September 2020

EU Competition Law Newsletter

Highlights

— A Step Forward In The Journey 'Towards More Effective EU Merger Control'?

— Block Exemption Troubleshooting: How E-Commerce Is Reshaping EU Antitrust Policy On Distribution Agreements

A Step Forward In The Journey 'Towards More Effective EU Merger Control'?

On September 11, 2020, Commissioner Vestager during a speech at a conference[1] for the 30th anniversary of the EU Merger Regulation ("EUMR"),[2] outlined her vision on merger control policy for the upcoming years.[3] In anticipation of the Commission's long awaited report on its 2016 consultation on the evaluation of procedural and jurisdictional aspects of EU merger control, Commissioner Vestager shed some light on the Commission's position on (i) notification thresholds; (ii) the simplification of merger filing and review processes; and (iii) its reflections on the substance of merger review in certain sectors. At a high-level, Commissioner Vestager's statements indicate what to expect from the upcoming EUMR reform proposals.

Out of oblivion – "Dutch clause" revival to solve alleged enforcement gap

Since Facebook's acquisition of WhatsApp in 2014,[4] a major topic discussed in the European antitrust community was the perceived enforcement gap for so-called "killer acquisitions"[5] and other transactions involving nascent targets with no or only limited revenues, mainly in the digital and pharmaceutical areas. Competition agencies'[6] concern was that turnover-based thresholds may not be suitable to subject transactions to merger review in situations where a company's turnover does not reflect its importance in the market. In line with last year's Special Advisers' report,[7] Vestager clarified that the existing notification

[1] International Bar Association 24th Annual Competition Conference.

[2] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004.

[3] International Bar Association 24th Annual Competition Conference, The future of EU merger control, Speech by Margrethe Vestager, September 11, 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

[4] *Facebook/WhatsApp* (Case COMP/M.7217), Commission decision of October 3, 2014.

[5] The term covers situations where companies allegedly acquire startups to obtain their technology, either to quell a nascent threat, or to integrate it to their own offerings, further entrenching their dominance.

[6] Germany and Austria have therefore introduced new transaction value-based filing thresholds, although the number of additional cases in both jurisdictions remains limited.

[7] Competition policy for the digital era, report, J. Crémer, Y-A. de Montjoye, and H. Schweitzer, May 20, 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

thresholds have proved to generally "work well." That said, in Vestager's view, have proved generally to remain a handful of cases that escape merger control under the current regime that do not meet turnover thresholds but can seriously affect competition. To remedy that situation, Vestager suggested to reinvigorate referrals from NCAs under Article 22 EUMR ("Article 22 Referral"),[8] commonly known as the Dutch clause,[9] a solution she described as "hiding in plain sight." The Commission plans to change its current approach of discouraging national competition authorities ("NCA") from Article 22 Referrals, and instead invite NCAs to make increased use of this tool. A notable feature of the Article 22 Referral process is that it allows NCAs to refer cases even when national thresholds are not met, provided the transaction is "worth reviewing at the EU level."

While it remains to be seen whether this new enforcement practice will lead to a significant number of otherwise non-notifiable merger reviews, there is a real risk that broader reliance on Article 22 Referrals introduces significant legal uncertainty:

- The Commission can accept cases even when they meet neither EU nor national notification thresholds, as long as the Commission "considers" them to "[affect] trade between Member States and [threaten] to significantly affect competition" within the territory of the referring Member State(s), potentially opening the door for review even of minor transactions at the EU level.[10] Merging companies will have to self-assess whether these two conditions are met in one or several Member States which, given the complexity and uncertainties associated with such assessment, will require them to proceed with great caution;

- The Commission can actively call in transactions by "inviting" Member States to make a referral,[11] leading to the need for strategic self-assessment of merging parties known only from other jurisdictions to date, in particular, the UK; [12] and

- Member States can make referrals within 15 working days from the date on which the transaction was "made known" to them.[13] This risks opening the door not only for interventions by (hostile) third parties, but also for referrals post-closing. This might also significantly lengthen the procedure for cases that are initially not reviewable, potentially resulting in arbitrary outcomes: transactions that are not closed by the time the Commission accepts the Article 22 Referral will become subject to the standstill obligation and may no longer be closed without the Commission's clearance, or risk significant fines for "jumping the gun."

