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EU Competition Law Newsletter

Highlights

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— RWE/E.ON: Not Enough *Energy* To Overturn A Merger Clearance Decision

— State Aid to Lufthansa and Scandinavian Airlines – Has A Wing Fallen Off?

Microsoft/Activision: Divergence On Behavioral Remedies

On May 15, 2023, the Commission conditionally approved Microsoft's proposed acquisition of Activision,[1] only a few weeks after the UK Competition and Markets Authority ("CMA") had blocked the transaction.[2] *After Cargotec/Konecranes*,[3] this is the second time since Brexit that the CMA has blocked a transaction approved by its European counterpart.

Background

Microsoft announced its c. $69 billion acquisition of Activision Blizzard—the largest-ever acquisition in video game history—in January 2022. Both companies develop and publish games for PCs, consoles, and mobile devices. Microsoft owns the Xbox gaming console, the Windows operating system, and is one of the largest providers of cloud gaming services through Azure. Activision is the leading independent developer and publisher of video games, including *Call of Duty, World of Warcraft* and *Candy Crush*.

Cloud Gaming

The main focus of the Commission's review was on vertical links and concerns that Microsoft would foreclose its rivals by withholding Activision's games or making them available on uncompetitive terms. The Commission's Statement of Objections[4] and CMA's Provisional Findings[5] both found that the transaction could harm competition in: (i) console gaming; (ii) multi-game subscriptions services; and (iii) cloud gaming services. The

[1] *See* Case COMP/ M.10646, Commission decision of May 15, 2023 (full decision text not yet published) and Commission Press Release IP/23/2705, "Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions," May 15, 2023.

[2] CMA Press Release, "Microsoft/Activision deal prevented to protect innovation and choice in cloud gaming," April 26, 2023, available here.

[3] CMA Press Release, "CMA blocks planned Cargotec/Konescranes merger," March 29, 2022, available here.

[4] Mlex, "Microsoft gets EU charge-sheet over $69 billion Activision bid," January 31, 2023, available here.

[5] CMA, "Anticipated acquisition by Microsoft of Activision Blizzard, Inc Provisional findings report," February 8, 2023, available here.

Commission was also concerned about a possible anti-competitive effect in PC operating systems. Both agencies subsequently narrowed their focus to cloud gaming, where they were concerned that Microsoft could make Activision's games fully or partially exclusive to its cloud gaming service.

Vertical Concerns and Behavioral Remedies

To remedy the Commission's and CMA's concerns, Microsoft committed to provide 10-year access to Activision's games to rival cloud gaming platforms.

In its April 2023 prohibition decision, the CMA rejected this offer as insufficient due to a "number of significant shortcomings connected with the growing and fast-moving nature of cloud gaming services".[6] The CMA found that the transaction would reinforce Microsoft's position in a nascent market where it "already accounts for an estimated 60-70% of global cloud gaming services and has other important strengths in cloud gaming from owning Xbox, the leading PC operating system (Windows) and a global cloud computing infrastructure (Azure and Xbox Cloud Gaming)."[7]

In May 2023, the Commission conditionally approved the transaction having found that Microsoft's remedy proposal "fully addresses" its concerns and could "promote" the growth of the cloud gaming market, "an innovative market segment that could transform the way many gamers play video games".

The divergence in the agencies' determinations attracted considerable media attention. The leaderships of both agencies publicly defended their positions: the CMA issued a statement reiterating that "cloud gaming needs to continue as a free, competitive market to drive innovation and choice in this rapidly evolving sector", while Commissioner Vestager maintained that Microsoft's access-remedy "opens the door for smaller cloud services in the EU to offer big games on their platforms, widening choice for gamers," which was a welcome departure from the pre-merger situation, in which Activision did "[n]ot license its games to cloud services."[8]

Next Steps

Microsoft has appealed the CMA's prohibition decision to the UK Competition Appeal Tribunal, requesting an expedited hearing to "remove uncertainties over the deal".[9] In the U.S., the Federal Trade Commission sued to block the transaction in December 2022,[10] and secured a temporary restraining order prohibiting closing in June 2023.[11]

[6] CMA Press Release, "Microsoft/Activision deal prevented to protect innovation and choice in cloud gaming," April 26, 2023, available here. The CMA notes in particular that the proposed remedies: (i) do not sufficiently cover different cloud gaming service business models; (ii) are not sufficiently open to providers who might wish to offer versions of games on PC operating systems; (iii) standardize the terms and conditions on which games are available, as opposed to them being determined by the dynamism and creativity of competition in the market; and (iv) that significant risks of disagreement and conflict between Microsoft and cloud gaming service providers exist, particularly over a 10-year period in a rapidly changing market.

