

Recent Developments in EU and EEA Competition Law

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ARTICLE 101 TFEU: ENFORCEMENT AT EU LEVEL

1. *Horizontal agreements*

PENDING ARTICLE 101 HORIZONTAL CASES BEFORE THE COMMISSION

Current investigations of horizontal agreements:

- *Special glass*
- *Flexible alternating current transmission systems*
- *Rail freight*
- *Piston engines*
- *Oil and biofuels - benchmarking*
- *Spot trading of precious metals*
- *Rail passenger transport in Austria*
- *Rail passenger transport in several Member States*
- *Motor car insurance in Ireland*
- *Online access to bank account information*
- *German car manufacturers*
- *Metal packaging*
- *Styrene monomer purchasing*
- *Farmed Atlantic salmon*
- *French grocery retail sector*
- *Canned vegetables: SO sent to Conserve Italia 5 October 2020; this case has already been settled with three other undertakings (fines of €31.6 million)*

Cartel decisions

- *Ethylene*

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

- This was a purchasing cartel
- Settlement decision
- Westlake was the whistleblower: otherwise it would have been fine €190 million
- Four firms in the cartel
- Value of purchases used to calculate the amount of the fine, increased by 10% to reflect the effect of the cartel: necessary to avoid under-deterrence
- 50% uplift in Clariant's fine as a recidivist

Clariant has appealed against the level of its fine: Case T-590/20 *Clariant v Commission*, not yet decided

- *Closure systems for cars*

Commission decision of 29 September 2020 imposing fines of €18 million for coordinating pricing behaviour and exchanging commercially sensitive information. Note the following:

- Settlement decision
- Magna was the whistleblower: otherwise it would have been fined something in the region of €6 million
- There were two separate infringements, one in relation to door modules and window regulators, and the other latches and strikers
- Kiekert was given partial immunity for the second infringement as it provided evidence to the Commission enabling it to extend the period of the infringement
- This is the 13th car part decision
- This is the 34th settlement

- *Teva/Cephalon: modafinil*

Commission decision of 26 November 2020 imposing fines of €60.5 million in relation to a pay-for delay agreement in the pharmaceutical sector. Note the following:

- This was **not** a settlement decision

- Teva acquired Cephalon: it is therefore liable for both parties' fines
 - Cephalon offered Teva 'a package of commercial side-deals that were beneficial to Teva and some cash payments'
 - The restriction was by object **and** effect
 - The Commission says the agreement harmed innovation as well as keeping prices high
 - The infringement lasted from December 2005 until October 2011, when Teva acquired Cephalon
 - Teva's fine set under point 37 of the *Fining guidelines* as it had no turnover in the relevant market
 - This decision 'completes the cycle of pay-for-delay agreements' (Commission Press Release)
 - On appeal to the General Court Case T-74/21, not yet decided
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- ***Cross-border rail cargo***

Commission decision of 20 April 2021 imposing fines of €38 million in relation to a customer allocation cartel for transport services on block trains on key rail corridors between the ports of Rotterdam, Antwerp and Hamburg and large industrial sites in Germany and Austria. Note the following:

- Settlement decision
 - ÖBB was the whistleblower and given immunity, avoiding a fine of €37 million
 - Deutsche Bahn and SNCB received reductions of 45% and 35% respectively for cooperation
 - The cartel ran from 2008 to 2014
 - Deutsche Bahn's fine was increased by 50% for recidivism
 - This is the 35th settlement
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- ***SSA bonds trading***

Commission decision of 28 April 2021 imposing fines of €28 million for collusion on trading strategies, the exchange of sensitive pricing information and coordination of prices. Note the following:

- This was **not** a settlement decision
 - Deutsche Bank was the whistleblower and given immunity, avoiding a fine of €21 million
 - Bank of America Merrill Lynch, Crédit Agricole and Credit Suisse fined
 - The traders were in touch with one other through chatrooms on Bloomberg terminals
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- ***European Government bonds trading***

Commission decision of 20 May 2021 imposing fines of €371 million for collusion: traders exchanging commercially sensitive information, informing each of their prices and volumes in the run up to auctions of bonds. Note the following:

