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# EU Competition Law Newsletter

## Highlights

- Inmarsat/Viasat Orbits Away From The Commission's And CMA's Competitive Concerns
- The Court Of Justice Clarifies National Limitations Periods And Upholds Parties' Right To Compensation In Follow-on Damages Actions

## Inmarsat/Viasat Orbits Away From The Commission's And CMA's Competitive Concerns

On April 2, 2024, the European Commission published, in full, its May 2023 decision unconditionally approving the acquisition of Inmarsat by Viasat<sup>1</sup> (the "Transaction"), following an in-depth Phase II investigation. The UK Competition and Markets Authority ("CMA") had also unconditionally cleared the acquisition on May 9, 2023.<sup>2</sup> The Transaction was approved in the context of a trend toward broader consolidation in an increasingly challenged European satellite operations market, with SES announcing its intention to acquire Intelsat just a week before the Commission published its Viasat decision.<sup>3</sup>

### Background

Viasat and Inmarsat are both vertically integrated Satellite Network Operators ("SNO") and Satellite Service Providers ("SSP").<sup>4</sup> Both offer global two-way satellite-based communication services<sup>5</sup> across a broad array of sectors, including commercial and business aviation, government, energy, and maritime. They operate four and 15 geostationary earth orbit ("GEO") satellites respectively, orbiting at altitudes of 35,000 km above Earth, following the Earth's rotation. They differ from non-geostationary orbit satellites ("NGSO") (including Low Earth Orbit ("LEO") and Mid-Earth Orbit ("MEO") Satellites) which orbit lower (in some cases at altitudes below

<sup>1</sup> *Viasat/Inmarsat* (Case COMP/M.10807), Commission decision of May 23, 2023 ("the Commission Decision"), available [here](#). See also, Cleary Antitrust Watch, "CMA and European Commission cleared *Viasat/Inmarsat* transaction after in-depth investigations," June 13, 2023, available [here](#).

<sup>2</sup> Decision of the UK Competition and Markets Authority on *Viasat/Inmarsat* merger inquiry, May 9, 2023 ("the CMA decision"), available [here](#).

<sup>3</sup> Intelsat Press Release, "SES to Acquire Intelsat in Compelling Transaction Focused on the Future," April 30, 2024, available [here](#).

<sup>4</sup> Commission Decision, *supra*, fn 1, paras. 18(a) and (b): Satellite Network Operators (SNO) own and manage their own satellite fleets. Satellite Service Providers (SSP) assemble packages of satellite connectivity solutions consisting of satellite capacity and related services and equipment, which they sell to resellers or end-customers.

<sup>5</sup> Commission Decision, *supra*, fn 1: Two-way communication satellite networks provide point-to-point connectivity, meaning information can be transferred to and from the same ground stations via the same satellite.

1000 km) and do not remain stationary over one spot on Earth.

In November 2021, Viasat announced its intention to acquire sole control of Inmarsat. The Spanish National Competition Authority, whose merger control thresholds were triggered by the Transaction, referred the proposal to the Commission under Article 22(1) of the EEU Merger Regulation.<sup>6</sup> Twelve other Member States then joined the referral.

The Commission upon receiving the referral, on February 13, 2023, opened an in-depth investigation<sup>7</sup> to assess whether the Transaction might reduce competition in the offerings of broadband in flight connectivity (“IFC”) services<sup>8</sup> to commercial airlines both at EEA and global level. At that point, the CMA had already referred the acquisition to a Phase 2 investigation on October 14, 2022.<sup>9</sup>

## Relevant markets

The Commission identified three relevant markets for its analysis:

### ***Supply of satellite capacity.***<sup>10</sup>

Within a market for the supply of satellite capacity, the Commission considered a range of possible market segmentations, including splits by: (i) broadband and narrowband satellite capacity; (ii) industry segments; (iii) GEO and NGSO/LEO satellite capacity; (iv) HTS<sup>11</sup> and non-HTS (broadband) capacity; and, (v) Ka-band and

Ku-band<sup>12</sup> satellite capacity. The Commission ultimately left the market definition for satellite capacity supply open, but acknowledged that a number of market participants had consistently identified differences in product characteristics between GEO and NGSO/LEO satellite capacity, as well as the lack of substitutability between HTS and non-HTS, and between Ka-band and Ku-band capacity for certain applications.

