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EU Competition Law

Newsletter

Highlights

- The Commission Publishes Its Decision To Fine Canon For Gun-Jumping
- The Commission Approves Vodafone's Acquisition Of Liberty Global's Cable Business Subject
 To Cable Access Remedies, A First In The Industry

The Commission Publishes Its Decision To Fine Canon For Gun-Jumping

On October 22, 2019, the Commission published its decision to fine Canon a total of €28 million for failure to file its acquisition of Toshiba Medical Systems Corporation ("TMSC").¹ Canon acquired TMSC via a warehousing arrangement, which involved a special purpose vehicle ("SPV") that held most of TMSC's shares pending merger control approval.

Canon's acquisition of TMSC

In early 2016, Toshiba decided to sell its wholly owned medical business, TMSC, in an attempt to overcome serious financial difficulties. Toshiba organized an accelerated bidding process in which Canon acquired TMSC through a two-step warehousing transaction:

— Step 1: On March 17, 2016, Canon acquired one non-voting Class-B share (corresponding to 5% of the share capital) and a call option to acquire all of TMSC's shares after obtaining relevant antitrust approvals. Upon agreeing on the call option, Canon paid Toshiba the full purchase price for TMSC. On the same day, an interim buyer, which was created in the form of an SPV specifically for the transaction, acquired 20 Class-A voting shares from Toshiba, representing the remaining 95% of TMSC's share capital.

— Step 2: On December 19, 2016, after having obtained all merger control clearances, Canon exercised its call option and completed the transaction by acquiring the remaining 95% of TMSC's shares from the SPV.

The Commission's assessment

On August 12, 2016, almost five months after completion of Step 1, Canon notified to the Commission its acquisition of control over TMSC. In its Form CO, Canon explained that its notification should be understood as covering both steps. The decision also reports that immediately after Step 1 and before submitting

Canon/Toshiba Medical Systems Corporation (Case COMP/M.8179), Commission decision of June 17, 2019 ("Decision"). The issuance of this decision was previously reported in our June 2019 edition of the EU Competition Law Newsletter.

the Form CO, the Commission had already received an anonymous complaint suggesting that Canon had breached EU merger control rules.

The Commission found that Step 1 already constituted a partial implementation of the concentration by which Canon acquired lasting control over TMSC. Relying on the Court of Justice's recent judgment in *Ernst & Young*, the Commission recalled that a concentration is implemented "by a transaction, which in whole or in part, in fact or in law, contributes to the change in control of the target undertaking." The Commission relied in particular on the following factors:

- Transaction agreements and internal documents, which showed that the sole purpose of the SPV was to expedite the closing of the acquisition due to Toshiba's financial difficulties.
- After the implementation of Step 1, Canon could singlehandedly determine the identity of TMSC's acquirer, because Canon could either exercise its call option after receiving the necessary antitrust approvals, or in the absence of antitrust approvals, sell the call option to an acquirer of its choice.
- Canon irreversibly paid the full purchase price for the acquisition of TMSC to Toshiba at Step 1.
 As such, Canon bore the economic risk of the overall transaction upon closing Step 1.
- Canon was closely involved in selling TMSC's voting shares to the SPV by proposing and

commenting on the agreement between Toshiba and the SPV.

Double jeopardy concerns

The Commission imposed two separate fines on Canon: (i) €14 million for implementing a concentration before notifying to the Commission; and (ii) €14 million for implementing a concentration before the Commission's clearance (in violation of the "standstill obligation"). In the recent non-binding opinion in the *Marine Harvest* case,³ which was issued only three months after the Commission's decision in Canon, the European Court of Justice's Advocate General Tanchev proposed that only a single fine may be imposed on companies that close a transaction before notifying it to the Commission.

According to AG Tanchev, imposing two fines for "one and the same" conduct violates the principle of concurrent offences as enshrined by international law and as codified by Member States' domestic laws. Should the European Court of Justice follow AG Tanchev's opinion, it would put in question the legality of double fines imposed in *Canon/Toshiba*.