- This was **not** a settlement decision
 - NatWest was the whistleblower and given immunity, avoiding a fine of €260 million
 - Bank of America and Natixis not fined as outside limitation period
 - Nomura, UBS and UniCredit fined
 - Portigon (WestLB) not fined as no relevant turnover in the last business year
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- ***Yen interest rate derivatives***

Commission decision of 28 May 2021 re-adopting a decision against ICAP and imposing a fine of €6.45 million on ICAP

GENERAL COURT

- ***Smart card chips***

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

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

- ***Speed skating***

- Case T-93/18 *International Skating Union v Commission*, judgment of 16 December 2020, EU:T:2020:610

Unsuccessful appeal against the Commission's decision *International Skating Union*. On appeal Case C-124/21 P, not yet decided

COURT OF JUSTICE

- ***Power cables***

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

Unsuccessful appeal in the *Power cables* case

- Case C-601/18 P *Prysmian SpA v Commission*, judgment of 24 September 2020

Unsuccessful appeal in the *Power cables* case

- Case C-611/18 P *Pirelli & C. SpA v Commission*, judgment of 28 October 2020, EU:C:2020:868

Unsuccessful appeal in the *Power cables* case

- Case C-595/18 P *The Goldman Sachs Group Inc v Commission*, judgment of 27 January 2021, EU:C:2021:73

Unsuccessful appeal in the *Power cables* case

- ***Retail food packaging***

- Case C-702/19 P *Silver Plastics GmbH & Co KG v Commission*, judgment of 22 October 2020

Unsuccessful appeal in the Retail food packaging cartel case. See also Case C-694/19 P *Italmobiliare v Commission*, appeal rejected 15 April 2021

- ***Heat stabilisers***

- Case C-823/18 P *Commission v GEA Group AG*, judgment of 25 November 2020, EU:C:2020:955

Ongoing litigation relating to the fines in the 2009 decision of the Commission on heat stabilisers; General Court judgment annulled and the case remitted to it for further consideration

- ***High voltage electricity transmission lines***

- Case C-450/19 *Eltel v Finnish Competition and Consumer Authority*, judgment of 14 January 2021, EU:C:2021:10

Judgment on when a cartel comes to an end for the purposes of a limitation rule in relation to fines

- ***Steel abrasives***

- Case C-440/19 P *Pometon SpA v Commission*, judgment of 18 March 2021, EU:C:2021:214

Judgment in a case in which the hybrid staggered settlement procedure was used. The original fine of €6.1 million is eventually reduced to €2.6 million

- ***Citalopram***

- Case C-591/16 P *H. Lundbeck A/S v Commission*, judgment of 25 March 2021, EU:C:2021:243

Judgment dismissing Lundbeck's appeal in a pay-for-delay case in the pharmaceutical sector; the appeals by the generic manufacturers also failed

2. *Vertical agreements*

COMMISSION INVESTIGATIONS

PENDING ARTICLE 101 VERTICAL CASES BEFORE THE COMMISSION

- *Airline ticket distribution services*

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

- *Chocolate, biscuits and coffee*

The Commission opened an investigation into possible cross-border restrictions of trade in chocolate, biscuits and coffee by Mondelēz, 28 January 2021 (the Commission is looking into possible infringements of both Article 101 and 102)

COMMISSION DECISIONS

- *Videogames*

Commission decision of 20 January 2021 imposing fines of €7.8 million on Valve and five publishers of videogames for ‘geo-blocking’ of videogames, preventing their activation in certain Member States. Note that this was a hybrid settlement case with the settlement and the contentious decisions adopted on the same date. On appeal Case T-172/21, not yet decided

