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## AG Rantos’ Opinion in *Servizio Elettrico Nazionale and Others* (Case C-377/20) Towards A Conceptual Approach To Identifying Exclusionary Abuses Under Article 102 TFEU

On December 9, 2021, Advocate General (“AG”) Rantos delivered his opinion on the questions referred to the Court of Justice (“ECJ”) by the Italian *Consiglio di Stato* in case *Servizio Elettrico Nazionale*.<sup>1</sup> The *Consiglio di Stato* is seeking clarification of certain aspects of the concept of “abuse” under Article 102 TFEU.<sup>2</sup> The alleged abuse concerns the discriminatory use of customer data to avoid losing those customers to rivals in a newly liberalized market. The case gives the Court the opportunity to address the issue of abusive conduct based on a competitive advantage lawfully inherited by a former statutory monopolist from that very same position. The case also touches

upon the value and potential replicability of a set of data as a means of competition. Above all, it allowed the AG to revisit the Court’s existing case-law on exclusionary non-price abuses, which he proposes to clarify and categorize for future guidance.

### Background

Upon the liberalization of the retail market for electricity distribution in Italy, Enel group’s (the former statutory monopolist) activities were unbundled, among others, into Enel Energia SpA (“EE”) (active in the liberalized market) and

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<sup>1</sup> *Servizio Elettrico Nazionale and Others v. Autorità Garante della Concorrenza e del Mercato* (Case 377-20), Opinion of Advocate General Rantos, EU:C:2021:998 (“AG Rantos Opinion”).

<sup>2</sup> Treaty on the Functioning of the European Union, OJ 2012, C 326, paras. 47–390.

Servizio Elettrico Nazionale SpA (“SEN”) (active in the so-called protected market).<sup>3</sup> In 2017, following a complaint by an industry association, the Italian antitrust authority (“AGCM”) opened an investigation into Enel SpA (“Enel”), SEN and EE.

In December 2018, the AGCM adopted its final decision in which it held that EE and SEN, coordinated by their parent company Enel, had abused their dominant position in the energy distribution sector in Italy in violation of Article 102 TFEU. The incriminated conduct lasted more than five years from 2012 until 2017. The AGCM was concerned that SEN had allowed EE to use a non-public database of SEN customers to target those customers with commercial offers by EE to incentivize customers to switch to EE and avoid a mass departure to rival distributors following the opening of the protected market. At the same time, SEN restricted access by third parties to its customer list.<sup>4</sup> The AGCM held that the discriminatory use of SEN customer data constituted an abuse by the Enel group of its dominant position. Following a partially unsuccessful challenge in first instance, the parties appealed to the *Consiglio di Stato*, which referred five questions to the Court of Justice:

1. What are the elements necessary for finding an exclusionary abuse of a dominant position?
2. What is the underlying purpose of Article 102 TFEU, consumer protection or protection of the competitive structure of the market (in an interest to identify the evidence to be taken into account for the assessment of whether a conduct is abusive)?

3. Can the dominant undertaking rely on *ex post* evidence to prove the absence of anticompetitive effects?
4. Is anticompetitive intent relevant in the finding of an abuse?
5. Does belonging to the same corporate group justify holding liable a company that did not take part in the prohibited behavior?

AG Rantos’ proposed response to the *Consiglio di Stato*’s first question will be particularly noteworthy for assessments of exclusionary non-pricing abuses, if endorsed by the Court.

### Clarification of the concept of ‘competition on the merits’ in exclusionary cases

The AG seeks to systemize the concept of abuse in exclusionary cases based on previous case-law.<sup>5</sup> By the first question, the referring *Consiglio di Stato* asks whether a dominant undertaking’s business practice that is considered ‘perfectly legal’ outside the context of competition law can be classified as an abuse under Article 102 TFEU solely based on its (potentially) restrictive effect on competition, or whether such finding requires an additional element of unlawfulness.

AG Rantos confirms that conduct can amount to an abuse under Article 102 TFEU if it is capable of causing (potential) harm to competition.<sup>6</sup> A different reading of Article 102 TFEU would risk under-enforcement in cases where anticompetitive conduct does not infringe any other laws.<sup>7</sup> Yet, a restrictive effect, whether actual or potential, is

<sup>3</sup> The liberalization of the Italian energy sector followed a two-step process. In a first step, Italy opened electricity distribution to competition for so-called “eligible” customers (mainly larger enterprises), while smaller customers (SMEs and individuals), referred to as “captive” customers, continued to benefit from a protected service (“*servizio di maggior tutela*”) under which prices and conditions remained strictly regulated. In a second step, the Italian legislator opened the market also for captive customers, which, after several postponements, was put into effect as from January 2021 (for SMEs) and as from January 2022 (for households).

<sup>4</sup> SEN requested two separate consents to its customers: a first consent to receiving commercial offers from undertakings of the Enel group, and a second one to receiving commercial offers by third-parties. In practice, clients more often refused consent to sharing their information with third parties but consented to SEN using their data assuming this was necessary for proper management of their contractual relation with SEN.

<sup>5</sup> *TeliaSonera* (Case C-52/09), EU:C:2011:83, *Post Danmark I* (Case C-209/10), EU:C:2012:172, *Post Danmark II* (Case C-23/14), EU:C:2015:651, *Intel* (Case C-413/14), EU:C:2017:632, *Generics (UK)* (Case C-307/18), EU:2020:52.

<sup>6</sup> AG Rantos Opinion, paras. 32–38.

<sup>7</sup> Whether the opposite, i.e. an abuse under Article 102 TFEU due to an infringement of other laws (in that case the General Data Protection Regulation), is true is currently pending before the Court of Justice in the *Facebook* case, see Bundeskartellamt decision B6-22/15 of February 6, 2019, as reported in our [February 2019 German Competition Law Newsletter](#) and the referral to the Court of Justice by the Regional Court of Appeals (*Oberlandesgericht*) Düsseldorf on April 22, 2021, *Facebook* (Case C-252/21).

not necessarily anticompetitive, as expressed by the “as efficient competitor” (“AEC”) test.<sup>8</sup> AG Rantos confirms that conduct that equally efficient rivals can replicate is generally not abusive.<sup>9</sup> This is consistent with the general premise that less efficient rivals may be driven out of the market as a natural outcome of competition ‘on the merits,’ and are therefore not meant to be protected by Article 102 TFEU.<sup>10</sup>

AG Rantos acknowledges the limits of the AEC test in this case, as it would be materially impossible for competitors to replicate Enel’s exact same strategy before the liberalization of the market.<sup>11</sup> Nonetheless, AG Rantos suggests applying the “underlying logic” of the AEC test “which seeks, in essence, to estimate whether a dominant undertaking was in a position in which it was able to foresee, on the basis of data known to it, whether a competitor could, despite the conduct in question, have stayed competitive on the market operating in an economically viable way.”<sup>12</sup>

In this context, AG Rantos seeks to clarify the meaning of ‘competition on the merits’ acknowledging that the Court’s inconsistent terminology in previous cases may have led to misunderstandings.<sup>13</sup> In his opinion, resorting to an assessment of the ‘normality’ of the conduct may be confusing. Antitrust authorities should rather focus on analyzing the effects of the conduct, in accordance with the case law, in particular *Intel*.<sup>14</sup>

The assessment of the effects of the behavior and whether the latter consisted of ‘competition on the merits’ must not be carried out in the abstract. The

analysis should consider the relevant economic and legal context of the behavior. For practical guidance, AG Rantos notes that ‘competition on the merits’ is generally (i) based on economic or objective reasons;<sup>15</sup> (ii) benefits consumers with lower prices, improved quality and/or larger choice of new or better products and services; and (iii) preserves the ability of competitors to imitate the conduct of the dominant undertaking.