Commissioner Vestager expects the new policy to come into effect by mid-2021, which leaves the Commission time to adopt clear guidance—for both companies and NCAs—to ensure at least a minimum of legal certainty for merging parties.

Cutting red tape – simplification of filing and review procedure

Commissioner Vestager further discussed the need to simplify merger filings, especially for cases unlikely to harm competition. Without changing the EUMR, the Commission plans to "review some of the rules and guidance that put

[8] Article 22(1) EUMR provides that "[o]ne or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 [of the EUMR] but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned."

[9] Named "Dutch clause" as it was introduced initially to allow Member States without merger control regime, such as the Netherlands at the time, to request examination of a transactions by the Commission.

[10] Article 22(3) EUMR.

[11] Article 22(5) EUMR.

[12] Outside the EU, this is the case *e.g.*, for Australia.

[13] Article 22(1) sub-para. 2 EUMR.

the regulation into practice." This includes the Best Practices on merger proceedings,[14] the Notice on simplified procedure,[15] and the Implementing Regulation No. 802/2004.[16] Contemplated measures include: (i) a further expansion of the categories of cases eligible for a simplified procedure;[17] (ii) a reduction of the amount of information that merging parties are required to provide; and (iii) a simplification and shortening of the filing process. In that context, the Commission could accept to digitize the entire filing procedure, which has proven workable during the Covid-19 pandemic.

The Commission will consider dropping the pre-notification phase for a broader set of cases "so straightforward that there's really nothing to discuss before the merger is filed." Although the Commission normally expects pre-notification contacts even in seemingly unproblematic cases, for a small set of cases already today, the Commission does not consider pre-notification contacts to be necessary. This concerns transactions subject to simplified procedure in which there exist no horizontal or vertical overlaps between any activities of the merging parties.[18] While these considerations are obviously a welcome starting point, they should go even further to also include, *e.g.*, clear guidance and a limitation of the scope for, ever broader information requests.

The Commission's full report on its 2016 consultation on the evaluation of procedural and jurisdictional aspects of EU merger control is now expected for early 2021.

Calibrating the focus of substantive merger control – not anytime soon

The Commission has intensified its reflection on the substance of merger review, though not least since the 2019 Special Advisers' report. While reiterating that the rules "still work very well," Commissioner Vestager underlined the ever-changing nature of markets and the constant need for EU merger rules to adapt. To that end, she announced a new review of recent Commission decisions to evaluate their effect, especially on prices, choice, quality, and innovation. This is complemented by the Commission's ongoing effort to better understand how certain markets, especially digital, work and evolve to make sure that merger rules remain fit for purpose.

The other area of interest focuses on reasons for and remedies against a perceived growing market concentration in various sectors, and persistently higher price mark-ups, and hence profit margins, without attracting additional market entry as traditional economic theory would suggest.

Any substantive revision of the merger rules is unlikely to materialize for some time.[19] In the coming months, the Commission will launch a "reflection" on how to improve the rules and will be "open to ideas, no matter where they come from." In addition, the Commission will not hasten the drafting of new merger guidelines, especially not before the outcome of its appeal in the Hutchison case.[20] It will also cautiously try to avoid discussion about another substantive change, which is the softening of standards for so-called "European champions."[21]

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[14] Commission Best Practices on the conduct of EC merger proceedings of 20 January 2004.

[15] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 of 14 December 2013, herein "the Notice on simplified procedure."

[16] Commission Regulation (EC) No. 802/2004 of 21 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, herein "the Implementing Regulation."

[17] Currently, around 75% of all cases are filed in simplified procedure.

[18] *See* Annex II of the Implementing Regulation, Short Form CO for the notification of a concentration pursuant to Regulation (EC) No. 139/2004, point 1.3; and point 5(b) of the Notice on simplified procedure.

[19] The announced "calibration" of the EU merger rules are part of a broader policy review, and build on efforts dating back to the Commission's White Paper "Towards More Effective EU Merger Control" (COM/2014/0449 final).

[20] *Commission v. CK Telecoms UK Investments* (Case C-376/20 P) EU:T:2020:217.

