

Recent Developments in EU and UK Competition Law

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ARTICLE 101 TFEU: ENFORCEMENT AT EU LEVEL

NB: there were 4 cartel decisions in 2018 and the fines totalled €800 million (€3.725 million in 2017 and €1.945 million in 2018)

1. Horizontal agreements

COMMISSION INVESTIGATIONS AND DECISIONS

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

- *Special glass*
- *Flexible alternating current transmission systems*
- *Rail freight*
- *Piston engines*
- *Oil and biofuels - benchmarking*: further inspections 7 October 2014 and 24 March 2015; the Commission formally opened proceedings in relation to the manipulation of ethanol benchmarks on 7 December 2015. There is an appeal against the Commission's procedure in this case, Case T-79/19 *Lantmännen v Commission*, Order of 2 April 2019 (hybrid settlement case); on appeal Case C-318/19, not yet decided
- *Spot trading of precious metals*
- *Rail passenger transport in Austria*: unannounced inspections 2 December 2015
- *Kraft paper and industrial paper sacks*: unannounced inspections 16 March 2016, 7 March 2017 and 15 January 2018; investigation reported to have been closed, May 2019)
- *Rail passenger transport in several Member States*: unannounced inspections 6 July 2016 (Slovakia, Czech Republic and Austria); SO sent to ZSSK 25 September 2018 for obstructing an inspection
- *Ethylene*: unannounced inspections 16 May 2017. Query – purchasing cartel?
- *Motor car insurance in Ireland*: unannounced inspections 4 July 2017; investigation opened 14 May 2019
- *Online access to bank account information*: unannounced inspections 3 October 2017

- *German car manufacturers*: unannounced inspections 16 and 23 October 2017; the Commission formally opened proceedings on 18 September 2018; statement of objections sent 5 April 2019
- *Metal packaging*: unannounced inspections 24 April 2018; BKA case, commenced in March 2015, discontinued 27 April 2018
 - NB Case T-410/18 *Silgan Closures v Commission*: appeal against the transfer of jurisdiction to the Commission. Declared inadmissible by Order, 15 March 2019
- *Styrene monomer purchasing*: unannounced inspections 8 June 2018
- *SSA bonds*: statement of objections 20 December 2018 sent to four banks for colluding, in periods from 2009 to 2015, to distort competition in secondary market trading in the EEA of supra-sovereign, sovereign and agency (SSA) bonds denominated in US Dollars
- *European Government bonds*: statement of objections 31 January 2019 sent to eight banks
- *Farmed Atlantic salmon*: unannounced inspections 19 February 2019. Query – purchasing cartel?
- *French grocery retail sector*: unannounced inspections 20 May 2019. Joint purchasing joint venture

Note also:

- the initiation of proceedings against O2 CZ/CETIN and T-Mobile CZ, 25 October 2016: network sharing in the mobile telephony sector
- the sending of a statement of objections to Brussels Airlines and TAP Portugal concerning code sharing between Brussels and Lisbon on 27 October 2016; case closed 30 October 2018
- the sending of a statement of objections to Teva – pay-for-delay in the pharmaceuticals sector – 17 July 2017

Cartel decisions/other violations of Article 101

- ***Multilateral interchange fees: Mastercard II***

Commission decision of 22 January 2019 imposing a fine of €570 million on the card scheme Mastercard for limiting the possibility for merchants to make use of cross-border acquiring services. Note the following:

- This is a settlement decision: 10% reduction in the fine
- But there was a statement of objections, reply and oral hearing
- Mastercard submitted a signed settlement submission 3 December 2018; Commission decision 22 January 2019
- Mastercard and its members were an association of undertakings and its decisions infringed Article 101(1)
- Fine based on the value of sales of Mastercard's acquiring members
- Starting point of fine 11%
- Period of infringement 27 February 2014 to 8 December 2015
- 50% uplift for recidivism (see the earlier decision of 19 December 2007, upheld on appeal)

- ***Forex***

Commission decision of 16 May 2019 imposing fines of €1.07 billion for participating in foreign exchange spot trading cartel. Note the following:

- Two settlement decisions:
 - 'Forex – Three Way Banana Split' (Barclays, RBS, Citigroup, JP Morgan - €811 million)
 - 'Forex – Essex Express' (Barclays, RBS, MUFG Bank - €257 billion)
- Individual traders exchanged sensitive information and trading plans and sometimes coordinated activities through online chatrooms
- UBS the whistleblower: fine of zero
- Ongoing investigation of Credit Suisse

