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EU Competition Law Newsletter

Highlights

— Commission Adopts Guidance For National Courts When Handling Disclosure Of Confidential Information In Private Cartel Follow-On Damages Litigation

— UPS/TNT: The General Court Awards UPS A Fraction Of Its Requested Costs Arising From Its Successful 2017 Application For Annulment Of The European Commission's Prohibition Decision

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Commission Adopts Guidance For National Courts When Handling Disclosure Of Confidential Information In Private Cartel Follow-On Damages Litigation

Following a public consultation launched in July 2019,[1] the Commission adopted a guidance document[2] on the protection of confidential information in proceedings for the private enforcement of EU competition law based on the Antitrust Damages Directive ("ADD").[3] The Confidentiality Guidance is intended for use by national courts to ensure consistency across Member States regarding access to and the protection of confidential information disclosed in private enforcement proceedings. The Communication is not binding and does not modify the rules applicable in different Member States, but rather outlines a number of measures and tools national courts may employ to help protect confidential information.

[1] The public consultation ran from July 29, 2019 until October 18, 2019. The Commission invited comments on a draft of the communication by various stakeholders, including from judges and other court support staff in national courts, lawyers, economic experts, and academics, *see* https://ec.europa.eu/competition/consultations/2019_private_enforcement/index_en.html.

[2] Communication from the Commission on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law 2020/C 242/01, OJ C 242, 22.7.2020, p. 1–17 ("Communication").

[3] The Antitrust Damages Directive helps citizens and companies claim damages if they are victims of infringements of EU antitrust rules. *See* Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

The ADD obliges Member States to ensure that national courts have the power to order the disclosure of evidence that may contain confidential information. This requirement applies if the damages claim is plausible, the evidence requested is relevant, and the disclosure request is proportionate. Additionally, national courts should have at their disposal effective measures to protect such confidential information. Allowing claimants access to evidence is a vital aspect of competition law litigation; this is however often characterized by information asymmetry. National courts have to find the right balance between allowing claimants access to evidence while protecting defendants' rights to the confidentiality of their information. Sufficient protection for confidential information is crucial to ensure that future leniency or immunity applicants continue to come forward. The ADD therefore provides national courts with a range of measures to help protect defendants' confidential information, including: redacting documents, conducting hearings *in camera*, restricting the range of persons that can see evidence, and using non-confidential aggregated summaries.

Given the different approaches Member States employ with respect to the protection of confidential information, the Communication seeks to help national courts strike the right balance between claimants' rights to access relevant information and the rights of others to protect confidential information. The Communication proposes a number of measures to allow national courts to protect confidential information whilst ensuring the parties' effective access to justice and the exercise of the right to full compensation.[4]

The Communication reiterates the measures to protect confidential information set out in the ADD, and recognizes that the measures adopted will be case-specific. The Communication addresses the following measures:

Redactions. Redactions protect confidentiality by removing, anonymizing, or aggregating confidential information in documents presented as evidence.[5] The Communication highlights the need to allow redactions that are strictly necessary to protect the interests of those from whom the information originates. For example, redacting customers' names while leaving in the quantities of product supplied to them may suffice to protect confidentiality. National courts can be involved to varying degrees in the redaction process—they may oversee the process themselves or delegate responsibility to the parties.

Confidentiality Rings and Use of Experts. Confidentiality rings allow for confidential information to be made available only to a defined category of individuals.[6] This allows confidential, quantitative data that is difficult to summarize in a meaningful way to retain its evidentiary value, but also reduces the workload when a large number of confidential documents are at issue. The Communication notes that it is important to identify which information is accessible only in the ring, to determine membership of the ring—this may include external advisors, in-house legal counsel, or other company representatives, for example—and to collect written undertakings from the members to ensure information is treated as confidential. Similarly, national courts may also appoint experts in a given field to access certain confidential information and to prepare non-confidential summaries.

Other Tools. The Communication sets out two further tools which can be used during and following proceedings.[7] These include: (i) holding certain portions of public hearings where confidential information may be discussed *in camera* where only external advisors or legal counsel may be present (including, for example, members of confidentiality rings); and (ii) anonymizing and redacting the copy of the judgment provided to the parties and thereafter

[4] Communication, para. 5.