[21] After prohibiting the merger between Siemens and Alstom in 2019 (see Case COMP/M.8677), the Commission faced calls to review merger control rules to allow for the creation of "industrial champions." France, Germany, and Poland in particular advocated for a stronger consideration of potential competition at the international level, and for a reinforced role for the Council regarding merger control policy and decision-making. Commissioner Vestager systematically rejected such suggestions, refusing to build industrial champions at the expense of competition on European markets.

Block Exemption Troubleshooting: How E-Commerce Is Reshaping EU Antitrust Policy On Distribution Agreements

For more than a decade, the Vertical Block Exemption Regulation ("VBER")[22] and the accompanying Guidelines on Vertical Restraints ("Guidelines")[23] have been the essential point of reference for the assessment of resale and distribution arrangements[24] under EU antitrust rules. With the VBER set to expire in 2022, the Commission in 2018 launched a review process to determine whether it should let the regulation lapse, prolong, or revise it.[25] After almost two years of evaluation, stakeholder feedback, public consultations and dialogues with national authorities, on September 9, 2020, the Commission published its report summarizing the outcomes of the evaluation.[26] The report provides a detailed overview of the VBER's shortcomings and points of strength, and paves the way for the possible introduction of a revised regulation within the next two years.

Unclear, outdated, or missing: a VBER provisions checklist

The European distribution and retail sectors have radically changed since the current VBER was introduced in 2010. As already reported by the Commission in its e-commerce sector inquiry, the share of retail sales made on the internet has dramatically increased over the last decade. Online marketing tools, such as virtual marketplaces, price comparison websites, and online advertising, have become more and more pervasive. Finally, the COVID-19 crisis and the resulting lockdown measures have increased consumers' reliance on internet platforms and online sales.

The evaluation report provides a detailed screening of the VBER provisions, focusing on the areas in which the regulation "is not functioning well or not functioning as well as it could."[27]

Some of the VBER's provisions remain unclear and are not easily applicable in practice:

— For instance, agency agreements are considered to fall outside the scope of Article 101 TFEU, but the distinction between agents and independent distributors is not sufficiently clear-cut.[28] This is particularly true for online platforms, which sometimes enter into agency agreements with their suppliers.[29] Several national agencies took the view that these intermediaries cannot qualify as "genuine agents" in light of their strong bargaining position, their diversified supplier base, and the risk associated with the significant investment they make in their digital infrastructure.

— Also, it is not always clear whether certain e-commerce practices may amount to an illegitimate imposition of minimum retail prices. This is for instance the case of algorithm-based mechanisms used to monitor the respect of recommended retail prices by resellers. Moreover, given the lack of clarity on the conditions in which a minimum resale price

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[22] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010.

[23] Guidelines on Vertical Restraints, OJ C 130, of 19 May 2010, p. 1–46.

[24] These agreements are considered "vertical" because they are entered into between companies operating at a different level of the production or distribution chain.

[25] As reported in our November 2018 EU Competition Law Newsletter, February 2019 EU Competition Law Newsletter, and May 2020 EU Competition Law Newsletter respectively.

[26] Commission staff working document on the Evaluation of the Vertical Block Exemption Regulation, SWD(2020) 17, of 8 September 2020 (the "Evaluation Report").

[27] These areas are summarized in Section 5.3 of the report and analyzed in full detail in Annex 4.

[28] Guidelines, para. 12 to 18, and Evaluation Report, page 148.

[29] *See* for instance the Commission decision in Case COMP/AT.39847, as discussed in our July/September 2013 EU Competition Quarterly Report, concerning the agency agreements for the distribution of e-books entered into between Apple and several publishers.

is permissible, businesses often consider this clause to be outright anticompetitive and refrain from using it in their distribution agreements.[30]

In light of the innovations introduced by e-commerce platforms, other provisions of the VBER appear to be outdated and no longer adapted to current market conditions:

— Some respondents to the public consultation propose a revision of the very notion of a vertical agreement, currently focused on the purchase, sale, and resale of goods and services. This definition should be extended to companies "making products available to third parties," so as to cover, for instance, online marketplaces and price comparison websites that do not fit the traditional definition of vertical relationships.[31]

— Respondents also call into question the prohibition to impose higher prices for products to be distributed online. This provision no longer seems necessary in a context where online sales have become ubiquitous and the brick-and-mortar channel often needs to be protected from free riding.[32]