- 30th and 31st settlements

GENERAL COURT

- ***Bathroom fittings***
 - Cases T-379/10 RENV and T-381/10 RENV *Keramag Karamische Werke GmbH v Commission*, judgment of 3 July 2018

Appeals against the Commission decision rejected following a remittal back to the General Court from the Court of Justice

- ***Power cables***
 - Cases T-419/14 etc. *Prysmian v Commission*, judgments of 12 July 2018

Rejection of numerous appeals against the Commission's *Power cables* decision. Of particular interest see Case T-419/14 *Goldman Sachs v Commission*, EU:T:2018:445, upholding the finding of Goldman Sachs' liability for the behaviour of Prysmian; on appeal Case C-595/18, not yet decided. The President made an order on 13 February 2019 as to the confidentiality of certain documents as between Goldman Sachs and Prysmian

- ***Shrimps***
 - Case T-58/14 *Stührk Delikatessen v Commission*, judgment of 13 July 2018

Partially successful appeal against the Commission's decision in the *Shrimps* decision

- ***Perindopril***
 - Cases T-691/14 etc *Servier v Commission*, judgment of 12 December 2018

Partially successful appeal against the Commission's decision in the *Servier* decision; there are appeals to the Court of Justice, including by the Commission. On appeal to the Court of Justice, Cases C-197/19 P *Mylan v Commission etc.*, not yet decided

Note also the Commission's Communication *Competition Enforcement in the Pharmaceutical Sector (2009-2017)*, COM(2019) 17 final discussing the impact of competition law enforcement in the pharmaceutical sector

- ***Steel abrasives***

- Case T-433/16 *Pometon v Commission*, judgment of 28 March 2019

Judgment reducing the fine on Pometon from €6.19 million to €3.87 million

- ***Car battery recycling***

- Case T-222/17 *Recyclex v Commission*, judgment of 23 May 2019, EU:T:2019:356

Judgment dismissing an appeal in the *Car battery recycling* case

COURT OF JUSTICE

- ***Smart card chips***

- Cases C-98/17 P and C-99/17 P *Philips v Commission* and *Infineon v Commission*, judgments of 26 September 2018

Unsuccessful appeals in the *Smart card chips* case, except for a remittal to the General Court on one aspect of the fine in *Infineon*

2. ***Vertical agreements***

COMMISSION INVESTIGATIONS

The Commission is conducting the following cases concerning vertical agreements

- *Tour operators*, commenced on 2 February 2017
- *Videogame makers* (geo-blocking), commenced on 2 February 2017; statement of objections sent 5 April 2019
- Two investigations commenced on 14 June 2017 into whether certain licensing and distribution practices of Sanrio and Universal Studios illegally restrict traders from selling licensed merchandise cross-border and online within the EU Single Market
- *Airline ticket distribution services*

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

COMMISSION DECISIONS

- *Consumer electronics manufacturers*

Four Commission decisions of 24 July 2018 imposing fines for imposing fixed or minimum resale prices on online retailers. Note the following:

- (i) Fines in total more than €10 million
- (ii) Individual fines Asus €3.5 million; Denon & Marantz €7.7 million; Philips €9.8 million; Pioneer €10.1 million
- (iii) Algorithms used to adapt prices; price-tracking software used
- (iv) Significant reductions in the fines for cooperation, before the SO, including the express acknowledgement of the facts and infringements (40%-50%)

- ***Clothing***

Commission decision of 17 December 2018 imposing a fine of €40 million on Guess for restricting retailers from online advertising and selling cross-border to consumers in other Member States ('geo-blocking')

Specifically the Commission found that Guess' distribution agreements restricted authorised retailers from:

- (i) using the Guess brand names and trademarks for the purposes of online search advertising (NB: *Pierre Fabre*, not *Coty*);
- (ii) selling online without a prior specific authorisation by Guess. The company had full discretion for this authorisation, which was not based on any specified quality criteria;
- (iii) selling to consumers located outside the authorised retailers' allocated territories;
- (iv) cross-selling among authorised wholesalers and retailers; and
- (v) independently deciding on the retail price at which they sell Guess products.

The Commission observed that in Central and Eastern European countries (Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia) the retail prices of Guess products are, on average, 5-10% higher than in Western Europe. The fine was reduced by 50% to reflect Guess' cooperative approach, including expressly acknowledging the facts of the case and the infringements

- ***Athletic footwear and apparel***

Commission decision of 25 March 2019 imposing a fine of €12.5 million for banning traders from selling licensed merchandise to other Member States.

