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EU Competition Law Newsletter

Highlights

— The Court of Justice Strengthens Rights of Defense of Companies in *Commission v. UPS*

— The Commission Fines MasterCard €570 Million for Hindering Merchants' Access to Better Conditions Offered by Banks Elsewhere in the EU

— 2018 Year-End Review: Record Amount of Competition Fines, Cartel Fines on the Decline, Increased Practice of Pull-and-Refile in Mergers

The Court of Justice Strengthens Rights of Defense of Companies in *Commission v. UPS*

Background

In 2013, the European Commission ("the Commission") prohibited the proposed acquisition of TNT by United Parcel Service ("UPS") on the basis that the merger could lead to a significant impediment of effective competition for intra-EEA express small package delivery services and result in increased prices. UPS offered a package of remedies, including divestment of TNT's subsidiaries in the 15 Member States where the Commission identified competition concerns.

The Commission considered that the proposed remedies were insufficient because they did not include an "up-front buyer" commitment. In addition, only a divestment to a pre-existing "integrator" (*i.e.*, a delivery company that controlled international integrated air and ground small package delivery networks) would provide a sufficient competitive constraint following the transaction. The Commission issued a decision blocking the transaction, which UPS appealed to the General Court.

Judgment under Appeal

The appeal focused on the fact that the Commission—after sending UPS the Statement of Objections, but two months before adopting its final decision—made non-negligible amendments to the econometric model it used to identify competition concerns. The General Court annulled the Commission decision, finding that the Commission had breached UPS's rights of defense by not giving it the opportunity to submit observations on the final, amended version of the econometric model on which the Commission's prohibition decision relied.[1] The Commission appealed to the Court of Justice.

[1] *United Parcel Service v. Commission* (Case T-194/13) EU:T:2017:144.

Judgment of the Court of Justice

On January 16, 2019, the Court of Justice upheld the General Court's judgment.[2] In particular, it confirmed that the principle of observance of the rights of defense requires the Commission to base its decisions only on objections which the parties have been able to comment on. The Court of Justice moreover agreed that the Commission should have disclosed the final version of its econometric model to the parties before adopting its final decision. It also upheld the General Court's finding that it was sufficient for UPS to show that there was "even a slight chance that it would have been better able to defend itself" had this procedural irregularity not occurred.[3] UPS was not required to show that the decision would have been different.

Implications

This judgment strengthens the rights of defense of parties involved in merger proceedings before the Commission. It confirms that before a merger decision is adopted, the parties must have been given the opportunity to "make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on".[4] In particular, if the Commission intends to base its objections to a proposed transaction on an econometric model—which the Court of Justice observed was an "appropriate" tool for analyzing the prospective effects of a merger—it must notify the parties of any non-negligible modifications to the model and allow them to submit comments before adopting a final decision. It remains to be seen if, as a result of this judgment, the Commission will rely less on econometric models going forward. It also remains to be seen how this judgment will impact UPS's ongoing damages litigation case before the General Court, where UPS Aviation Holdings DAC and ASL Airlines Ltd ("ASL") are respectively claiming €1.74 billion and €263.6 million in damages from the Commission for having prohibited the 2013 proposed acquisition of TNT Express.[5]

The Commission Fines MasterCard €570 Million for Hindering Merchants' Access to Better Conditions Offered by Banks Elsewhere in the EU

As reported in our December 2018 newsletter, the Commission fined MasterCard over €570 million for limiting merchants from benefitting from better conditions offered by banks established elsewhere in the EU.[6]

Background

By way of background, under the MasterCard scheme, banks offer card payment-related services. Issuing banks issue cards to cardholders and acquiring banks maintain merchants' bank accounts. When a consumer uses a debit or credit card in a shop/online, the acquiring bank pays a processing fee to the issuing bank. This is referred to as an interchange fee. The acquiring bank passes the interchange fee on to the relevant merchant, and this fee is included in the final price for consumers.

Commission Decision

The Commission decision of January 22, 2019, concerned MasterCard's obligation on acquiring banks to apply the interchange fee of the country in which the relevant merchant was located. This prevented merchants from shopping around for more competitive prices from acquiring banks located in lower interchange fee Member States. This in turn resulted in higher prices for

[2] *Commission v. United Parcel Service* (Case C-265/17 P) EU:C:2019:23.

