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EU Competition Law Newsletter

Highlights

— The Commission Publishes Its Decision To Fine Qualcomm For Abuse Of Dominant Position

— The Commission Launches Consultations On New Market Investigation Tool And Digital Platforms Regulation

The Commission Publishes Its Decision To Fine Qualcomm For Abuse Of Dominant Position

On June 8, 2020, the Commission published its decision to fine U.S. based chipset producer Qualcomm a total of €997 million for abusing its dominant position by offering payments to Apple under the condition that Apple purchases from Qualcomm all LTE chipsets for iPhones and iPads.[1] This is the first time the Commission issued a decision on exclusivity payments since the Court of Justice's ground-breaking *Intel* judgment in 2017.[2] Qualcomm's appeal against the decision is pending before the General Court.[3]

Qualcomm's exclusivity payments to Apple

In February 2011, Qualcomm entered into an agreement with Apple for the supply of LTE baseband chipsets. Under the agreement, which was in place for almost 6 years, Apple was entitled to receive payments (*e.g.*, lump sum, volume-based, and per-device payments) from Qualcomm if Apple obtained LTE chipsets exclusively from Qualcomm for iPhone and iPad models that had been launched after October 1, 2011. The agreement also provided for the automatic termination and reimbursement of a portion of Qualcomm's payments if Apple were to commercially sell an iPhone or iPad "that incorporate[d] a non-Qualcomm cellular baseband modem."[4] The agreement was terminated in September 2016, following Apple's launch of iPhone 7 that incorporated Intel's chipsets. Between 2011 and 2015, Apple purchased $20 billion worth of LTE chipsets from Qualcomm only, and in return received between $2–3 billion from Qualcomm.

[1] *Qualcomm (Exclusivity payments)* (Case COMP/AT.40220), Commission decision of January 24, 2018 ("Decision").

[2] *Intel v. Commission* (Case C-413/14 P) EU:C:2017:632 ("*Intel* judgment"), which was discussed in our Alert Memorandum on October 16, 2017.

[3] *Qualcomm v. Commission* (Case T-235/18), action brought on April 6, 2018.

[4] Decision, para. 152. *See also* paras. 158, 162, and 165 of the Decision.

The Commission's assessment

The Commission concluded that between 2011 and 2016 Qualcomm held a dominant position in the worldwide market for LTE chipsets in which Qualcomm's market share remained above 70% and was protected by high barriers to entry and expansion. Qualcomm's brand image and its strong relationships with its customers made it difficult for less known suppliers to enter the market without offering significant discounts. The Commission also concluded that a potentially strong countervailing buyer power exercised only by a limited number of customers (*e.g.*, Apple, Samsung, Huawei) did not undermine Qualcomm's dominance.

The Commission found Qualcomm's conduct to be abusive based on the legal test set out in the *Intel* judgment:[5] exclusivity-inducing payments offered by a dominant undertaking are presumed illegal unless the dominant undertaking offers evidence that the conduct in question is not capable of restricting competition and producing foreclosure effects. If the undertaking offers such evidence, the Commission is then obliged to analyze in more detail whether the payment is abusive, taking into account a number of circumstances, including: (i) the degree of the company's dominant position; (ii) the share of the market covered by the exclusivity-inducing payments; (iii) their conditions, duration, and size; and (iv) the potential strategy to exclude as-efficient competitors.[6]

The Commission found Qualcomm's exclusivity-inducing payments to be exclusionary and therefore abusive based on all four factors, however, the Commission's analysis in particular focused on three. First, exclusivity payments reduced Apple's incentive to switch to competing LTE chipset suppliers. For example, in its response to the Commission's request for information, Apple explained that it "would likely have selected Intel baseband chipsets for its 2014 iPad models but for Qualcomm's rebates conditioned on exclusivity."[7] Second, although Apple accounted on average for only 25–35% of LTE baseband chipset purchases worldwide, the Commission concluded that exclusivity payments covered a significant share of the LTE market.[8] In the Commission's view, Apple accounted for "not a small portion of demand"[9] and Qualcomm's payment were offered during a time of strategic market development, when the demand for LTE chipsets was growing rapidly. Third, Apple was considered an important customer for entry or expansion, with Qualcomm's internal documents referring to Apple as "the world's most significant customer of baseband chipsets."[10]

