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EU Competition Law Newsletter

Highlights

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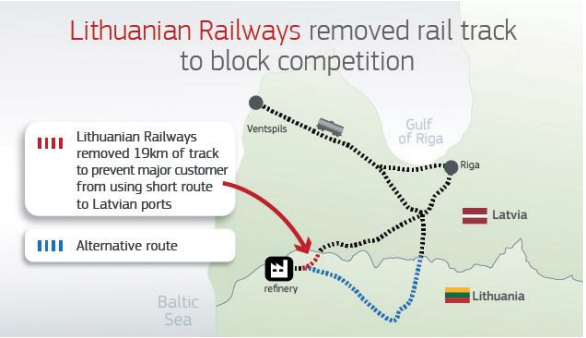
— The Commission Opens A Formal Probe And Second Investigation Into Amazon

— Presumption Of Decisive Influence: Court Of Justice Confirms In *Pirelli* That Parent Companies Will Pay The Price For Errant Subsidiaries

The General Court Rejects The Essential Facilities Doctrine In Rail Sector

On November 18, 2020, the General Court dismissed an appeal by AB Lietuvos geležinkeliai ("Lithuanian Railways") against a 2017 Commission decision which found that the company had abused its dominant position on the Lithuanian rail freight market by removing a stretch of track connecting Latvia and Lithuania (the "short route"). The Commission found that the conduct prevented one of Lithuanian Railways' major customers, the Polish stated-owned oil company AB Orlen Lietuva ("Orlen"), from switching transportation services to rival Latvian Railways.[1] The Commission and Lithuanian Railways discussed potential remedies, but failed to reach an agreement. The Commission therefore imposed a fine of €28 million. The General Court partially upheld the Commission decision, reducing the fine from €28 million to €20 million due to the limited territorial scope of the infringement.[2]



On appeal, Lithuanian Railways argued that the Commission should have assessed the case through the framework of the essential facilities doctrine.[3] The doctrine, developed in European

[1] *Baltic rail* (Case COMP/AT.39813), Commission decision of October 2, 2017.

[2] *Lietuvos geležinkeliai v. Commission* (Case T-814/17) EU:T:2020:545 ("*Lithuanian Railways*"), paras. 402–404: "Finally, as regards the geographic extent of the infringement, it should be noted that, although the infringement had an impact on part of the territory of two Member States, it does, however, continue to be relatively limited. The removal of the Track concerned solely a section of a track which provided one of the various possible rail links between Latvia and Lithuania."

[3] *Lithuanian Railways*, para. 71.

Court jurisprudence[4] and incorporated into formal Commission Guidelines,[5] applies a three-part test for a finding of abuse: (i) access to the facility must be indispensable;[6] (ii) access must be denied without objective justification; and (iii) the refusal to allow access must exclude all competition on a secondary market. A facility is considered "indispensable" if there is no actual or potential substitute on which downstream competitors can rely.[7]

Lithuanian Railways argued that the section of removed track was not "indispensable" for rival Latvian Railways to compete on the downstream market,[8] as they could use an alternative route (the "long route"). Moreover, the track had been suspended for safety reasons prior to its removal due to its poor condition. Finding an abuse in these circumstances would violate Lithuanian Railways' freedom to conduct business by requiring it to make substantial investments in the rail network for the sole benefit of allowing a single competitor to enter the market and compete.[9]

The General Court upheld the Commission's decision. Notably, the Court held that it was correct not to entertain the essential facilities doctrine but, rather, to assess the conduct solely as an exclusionary abuse under Article 102 TFEU (*i.e.*, as conduct capable of hindering access to the market and foreclosing competitors). The General Court referred to its recent judgment in *Slovak Telekom*,[10] currently under appeal before the Court of Justice, in which it held that the requirements of the essential facilities doctrine are only applicable in the absence of a regulatory obligation to provide access to other undertakings. The obligation on Lithuanian Railways to provide access to the short route derived from the applicable regulatory framework already required it to grant competitors access to the network, to ensure safe and uninterrupted rail traffic, and to restore the normal situation in the event of a disturbance.[11] The General Court therefore held that there was no tension with Lithuanian Railways' freedom to conduct business.

