June 2019

EU Competition Law Newsletter

Highlights

— The Commission Opens An Investigation Into Broadcom And Seeks To Impose Interim Measures For The First Time In 18 Years

— The Commission Fines Canon €28 Million For Gun-Jumping

— The Online Platform Regulation: Codifying Disclosure Obligations For Online Intermediation Services And Search Engines

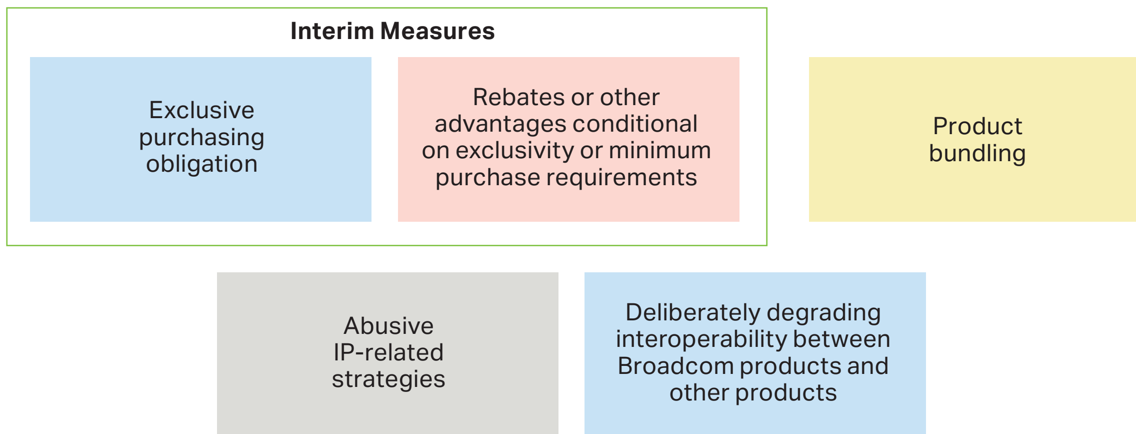
The Commission Opens An Investigation Into Broadcom And Seeks To Impose Interim Measures For The First Time In 18 Years

On June 26, 2019, the Commission opened a formal investigation into whether Broadcom's contractual requirements, IP practices, and technological developments relating to TV and modem chipsets infringed Article 102 TFEU. Simultaneously, the Commission issued a statement of objections seeking to impose interim measures against Broadcom's alleged abusive exclusivity clauses. This is the first time in 18 years that the Commission makes use of this legal instrument.[1]

The Commission's investigation focuses on five alleged practices relating to the manufacturing and sale of TV and modem chipsets: (i) exclusive purchasing obligations; (ii) rebates or other advantages conditioned on exclusivity or minimum purchase requirements; (iii) product bundling; (iv) abusive IP-related strategies; and (v) deliberate degradation of interoperability between Broadcom's products and other products.

The Commission also announced that it had sent Broadcom a statement of objections seeking to impose interim measures regarding two of the practices under investigation: Broadcom's alleged use of exclusive purchasing obligations and grant of rebates conditioned on exclusivity or minimum purchases.

[1] Commission Press Release IP/19/3410, "Antitrust: Commission opens investigation into Broadcom and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets." June 26, 2019.



The U.S. Federal Trade Commission has also opened an investigation into Broadcom over similar concerns.[2]

The "hunt" for an interim measures case

The last time the Commission imposed interim measures was in *IMS Health*[3] in 2001. This case resulted in the interim measures being overturned by the Court of Justice. The Court suspended the Commission's interim measures due to: (i) doubts over the correctness of the Commission's legal assessment that could only be resolved in the judgment on the merits; and (ii) no risk of serious and irreparable harm to IMS Health. While Article 8 of Regulation 1/2003 later introduced a statutory basis for the Commission to impose interim measures, it has never been used to-date.

The Commission's previous lack of appetite to bring a case mandating interim measures is due in part to the high standard required to impose them. Under Article 8, the Commission may only impose interim measures "in cases of urgency due to the risk of serious and irreparable damage to competition," and it must also be able to demonstrate a "*prima facie* finding of infringement." Commissioner Vestager herself described these criteria as a "very high bar."[4]

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of *prima facie* finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

[2] Reuters, FTC Investigating Broadcom for Antitrust Practices, January 17, 2018, available at: https://www.reuters.com/article/us-broadcom-ftc-idUSKBN1F62H8.

[3] *NDC Health/IMS Health: Interim measures* (Case COMP D3/38.044), Commission decision of July 3, 2001.

[4] Financial Times, EU considers tougher competition powers, July 2, 2017, available at: https://www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895.