The as-efficient-competitor test

To rebut the presumption that Qualcomm's payments were capable of foreclosing LTE chipset competitors, Qualcomm submitted a "critical margin analysis" claiming that a competitor as efficient as Qualcomm could profitably compete despite Qualcomm's payments. The Commission endorsed the as-efficient competitor test in its guidelines on applying Article 102 of the Treaty on the Functioning of the EU ("TFEU")[11] and applied it in the *Intel* decision.[12]

In *Qualcomm*, however, the Commission did not conduct its own as-efficient-competitor test and instead concluded that Qualcomm's analysis does not show that its exclusivity payments were incapable of having anticompetitive effects. According to the Commission, Qualcomm's analysis was based on three incorrect assumptions.

[5] Decision, paras. 382–385.

[6] *Intel* judgment, para. 139.

[7] Decision, para. 443.

[8] Interestingly, during certain periods of the infringement, Apple was found to account for less than 10% (in 2011) and less than 30% (in 2015) of the total worldwide demand for LTE chipsets (*see* Decision, para. 468).

[9] Decision, para. 470.

[10] Decision, para. 483.

[11] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009.

[12] *Intel* (Case COMP/AT.37990), Commission decision of May 13, 2009.

First, the analysis assumed that a competitor would only have had to cover average variable costs, which was rejected by the Commission because the LTE chipset market is characterized by high fixed costs in the form of R&D expenses. As such, any hypothetical competitor would also have had to cover a share of fixed costs. Second, none of Apple's requirements for iPhone generations in 2013, 2014, and 2015 were contestable, contrary to Qualcomm's claims. Third, Qualcomm's analysis failed to take into account that had Apple switched to another supplier, Apple would have also foregone payments in relation to upcoming iPhone and iPad generations. In particular, Qualcomm's analysis treated future payments as not being conditional on Apple obtaining all of its requirements from Qualcomm.

The Commission concluded it was not required to conduct its own as-efficient-competitor test because it is only one of the factors to analyze whether conduct is abusive.[13] However, since the Court of Justice recently held that not every exclusionary effect is necessarily detrimental to competition, and competition on the merits may lead to market exit of less efficient competitors;[14] one would have expected, contrary to the approach taken in the present case, the Commission to carry out its own as-efficient-competitor test, as it did so in previous similar cases.[15]

Conclusion

The Decision confirms that exclusivity payments offered by dominant companies still carry significant legal risks, even though companies may rebut the presumption of illegality.[16] However, it remains to be seen to what extent such a rebuttal can succeed in practice.

In April 2018, Qualcomm appealed the Decision by claiming, among other things, that the Commission erred in its finding that the alleged conduct was capable of producing any potential anticompetitive effects.[17] The judgment may clarify whether the Commission is obliged to carry out the as-efficient-competitor test when dealing with price-based exclusionary conduct, among other things.

The Commission Launches Consultations On New Market Investigation Tool And Digital Platforms Regulation

On June 2, 2020, the Commission published two inception impact assessments[18] and two public consultations which address two new policy initiatives: (1) a new market investigation tool ("new competition tool");[19] and (2) a regulatory instrument that would *ex ante* govern large online platforms that act as gatekeepers with significant network effects in the European Union's internal market.[20] These initiatives are part of the Commission's wider efforts to modernize EU competition law in an era of digitalization. Stakeholders are invited to submit their comments up until September 8, 2020[21] and the impact assessments are expected to be submitted to the

[13] Decision, para. 553.

[14] *Intel* judgment, para. 134; *see also Post Danmark* (Case C-209/10) EU:C:2012:172, para. 22.

[15] *See Intel* (Case COMP/AT.37990), Commission decision of May 13, 2009, paras. 1002–1576.

[16] *Hoffmann-La Roche v. Commission* (Case C-85/76) EU:C:1979:36, para. 89.

[17] *Qualcomm v. Commission* (Case T-235/18), action brought on April 6, 2018.

[18] An inception impact assessment sets out the Commission's plans for new policy initiatives.

[19] Commission Inception Impact Assessment, "*Single markets – new tools to combat emerging risks to fair competition*" (the "New Competition Tool Inception Impact Assessment"), available at: www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.

[20] Commission Inception Impact Assessment, "*Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers*" (the "Gatekeeper Inception Impact Assessment"), available at: www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers.

