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EU Competition Law Newsletter

Highlights

— The General Court Judgment In *UPS*: Damages Against European Commission Remain Aspirational

— The General Court Judgment In *Scania*: A Hybrid Cartel Path Is Fair And Square

The General Court Judgment In *UPS*: Damages Against European Commission Remain Aspirational

On February 23, 2022, the General Court dismissed UPS' €1.7 billion claim for damages allegedly suffered due to the Commission's prohibition of the proposed €5.2 billion merger between UPS and TNT Express ("TNT"). Although the General Court had previously annulled the Commission prohibition decision due to procedural deficiencies, it rejected UPS' follow-on damages claim because UPS failed to demonstrate that it would have secured approval for the TNT transaction absent the procedural breach.[1]

The judgment reiterates that the path to damages is paved with insurmountable challenges. The only conceivable scenario appears to be that of manifestly erroneous substantive reasoning, which seems highly unlikely as the Commission's merger control process normally follows prescribed merger guidelines, its preliminary substantive concerns are evaluated (and often rubber-stamped) by market test respondents, and the General Court affords it a wide margin of discretion.

Background

In January 2013, the Commission blocked a merger between UPS and TNT, which would have reduced the number of significant players in international express small package delivery services in 15 EU Member States from three to two.[2] UPS challenged the prohibition before the General Court, which annulled the Commission decision in March 2017. The General Court found that the Commission had infringed UPS' rights of defense because it did not share the final version of the econometric model it had relied on.[3] During the General Court appeal process, the Commission approved the acquisition of TNT by FedEx, UPS' leading competitor.[4]

[1] *United Parcel Service v. Commission* ("UPS v Commission") (Case T-834/17), EU:T:2022:84.

[2] *UPS/TNT Express* (Case COMP/M.6570), Commission decision of January 30, 2013.

[3] *United Parcel Service. v. Commission* (Case T-194/13), EU:T:2017:144. On August 17, 2020, the General Court ordered the Commission to pay €270,250 in recoverable costs to UPS (*United Parcel Service v. Commission* (Case T-194/13 DEP) EU:T:2020:371), as previously reported in our July/August 2020 EU Competition Law Newsletter. On January 16, 2019, the Court of Justice upheld the General Court's judgment (*Commission v. United Parcel Service* (Case C-265/17 P), EU:C:2019:23).

[4] *FedEx/TNT Express* (Case COMP/M.7630), Commission decision of January 8, 2016.

In December 2017, UPS sued the Commission for economic damages stemming from the annulled prohibition decision.[5] Previous damages claims brought by Schneider Electric[6] and MyTravel Group (previously Airtours)[7] against the Commission's merger control decisions date back to early 2000s, and were unsuccessful.

The General Court judgment

On February 23, 2022, the General Court dismissed UPS' claim, essentially because UPS failed to demonstrate that it would have secured approval for the TNT transaction absent the procedural breach.[8] The General Court acknowledged the right to seek damages for procedural infringements of EU administrative institutions, though recalled three cumulative conditions established in the seminal judgment in *Francovich*: (i) a sufficiently serious breach of the individuals' rights; (ii) a demonstration of actual damage suffered; and (iii) there must be a direct causal link between the infringement and the damage suffered.

— Establishing a sufficiently serious breach of rights requires showing that the Commission manifestly and gravely disregarded the limits of its discretion. The General Court found that the Commission's failure to communicate the evidence it relied on did meet this threshold.[9]

— UPS put forth three damages claims worth €1.7 billion: (i) lost profit; (ii) the payment of a contractual termination fee to TNT; and (iii) regulatory costs related to the subsequent TNT/FedEx review.

— However, the General Court dismissed the causality between the Commission's failure to communicate evidence to UPS during the TNT merger control process and UPS' alleged damages. UPS' claim could only conceivably be upheld in a counterfactual where the Commission's respect for UPS' procedural rights would have yielded a different outcome – a merger approval. This has not been demonstrated, absent major errors in the Commission's substantive reasoning. In addition, UPS' regulatory and contractual costs reflected its "free choice" and did not directly stem from the Commission prohibition decision.[10]

Implications

It remains to be seen whether UPS will appeal to the Court of Justice. But the present judgment will, in any case, likely have a chilling effect on any plausible damages actions for the foreseeable future.

