Major Events and Policy Issues in EU Competition Law 2018–2019: Part 2

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Abuse of dominant position; Anti-competitive practices; Cartels; Competition law; EU law; Licensing; Sector inquiries

Abstract

John Ratliff and his colleagues first summarise European Court judgments on art.102 TFEU, and procedural issues. Then they note (i) EC decisions on art.101 TFEU, including: cartels (with fines on foreign exchange trading collusion); several vertical cases (Guess, Nike and Sanrio) involving online and/or territorial restrictions and fine reductions for co-operation; and cases involving multilateral interchange fees (involving Mastercard and VISA); and (ii) EC decisions based on art.102 TFEU in the energy, digital/hi-tech and beer supply sectors. Finally, they outline recent policy developments on digital policy; an interim measures case involving Broadcom; an EC report on EC competition law and the pharmaceutical sector; and they highlight recent interest in joint-bidding cases.

This is the second and final part of the overview of "Major Events and Policy Issues in EU Competition Law 2018–2019", following on from Part 1 published in last month's journal.[1] The reference period is from November 2018 until the end of October 2019.[2]

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The first part of the article summarises: EU legislative developments, European Court judgments on general competition law issues, and cartel appeals.

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[1] "TFEU" is the abbreviation for "Treaty on the Functioning of the European Union"; "TEU" is Treaty on European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court, "ECJ" for the European Court of Justice and "CJEU" for the overall Court of Justice of the European Union; "AG" for Advocate General; "NCA" is the abbreviation for National Competition Authority; "SO" is the abbreviation for Statement of Objections; "BE" is the abbreviation for Block Exemption; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 [2003] OJ L1/1, 4 January 2003. References to the "ECHR" are to the European Convention of Human Rights 1950 and references to the "CFR" are to the EU Charter of Fundamental Rights 2000.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 6 February 2020]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.

This second part summarises: European Court judgments on art.102 TFEU and procedural issues. We then turn to EC decisions on art.101 TFEU, including: cartels (with fines on foreign exchange trading collusion); several vertical cases involving online and/or territorial restrictions and fine reductions for co-operation; and cases involving multilateral interchange fees. Then we summarise EC decisions based on art.102 TFEU in the energy, digital/hi-tech and beer supply sectors.

Finally, we outline recent policy developments on digital policy; an interim measures case involving Broadcom; an EC report on EC competition law and the pharmaceutical sector; and highlight recent interest in joint-bidding cases.

European Court cases

Article 102 TFEU

Deutsche Telekom/Slovak Telekom

Slovak Telekom, a subsidiary of Deutsche Telekom, owns the only nationwide Slovak telephone metallic access network. Slovak Telekom is also the only supplier of wholesale access to its local loop, i.e. the metallic cable pair that connects a customer's premises with a telephone exchange in Slovak Telekom's network. In 2005, the Slovak telecoms regulator required Slovak Telekom to grant alternative operators paid access to its network to enable effective competition on the downstream markets.

In October 2014, the EC imposed a fine of €38.8 million on Slovak Telekom and Deutsche Telekom jointly for pursuing a strategy for more than five years to keep competitors out of the Slovak market for broadband services. The EC found that the strategy included (1) constructive refusal of access and (2) margin squeeze practices.[3] As regards the first issue, the EC had found that Slovak Telecom: withheld from alternative operators information about the network which was necessary for unbundling the local loop; reduced its obligations relating to such unbundling; and applied unfair contract terms and conditions in its offer relating to unbundling.[4]

In addition, the EC fined Deutsche Telekom €31 million as a result of its position as a repeat infringer and on the basis that, given the size of its turnover, it should have a more severe penalty by way of deterrence. Deutsche Telekom and Slovak Telekom appealed.[5]

The GC generally upheld the EC's findings of abusive conduct. However, the Court partially annulled the EC decision and reduced the fines. On the substantive issues, the following refers to the *Slovak Telekom* judgment, although similar points are also made in the *Deutsche Telekom* judgment.

As regards *constructive refusal of access*, Deutsche Telekom and Slovak Telekom both claimed that the EC qualified the conduct as a refusal to allow access to

[3] Case AT.39523—*Slovak Telekom*, EC decision of 15 October 2014.
[4] See Case AT.39523—*Slovak Telecom* at [113].
[5] With thanks to Itsiq Benizri. GC Press Release 196/18, 13 December 2018. *Deutsche Telekom AG v European Commission* (T-851/14) EU:T:2018:930 and *Slovak Telekom as v European Commission* (T-827/14) EU:T:2018:929; [2019] 4 C.M.L.R. 21, Judgments of 13 December 2018.

Slovak Telekom's local loop without having verified the indispensable nature of such access.[6]

However, according to the GC, telecommunications law contributes to determining the competitive conditions under which a company performs its activities and therefore constitutes a relevant factor in the application of art.102 TFEU.[7] In this case, the Slovak regulatory framework had clearly acknowledged the need for access to Slovak Telecom's loop to enable the emergence of effective competition.[8] The GC considered that it was sufficient for the EC to rely on the Slovak regulatory framework to demonstrate that access to Slovak Telecom's loop was indispensable.[9]

The Court also noted that *TeliaSonera* covers not only a margin squeeze, but other business practices capable of producing unlawful exclusionary effects for current or potential competitors[10] (so it could also apply to a constructive refusal of access).

As regards the *margin squeeze*, Deutsche Telekom and Slovak Telekom both claimed that the EC erred in its margin squeeze calculation. This calculation relied on a consolidation of revenue and costs for the entire infringement period (a "multi-period" approach). Slovak Telekom claimed that a calculation relying on a year-by-year basis would have shown that there was a positive margin in 2005.[11]

The GC confirmed that the EC "As Efficient Competitor" analysis showed a positive margin for a four-month period in 2005.[12] Therefore, during that period, a competitor as efficient as Slovak Telekom had the possibility to compete with Slovak Telekom.[13] In such a case, the EC had to demonstrate that the pricing practice would be likely to make it at least more difficult for the operators concerned to trade on the market (e.g., by reason of reduced profitability).[14]

However, in this case, the EC had not shown that Slovak Telekom's pricing practice resulted in such exclusionary effects during the 2005 four-month period.[15] As a result, the GC annulled the EC decision to that extent and reduced the amount of the fine to €38 million (instead of €38.8 million).[16]

As regards the *additional amount of the fine imposed on Deutsche Telekom*, the GC recalled that it is settled case law that the EC may impose a higher fine on a parent company than on its subsidiary, even if the parent company's liability purely derives from its subsidiary. However, this requires the EC to identify a factor that "individually characterises" the parent company's conduct.[17]

[6] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [95], referring to *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* (C-7/97) EU:C:1998:569; [1999] 4 C.M.L.R. 112 .

[7] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [117].

[8] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [119].

[9] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [121].

[10] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [126]; see *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) EU:C:2011:83; [2011] 4 C.M.L.R. 18, Judgment of 17 February 2011.

[11] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [240] and [250].

[12] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [256].

[13] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [258].

[14] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [259].

[15] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [260].

[16] *Slovak Telekom* EU:T:2018:929; [2019] 4 C.M.L.R. 21 at [477]–[478].

[17] *Deutsche Telekom* EU:T:2018:930 at [499] and [520]. See *Akzo Nobel NV v European Commission* (C-97/08 P) EU:C:2009:536; [2009] 5 C.M.L.R. 23, Judgment of 10 September 2009.

The Court then noted that being a repeat offender could be such a factor.[18] However, the turnover of the parent company was not an element likely to characterise its individual behaviour in the realisation of the infringement, its liability being purely derived from its subsidiary's liability. The simple noting that a parent company's turnover is greater than that of its subsidiary was a matter of fact, which was not enough to "individualise" the conduct of parent company.[19]

Therefore, the EC could not take into account the parent company's turnover to justify the application of the deterrence coefficient specific to Deutsche Telekom. Accordingly, the GC reduced Deutsche Telekom's fine to €19 million.[20]

Servier

As noted in the first part of this article, the *Servier* case also involved an abuse of dominant position/market definition issue. For that, please see last month's journal, since we summarised it together with the cartel appeal aspects.

Procedure

Canal+

In December 2018, the GC dismissed Canal+'s action for annulment of the EC decision[21] accepting the commitments offered by the US studio Paramount.[22] These commitments aimed at addressing (i.e. removing) certain clauses in film licensing contracts for pay-TV between Paramount and Sky UK.

Background

In July 2015, the EC sent a SO to Paramount setting out its preliminary view that certain clauses in film licensing contracts for pay-TV between Paramount and Sky UK would breach EU competition rules. The clauses in issue were: (1) Sky was prohibited from answering positively to consumers, residing in the EEA but located outside UK and Ireland, seeking to purchase its services; and (2) in return Paramount was required to prohibit other broadcasters in the EEA and outside UK from answering positively to consumers from UK seeking to purchase their services.

Canal+ participated in the proceedings as an interested party and was notified by letter in December 2015 of the EC's preliminary's assessment that Sky UK and Paramount had infringed art.101 TFEU.

In April 2016, Paramount offered commitments to address the EC's competition concerns, among others, the elimination of cross-border competition between pay-TV broadcasters and the partitioning of the EU Single Market.

A few months later, in July 2016, after hearing observations from interested third parties, the EC adopted its commitments decision. Paramount committed to

[18] *Deutsche Telekom* EU:T:2018:930 at [506]–[508], referring to *UTi Worldwide Inc v European Commission* (T-264/12) EU:T:2016:112; [2016] 4 C.M.L.R. 24.
[19] *Deutsche Telekom* EU:T:2018:930 at [520] and [523].
[20] *Deutsche Telekom* EU:T:2018:930 at [559] and [562].
[21] Case AT.40023—*Cross-border access to pay-TV* [2019] 4 C.M.L.R. 45, EC decision of 26 July 2016.
[22] With thanks to Geoffroy Barthet. *Groupe Canal+ SA v European Commission* (T-873/16) EU:T:2018:904; [2019] 4 C.M.L.R. 43, Judgment of 12 December 2018.

no longer enforce clauses such as those described above (the Clauses) and to refrain from including such clauses in its EU licence agreements.

Canal+ was concerned about the effect of that decision on its agreement with Paramount. Therefore, it lodged an application for annulment of the EC decision with the GC.

The GC judgment

The GC rejected Canal+'s application.

First, Canal+ argued that the EC did not identify that the Clauses raised concerns in connection with an infringement by object.[23] The GC disagreed, stating that the EC had shown that there were actual competition concerns, given that, under the contractual scheme at issue, the copyright holder had to prevent all broadcasters in the EEA from making any passive sales to customers outside the territory for which they hold a licence. Such clauses granted an absolute territorial exclusivity.[24]

Second, Canal + argued that the protection of IP laws justified the lawful existence of the Clauses and was linked to achieving an appropriate and necessary remuneration for the rights holders.[25]

The GC disagreed. The Court stated that, although IP laws aim at ensuring returns on investment, IP holders are not entitled to a maximum return, but only to an appropriate remuneration.[26] The GC specified that an appropriate remuneration should be in line with the actual or potential number of persons who wish to benefit from the services. In this case, the GC considered that such a remuneration should be in line with the actual and potential audience for the language version (i.e. both in France and abroad).[27] However, it should not be linked to absolute territorial exclusivity.

Third, Canal+ argued that abolishing the Clauses would jeopardise cultural diversity in the EU.[28]

The GC considered that this argument could not apply here. Notably, it raised an issue concerning the applicability of art.101(3) TFEU whereas, in light of the commitments given by Paramount, the EC had decided not to rule on whether there was an infringement of art.101(1) TFEU. A ruling on the application of art.101(3) TFEU was therefore not contemplated by the procedure.[29]

In such circumstances it was not for the GC, in the context of a review of legality, to rule on arguments that the Clauses promote production and cultural diversity. However, the GC added that such arguments could be presented before the national courts in proceedings against Paramount as regards the licensing agreement.[30] The Court added however that, even where art.101(3) TFEU might be applicable, absolute territorial protection manifestly goes beyond what is indispensable for the production and distribution of audio-visual works requiring IP protection.[31]

[23] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [29].
[24] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [40]–[45] and [50].
[25] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [30]–[31].
[26] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [53].
[27] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [54]–[58].
[28] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [32].
[29] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [61]–[63].
[30] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [66].
[31] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [67]–[68].

Fourth, the GC reviewed Canal+'s claim that the commitments were not proportionate because they unduly affected the contractual interests of third parties.[32] Here, the Court noted that the EC decision did not impose any obligation upon Paramount's contractors.[33] It just made binding commitments given by Paramount voluntarily.

The Court also explained that the EC decision did not prevent Canal+ from bringing proceedings before the national courts to protect its rights or challenge the compatibility of the relevant Clauses with art.101 TFEU.[34] If the result of such proceedings were to lead Paramount to act contrary to its commitment to the EC, then the EC would have to reopen its investigation.[35] Therefore, the GC concluded that the EC had not exceeded its powers to accept commitments or infringed the principle of proportionality.[36]

Finally, the GC rejected other arguments regarding the relevance of the commitments and on alleged misuse of powers by the EC. The GC recalled that the EC had shown that the commitments made binding by the EC were compatible with the competition concerns that the EC had raised.

