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Highlights

— The Commission Proposes A Draft Regulation To Tackle Potential Distortions Caused By Foreign Subsidies

— The General Court Rules On Two Commission State Aid "Tax Ruling" Decisions: Annuls In Amazon, Upholds In Engie

The Commission Proposes A Draft Regulation To Tackle Potential Distortions Caused By Foreign Subsidies

Background

On May 5, 2021, the Commission proposed a draft regulation to tackle potential distortions in the internal market caused by foreign subsidies ("Draft Regulation").[1]

The Draft Regulation—the adoption of which is a "key action" of the EU Industrial Strategy[2]—is born out of a concern that the current regulatory framework makes for an uneven playing field. While there are rigorous EU State aid rules concerning subsidies issued by EU Member States, foreign aid is not scrutinized under the same standards.

The Commission has concluded that none of the currently available instruments (antitrust, trade, public procurement, and foreign investment rules) can be used to level the playing field between undertakings that receive foreign aid, and undertakings that do not.[3] The Draft Regulation aims to fill this gap.

Definition of "Foreign Subsidy"

The Draft Regulation sets out rules and procedures for investigating foreign subsidies that distort the internal market and for remedying such distortions. Under the Draft Regulation, a "foreign subsidy" exists if three cumulative conditions are met:

[1] Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, Explanatory Memorandum, pp. 1–2, COM(2021) 223 final of May 5, 2021, available at: https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf. For a detailed analysis, see our May 19, 2021 Alert Memorandum "The European Commission Proposes A Far-Reaching Regulation To Tackle Foreign Subsidies."

[2] Communication from the Commission on updating the 2020 new industrial strategy: building a stronger Single Market for Europe's recovery, COM(2021) 350 final of May 5, 2021, p. 15, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0350&from=EN.

[3] Draft Regulation, Article 1.

- A financial contribution has been granted by the relevant public authorities of a non-EU country. The term "financial contribution" is not defined, but the Draft Regulation explains that such contributions may include, *e.g.*, the transfer of funds or liabilities, foregoing revenue owed, *etc.*;[4]
- This contribution confers a "benefit" to an undertaking engaging in an economic activity in the EU; and
- The contribution is limited "to an individual undertaking or industry or to several undertakings or industries."

Substantive analysis

For a subsidy to be prohibited under the Draft Regulation, the Commission will have to establish the existence of a distortion of the internal market. A distortion of the internal market occurs when the foreign subsidy (i) can improve the competitive position of the beneficiary; and (ii) in doing so, negatively affects competition.[5] Such a finding will be based on a series of parameters, including the amount, nature, purpose, conditions, and use of the subsidy.

By way of guidance, the Draft Regulation lists particular types of subsidies that are likely to distort competition on the internal market, *e.g.*, those granted to an ailing undertaking, involving unlimited guarantees, or directly facilitating a transaction.[6] It also sets out a *de minimis* criterion for subsidies of less than € 5 million over three fiscal years, which it considers unlikely to be distortive.[7]

The Draft Regulation provides the Commission with broad review powers, including over subsidies that have already been paid out as of its enactment. Indeed, the Draft Regulation will apply to foreign subsidies received in the ten years prior to the start of its application where the subsidies still distort the internal market.[8]

If the existence of a distortion is established, the Commission will then need to carry out a "balancing test" between "the negative effects of a foreign subsidy in terms of distortion on the internal market" and the "positive effects on the development of the relevant economic activity."[9] If negative effects prevail, the Commission can impose restorative measures and the beneficiary may offer commitments to remedy the distortions created by the foreign subsidy.

The Commission may also impose fines. The two types of fines available under the Draft Regulation mirror those under the EUMR. First, the Commission may fine undertakings that either fail to provide information requested by the Commission or provide misleading information up to 1% of the aggregated worldwide turnover of the undertaking and levy periodic penalty payments of up to 5% of the undertaking's average daily aggregate worldwide turnover.[10]

Second, if the undertaking does not comply with the measures imposed, breaches commitments, fails to notify a subsidy, or does not file an acquisition that was reportable, the Commission can levy fines of up to 10% of the company's aggregated worldwide turnover.[11]

[4] Draft Regulation, Article 2.

[5] Draft Regulation, Article 3.

[6] Draft Regulation, Article 4 and Recitals 12–15.

[7] Draft Regulation, Article 3.