Conversely, the manifest deviation from normal commercial practice can be a relevant indicator of a conduct’s abusive nature.<sup>16</sup> Ultimately, the conduct at issue must be assessed in close correlation with the “special responsibility” that rests on dominant firms not to allow their conduct to impair effective competition in the market. This “special responsibility” however does not prevent dominant firms from protecting their legitimate commercial interests.<sup>17</sup>

In practice, to determine whether the Enel group’s conduct was abusive AG Rantos considers the *Consiglio di Stato* should assess (i) the competitive significance of Enel’s lists, (ii) to what extent access to these lists was discriminatory against rivals and in favor of EE, *e.g.*, in view of maintaining the contract with the supplier; and (iii) finally, and irrespective of the previous point, the replicability or the availability of similar lists (in terms of price and content) in the Italian market. If the commercial value of competitors’ lists is similar to the SEN lists, then no potential foreclosure effect of this strategy would be attributable to Enel.<sup>18</sup>

<sup>8</sup> AG Rantos Opinion, paras. 43–45.

<sup>9</sup> AG Rantos Opinion, para. 69. In footnote 52, the AG nonetheless admits that this is not an absolute rule as, in particular circumstances, a behavior can be replicated by an equally efficient competitor but still not be considered as competition on the merits (*e.g.*, misleading statements to public authorities as was the case in *AstraZeneca* (Case C-457/10 P)).

<sup>10</sup> It is the that inefficient competitors.

<sup>11</sup> The Court’s case-law has established the AEC test as an appropriate test for price-related abuses, showing obvious limits to the AEC test for instance in cases where the structure of the market makes the emergence of an as-efficient competitor practically impossible, *e.g.*, due to a (former) statutory monopoly and high barriers to entry, *see, e.g.*, *Post Danmark II*, paras. 57–61.

<sup>12</sup> AG Rantos Opinion, paras. 73–74.

<sup>13</sup> AG Rantos Opinion, para. 53.

<sup>14</sup> AG Rantos Opinion, para. 54.

<sup>15</sup> AG Rantos Opinion, para. 62; *TeliaSonera*, para. 88; *Akzo* (Case C-550/07), EU:C:2010:512, para. 71; *AstraZeneca* (Case C-457/10), EU:C:2012:770, para. 130.

<sup>16</sup> AG Rantos Opinion, paras. 61 and 128.

<sup>17</sup> AG Rantos Opinion, paras. 58–60. *United Brands* (Case C-27/76), para. 189.

<sup>18</sup> AG Rantos Opinion, paras. 75–81.

## Consumer welfare vs protection of a competitive market structure

The second question referred to the Court of Justice asks whether the aim of Article 102 TFEU is to maximize consumer protection or rather preserve the market's competitive structure. The AG sees both objectives as closely linked: the ultimate aim of increasing consumer welfare encompasses their protection not only against direct harm (such as higher prices or diminished choice) but also against indirect harm caused by an alteration of the market structure that would otherwise have guaranteed effective competition.<sup>19</sup>

AG Rantos recalls that there is no room for the application of Article 102 TFEU absent consumer harm,<sup>20</sup> and hence, no reason to protect the competitive market structure in the abstract where it does not contribute to the ultimate objective—and, indeed, the “leitmotiv of competition law more generally”—of consumer welfare protection.<sup>21</sup>

As a result, if endorsed by the Court, competition authorities relying on theories of indirect consumer harm will need to demonstrate that an exclusionary practice not only impairs the competitive market structure but also causes actual or potential harm to consumers.<sup>22</sup>

## ***Ex-post* evidence of absence of actual effects is a relevant factor in assessing whether alleged foreclosure could have actual effects**

The *Consiglio di Stato*'s third question will allow the Court to discuss the relevance of *ex post* evidence that undertakings may rely on to prove a lack of actual anticompetitive effects. It is established that competition authorities do not need to prove

actual anticompetitive effects in the market to establish an infringement of Article 102 TFEU.<sup>23</sup> As AG Rantos notes, any such requirement would be contrary to the *ratio* of Article 102 TFEU, which is preventive and forward-looking in nature, and which would be thwarted if competition authorities would have to wait for the detrimental effects to occur in the market.<sup>24</sup>

Nonetheless, and especially when the behavior under scrutiny is dated, elements advanced by the dominant undertaking during the administrative procedure to evidence the absence of actual foreclosure can be a relevant circumstance for the assessment of the conduct's capacity to restrict competition in cases where the competition authority's theory of harm is based on actual, and not just potential, anticompetitive effects.<sup>25</sup>

The third question offers AG Rantos the opportunity to address the relevant threshold of effects to find an abuse. Is it enough to demonstrate that exclusionary effects appear more likely than not? Or should the likelihood of the restrictive effect be considerably more than a mere possibility? As did Judge Wahl, AG Rantos recognizes that the terms ‘probability,’ ‘likelihood,’ or ‘capability’ to restrict competition are used interchangeably.<sup>26</sup> AG Rantos' further considers that the degree of probability will depend on the legal, economic, and factual context of each case and on “hard facts” *e.g.*, the duration and the coverage of the practice. Accordingly, the type of abuse at hand would impact the threshold of effects required: the threshold for below-cost pricing cases would be lower than that of margin squeezing cases.<sup>27</sup>

In response to the *Consiglio di Stato*'s fourth and fifth questions, the AG recalls, first, that abusive foreclosure practices do not require demonstration

<sup>19</sup> AG Rantos Opinion, para. 96.

<sup>20</sup> As clarified by the Court in *Post Danmark I* and *Intel*.

<sup>21</sup> AG Rantos Opinion, para. 99.

<sup>22</sup> AG Rantos Opinion, para. 108.

<sup>23</sup> AG Rantos Opinion, paras. 110–113.

<sup>24</sup> AG Rantos Opinion, para. 110.

<sup>25</sup> AG Rantos Opinion, para. 119. The absence of actual effects can also be a mitigating factor in the calculation of the amount of the fine.

<sup>26</sup> AG Rantos Opinion, paras. 113 and 118.

