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EU Competition Law Newsletter

Highlights

— The Commission Fines General Electric €52 Million For Providing Incorrect Information During Merger Review

— Hearing Officer Rules That Statements Made By Former Commissioner Almunia Did Not Breach The Presumption Of Innocence In Euribor Proceedings

— The Commission Issues A Statement Of Objections Over Geo-Blocking Arrangements For Video Games

— The Court Of Justice Clarifies The Prohibition Of Double Jeopardy In Competition Law Cases

The Commission Fines General Electric €52 Million For Providing Incorrect Information During Merger Review

On April 8, 2019, the Commission fined General Electric ("GE") €52 million for providing incorrect information during its 2017 investigation of GE's acquisition of Danish wind turbine blade manufacturer LM Wind Power Holdings A/S ("LM Wind"). The Commission learned of the incorrect information through a third party, well in advance of the regulator's unconditional approval of the acquisition, which was therefore not affected by it. This fining decision is the latest highlight in the Commission's continued effort to clamp down on procedural infringements and, as Commissioner Vestager made clear, "is proof that the Commission takes breaches of the obligation for companies to provide [the Commission] with correct information very seriously."[1]

Background

On January 11, 2017, after several months of pre-notification discussions, GE notified its then-proposed acquisition of LM Wind to the Commission. In the context of the Commission's assessment of GE's pipeline products on the wind turbine market, GE had erroneously stated that—beyond its existing 6 megawatt turbine—it did not have any high power output wind turbine for offshore applications in development. The Commission subsequently learned through a third party response to its market investigation that GE was offering a 12 megawatt offshore wind turbine to potential customers. When confronted with this information, GE withdrew its notification

[1] Commission Press Release IP/19/2049, "Mergers: Commission fines General Electric €52 million for providing incorrect information in LM Wind takeover," April 8, 2019.

on February 2, 2017 and re-notified the deal on February 13, 2017, in which it disclosed the existence of the additional turbine product.

The Commission approved the transaction unconditionally in Phase 1 on March 20, 2017. On July 6, 2017, the Commission issued a Statement of Objections ("SO") to GE, in which it took the preliminary view that GE had provided "incorrect or misleading information" in violation of its procedural obligations under the EUMR.[2]

The Fine

In setting the level of a fine, the Commission must take into account the nature, gravity, and duration of the infringement. In the present case, the Commission reasoned that GE had committed a serious infringement by "negligently providing incorrect information" (dropping "misleading" from its earlier characterization of the conduct). The Commission explained that GE "should have been aware of the relevance of the information" as it had engaged with the Commission on the subject of pipeline products throughout pre-notification. While clarifying that the decision to approve the transaction would be unaffected by the procedural infringement because it had been based on the full set of facts, the Commission had noted at the SO stage that the missing information had consequences not only for the assessment in this case but also for its parallel assessment of *Siemens/Gamesa*.[3] Against these facts, the Commission fined GE €52 million, which it deemed "deterrent and appropriate." The fine—while high in absolute terms—amounts to less than 0.05% of GE's worldwide turnover in 2018, which remains at the lower end of the legal maximum in this case of approx. €1 billion (*i.e.*, 1% of annual worldwide revenues).

Incidentally, this is not the first time the Commission has taken issue with GE's conduct during merger control proceedings. In the context of its review of *GE/Alstom* (*Power Business*), the Commission discovered that GE had carried out a "wide ranging and carefully planned" customer outreach program in which GE allegedly sought to influence customers' responses to the market investigation questionnaires and overall views about the transaction, which reportedly resulted in a number of customers adjusting their feedback to the Commission in GE's favor.[4] The Commission did not impose a fine but instead explained in its decision that it generally discounted those customers' favorable views in its assessment. It is conceivable, but entirely speculative, that this past conduct played a role in the Commission's decision to prosecute GE.

Enforcement Context

The fine imposed on GE follows the €110 million fine imposed on Facebook in 2017 for providing "incorrect or misleading" information to the Commission during the review of *Facebook/WhatsApp*.[5] Prior to the Facebook decision, the largest fine imposed by the Commission for providing incorrect or misleading information amounted to only €90,000.[6] In 2004, the EU Merger Regulation ("EUMR") was revised, *inter alia*, to increase the level of fines that could be imposed from a maximum of €50,000 to 1% of a company's global revenues. While GE and Facebook are currently the only two companies that have been fined for providing incorrect or misleading information to the Commission under the 2004 EUMR, further enforcement is on the horizon. Merck and Sigma-Aldrich received the SO on the same day as GE in July 2017 for allegedly providing misleading or incorrect information to

[2] Commission Press Release IP/17/1924, "Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules," July 6, 2017.