[8] Draft Regulation, Article 47. Based on its current text the Draft Regulation should not, however, apply to triggering events initiated before its date of application (notification would not be required with respect to already initiated public procurement procedures, or to concentrations for which the deal was already concluded, the public bid announced, or a controlling interest acquired).

[9] Draft Regulation, Article 5.1.

[10] Draft Regulation, Article 15.

[11] Draft Regulation, Article 15.5, 25 and 32.

The Commission's investigative tools

The Draft Regulation envisages providing the Commission with three investigative tools. These include two obligations on companies to notify financial contributions to the Commission and one general market investigation tool.

— **Notification of concentrations.** The Draft Regulation imposes a mandatory pre-closing notification of concentrations where two cumulative conditions are met:[12] (i) the undertaking being acquired or, in the case of a merger, at least one of the merging undertakings, is "established" in the EU and generates an aggregate turnover in the EU of at least € 500 million; and (ii) the undertakings concerned received from non-EU countries an aggregate financial contribution of more than € 50 million in the three calendar years prior to notification.[13]

Notifiable transactions are subject to a standstill obligation pending the Commission's investigation.[14] At the end of its investigation, the Commission may prohibit the transaction if it finds that the foreign subsidy distorts the internal market and the undertaking offered no suitable commitment to remedy the distortion.[15]

— **Notification of public procurement bids.** The Draft Regulation applies to public tenders worth € 250 million or more. For such tenders, it imposes a mandatory prior notification to the contracting authority (for further transmission to the Commission) of any foreign financial contribution received in the three years preceding participation in the bid. As a result, the public bid procedure may be significantly delayed as the contracting authority is prevented from awarding the contract during the Commission's 60 day preliminary review.[16]

If the Commission decides to open an in-depth investigation, which lasts an additional 140 days, the contracting authority may not award the contract to the relevant party during that period unless the tender evaluation has established that the party has submitted the most economically advantageous tender.[17] At the end of this process, if the Commission maintains a concern, it may either (i) accept commitments addressing any distortive effects; or (ii) prohibit the award of the contract in the absence of suitable commitments.[18]

— **Market Investigation Tool.** The Draft Regulation also includes a general market investigation tool that grants the Commission broad powers to investigate of its own accord a potentially distortive foreign subsidy relating to an (EU or foreign) undertaking's "economic activity" in the EU. These powers include the ability to request information, carry out on-site inspections (including outside the EU),[19] as well as to order interim measures.[20]

The procedure starts with a preliminary review followed by an in-depth investigation if the initial assessment reveals that a foreign subsidy could distort the internal market.[21] If the Commission confirms a distortion at the end of this review, it may impose redressive measures or make binding any commitments offered to address the distortion.[22]

[12] The notification obligation applies to the same types of transactions as under the EU Merger Regulation ("EUMR").

[13] Draft Regulation, Article 18.

[14] Draft Regulation, Article 27. After the first phase review (25 working days), the Commission may open an in-depth second phase review (90 working days, plus 15 more if the undertaking offers commitments). Draft Regulation, Article 23.1. As explained below, Article 6 of the Draft Regulation enables the Commission to impose redressive measures and accept commitments offered by undertakings to remedy the distortions to the internal market caused by a foreign subsidy.

[15] Draft Regulation, Article 24.

[16] Draft Regulation, Articles 29 (2) and 31 (1).

[17] Draft Regulation, Article 31.

[18] Draft Regulation, Article 30.

[19] Draft Regulation, Articles 11, 12 and 13.

[20] Draft Regulation, Article 10. The Commission may impose interim measures if: (i) there are indications that a financial contribution constitutes a foreign subsidy and distorts the internal market; and (ii) there is a serious risk of substantial and irreparable damage to competition on the internal market.

[21] Draft Regulation, Article 8.2. On the contrary, if there are not enough grounds to do so, it will close the preliminary review and inform the undertaking. Draft Regulation, Article 8.3

[22] Draft Regulation, Article 9.4.

Next steps and practical considerations

The Commission is collecting public feedback on the Draft Regulation until July 20, 2021. The feedback received will be published on the Commission's website, and presented to the European Parliament and Council for discussion. The debate is likely to be extensive (particularly within the Council, as some Member States still appear doubtful about the need for a new instrument), and several open questions remain unaddressed.[23]

Nevertheless, it is not too soon for companies backed by non-EU governmental entities to start considering the practical implications the Draft Regulation may have on their economic activities in the EU. Companies receiving any foreign subsidies would benefit from carefully factoring the requirements of the Draft Regulation into their decisions to invest and conduct economic activity in the EU in the coming years.

