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EU Competition Law Newsletter

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Generics UK: The Court Of Justice Issues Judgment On The Application Of EU Competition Law To Pharmaceutical Reverse-Payment Settlements

On Janaury 30, 2020, the European Court of Justice (the “ECJ”) issued a potentially far-reaching preliminary ruling in response to a May 2018 preliminary reference made by the U.K. Competition Appeals Tribunal (the “CAT”).[1]

The case arose from an appeal brought by two generic drug manufacturers—Generics (UK) (“GUK”) and Alpharma—and GlaxoSmithKline (“GSK”), a pharmaceutical company that produces a variety of products, including patent-protected original drugs. GSK held the composition patent on paroxetine, a type of antidepressant drug belonging to the selective serotonin reuptake inhibitor (“SSRI”) group of molecules. GSK also held a variety of process patents on paroxetine, meaning that it was the only company with the ability to create the drug (through the composition patent) in a commercially viable method (through its process patents).

Following the expiration of GSK’s composition patent on paroxetine in 1999, the company became aware that GUK and Alpharma were attempting to enter the U.K. market with generic supply of the drug. In 2001 and 2002, GSK commenced litigation against these companies for infringing its process patents, before ultimately

[1] *See* Generics (UK) Ltd and Others (Case C-307/18) EU:C:2020:52 (“*Paroxetine*”).

settling with both companies ahead of trial. As part of those settlements, GUK and Alpharma agreed not to produce, import, or sell generic paroxetine in the U.K. In return, GSK *inter alia* granted both companies (i) the rights to sub-distribute its paroxetine product in the U.K., as well as (ii) a "marketing allowance" and other payments, in excess of £5 million.

The U.K. Competition and Markets Authority (the "CMA") launched an investigation into these settlements, and found in February 2016 that GSK and GUK, and GSK and Alpharma, had entered into agreements that restricted competition by object and by effect, within the meaning of Article 101 of the Treaty on the Functioning of the European Union (the "TFEU") and its U.K. analogue. In addition, the CMA found that GSK's decision to enter into the settlement agreements constituted an abusive strategy by a dominant firm to restrict competition by delaying generic entry, within the meaning of Article 102 TFEU. The CMA imposed fines totaling £45 million.

The parties appealed the CMA's decision to the CAT, which made a preliminary reference on several questions of EU law. The ECJ's judgment addresses a variety of issues, the most important of which are as follows.

Notion of potential competition

A key question in the case was whether GUK and Alpharma were to be considered potential competitors of GSK. The ECJ held that when determining whether a generic drug firm should be considered a potential competitor to a drug manufacturer that holds an expired composition patent (an "originator firm"), the key question was whether the generic drug firm "has a firm intention and an inherent ability" to enter the market with the previously patent-protected drug molecule, and that any barriers to entry are not "insurmountable,"[2] a position that was in line with previous case law calling for real and concrete possibilities of competition.

Remarkably, the ECJ also held that in the context of an expired composition patent allowing for potential generic entry, the existence of process patents, which the ECJ itself noted benefit from a presumption of their legality, "cannot, as such, be regarded as an insurmountable barrier." The ECJ went even further to say that "the uncertainty as to the validity of patents covering medicines is a fundamental characteristic of the pharmaceutical sector,"[3] and the very existence of a dispute between a generic drug firm and an originator firm "rather constitutes evidence of the existence of a potential competitive relationship between them."[4]

The judgment suggests that, at least in the context of a process patent covering a production method for a drug whose composition patent has expired, the Court considers any generic manufacturer who has demonstrated sufficient intent and capability to enter a market as a potential competitor to an originator, and that litigation of these process patents is merely an ordinary parameter of competition—rather than an attempt by an originator firm to assert its property rights.

The practical implication of this part of the judgment may be that any generic company attempting to enter a market with drug products will be considered a potential competitor even if its strategy is to dispute or disregard an otherwise presumptively lawful process patent, and that any attempt by an originator firm to litigate against a generic drug firm and protect its IP rights will, perversely, strengthen the presumption that the infringing firm is a potential competitor.

Restrictive object

While at least acknowledging that settlements between originator and generic firms could be legitimate even where the originator provided the generics firms with a financial payment, the ECJ nonetheless held these agreements would have a restrictive object where the payment (which could be non-pecuniary in nature) "can have no explanation other than the commercial interest

[2] *Paroxetine*, paras. 44–45.

[3] *Paroxetine*, para. 46.

[4] *Paroxetine*, para. 52

of the parties to that agreement not to engage in competition on the merits."[5] The Court's position in this regard, much like its discussion of potential competition, appears to relegate intellectual property rights (for process patents, at least), to little more than a single parameter of competition, rather than a fundamental property right.

While it is unclear as of yet how this holding will be given effect by the CAT, the ECJ's judgment appears to put significant restraints on a court's ability to gauge the strength of a process patent when determining whether a settlement agreement has a competitively benign explanation. The judgment notes that (1) the presumption of validity afforded to a patent; (2) the existence of genuine litigation to enforce that patent; and even (3) the award of an interim injunction preventing a generic firm from producing drugs under that patent "sheds no light, for the purpose of application of Articles 101 and 102 TFEU, on the outcome of any dispute in relation to the validity of that patent," which would appear to significantly restrict drug companies' ability to motivate why they decided to settle litigation for justifiable reasons.