The General Court Judgment In *Scania*: A Hybrid Cartel Path Is Fair And Square

On February 2, 2022, the General Court dismissed Scania's trucks cartel appeal and essentially endorsed the Commission's hybrid cartel procedure that bifurcates the Commission's investigation into a settlement path with willing parties and an adversarial path with any hold

[5] This was followed by similar actions brought by Irish airline companies ASL Aviation Holdings DAC and ASL Airlines Ltd ("ASL") which, prior to the adoption of the Commission decision, had concluded commercial agreements with TNT that were to be implemented following the contemplated clearance of the UPS/TNT transaction.

[6] *Schneider/Legrand* (Case COMP/M.2283), Commission decision of October 10, 2001 and *Schneider Electric v. Commission* (Case T-351/03), EU:T:2007:212, and *Commission v. Schneider Electric* (Case C-440/07 P), EU:C:2010:324 (Schneider was awarded €50,000).

[7] *Airtours/First Choice* (Case COMP/IV/M.1524), Commission decision of September 22, 1999 and *MyTravel v. Commission* (Case T-212/03), EU:T:2008:315.

[8] The same day, the General Court also dismissed ASL's damages claim on the grounds that: (i) ASL could not rely on the breach of UPS' rights of defense; (ii) the Commission had not infringed ASL's fundamental rights and, in particular, its right to sound administration; and (iii) ASL's plea alleging the existence of a serious and manifest error committed by the Commission was inadmissible, given that ASL confined itself to referring to UPS' application.

[9] The General Court rejected UPS' claim that the Commission's inadequate reasoning constituted a sufficiently serious breach. Similarly, even though the Commission made errors in the substantive assessment of the notified concentration, these were not sufficient to constitute a serious breach of EU law.

[10] The General Court further noted that UPS terminated the proposed TNT transaction as soon as the Commission's prohibition decision was announced, which broke any direct causal link.

outs.[11] The General Court was satisfied that the Commission examined all the facts and arguments that Scania (a non-settling party) brought before it afresh, and in particular, without relying on the facts or conclusions reached during the settlement procedure, which ensured a fair and impartial adversarial procedure.

Background

In November 2014, the Commission launched a formal investigation into six European truck manufacturers suspected of fixing prices for medium- and heavy-duty trucks.[12] In 2016, all truck manufacturers,[13] excluding Scania, agreed to settle with the Commission for a then-record total fine of around three billion euro.[14] While Scania initially entered into settlement discussions, but subsequently withdrew. As a result, the Commission pursued a so-called "hybrid" path:[15] settling the case with interested parties while reverting to an "adversarial" procedure with Scania. Since the introduction of the settlement procedure, hybrid cases have been rare—only 6 out of the 41 cartel cases in the past decade or so.

In September 2017, the Commission imposed a fine of around €880 million on Scania.[16] Scania's appeal to the General Court did not focus on the merits of the Commission's case,[17] but rather on the fact that Scania's rights of defense and presumption of innocence were breached because Scania's conduct was referenced in the settlement decision. This made the Commission biased such that it could not ensure impartiality in the subsequent adversarial proceedings.

The General Court's judgment

The General Court had little sympathy for Scania's challenge to the foundation of the hybrid settlement path. It found that pursuing a hybrid procedure does not, in itself, infringe the non-settling party's presumption of innocence, the rights of the defense, or the duty of impartiality.[18]

Indeed, despite the adversarial nature of the investigation, Scania's rights of defense had been respected "in a situation known as '*tabula rasa*'": the Commission demonstrated that it examined all the facts and arguments brought before it afresh, and in particular, without relying on the facts or conclusions reached during the settlement procedure.[19] The fairness of the adversarial process is not called into question by the adoption of a settlement decision prior to the conclusion of the adversarial proceedings either, provided that the Commission respects the non-settling party's rights of the defense, which was sufficiently demonstrated.

Implications

The judgment rubber stamps the Commission's hybrid cartel procedure designed to incentivize all investigated companies to settle, while preserving the Commission's ability to pivot to an adversarial path if there are a few hold outs. Scania could still appeal to the Court of Justice which, if anything, would further delay any follow-on claims against Scania that the settling truck manufacturers have meanwhile been battling in several European countries.