A potential remedy to a finding of abusive refusal to supply is typically an obligation on the undertaking to grant access to the facility on "reasonable and non-discriminatory" terms.[12] The Commission offered Lithuanian Railways two alternative remedies: (i) reconstruct the section of removed track; or (ii) eliminate the disadvantages faced by competitors on the long route, for example by streamlining licensing and safety procedures, ensuring fair capacity allocation, and increasing transparency on access costs.[13]

On appeal, Lithuanian Railways submitted that the first alternative remedy was disproportionate because the investment required would go beyond restoration of the competitive *status quo* at the time the track was removed.[14] The effect of such an investment would not be to maintain an existing facility, but to create an entirely new one.[15]

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[4] Notably, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* (Case C-7/97) EU:C:1998:569; and *IMS Health* (Case C-418/01) EU:C:2004:257.

[5] Guidelines on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

[6] The assessment is normally made by looking at whether the input through which access is sought is incapable of being duplicated, or could only be duplicated with great difficulty, meaning its duplication is physically and legally impossible, and not economically viable. *See* Bellamy and Child (ed. Bailey D. and John, L., *European Union Law of Competition* (8th Edition), "Chapter 10: Article 102," 2018, Oxford Competition Law, p. 719. Facilities that have been held to be indispensable include ports, airports, rail networks, gas pipelines, telecommunications wires and cables and cross-border payment systems, among others. (See, for example, *Port of Rødby* (Case COMP 94/119/EC), Commission decision of December 21, 1993; *Frankfurt Airport* (Case COMP/IV/34.801), Commission decision of January 14, 1998; *GVG/FS* (Case COMP/37.685), Commission decision of August 27, 2003; *Gaz de France* (Case COMP/39.316), Commission decision of December 3, 2009; and *Slovak Telekom v. Commission* (Case T-851/14) EU:T:2018:929).

[7] Guidelines on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para. 83.

[8] *Ibid.,* para. 72.

[9] *Ibid.*, para. 73.

[10] *Slovak Telekom v. Commission* (Case T-851/14) EU:T:2018:929, paras. 117–121.

[11] *Lithuanian Railways*, para. 91.

[12] Whish, R. and Bailey, D., *Competition Law* (9th Edition), "Chapter 17: Abuse of dominance (1): non-pricing practices," 2018, Oxford Competition Law, p. 724.

[13] *Baltic rail* (Case COMP/AT.39813), Commission decision of October 2, 2017, paras. 395–396.

[14] *Lithuanian Railways*, paras. 301–302.

[15] *Ibid.*, para. 306.

The second alternative remedy was unnecessary because there were no high barriers to entry on the long route. Nevertheless, the General Court upheld the Commission's decision, finding that Latvian Railways faced competitive disadvantages and that the proposed remedies were not disproportionate.[16]

The Commission Opens A Formal Probe And Second Investigation Into Amazon

On November 10, 2020, the Commission sent a Statement of Objections ("SO") to Amazon, alleging that Amazon abused its dominance on the market for provision of marketplace services in France and Germany, by accumulating and using sensitive data of independent retailers to benefit Amazon's own retail business.[17] On the same day, the Commission announced that the investigation into Amazon's e-commerce business practices was spun-off into a standalone probe.

Background

In July 2019, following the Commission's 2015 inquiry into the e-commerce sector,[18] the Commission announced the opening of a formal investigation into Amazon's 'dual role' as (i) a marketplace service provider for independent retailers that sell products directly to consumers on Amazon's platform; and (ii) a competing retailer selling the same or similar products on the same platform.[19]

The Commission ultimately decided to split the investigation into two standalone probes: one focusing on Amazon's use of independent retailer data; and the other focusing on Amazon's e-commerce business' 'Buy Box' and 'Prime' label features.

Amazon's Use of Retailer Data

According to the SO, Amazon's retail business has direct, automatic access to the real-time, non-public, competitively sensitive business data of over 800,000 active independent retailers and more than 1 billion products, that Amazon continuously collects on its platform.[20] These data include revenues, number of visits, orders, and shipped units, past performance, and consumer claims and guarantees.