The General Court Rules On Two Commission State Aid "Tax Ruling" Decisions: Annuls In *Amazon*, Upholds In *Engie*

On May 12, 2021, the General Court handed down two judgments on the Commission's review under EU State aid rules of tax rulings in which the Luxembourg tax authorities had clarified in advance how national taxation provisions will apply to specific companies. The judgments were split:

- In *Amazon*, the General Court annulled the Commission's 2017 decision ordering Luxembourg to recover € 250 million in back-taxes from Amazon.[24] The General Court ruled that the Commission had not proved to the required standard that a 2003 Luxembourg tax ruling had granted a selective advantage to Amazon.[25]
- In *Engie*, however, the General Court upheld the Commission's 2018 decision ordering Luxembourg to recover € 100 million from Engie.[26] The Court ruled that Engie—through two intra-group financing structures that treated the same transaction both as debt and as equity, with the result that the group's profits remained untaxed—had received preferential tax treatment due to the non-application of a national measure relating to abuse of law.[27]

In both judgments, the General Court endorsed the Commission's legal framework to review individual tax rulings. But the differing outcomes confirm that the EU Courts will scrutinize the Commission's application of this legal framework in detail. The *Amazon* judgment, which follows a similar annulment in *Apple* (the Commission's largest ever State aid recovery order)[28] and *Starbucks*,[29] represents a further setback to Commissioner Vestager's strategy of using EU State aid rules to target what are perceived to be "sweetheart" tax deals given to multinational companies.

[23] *See* our May 19, 2021 Alert Memorandum "The European Commission Proposes A Far-Reaching Regulation To Tackle Foreign Subsidies."

[24] *Aid to Amazon – Luxembourg* (Case SA.38944), Commission decision of October 4, 2017.

[25] *Luxembourg v. Commission* and *Amazon EU Sàrl* and *Amazon.com, Inc. v. Commission* ("*Amazon*") (Cases T-816/17 and T-318/18) EU:T:2021:252.

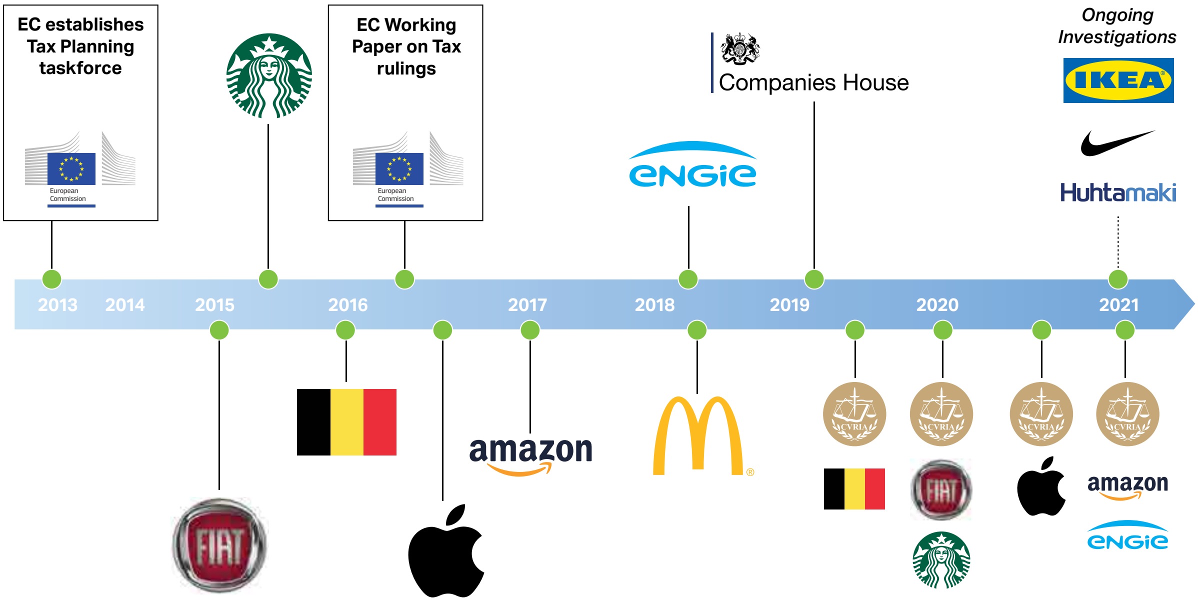
[26] *Aid to Engie* (Case SA.44888), Commission decision of June 20, 2018.