Specifically the Commission found the following:

- (i) Nike imposed a number of **direct measures restricting out-of-territory sales by licensees**, such as clauses explicitly prohibiting these sales, obligations to refer orders for out-of-territory sales to Nike and clauses imposing double royalties for out-of-territory sales;
- (ii) Nike enforced **indirect measures** to implement the out-of-territory restrictions, for instance threatening licensees with ending their contract if they sold out-of-territory, refusing to supply “official product” holograms if it feared that sales could be going towards other territories in the European Economic Area (EEA), and carrying out audits to ensure compliance with the restrictions;
- (iii) In some cases, Nike used master licensees in each territory to grant sub-licences for the use of the different IPRs to third parties. To secure the practice through the whole distribution chain, Nike imposed **direct and indirect measures on master licensees**. Through these measures, Nike compelled master licensees to stay within their territories and to enforce restrictions vis-à-vis their sub-licensees;
- (iv) Nike included clauses that explicitly prohibited licensees from supplying merchandising products to customers, often retailers, who could be selling outside the allocated territories. In addition to **obliging licensees to pass on these prohibitions** in their contracts, Nike would intervene to ensure that retailers (e.g. fashion shops, supermarkets, etc.) stopped purchasing products from licensees in other EEA territories.

The Commission has concluded that Nike's illegal practices, which were in force for approximately 13 years (from 1 July 2004 until 27 October 2017), partitioned the Single Market and prevented licensees in Europe from selling products cross-border, to the ultimate detriment of European consumers. Nike's illegal practices affected to varying degrees the licensed merchandise products bearing the brands of clubs like FC Barcelona, Manchester United, Juventus, Inter Milan and AS Roma, as well as national federations like the French Football Federation.

COURT OF JUSTICE

- *Coty*
 - Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, judgment of 6 December 2017, EU:C:2017:941

Judgment on the compatibility of certain restrictions in a selective distribution system relating to the use of online sales platforms with Article 101. The Oberlandsgericht in Frankfurt ruled on 12 July 2018 that the Coty distribution agreement was legal

ARTICLE 102: ENFORCEMENT AT EU LEVEL

PENDING ARTICLE 102 CASES BEFORE THE COMMISSION

- *Qualcomm* – formal investigations commenced 16 July 2015 in relation to predatory prices; statements of objections sent 8 December 2015. An oral hearing was held in the autumn of 2016; a second one was held on 10 January 2019. NB also Case T-371/17 under Practice and Procedure
- *Ceské dráhy, a.s.* – formal investigation commenced 10 November 2016 into possible predatory pricing in rail passenger transport services in the Czech Republic
- *Electricity sector in Greece* – unannounced inspections 15 February 2017 relating to possible abusive behaviour
- *Aspen Pharma* – formal investigation commenced 15 May 2017 into alleged excessive pricing by Aspen concerning five life-saving cancer medicines
- *Transgaz* - the European Commission opened a formal investigation 1 June 2017 to assess whether Romania's gas transmission system operator Transgaz has been hindering gas exports from Romania to other EU Member States; commitments being market tested, 21 September 2018
- *Qatar Petroleum* – formal investigation opened 21 June 2018 into possible restrictions to the free flow of LNG

COMMISSION

- *Velux*, Commission decision of 14 June 2018

Rejection of a complaint against Velux that it was guilty of abuse of dominance. On appeal to the General Court, Case T-293/18 *Fakro v Commission*, dismissed by order 23 October 2018

- *Google Android*, Commission decision of 18 July 2018

Decision imposing a fine of €4.3 billion for abuse of a dominant position in relation to the licensing of the Android operating system. On appeal Case T-604/18, not yet decided

- *Bulgarian Energy Holding*, Commission decision of 17 December 2018

Decision imposing a fine of €77 million on the BEH group for refusal to grant access to essential gas infrastructure in Bulgaria

The Commission found that between 2010 and 2015 the BEH Group blocked access to the following gas infrastructure:

- (i) the domestic Bulgarian gas transmission network
- (ii) the only gas storage facility in Bulgaria and
- (iii) the only import pipeline bringing gas into Bulgaria, which was fully booked by BEH

The case is on appeal to the General Court, Case T-136/19 *BEH v Commission*, not yet decided

- *Google AdSense*, Commission decision of 20 March 2019

Decision imposing a fine of €1.49 billion for abuse of a dominant position in relation to restrictions placed on the ability of certain third party websites to display search advertisements from Google's competitors