[3] *Ibid.*

[4] *General Electric/Alstom (Thermal Power – Renewable Power & Grid Business)* (Case COMP/M.7278), Commission decision of September 8, 2015, para. 36.

[5] *Facebook/WhatsApp* (Case COMP/M.8228), Commission decision of May 17, 2017.

[6] *Tetra Laval/Sidel* (Case COMP/M.3255), Commission decision of July 7, 2004. Tetra Laval was fined €90,000 under the old EU Merger Regulation, which capped the level of fine at €50,000, for two separate infringements (€45,000 each), *i.e.*, for supplying incorrect or misleading information in the notification and in response to an information request.

the Commission during the course of its review of Merck's acquisition of Sigma-Aldrich,[7] and a fining decision is expected to be forthcoming soon.

A similar recent uptick in enforcement of procedural violations can be detected in the area of gun-jumping (*i.e.*, violations of the stand-still obligation), for which the Commission fined Marine Harvest €20 million in 2014,[8] Altice €124.5 million in 2018,[9] and issued an SO to Canon in relation to the acquisition of Toshiba Medical Systems as reported in our November 2018 newsletter.

The exact methodology used by the Commission in calculating a fine for an infringement of a procedural rule in a merger case remains unclear. In particular, while the Commission will take into account the nature and gravity of the infringement, the weight of these factors, as well as the base amount (such as the "affected turnover" in a cartel case), is unknown. The €110 million fine levied on Facebook comprised two fines of €55 million (0.22% of total turnover) for providing incorrect or misleading information in two separate submissions, which is close to the €52 million (0.05% of total turnover) imposed on GE for a single infringement. Similarly, in the context of gun-jumping (where the legal maximum is capped at 10%), the €124.5 million fine levied on Altice comprised two fines of €62.25 million each (0.27% of total turnover) for two separate infringements (*i.e.*, for failing to notify the transaction contrary to Article 4(1) EUMR and for violating the stand-still obligation under Article 7(1) EUMR).[10] The lower fine of €20 imposed on Marine Harvest in 2014 for gun-jumping consisted of two fines of €10 million (0.41% of total turnover) for two separate infringements.[11]

Implications

The fine imposed on GE underlines the Commission's increased determination to enforce its procedural rules vigorously and to discipline companies that infringe them by imposing significant fines. Merging parties will need to exercise even greater care in ensuring that information and data provided to the Commission in the context of merger control proceedings are correct and complete. This may prove particularly challenging in those increasingly common cases where the Commission sends lengthy information requests and/or requires the production of large volumes of internal documents under tight deadlines. In fact, the risk of detection of incomplete or incorrect information increases with the Commission gaining access to ever larger volumes of internal documents. It is equally all the more unclear whether a disclaimer by the merging parties in submissions to the Commission that information is being provided "to the best of the parties' knowledge" (or similar) would provide any protection against fines.

[7] Commission Press Release IP/17/1924, "Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules," July 6, 2017.

[8] *Marine Harvest/Morpol* (Case COMP/M.7184), Commission decision of July 23, 2014.

[9] Commission Press Release IP/18/3522, "Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval," April 24, 2018.

[10] *Altice/PT Portugal* (Case COMP/M.7993), Commission decision of April 24, 2018.

[11] *Marine Harvest/Morpol* (Case COMP/M.7184), Commission decision of July 23, 2014.

News

Commission Updates

Hearing Officer Rules That Statements Made By Former Commissioner Almunia Did Not Breach The Presumption Of Innocence In Euribor Proceedings

On April 9, 2019, the Commission published the Final Report of the Hearing Officer on procedural issues relating to its 2016 decision in the *Euribor* case, in which it fined Crédit Agricole, HSBC and JPMorgan Chase a total of €485 million for participating in a cartel in euro interest rate derivatives.[12] The Hearing Officer found that while certain statements made by then-Competition Commissioner Joaquín Almunia during the investigation were "regrettable," they did not breach the presumption of innocence.[13]