[11] *Scania and Others v. Commission* (Case T-799/17), EU:T:2022:48 ("Scania v. Commission").

[12] Commission Press Release IP/14/2002, "Antitrust: Commission sends statement of objections to suspected participants in trucks cartel," November 20, 2014.

[13] DAF Trucks N.V, Daimler, Iveco, MAN and Volvo/Renault.

[14] *Trucks* (Case COMP/AT.39824), Commission settlement decision of July 19, 2016.

[15] Under a hybrid regime, the Commission applies two distinct procedures in parallel: (i) a settlement procedure for the entities that agreed to settle; and (ii) a standard procedure, governed by the general provisions of Commission Regulation (EC) No 773/2004 of April 7, 2004, for the non-settling entities.

[16] *Trucks* (Case COMP/AT.39824), Commission decision of September 27, 2017.

[17] Scania also claimed that the concept of a single and continuous infringement cannot encompass instances of conduct which do not constitute infringements in themselves. The General Court dismissed this argument, finding that establishing a single and continuous infringement does not necessarily require the enforcer to establish multiple infringements that each, in isolation, falls within Article 101 TFEU. Rather, it is sufficient to establish that the conduct (that took place at different levels and different moments in time) forms part of an "overall plan designed to achieve a single anti-competitive objective." This is in line with recent case law (*HSBC Holdings and Others v. Commission* (Case T-105/17), EU:T:2019:675 (under appeal)).

[18] *Scania v. Commission*, para. 104.

[19] *Ibid.*, paras. 129-165.

News

Court Updates

Gazprom: The Return Of The State Compulsion Defense?

On February 2, 2022, the General Court annulled a Commission decision rejecting an antitrust complaint against Gazprom, due to deficient Commission reasoning.[20]

Background

In 2015, the Commission launched a formal investigation into a potential abuse of dominant position by Gazprom in the wholesale supply of gas in Central and Eastern Europe (including Poland), through the imposition of unfair prices and gas export bans.[21] In March 2017, Polish gas company PGNiG[22] submitted a complaint to the Commission with a new allegation that Gazprom made its gas supply contract with PGNiG subject to certain conditions, including veto rights over Gaz System, which owns the infrastructure of the Polish section of the Yamal gas pipeline.[23]

In January 2018, the Commission informed PGNiG that it intended to reject the complaint and asked it to submit any observations ("Intention Letter"). PGNiP replied that it was not privy to all the information on which the Commission's preliminary position was based. In April 2019, the Commission formally rejected the complaint on two grounds: (i) the possible applicability of the state compulsion defense, which excludes from antitrust scrutiny practices imposed, rather than merely encouraged, by national authorities or legislation;[24] and (ii) a decision adopted by the Polish Regulatory Authority certifying Gaz System as an independent system operator ("Certification Decision"), indicating that Gazprom had no influence over the pipeline and was thus not in a position to implement the alleged abusive conduct.[25]

Shortly after this, in May 2018, the Commission closed its main Gazprom investigation, following Gazprom's binding commitments to remove the contractual export ban and to set up a tool allowing customers to verify that their gas prices are competitive compared to price levels prevailing in Western European gas markets.[26]

PGNiG appealed to the General Court, arguing that the Commission had violated its right to information and right to be heard[27] because it rejected the complaint based on an element that was not expressly mentioned in the Intention Letter: the possible applicability of the state compulsion defense.

The General Court's judgment

The General Court annulled the Commission decision in its entirety. The General Court found that the Intention Letter did not expressly address the state compulsion defense,[28] precluding PGNiG

[20] *Polskie Górnictwo Naftowe i Gazownictwo S.A. v. Commission* (Case T-399/19), EU:T:2022:44.

[21] *Upstream gas supplies in Central and Eastern Europe* (Case COMP/AT.39816), Statement of Objections of April 22, 2015.

[22] Polskie Górnictwo Naftowe i Gazownictwo S.A.

[23] System Gazociągów Tranzytowych EuRoPol Gaz S.A., a joint venture between PGNiG and Gazprom.