Silgan

In March 2019, the GC ruled on an action for annulment brought by Silgan as regards the EC's opening of an investigation under art.101 TFEU in the metal packaging sector.[37] The GC, by order, dismissed the action as inadmissible.

In 2015, Silgan, active in the metal packaging sector, applied for leniency to the *Bundeskartellamt* (the BKA) in connection with an investigation. In April 2018, the EC initiated proceedings under art.101 TFEU against several companies in the sector, including Silgan. In its announcement of onsite inspections, the EC noted that the BKA had found that the anti-competitive behaviour had effects in several Member States and that the EC had taken over the case.[38]

Silgan requested the annulment of the EC decision initiating proceedings. The EC claimed inadmissibility of the action on the ground that the decision was not a challengeable act.

There are two main points of interest in the GC's order:

First, the GC recalled that, regardless of the form, only measures the legal effects of which are binding, and that are capable of affecting the interests of the applicant by definitively changing its legal position may be the subject of an action for annulment.[39] The GC assessed the effects and the legal character of the decision in light of its purpose in the context of the procedure, which in this case was considered to include procedural guarantees for the undertakings concerned.[40]

[32] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [76]–[79].
[33] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [94].
[34] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [104]–[106].
[35] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [103].
[36] *Canal+* EU:T:2018:904; [2019] 4 C.M.L.R. 43 at [108].
[37] With thanks to Su Şimşek. *Silgan Closures GmbH v European Commission* (T-410/18 R) EU:T:2019:166; [2019] 5 C.M.L.R. 1, Order of 15 March 2019.
[38] European Commission MEMO/18/3662, 3 May 2018.
[39] *Silgan* EU:T:2019:166; [2019] 5 C.M.L.R. 1 at [13] and [14].
[40] *Silgan* EU:T:2019:166; [2019] 5 C.M.L.R. 1 at [16] and [17].

The GC noted that an action against the initiation of proceedings would require the GC to rule on a case on which the EC had not yet taken a position.[41] The GC held therefore that initiation of a proceeding under art.101 TFEU was merely a procedural step that did not affect the legal position of the applicant.[42]

Second, Silgan argued that the EC's initiation of proceedings resulted in its loss of the opportunity to benefit from the BKA's leniency programme. However, the Court noted that it was the responsibility of undertakings to consider the parallel competence between the EC and NCAs established by Reg. 1/2003. It was for an undertaking wishing to benefit from leniency to submit applications before the potentially competent NCAs as well as the EC.[43]

So, overall the Court found that Silgan's arguments did not show a change in its legal position, ruled that the decision was merely a preparatory act, and dismissed the action as inadmissible.[44]

Qualcomm

Icera, a competitor of Qualcomm in the supply of certain types of chipset, complained that Qualcomm was abusing its dominant position through predatory pricing.[45] The EC investigated and sent Qualcomm an SO, alleging that it had done so between 2009 and 2011 as regards two of its key customers, Huawei and ZTE, in order to eliminate Icera. The EC's investigation was from June 2010 until the SO in December 2015.

Qualcomm argued in response to the SO that the EC had not taken into account Qualcomm's internal revenue allocation practices related to its fiscal year.

After the SO, the EC sent a further request for information, confirmed by a decision, designed to obtain the facts related to the arguments raised by Qualcomm. Notably, (1) for the rest of the fiscal years at the beginning and the end of the alleged infringement; (2) at the level of chips, since prices were not set at chipset level and Qualcomm had explained that prices depended on the components included.[46] The EC also set a daily penalty for non-compliance at €580,000 per day.

Qualcomm contested the time allowed for its response to the EC before the Hearing Officer and, ultimately had to answer part of the RFI in 10 weeks; and another part in 12 weeks. Then later, after further questions, the EC adopted a second SO in July 2018.

Qualcomm appealed against the RFI, with three main lines of argument: (1) the EC should not be allowed to continue with more questions after the SO[47]; (2) the EC had wrongly enlarged its investigation in material scope and timing; and (3) the daily penalty was too high.

The GC rejected these arguments.

[41] *Silgan* EU:T:2019:166; [2019] 5 C.M.L.R. 1 at [18].
[42] *Silgan* EU:T:2019:166; [2019] 5 C.M.L.R. 1 at [19].
[43] *Silgan* EU:T:2019:166; [2019] 5 C.M.L.R. 1 at [23]–[25].
[44] *Silgan* EU:T:2019:166; [2019] 5 C.M.L.R. 1 at [30].
[45] With thanks to Virginia Del Pozo and Edouard Bruc.
[46] See *Qualcomm Inc v European Commission* (T-371/17) EU:T:2019:232; [2019] 4 C.M.L.R. 44, Judgment of 9 April 2019, at [99] and [126]–[128].
[47] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [116].

As regards the first and second arguments, the GC considered that all the EC was doing was correctly investigating the points made by Qualcomm in its response to the SO.[48] That necessarily meant that a wider time frame was considered, adjacent to that of the alleged infringement. It also meant that the EC could ask for information to check its price-cost assessments.[49] The EC was entitled to do that because an SO reflected the EC's preliminary assessment and, in fact, the EC was obliged to take into account any points made in defence. Moreover, the EC was not obliged to stop after the process of putting its arguments to the defence in an SO.[50]

The fact that all this data collection was highly onerous on Qualcomm did not make it any less necessary for the EC's investigation in the circumstances. The Court also considered that Qualcomm could be expected to deal with it, given its economic weight.[51] The Court underlined that if a company starts to be investigated, it is "incumbent on it" from that date to preserve such evidence as might reasonably be available.[52]

As regards the third argument, the GC ruled that the claim was inadmissible because, in the case of a daily penalty, the final penalty amount is only set after a second decision and related defence rights. So, the latter decision is the challengeable act, not the preliminary decision establishing the daily penalty amount.[53]

To some extent, Qualcomm appears to have modelled its arguments on the *Heidelberg Cement* case,[54] where the GC struck down a big, late RFI after a long investigation. However, the cases are rather different, because here the EC was reacting to Qualcomm's arguments at the Hearing.

Alcogroup

In October 2019, the ECJ ruled on the appeal by Alcogroup and Alcodis against the GC's dismissal of their challenge to the EC's investigations in the Biofuels and Bioethanol investigations.[55] The ECJ upheld the GC's ruling that the challenges were inadmissible and ruled that one claim was ineffective.

We summarised the GC's judgment in detail last year.[56] It may be recalled that the core issues were (1) whether the EC had made Alcogroup's defence impossible (in both investigations) by copying and reading "Privileged and Confidential" emails[57]; and (2) whether the EC had ruled on the confidentiality of the emails, taking a decision that could be litigated as a Commission 'act' (as opposed to a preliminary step in the proceedings).[58]

[48] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [53]–[55].
[49] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [81]–[90].
[50] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [69]–[76].
[51] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [165].
[52] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [136].
[53] *Qualcomm* EU:T:2019:232; [2019] 4 C.M.L.R. 44 at [154]–[155] and [158]–[159].
[54] *HeidelbergCement AG v European Commission* (C-247/14 P) EU:C:2016:149; [2016] 4 C.M.L.R. 28, Judgment of 10 March 2016.
[55] *Alcogroup and Alcodis v European Commission* (C-403/18 P) EU:C:2019:870, Judgment of 17 October 2019.
[56] See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 1" [2019] I.C.C.L.R. 121, 164. *Alcogroup* (T-274/15) EU:T:2018:179.
[57] *Alcogroup* EU:C:2019:870 at [21].
[58] *Alcogroup* EU:C:2019:870 at [56]–[57].

On the first issue, broadly what had happened was that certain emails had been copied and, in the email chain linked thereto, there had been some emails labelled "Privileged and Confidential".[59] Alcogroup argued that they "could have been" reviewed as a result,[60] at the least summarily. The EC did not accept that this meant that they had been read; that was not "necessarily" the case.[61]

The GC ruled that, even if there had been incorrect behaviour in the manner in which an inspection was conducted, that did not mean that the inspection was unlawful as such.[62] The decision to inspect remained valid. Equally, such conduct on a second inspection could not result in the invalidity of an earlier inspection. So, Alcogroup's challenge, arguing that both investigations were compromised, was inadmissible. The ECJ agreed with the GC's approach.[63]

On the second issue, the GC found that the EC had not taken a definitive decision on the inclusion or exclusion of the documents in question from the case file, and its decision was just a preliminary step in the proceedings.[64] So, again Alcogroup's challenge was inadmissible. The ECJ agreed, noting that the GC had not distorted the evidence in its review.[65]

Otherwise, the ECJ ruled that the GC's statement that, even if there were procedural issues in the investigation, they should be raised later on the appeal of the EC's final decision in the proceedings, or through a non-contractual claim for damages,[66] was unnecessary for and additional to the GC's other rulings. As a result, it could not be challenged as contrary to the CFR, since it was "ineffective".[67]

As noted last year, much of this is disappointing to defence counsel. It may be recalled that several Belgian Bars intervened on the principles here. As last year, it is submitted that only officials independent from the EC case team and under the Hearing Officer's control should check documents for legal professional privilege. Then there would be no need for fine arguments that such documents "may not necessarily have been read", or that they "could have been read" by those investigating an infringement.

Eco-Bat

In February 2017, the EC found that Eco-Bat and three other undertakings participated in a cartel to fix the purchase price of scrap lead-acid car batteries used for the production of recycled lead and imposed a fine of €32.7 million on Eco-Bat ("initial decision").[68]

In April 2017, the EC adopted a correcting decision, including figures on the value of purchases for each of the addressees which it had omitted to indicate in the initial decision and used for calculating fines ("the amending decision").[69]

In June 2017, Eco-Bat appealed against the initial decision, as corrected.

59 *Alcogroup* EU:T:2018:179 at [16].
60 *Alcogroup* EU:C:2019:870 at [60].
61 *Alcogroup* EU:T:2018:179 at [25] and EU:C:2019:870 at [4].
62 *Alcogroup* EU:T:2018:179 at [10].
63 *Alcogroup* EU:C:2019:870 at [38]–[42], [45]–[46] and [54].
64 *Alcogroup* EU:C:2019:870 at [13]–[14].
65 *Alcogroup* EU:C:2019:870 at [65]–[69].
66 *Alcogroup* EU:C:2019:870 at [15].
67 *Alcogroup* EU:C:2019:870 at [75]–[78].
68 With thanks to Alessia Varieschi. Case AT.40018—*Car battery recycling*, EC Decision of 8 February 2017.
69 Case AT.40018—*Car battery recycling*, EC Decision of 6 April 2017.

In March 2018, the GC ruled that Eco-Bat's challenge of the initial decision was outside the two-month time limit and was therefore inadmissible.[70] In doing so, the Court found on the facts that the value of Eco-Bat's purchases could be understood by reading the text of the initial decision.[71]

In May 2018, Eco-Bat appealed the GC's order to the ECJ. In March 2019, the ECJ upheld the GC's decision.[72]

Eco-Bat claimed that the GC erred in law by considering the date of notification of the initial decision, not the amending decision, as the starting point of the period for bringing an action for annulment.[73] Eco-Bat contended that the initial decision was not sufficiently clear without the missing figures and that this infringed its rights of defence.

However, the ECJ found that the date to consider as the starting point for the period for bringing an annulment proceeding is the date of notification of the act that specifies its addressee, where the addressee is in a position to "become acquainted with" the content of the decision and the grounds on which it is based.[74]

The Court stated that an error or omission which does not affect the addressee's understanding of the reasons for the decision does not affect the period for bringing appeal proceedings.[75] Here, the ECJ agreed with the GC that the failure to state the value of Eco-Bat's purchases in the initial decision did not prevent Eco-Bat from being aware of the grounds of that decision. Moreover, the ECJ noted that on its appeal, Eco-Bat had only reproduced the pleas in law and the arguments already submitted to the GC, without establishing that the GC distorted the facts. Therefore, the ECJ could not review those facts on appeal.

RF v Commission

In June 2019, the ECJ also upheld an order of the GC finding that an action brought against a rejection of a complaint by the EC had not been lodged at the Court in time.[76] It appears that the complaint concerned the freight rail transport sector. RF sent its application to the Court by fax and put the signed original in the post straight away. However, it did not arrive at the Court within 10 days, as required by art.73(3) of the Rules of Procedure of the General Court.

RF sought to argue "force majeure", on the basis that it should have been able to rely on the post to deliver in time. However, both the GC and ECJ rejected this, insofar as RF had not been able to show that it had taken all appropriate measures to avoid such a possibility. Nor had RF shown a particular issue, such as administrative failure, natural disaster or strike.

[70] *Eco-Bat Technologies Ltd v European Commission* (T-361/17) EU:T:2018:173; [2019] 4 C.M.L.R. 6, Order of 21 March 2018.