In July 2014, Crédit Agricole, one of the non-settling parties, complained to the European Ombudsman (the "Ombudsman") that a series of public statements made by Mr. Almunia during the Commission's investigation called into question its impartiality and breached the presumption of innocence. In those statements, which were delivered to the European Parliament, the French Senate, and media outlets, among others, Mr. Almunia had described the Commission's evidence in the case as "quite telling" and referred to the gravity of the infringement as "above the average."[14] The Ombudsman found the statements liable to create a public impression of bias and issued a finding of maladministration, calling on the Commission to apologize and publish guidelines on public statements of its officials.[15] Although the Commission did neither, the Ombudsman later closed the investigation on the grounds that Mr. Almunia had since left office and that the procedure had been taken over by Mr. Almunia's successor, Commissioner Vestager, who was responsible for the final decision in this case.[16]

Crédit Agricole, together with the other non-settling parties HSBC and JPMorgan Chase, raised the issue again in the course of the non-settlement procedure which was dealt with by the Hearing Officer in his Final Report. The Hearing Officer emphasized the importance of context when distinguishing between objective statements about investigations, which are generally permitted, and subjective opinions about guilt, which are not. He described Mr. Almunia's statements as "regrettable" and said that "greater discretion and circumspection" should have been exercised. Ultimately, however, he agreed with the Ombudsman that Mr. Almunia's statements would not affect the validity of the final decision as the non-settling parties had been heard during the non-settlement procedure and the final decision was adopted by a different College of Commissioners after Mr. Almunia and his fellow Commissioners had left office.

The fact that the parties' claims were dismissed because of a change in executive, rather than the absence of procedural faults, suggests that similar statements may not escape sanction in future. Growing use of professional social media outlets such as Twitter and LinkedIn also raises the question of whether statements made by Commission officials, acting in a personal capacity, about ongoing investigations will be subject to the same levels of scrutiny as official statements. A recent example is a tweet sent out by the Commission's Chief Economist in November 2018, during the then ongoing *Siemens/Alstom*[17] investigation, in which he appeared to criticize the deal.[18]

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[12] *Euro Interest Rate Derivatives* (Case COMP/AT.39914), Final Report of the Hearing Officer, December 5, 2016.

[13] *Ibid.*, para. 26.

[14] Decision of the European Ombudsman (Case 1021/2014/PD), November 11, 2015, para. 14. A full list of Mr. Almunia's statements referred to by Crédit Agricole is available in the Draft Recommendation of the European Ombudsman (Case 1021/2014/C), March 10, 2015, para. 10.

[15] Draft Recommendation of the European Ombudsman (Case 1021/2014/C), March 10, 2015.

[16] Decision of the European Ombudsman (Case 1021/2014/PD), November 11, 2015, paras. 21–22.

[17] *Siemens/Alstom (Case COMP/M.8677), Commission decision of February 7, 2019.*

[18] Chief Competition Economist Tommaso Valletti retweeted an article by Economist Marc Ivaldi, with the caption: "*Creating a European Champion in rail? Not a good idea according to @marcivaldi of Toulouse University. Vive la France.*"

The Commission Issues A Statement Of Objections Over Geo-Blocking Arrangements For Video Games

On April 5, 2019, the Commission sent a Statement of Objections ("SO") to Valve, the owner of the video game distribution platform Steam, as well as five video game publishers[19] whose video games are distributed by Valve. The SO sets out the Commission's concerns that the companies have prevented customers from purchasing PC video games online from sellers in certain Member States in Central and Eastern Europe[20] where prices are lower (so-called "geo-blocking").[21]

The five video game publishers distribute their games via Valve's Steam platform, where customers can purchase and play video games. Valve provides the publishers with so-called "activation keys" that have (at least in some instances) been locked to the country in which the video game was purchased as well as—in some cases—additional countries. Customers receive an activation key upon purchase of a video game through channels other than Steam—whether digitally through downloads or a physical copy—which must be entered on Steam to start playing. The Commission has preliminarily concluded that Valve and the five video game publishers used the activation keys to partition the market. More specifically, (i) Valve is alleged to have restricted cross-border sales, including passive sales (*i.e.*, where sellers respond to unsolicited customer requests) by using geo-blocked activation keys that prevented customers from buying video games at a lower price in other Member States (notably, Valve's own prices varied by Member State); and (ii) the five video game publishers are alleged to have included contractual export restrictions in their agreements with distributors (other than Valve) that prevented them from selling the video games outside specifically allocated territories. The Commission reasoned that these restrictions may have prevented consumers from buying cheaper games available in other Member States (*i.e.*, in certain Central and Eastern European Member States), thereby denying consumers the benefits of the EU's Single Digital Market to shop around for the lowest price, in violation of Article 101 TFEU.