[7] *Ibid.*

[8] Commission Press Release SPEECH/23/2923 Executive Vice-President Vestager, keynote speech at the International Forum of the Studienvereinigung Kartellrecht: "Recent Developments in EU merger control," May 25, 2023, available here.

[9] GCR, "Microsoft pushes for summer trial in bid to overturn UK Activision Blizzard deal block," May 30, 2023, available here.

[10] FTC, "FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.," December 8, 2022, available here.

[11] MLex, "Microsoft-Activision deal halted by temporary restraining order from US judge; FTC hearing set for next week," June 14, 2023, available here.

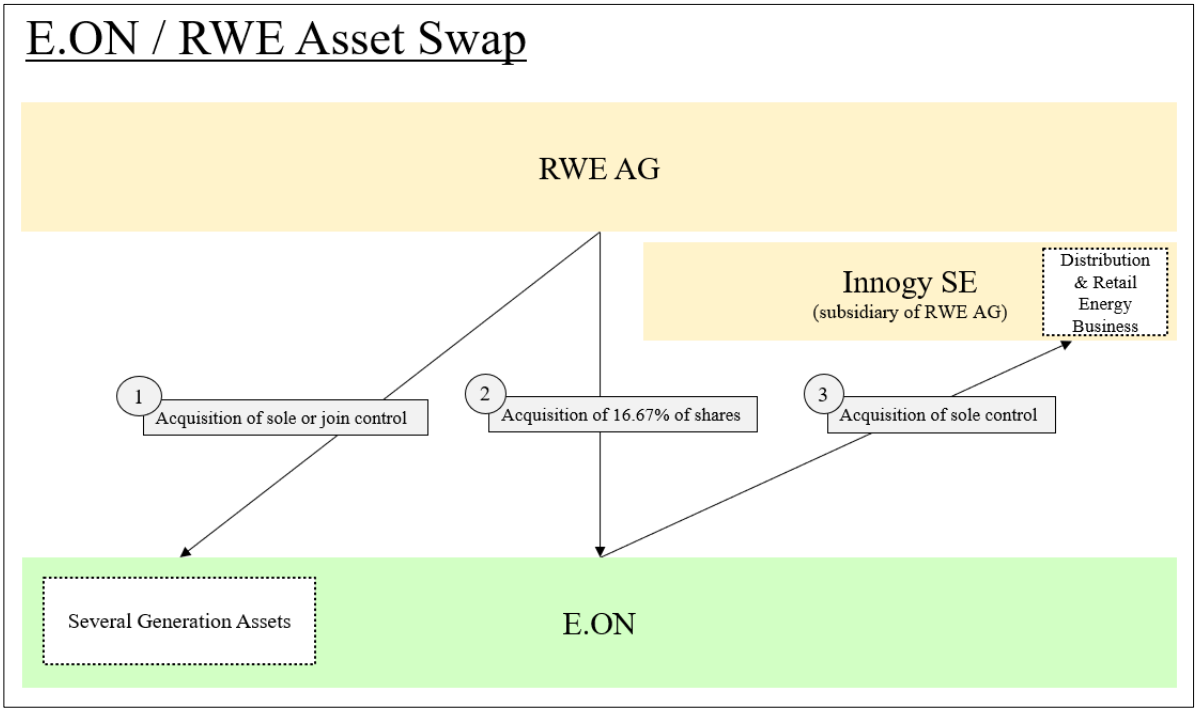
RWE/E.ON: Not Enough *Energy* To Overturn A Merger Clearance Decision

In two separate judgements, the General Court dismissed third-party actions seeking to overturn the Commission's merger clearance of a complex asset swap deal between German energy companies RWE and E.ON. The General Court reconfirmed that overturning a merger clearance is practically unfeasible, and also provided useful clarifications on various merger control concepts, including: (i) "single concentration"; (ii) third-party standing; (iii) the Commission's duty in publishing merger decisions; and (iv) the relevant timeframe for prospective merger control analysis.