[21] Stakeholders may submit comments via the links listed in footnotes 18 and 19.

Regulatory Scrutiny Board of the Commission and be finalized in the fourth quarter of 2020.

"New Competition Tool"

The new competition tool would give the Commission the ability to initiate market investigations and impose remedies in markets with "structural competition problems," which the Commission believes cannot be addressed as effectively, or at all, under the EU's existing competition rules. The examples noted by the Commission include monopolization strategies by companies that have market power short of a dominant position, or dominant companies' attempts to leverage market power in multiple adjacent markets.

It is foreseen that the proposed tool will be used where competitive harm: (i) is about to occur (addressing the conduct of companies that may restrict competition in tipping markets with network and scale effects, lack of multi-homing,[22] and lock-in effects); or (ii) has already occurred (addressing oligopolistic markets with an increased risk for tacit collusion or systemic market failures regardless of the conduct of a particular firm).

The impact assessment explores four types of enforcement tools:

— Two of these to be applied only to dominant companies (tools based on a prior finding of dominance), in any industry (Option 1) or only in specific sectors including certain "digital or digitally-enabled markets" as identified by recent reports on competition policy[23] (Option 2).

— The two remaining enforcement options would be applicable to any company in the market, regardless of their dominance (tools based on the structure of the market) in any industry (Option 3) or, similar to the Option 2 tool, only in specific sectors (Option 4).

Targeted Companies	Industry Coverage	
Tool based on a prior finding of dominance — Applies to dominant companies	Applicable across all industries (Option 1)	Restricted to certain sectors more prone to dominance or identified by reports on competition policy (*e.g.*, "digital or digitally-enabled markets") (Option 2)
Tool based on the structure of the market — Applies to any market player, even in the absence of dominance	Applicable across all industries (Option 3)	Restricted to certain sectors with high barriers to entry and fears of competitor foreclosure (*e.g.*, digital sector) (Option 4)

All four options would give the Commission the power to impose behavioral or even structural remedies without imposing fines and without finding an infringement, which means a reduced, if not eliminated, risk of follow-on damages actions (which can be brought following a Commission infringement decision under the current enforcement framework). In practice this may mean the Commission would be subject to a lower standard of proof when imposing remedies in cases brought under this new regime than when brought under existing competition rules. The proposed changes seemingly draw inspiration from the U.K. market investigation tool, which allows the U.K. regulator to conduct in-depth inquiries into markets to remedy

[22] Multi-homing occurs when customers join and use several platforms to buy goods or services. This feature is used as a relevant criterion for assessing competition in two-sided markets.

[23] The telecommunications, pharmaceutical, and agro-chemical sectors may be covered by this option. *See* European Commission, "*Report on competition policy* 2018," July 15, 2019, available at: www.ec.europa.eu/competition/publications/annual_report/2018/part1_en.pdf and European Commission, "*Competition Policy for the Digital Era*," Final Report of April 5, 2019, available at: www.ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

harm due to structural market failures. While competition agencies in Greece, Romania, and several other Member States may also impose remedies following market investigations, the Commission's proposed framework would afford the Commission much broader enforcement prerogatives. Executive Vice-President Vestager warned that this could lead to far-reaching interventions, such as a duty "to make data available to others, for instance. As a last resort, it could even mean breaking up companies, to protect competition."[24]

New regulation for large online platforms acting as "gatekeepers"

The Commission also proposes to impose new rules on large online "gatekeeper" platforms concerning: self-preferencing; access to data; algorithmic transparency; and other practices that the Commission views as restricting competition in digital markets.[25] This initiative forms part of the Commission's wider public consultation regarding the adoption of the Digital Services Act,[26] a package announced by President von der Leyen in her political guidelines[27] and in the Commission's strategy to "shape Europe's digital future."[28] The Commission's proposal stems from the position that to create a "level playing field," these platforms need to be held to a different standard than small and medium enterprises.[29]

The Commission explores three policy options that are presented as both alternative and complementary to each other:

— Amend the Platform-to-Business Regulation,[30] to impose additional rules: against self-preferencing, on data access policies, and on unfair contractual provisions. These rules would apply to online intermediation services that currently fall within the scope of the Platform-to-Business Regulation.[31] Due to come into effect on July 12, 2020, this Regulation will require online platforms and search engines for business users to comply with certain transparency requirements, including the obligation to disclose the ranking methodology behind search results.