- *AB InBev*, Commission decision of 13 May 2019

Decision imposing a fine of €200 million for restricting cross-border sales of beer. Note that this is a settlement with a reduction of 15% in the fine for cooperation

- NB also the BKa decision on *Facebook*, 7 February 2019

GENERAL COURT

- ***Slovakian broadband***
 - Cases T-851/14 and T-827/14 *Slovak Telekom a.s. v Commission* and *Deutsche Telekom v Commission*, judgments of 13 December 2018, EU:T:2018:929 (*Slovak Telekom*): slight reduction in the fine of Slovak Telekom and significant reduction in the fine of Deutsche Telekom in the Slovakian margin squeeze case. On appeal to the Court of Justice, Cases C-152/19 (*Deutsche Telekom*) and C-165/19 (*Slovak Telekom*)

COURT OF JUSTICE

- ***Polish telecommunications***
 - Case C-123/16 P *Orange Polska S.A.*, judgment of 25 July 2018: unsuccessful appeal against the Commission's decision imposing a fine for abuse of dominance

EFTA Court

- Case E-6/17 *Fjarsskipti hf. V Síminn hf.*, judgment of 30 May 2018 answering questions about margin squeeze and the availability of damages for infringement of Article 54 EEA Agreement

PRACTICE AND PROCEDURE AT EU LEVEL

GENERAL COURT

- ***Czech rail services***

- Cases T-325/16 etc. *Ceské dráhy a.s. v Commission*, judgment of 20 June 2018

Judgment partially annulling a Commission inspection decision; on appeal to the Court of Justice Cases C-538/18 and C-539/18

- ***Spanish pharmaceuticals***

- Case T-574/14 *EAEPC v Commission*, judgment of 26 September 2018

Judgment rejecting an appeal against the Commission's refusal to proceed against GSK for infringing Article 101

- ***Predatory pricing/RFI***

- Case T-371/17 *Qualcomm Inc v Commission*, judgment of 9 April 2019

Judgment rejecting an appeal against a Commission RFI

- ***Google Shopping***

- Case T-612/17 *Google LLC and Alphabet Inc v Commission*, order of 11 April 2019

Order dealing with the confidentiality of certain information in the *Google Shopping* decision given the intervention by third parties in the appeal

COURT OF JUSTICE

- ***Finnish asphalt***

- Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy* judgment of 14 March 2019, EU:C:2019:204

Article 267 reference from Finnish Supreme Court: the doctrine of economic continuity, as it applies to fines, also applies in actions for damages as matter of EU law

- ***Latvian air transport***

- Case C-27/17 *AB 'flyLAL-Lithuanian Airlines', in liquidation v Riga Airport and Air Baltic*, judgment of 5 July 2018, EU:C:2018:533

Article 267 reference from the Court of Appeal, Lithuania on the interpretation of Articles 5(3) and 5(5) of the Brussels Regulation, Regulation 44/2001

- ***Plant protection products***

- Case C-373/17 *P Agria Polska sp. Z.o.o. v Commission*, judgment of 20 September 2018

Judgment dismissing an appeal against the General Court's conclusion that the Commission had legitimately rejected a complaint by Agria Polska

- ***Brussels Regulation***

- Case C-595/17 *Apple Sales International v MJA, acting as liquidator of eBizcuss.com*, judgment of 24 October 2018, EU:C:2018:854

Judgment on the application of Article 23 of the Brussels Regulation to a jurisdiction clause in a distribution contract

- ***Car battery recycling***

- Case C-312/18 P *Eco-Bat Technologies v Commission*, judgment of 21 March 2019

Judgment on the time from which the right to appeal against a Commission decision begins to run

- ***Portuguese television***

- Case C-637/17 *Cogeco Communications v Sport TV Portugal*, judgment of 28 March 2019

Judgment on Portuguese limitation periods and EU law

- ***Polish life insurance***

- Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie S.A. v Polish Competition Authority*, judgment of 3 April 2019

Judgment on the application of the principle of *ne bis in idem* where an NCA imposes fines both for breach of EU and domestic law in one decision

EFTA COURT

- ***Limitation periods***

- Case E-10/17 *Nye Kystlink AS v Color Group AS*, judgment of 17 September 2018

Judgment on the limitation period for damages claims under Articles 53 and 54 EEA

COMMITMENT DECISIONS

Gazprom, Commission decision of 24 May 2018 accepting commitments in relation to gas sales within the EU. On appeal to the General Court, Case T-??/18 *PGNiG v Commission*, not yet decided; the Governments of Poland and Lithuania have intervened on the side of PGNiG