[27] *Luxembourg v. Commission* and *Engie, Engie Global LNG Holding Sàrl, and Engie Invest International SA v. Commission* ("*Engie*") (Cases T-516/18 and T-535/18) EU:T:2021:251.

[28] *Ireland and Apple v. Commission* (Cases T-778/16 and T-892/16) EU:T:2020:338.

[29] *Starbucks* (Case T-760/15) EU:T:2019:669.

Figure 1: Commission Scrutiny Of Tax Rulings Under EU State Aid Rules



The General Court confirms the legal framework applied by the Commission to review individual tax rulings

The General Court began by endorsing the principles underpinning the Commission's review of individual tax rulings under EU State aid rules.

— **The Commission has jurisdiction to review individual tax rulings under EU State aid rules.** The General Court confirmed that the Commission's jurisdiction to investigate tax rulings does not amount to "tax harmonization in disguise"[30] and "is not excluded from the scope of the rules on the monitoring of State aid" despite Member States' exclusive competence for direct taxation.[31] The Commission may consider that an individual tax ruling by a Member State for a specific company amounts to illegal State aid if the tax ruling gives a selective advantage to a company that deviates from "normal taxation" "compared with his or her position in the absence of the measure at issue."[32]

— **The Commission can use the "arms' length" principle and refer to OECD Guidelines to establish a selective advantage.** To assess whether the tax rulings amounted to an advantage under State aid rules, the Commission relied on the "arms' length" principle.[33] The arm's length principle requires that financial relations within a group of companies should not differ from those between independent companies under market conditions. Reiterating its findings from *Apple*,[34] the General Court held that the Commission was entitled to use the principle to assess whether there was an undue reduction of the tax burden of an Amazon subsidiary or the Engie group. Moreover, when using the principle, the Commission can refer to, but is not bound by,

[30] *Engie*, para. 160.

[31] *Amazon*, para. 112; *Engie*, para. 138.

[32] *Amazon*, paras. 114–116; *Engie*, paras. 138–141.

[33] "This "arm's length principle" aims to ensure that all economic operators are treated in the same manner when determining their taxable base for corporate income tax purposes, regardless of whether they form part of an integrated corporate group or operate as standalone companies on the market." *See* DG Competition Working Paper on State Aid and Tax Rulings, June 2016, available at: https://ec.europa.eu/competition-policy/system/files/2021-04/specific_aid_instruments_working_paper_tax_rulings.pdf.

[34] *Apple*, paras. 224–225.

OECD Guidelines on transfer pricing which, "reflect international consensus" and thus "have a certain practical significance in the interpretation of issues relating to transfer pricing."[35]

The General Court exercises strict control over the Commission's application of this legal framework

Individual tax rulings involve a complex, fact-specific assessment. In competition law cases, the EU Courts are often perceived to grant considerable deference to the Commission's factual assessment. In *Amazon*, however, the General Court scrutinized closely whether the Commission had discharged its burden of proof in establishing a selective advantage.

Amazon. In its decision, using the arm's length principle, the Commission concluded that the royalties paid by LuxOpCp to LuxSCS to use intangible assets were lower than what it would have obtained under normal market conditions, which reduced artificially LuxOpCo's tax base. The General Court disagreed. It found that the Commission underestimated the functions performed by LuxSCS, notably its "unique and valuable" intangible assets.

More generally, the General Court also clarified the scope of the Commission's burden of proof to demonstrate a selective advantage. The "mere finding of a methodological error" when applying a transfer pricing method does not suffice "to demonstrate that a tax ruling conferred an advantage on a specific company."[36] The errors must result in "a reduction in the tax burden" of the beneficiary.[37] Here, the Commission had alleged but not demonstrated how the purported errors would undervalue LuxOpCo's remuneration (and thus had not established an advantage arising from a reduced tax burden). The General Court therefore annulled the Commission's decision.