Lastly, the Commission emphasized that Canon could have asked for a derogation from the standstill obligation under Article 7(3) of the Merger Regulation.⁴ The Commission has previously granted derogations for similar reasons in cases such as *Ryanair/Lauda Motion*⁵ and *Orkla/Elkem*.⁶

The Commission Approves Vodafone's Acquisition Of Liberty Global's Cable Business Subject To Cable Access Remedies, A First In The Industry

On October 30, 2019, the Commission published its July 2019 decision to conditionally approve

the acquisition by Vodafone of Liberty Global's cable business in Germany, the Czech Republic,

² Ernst & Young P/S v. Konkurrencerådet (Case C-633/16) EU:C:2018:371, para. 59.

³ Marine Harvest v. European Commission (Case C-10/18 P), Opinion of Advocate General Tanchev, EU:C:2019:795.

⁴ Decision, para. 177.

⁵ Ryanair/LaudaMotion (Case COMP/M.8869), Commission decision of July 12, 2018.

⁶ Orkla/Elkem (Case COMP/M.3709), Commission decision of March 4, 2005.

Hungary, and Romania, following an in-depth Phase II investigation.⁷ The decision marks the first-ever cable access commitment approved by the Commission in the telecommunications sector.

The Commission raised concerns over horizontal overlaps in the retail fixed broadband services market and in the wholesale TV signal transmission market in Germany. Vodafone owns a cable network which covers urban areas within 13 of the 16 federal states in Germany. Liberty Global owns the Unitymedia cable network in the remaining three federal states where Vodafone did not own a cable network (North Rhine-Westphalia, Hesse, and Baden-Wuerttemberg).

Retail fixed broadband services in Germany

Vodafone's and Unitymedia's respective cable networks did not overlap in any given geographic region in Germany. However, in the three federal states where Vodafone did not operate its own cable network, it had wholesale access to Deutsche Telekom's network, which allowed Vodafone to provide retail fixed broadband services in competition against Unitymedia, Deutsche Telekom, United Internet, and Telefónica DE. The Commission had concerns that in these three regions, the transaction would have given rise to a combined share of 40-50% in retail fixed broadband services, followed by Deutsche Telekom (approx. 20-30% share). The combined entity would have also had a 30-40% combined share at national level.

Vodafone proposed a fix-it-first remedy, offering a behavioral commitment to provide Telefónica DE, which pre-transaction had 5-10% shares in the three regions, with long-term wholesale access to the merged entity's combined cable network in all federal states in Germany. The Commission concluded that the access remedy would enable Telefónica DE to replace the pre-transaction competitive constraint exerted by Unitymedia because it would allow Telefónica DE to offer more competitive retail fixed

internet access services, fixed telephony services, and over-the-top ("OTT") TV services to consumers on Vodafone's and Unitymedia's network of 23.7 million German households.

Wholesale TV signal transmission market in Germany

After the transaction, the parties would have had a combined market share of 60–80% in the wholesale TV signal transmission market in Germany, where Vodafone and Liberty Global sell to TV broadcasters the transmission of TV signals through the parties' cable networks. Though neither party was competing against TV broadcasters in the downstream market for the wholesale supply of TV channels, the Commission had horizontal concerns that the combined cable networks business would have the market power to hamper TV broadcasters' ability to introduce innovative TV services involving hybrid broadcast broadband TV ("HbbTV") signals⁹ and OTT offers.

To address this concern, Vodafone committed to refrain, for a period of eight years, from contractually restricting the ability of TV broadcasters that transmit their content on the merged entity's TV platform (consisting of the merged entity's cable network, IPTV platforms, and mobile network) to also distribute their content via an OTT service. In addition, the parties committed to continue to carry the HbbTV signal of free-to-air ("FTA") broadcasters over their cable network for a period of eight years.

The Commission also raised concerns that the merged entity could impose unfavorable contractual and financial conditions on TV broadcasters, such as payments for additional services and features for FTA and Pay TV channels, and increased feed-in-fees for FTA broadcasters. According to the Commission, these types of revenue losses for TV broadcasters could lower their incentive to continue investing in content, which could ultimately lead to quality degradation of the TV offer to final viewers.

⁷ Vodafone/Certain Liberty Global Assets (Case COMP/M.8864), Commission decision of July 18, 2019.