There are several reasons why the Commission may consider *Broadcom* an appropriate case for interim measures. First, the investigation concerns exclusivity obligations—one of the most established theories of harm in EU competition law dating back to *Hoffman La Roche* in the late 1970s.[5] This should help the Commission meet both limbs of the test. A well-established theory will make it easier to show a *prima facie* case. It should also make it easier to claim a risk of serious and irreparable damage to competition because exclusivity-based conduct inherently creates, as the name suggests, a risk of exclusion. Second, the Commission reportedly has evidence of several of Broadcom's rivals teetering on the brink of exiting the market.[6] Third, procurement in this space often involves tenders, which means that the Commission may consider damage to competition more likely and new entry more difficult. Similarly, the Commission may argue that economies of scale in the segments under investigation may exacerbate any potential effects.[7]

What's next

Following the statement of objections, Broadcom can respond within two weeks. This period can be extended to account for Broadcom's procedural rights, such as the right to access the file. Should the Commission then issue a decision imposing interim measures, Broadcom could appeal to the General Court. An appeal would not in itself have suspensory effect on the interim measures imposed.

Broadcom could, however, also apply to the Court for interim relief from the Commission's interim measures, as IMS did in 2001.[8] Interim relief is not often granted by the European Courts. There are few instances of successful actions in antitrust cases.[9] If obtained here, the Court order would suspend application of the Commission's interim measures during the appeal against them. While the Court expedites hearings on interim measures, it would still delay application of the measures mandated by the Commission by several months.

The outcome of this case, which is unlikely to be concluded under Commissioner Vestager, could dictate the Commission's approach to interim measures for years to come. Success may revitalize the Commission's use of the tool. A repeat of the *IMS* experience may conversely see interim measures fall out of the enforcer's toolbox for another twenty years.

The Commission Fines Canon €28 Million For Gun-Jumping

On June 27, 2019, the Commission imposed two fines totaling €28 million on Canon in the context of its acquisition of Toshiba Medical Systems Corporation ("TMSC"). The first fine of €14 million was levied for Canon's failure to notify the Commission prior to the implementation of the transaction in violation of Article 4(1) of the EU Merger Regulation ("EUMR"). The second fine of €14 million, was imposed as a result of Canon implementing the transaction prior to obtaining clearance, breaching Article 7(1) EUMR.

Canon's acquisition of TMSC

In 2016, Canon acquired TMSC through a so-called "warehousing" two-step transaction:

— **Step 1**—Before notification of its proposed transaction to the Commission, Canon paid €5.28 billion for 5% of the share capital of TMSC, with non-controlling voting rights and an option to acquire all of TMSC's shares. This option was exercisable only upon receipt of antitrust clearance. At the same time, an

[5] *Hoffman-La Roche v. Commission* (Case 85/76), EU:C:1979:36.

[6] MLex, Comment: Broadcom's modem terms are testing ground for EU 'interim measures' renaissance, June 26, 2019, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1106884&siteid=190&rdir=1.

[7] *Ibid*.

[8] *See IMS Health v. Commission* (Case T-184/01 R), EU:T:2001:259; NDC Health v. IMS (Case C-481/01 P(R)), EU:C:2002:223.

[9] Apart from *IMS Health* cited above, the claimants managed to successfully obtain interim relief from the Courts in, for example, *Van den Bergh Foods Ltd. v. Commission* (Case T-65/98 R), EU:T:1998:155 and *Bayer AG v. Commission* (Case T-41/96 R), EU:T:1996:68.

interim buyer paid €800 for the remaining 95% of TMSC's share capital, including their voting rights;

— **Step 2**—Following antitrust approvals, Canon exercised its option rights and acquired 100% of TMSC.

Canon notified the Commission of the transaction between the two steps, and the Commission cleared the transaction on September 19, 2016. Subsequently, the Commission issued a statement of objections and a supplementary statement of objections taking issue with Canon having completed the first step of the transaction prior to notification and clearance. In the Commission's view, Canon only notified the transaction after it had already partially implemented it through the earlier, preliminary step. Because the Commission took the view that both steps together qualified as a single, notifiable transaction, by completing the first step prior to notification and clearance, Canon had failed to respect both the corresponding requirements of the EUMR.[10]

Canon's deal structure has triggered similar concerns from other antitrust authorities, including in China, where Canon was fined for gun-jumping, and in the U.S., where Canon agreed to pay $5 million for failure to observe the required waiting period.

