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EU Competition Law Newsletter

Highlights

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— Commission Prohibits Merger Between Rolled Copper Producers

— Commission Accepts TenneT's Commitment To Increase The Maximum Capacity Of The Electricity Interconnector Between Denmark And Germany

Prohibition Of Siemens/Alstom Triggers Debate About Far-Reaching Changes To EU Merger Control

On February 6, 2019, the Commission[1] prohibited the then-proposed combination of Siemens AG's ("Siemens") mobility business and Alstom S.A. ("Alstom") which put an end to the parties' ambition of creating a European Champion in the rail industry.[2] The Financial Times called this Phase 2 investigation "one of the most important test cases for the commission since it assumed powers to vet EU mergers in 1989."[3]

The Commission conducted an eight-month pre-notification investigation, issued almost 200 requests for information, reviewed around 800,000 internal documents, and engaged in extensive remedy discussions with the parties throughout. In addition, the €15 billion deal was reportable in almost 30 jurisdictions worldwide.

The Commission's Concerns

The Commission's decision found that the transaction would have produced anticompetitive effects in the markets for: (i) high-speed/very high-speed trains; and (ii) a number of mainline signaling systems.[4] The Commission had originally raised concerns in multiple additional markets, including for mainline and urban rolling stock, signaling systems for conventional metros and light rail, and rail electrification. These were ultimately dropped based on the parties' arguments in their response to the Statement of Objections. Concerns in urban signaling systems were dropped following remedies submitted by the parties.

1 *Siemens/Alstom* (Case COMP/M.8677), decision not yet published.

2 Cleary Gottlieb acted as Alstom's antitrust counsel globally, including in the EU.

3 *See* Rochelle Toplensky, "EU blocks planned Siemens-Alstom rail deal in landmark decision", February 6, 2019, Financial Times.

4 Signaling systems are designed to prevent train collisions and increase traffic efficiency.

High-Speed and Very High-Speed Trains. The relevant market included trains capable of maximum speeds equal to or higher than 250 km/h. These were viewed as distinct from lower-speed intercity and regional trains due to regulatory and technical specifications that allow them to run at high service speeds. The Commission regarded the market as EEA-wide, including Switzerland, while acknowledging that it could also be wider. China, Japan, and South Korea were excluded from the relevant market due to "insurmountable barriers" impeding the entry of foreign competitors.

The parties considered competition in high-speed/very high-speed to be particularly intense, with at least eight suppliers globally, including CAF, Bombardier, Hitachi/Ansaldo, Stadler, and Talgo. According to the parties, all of these players have confirmed track records, and comparable technical know-how and innovation capabilities. China's CRRC has recently developed high-speed trains compliant with EU standards, and European customers expected them to enter the market within 3 to 5 years. The HS2 project in the U.K., the largest recent tender for very high-speed trains in the EEA, attracted seven bidders, including China's CRRC. The vast majority of European customers supported or were unconcerned by the transaction, including Europe's largest railway operators such as the U.K.'s HS2, Eurostar, Renfe (Spain), SBB (Switzerland), SJ (Sweden), and SNCF (France).

The Commission rejected these arguments and concluded that the transaction would have given rise to unilateral effects due to high combined market shares (60–80%, depending on the segmentation and time frame) and would have removed one of the two largest suppliers outside of China. In the Commission's view, the parties were leading innovators and close competitors, with incumbent positions in France and Germany, providing them with large recurring orders. Competitors, such as Bombardier, Hitachi/Ansaldo, Stadler, Talgo, and CAF, were considered weak in comparison, with comparatively low tender participation and winning rates. The Commission also found that CRRC was unlikely to successfully enter the EEA market despite its recent participation in the HS2 tender in the U.K.

Signaling Systems. The Commission distinguished between signaling systems for mainline trains (*e.g.*, high-speed, intercity, and regional trains) and urban trains (*e.g.*, metros and trams).

- **For mainline signaling projects**, the Commission identified further sub-segments of certain signaling systems (*e.g.*, interlockings and Automatic Train Protection (ATP)), differentiated between legacy and European Train Control System (ETCS) projects, and on-board and wayside/trackside solutions. The geographic market of these sub-segments was found to be national or EEA-wide.[5]

  The Commission concluded that the combined entity would have been the main innovator and market leader in many of these sub-segments, with combined shares ranging between 40–100%. The parties were considered close competitors based on their bidding activity, feedback from the market investigation, and internal documents. The competitive pressure from the remaining signaling suppliers, including Thales, Bombardier, and Ansaldo, was considered insufficient.

- **For urban signaling projects**, in view of the remedies offered, the Commission did not maintain its objections.