The exact duration of the agreement between the parties and Telefónica DE was redacted, but other sections of the decision suggest that it was set at 10 years (e.g., paragraph 1884 of the decision mentions that "several respondents suggesting that the ten years duration would be appropriate.").

⁹ HbbTV is a development whereby TV broadcasters are able to allow retail TV customers that have a smart TV to directly connect to those broadcasters' own interactive OTT services.

To address the Commission's concerns, the parties committed to not raising feed-in-fees¹⁰ for FTA broadcasters for the transmission of their linear TV channels via the merged entity's cable network in Germany for a period of eight years.

Conclusion

The Commission approved the acquisition, subject to the above remedies, after seven months of in-depth review. The Commission's decision has been criticized by competitors and industry associations alike for failing to address their concerns about the transaction, which would allegedly create a *de facto* monopoly in the cable market in Germany, and potentially slow down fiber rollouts. Several opponents of the approval, including Deutsche Telekom and an association of German small and medium-sized cable operators (the Fachverband Rundfunk- und Breitband Kommunikation), are reportedly

considering appealing the decision. ¹² According to Vodafone, the transaction will increase Telefónica DE's ability to effectively compete in the high-speed broadband sector, and accelerate innovation in terms of network and service provision.

Vodafone/Liberty Global is the first-ever cable access commitment that has been approved by the Commission in the context of telecommunications mergers. The French national competition authority appears to be the only competition authority in the EEA that has previously approved a cable access commitment in such a context.¹³

Vodafone/Liberty Global also continues the trend in the recent uptick in the deployment of fix-it-first remedies in EU merger control, as reported in our July 2019 edition of the EU Competition Law Newsletter (see, for example, Valeo/FTE Group, AB InBev/SABMiller, Boehringer Ingelheim/Sanofi Animal Health Business, Hutchison 3G Italy/Wind/JV, and Liberty Global/BASE).¹⁴

News

Commission Updates

Two Cycling Groups Call For Antitrust Probe Into Governing Body For Sports Cycling

In September 2019, cycling organizations Velon and the Italian Cycling League filed separate complaints with the Commission, alleging that the world governing body for sports cycling, Union Cycliste Internationale ("UCI"), breached EU competition law in its dual role of regulating and organizing cycling events.¹⁵

Velon, a joint venture made up of certain professional cycling teams, provides live coverage of races, real-time biometric rider data, and organizes cycling events. In its complaint, based on Articles 101 and 102 TFEU, Velon argued that UCI uses its regulatory powers to increase participation at its events and prevent other race organizers from growing into competing leagues.

 First, in 2017, Velon launched the Hammer Series, a new format of linked races where cyclists compete on a team basis rather than as individual athletes. According to Velon, in

¹⁰ Defined as fees per connected household that a FTA broadcaster pays to Vodafone and/or Unitymedia (or the merged entity) for the transmission of the FTA broadcaster's FTA TV channels in their respective cable networks (or in the merged entity's combined cable network).

¹¹ See Broadband TV News, 'German industry associations oppose Vodafone/Liberty Global cable deal,' March 25, 2019, available at: www.broadbandtvnews.com/2019/03/25/german-industry-associations-oppose-vodafone-liberty-global-cable-deal/; and Reuters, 'Deutsche Telekom says Vodafone-Telefonica deal bad news for German broadband,' May 7, 2019, available at: www.reuters.com/article/us-liberty-global-m-a-vodafone-deutsche/deutsche-telekom-says-vodafone-telefonica-deal-bad-news-for-german-broadband-idUSKCN1SDoZV/.

¹² See Broadband TV News, 'FRK to take legal action against Vodafone/Unitymedia merger,' September 24, 2019, available at: https://www.broadbandtvnews.com/2019/09/24/frk-to-take-legal-action-against-vodafone-unitymedia-merger/; and Reuters, 'EU clears Vodafone's \$22 billion Liberty deal,' July 18, 2019, available at: https://www.reuters.com/article/us-liberty-global-m-a-vodafone-group-eu-idUSKCN1UD114/.

¹³ Numericable/SFR (Case 14-DCC-160), French Competition Authority decision of October 30, 2014.