Previous cases

Although this is the first fine imposed by the Commission for gun-jumping involving a warehousing structure, it is not the first case to highlight the Commission's attentiveness to breaches of the notification and standstill obligations:

— Marine Harvest acquired a 48.5% stake in Morpol's share capital from a single buyer, and later increased its shareholding to 87.1% through a public bid. The transaction was notified to the Commission prior to conclusion of the public bid, but after the acquisition of the initial stake. The Commission found that the first step was sufficient in itself to grant control and therefore triggered the notification obligation. The Commission fined Marine Harvest €20 million in 2014.[11]

— In 2018, the Commission fined Altice €124.5 million for implementing the acquisition of PT Portugal before obtaining approval under the EUMR.[12] The Commission found that, while a buyer may intervene in the management of a target prior to closing to preserve the target's value, Altice's involvement in PT Portugal went beyond that, as Altice had control over decisions occurring in the "ordinary course of business."[13]

The Court of Justice recently clarified some elements of the standstill obligation in the *Ernst & Young* case.[14] KPMG Denmark publicly announced that it was withdrawing from the KPMG International network due to its acquisition by Ernst & Young. The Danish Competition Authority viewed this announcement as gun-jumping. Ernst & Young appealed and the Danish court referred the case to the Court of Justice. The Court clarified that the standstill obligation only covers transactions which "in whole or in part, in fact or in law, contribute to the change in control of the target," and it should not apply to measures that "precede and are severable from the measures leading to the control of the target undertaking."[15]

[10] The Commission's Jurisdictional Notice explains that, in two-step transactions involving an interim buyer, the first step may trigger the EUMR requirements even if it does not confer control rights to the ultimate buyer during the interim period. *See* Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C95/01), para. 35.

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

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

[13] In both *Marine Harvest* and *Altice*, the Commission imposed two equal fines for violating both the notification requirement and standstill obligation. The two companies raised the principle of *ne bis in idem* in their respective appeals before the Court of Justice. *See Marine Harvest v. Commission* (Case C-10/18 P), case pending; and *Altice v. Commission* (Case T-425/18), case pending.

[14] *Ernst & Young P/S v. Konkurrencerådet* (Case C-633/16), EU:C:2018:371.

[15] *Ernst & Young P/S v. Konkurrencerådet* (Case C-633/16), EU:C:2018:371 para. 62 and para. 78.

Practical considerations

A critical question is whether a given transaction "contributes" to a change in control or whether it is a preceding, severable measure or transaction. This is not always a straightforward determination to make. In *Canon* it was worth €28 million.

Prior practice suggests that the Commission will generally look for whether there is a degree of conditionality between the transactions. This conditionality may be legal, where one transaction is contractually triggered by the other, or it may be factual, where one transaction is linked to the other by a common purpose.

Facts that militate in favor of considering a series of transactions as a single concentration include the timing between the transactions, the objectives pursued by each transaction, and their interdependence from the perspective of the acquirer. As always, internal documents matter. These can evidence that transactions, even though separate in time, are part of an overall strategy to gain control over a target.

The Commission's broad interpretation of the EUMR's notification and standstill obligations can therefore have a real impact on how to structure transactions.[16] Under certain circumstances, however, derogations are possible:

— In *Ryanair/LaudaMotion*, the Commission granted two derogations from the suspensive period. The first was granted because without it LaudaMotion would have been forced to reduce its scheduled flights and forego access to airport slots, jeopardizing its ability to operate independently. The second, later derogation allowed Ryanair to lease further aircrafts to LaudaMotion and provide operational support.[17]

— In *Orkla/Elkem*, the Commission granted a derogation from the suspensive period in order to respond to a risk of share price manipulation. The Commission allowed Orkla, which already held approximately 40% of Elkem's shares, to purchase Elkem's outstanding shares, which would have granted it control over the whole company. Compliance with the suspensory obligation would have created a risk for the share price to artificially increase in view of limited free float.[18]

Derogations are therefore more likely to be granted when there is evidence that the suspension creates financial difficulties and where competition concerns around the concentration appear limited.

The Online Platform Regulation: Codifying Disclosure Obligations For Online Intermediation Services And Search Engines

On June 14, 2019, the European Council adopted the "Regulation on promoting fairness and transparency for business users of online intermediation services" (the "Regulation").[19] The Regulation seeks to address a range of issues in online search and intermediation platform-to-business relationships. It is the first piece of EU legislation to do so.

The Regulation's focus and structure

The stated purpose of the Regulation is to guarantee transparency, fairness, and "effective

[16] The standstill approach does not prevent shares being transferred in deals involving public bids, provided that the transaction is notified under the EUMR and the buyer does not exercise the voting rights attached to them (or, if it does, only does so to maintain the full value of the investment based on a derogation granted by the Commission).