TenneT, Commission decision of 7 December 2018 accepting commitments in relation to the import of electricity into Germany from Denmark by a German grid operator to ensure that a specific guaranteed capacity will be available at all time

Cross-border pay-TV services, Commission decision of 7 March 2019 accepting commitments from Disney, NBCUniversal, Sony Pictures, Warner Bros and Sky

Note also that Paramount Pictures gave Article 9 commitments on 26 July 2016; this decision was appealed by Groupe Canal in Case T-873/16, rejected 12 December 2018. Groupe Canal has now appealed to the Court of Justice, Case C-132/19, not yet decided

Inter-regional interchange fees, Commission decision of 29 April 2019 accepting commitments from MasterCard and Visa to reduce their MIFs for payments in the EEA with consumer cards issued elsewhere

DRAFT GUIDELINES ON PASSING ON

The Commission launched a consultation on 5 July 2018 on its draft Guidelines; comments due by 4 October 2018

STATEMENT OF OBJECTIONS FOR OBSTRUCTING AN INSPECTION

The Commission sent a Statement of Objections to Slovak rail company ZSSK 25 September 2018 for obstructing an inspection

ELENIENCY TOOL

The Commission launched a new online tool for cartel leniency and settlements on 19 March 2019

HEARING OFFICER

The Hearing Officer has published an activity report for 2017 and 2018, 22 March 2019

COMPETITION IN AIR TRANSPORT

Note Regulation 2019/712 on safeguarding competition in air transport

EUROPEAN UNION MERGER REGULATION

RECENT AND CURRENT PHASE II INVESTIGATIONS

Name of case	Cleared?	Cleared with commitments?	Prohibited?
Case No COMP M.8451 <i>Tronox/Cristal</i>		Yes (4.7.18)	
Case No COMP M.8480 <i>Praxair/Linde</i>		Yes (20.8.18)	
Case No COMP M.8788 <i>Apple/Shazam</i> NB: Article 22 reference from Member States	Yes (6.9.18)		
Case No COMP M.8792 <i>T-Mobile NL/Tele2 NL</i>	Yes (27.11.18)		
Case No COMP M.8674 <i>BASF/Solvay</i>		Yes (18.1.19)	
Case No COMP M.8677 <i>Siemens/Ahlstrom</i> NB: open letter to DG COMP from UK, Dutch, Spanish and Belgian competition authorities, 20 December 2018)			Yes (6.2.19)
Case No COMP M.8797 <i>Thales/Gemalto</i>		Yes (11.12.18)	
Case No COMP M.8909 <i>KME/MKM</i>	Yes (11.12.18)		
Case No COMP M.8900 <i>Wieland/Aurubis Rolled Products and Schwermetall</i>			Yes (6.2.19) On appeal,

			Case T-251/19 Wieland- Werke v Commission, not yet decided
Case No COMP M.8713 <i>Tata Steel/Thyssen Krupp</i>			
Case No COMP M.8907 <i>Aperam/VDM</i>			
Case No COMP M.8947 <i>Nidec/Whirlpool</i>		Yes (12.4.19)	
Case No COMP M.8864 <i>Vodafone/Liberty Global</i> (concerns in Germany and the Czech Republic)			
Case No COMP M.8870 <i>E.ON/Innogy</i>			
Case No COMP M.9076 <i>Novelis/Aleris</i>			
Case No COMP M.9064 <i>Telia Company/Bonnier Broadcasting</i>			

GENERAL COURT

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

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

- Case T-43/16 *1&1 Telecom GmbH v Commission*, judgment of 9 October 2018

Judgment dismissing appeal against the Commission's clearance of the *Telefónica Deutschland /E-Plus* merger

COURT OF JUSTICE

Case C-265/17 *Commission v UPS*, judgment of 16 January 2019, EU:C:2019:23

Judgment rejecting the Commission's appeal against the annulment of its decision to prohibit the *UPS/TNT* merger in January 2013

OTHER ISSUES

Note also:

- Fine of €2 million imposed on General Electric for providing incorrect information during the investigation of its planned acquisition of LM Wind: Commission decision of 8 April 2019
- Statements of objections sent to Merck and Sigma-Aldrich and Canon 6 July 2017 for gun-jumping (Canon: oral hearing 14 February 2019) or providing misleading information (in the other two cases); supplementary statement of objections sent to Canon 30 November 2018
- Statement of objections sent to Telefónica 22 February 2019 for breach of commitments given in the *Telefónica Deutschland/E-Plus* case