In sum, the judgment not only confirms that reverse-payment settlements can be considered by-object restrictions of Article 101, but sets a difficult test for companies to satisfy in defending any decision to settle, including by severely restricting the weight placed on a company's decision to use its patents to exclude infringing behavior by other companies.

Abuse of Dominance

The judgment also addressed the approach to market definition that authorities may adopt in abuse of dominance cases involving a drug whose composition patent has expired. The traditional approach taken to the market definition of pharmaceutical products is to define products based on their therapeutic and chemical group—an approach that includes equivalent products that are capable of treating the same types of condition. Applied to the current case, such an approach would have included all SSRIs, which the CMA acknowledged would result in GSK not having a dominant position during the period of time covered by its decision. The CMA has instead defined the market at the molecule level (*i.e.*, to include GSK's paroxetine, and potential entry by generic firms).

The ECJ held that, provided generic drug companies "are in a position to present themselves within a short period on the market concerned with sufficient strength to constitute a serious counterbalance to the [originator firm],"[6] in cases where a composition patent has expired but a process patent has not, the relevant product market should comprise both the originator's version of the product and generic products "even if the latter would not be able to enter legally the market before the expiry of that process patent." This approach implies that any meaningful attempts at entry by generic firms following the expiry of a composition patent on a pharmaceutical drug will result in the originator firm being considered dominant, at least for the purposes of its conduct in managing its process patent rights.[7]

As to abuse, the ECJ held that where an originator firm holds process patents for a molecule that is no longer protected by composition patents, any strategy "which leads it to conclude … a set of agreements which have, at least, the effect of keeping temporarily outside the market potential [generic competitors] constitutes an abuse," to the extent it restricts competition.[8] In reaching this conclusion, the Court acknowledged that the "exercise of [intellectual property rights] … cannot in itself constitute an abuse," but immediately

[5] *Paroxetine*, para. 90.

[6] *Paroxetine*, para. 140.

[7] The judgment also appears to suggest that the General Court's judgment in *Servier*—currently under appeal before the ECJ, where that General Court rejected the Commission's molecule-level approach to market definition in another reverse-payment settlement case—will at most be upheld only on factual grounds as a result of the Commission's failure to substantiate its conclusions on market definition.

[8] *Paroxetine*, para. 172.

undermined this proposition by noting that "such conduct cannot be accepted when its purpose is precisely to strengthen the dominant position of the party engaging in it."[9]

The limits of the judgment in this regard are entirely unclear. Presumably, the ECJ did not intend to define any concerted strategy to enforce patent rights (*i.e.*, by litigating before a court) as an abuse. But as almost any exercise of a patent right necessarily involves excluding (or at the very least conditioning) competition by other players that rely on that patent, the extent to which dominant firms' may rely on their process patents is in need of urgent clarification.

Conclusion – a concerning judgment in need of clarification

Overall, the ECJ's judgment in *Paroxetine* is a loss for the robust protection of intellectual property rights across the EU. It now appears that, in the pharmaceutical sector at least, intellectual property rights have been fundamentally subordinated to competition policy. In addition to this overarching theme that permeates the judgment, the ECJ's ruling also raises a number of questions as to what considerations companies may take into account when settling patent litigation, an issue made all the more problematic by the apparent ease with which an originator firm may now be characterized as dominant.

In light of the broad and aggressive approach the Court has taken in elevating competition law above property rights, additional guidance and clarity, hopefully to follow in the pending *Servier* and *Lundbeck* appeals, would be welcome. In the meantime, the judgment may well have a chilling effect on innovation in the European pharmaceutical sector.

Proposals For Reform Of Competition Law Policy: Proposed Revision Of The Commission's Market Definition Guidance

Over the past several months, there have been a number of statements by politicians and Member State governments regarding the reform of EU competition law. Much of this debate is fundamentally linked to how authorities should define the relevant product and geographic markets that guide their antitrust and merger investigations.

In this context, in December 2019, EU Commissioner for Competition and Executive Vice President for 'A Europe Fit for the Digital Age,' Margrethe Vestager, announced that the Commission is preparing to revise its formal guidance document on market definition (the "Market Definition Notice"),[10] to reflect current competitive trends, noting that "changes like globalisation and digitisation mean that many markets work rather differently from the way they did, 22 years ago." Published in December 1997, the Market Definition Notice is now over two decades old.

Geographic market definition

Many antitrust and merger investigations turn on the extent to which the Commission will accept that companies from outside the EEA are able to constrain domestic players. Since the *Siemens/ Alstom* prohibition decision—which was widely criticized by European politicians for failing to take sufficient account of Chinese competitors, thereby preventing the creation of a "European

9 *Paroxetine*, paras. 150, 151.

10 Commission Notice on the definition of relevant market for the purposes of Community competition law, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29.

champion" for rail—there has been ongoing debate as to whether the Commission is adequately taking international competition into consideration in its investigations.

The French and German governments proposed radical reform in favor of a presumption of global markets.[11] These proposals have now been joined by the Austrian government, where the newly elected government calls for "greater consideration of global competition, and reformulation of market definition in merger control."[12]

In addition to the Franco-German and Austrian proposals, the Dutch government's Ministry of Economic Affairs and Climate policy published a non-paper on competition law reform on December 9, 2019.[13] The paper strikes a balanced approach, by first cautioning that any relaxation of merger control rules to facilitate the creation of national champions "removes too much competitive pressure from European economic operators and is harmful to consumers," but then suggests that the Commission adopt a "level playing field approach" that allows it to take into account any current or future effect on competition within an EEA market that may stem from market distortions arising from non-EU countries (*e.g.*, foreign government subsidies and other support to local champions).