In a public statement, Valve explained that it had turned off geo-blocks ("region locks") within in the EEA starting in 2015 in response to the Commission's concerns, adding that they had in any event only been used for a small number of video games available on Steam (approx. 3%)—and on none of its own games. In Valve's view, the elimination of geo-blocks will result in publishers increasing prices in "less affluent regions" to thwart price arbitrage.[22] Valve will undoubtedly seek to establish and quantify these alleged price-developments in its response to the SO.

The SO comes in the wake of the Single Digital Market strategy and new rules on e-commerce (such as the Geo-Blocking Regulation[23]), which have triggered a flurry of enforcement activity—including in particular the fines imposed on GUESS[24] and Nike[25]—as reported in our December 2018 and March 2019 newsletters. These rules are intended to afford EU consumers full access to goods and services offered anywhere in the EU, in particular online through cross-border deliveries. In this case, the Commission specifically included video game downloads within the scope of the SO, even though the Geo-Blocking Regulation does not apply to video game downloads, noting that its investigation complements the Geo-Blocking Regulation.

[19] Bandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax.

[20] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and in some cases Romania.

[21] Commission Press Release IP/19/2010, "Antitrust: Commission sends Statements of Objections to Valve and five videogame publishers on "geo-blocking" of PC video games," April 5, 2019.

[22] *See* https://steamdb.info/blog/steam-geo-locking-europe/.

[23] Regulation (EU) 2018/302 of the European Parliament and of the Council of February 28, 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2018 LI 60/1.

[24] *GUESS* (Case COMP/AT.40428), Commission decision of December 17, 2018. *See also* EU Competition Law Newsletter, December 2018, pp. 1–2.

[25] *Ancillary sports merchandise* (Case COMP/AT.40436), decision not yet published. *See also* EU Competition Law Newsletter, March 2019, pp. 6–8.

The Commission Issues A Statement Of Objections To BMW, Daimler, And Volkswagen For Colluding To Equip Vehicles With Inferior Emissions Control Equipment

On April 5, 2019, the Commission issued a Statement of Objections ("SO") to BMW, Daimler, and Volkswagen ("VW") alleging that the car manufacturers conspired to halter the development of clean emissions technology for passenger cars running on petrol and diesel.[26]

Following a dawn raid in 2017, the Commission opened a formal investigation in September 2018 into meetings among BMW, Daimler, VW, and VW-owned Audi and Porsche (referred to as the "circle of five"), in which they allegedly discussed the development of technology to reduce harmful car exhaust emissions. In the SO, the Commission takes the preliminary view that the car manufacturers, in an effort to reduce development costs, effectively agreed to (i) limit the components and effectiveness of a certain cleaning technology for diesel emissions (so-called selective catalytic reduction systems), and to (ii) avoid or delay the introduction of a cleaning technology for petrol emissions (so-called "Otto" particle filters). By doing so, they conspired to restrict competition on innovation for these two technologies in violation of Article 101(1)(b) TFEU, and—despite the technology already existing—deprived consumers of the availability of more environmentally friendly cars.

This investigation is conducted in the aftermath of the VW emissions scandal of 2015, in which VW stood accused of cheating emissions tests—prompting worldwide litigation. The investigation also follows the €2.93 billion fine imposed by the Commission on truck manufacturers MAN, Volvo/Renault, Daimler, Iveco, and DAF in 2016 for *inter alia* colluding on the timing for introducing emission technologies for medium and heavy trucks to comply with new European emission standards.[27] By contrast to the latter, the present case does not have a price-fixing element and is focused solely on the slowing down of technical development—a seemingly novel stand-alone theory of harm in EU cartel enforcement.