[3] *United Parcel Service v. Commission*, (Case T-194/13) EU:T:2017:144, para. 210.

[4] *Commission v. United Parcel Service* (Case C-265/17 P) EU:C:2019:23, para. 31.

[5] EU Competition Law Newsletter, November 2018, p. 7.

[6] *MasterCard II* (Case COMP/AT.40049), Commission decision of January 22, 2019.

merchants and consumers, limited cross-border competition, and artificially segmented the Single Market. The Commission found this to be a breach of EU competition law and fined MasterCard over €570 million. The Commission held that the infringement only ended when, in December 2015, MasterCard amended its rules as a result of the entry into force of the Interchange Fee Regulation, whereby interchange fees in the EEA were capped (and no longer varied significantly from one Member State to another). MasterCard was granted a 10% fine reduction for cooperation with the Commission shortly after the Commission published a Fact Sheet on the reduction of fines for cooperation in non-cartel cases based on its experience in the *Guess* decision.[7] Both developments were reported in detail in our December 2018 newsletter.[8]

Wider Context

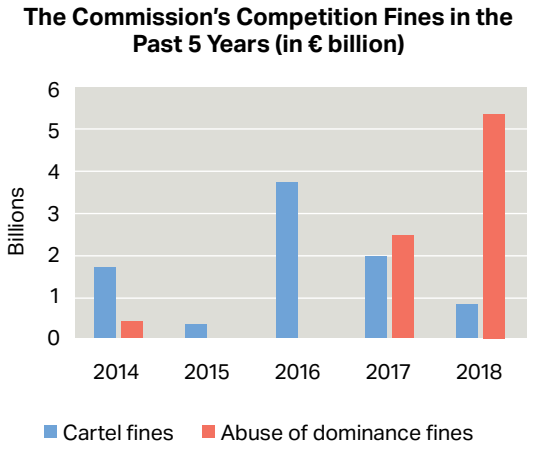
The fine against MasterCard is the latest in a string of antitrust investigations into card payment schemes at both EU and national level. These investigations largely revolved around Multilateral Interchange Fees ("MIFs") paid by acquiring banks to issuing banks. MIFs constitute a default fee decided by the MasterCard scheme in the event that banks do not bilaterally negotiate an interchange fee. The Commission found that MIFs established a floor which acquiring banks could not compete away and, as a result, they inflated the merchant service charge payable by retailers to acquiring banks. The Commission found that this ultimately increased prices for all consumers and constituted a restriction of competition within the meaning of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

2018 Year-End Review: Record Amount of Competition Fines, Cartel Fines on the Decline, Increased Practice of Pull-and-Refile in Mergers

The Commission issued fines totaling €6.5 billion in 2018, which is a new record and almost double the amount of competition fines in 2017.

Cartel and Abuse of Dominance Fines

Despite the increase of competition fines in general, cartel fines are on the decline according to recently published statistics. The Commission issued fines of less than €1 billion in cartel proceedings and announced only four dawn raids in 2018. In comparison, the Commission issued fines of approximately €1.9 billion for cartel infringements and announced seven dawn raids in 2017. Fines for abuse of dominance remained at the top of the list in 2018, as a result of large-scale fines issued against Google and Qualcomm.



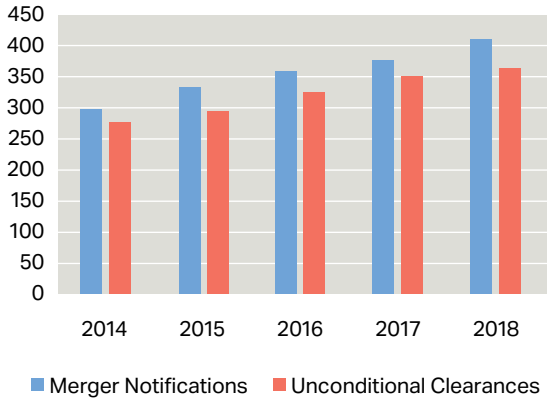
[7] *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018.

[8] EU Competition Law Newsletter, December 2018.

Merger Control

2018 was also a record year for merger control with 414 mergers notified to the Commission. No mergers were prohibited by the Commission in 2018. However, in *Aperam/VDM*[9] and *Celanese/Blackstone/JV*[10], the parties abandoned the transactions during the Phase II investigation.