The SO reflects preliminary concerns that Amazon uses these data to benefit its own retail activities, including to determine its strategic business decisions such as product launches and targeted price discounts. Through its use of these data, Amazon avoids the normal risks of retail competition on its platform.

The Amazon Investigation is therefore yet another prime example of the general flurry of enforcement activities concerning vertical integration and "self-preferencing" in the digital era. While historic Commission precedents[21] and the Guidelines on non-horizontal mergers clearly provide that self-preferencing is not anticompetitive in and of itself, the Commission's recent enforcement record, including in the seminal *Google Shopping* decision, fails to clarify the exact legal test that is relevant

[16] *Lithuanian Railways*, paras. 247–263, 301–330.

[17] European Commission Press Release, November 10, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077. The case is referenced herein as *AT.40703 – Amazon*.

[18] The results of the inquiry were formalized in the European Commission's Final Report on the E-Commerce Sector Inquiry, May 10, 2017, available at: https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

[19] European Commission Press Release, July 17, 2019 available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

[20] Statement by Executive Vice-President Margarethe Vestager on Statement of Objections to Amazon for the use of non-public independent seller data and second investigation into its e-commerce business practices, November 10, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_2082.

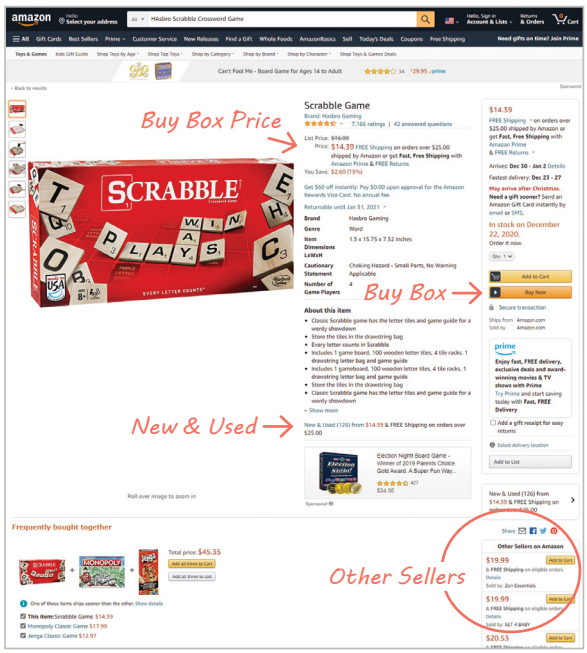
[21] See, Commission Decision not to oppose the production by Tabacalera of its own cigarette filters, of May 8,1989, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_89_330.

for the assessment. It will, however, be interesting to see how the Commission will deal with the possible procompetitive effects of Amazon's conduct, including that it enables Amazon's retail business to compete more effectively against well-established, and often much larger, retailers.

Amazon's Buy Box and Prime Label

Amazon also provides logistics and delivery services to a number of retailers active on its platform. While Amazon is the default logistics and delivery services provider to its own retail business, third-party retailers can also opt-in for this service, called 'Fulfillment by Amazon.' The Commission's probe will assess whether Amazon favors retailers that use Amazon's logistics and delivery services by selecting them as "winning" retailers for the Buy Box and Prime label features.[22]

The Buy Box feature is prominently displayed on Amazon's product page and allows customers to add items from the "winning" retailer directly into their shopping carts. While Amazon also displays offers from competing retailers on the product page, these offers do not enjoy the same level of prominence. Buy Box provides a competitive advantage as it generates the vast majority of sales on Amazon.



The Prime label enables retailers to offer products to users subscribed to Amazon's Prime loyalty program. The access to Prime customers likewise offers a competitive edge because Prime customers generate more sales than non-Prime users.