[71] *Eco-Bat* Order EU:T:2018:173; [2019] 4 C.M.L.R. 6 at [35]–[36].

[72] *Eco-Bat Technologies v Commission* (C-312/18 P) EU:C:2019:235; [2019] 4 C.M.L.R. 27 at [29], Judgment of 21 March 2019 at [16].

[73] *Eco-Bat* EU:C:2019:235; [2019] 4 C.M.L.R. 27 at [16].

[74] *Eco-Bat* EU:C:2019:235; [2019] 4 C.M.L.R. 27 at [25] and [26].

[75] i.e. under art.263(28) TFEU.

[76] *RF v European Commission* (C-660/17 P) EU:C:2019:509, Judgment of 19 June 2019.

European Commission decisions

Article 101 TFEU Cartels—New

Box 8			
New Cartel Fines			
(November 2018-October 2019)			
Total Fines		**Highest company fine(s)**	
Car Safety Equipment (2)	*€368 million*	*TRW*	*€188.9 million*
Reinforcing Steel Bars (re-adoption)	*€16.1 million*	*[Not indicated]*	
Forex I	*€811.2 million*	*Citigroup*	*€310.8 million*
Forex II	*€257.7 million*	*Barclays*	*€94.2 million*
Canned Vegetables	*€31.6 million*	*Groupe CECAB*	*€18 million*
TOTAL	**€1.5 billion**		

Car Safety Equipment (2)

In March 2019, the EC fined Autoliv and TRW a total of €368.2 million for participation in two cartels with Takata, related to the supply of car seatbelts, airbags and steering wheels to European car producers.[77] This is the EC's second cartel case concerning the supply of car safety equipment.[78]

The EC found that the three companies had exchanged commercially sensitive information and co-ordinated their market behaviour as regards supplies to the Volkswagen/Porsche and BMW/Mini groups. There were meetings and exchanges through phone calls and emails.

There were bilateral or trilateral contacts, in some cases involving co-ordination on responses for requests for quotations, periodical requests for price reviews and cost reductions, certain development costs and compensation for raw material price increases.[79] The companies aimed to maintain the status quo of existing business in one cartel; and to resist the purchasers' requests for price reductions in both cartels.[80]

The cartel as regards Volkswagen was found to have lasted from January 2007 to March 2011 (with variations for each supplier); that as regards BMW from February/June 2008 to September 2010/February 2011 (again with variations by supplier).

Takata received full immunity from fines, having revealed the activities. TRW received a 50% fine reduction for its co-operation. Autoliv received a 30% fine reduction for its co-operation. Both TRW and Autoliv received a 10% fine reduction

[77] Case AT.40481—*Occupant Safety Systems (II) supplied to the Volkswagen Group and the BMW Group*, EC Press Release IP/19/1512, 5 March 2019. The EC's summary is in [2019] OJ C199/4, 14 June 2019. The EC's settlement decision is available on the EC's website.

[78] See Case AT.39881 concerning suppliers to Japanese car manufacturers in John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2" [2019] I.C.C.L.R. 195, 196.

[79] *Occupant Safety Systems (II)*, EC summary [2019] OJ C199/4 at [10]–[11].

[80] *Occupant Safety Systems (II)* at [29]–[30].

for acknowledging the infringement. Autoliv was not fined for an extended duration of one of the cartels for which it provided evidence to the EC.

The EC also reduced the fines by 5% because of its decision to split its investigations into car safety cartels into two separate proceedings. The EC considered that this had led to a longer investigation period.[81]

Forex Spot Trading

In May 2019, the EC fined five banks a total of €1.07 billion for their participation in *two cartels* in the foreign exchange spot trading market, involving 11 currencies.[82] This was after a settlement procedure.

Spot trading of foreign exchange means that traders working for a bank exchange foreign currencies on the same day at the prevailing exchange rate. The 11 currencies in this case were the Euro, the British Pound, the Japanese Yen, the Swiss Franc, the US, Canadian, Australian, and New Zealand Dollar, and the Danish, Swedish and Norwegian Crown.

The banks fined by the EC were: Barclays and RBS, involved in both cartels; Citigroup and JP Morgan, only involved in the cartel called the "Three Way Banana Split" (Forex I); and MUFG Bank (which was formerly Bank of Tokyo-Mitsubishi), only involved in the cartel called "Essex Express" (Forex II). UBS traders also participated in both cartels, but the bank was not fined since it revealed the cartels.

The EC found that individual traders exchanged sensitive information and trading plans using various online chatrooms. They also occasionally co-ordinated trading strategies. Some of the traders knew each other personally and decided to create chatrooms to which they invited other traders. The traders were generally logged into multi-lateral chatrooms for the whole working day, with extensive conversations including recurring updates on their trading.

The commercially sensitive information exchanged in the chatrooms related to (1) customers' orders; (2) bid-ask spreads (i.e. prices) re specific transactions; (3) traders' open risk positions (i.e. currencies traders needed to sell or buy); and (4) other details of current or planned trading activities.

The EC noted that such exchanges allowed the traders concerned to make informed market decisions on whether and when to sell or buy currencies.

The EC also found that, occasionally, the exchanges allowed traders to identify opportunities for co-ordination (such as "standing down") where a trader refrained from trading temporarily to avoid interfering with another in the chatroom.

The ThreeWay Banana Split cartel lasted from December 2007 to January 2013; the Essex Express cartel from December 2009 to July 2012. The banks did not all participate for the same duration.

The total fines on the Three Way Banana Split cartel were €811.19 million; and on the Essex Express €257.68 million. The EC imposed the highest fine on Citigroup at €310.8 million, followed by RBS which received a fine of €249.2 million, and Barclays which was fined €210.3 million.

[81] See *Occupant Safety Systems (II)* EC summary [2019] OJ C199/4 at [28]–[29]; EC decision at [129]–[130].

[82] With thanks to Katrin Guéna for her assistance with this cartel section. Case AT.40135—*Forex*, EC Press Release IP/19/2568, 16 May 2019.

The banks' fines were reduced by between 10% to 50% for their co-operation in the investigation, except for MUFG Bank. All the banks received an additional 10% fine reduction because they admitted their cartel participation and liability.

Re-adoption of Reinforcing Steel Bars decision

In July 2019, the EC re-adopted its decision in the reinforcing steel bars cartel, which lasted from December 1989 to July 2000.[83] The EC fined the cartel participants a total of €16.1 million, applying an *exceptional 50% fine reduction* for all companies for the long duration of the proceedings.

It may be recalled that the EC adopted its first decision imposing fines on eight Italian manufacturers of reinforcing steel bars in 2002. It re-adopted its decision in 2009 following the annulment of the 2002 decision by the GC. The EC's 2009 decision was then annulled by the ECJ in 2017. The reasons for both annulments were procedural.[84]

Since three companies, Leali, Lucchini and IRO did not appeal the 2009 decision, the 2019 re-adopted decision is addressed only to five companies, i.e. AlfaAcciai, Feralpi Holding, Ferriere Nord, Partecipazioni Industriali (Riva Fire), and Valsabbia Investimenti. (Lucchini's appeal against not being included in the latest decision is outlined above in last month's journal in the section on cartel appeals.)

Canned Vegetables

In September 2019, the EC issued its decision on the canned vegetables cartel case after three participants agreed to settle.[85] The EC fined Groupe CECAB €18 million and Coroos €13.6 million. Bonduelle received full immunity because it revealed the cartel. The investigation continues for a fourth participant in the cartel, Conserve Italia, which decided against settlement.

The EC found that the cartel participants had entered into three separate agreements infringing competition rules: one agreement on private label sales, mainly for green beans and peas, a peas-and-carrots mix and vegetable macedoine; and a second agreement for sweetcorn. The third agreement covered private label sales and own brand sales to retailers and the food service industry, particularly in France, of various types of canned vegetables. Coroos only participated in the first agreement.

The EC found that the infringement lasted for over 13 years, from January 2000 to June 2013 for Bonduelle and until October 2013 for the two other producers.

Coroos and Groupe CECAB obtained respectively a 15% and 30% fine reduction for their co-operation. Both parties received in addition a 10% fine reduction since they acknowledged their cartel participation.

The EC indicated that the fine of one of the participants had been reduced due to its inability to pay.

[83] Case AT.37956—*Reinforcing Steel Bars* EC's Daily News, 4 July 2019.
[84] See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006-2007: Part 1" [2008] I.C.C.L.R. 29, 56; and John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 1" [2018] I.C.C.L.R. 143, 188.
[85] Case AT.40127—*Canned Vegetables* EC Press Release IP/19/5911, 27 September 2019.

Box 9

- **Cartels**
  - 4 new cartel decisions, one a "re-re-adoption"
  - Huge fines on two foreign exchange (*Forex*) cartels, colourfully called:
    - "The Three Way Banana Split"; and
    - "The Essex Express"
  - The *Euribor* decision was published which, with the *HSBC* appeal, shows the specific issues arising in the trading context
    - Traders forgetting that online chatrooms are traceable
    - "Price discovery" by traders has its limits (i.e. to exchanges for potential transactions)
    - Derivatives trading is about a sales value after "netting out" transactions
    - Interesting EC observation that the average overcharge in the EIRD market was far below that in classical industries (as part of the EC's Fining assessment)

Cartels—Old

Capacitors

In December 2018, the EC published its summary of the *Capacitors* cartel case.[86]

Euribor

As noted in our 2017 review[87] and in the section on European Court cases in last month's journal, in December 2016, the EC fined Crédit Agricole, HSBC and JP Morgan Chase a total amount of €485 million for their participation in a cartel as regards Euro Interest Rate Derivatives (EIRD), linked to the manipulation of the Euro Interbank Offered Rate (Euribor) and/or the Euro Over-Night Index Average (EONIA). These three banks decided not to settle, unlike the other four cartel participants.[88]

In April 2019, the EC published the non-confidential version of its decision on the EC website and its case summary.[89]

The main points of interest are as follows:

First, in the EC's decision it is explained that traders employed by the three non-settling banks engaged in collusive practices with the objective of manipulating pricing for EIRDs, for individually different periods between September 2006 and March 2007. The collusion took place through online chats, emails, online messages and phone conversations.[90]

[86] Case AT.40136—*Capacitors* OJ C446/10, 11 December 2018. See the summary in John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2" [2019] I.C.C.L.R. 195, 200.

[87] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 2" [2018] I.C.C.L.R. 227, 247.

[88] Barclays, Deutsche Bank, RBS and Société Générale. See EC decision of 4 December 2013, EC Press Release IP/13/1208 of the same date.

[89] With thanks to Marilena Nteve. Case AT.39914—*Euro Interest Rate Derivatives*, EC decision of 7 December 2016. The EC's summary is in [2019] OJ C130/11, 8 April 2019.

[90] *Euro Interest Rate Derivatives* EC summary, [2019] OJ C130/11 at [16], [20] and [21]–[23].

Second, the Euribor benchmark, which is meant to reflect the cost of interbank lending in Euro, is based on submissions by banks of the rates at which each bank believes that a hypothetical prime bank would lend funds to another.[91] Submissions are made to a co-ordinating calculation agent every day between 10.45 and 11.00 a.m. CET. Then the Euribor is published at 11.00 a.m. CET. In fact, multiple submissions are made for differing maturities ranging from one week to 12 months (called "tenors").[92]

Third, the different Euribor tenors serve as pricing components for Euribor-based EIRDs and the level of the Euribor tenor may affect the cash-flow a bank receives under an EIRD, or what it has to pay to the counterparty on a given date. Depending on the trading positions/exposures entered into for a bank by its traders therefore, a bank may have an interest either in a high Euribor fixing, a low Euribor fixing, or for Euribor to be flat.[93]

Fourth, in that context certain traders exchanged information on preferences for fixing of certain Euribor tenors and trading positions, or intentions that were not publicly available.[94] They:

- explored possibilities to align their EIRD trading positions and future Euribor submissions;
- approached their respective bank's Euribor submitters to request a submission towards a certain direction or at a certain level;
- promised to report back to other traders before the daily Euribor submissions or related discussions; and
- disclosed sensitive information on pricing strategies regarding EIRDs.

In addition, certain traders "monitored" the cartel behaviour by discussing the outcome of the Euribor rate setting, including specific banks' submissions, after the daily Euribor rates had been set and published.

In its decision, the EC sets out, in some 62 pages, the chronology of events between August 2005 and March 2007.