Annual Merger Notifications Over Time



In addition, the use of the pull-and-refile strategy in the EU has become more frequent in 2018. This is a common strategy in the US to avoid an in-depth investigation. Both *Quaker/Global Houghton*[11] and *Knauf/Armstrong*[12] were conditionally cleared in Phase I by the Commission after the pull-and-refile. Although this strategy was used in earlier years, for example in *Boehringer Ingelheim/Sanofi*,[13] pre-notification discussions have instead generally been used as a major tool to avoid Phase II investigations in the EU and they continue to be frequently used if an in-depth investigation is expected.

The average length of pre-notification discussions has been gradually increasing since the 1990s. The average duration of pre-notification discussions for Phase II decisions was 185 days in 2018 as opposed to 158 days in the 2011-2017 time period. The average duration of investigations (from public announcement to the Commission decision) for Phase II cases has also increased from 336 days in the 2011-2017 time period to 404 days in 2018.

News

Commission Updates

The Commission Conditionally Approves *BASF/Solvay* Creating a "significant European player" in the Nylon Compound Market

On January 18, 2019, following a Phase II investigation, the Commission conditionally cleared BASF's acquisition of Solvay's nylon business, which created a leading player in the nylon compound market.[14] The Commission was concerned that, without commitments, the parties would have been able to foreclose the market for key nylon inputs because of their strong market power.

In order to address the Commission's concerns, the parties offered to divest Solvay's nylon production facilities in France, Poland, and Spain. The parties also committed to create a production joint venture in France with the buyer of the divestment business and to enter into long-term supply agreements for Adiponitrile, a key input for nylon fibers.

The decision allows for "the creation of a significant European player"[15] in the nylon compound market whilst the Commission's policy toward creating European champions has been widely debated by various stakeholders. In December 2018, 19 EU Member States issued a joint statement calling for a reform in European competition law to enable the

[9] *Aperam/VDM* (Case COMP/M.8907), Commission decision of December 21, 2018.

[10] *Celanese/Blackstone/JV* (Case COMP/M.8547), Commission decision of March 19, 2018.

[11] *Quaker/Global/Houghton* (Case COMP/M.8492), Commission decision of December 11, 2018.

[12] *Knauf/Armstrong* (Case COMP/M.8832), Commission decision of December 7, 2018.

[13] *Boehringer Ingelheim/Sanofi* (Case COMP/M.7917), Commission decision of November 9, 2018.

[14] *BASF/Solvay's EP and P&I Business* (Case COMP/M.8674), Commission decision of January 18, 2019.

[15] Commission Press Release IP/19/522, "Mergers: Commission approves BASF's acquisition of Solvay's nylon business, subject to conditions", January 18, 2019.

creation of "European champions". They drew attention to the emerging national champions outside Europe that lead to increasing global competition and which are supported by national governments. They called on the EU to "take account, in its competition policy, the evolution of the global competitive environment in terms of investment, trade and industry".

In the same context, the Commission prohibited the *Siemens/Alstom* transaction on February 6, 2019, which, as commentators have also noted, would have created a European champion able to compete with emerging national champions outside Europe, in particular from China.[16] The Commission dismissed this argument and found that the transaction would have harmed competition in markets for railway signaling systems and very high speed trains.

Commissioner Vestager Reiterates Concerns Over Online Platforms and Announces "more [cases] to come", as well as Plans to Hire Experts and Buy Software for Speedier Assessment of Cases in the Digital Sector

During a speech delivered at the Paris Institute of Political Studies (Sciences Po) on January 21, 2019, Commissioner Vestager indicated that more cases concerning online platforms are to be expected.

The Commission fined Google €2.42 billion in June 2017 for abusing its dominant position as a search engine by giving an illegal advantage to its own comparison shopping service, and €4.34 billion in July 2018 for illegal practices regarding Android mobile devices to strengthen the dominant position of Google's search engine. Currently, the Commission is investigating Amazon's use of third-party merchant data on its platform. Commissioner Vestager indicated that "[t]hese are the most recent cases. We have more to come". Indeed, there are several more high-profile cases at both EU and national level pending, such as the Commission's on-going investigations into Google AdSense and Amazon merchant data collection, the Austrian Competition Authority's probe into Amazon's marketplace dominance or the recent German Competition Authority's *Facebook* decision.