Proposed Remedies

To address the Commission's concerns in high and very high-speed trains, Siemens and Alstom offered to either: (i) divest one of Alstom's high-speed train businesses (the Pendolino); or (ii) grant a license to Siemens' Velaro very high-speed technology and technology bricks of the Velaro Novo (Siemens' future very high-speed platform).

For mainline signaling systems, the parties offered Siemens' entire on-board ATP business in the EEA while Alstom offered its entire global

[5] The Commission identified markets for (i) ETCS on-board projects in the EEA, (ii) legacy on-board projects at national level, (iii) standalone interlockings at national level, (iv) ETCS ATP for overlay projects in the EEA, and (v) ETCS ATP for re-signaling projects in the EEA (bundling ETCS ATP and interlockings).

wayside ATP ETCS business and most of its interlocking business in the EEA. In addition, the parties proposed to divest one of Siemens' urban signaling businesses. These assets combined would have created a new signaling player which would have been approximately the same size as Alstom's European signaling business today, including R&D resources, a significant patent portfolio, backlog and personnel. The proposed remedies attracted significant interest from potential purchasers.

However, both the proposed high-speed and signaling remedies, which in aggregate were estimated to amount to around four percent of the combined entity's total, global, sales, were considered insufficient by the Commission and the transaction prohibited on that basis.

Calls For Reform of EU Merger Control Rules

While *Siemens/Alstom* was only the 9th prohibition decision since the 2004 EU Merger Regulation, it has caused sizeable controversy. During the final stages of the Commission investigation, 19 EU Member States had called for an update of the merger control rules to facilitate the creation of European industrial champions.[6] France's economy minister subsequently called the decision a "political mistake",[7] and the German minister of economy stated that it "demonstrates the urgent need for a European industrial strategy. It involves orders of many $100 billion worldwide. That is why we need strong European champions. France & Germany agree."[8] These two Member States then published a Franco-German Manifesto setting out their goals for European industrial policy.[9] The document acknowledges that merger control rules are essential but suggests three fundamental changes: (1) taking into account government control and subsidies of competing suppliers; (2) assessing competition at a global level and extending the time frame of assessing potential future competition; and (3) introducing a right of appeal to the EU Council, which would have the power to ultimately override Commission decisions in certain, yet to be defined cases.

Most competition law experts appear highly skeptical of these proposals that would politicize the rules-based, and generally considered world-leading, merger review system that the Commission has established over the course of the past 30 years. In Commissioner Vestager's view, the prohibition decision should not prompt an overhaul of EU merger rules.[10] The Commission's position is supported by multiple national antitrust authorities including in Germany, France, and the U.K., and by almost 50 European industrial economists emphasizing that "competition policy should be independent from political interference based on perceived European industrial goals, and respond to efficiency considerations and the protection of the competitive process."[11] Economist Patrick Rey and Nobel laureate Jean Tirole, who advised the Commission on the economics of unilateral effects at the time of the adoption of the current EU Merger Regulation in 2004, commented that "Europe would be wise not to leave competition policy enforcement in the hands of its politicians" and rather called for "World Trade Organization dispute-settlement procedure or for stronger EU trade and procurement policy, not the weakening of its competition policy."[12] Commission President Juncker argued similarly and promoted alternative solutions to protect the single market stating that "this is why we have shown our teeth by raising tariffs on cheap steel coming from China or taken a no tolerance approach on the forced transfer of technology. It is why we have modernised our trade defence instruments and have just recently agreed new rules on screening foreign investment in areas that may affect security or public order."[13]

[6] *See* Jorge Valero, "19 EU countries call for new antitrust rules to create 'European champions'", December 19, 2018, EurActiv.

[7] *See* Harriet Agnew, "EU blocks Siemens-Alstom rail merger, Le Maire says", February 6, 2019, Financial Times.

[8] *See* Florence Schulz, "German 20130 industrial strategy: Altmaier backs 'European Champions'", February 7, 2019, EurActiv.

[9] *See* full manifesto dated February 19, 2019, available here https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century.

[10] *See* Eszeter Zalan, "Vestager says 'no' to Siemens-Alstom mega-merger", February 6, 2019, EUObserver.

[11] *See* full open letter from February 2019, available at: https://www.barcelonagse.eu/microupdates/open-letter-massimo-motta-european-industrial-economists.

[12] *See* Patrick Rey and Jean Tirole, "Keep Politics Out of Europe's Competition Decisions", March 4, 2019, Project Syndicate.

[13] *See* European Commission Speech SPEECH/19/870, "Keynote speech by President Juncker at the EU Industry Days 2019", February 5, 2019.