— Grant powers to a dedicated EU regulatory body (not specified in the proposal) to collect information from large online "gatekeeper" platforms with a view to gaining insight into the impact of their business practices on users and consumers.

— Adopt a new regulatory framework that would restrict certain "unfair trading practices" concerning self-preferencing, algorithmic transparency, and online advertising services. These rules are proposed to target a limited set of "gatekeeper" platforms that would be defined by reference to their network effects, the size of their user base, and/or the ability to leverage data across markets. This option would also differ from the other two in that it would grant powers to impose tailored remedies such as access to non-personal data, portability of personal data portability, and interoperability.

[24] Speech by Commissioner Vestager, *Competition in a Digital Age: Changing Enforcement for Changing Times*, Speech to ASCOLA Annual Conference, June 26, 2020.

[25] The Commission considers online platforms to be characterized by network effects and the ability to facilitate interactions between users, and to collect and use data about such transactions. According to the Commission, these platforms cover a range of activities (*e.g.*, online marketplaces, social media, search engines, creative content outlets, app stores, and price comparison websites).

[26] The Digital Services Act package aims to strengthen user protection and facilitate competition in the EEA through further rules and obligations for digital platforms.

[27] Ursula von der Leyen, "*A Union that strives for more: My agenda for Europe*," November 9, 2019, available at: www.ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf.

[28] Commission Communication, "*Shaping Europe's Digital Future*," February 19, 2020, available at: www.ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

[29] Gatekeeper Inception Impact Assessment, p.2 and 5. In a recent speech, Executive Vice-President Vestager also expressed that smaller platforms would not be caught by the gatekeeper rules. *See* Margrethe Vestager, *Competition in a Digital Age: Changing Enforcement for Changing Times*, Speech to ASCOLA Annual Conference, June 26, 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en.

[30] Regulation (EU) No 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, available at: www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150.

[31] Regulation (EU) No 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, available at: www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN.

The initiative does not specify a number of details, such as the types of unfair contractual provisions that supposedly raise concerns, the definition of a "gatekeeper," nor the scope of the new rules on self-preferencing, algorithmic transparency, and online advertising services. Much of this detail will likely depend on the feedback submitted to the Commission.

News

Commission Updates

The Commission Investigates Apple's Rules Governing The Distribution Of Third-Party Apps And Services On iOS Devices

On June 16, 2020, the Commission launched four formal investigations into Apple's business practices. Three of the investigations seem to follow the same theory of harm and zero in on contract terms that Apple imposes on developers wishing to distribute apps through the App Store on Apple devices, and whether Apple has been using those terms to disadvantage app developers that compete against Apple's own apps.[32] One of these investigations concerns the music streaming market, another relates to audio books/e-books, while the third in principle concerns all other apps that "are directly competing with apps or services offered by Apple"[33] (although it is understood the Commission is particularly looking at the markets for cloud services and videogames). The Commission's fourth investigation relates to Apple Pay, Apple's solution for online payments on iOS devices.[34]

— **App Store investigations.** It is alleged that Apple requires rival app developers to use Apple's own proprietary in-app purchase system ("IAP") for any purchases made through their app (notably, subscriptions), for which Apple charges a 30% commission. It is also claimed that app developers are not allowed to inform users of alternative purchasing possibilities outside of apps. Consequently, Apple's rivals are reported to have either disabled the in-app subscription possibility altogether (prompting users to instead subscribe to paid services through the developer's website), or raised their in-app subscription fees in order to bear the cost of distributing their apps on Apple's platform. As reported in our March 2019 EU Competition Law Newsletter, Spotify claims it had to raise its monthly subscription fee from $9.99 to $12.99 in 2014 for this very reason; Apple then launched Apple Music for the monthly price of $9.99 a year later (forcing Spotify to stop offering users the in-app subscription possibility).

In addition, the Commission is concerned that the IAP obligation gives Apple full control over the relationship between rival developers' and their customers, which could potentially allow Apple to impede rivals' access to customer information and obtain valuable data about their activities and offers.

The Commission's investigations are likely to focus on whether Apple's platform gives rise to a dominant position and whether its terms constitute abusive leveraging in violation of Article 102 TFEU.[35] The case is expected to show whether and how the Commission will apply in practice the competition policy recommendations published in the Special

[32] *Apple – App Store Practices (music streaming)* (Case COMP/AT.40437), *Apple – App Store Practices (e-books/audibooks)* (Case COMP/AT.40652), and *Apple – App Store Practices* (Case COMP/AT.40716). All three investigations are ongoing.