[5] Communication, paras. 36–49. The Communication acknowledges that redactions may not be the most efficient tool in cases where large numbers of third-party documents are required.

[6] Communication, paras. 50–87.

[7] Communication, paras. 88 *et seq.*

published—this also applies to future requests for access to court records under national procedure rules.

Overall, the Communication seeks to provide practical guidance to national courts in selecting effective protective measures when considering the specific circumstances of each case, and the type and degree of sensitivity of the relevant information that needs to be protected.

UPS/TNT: The General Court Awards UPS A Fraction Of Its Requested Costs Arising From Its Successful 2017 Application For Annulment Of The European Commission's Prohibition Decision

On August 17, 2020, the General Court ordered the Commission to pay EUR 270,250 in recoverable costs to UPS.[8] UPS' application for costs followed its successful 2017 action for annulment of the Commission's January 30, 2013, veto of UPS' takeover of TNT.[9]

Procedural Background

UPS had originally sought total costs of over EUR 1.5 million from the Commission, claiming for: (i) lawyers' fees; (ii) economists' fees; and (iii) professional disbursements that UPS incurred during the court proceedings which eventually resulted in the annulment of the Commission's prohibition decision.[10]

Following a (perhaps inevitable) disagreement between UPS and the Commission on the exact amount of costs, UPS submitted on January 9, 2020, an application for the recovery of costs pursuant to Article 170(5) of the Rules of Procedure of the General Court, which dictates that "if there is a dispute concerning the costs to be recovered, the party concerned may apply to the General Court to determine the dispute… the General Court shall give its decision by way of an order from which no appeal shall lie."

The General Court's Legal Criteria

According to Article 140 (b) of the Rules of Procedure, recoverable costs include "expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers." The legal criteria on the basis of which the General Court was called to make its assessment regarding the appropriate amount of recoverable costs included:

— The subject matter and nature of the proceedings, the case significance from the point of view of EU law, and the difficulties presented by the case

— The financial interest that the parties had in the proceedings; and

— The amount of work generated by the case for the agents or advisers involved.

The General Court's Substantive Assessment

The General Court accepted that the "the action was of a complex nature" and that the value of the transaction was significant ("estimated at EUR 5.2 billion"), but following a detailed

[8] *United Parcel Service v. Commission* (Case T-194/13 DEP) EU:T:2020:371. FedEx, which intervened in support of the Commission during UPS' appeal at the General Court, was also ordered to pay EUR 56,000 euros. As explained below, UPS' action for damages is still pending (separately) in front of the General Court.

[9] *See United Parcel Service v. Commission* (Case T-194/13) EU:T:2017:144, annulling UPS/TNT (Case COMP/M.6570), Commission decision of January 30, 2013.

[10] *Commission v. United Parcel Service* (Case C-265/17 P) EU:C:2020:655

assessment of the total amount of working hours that UPS' lawyers had charged (1,871.1 hours), it found the amount of work that was generated for the case to be excessive.

In its assessment, the General Court criticized various tasks and the way they were performed by UPS' legal advisers, including the long hours spent on formatting of annexes. The Court further criticized duplication of work, mentioning that multiple lawyers had appeared to deal with the same task (*e.g.*, in the context of drafting and reviewing the reply).

The relationship between the administrative procedure and the court procedure

An interesting aspect of the General Court's decision relates to the relationship between the administrative procedure and the ensuing judicial proceedings, with respect to the attribution of recoverable costs for each stage. The Court mentioned that the "contested decision concerned issues that had already been the subject of significant debate between UPS and the Commission following the statement of objections and throughout the administrative procedure, so that the content of the contested decision was not entirely unfamiliar to UPS' lawyers." As a result, and due to what it perceived as UPS' lawyers' previous familiarity with the material of the case, the Court determined that the amount of working hours spent in the court proceedings should be significantly reduced.