Commission Prohibits Wieland's Proposed Acquisition of Aurubis Rolled Copper Products and Schwermetall

On February 6, 2019—the same day the *Siemens/Alstom* decision was adopted—and again following a Phase II investigation, the Commission prohibited German rolled copper products manufacturer Wieland's proposed acquisition of Aurubis's rival business and of its 50% stake in the parties' pre-rolled strip manufacturing joint-venture Schwermetall.[14]

Parallel Mergers and the Effect of the "Priority" Rule

The assessment of the transaction was influenced by the fact that rivals KME and MKM formally notified their transaction 11 days before Wieland and Aurubis. It meant that the so-called "priority" (or "first-in") rule applied. The Commission assessed *Wieland/Aurubis/Schwermetal*[15] by taking into account the more concentrated market conditions following *KME/MKM*,[16] which the Commission unconditionally cleared on December 11, 2018. KME and MKM were considered to remain sufficiently constrained by Wieland and Aurubis.

The Commission's Concerns

In *Wieland/Aurubis/Schwermetall*, however, the Commission found that the acquisition would have been a 3-to-2 merger in the EEA market for rolled copper products, which, according to Commissioner Vestager, constitutes a "key input for many industries in Europe,"[17] such as electric cars, trains, and electronic devices. The new Wieland would have been a dominant player with a market share in excess of 50% competing against the newly merged KME/MKM, as the only other supplier with a market share above 20%. The Commission concluded that Wieland would have been able to raise prices because European customers cannot rely on suppliers outside the EEA due to "import duties and just-in-time requirements," as well as the "superior technical capabilities of EU suppliers."[18]

The Commission also identified vertical concerns arising from the parties' rolled copper products businesses downstream and the upstream market for pre-rolled strip in the EEA where Schwermetall was found to have a market share exceeding 60%.[19] The Commission concluded that the transaction would have eliminated Schwermetall's operational independence from its shareholders Wieland and Aurubis, and would have allowed Wieland to raise input costs for smaller downstream competitors in rolled copper products and to obtain access to their confidential information post-transaction.

Proposed Remedies

The parties offered to divest two Aurubis rolled copper plants in Germany and the Netherlands but were unable to present a buyer suitable to the Commission. The Commission found that the parties failed to show that the potential buyer would compensate for the lack of access to cost-competitive pre-rolled strip from Schwermetall after a transitional period or would not create new competition concerns. The Commission considered the proposed remedy to be insufficient also because it did not include the divestment of Aurubis' stake in Schwermetall and thus did not address its vertical concerns.

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[14] Pre-rolled strip is an input in the manufacturing of rolled copper products. *See* Commission Press Release IP/19/883, "Mergers: Commission prohibits Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall", February 6, 2019.

[15] *Wieland/Aurubis/Schwermetall* (Case COMP/M.8900), decision not yet published.

[16] *KME/ MKM* (Case COMP/M.8909), decision not yet published.

[17] *See* Commission Press Release IP/19/883, "Mergers: Commission prohibits Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall", February 6, 2019.

[18] *Ibid.*

[19] *Ibid.*

Commission Accepts TenneT's Commitment to Increase the Maximum Capacity of the Electricity Interconnector Between Denmark and Germany

On February 14, 2019, the Commission published a decision, adopted on December 7, 2018,[20] accepting commitments offered by TenneT, an electricity transmission system operator ("TSO"), to remove restrictions on, and in the long term also to increase, the maximum capacity of the electricity interconnector between Germany and West Denmark ("the DE-DK1 interconnector").

The Commission's Concerns

The Commission found TenneT to have a natural monopoly on the market for high voltage electricity transmission[21] within its grid area in Germany. TenneT's network covers around 40% of the German territory and extends from the border of Denmark to the Alps. The Commission was concerned that TenneT may have abused its dominant position in violation of Article 102 TFEU by systematically limiting, since at least 2011, the capacity in the southbound direction of the DE-DK1 interconnector. TenneT was found to have restricted the southbound capacity for 88% of the hours between 2011–2014 and in 100% of the hours between 2015 and June 30, 2016. As the capacity reduction limited electricity flows from Denmark to Germany, it resulted in higher electricity prices in the German, Luxembourg, and Austrian bidding zone and in hindering Danish wholesale electricity suppliers from competing on the wholesale supply markets in Germany, Luxembourg, and Austria. TenneT's defense was that during hours of high wind-based electricity production the extra electricity flow via interconnectors from Denmark to an already congested network in Germany could have endangered the network's safety. However, the Commission took the view that TenneT could have managed the congestion problem by, for example, counter-trading or re-dispatching, which are costly remedial measures. According to the Commission, a company may not infringe EU competition rules and impede the functioning of the internal electricity market[22] "on the basis that it would otherwise have to incur extra-costs."[23]

Offered Commitments

In order to avoid the finding of an infringement and to address the Commission's competition concerns, TenneT committed to make available a minimum hourly capacity of 1,300 MW at all times (approximately 75% of the interconnector's technical capacity). Following the planned expansion projects of the interconnector in 2020 and 2022, TenneT will have to progressively increase the guaranteed hourly capacity to 2,625 MW by 2026.