Engie. In *Engie*, the General Court approved the Commission's assessment of a complex intra-group financing structure that allegedly transferred business activity and financing between three companies belonging to the same group without any taxable profits.

The General Court did not dispute that the relevant Luxembourg tax rules had been applied correctly, but considered it necessary to go "beyond the legal form in order to look at the economic and fiscal reality of the structure,"[38] looking at the interdependent transactions between the three companies—rather than opting for a formalistic approach to isolate each of the transactions under the structure. In so doing, the Luxembourg tax authorities should have applied their abuse of law rules to a tax planning structure that allegedly deviated from the objectives of the tax system. Failure to apply these rules conferred a selective advantage on Engie by affording it preferential tax treatment.

Practical considerations

— ***Tax ruling investigations under EU State aid rules are likely to continue.*** The high-profile *Amazon* and *Apple* defeats show that investigating tax rulings under EU State aid rules has not been the policy tool the Commission hoped it would be. The EU Courts have demonstrated they will remain a limiting factor on the Commission's policy goals in the tax ruling field. But despite the *Amazon* setback, the Commission is likely to welcome the General Court's confirmation of its core approach to State aid investigations into tax rulings, including the use of the arm's length principle.

It will be interesting to see whether the Commission will appeal the *Amazon* judgment. The Commission refrained from appealing the annulment in *Starbucks* but appealed in *Apple*.

[35] *Amazon*, para. 122.

[36] *Amazon*, para. 545.

[37] *Amazon*, para. 546.

[38] *Engie*, para. 311.

One difficulty for the Commission is that an appeal would in principle be limited to points of law (or manifest distortion of facts), and the *Amazon* judgment centers on factual assessments relating to the Commission's failure to satisfy the burden of proof for methodological errors. The Commission is likely to exercise particular caution in future decisions—particularly in its four open investigations.

— ***Potential for EU legislative action.*** Faced with several defeats in the tax ruling ring (the General Court has now annulled four of eight tax ruling decisions),[39] the Commission may now look to other mechanisms to combat perceived tax advantages given to multinational companies by certain Member States. In July 2020, it was reported that the Commission was considering using a far-reaching, and so far unused treaty provision, Article 116 TFEU, which allows it to enact legislation to eliminate distortions of competition due to, for example, different tax rules between Member States.[40] Legislation under Article 116 TFEU can be passed by a qualified majority (rather than unanimity), meaning no single Member State (nor even a grouping of the smaller Member States that have been the subject of the Commission's decisions on tax rulings, *i.e.*, Belgium, Ireland, Luxembourg, and the Netherlands) would be able to block such legislation.

These developments are occurring with tax advantages and perceived avoidance atop the EU's target list. On June 1, 2021, EU Member State governments and the European Parliament announced country-by-country tax reporting rules to force multinational companies to disclose where they pay tax (and how much).[41] Most recently, on June 5, 2021, the G7 struck a "historic" agreement on taxing multinational companies.[42] In short, whether under the competition law framework validated by the Court or under some other instrument, tax scrutiny by the Commission is likely to continue.

News

Commission Updates

Commission Sends Apple a Statement Of Objections Alleging Apple Abused Its Dominant Position To Advantage Its Music Streaming Service

On April 30, 2021, the European Commission issued a Statement of Objections to Apple alleging it abused its dominant position in the market for the distribution of music streaming apps.[43] The Commission's investigation follows Spotify's complaint filed in March 2019,[44] and marks the first major procedural development in the four investigations opened against Apple in June 2020.[45]

Apple's alleged dominant position

The Commission has reached the preliminary view that Apple's distribution platform, the App Store, is the "sole gateway" through which app developers can reach Apple device users. Executive Vice-President Vestager commented that through its App Store Apple is an apparent

[39] The other three cases are *Apple*, *Starbucks*, and *Belgium v. Commission* and *Magnetrol International v. Commission* ("*Belgian Excess Profits*") (Joined Cases T-131/16 and T-263/16) EU:T:2019:91. For information on the Commission's ongoing investigations, see its Tax Rulings page, available at: https://ec.europa.eu/competition-policy/state-aid/tax-rulings_en.

[40] Financial Times, "Brussels plans attack on low tax member states," July 14, 2020, available at: https://www.ft.com/content/4068b83a-2c64-43e9-b82a-0b77c454164b.