Fifth, the EC also addresses a number of points raised by the banks. Notably, the EC rejected the argument that the information exchanged was widely available to other market participants and that the exchange was legitimate. It was argued that the exchange was part of "price discovery", seeking information in order to trade and create market liquidity.[95]

However, the EC noted that the overwhelming majority of the transactions were concluded "over the counter" (OTC), meaning that neither prices nor volumes were visible to third parties. Nor had the exchanges concerned occurred in the context of a potential transaction.[96] Traders could make profit in the EIRD trading only by keeping prices secret or minimising their accuracy in any disclosure. Moreover, the parties were not required to exchange information in order to offset hedge risks.[97]

[91] *Euro Interest Rate Derivatives* EC summary, [2019] OJ C130/11 at [2].
[92] *Euro Interest Rate Derivatives* EC summary, [2019] OJ C130/11 at [3].
[93] *Euro Interest Rate Derivatives* EC summary [2019] OJ C130/11 at [5].
[94] *Euro Interest Rate Derivatives* EC summary [2019] OJ C130/11 at [17]–[18] and EC decision at [113]–[125], [357]–[359] and [392].
[95] *Euro Interest Rate Derivatives* at [399].
[96] *Euro Interest Rate Derivatives* at [403].
[97] *Euro Interest Rate Derivatives* at [403].

Sixth, the EC's express exclusion of the banks which did not settle from its settlement decision is referred to in para.529 of the non-settling banks decision and a summary of the EC's approach in hybrid cases is in para.517 (see further the *HSBC* appeal discussion of this in last month's journal).

Seventh, the EC's reasoning on its netting discount (also discussed in the *HSBC* appeal section in last month's journal) is set out in the EC decision.[98] The main points are that it applied a uniform discount rate for the particularities of the EIRD market, in particular the netting inherent in derivatives trading, based on (1) the general level assessed by the International Swap Dealer Association; (2) adjusted (down) to take into account the netting levels of the banks concerned; (3) adjusted again (down), taking the view that the average overcharge in the EIRD market was far below that in classical industries; with then (4) a factor in the EC's margin of discretion (which the EC does not disclose in this non-confidential version, but which was revealed at Court).[99]

Article 101 TFEU—Vertical cases

Box 10

- **New EC Cooperation Procedure Fine Reductions**
  - Formal request under arts 7 and 23 of Reg.1/2003
  - Fine reduction based on art.37 of EC Fining Guidelines
  - Applies in non-cartel cases (arts 101 and 102 TFEU)
  - No notice yet, but a FAQs sheet with the *Guess* Press Release
  - Co-operation: acknowledgement of infringement, evidence and remedies
  - Amount depends on timing, extent of co-operation, procedural efficiencies for EC
  - New cases this year: *Guess* (50%), *Mastercard* (10%), *Nike* (40%) and *Sanrio* (40%)

Box 11

- **Article 101 TFEU – Vertical Cases**
  - *Guess*: €39.8 million fine
    - Restriction on resellers bidding for Adwords on Google
    - Restriction on selling online: Instore focus
    - Territorial/cross-selling restrictions
    - Resale price maintenance
    - 50% fine reduction
  - *Nike*: €12.56 million fine
    - Territorial restrictions on non-exclusive licensees producing and selling goods
    - "Ancillary sports merchandise" (toys, clothing, shoes and bags); *not* Nike-branded products
    - Nike handling this for football clubs and a national football federation

[98] *Euro Interest Rate Derivatives* at [643]–[648].

[99] See the section on cartel appeals in John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018–2019: Part 1" [2020] I.C.C.L.R. 109.

- * 40% fine reduction for co-operation
- *Sanrio*: €6.2 million fine
  - * Territorial restrictions on non-exclusive licensees re "Hello Kitty" and other Sanrio products
  - * 40% fine reduction for co-operation

Guess

In December 2018, the EC fined Guess, the branded clothing company, €39.8 million for limiting cross-border sales through restrictions in its distribution agreements.[100] The EC found that Guess had developed an e-commerce strategy focused on expanding its distribution channel through its own website and online shop. To "avoid cannibalisation" of the official Guess website, Guess sought to control the competitive pressure from Guess's independent distributors selling Guess products online.[101] The infringement was held to be from January 2014 until October 2017.

The EC found that Guess restricted authorised distributors in its selective distribution system from doing the following[102]:

First, the authorised distributors could not use the Guess brand names and trade marks, in particular in Google AdWords, for the purpose of online search advertising.[103] As a result, Guess was the only one that could bid for Google AdWords with its brand name. Guess thereby could drive more traffic to its own website and minimise costs in such advertisement auctions.[104]

The EC stated that on the case law a trade mark proprietor could prohibit an advertiser from using an identical keyword to that trade mark where the advertisement did not allow an average internet user to ascertain whether the goods or services advertised originated from the trade mark proprietor, referring to *Google France*, a case involving search engines.[105] However, the EC noted that the restriction was imposed on authorised retailers that sold genuine Guess products, which did not create any risk of confusion as to the origin of the products.[106]

The EC concluded that the conduct had the object of restricting competition since it limited the "findability" of retailers selling Guess products online, provided Guess with a considerable competitive advantage and restricted intra-brand competition.[107]

Second, the authorised distributors could not sell online without a prior specific authorisation by Guess. The company reserved to itself full discretion for this authorisation, which was not based on any specified quality criteria.[108]

[100] With thanks to Alessia Varieschi. Case AT.40428—*Guess*, EC Press Release IP/18/6844 and EC decision of 17 December 2018, which is available on the EC's website. The EC's summary was published in [2019] OJ C47/5, 6 February 2019.
[101] *Guess* at [35] and [36].
[102] *Guess* at [2].
[103] *Guess* at [40].
[104] *Guess* at [49] and [50].
[105] *Google France Sarl v Louis Vuitton Malletier SA* (C-236/08)*;Google France Sarl v Centre National de Recherche en Relations Humaines (CNRRH) Sarl* (C-238/08) EU:C:2010:159; [2011] Bus. L.R. 1.
[106] *Guess* at [116] and [117].
[107] *Guess* at [120] and [121].
[108] *Guess* at [53].

According to the EC, this requirement mainly had the object of restricting sales on authorised retailers' websites, to protect Guess's online sales activities from intra-brand competition and facilitate market partitioning. Therefore, the conduct amounted to a restriction by object. It could not be argued that these were necessary provisions for the selective distribution system.[109]

Provisions in Guess's retail store agreement also emphasised that sales were meant to be in stores, i.e. physical locations.[110]

Third, cross-selling among authorised wholesalers and retailers was restricted. Some provisions prevented solicitation of customers outside the allocated territory (active sales restrictions); others restricted unsolicited sales to other network members and prevented or provided disincentives for purchases from other network members (passive sales restrictions).[111]

The EC found that these restrictions aimed at ensuring that only Guess and/or the appointed national wholesaler could supply the retailers operating on a national market. Further, that wholesalers purchased only from Guess and did not resell the contract products to other wholesalers or retailers outside their allocated territory. The EC noted that a restriction of sales between authorised distributors within a selective distribution network was a restriction by object.[112]

Fourth, the authorised distributors could not sell to consumers located outside the distributors' allocated territory.[113] The EC noted that restricting active and passive sales by members of a selective distributions system to end-users located outside the allocated territory of those members was a restriction by object.[114]

Fifth, the authorised distributors could not independently decide on the retail price at which they sold Guess products. Retailers in the distribution network had to follow recommended prices under threat of an obligation to reimburse damages incurred and discontinuation of future supplies.[115] The EC noted that, in a selective distribution system, the imposition of fixed or minimum retail prices goes beyond the requirements of such a distribution system, thus constituting a restriction by object.[116]

The EC concluded that Guess restricted intra-brand competition and partitioned national markets for its products.[117]

Guess's conduct also could not benefit from the Vertical Restraints Block Exemption Regulation (VBER)[118] because the object of the online advertising restrictions was to restrict the ability of authorised retailers to advertise and sell the contractual products to customers outside their contractual territory or area of activity.[119]

To calculate the fine, the EC considered the value of sales that Guess made in 2017 in connection with the infringement, namely between €250 and €300 million.

[109] *Guess* at [131].
[110] *Guess* at [57]–[58].
[111] *Guess* at [132].
[112] *Guess* at [132]–134].
[113] *Guess* at [132].
[114] *Guess* at [135].
[115] *Guess* at [84].
[116] *Guess* at [136]–[137].
[117] *Guess* at [138].
[118] Article 4(c) of Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of art.101(3) TFEU to categories of vertical agreements and concerted practices [2020] OJ L102/1, 23 April 2010.
[119] *Guess* at [157] and [158].

This excluded products reserved solely for Guess's own distribution in Guess-owned stores and on its website.[120]

The EC set the percentage of the value of sales at 7% and the multiplier at 1400 as regards the gravity and the duration of the infringement respectively. The basic amount of the fine was €75–€85 million.

Guess formally offered to co-operate pursuant to arts 7 and 23 of Reg.1/2003.[121] In view of that co-operation by (1) revealing a restriction of competition which was not known to the EC; (2) providing additional evidence than that in the EC's possession; (3) acknowledging the infringement of art.101 TFEU and art.53 of the EEA Agreement; and (4) waiving certain procedural rights, the fine was reduced by 50%.[122] As a result, the EC imposed a fine of €39.8 million.[123]

Comment

This is an important case for three reasons: first, insofar as it involves EC action against a restriction on Google AdWord auctions; second, insofar as it is one of the first applications of the EC's new co-operation procedure; third, insofar as the distribution strategy pursued was surprisingly out of line with the EU regulatory options, as Guess sought to reserve online sales to itself, while having a network of stores for those who want to buy that way.

Nike

In March 2019, the EC fined Nike €12.56 million for illegally preventing licensees in the EEA from selling "ancillary sports merchandise" cross-border, both offline and online.[124]

Nike's core business is the design and sale of athletic footwear, apparel, equipment, accessories and services. Those products generally feature one or more of Nike's registered trademarks, including the "Nike" word and Nike's Swoosh logo.[125] However, Nike also supplies other licensed merchandise, which features the brands of football clubs and national football federations. Such merchandise may be "co-branded'" with Nike branding alongside the branding of the club or federation,[126] in order for Nike to make the products, clubs and federations license their intellectual property rights (IPR) to Nike under various sponsorship agreements.[127]

Nike also exploits broader exclusive rights allowing Nike to sub-license for manufacture other product categories featuring only the brands of the club and not the Nike trade marks.[128]

This case related to Nike's position as licensor of the IPR related to such other goods for various football clubs (Barcelona, Manchester United, Juventus, Inter

[120] *Guess* at [165] and [192].
[121] *Guess* at [16].
[122] *Guess* at [199].
[123] *Guess* at [201].
[124] With thanks to Lukas Simas. Case AT.40436—*Ancillary sports merchandise*, EC decision of 25 March 2019, which is available on the EC website, EC Press Release IP/19/1828 of the same date. The EC's summary is in [2019] OJ C216/7, 27 June 2019.
[125] *Ancillary sports merchandise* at [22].
[126] *Ancillary sports merchandise* at [23].
[127] *Ancillary sports merchandise* at [24].
[128] *Ancillary sports merchandise* at [25].

Milan and Roma) and the French Football Federation. The goods concerned included toys, clothing, shoes and bags.[129]

The EC found that Nike's non-exclusive licensing and distribution agreements breached EU competition rules, through the following unlawful practices[130]:

First, 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.[131] Second, Nike applied indirect measures to implement the out-of-territory restrictions, for instance, threatening licensees with ending their contracts if they sold out-of-territory, refusing to supply "official product" holograms if it feared that sales could be going toward other territories in the EEA, and carrying out audits to ensure compliance with the restrictions.[132]

Third, Nike imposed direct and indirect measures on master licensees, which it had in some cases, compelling the master licensees to stay within their territories and to enforce restrictions vis-à-vis their sub-licensees.[133]

Fourth, Nike included clauses that explicitly prohibited licensees from supplying merchandising products to customers, often retailers, which 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) stopped purchasing products from licensees in other EEA territories.[134]

The EC found that the practices were in place for some 13 years (July 2004 to October 2017).

As regards fines, the EC took into account as sales value the amount of royalties which Nike collected in the last year of each infringing sponsorship agreement.[135] The percentage of the value of sales for gravity was set at 8%.[136]

The EC applied a 1.1% deterrence increase to the fine.[137]

Nike received a 40% fine reduction in return for its co-operation with the investigation beyond its legal obligation to do so.[138]

Comment

This is an important decision, mainly because it is a licensing case.[139] In other words, the restrictions concerned involved Nike's behaviour (1) as licensor of the rights concerned; and (2) as regards its master licensees and their sub-licensees for the manufacture and distribution of the goods concerned.[140] As the EC put it "Nike aimed at ensuring a compartmentalisation of its licensing network so as to prevent cross-border sales".[141]

129 *Ancillary sports merchandise* at [28].
130 *Ancillary sports merchandise*, EC summary [2019] OJ C216/7 at [13].
131 *Ancillary sports merchandise* at [44]–[61].
132 *Ancillary sports merchandise* at [62]–[72].
133 *Ancillary sports merchandise* at [73]–[83].
134 *Ancillary sports merchandise* at [84]–[88].
135 *Ancillary sports merchandise*, EC summary [2019] OJ C216/7 at [19]; *Ancillary sports merchandise* at [153].
136 *Ancillary sports merchandise*, EC summary [2019] OJ C216/7 at [20].
137 *Ancillary sports merchandise* at [163].
138 *Ancillary sports merchandise* at [165].
139 *Ancillary sports merchandise* at [91]–[93].
140 *Ancillary sports merchandise* at [32].
141 *Ancillary sports merchandise* at [110].

