June 2022

EU Competition Law Newsletter

Highlights

— *Qualcomm v. Commission* (Case T-235/18): General Court Stresses the Importance of Procedural Rigor and a Careful Analysis of Anticompetitive Effects

— *Optical Disc Drives* Cartel: The Court of Justice Upholds Fines Despite Procedural Rights Violations (Cases C-697/19 P to C-700/19 P)

Qualcomm v. Commission (Case T-235/18): General Court Stresses the Importance of Procedural Rigor and a Careful Analysis of Anticompetitive Effects

On June 15, 2022, the General Court annulled the Commission's decision and corresponding fine of €997 million in the *Qualcomm* case[1] due to procedural violations and a flawed substantive assessment. The General Court first found that the Commission had infringed Qualcomm's rights of defense by failing to properly inform Qualcomm of meetings with third parties, and failing to hear Qualcomm on the consequences of substantial changes between the Statement of Objections ("SO") and the final decision. Second, the General Court found that the Commission's analysis of anticompetitive effects was flawed in that it did not take into account all relevant factual circumstances and did not support its findings.

Background

On January 24, 2018, the Commission found that Qualcomm had abused its dominant position in the global market for LTE baseband chipsets[2] between 2011 and 2016.[3] The infringement started when Qualcomm entered into a supply agreement with Apple that included exclusivity payments[4] which, in the Commission's view, were capable of having anticompetitive effects because they reduced Apple's incentive to switch to other chipset suppliers. The Commission's assessment took into account, in particular, the extent of Qualcomm's dominant position, the share of the market covered by the exclusivity payments, their

[1] *Qualcomm v. Commission* (Case T-235/18) EU:T:2022:358.

[2] Baseband chipsets enable smartphones and tablets to connect to cellular networks and are used for both voice and data transmission. LTE baseband chipsets comply with the 4G Long-Term Evolution ("LTE") standard.

[3] *Qualcomm (exclusivity payments)* (Case COMP/AT.40220), Commission decision of January 24, 2018.

[4] Under these arrangements, Apple committed to obtain LTE chipsets exclusively from Qualcomm in exchange for incentive payments.

conditions, arrangements, duration and amount,[5] the importance of Apple as a customer,[6] and the absence of efficiencies justifying the payments.

Infringement of Qualcomm's rights of defense

In its appeal, Qualcomm argued that the Commission had infringed its rights of defense by committing manifest procedural errors. In particular, Qualcomm claimed that the Commission had: (i) failed to disclose to Qualcomm evidence relevant to its defense; and (ii) deprived it of the opportunity to comment on important aspects of the decision.

Failure to disclose relevant evidence

Qualcomm complained that the case file lacked notes and information concerning the content of meetings and conference calls between the Commission and third parties (seven in total, some of which Qualcomm was only informed of after the decision). For some of these meetings, the Commission shared "succinct" notes with Qualcomm after the decision. Qualcomm claimed that these notes were inappropriate and meaningless because they did not inform it of the content of the discussions held during the meetings. For other meetings, the Commission was not able to share any notes with Qualcomm because they did not exist.

The General Court found that the purpose of the meetings was to collect information relating to the subject matter of the investigation that led to the adoption of the decision. Therefore, these meetings fell within the scope of Article 19 of Regulation 1/2003[7] and the Commission should have properly recorded them to be able to provide information on the content of the discussions and indicate the information gathered.[8]

In the case at hand, the notes that the Commission shared with Qualcomm failed to meet that standard because they only contained a "very general indication" of the topics discussed.[9] In light of the specific circumstances of the case, the General Court found that Qualcomm would have been able to better ensure its defense had the Commission taken and shared proper notes of these meetings. Because the outcome of the procedure could have been different absent this procedural error, the General Court held that the Commission had infringed Qualcomm's rights of defense.