[33] *Apple – App Store Practices* (Case COMP/AT.40716), Opening of Proceedings.

[34] *Apple – Mobile payments* (Case COMP/AT.40452), investigation ongoing.

[35] The investigations were prompted by complaints by Spotify, the provider of music streaming services, and Kobo, a distributor of e-books and audiobooks. The Commission appears to have expanded its examination of the relevant App Store rules beyond the two markets singled out in the complaints, and will now examine all markets where Apple competes with third-party apps distributed on iOS devices. See *Apple – App Store Practices* (Case COMP/AT.40716), Notice on Opening of Proceedings, June 16, 2020: "The proceedings [...] concern the terms that govern the use of Apple's App Store in the European Economic Area by developers offering apps (or certain content within these apps) which are directly competing with apps or services offered by Apple (excluding music streaming apps or ebooks/audiobooks apps for which separate proceedings are initiated [...])." *See also* Commission's press release, "*Antitrust: Commission opens investigations into Apple's App Store rules*," June 16, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

Advisors' Report of 2019.[36] Among other things, the Report recommends the expansion of the abuse concept by applying it, not only to self-preferencing by digital platforms that constitute an essential facility,[37] but also to "wherever it is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale."[38] In addition, the case might clarify what a dominant undertaking's "special responsibility" means in the context of digital platforms: Competition Commissioner Vestager has previously indicated this could be "[setting] the rules in a way that keeps markets open to competition" rather than "[helping] their own services."[39]

— **Apple Pay investigation.** In a separate matter, the Commission is investigating Apple Pay, Apple's solution for mobile payments on iOS devices.[40] The investigation considers whether Apple forecloses rival providers of mobile payments from offering their solutions to users of iOS devices. More specifically, the Commission is looking into (i) "Apple's terms, conditions, and other measures" related to the integration of Apple Pay for purchases made on merchant apps and websites accessed from iOS devices; as well as (ii) favoring Apple Pay, as this is the only solution that has access to the so-called "tap and go" technology embedded in iOS mobile devices.[41]

The Commission Invites Feedback On The 1997 Market Definition Notice

On June 26, 2020, the Commission opened a public consultation on the 1997 Market Definition Notice (the "Notice"), which sets out the Commission's formal guidance on the definition of the relevant product and geographic market in competition cases.[42] Until October 9, 2020, anyone interested may visit the Commission's website (here) and submit comments and respond to the Commission's questionnaire about the relevance, effectiveness, efficiency, coherence, and value of the Notice as a guidance instrument.

The Notice governs the definition of the relevant product and geographic market, a competition law concept that defines the extent of competition between companies and in practice is the denominator used for calculating market shares. Companies' market shares serve as a proxy for their market power and are an important tool of the Commission's analysis in merger cases and competition investigations.

— **Merger cases.** The scope of information that needs to be provided in an EU merger filing depends on the merging parties' market shares in the relevant markets. Market shares also have a major impact on the substantive assessment of the deal. For example, when prohibiting the Siemens/Alstom merger,[43] the Commission excluded China, Japan, and South Korea from the relevant geographic market for high speed and very high-speed trains and therefore

[36] Report by J. Crémer et al., *Competition Policy for the digital era*, 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf, p. 7.

[37] Under EU case law, an essential facility is an input "indispensable" for carrying out a certain activity because there are no actual or potential substitutes. A refusal to grant access to such input can amount to an abuse of dominant position under Article 102 TFEU if it is likely to eliminate all effective competition on the market that relies on that input, and insofar as there is no objective justification. *See Oscar Bronner GmbH & Co. KG v. Mediaprint Zeinungs-und Zeitschriftenverlag Gmbh & Co. KG* (Case C-7/97) EU:C:1998:569, para. 41.

[38] "[...] we believe that self-preferencing by a vertically integrated dominant digital platform can be abusive not only under the preconditions set out by the 'essential facility' doctrine, but also wherever it is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale. [...] we propose that, to the extent that the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets." *See* Report by J. Crémer et al., *Competition Policy for the digital era*, 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf, p. 7.