Enforcement Context

The present decision is another example of Commission enforcement action aimed at attaining internal market and EU energy union objectives. In recent years, similar alleged violations of Article 102 TFEU required: (i) Svenska Kraftnät to manage internal congestion in the Swedish transmission system without limiting trading capacity on interconnectors;[24]

[20] *DE/DK Interconnector* (Case AT.40461), Commission decision of December 7, 2018.

[21] It involves transmission of high voltage electricity from generation plants to electricity distribution operators and large industrial electricity consumers.

[22] In addition, under sector-specific EU regulations, TenneT was obliged to make available the maximum capacity of the cross-border interconnector and could not reduce the interconnection capacity as a means of solving congestion within its own control area. *See* Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L211, 14.8.2009, p.15), Article 16(3), which requires TSOs to maximize interconnection capacity: "the maximum capacity of the interconnections and/or the transmission networks affecting cross-border flows shall be made available to market participants, complying with safety standards of secure network operation." Point 1.7 of Annex I to Regulation (EC) No 714/2009 states that "TSOs shall not limit interconnection capacity in order to solve congestion inside their own control area, save for the abovementioned reasons [cost effectiveness and minimisation of negative impacts on the internal market in electricity] and reasons of operational security."

[23] *DE/DK Interconnector* (Case COMP/AT.40461), Commission decision of December 7, 2018, para. 67.

[24] *Swedish Interconnectors* (Case COMP/AT.39351), Commission decision of April 14, 2010.

(ii) the Bulgarian Energy Holding ("BEH") to offer a certain guaranteed minimum volume of electricity on an independently-operated day-ahead market on a newly-created power exchange in Bulgaria;[25] and (iii) Gazprom to ensure free flow of gas on the upstream level in the Central and Eastern European gas market.[26] On December 17, 2018, in an unrelated case, the Commission imposed a €77 million fine on BEH for blocking access by electricity providers to key gas infrastructure in Bulgaria.[27] The Commission currently assesses commitments offered by Romanian TSO Transgaz concerning alleged restrictions on gas exports from Romania.[28] The Commission has also proposed an update to the current electricity regulation as part of the "clean energy for all Europeans"[29] package which, amongst other things, aims to improve the Union rules on cross-border capacity available to TSOs.

News

Commission Updates

Update on Commission's Anti-Cartel Enforcement

Fish Farming Sector

On February 19, 2019, the Commission carried out unannounced inspections in various Member States at premises of companies active in the farmed Atlantic salmon sector for suspected infringements of EU rules prohibiting cartels and restrictive business practices.[30] At least three companies, Mowi, Grieg Seafood Shetland, and Scottish Sea Farms, have publicly confirmed that their premises in the U.K. and the Netherlands were subject to inspections. This is the Commission's first publicly known dawn raid in 2019.

Government Bonds Investigation

On January 31, 2019, the Commission issued a Statement of Objections ("SO") alleging that eight banks participated in a cartel in the European government bonds market.[31] The Commission has concerns that, at different periods between 2007 and 2012, the banks' traders participated in a collusive scheme aimed at distorting competition in purchasing and trading European government bonds ("EGBs"). Without naming the banks charged in the SO, the Commission's press release stated that these contacts mainly took place through online chatrooms.

EGBs are financial instruments issued on the primary market for the purposes of raising debt capital by the governments of the Eurozone Member States. Once bought at primary market auctions, EGBs are traded on the secondary market among investors and financial institutions. According to the Commission's preliminary view, the alleged collusion on prices on the primary market auctions may have had an adverse effect on prices in the secondary market for EGBs.

This SO was issued only a month after the Commission charged four banks for participating in another bonds cartel concerning US dollar-denominated supra-sovereign, sovereign, and agency bonds (also known as "SSA bonds").[32] The conduct on SSA bonds prices is alleged to have taken place primarily through online chatrooms in the years during and following the financial crisis

[25] *BEH Electricity* (Case COMP/AT.39767), Commission decision of December 10, 2015.

[26] *Upstream gas supplies in Central and Eastern Europe* (Case COMP/AT.39816), Commission decision of May 24, 2018.

[27] *BEH Gas* (Case COMP/AT.39849), Commission decision of December 17, 2019, a public version of the decision is not yet available.