Also, the VBER does not provide sufficient guidance with respect to certain commercial practices that are now widespread in online retail:

— The VBER is silent regarding clauses prohibiting resellers from using price comparison websites. Although the case law of the European Court of Justice allows suppliers of luxury goods to restrict the use of online marketplaces by their resellers, it is unclear whether this principle would also apply to price comparison websites.[33]

— Effective guidance is also lacking with respect to retail parity clauses, which have come under close scrutiny of national agencies in recent years.[34] Certain respondents argued that these clauses are anticompetitive, as their economic effects are largely identical to those of resale price maintenance. Others believe that parity clauses can reduce free riding and negotiation costs, and therefore encourage investments in distribution platforms.[35]

Room to improve overall effectiveness, efficiency, and coherence

Besides the evaluation of the VBER's individual provisions, the Commission also carried out a holistic assessment of the regulation's overall effectiveness with respect to its stated purpose, its efficiency in terms of cost savings, and its coherence with other instruments of EU law.[36] While concluding that the regulation remains a useful and relevant instrument for stakeholders, the report identifies a number of issues where further improvement is possible.[37]

The effectiveness of the VBER is undermined by diverging interpretations adopted by antitrust agencies and courts at the national level. These diverging interpretations are possible due to the lack of clarity of the VBER provisions, as well as the lack of binding effect of the Guidelines. Respondents have noted that the uneven application of the VBER forces businesses to conduct different risk assessments for each EU country in which they operate. This inflates compliance and negotiation costs and stands in the way of a coherent implementation of commercial strategies across Member States.

[30] Guidelines, para. 225, and Evaluation Report, page 170.

[31] *See* VBER, Article 1(a). Similarly, the notion of buyer in a vertical relationship would benefit from an extension of the definition around the company that "sells goods or services on behalf of another undertaking," to include companies that "make available to third parties" in Article 1(1)(h) of the VBER; see Evaluation Report, page 152.

[32] Guidelines, para. 52, and Evaluation Report, page 212.

[33] *Coty Germany* (Case C-230/16) EU:C:2017:941, as discussed in our October/November 2017 EU Competition Quarterly Report.

[34] Retail parity clauses are typically applied by hotel booking platforms, and prevent listed suppliers from offering lower prices or better terms on other platforms or on their own websites. These arrangements were recently scrutinized, with divergent outcomes, by national authorities in Germany, as discussed in our July/August 2019 German Competition Law Newsletter, France, as discussed in our December 2019 French Competition Law Newsletter, and Italy and Sweden.

[35] Evaluation Report, page 182.

[36] This analytical framework for the evaluation of policy interventions is prescribed by the Commission's Guidelines on Better Regulation (*see* Commission staff working document, SWD (2017) 350).

[37] Evaluation Report, pages 49 to 93.

In terms of efficiency, all sources suggest that the VBER reduces the costs incurred by businesses (especially small and medium enterprises) in assessing their compliance with EU antitrust rules. However, the evaluation report shows significant room for further simplification and cost reduction, by streamlining the most complex provisions of the VBER (such as the "exceptions to the exceptions" in Article 4) and clarifying the wording of its definitions.

The coherence of the VBER with other instruments of EU law could also be improved. For instance, under the Geo-Blocking Regulation, restrictions of passive sales based on the location of the customer are always void,[38] while so far they may be permissible under the Guidelines in certain cases.[39]

Outlook and next steps

Based on the results of the evaluation, the Commission has now launched an impact assessment phase to explore the underlying causes of the problems identified in the report and consider possible solutions. The Commission intends to hold public consultations with stakeholders by the end of 2020, with a view to publishing a draft proposal for the reform of the VBER and the Guidelines in the course of 2021.

News

Court Updates

Court Denies Spanish NCA Status As "Court Or Tribunal" For Making Preliminary References (Anesco)

On September 16, 2020, the Court of Justice ruled on the interpretation of the concept of "court or tribunal" within the meaning of Article 267 TFEU.[40] The Court of Justice held the reference for a preliminary ruling inadmissible, for lack of the referring Spanish competition authority ("CNMC") constituting a "court or tribunal" for the purpose of Article 267 TFEU.