[39] Speech by Commissioner Vestager, *Building a positive digital world*, Digital Summit, Dortmund, Germany, October 29, 2019.

[40] *Apple – Mobile payments* (Case COMP/AT.40452), investigation ongoing.

[41] Commission's Press Release IP/20/1075, "Antitrust: Commission opens investigation into Apple practices regarding Apple Pay," June 16, 2020.

[42] 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. The public consultation follows the evaluation roadmap that was published on April 3, 2020, reported in the April 2020 edition of the newsletter.

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

discounted the competitive threat of suppliers active in these countries.

— **Abuse cases.** The existence of the dominant position is analyzed on the basis of a defined relevant market and the company's market share in said market. By way of example, according to the Commission's guidelines, dominance is not likely to be established if the company's market share is below 40% in the relevant market.[44]

— **Cooperation among companies.** Market shares are also critical to the application of safe harbors under the Commission's block exemption regulations, including on vertical agreements between customers and suppliers,[45] and on cooperation arrangements between actual and potential competitors in relation to research and development,[46] specialization and joint production,[47] and technology transfer.[48]

The consultation on the Notice will be followed by a conference or workshop in the fourth quarter of 2020 involving technical experts and stakeholder representatives, and discussions with the national competition authorities of the EU Member States. This is set to result in the Commission's staff working document, which will summarize the results of all consultation activities and will likely take a view on whether and how the Commission should change the Notice. If the Commission decides to revise the Notice, it will likely reflect "changes like globalization and digitization," which Competition Commissioner Vestager addressed in her speech when announcing the need to review the Notice in November 2019.[49]

Court Updates

Advocate General Kokott Opines On Pharma Reverse-Payment Settlement (Lundbeck)

On June 4, 2020, AG Kokott advised the Court of Justice to confirm the General Court's judgment upholding the Commission's decision of June 19, 2013 ("the Opinion"). The aforementioned decision imposed fines of €146 million on Lundbeck and five other generic drug manufacturers ("generics") for patent settlement agreements that prevented the sale of rival versions of Lundbeck's antidepressant drug citalopram.[50]

Broadly consistent with the Court of Justice's ruling in *Generics (UK)*[51] (reported in our January 2020 EU Competition Law Newsletter),[52] the Opinion here applied a broad interpretation of the notion of potential competition. It also confirmed that a patent settlement agreement under which an originator makes a payment or other value transfer to a generic in order to prevent its entry into the market has the object of restricting competition within the meaning of Article 101 TFEU. For this reason, there is no need to assess its actual effects.

— **Potential competition.** AG Kokott's Opinion agreed with the General Court's finding that

[44] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para.14.

[45] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

[46] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

[47] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

[48] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

[49] *See* https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en. As reported in the April 2020 edition of the newsletter, the review of the Notice follows open calls by a number of EU Member States to better reflect the reality of "global" markets in the aftermath of the *Siemens/Alstom* merger prohibition decision, and to tackle market definition challenges involving multi-sided online platforms.

[50] *H. Lundbeck A/S and Lundbeck Ltd v. European Commission* (Case C-591/16 P), Opinion of Advocate General Kokott, EU:C:2017:351 (the "Opinion").

[51] The *Generics (UK)* judgment initiated by a preliminary reference made by the U.K. Competition Appeals Tribunal (the "CAT"), involved patent agreements between GlaxoSmithKline and generics manufacturers Generics UK and Alpharma delaying sales of generic versions of paroxetine, an antidepressant medicine. *See Generics (UK) Ltd and Others* (Case C-307/18) EU:C:2020:52 ("*Paroxetine*").

[52] *See* Cleary Gottlieb, "Generics UK: The Court Of Justice Issues Judgment On The Application Of EU Competition Law To Pharmaceutical Reverse-Payment Settlements," EU Competition Law Newsletter, December/January 2020.