Commissioner Vestager appears to acknowledge the political concerns raised by national governments, noting the increasing trends of globalization affecting Europe, but also explicitly references a recent investigation, *Tata/ThyssenKrupp*, where the Commission thoroughly investigated whether Chinese steel represented "a genuine alternative to steel made in Europe."

Ultimately, it may be unlikely that the Commission's revised Market Definition Notice will radically change its approach to defining geographic markets. While occasionally politically controversial, the overall approach is relatively mature, increasingly rooted in economics, and in large part accepted amongst practitioners. Nevertheless, an acknowledgement of the increasing ease of cross-border trade would be welcome. Companies would also benefit from guidance on how to identify the evidence required to demonstrate that their markets are global.

Product market definition

In addition to geographic market definition, the Commission's revision of the Market Definition Notice will also allow it to update its guidance on determining which products and services compete with one another. The most significant issue in this exercise will be how the Commission addresses digital markets, an area of considerable current scrutiny, and where the 1997 Market Definition Notice offers little direction (indeed, the terms "internet," "online," and "e-commerce" do not feature at all).

The Commissioner seems to acknowledge that digitization and the availability of free online services has had a profound impact on "which products consumers are willing to substitute for each other." Ms. Vestager also remarked that the SSNIP test,[14] which examines the "products people would switch to if the price for the one they're using goes up," is not fit for the digital age, and that alternative methods of evaluating the market may be necessary.

Prompted by the recent debate over the impact of "Big Tech" companies taking place on both sides of the Atlantic,[15] Commissioner Vestager mentioned that digital businesses are "often active in a whole range of different areas, providing consumers with an ecosystem of services," which makes it difficult

[11] The proposed reform of EU Merger Control Rules after Siemens/Alstom was discussed in our February 2019 EU Competition Law Newsletter.

[12] See page 176 of the program ("*Stärkere Berücksichtigung des globalen Wettbewerbs, Neudefinition der Marktabgrenzung bei Fusionskontrolle*"), available at: https://www.dieneuevolkspartei.at/Download/Regierungsprogramm_2020.pdf#page=176.

[13] Non-paper strengthening the level playing field on the internal market, available at: https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field.

[14] The test of small but significant and non-transitory increase in price (SSNIP) can be a useful starting point to define relevant product markets in competition law cases.

[15] *See*, *e.g.*, https://www.bloomberg.com/news/articles/2019-10-25/how-elizabeth-warren-would-break-up-big-tech.

for consumers to switch from one ecosystem to another. This view was echoed by the European Parliament, which published a briefing paper that claimed that "ecosystems may raise barriers to entry if they integrate complementary services without making them inter-operable with alternative offers."[16] Ms. Vestager's comments suggest that the revised Market Definition Notice may propose guidance on how to identify and correlate different goods and services into "ecosystems."

In revising the guidance on product market definition, some caution may be advisable. While the Commissioner rightly pointed to a variety of considerations that make the application of the current guidance to digital markets difficult, adopting a framework for digital product market definition prematurely may lead to unpredictable outcomes that deter companies from engaging in effective competition.

The analyses that the Commission, National Competition Authorities ("NCAs"), and other global enforcers are developing to assess digital competition are not consistent,[17] and the Commission's decisions in the Google Shopping,[18] Google Android,[19] and Google AdSense investigations,[20] each of which involved complex questions regarding the definition of inter-connected services, are all under appeal before the General Court. While a more structured outline of the Commission's approach to digital product market definition would be helpful for companies to understand its current thinking, creating formal guidelines ahead of any economic or legal consensus may be a step too far.

The European Commission Receives Feedback From National Competition Authorities On Its Review Of The VBER

On December 13, 2019 the Commission published an anonymized summary of the contributions submitted by NCAs during the Commission's ongoing evaluation of the Vertical Block Exemption Regulation ("VBER") and the accompanying Guidelines on Vertical Restraints ("Guidelines"), which will lapse in 2022.[21] The Commission received 20 contributions from NCAs across the EEA.[22]

The NCAs agreed that the VBER has met its objectives to provide helpful guidance and legal certainty to companies and should therefore be maintained. In the NCAs' view however, the VBER should be amended to provide additional and updated guidance, in particular[23] on the following issues:

— Recent market developments brought about by new technologies, such as the proliferation of online sales and online platforms, which necessitate an update of the VBER and the Guidelines to take account of, in particular, the

[16] http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646117/EPRS_BRI(2020)646117_EN.pdf.

[17] For example, various EU NCAs have taken different approaches to the regulation of most-favored-nation clauses in the context of hotel booking websites.

[18] Case AT.39740, Commission decision of June 27, 2017, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.

[19] Case AT.40099, Commission decision of July 18, 2018, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099.

[20] Case AT.40411, Commission decision of March 20, 2019, not yet published. The press release is available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

[21] A summary of initial feedback received from industry players on the VBER consultation in response to the Commission's evaluation roadmap was previously discussed in our November 2018 EU Competition Law Newsletter.

[22] This includes one non-EU member of the EEA. NCAs in the EU are bound by the VBER when assessing vertical agreements and the Guidelines serve as a non-binding accompaniment.