While discussions about price or pricing-elements have become universally recognized as unlawful and strictly off limits, competitors are typically allowed to discuss technological and legislative developments to the extent they do not entail the exchange of competitively sensitive information and more generally lead to a restriction of competition. For example, competitors commonly discuss, *e.g.*, in industry or trade association meetings, their position on a legislative proposal relevant to their industry, how to prepare for compliance, and whether to intervene in the process by engaging external consultants or counsel. Genuine forms of cooperation between companies aimed at improving product quality and innovation, including R&D joint ventures, continue to not raise concerns under competition law.[28]

The Commission Accepts Visa And Mastercard Commitments That End Decade-Long Antitrust Row About Multi-Lateral Interchange Fees

Following the Commission's market test of Visa's and Mastercard's commitments offered on April 29, 2019, as reported in our December 2018 newsletter, the Commission accepted the companies' commitments to cap their inter-regional multi-lateral interchange fees ("MIFs").[29] The commitments put an end to the first publically reported probe into inter-regional MIFs by any antitrust authority worldwide, which was opened by the Commission in 2013.

While the imposed fine of €570 million—as reported in our January 2019 newsletter—sanctioned Mastercard's practice of restricting

[26] Commission Press Release IP/19/2008, "Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology," April 5, 2018.

[27] *Trucks* (Case AT.39824), Commission decision of July 19, 2016.

[28] Commission Press Release IP/19/2008, "Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology," April 5, 2018.

[29] Inter-regional MIFs are fees that apply to payments made within the EEA with consumer debit or credit cards issued outside the EEA. Commission Press Release (IP/19/2311), "Antitrust: Commission accepts commitments by Mastercard and Visa to cut inter-regional interchange fees", April 29, 2019.

retailers' ability to shop around the EEA for different banks to handle their payments (so-called "cross-border acquiring"), the present commitments address the Commission's concerns that high inter-regional MIFs for transactions using cards issued outside the EEA might increase prices for European retailers and, ultimately, European consumers. Both parties separately offered to cap their inter-regional MIFs at 0.2% of the transaction value for debit card payments and 0.3% for credit card payments at a physical point of sale, bringing the inter-regional MIFs into line with the intra-EEA MIFs under the Interchange Fee Regulation.[30] For online payments, the parties offered to cap their inter-regional MIFs at 1.15% of the transaction value for debit card payments and 1.5% for credit card payments. The higher cap for online payments accounts—somewhat unconvincingly—for a higher risk of fraud, although the Interchange Fee Regulation makes no such distinction for cards issued in the EEA, and critics have pointed out that this risk would be better addressed through adequate fraud prevention measures by card issuers. The commitments will take effect six months after the Commission's acceptance and will be binding for five and a half years after taking effect. The Commission concluded that the capped inter-regional MIFs will not exceed retailers' costs for alternative means of payment including e-wallets for online payments and cash payments in store, the latter of which generate costs such as cash counting and reconciliation, identifying counterfeit notes, and transport of cash to and from the bank.[31]

Court Updates

The Court Of Justice Clarifies The Prohibition Of Double Jeopardy In Competition Law Cases

On April 3, 2019, the Court of Justice ruled that a national competition authority can in a single decision fine a company for infringing both EU and national competition law, without infringing the principle of *ne bis in idem* (double jeopardy).[32]

On October 25, 2007, the Polish Competition Authority ("PCA") found the Polish insurance provider Powszechny Zakład Ubezpieczeń na Życie S.A. ("PZU") to have abused its dominant position in the market for group life insurance for employees in Poland. PZU's policies included a provision that conditioned policy cancellations on the consent of 75% of the employees, which made it excessively difficult for employees to switch insurance providers. The PCA found that in doing so, PZU had infringed both EU and national competition law, and imposed two fines on PZU, *i.e.*, €7.7 million for infringing national competition law from May 2001 until October 2007, and €4.3 million for infringing Article 102 TFEU from Poland's accession to the EU on May 1, 2004 to October 2007.

PZU appealed the decision to the Supreme Court of Poland, following dismissals by a regional court and the court of appeals, claiming that by fining it twice for the same infringement, the PCA had violated the double jeopardy prohibition.[33] Responding to a request for a preliminary ruling from the Supreme Court of Poland, the Court of Justice ruled that a national competition authority can fine a company in a single decision for an infringement of both EU and national competition law, provided the fine is proportional to the infringement.[34]

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

[31] *See* European Commission, Survey on merchants' costs of processing cash and card payments, March 2015, available at http://ec.europa.eu/competition/sectors/financial_services/dgcomp_final_report_en.pdf.

[32] Powszechny Zakład Ubezpieczeń na Życie S.A. (Case C-617/17) EU:C:2019:283.

[33] The principle of *ne bis in idem* (double jeopardy) is enshrined in Article 50 of the Charter of Fundamental Rights of the European Union and Article 3 of the Council Regulation (EC) No. 1/2003.

