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EU Competition Law Newsletter

Highlights

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A New Theory Of Harm And An Unprecedented Enforcement Action: The Commission Flexes Its Muscles In *Novelis/Aleris*

On January 27, 2021, the Commission published its decision to conditionally approve Novelis' acquisition of Aleris, two suppliers of flat-rolled aluminum sheets.[1]

The Commission pushed the boundaries of its own powers in merger control proceedings, both in terms of substance and procedure. With respect to substance, the Commission introduced in its decision a new theory of harm for the competitive analysis of transactions, particularly with respect to markets affected by significant capacity constraints. From a procedural standpoint, the Commission adopted far-reaching measures to enforce the commitments that had been offered–and eventually infringed–by the parties to the transaction.

Pivotality as a (somewhat) new theory of harm

In its conditional approval decision, the Commission raised concerns in relation to Novelis' pivotal position in the European market of aluminium automotive body sheets. A firm may be considered pivotal when all other competitors are capacity constrained, and therefore unable to cover the entire demand in the market. In these circumstances, according to the Commission, the pivotal firm may have an incentive to keep prices high to maximize profits in the portion of demand that cannot be covered by rivals.

The Commission found that Novelis was "already pivotal pre-Transaction. That is, it faces significant residual demand that cannot be covered by its

[1] *Novelis/Aleris* (Case COMP/M.9076), Commission decision of October 1, 2019.

rivals."[2] Post-transaction, Novelis would have become even more pivotal, as the acquisition would have eliminated one of its rivals in Europe and would have increased Novelis' capacity share from more than 40% to over 50%.

The parties argued that these concerns do not take sufficiently into account the specific market conditions characterizing the aluminium industry. In this sector, a large share of the production capacity is committed to long-term supply agreements, and suppliers cannot unilaterally increase prices for volumes covered by those contracts. Novelis argued that its production capacity is not pivotal, because its rivals' available capacity was sufficient to cover all non-nominated demand in the market (that is, demand that is not yet covered by a long-term supply agreement) at least for the next two years. However, the Commission dismissed these arguments, noting that the transaction would have negatively impacted prices in the longer term, as supply contracts come to an end and have to be renegotiated.

The Commission already used the notion of pivotality as an indicator of market power in previous cases, mainly relating to electricity markets.[3] However, in *Novelis/Aleris* the Commission developed this notion into a fully-fledged and standalone theory of harm. This approach has been criticized for potentially leading to both false positives and false negatives in merger control enforcement. On the one hand, a pivotal firm may have no incentive to increase prices in light of the market conditions prevailing in a given sector. For instance, an expansion of the competitors' supplies, even if not sufficient to cover the entire market demand, could be enough to render the attempted price increase unprofitable. On the other hand, a transaction could be problematic even if the merging parties are not pivotal, for instance if they are particularly close competitors.[4]

The infringement of Novelis' commitments (and the Commission's reaction)

The Commission eventually cleared Novelis' acquisition of Aleris, subject to commitments offered by the parties. The commitments consisted of the divestment of Aleris' plant located in Duffel, Belgium. The divestment of the Duffel plant would have removed the entire overlap created by the transaction in the European market of aluminum automotive body sheets.

At the request of Novelis, the Commission repeatedly extended the deadline for the divestment of the Duffel plant until September 1, 2020. Novelis was still unable to finalize the divestment by that date, and the Commission rejected the company's request for a further extension of the deadline. Novelis consequently found itself in breach of the commitments.

This unprecedented outcome left the parties in a regulatory limbo. On the one hand, the Commission's decision clearing the acquisition of Aleris became automatically inapplicable,[5] although in the meantime the acquisition had already been concluded. On the other hand, the commitments attached to that decision, including Novelis' obligation to divest the Duffel plant, also became inapplicable.

To fill this legal vacuum, the Commission immediately adopted an interim decision to preserve the viability of the Duffel plant during this transitional phase and ensure its complete divestment. After the divestment was finalized on September 30, 2020, the Commission adopted a second decision imposing on Novelis a set of obligations similar to the original commitments, including an obligation not to re-acquire the Duffel plant and not to solicit its customers.[6]

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[2] *Ibid.*, para. 532.

[3] *See*, *EDF / British Energy* (Case COMP/M.5224), Commission decision of December 22, 2008; *EDF / AEM / EDISON* (Case COMP/M.3729), Commission decision of August 12, 2005. For natural gas markets, *see*, *Gazprom/Wintershall/Target Companies* (Case COMP/M.6910), Commission decision of December 3, 2013.

[4] *See*, R. De Coninck, R. Fischer, "Pivotality: A Sound New Theory of Harm in Horizontal Mergers?" in *Journal of European Competition Law & Practice*, Volume 11, Issue 7, September 2020, pp. 380–385.