Denied opportunity to comment on the revised scope of the SO

Separately, Qualcomm argued that the Commission had infringed its rights of defense by failing to let it express its views on key differences between the SO and the decision. In particular, while the SO concerned two chipsets markets, the final decision only concerned the LTE chipsets market. While the General Court acknowledged that the SO is a preparatory procedural measure from which the final decision may differ, it added that the alteration in the scope of the alleged abuse had an effect on the relevance of the data and essential parameters underlying Qualcomm's "critical margin analysis."[10] Therefore, the Commission could not base its decision on this analysis without allowing Qualcomm to express its views on the consequences of this change and, where appropriate, letting it revise its economic analysis. By doing so, the Commission infringed Qualcomm's rights of defense.

Substantive assessment

In addition to these procedural violations, Qualcomm claimed that the Commission had erred in concluding that its payments to Apple were capable of having anticompetitive effects.

[5] The amount of the payments, as reported in the Commission's decision, was of c. $2–3 billion in total. *See Qualcomm (exclusivity payments)* (Case COMP/AT.40220), Commission decision of January 24, 2018, para. 172.

[6] In particular, the Commission found that Apple was "an attractive customer for LTE chipset suppliers because of its importance for entry or expansion in the worldwide market for LTE chipsets". *Ibid.*, para. 410.

[7] Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/18.

[8] *Qualcomm v. Commission* (Case T-235/18) EU:T:2022:358, para. 190.

[9] *Ibid.*, para. 191.

[10] This analysis aimed to demonstrate that the exclusivity payments were not capable of having foreclosure effects.

The General Court found that the Commission's substantive assessment was flawed in several aspects, one of which was the Commission's failure to take into account that Qualcomm was the only chipset supplier that met Apple's technical requirements for most iPhone devices. Apple had no technical alternative to Qualcomm's LTE chipsets (*i.e.*, no ability to switch to another supplier) for most of its products, regardless of any incentive payments. Therefore, Qualcomm's payments could not have affected its incentives to switch.

The General Court thus concluded that the Commission had failed to carry out its analysis in the light of all relevant factual circumstances of the case, and that it had erred in finding that Qualcomm's payments had reduced Apple's incentives to switch to competing chipsets suppliers.[11] These shortcomings were not remedied by the Commission's analysis concerning Apple's incentives to switch for certain iPad models, which the General Court found incapable of supporting the Commission's findings in any case.

Implications

This judgment underlines how important it is for the Commission to respect fundamental procedural rights in antitrust investigations. Specifically, the judgment: (i) emphasizes the Commission's duty to take proper notes during meetings discussing information potentially relevant to an undertaking's defense; and (ii) clarifies that where changes occur to the scope of its objections after the SO, which affect the relevance of the data on the basis of which the effects of the investigated conduct have been challenged, the Commission must give the undertaking concerned the opportunity to be heard and, if necessary, adapt its analysis.

Though it could have annulled the Commission's decision on procedural grounds alone, the General Court dedicated almost a third of its judgment to a review of its effects-based analysis. This sends a strong signal about the General Court's approach to reviewing the Commission's economic analysis following the *Intel* case earlier this year.[12] There too, the General Court conducted a strict review of the Commission's analysis of anticompetitive effects, concluding that it was incomplete and did not meet the required legal standard to show potential anticompetitive effects. *Qualcomm* confirms and corroborates this trend, holding the Commission to a more rigorous approach in future cases where companies object to the characterization of the practices at issue as being capable of having anticompetitive effects.

Optical Disc Drives Cartel: The Court of Justice Upholds Fines Despite Procedural Rights Violations (Cases C-697/19 P to C-700/19 P)

On June 16, 2022, the Court of Justice set aside four judgments of the General Court and partially annulled the Commission's decision in the *Optical Disc Drives* cartel case.[13]

The Court of Justice found—contrary to the General Court—that the Commission had breached the appellants' rights of defense, and that the Commission's decision was insufficiently reasoned. The judgments related principally to the Commission's characterization of the conduct as several standalone infringements *in addition to* a single and continuous infringement ("SCI"), and to the General Court's assertion that an

[11] Other criticisms included, for example, the Commission's failure to take into account relevant evidence, and reliance on evidence that lacked consistency and was not capable of substantiating its conclusions.