Without ruling on the substance of a dispute regarding the legality under Article 101 TFEU of a collective agreement between an employer and trade unions, the Court of Justice held that the conditions for referral for a preliminary ruling were not met.

First, the Court of Justice held that the CNMC is not a third party in relation to the authority which adopted the contested decision. The CNMC's decision-making body, the Board of the CNMC, cannot be regarded as independent from the CNMC's investigatory body, the Competition Directorate, which makes proposals for decisions that the Board is called upon to adjudicate. Although the CNMC's investigative and decision-making activities are functionally separate, they are organizationally and operationally linked as the Board manages staff of, and coordinates and supervises the Competition Directorate.

Second, the decisions adopted by the CNMC are similar to administrative decisions and therefore cannot be considered as adopted in the exercise of judicial functions. In particular, the Court noted that the administrative nature of the main proceedings is confirmed, among others, by the fact that (i) the CNMC acts, of its own motion, as a specialized administration exercising the power to impose penalties in cases falling within its competence; (ii) it works in close collaboration with the Commission and may be denied jurisdiction in favor of the latter under Article 11(6) of Regulation No. 1/2003; (iii) penalty decisions of the CNMC for anti-competitive behavior are

[38] Regulation (EU) No. 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) No. 2017/2394 and Directive 2009/22/EC, OJ L 60I of 2 March 2018, p. 1–15. Passive sales are sales following unsolicited requests from individual customers.

[39] Guidelines, para. 61 and Evaluation Report, p. 179.

[40] *Anesco e. a.* (Case C-462/19), judgment of 16 September 2020.

subject to a maximum time of expiry by which the proceedings will lapse automatically, regardless of the view of the parties; (iv) the CNMC's decisions, whilst being final and immediately enforceable, lack the attributes of a judicial decision, in particular they do not bear authority of a judgment; and (v) where a decision of the CNMC is challenged in the administrative courts, the CNMC acts as a defendant in the court proceedings at first instance or as an appellant or respondent to an appeal before the Spanish Supreme Court.

To be referred to the Court of Justice, the CNMC's decision would therefore first need to be challenged in Spanish courts which are entitled to refer a question to the Court of Justice. Alternatively, the CNMC could refer the case to the Commission, whose decisions are challengeable to the General Court. Either of these alternatives does not allow for a fast track resolution of interpretative questions that are commonly better solved at the EU level, and raises the question as to whether the uniform and effective application of EU competition law would not be better served by allowing direct referrals for preliminary rulings through specialized administrative bodies, too.

The judgment confirms the Court of Justice's restrictive approach of the interpretation of "court or tribunal" within the meaning of Article 267 TFEU, in line with its *Syfait* case.[41] While unsurprising in its result, the judgment still places a new emphasis on the nature of the proceedings and the decision to be taken by the referring body in the main suit: only if they are judicial in nature will the referral be held admissible. The judgment may therefore foster disparities in treatment of the different national competition authorities of the EU Member States. It is not directly intuitive why competition authorities following the judicial model of competition law enforcement (such as in Austria) will be allowed a direct dialogue with the Court of Justice, while those following an administrative model are not.

The Court Of Justice Rejects Prysmian's Appeal In Line With Its Prior Judgments On The Power Cables Cartel

On September 24, 2020, the Court of Justice dismissed an appeal brought by the Italian cable producer Prysmian against a €104.6 million fine imposed by the Commission for its participation in the *Power Cables* cartel.[42]

In its 2014 decision, the Commission found several European, Japanese, and Korean producers of underground and submarine high-voltage power cables to have engaged in territorial and customer allocation and imposed fines totaling €302 million.[43] Most of the addressees, including Prysmian, challenged the decision before the General Court; each of them without success.[44] Of the following appeals, the Court of Justice to date rejected five.[45]

The judgment confirms the Court's position in the *Nexans v. Commission* case, where the Court clarified the scope of the Commission's inspection powers in antitrust proceedings under Article 20 of Regulation No. 1/2003.[46] In particular, with reference to the *Nexans* judgment, the Court recalled that the Commission was right to make copy-images of the hard drives of employees' computers without first examining the nature and

[41] *See Syfait and others v. GlaxoSmithKline AEVE and GlaxoSmithKline plc.* (Case C-53/03) EU:C:2004:673, judgment of 31 May 2005. The *Anesco* judgment is also in line with the Court's judgment in *Asociación Española de Banca Privada and Others* (Case C-67/91) ECR I-4785, of 16 July 1992, where it admitted a request for a preliminary ruling from the former Spanish Competition Court, because under the Spanish law in force at the time, the Spanish Competition Court was fully separate from the investigative body in competition matters.