Background

In March 2018, RWE and E.ON announced their asset swap by way of a three-part operation. The first two parts were notified in two separate filings to the Commission[12] while the third part was notified to the German Federal Cartel Office.[13] Both agencies cleared the transaction.

Eleven undertakings sought the annulment of the two Commission clearance decisions.[14]



[12] *E.ON/Innogy* (Case COMP/M.8870), Commission decision of October 17, 2019, available here; *RWE/E.ON Assets* (Case COMP/M.8871), Commission decision of February 26, 2019, available here.

[13] *E.ON SE/RWE AG* (B8-28/19), FCO decision of February 26, 2019, Case summary available in German here and in English here.

[14] *Stadtwerke Leipzig v. Commission* (Case T-313/20) EU:T:2023:257; *Stadtwerke Hameln v. Commission* (Case T-314/20) EU:T:2023:258; *TEAG v. Commission* (Case T-315/20) EU:T:2023:259; *Naturstrom v. Commission* (Case T-316/20) EU:T:2023:260; *EnergieVerbund Dresden v. Commission* (Case T-317/20) EU:T:2023:261; *eins energie in sachsen v. Commission* (Case T-318/20) EU:T:2023:262; *GGEW v. Commission* (Case T-319/20) EU:T:2023:263; *Mainova v. Commission* (Case T-320/20) EU:T:2023:264; and *Stadtwerke Frankfurt am Main v. Commission* (Case T-322/20) EU:T:2023:265.

The General Court Judgment

The General Court dismissed all appeals, with some notable findings.

First, the General Court upheld the standing of EVH (a German energy generation company) which was deemed directly and individually concerned by the Commission's decision because it was active on the markets affected by the decision and was actively involved in the administrative procedure: it submitted observations in writing, attended a meeting with the Commission, sent a letter to the Commission to complement its written observations, and commissioned an expert economic report.[15] In contrast, enercity, a German municipal authority active in energy generation and distribution, did not have standing because its involvement in the administrative process was not "active" enough[16] —the General Court explained that a mere reply to the Commission questionnaire and application to the hearing officer to be recognized as an interested party is inadequate in this regard and that enercity's observations were insufficiently related to the concentration at hand.[17]

Second, the General Court dismissed EVH's claim that the three operations at issue should have been analyzed as a "single concentration."[18] The General Court disagreed, essentially upholding the Commission's guidance in the Consolidated Jurisdictional Notice whereby transactions that are interdependent are nonetheless not treated as one concentration where control is not acquired by the same person(s).[19]

Third, the General Court noted that a late publication of the Commission's merger decision did not undermine the rights of third parties to an effective judicial protection nor vitiate the decision's validity. The General Court clarified that the Commission's duty to publish decisions declaring concentrations compatible with the internal market was self-imposed, as there was no textual basis for such obligation in Article 6(1)(b) of the EU Merger Regulation.

Fourth, the General Court clarified that the Commission could not be required to examine long-term (15-20 years) effects of mergers under the Significant Impediment to Effective Competition legal test, as this would imply a high margin of error, *i.e.*, the Commission's prospective assessment had to remain in the realm of the "most likely" effects within the next three to five years.[20]

State Aid to Lufthansa and Scandinavian Airlines – Has A Wing Fallen Off?

On May 10, 2023, the General Court annulled in entirety two Commission decisions authorizing a combined €7 billion recapitalization aid granted by Germany to Lufthansa and by Denmark/Sweden to Scandinavian Airlines ("SAS") during the COVID-19 pandemic, following a challenge brought by rival airlines Ryanair and Condor.[21] These judgments mark the first annulment of recapitalization measures granted under the COVID-19 State Aid Temporary Framework

[15] *EVH v. Commission* (Case T-312/20) EU:T:2023:252, paras. 34-35.