ARTICLE 102: ENFORCEMENT AT EU LEVEL

PENDING ARTICLE 102 CASES BEFORE THE COMMISSION

- *Ceské dráhy, a.s.* – formal investigation commenced 10 November 2016 into possible predatory pricing in rail passenger transport services in the Czech Republic. Statement of objections sent 30 October 2020
- *Qatar Petroleum* – formal investigation opened 21 June 2018 into possible restrictions to the free flow of LNG
- *Amazon* – formal investigation opened 17 June 2019 in relation to Amazon's use of data from independent retailers. Statement of objections sent 10 November 2020.
- *Amazon* – formal investigation opened 10 November 2020 into 'Buy Box' and Amazon Prime/logistics. The AGCM is also proceeding against Amazon, and there is a jurisdictional dispute about this: Case T-19/21 *Amazon.com v Commission*, not yet decided
- *Apple* – formal investigation in relation to Apple Pay launched 16 June 2020
- *Apple* – formal investigation in relation to Apple's App Store rules launched 16 June 2020
- *Teva* – formal investigation in relation to possible abuses of patent procedures and exclusionary disparagement of competing products in the pharmaceutical sector launched 4 March 2021
- *Public Power Corporation of Greece* – formal investigation of Greek wholesale electricity market launched 16 March 2021
- *EPEX Spot* – formal investigation of possible foreclosure of the market for intraday trading of electricity launched 30 March 2021

GENERAL COURT

- ***Baltic Rail***
 - Case T-814/17 *Lietuvos geležinkelai AB v Commission*, judgment of 18 November 2020, EU:T:2020:545

Judgment upholding the Commission's finding of abuse of dominance, but reducing the fine from €27 million to €20 million. On appeal to the Court of Justice, Case C-42/21, not yet decided

COURT OF JUSTICE

- ***Slovakian local loop***
 - Cases C-152/19 P and C-165/19 P *Deutsche Telekom AG and Slovak Telekom AG v Commission*, judgments of 25 March 2021, EU:C:2021:238 and 239

Judgments dismissing appeals against the Commission's finding of abuse contrary to Article 102

- ***Copyright collection agencies***
 - Case C-372/19 *SABAM*, judgment of 25 November 2020, EU:C:2020:959

Judgment on whether SABAM was charging abusively high prices to music festivals

NB in France the decision of the French Competition Authority, 9 September 2020, imposing fines on €444 million for collective abuse of collective dominance by Roche, Novartis and Genentech in the pharmaceutical sector for action taken to protect a higher priced drug, Lucentis, from a lower priced one, Avastin

PRACTICE AND PROCEDURE AT EU LEVEL

GENERAL COURT

- ***French supermarkets***

- Case T-255/17 etc *Les Mousquetaires v Commission*, judgment of 5 October 2020

Judgment partially annulling the Commission's warrants to conduct dawn raids against French supermarkets: the Commission lacked evidence to suspect that they were secretly exchanging information about future strategies

- ***Roof windows and brackets***

- Case T-515/18 *Fakro sp. Z oo v Commission*, judgment of 16 December 2020, EU:T:2020:620

Judgment rejecting the Commission's rejection of a complaint against Velux that it was abusing a dominant position; on appeal, Case C-149/21, not yet decided

COURT OF JUSTICE

- ***Cargo handling services***

- Case C-462/19 *Anesco*, judgment of 16 September 2020, EU:C:2020:715

Judgment concluding that the Spanish Competition Authority is not a Court or Tribunal for the purposes of Article 267 TFEU (cf *Syfait*, 2005)

- ***Hotel booking***

- Case C-59/19 *Wikingerhof GmbH & Co KG v Booking.com*, judgment of 24 November 2020, EU:C:2020:950

Judgment considering whether a dispute between a hotel and Booking.com related to contract or tort for the purposes of Article 7(2) of the Brussels Regulation

- ***Hollywood film studios***

- Case C-132/19 P *Group Canal v Commission*, judgment of 9 December 2020, EU:C:2020:1007

Judgment reversing the conclusion of the General Court's conclusion on the commitments offered by Paramount in the Hollywood Film Studio case: the Court of Justice concluded that the Commission had failed to take into account the effect of the commitments on the rights of third parties (eg Group Canal). The Court of Justice annulled the Commission's decision rather than remitting it to the General Court. The Commission withdrew the commitments decision of 7 March 2019 of various studios and Sky on 31 March 2021

- ***Retail food market in Romania: limitation periods***

- Case C-308/19 *Consiliul Concurenței v Whiteland Import Export SRL*, judgment of 21 January 2021, EU:2020:C:47