[42] *Prysmian and Prysmian Cavi e Sistemi v. Commission* (Case C-601/18 P) EU:C:2020:751. Of the €104.6 million fine, €67.3 million were imposed on Pirelli and €37.3 million on Goldman Sachs, both jointly and severally with Prysmian.

[43] Power cables (Case AT.39610), Commission decision of April 2, 2014. *See also* our previous reports in our November 2019 EU Competition Law Newsletter and July/August 2020 EU Competition Law Newsletter.

[44] *Prysmian and Prysmian Cavi e Sistemi v. Commission* (Case T-475/14) EU:T:2018:448. Prysmian's former parents Pirelli and Goldman Sachs both unsuccessfully challenged the Commission's finding of joint and several parental liability before the General Court (cf. *The Goldman Sachs Group v. Commission* (Case T-419/14) and *Pirelli & C. v. Commission* (Case T-455/14)). The appeals in both cases are pending before the Court of Justice.

[45] In November 2019, the Court rendered judgments on the appeals filed by ABB Ltd and ABB AB, Silec, Brugg Kabel, and LS Cable, partially upholding ABB's appeal while dismissing the other four entirely; *see ABB Ltd and ABB AB v. Commission* (Case C-593/18 P) EU:C:2019:1027; *Silec Cable and General Cable v. Commission* (Case C-599/18 P) EU:C:2019:966; *Brugg Kabel AG and Kabelwerke Brugg AG Holding v. Commission* (Case C-591/18 P) EU:C:2019:1026; and *LS Cable & System Ltd v. Commission* (Case C-596/18 P) EU:C:2019:1025. Most recently, on July 16, 2020, the Court of Justice affirmed the judgment of the General Court in *Nexans v. Commission*; *see Nexans France and Nexans v. Commission* (C-606/18 P) EU:C:2020:571. The other appeals remain pending before the Court of Justice.

[46] Reported in detail in our July/August 2020 EU Competition Law Newsletter.

relevance of the documents contained thereon, and to examine them at the Commission's premises in Brussels.

The Commission's approach was justified by legitimate reasons, such as (i) the effectiveness of the inspection; and (ii) the avoidance of excessive interference with the operations of the undertaking concerned.[47] Moreover, the Court held that the Commission's right to make copy-images of an undertaking's hard drives did not constitute an additional power granted to the Commission, but was merely an intermediate step in the examination under Article 20 of Regulation No. 1/2003.[48]

The Court of Justice further confirmed Prysmian's liability for the entire duration of the cartel—between 1999 and 2009—rejecting Prysmian's claims that its fine should not cover the period before 2005, during which it was part of the Pirelli group before being acquired by a subsidiary of Goldman Sachs. Instead, the Court upheld the General Court's finding that Prysmian was liable for the entire period of its involvement in the cartel based on the principle of "economic continuity."[49] In particular, the Court held that the change in Prysmian's ownership structure also led to a transfer of the economic activities that were part of the infringement, in particular because the incumbent and the new entity had been under the control of the same person and carried out the same commercial instructions.[50] The Commission's decision therefore did not contradict the general rule that the Commission is required to impose a fine on the entity that committed the infringement where this entity continues to exist in law and to carry on economic activities.

Commission Updates

Update On DG COMP's Response To The COVID-19 Pandemic

The COVID-19 pandemic has caused significant economic disruption, as a consequence of the prolonged and re-occurring shutdowns and the ongoing political and economic uncertainties.