[17] *Ryanair/LaudaMotion* (Case COMP/M.8869), Commission decision of July 12, 2018.

[18] *Orkla/Elkem* (Case COMP/M.3709), Commission decision of March 4, 2005.

[19] Regulation (EU) 2019/1150 of the European Parliament (EP) and of the Council of June 20, 2019 on promoting fairness and transparency for business users of online intermediation services was published in the Official Journal on July 11, 2019. Publication in the Official Journal follows formal first-reading adoption by the Economic and Financial Affairs Council on June 14, 2019 and by the EP on April 17, 2019. The European Commission adopted its proposal for this Regulation on April 26, 2018 as part of its Digital Single Market Strategy.

redress" for business users of online platforms. It applies to two main types of platforms: online search engines, such as Google, Yahoo, and Bing, and online intermediation service providers, such as e-commerce market places like Amazon and eBay, app stores, and business pages on social media sites. The Regulation chooses this focus because it considers that many business users and corporate-website operators increasingly "depend" on such services.

Requirements applying to both intermediation service providers and search engines

Articles 5 and 7 cover ranking and differentiated treatment. They mandate different transparency requirements depending on the type of service they cover.

Ranking. Under Article 5, platforms are required to set out the main parameters determining ranking and explain their "relative importance." Online search engines should provide this information in "an easily and publicly available description, drafted in plain and intelligible language." Intermediation platforms, however, only need to provide it in their terms and conditions, among other requirements. Both types of service must clearly indicate whether or not payment can influence ranking.

Where an online search service has altered the ranking in a "specific case" based on a "third-party notification," it must make the contents of that notification available to the website that was impacted.

The Regulation clarifies that the requirements do not imply that any service will need to disclose algorithms or information that would likely allow for the manipulation of the results.[20] It also explains that Guidelines on the transparency requirements will follow.

Differentiated treatment. Article 7 deals with situations where platforms provide sets of results that include results sourced from their own service. For intermediation services, this may include, for example, a merchant platform that hosts third-party sellers' goods but also sells goods itself. The Regulation requires that online platforms describe in a transparent manner any differentiated treatment they grant their own goods or services compared to those of other business users. Article 7(3) seeks to give a degree of clarity as to what should be mentioned in the platforms' explanations to businesses around this issue. It lists factors such as data, payment, and ranking, but the precise interplay of these factors with the platforms' own services are not clear. Guidance from the Commission along the lines of that mentioned in Article 5 would likely also be useful here.

Requirements applying only to intermediation service providers

"Most-favoured-nation" clauses. If an intermediation service restricts a business' ability to offer the same goods and services to consumers under different conditions elsewhere, it must explain this restriction in its terms and conditions.[21] This provision appears designed to address contractual terms like parity requirements or "most-favoured-nation" ("MFN") clauses. These terms have previously given rise to antitrust scrutiny, for instance, in the Amazon e-books case.[22] This issue is still a live one, as exemplified by the recent complaint made by Nustay against Booking.com and Expedia, which is discussed in this month's EU Competition Newsletter.

Ancillary services. The regulation also introduces a requirement that the terms and conditions of online intermediation services set out whether ancillary goods and services are offered by the platform or by third parties and if so, under what conditions business users of the platform may also offer their own.[23] This too has been an area of

[20] This issue is also discussed in the Preamble, ¶27, which stipulates that platforms' "ability to act against bad faith manipulation of ranking by third parties, including in the interest of consumers, should [...] not be impaired." As such, only a "general description" of the ranking mechanisms is required.

[21] See Article 10 of the Regulation.

[22] *See E-Book MFNS and related matters* (Case AT.40153), Commission decision of May 4, 2017.

[23] See Article 6 of the Regulation.

antitrust activity. The Italian Competition Authority is investigating Amazon for alleged discrimination on its market-place in favor of merchants using Amazon's logistics services.[24]

Access to Data. Online intermediation services are required to provide business users with a clear explanation of the scope, nature, and conditions of their access to data.[25] The goal is to inform business users of the sort of data that the platform may be collecting from their participation.