The impact of the winning plea on costs and the difference between lawyers and economists

With respect to the work spent on the various different legal pleas seeking annulment of the prohibition decision, it is noteworthy that the General Court treats recoverable costs differently in the case of lawyers' fees compared to economists' fees. As far as lawyers' fees are concerned, the General Court rejected the Commission's argument that only the work related to the "winning" plea (in this case, the infringement of UPS' rights of defense) should be compensated and mentions that "account must be taken of the costs incurred by the applicant's legal advisers for the purpose of drafting all the pleas of the action." On the contrary, the General Court deems as recoverable costs for economists only those which were "objectively necessary," explaining further that these only related to "the analysis of the impact of the merger on prices and the Commission's econometric model," *i.e.*, to the "winning" plea on the basis of which the EC's decision was overturned.

A discouraging signal also for damages actions?

Notwithstanding the General Court's willingness to take a fulsome approach to the recovery of legal costs as a matter of principle, the court's order does reflect a highly conservative calculation of costs in practice, with UPS recovering only a fraction of its total fees. The approach taken by the General Court may nonetheless be viewed as considerably more favorable to companies than in the U.K., where the Court of Appeal recently held that the U.K. national competition authority is not required to pay the legal costs of a company that brings a successful challenge to its decisions.[11]

It remains to be seen whether the pending damages actions that have been filed by UPS and ASL (the proposed remedy purchaser that the Commission rejected by prohibiting the transaction) against the Commission will prove much additional comfort. Existing precedent suggests that UPS and ASL may find themselves disappointed by the General Court's generosity resulting from these actions: in 2007, Schneider was awarded only EUR 50,000 of the EUR 1.66 billion it claimed for losses incurred by the Commission's (similarly annulled) decision to prohibit Schneider's acquisition of Legrand.[12]

[11] Competition and Markets Authority v Flynn and Pfizer [2020] EWCA Civ 617., summarized on pages 4 and 5 of the Cleary Gottlieb U.K. Competition Law Newsletter for April and May 2020. While the judgment related to an overturned antitrust decision, and has not been directly applied to a merger decision, the CMA can likely be expected to argue that the same rule applies in both types of case.

[12] *See Commission v. Schneider Electric* (Case C-440/07 P) EU:C:2010:324, Order of the Court of Justice of June 9, 2020.

The limited scope for recovery of professional costs and damages, as well as the excessive lengthy court procedure (where in this case the General Court's costs order comes more than 7 years after the Commission's original prohibition decision) continue to highlight the practical difficulties of litigating a Commission prohibition decision. In practice, few companies consider the significant time and resources needed to challenge a merger prohibition decision to be worthwhile. The result is that many contested assessments by the Commission go unchallenged (including in cases where merging parties do not believe there are any competitive concerns, but feel compelled to offer remedies to avoid a prohibition), and that the essential role of the General Court in holding the Commission to account is more often than not only a theoretical disciplining force.

The Commission Approves Mastercard's Acquisition Of Nets' Account-To-Account Payments Business Subject To Remedies

On August 17, 2020, the Commission conditionally approved Mastercard's acquisition of Nets' payment application division, following a Phase I review ("the Transaction").[13] The Commission reviewed the Transaction following a referral by the Danish Competition and Consumer Authority, and ultimately identified competitive concerns in an EEA-wide market for account-to-account core infrastructure services ("A2A CIS") in relation to managed solutions that required the transfer of the overlapping business to secure Phase I approval.

Mastercard is a U.S.-based global payments operator. Nets A/S is a Danish payment solutions company, whose account-to-account payment business was the target of the transaction. The Commission found that the parties' activities overlapped in the provision of A2A CIS and account-to-account payment services ("A2A payment services"). A2A CIS allow for real-time and scheduled payments to be processed directly between banks. A2A payment services allow end-users to transfer money between banks.They include services and applications that allow real-time transfers, without the need for a card. Online payments can thus be initiated without a card, by using online banking services and applications.

The Commission excluded concerns in A2A payment services, finding that competition was national, and that the parties only overlapped in the Nordic countries, where Nets' products were expected to be replaced by newer and more competitive solutions.