¹⁴ Valeo/FTE Group (Case COMP/M.8102), Commission decision of October 13, 2017; AB InBev/SABMiller (Case COMP/M.7881), Commission decision of May 24, 2016; Boehringer Ingelheim/Sanofi Animal Health Business (Case COMP/M.7917), Commission decision of November 9, 2016; Hutchison 3G Italy/Wind/JV (Case COMP/M.7758), Commission decision of September 1, 2016; and Liberty Global/BASE (Case COMP/M.7637), Commission decision of February 4, 2016.

¹⁵ See Velon's statement 'Velon files complaint with European Commission against UCI,' October 1, 2019, available at: https://www.velon.cc/news/2019/9/27/velon-files-ec-complaint-uci; Italian Cycling League's statement 'La Lega Ciclismo denuncia l'UCI alla Commissione Europea,' October 8, 2019, available at: <a href="https://beta.com/https://beta.c

February 2019, UCI ruled that it would not recognize this new competition, which meant that UCI license holders were prohibited from participation, risking fines and temporary suspension from UCI events.

— Second, Velon complained about UCI's new technical regulation that allegedly seeks to give itself and race organizers ownership and control over teams' racing data. This regulation supposedly prevents Velon from further offering its fan-engagement technologies, which include live performance data and real-time biometrics information.

In early November 2019, Velon filed an addendum to its initial complaint, arguing that UCI discriminated against women's cycling by prohibiting a race in Norway that would offer same prize-money to both male and female participants. At the same time, Velon also filed a request for interim measures, asking for this race to be staged in May 2020.¹⁶

Separately, on October 7, 2019, the Italian Cycling League ("IPCL"), a consortium of racers, teams, and riders, filed a complaint alleging that the UCI's decision to increase the number of teams participating in the WorldTour (premiere cycling competition) breached Article 101 TFEU. The IPCL argued that the expansion would increase the number of UCI events, thereby preventing cyclists from competing in less-renowned competitions not organized or recognized by UCI. In other words, a calendar full of UCI events would arguably prevent cyclists from participating in other non-UCI events.

The merits of the complaints are expected to be assessed in the context of the specificities of sport as acknowledged in EU case law and Article 165(2) TFEU, which stipulates that "Union action shall be aimed at... developing the European dimension

in sport, by promoting fairness and openness in sporting competitions."18

According to EU courts, sport's governing bodies may regulate and restrict participation in third-party events, and do not breach EU competition rules if such regulations are inherent to, and proportionate to, legitimate objectives. This includes, among other things, the protection of health, safety, integrity, organization and proper conduct of competitive sport, and the need to maintain competitive balance, promote fairness and openness, and safeguard equal opportunities for players and teams.¹⁹

Against this background, the Commission found, in a 2017 decision, that certain terms of the International Skating Union's ("ISU") rules sanctioning athletes for participating in an event not authorized by the ISU were illegal.²⁰ The Commission attributed importance to the ISU's severe suspension terms, including a lifetime ban, which in the circumstances were found to be neither inherent nor proportionate to the protection of legitimate sports objectives. The Commission's ISU decision is currently subject to appeal before the General Court in Case T-93/18 *International Skating Union v. Commission*.

The Commission Unconditionally Approves BMS's Acquisition Of Celgene

On October 10, 2019, the Commission published its decision of July 29, 2019, to unconditionally approve Bristol-Myers Squibb Company's ("BMS") acquisition of Celgene Corporation ("Celgene") following a Phase I review. 21 BMS and Celgene are global pharmaceutical companies.

The two companies' products primarily overlapped in respect of Celgene's already marketed Otezla, and BMS' pipeline treatments, one in Phase 3 and one in Phase 1 of clinical trials, for moderate to

¹⁶ See Velon's statement 'Velon makes additional complaint against UCI for discrimination against women's cycling,' November 8, 2019, available at: https://www.yelon.cc/news/2019/11/7/velon-makes-additional-complaint-against-uci-for-discrimination-against-womens-cycling.

Yose Italian Cycling League's statement 'La Lega Ciclismo denuncia l'UCI alla Commissione Europea,' October 8, 2019, available at: https://legaciclismo-denuncia-luci-alla-commissione-europea

¹⁸ Article 165(2) of the Treaty on the Functioning of the European Union, OJ 2012 C 326.