The Commission's Competition Directorate is also seeking a new budget line specifically for tools to prosecute cases in the digital sector. Commissioner Vestager stated that the Commission's proposal for a special €140 million budget dedicated to digital tools will, *e.g.*, include the hiring or contracting of experts. The special budget shall cover "all sorts of digital tools" to help improve access to file, data-mining, forensic IT or store large amounts of data. The separate budget line is for the next seven-year Multiannual Financial Framework—the EU funding mechanism—which runs from 2021 to 2027.

These statements highlight the continued interest of the Commission in the digital sector.

The Commission Continues to Target Aggressive Tax Arrangements for Multinationals

The Commission continues its policy of targeting aggressive tax arrangements for multinationals (*Apple*[17]—Irish tax benefits case; *Engie*[18] and *McDonald's*[19]—Luxembourg tax benefits cases) as can be seen from the opening of a state aid investigation into a tax ruling granted by the Netherlands to Nike.

Nike and Converse obtained licenses to use intellectual property rights relating to products in the EMEA region. The two companies obtained the licenses in return for a tax-deductible royalty payment, from two Nike group entities, which are currently Dutch entities that are not taxable in the Netherlands.

From 2006 to 2015, the Dutch tax authorities issued five tax rulings endorsing a method to calculate the royalty to be paid by Nike.

[16] *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019.

[17] Commission Decision C (2017) 5605 of August 30, 2016 (State Aid SA.38373 (2014 / C) (ex 2014 NN) (ex 2014 / CP), OJ 2017 L 187/1.

[18] Commission Decision C (2018) 3839 of June 20, 2018 (State Aid) SA.44888 (2016 / C) (ex 2016 / NN)), not yet published. Commission Press Release IP/18/4228, "State aid: Commission finds Luxembourg gave illegal tax benefits to Engie; has to recover around €120 million", June 20, 2018.

[19] Commission Decision C (2018) 6076 of September 19, 2018 (State Aid SA.38945 (2015 / C) (ex 2015 / NN)), not yet published. Press Release IP/18/5831, "State aid: Commission investigation did not find that Luxembourg gave selective tax treatment to McDonald's", September 19, 2018.

The Commission is concerned that the royalty payments endorsed by the rulings may not reflect the economic reality as they appear to be higher than what independent companies negotiating on market terms would have agreed between themselves.

Courts

Advocate General Kokott Issues an Opinion on the Scope of Application of the Private Damages Directive

On January 17, 2019, Advocate General Kokott issued an opinion[20] on the scope of application of the Private Damages Directive[21] ("Directive") in the context of a preliminary ruling request from the Lisbon Commercial Court.

The Portuguese competition authority in 2013 found that Sport TV, Portugal's main pay TV sports channel, had abused its dominant position under both Portuguese and EU competition law. Upon appeal, the Court of Competition, Regulation, and Supervision found in June 2014 that Sport TV's conduct constituted an abuse of a dominant position pursuant to Portuguese law, but that EU competition law was not applicable to the case.

In 2015, *i.e.*, before the deadline for Member States to transpose the Directive had lapsed, television cable company Cogeco filed a private damages claim against Sport TV for the amount of €11.5 million. The claim was filed before Portugal had implemented the Directive and even before Member States were obliged to transpose it.[22]

In its preliminary reference, the Lisbon Commercial Court asked, among other things, whether the Directive applies to the merits of the case even though the Court of Competition, Regulation, and Supervision found that EU law was not applicable to the case, and whether the claimant could rely on the Directive in a case where the facts occurred before the Directive was adopted and even before it had to be transposed into national law.

Advocate General Kokott noted that the underlying facts of the case arose before the adoption and entry into force of the Directive, and that Cogeco's action for damages was brought at a time after the entry into force of the Directive, but before the expiry of its transposition period. According to Advocate General Kokott, the temporal scope of the Directive is limited in the sense that there is a general prohibition to apply substantive provisions retroactively. However, the Advocate General held that some of the Directive's procedural provisions could apply to actions brought before national courts between the date of entry into force of the Directive and the lapse of the period prescribed for its transposition, even where the facts of the case arose prior to the entry into force of the Directive. As the relevant provisions of the Directive in the present case did not fall into this category, they could not be applied.

