety.

Background: the air transport proceedings

In the freight sector, air carriers provide transport services to freight companies ("forwarders") that arrange transportation on behalf of cargo shippers. Air carriers charge freight forwarders a base price and, where appropriate, surcharges to cover specific costs, such as fuel ("fuel surcharge") and compliance with security measures ("security surcharge"). Freight forwarders can then benefit from a rebate, referred to as a "commission" on surcharges.

On November 9, 2010, the Commission imposed a €790 million fine on 21 air carriers for illegally coordinating fuel surcharges, security surcharges and the refusal to pay commissions for routes to and from the EEA between 2002 and 2006.[10] On December 16, 2015, the General Court annulled the Commission decision on the grounds that it was vitiated by a defective statement of reasons.[11] On March 17, 2017, the Commission adopted a new decision that largely mirrored the previous one. This decision imposed a €776 million fine on many of the same grounds: that 19 air carriers[12] had coordinated their prices through fuel surcharges, security surcharges and the refusal to pay commissions.[13]

The 2022 General Court judgments

The airlines appealed. On March 30, 2022, the General Court upheld the Commission's decision in relation to seven of the 13 appellants and partially annulled it in relation to the remaining six appellants.

[8] *Airfreight* (Case COMP/AT.39258), Commission decision of March 17, 2017.

[9] The General Court treated each appeal separately, while carriers belonging to the same group appealed jointly: SAS Cargo, Scandinavian Airlines, and SAS Group; Lufthansa Cargo, Lufthansa, and Swiss Air Lines; Latam Airlines Group and Lan Cargo; and Singapore Airlines and Singapore Airlines Cargo.

[10] *Airfreight* (Case COMP/AT.39258), Commission decision of November 9, 2010.

[11] The General Court found that the operative part and the grounds of the Commission's decision were contradictory; *Air Canada v. Commission* (Case T9/11), EU:T:2015:994; *Koninklijke Luchtvaart Maatschappij v. Commission* (Case T28/11), EU:T:2015:995; *Japan Airlines v. Commission* (Case T36/11), EU:T:2015:992; *Cathay Pacific Airways v. Commission* (Case T38/11), EU:T:2015:985; *Cargolux Airlines v. Commission* (Case T39/11), EU:T:2015:991; *Latam Airlines Group and Lan Cargo v Commission* (Case T40/11), EU:T:2015:986; *Singapore Airlines and Singapore Airlines Cargo Pte v. Commission* (Case T43/11), EU:T:2015:989; *Deutsche Lufthansa and Others v. Commission* (T46/11), EU:T:2015:987; *British Airways v Commission* (Case T48/11), EU:T:2015:988; *SAS Cargo Group and Others v. Commission* (Case T56/11), EU:T:2015:990; *Air France-KLM v. Commission* (Case T62/11), EU:T:2015:996; *Air France v. Commission* (Case T63/11), EU:T:2015:993; and *Martinair Holland v. Commission* (Case T67/11), EU:T:2015:984.

[12] The reduction in the number of incriminated air carriers is due to changes in the structure of the airlines and to the fact that Qantas Airways did not bring an action against the initial November 9, 2010, decision.

[13] *Airfreight* (Case COMP/AT.39258), Commission decision of March 17, 2017.

In four of the six partially successful appeals,[14] the General Court found that the decision failed to demonstrate that the applicants participated in the portions of the infringement relating to the refusal to pay surcharge commissions (Air Canada, British Airways, SAS and Latam Airlines), the payment of fuel surcharges (SAS and Latam Airlines) and security surcharges (Latam Airlines). This outcome reflects a careful approach by the Court to assessing each company's involvement in each aspect of the alleged conduct.[15] Participation in one portion of an infringement does not automatically give rise to liability for the infringement as a whole.[16] Furthermore, in *Japan Airlines*,[17] *Cathay Pacific Airways*[18] and *Latam Airlines*,[19] the General Court found that the applicable 10-year[20] limitation period had expired in 2016 for practices[21] that the Commission's initial 2010 decision did not cover but that had been included in the scope of the 2017 decision.[22] The General Court reduced the total fine imposed by approximately €45 million.