The main IP in issue appears to have been trade marks and copyright. The EC noted that the hardcore nature of the restrictions meant that neither the VBER,[142] nor the TTBER would apply, to the extent any IP could fall in their scope.[143] It may be noted also that the licensing agreements were non-exclusive.[144] The distribution system was not a selective distribution system.[145]

The other important aspect is another application of the EC's new co-operation procedure. Nike made a formal offer to co-operate under arts 7 and 23 of Reg.1/2003.[146] Of its own initiative, Nike also issued waiver/non-enforcement letters to licensees.[147] Nike also provided additional evidence to extend the case beyond its initial scope.[148]

Sanrio

In July 2019, the EC fined Sanrio €6.2 million for imposing restrictions on its licensees selling licensed merchandise to other EEA Member States.[149] The restriction concerned products featuring "Hello Kitty" and other characters owned by Sanrio.

The EC found that Sanrio's *non-exclusive licensing agreements* 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 Sanrio and limitations to the languages used on the merchandising products.

Sanrio also implemented a series of measures to encourage compliance with the out-of-territory restrictions. These included carrying out audits and the non-renewal of contracts if licensees did not respect the out-of-territory restrictions.

The EC found that the practices had been in place from January 2008 until December 2018.

Sanrio co-operated with the EC, providing information which allowed the EC to establish the extended duration of the infringement. Sanrio also provided evidence of significant added value and acknowledged the facts and infringements. For this, the EC granted Sanrio a 40% fine reduction.

Cross-border Access to Pay-TV

In March 2019, the EC made binding the commitments offered by NBCUniversal, Sony Pictures, Warner Bros., Disney and Sky, in a proceeding under art.101 TFEU.[150]

[142] Article 4(c) of Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of art.101(3) TFEU to categories of vertical agreements and concerted practices [2020] OJ L102/1, 23 April 2010.
[143] *Ancillary sports merchandise* at [130].
[144] *Ancillary sports merchandise* at [124].
[145] *Ancillary sports merchandise* at [33(3)].
[146] *Ancillary sports merchandise* at [18].
[147] *Ancillary sports merchandise* at [134]–[136].
[148] *Ancillary sports merchandise* at [165]–[166].
[149] Case AT.40432—*Sanrio*, EC decision of 9 July 2019, EC Press Release IP/19/3950.
[150] With thanks to Georgia Tzifa. Case AT.40023—*Cross-border Acess to Pay-TV*, EC decision of 7 March 2019, EC Press Release IP/19/1590 of the same date. The EC's summary is in [2019] OJ C132/8, 9 April 2019; the non-confidential version of the decision is available on the EC's website.

It may be recalled that, following the *Premier League/Murphy* judgment of the ECJ,[151] the EC launched a fact-finding investigation in 2012 as regards potential competition restrictions contained in licensing agreements for premium pay-TV content.[152]

In January 2014, the EC opened formal proceedings against several US film studios (Twentieth Century Fox, Warner Bros., Sony Pictures, NBCUniversal, Paramount Pictures) and the largest European pay-TV broadcasters such as BSkyB (UK), Canal+ (France), Sky Italia (Italy), Sky Deutschland (Germany) and DTS Distribuidora de Television Digital (Spain).

The EC's investigation focused on whether provisions contained in licensing arrangements for premium pay-TV content infringed art. 101 TFEU by preventing broadcasters from providing their services across borders. For example, by refusing potential subscribers from other Member States or blocking cross-border access to their services. These proceedings were extended to Disney in July 2015.[153]

In July 2015, the EC also sent an SO to NBCUniversal, Sony Pictures, Warner Bros., Disney (the Studios), Twentieth Century Fox, Paramount Pictures and Sky.[154]

According to the SO, each of the Studios, Twentieth Century Fox and Paramount Pictures had entered into licensing agreements with Sky, whereby the Studios, Fox and Paramount Pictures granted Sky exclusive pay-TV and subscription video-on-demand rights with regard to certain films in the UK and Ireland.[155]

In addition, each agreement contained clauses that prohibited or limited Sky from making available via internet and/or satellite transmission its retail pay-TV services in response to unsolicited requests from consumers located in the EEA, but outside the UK and Ireland ("the Contested Clauses").[156]

In the SO, the EC reached the preliminary conclusion that the Contested Clauses were liable to impair competition and had an anti-competitive object because they were designed to prohibit or limit cross-border passive sales of retail pay-TV services and grant absolute territorial exclusivity in relation to the content of the Studios, Fox and Paramount Pictures.[157]

The EC also reached the preliminary conclusion that there were no circumstances in the economic and legal context of the Contested Clauses, including the nature of the services affected and the conditions of the functioning and structure of the markets in question, that would justify the finding that the clauses were not liable to impair competition and therefore did not have an anti-competitive object.[158]

The Studios, Fox, Paramount Pictures and Sky, claimed, among other things, that the Contested Clauses: (1) brought about cost and qualitative efficiencies; (2) ensured that consumers could enjoy a culturally targeted, local language product, with greater choice and variety of content; (3) maintained the incentives of the

[151] *Football Association Premier League Ltd v QC Leisure* (C-403/08); *Murphy v Media Protection Services Ltd* (C-429/08) EU:C:2011:631; [2012] 1 C.M.L.R. 29, Judgment of 4 October 2011.

[152] *Cross-border Acess to Pay-TV* EC Press Release IP/14/15, 13 January 2014.

[153] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [31]–[32].

[154] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [33]. In January 2018, following changes to NBCUniversal's corporate structure, the EC initiated proceedings against Universal Studios Ltd and adopted a Supplementary Statement of Objections (SSO) addressed to NBCUniversal: *NBCUniversal* EC decision of 7 March 2019 [37]–[38].

[155] *Cross-border Acess to Pay-TV*, EC decision at [2].

[156] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [2].

[157] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [3] and [75]–[77].

[158] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [3] and [78].

Studios, Fox, Paramount Pictures and pay-TV broadcasters, such as Sky, and distributors to invest in local content; and (4) did not eliminate a substantial part of competition between pay-TV broadcasters in the EEA.[159]

The EC examined these arguments in the SO but reached the preliminary conclusion that the Contested Clauses did not meet any of the cumulative conditions for exemption under art.101(3) TFEU.[160]

The EC's preliminary conclusion took into account the specific economic and legal context of which the Contested Clauses form part, including the financing model of the films licensed by the Studios, Fox and Paramount Pictures, the ownership of the rights in those films and the level of investment in film production by Sky.

That preliminary conclusion was therefore without prejudice to the EC's assessment whether similar clauses forming part of a different economic and legal context could have as their object the restriction of competition within the meaning of art.101(1) TFEU, or satisfy the cumulative conditions for an exemption under art.101(3) TFEU.[161]

In July 2016, the EC made binding the commitments offered by Paramount Pictures.[162]

Disney offered commitments in October 2018, which were market tested[163] and revised in February 2019. NBCUniversal, Sony, Warner Bros. and Sky offered commitments in December 2018 which were also market tested.[164] The EC received observations from 10 interested parties on the commitments offered by the Studios and Sky.[165]

The main aspects of the commitments offered *by the Studios* are as follows:

First, the Studios will not enter into, renew or extend a pay-TV output licence agreement that, with respect to any territory in the EEA, (re)introduces any:

- clauses that prevent or limit pay-TV broadcasters located in the EEA from responding to unsolicited requests from consumers residing and located in the EEA, but outside of the licensed territory of such pay-TV broadcasters (Broadcaster Obligation); and
- clauses that require the Studios to prohibit or limit other pay-TV broadcasters located in the EEA, but outside a given pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located in that pay-TV broadcaster's licensed territory (Studio Obligation).[166]

Second, the Studios will not:

- seek to enforce or initiate proceedings before a court or tribunal for the violation of a Broadcaster Obligation and/or Studio Obligation, as applicable, in an existing pay-TV output license agreement; and

[159] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [3] and [80]–[82].
[160] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [3] and [80]–[82].
[161] *Cross-border Acess to Pay-TV*, EC decision of 7 March 2019 at [4].
[162] EC decision of 26 July 2016. EC Press Release IP/16/2645. The EC's summary is in OJ C 437/5, 25 November 2016; the non-confidential version of the decision is available on the EC's website.
[163] EC Press Release IP/18/6346, 9 November 2018, Article 27(4) Notice [2018] OJ C403/7, 9 November 2018.
[164] EC Press Release IP/18/6894, 20 December 2018, Article 27(4) Notice [208] OJ C460/32, 21 December 2018.
[165] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [44].
[166] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [85].

- honour any Broadcaster Obligation and/or Studio Obligation, as applicable, to which it is subject pursuant to any existing pay-TV output licence agreement.[167]

The main aspects of the commitments offered *by Sky* are as follows:

First, Sky will not enter into, renew or extend a pay-TV output licence agreement with the Studios, Twentieth Century Fox or Paramount Pictures that, with respect to any territory in the EEA, (re)introduces any:

- clauses that prevent or limit Sky from responding to unsolicited requests from consumers residing and located in the EEA, but outside of Sky's licensed territory (Broadcaster Obligation); and
- clauses that require the Studios, Fox or Paramount Pictures to prohibit or limit other pay-TV broadcasters located in the EEA, but outside a given pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located in that pay-TV broadcaster's licensed territory (Studio Obligation).[168]

Second, Sky will not:

- seek to enforce or initiate proceedings before a court or tribunal for the violation of Studio Obligation in an existing pay-TV output licence agreement; and
- honour any Broadcaster Obligation, to which it is subject pursuant to any existing pay-TV output licence agreement.[169]

The commitments offered by the Studios and Sky cover both linear pay-TV services and, to the extent included in the licence(s) with a broadcaster, companion subscription video-on-demand services. They cover current and future subsidiaries of the committing parties and also contain clauses on non-circumvention, review and the monitoring trustee.[170]

Finally, the commitments are expressly without prejudice to rights conferred on the Studios under Reg. (EU) 2017/1128 (the EU Portability Regulation)[171] or under copyright law. Neither do the commitments affect the rights of the Studios or a pay-TV broadcaster to decide unilaterally to employ geo-filtering technology.[172]

Article 101 TFEU—other horizontal cases

Box 12

- **Article 101 TFEU—Other horizontal cases (1)**
  - *Mastercard*: €570.56 million
    - Cross-border MIF competition
    - Mastercard rule/decision of association of undertakings

[167] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [86].
[168] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [96].
[169] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [97].
[170] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [87]–[90], [94], [98]–[101] and [105].
[171] *Cross-border Acess to Pay-TV* [2017] OJ L168/1, 30 June 2017.
[172] *Cross-border Acess to Pay-TV* EC decision of 7 March 2019 at [91]–[93] and [102]–[104].

- * Bank acting only for retailer/merchant in an EEA cross-border card transaction required to apply the MIF (fee for exchange with bank acting for cardholder) where the retailer/merchant was located (default rule)
- * 10% fine reduction for co-operation after SO

– *Mastercard and Visa*: Inter-regional MIFs

- * EC accepted commitments re the two systems
- * MIFs subject to lower caps (some 40% reduction)
- * 2 levels: a cap for instore transactions; and a cap for online transactions (differences in non-SEPA transfer costs)
- * Designed to ensure merchant pays no more than the value of the card transaction
- * Object and effect cases

Mastercard—Cross-border MIF competition

In January 2019, the EC fined Mastercard €570.56 million for restricting multilateral interchange fee (MIF) competition between Member States, by requiring a bank acting for a retailer (the acquiring bank) in a cross-border transaction in the EEA to apply the interchange fee paid to the cardholder's bank (the issuing bank) where the retailer merchant was located (unless the acquirer had agreed a different fee bilaterally with the issuer).[173]

Mastercard's decision establishing such a rule was considered to be a decision of an association of undertakings.[174]

The EC found that Mastercard's cross-border acquiring rules meant that acquirers offering services in Member States where the domestic MIFs were lower were prevented from offering cheaper services based on the MIFs in their "home" countries to merchants based in Member States where the domestic MIFs were higher. Merchants were also prevented from benefiting from less expensive services from card acquirers in Member States where MIFs were lower.[175]

The EC considered Mastercard's decision to be a restriction by object, insofar as the rules created an obstacle to trade in the market for acquiring card payment transactions in the EEA.[176]

The EC found that the infringement lasted from February 2014 until December 2015.[177] This was based on the fact that in February 2014 the EC had issued a decision settling with Visa,[178] in which the EC had made clear its position on a similar restriction.[179] In December 2015, the EU Interchange Fee Regulation, Regulation (EU) 2015/751 capped interchange fees in the EEA at 0.20% of the transaction value for consumer debit cards and 0.30% for consumer credit cards for all transactions where the payer and payee's service providers are located in the EEA.[180]

[173] Case AT.40049—*Mastercard II* EC Press Release IP/19/582 and EC decision of 22 January 2019 (which is available on the EC's website). The EC's summary is in [2019] OJ C185/10, 29 May 2019.
[174] *Mastercard II* EC decision at [44].
[175] *Mastercard II* EC summary at [13] and EC decision at [25] and [54].
[176] *Mastercard II* EC decision at [62]–[70].
[177] *Mastercard II* EC summary at [11].
[178] *Visa MIF* COMP 39.398 [2014] OJ C147/7, 16 May 2014.
[179] *Mastercard II* EC decision at [48].
[180] *Mastercard II* EC decision at [51]–[53]. Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based transactions [2015] OJ L123/1, 19 May 2015.