[24] The state compulsion exception excludes anticompetitive conduct from the scope of Articles 101 and 102 TFEU, when it is imposed by national legislation or by irresistible pressure exerted by national authorities, *e.g.*, threat of state measures likely to cause great harm (*see Polskie Górnictwo Naftowe i Gazownictwo S.A. v. Commission* (Case T-399/19), EU:T:2022:44, paras. 54-55). This exception is applied restrictively and has been accepted only to a limited extent by EU courts. In particular, it will not be accepted when national law merely encourages or makes it easier for undertakings to engage in autonomous anticompetitive conduct (*see Deutsche Telekom AG* (Case C-280/08 P), EU:C:2010:603, paras. 80-82).

[25] *Polish Gas Prices* (Case COMP/AT.40497), Commission decision of April 17, 2019.

[26] *Upstream gas supplies in Central and Eastern Europe* (Case COMP/AT.39816), Commission decision of May 24, 2018. This decision was confirmed by the General Court in *Polskie Górnictwo Naftowe i Gazownictwo S.A. v. Commission* (Case T-616/18), EU:T:2022:43.

[27] According to Article 7(1) of Regulation No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 of the TFEU, OJ 2004 L 123/18, the Commission shall inform the complainant of its reasons and set a time-limit within which the complainant may make its views known. Pursuant to Article 8(1), the complainant may request access to documents on which the Commission bases its provisional assessment.

[28] The Intention Letter referenced the intergovernmental Poland-Russia agreement governing the management of the Yamal pipeline, implying that Gazprom's conduct might not have necessarily been attributable to the company.

from putting its argument forth. The Commission also erred in relying on the Certification Decision, which endorsed Gaz System's independence, but had not been correctly executed following a threat by the Russian Government to cease gas supply to Poland.

This is the first judgment in over a decade annulling the Commission's rejection of a complaint due to insufficient reasoning, and was followed by a similar judgment issued just days later (*see Sped-Pro* below). Both judgments are a reminder that the Commission's wide margin of discretion in handling complaints is counterbalanced by the parties' procedural rights and the Commission's obligation to state reasons. And they follow a stream of EU Court judgments, particularly in the cartel area, annulling Commission decisions on account of procedural deficiencies.[29]

Sped-Pro: Rule Of Law Vs EU Law Clash

On February 9, 2022, the General Court annulled another Commission decision rejecting an antitrust complaint, because the Commission failed to properly examine and address alleged systemic and generalized rule of law deficiencies in Poland which question the possibility of a fair trial before the Polish Competition Authority.[30]

Background

In November 2016, the Polish shipping company Sped-Pro lodged a complaint with the Commission alleging that state-owned PKP Cargo abused its dominant position in rail freight forwarding services in Poland by failing to provide access to its carrier services through cargo trains on non-discriminatory terms. In August 2019, the Commission rejected the complaint because it related solely to Poland, and would thus be best handled by the Polish Competition Authority.[31] In doing so, the Commission disregarded Sped-Pro's argument that the Polish Competition Authority would not guarantee a fair trial due to general rule of law concerns in Poland, including the lack of independence of the national antitrust agency and the competent courts.[32] Sped-Pro appealed to the General Court.

General Court

The General Court recalled that the Commission and the Member States authorities have parallel competence to apply competition rules, in close and sincere cooperation, respecting the principles of mutual recognition and trust. Although the Commission is entitled to reject a complaint without a Union interest, it can only do so if the complainant's rights will be sufficiently safeguarded by national authorities. The General Court found that the Commission did not properly examine the evidence indicating a real and individual risk of a lack of fair trial. Instead, the Commission limited its reasoning to a brief statement that the arguments put forward by Sped-Pro were unsubstantiated allegations.[33] Accordingly, the General Court annulled the Commission decision in its entirety. Interestingly, the Commission recently disregarded the lack of rule of law argument in *Terminals at Warsaw Airport* and *PPL/Modlin airport*,[34] and *Polish Sands*,[35] though the parties did not appeal.