[16] *enercity v. Commission* (Case T-321-20) EU:T:2023:253, para. 35.

[17] *enercity v. Commission* (Case T-321-20) EU:T:2023:253, paras. 50 and 52.

[18] *EVH v. Commission* (Case T-312/20) EU:T:2023:252, paras. 73-86.

[19] In asset swaps, independent undertakings gain control of different targets.

[20] *EVH v. Commission* (Case T-312/20) EU:T:2023:252, para. 258.

[21] *Ryanair v Commission* and *Condor Flugdienst v Commission* (Joined Cases T-34/21, and T-87/21) EU:T:2023:248 ("Lufthansa Judgment"); and *Ryanair v Commission* (Case T-238/21) ECLI:EU:T:2023:247 ("SAS Judgment"). Condor challenged the Lufthansa decision.

Cleary Gottlieb represented Ryanair in these proceedings.

("TF"), and the largest amount of previously cleared aid covered by an annulment judgement.[22] For a detailed analysis, please refer to Cleary Gottlieb's Alert Memorandum.[23]

The Commission Infringed Multiple Requirements of Section 3.11 of the TF

The General Court struck down the Lufthansa and SAS decisions on five principal grounds.

First, the Commission had failed to verify whether Lufthansa could have obtained at least part of its financing needs on the market at affordable terms.[24] Based on economic reports submitted by Ryanair, as well as public statements from Lufthansa's Chief Financial Officer,[25] the General Court upheld Ryanair's argument that Lufthansa could have raised between €1–3.7 billion in debt financing by using its aircraft and spare parts as collateral.[26] The General Court ruled that a beneficiary can only receive aid for the amounts that it is unable to raise on the markets.[27]

Second, Member States granting COVID-19 aid in the form of a recapitalization (equity or hybrid instruments) must provide a "step up" mechanism - *i.e.*, an increase of the State's remuneration or the attribution to the State of additional shares for free, or a comparable alternative, in order to incentivize the beneficiary to redeem the State recapitalization.[28] In both cases, the Commission had failed to require such mechanism.[29]

Third, the Commission erred in accepting a price for Lufthansa's shares at the time of the conversion of Silent Participation II into equity that departed from the binding Theoretical Ex-Rights Price (TERP) methodology.[30] Such alternative methodology could yield a higher price than provided under the TF and the Commission did not offer any explanations for its departure. The General Court also dismissed the Commission's claim that Germany had undertaken to seek authorization *ex post* if the conversion price was higher than the price calculated following TERP.[31] The Commission could not postpone its compatibility assessment where the aid measure is liable to infringe State aid rules,[32] particularly where Germany had failed to commit "in substantive terms" to ensure that it would actually acquire Lufthansa's shares at a price compliant with the TF.[33]

Fourth, the Commission had ignored that Lufthansa held significant market power at a number of relevant airports.[34] In its assessment of market power, the Commission had only considered criteria related to airport capacity such as slot holdings[35] and congestion rates (*i.e.*, barriers to entry) and excluded other relevant criteria such as the beneficiaries' shares of flights

[22] *See* Section 3.11, Communication from the Commission on Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, C/2020/1863, O.J. C 91I, as last amended on May 8, 2020 (the "Transition Framework").

[23] *See* our June 2023 Alert Memorandum, "EU General Court Strikes Down Commission Decisions Authorizing EUR 7 Billion State Aid to Lufthansa and SAS".

[24] Lufthansa Judgment, para. 132. According to Recital 49(c) TF, to be eligible for a recapitalization measure, the beneficiary must, *inter alia*, be "not able to find financing on the markets at affordable terms".

[25] Lufthansa Judgment, paras. 121 and 134. According to the statement of Lufthansa's CFO of 19 March 2020, the Lufthansa Group was "financially well equipped to cope with an extraordinary crisis situation such as [the COVID-19 crisis]", in particular because it owned "[86%] of the Group's fleet, which is largely unencumbered and [had] a book value of around [EUR] 10 billion".