<sup>27</sup> In *Akzo*, the Court suggested that “plausibility” is sufficient (Case C-62/86, paras. 71–74), whereas the Court applies a higher threshold in *Deutsche Telekom* (Case C-280/08, paras. 250–254).

of a specific intent but rather of “the economic logic of the behavior in question, as it objectively results from the characteristics of that behavior and its context,”<sup>28</sup> and second, that according to the settled case law of the Court, a parent company that holds 100% of the capital in its subsidiaries is presumed to exert decisive influence on its subsidiaries, unless it adduces sufficient evidence that the subsidiary acted independently in the market.<sup>29</sup>

## Conclusion

The Opinion is a welcome advancement of a more systematic approach to exclusionary non-pricing abuses under Article 102 TFEU. Nonetheless, it provides little innovation. AG Rantos’ summary

of the existing case-law is helpful but remains retrospective in nature. Should the Court engage with such fundamental discussions as regards the ultimate goal of Article 102 TFEU, it may be useful to maintain flexibility to include, for example, aspects of environmental and social sustainability that are at the center stage of current antitrust debates and that might soon emerge as serious sources of (indirect) consumer harm, if not as fundamental goals in themselves.

It remains to be seen whether and to what extent the Court of Justice will endorse the Opinion. The outcome may have repercussions beyond recently liberalized sectors, including for the data-related conduct at issue.

# The European Commission Approves The Acquisition Of Suez By Veolia, Subject To Remedies

On December 14, the Commission conditionally approved the proposed acquisition of Suez by Veolia (“the Transaction”) following review in Phase I.<sup>30</sup>

The Commission cleared the Transaction subject to divestiture remedies in the water and waste sectors in Europe and France, including the markets for (i) municipal water management, (ii) industrial water management in France and mobile water services in the European Economic Area (EEA), (iii) the collection and treatment of non-hazardous and regulated waste, and (iv) the treatment of hazardous waste in France.

## Background

Veolia and Suez both offer water treatment and waste management services to municipal and industrial customers.

On August 30, 2020, Veolia announced its intention to acquire its rival Suez through an acquisition structured in two steps: first, the private acquisition of a non-controlling minority stake (29.9%) in Suez from Engie (in October 2020), and, second, a public tender offer for the entire outstanding share capital of Suez (launched in February 2021).<sup>31</sup>

## Gun-jumping allegations as takeover defense

Until Veolia and Suez finally reached agreement over the takeover,<sup>32</sup> Suez fought an intensive battle that lasted more than seven months, making Veolia’s bid only the sixth hostile takeover bid in France since 2010.<sup>33</sup> In its defense, Suez employed a number of tactics including, *inter alia*, legal action in the domestic courts, the search for a third-party investor (also known as a “white

<sup>28</sup> AG Rantos Opinion, para. 130. The existence of this intention can be taken into account as a simple factual circumstance and does not entail any reversal of the burden of proof.

<sup>29</sup> AG Rantos Opinion, paras. 149–155.

<sup>30</sup> See European Commission Press Release, “Commission approves the acquisition of Suez by Veolia, subject to conditions,” December 14, 2021, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6885](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6885).

<sup>31</sup> See, e.g., Veolia Press Release, “Veolia acquires 29.9% of Suez’ capital from Engie and confirms its intention to acquire control,” October 5, 2020, available at: <https://www.veolia.com/en/newsroom/press-releases/veolia-acquires-299-suezs-capital-engie-and-confirms-its-intention-acquire>.

<sup>32</sup> See Veolia Press Release, “Veolia and Suez announce that they have reached an agreement allowing the merger of the two groups,” April 12, 2021, available at: <https://www.veolia.com/en/our-media/newsroom/press-releases/veolia-and-suez-announce-they-have-reached-agreement-allowing>.

<sup>33</sup> See Peggy Hollinger, “Suez-Veolia hostile bid battle tests European M&A law,” March 17, 2021, Financial Times, available at: <https://www.ft.com/content/47fb3352-be00-46e7-9a2c-7bdo139c8a5>.

knight”)<sup>34</sup> and the creation by Suez of a Dutch foundation whose board members would have had veto rights<sup>35</sup> over any disposal of Suez’ French water business. This latter move was intended to prevent Veolia from selling the French water business to remedy the Commission’s anticipated competition concerns in the water sector in France. Suez abandoned its defensive actions after the companies reached agreement in April 2021.

As part of its takeover defense, Suez called on the Commission to stop Veolia’s efforts under the Commission’s gun-jumping rules. Suez claimed that Veolia’s acquisition of the minority stake in Suez from Engie infringed the standstill obligation under Article 7(1) of the Merger Regulation<sup>36</sup> by implementing the first step of a single concentration prior to obtaining the Commission’s clearance.

In parallel, Veolia had applied for an exemption to the standstill obligation under Article 7(2) of the Merger Regulation (the “Article 7(2) exemption”) prior to acquiring the minority stake in Suez. The Article 7(2) exemption applies to the implementation of a public bid or a series of transactions in securities, provided that the purchaser notifies the transaction to the Commission without delay and does not exercise the related voting rights until the acquisition has been cleared.

The Commission rejected Suez’ line of argument in a separate decision on December 17, 2020.<sup>37</sup> Although it agreed that the minority stake in Suez and the subsequent public takeover bid formed one single concentration, it rejected Suez’ argument that the former was unlawful. Applying (and clarifying) the Court’s rulings in *Ryanair/Aer Lingus*<sup>38</sup> and *Marine Harvest*,<sup>39</sup> the Commission held (i) that the acquisition of a non-controlling stake can be subject to the standstill obligation when it is part of a broader

plan to acquire control over the target, and (ii) that the Article 7(2) exemption can apply to hybrid series of transactions combining private securities transactions and a public takeover bid. The Commission therefore concluded that Veolia could benefit from the Article 7(2) exemption, and that the acquisition of a non-controlling minority stake in Suez did not constitute a gun jumping infringement.

### **Divestiture commitments to “rule out ‘serious doubts’” in phase 1**

Following almost one year of pre-notification discussions,<sup>40</sup> the Transaction was notified to the Commission on October 22, 2021. The Commission’s investigation indicated that the Transaction would raise competition concerns in the markets for municipal water management in France, industrial water management in France, mobile water services in the EEA, the collection and treatment of non-hazardous and regulated waste in France, and the treatment of hazardous waste in France. The investigation however confirmed that the Transaction did not raise concerns in any other horizontally affected markets or for any non-horizontal links between the Parties created by the Transaction.

In order to address the Commission’s concerns, Veolia offered a package of structural commitments that include the divestment of almost all of Suez’ French non-hazardous and regulated waste management activities and municipal water management activities to a newly created entity called “New Suez.” Veolia further committed to divest its activities of mobile water services in the EEA, almost all of its French industrial water management activities, and part of Veolia’s and Suez’ hazardous waste treatment activities. For the creation of “New Suez,” Veolia and Suez signed

<sup>34</sup> See Christopher Thompson, “Suez white knight is a flawed M&A savior,” October 2, 2020, Reuters, available at: <https://www.reuters.com/article/us-veolia-m-a-breakingviews/breakingviews-suez-white-knight-is-a-flawed-ma-saviour-idUSKBN26N1R2>.

<sup>35</sup> Suez amended its bylaws to require unanimous consent by its shareholders to any sale, giving the foundation *de facto* veto power.