[5] *See*, Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, para. 20: "where … a condition is breached, e.g., a business is not divested in the time-frame foreseen in the commitments … the compatibility decision is no longer applicable."

[6] *See*, Commission's Press Release IP/21/687, "Commission adopts final measures to preserve the divestment of former Aleris plant in Belgium following Novelis' acquisition of Aleris," February 18, 2021. The text of the interim and final decisions have not been published.

Finally, the Commission may impose a fine on Novelis for infringing the original commitments.[7]

This is a rare example of the Commission issuing a decision under the Merger Regulation[8] to replace the commitments infringed by the parties, and force the divestment of a business. For several reasons, this move may signal a stricter stance on the part of the Commission in relation to the implementation of commitments in merger cases.

Firstly, the Commission was uncompromising in rejecting Novelis' request for a further extension of the divestment deadline. This approach may appear somewhat disproportionate, in particular in the midst of the COVID crisis and given that a short extension would have been enough to allow the parties to comply with the original commitments (and therefore avoid the legal uncertainty resulting from their infringement).[9] Also, longer divestment periods were accepted in previous cases.

Second, the Commission adopted an extensive interpretation of its powers under the Merger Regulation. Those provisions only empowered the Commission to order *restorative* measures, consisting in the dissolution of the acquisition of Aleris or in any event the restoration, to the extent possible, of the conditions prevailing *before* that acquisition.[10] Instead the Commission used its powers to achieve a different outcome, namely the full implementation of the infringed commitments.

Finally, this case shows that an infringement of the commitments may have far-reaching consequences. The Commission effectively replaced the commitments designed by the parties with its own unilateral decision. And while the Commission's decision in this case seems to largely reflect the original commitments, in principle any "appropriate" measures could be ordered to remedy an infringement, irrespective of the commitments initially offered.[11]

EU courts will have the last word

Novelis/Aleris is the last in a string of cases affecting the metals industries in which the Commission has put forward innovative approaches to merger control. The Commission's reasoning in several of these cases is currently subject to judicial review before the General Court.

For instance, the steel producer ThyssenKrupp challenged the prohibition of its merger with Tata Steel, claiming that the Commission erred in the definition of the relevant market for galvanized steel.[12] Likewise, the copper supplier Wieland-Werke challenged the prohibition of its merger with Aurubis, arguing that the Commission erred in applying an untenable theory of harm confounding horizontal with non-horizontal effects.[13] Lastly, Novelis challenged the Commission's decision not to extend the deadline for the divestment of the Duffel plant, claiming that "in light of its legal consequences and the availability of several less onerous means, the [decision] infringes the principle of proportionality."[14]

These actions will provide several opportunities for the EU courts to clarify the scope of the Commission's powers in merger control proceedings.

[7] *See*, Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, para. 20: when the compatibility decision is no longer applicable, "the Commission may, first, take interim measures appropriate to maintain conditions of effective competition ... Second, it may ... order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures ... In addition, the parties may also be subject to fines ..."

[8] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, pp. 1–22.

[9] In fact, Novelis was able to finalize the divestment less than one month after the final deadline.

[10] *See*, Merger Regulation, Article 8(4): "Where the Commission finds that a concentration ... has been implemented in contravention of a condition attached to a [conditional clearance decision], the Commission may: (-) require the undertakings concerned to dissolve the concentration ... so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible, (-) order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision."

[11] *Ibid*.

[12] *Thyssenkrupp v. Commission* (Case T-584/19) action brought on August 22, 2019.

[13] *Wieland-Werke v. Commission* (Case T-251/19) action brought on April 15, 2019.

[14] *Novelis v. Commission* (Case T-680/20), action brought on November 11, 2020. *See*, the summary of the application published in OJ C 19 on January 18, 2021, pp. 64–64.

News

Court Updates

The Court Of Justice Confirms Parallel Antitrust Investigations At European And National Level Are Possible If Different In Scope

On February 25, 2021, the Court of Justice held that the Commission and the Slovak competition authority did not infringe EU law when conducting two parallel investigations against Slovak Telekom.[15] Because the two investigations pertained to different product markets, regulators at the European and national level were entitled to proceed in parallel and eventually impose two distinct fines on Slovak Telekom.

Background

On April 8, 2009, the Commission launched an investigation against Slovak Telekom for abusing its dominant position in the Slovak market for broadband services (high-speed internet).[16]

The following day, the Slovak competition authority fined the same company €17.5 million for abusing its dominant position in the markets for retail telecommunications and wholesale interconnection (telephone services and low-speed internet).