[34] *Powszechny Zakład Ubezpieczeń na Życie S.A.*, para. 39.

The Court of Justice referred to the well-established principle that EU and national competition law apply in parallel, and explained that a Member State's competition authority is required to assess the applicability of Article 102 TFEU in parallel to the national law equivalent, provided the Commission has not opened an Article 102 TFEU investigation into the same conduct.[35] The double jeopardy prohibition, which is meant to ensure legal certainty and fairness, specifically prevents a repetition of proceedings, *i.e.*, new proceedings being brought against a company for conduct that has been dealt with in an earlier and final decision. The Court of Justice explained that parallel application of Article 102 TFEU and its national law equivalent are part of a single procedure in this case and thus entail no such repetition of proceedings.[36] As regards the penalty imposed for a parallel application of EU and national competition law, the Court of Justice found that any such penalty must be proportionate to the nature of the infringement, which would be for the national court to determine.[37]

The General Court Rejects Application To Block Disclosure Of Cartel Settlement Submissions To Interested Third Parties Following Ethanol Benchmark Case

On April 2, 2019, the General Court dismissed an application by Swedish agricultural cooperative Lantmännen for interim measures to block the Commission from disclosing documents it had submitted in the course of the settlement procedure in the *Ethanol Benchmarks*[38] case to its co-defendants.[39]

Lantmännen was one of three defendants in the Commission's investigation into an alleged manipulation of ethanol benchmarks, in which the three producers were suspected of coordinating submissions to the price-reporting agency Platts. All three companies initially entered into a settlement procedure with the Commission, but two subsequently dropped out to fight the charges—resulting in a so-called hybrid procedure. Lantmännen became the sole settlement participant and had at this stage submitted a number of non-papers. Upon receipt of a Statement of Objections, one of the non-settling parties requested access to Lantmännen's submissions. Lantmännen initially provided a redacted version of the non-papers, but refused to provide a redacted version of call minutes, and ultimately objected to a disclosure of redacted non-papers and minutes to the Hearing Officer. By decision of January 28, 2019, the Hearing Officer decided that the Commission was entitled to grant access to the documents. Lantmännen lodged an appeal for annulment of the Hearing Officer's decision to the General Court, which remains pending, and filed a parallel application to the General Court for interim measures to block the disclosure.

The General Court rejected Lantmännen's request to block the disclosure as Lantmännen had failed to demonstrate the urgency for interim measures. While recognizing the irreversible nature of a document disclosure, the General Court reasoned that a disclosure of Lantmännen's documents was unlikely to cause serious and irreparable damage. The General Court found that Lantmännen had not only failed to identify any specific information that could have harmed their interests, it had also failed to produce the documents for examination by the General Court.[40]

Against this background, the General Court did not have to weigh confidentiality interests against the defense rights of non-settling cartelists in hybrid settlement cases. In light of the *ICAP* jurisprudence,[41] confidentiality claims might get the short end of that stick. Although the

[35] *Ibid.*, paras. 25–26.

[36] *Ibid.*, paras. 28 and 32.

[37] *Ibid.*, para. 38.

[38] *Ethanol Benchmarks* (Case COMP/AT.40054).

[39] *Lantmännen and Lantmännen Agroetanol v. Commission* (Case T-79/19 R) EU:T:2019:212.

[40] *Ibid.*, paras. 44–54.

[41] *Icap and Others v. Commission* (Case T-180/15) EU:T:2017:795. *See also* the recent judgment in *Pometon v. Commission* (Case T-433/16) EU:T:2019:201.

facts are particular to this case, it remains to be seen whether this ruling might impact future settlement proceedings where potential settlers know that any non-redacted (or insufficiently) redacted information might have to be disclosed to the non-settling co-defendants.

On April 18, 2019, Lantmännen appealed the General Court's order to the Court of Justice. It seems likely that the Court of Justice will confirm the end of the so-called "non-paper," the concept of a written submission "for the Commission's eyes only." In light of the recent *Intel* judgment,[42] according to which the Commission must take minutes of every oral exchange with anyone active in the proceedings and put them on file, a survival of—less confidential, because written—non-papers would come as a surprise.