The Platform Saga Continues

Amazon has long been subject to antitrust enforcement. It already settled investigations in Germany and Austria, offering improved terms and conditions for online retailers across Europe.[23] The Amazon investigations demonstrate the Commission's ongoing enforcement efforts in today's platform economy and reflect Vice-President Vestager's general concerns relating to businesses' and consumers' increasing dependence on allegedly "dominant" online platforms.[24]

[22] The Commission's investigation closely follows an ongoing Italian investigation assessing whether Amazon discriminates against independent retailers using alternative logistics and delivery services by placing those sellers' products further down a list of search results on its website (see, Press Release, Italian Competition Authority, April 16, 2019, available at: https://en.agcm.it/en/media/press-releases/2019/4/A528. The Italian investigation is ongoing, but was delayed to April 20, 2021, due to the Covid-19 pandemic).

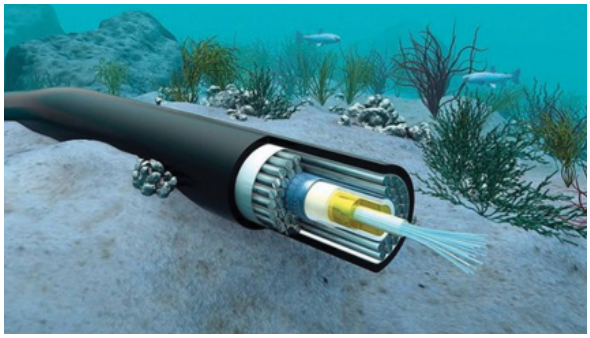
[23] See, Press Release, Bundeskartellamt, July 17, 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html; Press Release Austrian Bundeswettbewerbsbehorde, July 17, 2019, available at: https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1. The authorities' main theories of harm were exploitative abuse, unfair trading terms, and exclusionary abuse. A wide range of contractual terms (including clauses on termination and blocking of seller accounts, parity, confidentiality, and choice of law and court of jurisdiction) was regarded as abusive. To accommodate these concerns, Amazon revised its business terms across Europe (and even worldwide).

[24] Similar concerns were also recently included in the US House Judiciary Committee's report following its investigation of competition in digital markets, which saw the CEOs of Apple, Amazon, Google, and Facebook testify before Congress over the summer. The full report is available at https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/.

Presumption Of Decisive Influence: Court Of Justice Confirms In *Pirelli* That Parent Companies Will Pay The Price For Errant Subsidiaries

On October 28, 2020, the Court of Justice rejected an appeal by Pirelli & C. SpA ("Pirelli") against a 2018 judgment of the EU General Court upholding a 2014 Commission decision which held the power cables manufacturer jointly and severally liable, with its former subsidiary Prysmian, for Prysmian's participation in a bid-rigging cartel. Pirelli's appeal focused on the concept of parental liability and the Commission's obligation to explain its reasoning.

The *Power cables* cartel



In 2014, the Commission fined eleven European, Korean, and Japanese producers[25] of underground and submarine high voltage power cables[26] a total of €302 million for market sharing and customer allocation globally, by coordinating their behavior and exchanging sensitive information to rig the outcome of bids over a period of almost 10 years (1999–2009).[27] One of the addressees of the decision was the Italian cable manufacturer Prysmian, which was owned initially by Pirelli (1999–2005) and subsequently sold to the Goldman Sachs Group (2005–2009). The Commission fined Prysmian c. €105 million, and held its parent companies Pirelli and Goldman Sachs jointly and severally liable to the tune of c. €67 million and c. €37 million, respectively, according to the amount of time they each owned Prysmian.

Parental liability

Under the well-established principle of parental liability, a parent company may be held liable for the anticompetitive conduct of its subsidiary[28] if the parent exercises "decisive influence" over the commercial strategy of its subsidiary (*i.e.*, the subsidiary is not capable of acting independently on the market but carries out the instructions of its parent).[29] If the parent holds all, or almost all, of its subsidiary's share capital, that creates a rebuttable presumption of decisive influence requiring the parent to demonstrate otherwise. Parental liability is triggered at the time when the infringement took place and is not affected by the subsequent sale of the subsidiary, a change in company name,[30] disposal of the relevant assets, or the subsidiary exiting the market.[31]

General Court judgment

Pirelli appealed the Commission decision to the General Court in July 2014, as did Goldman Sachs

[25] ABB, Nexans, Prysmian (previously Pirelli), J-Power Systems (previously Sumitomo Electric and Hitachi Metals), VISCAS (previously Furukawa Electric and Fujikura), EXSYM (previously SWCC Showa and Mitsubishi Cable), Brugg, NKT, Silec (previously Safran), LS Cable and Taihan.