### ***Supply of broadband IFC services to commercial aviation customers.***<sup>13</sup>

The Commission had previously defined a commercial two-way satellite communications market that was separate from the commercial one-way satellite communication market.<sup>14</sup> In the decision at hand, it explored a number of sub-segmentation options for this market<sup>15</sup> and indeed found the existence of a narrower market for the supply of broadband IFC services to *commercial aviation customers* (separate to business aviation customers), while leaving the ultimate market definition with regard to other potential sub-segments of the commercial two-way satcom space open. The CMA similarly defined a market for the supply of broadband IFC services to commercial aviation customers, after exploring various market splits.

### ***Supply of IFC services to business aviation customers.***<sup>16</sup>

The Commission separately considered the market for IFC services to *business* aviation customers. It had not previously segmented this market any

<sup>6</sup> Article 22 serves as a referral mechanism under the EU Merger Regulation, allowing Member States to request that the European Commission examine any merger that, while lacking an EU dimension, impacts inter-state trade and threatens to significantly affect competition within the requesting Member State’s territory.

<sup>7</sup> See Commission Press Release IP/23/768, “Mergers: Commission opens in-depth investigation into the proposed acquisition of Inmarsat by Viasat,” February 13, 2023, available [here](#).

<sup>8</sup> Broadband inflight connectivity (IFC) services are onboard technology using an internet connection.

<sup>9</sup> See CMA Press Release ME/6895/22, “Anticipated Acquisition by Viasat, Inc. of Connect TopCo Limited: Decision to Refer,” October 14, 2022, available [here](#).

<sup>10</sup> Commission Decision, *supra*, fn 1, paras. 54–81.

<sup>11</sup> High throughput satellites (“HTS”) provide 10 or more times higher transmission capacity.

<sup>12</sup> Higher frequency bands. Ku-band refers to 12–18 GHz and Ka-band to 26.5–40 GHz frequencies.

<sup>13</sup> Commission Decision, *supra*, fn 1, paras. 82–134; and CMA Decision, paras. 7.17–7.20.

<sup>14</sup> *Astrium Holding/Vizada Group* (Case COMP/M.6393), Commission decision of November 30, 2011; and *Apax Partners/Telenor Satellite Services* (Case COMP/M.4709), Commission decision of August 20, 2007.

<sup>15</sup> Specifically between: (i) broadband and narrowband connectivity; (ii) commercial and business aviation; (iii) short-haul and long-haul flights; (iv) Ku- and Ka-band capacity; (v) GEO- and LEO-based IFC solutions; and, (vi) satellite technology and ATG or hybrid technology.

<sup>16</sup> Commission Decision, *supra*, fn 1, paras. 135–153; and CMA Decision, *supra*, fn 2, paras. 7.21–7.25.

further, but it did leave open future potential segmentation based on the type of service provided and the aircraft type and size. The CMA, in contrast, defined a narrower market of IFC services provided to large vs. small business aircraft.

## Competitive assessment

Neither the Commission nor the CMA found that the Transaction would significantly impede competition on any of the relevant overlapping markets.

As a starting point, the combined market shares of the parties were deemed moderate,<sup>17</sup> *i.e.*, around 20% in the supply of satellite capacity, 30-40% in the supply of broadband IFC services to commercial aviation customers, and 20-30% in the supply of IFC services to business aviation customers.<sup>18</sup> The increment accounted for by Inmarsat was also considered limited, *i.e.*, 0-5% and 0-10% in the satellite capacity and commercial aviation IFC markets respectively. The Commission concluded that, even though the merged entity's market power was expected to increase in the near future in the supply of satellite capacity, its market power would not ultimately be significant,<sup>19</sup> given that:

- Broadband satellite capacity is a homogeneous good, which is interchangeable across various industry segments and creates a platform for close competition;
- The parties use most of their capacity captively, while leasing only around 20% of their capacity downstream; and,

- There is over 40% of spare/unused capacity in the market.

The Commission's investigation further established that, there are a sufficient number of credible competitors in the markets for the supply of IFC services, including Intelsat, Panasonic, and Anuvu, all of whom have an established and strong presence in the market, and SpaceX, who, while a new market entrant, has already begun exerting material competitive pressure on the parties.<sup>20</sup> Indeed, the Commission's market investigation revealed that SpaceX is already one of the top competitors in the space when it comes to latency and innovation. It competes closely with Viasat today, and could easily and rapidly expand should the Transaction result in a price increase. While SpaceX claimed that it does not yet have the required licenses to compete across the board with the parties, it seemed to the Commission to be capable of overcoming those barriers, considering that it had already secured several tenders in the market.