<sup>36</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L24/1.

<sup>37</sup> *Veolia/Suez* (Case COMP/M.9969), Commission decision of December 17, 2021.

<sup>38</sup> *Aer Lingus Group v. Commission* (Case T-411/07), para. 83.

<sup>39</sup> *Marine Harvest v. Commission* (Case T-704/14), para. 191.

<sup>40</sup> *Veolia/Suez* has seen one of the longest pre-notification periods in recent years (the average of pre-notification in Phase I cases usually lasts between two to three months).

a commercial agreement with a consortium of investors earlier in 2021, which the Commission approved a few weeks after the clearance of the Transaction.

The Commission cleared the Transaction on December 14, 2021.

## *Intel Corporation v. Commission* (Case T-286/09 RENV): General Court Quashes Intel's €1.06 Billion Fine

On January 26, 2022, the General Court partially annulled the Commission's decision imposing a €1.06 billion fine on Intel for abusing its dominant position through the granting of exclusivity-conditioned rebates.<sup>41</sup> The General Court found that the Commission had not established to the requisite legal standard that the rebates were capable of having, or were likely to have, anticompetitive effects.<sup>42</sup>

### Background: the Intel saga

**The Commission decision.** In 2009, the Commission imposed a €1.06 billion fine on Intel for having abused its dominant position in x86 central processing units ("CPUs") through two kinds of exclusivity rebates. Specifically, Intel (i) granted rebates to four original equipment manufacturers ("OEMs")<sup>43</sup> on condition that they purchased all, or almost all, of their x86 CPUs from Intel; and (ii) awarded payments to Media-Saturn, a large European retailer, on condition that it only sold computers carrying Intel's x86 CPUs.<sup>44</sup> The Commission found that Intel had also abused its dominant position by making payments to three computer OEMs to postpone, cancel, or otherwise restrict the commercialization of products using Intel's competitor's components (the "naked restrictions").

The Commission claimed in its decision that exclusivity rebates granted by a dominant undertaking are *per se* illegal. The Commission therefore considered that it was not required to show that Intel's actions were capable of restricting competition but nonetheless carried out a 151-page long AEC test.<sup>45</sup> According to the Commission, this test indicated that an AEC would have had to price below average avoidable costs to compete with Intel's discounted prices. The Commission concluded on this basis that Intel's rebates were capable of foreclosing an AEC and were therefore abusive even if they were not *per se* illegal.

**The initial General Court judgment.** Intel appealed the decision, claiming among other things that the Commission had failed to establish that the rebates were capable of foreclosing AECs.<sup>46</sup> Siding with the Commission, the General Court concluded on June 12, 2014 that exclusivity rebates by dominant undertakings are *per se* abusive, regardless of the circumstances of the case.<sup>47</sup> The Commission therefore did not have to establish that Intel's conduct was capable of restricting competition and there was no need for the General Court to review the Commission's AEC test.<sup>48</sup>

<sup>41</sup> *Intel Corporation v. Commission* (Case T-286/09 RENV) EU:T:2022:19 ("General Court Renvoi Judgment").

<sup>42</sup> *Ibid.*, para. 525.

<sup>43</sup> Dell, Lenovo, HP, and NEC.

<sup>44</sup> *Intel* (Case COMP/C-3/37.990), Commission decision of May 13, 2009.

<sup>45</sup> The AEC test is aimed to determine at what price an AEC would have to offer x86 CPUs in order to compensate an OEM for the loss of an Intel rebate, and whether at this price it could still cover its costs.

<sup>46</sup> *Intel Corporation v. Commission* (Case T-286/09) EU:T:2014:547 ("initial General Court Judgment").

<sup>47</sup> *Ibid.*, para. 87.

<sup>48</sup> *Ibid.*, para. 151.



**The Court of Justice appeal.** On September 6, 2017, on appeal, the Court of Justice set aside the initial General Court Judgment<sup>49</sup> for failure to examine Intel’s rebates in light of all relevant circumstances—including the AEC test which, it found, had played an important role in the Commission’s assessment.<sup>50</sup> The Court of Justice explained that, even though exclusivity rebates are presumptively unlawful, the presumption is rebuttable if the undertaking proves that the conduct is not capable of restricting competition and foreclosing AECs.<sup>51</sup>

It followed that, if a dominant undertaking submits evidence that the conduct at issue is not capable of restricting competition, the Commission must assess all relevant circumstances, including the following five criteria: (i) the dominant undertaking’s market position; (ii) the market share covered by the rebates; (iii) the conditions and arrangements governing the rebates; (iv) their duration and amount; and (v) the possible existence of a strategy to exclude AECs.<sup>52</sup>

The General Court should therefore have examined all of Intel’s arguments regarding the Commission’s application of the AEC test.<sup>53</sup> Since the General Court had not examined this, the Court of Justice sent the case back to the General Court to examine whether Intel’s rebates were capable of restricting competition.<sup>54</sup>

### **The General Court *Renvoi* Judgment: the importance of anticompetitive effects**

On January 26, 2022, the General Court rendered its *Renvoi* Judgment annulling in part the

Commission’s decision and the €1.06 billion fine in full. Applying the Court of Justice judgment, the General Court found that the Commission had erred in law by taking the view that exclusivity rebates are *per se* abusive, without considering the capability of those rebates to restrict competition.<sup>55</sup> It followed that the Commission’s second finding—namely that the rebates were capable of foreclosing an AEC—was critical to the outcome of the case. The General Court therefore examined in detail Intel’s various claims regarding the shortcomings in the Commission’s analysis.<sup>56</sup>

On this basis, the General Court identified numerous errors in each of the five AEC tests that the Commission carried out for Intel’s five direct and indirect customers. It concluded that the Commission had not established to the requisite legal standard the capacity of each of the rebates to have anticompetitive foreclosure effects.<sup>57</sup>

The General Court criticized several features in particular: the Commission’s analysis of Dell’s “contestable share;”<sup>58</sup> its failure to demonstrate a foreclosure effect for part of the infringement period with respect to rebates to HP; its quantification of non-cash advantages granted to Lenovo; the value of the rebates granted to NEC; and the use of data concerning a single three-month period as a proxy for the entire infringement period for both NEC and Media-Saturn.

Beyond its in-depth review of the Commission’s AEC test, the General Court found that the decision failed to properly consider two of the five criteria identified by the Court of Justice to assess the rebates’ ability to restrict competition: the share of the market covered by the rebates, and

<sup>49</sup> *Intel Corporation v. Commission* (Case C-413/14 P) EU:C:2017:632. See our [Alert Memorandum of October 16, 2017](#).

<sup>50</sup> *Ibid.*, para. 143.

<sup>51</sup> It follows that, if only less efficient competitors are harmed, there is no harm to competition and the rebates are lawful.

<sup>52</sup> *Ibid.*, paras. 137–139.

<sup>53</sup> *Ibid.*, para. 144.

<sup>54</sup> *Ibid.*, para. 148.