Advocate General Kokott concluded that where an action for damages under civil law relates to a situation outside the temporal scope of the Directive, there is no obligation to interpret national law in accordance with that Directive. The obligation to interpret national law in accordance with Article 102 of the TFEU, in so far as it is applicable, remains unaffected.

Advocate General Wahl Provides Guidance on "unforeseeable circumstances or *force majeure*" in *RF v. Commission*

On January 24, 2019, Advocate General Wahl issued an opinion in a Polish company's ("RF") appeal before the Court of Justice and provided guidance on "unforeseeable circumstances or *force majeure*" in the context of a failure to comply with the time limit for lodging an application before the General Court.[23]

[20] *Cogeco Communications* (Case C-637/17), opinion of Advocate General Kokott, EU:C:2018:628,.

[21] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1.

[22] The Directive entered into force in December 2014. Member States had two years from that date to implement it, *i.e.*, until December 2016.

[23] *RF v Commission* (Case C-660/17 P), opinion of Advocate General Wahl, EU:C:2019:67.

In 2016, the Commission adopted a decision rejecting an antitrust complaint in the rail transport freight forwarding sector.[24] RF appealed the decision to the General Court, which in 2017 dismissed the case because the application had been lodged out of time. The General Court considered that RF had not been able to establish the existence of unforeseeable circumstances or of *force majeure* to justify its failure to lodge its appeal in time. The General Court ruled that only an unavoidable event can be regarded as an unforeseeable circumstance or *force majeure*.

According to settled case law, the test for unforeseeable circumstances or *force majeure* consists of an objective and a subjective limb.[25] The objective limb relates to "abnormal circumstances unconnected with the party" and the subjective element involves the "obligation (...) to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices."[26]

According to Advocate General Wahl, to satisfy the objective element, it should be sufficient for a party to show that the failure to comply with the prescribed time limit was caused by an unusual delay in the particular circumstances of the case (such as distance or time of the year). The General Court therefore erred in law in concluding that a party may be exempted from time-bar only if the failure to comply with the prescribed time limit was caused by an unavoidable event.

However, Advocate General Wahl concluded that this error should not cause the order under appeal to be set aside. According to settled case law, where the grounds of a decision of the General Court are vitiated by an error of law, but its operative part is well founded on other legal grounds, such an error should not cause that decision to be set aside, and the grounds should be substituted. Because the General Court examined the measures RF had taken to avoid exceeding the prescribed time limit, the legal error identified does not affect the operative part of the order under appeal.

[24] *PL - Rail transport freight forwarding* - PKP Cargo (Case COMP/40251), Commission decision of September 15, 2016.

[25] *Bayer v. Commission* (Case C-195/91 P) EU:C:1994:412.

[26] *RF v Commission* (Case C-660/17 P), opinion of Advocate General Wahl, EU:C:2019:67, para. 32.

Upcoming Events

Date	Conference	Organizer	Location
February 18	Is the role of the competition authorities restricted to sanctions only?	Concurrences + Fréget & Associés + Analysis Group	Paris
February 21	3rd Annual W@Competition Conference	W@Competition	Brussels
February 21	Purchasing power and reconciliation of central purchasing bodies: Which control of the competition authorities?	Concurrences + Fréget & Associés + Analysis Group	Paris
February 21	The New Cooperation Procedure in EU Antitrust Cases	AntitrustItalia	Brussels
February 21—February 22	Annual Conference on EU Law in the Pharmaceutical Sector 2019	ERA	Brussels
February 22	106th GCLC Lunch Talk: "Do you have a new dawn for third parties?"	GCLC	Brussels
February 26	Private Enforcement of Competition law	Knect365	Brussels
February 28	GCR Live Pharmaceuticals	GCR	Washington, DC
March 1	Innovation Economics for Antitrust Lawyers Conference	Concurrences + King's College London	London
March 7—March 8	GCR Live Singapore - 8th Annual Asia Pacific Law Leaders Forum	GCR	Singapore
March 13—March 15	19th International Conference on Competition	Bundeskartellamt	Berlin
March 26	GCR Live 4th Annual Cartels	GCR	Washington, DC

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