We reported in our March 2020 EU Competition Law Newsletter, April 2020 EU Competition Law Newsletter, and May 2020 EU Competition Law Newsletter about updates on the European level. Since May 2020, the following developments are noteworthy:

— **Antitrust and mergers.** Changes to the antitrust and merger regimes have not been as substantial as to the State aid rules (see below). The most important changes have been outlined in our previous newsletters.[51] The Commission announced after its summer break that it plans to update the rules for mergers and State aid regimes in line with its new industrial strategy "at a time when the global competitive landscape is fundamentally changing."[52]

— **State aid and coronavirus.** In July 2020, the Commission decided to prolong the amended State aid rules, which would otherwise expire by the end of this year. In view of this, the Commission adopted new targeted adjustments to combat the impact of the coronavirus outbreak, including a Regulation amending the General Block Exemption Regulation and the *de minimis* Regulation,[53] and a Communication[54] which

[47] *Prysmian* judgment, para. 66; *see also Nexans* judgment, para. 87.

[48] *Prysmian* judgment, para. 57.

[49] *Prysmian* judgment, para. 86.

[50] *Prysmian* judgment, para. 87.

[51] *See* our March 2020 EU Competition Newsletter, April 2020 EU Competition Newsletter, and May 2020 EU Competition Newsletter.

[52] *See* Speech by Commissioner Vestager, delivered at IBA 24th Annual Competition Conference, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en. *See* also our separate report in this newsletter.

[53] Commission Regulation (EU) No. 2020/972 amending Regulation (EU) No. 1407/2013 as regards its prolongation and amending Regulation (EU) No. 651/2014 as regards its prolongation and relevant adjustments, OJ L 2015/3 ("Regulation amending the General Block Exemption Regulation and the *de minimis* Regulation").

[54] Commission Communication concerning the prolongation and the amendments of the Guidelines on Regional State Aid for 2014–2020, Guidelines on State Aid to Promote Risk Finance Investments, Guidelines on State Aid for Environmental Protection and Energy 2014–2020, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Communication from the Commission – Framework for State aid for research and development and innovation, and Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export credit insurance, OJ C 224/22.

amends seven blocks of State aid guidelines.

The Commission has also amended the Temporary Framework (the "Framework")[55] in July 2020, for the third time, to further extend the scope of the Framework.[56] The main purpose of the amended Framework is to support micro and small companies. Commissioner Vestager stated in this regard that the Framework "introduce[s] conditions that provide incentives for private investors to participate alongside the State in recapitalizations."[57] Furthermore, the Framework aims to facilitate research and development, to protect employment, and to expand the production of Coronavirus-related products.

By the end of September 2020, almost 300 State aid measures were approved by the Commission under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework. An overview of the measures is available here.

Not only has the Commission taken measures, but also national competition agencies and other enforcers globally. These developments are monitored in our COVID-19 Resource Center. A regularly updated status overview of measures per antitrust agency is provided here.

The table below provides relevant links and an overview of measures published since our May 2020 EU Competition Law Newsletter.

Antitrust & mergers	
DG Competition page on antitrust rules and coronavirus	Link
DG Competition page on merger rules and coronavirus, including some practical information regarding merger notifications	Link
DG Competition page with detailed practical information concerning merger notifications	Link
State aid	
DG Competition page on State aid rules and coronavirus	Link
Comprehensive overview of State aid decisions approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework	Link
Overview of the State aid rules and public service obligation rules applicable to the air transport sector during the COVID-19 outbreak	Link

[55] Commission Communication concerning the third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 218/3.

[56] The first amendment of April 2020 increased the possibilities for public support to research, testing and production of products that are relevant to counter the coronavirus, to protect jobs and support the economy. The second amendment of May 2020 extended the scope of the Temporary Framework to recapitalization and subordinated debt measures.

[57] *See* https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1054.

State aid	
Targeted adjustments on State aid rules to mitigate the impact of the coronavirus outbreak (July 2020):	An overview can be accessed here
Communication from the Commission concerning: — The prolongation and the amendments of the Guidelines on Regional State Aid for 2014–2020 — Guidelines on State Aid to Promote Risk Finance Investments — Guidelines on State Aid for Environmental Protection and Energy 2014–2020 — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty — Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest	Link to the Commission Communication: here
— Communication from the Commission – Framework for State aid for research and development and innovation — Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance 2020/C 224/02 — Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No. 1407/2013 as regards its prolongation and amending Regulation (EU) No. 651/2014 as regards its prolongation and relevant adjustments	Link to the Commission Regulation: here
Temporary Framework to support the economy in the context of the coronavirus outbreak: — Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 218/03	Link

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20.1005.07_101320