Terms, conditions, and terminations. The Regulation also touches on the accessibility of the terms and conditions used by online intermediation service providers.[26] These terms and conditions should explain potential reasons for termination. Were termination or suspension to occur, the intermediation service provider must give prior notice to the business user and justify the action.[27]

Dispute resolution. Online intermediation providers are required to establish an internal complaint-handling system.[28] This system must be easily accessible and free to use for business users. These providers will also have to identify mediators that are willing to engage in settling disputes.[29] Additionally, companies can take legal action directly against a platform for infringing the Regulation. Recognizing that business users may be deterred from settling disputes individually for financial reasons or fear of retaliation, the Regulation establishes that collective proceedings may be brought by representative associations with a legitimate interest.[30]

Conclusion

Although legislation in this area is a new step, online platforms have already been subject to considerable political and antitrust scrutiny for some time, especially in Europe. For instance, in the ongoing Amazon investigation, the Commission is scrutinizing how *Amazon* uses the data of third-party merchants that rely on its platform to improve its own product positioning, which competes against theirs. This scrutiny is also becoming increasingly common abroad. The themes at the center of most of these cases, including "self-preferencing," ranking, and access to data to name but a few, are similar to those in the Regulation.

The extent to which these transparency requirements will require platforms to change their current practices is not yet clear. Many online platforms already disclose that certain content is paid for; explain their ranking mechanisms; and stipulate that they offer services that may compete with the sellers they host.

[24] See Italian Competition Authority Press Release of April 16, 2019 available at: https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services.

[25] See Article 9 of the Regulation.

[26] See Article 3 of the Regulation.

[27] See Article 4 of the Regulation.

[28] See Article 11 of the Regulation.

[29] See Article 12 of the Regulation.

[30] See Article 14 of the Regulation.

News

Commission Updates

Complaint Against Booking.com And Expedia Brings Hotel Booking Parity Clauses To The Commission's Docket

On June 11, 2019, Nustay, a Danish online booking agency, filed a complaint with the Commission against Expedia and Booking.com, alleging a breach of Articles 101 and 102 TFEU. The complaint centers on parity clauses in online hotel booking. In 2015, both Expedia and Booking.com agreed with the Danish Competition Authority to remove wide price-parity clauses from their contracts with hotels.[31] Nustay alleges that these two companies have *de facto* re-introduced these clauses through certain commercial practices.

Booking platform parity clauses have been a recent focus of national competition authorities, leading to partially diverging decisions across Europe. Nustay's complaint may therefore offer an opportunity for the Commission to harmonize antitrust enforcement with respect to these clauses.

Theories of harm

Nustay alleges that Expedia and Booking.com are imposing commercial penalties on hotels that show cheaper offers on Nustay than on their platforms. The penalties include downgrading a hotel's ranking on Expedia's and Booking.com's websites and moving the hotel's offer to other, allegedly less attractive, inventory plans. One example of an inventory plan is Booking.basic, which does not allow customers to make any special requests, alter bookings, request invoices, or receive money back in case of cancellation. This strategy—which Nustay describes as amounting to the enforcement of a wide price-parity clause—would allegedly prevent customers from benefitting from lower prices, especially in view of Expedia's and Booking.com's strong position in this space. Industry reports suggest their combined share of a European-wide market for online hotel bookings has been estimated to be around 80% and is likely in the same order of magnitude in Denmark.[32]

Online hotel booking has been a focus for national competition authorities

Nustay's complaint comes against a background of considerable scrutiny of online booking platforms' conduct at Member State level in recent years:

— In December 2013, the German Competition Authority prohibited wide price-parity clauses in proceedings against HRS, a German online hotel booking platform. These clauses expressly prohibited hotel operators from offering rival platforms a cheaper rate. The German Competition Authority's decision was upheld by the Düsseldorf Higher Regional Court in January 2015.

— In 2015, Booking.com agreed with competition regulators in France, Italy, and Sweden to remove wide price-parity clauses, but maintained narrow price-parity clauses that prohibited hotels from offering a cheaper price on their own website compared to the price they offered on Booking.com.