[28] *Romanian gas interconnectors* (Case COMP/AT.403350), decision not yet issued.

[29] *See* Commission Press Release IP/16/4009, "Clean Energy for All Europeans – unlocking Europe's growth potential", November 30, 2016.

[30] Commission Statement STATEMENT/19/1310, "Antitrust: Commission confirms unannounced inspections in the farmed Atlantic salmon sector," February 19, 2019.

[31] Commission Press Release IP/19/804, "Antitrust: Commission sends Statement of Objections in European government bonds cartel", January 31, 2019.

[32] Commission Press Release IP/18/6895, "Antitrust: Commission sends Statement of Objections in US Dollar supra-sovereign, sovereign and agency bond trading cartel", December 20, 2018.

(between 2009 and 2015). Contrary to EGBs, the Commission's objections appear to be focused only on the secondary market for SSA bonds.

These investigations confirm that the Commission continues to view the financial sector as an enforcement priority. The industry has seen approximately €2 billion in cartel fines imposed by the Commission since 2013.[33]

The Commission Launches its Public Consultation on the Review of the Vertical Block Exemption Regulation and Publishes a Roadmap for its Future Review of the Motor Vehicle Block Exemption Regulation

Vertical Block Exemption Regulation

Following the Commission's roadmap,[34] on February 4, 2019, the Commission launched a public consultation on the review of the Vertical Block Exemption Regulation ("VBER").[35] An online questionnaire, available until May 27, 2019, seeks evidence from and views of stakeholders[36] notably on whether: (i) major trends and changes over the past five years call for a revision of the VBER; (ii) the VBER provides a sufficient level of legal certainty when assessing whether specific agreements are within its scope; and (iii) the VBER resulted in an increase in companies' compliance costs. Following the completion of the consultation, in which companies and individuals can participate on the Commission's website available here, the Commission is expected to publish stakeholders' main observations and to conclude on whether to revise, replace, or maintain the VBER by the second quarter of 2020.

Motor Vehicle Block Exemption Regulation

In addition, on February 19, 2019, as part of a separate review, the Commission started gathering initial feedback on the scope of its upcoming consultation on the review of the Motor Vehicle Block Exemption Regulation ("MVBER"), which provides for a safe harbor from Article 101(1) TFEU for certain agreements and practices in the automotive sector.[37] The Commission aims to assess whether the MVBER, which expires on May 31, 2023, is still "effective, efficient, and consistent with other EU and national rules."[38] Based on the input received by March 19, 2019, the Commission could expand or narrow the scope of its upcoming MVBER public consultation, which the Commission is expected to launch in the second quarter of 2020.

Commission Issues Two Conditional Merger Control Approvals

In February, the Commission approved two transactions in the flexible packaging and farmed fish industries conditional on partial divestment of the acquired businesses.

In Amcor/Benis (Case COMP/M.9094), the Commission raised horizontal concerns regarding the parties' activities in flexible packaging for food products and for medical use in the EEA. It concluded that Amcor and Bemis were the most significant players in flexible packaging for medical use. The transaction would "have created a player three times larger than the second largest supplier, on a fragmented market with many small suppliers"[39], while barriers to entry are very high, and customers do not easily switch suppliers. In order to address its concerns,

[33] Over €485 million on Crédit Agricole, HSBC, and JP Morgan Chase, and over €800 million on Deutsche Bank, Société Générale, and RBS for collusion on the euro interest rate derivatives, s*ee Euro Interest Rate Derivatives* (Case COMP/AT.39914), Commission decisions of December 7, 2016, and December 4, 2013, respectively; over €660 million on ICAP, RBS, Deutsche Bank, JPMorgan, Citigroup and RP Martin for participation in the Japanese yen interest rate derivatives cartel, *see Yen Interest Rate Derivatives (YIRD)* (Case COMP/AT.39861) Commission decision February 4, 2015; and €94 million on UBS, JP Morgan and Crédit Suisse for collusion concerning Swiss franc interest rate derivatives, *see Swiss Franc interest rate derivatives* (Case COMP/AT.39924) Commission decision October 21, 2014.

[34] As reported in our November 2018 Newsletter.

[35] 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 2010 L 102/1.

[36] The Commission identified the following stakeholders: (i) companies with business operations in the EU (*e.g.*, suppliers/distributors of goods and services, and platforms active in e-commerce); (ii) law firms advising such companies on related competition issues; (iii) industry associations; (iv) consumer organizations; and (v) academics with a focus on European competition law (*e.g.*, on vertical restraints).

[37] Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector, OJ 2010 L 129/52.

[38] EU Automotive Sector: Exemption From Antitrust Rules, Review Roadmap: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6188380_en.

