

**Recent Developments in EU Competition Law**

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**ARTICLE 101 TFEU: ENFORCEMENT AT EU LEVEL**

NB: there were four cartel decisions in 2019 and the fines totalled €1.671 million

1. *Horizontal agreements*

**PENDING ARTICLE 101 HORIZONTAL CASES BEFORE THE COMMISSION**

There would appear to be many more cartel decisions 'in the pipeline', for example in relation to:

- *Special glass*
- *Flexible alternating current transmission systems*
- *Rail freight*
- *Piston engines*
- *Oil and biofuels - benchmarking*: further inspections 7 October 2014 and 24 March 2015; the Commission formally opened proceedings in relation to the manipulation of ethanol benchmarks on 7 December 2015. There is an appeal against the Commission's procedure in this case, Case T-79/19 *Lantmännen v Commission*, Order of 2 April 2019 (hybrid settlement case); appeal to Court of Justice rejected Case C-318/19, 10 September 2019. Case removed from the register 18 November 2019
- *Spot trading of precious metals*
- *Rail passenger transport in Austria*: unannounced inspections 2 December 2015
- *Rail passenger transport in several Member States*: unannounced inspections 6 July 2016 (Slovakia, Czech Republic and Austria)
- *Motor car insurance in Ireland*: unannounced inspections 4 July 2017; investigation opened 14 May 2019
- *Online access to bank account information*: unannounced inspections 3 October 2017
- *German car manufacturers*: unannounced inspections 16 and 23 October 2017; the Commission formally opened proceedings on 18 September 2018; statement of objections sent 5 April 2019
- *Metal packaging*: unannounced inspections 24 April 2018; BKA case, commenced in March 2015, discontinued 27 April 2018

- NB Case T-410/18 *Silgan Closures v Commission*: appeal against the transfer of jurisdiction to the Commission. Declared inadmissible by Order, 15 March 2019; appeal rejected by Order, 30 March 2020, EU:C:2020:??
- *Styrene monomer purchasing*: unannounced inspections 8 June 2018
- *SSA bonds*: statement of objections 20 December 2018 sent to four banks for colluding, in periods from 2009 to 2015, to distort competition in secondary market trading in the EEA of supra-sovereign, sovereign and agency (SSA) bonds denominated in US Dollars
- *European Government bonds*: statement of objections 31 January 2019 sent to eight banks
- *Farmed Atlantic salmon*: unannounced inspections 19 February 2019
- *French grocery retail sector*: unannounced inspections 20 May 2019; the Commission formally opened proceedings on 4 November 2019. Joint purchasing joint venture. The inspection decisions have been appealed to the General Court, Cases T-538/19 *Casino v Commission* and Case T-539/10 *Les Mousquetaires v Commission*, not yet decided

### **Cartel decisions**

- ***Canned vegetables***

Commission decision of 27 September 2019 imposing fines of €31.6 million for participating in a canned vegetables cartel. Note the following:

- Settlement decision; there is an ongoing investigation against a fourth undertaking, Conserve Italia: staggered hybrid settlement case
- Bonduelle the whistleblower: fine of zero, but would have been about €250 million
- Three undertakings settled; 13 year cartel
- Price fixing; agreed market shares; volume quotas; customer and market allocation; coordinated replies to tenders; commercially sensitive information exchange
- Single infringement consisting of three separate agreements
- Reduction in the penalty allowed in one case due to inability to pay

- NB there was the earlier *Canned mushrooms* cartel, in which Bonduelle had been fined
  
- ***Ethylene***

Commission decision of 14 July 2020 imposing fines of €260 million for colluding on the purchase price of ethylene. Note the following:

- This was a purchasing cartel
- Settlement decision
- Westlake was the whistleblower: otherwise it would have been fine €190 million
- Four firms in the cartel
- Value of purchases used to calculate the amount of the fine, increased by 10% to reflect the effect of the cartel: necessary to avoid under-deterrence

## **GENERAL COURT**

- ***Car battery recycling***

- Case T-240/17 *Campine NV v Commission*, judgment of 7 November 2019

Judgment dismissing an appeal as to substance in the *Car battery recycling* case, but reducing the fine significantly, in particular due to an error as to the duration of the infringement

- ***Euro Interest Rate Derivatives***

- Case T-105/17 *HSBC Holdings plc v Commission*, judgment of 24 September 2019

Judgment upholding the Commission's decision as to substance but annulling the fine for insufficient reasoning. On appeal to the Court of Justice, Case C-883/19 P *HSBC Holdings plc*

*v Commission* and Case C-806/19 *Commission v HSBC Holdings plc*, not yet decided. NB: permission granted to Credit Agricole SA to intervene, 16 July 2020