As regards A2A CIS, the Commission distinguished between CIS provided as a software solution, and those provided as a managed solution, *i.e.*, combining software with hardware, infrastructure, and the management of the payment service. The Commission found that both parties were well-established players in the EEA market for the provision of managed A2A CIS, and that the Transaction would strengthen Mastercard's leading position. The Commission also noted that the parties were particularly close competitors, noting that they had been shortlisted against one another in a number of tenders, in a market where only a small number of rivals offered competing solution.

To address the Commission's concerns, Mastercard offered to transfer a global license to develop an A2A CIS solution using the technology that Nets' business itself relied on. The divestment package included an exclusive license within the EEA, and included the necessary personnel, services, and know-how that would allow a suitable purchaser to compete with Mastercard, including through the provision of consultancy services and transitional support services.

[13] *Mastercard/Nets* (Case COMP/M.9744), Commission decision of August 17, 2020.

The critical importance in the card-payment business of faster and card-free payment transactions has led to increased review of deals in the sector by the Commission. The technology underpinning the new payments applications are typically at the core of the analysis and affect companies' competitiveness in tenders, as illustrated by the present case.

The transaction is also noteworthy, in that it represents the first time the Danish Competition and Consumer Authority referred a transaction to the Commission under Article 22 of the EUMR,[14] a decision that was supported by the U.K. CMA (which also asserted jurisdiction over the transaction),[15] as well as the national competition authorities of Austria, Finland, Norway, and Sweden.

The sometimes overlooked ability of Member States to refer transactions to the Commission for close scrutiny at an EEA-level can lead to significant delays if the decision to refer is only made after the conclusion of an initial domestic investigation. Based on the Danish Competition and Consumer Authority's press release, the Parties had commenced national pre-notification discussions as far back as September 12, 2019, with formal notification on February 21, 2020, and the decision to request a referral on only February 27, 2020. This, presumably, led to a renewed pre-notification process with the European Commission, where formal notification made only on June 26, 2020. Given the significant time and expense of engaging in multiple pre-notification processes, which may well involve different authorities focusing on different areas of enquiry, merging parties and their advisors should consider well in advance their strategy for dealing with potential Article 22 referrals, including pro-actively discussing whether a national competition authority intends to make a referral at an early stage of pre-notification if overlapping businesses have an EEA-wide dimension. Executive Vice-President Margrethe Vestager also recently confirmed that the Commission would be accepting referrals from a national competition authority, even in cases where national thresholds are not met, provided the transaction is "worth reviewing at the EU level."[16] Those referrals are likely to expand considerably in light of her announcement.

News

Commission Updates

Commission Publishes 2019 Annual Activity Report

On July 9, 2020, the Commission published its annual report on competition policy, setting out the Commission's main policy and legislative initiatives, as well as key decisions adopted in 2019.[17] In antitrust enforcement, the Commission imposed a fine of EUR 1.49 billion on Google for abuse of dominance in the market for the brokering of online search advertisement,[18] and of EUR 242 million on Qualcomm for abuse of dominance in the worldwide market for chipsets complying with the Universal Mobile Telecommunications System.[19]

[14] *See* https://www.en.kfst.dk/nyheder/kfst/english/news/2020/20200403-the-european-commission-to-decide-on-the-master-card-nets-merger/.

[15] *See* https://assets.publishing.service.gov.uk/media/5e86fe8be90e0706f24fe002/Mastercard._Nets_Article_22_Request_-_for_publication_-_03042020_v2.pdf.

[16] *See* Margrethe Vestager, *The future of EU merger control*, Speech to the International Bar Association 24th Annual Competition Conference, September 11, 2020.

[17] Report of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on Competition Policy 2019, SWD(2020) 126 final ("the Report"), available at https://ec.europa.eu/competition/publications/annual_report/2019/part1_en.pdf.

[18] *Google Search* (*AdSense*) (Case AT.40411), Commission decision of March 20, 2019.

[19] *Qualcomm* (*predation* (Case AT.39711), Commission decision of July 18, 2019.