[26] The cables are typically used to connect to the electricity grid and between power grids in different countries.

[27] *Power cables* (Case COMP/AT.39610), Commission decision of April 2, 2014.

[28] "[A] legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalized for the unlawful conduct of another legal person, if both of those persons form part of the same economic entity." *Siemens Österreich and Others v. Commission*, and *Siemens Transmission & Distribution and Others v. Commission* (Case C-231/11 P) EU:C:2014:256, para. 45.

[29] The analysis should have particular regard for "the economic, organisational and legal links between those two legal entities" (*see Akzo Nobel NV and Others v. Commission of the European Communities* (Case C-97/08) EU:C:2009:536, para. 52; and *AEG v. Commission* (Case C-107/82) EU:C:1983:293, paras. 49–53).

[30] *Compagnie Royale Asturienne des Mines SA and Rheinzink v. Commission* (Case C-29/83) EU:C:1984:130, para. 9.

[31] *Prestressing steel* (Case COMP/AT.38344), Commission decision of June 30, 2010.

and most of the other addresses.[32] Pirelli argued that it did not have decisive influence over Prysmian during the relevant period for two main reasons.

First, Pirelli was the holding company of a conglomerate that controlled over 100 subsidiaries across diverse commercial sectors and therefore its "control" over activities was, in essence, limited to technical and financial management, devoid of commercial aspects. Second, Prysmian's continued engagement in anticompetitive conduct after it was taken over by Goldman Sachs was indicative of its ability to operate autonomously on the market.

Pirelli further argued that the Commission had breached its obligation to state reasons[33] by not explaining why the evidence submitted by Pirelli during the investigation was held to be insufficient to rebut the presumption of decisive influence.

In 2018, the General Court dismissed Pirelli's appeal and upheld the Commission's decision in its entirety.[34] The General Court found that the Commission had correctly applied the presumption of decisive influence, even though Pirelli did not directly hold all of Prysmian's share capital.[35] Further, the Court found that the Commission had correctly taken other factors into account, such as the power to appoint or dismiss board members, to call shareholder meetings, and to receive regular updates on the subsidiary's business.

On the alleged failure to state reasons, the General Court held that the only evidence the Commission needed to bring forward to trigger the presumption of decisive influence was the near-100% shareholding, and that it was not required to specify all relevant factual and legal elements underlying its decision.

Pirelli appealed the General Court judgment to the Court of Justice in October 2018.[36]

Court of Justice judgment

On October 28, 2020, the Court of Justice dismissed Pirelli's appeal in its entirety.[37] On the presumption of decisive influence, the Court of Justice recalled that the presumption is that the parent company actually exercises decisive influence over its subsidiary.[38] It also clarified that rebuttal of the presumption was "difficult" but not impossible, and that the evidence submitted by Pirelli was clearly insufficient in this respect.[39]

On the alleged failure to state reasons, the Court of Justice confirmed that, where evidence is adduced to rebut the presumption of decisive influence, the Commission must set out the reasons why it deems the evidence insufficient, but is "not required to take a position on matters which are clearly out of scope, meaningless or clearly secondary."[40]

Goldman Sachs and the implications for pure financial investors

The Court of Justice judgment in *Pirelli* will likely strengthen the Commission's ability to rely on the presumption of decisive influence in cartel cases, including when the parent is a holding or conglomerate company with multiple interests spanning diverse commercial sectors.

[32] Nexans, Prysmian, NKT, Goldman Sachs, LS Cable & System, Fujikura, Furukawa, Viscas, Brugg Kbel, Silec Cable, and General Cable all lodged appeals.

[33] This obligation is rooted in Article 296 of the Treaty on the Functioning of the European Union, which states that "[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."

[34] *Pirelli & C. v. Commission* (Case T-455/14) EU:T:2018:450.

[35] Pirelli held 98.75% of Prysmian shares (Pirelli Finance S.A. owned the remaining 1.25%).