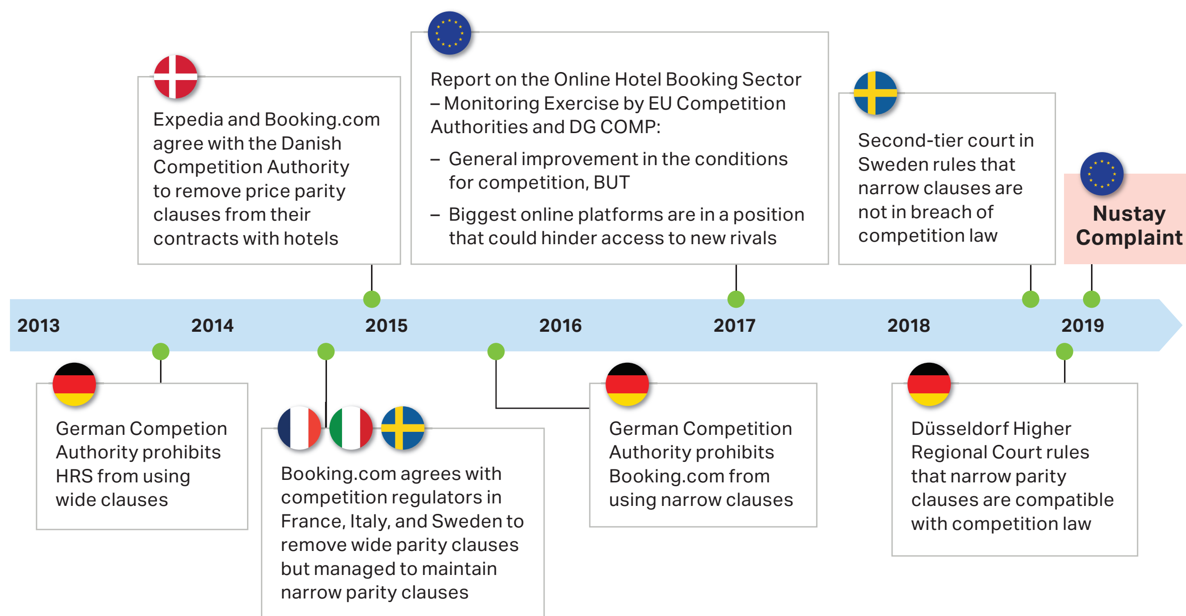
— In the same year, the German Competition Authority prohibited Booking.com from using narrow price-parity clauses. In June 2019, however, the Düsseldorf Higher Regional Court ruled that narrow price-parity clauses are compatible with competition law. It found that these clauses can prevent free riding from hotels where customers find the hotel on the online booking platform but later book the room at the lower price on the hotel's own website; thereby benefitting from the platform's service while avoiding the platform's fees. The German Competition Authority has appealed this judgment.

[31] Wide price-parity clauses expressly prohibit hotel operators from offering rival platforms a cheaper rate, whereas narrow price-parity clauses prohibit hotels from offering a cheaper price on their own website.

[32] *See*, for instance, the following industry reports, available at: https://medium.com/traveltechmedia/the-state-of-online-travel-agencies-2019-8b188e8661ac; https://www.statista.com/statistics/870046/online-travel-agency-ota-market-share-in-europe/; https://www.hotrec.eu/wp-content/customer-area/storage/2a67daccb0e9486218e1a53b48494ab8/European-hotel-distribution-study-final-results-revsl18.pdf.

— In July 2018, following an action brought by a Swedish organization representing hotels in Sweden, the Swedish Patent and Market Court Litigation adopted a ruling requiring Booking.com to remove narrow price-parity clauses from its contracts with hotels. This ruling, however, was overturned in May 2019.

Additionally, some Member States, such as Italy, France, and Austria, have passed legislation prohibiting the use of wide price-parity clauses. But so far, neither wide nor narrow price-parity clauses have been assessed at the EU-level with respect to online bookings.



Conclusion

The Commission may take the view that existing Member State action, including in Denmark, has addressed this issue, militating against apportioning resources to it. Conversely, the complaint may offer the Commission an opportunity to potentially confirm and consolidate Member State practice in respect of wide price-parity clauses and clarify the approach to narrow price-parity clauses.

From a procedural standpoint, Nustay is seeking to push the Commission to decide in short order on which of the above paths to follow. By making a formal complaint—as opposed to an informal submission,[33] and by announcing this submission publicly—as opposed to keeping such information confidential, Nustay has taken the most aggressive approach to focalizing the Commission's attention on the issue. As covered in March's EU Competition Law Newsletter, Spotify adopted the same strategy in its recent complaint against Apple, which received significant press coverage, further fueled by a highly-publicized rebuttal from Apple. This approach may have contributed to the rumored opening of a formal Commission investigation.[34]

The Commission Prohibits Tata/ Thyssenkrupp JV As The Parties Fail To Offer Suitable Remedies

On June 11, 2019, the Commission prohibited the then-proposed joint venture between Tata Steel and Thyssenkrupp as the parties failed to provide commitments that fully addressed the Commission's concerns.[35] In Thyssenkrupp's view, offering commitments would have "adversely

[33] Requirements for a Form C complaint are set out in the Commission Regulation (EC) No. 773/2004 of April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004.

[34] *See*, e.g., Financial Times, Brussels poised to probe Apple over Spotify's fees complaint, May 5, 2019, available at: https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d.

[35] *Tata Steel/Thysenkrupp/JV* (Case COMP/M.8713), decision not yet published.

affected the intended synergies of the merger to such extent that the economic logic of the joint venture would no longer be valid."[36]

The Commission's concerns

The transaction would have combined the second and third largest steel producers in Europe. The Commission's concerns focused on the creation of the leading position in the steel-packaging sector, especially in the metallic coated and laminated steel packaging sub-segments. The Commission also outlined concerns in the automotive hot dip galvanized segment where, despite combined shares being below 30%, the Commission was concerned that the parties were particularly close competitors.