- ***Envelopes***

- Case T-466/17 *Printeos v Commission*, judgment of 24 September 2019

Judgment dismissing an appeal in the *Envelopes* case

- ***Smart card chips***

- Case T-758/14 RENV *Infineon Technologies AG v Commission*, judgment of 8 July 2020

Judgment recalculating the fine imposed on Infineon in the light of the judgment of the Court of Justice in Case C-99/17 P, holding that the General Court had erred by not examining all the factual and legal circumstances of the case when determining whether the Commission's fine was proportionate. Infineon's original fine of €82 784 000 was reduced to €76 871 600

## **COURT OF JUSTICE**

- ***Payment card systems in Hungary***

- Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank etc.*, judgment of 2 April 2020, EU:C:2020:265

Judgment of the Court of Justice on object restrictions

- ***Power cables***

- Case C-599/18 P *Silec Cable SAS v Commission*, judgment of 14 November 2019

Unsuccessful appeal in the *Power cables* case

- Cases C-591/18 etc. *Brugg v Commission*, C-593/18 *ABB v Commission* and *LS Cable v Commission*, judgments of 28 November 2019

Unsuccessful appeals in the *Power cables* cases except for a partial annulment in the case of ABB

- Case C-607/18 *NKT Verwaltungs GmbH v Commission*, judgment of 14 May 2020

Partially successful appeal in the *Power cables* case

- Case C-606/18 P *Nexans France SAS v Commission*, judgment of 16 July 2020

Unsuccessful appeal in the *Power cables* case

- ***Paroxetine***

- Cases C-307/18 *Generics UK Ltd etc. v CMA*, judgment of 30 January 2020, EU:C:2020:52

Judgment given in response to the CAT's Article 267 reference to the Court of Justice on a number of aspects relating to pay-for-delay agreements under Articles 101 and 102

2. *Vertical agreements*

## COMMISSION INVESTIGATIONS

## PENDING ARTICLE 101 VERTICAL CASES BEFORE THE COMMISSION

- *Videogame makers* (geo-blocking), commenced on 2 February 2017; statement of objections sent 5 April 2019; oral hearing 9.10.19
- *Airline ticket distribution services*

The Commission opened an investigation into the agreements between Amadeus and Sabre with airlines and travel agents, 23 November 2018

## **COMMISSION DECISIONS**

- *Film merchandise products*

Commission decision of 30 January 2020 imposing a fine of €14.327 million on NBCUniversal (part of Comcast) for restrictions imposed on traders from selling film merchandise products cross-border within the EEA. Settlement decision

Note the following:

- (i) NBCUniversal imposed a number of direct measures restricting out-of-territory sales by licensees, such as clauses explicitly prohibiting these sales, obligations to notify out-of-territory sales to NBCUniversal, limitations to the languages used on the merchandise products and obligations to pay to NBCUniversal revenues generated from out-of-territory sales.
- (ii) NBCUniversal imposed a number of direct measures restricting sales beyond allocated customers or customer groups, such as clauses explicitly prohibiting these sales and obligations to pay to NBCUniversal revenues generated from sales to non-allocated customer groups
- (iii) NBCUniversal imposed a number of direct measures restricting online sales, such as clauses prohibiting all online sales, clauses prohibiting out-of-territory

online sales or clauses only allowing online sales on the websites of specific retailers

- (iv) NBCUniversal obliged licensees to pass on these sales restrictions to their customers, by requiring its licensees not to supply their products to customers who could be selling those outside the licensees' allocated territories or customer groups
  
- (v) NBCUniversal also implemented a series of measures as an indirect way to encourage compliance with the sales restrictions. These measures included carrying out audits and the termination or non-renewal of contracts if licensees did not respect the sales restrictions

The Commission concluded that NBCUniversal's illegal practices were in force for more than 6.5 years (from 1 January 2013 until 25 September 2019). The Commission granted NBCUniversal a 30% fine reduction in return for cooperation

- ***Tour operators***

Commission decision of 21 February 2020 imposing a fine of €6.7 million on Meliá for restricting active and passive selling of hotel accommodation. Settlement decision: 30% reduction in the fine.