The Commission also considered there to be a nascent and evolving EU market for the supply of IFC services, which has allowed existing competitors and aspiring entrants to find considerable openings.<sup>21</sup> Specifically, the Commission noted that LEO investments and further satellite launches by GEO operators were expected,<sup>22</sup> while partnerships for the hybrid supply of IFC services have also been announced in the EU.<sup>23</sup>

While such a Transaction in tendering markets (including the market for commercial IFC services) might theoretically lead to less

<sup>17</sup> Commission Decision, *supra*, fn 1, paras. 170-187, 200-203, 249-262, and 314-316

<sup>18</sup> The CMA, however, found that market shares are of decreased evidentiary value in the Transaction, as there are differentiations between the offerings and the market is characterized by tendering. *See* CMA Decision, *supra*, fn 2, para. 8.116.

<sup>19</sup> Commission Decision, *supra*, fn 1, paras. 204-214.

<sup>20</sup> *See* Commission Decision, *supra*, fn 1, paras. 263-300.

<sup>21</sup> Viasat explains that most of the European aircraft are not supplied with IFC, whereas, for example, for short haul flights, the penetration rate in the US is almost 73%. *See* the Commission Decision, *supra*, fn 1, para. 303; and the CMA Decision, *supra*, fn 2, para 2.37.

<sup>22</sup> Commission Decision, *supra*, fn 1, para. 289: "SpaceX has submitted request for regulatory approval to operate a constellation of 30,000 more LEO satellites."

<sup>23</sup> Commission Decision, *supra*, fn 1, paras. 305(a) and (b). Intelsat and One Web distribution partnership for the offer of new multi-orbit IFC services, as well as One Web and Panasonic distribution partnership for hybrid IFC services. *See* Intelsat Press Release, "Intelsat and OneWeb partnership brings multi-orbit connectivity to airlines worldwide," August 11, 2022, available [here](#); and Eutelsat Group Press Release, "OneWeb and Panasonic Avionics Corporation to deliver low Earth orbit (LEO) connectivity to airlines worldwide," October 17, 2022, available [here](#).

aggressive bidding between the reduced number of players post-Transaction,<sup>24</sup> the Commission and the CMA both considered that customer contracts in the relevant tendering markets had sufficiently long terms to ensure that they would not be affected by the Transaction and that customers still retained the option of switching to sufficiently credible competitors with “similar (or even stronger, depending on the tender criteria) offerings.”<sup>25</sup>

### No commitments required

The Transaction was one of the few examples of cases in recent years where the Commission and CMA unconditionally approved a transaction following a Phase II investigation (only around

17% of the Commission’s Phase II investigations lead to approval without remedies).<sup>26</sup> Along with other recent transactions cleared in Phase II without remedies (see, *e.g.*, the CMA’s clearance of *Arcelik/Whirlpool* notwithstanding high shares in certain segments<sup>27</sup>), the Transaction provides continued hope that a Phase II investigation does not need to be the death knell of a deal or a path to certain remedies, but rather that both the Commission and the CMA do keep an open mind and carefully assess the strength of the Parties arguments (including on recent market entry) before drawing any conclusions on the outcome of their review. It remains to be seen whether these arguments will be enough to ensure a similar outcome for the *SES/Intelsat* deal which will likely get close scrutiny as well.

## The Court Of Justice Clarifies National Limitations Periods And Upholds Parties’ Right To Compensation In Follow-on Damages Actions

On April 18, 2024, the Court of Justice delivered its judgement on the questions referred to it by the Prague Municipal Court in the *Heureka v. Google* case.<sup>28</sup> Heureka Group (“Heureka”), a Czech comparison shopping service company (“CSS”) brought an action before the Municipal Court of Prague in the Czech Republic, seeking compensation from Google for the harm it allegedly suffered as a result of Google’s abusive behavior as part of the Google Shopping decision. The referring court sought clarification about whether Article 10 of Directive 2014/104 (the “Damages Directive”)<sup>29</sup> and/or Article 102 TFEU<sup>30</sup> preclude the effects of a

national law that requires parties seeking compensation for competition infringements to file suit within three years of the occurrence of the harm. The Court of Justice ruled that Article 102 TFEU and the principle of effectiveness require the suspension of limitation periods during the Commission’s investigation. The limitation period will only start running when the injured party knows the information necessary to bring its claim, which is presumed to be as of the date of the publication of the summary of the Commission’s infringement decision in the Official Journal of the EU. Additionally, the injured party—Heureka in

<sup>24</sup> *General Electric/Alstom* (Case Comp/M.7278), Commission decision of September 8, 2015. See Commission Decision, *supra*, fn 1, paras. 264–265; and CMA Decision, *supra*, fn 2, paras. 8.132–8.154.