The General Court Dismisses Qualcomm's Challenge Of A Commission Request For Information

On April 9, 2019, the General Court dismissed Qualcomm's application for annulment of a Commission decision of March 31, 2017, requiring Qualcomm to provide information in the context of an antitrust probe.[43]

The Commission sent a Statement of Objections ("SO") to Qualcomm in December 2015, in which it took the preliminary view that Qualcomm had engaged in predatory pricing by selling its baseband chipset products below cost to two of its key customers (Huawei and ZTE) in an effort to eliminate its competitor Icera, and thereby abused its dominant position in the market for UMTS-compliant baseband chipsets in violation of Article 102 TFEU. Following Qualcomm's response to the SO and an oral hearing, the Commission sent Qualcomm an information request with 4 weeks to respond. Qualcomm perceived the request as overly broad and burdensome, and tried to persuade the Commission to limit the scope and explain the precise subject matter of its investigation, citing practical difficulties in complying. The Commission refused to do so and adopted a legally binding decision (the "Decision") forcing Qualcomm to comply with the request within 8 weeks or pay a daily penalty of €580,000. Following a back-and-forth with the Commission and Hearing Officer on extensions, submissions of partial responses, follow-up requests from the Commission, and a concurrent and unsuccessful attempt to suspend the Decision (alternatively the periodic penalty payment) through a request for interim measures to the General Court, Qualcomm sought an annulment of the Decision by the General Court.

Qualcomm relied on a number of arguments in support of its application, including an infringement of (i) the principles of necessity, proportionality, and good administration, (ii) the obligation to state reasons, (iii) a reversal of the burden of proof, and (iv) the right to avoid self-incrimination.[44] The General Court rejected each of Qualcomm's arguments. In particular, the General Court held that while the Commission was indeed obliged to explain the purpose of its request and the subject matter of its investigation,[45] it was not obliged to disclose all of the information at its disposal.[46] The General Court also noted that issuing an information request following an SO does not render the request unlawful or unnecessary,[47] to the extent that the Commission allows the addressee to exercise its right to be heard.[48] As to proportionality, the General Court reasoned that the complicated nature of a predatory pricing investigation—which requires assessment of a large amount of data—coupled with the resources at Qualcomm's disposal, rendered the

[42] *Intel v. Commission* (Case C-413/14 P) EU:C:2017:632.

[43] *Qualcomm v. Commission* (Case-T-371/17) EU:T:2019:232.

[44] Ibid., para. 28.

[45] *Ibid.*, paras. 44-46.

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

[47] *Ibid.*, para. 69.

[48] *Ibid.*, paras. 79 and 99.

request proportionate.[49] The General Court also found that Qualcomm had failed to establish prosecutorial bias on the part of the Commission.[50] Qualcomm is not the first company to challenge a Commission information request. In 2016, the Court of Justice annulled a Commission decision in which it requested information from a number of cement manufacturers for failing to explain the underlying allegations.[51]

As confirmed by the General Court, the Commission did not make the same mistake with respect to Qualcomm. Qualcomm's efforts to object on the basis of practical difficulties were largely dismissed by both the Commission and the General Court, which shows that beyond possible deadline extensions, similar claims are unlikely to succeed in the future.

[49] *Ibid.*, para. 123.

[50] *Ibid.*, para. 202.

[51] *HeidelbergCement AG v. Commission* (Case C-247/14 P) EU:C:2016:149; *Schwenk Zement KG v. Commission* (Case C-248/14 P) EU:C:2016:150; *Buzzi Unicem SpA v. Commission* (Case C-267/14 P) EU:C:2016:151; *Italmobiliare SpA v. Commission*, (Case C-268/14 P) EU:C:2016:152.

Upcoming Events

Date	Conference	Organizer	Location
21/05	Competition Law Central & Eastern Europe	Knect365	Warsaw
21/05	Competition Law Challenges in the Financial Services Sector	Knect365	London
22/05	GCR Live Antitrust in the Digital Economy	GCR	San Francisco
22/05	Current Trends in Slovak and European Competition Law	Antimonopoly Office of the Slovak Republic	Bratislava
23/05	EU Merger Control	Knect365	Brussels
23/05	Competition policy - need for a paradigm shift?	Chatham House	London
23-25/05	Second annual conference of the European Competition Lawyers Association	European Competition Lawyers Associations	Prague
23-24/05	EU State Aid Litigation	ERA	Brussels
24/05	Antitrust in Asia: One size fits all?	Concurrences	Hong Kong
23-24/05	EU State Aid Litigation	ERA	Brussels
31/05	The Global Antitrust Economics Conference	Concurrences + NYU Stern	NY

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