[36] Nexans, Prysmian, NKT, Goldman Sachs, LS Cable & System, Fujikura, Furukawa, Viscas, Brugg Kabel, Silec Cable, and General Cable also filed appeals against the General Court decision.

[37] *Pirelli & C. SpA v. European Commission* (Case C-611/18 P) EU:C:2020:868 ("*Pirelli*"). The Court of Justice also rejected Pirelli's other arguments, specifically, that the Commission, in its application of a different method of assessment to Goldman Sachs, had breached the principle of equal treatment, and hence Pirelli's fundamental rights under Articles 48 and 49 of the Charter of Fundamental Rights, *i.e.*, the presumption of innocence and rights of defence, and principle of proportionality; and that it had breached Article 261 TFEU in respect of the order, distribution, and amount of the fine.

[38] *Pirelli*, para. 68.

[39] *Pirelli*, paras. 72 and 49 ("*manifestement non suffisant*").

[40] *Pirelli*, para. 46. The Court held that the evidence had actually been submitted in response to an argument made by Prysmian as to why Pirelli should be held solely responsible for the infringement, and were thus outside the scope of Pirelli's arguments on decisive influence.

It will be interesting to see whether the Court takes a similar approach in the forthcoming Goldman Sachs appeal.[41] In the General Court judgment,[42] Goldman Sachs' ownership of Prysmian was divided into two phases: 2005–2007, during which its shareholding ranged between 84.4% to 91.1% (the "first period"); and 2007–2009, when it divested the majority of its shares, retaining only 31.69% (the "second period").

The General Court followed the *Pirelli* reasoning for the first period. For the second period, the General Court held that Goldman Sachs continued to exercise decisive influence over Prysmian's commercial strategy after the share divestment because the members of Prysmian's board of directors that were nominated by Goldman Sachs before 2007 remained on the board until the end of the infringement, and because Goldman Sachs continued to use its power to revoke and nominate board members.

News

Commission Updates

Predatory Pricing, Again: The Commission Sends A Statement Of Objections To České Dráhy

On October 30, 2020, the Commission sent an SO to České dráhy, the Czech state-owned incumbent rail operator, for allegedly abusing its dominant position through predatory pricing.[43]

The Commission's charge sheet focuses on the allegation that the Czech rail passenger operator charged prices below cost on the Prague – Ostrava route, which is the backbone of the Czech rail network, between 2011 and 2019. This conduct is alleged to have hindered the rapid growth of two nascent local competitors, RegioJet and Leo Express, which started offering rail passenger transport services on the route in question in 2011 and 2012 respectively.

Predatory pricing is a strategy whereby an allegedly dominant company sets prices below cost to drive competitors out of the market and then recoups the loss by charging "monopoly" prices in the absence of competition.[44] These cases are usually difficult for antitrust regulators to bring because price competition, and the resulting lower prices, is one of the most fundamental ways in which firms compete on the merits; the targets of predation generally do not exit the market easily, and the substantiation of the theory of harm entails complex cost calculations.

Indeed, predatory pricing cases have generally been rare: the recent *Qualcomm*[45] decision is the first Commission predatory pricing case since the *Wanadoo* decision in 2003.[46] That said, several Member States had investigated and imposed fines for predatory pricing in bus passenger transport,[47]

[41] *The Goldman Sachs Group v. Commission* (Case C-595/18 P), case pending.

[42] *The Goldman Sachs Group v. Commission* (Case T-418-14) EU:T:2018:445 ("*Goldman Sachs*").

[43] *Czech Rail* (Case COMP/AT.40156), investigation ongoing. The Commission formally started the investigation in November 2016, following a dawn raid at České dráhy's premises in April that year. The dawn raid led to a separate proceeding regarding the appropriate scope of the Commission's dawn raid investigations. Following České dráhy's appeal, the General Court partly annulled the Commission's dawn raid decision, which set out the Commission's intention to investigate predatory pricing practices on certain railway lines (including, but not limited to, the Prague-Ostrava route) in the Czech Republic. The General Court agreed with České dráhy that, on the basis of information available to it, the Commission had sufficient grounds to suspect predatory pricing only with respect to the Prague-Ostrava line, and annulled the dawn raid decision in part where it concerned other routes. *České dráhy v. Commission* (Case T-325/16).