In cartels, the Commission fined Mastercard EUR 570 million for obstructing merchants' access to cross-border card payment services[20] and Autoliv and TRW EUR 368 million for their involvement in two cartels for the supply of car seatbelts, airbags, and steering wheels.[21] The Commission also scrutinised several cases of licensees being prevented from selling licensed products in a different country, resulting in EUR 12.5 and EUR 6.2 million fines for Nike and Sanrio respectively.[22] The Commission also highlighted its new "eLeniency" online tool launched in March 2019, which allows for the online submission of leniency statement, noting that it had already "received a high number of statements and documents."[23]

In mergers, the Commission conducted 16 in-depth investigations in 2019. Those investigations resulted in the prohibition of three transactions: Siemens' proposed merger with Alstom;[24] Wieland's proposed acquisition of Aurubis Rolled Products and Aurubis' stake in Schwermetall;[25] and the proposed joint venture between Tata Steel and ThyssenKrupp.[26] In this context, the Commission recalled that over the past ten years, it had "only blocked ten mergers."[27]

In addition, the Commission highlighted its "significant efforts to enforce procedural obligations under the EU Merger Regulation."[28] These included the imposition of a EUR 52 million fine on General Electric for providing incorrect information during the Commission's review of its acquisition of LM Wind,[29] as well as a EUR 28 million fine on Canon for partially implementing its acquisition of Toshiba Medical Systems Corporation before notification and approval by the Commission.[30]

Finally, in 2019, the Commission launched several evaluations of current competition rules and guidelines to ensure that they remain fit for purpose. The Commission's review encompasses State aid rules (the State aid modernization package, railway guidelines, and short-term export credit insurance communication),[31] as well as EU rules exempting certain horizontal agreements from general competition rules (block exemption regulations for horizontal cooperation agreements for certain research and development and specialization agreements, and related guidelines).[32]

Commission Seeks Feedback On Aspen Commitments To Reduce Cancer Medication Prices Addressing Concerns Over Excessive Pricing

On July 14, 2020, the Commission invited interested parties to comment on commitments offered by Aspen Pharma.[33] The commitments came following a Commission investigation opened on May 15, 2017 into excessive pricing for six life-saving cancer medications that Aspen purchased in 2009.[34]

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

[21] *Occupants Safety Systems II* (Case AT.40481), Commission decision of March 5, 2019.

[22] *Licensed Merchandise – Nike* (Case AT.40436), Commission decision of March 25, 2019; *Licensed Merchandise – Sanrio* (Case AT.40432), Commission decision of July 9, 2019. On May 13, 2019, the Commission also fined Anheuser-Busch InBev NV/SA €200.4 million for restricting sales of beer across neighboring EU Member States. *AB InBev Beer Trade Restrictions* (Case AT.40134), Commission decision of May 13, 2019.

[23] The Report, p. 5.

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

[25] *Wieland/Aurubis Rolled Products/Schwermetal* (Case COMP/M.8900), Commission decision of February 6, 2019.

[26] *Tata Steel/Thyssenkrupp/JV* (Case COMP/M.8713), Commission decision of June 11, 2019.

[27] The Report, p. 14.

[28] *Ibid*., p. 5.

[29] *General Electric Company/LM Wind Power Holding* (Case COMP/M.8436), Commission decision of April 8, 2019.

[30] *Canon/Toshiba Medical Systems Corporation* (Case COMP/M.8179), Commission decision of June 27, 2019.

[31] The Report, p. 3.

[32] Commission Regulation No. 1217/2010 of December 14, 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335; Commission Regulation No. 1218/2010 of December 14, 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335.

[33] Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No. 1/2003 in Case AT.40394 – Aspen, OJ C 233/06 (15.7.2020).

[34] The medications concerned—sold under the brand names: Alkeran, Leukeran and Purinethol—are used in the treatment of leukemia and other hematological cancers.