[23] The views expressed in the Commission's summary were also broadly echoed by the German Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt in a separate position paper, see Comments by the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt assessing Commission Regulation (EU) No. 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices and Guidelines on Vertical Restraints, October 8, 2019, available at: https://ec.europa.eu/competition/consultations/2018_vber/bundesministerium_bundeskartellamt_en.pdf.

nature of platform's commercial relationships, whether horizontal or vertical.

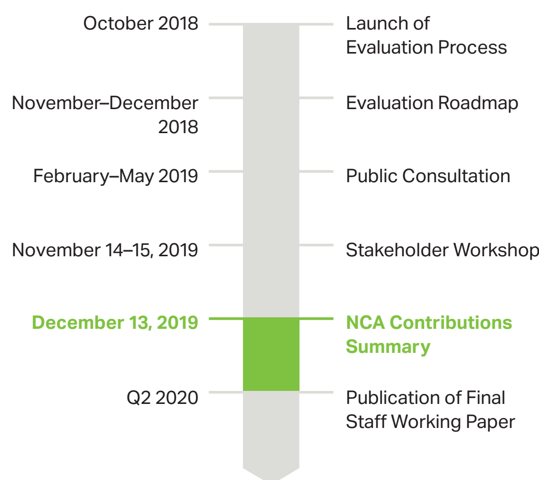
- In light of the exponential growth of e-commerce over the past decade, and companies' distribution strategies evolving to include online sales channels, the NCAs have requested additional guidance on the distinction between independent traders and agents acting on behalf of suppliers, and whether online platforms can qualify as true agents. While most online platforms do not assume risk when selling a supplier's products, they bear the risk of investing in infrastructure. Additionally, they typically have strong bargaining power, and cannot be seen as an integrated part of a supplier's distribution system.

- NCAs had difficulties in the past applying the 30% market share threshold to online platforms. They saw a distinction between platforms that merely facilitate transactions between independent buyers and sellers, often charging a commission (*e.g.*, platforms like eBay or Booking.com) and platforms that may purchase goods themselves and subsequently sell them on to buyers (*e.g.*, Amazon). NCAs also questioned whether companies providing similar services in the offline sector should be taken into account when calculating these market shares.[24] More generally, some NCAs considered that the 30% threshold should be reviewed to allow for a more accurate assessment of cumulative effects of similar vertical restrictions in the same market.[25]

- The NCAs also asked for further clarity and stronger guidance on hardcore restrictions, including the definition of active and passive sales, resale price maintenance, and territorial and/or customer restrictions. NCAs have queried whether the prohibition of dual pricing systems should be reviewed to allow companies to adjust their wholesale prices for online sales compared to sales through bricks and mortar outlets to reflect the significant differences associated with each.

The NCAs' contributions highlight many of the same issues raised during the public consultation in late 2018. The consensus remains that the VBER is an important resource providing legal certainty to companies, but should be updated to keep up with the significant changes e-commerce has brought about.

Figure [1]: Timeline of VBER review process



Source: CGSH, based on public information

[24] Moreover, where platforms are operating on multisided markets, it is not clear whether having a 30% share on one side of the market is sufficient to meet the thresholds.

[25] For example, in oligopolistic markets where two-to-four players may have market shares fluctuating around the 30% mark, the same practices may be permissible for some competitors but not others.

The Commission Reviews A Decision To Cut Jobs In A Divested Compressor Plant Following The Nidec/ Embraco Phase II Merger Approval

On January 6, 2020, the Commission announced that it would investigate job losses in a plant in Fürstenfeld, Austria, following the acquisition of Whirlpool's refrigeration compressor business, Embraco, by Nidec, a Japanese manufacturer of electric motors, powertrains, and other related industrial components. The Commission had conditionally approved the transaction following an in-depth merger control investigation, allowing the creation of a leading player in the refrigeration sector.[26]

The Commission's clearance decision required the divestment of several plants in Austria, Slovakia, and China, which played a key role in the production of compressors for domestic and light commercial uses, the key overlap where the Commission identified concerns. To facilitate the sale of the plants and the full effectiveness of the divested business, the Commission required Nidec to commit to providing considerable financial support to the buyer for the continued operation of these plants, equivalent to the capital expenditure that Nidec would have invested in the plants absent the transaction.

On June 26, 2019, the Commission ultimately approved the acquisition of the divestment business by ESSVP IV, an investment fund managed by Special Situation Venture Partners, finding that it was a suitable purchaser in light of its business plan.

On September 10, 2019, ESSVP IV and the divested Austrian business announced closing of the divestiture transaction, and issued a press release stating that "[m]ore than EUR 33 million have been set aside to fund the development and further improvement of the design and manufacturing of the compressors produced in Austria."[27] This press release was followed by an announcement on October 22, 2019, stating that the compressor production lines in Austria would be shut down, resulting in the loss of around 250 employees.[28]

After this announcement, Austrian MEP Othmar Karas submitted a formal parliamentary question to the Commission, inquiring what steps were being taken to prevent job losses, in light of Nidec's original plan to invest in the site. In the Commission's response, on January 6, 2020, it noted that it had commenced a comprehensive 'fact finding' investigation to ascertain whether the decision to close the Austrian plant was in line with the original commitments.[29]

The Commission's response does not explain whether there was any obligation on how ESSVP IV used the funds made available by Nidec. Additionally, the publicly available version of the commitments decision does not explain whether it prohibits ESSVP IV or Nidec to close or not to invest in the plant.[30]

The Commission's decision to initiate a review of ESSVP IV's resolution to close the Austrian plant highlights the risk that merger control remedies may still entangle for merging parties long after closing of a transaction, and that these investigations may require a burdensome "comprehensive exercise, which involves gathering

[26] *See* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2136.