[12] *Intel Corporation v. Commission* (Case T-286/09 RENV) EU:T:2022:19, as reported in our January 2022 Newsletter.

[13] *Sony Corporation and Sony Electronics v. Commission* (Case C-697/19 P) EU:C:2022:478; *Sony Optiarc and Sony Optiarc America v. Commission* (Case C-698/19 P) EU:C:2022:480; *Quanta Storage, Inc. v. Commission* (Case C-699/19 P) EU:C:2022:483; *Toshiba Samsung Storage Technology Corp. and Toshiba Samsung Storage Technology Korea Corp. v. Commission* (Case C-700/19 P) EU:C:2022:484.

SCI necessarily consists of multiple separate infringements.

The Court of Justice nevertheless upheld the Commission's decision on the SCI and fine calculation, because the issues identified with respect to the additional standalone infringements did not affect the Commission's SCI finding, and none of the appellants' other arguments on fine calculation and the SCI finding were sufficient to warrant a different outcome.

Background

On October 21, 2015, the Commission fined five optical disc drive ("ODD") suppliers €116 million for participating in a cartel.[14] The Commission found that those companies had colluded, through a network of bilateral contacts, to fix procurement tenders between at least June 23, 2004 and November 25, 2008. While the SO had characterized the conduct as an SCI, the Commission's decision added that this *consisted of* several separate infringements.[15]

ODD suppliers challenged this "dual characterization" before the General Court, alleging (among other things): (i) that the Commission had breached their rights of defense by failing to put the characterization of the conduct as several separate infringements to them in the administrative procedure (and giving them an opportunity to comment); and (ii) that the Commission's decision had failed to properly explain this characterization. The General Court disagreed, holding that an SCI presupposes a "complex of practices", each of which *necessarily* amounts to a distinct infringement. Accordingly, by alleging an SCI, the Commission had also—by definition—alleged the characterization of the conduct as a series of discrete infringements.[16] In other words, the suppliers had been put on notice.

The 2022 Court of Justice judgments

The Court of Justice held that an SCI presupposes "a complex of practices", but that these practices may (or may not) amount to separate infringements.[17] The General Court had therefore erred in law by stating that an SCI always consists of distinct infringements. Accordingly, the Commission should have put both characterizations of the conduct—as an SCI and as several distinct infringements—to the ODD suppliers during the administrative procedure and substantiated its reasoning in its final decision.[18]

Specifically, the Court of Justice held that the SO had failed to set out the necessary elements[19] to enable the appellants to understand that the Commission would allege both an SCI and separate infringements, and to defend themselves on this point.

The Court of Justice set aside the General Court's judgments and partially annulled the Commission's decision to the extent it found that the appellants had been guilty of separate infringements, on the grounds that the Commission had breached the ODD suppliers' rights of defense and the Commission's own duty to give reasons for its decision. The Court of Justice nevertheless upheld the fine imposed by the Commission because the SCI finding had been properly put to the defendants during the administrative procedure, and the Commission's decision provided sufficient reasons on this point.[20]

Implications

Similarly to the *Qualcomm* judgment discussed above, these judgments underline the importance of the SO as a procedural instrument safeguarding undertakings' rights of defense, and in particular their ability to effectively make their arguments

[14] Three more cartel participants received immunity under the 2006 Leniency Notice. *See* Commission Press Release IP/15/5885, "Commission fines suppliers of optical disc drives € 116 million for cartel," October 21, 2015.

[15] *Optical Disc Drives* (Case COMP/AT.39639), Commission decision of October 21, 2015.

[16] *See, e.g., Sony & Others v. Commission* (Case T-762/15) EU:T:2019:515, paras. 236-240 and 254.

[17] *See, e.g., Sony & Others v. Commission* (Case C-697/19 P) EU:C:2022:478, para. 67.

[18] *Ibid.*, para. 68.