Following the investigation, the Commission had serious concerns that Aspen may have abused a dominant position in a number of national markets.[35]

In 2012, Aspen began raising prices of these medications, often by several hundred percent. The Commission's investigation found that between July 2012 and June 2019 Aspen's prices exceeded relevant costs by almost 300% on average and were more than three times higher than the average when looking at a number of similar pharmaceutical businesses. The investigation did not find any legitimate reasons for such high prices: the medications had been off-patent for 50 years—so any R&D investments would have been fully recouped—and the price increases were disproportionate to any rises in cost. Aspen has also not made any material improvements to the medicines or their distribution that would justify such price increases.

Although Aspen stated that it did not agree with the Commission's findings, they proposed commitments to reduce the prices of the six medications by an average of 73% throughout the EEA.[36] The reduced prices would be the maximum Aspen can charge for the following 10 years (effective as of October 2019), with one review after five years to allow for the reflection of any changes in Aspen's direct costs. Aspen also pledged to ensure a continued supply of the medications for the next five years.[37] Unusually, Aspen will also retroactively reimburse amounts paid in excess of the reduced prices by a number of health bodies in 25 EU Member States, between October 1, 2019 and the commitments implementation date.[38]

The Commission has launched a public consultation on the proposed commitments, inviting interested parties to submit their views by September 15, 2019. This is the first case in which the Commission has alleged that excessive pricing alone, without being combined with any other exclusionary practices, could amount to an abuse of competition law.[39] This consultation is the first of its kind and will inform the Commission's decision on whether the commitments will be sufficient to remedy the harm caused.

The European Commission announces Internet-of-Things inquiry

On July 16, 2020, the Commission started a sector inquiry in relation to the internet of things ("IoT") ecosystem, which is becoming increasingly important in Europe and worldwide.[40] The inquiry covers three groups of products: (i) smart home devices, including wearable devices and connected smart home devices, such as fridges, washing machines, smart TVs, smart speakers and lighting systems; (ii) services accessible via smart devices, such as music and video streaming services; and (iii) digital voice assistants. The inquiry is specifically limited to consumer products and therefore does not cover the industrial IoT ecosystem.

The Commission is concerned that some companies may be gatekeepers in the IoT sector and use their position to prevent market entry. To that end, the inquiry will explore three main categories of concerns:

[35] The Commission did not include Italy in its investigation as the Italian Competition Authority adopted a decision in 2016 for the Italian market ordering Aspen to reduce its prices.

[36] These prices are maximum prices and Aspen will remain free to apply lower prices.

[37] For a second five-year period, Aspen will also continue supplying the medications unless it chooses to discontinue; if so, Aspen must: (i) inform the relevant Member State authorities at least one year in advance; and (ii) make the medications' marketing authorizations available to any third-party purchaser (and maintain the authorizations until it has found a purchaser).

[38] As the Commission has not issued a full prohibition decision, health bodies lack a basis on which to claim compensation going back to the beginning of the conduct in 2012, although any findings the Commission may set out in the commitments decision would provide strong, non-binding guidance to national courts.

[39] By contrast, in its investigation into Gazprom's activities, the Commission imposed commitments intended to put an end to practices that amounted to market partitioning in addition to ensuring competitive prices. *See* Commission Press Release IP/18/3921, "Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets

[40] Commission decision of July 16, 2020 initiating an inquiry into the sector for consumer Internet of Things related products and services, available at: https://ec.europa.eu/competition/antitrust/IoT_decision_initiating_inquiry_en.pdf.

— **Restrictions on data access.** In the Commission's view, access to data is an important input for providers of IoT-related products and services. This, for example, includes data on consumer habits, trends, and health, which allow companies to predict consumer behavior. A large number of user interactions are required to develop services based on artificial intelligence.

— **Interoperability.** The Commission observes that consumer devices are increasing becoming "smart" and therefore need to be interconnected. The inquiry will therefore explore whether companies face any obstacles in connecting their products and services to IoT ecosystems.

— **Exclusivity arrangements.** The Commission will explore whether contractual arrangements may place certain service providers or manufacturers in a "preferred" position, which could ultimately limit choice for users and increase entry barriers.