[44] In contrast to the U.S. antitrust framework, the Commission does not have to demonstrate a serious probability of recoupment to establish predatory pricing. *See France Telecom v. Commission* (Case C-202/07 P) EU:C:2009:214, para. 37.

[45] In 2019, the Commission fined Qualcomm €242 million for abusing dominance by predatory pricing of 3G baseband chipsets. *Qualcomm (predation)* (Case COMP/AT.39711), Commission decision of July 18, 2019, currently under appeal before the General Court in *Qualcomm v. Commission* (Case T-671/19). The *Qualcomm* decision was discussed in our July 2019 European Competition Law newsletter.

[46] *Wanadoo Interactive* (Case COMP/AT.38233), Commission decision of July 16, 2003.

[47] *Student Agency* (Case No. 62 Af 27/2011-554), Regional Court in Brno, September 25, 2014; and *Abuse of a dominant position by Cardiff Bus* (Case No. CE/5821/04), UK Office of Fair Trading, November 18, 2008. While the UK Office of Fair Trading did not fine Cardiff Bus (due to its low revenues), the Competition Appeal Tribunal later ordered it to pay nearly £94,000 in damages to its rival 2 Travel. See 2 *Travel/Cardiff Bus* (Case No. 1178/5/7/11), UK Competition Appeal Tribunal, July 5, 2012.

rail freight transport,[48] pharmaceuticals,[49] and milk supply sectors.[50]

The *Czech rail* case is the first time the Commission has alleged predatory pricing in the passenger rail transport segment, and its decision could have implications for passenger rail transport in other EU countries. It will also be interesting to see if (and how) the Commission's competitive assessment takes stock of the Green Deal objectives, which Commissioner Vestager explicitly called out in the statement accompanying the SO.[51] The Green Deal encompasses a comprehensive action plan aimed at making Europe climate neutral by 2050. The Commission is currently in the process of determining how competition rules could support the Green Deal objectives.[52]

Pay-For-Delay Again: Commission Fines Teva And Cephalon €60.5 Million For Delaying Entry Of Cheaper Generic Medicine

On November 26, 2020, the Commission fined Teva and Cephalon a total of €60.5 million for entering into a pay-for-delay agreement in relation to a sleep disorder drug. This arrangement is alleged to have helped maintain high prices for several years, to the detriment of patients and healthcare systems.[53]

Background

Modafinil, sold under the brand name 'Provigil,' is a medicine used for the treatment of excessive daytime sleepiness associated with narcolepsy. The product was a best-seller, accounting for more than 40% of Cephalon's worldwide turnover. By 2005, Provigil lost patent exclusivity in the EU for its main patents. Shortly after, Teva introduced a materially cheaper generic version in the United Kingdom and was ready to expand to the rest of the EU. Cephalon sued for alleged breach of Cephalon's secondary patents related to the pharmaceutical composition of modafinil.

This led to a 2005 worldwide patent settlement agreement between the parties. Teva agreed not to sell its generic modafinil products in Europe until October 2012 and not to challenge Cephalon's patents. In exchange, Cephalon offered Teva certain cash payments and a package of commercial side deals, including a distribution agreement, the acquisition of a license for a certain number of Teva's modafinil patents, purchase of raw materials from Teva, and access to valuable clinical data for an unrelated medicine to treat the Parkinson disease. In October 2011, Teva acquired Cephalon.

The Commission opened formal proceedings in April 2011[54] and sent the parties an SO in July 2017, alleging that the agreement constituted a pay-for-delay arrangement in violation of Article 101 TFEU.[55] Moreover, a similar action was brought by

[48] *English Welsh and Scottish Railways Ltd.* (Decision No. CA98/3/03), UK Office of Rail Regulation, November 17, 2006.

[49] *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* (CE/9742-13), Competition and Markets Authority, December 7, 2016, partially annulled by the UK Competition Appeal Tribunal in *Pfizer/Flynn* (Case No. 1275-1276/1/12/17), June 7, 2018.