Judgment providing for the possibility of the non-application of a Romanian limitation period if its application would undermine the *effet utile* of Article 101

- ***UMTS chipsets***

- Case C-466/19 P *Qualcomm Inc v Commission*, judgment of 28 January 2021, EU:C:2021:76

Judgment dismissing Qualcomm's appeal against the Commission's RFI in the predatory pricing case against it

- *Slovakian telecommunications*

- Case C-857/19 *Slovak Telekom v Slovakian Competition Authority*, judgment of 25 February 2021, EU:C:2021:139

Judgment on the principle of *ne bis in idem*

COMMITMENT DECISIONS

Broadcom, Commission decision of 7 October 2020 accepting commitments from Broadcom to refrain from measures to cause OEM's to take minimum requirements of Systems-on-a-chip from it or to cause bundling of different products

Aspen Pharma, Commission decision of 10 February 2021 accepting commitments from Aspen concerning the prices of six critical cancer medicines. Decision published

CONSULTATION ON GUIDANCE FOR NATIONAL COURTS WHEN HANDLING DISCLOSURE INFORMATION

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

LINER SHIPPING BLOCK EXEMPTION

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

CONSULTATION ON MARKET DEFINITION

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

COLLECTIVE BARGAINING FOR SELF-EMPLOYED WORKERS

The Commission launched a process on 30 June 2020 into collective bargaining by self-employed workers: is this prevented by Article 101? Inception Impact Assessment launched 6 January 2021; public consultation initiated 5 March 2021

SECTOR STUDY ON THE INTERNET OF THINGS

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

REFORM OF THE VBER

The Commission published its final report on its evaluation of the VBER on 26 May 2020; the Staff Working Document was published on 8 September 2020; formal consultation launched 18 December 2020

REFORM OF THE HORIZONTAL REGIME

The Commission is formulating its reform of the horizontal cooperation agreement regime: it published the findings in its evaluation of the rules on cooperation on 6 May 2021

REFORM OF THE MOTOR VEHICLE BLOCK EXEMPTION

The Commission launched a consultation of the reform of the motor vehicle block exemption on 12 October 2020; findings of evaluation published 28 May 2021

DG COMPETITION MANAGEMENT PLAN 2020

The Commission published its Management Plan in November 2020

BREXIT GUIDANCE

The Commission published guidance on the effect of Brexit on competition enforcement on 2 December 2020

DAMAGES

The Commission published a report on implementation of the Damages Directive on 14 December 2020

DIGITAL MARKETS ACT

The Commission published its proposals on 15 December 2020

PENDING ARTICLE 267 REFERENCES

- Case C-819/19 *Stichting Cartel Compensation v KLM* and others: Article 267 reference concerning the temporal application of Article 101 TFEU in the air transport sector: AG Opinion 6 May 2021
- Case C-882/19 *Sumal SL v Mercedes Benz Trucks*: Article 267 reference concerning the single economic entity doctrine, in particular when a subsidiary can be liable for the behaviour of a parent; AG Opinion 15 April 2021
- Case C-30/20 *Volvo and others*: the scope of Article 7(2) Brussels Regulation
- Case C-117/20 *bpost SA v Autorité belge de la concurrence*: the principle of *ne bis in idem* where similar facts may be covered both by sector-specific regulation and competition law
- Case C-142/20 *Analisi G. Caraccioco s.r.l. v Regione Siciliana*: does Regulation 765/2008 create a monopoly contrary to Article 102? (Article 4(1) of the Regulation provides that each MS will appoint only one national accreditation body)
- Case C-151/20 *Bundeswettbewerbsbehörde v Nordzucker AG*: the principle of *ne bis in idem* where the same cartel is investigated in Germany and Austria
- 1 May 2004 and 18 October 2006?; withdrawn by Order 6 October 2020
- Case C-306/20 *Visma Enterprise*: a question about the prohibition of active sales in an exclusive distribution agreement for software
- Case C-377/20 *Servizio Elettrico Nazionale SpA v AGCM*: Article 267 reference raising a series of questions about the scope of application of Article 102 TFEU
- Case C-680/20 *Unilever Italia Mkt. Operations Srl v AGCM*: Article 267 reference on the single economic entity doctrine and on the use of the as-efficient competitor test in Article 102 cases
- Case C-25/21 *ZA etc v Repsol*: Article 267 reference concerning the burden of proof and voidness of a vertical agreement following a decision of the Spanish competition authority
- Case C-57/21 *RegioJet a.s.*: Article 267 reference on various aspects of the Damages Directive
- Case C-128/21 *Lietuvos notaru rumai v Lithuanian Competition Authority*: Article 267 reference on whether notaries are undertakings