Although the merits of the *Sped-Pro* judgment reflect the particular situation of a Member State, it does, together with the *Gazprom* judgment addressed above, more broadly reiterate that the Commission's discretion in the handling of

[29] *See, e.g., Commission v. ICap* (Case C-39/18 P), EU:C:2019:584; *CCPL and Others v. Commission* (Case T-522/15), EU:T:2019:500; *Printeos v. Commission* (Case T-95/15), EU:T:2016:722; and *GEA Group v. Commission* (Case T-189/10), EU:T:2015:504.

[30] *Sped-Pro S.A. v European Commission* (Case T-791/19), EU:T:2022:67.

[31] *Rail Freight Forwarding in Poland* (Case COMP/AT.40459), Commission decision of August 12, 2019.

[32] *See Rail Freight Forwarding in Poland* (Case COMP/AT.40459), Commission decision of August 12, 2019, para. 25 (v). The Commission applied, by analogy, the lessons of the judgment in *LM* (Case C-216-18 PPU), EU:C:2018:586, where the Court of Justice concluded that European Arrest Warrants may be suspended only after the executing authority has applied the following two-pronged test to analyze the rule of law situation in the country: (i) evaluate whether there are generalized rule of law deficiencies impairing the independence of the courts and potentially leading to breaches of the fundamental right to a fair trial; and (ii) evaluate whether there are serious grounds to believe that, following the surrender, the person concerned actually runs a real and individual risk.

[33] The Commission explained that "[Sped-Pro's] arguments in this regard contain only supported presumptions. In particular, the fact that the Chairman of the OCCP is appointed by the Prime Minister does not prejudge the lack of independence of the OCCP's decision towards PKP Cargo" (para. 25).

[34] *Terminals at Warsaw Airport* and *PPL/Modlin airport* (Joined Cases COMP/AT.40558 and COMP/AT.40570), Commission decision of July 2, 2021, para. 95.

[35] *Polish Sands* (Case COMP/AT.40498), Commission decision of July 23, 2019, paras. 22-23.

complaints is subject to a corresponding obligation to provide sufficient reasoning for its decision. This may potentially cause the Commission to become more cautious when handling complaints, which might, in turn, result in more burdensome requests for information being sent to the subjects of antitrust complaints in the future.

Commission Updates

Revision of Vertical Rules: Further Clarity On Dual Distribution Rules?

On February 4, 2022, the Commission released a revised draft dual distribution guidance[36] within the broader context of the ongoing review of EU vertical rules.

Background

On July 9, 2021, the Commission published its long-anticipated proposed update of the Vertical Block Exemption Regulation ("VBER")[37] and the corresponding draft Vertical Restraints Guidelines ("Vertical Guidelines")[38] for public consultation and comment by September 17, 2021.[39] The draft updated framework made a number of important adjustments to the existing rules, in part to reflect the significant growth in online sales by manufacturers directly and through online intermediaries. The primary proposed changes to the existing rules relate to dual distribution, Most-Favored-Nation clauses, dual pricing and other protections of brick-and-mortar sales, online customer and territorial resale restrictions, online intermediation services and agency, and broader exemption for resale restrictions in exclusive and selective distribution models.

The current VBER allows for the block exemption to apply even where a manufacturer directly sells its product to end-customers in competition with its downstream distributors (also known as "dual distribution"). Manufacturers are increasingly competing directly in the retail space using their own online shops or online marketplaces. Large hybrid platforms (such as Amazon) have begun selling not only their own products, but also those of third parties. These developments have increased the instances of horizontal competition between manufacturers and their distributors, and have made the retention of the dual distribution exemption a contentious issue during the consultation procedure.[40]

To account for this concern, the draft revised VBER introduced a number of changes in relation to vertical agreements between competing companies. It proposed to eliminate the safe harbor for agreements between sellers and online platforms (providers of online intermediation services) that sell goods or services in competition with the sellers relying on the platform. In other non-reciprocal dual distribution scenarios, it proposed that a full exemption would apply where the parties' combined market share at the retail level is below 10%. Above the 10% ceiling, provisions on "any information exchanges" would be excluded from the block exemption of dual distribution agreements (including, in particular, exchanges between a manufacturer and a distributor concerning downstream customers, sales prices or volumes, or marketing strategies). The draft revised VBER would also extend the dual distribution exemption beyond manufacturers to cover wholesalers and importers, but only to the extent that the buyer does not compete with the supplier at the manufacturing, wholesale, or import level.