[19] As the Court of Justice recalled, the SO must clearly set out the essential matters on which the Commission relies at that stage of the proceedings—*e.g.*, the facts, the legal characterization thereof, and the corresponding evidence.

[20] In doing so, the Court of Justice rejected a number of additional arguments from the appellants against the SCI finding, as well as on the calculation of the fines.

during the administrative procedure with respect to the objections ultimately retained in the decision. The Commission breaches an undertaking's defense rights where this is not the case, and the decision upholds an objection that it had not set out in the SO, or that it had set out in a way that did not enable the addressees to make their arguments during the administrative procedure.

The judgments also underline, however, that a breach of defense rights will not lead to the annulment of a decision or a fine reduction if the decision can be maintained—while respecting procedural rights—on other grounds. In other words, any procedural errors must taint the decision fully in order to be of any practical consequence.

Separately, these judgments clarify the relationship between an SCI and individual infringements, which may (but do not necessarily) occur in parallel. Where this is the case, the Commission may not just rely on the SCI finding. Rather, it must prove the unlawful nature of each instance of conduct which it characterizes as a distinct infringement, and set out such objections in the SO in a way that enables the addressees to defend themselves on this point before the final decision. The decision must, in turn, adequately state the reasons for such a "dual characterization".

News

Commission Updates

Commission Dawn Raids Water Infrastructure Companies

In October 2021, Commissioner Vestager announced that the Commission was planning a series of dawn raids.[21] Since then, there has been an uptake in the number of dawn raids conducted across the EU. The Commission has undertaken unannounced inspections in the wood pulp industry,[22] the automotive sector,[23] the defense sector,[24] the animal health sector,[25] the natural gas sector,[26] and the fashion sector.[27] Now, the Commission has turned its attention to water infrastructure companies.[28]

On June 14, 2022, the Commission announced it was conducting dawn raids at the premises of water infrastructure companies suspected of bid-rigging in tenders involving EU funds for the construction of networks and treatment plants for drinking water and wastewater.

The Commission did not disclose the identity of the affected undertakings, nor the Member State in which the inspections took place, but confirmed that the dawn raids had been conducted in cooperation with the relevant national competition authority.

The Commission has investigated the water sector before, following unannounced inspections at the premises of French companies in April 2010.[29]

[21] As reported in our February 2022 EU Competition Law Newsletter.

[22] Commission Press Release IP/21/5223, "Antitrust: Commission carries out unannounced inspections in the wood pulp sector," October 12, 2021.

[23] Commission Press Release IP/21/5223, "Antitrust: Commission carries out unannounced inspections in the wood pulp sector," October 12, 2021 and Commission Press Release IP/22/1765, "Antitrust: Commission carries out unannounced inspections in the automotive sector," March 15, 2022.

[24] Commission Press Release IP/21/6241, "Antitrust: Commission carries out unannounced inspections in the defence sector," November 23, 2021.

[25] Commission Press Release IP/21/5543, "Antitrust: Commission carries out unannounced inspections in the animal health sector in Belgium," October 25, 2021.

[26] Commission Press Release IP/22/2202 "Antitrust: Commission confirms unannounced inspections in the natural gas sector in Germany," March 31, 2022.

[27] Commission Press Release IP/22/3134, "Antitrust: Commission carries out unannounced inspections in the fashion sector," May 17, 2022.

[28] Commission Press Release IP/22/3706, "Antitrust: Commission carries out unannounced inspections in the water infrastructure over alleged bid-rigging," June 14, 2022.

[29] Commission Press Release MEMO/10/137, "Antitrust: la Commission confirme avoir mené des inspections en France auprès de plusieurs entreprises actives dans le secteur de l'eau et de l'assainissement, " April 16, 2020 and Commission Press Release IP/12/26, "Antitrust: Commission opens proceedings against companies in French water sector," January 18, 2012.