The unsuccessful appellants[23] had raised several grounds of appeal, including that the Commission lacked jurisdiction to apply Article 101 TFEU to freight services inbound from third countries.[24] The General Court found that, though EU legislation implementing Article 101 had indeed exempted such services in the past,[25] this exemption had lapsed.[26] In addition, it considered that the Commission had correctly found that the foreign conduct at issue would have an immediate and substantial effect in the internal market and that EU competition rules could thus apply under the "qualified effects test." The unsuccessful applicants had also argued that the decision breached the principle of equal treatment and the obligation to state reasons by fining only certain carriers. But the General Court found that the obligation for the Commission to state the reasons on which a measure is based did not encompass an obligation to give reasons for not adopting similar measures addressed to third parties and dismissed the plea.[27] Likewise, the General Court rejected the plea from some appellants that the Commission had failed to establish their participation in the entire infringement. It also dismissed a number of pleas alleging other illegal findings by the Commission,[28]

[14] *Air Canada v. Commission* ("Air Canada II")(Case T-326/17) EU:T:2022:177; *British Airways* (Case T-341/17), EU:T:2022:182; *SAS Cargo Group and Others v. Commission* (Case T-324/17), EU:T:2022:175; and *Latam Airlines Group SA and Lan Cargo SA v Commission* ("Latam Airlines")(Case T-334/17), EU:T:2022:18.

[15] *E.g., Japan Airlines v. Commission* ("*Japan Airlines*")(Case T-340/17), EU:T:2022:181, para. 215: the Court thus regards the Commission's decision as a group of individual decisions, each of which establishes, in relation to its addressee, the specific infringement which it was found to have committed.

[16] *See e.g., Air Canada II*, para. 522.

[17] *Japan Airlines*, paras. 193 and following.

[18] *Cathay Pacific Airways Ltd v. Commission* (Case T-343/17) EU:T:2022:184, paras. 218 and following.

[19] *Latam Airlines*, paras. 104 and following.

[20] Regulation 1/2003 provides: (i) in the absence of an interrupting act, such as the initiation of proceedings by the Commission, for a five-year limitation period (Article 25(3)); and (ii) if interruptive action was taken, for a maximum 10-year limitation period (Article 25(5)) from the day on which the infringement ceased.

[21] For Japan Airlines: EEA to third country routes; for Cathay Pacific Airways: intra-EEA routes and EU to Switzerland routes; and for Latam Airlines: intra-EEA routes, non-EU EEA to third country routes and EU to Switzerland routes.

[22] Because the initial 2010 decision did not cover these practices, the appeal did not suspend the limitation period that had started to run for these practices when they ceased in 2006; the limitation period thus expired in 2016, before the Commission's adoption of its second decision in 2017.

[23] *Martinair Holland NV v. Commission* ("Martinair")(Case T-323/17) EU:T:2022:174 ; *KLM v. Commission* (Case T-325/17) EU:T:2022:176; *Cargolux Airlines v. Commission* (Case T-334/17) EU:T:2022:178; *Cargolux Airlines v. Commission* ("Cargolux")(Case T-334/17) EU:T:2022:178; *Air France-KLM* ("Air France-KLM") (Case T-337/17) EU:T:2022:179; *Singapore Airlines Ltd and Singapore Airlines Cargo Pte Ltd v. Commission* (Case T-350/17) EU:T:2022:186; *Société Air France v. Commission* (Case T-338/17) EU:T:2022:180 ; and *Lufthansa and Others v. Commission* (Case T-342/17) EU:T:2022:183.

[24] The plea was likewise rejected on the same grounds in certain partially upheld appeals, *e.g., Air Canada v. Commission* ("Air Canada") (Case T-326/17) EU:T:2022:177, paras. 188 and following.

[25] The whole of the air transport sector was exempted from the scope of the initial Article 101 implementing regulation, Regulation 17 (OJ, English Special Editions 1959-1962, p. 291). Later, Regulation No. 3975/87, which laid down the procedure for the application of competition rules to air transport, and the initial iteration of Regulation No. 1/2003 excluded air transport to third countries from their scopes.

[26] Regulation No. 411/2004 extended the scope of Regulation No. 1/2003 to cover air transport to third countries.

[27] *E.g., Air France-KLM*, paras. 347 and 352: the General Court considered that a fine cannot be annulled on the grounds that another participant to the cartel was not sanctioned. The plea was also rejected when it was raised in the appeals that were partially upheld; see for instance, *Japan Airlines*, para. 295; *Martinair*, para. 238 and *Cargolux*, para. 366.

[28] *E.g., Air France-KLM*, paras. 213 and following: the General Court dismissed Air France's claim that sanctioning it for the practices of the former Air France business breached the principles of personal responsibility and individualization of penalties and sanctions.

violations of the principle of proportionality and equality,[29] and the misuse of powers.[30]

Beyond fine reductions, the General Court proceedings may help successful appellants limit the scope of follow-on actions for damages brought against them in national courts. A number of actions have already been brought in Germany, the Netherlands and the U.K., and more may follow once the Commission's decision becomes final, which will occur if the parties opt not to appeal the General Court judgments.[31]

In conclusion, over the course of 12 years, two decisions and two rounds of appeals before the General Court, the Commission was able to cure the majority of the defects that had affected its initial 2010 decision on the air transport cartel. Nevertheless, 6 of the initial 21 carriers successfully reduced the fines imposed on them from approximately €302 to €251 million. Latam Airways was most successful in this regard, reducing its initial fine of €8 million by close to 75% to just over €2 million. Despite the Commission's ultimate success in its qualification of the conduct as a whole and in establishing its jurisdiction to review it, the air transport cases evidence the complexity of investigating large international cartels.