<sup>25</sup> Commission Decision, *supra*, fn 1, para. 265.

<sup>26</sup> Assessment completed by Cleary Gottlieb based on publicly available resources, in respect of the period January 1, 2018, to December 31, 2023.

<sup>27</sup> In March 2024, following a Phase 2 investigation, the CMA cleared the acquisition of Whirlpool by Arçelik because of changes in the competitive landscape, despite high market shares of the merging parties in the identified markets. The CMA attempted to balance the decreasing market power of Whirlpool with other suppliers’ growth and intention to expand (See *Arçelik / Whirlpool EMEA* (Case ME/7044/23), CMA decision of March 7, 2024). Similarly, in October 2023, the Commission cleared the transaction without an in-depth investigation, given the presence of alternative suppliers in the EEA countries where both parties are active (See *Arçelik / Whirlpool EMEA MDA* (Case COMP/ M.11086), Commission decision of October 23, 2023).

<sup>28</sup> *Heureka Group a.s. v. Google LLC* (Case C-605/21) EU:C:2024:324, (“Heureka”).

<sup>29</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, OJ 2014 L 349/1. Article 10 harmonizes rules applicable to limitation periods for bringing actions for damages, such as when limitation periods begin (Article 10(2)) or are suspended (Article 10(4)), and provides for a minimum limitation period of five years (Article 10(3)).

<sup>30</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47, (“TFEU”). Article 102 prohibits abusive behavior by companies holding a dominant position in any given market.

this instance—can then rely on the findings of a Commission decision under appeal, as it is binding in nature, unless and until it has been annulled.

## Background

In 2017, the Commission fined Google for favoring its own CSS by showing it in prominent boxes with rich display formats (called Shopping Units), while displaying competing CSSs only as generic results which were not as prominent because they were prone to being demoted.<sup>31</sup> The Commission found the abuse lasted at least from February 2013 to the date of its decision, on June 27, 2017. The General Court upheld the Commission’s decision and Google subsequently appealed that judgment to the Court of Justice on January 20, 2022.

In June 2020, Heureka filed for damages relying on the Commission’s 2017 decision. Google argued the action was at least partially time barred under Czech time limitation rules, which would have required Heureka bring an action seeking damages within three years of each partial occurrence of harm, *i.e.*, each time that Google favored its own CSS and allegedly reduced the number of visits to Heureka’s CSS. In practice, this meant that Heureka’s claims for damages would have needed to be rejected for the period between February 2013 and June 2016.

On September 30, 2021, the Prague Municipal Court asked the CJEU to confirm the compatibility of the Czech time limitation period with EU law.<sup>32</sup>

## Enforceability of limitation periods under the Damages Directive for competition infringements

In its judgment, the Court of Justice emphasized the importance of the right of parties that had

suffered harm as a result of an abuse of a dominant position under Article 102 TFEU to claim compensation for damages from the infringing parties.<sup>33</sup> The Court of Justice considers that this right contributes to the full effectiveness and deterrence of Article 102 TFEU, and thus constitutes “an integral part of the system for the enforcement of those rules.”<sup>34</sup> In the absence of fully harmonized EU procedures, injured parties must rely on national procedural laws to claim damages, so long as it is not “excessively difficult or practically impossible” to exercise that right. It would otherwise be contrary to the EU law principle of “effectiveness and proportionality.”<sup>35</sup>

The Damages Directive aligned national procedural laws for these damages claims, including with respect to limitation periods.<sup>36</sup> However, the Czech Republic only adopted the Damages Directive on September 1, 2017, both after the transposition deadline of December 27, 2016, and after the end of the infringement period stated in the Commission’s *Google Shopping* decision.

First, in line with its jurisprudence,<sup>37</sup> the Court of Justice held that the competition infringement must come to an end for the limitation period to commence. This is because a limitation period which forces the injured party to constantly re-evaluate the harm it has suffered for every occurrence would be too complicated, given the already complex factual and economic assessments that a victim must conduct to quantify the harm it suffered.<sup>38</sup> The Court of Justice also noted that starting the limitation period when the infringement ends has a deterrent effect, encouraging the offender to bring the violation to an end sooner rather than later to limit potential damages.<sup>39</sup> In the present case, the Court of Justice considered that the limitation period could have only started to run after 2017, when the Commission considered

<sup>31</sup> *Google Shopping* (Case AT.39740), Commission decision of June 27, 2017. See our previous newsletter [here](#).