[27] *See* https://www.secop.com/updates/news/newsshow/essvp-iv-completes-acquisition-of-secop-from-nidec.

[28] *See* https://www.secop.com/updates/news/news-show/restructuring-of-secopaustria-gmbh.

[29] *See* http://www.europarl.europa.eu/doceo/document/P-9-2019-003845-ASW_EN.html.

[30] *See* https://ec.europa.eu/competition/mergers/cases/additional_data/m8947_3657_3.pdf.

and analyzing data and information from different sources."[31]

In cases where divestitures are offered to secure approval for a deal, merging parties should carefully consider the extent to which any financial or other incentives provided to the buyer may result in fresh scrutiny in future.

Remedy-related fact-finding investigations have been rare occurrences historically, particularly in cases of structural remedies. Such investigations, however, highlight the Commission's increasing scrutiny of how remedies have ultimately affected competition, in particular, the execution of post-closing verification.

News

Commission Updates

Commission Conditionally Clears Battery Maker Varta's Acquisition Of Energizer's Divestment Business Subject To Behavioral Remedies To Address Input Foreclosure Concerns

On December 3, 2019, the Commission approved German battery maker Varta AG ("Varta AG") as a suitable purchaser of assets divested by US-based rival Energizer in its acquisition of U.S. consumer products company Spectrum Brands' batteries and portable lighting business.[32] In a separate decision on the same day, the Commission also cleared Varta AG's acquisition of the divested Varta-branded assets subject to behavioral remedies.[33]

The decisions come almost one year after the Commission's clearance in December 2018 of Energizer's purchase of Spectrum Brands' batteries and portable lighting business, which was conditional on Energizer divesting Spectrum's Varta-branded business for household and specialty batteries, chargers, and portable lighting in Europe, the Middle-East, and Africa.

After Energizer's notification of Varta AG as the suitable purchaser of its divestment business, the Commission voiced concerns that Varta AG may have an incentive to foreclose customers in the market for wholesale supply of hearing aid batteries to battery brands. While Varta AG is a major manufacturer and wholesale supplier of hearing aid batteries, the divested Varta-branded business is a leading downstream supplier of branded hearing aid batteries to the mass retail channel.

The Commission therefore feared that Varta AG may have an incentive to favor supplies to its own future downstream business and raise prices for, or otherwise disadvantage supplies to, competing hearing aid battery brands. The Commission found that customers relying on Varta AG's supply of batteries effectively lacked alternative sources of supply in the short term. To alleviate these concerns, Varta committed to supply hearing aid batteries globally to any existing or potential customers.[34]

Given the Commission's usual hesitance *vis-à-vis* behavioral remedies, its acceptance of Varta AG's commitments is noteworthy. It coincides with the broader European initiative to develop innovative and sustainable technologies for lithium-ion batteries, known as the European Battery Alliance.[35] Less than a month after the

[31] *See* http://www.europarl.europa.eu/doceo/document/P-9-2019-003845-ASW_EN.html.

[32] *Energizer/Spectrum Brands (Battery and Portable Lighting Business)* (Case COMP/M.8988), Commission decision of December 11, 2018.

[33] *VAG/Varta (Consumer Battery, Chargers and Portable Power and Lighting Business)* (Case COMP/M.9449), Commission decision of December 3, 2019. In 2002, Varta AG had sold its Varta-branded consumer batteries business to Rayovac (now Spectrum Brands), *see*, *e.g.*, https://investor.spectrumbrands.com/news-releases/news-release-details/rayovac-and-leading-european-based-battery-maker-varta-announce. Varta AG's current acquisition of the Varta-branded consumer batteries business from Energizer reunites the Varta-branded consumer batteries business with the Varta AG group.

[34] The specific conditions remain unknown pending the Commission's publication of the non-confidential version of its decision.

[35] *See*, *e.g.*, https://ec.europa.eu/growth/industry/policy/european-battery-alliance_en.

Commission's decisions, Varta AG announced it intended to use the cash flow from the acquired divestment business to fund the expansion of its lithium-ion production.[36]

The approval of Varta's acquisition also closely coincides with the Commission's decisions, under State aid rules, not to raise objections against State funding for a pan-European research and innovation project in the lithium-ion batteries sector,[37] which were issued on December 9, 2019.[38]

The Commission Publishes Its Decision To Waive Commitments In The Steel Sector

On December 3, 2019, the Commission published its decision granting steel company Evraz Group S.A.'s ("Evraz") request for a partial waiver of commitments it submitted as part of its acquisition of Highveld Steel and Vanadium Corporation Limited ("Highveld"). The Commission cleared the transaction in 2007, subject to divestment and behavioral commitments to address its concerns regarding anticompetitive effects in the markets for the supply of high-purity vanadium pentoxide and vanadium chemicals. The commitments also addressed concerns regarding a potential foreclosure of downstream competitors on the markets for vanadium oxides and finished vanadium products.