[26] Lufthansa Judgment, paras. 118-119.

[27] Lufthansa Judgment, paras. 122 and 128-132; Lufthansa Decision, para. 22.

[28] *See*: Recitals 61 and 62 TF for equity instruments and Recitals 68 and 70 TF for hybrid instruments.

[29] In the SAS judgment, the General Court annulled the aid measure in its entirety, despite the fact that a part of the hybrid component complied with the requirements of Section 3.11 TF, because the measure was tightly interconnected and therefore could not be partially annulled without compromising its integrity. SAS Judgment, paras. 53 and 83-88.

[30] Recital 67 TF indicates that the conversion of hybrid capital instruments into equity must be conducted at a level that is at least 5% below the Theoretical Ex-Rights Price at the time of the conversion.

[31] Lufthansa Judgment, paras. 280-286.

[32] Lufthansa Judgment, paras. 283 and 285.

[33] Lufthansa Judgment, para. 284.

[34] Lufthansa Judgment, paras. 359-412. Recital 72 TF states that "[i]f the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. […]."

[35] Lufthansa Decision, para. 180

or seats (*i.e.*, actual market shares).[36] Moreover, the slot holding and congestion rates criteria that led the Commission to conclude that Lufthansa held significant market power at Frankfurt and Munich airports should have led to the same conclusion in relation to airports in Düsseldorf and Vienna.

Fifth, the Commission had erred in accepting slot divestiture commitments in relation to airports in Frankfurt and Munich because these did not preserve effective competition for two principal reasons.[37] First, the procedure for the divestment of the slots gave preference to new entrants and excluded Lufthansa's closest competitors from bidding, *i.e.*, airlines that already had a base at Frankfurt and Munich airports, such as Ryanair, easyJet and Wizzair.[38] Second, the slots were divested for remuneration instead of being offered for free,[39] which reduced their attractiveness.[40]

Conclusion

The Lufthansa and SAS judgments clarify the legal standard that the Commission must apply when assessing the compatibility of recapitalization measures with State aid rules. It remains to be seen whether the Commission decides to appeal to the Court of Justice and what impact will these judgments have on the outcome of comparable recapitalization cases pending before the General Court.

News

Commission Updates

Norsk Hydro/Alumetal: A Rare Phase II Unconditional Clearance

On May 4, 2023, the Commission unconditionally approved the proposed acquisition of Alumetal by Norsk Hydro after a Phase II review.[41] Both companies are major European producers of semi-finished aluminium products used for automotive parts and utilize a "green" production process: Alumetal uses recycled materials, while Norsk Hydro relies on renewable energy.

Procedural Back-and-Forth: Simplified filing, to in-depth Phase II review, to unconditional clearance

Norsk Hydro announced the deal in April 2022 and submitted a merger filing under the so-called "simplified" procedure available for transactions with moderate shares and no competition concerns. In September 2022, Norsk Hydro withdrew the simplified filing and re-notified under the standard procedure. The Commission opened an in-depth Phase II investigation in October 2022 after a preliminary finding that the transaction might reduce competition in the production and supply of aluminium foundry alloys and master alloys in Europe.[42] The Commission was concerned that the transaction would eliminate competitive constraint from Alumetal, a "recycling maverick" bringing cheaper and recycled aluminium products to the market. The Commission also raised vertical foreclosure concerns stemming from the combination of Norsk Hydro and Alumetal's production operations at different levels of the supply chain.

The parties stuck to their guns that the case was a candidate for a simplified procedure and did not submit any commitments. The Commission

[36] Lufthansa Judgment, paras. 375-382.

[37] Under Recital 72 TF, where the Commission finds that the beneficiary holds SMP on any market, "Member States must propose [...] structural or behavioural commitments foreseen in Commission Notice on remedies acceptable under the [EU Merger Regulation]."

[38] Lufthansa Judgment, paras. 467-480.

[39] As required by Article 8(b) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, O.J. L 14/1 (22.1.1993).

[40] Lufthansa Judgment, paras. 494-503.