¹⁹ See David Meca-Medina and Igor Majcen v. Commission of the European Communities (Case C-519/04 P) EU:C:2006:492, paras. 43-54.

²⁰ International Skating Union's Eligibility Rules (Case COMP/AT.40208), Commission decision of December 8, 2017.

²¹ BMS/Celgene (Case COMP/M.9294), Commission decision of July 29, 2019.

severe psoriasis and psoriasis arthritis.²²

The Commission reaffirmed its increasingly forward-looking framework for the assessment of transactions in R&D-intensive industries, such as pharmaceuticals.²³ The Commission closely scrutinized the parties' new pipeline products that may ultimately replace existing treatments or create an entirely new demand, analyzing the potential competition between the parties' existing and pipeline products.

The Commission found that the combined entity would most likely have no incentive to cease, repurpose, or delay the development of BMS' pipeline treatments because, among other things, the parties' drugs are different in terms of mode of action, line of treatment, efficacy, and safety profiles. In Europe, Otezla is used and reimbursed as a third-line treatment for patients who have failed a conventional therapy, whereas BMS' pipeline drug is intended to be used as a first-line treatment.

Interestingly, in the U.S., Celgene's Otezla is used as a first-line treatment and holds a strong market position. This led the parties to divest Otezla in order to address the FTC's competition concerns.²⁴ The Commission's unconditional Phase I approval comes after two recent cases where the Commission conditioned its clearance upon the merging parties divesting the pipeline drug.²⁵

Court Updates

The Court of Justice Upholds Dismissal Of Alcogroup's Appeal Concerning Access To Legally Privileged Documents During A Dawn Raid

On October 17, 2019, the Court of Justice upheld the General Court's judgment of April 10, 2018, dismissing ethanol producer Alcogroup's appeal against a Commission decision to carry out a dawn raid during which the Commission allegedly read potentially legally privileged documents. ²⁶ According to the Court of Justice, irregularities during a dawn raid may only result in the annulment of subsequent Commission decisions and not the prior decision authorizing the dawn raid in question. This judgment highlights the need for legal counsel to closely monitor dawn raids, to ensure that Commission officials do not read or seize legally privileged documents.

Factual background: tagging legally privileged documents for export to the Commission's case file

In March 2015, Commission officials inspected Alcogroup's premises, as part of an investigation into the bioethanol sector, following a prior inspection in October 2014. In the course of this second inspection, and at the premises of Alcogroup, the Commission used a forensic evidence software called Nuix, which enables searching and indexing of electronic devices, such as computers, by specific keywords, to copy selected documents temporarily onto the Commission's laptops.

After the inspection, Commission officials began individually examining the documents that were saved temporarily on the Commission's laptops, and saved 59 series of documents, which were tagged for export to the Commission's case file, onto a USB-stick. Upon review of the list of documents selected, Alcogroup's lawyers objected to the review of five emails, including their attachments, which were labelled "legally privileged."

The Commission accepted that these five emails were potentially subject to EU outside counsel legal professional privilege ("LPP"), and therefore

²² Psoriasis is an autoimmune disease characterized by patches of abnormal skin. Other horizontal overlaps between the two companies' products concerned other autoimmune diseases (inflammatory bowel diseases, including ulcerative colitis and Crohn's disease, and systemic lupus erythematosus), fibrotic diseases, and oncology.

²³ The Commission specifically referred to its analysis in prior cases *Bayer/Monsanto* (Case COMP/M.8084), Commission decision of March 21, 2018; Novartis/GSK Oncology (Case COMP/M.7275), Commission decision of January 28, 2018; and *Dow/Dupont* (Case COMP/M.7932), Commission decision of March 27, 2017.

²⁴ On June 24, 2019, BMS announced its plan to divest Celgene's psoriasis treatment (Otezla). On August 26, 2019, BMS announced the divestment of Celgene's Otezla to Ameen for \$13.4 billion.