<sup>55</sup> General Court *Renvoi* Judgment, para. 145.

<sup>56</sup> *Ibid.*, paras. 167–481.

<sup>57</sup> *Ibid.*, para. 525.

<sup>58</sup> That is, the proportion of a customer’s requirements for which it is willing and able to switch to an alternative supplier. The smaller the contestable share, the greater the likelihood that the exclusivity payment will be capable of foreclosing an AEC.



the duration thereof.<sup>59</sup> The Court considered that the Commission is required to consider each of the five criteria every time it needs to assess the foreclosure capability of a rebate scheme.<sup>60</sup> The absence of such an assessment and the errors in the AEC test vitiated the Commission's decision.

Because it was not possible to identify the amount of the fine that related solely to the “naked restrictions,” which in the General Court's view the Commission correctly qualified as *per se* illegal, the General Court annulled the entire fine.

## The Commission Publishes Its Final Report In The Consumer IoT Sector Inquiry

On January 20, 2022, the Commission published its final report (the “Report”) in the consumer Internet of Things (“IoT”) sector inquiry.<sup>61</sup> The Report identifies antitrust concerns relating to consumer IoT, and sets out policy implications stemming from these concerns.

### Background

IoT products are available in both industrial and consumer contexts. Consumer IoT products—an industry due to grow to a value of over €400 billion by 2030—are already prevalent in houses, cars, and pockets in Europe.<sup>62</sup> The Commission launched a sector inquiry into consumer IoT in July 2020 to examine, notably, barriers to entry, the role of standard-setting, and interoperability and data concerns.<sup>63</sup>

The inquiry focused on consumer IoT and, in particular, on smart home devices, wearable devices, consumer services accessible via such smart devices (*e.g.*, music, fitness, or search services), and voice assistants, “the fastest developing interface” through which customers can access such services on smart devices, such as those provided by Amazon (Alexa), Google (Google Assistant), Apple (Siri).<sup>64</sup>

On June 9, 2021, the Commission published its preliminary findings, focusing on the gatekeeping role of voice assistants and operating systems providers.<sup>65</sup> The final Report published last month confirms these preliminary findings.

### Antitrust concerns with consumer IoT

The Report highlights five key antitrust concerns in consumer IoT:

— **Lack of interoperability.** The Report finds that because Amazon, Google, and Apple are the leading providers of voice assistants and operating systems, they can determine independently the requirements for interoperability through their standard terms and conditions, technical requirements, and certification processes. The Report also expresses a concern that these companies can use this power to preference their own smart devices and consumer IoT services by limiting the functionalities of third parties through technical constraints. These concerns are allegedly exacerbated by high barriers to entry, which the Report finds are driven notably by the prohibitively high cost of the technology investment required to build a voice assistant capable of matching these vertically integrated companies.

<sup>59</sup> *Ibid.*, paras. 499 and 520.

<sup>60</sup> *Ibid.*, paras. 119 and 125.

<sup>61</sup> Report from the Commission to the Council and the European Parliament, Final report – sector inquiry into consumer Internet of Things, SWD (2022) 10 final of January 20, 2022 (“IoT Final Report”). See also Commission staff working document accompanying the document Report from the Commission to the Council and the European Parliament, Final report – sector inquiry into consumer Internet of Things, COM (2022) 19 final (“Working Document”).

<sup>62</sup> IoT Final Report, para. 2.

<sup>63</sup> See our [July/August 2020 EU Competition Law Newsletter](#).

<sup>64</sup> Working Document, p. 13.

<sup>65</sup> See our [June 2021 EU Competition Law Newsletter](#).

- **Unilateral standard-setting.** The Report considers that the leading providers of voice assistants and operating systems could potentially impose new technology standards. This could lock in users and threaten inter-system communications, which would in turn fragment the technology landscape and therefore negatively impact the growth of potential consumer IoT segments.
- **Concentration of valuable data.** Through the central position of voice assistants, these leading providers allegedly have access to large amounts of data. The Report claims that these companies could limit third parties' access to data, while using their own access to provide themselves an advantage in adjacent markets.
- **Tying/exclusivity.** The Report alleges that certain companies may engage in the pre-installation, default-setting, and prominent placement of their own voice assistants on their operating systems. The Report also identifies concerns regarding practices of only licensing voice assistants together with other software, as well as concerns regarding attempts to secure exclusivity of a given voice assistant on a given device or service.
- **The role of leading providers of voice assistants and smart device operating systems as intermediaries between users and consumer IoT devices.** The Commission formulates multiple concerns flowing from the intermediary role of voice assistants and operating systems, such as other companies' loss of brand recognition and a

direct relationship with customers, as well as the leading providers' control over valuable data and technical support.

## Policy implications

A sector inquiry does not necessarily imply antitrust enforcement is inevitable. That said, the Report suggests the Commission may be preparing for enforcement action in these areas for three reasons. First, the Commission's recent trend following sector inquiries—if the energy, pharmaceuticals, and e-commerce sector inquiries are anything to go by—is to use the sector inquiry findings as a springboard for multiple cases. Second, the theories of harm outlined above are, according to Commissioner Vestager, “practices we know too well”<sup>66</sup> that dovetail with the Commission's enforcement priorities. Third, the companies name-checked in the Report—Amazon, Apple, and Google—are all already under scrutiny by the Commission.

Another open question is whether the Commission will use traditional competition law tools to address the Report's concerns, or whether it will seek to resolve them through the Digital Markets Act. Current proposed amendments to the draft Digital Markets Act—which aims to address concerns of the sort identified in the Report—would bring voice assistants into the scope of the Act.<sup>67</sup>

Regardless of the enforcement toolbox the Commission ultimately relies upon, the Report serves as another reminder of the Commission's continued focus on the conditions of competition in digital markets.

<sup>66</sup> Margrethe Vestager, EVP Vestager on the initial findings of the Consumer IoT, Brussels, June 9, 2022, SPEECH/21/2926.

<sup>67</sup> For a detailed analysis, see our [December 2020 EU Competition Law Newsletter](#).

# News

## Commission Updates

### ***EU-U.S. Launch Joint Technology Competition Policy Dialogue To Foster Cooperation In Competition Policy And Enforcement In Technology Sector***

On December 7, 2021, the Commission, the United States Federal Trade Commission (“FTC”) and the United States Department of Justice Antitrust Division (“DOJ”) published a Joint Statement establishing the EU-U.S. Joint Technology Competition Policy Dialogue (the “Policy Dialogue”).<sup>68</sup> The Policy Dialogue has been established in parallel with the EU-U.S. Trade and Technology Council (“TTC”), which is a forum for the EU and United States to coordinate approaches to global trade, economic and technological issues, and to strengthen EU-U.S. economic and trade relations.<sup>69</sup>

The Joint Statement highlights the EU’s and United States’ shared democratic values and beliefs in the importance of promoting fair competition and ensuring effective competition enforcement. It underscores the long history of coordination between the Commission, FTC and DOJ on antitrust policy and enforcement, and emphasizes the common challenges faced by the three regulators in light of new technological developments and the emergence of the digital economy.