[39] Commission Press Release IP/19/1010, "Mergers: Commission approves merger between Amcor and Bemis, subject to conditions", February 11, 2019.

the Commission accepted Amcor and Bemis's offer to divest Bemis's entire medical packaging business in the EEA. Notably, Amcor and Bemis withdrew their original notification made in November and refiled in December. As discussed in our January newsletter, this is becoming an increasingly common practice in EU merger control to avoid lengthy Phase II investigations.[40]

In Amerra/Mubadala/Nireus/Selonda (Case COMP/M.9110), Amerra and Mubadala acquired joint control over Greek aquaculture companies Andromeda, Nireus, and Selonda. The Commission concluded that the transaction would have created the largest European producer of Mediterranean farmed fish (which includes sea bream and sea bass), with a strong presence in Greece, Italy, Portugal, and the EEA as a whole. The combined entity would also have been the only fry producer with a research and breeding program for both sea bream and sea bass, which lowers farming costs and improves fish quality. The Commission cleared the transaction based on the parties' commitment to divest certain fish farms and hatcheries, alongside the transfer of the know-how in research and breeding programs.

The Commission Sends its First Statement of Objections for an Alleged Breach of Merger Commitments

On July 2, 2014, the Commission conditionally cleared Telefónica Deutschland's acquisition of E-plus, KPN's German mobile telecommunications business, which combined the third and fourth largest mobile network operators in Germany. The acquisition was characterized as a 4-to-3 merger resulting in three mobile operators of a similar size.[41]

The Commission's decision was controversial for authorizing a 4-to-3 merger among mobile network operators and for accepting a commitment to sell network capacity and radio spectrum instead of a structural divestment of a standalone business.[42] At the time of its adoption, five national competition authorities issued a negative opinion on the decision[43] and the OECD, which conducted a study of the German mobile telecommunications market, concluded in 2018 that four big telecoms operators are needed to provide competitive prices and innovation.[44]

As part of its commitments to obtain conditional clearance,[45] Telefónica had an obligation to extend existing wholesale agreements for the provision of wholesale 4G services to Telefónica's and E-Plus's partners, both Mobile Virtual Network Operators ("MVNOs") and service providers ("SPs"),[46] at "best prices under benchmark conditions of comparable products, volumes and commercial/operational model, which TEF DE [Telefónica Deutschland] offers to another SP/MVNO."[47] The aim of the wholesale 4G access obligation was to improve the position of MVNOs and SPs.

On February 22, 2019, the Commission issued an SO against Telefónica Deutschland for an alleged breach of the wholesale 4G access

[40] This is a common strategy in the US to avoid an in-depth investigation. Both *Quaker/Global Houghton* and *Knauf/Armstrong* (Case COMP/M.8492), Commission decision of December 11, 2018, were conditionally cleared in Phase I by the Commission in 2018 after pulling and refiling the notification. Although this strategy was used in earlier years, for example in *Boehringer Ingelheim/Sanofi* (Case COMP/7917), Commission decision of November 9, 2016, pre-notification discussions have instead generally been used as a major tool to avoid Phase II investigations in the EU and they continue to be frequently used if an in-depth investigation is expected.

[41] *See* Commission Press Release IP/14/771"Mergers: Commission clears acquisition of E-Plus by Telefónica Deutschland, subject to conditions", July 2, 2014.

[42] *See, e.g.,* James Fontanella-Khan, "Telefónica's €8.6bn takeover of E-Plus approved", July 2, 2014, Financial Times. *See also* "DT angry as Telefónica/E-Plus deal is finally given green light", July 2, 2014, European COMMUNICATIONS.

[43] *Telefónica Deutschland/E-Plus* (Case COMP/M.7018), Commission decision of July 2, 2014, para. 8.

[44] *See* the full study: OECD (2018), "OECD Economic Surveys: Germany 2018", OECD Publishing, Paris, https://doi.org/10.1787/eco_surveys-deu-2018-en, "Key policy insights" available at https://www.oecd-ilibrary.org/sites/eco_surveys-deu-2018-3-en/index.html?itemId=/content/component/eco_surveys-deu-2018-3-en.

[45] Telefónica also committed to divest: (i) up to 30% of its network capacity to a maximum of three MVNOs at fixed prices to ensure short-term entry or expansion; and (ii) radio wave spectrum and certain assets to these MVNOs.

[46] MVNOs and SPs are providers of mobile communication services, which do not operate a mobile network themselves. These sell mobile communication services to end-customers in their own name and on their own account based on wholesale access granted by mobile network operators (*e.g.* Telefónica) to their respective mobile networks. While MVNOs partially own network infrastructure, such as the core network, which allows them to control their traffic, SPs do not own any network infrastructure at all. *See Telefónica Deutschland/E-Plus* (Case Comp/M.7018), Commission decision of July 2, 2014, paras. 174-175.