Evraz honored its commitment to divest Highveld's vanadium business—including a stake in Highveld's Mapochs Mine—and entered into long-term supply agreements with three of its main customers and with the Divestment Business.[39] While the supply agreements with two of the customers were limited in time, and had lapsed by the time of the decision, the agreements with one of the customers and the Divestment Business were not limited in time and remained applicable.

On January 14, 2019, Evraz requested a waiver of all commitments that were still applicable, in particular, the vanadium feedstock supply agreements. The waiver request follows Highveld and the Mapochs Mine falling into financial difficulty, both of which entities had been under the control of insolvency administrators since April 2015. As part of the rescue attempts, the administrators sold Evraz's steel mill to AcelorMittal South Africa, and the Mapochs Mine assets to International Resources Ltd. in 2017.

Evraz based its waiver request on the standard review clause contained in the commitments, according to which the Commission could waive, modify, or substitute in part or in full, if (i) Evraz showed good cause; and (ii) proved exceptional circumstances.[40] In line with the legal test set forth in the Remedies Notice, the Commission found that the circumstances in Evraz' case amounted to a significant, permanent, and unforeseeable change in market conditions leading to Evraz' inability to fulfil its commitments and to the initial competition concerns no longer arising. This change of circumstances was permanent as the rescue proceedings were likely to result in the liquidation of Highveld following the sale of its final assets. These circumstances made it impossible for Evraz to honor its long-term supply obligation.[41]

[36] *See* Varta AG corporate news, January 2, 2020, available at: https://www.varta-ag.com/varta-ag-successfully-completes-acquisition-of-varta-consumer-batteries-business-from-energizer/?lang=en.

[37] The project qualifies as an Important Project of Common European Interest ("IPCEI"). IPCEI comprise innovative research projects that often entail significant risks, and require joint, well-coordinated efforts and transnational investments by public authorities and industries from several Member States. IPCEI have been introduced in 2017 under the renewed EU Industrial Policy Strategy.

[38] *See* Commission decisions in cases SA.54793 (Belgium), SA.54801 (Germany), SA.54794 (France), SA.54806 (Italy), SA.54808 (Poland), SA.54796 (Sweden) and SA.54809 (Finland), not yet published.

[39] The Divestment Business was sold to Duferco, see *Duferco/Mitsui/Nippon Denko/SAJV* (Case COMP/M.5205), Commission decision of August 21, 2008.

[40] *See also* Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 ("Remedies Notice"), paras. 73–74.

[41] The Commission contacted Evraz' customers with whom the supply agreements remained applicable, to gather their views on the potential impact of the partial waiver. One customer did not comment, while the other—the Divestment Business—disagreed with the partial waiver. In a footnote, the Commission noted that due to the loss of supply from Highveld and the Mapochs Mine, the Divestment Business had also entered into insolvency proceedings in late 2015.

While requests for waivers or modifications of divestment commitments are less common,[42] the Commission has occasionally granted waivers or modifications of behavioral commitments in similar situations in the past, where, often many years after the original decision, market conditions had changed so significantly that it would have been unfair to hold a company to the commitment,[43] or where commitments of unlimited duration proved no longer necessary.[44] The Commission likely also considered the General Court's recent criticism of the Commission's failure to conduct a proper assessment of the changes in market conditions in previous cases.[45]

NBCUniversal Completes The Commission's Investigations Against Vertical Restraints In The Merchandising Sector

On January 30, 2020, the Commission fined NBCUniversal and other companies belonging to the Comcast Corporation €14.3 million for breaching Article 101 TFEU by imposing territorial restrictions on cross-border and online sales of movie merchandising products within the EEA.[46] The Commission granted NBCUniversal a 30% fine reduction on account of its cooperation.

The NBCUniversal decision is the Commission's third antitrust decision in the merchandise sector in less than a year,[47] and concludes a series of Commission investigations against licensors of intellectual property rights that resulted from its e-commerce sector inquiry that concluded in May 2017.[48] NBCUniversal is a U.S. operator of TV networks and a producer of popular movies and TV series, including Jurassic Park, the Minions, Shrek, and many others.

NBCUniversal owns the intellectual property rights to the characters in its movies, including the themes, images, and logos. It grants non-exclusive licenses to these intellectual property rights to merchandise suppliers who produce and sell toys, mugs, bags, and other merchandise goods in the EEA.

Similar to Nike and Sanrio,[49] NBCUniversal used direct and indirect measures to restrict intra-EEA trade, effectively undermining the EU single market. These measures included direct restrictions of (i) out-of-territory sales; (ii) sales beyond allocated customer groups; and (iii) online sales by licensees. Additionally, NBCUniversal obliged licensees to pass on these restrictions to their customers, and encouraged them to comply with these sales restrictions, through measures such as regular audits and non-renewal of contracts.

The Commission's fines in cases resulting from its e-commerce sector inquiry now total €184 million. This amount reflects the seriousness of the infringements found, which constitute by-object infringements of Article 101 TFEU. The 30% fine reduction granted to NBCUniversal for cooperation, acknowledgement of the

[42] Requests for waiver of divestment commitments have been brought in early stages of divestment proceedings, *e.g.*, to align with requirements set by other global competition authorities. See, for example, *Shell/Montecatini* (Case IV/M.269), Commission decision of June 8, 1994. Such requests have also been brought in light of significant changes to the value or viability of a divestment business between the approval of a remedy and the time of foreseen divestiture. See, for example, *Hoechst/Rhône-Poulenc* (Case IV/M.269), Commission decision of January 30, 2004. The Commission, however, applies strict standards regarding the proof of significant impediments to the value or viability of a divestment business, as determined in, for example, *Outokumpu/Inoxum* (Case COMP/M.6471), and *ThyssenKrupp/AST/Outokumpu VDM* (Case COMP/M.7138), *see* press release, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_143.