Common problems faced by the three regulators with respect to competition enforcement in the technology sector include, for instance, the role of big data in digital investigations, and the assessment of characteristics like network effects

and interoperability in new technological and digital markets.

The Policy Dialogue will focus on strengthening trans-Atlantic cooperation and developing common approaches to competition policy and enforcement in the technology sector, as well as the development of new mechanisms for coordination and the exchange of knowledge and information. The Joint Dialogue will include high-level meetings and regular staff discussions, and will operate in parallel with other forms of cooperation, such as the TTC.

The establishment of the Policy Dialogue highlights the increasing focus of competition authorities on both sides of the Atlantic on the regulation of big technology companies, and a recognition of the need for competition enforcement and merger control to adapt to the realities of the digital era.

### ***Commission Clears Way For Collective Negotiations Over Working Conditions Of Solo Self-Employed Persons In A Weak Position***

#### **Introduction**

On December 9, 2021, the Commission published its Draft Guidelines on the application of EU competition law to collective agreements regarding working conditions of solo self-employed people (the “Draft Guidelines”).<sup>70</sup> The Draft Guidelines, along with a proposal for a directive<sup>71</sup> and a communication,<sup>72</sup> form part of a broader package aimed at improving the working conditions of persons operating on digital labor platforms.<sup>73</sup>

<sup>68</sup> EU-U.S. Joint Technology Competition Policy Dialogue Inaugural Joint Statement between the European Commission, the United States Department of Justice Antitrust Division and the United States Federal Trade Commission, December 7, 2021 (“Policy Dialogue”).

<sup>69</sup> Commission Press Release IP/21/6671, “Competition: EU-US launch Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in technology sector,” December 7, 2021.

<sup>70</sup> Annex to the Communication from the Commission on Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, COM/2021/8838 (“Draft Guideline”); Commission Press Release IP/21/6620, “Antitrust: Commission invites comments on Draft Guidelines about collective agreements regarding the working conditions of solo self-employed people,” December 9, 2021.

<sup>71</sup> Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 2021/0414.

<sup>72</sup> Communication from the Commission on better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work, COM/2021/761.

<sup>73</sup> Commission Press Release IP/21/6605, “Commission proposals to improve the working conditions of people working through digital labour platforms,” December 9, 2021.

## Background

Self-employed persons risk infringing Article 101 TFEU if they engage in collective bargaining because they constitute “undertakings” under competition law, making unionization a form of collusion between independent businesses. While the Court of Justice has held that collective agreements by trade unions negotiating on behalf of self-employed members comparable to workers fall outside the scope of Article 101 TFEU, uncertainty as to the status of self-employed persons remains.<sup>74</sup> Recent developments, such as an increase in subcontracting and outsourcing, the digitization of the production process and the rise of online platform economies, have exacerbated the need for clarity on the application of Article 101 TFEU to self-employed persons.

### Competition law no longer an excuse for (platform) employers’ reluctance to negotiate decent working conditions

The Draft Guidelines exclude collective agreements by and with solo self-employed persons regarding their working conditions from the application of competition law’s prohibition of restrictive agreements between undertakings.

The Draft Guidelines apply to all collective agreements and negotiations between certain categories of solo self-employed people and their counterparties, to the extent that they concern their working conditions, including remuneration. They extend to existing collective agreements and to necessary and proportionate coordination between parties on the negotiating side prior to concluding the collective agreement. However, collective agreements under which solo self-employed persons decide not to provide services require an individual assessment.

The Draft Guidelines clarify that, firstly, collective agreements by solo self-employed persons who are in a situation comparable to workers fall outside the scope of Article 101 TFEU. This relates mainly to three categories of solo self-employed persons that are in a situation comparable to workers, and—irrespective of their classification under national law—therefore fall outside the scope of Article 101 TFEU: solo self-employed persons who are (i) economically dependent on one counterparty; (ii) working “side by side” with workers performing same or similar tasks;<sup>75</sup> and (iii) working through digital labor platforms.<sup>76</sup>

Secondly, the Commission will not intervene against collective agreements regarding working conditions of solo self-employed persons, which potentially fall within the scope of Article 101 TFEU, where solo self-employed people are in a weak bargaining position and unable to influence their working conditions, despite not being in a situation comparable to workers. Agreements potentially falling within this category include circumstances where national law grants solo self-employed people the right to collectively bargain or excludes them from the scope of competition law.<sup>77</sup>

## Conclusion

The Draft Guidelines are a necessary piece of the Commission’s broader measures aimed at improving working conditions in digital platform working relationships.<sup>78</sup> While the Commission’s initiative to provide legal certainty for collective bargaining to all solo self-employed persons targets no particular industry sector, its focus on online platform economies transpires from numerous hypothetical examples in the guidelines relating to online delivery services and ridesharing platforms.

<sup>74</sup> *FNV Kunsten Informatie en Media v. Staat der Nederlanden* (Case C-413/13) EU:C:2014:2411; *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) EU:C:1999:430; Draft Guidelines, para. 5.

<sup>75</sup> Solo self-employed persons working “side by side” with workers are considered to be comparable to workers because they are under the direction of the same counterparty, and neither bear any commercial risk, nor enjoy any independence, in the performance of their services.

<sup>76</sup> Solo self-employed persons operating on digital labor platforms are comparable to workers because they are often dependent on the platform to operate and unable to negotiate their working conditions.

<sup>77</sup> Such as agreements regarding remuneration for authors and performers under Directive of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130 of May 17, 2019, p. 92–125 (the Copyright Directive).

<sup>78</sup> Commission Press Release IP/21/6605, “Commission proposals to improve the working conditions of people working through digital labour platforms,” December 9, 2021.

Importantly, however, the guidelines reflect the Commission's enforcement priorities and do not introduce harmonization in the social sector, where competences remain national to a large extent. The Commission aims to publish the final version of the guidelines in the second quarter of 2022.

### ***IAG/Air Europa Becomes Second Abandonment Of A Planned Airline Merger In 2021***

On December 16, 2021, the European Commission officially 'took note' of IAG and Globalia's announcement to terminate their proposed agreement according to which IAG would acquire sole control over Air Europa.<sup>79</sup>

#### **Background**

On May 25, 2020, IAG notified its intention to acquire sole control over Air Europa. IAG, as the holding company of Iberia and Vueling, is the largest provider of scheduled passenger air transport services in Spain. Air Europa is the third largest airline in Spain and the only other network carrier having hub-and-spoke operations at the Madrid airport.

On June 29, 2021, the Commission opened a Phase II investigation, raising concerns in markets for passenger air transport services on Spanish domestic routes and on international routes to and from Spain. The Commission was concerned that the proposed transaction could (i) significantly reduce competition on routes within, to, and from Spain as the parties are the only two airlines operating several routes; and (ii) reduce choice for travellers because airlines that rely on Air Europa's network could terminate their services to international destinations also served by IAG.

During the Phase II investigation, the Commission considered the proposed remedy package would not adequately address the competition concerns identified. As a result, the parties were left with no other option than to withdraw from the proposed agreement.