News

Commission Updates

Revision of Regulation 1/2003 and the Commission's Leniency Policy

The Commission has recently revealed its plan to review two foundations of EU competition law enforcement: Regulation 1/2003 and the Leniency Policy.

Regulation 1/2003

On March 31, 2022, the Commission announced its intention to revise Regulation 1/2003, which sets out the Commission's powers and its relations with national authorities.[32] The revisions will aim to modernize procedures in order to shorten investigations, provide more clarity to companies on the application of antitrust rules, and enable more decentralized enforcement. On May 19, 2022, the Commission started the revision process with the launch of an open call for tenders to conduct an evaluation support study on the performance of the procedures for the application of EU competition rules, based on experts' analyses and on decision-making practice. The Commission will also build its evaluation on the results of an upcoming public consultation and on the long experience gathered by the Commission and national competition authorities in applying the current framework.

Although Regulation 1/2003 has achieved "remarkable success,"[33] the Commission is seeking to refresh the rules to ensure EU enforcement remains at the "forefront of the global enforcement." In addition, the Commission has also explained the update as forming part of the Commission's ongoing work to ensure it has a competition tool chest that is suitable for the digital economy.

[29] *E.g.*, *Air France-KLM*, paras. 321 and following: Air France argued that evidence provided by Lufthansa in its immunity application should not be taken into consideration because, in its view, Lufthansa had failed to satisfy the conditions for immunity (ending the infringement after requesting immunity). The General Court considered that, should Lufthansa indeed have failed to meet certain requirements for immunity, this would not deprive the Commission of the possibility to use the evidence submitted.

[30] *E.g.*, *Cargolux*, paras. 209 and following: Cargolux argued that the Commission had misused its powers by relying on evidence for certain routes that predated the Commission's acquisition of the competence to find infringements on those routes. However, the General Court found that the Commission may rely on contacts predating the infringement period in order to construct "an overall impression of the situation" and "corroborate the interpretation of certain items of evidence."

[31] In the case of an appeal against a Commission decision, national courts must in principle stay follow-on actions for damages pending a definitive determination of the matter by the EU courts, *see* Regulation No. 1/2003, art. 16(1) and *Masterfoods and HB* (Case C-344/98) EU:C:2000:689, paras. 52 and 57.

[32] Commissioner Vestager, *Competition and regulation in disrupted times*, Keynote speech at the Charles River Associates Conference, Brussels, March 31, 2022.

[33] Commissioner Vestager, *Competition and regulation in disrupted times*, Keynote speech at the Charles River Associates Conference, Brussels, March 31, 2022.

As to its substance, the revision would recast both the relationship between the Commission and the national competition authorities on the one hand, and the relationship between regulators and companies on the other. Specifically, the Commission is seeking to boost its cooperation with national competition authorities and to expand their responsibilities, for example, by giving them a more important role in antitrust investigations. The Commission would also increase the amount of tailored advice competition authorities can provide to companies. This change in the governance structure is part of a broader philosophical move—most obviously embodied by the Digital Markets Act—to *ex ante* intervention as opposed to punishing breaches after they have already occurred. Indeed, the Commission considers that informal guidance given by Commission's services to companies are often not followed by stakeholders, including because of the restrictiveness of current policies. A key area of investigation envisaged in this update to the law is therefore to make informal guidance issued by the Commission more "operational."

The Commission's Leniency Policy

On April 5, 2022, the Commission announced a review of its leniency program,[34] which is embodied in the Leniency Notice.[35] The Commission's leniency program provides full financial incentives to companies that report cartel activity to the Commission. This program, which has assisted in the detection of a range of cartel abuses since its institution in 1996, has largely been viewed as extremely successful. Nonetheless, the Commission has identified a marked decline in leniency applications over the last five years. The review announced by the Commission is designed to address this decline. The review is therefore designed to bring about changes that will increase legal certainty for potential applicants as to what conduct falls under the EU antitrust provisions and improve incentives to report potential infringements.

Specifically, the Commission is contemplating, among other amendments, granting immunity applicants full immunity from follow-on damage claims.[36] The Commission has also committed to improve international cooperation and to strengthen bilateral discussions with other agencies as part of the review process. The Commission has observed that the creation of new leniency regimes all over the world could also explain the decline on leniency applications. In fact, having to meet an increasing number of requirements and liaise with different agencies at the same time could be too burdensome for potential immunity applicants, which might be generating a deterrent effect. Increasing international cooperation may help reduce this burden, and thus increase the number of leniency applications.