However, the case was closed one year later due to a lack of evidence.[30]

Commission Opens a Formal Investigation Into Vifor Pharma for Alleged Disparagement Practices

On June 20, 2022, the Commission opened a formal investigation into Vifor Pharma for the possible anticompetitive disparagement of a rival's iron medicine.[31] Although the Commission launched a disparagement investigation last year,[32] this is the first time that it opens an investigation based exclusively on a disparagement theory of harm, and in relation to two originator products at that.[33]

Background

The Commission's investigation follows a complaint lodged by Pharmacosmos, whose iron deficiency treatment (Monofer) competes with Vifor Pharma's Ferinject.[34] The Commission is investigating whether Vifor Pharma conducted a misleading communication campaign targeting healthcare professionals, and alleged safety issues with respect to Monofer, which might have hindered competition in the EEA.

Precedents

So far, there are no precedents sanctioning disparagement practices at the EU level.[35] The Commission considers that disseminating misleading information about competitors can amount to an abuse of dominant position infringing Article 102 TFEU. Based on national precedents to date, it appears that the legal framework for disparagement would involve sanctioning any statements about rival products that: (i) are based on unverified assertions; (ii) are likely to influence the structure of the market; and (iii) appear credible because of the company's reputation and the trust placed in it by the market players.[36]

Implications

Either way, competition authorities seem to be increasingly keen to pursue disparagement cases. For example, the Commission initiated a similar investigation into Teva in March 2021,[37] and the French Competition Authority has sanctioned several companies on anticompetitive disparagement grounds since 2013.[38] Thus, companies (not only those in the pharmaceutical business) should exercise caution when commenting on rivals' products, including in their marketing materials and if they do so, their statements had better be backed by, and extensively cite, solid scientific evidence.

Considering the precedents discussed above (which concerned the alleged disparagement of generic products), as well as DG COMP's enforcement priorities for 2021,[39] a particular

[30] *Marchés de l'eau et de l'assainissement en France* (Case AT.39756).

[31] Commission Press Release IP/22/3882, "Antitrust: Commission opens investigation into possible anticompetitive disparagement by Vifor Pharma of iron medicine," June 20, 2022.

[32] Commission Press Release IP/21/1022, "Antitrust: Commission opens formal investigation into possible anticompetitive conduct of Teva in relation to a blockbuster multiple sclerosis medicine," March 4, 2021.

[33] Until recently, disparagement cases had been primarily tackled by national competition authorities. *See* our March 2021 EU Competition Law Newsletter, citing the fines imposed by the French Competition Authority on Sanofi-Aventis in 2013 (FCA Decision n°13-D-11 of May 14, 2013) and by the Italian Competition Authority on F. Hoffman-La Roche in 2014 (ICA Decision in the case 1760 of February 27, 2014), both for implementing a disparaging campaign against competitors.

[34] In parallel to this investigation, Vifor is being acquired by CSL Limited for approximately $11 billion.

[35] In one case, the Commission sanctioned "misleading misrepresentations" about a competitor. The context of that case was, however, different because the misleading statements were provided in a regulatory application (*i.e.*, the case concerned an abuse of regulatory proceedings for patent approval related to a generic medicine). *See AstraZeneca* (Case COMP/A.37.507/F3), Commission decision of June 15, 2005. Additionally, in a preliminary ruling with respect to a cartel case, the Court of Justice held that the coordinated dissemination of misleading safety claims about a medicine's off-label use, in a context of scientific uncertainty, is a by-object restriction of competition. S*ee F. Hoffmann-La Roche and Others* (Case C-179/16) EU:C:2018:25, as reported in our March 2021 EU Competition Law Newsletter.

[36] FCA Decision n°13-D-11, *supra*, paras. 367–369.

[37] As reported in our March 2021 EU Competition Law Newsletter.

[38] For instance, it fined Sanofi-Aventis in 2013, Jassen-Cilag in 2017, and Roche and Novartis in 2020 for disparaging competitors. *See* more detail in our October 2021 French Competition Law Newsletter.