#### **Implications**

Earlier this year, Air Canada also had withdrawn from its plans to purchase Transat, when the Commission considered the remedy package would not fully solve competition concerns.<sup>80</sup> Similar to the Air Canada/Transat deal, the Commission refused to grant the parties' failing-firm defense, relying on the incoming upturn in the airline sector. Executive Vice-President Vestager's statement noted that "competitive transport markets offer connectivity with a wide offering of affordable flights. This should be preserved for when demand returns fully and travelling picks up once again." The Commission's chief merger control official, Olivier Guersent, was reported earlier in 2021 to have made similar remarks, calling for a tighter stance on merger control enforcement, including upholding high standards for a possible failing-firm defense.<sup>81</sup>

These recent deals show the Commission's stark approach towards the failing firm defense, even in an industry that is heavily impacted by the pandemic. Indeed, the bloc's response to the pandemic makes it difficult for merging parties to prove the counterfactual under the failing-firm defense.

Another recurring issue is the Commission's reluctance to accept certain remedies in the airline sector. As with Air Canada earlier in 2021, the Commission remained skeptical as to whether the merging parties' slot offerings, together with the usual access rights to feeder traffic, loyalty schemes and other benefits could attract a suitable buyer, let alone establish a new competitor. Airline mergers between close competitors may have become increasingly difficult—although not impossible—to clear.

<sup>79</sup> IAG/Air Europa (Case COMP/M.9637). See Commission Press Release issued on December 16, 2021, available at: [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_21\\_6942](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_6942).

<sup>80</sup> See our April 2021 EU Competition Law Newsletter, available at: <https://www.clearygotlieb.com/-/media/files/eu-competition-newsletters/eu-competition-law-newsletter--april-2021-pdf.pdf>.

<sup>81</sup> "No competition enforcement let-up as Europe exits pandemic, Guersent says," see MLex insight of July 5, 2021.

### ***Commission Conditionally Clears Meta's Acquisition of Kustomer Following Phase II Investigation***

On January 27, 2022, the Commission conditionally cleared Meta's (formerly Facebook) acquisition of Kustomer, a U.S.-based Customer Relationship Management ("CRM") software provider.<sup>82</sup> The transaction was initially notified in Austria in March 2021. The Austrian competition authority referred it to the Commission in April pursuant to Article 22 of the EU Merger Regulation, and several other Member States subsequently joined the referral.<sup>83</sup> The deal was notified in the EU at the end of June, and the Commission opened an in-depth investigation in August.<sup>84</sup>

In its recent clearance decision, the Commission dismissed the preliminary concerns it had articulated in August regarding potential leveraging of Kustomer's data to advantage Meta's online display advertising services—the in-depth investigation having shown that the transaction would not grant Meta a significant amount of additional data.

On the other hand, the Commission maintained a concern that Meta would have the ability and incentive to foreclose Kustomer's rivals, including by denying or degrading access to the APIs<sup>85</sup> needed to interoperate with Meta's B2C messaging channels—WhatsApp, Messenger and Instagram.<sup>86</sup> The Commission considered that these services are important inputs for the supply of CRM software. Reductions in access to these services for Kustomer's rivals may reduce downstream competition and result in higher prices, lower quality and less innovation for business customers.

To obtain clearance, Meta committed to providing Kustomer's current and prospective rivals fair

and equal access to its messaging services for a period of ten years. The messaging services in the scope of the commitment are both (i) those that Facebook makes publicly available to its ecosystem—implying that Facebook cannot treat Kustomer's rivals less well than it treats third parties with whom it does not compete—and; (ii) the APIs used today or by a "sizable proportion" of Kustomer's users in the future—implying that Facebook cannot treat Kustomer meaningfully better than it treats Kustomer's rivals.

These commitments mirror the approach accepted by the Commission in *Google/Fitbit*.<sup>87</sup> Both commitments evidence the Commission's care in making remedies in digital market "future-proof." *Google/Fitbit* featured innovative benchmarking systems that ensure that rivals have access to relevant APIs on a standard that is objective while also able to accommodate technological developments. The *Facebook/Kustomer* resolution adapts a similar standard to its own facts. Technologically-savvy resolutions of this nature are likely to feature increasingly prominently in the Commission's work in the digital space—an area where it is one of a small number of authorities willing to develop innovative solutions to address new types of concern.

Unusually, as shown in the timeline below, the Commission's clearance decision was not the final step in Facebook's journey to acquire control of Kustomer. The German Federal Cartel Office ("FCO") decided not to join the referral request initiated by Austria. In parallel to the Commission's own investigation, the FCO assessed whether it had jurisdiction to review the transaction. Having decided that it had competence, the FCO opened its own probe in December 2021<sup>88</sup> before ultimately clearing Meta's acquisition on February 11, 2022. In a rather succinct press release, the German

<sup>82</sup> Commission Press Release IP/22/652, "Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions," January 27, 2022.

<sup>83</sup> Belgium, Bulgaria, France, Iceland, Italy, Ireland, the Netherlands, Portugal and Romania. See Commission Press Release MEX/21/2464, "Commission to assess proposed acquisition of Kustomer by Facebook," May 12, 2021.

<sup>84</sup> Commission Press Release IP/21/4021, "Commission opens in-depth investigation into proposed acquisition of Kustomer by Facebook," August 2, 2021. See also our [August-September 2021 EU Competition Law Newsletter](#).

<sup>85</sup> Application programming interfaces ("APIs") are intermediary software allowing two applications to 'talk' to each other.

<sup>86</sup> The Commission found that these channels are particularly used by small and medium business customers – the same segment targeted by Kustomer – and are "particular drivers of innovation."

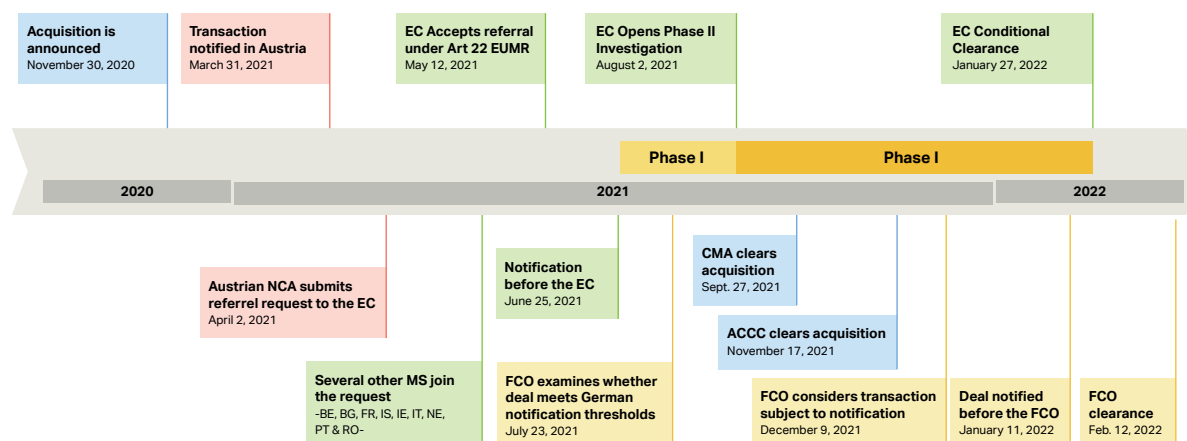
<sup>87</sup> *Google/Fitbit* (Case COMP/M.9660), Commission decision of December 17, 2020. To address the Commission's concerns, Google proposed *inter alia* to keep licensing for free the public APIs covering functionalities that devices need to interoperate with Android smartphones, thus keeping the Android operating system open to competing makers of wearable devices.