[36] *See* Draft new section dealing with information exchange in dual distribution, February 4, 2022.

[37] *See* Annex to the Communication from the Commission Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, C(2021) 5026 final of July 9, 2021.

[38] *See* Annex to the Communication from the Commission Approval of the content of a draft for a Commission Notice Guidelines on vertical restraints, C(2021) 5038 final of July 9, 2021.

[39] As reported in our Alert Memo "EC Seeks Comments on Draft Revised Distribution Rules", July 22, 2021.

[40] The EC indeed noted that "the current exception for dual distribution is likely to exempt vertical agreements [from scrutiny] where possible horizontal concerns are no longer negligible," Revision of the Vertical Block Exemption Regulation Explanatory Note, p. 2.

Further Revisions To The Revised Draft Dual Distribution Rules

The public consultation indicated that additional guidance was warranted on the type of information that may be exchanged between supplier and buyer in a dual distribution context. The Commission responded with a proposal to exclude the benefit of the exemption in circumstances where the information exchanges are not "necessary to improve the production or distribution of the contract goods"[41] and concurrently provided a non-exhaustive whitelist of information deemed "necessary" and therefore open to exchange: (i) technical information relating to the contract goods (*e.g.*, information on registration, certification, or handling of the goods), as well as marketing and promotional campaigns; (ii) aggregated information relating to customer purchases, consumer preferences, and customer feedback; (iii) recommended and maximum resale prices; and (iv) performance-related information, including on marketing and sales activities of other buyers of the contract goods, as long as this does not enable the buyer to identify the activities of specific competing buyers. Conversely, specific pricing and customer sales data will fall outside the scope of the exemption and would need to be individually assessed under the rules applicable to horizontal agreements.

The Commission also suggested possible compliance measures, including exchanging solely aggregated sales information, ensuring an appropriate delay between the generation of the information and the exchange, and setting up firewalls.

Notably, the revised draft dual distribution rules do not appear to refer to the above-mentioned 10% safe harbor, leaving stakeholders speculating as to whether that threshold was dropped or might re-appear in the final revised rules. The Commission is expected to wrap up the VBER revision process with a view to adopting the new distribution rules by June 2022.

Continued Zoom-In On Distribution Agreements: The Commission Probes Pierre Cardin For Online Sales Restrictions

On January 31, 2022, the Commission launched a formal investigation of Pierre Cardin and its largest licensee, the Ahlers Group ("Ahlers") concerning the restriction of cross-border and online sales of Pierre Cardin-licensed products.[42] The Commission will investigate whether Pierre Cardin's licensing agreement with Ahlers restricted parallel imports and sales to specific customer groups.

The investigation has important implications for businesses:[43] it reaffirms the Commission's continued enforcement focus on online sales bans and restrictions of cross-border sales, following a series of cases since 2018.[44] Companies should carefully review their distribution agreements to ensure that counterparties are not limited in their ability to sell or effectively advertise online, or that there is at least a carefully crafted legitimate objective (such as the protection of the luxury image of the brand) that is laid down uniformly for all potential resellers, applied in a non-discriminatory fashion, and does not go beyond what is necessary, in line with the Court of Justice's seminal *Coty* judgment.[45] Moreover, companies will likely have to re-assess their distribution agreements in more detail following the expected adoption of the new Vertical Block Exemption Regulation in June 2022.

More generally, the investigation, which follows on-site inspections the Commission carried out

[41] Draft new section dealing with information exchange in dual distribution, February 4, 2022, p. 2.

[42] Commission Press Release IP/22/682, "*Antitrust: Commission opens investigation into licensing and distribution practices of fashion house Pierre Cardin and its licensee Ahlers*," January 31, 2022.

[43] Commission Press Release IP/21/3145, "*Antitrust: Commission carries out unannounced inspections in the manufacturing and distribution of garments sector*," June 22, 2021.