<sup>32</sup> *Heureka*, para. 30.

<sup>33</sup> *Heureka*, para. 53.

<sup>34</sup> *Heureka*, paras. 54, 61.

<sup>35</sup> *Heureka*, para. 51.

<sup>36</sup> Directive 2014/104/EU, *supra*, fn 29.

<sup>37</sup> *Volvo and DAF Trucks* (Case C-267/20) EU:C:2022:494.

<sup>38</sup> *Heureka*, paras 57–60.

<sup>39</sup> *Heureka*, para 63.

that Google's alleged abuse of dominance had ended.<sup>40</sup>

Second, the limitation period only starts running after the injured party can reasonably be expected to know all the information necessary for bringing its action. That information includes: (i) the existence of the infringement; (ii) the existence of the harm; (iii) the causal link; and, (iv) the identity of the infringer(s).<sup>41</sup> The injured party is presumed to be aware of all the relevant information on the date of the publication of the summary of the Commission's infringement decision in the Official Journal of the EU, where there is such an investigation. The alleged infringing company (here, Google) can rebut this presumption by showing that the victim knew all the elements necessary to bring its action before the publication.<sup>42</sup>

Third, the Court of Justice held that the principle of effectiveness requires the suspension of limitation periods during the Commission's investigation. It argued this was necessary to guarantee the injured party's rights and to allow it to assess: (i) whether an infringement of competition law has been committed; (ii) the scope of the infringement; and, (iii) its duration; and be able to rely on that finding in a subsequent action for damages.<sup>43</sup> In essence, the Court of Justice found that Article 102 TFEU and the principle of effectiveness require what is provided by Article 10(2) and 10(4) of the Damages Directive.

## **National Courts must Follow Commission Decisions until they are Annulled, and are Not Required to Suspend Follow-on Damages Proceedings during the Appeal**

The Court of Justice also clarified that an injured party can rely on a Commission decision which is subject to appeal to substantiate its claims for damages.<sup>44</sup> Indeed, decisions from the Commission enjoy a presumption of legality and carry an obligation for all persons, including national courts, to respect their enforceability.<sup>45</sup> In turn, this implies that national courts can rely on a non-final Commission decision to establish the existence of an infringement and its duration, and are not required to suspend the proceedings in the action for damages while the Commission decision is being appealed.<sup>46</sup> They may do so if they consider it appropriate and do not depart from said decision.<sup>47</sup> The upshot is that the limitation period for follow-on damages claims will usually start running after the summary of the Commission's decision has been published in the Official Journal, and will generally not be suspended during an appeal of the decision.

## **Conclusion**

The judgment is the latest instalment in a saga addressing whether procedural limitations hinder the ability of injured parties to bring claims for damages resulting from competition law infringements.<sup>48</sup> The judgment of the Court of Justice essentially extends the applicability of Article 10(2) and (4) of the Damages Directive to conduct that occurred prior to the Directive's adoption—at least in circumstances where the infringement started prior to the Directive coming into force and ended before the Member State adopted the Directive.

<sup>40</sup> *Heweka*, para 86.

<sup>41</sup> *Heweka*, para 64.

<sup>42</sup> *Heweka*, paras. 70–71, and 86.

<sup>43</sup> *Heweka*, para 79.

<sup>44</sup> *Heweka*, para 77.

<sup>45</sup> *Heweka*, para 73–74. This is also provided for by Article 16(1) of Council Regulation (EC) No.1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

<sup>46</sup> *Heweka*, paras. 62, 79, and 80.

<sup>47</sup> *Heweka*, paras. 80, and Article 16(1) of Regulation 1/2003.

<sup>48</sup> *Volvo and DAF Trucks*, *supra*, fn 37, and *Cogeco Communications* (Case C-637/17) EU:C:2019:263.

# News

## Commission Updates

### ***Commission Powers Up FSR Enforcement: Launches Two In-Depth Investigations Into Chinese Solar Photovoltaic Producers***

On April 3, 2024, the Commission launched two in-depth investigations into tenders by Chinese solar photovoltaic suppliers under the EU Foreign Subsidies Regulation (“FSR”).<sup>49</sup> The investigations relate to a public procurement procedure launched on September 27, 2023 by a Romanian contracting authority (Societatea Parc Fotovoltaic Rovinari Est S.A.) for the design, construction, and operation of a photovoltaic park with an installed capacity of 454.97 MW.<sup>50</sup>

### **Overview of the FSR: filing conditions and criteria for assessment**

The FSR, designed to tackle distortive subsidies given by non-EU countries to companies active in the EU single market, entered into effect on July 12, 2023.<sup>51</sup> It empowers the Commission to investigate potentially distortive non-EU subsidies in the context of *ex ante* notifications for certain large mergers and public tenders, and in *ex officio* investigations.