Slovak Telekom challenged the national authority's decision in national court. On appeal before the Slovak Supreme Court, the company argued that the initiation of an investigation at the European level should have prevented the national authority from fining the same company for the same conduct.

In particular, Slovak Telekom claimed the imposition of a fine by the national authority was in breach of Article 11(6) of Regulation 1/2003,[17] whose aim is to prevent conflicts of competence between the Commission and national authorities. According to this provision, "[t]he initiation by the Commission of proceedings for the adoption of a decision ... shall relieve the competition authorities of the Member States of their competence to apply [EU antitrust rules]."

Slovak Telekom also claimed that the national authority's decision infringed its rights of defense, as enshrined in Article 50 of the Charter of Fundamental Rights of the European Union. This provision reflects the fundamental principle of *ne bis in idem*, according to which no one should be tried or punished twice for the same offense.

On November 12, 2019, the Slovak Supreme Court stayed the appeal proceedings and requested the European Court of Justice to issue a preliminary ruling to clarify the correct interpretation of these two provisions.

Court of Justice clarifies rule on parallel proceedings and *ne bis in idem* principle

In its preliminary ruling, the Court of Justice recalled that, under Article 11(6) of Regulation 1/2003, a national competition authority loses its competence to investigate anticompetitive conduct under EU law if the Commission opens proceedings to examine the same conduct. But the Court of Justice clarified that the national authority is only relieved of its power insofar as the Commission brings proceedings against the same undertakings for the same alleged infringement on the same product and geographical markets during the same period.

While deferring to the Slovak Supreme Court for the final adjudication on this issue, the Court of Justice went on to find that the investigations conducted by the Commission and the national

[15] *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky* (Case C-857/19) EU:C:2021:139.

[16] After a five-year investigation, the Commission eventually imposed a €38.8 million fine on Slovak Telekom and its parent company, Deutsche Telekom AG. *See*, *Slovak Telekom* (Case COMP/AT.39523), Commission decision of 15 October 2014. On appeal, the General Court upheld the Commission's decision but reduced the fine. *See*, *Deutsche Telekom v. Commission* (Case T-827/14) EU:T:2018:930; *Slovak Telekom v. Commission* (Case T-851/14) EU:T:2018:929. Appeals before the Court of Justice are pending (Cases C-152/19 P and C-165/19 P, respectively).

[17] 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 ("Regulation 1/2003 EC").

authority relate to infringements committed in different markets (respectively, the market for broadband services and the markets for retail telecommunications and wholesale interconnection). In light of this difference in scope, the Commission's decision to open proceedings did not relieve the Slovak authority of its competence to conduct and conclude its own investigation against the same company.

Further, the Court of Justice confirmed that the *ne bis in idem* principle applies to antitrust infringements.[18] However, the principle does not preclude separate and independent investigations at the national and European level if those investigations relate to different product markets or geographical markets. Where the investigations related to the same markets, the principle of *ne bis in idem* would still not come into play because the decision of the national authority would be illegitimate under Article 11(6) of Regulation 1/2003 in the first place.

Implications

The judgment will likely impact the fate of other parallel investigations conducted both at the European and national level, including the ongoing abuse of dominance proceedings launched by the Commission and the Italian competition authority against Amazon.

In 2019, the Italian authority launched an investigation in relation to the online retailer's "buy box", the space at the top of a page that allows customers to make swifter and more direct purchases.[19] The following year, the Commission launched a similar investigation, but carved Italy out of the scope of its proceedings. Amazon brought a challenge before the General Court on January 19, 2021, claiming that in doing so the Commission unlawfully circumvented Article 11(6) of Regulation 1/2003.

In light of the *Slovak Telekom* judgment, the General Court may decide that Article 11(6) of Regulation 1/2003 does not apply in this case, because the two investigations against Amazon differ in geographic scope. At the same time, the judgment emphasizes that Article 11(6) seeks to ensure the "best possible" enforcement and to protect companies from parallel enforcement proceedings, which "cannot be at the expense of undertakings."[20] There is concern that if the Commission were allowed to freely tailor the geographic scope of its proceedings to the benefit of national authorities' ongoing investigations, this could cause a proliferation of parallel actions against the same companies and an inconsistent application of antitrust rules across Europe.[21]

Commission Updates

The Commission Accepts Commitments Offered By Aspen In Its First Decision On Excessive Pricing In The Pharmaceutical Sector

On February 10, 2021, the Commission accepted commitments offered by South African pharmaceutical company Aspen and ended one of its rare investigations into excessive pricing (and reportedly the first in the pharmaceutical sector).[22] The decision provides guidance on how the Commission evaluates excessive pricing of off-patent medicines and how to remedy potential concerns.