[44] See, *Asus* (Case COMP/AT.40465), *Denon & Marantz* (Case COMP/AT.40469), *Philips* (Case COMP/AT.40181), and *Pioneer* (Case COMP/AT.40182), Commission decisions of July 24, 2018; *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018; *Ancillary sports merchandise* (Case COMP/AT.40436), Commission decision of March 25, 2019; *Character merchandise* (Case COMP/AT.40432), Commission decision of September 9, 2019; *Film merchandise* (Case COMP/AT.40433), Commission decision of January 30, 2020; and *Meliá (Holiday Pricing)* (Case COMP/AT.40528), Commission decision of February 21, 2020.

[45] *Coty Germany* (Case C-230/16), EU:C:2017:941.

in Germany in June 2021, continues a trend of dawn raids the Commission has been planning since the relaxation of Covid-19 measures in Europe. The Commission has since conducted on-site inspections in the wood pulp industry[46] and most recently in the automotive sector.[47] As Commissioner Vestager noted in October 2021,[48] companies can expect more dawn raids in the coming months. [49]

NVIDIA/Arm Transaction Collapse Signals Increased Scrutiny For Vertical Mergers

On February 7, 2022, NVIDIA announced the termination of its agreement to acquire Arm Limited ("Arm"), a UK-based semiconductor design company of the SoftBank Group.[50] Following its announcement in September 2021, the transaction, which would have been the largest of its kind in the semiconductor sector, had attracted significant regulatory interest across the globe.

NVIDIA develops and supplies processor products for various applications, including in data centers, Internet of Things, automotive applications and gaming. Arm licenses out intellectual property for processing units, in particular to semiconductor chipmakers and Systems-on-Chip developers. The Commission investigated whether NVIDIA might get an unfair advantage over its rivals by having access to Arm's technology, particularly for smart network interconnect cards, high-level advanced driver assistance systems for passenger cars, and Arm-based CPUs for cloud computing service providers.

The Commission started an in-depth Phase II probe in October 2021 (which was subject to a stop-the-clock suspension of seven weeks). The U.S. FTC issued an extended Second Request in December 2020 (*i.e.*, the equivalent of an in-depth Phase II review in Europe), and decided to sue to block the transaction in December 2021. This despite NVIDIA's offer of a structural remedy that would have split Arm's intellectual property licensing into a separate entity.[51] In addition, in November 2021, the UK Digital and Culture Secretary had also ordered a Phase II review by the CMA on competition and national security grounds. And China's competition regulator, the State Administration for Market Regulation, accepted the formal notification of the transaction only in January 2022.

NVIDIA's abandonment of the deal, worth $40 billion at signing, highlights the increasing scrutiny of vertical mergers. The U.S. FTC withdrew the Vertical Merger Guidelines in September 2021, only a year after its publication, arguing that it included unsound economic theories that are unsupported by the law or market realities.

On January 18, 2022, the U.S. FTC and the U.S. Department of Justice announced a joint initiative to conduct a comprehensive analysis of their merger guidelines, which is likely to further increase enforcement in vertical mergers, particularly in the digital sector. And the CMA recently ordered Meta to reverse its acquisition of the animated GIF platform Giphy, on the basis of a vertical input foreclosure theory in the supply of social media. It remains to be seen whether the Commission's extensive review of the *NVIDIA/Arm* transaction is a precursor to an increasing scrutiny of vertical mergers under the EU merger control regime.

[46] Commission Press Release IP/21/5223, "*Antitrust: Commission carries out unannounced inspections in the wood pulp sector*," October 12, 2021.

[47] Commission Press Release IP/22/1765, "*Antitrust: Commission carries out unannounced inspections in the automotive sector*," March 15, 2022.

[48] Commissioner Vestager, *A new era of cartel enforcement*, Speech at the Italian Antitrust Association Annual Conference, Rome, October 22, 2021.

[49] Commissioner Vestager, *A new era of cartel enforcement*, Speech at the Italian Antitrust Association Annual Conference, Rome, October 22, 2021.

[50] NVIDIA Press Release, "*NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited*," February 7, 2022.

[51] *FTC Sues to Block $40 Billion Semiconductor Chip Merger*, FTC, December 2, 2021, available at: https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger. *See also, Nvidia-Arm deal blocked by US FTC, remedies didn't address concerns,* MLex, December 3, 2021, available here.

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