In public procurement procedures, the FSR requires tenderers to notify their bid if:

- i. the overall contract value of the tender is at least €250 million (and if divided into lots, the aggregate value of the lots applied for is at least €125 million); and

- ii. the tenderers and any main subcontractors and suppliers involved in the same tender received at least four million euros in financial contributions from a single non-EU country in the last three years prior to notification.

The Commission holds extensive powers to address distortions caused by foreign subsidies. It may impose corrective measures or commitments, prohibit the relevant merger or public contract awards, and even accept the reimbursement of the foreign subsidy (with interest), provided that the repayment is transparent, verifiable, and effective.

### **Prior enforcement of the FSR**

These investigations in the photovoltaic sector follow the Commission’s first in-depth investigation under the FSR, opened on February 16, 2024. This concerned a tender by Chinese state-owned train manufacturer CRRC Qingdao Sifang Locomotive Co., Ltd. (“CRRC”) for a €610 million contract to supply electric trains in Bulgaria, submitted on January 22, 2024.<sup>52</sup> On March 26, 2024, CRRC withdrew its bid from the tender procedure and the Commission closed the investigation. Commissioner for the EU’s internal market, Thierry Breton, celebrated the victory, stating that “[i]n just a few weeks, our first investigation under the [FSR] has already yielded results. Our Single Market is open for firms that are truly competitive and play fair,” and vowed that the Commission “will continue to take all necessary measures to preserve Europe’s economic security and competitiveness – with assertiveness and speed.”<sup>53</sup> The Commission has since announced new FSR investigations targeting Chinese

<sup>49</sup> Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330/1, available [here](#).

<sup>50</sup> See Commission Press Release, IP/24/1803, “Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector,” April 3, 2024, available [here](#).

<sup>51</sup> See our Alert Memorandum, “EU Foreign Subsidies Regulation Takes Effect and Filing Forms Adopted,” July 12, 2023, available [here](#).

<sup>52</sup> The tender, initiated by Bulgaria’s Ministry of Transport and Communications, related to the procurement and maintenance of 20 electric “push-pull” trains, with an estimated contract value of €610 million. See Commission Press Release, IP/24/887, “Commission opens first in-depth investigation under the Foreign Subsidies Regulation,” February 16, 2024, available [here](#). See also Summary notice concerning the initiation of an in-depth investigation in case FSP.100147, OJ C/2024/1913, available [here](#).

<sup>53</sup> See Commission Statement, STATEMENT/24/1729, “Statement by Commissioner Breton on withdrawal by CRRC Qingdao Sifang Locomotive Co., Ltd. from public procurement following the Commission’s opening of an investigation under the Foreign Subsidies Regulation,” March 26, 2024, available [here](#).

suppliers of wind turbines for wind parks in Spain, Greece, France, Romania, and Bulgaria.<sup>54</sup> The Commission also announced on April 23, 2024 its first-ever FSR dawn raid at the premises of Nucotech, a Chinese producer of security equipment, in the Netherlands and Poland, to gather possible evidence of distortive foreign subsidies.<sup>55</sup>

### Investigations of Chinese solar photovoltaic producers

The Commission's solar photovoltaic investigations concern two different bids by consortiums involving Chinese companies:<sup>56</sup>

- A consortium comprising ENEVO Group, a Romanian engineering and consulting services provider, and LONGi Solar Technologie GmbH, a German subsidiary of the Chinese photovoltaic manufacturer LONGi Green Energy Technology Co., Ltd.
- A consortium consisting of two companies owned and controlled by Shanghai Electric Group Co. Ltd, a Chinese state-owned enterprise that provides an integrated process and services concerning the generation, grid, load, and storage of wind, solar and hydrogen energy.

The Commission opened its in-depth investigations after finding that:

- Both consortia received: (i) government grants; (ii) tax refunds, fiscal incentives and levies; (iii) financing, and, in the case of Shanghai Electric Group Co. Ltd; and, (iv) sales of goods and the provision of services of c. €546 million, in the three years prior to notification; and

- The amount of these benefits was significantly higher than the value of the contracts for which the consortia was bidding.<sup>57</sup>

The Commission will now conduct a detailed review to determine by August 14, 2024 if these financial contributions amounted to non-EU subsidies that allowed the two consortia to submit unduly advantageous offers for the photovoltaic park contract.