The parties argued that concerns were mitigated by competitive pressure from imports. The Commission was not convinced. As in the ArcelorMittal/Ilva transaction[37] conditionally approved just one year earlier, the Commission argued that imports from outside the EEA could not sufficiently constrain the merged entity due to, in particular, long delivery lead times, low security of supply, and lower service quality for imported steel.

On this basis, the Commission concluded that the transaction would lead to a reduced choice of suppliers, as well as to higher prices for European consumers.

Proposed remedies

The parties offered to divest their automotive and packaging plants in Spain, Belgium, and the U.K. The steel packaging divestments were to be paired with a three-year tolling arrangement, under which the companies would use their "best efforts" to convince existing customers to transfer their contracts to the purchaser of the plants, and then provide the finished products to the buyer on a pre-determined pricing formula (reflecting processing costs as well as a fixed markup).

The Commission found these commitments did not fully address its concerns. First, it observed that the divested assets represented only a small part of the competitive overlap in the steel packaging segment, and therefore only partly addressed the Commission's concern. In particular, with regard to "tinplate steel," Europe's most important steel packaging product by volume due to its use for tin cans, the parties would have continued to exercise considerable market power. Second, the commitments did not resolve the Commission's concerns with respect to the competitive overlap in hot-dip galvanized steel. This specialty steel is particularly important for car manufacturers, and the commitments did not provide for the divestment of hot-dip galvanized finishing assets in areas where the parties compete most intensively. Third, the Commission was concerned that the parties did not commit to divesting assets for the production of the necessary input for packaging as well as hot-dip galvanized steel.

Conclusion

In light of the parties' refusal to agree to more far-reaching commitments, such as divesting Tata Steel's and Thyssenkrupp's "crown jewel assets" in Germany and the Netherlands, the Commission prohibited the transaction. In doing so, the Commission highlighted the negative feedback received from customers, again underlining the importance of customer and competitor interviews in EU merger proceedings. This is the Commission's third prohibition decision this year following *Siemens/Alstom*[38] and *Wieland/Aurubis/Schwermetall*,[39] which were discussed in February's EU Competition Law Newsletter.

The Commission Approves Harris's Acquisition Of L3 Subject To Divestment Of Harris's Night Vision Operations

On June 21, 2019, the Commission conditionally approved in Phase I the acquisition of L3 Technologies ("L3") by Harris Corporation ("Harris"), both U.S. based aerospace and

[36] *See* Thyssenkrupp, Press Release of May 10, 2019, available at: https://www.thyssenkrupp.com/en/newsroom/press-releases/press-release-146592.html?id=182402.

[37] *ArcelorMittal/Ilva* (Case COMP/M.8444), Commission decision of May 7, 2018.

[38] *Siemens/Alstom* (Case COMP/M.8677), decision not yet published.

[39] *Wieland/Aurubis/Schwermetall* (Case COMP/M.8900), decision not yet published.

defence companies. The approval was subject to the divestment of Harris's night vision devices business.[40]

The Commission looked into the transaction's effects on competition in the EEA markets for (i) night vision devices; and (ii) hand-held video-data links businesses. For night vision devices, the Commission distinguished between image-intensification night-vision devices and image-intensification tubes, the purpose of which is to support military personnel with improved night-vision capabilities in low-light conditions. The Commission considered that the acquisition would have significantly reduced competition in these markets, where Harris and L3 compete directly with one another. The Commission accepted the parties' offer to divest Harris's global night vision operations to address these concerns. Second, with respect to handheld video-data links, which are used to transfer live video feed from aerial devices, the Commission found overlaps in these markets between the companies, but concluded that competition would remain sufficiently robust post-acquisition.

The Commission's stance is similar to the position taken by its U.S. counterpart, the Department of Justice. The day before the Commission's clearance, the Department of Justice also announced that its approval of the acquisition was subject to the divestment of Harris's night vision business.[41]

This clearance comes in the context of possible consolidation in the defence sector. Earlier in June, two other U.S. based defence companies, United Technologies Corporation and Raytheon announced a plan to merge.

Court Updates

RF v. Commission (Case C-660/17 P)

On June 19, 2019, the Court of Justice dismissed an appeal against a General Court order rejecting an appeal filed by RF, a Polish transportation company based in Gdynia, a city on the Baltic sea coast.[42] The General Court had rejected RF's appeal because the original, signed version reached the General Court's premises after the deadline to file an appeal. The General Court concluded that RF's failure to meet the deadline due to a postal delay did not amount to an unforeseeable event or force majeure, which would have allowed for its acceptance, notwithstanding its late arrival in Luxembourg.