[39] As noted in DG COMP's 2021 Management Plan, "the Commission will continue investigating, for instance, the potential market foreclosure of generic or biosimilar versions of medicines."

degree of caution was already advisable for companies facing competition from generic drugs. That said, as the Commission's investigation into Vifor concerns two originator medicines, the present case will likely clarify whether and how the Commission's framework of assessment will differ in situations where generic competition is not at stake.

Court Updates

The Facebook Investigation: A Fishing Expedition?

On June 1, 2022, the General Court heard arguments from Meta (previously Facebook) and the Commission in the case relating to Meta's challenge of a Commission decision dated May 4, 2020, issued in the context of the Commission's antitrust investigation into Facebook's data-related practices.[40]

Background

In 2019, the Commission started an informal investigation into Facebook's data-related practices and sent a number of requests for information to Meta.[41] On May 4, 2020, the Commission issued a decision requesting internal documents from Meta that were responsive to certain search terms. On July 15, 2020, Meta lodged an appeal against this decision for reasons of "excessive demands."[42] Meta argued that the contested decision requested internal documents that were irrelevant to the investigation, and documents of a personal and/or private nature.[43]

On October 29, 2020, the General Court granted interim relief, ordering the creation of a data-sharing framework involving a virtual data room with limited access to enable the Commission to access the data requested whilst seeking to ensure that sensitive data benefited from "strong legal protections".[44]

Meta's pleas and arguments raised at the hearing

Meta relied on four pleas to supports its case. First, Meta alleged that the decision failed to define the subject of the investigation in sufficiently clear or consistent terms, contrary to a number of provisions and principles of EU law, including good administration and legal certainty, and in breach of Meta's rights of defense. Second, Meta argued that the majority of the documents requested were wholly irrelevant and personal, in breach of the principle of necessity. The request thereby violated Meta's rights of defense and constituted a misuse of powers. Third, Meta contended that the Commission infringed the right to privacy, the principle of proportionality and the right to good administration by requiring the production of many wholly irrelevant and personal documents, including correspondence regarding medical issues of employees and their families. Finally, Meta claimed that the decision was supported by insufficient reasoning because it failed to explain why its search terms would only identify documents that are necessary and relevant to the Commission's investigation, and why a review of the documents for relevance by external lawyers or the use of a data room were not permitted.

At the hearing, Meta reportedly argued that the vague manner in which the Commission requested information from the company as part of the antitrust probe was a "classic fishing expedition." Meta described the Commission to be "[…] operating like a fishing super trawler, hoovering up the whole sea bed - with the intention that it will later see what species of rare fish it finds within its vast nets."[45]

[40] *Meta Platform Ireland v. Commission* (Case T-451/20).

[41] The Commission is investigating Facebook's data-related practices in a, still informal, investigation (Case AT.40628). In a separate investigation, the Commission is assessing whether Facebook tied its classified ads service, Facebook Marketplace, to its social network (Case AT.40684). *See* Commission Press Release IP/21/2848, "Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook," June 4, 2021.

[42] *Meta Platform Ireland v. Commission* (Case T-451/20).

[43] Meta lodged another appeal in relation to a decision issued as part of the Facebook Marketplace investigation. *See Facebook Ireland v. Commission* (Case T-452/20).

[44] *Meta Platform Ireland v. Commission* (Case T-451/20) EU:T:2020:515, as reported in our October 2020 EU Competition Law Newsletter.

[45] *See* EU acted like a fishing trawler in antitrust data searches, Meta lawyer says, Reuters, June 1, 2022, available here.

The Commission's defense

At the hearing, the Commission argued that the contested decision identified five specific potential anticompetitive practices, and fully conformed to the required standard of reasoning. The Commission contended that the allegation that it was on a fishing expedition was "manifestly unfounded" and that it was for the Commission to determine which documents should be included in the case file.

The Commission also explained that its approach to the investigation had been gradual and that Facebook had provided few documents in response to the initial requests. The Commission is reported to have claimed that it followed its standard practice and engaged with Meta in a constructive manner when negotiating search terms. Finally, the Commission added that the right to privacy was sufficiently protected through the safeguards in place, including the data room.

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