Meliá's standard terms and condition contained a clause that stipulated that certain contracts could be entered into only with consumers resident in specified countries

NB: public decision published



**ARTICLE 102: ENFORCEMENT AT EU LEVEL**

**PENDING ARTICLE 102 CASES BEFORE THE COMMISSION**

- *Ceské dráhy, a.s.* – formal investigation commenced 10 November 2016 into possible predatory pricing in rail passenger transport services in the Czech Republic. NB in Case T-325/16 the warrant for inspection in this case was partially annulled, judgment of 20 June 2018
- *Electricity sector in Greece* – unannounced inspections 15 February 2017 relating to possible abusive behaviour
- *Aspen Pharma* – formal investigation commenced 15 May 2017 into alleged excessive pricing by Aspen concerning five life-saving cancer medicines: commitments to reduce price market tested 14 July 2020
- *Qatar Petroleum* – formal investigation opened 21 June 2018 into possible restrictions to the free flow of LNG
- *Amazon* – formal investigation opened 17 June 2019 in relation to Amazon's use of data from independent retailers: Articles 101 and 102
  - NB: Commission coordinating with the FTC and the Italian and Luxembourgish competition authorities
  - NB: fine of €4 million imposed in France by the Tribunal de commerce de Paris on Amazon France Services for creating a 'significant imbalance' for third-party merchants using the Amazon platform
- *Broadcom* – formal investigation opened 26 June 2019
  - Interim measures imposed 16 October 2019 (Broadcom not to enforce certain contractual provisions for three years or until the adoption of a final decision, whichever is earlier). Broadcom has appealed the interim measures decision, Case T-876/19 *Broadcom v Commission*, not yet decided
  - Commission consulting on commitments offered by Broadcom, 27 April 2020
- *Apple* – formal investigation in relation to Apple Pay launched 16 June 2020
- *Apple* – formal investigation in relation to Apple's App Store rules launched 16 June 2020

Note that the Commission is also considering a complaint 23 job-search websites against Google

## **COURT OF JUSTICE**

- *Paroxetine*
  - Cases C-307/18 *Generics UK Ltd etc. v CMA*, judgment of 30 January 2020, EU:C:2020:52

Judgment given in response to the CAT's Article 267 reference to the Court of Justice on a number aspects relating to pay-for-delay agreements under Articles 101 and 102

**PRACTICE AND PROCEDURE AT EU LEVEL**

**COURT OF JUSTICE**

- ***Industrial bags***

- Cases C-447/17 P and C-479/17 P *European Union v Guardian Europe Sàrl*, judgment of 5 September 2019

Judgment dismissing Guardian's action for damages against the Commission for unreasonable delay

- ***Elevators***

- Case C-435/18 *Otis v Land Oberösterreich*, judgment of 12 December 2019, EU:C:2019:1069

Judgment on the availability of damages for a claimant not directly the 'victim' of the cartel nor a sub-purchaser

- ***Czech rail services from Prague to Ostrava***

- Joined Cases C-538/18 P and C-539/18 P *Ceské dráhy as v Commission*, judgment of 30 January 2020, EU:C:2020:53

Judgment rejecting appeals in relation to the dawn raids in this case

**COMMITMENT DECISIONS**

*Transgaz*, Commission decision of 6 March 2020 accepting commitments from Transgaz to prevent it from hindering exports of gas from Romania to neighbouring Member States, in particular Hungary and Bulgaria

## **COMPETITION IN AIR TRANSPORT**

Note Regulation 2019/712 on safeguarding competition in air transport

## **CONSULTATION ON GUIDANCE FOR NATIONAL COURTS WHEN HANDLING DISCLOSURE INFORMATION**

Consultation launched by the Commission, 29 July 2019: guidance adopted 20 July 2020

## **LINER SHIPPING BLOCK EXEMPTION**

Regulation 906/2009 extended until 25 April 2024 by Regulation 2020/436

## **NEW COMPETITION TOOL**

Consultation launched by the Commission, 2 June 2020

## **CONSULTATION ON MARKET DEFINITION**

The Commission announced on 26 June 2020 that it has published a public consultation on its Market Definition Notice; the consultation is open until 9 October 2020 and the Commission expects to publish the results of the evaluation in 2021

## **COLLECTIVE BARGAINING FOR SELF-EMPLOYED WORKERS**

The Commission launched a process on 30 June 2020 into collective bargaining by self-employed workers: is this prevented by Article 101?

## **SECTOR STUDY ON THE INTERNET OF THINGS**

The Commission launched a sector inquiry into the Internet of Things for consumer-related products and services in the EU on 16 July 2020; a preliminary report is expected in the spring of 2021 and a final report in the summer of 2022

## **REFORM OF THE VBER**

The Commission published its final report on its evaluation of the VBER on 26 May 2020; the Staff Working Document was published on 8 September 2020