The EC sought to use the value of sales of the acquiring Mastercard members as the sales reference for the fine. In other words, the merchant service charge (MSC) for the transaction. However, in the absence of data thereon, the EC took the MIF applied to the transactions affected by the infringement as a proxy for the MSC.[181]

The EC set the proportion of value of sales to be taken into account for the gravity of the infringement at 11%.

The EC applied a 50% fine increase for recidivism, insofar as in 2007 Mastercard had been the subject of a prohibition decision as regards intra-regional MIFs.[182]

Mastercard settled the case with the EC, with a formal offer of co-operation.[183] However, this was after the EC had sent an SO, so the fine reduction granted was only 10%.[184]

Finally, it may be of interest to note that the EC used a Data Room system for access to file in the case.[185]

Mastercard/Visa—inter-regional MIFs

It may be recalled that for some years the EC has been investigating Mastercard and Visa's Multilateral Interchange Fees (MIFs) which apply to "inter-regional" transactions, meaning between different regions of the world, the EEA being one such region.

In December 2018, the EC published proposed commitments from Mastercard and Visa, inviting third-party comments.[186] Then in April 2019, the EC accepted the commitments and made them binding.[187]

Card-based *inter-regional* transactions are concluded at merchants located in the EEA with consumer debit and credit cards issued by *an issuer located outside the EEA*. These include "card present transactions" (meaning in store, with the cardholder present) and "not card present transactions" (meaning online transactions).

As noted above, once a transaction is cleared, an interchange fee has to be paid by the acquiring bank to the issuing bank. This fee can either be agreed bilaterally or set by the card scheme operator. The acquiring bank charges the merchant a Merchant Service Charge (MSC) and part of it is used to pay the MIF. MIFs are treated by the acquiring banks as a cost and they represent a significant price component of the MSCs.[188]

The EC's approach in the two cases is the same.

The EC was concerned that inter-regional MIFs might increase prices for European retailers accepting payments from cards issued outside the EEA and, in turn, lead to higher prices for consumer goods and services in the EEA.

[181] *Mastercard II* EC decision at [100].
[182] *Mastercard II* EC decision at [109].
[183] *Mastercard II* EC decision at [10].
[184] *Mastercard II* EC decision at [10] and [118].
[185] *Mastercard II* EC decision at [7].
[186] With thanks to Marilena Nteve. Case AT.39398—*Visa MIF*, [2018] OJ C438/8, 5 December 2018; Case AT.40049—*Mastercard II*, [2018] OJ C438/11, 5 December 2018.
[187] Case AT.39398—*Visa MIF*, EC decision of 29 April 2019; and Case AT.40049—*Mastercard II (Mastercard)*, EC decision of 29 April 2019, EC Press Release IP/19/2311 of the same date. The EC's summaries of the cases were published in [2019] OJ C299/8 (*Visa*) and [2019] OJ C300/6, 5 September 2019 (*Mastercard*).
[188] *Visa* at [13]–[21] and *Mastercard* at [12]–[20].

The EC considered that Visa's and Mastercard's practices amounted to horizontal price-fixing, with Visa and Mastercard taking decisions as representatives of associations of undertakings. The EC found that the objective of both payment organisations was to restrict competition to their benefit and their members/licensees, especially the issuing banks (representing cardholders).[189]

The EC also considered that the conduct could have the effect of restricting competition in the market for acquiring card payments within the EEA. In the absence of bilateral agreements between the banks, acquiring banks have limited scope to reduce and differentiate their MSCs. The EC considered that the inter-regional MIFs could have a direct impact on prices by inflating MSCs.[190]

There were also a number of factors which the EC considered reinforced the EC's preliminary finding that these MIFs were restrictive by object and effect: the inter-system competition resulting in high MIFs, the lack of downward pressure by acquiring banks on MIFs and the merchant's lack of countervailing bargaining power to constrain the level of MIFs.

As regards acquiring banks, the EC took the preliminary view that they appear to be indifferent to the MIFs because MIFs apply equally to all acquiring banks, which allows them to pass on the common MIF cost to the merchants.

The EC also held that merchants' lack of countervailing bargaining power might be due to several factors, in particular the must-take nature of Visa and Mastercards.[191] Merchants were also obliged to honour all cards, so that if they felt they had to have "ordinary" cards, they were also obliged to accept higher fees on other cards or transactions.[192]

In November 2018, Visa and Mastercard offered the following commitments to address the EC's preliminary concerns.

First, they committed to reduce the current level of inter-regional MIFs, within six months following the date of the formal notification of the decision. In particular, they agreed to apply for "card present transactions" a cap of 0.2% and 0.3% of the value of the transaction for debit and credit cards respectively. They also agreed to apply caps for "card not present transactions" of 1.15% and 1.50% of the value of the transaction for debit and credit cards.

They undertook to notify acquiring banks and to request them to inform inter-regional merchants of this decision and the new caps; and to publish the applicable inter-regional MIFs on their respective websites.[193]

Second, Visa and Mastercard undertook a "non-circumvention obligation": in other words, to refrain from all practices which have the equivalent object or effect to inter-regional MIFs, including programmes or new rules transferring scheme or other fees from acquirers to issuers. However, this commitment could be combined with appropriate consumer protection measures concerning matters such as fraud, currency conversion, refunds and charge backs.[194]

Third, Visa and Mastercard would appoint Monitoring Trustees to monitor compliance with the commitments.[195]

[189] *Visa* at [34] and *Mastercard* at [33].
[190] *Visa* at [35] and *Mastercard* at [34].
[191] *Visa* at [36]–[37] and *Mastercard* at [35]–[36].
[192] *Visa* at [38] and *Mastercard* at [37].
[193] *Visa* at [48-]–[50] and *Mastercard* at [47]–[49].
[194] *Visa* at [51]–[52] and *Mastercard* at [50]–[51].
[195] *Visa* at [53] and *Mastercard* at [52].

The duration of the commitments would be five years and six months after the notification of the EC's decisions to the parties.[196]

The other main points of interest in these decisions are as follows:

First, even though the issuers and their cardholders are not based in the EEA, the EC is clear about the consumer impact in the EEA. The EC's point appears to be that MIFs impact merchants in the EEA, who pass on an anti-competitive element of the MIF to EEA-based transactions and whose costs are generally affected. In its Press Release, the EC stated that Visa and Mastercard would reduce the MIFs concerned "on average by around 40%".[197] The EC also considered that there was an effect on trade between Member States since the MIFs applied to the whole of the EEA.[198]

Second, the EC assessed the level of the MIF against the so-called "Merchant Indifference Test" (MIT). The idea here is to limit the cost essentially imposed on merchants so that Merchant Service Charges (MSCs), including such MIFs, do not exceed the transactional benefits that merchants derive from accepting payment cards.[199]

So, the level of the MIF should be such that a merchant is "indifferent" between accepting and handling card payments and alternative means of payment. To that end the EC based itself on a study of cash and cards in 2015, complemented by data specific to inter-regional transactions from Visa and Mastercard.[200]

Third, this assessment of the MIT led to different results for cash and online transactions because the alternative means of payment were different. Notably, for inter-regional "cash present" (instore) transactions cash was an alternative; whereas for inter-regional "cash not present" (online) transactions, the alternatives were payments funded via bank transfers from outside the EU Single Euro Payments Area (SEPA).[201] This meant that the "cash not present" (online) transaction caps were higher than those for "cash present" (instore) transactions.[202]

As explained in the decisions, the same point does not arise inside the SEPA, because cross-border payments charges are equalised to cash.[203]

Fourth, in assessing the level of a "MIT compliant MIF cap", the EC looked at the fact that different merchants and different sectors bear different costs for handling payment transactions. For example, the EC took into consideration that, in inter-regional transactions, the accommodation sector is more important than it is for domestic transactions, while the retail trade is relatively less important.[204]

Fifth, Brexit loomed. In other words, some third parties expressed concern as to the potential application of the commitments to consumers in the United Kingdom in the future.[205] The EC's response was to note that the relevant region for its decision was the EEA and the relevant activity was the acquiring of card-based payment transactions within the EEA.[206] The implication being that this

[196] *Visa* at [54] and *Mastercard* at [53].
[197] EC Press Release IP/19/2311, 29 April 2019.
[198] *Visa* at [45]–[46] and *Mastercard* at [44]–[45].
[199] *Visa* at [71]–[73] and *Mastercard* at [70]–[72].
[200] *Visa* at [78] and *Mastercard* at [77].
[201] *Visa* at [80] and *Mastercard* at [79].
[202] *Visa* at [85]–[86[and *Mastercard* at [84]–[85].
[203] *Visa* fn. 44 and *Mastercard* fn. 41.
[204] *Visa* at [82] and *Mastercard* at [81].
[205] *Visa* at [67] and *Mastercard* at [66].
[206] *Visa* at [98]–[99] and *Mastercard* at [97]–[98].

is an(other) issue to be clarified if Brexit occurs and the U.K. is then outside the EEA, with the EC's jurisdiction being for the EEA alone.

Sixth, the EC argued the case both on restriction "by object" and restriction "by effect", the essential practice challenged being treated as collective price setting/horizontal price-fixing.[207]

International Skating Union decision

Box 13

- **Article 101 TFEU—Other horizontal cases (2)**
  - *International Skating Union*: Competition and Arbitration
    - * EC published section in ISU decision concerning restrictions on ice speed skaters participating in events organised by third parties
    - * EC found ISU Appeal Arbitration rules reinforced the restrictions of competition on skaters
      - Court of Arbitration for Sport (CAS) and related appeal in Switzerland
      - Exclusive jurisdiction on appeals
      - Not obliged to apply EU competition law, nor was Swiss Federal Tribunal on appeal (and that court could not make a reference to the ECJ if in doubt)
    - * In practice, difficult, burdensome and costly for skaters to challenge enforcement of awards in EEA
      - ISU sanctions "self-enforcing"
      - Skaters required to waive right to interim relief

It will be recalled that in December 2017, the EC found that the International Skating Union's (ISU) rules (the Eligibility rules) preventing skaters that participated in its events from participating in events organised by third parties were in breach of art.101 TFEU.[208] This was summarised last year, based on the provisional version of the EC's decision.[209]

In September 2019, the EC published the final non-confidential version of the decision on its website. The key point is that the EC unredacted those parts of the decision explaining why the EC considered that the ISU's Appeal Arbitration rules reinforced the restriction of competition it had found in the Eligibility rules, insofar as the Court of Arbitration for Sport (CAS), based in Switzerland, had exclusive jurisdiction over appeals to ISU decisions to sanction a skater for participating in unauthorised events.[210]

The main points are as follows:

First, the EC considered that the Appeal Arbitration rules made it difficult for athletes to obtain effective judicial protection against ISU's "ineligibility decisions"

[207] *Visa* at [31]–[35] and *Mastercard* at [30]–[34].

[208] With thanks to Álvaro Mateo Alonso. Case AT.40208—*International Skating Union's Eligibility Rules*, EC Press Release IP/17/5184, 8 December 2017. In March 2018, the EC published the *provisional* non-confidential version of the decision on the EC's website.

[209] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2" [2019] I.C.C.L.R. 195, 205.

[210] *International Skating Union's Eligibility Rules* at [5], [269] and [277].

(i.e. the decisions ruling that a skater or official could not participate in ISU organised activities) violating art.101 TFEU.

Notably, ISU members could only appeal CAS arbitration awards to the Swiss Federal Tribunal on very limited grounds, which did not include a violation of EU or EEA competition law.[211] That Tribunal has also ruled that EU competition law does not pertain to international public policy in the sense of the Swiss legal order.

The EC therefore considered that the Tribunal was not likely to annul a CAS arbitral award that confirms an ISU ineligibility decision violating art.101 TFEU and, even if the Tribunal applied the EU competition rules, it could not refer a question for preliminary ruling to the ECJ in case of doubts about the interpretation of those rules.[212]

Second, the EC noted that, even if the enforcement of CAS awards could be challenged before EEA national courts on public policy grounds (including competition law), such challenges were, in practice, difficult and burdensome for athletes[213]:

- Sanctions imposed by the ISU (and sports governing bodies) were "self-enforcing": the ISU, in co-operation with its Members, simply could not allow the ineligible speed skater to participate in the ISU event; and not register her/him on the participants' list. The ISU therefore generally had not sought judicial assistance to enforce its ineligibility decisions.
- A national court could not annul an anti-competitive ineligibility decision by the ISU or a CAS arbitration award, based on violations of arts 101 or 102 TFEU. It could merely refuse the recognition or enforcement of the arbitral award.
- The procedural rules of the CAS purported to remove athletes' rights to interim relief in national courts in the EEA, by requiring them to expressly waive such rights.
- A national judgment relating to a CAS arbitration award would only cover the Member State in question and would not be automatically applicable in the whole EEA.
- In practice, there were only a few challenges to CAS awards before national courts. The EC considered that this reflected the fact that the practical hurdles discouraged athletes from seeking judicial redress against anti-competitive ineligibility decisions.