[50] *Valio* (Case No. 2553/3/14), Finnish Supreme Administrative Court, December 29, 2016.

[51] "Competition in the rail passenger transport sector can drive prices down and service quality up to the benefit of consumers. It benefits the environment too as travellers shift to rail in line with the Green Deal objectives." See Commission's Press Release, "Antitrust: The Commission sends Statement of Objections to České dráhy for alleged predatory pricing," October 30, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2017. The Commissioner referred to green objectives also when the Commission opened the formal investigation in 2016: "Competition drives prices down and service quality up. This is what we need in railway passenger transport, especially when we're serious about cutting our carbon emissions." See Commission's Press Release, "Antitrust: Commission investigates practices of Czech railway incumbent České dráhy in passenger transport," November 10, 2016, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3656.

[52] Competition Policy Supporting the Green Deal – Call for Contributions, October 13, 2020, available at: https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf.

[53] European Commission Press Release, November 26, 2020, "Antitrust: Commission fines Teva and Cephalon €60.5 million for delaying entry of cheaper generic medicine," available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2220.

[54] European Commission Press Release, April 28, 2011, "Antitrust: Commission opens investigation against pharmaceutical companies Cephalon and Teva," available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_11_511.

[55] European Commission Press Release, July 17, 2017, "Antitrust: Commission sends Statement of Objections to Teva on 'pay for delay' pharma agreement," available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_17_2063.

the U.S. Federal Trade Commission in 2008 and settled in 2015.[56]

Pay-For-Delay Agreement

The Commission acknowledged that patent settlements, including payments, are generally legitimate. But this is not the case of a 'pay-for-delay' arrangement.[57] The Commission's investigation allegedly revealed that both parties had doubts as to the strength of Cephalon's secondary patents and entered into the settlement agreement for anti-competitive reasons.

Both parties benefited from the arrangement. Cephalon eliminated its most advanced generic competitor at the time, which enabled it to maintain higher prices for its best-selling medicine. Teva obtained a substantial value transfer from Cephalon through a number of attractive commercial deals which, absent the settlement, would not have been concluded, or would only have been concluded on less advantageous terms.

Accordingly, the Commission considered that the arrangement infringed Article 101 TFEU and imposed a fine on Teva and Cephalon of €30 million and €30.5 million respectively.[58] Through the 'pay-for-delay' arrangement, Teva did not realize any sales, the value of which normally forms the starting position for any fine calculation. The Commission therefore imposed on Teva a fixed fine amount that essentially mirrored that of Cephalon.

Patent Settlements in the Pharma Sector

The Commission's *Teva* decision is the latest pay-for-delay decision stemming from the Commission's 2009 pharma sector inquiry, which also included cases against *Lundbeck* (2013),[59] *Johnson & Johnson* (2013),[60] and *Servier* (2014).[61] Teva publicly announced its intention to appeal to the EU General Court.[62]

[56] See, Federal Trade Commission Press Releases, "FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics," available at: https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[57] It is of no importance whether the arrangements are "in the form of patent settlements or other seemingly normal commercial transactions" (see European Commission Press Release, November 26, 2020, "Antitrust: Commission fines Teva and Cephalon €60.5 million for delaying entry of cheaper generic medicine," available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2220).

[58] In calculating the fines, the Commission took into account the long duration of the infringement (from December 2005 to October 2011) and its gravity. See the Commission's 2006 Fining Guidelines (available at https://ec.europa.eu/competition/antitrust/legislation/fines.html).

[59] *Lundbeck* (Case COMP/AT.39226), Commission decision of June 19, 2013; *Lundbeck v. Commission* (Case T-472/13) EU:T:2016:449; *Lundbeck v. Commission* (Case C-591/16 P).

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

[61] *Perindopril (Servier)* (Case COMP/AT.39612), Commission decision of July 9, 2014; *Servier v. Commission* (Case T-691/14) EU:T:2018:922; and *Commission v. Servier and Others* (Case C-176/19 P) (pending).

[62] Teva said in a statement of November 26, 2020 that "We continue to believe the modafinil patent settlement agreement did not infringe EU competition law in relation to the principles laid out by the EU's court of justice. We are planning to file an appeal."

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