²⁵ See Takeda's acquisition of Shire (*Takeda/Shire* (Case COMP/M.8955), Commission decision of November 20, 2018); and Pfizer's acquisition of Hospira (*Pfizer/Hospira* (Case COMP/M.7559), Commission decision of June 15, 2015).

²⁶ Alcogroup and Alcodis v. Commission (Case T-274/15) EU:T:2018:179, upheld on appeal in Alcogroup and Alcodis v. Commission (Case C-403/18 P) EU:C:2019:870. Under Regulation 1/2003, the Commission may carry out unannounced inspections at companies' premises (also called "dawn raids"). See Council Regulation (EC) No. 1/2003 of the Council of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

did not include them in the Commission's file. It appears from the judgment that the Commission had access to these potentially legally privileged documents for a period of less than 24 hours.

Initial challenge and appeal

On April 21, 2015, Alcogroup requested that the Commission immediately suspend the second investigation on the grounds that following the second dawn raid, the Commission allegedly inspected a significant amount of legally privileged documents (the emails, plus their attachments), which were prepared for Alcogroup's defense after the first dawn raid.

The Commission dismissed Alcogroup's request for suspension in a letter ("the Commission's letter"). It noted that the mere tagging of documents via Nuix does not by default mean that they were read by investigators. Subsequently, Alcogroup appealed against the Commission's decision to carry out the second dawn raid ("the Commission's second decision") and the Commission's letter, both grounded in the Commission's alleged violation of the company's right to a fair trial, in particular its rights of defense, to good administration and an impartial investigation, ²⁷ as well as the inviolability of the home. ²⁸

Dismissal rationale

First, the Court of Justice upheld the General Court's dismissal of Alcogroup's appeal against the Commission's decision on the principle that irregularities during a dawn raid may only result in the annulment of subsequent Commission decisions, which were based on unlawfully-seized documents during that dawn raid.²⁹ In other words, acts subsequent to a Commission decision, such as the authorization of a dawn raid, cannot impact that decision's validity.

Second, the Court of Justice agreed with the General Court's ruling that the Commission did not have an obligation to take additional "precautionary measures" during a second dawn raid due to the higher risk that Commission officials may find legally privileged documents prepared following a previous dawn raid. According to the Court of Justice, the Commission is generally obliged to respect legally privileged documents as part of a party's defense rights, including before a dawn raid takes place, and irrespective of whether it is the first or a subsequent dawn raid, and irrespective of the scope of an investigation.

Third, the Court of Justice noted that the Commission's letter did not explicitly deny reading or taking a cursory glance at the potentially privileged emails in question. However, as the Commission's letter did not explicitly state otherwise, the Court of Justice agreed with the General Court that it could reasonably be inferred that the Commission had not read the potentially legally privileged documents.

Practical implications

Alcogroup stresses the role of the presence of legal counsel during dawn raids to diligently ensure that Commission officials do not seize, read, or take merely a cursory look at documents that are legally privileged.³⁰ The case demonstrates that a subsequent appeal against the seizure of potentially legally privileged documents may be difficult to substantiate, and in any event, may not remedy the breach of confidentiality of legally privileged documents. This challenge is certainly exacerbated in an increasingly digital environment characterized by the proliferation of written (electronic) communications channels.

²⁷ See Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights.

²⁸ See Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights.

²⁹ Deutsche Bahn and others v. Commission (Case C-585/13 P) EU:C:2015:404.

³⁰ The General Court confirmed in Akzo that an undertaking under investigation "is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by LPP, provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view." See Akzo Nobel Chemicals and Akcros Chemicals v. Commission (Joined Cases T-125/03 and T-253/03) [2007] ECR 11-3523, para. 82.

Upcoming Events

Date	Conference	Organizer	Location
26-27/11	Advanced EU Competition Law	Knect365	Brussels
04/12	Future Legal Technology Forum	Knect365	London
04/12	Competition Law in the Pharmaceutical Sector	Knect365	Brussels
05/12	GCR Live IP and Antitrust Beijing	GCR	Beijing
05-06/12	OECD Global Forum on Competition	OECD	Paris
06/12	7th Global Merger Control Conference	Concurrences	Paris
09/12	Chillin'Competition Conference 2019	Chillin'Competition	Brussels

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