[47] *Telefónica Deutschland/E-Plus* (Case Comp/M.7018), Commission decision of July 2, 2014.

obligation.[48] The Commission has preliminarily concluded that Telefónica failed to implement its obligation "by not including certain existing wholesale agreements in the benchmark" used for assessing prices of the provision of wholesale 4G services.[49] This led to less advantageous conditions for wholesale 4G access and may have reduced the ability of MVNOs and SPs to compete in the German market for mobile communication services. In addition, potential beneficiaries of the commitments have initiated both litigation and arbitration proceedings against Telefónica for failure to comply with the commitments.[50]

This is the first time that the Commission has issued an SO for a failure to comply with merger commitments. The Commission may ultimately impose a fine of up to 10% of the company's annual worldwide turnover and arguably, in theory, even revoke the merger approval. This case highlights the Commission's continued enforcement of procedural breaches in merger control cases.[51]

Court Updates

The General Court Orders the Commission to Pay Damages for Interest on a Paid, but Subsequently Annulled, Cartel Fine

On February 12, 2019, the General Court ordered the Commission to pay Printeos €0.18 million in interest on a previously paid cartel fine that was subsequently repealed by the General Court.[52]

On December 11, 2014, the Commission imposed a €4.7 million fine on Printeos for participation in the paper envelope cartel.[53] Printeos appealed the Commission's decision and decided to provisionally pay the imposed fine instead of providing a bank guarantee. As required under EU law, the Commission invested this amount into financial assets, to ensure the security and liquidity of the money, while aiming at yielding a positive return.[54] In December 2016, the General Court upheld Printeos' appeal.[55] The Commission repaid the €4.7 million fine on February 1, 2017, but refused to pay any interest because its investment of the money did not return any profit. Printeos brought an action for damages claiming financial compensation equivalent to two percentage points over the European Central Bank's ("ECB") rate (which equated to an effective annual interest rate of approximately 0.00–0.05%) for the 23-month period between the provisional payment of the fine on March 9, 2015, and its reimbursement on February 1, 2017.

The General Court ruled that the Commission should have paid default interest and that the Commission's refusal breached Article 266(1) TFEU, which stipulates that the EU institutions should take the necessary measures to comply with the judgments of the EU courts.[56] The General Court found that the Commission had an unconditional and absolute obligation to pay a default interest, without any margin of discretion in this regard. According to the General Court, such a breach was sufficiently serious to incur the EU's non-contractual liability under Article 266 TFEU, read in conjunction with Article 340 TFEU.[57] The General Court

[48] *See* Commission Press Release IP/19/1371 "Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition", February 22, 2019.

[49] *Ibid*.

[50] *See, e.g.,* Harro Ten Wolde and Georgina Prodhan, "UPDATE 3- Telefónica Deutschland's E-Plus takeover faces legal challenge", June 8, 2015, Reuters.

[51] The Commission recently fined Facebook €110 million for providing incorrect or misleading information during the investigation of its acquisition of WhatsApp. The Commission has also fined Altice €124.5 million in 2018 for implementing its acquisition of PT Portugal before notification. The Commission has recently also sent SOs to (i) Merck and Sigma-Aldrich for allegedly providing incorrect or misleading information, and (ii) General Electric and Canon for allegedly implementing a merger before notification.

[52] *Printeos v. Commission* (Case T-201/17) EU:T:2019:81.

[53] *Envelopes* (Case COMP/AT.39780), Commission decision of December 10, 2014.

[54] Article 90 (2) of Commission Delegated Regulation No. 1268/2012 of 29 October 2012, repealed by Regulation (EU, Euratom) 2018/1046 of 18 July 2018, OJ L 193/30.

[55] *Printeos and Others v Commission* (Case T-95/15) EU:T:2016:722.

[56] Article 266(1) TFEU stipulates "[t]he institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union."

[57] Article 340(2) TFEU stipulates that "[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

ordered the Commission to pay approximately €180,000 in damages, equivalent to the default interest amount claimed by Printeos.

The Printeos judgment illustrates the General Court's willingness to award non-contractual damages caused by the EU institutions. This question is of particular relevance in the two currently pending actions for damages brought against the Commission following the annulment of the *UPS/TNT Express*[58] merger prohibition decision. As further explained in our November 2018 newsletter, UPS[59] and ASL[60] are seeking €1.7 billion and €263.6 million in damages (plus interest), respectively, for losses generated as a result of the Commission's 2013 decision to prohibit the proposed acquisition of TNT Express NV by UPS.