[41] Financial Times, "EU seals pact on forcing multinationals to report profits and tax," June 1, 2021, available at: https://www.ft.com/content/8dc4e155-fae0-4800-89fc-d647dba7872c.

[42] Financial Times, "G7 strikes historic agreement on taxing multinationals," June 5, 2021, available at: https://www.ft.com/content/a308bbff-5926-47a1-9202-6263e667511e.

[43] *Apple – App Store Practices (music streaming)* (Case COMP/AT.40437). *See* Commission Press Release issued on April 30, 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061.

[44] As reported in our May 2019 EU Competition Law Newsletter.

[45] As reported in our June 2020 EU Competition Law Newsletter.

"gatekeeper" to users of iPhones and iPads. This affinity for words starting with "gate" directly links this finding to the current Proposed Digital Markets Act, which focuses on platforms that have a "gatekeeper" role in digital markets.[46]

Apple's alleged abusive conduct

The Commission is taking issue with two rules imposed by Apple in agreements with music streaming app developers:

— Apple's practice of charging app developers a 30% commission fee on all subscriptions purchased by consumers through Apple's mandatory in-app purchase system ("IAP").

— So-called "anti-steering provisions" that allegedly limit the ability of app developers to inform users of alternative mechanisms to complete a purchase outside of the apps where the purchase could avoid relying on the IAP.

The Commission considers that both rules effectively increase the costs of music streaming app developers that compete with Apple's own streaming service. According to the Commission, most app developers pass this fee on to end-users, leading to higher prices for consumers.

Apple will now have the opportunity to contest these preliminary findings. Having seen this response, the Commission will determine whether to adopt an infringement decision against Apple. Such an order would likely compel Apple to change its App Store practices.

The Commission Fines Sigma-Aldrich € 7.5 Million For Providing Incorrect Information During Merger Review

On May 3, 2021, the European Commission fined life science company Sigma-Aldrich € 7.5 million for providing incorrect or misleading information during the Commission's 2015 review of Merck's acquisition of the company. The fine marks another step in an increasingly stringent approach to enforcing the procedural rules that apply during the Commission's merger control process.[47]

Background

On June 15, 2015, following a Phase I investigation, the Commission conditionally approved Merck's acquisition of Sigma Aldrich, subject to the divestiture of certain Sigma-Aldrich assets to a third-party purchaser. This remedy would address the competition concerns the Commission identified in markets for specific laboratory chemicals.

During the divestment process in 2016, a third-party informed the Commission that Sigma-Aldrich had excluded from the scope of the remedy an important innovation project ("iCap"), which was closely linked to the divested business. In response, the Commission issued a Statement of Objections ("SO") to both Merck and Sigma-Aldrich in 2017. The SO alleged that Sigma had intentionally—and Merck, negligently—provided incorrect information during the merger review in breach of their procedural obligations under the Merger Regulation.[48]

The SO identified three separate instances where the parties had provided misleading information and established a distinct infringement for each instance of misleading information. The Commission claimed the infringements were

[46] *See* the Commission's draft Online Platform Regulations, as detailed in our December 2020 EU Competition Law Newsletter.

[47] For instance, in 2017, the Commission imposed a € 110 million fine on Facebook for providing misleading information as part of the notification and in response to an RFI during the Commission's review of *Facebook/Whatsapp*. Two years later, in 2019, General Electric was fined € 52 million for similar alleged infringements during the investigation of its planned acquisition of Danish wind turbine blade manufacturer LM Wind Power Holdings. To date, none of these cases have involved the Commission revoking a clearance decision due to the misleading information provided.

[48] Commission Implementing Regulation No 1269/2013 of 5 December 2013 amending Regulation No 802/2004 implementing Council Regulation No 139/2004 on the control of concentrations between undertakings, OJ L 336 ("Implementing Regulation"); Moreover, recital 5 of the Implementing Regulation states: "It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration."

intended to ensure that the technology of the innovation project would not be transferred to Honeywell, the approved purchaser of the divestment business. Following oral hearings in June 2020, the Commission dropped its charges against Merck, ultimately fining only Sigma-Aldrich in this decision.

As a practical matter, however, Merck will nevertheless indirectly bear the financial burden of the fine since Sigma-Aldrich is now a wholly owned subsidiary. This highlights how the sanctions for providing misleading information can lead to a situation where the buyer ultimately ends up financially responsible for actions by the seller during the merger review process.