### Implications

These investigations underscore the Commission's serious commitment to utilizing its new FSR powers. They also highlight the significant repercussions that FSR notifications can entail, as evidenced by CRRC's withdrawal of its bid after the Commission opened an in-depth FSR investigation.

As the Commission ramps up FSR enforcement, it is prioritizing strategic sectors crucial for the EU economy. Executive Vice-President and Commissioner for Competition, Margrethe Vestager, has explained that dependency on third countries for critical technologies "is not only dangerous for [the EU's] competitiveness," but also jeopardizes the EU's economic security.<sup>58</sup> Similarly, Commissioner for the EU's internal market, Thierry Breton, explained that the solar panel investigations "aim to preserve Europe's economic security and competitiveness by ensuring that companies in our Single Market are truly competitive and play fair."<sup>59 60</sup>

While only time will shine light on the Commission's future enforcement under the FSR, it is likely that

<sup>54</sup> See Commission Speech, SPEECH/24/1927, "Speech by Executive Vice President Vestager on technology and politics at the Institute for Advanced Study," April 9, 2024, available [here](#).

<sup>55</sup> See Commission Press Release, MEX/24/2247, "Commission carries out unannounced foreign subsidies inspections in the security equipment sector," April 23, 2024, available [here](#); and Foo Yun Chee, "China's Nucotech raided in EU over foreign subsidies concerns," *Reuters*, April 24, 2024, available [here](#).

<sup>56</sup> See Commission EU tenders portal under the reference "Romania-Târgu Jiu: Construction work for power plant," 2023/S 189-592487, available [here](#).

<sup>57</sup> See Summary notice concerning the initiation of an in-depth investigation in Case FSP.100151, OJ C/2024/2830, available [here](#); and Summary notice concerning the initiation of an in-depth investigation in Case FSP.100154, OJ C/2024/2832, available [here](#).

<sup>58</sup> See Commission speech, *supra*, fn 54.

<sup>59</sup> See Commission Press Release, IP/24/1803, "Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector," April 3, 2024, available [here](#).

<sup>60</sup> The importance of the solar sector was further underscored by the signing of the European Solar Charter on April 15, 2024, in the margins of the informal Energy Council meeting attended by the Commission, the 27 EU Member States, and industry representatives. At the signing ceremony, Commissioner for Energy, Kadri Simson, stressed the sector's significance, stating that "[w]e all want a thriving EU solar manufacturing industry." (See Commission News Announcement, "Commission supports European photovoltaic manufacturing sector with new European Solar Charter," April 15, 2024, available [here](#); and Commission Speech, SPEECH/24/2052, "Speech by Commissioner Simson at the signing ceremony of the European Solar Charter on the margins of the Informal Energy Council," April 15, 2024, available [here](#)).



a continued focus on strategic sectors essential for the EU economy will persist.

## Other Updates

### ***Enrico Letta's Report – The Future Of The Single Market***

On April 17, 2024, the former Italian Prime Minister, Enrico Letta, published a report outlining the future of the EU's single market (the "Report").<sup>61</sup> Letta proposed significant reforms, including the addition of a fifth freedom to spur innovation, consolidation in key sectors to enhance global competitiveness, and a new framework for State aid governance.

### **Background**

The Presidencies of the Council and the Commission asked Letta, for the 30th anniversary of the Single Market, to prepare a report detailing recommendations to increase the competitiveness of the Single Market. The Report, which has been published a few months before the next European elections, suggests revised competition priorities for the next Commission. Letta suggests that the EU should introduce a new fundamental freedom focused on innovation, back consolidation in certain strategic sectors, and propose State aid funding through the EU budget.

### **A fifth freedom to foster innovation**

The Single Market is focused on four pillars: the free movement of goods, services, people and capital. The Report claims that the Single Market framework has become outdated and suggests the addition of a fifth freedom to drive innovation. To foster European innovation, Letta recommends to increase transparency and data access in key

areas such as AI, quantum computing, biotech, biorobotics, and space.<sup>62</sup>

The fifth freedom would complement the Digital Market Act, the Digital Services Act, the AI Act, the Data Act, and the Data Governance Act.<sup>63</sup> The fifth freedom—complex enough an idea to not have been precisely defined in the report<sup>64</sup>—is likely a response to the discussion that the Digital Markets Act targets companies outside the EU but provides few concrete tools to promote the emergence of European digital competition.