The Commission has sent questionnaires to approximately 400 companies active in the IoT space in the EU. The Commission is planning to issues a preliminary report on the replies for public consultation in the spring of 2021 and the final report in the summer of 2022.[41]

In the context of a sector inquiry, the EC does not have the power to issue infringement decisions, impose fines or behavioral remedies.[42] However, should the EC identify any competition concerns within the scope of the inquiry, it may initiate follow-on infringement cases. For example, the 2015–2017 e-commerce sector inquiry led to several investigations and infringement decisions: online video games, consumer electronics, hotel bookings, and online licensing and distribution practices.[43]

The Commission Conditionally Approves Alstom's Acquisition of Bombardier's Rail Division

On July 31, 2020, the Commission conditionally approved Alstom's acquisition of Bombardier's rail transport division, following a Phase I investigation.[44] The *Alstom/Bombardier* merger is one of the first complex deals to be cleared during the COVID-19 pandemic.

Both Alstom and Bombardier are strong global players in the rail sector, which is why the parties' activities overlapped in several relevant areas, including rolling stock and signaling. In its assessment, the Commission identified competition concerns in three areas:

— **Very high-speed rolling stock.** The Commission was concerned that the combined entity would become the market leader in the EEA.

— **Mainline rolling stock.** The Commission was concerned that the merger would strengthen the parties' already strong positions in the EEA in mainline rolling stock.[45]

— **Mainline signaling.** The Commission was concerned that, as a result of the parties' significant installed base of signaling systems and their largest combined operating fleet of trains in the EEA, the merged entity would have the ability and the incentive to make it more difficult for other suppliers to interface their solutions with the parties' legacy systems and rolling stock.

To address the Commission's concerns, the parties offered commitments in each of the three areas. In very high speed rolling stock, the parties committed to divest Bombardier's

[41] Statement by Executive Vice-President Margrethe Vestager on the launch of a Sector Inquiry on the Consumer Internet of Things, July 16, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1367.

[42] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 17.

[43] *See* our EU Competition Law Newsletters, from: April 2019; July 2019; June 2019; and March 2019.

[44] *Alstom/Bombardier* (Case COMP/M.9779), decision not yet published.

[45] Additionally, the Commission found that in the Netherlands, the merger risked making the parties an "unavoidable supplier of legacy OBUs." *See* Commission Press Release IP/19/1371 "Mergers: Commission clears Alstom's acquisition of Bombardier, subject to conditions," July 31, 2020.

assets currently contributing to its joint very high-speed platform with Hitachi, the "Zefiro V300." In mainline rolling stock, the divestment package included Alstom's Coradia Polyvalent platform, together with its production facility. Additionally Bombardier's Talent 3 platform, and part of Bombardier's dedicated production facility were offered.[46] In mainline signaling, the parties committed to supply their legacy solutions to their competitors in signaling, and provide necessary interfacing information and support.[47]

The Commission approval comes only 18 months after the Commission's prohibition of the *Siemens/Alstom* transaction[48], showing that mergers in the rail sector are possible.[49]

Court Updates

The Court of Justice Clarifies the Scope of the Commission's Inspection Powers in Antitrust Proceedings

On July 16, 2020, the Court of Justice affirmed the judgement of the General Court in the *Nexans v Commission*, which upheld the Commission's decision in the *Power Cables* cartel case.[50] In its judgment, the Court of Justice clarified the scope of the Commission's inspection powers in antitrust proceedings under Article 20 of Regulation No. 1/2003.

The case is stemming from an inspection that the Commission conducted in 2009 on Nexan's premises as part of the Power Cables case, which ultimately lead to the Commission imposing fines totaling more than €300 million on 11 producers of underground and submarine high voltage power cables.[51] The aspect of the inspection that Nexan challenged was that the Commission created a copy of hard drives of Nexan's employees and later examined them in its office in Brussels (instead of copying only the documents that are identified as relevant during the inspection on the companies' premises).