Court Updates

Advocate General Szpunar's Opinion on Disclosure of Evidence Created ex novo

On April 7, 2022, Advocate General Szpunar delivered his opinion on the interpretation of Article 5(1) of Directive 2014/104 (the "Damages Directive") and on the scope of its rules on evidence production.[37] The Advocate General called on the Court of Justice to allow national courts to require defendants to disclose evidence of a type that would require the defendant to compile or classify information rather than merely produce existing material. The Advocate General considered that, as long as national courts limit such disclosure of so-called "*ex novo* evidence" to relevant, necessary, and proportionate requests, this interpretation is justified by the need for effective implementation of EU competition law. The position is unsurprising but—if upheld to by the Court of Justice—may further increase the burden of follow-on litigation on companies.

[34] Deputy Head of Cartels Unit Mayock, *The State of Global Cartel Enforcement*, Speech at GCR Live: Cartels Conference, Washington D.C., April 5, 2022.

[35] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/11.

[36] Under the current regime, the EU Damages Directive stipulates that immunity applicants are only liable to pay damages to their customers.

[37] *AD and others v. PACCAR Inc, DAF TRUCKS NV, DAF Trucks Deutschland GmbH* ("AD and others") (Case C-163/21), opinion of Advocate General Szpunar, EU:C:2022:286.

Background

In July 2016, five European truck manufacturers settled a cartel investigation with the Commission. The settlement decision led to hundreds of follow-on damages cases before the national courts of multiple Member States.

In March 2019, in the context of one of these cases, a claimant requested the Court of First Instance of Barcelona to order the disclosure of evidence pertaining to the calculation of potential harm suffered by the company.[38] Article 5(1) of the Damages Directive allows national courts to order the disclosure, by the defendant or a third party, of relevant evidence "which lies in their control." Part of the evidence requested in this case was not pre-existing and required an *ex novo* comparison of recommended prices before, during and after the infringement period.[39] The defendants argued that the Damages Directive did not allow the national court to request such evidence, as it did not "lie in their control", and would require them to compile a new analysis.[40]

In February 2020, the Spanish court sought guidance from the Court of Justice on the interpretation of Article 5(1) of the Damages Directive. Specifically, the Court of Justice was asked whether Article 5(1) could cover the disclosure of potential evidence created by compiling or classifying information, knowledge, or data.

Advocate General's opinion

In his opinion, Advocate General Szpunar considered the issue through three interpretational lenses of EU law: textual, systematic, and teleological.

— **Textual interpretation.** While the textual interpretation of Article 5(1) and recitals of the Damages Directive did not enable an unequivocal conclusion, the Advocate General argued that the text did not preclude an interpretation that would require defendants to prepare and disclose new material.[41]

— **Systematic interpretation.** A systematic interpretation pointed towards an affirmative answer to the Spanish court's question.[42] The Advocate General interpreted the Damages Directive's requirement that the national court consider the scope and cost of disclosure of evidence as implying that the disclosure might require performing tasks that go beyond the mere collection of documents.[43]

— **Teleological interpretation.** A teleological interpretation would favor the possibility for courts to require the production of *ex novo* evidence to ensure the effectiveness of Articles 101 and 102 TFEU.[44] If evidence which required companies to compile or otherwise process data, were excluded, this would create significant barriers to private enforcement.

  Thus, the Advocate General considered that allowing the disclosure of evidence that requires companies to process information or otherwise create new documents is in line with, and indeed required by, the objectives of the Damages Directive.[45]

The Advocate General also stressed, however, that the Damages Directive requires strict supervision by the national courts.[46] It is for these courts to determine whether such requests are proportionate and necessary on a case-by-case basis.

[38] *Ibid.*, para. 9.
[39] *Ibid.*, para. 9.
[40] *Ibid.*, para. 10.
[41] *Ibid.*, para. 79.
[42] *Ibid.*, para. 84.
[43] *Ibid.*, para. 83.
[44] *Ibid.*, para. 86.
[45] *Ibid.*, para. 90.
[46] *Ibid.*, para. 89.

Claimants to receive access to the evidence prepared *ex novo*?

The Court of Justice will now decide whether or not to follow the approach proposed by Advocate General Szpunar. Claimants will hope it does, as this would ease their cases and create an additional source of pressure on defendants during discovery. That said, even if the Court of Justice were to follow the Advocate General's approach, the disclosure of *ex novo* evidence would still require national courts to agree that claimants' requests for such evidence are proportionate. The extent to which this case will change access to evidence in follow-on litigation will therefore depend both on the Court of Justice's judgment and how national courts apply it in practice.

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