The EC concluded that, in practice, the Appeal Arbitration rules made it very burdensome and costly for athletes to try to block the enforcement of an arbitral award in every Member State in which they would like to participate in an ISU speed skating event. By the time a national court would decide, the event would have already taken place, since athletes were prevented from seeking interim relief.[214]

[211] *International Skating Union's Eligibility Rules* at [271].
[212] *International Skating Union's Eligibility Rules* at [271].
[213] *International Skating Union's Eligibility Rules* at [272]–[275], [284].
[214] *International Skating Union's Eligibility Rules* at [275].

Third, the EC found that athletes had no real choice but to accept the Appeals Arbitration rules and the exclusive competence of the CAS. Otherwise, they would not be able to compete in ISU speed skating events and carry out their profession.[215]

In sum, the EC concluded that the Appeal Arbitration rules shielded ISU's anti-competitive decisions issued under its Eligibility rules from the reach of EU/EEA competition rules. As a result, the rules reinforced the restriction on athletes' commercial freedom and foreclosed ISU's potential competitors.

Article 102 TFEU

Box 14

- **EC decisions—Article 102 TFEU—Energy**
  - *BEH*: €77 million fine
    - Foreclosure of entry to Bulgarian gas markets
    - Capacity hoarding on pipeline bringing gas from Romania to Bulgaria
    - Access denied to transmission network and gas storage facility
  - *TenneT*: Commitments
    - Limiting access to Danish German electricity interconnector to favour domestic wind production over cheap Scandinavian imports
    - Minimum guaranteed capacity access (save for limited exceptions)
    - Progressive increase in capacity as interconnector expanded

Energy

Bulgarian Energy Holding

It may be recalled that in July 2013, the EC opened proceedings for alleged infringement of art.102 TFEU by Bulgarian Energy Holding (BEH), together with its gas supply subsidiary Bulgargaz and its gas infrastructure subsidiary Bulgartransgaz.[216]

The EC expressed concerns that BEH and its subsidiaries might be hindering competitors from accessing key infrastructures in Bulgaria. In particular, the EC stated its concern that these companies might be preventing potential competitors from accessing the Bulgarian gas transmission network and gas storage facilities, by explicitly or tacitly refusing or delaying access to third parties. Moreover, the EC suspected that these companies might be preventing competitors from accessing the main gas import pipeline by reserving capacity that was consistently not used.

In March 2015, the EC sent an SO to BEH.[217]

In December 2018, the EC imposed a fine of €77 million on the BEH group for blocking competitors' access to key natural gas infrastructure in Bulgaria.[218] In its decision, the EC found that the BEH group held dominant positions in gas

[215] *International Skating Union's Eligibility Rules* at [276].
[216] With thanks to Alessia Varieschi. Case AT.39849—*BEH Gas*.
[217] *BEH Gas* EC Press Release IP/15/4651, 23 March 2015.
[218] *BEH Gas* EC Press Release IP/18/6846, 17 December 2018. The EC's summary is in [2019] OJ C121/8, 1 April 2019.

infrastructure markets and gas supply markets in Bulgaria. BEH and its subsidiaries were considered to have abused their dominant positions by foreclosing entry into the gas supply markets in Bulgaria:

- BEH used Bulgartransgaz's dominant position on gas infrastructure in Bulgaria to protect Bulgargaz's near monopolistic position on the supply of gas there.
- Bulgargaz also hoarded capacity on the only important pipeline bringing gas through Romania to Bulgaria so that it could not be used by potential competitors.

Between 2010 and 2015, the EC found that the BEH group blocked access to the domestic Bulgarian transmission network, the only gas storage facility in Bulgaria (the underground facility in Chiren), and the only import pipeline gas into Bulgaria which BEH fully booked. Without access to this essential facility, it was impossible for potential competitors to enter wholesale gas supply markets in Bulgaria.

TenneT

It may be recalled that in March 2018, the EC opened an investigation into the German high-voltage electricity operator TenneT, insofar as TenneT might have limited capacity in the electricity interconnector between Western Denmark and Germany, preventing Danish producers from selling electricity in Germany, contrary to art.102 TFEU.[219]

The EC preliminarily concluded that TenneT may have given priority access to its network to domestic electricity production, in particular during hours when domestic wind-based electricity production is high, by limiting access to electricity coming via the interconnector with West Denmark (DK1) (the DE-DK1 Interconnector).

Then, shortly afterwards, the EC invited comments on commitments offered by TenneT to increase capacity on the electricity interconnector (while not agreeing with the EC's preliminary assessment).[220]

Following the market test, TenneT modified the initial commitments and, in November 2018, submitted a revised proposal.

In December 2018, the EC accepted the revised commitments and made them legally binding.[221] In their final form:

First, TenneT will make available to the market the maximum capacity compatible with the safe operation of the interconnector between Western Denmark and Germany and, in any event, will guarantee a minimum hourly capacity of 1300 MW on the interconnector (around 75% of its technical capacity).

Second, this minimum guaranteed hourly capacity will be reached following an implementation phase of up to six months.

Third, following the planned expansion of the interconnector between Western Denmark and Germany in 2020 (the East Coast Line project) and 2022 (the West Coast Line project), TenneT will increase the guaranteed hourly capacity progressively to 2,625 MW in January 2026.

[219] With thanks to Alessia Varieschi. Case AT.40461—*TenneT* IP/18/2122, 19 March 2018.
[220] *TenneT* EC Press Release IP/18/2622, 27 March 2018.
[221] *TenneT* EC Press Release IP/18/6722, 7 December 2018. The EC's decision is available on the EC website.

Finally, TenneT can reduce the capacity offered below the minimum guaranteed level only in a very limited number of exceptional circumstances, where no other option is available to ensure the security of the high-voltage electricity network. The commitments will remain in force for nine years and a trustee will monitor TenneT's compliance with them.

Comment

The case is interesting partly because it shows how apparently legitimate policy objectives (here, to favour wind-based electricity) still have to be in line with the EU competition rules (here, allowing imports of competitive electricity from Scandinavia). This is partly, also, insofar as it builds on the *Svenska Kraftnät* case[222] in requiring structural changes to facilitate intra-EU competition.

It is also noteworthy that, in the EC's decision, political discussions to resolve the issue were not accepted as an adequate defence.

Digital

Box 15

- **EC decisions—art.102 TFEU—Digital/Hi-Tech**
  - *Google AdSense*: €1.49 **billion** fine
    - Restrictions on website users of Google's online search advertising intermediation platform
    - Exclusivity clauses (so websites could not place search adverts from competitors on their pages)
    - "Premium placement" clauses (most profitable spaces in search results reserved for Google-sourced adverts)
    - Google approval required for changes to display of rival adverts
  - *Google Android*: decision published
  - *Qualcomm*: €242 million fine
    - Predatory pricing
    - Below cost price supply of 3G baseband chipsets to Huawei and ZTE to eliminate Icera, which was becoming a viable competitor
  - (See also *Broadcom-Interim Measures* case related to exclusivity practices)

Google/AdSense

In March 2019, the EC fined Google €1.49 billion for an infringement of art.102 TFEU in relation to the brokering of adverts in online search services.[223]

Through its "AdSense for Search" service, Google provides adverts to owners of so-called "publisher" websites such as newspapers, blogs or travel sites. The idea is that when a user searches using the search function on the website, adverts are provided. Google acts as an intermediary, like an advertising broker, between

222 Case AT.39351—*Swedish Interconnectors* EC decision of 14 April 2010. See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009-2010: Part 2" [2011] I.C.C.L.R. 113, 128.

223 Case AT.40411—*Google Search (Adsense)* EC Press Release IP/19/1770, 20 March 2019.

advertisers and the website owners. So Google's "AdSense for Search" service operates as an "online search advertising intermediation platform".

The EC found that Google was dominant on the market for such services in the EEA with shares exceeding 88% for most of the period.

The EC found that Google prevented competitors such as Microsoft and Yahoo from accessing the websites concerned and thereby finding an entry point to try and compete with Google. Notably, the EC found that, starting in 2006 Google included exclusivity clauses in its contracts, so "publishers" could not place search adverts from competitors on their search results pages. Then, in March 2009, the EC held that Google had started to replace the exclusivity clauses with "Premium Placement" clauses, requiring publishers to reserve the most profitable space on their search results pages to Google-sourced adverts. Google also included clauses requiring publishers to seek written approval from Google before changing how rival adverts were displayed.

The EC found that Google's practices covered over half of the market for most of the infringement period, which lasted over 10 years (2006–2016).

The EC noted that the fine was 1.29% of Google's turnover in 2018.

Google Android decision

As summarised in last year's article, in July 2018 the EC fined Google €4.34 billion for infringing art.102 TFEU.[224] In September 2019, the EC published the non-confidential version of its decision.[225] It is 327 pages long.

It may be recalled that the EC found that, in order to deal with the effects of the market shift from desktop PC to mobile internet, Google bought the original developer of the Android Operating System (OS). Google then sought to consolidate its dominant position in advertising via Google Search, by making the Android OS widely accessible and Google Search and Chrome apps present in all mobile devices.

For this reason, Google offered the Android OS free and on a stand-alone basis (the Android Open Source Project, AOSP).

Google also offered Google apps for free, but only conditional on two agreements:

1. the Mobile Application Distribution Agreement (MADA) (through which, amongst other things, hardware manufacturers may not take action to fragment Android; and, if they install a Google app on their devices, they have to pre-install *all* mandatory Google apps)[226]; and
2. the Anti-Fragmentation Agreement (AFA) through which, among other things, hardware manufacturers commit not to supply devices based on different versions of Android, called "forks".[227]

The EC considered these conditions to be unlawful tying.

[224] With thanks to Alessia Varieschi, Marilena Nteve, Edouard Bruc and Georgia Tzifa. EC Press Release IP/18/4581, 18 July 2018. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2" [2019] I.C.C.L.R. 195, 212.

[225] Case AT.40099—*Google Android*, EC decision of 18 July 2018, available on the EC's website.

[226] *Google Android* at [160]–[173] and [180].

[227] *Google Android* at [157]–[160].

The EC also found that Google abusively had made payments subject to the exclusive pre-installation of Google Search, which no competitor would be able to match.[228]

Points of interest on the decision include the following:

First, the EC found that Google had a dominant position in three relevant markets: (1) licensable smart mobile operating systems (OSs); (2) app stores for the Android mobile OS; and (3) general internet search services.[229]

Second, one of the EC's most significant findings related to Google's dominant position in licensable smart mobile OSs was that the Android OS and Apple's iOS were not in the same relevant market.[230] The EC decided to exclude Apple from the relevant market because OEMs could not license Apple's iOS or its App Store. Therefore, for licensable OSs, Android was different from operating systems exclusively used by vertically integrated developers, such as Apple iOS or BlackBerry.

Third, the EC's conclusion that Google held a dominant position in the market of licensable smart mobile OSs was based, among other things, on the following:

- Google held a market share of more than 70% since 2011, reaching 96% in 2016.[231]
- Google Android also had a huge installed base.[232]
- The EC also noted that the barriers to entry in this market were high owing to network effects: the more people use a smart mobile OS, the more developers write apps for that system.
- Furthermore, significant resources were required to develop a successful licensable smart mobile OS.[233]

Fourth, the EC still investigated to what extent competition *for end-users* (downstream), in particular between Apple and Android devices, could indirectly constrain Google's market power for the licensing of Android to device manufacturers (upstream).

According to the EC, this was not the case for the following reasons:

- End-user purchasing decisions were influenced by a variety of factors (such as hardware features or device brand), independent from the mobile OS.[234]
- Apple devices were typically priced higher than Android devices which made them inaccessible for a large part of the Android device user base.[235]
- Android device users faced significant switching costs to Apple devices, such as losing their apps, data and contacts; and having to learn how to use a new OS.[236]

[228] *Google Android* at [192].
[229] *Google Android* at [439]–[440], [590] and [674].
[230] *Google Android* at [451] and [238]–[267].
[231] *Google Android* at [446].
[232] *Google Android* at [448].
[233] *Google Android* at [464]–[472].
[234] *Google Android* at [483]–[485].
[235] *Google Android* at [502].
[236] *Google Android* at [522-[524].