### **More consolidation at the EU level to compete at the global level**

According to the Report, European companies suffer from a significant "size deficit" compared to global competition from the USA and China and "[t]he lack of integration in the financial, energy, and electronic communications sectors is a primary reason for Europe's declining competitiveness." The Report warns that a balance must be struck between allowing companies to scale up and safeguarding a level playing field.<sup>65</sup>

The Report warns that keeping the focus only on "pro-entrant" regulation would be detrimental in the context of telecommunications infrastructure.<sup>66</sup> The Report claims that more consolidation would create pro-competitive sharing of investments in key network elements, necessary in new technologies, like in 6G and AI, for example.<sup>67</sup> This is at odds with the current Commission's tough stance on consolidation in the telecommunications sector, particularly in mergers that reduce the number of players in the relevant national market from four to three.<sup>68</sup>

<sup>61</sup> Enrico Letta, "Much More than a Market," April 2024, available [here](#).

<sup>62</sup> *Ibid.*, pp. 7, 21-23.

<sup>63</sup> *Ibid.*

<sup>64</sup> Rather the Report outlines the objectives and fields that the fifth freedom seeks to cover.

<sup>65</sup> *Ibid.*, p. 8.

<sup>66</sup> *Ibid.*, p. 52.

<sup>67</sup> *Ibid.*, p. 55.

<sup>68</sup> Samuel Stolton and Jillian Deutsch, "EU's Vestager Warns of Telecoms Merger Risks to Competition," *Bloomberg*, April 18, 2024, available [here](#).

In the energy sector, the Report seeks to foster market integration and interconnectivity between Member States to “ensure the deployment of new clean energy generation in the fastest and most cost-efficient manner possible.” According to Letta, this cooperation towards the achievement of a carbon-free competitive Single Market presupposes a strict implementation of the rules on foreign direct investments at the EU level, coupled with easier access to EU funds or State aid.<sup>69</sup> The Commission’s Carbon Border Adjustment Mechanism is a step in that direction.<sup>70</sup>

### **A new state aid governance framework**

The Report acknowledges that the relaxation of State aid rules has contributed to limiting the negative effects of recent crises, but has also produced distortions of competition. The Report suggests balancing a strict enforcement of State aid at the national level and the progressive expansion of EU-level funding support to overcome market distortions. This would require Member States to allocate a portion of their national funding to finance pan-European initiatives and investments.<sup>71</sup> Letta emphasizes that a State aid governance framework with common conditionalities for disbursement encourages a level playing field,<sup>72</sup> protects against harmful foreign subsidies,<sup>73</sup> and also constitutes a response to alternative legislation from different economic blocs like the US Inflation Reduction Act.<sup>74</sup>

### **Conclusion**

The Report is a response to the current geopolitical discourse—it details the state of play of the Single Market and formulates ambitious recommendations to increase its competitiveness in the current global landscape. However, some of these proposals are at odds with the current objectives of the Commission’s Directorate-General for Competition as well as with the stances of some Member States on public funding. With regard to the consolidation proposal to drive investments, Competition Commissioner Margrethe Vestager explained that, “We have nothing to suggest that a more consolidated market invests more. We have every suggestion that competition is the fundamental driver to investment.”<sup>75</sup> Furthermore, some Member States such as the Netherlands—historically reluctant to increase EU funds<sup>76</sup>—will require substantial persuasion to back the proposal for a New State Aid Governance Framework. To further fuel the debate, former European Central Bank President, Mario Draghi, is preparing another competitiveness report that is expected to be published in June, 2024.<sup>77</sup>

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<sup>69</sup> Report, *supra*, fn 61, pp. 62-66.

<sup>70</sup> See Cleary Gottlieb’s Climate and Financial Sector Newsletter, May 2023, available [here](#).

<sup>71</sup> Report, *supra*, fn 61, p. 11.

<sup>72</sup> *Ibid.*, p. 39.

<sup>73</sup> *Ibid.*, p. 12.

<sup>74</sup> *Ibid.*, pp. 12 and 27.

<sup>75</sup> Bethan John, Vestager stands firm as EU report pushes for greater consolidation in telecom markets,” *Global Competition Review*, April 18, 2024, available [here](#).

<sup>76</sup> E.g. See Sam Fleming, “Netherlands opposes new EU money to counter US green subsidies,” *Financial Times*, January 24, 2023, available [here](#).

<sup>77</sup> “Draghi to speak to EU ministers ahead of competitiveness report, source says,” *Reuters*, February 12, 2024, available [here](#).

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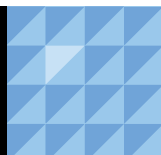
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