Lundbeck and the generic drug manufacturers were at least potential competitors despite Lundbeck's valid patents that prevented generics from entering the market. According to AG Kokott, potential competition exists as soon as one company has "a firm intention and an inherent ability to enter the market"[53] and where there are no insurmountable barriers to entry. In practice, a potential competitive relationship will arise as soon as the generics company takes steps or makes business decisions with the aim of entering the market. AG Kokott's Opinion sates that such actions can include making investments, taking steps to obtain marketing authorizations, concluding contracts with suppliers, challenging a patent's validity, or seeking to invest in technology not covered by the patent.[54]

Notably, according to AG Kokott, "the existence of a patent protecting the manufacturing process of that substance cannot, as such, be regarded as an insurmountable barrier" because process patents can be challenged and invalidated in legal proceedings, which are "a fundamental characteristic of competitive relationships in the pharmaceutical sector."[55] It was concluded by AG Kokott that a potential competitive relationship exists not only in the context of process patents but even in circumstances where the originator holds a valid product patent, *i.e.*, a patent on the relevant active chemical substance, which Lundbeck was found to have in Austria.[56]

— **Restriction of competition by object.** AG Kokott also confirmed that patent settlement agreements that include any type of value transfer from an originator company to a generics in order to incentivize them not to enter the market, restricts competition by object and are presumptively illegal. AG Kokott dismissed Lundbeck's claim that such payments are not necessarily anticompetitive and could be justified by the imperfect patent enforcement framework in certain EU Member States where an originator company cannot be fully compensated for damages caused by illegal generics entry. For these reasons, an originator company has an incentive to make a reverse payment even if it has strong patents. According to AG Kokott, it is not the place of companies to redress alleged legislative inadequacies, and effectively take the law into their own hands.[57]

The Lundbeck case is different from the facts assessed in the *Generics (UK)* judgment. Lundbeck's patent settlement agreements did not require generics to refrain from challenging the patent at issue (*i.e.*, they did not include any no-challenge clause) and one of the agreements in Lundbeck did not prevent the generics from selling products not manufactured under the patent at issue (*i.e.*, the restrictions were within the scope of the patent right).[58] However, according to AG Kokott, these differences did not matter because the fact of even entering into a reverse payment patent settlement agreement does not fall "within the exercise, by the patent holder, of its prerogatives stemming from the object of the patent."[59]

The Court of Justice's judgment in Lundbeck is expected by the end of the year and will conclude the Commission's very first "pay-for-delay" case, which was initiated back in 2005 with dawn-raids at Lundbeck's premises. Three similar Commission investigations have followed, and total fines imposed by the Commission in "pay-for-delay" cases now exceed €590 million:

— In 2013, the Commission imposed fines of €11 million on Johnson & Johnson and €5.5 million on Novartis for entering a "co-promotion agreement" that provided Sandoz, Novartis' Dutch subsidiary, with strong

[53] Opinion, para. 48.

[54] Opinion, para. 76.

[55] Opinion, paras. 47 and 51–60.

[56] Opinion, para. 223.

[57] *Paroxetine*, para. 135.

[58] *Generics (UK)*, paras. 60 and 75.

[59] Opinion, para. 130. *See also* paras. 144–149.

incentives not to sell a cheaper generic version of the painkiller fentanyl in the Netherlands.[60] This agreement was not related to a patent dispute and the companies did not appeal the Commission's decision.

— In 2014, the Commission imposed a fine of €331 million on Servier, and total fines of €98 million on five generics companies for a series of patent settlements that violated Article 101 TFEU. This behavior was also found to constitute an abuse of Servier's dominant position in the market for blood pressure drug perindopril. In 2018, the General Court overturned the Commission decision with respect to the abuse of dominance, and annulled one of the fines linked to the anticompetitive agreements, reducing Servier's fine to €228 million.[61] Both Servier and the Commission have appealed to the Court of Justice.

— In 2011, the Commission opened an investigation against Teva and Cephalon for having entered an agreement to settle a patent litigation in the U.K.[62] and to allegedly restrict Teva from selling a generic version of Cephalon's modafinil sleep disorder drug in exchange for a series of payments. The Commission issued a statement of objections in July 2017 and a supplementary statement of objections in June 2020[63] in view of the Court of Justice's judgments in *Generics (UK)* and *Lundbeck*. The Commission's investigation is pending.

[60] *Fentanyl* (Case COMP/AT.39685), Commission decision of December 10, 2013.

[61] *Servier e.a. v. Commission* (Case T-691/14) EU:T:2018:922.

[62] *Cephalon* (Case COMP/AT.39686), investigation ongoing.

[63] *See* Commission Press Release MEX/20/1018, "Antitrust: Commission sends supplementary Statement of Objections to Teva on suspected 'pay-for-delay' pharma agreement," June 8, 2020.

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