[43] *See*, *e.g.*, *NewsCorp/Telepiù* (Case COMP/M.2876), Commission decision of April 2, 2003.

[44] *See*, *e.g.*, *Nordbanken/Postgirot* (Case IV/M.2567), Commission decision of November 8, 2001 and the waiver decision Case IV/M.2567, Commission decision of October 14, 2014.

[45] *See* the General Court's reversal of the Commission's decision to reject Lufthansa's request for a waiver of commitments in connection with its acquisition of Swiss in 2005, the first time such a decision had been challenged, in *Deutsche Lufthansa AG v. Commission* (Case T-712/16) EU:T:2018:269.

[46] *Film merchandise* (Case COMP/AT.40433), decision not yet published. *See* Commission Press Release IP/20/157.

[47] Summaries of the Commission's decisions imposing fines against Nike and Sanrio were previously published in the March 2019 and July 2019 editions of our EU Competition Law Newsletter.

[48] *See* Final Report on the E-commerce Sector Inquiry, COM/2017/0229, May 10, 2017; and Commission Sector Inquiry into E-commerce, available at: https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

[49] *See Character merchandise* (Case COMP/AT.40432), and *Ancillary sports merchandise* (Case COMP/AT.40436).

infringement, and for waiving certain procedural rights is the lowest reduction granted in any of the Commission's post-sector inquiry decisions (Nike and Sanrio were granted 40% reduction, as were Asus, Denon & Marantz, and Philipps; Pioneer and Guess had received a reduction of 50%), as shown in Figure [2] below.

Figure [2]: Overview of Commission antitrust decisions in cases initiated following the final report in the e-commerce sector inquiry

Decision (date)	Infringement(s)	Duration (years)	Fine (amount)	Fine (reduction)
NBCUniversal Jan. 30, 2020	Restriction of cross-border sales	6.5	€14.3 million	-30%
Sanrio July 9, 2019	Restriction of cross-border sales	11	€6.2 million	-40%
Nike March 25, 2019	Restriction of cross-border sales	13.3	€12.5 million	-40%
Guess Dec. 17, 2018	Selective distribution	3.8	€39.8 million	-50%
Asus July 24, 2018	RPM[50]	1.8 and 3.3	€63.5 million	-40%
Denon & Marantz July 24, 2018	RPM	3.8 and 3.7	€7.7 million	-40%
Philips July 24, 2018	RPM	2	€29.8 million	-40%
Pioneer July 24, 2018	RPM Restriction of cross-border sales	2.9	€10.2 million	-50%

Source: European Commission

Court Updates

Otis: The Court Of Justice Clarifies That Compensation For Loss Caused By A Cartel Is Not Limited To Market Participants

On December 12, 2019, the ECJ clarified in a preliminary ruling that entities which are not active as customers or suppliers in the markets affected by a cartel are entitled to claim damages under Article 101 TFEU.[51]

The case arose from the Supreme Court of Austria's reference for a preliminary ruling in a case involving a damages action brought by the Province of Upper Austria ("Upper Austria") against five companies that had been fined by the Austrian NCA for their involvement in a cartel for the installation and maintenance of lifts and escalators.

Upper Austria, which had not been a (direct or indirect) purchaser of the products affected by the cartel, claimed that it had suffered a financial loss in its capacity as a body granting subsidies to purchasers of lifts and escalators. These subsidies had been granted in the form of low-interest loans for the financing of construction projects, with the amount of the loan calculated based on loan recipients' overall costs of construction.

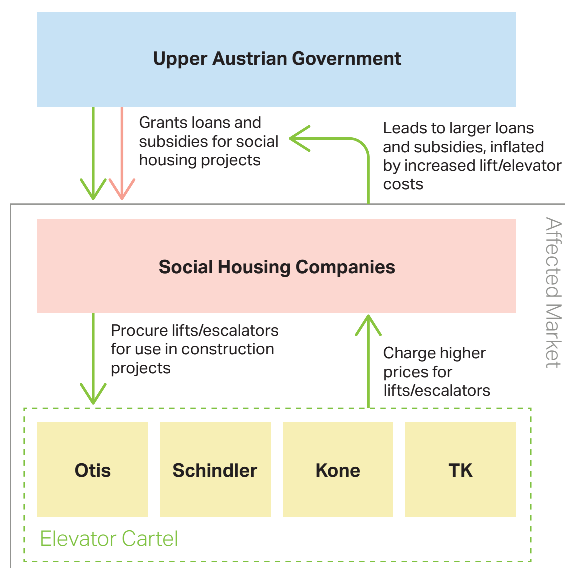
Upper Austria claimed that the costs connected with the installation of lifts, included in the overall

[50] Resale price maintenance.

[51] *See Otis GmbH and Others* (Case C-435/18) EU:C:2019:1069 ("Otis").

building costs paid by the loan recipients, were higher as a result of the cartel, and that it had therefore granted loans for higher amounts. If the cartel had not existed, Upper Austria would have granted smaller loans, and hence smaller subsidies, to these recipients. The Austrian region could have invested the difference at an on average higher, non-subsidized interest rate.