[41] *Norsk Hydro/Alumetal* (Case COMP/M.7612), Commission decision of May 4, 2023 (full decision text not yet available). The unconditional clearance of *Norsk Hydro/Alumetal* was followed by another unconditional clearance after a Phase II review in *Viasat/Inmarsat* (Case COMP/M.10807), Commission decision of May 25, 2023 (full decision text not yet available).

[42] *See* Commission Press Release IP/22/6013, "Mergers: Commission opens in-depth investigation into Hydro's proposed acquisition of Alumetal," October 6, 2022.

ultimately sided with the parties, finding that their combined shares were moderate, the parties were not close competitors, and there were a number of sizeable alternative suppliers, including "green" players.[43] On this basis, the Commission cleared the deal unconditionally. This was only the tenth Phase II unconditional clearance since 2010 and similar to a recent acquisition by Aurubis of Metallo in the copper scrap market.[44]

Increased scrutiny of deals with "green" elements

The in-depth investigation reflects the Commission's increased focus on green transition and green "killer" acquisitions.[45] This stems from the Commission's commitment to preserve access to green materials in Europe by thoroughly assessing M&A impact on the EU Green Deal program. The Commission is expected to increasingly take into account sustainability externalities as merger-specific efficiencies in order to counterbalance the anticompetitive effects of a merger,[46] as also indicated by analogy in the Commission's new Horizontal Guidelines of June 1, 2023, which contain specific guidance for undertakings wishing to conclude sustainability agreements.[47]

Court Updates

Meta — The General Court Boosts The Commission's RFI Powers

In two judgements of May 24, 2023,[48] the General Court boosted the Commission's extensive information request powers during early stage antitrust investigations.

Background

On May 4, 2020, the Commission sent two requests for information ("RFIs") asking Meta to search for internal documents by running thousands of search terms in the context of the Commission's investigation into data gathering practices by Meta's social media network Facebook and the rollout of its Marketplace service.[49] The search caught almost a million documents. The Commission subsequently narrowed the scope of its RFIs by reducing the number of search terms and the individuals concerned. Meta nonetheless sought the annulment of the RFI decision and interim relief to suspend the document production process, alleging a failure to state reasons and infringements to Meta's fundamental rights.[50]

On October 29, 2020, the General Court granted the requested suspension until a separate data room had been put in place to avoid Meta producing documents that were not linked to Meta's business and that contained sensitive personal data on Meta's employees.[51] The Commission responded by setting up a virtual data room, where documents Meta deemed non-responsive to the investigation and containing sensitive personal data could be examined by the Commission case team in the presence of Meta's outside counsel and if found responsive be redacted before being placed in the case file.

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[43] *See* Commission Press Release IP/23/2566, "Mergers: Commission clears Hydro's acquisition of Alumetal," May 4, 2023.

[44] *Aurubis/Metallo Group Holding* (Case COMP/M.9409), Commission decision of May 4, 2020.

In this case, the Commission also concluded that the merged parties market shares were moderate, that they weren't close competitors, and that there were a large number of alternative players on the market.

[45] The Commission defined these as acquisitions where "an incumbent acquires a potential competitor with an innovative project that is still at an early stage of its development and subsequently terminates the development of the target's innovation in order to avoid a replacement effect." *See* "Competition policy for the digital era," April 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf. *See* our March 2021 EU Competition Law Newsletter for more information on the Commission's scrutiny of killer acquisitions.

[46] *See* our July 2021 EU Competition Law Newsletter for an assessment of how the Commission is likely to use competition law to achieve the Green Deal's objectives. *See also* our October 2020 Alert Memorandum on how competition policy can support the Green Deal.

[47] *See* our Blog Post on the new EU antitrust guidelines for sustainability agreements.

[48] *Meta v. Commission* (Case T-451/20) EU:T:2023:276 and *Meta v. Commission* (Case T-452/20) EU:T:2023:277.

[49] Commission Decision C(2020) 3011 final of May 4, 2020, relating to a proceeding pursuant to Article 18(3) and to Article 24(1)(d) of Regulation (EC) No 1/2003 (Case AT.40628 - Facebook Data-related practices); and Commission Decision C(2020) 3013 final of May 4, 2020, relating to a proceeding under Article 18(3) and Article 24(1)(d) of Council Regulation (EC) No 1/2003 (Case AT.40684 – Facebook Marketplace).