The Printeos judgment comes only two months after the ECJ judgment *European Union v. Gascogne*.[61] This judgment established a high bar for awarding non-contractual damages related to additional costs incurred as a result of choosing the bank guarantee instead of provisional fine payment. These two rulings should thus be factored in by companies when choosing between posting a bank guarantee or provisionally paying a fine.

European Court of Human Rights Rules on the Admissibility of Hearsay Evidence in Cartel Cases

On February 14, 2019, the European Court of Human Rights ("ECtHR") found in *SA-Capital Oy v. Finland*, that the Finnish Supreme Administrative Court had not violated SA-Capital's right to a fair trial under Article 6 of the European Convention on Human Rights by partially relying on hearsay evidence in finding the existence and the scope of a cartel.[62] In particular, given the evidentiary complexity of cartel infringements, the ECtHR concluded that national competition authorities may use hearsay to the extent their findings do not solely depend on it.[63]

The ECtHR's judgment does not indicate what specific findings were supported by hearsay. It stressed that the findings of the national court relied on several other types of evidence, which included documentary evidence, phone recordings, and witnesses' testimony offering firsthand knowledge about the existence and implementation of the cartel.[64] The national court had not breached SA-Capital's right to a fair trial because there was no "indication that the [national] court had in any significant degree relied on testimony consisting of hearsay."[65]

This is another recent judgment dealing with companies' rights of defense in competition cases, just less than a month after the EU Court of Justice ruled on the right to be heard in merger cases (see our January 2019 Newsletter).[66] Although the case law of the ECtHR is not legally binding for EU courts and the Commission,[67] under Article 52(3) of the Charter of Fundamental Rights of the European Union, the EU institutions have to take the ECtHR's jurisprudence into account when ruling on infringements of EU competition law. It remains to be seen to what extent this ECtHR judgment will have any practical implications on EU case law. To date, as regards hearsay evidence,

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58 *UPS/TNT Express* (Case COMP/M.6570) Commission decision of January 30, 2013.

59 *United Parcel Service v Commission* (Case T-834/17), appeal pending.

60 *ASL Aviation Holdings and ASL Airlines v. Commission* (Case T-540/18), appeal pending.

61 *European Union v. Gascogne Sack Deutschland and Gascogne* (Joined Cases C-138/17 P and C-146 17 P) EU:C:2018:1013. For more details on this judgments see our December 2018 Newsletter.

62 *SA-Capital Oy v. Finland* (application no. 5556/10), February 12, 2019.

63 *Ibid.*, para. 96.

64 *Ibid.*, para. 90 (The ECtHR dismissed the applicant's allegation that the Finnish Supreme Administrative Court had breached its right to a fair trial by shifting the burden of proof, finding it to be manifestly ill-founded.)

65 *SA-Capital Oy v. Finland*, para. 90.

66 *Commission v. United Parcel Service* (Case C-265/17 P) EU:C:2019:23. (The ECJ found that, had the Commission given TNT and UPS the opportunity to submit their observations on the econometric analysis model the Commission used to prohibit their merger, they would have had some chance of better defending themselves. Therefore, the ECJ concluded that the Commission's failure to disclose this model to TNT and UPS breached their rights of defense.)

67 Opinion 2/13, EU:C:2014:2454.

the EU Courts have typically either refused to characterize evidence as hearsay—to instead find it to constitute direct evidence—or validated the Commission's partial reliance on indirect evidence.[68]

Upcoming Events

Date	Conference	Organizer	Location
March 22	107th GCLC Lunch Talk: "Siemens/Alstom: merger control between a rock and a hard place?"	Global Competition Law Centre (GCLC)	Brussels
March 25	Prix excessifs dans le secteur pharmaceutique	Concurrences	Paris
March 26	GCR Live 4th Annual Cartels	Global Competition Review (GCR)	Washington, D.C.
March 27 – March 29	ABA 67th Annual Antitrust Law Spring Meeting	American Bar Association (ABA)	Washington, D.C.
March 28	Action en réparations des pratiques anticon-currentielles: Etats des lieux en France en de l'Union	Concurrences	Paris
April 10	Competition law challenges in the shipping sector	Knect365	Brussels
April 11	Latest Developments in EU Merger Control	ERA	Brussels

[68] *See Shell Petroleum NV, The Shell Transport and Trading Company Ltd, and Shell Nederland Verkoopmaatschappij BV v. European Commission* (Case T-343/06) EU:T:2012:478, paras. 192-229, and *Toshiba Corp. v European Commission* (Case T-113/07) EU:T:2011:343, paras. 121-122.

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