**PENDING ARTICLE 267 REFERENCES**

- Case C-372/19 *SABAM*: does SABAM charge abusively high prices to music festivals?  
AG Pitruzella's Opinion given 16 July 2000
- Case C-450/19 *Eltel v Finnish Competition and Consumer Authority*: Article 267 reference exploring limitation rules: when does a cartel come to an end?
- Case C-30/20 *Volvo and others*: the scope of Article 7(2) Brussels Regulation
- Case C-117/20 *bpost SA v Autorité belge de la concurrence*: the principle of *ne bis in idem* where similar facts may be covered both by sector-specific regulation and competition law
- Case C-142/20 *Analisi G. Caraccioco s.r.l. v Regione Siciliana*: does Regulation 765/2008 create a monopoly contrary to Article 102? (Article 4(1) of the Regulation provides that each MS will appoint only one national accreditation body)
- Case C-151/20 *Bundeswettbewerbsbehörde v Nordzucker AG*: the principle of *ne bis in idem* where the same cartel is investigated in Germany and Austria
- Case C-2/20 *Daimler AG v MOL (Europe Africa) Ltd*: temporal scope of the competition rules as applied to maritime transport arising from the *Maritime Carriers* decision of the Commission – can damages be claimed for the period before 1 May 2004, or between 1 May 2004 and 18 October 2006?
- Case C-306/20 *Visma Enterprise*: a question about the prohibition of active sales in an exclusive distribution agreement for software

**COVID-19 CRISIS**

**European Commission**

- Communication from the Commission: *Temporary Framework for assessing the antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*, 8 April 2020, OJ [2020] C 116 I/7
  - NB: comfort letter sent to Medicines for Europe 8 April 2020; available on DG COMP website
- Note the adoption of three regulations in the agriculture sector permitting derogation from the application of the competition rules to certain agreements as a result of severe imbalance in the market:
  - Regulation 2020/593 on market stabilisation measures in the potatoes sector, OJ [2020] L 140/13
  - Regulation 2020/594 on market stabilisation measures in the live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage sector, OJ [2020] L 140/17
  - Regulation 2020/599 on planning of production the milk and milk products sector, OJ [2020] L 140/37
- Note also an additional package of measures was adopted on 7 July 2020 to provide support measures for the wine sector: Commission Press Release IP/20/1267

**ECN**

- Antitrust: *Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*

**ICN**

- ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic, April 2020



**EUROPEAN UNION MERGER REGULATION**

**RECENT AND CURRENT PHASE II INVESTIGATIONS**

Name of case	Cleared?	Cleared with commitments?	Prohibited?
Case No COMP M.8870 <i>E.ON/Innogy</i>		Yes (17.9.19)	
Case No COMP M.9076 <i>Novelis/Aleris</i>		Yes (1.10.19)	
Case No COMP M.9064 <i>Telia Company/Bonnier Broadcasting</i>		Yes (12.11.19)	
Case No COMP M.9014 <i>PKN Orlen/Lotos</i>		Yes (14.7.20)	
Case No COMP M.9097 <i>Boeing/Embraer</i> <b>NB: notification withdrawn 8.5.20</b>			
Case No COMP M.9162 <i>Fincantieri/Chantiers de l'Atlantique</i>			
Case No COMP M.9409 <i>Aurubis/Metallo</i>	Yes (4.5.20)		
Case No COMP M.9343 <i>Hyundai Heavy Industries/Daewoo Shipbuilding &amp; Marine Engineering</i>			
Case No COMP M.9569 <i>EssilorLuxottica/GrandVision</i>			
Case No COMP M.9547 <i>Johnson &amp; Johnson/Tachosil</i> <b>Notification withdrawn 17.4.20</b>			

Case No COMP M.9489 <i>Air Canada/Transat</i>			
Case No COMP M.9730 <i>Fiat Chrysler Automobiles NV/Peugeot SA</i>			
Case No COMP M.9564 <i>London Stock Exchange Group/Refinitiv</i>			
Case No COMP M.9660 <i>Google/Fitbit</i>			

### **GENERAL COURT**

- Case T-834/17 *UPS v Commission* (not yet decided) and Case T-540/18 *ASL Aviation Holdings v Commission* (not yet decided)

Applications for damages arising from the Commission's prohibition of the *UPS/TNT* merger

- Case T-399/16 *CK Telecoms UK Investments Ltd v Commission*, judgment of 28 May 2020

Annulment of the Commission's decision prohibiting the *Hutchison 3G UK/Telefónica* merger

### **COURT OF JUSTICE**

- Case C-10/18 P *Mowi ASA v Commission*, 4 March 2020, EU:C:2020:149

Judgment rejecting Marine Harvest's (now Mowi) appeal against two fines for gun-jumping (Article 4(1) for failing to notify and Article 7(1) for implementation prior to Commission approval)

## **OTHER ISSUES**

Note also:

- Statements of objections sent to Merck and Sigma-Aldrich for providing misleading information; SO replaced 1 July 2020 by a SSO addressed only to Sigma-Aldrich
- Statement of objections sent to Telefónica 22 February 2019 for breach of commitments given in the *Telefónica Deutschland/E-Plus* case