[50] *Meta v. Commission* (Case T-451/20) EU:T:2023:276, para. 26; *Meta v. Commission* (Case T-452/20) EU:T:2023:277, para. 22.

[51] Order of October 29, 2020, *Facebook Ireland v. Commission* (Case T-451/20 R) EU:T:2020:515; Order of October 29, 2020, *Facebook Ireland v. Commission* (Case T-452/20 R) EU:T:2020:516.

Extensive Document Searches Are Justifiable

Meta challenged the RFIs under Article 18(3) of Regulation 1/2003[52] on the basis that the Commission failed to state sufficient reasons for the RFIs and sought to collect irrelevant documents because: (i) the search period was too long; (ii) the search terms in question were very common words or expressions that would capture a lot of irrelevant documents;[53] and (iii) sensitive personal data would not have been sufficiently protected in the course of the investigation.

However, the General Court held that the contested decision was only adopted at the preliminary investigation stage of the administrative procedure under Regulation 1/2003, which is intended to enable the Commission to gather all the relevant evidence to establish the existence of an antitrust infringement and to decide whether to open formal proceedings. On this basis, the Commission's document request was not disproportionate.

Moreover, while the obligation to state specific reasons is a fundamental requirement,[54] the Commission was not required to communicate all the information at its disposal concerning the suspected infringements, or to make a precise legal analysis of those infringements, provided it clearly indicated the allegations it intended to investigate.[55]

Finally, the General Court approved the Commission's virtual data room procedure as proportionate because it made it practically possible for the case team to assess responsiveness and Meta's personal data confidentiality claims prior to documents being included in the case file.[56]

Conclusion

Following in the footsteps of its U.S. counterparts, the Commission has increasingly been requesting millions of internal documents in complex antitrust and merger investigations. The judgment rubber stamps the Commission's practice and will therefore likely make it more challenging for parties to push back against the scope of the Commission's document requests going forward.

Amazon's "Buy Box" Appeal: No Right To A 'One-Stop-Shop' EU Abuse Investigation

The Court of Justice rejected Amazon's appeal against the Commission's decision to carveout Italy from the territorial scope of its "Buy Box" investigation, reiterating that there is no right to a 'one-stop-shop' EU abuse investigation.

Background

In November 2019, the Commission opened an abuse investigation regarding Amazon's criteria for selecting the sellers appearing in the so-called "Buy Box."[57] The Buy Box feature is displayed on Amazon's product page and allows customers to add items from retailers directly into their shopping carts. The Commission expressed concerns that the Buy Box could blead to favor Amazon's own retail offers as well as offers of marketplace sellers that use Amazon's logistics and delivery services.[58]

[52] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2004 L 1/1 (04.01.2003). RFIs can be issued by: simple request (Article 18(1)); or by decision (Article 18(3)). When the Commission issues RFIs by decision, it states the penalties or periodic penalty payments for failure to comply with the decision. Article 18(3) decisions require the Commission to state the legal basis and the purpose of the request.

[53] *Meta v. Commission* (Case T-451/20) EU:T:2023:276, para. 68; *Meta v. Commission* (Case T-452/20) EU:T:2023:277, para. 64.

[54] *Meta v. Commission* (Case T-451/20) EU:T:2023:276, para. 82; *Meta v. Commission* (Case T-452/20) EU:T:2023:277, para. 35.

[55] *Meta v. Commission* (Case T-451/20) EU:T:2023:276, para. 41; *Meta v. Commission* (Case T-452/20) EU:T:2023:27, para. 37.

[56] *Meta v. Commission* (Case T-451/20) EU:T:2023:276, para. 218; *Meta v. Commission* (Case T-452/20) EU:T:2023:277, para. 172.

[57] Commission Press Release IP/20/2077, "Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices," November 10, 2020. The case is referenced herein as AT.40703 – Amazon. *See also* our November 2020 Alert Memorandum, "The Commission Opens a Formal Probe and Second Investigation Into Amazon."