<sup>88</sup> See Federal Cartel Office Press Release "Bundeskartellamt considers Meta/Kustomer merger to be subject to notification," December 9, 2021.

watchdog stated that the impact of the transaction would not have warranted a prohibition under German competition law.<sup>89</sup>

The FCO's parallel review in this case evidences the complex jurisdictional situation created under Article 22. Under this article, referrals by one or more Member States do not prevent other Member States from carrying out their own

independent investigation. The FCO did reduce this tension somewhat by expressly taking the Commission's findings into consideration and instead "concentrated on further aspects" in its assessment.<sup>90</sup> For the time being, this represents a diplomatic solution to the jurisdictional tensions inherent in the Commission's recently revised approach to Article 22,<sup>91</sup> which is currently under review by the General Court, as discussed above.



### ***The Hour That The Ship Comes In: The Commission Prohibits The Acquisition Of Daewoo Shipbuilding & Marine Engineering By Hyundai Heavy Industries Holdings***

After a review of over two years, on January 13, 2022, the Commission prohibited Hyundai Heavy Industries Holdings' ("HHIH") acquisition of Daewoo Shipbuilding & Marine Engineering ("Daewoo").<sup>92</sup> This is only the tenth prohibition decision in ten years, and the first since 2019.<sup>93</sup>

The Commission opened an in-depth investigation on December 17, 2019, raising concerns in four markets related to the construction of cargo ships.<sup>94</sup> The prohibition decision relates to the market for the construction of large liquefied

natural gas ("LNG") carriers, where HHIH and Daewoo are two of the three largest players worldwide. According to the Commission, large LNG carriers are essential in the supply chain of LNG, which in turn is important for Europe's energy security. Over the past five years, EU customers accounted for almost 50% of global orders.

The Commission found that the transaction would have created a "dominant" undertaking with a market share of at least 60% and facing only one large competitor. This market concentration would have occurred in the context of market-wide capacity constraints, high barriers to entry, and lack of buyer power.<sup>95</sup>

<sup>89</sup> See Federal Cartel Office Press Release "Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)," February 11, 2022.

<sup>90</sup> *Ibid.*

<sup>91</sup> See our [Alert Memorandum of April 23, 2021](#) and our [March 2021](#) and [April 2021](#) EU Competition Law Newsletters.

<sup>92</sup> Commission Press Release IP/22/343, "Mergers: Commission prohibits proposed acquisition of Daewoo Shipbuilding & Marine Engineering by Hyundai Heavy Industries Holdings," January 13, 2022.

<sup>93</sup> The Commission adopted three prohibition decisions in 2019: *Wieland/Aurubis/Schwermetall* (Case COMP/M.8900), Commission decision of February 5, 2019; *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019; and *Tata Steel/Thyssenkrupp/JV* (Case COMP/M.8713), Commission decision of June 11, 2019. These decisions are reported in our [February 2019](#) and [June 2019](#) EU Competition Law Newsletters. The number of prohibition decisions does not provide the full picture, however, as a larger amount of proposed transactions was abandoned during the same timeframe.

<sup>94</sup> Commission Press Release IP/19/6792, "Mergers: Commission opens in-depth investigation into proposed acquisition of DSME by HHIH," December 17, 2019.

<sup>95</sup> The Commission also found that demand was not affected by the Covid-19 pandemic.



During the lengthy review,<sup>96</sup> remedies were apparently discussed but never formally submitted. This is unusual in Phase II investigations, particularly those leading to a prohibition decision (where merging parties would typically either submit formal undertakings, abandon the deal altogether, or do both to avoid receiving a prohibition).<sup>97</sup> Instead, HHIH and Daewoo reportedly focused on their core arguments that the market shares do not accurately reflect market power in the shipbuilding industry, which is a bidding market where shares can easily be lost after the next bidding round. The parties also maintained that the Commission was wrong to dismiss competition from Chinese companies (an argument which had a low success rate with the Commission in past cases).

The parties will now have an opportunity to test these arguments in a new forum as HHIH has indicated that it will appeal.

## Court Updates

### ***Deutsche Telekom (Case T-610/19): The General Court Orders Commission To Pay Default Interest After Fine Reduction***

On January 19, 2022, the General Court ordered the Commission to pay default interest on the excess amount of a fine paid by Deutsche Telekom. The interest relates to a €31 million fine the Commission imposed on Deutsche Telekom in October 2014 for infringing Article 102 TFEU by implementing margin squeezing practices in the Slovak broadband market. Before paying the fine in 2015, Deutsche Telekom appealed to the General Court which, in 2018, reduced its fine to €19 million.

In 2019, the Commission repaid the €12 million to Deutsche Telekom, but refused to pay default interest on this amount on the basis that it only had to repay the fine plus any interest yields generated after the fine payment. Deutsche Telekom appealed this refusal, requesting the

General Court to order the Commission to pay default interest of 3.55% per annum to compensate Deutsche Telekom's deprivation of the €12 million caused by the Commission's defective decision.

The General Court found that, by refusing to pay default interest, the Commission infringed its duty to take the necessary measures to comply with a judgment under Article 266 TFEU. Article 266 TFEU precludes the Commission from controlling the scope of repaying after a fine reduction or annulment.

The General Court dismissed the Commission's argument that default interest should only arise after the judgment reducing or annulling the fine. Reiterating its case law, the General Court affirmed that its unlimited fine jurisdiction under Article 261 TFEU and Article 31 of Regulation EC No. 1/2003 when reviewing a Commission decision applies from the outset ("ex tunc"). Consequently, the excess amount paid by Deutsche Telekom should be considered unduly paid on, and default interest should start accruing from the date of the fine payment, not the date of the judgment finding that the fine was unduly high.

This judgment follows the Court of Justice's *Printeos* ruling, which established that the accrual of default interest from the moment of paying a fine incentivizes the Commission to give "particular attention" when adopting fining decisions.

<sup>96</sup> The Commission suspended the review three times due to HHIH's failure to provide requested information on time.

<sup>97</sup> Almost 80% of all Phase II investigations opened since February 2012 at some point involved a formal remedy submission, either in Phase I or in Phase II. Additionally, before *HHIH/Daewoo*, a formal remedy proposal had been submitted in each of the cases that ultimately led to a prohibition within this timeframe.

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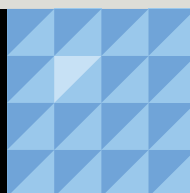
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