The fine

The Commission may impose fines up to 1% of the aggregate global turnover of a company that intentionally or negligently supplies incorrect or misleading information.[49] In setting the fine, the Commission will take into account the nature, gravity, and duration of the infringement.[50]

Here, the Commission considered that the three infringements were serious in nature and particularly grave because (i) correct information is crucial for a well-functioning merger control system; (ii) the undisclosed innovation project was clearly related to the divestment business; and (iii) because the project was confidential, the only source of information was from Sigma-Aldrich itself.[51]

The Commission appears to have fined each infringement separately, as it did in *Facebook/Whatsapp* in 2017.[52] While the Commission clarified that the approval of the transaction will remain unaffected by the procedural infringement, the Commission considered a fine was still appropriate since the obligation to provide correct information applies regardless of whether the information has an impact on the ultimate outcome of the merger assessment.

Take-aways

As the Commission's merger-review process requires businesses to provide a significant and increasing amount of information, validating the accuracy of the statements made can be burdensome. But the risk of fines and the potential damage to companies' credibility highlight the importance of carefully validating the information provided.

Update On The Commission's Anti-Cartel Enforcement

On May 20, 2021, the Commission issued a decision fining several banks for participation in an alleged cartel in European government bonds ("EGB") trading.[53] The Commission decision found that seven investment banks (Bank of America, Natixis, Nomura, UBS, UniCredit, RBS, and WestLB (now called Portigon)) participated in an alleged collusive scheme aimed at distorting competition in purchasing and trading EGBs.[54] EGBs are financial instruments issued on the primary market for the purposes of raising debt capital by the governments of the Eurozone Member States. Once bought by "primary dealers" in primary market auctions, EGBs are traded on the secondary market among investors and financial institutions.

A group of traders, operating in "multilateral chatrooms," allegedly exchanged commercially sensitive information, including on their prices and volumes, on their bidding strategy, and on trading parameters. This conduct took place

[49] *Ibid.*

[50] *Ibid.* Article 14(4) EUMR.

[51] Commission Press Release IP/21/2181, "Mergers: Commission fines Sigma-Aldrich € 7.5 million for providing misleading information during Merck takeover investigation," May 3, 2021.

[52] *Facebook/Whatsapp* (Case COMP/M.8228), Commission decision of May 17, 2017. The Commission imposed a € 110 million total fine on Facebook, sanctioning two separate infringements with a € 55 million fine each.

[53] Commission Press Release IP/21/2565, "Antitrust: Commission fines investment banks € 371 million for participating in a European Governments Bonds trading cartel," May 20, 2021.

[54] *Ibid.*

between 2007 and 2011, thereby covering the heights of the 2008 financial crisis.[55]

Although the Commission found that seven banks participated in the cartel, it only fined UBS (€ 172 million), Nomura (€ 129 million), and UniCredit (€ 69 million) for a total of € 371 million after discounts. Bank of America and Natixis avoided fines because the statute of limitations had expired for their participation in the infringement. Natwest applied for and received immunity, whereas WestLB avoided a fine since it did not have any company-wide net turnover in the year preceding the fine and the maximum fine the Commission can levy is 10% of such turnover.

The EGB decision comes only a month after the Commission cartel decision relating to the secondary trading market of Supra-sovereign, Sovereign and Agency ("SSA") bonds denominated in US Dollars,[56] where the Commission fined Bank of America, Credit Agricole, and Credit Suisse € 28 million (Deutsche Bank escaped fines through immunity).

These cases reaffirm the Commission's focus on cartel enforcement in the financial sector, sending "a clear message that the Commission will not tolerate any kind of collusive behavior," in the words of Executive Vice-President Margrethe Vestager. Yet, despite active enforcement in this area over the last decade, these two decisions relating to bonds stand out: they are the only two major decisions adopted in this sector by the Commission that have resulted from the normal procedure.

Previous financial cases have been settled by a majority of the parties at issue. These two decisions may therefore mark the start of a series of litigation in Luxembourg that will test the Commission's approach to developing theories of harms in complex financial markets—theories that have, to date, only been tested by holdouts from settlement resolutions.

[55] *Ibid.*

[56] Commission Press Release IP/21/2004, "Antitrust: Commission fines investment banks € 28 million for participating in SSA bonds trading cartel," April 28, 2021.

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