[58] Commission Press Release IP/22/7777, "Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime," December 20, 2022. The Commission's investigation also focused on the possibility for retailers to effectively reach Prime users. The Prime label enables retailers to offer products to users subscribed to Amazon's Prime loyalty program. The access to Prime customers offers a competitive edge because Prime customers generate more sales than non-Prime users. The Commission was concerned that this feature would lead to preferential treatment of Amazon's own retail business or of the sellers that use Amazon's logistics as Prime sellers were restricted in their choice of logistics and delivery service.

The Commission settled the Buy Box probe in December 2022,[59] together with a separate investigation into Amazon's data collection practices on its Marketplace platform, after the company offered a package of remedies[60] in which it committed to ensure equal access to the "Buy Box" selection. However the Commission carved out Italy from its decision because the Italian national competition authority had already started its own investigation into Amazon.[61] Amazon challenged the Italian carveout before the General Court.

Judgment of the General Court

In October 2021, the General Court dismissed Amazon's appeal.[62] The General Court held that Article 11(6) of Regulation 1/2003[63]—relieving Member States from their competence to bring proceedings against the same undertaking for the same anti-competitive practice occurring on the same product and geographical market or during the same period once the Commission already initiated proceedings—did not bar all types of parallel proceedings and thus did not give Amazon the right to have its case dealt with in its entirety by the Commission in this instance.[64] Amazon appealed to the Court of Justice.

Judgement of the Court of Justice

In dismissing Amazon's appeal, the Court of Justice held that Article 11(6) of Regulation 1/2003 did not provide an absolute protection against parallel antitrust proceedings.[65] The protection afforded by the said provision depends on the scope of the decision to initiate proceedings under Article 101 TFEU or Article 102 TFEU[66]—if the Commission opens formal proceedings covering the EEA, parallel proceedings are excluded; conversely, if the Commission carves-out certain EU Member States at the time of launching the formal proceedings (as it did in this case in relation to Italy), parallel proceedings are not excluded.[67] The Court of Justice emphasized the Commission's discretion in delineating the geographical scope of its investigation and held that there is no right to a 'one-stop-shop' EU abuse investigation if the Commission exercises that discretion.[68]

[59] Commission Press Release IP/22/7777, "Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime," December 20, 2022. *See also* our December 2022 EU Competition Law Newsletter.

[60] *See* our July 2022 EU Competition Law Newsletter.

[61] *See* our November 2021 Alert Memorandum, "The ICA Fines Amazon and Apple for Restricting Competition in the Sales of Apple and Beats Products on Amazon Marketplace."

[62] *Amazon v. Commission* (Case T-19/21) EU:T:2021:730, paras. 28, 31. The General Court held that an action for annulment was not available for intermediate measures taken in order to prepare for a definitive decision. The investigation procedure was rather designed to enable the undertakings concerned to communicate their views and to provide the Commission with information before the Commission adopts a decision affecting their interests. Its purpose was, therefore, to create procedural guarantees for the benefit of those undertakings (paras. 18-21).

[63] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2004 L 1/1 (04.01.2003) ("Regulation 1/2003").

[64] *Amazon v. Commission* (Case T-19/21) EU:T:2021:730, paras. 39, 45, 48.

[65] The Court of Justice stated that "the line of argument put forward by Amazon in support of this part of the single ground of appeal that Article 11(6) of Regulation No 1/2003 affords undertakings protection against parallel proceedings on the part of the competition authorities of the Member States and the Commission, protection which the Commission deprived it of by unlawfully excluding Italy from the territorial scope of the investigation opened by the decision at issue, is based on a manifestly incorrect interpretation of that provision" (*Amazon v. Commission* (Case C-815/21 P) EU:C:2023:308, para. 30).

[66] *Amazon v. Commission* (Case C-815/21 P) EU:C:2023:308, para. 32.

[67] *Amazon v. Commission* (Case C-815/21 P) EU:C:2023:308, para. 34.

[68] *Amazon v. Commission* (Case C-815/21 P) EU:C:2023:308, para. 36.

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