Figure [3]: Overview of claimant-defendants relationship



Source: CGSH, based on public information

The Austrian Trial Court rejected Upper Austria's claim, holding that an entity not active in the relevant market affected by the cartel suffers merely indirect loss which does not give rise to a claim for compensation. The Austrian Appellate Court held instead that the prohibition of cartels also serves to protect the financial interests of those who incur additional costs resulting from any direct or indirect distortion of market conditions.

On further appeal, the Supreme Court of Austria first held that under well-established principles of Austrian law, pure monetary losses do not enjoy protection outside of a contractual relationship. However, the Court decided to stay the proceedings and ask the ECJ whether the general principle allowing all injured parties to take action against a member of a cartel applies to persons who (1) are not active as suppliers or customers upstream or downstream in the market where the cartel was implemented; and (2) have experienced only indirect loss arising from a directly affected third party.

By way of reference, the Austrian Supreme Court strongly implied that Article 101 is not "designed" to prevent against loss suffered by entities not active in the markets affected by the cartel, and that Upper Austria's alleged damages would not have been recoverable under national law.

The ECJ took a different view, and held that Article 101 TFEU confers the right to seek compensation for the damages caused by an infringement upon any harmed persons (without limitations),[52] and that national rules on liability must not interfere with the effective application of EU law, and that compensation for loss caused by a cartel cannot only be reserved to suppliers and customers of the affected markets.

Consequently, the Court concluded that it is not necessary to establish that the loss suffered as a result of a cartel must have a specific connection with the Article 101 objective of protecting the competitive process, and that even an entity other than a purchaser or a supplier must be allowed to seek compensation. The Court nevertheless noted that it is for national courts to assess whether a causal connection exists between the entity's loss and the Article 101 infringement, as well as whether sufficient proof of material loss exists (*i.e.*, in the present case, whether Upper Austria could have made more profitable investments absent the cartel).

In line with observations on the *Skanska* judgment,[53] the *Otis* ruling represents the strengthening of private enforcement by the ECJ from broad interpretation of circumstances in which claimants can directly enforce EU law through damages actions—namely by allowing claims (i) against

[52] *See Courage and Crehan* (Case C-453/99) EU:C:2001:465, *Manfredi and Others* (Cases C-295/04 to C-298/04) EU:C:2006:461, *Kone and Others* (C-557/12) EU:C:2014:1317, and *Skanska Industrial Solutions and Others* (C-724/17) EU:C:2019:204.

[53] *Skanska Industrial Solutions and Others* (Case C-724/17) EU:C:2019:204, as reported in our March 2019 EU Competition Law Newsletter.

non-participants in a cartel (*Skanska*); and (ii) from non-participants in the market (*Otis*).

There are two noteworthy developments that are likely to follow from the *Otis* judgment:

— First, the ability of claimants—whose claims are not connected to their position as supplier or purchasers from a market affected by a cartel—will likely open the door for more indirect claims of loss by national, federal, and local governments, as well as other state entities. To the extent that these types of entities are more likely to have the resources and inclination to bring damages claims than individual consumers or small and medium enterprises, companies are likely to face increased litigation in the wake of their participation in cartels and other anticompetitive conduct.

— Second, the judgment will add to the chilling effect invoked by private antitrust damages litigation on leniency applications, which only protect whistleblowing companies against fines from authorities. Damages claims (and their related litigation expenses) can often vastly dwarf even the heaviest cartel fines. The increased prospect of such actions, especially with indirect claims that will likely require significant legal and economic advice to litigate the causation and quantum of any alleged harm, will almost certainly further disincentivize companies from cooperating with authorities and exposing anticompetitive conduct.

The Commission's and NCA's leniency programs have been crucial and arguably indispensable tools in allowing authorities to uncover and eliminate cartels and other instances of anticompetitive behavior. With the growing cloud of litigation risk facilitated by the ECJ's judgments in this field, the time may be right for the Commission to reassess the balance between leniency and follow-on damages, including by extending immunity to leniency participants through new legislation.

Upcoming Events

Date	Conference	Organizer	Location
02/03	GCR Live 9th Annual Telecoms, Media & Technology	GCR	London
02/03	Centre of European Law Annual Lecture - EU Law and New Technologies	King's College London	London
04/03	Private Enforcement of Competition Law	Knect365	Brussels
17/03	4th Annual W@Competition Conference	W@Competition	Brussels
18/03	Les Nouvelles Lignes Directrices Concentrations	Concurrences	Paris
20/03	4th Innovation Economics for Antitrust Lawyers Conference	Concurrences	London
24/03	Digital Services Act — a new rulebook for the digital economy?	Forum Europe	Brussels

AUTHORS

Remco Bernaerdts
+32 2 287 2169
rbernaerdts@cgsh.com

Quentin de Keersmaecker
+32 2 287 2164
qdekeersmaecker@cgsh.com

Shantanu Kafle
+32 2 287 2061
skafle@cgsh.com

Myrane Malanda
+32 2 287 2115
mmalanda@cgsh.com

Thorsten Schiffer
+32 2 287 2090
tschiffer@cgsh.com

Claire Smith
+32 2 287 2050
clsmith@cgsh.com

Teresa Spolidoro
+32 2 287 2034
tspolidoro@cgsh.com

Petros Vinis
+32 2 287 2141
pvinis@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

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