The Court's reasoning for upholding the Commission's decision was two-fold. First, the Court stated that Article 20(2)(b) of Regulation No. 1/2003—which permits the Commission "to examine the books and other records related to the business, irrespective of the medium on which they are stored"—also allows the Commission to create copies of hard drives and email boxes without carrying out an examination of those documents beforehand.[52] According to the Court, the EU legislature intended to grant the Commission "a certain discretion regarding its specific examination procedures."[53] Second, the Court found that Article 20(2)(b) of Regulation No. 1/2003 does not require that the examination of books and records to be always carried out on the premises of the inspected undertaking.[54] Although the inspection must begin on the premises "of undertakings and associations of undertakings," it does not need to continue there.[55]

According to the Court, the Commission may find legitimate reasons to continue the examination

[46] With regard to very high speed rolling stock remedies, the parties also committed to a series of measures aimed at preserving the joint bid offered in consortium by Bombardier and Hitachi to HS2 (the largest opportunity for the production of very high-speed rolling stock in Europe). *See* Commission Press Release IP/19/1371 "Mergers: Commission clears Alstom's acquisition of Bombardier, subject to conditions," July 31, 2020.

[47] As regards the Netherlands, the parties committed to the supply of legacy OBUs to the Dutch infrastructure manager, ProRail, in favor of all interested operators. *See* Commission Press Release IP/19/1371 "Mergers: Commission clears Alstom's acquisition of Bombardier, subject to conditions," July 31, 2020.

[48] *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019 reported in our February 2019 Competition Law Newsletter.

[49] *See* Commission Press Release IP/19/1371 "Mergers: Commission clears Alstom's acquisition of Bombardier, subject to conditions," July 31, 2020.

[50] *Nexans France and Nexans v Commission* (C-606/18 P) EU:C:2020:571.

[51] *Power Cables* (AT.39610) – Commission decision of April 2, 2014.

[52] *Nexans* judgment, para. 60.

[53] *Nexans* judgment, para. 61.

[54] *Nexans* judgment, para. 78.

[55] *Nexans* judgment, para. 77.

of the data collected from the undertakings concerned at its premises in Brussels.[56] The Court noted that continuing the examination of the data at the premises of the Commission in Brussels may not necessarily encroach on the inspected undertaking's rights, provided that:[57]

It is justified by: (i) the interest of the inspection's effectiveness; or (ii) to avoid excessive interference with the operations of the undertaking concerned.[58] This may be the case when large volumes of data need to be collected and processed, which may in turn significantly and unnecessarily extend the inspectors' presence at that undertaking's premises.[59] In turn, that could "hamper the effectiveness of the inspection and needlessly increase the interference in that undertaking's operations on account of the inspection."

Furthermore, it does not give rise to any additional encroachment on the rights of the undertaking concerned, which goes further than that inherent in an inspection at their premises.[60] If this were the case, the undertakings concerned would have to identify such an encroachment. [61]

[56] *Nexans* judgment, para. 81.

[57] *Nexans* judgment, para. 80.

[58] *Nexans* judgment, para. 87.

[59] *Nexans* judgment, paras. 81 and 88.

[60] *Nexans* judgment, para. 90.

[61] *Nexans* judgment, para. 90.

AUTHORS

Konstantin Bondarenko
+32 2 287 2286
kbondarenko@cgsh.com

Lydia Bitsakou
+32 2 287 2242
lbitsakou@cgsh.com

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

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

Géraldine Babin
+32 2 287 2151
gbabin@cgsh.com

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

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

Daniela Weerasinghe
+32 2 287 2180
dweerasinghe@cgsh.com

Petros Vinis
+32 2 287 2141
pvinis@cgsh.com

David Pérez de Lamo
+32 2 287 2067
dperezdelamo@cgsh.com

EDITOR

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

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Christopher Cook
ccook@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Daniel P. Culley
dculley@cgsh.com

Romano Subiotto QC
rsubiotto@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Dirk Vandermeersch
dvandermeersch@cgsh.com

Nicholas Levy
nlevy@cgsh.com

Stephan Barthelmess
sbarthelmess@cgsh.com

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

Till Müller-Ibold
tmuelleribold@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Niklas Maydell
nmaydell@cgsh.com

Thomas Graf
tgraf@cgsh.com

Richard Pepper
rpepper@cgsh.com

Patrick Bock
pbock@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

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