In 2017, the Commission started an investigation into Aspen's steep price increases of six off-patent cancer medicines in the previous five years. In its preliminary assessment, the Commission was concerned that Aspen abused its dominant position in several national markets in the EEA by imposing excessive prices. Aspen allegedly succeeded in imposing those prices by threatening to withdraw the medicines—most without alternatives—from the national lists of reimbursable drugs.

[18] *See*, *Toshiba Corporation and Others* (Case C-17/10) EU:C:2012:72, para. 94.

[19] *Amazon – Buy Box* (Case COMP/AT.40703), Opening of Proceedings Decision of 10 November 2020.

[20] *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky* (Case C-857/19) EU:C:2021:139, para. 32 (citing *IBM v. Commission* (Case 60/81) EU:C:1981:264, para. 18; *Silgan Closures and Silgan Holdings v. Commission* (Case C-418/19 P) EU:C:2020:43, para. 73).

[21] *See*, Lewis Crofts, *Comment: Amazon fight against EU probe faces new legal headwind from Slovak Telekom case*, MLex Global Antitrust, February 25, 2021.

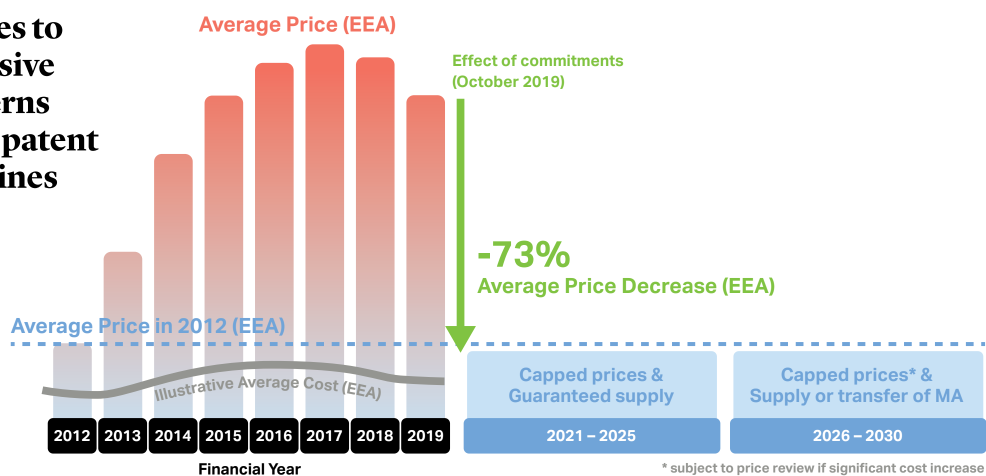
[22] Commission Press Release IP/21/524, "Antitrust: Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns," February 10, 2021. The text of the Commission's decision accepting Aspen's commitments has not been published yet.

The Commission's methodology in its preliminary assessment was to analyze Aspen's profitability by looking at its accounting data. The Commission found that Aspen's prices exceeded its relevant costs by almost 300% on average, even after accounting for a reasonable rate of return. Aspen's average profitability in the EEA was three times higher than the average profitability of comparable companies. The Commission found no legitimate reasons for these high profit margins. Aspen did not improve the medicines or their distribution, nor would it recoup R&D investments because the medicines were off-patent for 50 years. The Commission's preliminary assessment therefore found that Aspen likely abused its dominant position by imposing excessive prices.

To end the probe, Aspen committed to decrease the prices of the medicines to a fixed price ceiling for the next 10 years in the EEA Member States where the medicines are sold (retroactively taking effect as of October 1, 2019).[23] This entails a price decrease of 73% on average in the EEA (*see* picture below). Aspen further guarantees to supply the medicines for the next 5 years, and for an additional 5 years will either supply the medicines or make the marketing authorization available to other suppliers. The commitments do not cover Italy because the Italian competition authority took a separate decision against Aspen in 2016.[24]

Commission decisions on excessive pricing are rare, and Commissioner Vestager emphasized in her press statement that the Commission is not a price regulator.[25] She continued to say, however, that the Commission will intervene when a company abuses its dominant position by imposing excessive prices. The decision in *Aspen* provides welcome guidance on what the Commission considers to be 'excessive' and how to remedy abusive price practices in future cases affecting the pharmaceutical sector.

Reduced prices to remedy excessive pricing concerns for Aspen off-patent cancer medicines



Source: European Commission

[23] *Aspen* (Case COMP/AT.40394), final commitments of February 10, 2021.

[24] Autorità garante della concorrenza e del mercato, Case A480 *Price increase of Aspen's medicines*, decision of September 29, 2016.

[25] Commission Press Release STATEMENT/21/526, "Statement by Executive Vice-President Vestager on the Commission decision to accept commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns," February 10, 2021.

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