- Case C-163/21 *PACCAR and others*: Article 267 reference on the Damages Directive, and specifically about the rules on disclosure
- Case C-182/21 *Nokia Technologies*: Article 267 reference
- Case C-252/21 *Facebook*: Article 267 reference on the relationship between the GDPR and (German) competition law
- Case C-261/21 *Hoffmann-La Roche*: Article 267 reference
- Case C-??/21 *Epifanio Campe v Renault*: did the Commission's decision in Trucks extend to dumper trucks?
- Case C-333/21 *European Super League v FIFA and UEFA*: did the latter infringe competition law in their reaction to the proposed formation of a European Super League?

EUROPEAN UNION MERGER REGULATION

RECENT AND CURRENT PHASE II INVESTIGATIONS

Name of case	Cleared?	Cleared with commitments?	Prohibited?
Case No COMP M.9014 <i>PKN Orlen/Lotos</i>		Yes (14.7.20)	
Case No COMP M.9097 <i>Boeing/Embraer</i> NB: notification withdrawn 8.5.20			
Case No COMP M.9162 <i>Fincantieri/Chantiers de l'Atlantique</i> NB: notification withdrawn 2.2.21			
Case No COMP M.9409 <i>Aurubis/Metallo</i>	Yes (4.5.20)		
Case No COMP M.9343 <i>Hyundai Heavy Industries/Daewoo Shipbuilding & Marine Engineering</i>			
Case No COMP M.9569 <i>EssilorLuxottica/GrandVision</i>		Yes (23.3.21)	
Case No COMP M.9730 <i>Fiat Chrysler Automobiles NV/Peugeot SA</i>		Yes (21.12.20)	
Case No COMP M.9564 <i>London Stock Exchange Group/Refinitiv</i>		Yes (13.1.21)	
Case No COMP M.9660 <i>Google/Fitbit</i>		Yes (17.12.20)	

Case No COMP M.9820 <i>Danfoss/Eaton Hydraulics</i>		Yes (18.3.21)	
Case No M.9829 <i>Aon/Willis Towers Watson</i>			
Case No M. 9938 <i>Kingspan Group plc/Trimo</i>			

GENERAL COURT

- Case T-380/17 *HeidelbergCement and Schwenk Zement v Commission*, judgment of 5 October 2020

Judgment dismissing an appeal against the Commission's prohibition of their merger

- Case T-430/18 *American Airlines Inc v Commission*, judgment of 16 December 2020

Judgment dismissing an appeal against a Commission decision in relation to commitments given in a merger case, *US Airways/AMR Corp* in 2013; on appeal Case C-127/21 P, not yet decided

- Case T-691/18 *KPN BV v Commission*, judgment of 27 January 2021, EU:T:2021:43

Judgment dismissing an appeal by KPN against the Commission's clearance of the *Liberty Global/Ziggo* merger

OTHER ISSUES

Note also:

- Sigma-Aldrich fined €7.5 million for providing misleading information during the Merck/Sigma-Aldrich merger investigation: Commission decision of 3 May 2021

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Norwegian Competition Authority, 3 June 2021
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- Statement of objections sent to Telefónica 22 February 2019 for breach of commitments given in the *Telefónica Deutschland/E-Plus* case
- Commission decision of 18 February 2021 imposing measures under Article 8(4)(b) EUMR on Novelis relating to its sale of part of the Aleris business as required in an earlier decision of the Commission
- Commission Press Release of 26 March 2021 on the evaluation of jurisdictional and procedural aspects of merger control
- Draft Regulation on distortions caused by foreign subsidies proposed on 5 May 2021