On September 15, 2016, the Commission rejected a complaint filed by RF regarding the Polish transport sector. Pursuant to Article 263 (6) TFEU, the deadline for an action for annulment runs for two months as of the publication of the decision, its notification to the plaintiff, or the day the plaintiff took knowledge of it. This deadline is automatically extended on account of distance for a period of 10 days for any applicant established outside of Luxembourg.[43] RF therefore had two months and 10 days for its appeal to arrive at the General Court's premises. While RF faxed its appeal to the General Court within the deadline, the signed copy only arrived 17 days later, six days after the expiry of the deadline. RF argued that it sent the hard copy of the appeal through the Polish postal operator on the same date it sent the copy by fax, which was 11 days before the expiry of the deadline. RF claimed that the fact that the postal service took 17 days to deliver the original signed hard copy was out of its control and constituted force majeure.

The General Court rejected this argument in September 2017. RF appealed. But this month, the Court of Justice upheld the General Court's ruling. According to the Court of Justice, only an event that could not have been avoided, thereby constituting a decisive reason for missing the deadline, can be regarded as an unforeseeable circumstance or force majeure. In order for an event to qualify as "unavoidable" the event must be external, abnormal, and outside of the

[40] Commission Press Release IP/19/3354, "Mergers: Commission approves acquisition of L3 Technologies by Harris Corporation, subject to conditions", June 21, 2019.

[41] DOJ Press Release 19-690, "Justice Department Requires Harris and L3 to Divest Harris's Night Vision Business to Proceed with Merger", June 20, 2019.

[42] *RF v. Commission* (Case C-660/17 P), EU:C:2019:509.

[43] Article 60 of Rules of Procedure of the General Court, OJ L 105/1.

responsibility of the party, and, in addition, the party must have taken appropriate measures to guard against the consequences of abnormal events, although there is no requirement to make unreasonable sacrifices.

The Court of Justice held that, for an unforeseeable circumstance or force majeure to occur, the claimant must show that the event could not have been avoided with sufficient diligence. In his Opinion,[44] Advocate General Wahl examined what could constitute sufficient diligence. AG Wahl noted that when a document is sent by mail, sufficient diligence implies a party (i) sent the original immediately after the fax; (ii) used more expensive delivery methods if there was a risk that the original would not arrive on time; and (iii) monitored the progress of the original or—if tracking is not available—at least contacted the Registry to verify that the original had arrived on time.

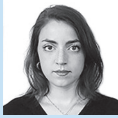
Because RF was only able to prove that it sent the original immediately after the faxed copy, but was unable to show it had adopted other measures to avoid delay, the Court of Justice rejected the appeal.

Upcoming Events

Date	Conference	Organizer	Location
05-09/08	The EU Competition Law Summer School	NERA	Cambridge
06-07/09	23rd Annual Competition Conference	IBA	Florence
10/09	13th Annual Georgetown Antitrust Enforcement Symposium	Georgetown University/ Baker Botts	Washington, D.C.

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

AUTHORS



Carmen Buono
+32 2 287 2125
cbuono@cgsh.com

François-Guillaume de Lichtervelde
+32 2 287 2104
fdelichtervelde@cgsh.com

Fynn Dewald
+32 2 287 2079
fdewald@cgsh.com

Beatriz Martos Stevenson
+32 2 287 2008
bmartosstevenson@cgsh.com

Conor Opdebeeck-Wilson
+32 2 287 2211
copdebeeckwilson@cgsh.com

Jan Przerwa
+32 2 287 2157
jprzerwa@cgsh.com

EDITOR

Niklas Maydell
+32 2 287 2183
nmaydell@cgsh.com

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Romano Subiotto QC
rsubiotto@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Nicholas Levy
nlevy@cgsh.com

F. Enrique González-Díaz
fgonzalez-diaz@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Thomas Graf
tgraf@cgsh.com

Patrick Bock
pbock@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

Christopher Cook
ccook@cgsh.com

Daniel P. Culley
dculley@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Dirk Vandermeersch
dvandermeersch@cgsh.com

Stephan Barthelmess
sbarthelmess@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

Niklas Maydell
nmaydell@cgsh.com

Richard Pepper
rpepper@cgsh.com

© 2019 Cleary Gottlieb Steen & Hamilton LLP
Under the rules of certain jurisdictions, this may constitute Attorney Advertising.

19.0605.01_071719