- Smartphone users showed considerable loyalty to Android on their next purchases; users do not generally switch "ecosystem".[237]
- Even if end-users were to switch from Android to Apple devices, this would have limited impact on Google's core business, because Google Search was set as the default search engine on Apple devices. Apple users were, therefore, likely to continue using Google Search for their queries.[238]

As a result, the EC concluded that competition for end-users did not sufficiently constrain Google's market power.[239]

Fifth, the EC found that Google had abusively tied Google Search and Google Chrome to the Google Play Store.[240] Through MADA, the licensing of Google Mobile Services (GMS), which the EC noted was a bundle of Google's apps, was conditioned on its whole pre-installation in the default screen of the mobile phones.

After showing Google's dominance in Google Search engines and the mobile web browsers respectively, the EC explained that Google Search and Google Chrome were separate products compared with the Google Play Store.[241] However, OEMs were unable to obtain Google Play Store on a stand-alone basis owing to their MADA obligations.[242]

The EC considered that this practice provided Google with a significant competitive advantage over its competitors and helped to maintain and strengthen its dominant position.[243] Notably, despite the possibility to obtain Android OS without the Google apps, Google Play Store constitutes a "must-have" that end-users expect to find when they buy an Android device.[244] Compared with alternative app stores, Google Play Store offers apps, such as YouTube, that are characterised by their network effect and for which there is no substitute.

The pre-installation of these apps also resulted in "status quo bias", as end-users tend to stick to the apps they find pre-installed.[245] Given end-users' inertia, the EC also rejected Google's argument that end-users were now familiar with the technology and could personalise their devices by downloading competing apps and setting them as a default.[246]

Moreover, the EC found that competitors could not offset Google's advantage through downloads or agreements with OEMs given their reduced incentives (e.g. duplication of apps, storage space, MADA obligations).[247]

Finally, the EC concluded that competitors' inability to offset Google's competitive advantage was consistent with the evolution of Google's market shares.[248]

[237] *Google Android* at [533]–[534].
[238] *Google Android* at [515].
[239] *Google Android* at [588].
[240] *Google Android* at [752]–[753].
[241] *Google Android* at [756]–[762].
[242] *Google Android* at [764]–[772].
[243] *Google Android* at [773].
[244] *Google Android* at [645]. See also EC Press Release IP/18/4581, 18 July 2018.
[245] *Google Android* at [781]–[782].
[246] *Google Android* at [802] and [915].
[247] *Google Android* at [823]–[834].
[248] *Google Android* at [835]–[851].

Sixth, Google argued that the tying was "objectively justified",[249] as it allowed Google (1) to monetise its investment, to offer a "consistent-out-of-the-box experience" to end-users "facilitating competition with Apple and other vertically integrated or closed mobile platforms"; and (2) to license the Google Play Store for free.[250]

The EC disagreed, given the revenues achieved with Google Play Store, search advertising and the valuable user data gathered via Android devices. It also emphasised that there were less restrictive ways to compete with the "look-and-feel" of vertically integrated competitors (e.g. design and interface guidelines) and that end-users would benefit from OEMs flexibility to assemble different apps from different providers.

Seventh, the EC found that Google abusively made licensing of the Google Play Store and the Google Search app subject to the acceptance of the anti-fragmentation obligations in the AFAs. According to the AFAs, hardware manufacturers committed not to develop or distribute incompatible versions of Android. This obligation covered not only GMS devices, but also the OEMs' entire device portfolio. Typically, an AFA would last 5 to 10 years, and all major players had signed one.[251]

The EC concluded that this practice was capable of restricting competition and addressed in detail the issue of Android forks.[252]

The EC stated that they constituted a credible competitive threat, since it would take less time and investment to develop them[253] than an entirely new smart mobile OS, and that many apps could run on Android forks with no or only minor adjustments. Further the EC found that there was demand from certain OEMs to commercialise them.[254] The EC also found that Google actively monitored compliance with the anti-fragmentation obligations and enforced the obligations.[255]

The EC therefore found that the AFA obligations hindered the development of Android forks, leaving forks developers with no available distribution channel through OEMs, or possibility of co-operating with app developers.[256]

Google argued that this practice was *justified* as necessary, among other things, to ensure interoperability, to prevent fragmentation detrimental to the Android ecosystem and free-riding on technical support, and to protect its reputation.[257]

The EC's response was that:

- The AFA obligations were not limited to interoperability, but went further than that.
- Google had significantly profited through the open-source licence of Android and could not argue that the anti-fragmentation obligations were necessary to minimise further competition from Android forks.[258]

[249] For the principle of objective justification in abuse cases, see *Google Android* decision at [735]–[736].
[250] *Google Android* at [993]–[1008].
[251] *Google Android* at [166]–[168] and [1077].
[252] *Google Android* at [1036].
[253] *Google Android* at [1040].
[254] *Google Android* at [1044].
[255] *Google Android* at [1050]–[1061].
[256] *Google Android* at [1076].
[257] *Google Android* at [1155].
[258] *Google Android* at [1159]–[1061].

- It was irrelevant that other smart mobile OS operators might have more restrictive models.[259]
- Google itself had contributed to the fragmentation of the Android ecosystem by releasing two separate versions of the OS, AOSP and Android OS.[260]
- Google's reputation was not at risk, since devices running Android forks were not allowed to use the "Android" logo or trade mark.[261]

Finally, it may be of interest to practitioners that the EC used a confidentiality ring with 26 Non-Disclosure Agreements and five data room procedures in the case.[262]

In order to comply with the EC decision, Google has decided to charge a licensing fee for its GMS, while also offering separate licences to the Google Search app and to Chrome. In addition, Google has updated its compatibility agreements, allowing OEMs to distribute non-compatible Android forks.[263] At the same time, Google has appealed.[264]

Other

AB InBev

Anheuser-Busch InBev NV/SA (AB InBev) is the world's biggest beer brewer. Its most popular beer in Belgium is Jupiler, which represents some 40% of the total Belgian beer market by sales volume. It is sold also in the Netherlands and France.

In May 2019, the EC adopted a decision imposing a fine of €200 million on AB InBev for abusing its dominant position on the Belgian beer market from February 2009 to October 2016.[265] The EC found that AB InBev pursued a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy Jupiler at lower prices in the Netherlands and to import it into Belgium. The overall objective of this conduct was to maintain higher prices in Belgium by limiting imports of less expensive Jupiler products from the Netherlands.

In order to achieve this, AB InBev:

- changed the packaging of some Jupiler products supplied in the Netherlands, notably removing French mandatory information from the labels, to make it harder to sell them in Belgium;
- limited the volumes of Jupiler beer supplied to wholesalers in the Netherlands, to restrict imports into Belgium;
- refused to sell certain leading beers which Belgian customers expect to see on a retailer's shelves to one retailer unless the latter agreed to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium; and

[259] *Google Android* at [1161].
[260] *Google Android* at [1164].
[261] *Google Android* at [1172]–[1174].
[262] *Google Android* at [20].
[263] See, Hiroshi Lockheimer, "Complying with the EC's Android decision", available at *https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/* [Accessed 7 February 2020].
[264] *Google and Alphabet v European Commission* (T-604/18) [2018] OJ C445/21, 10 December 2018.
[265] With thanks to Alessia Varieschi. EC Press Release IP/19/2488, 13 May 2019. Case AT.40134—*AB InBev Beer Trade Restrictions*, EC decision of 13 May 2019.

- made access to customer promotions for beer offered to a retailer in the Netherlands conditional upon the retailer not offering the same promotions to its customers in Belgium.

The fine imposed on AB InBev took into account the value of sales of Jupiler beer in Belgium and the Netherlands, the gravity of the infringement and its duration.

However, the EC granted AB InBev a 15% fine reduction for its co-operation with the EC during the investigation, which consisted in: (1) acknowledging the facts and the infringement; and (2) proposing a remedy. More specifically, AB InBev undertook that its existing and new products in Belgium, France and the Netherlands will include mandatory food information in both Dutch and French for the next five years.

Qualcomm

In July 2019, the EC fined Qualcomm €242 million for abusing its dominant position in 3G baseband chipsets through predatory pricing.[266] Baseband chipsets enable smartphones and tablets to connect to cellular networks and are used in both voice and data transmission. The case concerns chipsets complying with the "3G" standard, the Universal Mobile Telecommunications System (UMTS).

The EC considered that Qualcomm held a dominant position in the global market for such chipsets between 2009 and 2011, based on its market share of some 60% and high barriers to enter the market.

The EC found that between mid-2009 and mid-2011 Qualcomm sold certain quantities of three of its UMTS chipsets below cost to Huawei and ZTE, with the intention to eliminate Icera, its main rival at the time. The EC considered that this conduct took place as Icera was a viable supplier of UMTS chipsets providing high data rate performance, i.e. posing a growing threat to Qualcomm's chipset business.

The EC's case was based on a price-cost test for the three chipsets concerned; and evidence showing Qualcomm's aim to prevent Icera from expanding and building market presence. The EC concluded that Qualcomm's conduct had a significant detrimental impact on competition.

The fine represented 1.27% of Qualcomm's turnover in 2018.

For Qualcomm's challenge to the EC's RFI after the SO in this case, see the procedural issue part of the Court Appeals section above.

Policy and Reports

Box 16

- **Policy**
  - Digital Policy
    - EC and other reports, *Shaping competition in the digital era*
  - Related case developments
    - *Amazon*: use of marketplace data

[266] Case AT.39711—*Qualcomm* EC Press Release IP/19/4350, 18 July 2019.

- * *Broadcom*: a revival of interim measures
- – Will there be more competition related regulation?
  - * Trend? (e.g. Geoblocking Regulation)
- – ECN overview of competition law and pharma cases
- – Growth in NCA joint bidding cases
- – Margrete Vestager reappointment: Competition Commissioner and Executive Vice-President Designate with the mandate for making Europe "fit for the Digital Age"

Digital policy

Competition Policy in the Digital Economy

In January 2019, the EC organised a day-long conference called *Shaping competition policy in the era of digitisation*. The presentations can be found on the website of DG Competition.[267] It was a wide-ranging day with contributions on: (1) the role of data in competition policy and regulation; (2) digital platforms' market power; (3) competing with data; and (4) preserving digital innovation through competition policy.

Before the conference, the EC had organised a public consultation on the same topic, the results of which are also available on the EC's website. There are some 120 contributions.

The Director-General for Competition, Johannes Laitenberger, summed up the conference with various themes: notably (1) "that we either shape digitisation or it will shape us"; (2) comments about how competition law "can capture changing realities, and new phenomena"; and (3) that issues were raised "that require specific normative choices and whose assessment must be based on broad normative choices".[268]

Some were critical because there were no speakers from the leading digital companies and online platforms. However, some had offered comments in the consultation (e.g. Facebook).

In general, there was a sense that this was all a preamble to the EU considering further regulatory action in the next Commission's mandate.

Then the EC published a report by three special advisers: *Competition policy for the digital era*, by J. Crémer, Y.A. de Montoye and H. Schweitzer.[269] It is a wide-ranging conceptual study of some 127 pages. It outlines and discusses: (1) the key characteristics of digital markets; (2) what the authors think the goals and methodologies of competition law should be in the digital era; (3) the application of competition rules to platforms and "ecosystems" of services[270]; (4) data (where the authors discuss the nature and types of data concerned; and issues related to data access); and (5) comments on whether European merger control needs updating (in terms of jurisdiction and theories of harm).

[267] EC, "Shaping Competition Policy in the Era of Digitisation", available at: *https://ec.europa.eu/competition/information/digitisation_2018/conference_en.html* [Accessed 7 February 2020].

[268] EC, "Closing Remarks at the 'Shaping Competition Policy in the Era of Digitisation' Conference" (17 January 2019), available at: *https://ec.europa.eu/competition/speeches/text/sp2019_01_en.pdf* [Accessed 7 February 2020].

[269] EC, "Competition Policy for the Digital Era" (2019), available at: *https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf* [Accessed 7 February 2020].

[270] EC, "Competition Policy for the Digital Era" (2019), pp.32–35.

There are many themes in the report. Notably: (1) how much digital competition is "between ecosystems", even if there continue to be markets for more specific products or systems; (2) how dominant platforms, in particular marketplaces, may act as regulators, setting up the rules for how their users interact; and (3) the complementarity of competition enforcement with other regulatory developments.

Since then, the impression is that the EC, like other competition regulators and legislatures creating their own reports,[271] is trying to absorb all this and see how to translate it into future fact-finding, enforcement and regulatory action.

Related new cases

In the context of recent developments on digital/platform policy and enforcement, two new cases are of interest.

Amazon investigation

In September 2018, the EC launched a preliminary investigation into Amazon's use of data coming from merchants using its marketplace. The investigation followed concerns raised by retailers in the course of the e-commerce sector inquiry in 2017.[272]

In July 2019, the EC then decided to open an antitrust investigation into Amazon's practices.[273] In parallel, the competition authorities in Germany, Austria and Luxembourg concluded their antitrust proceedings against Amazon. More specifically, Amazon agreed to modify certain contractual clauses related to liability, termination and blocking of accounts, product information, product reviews, etc.[274]

The issue, as explained by the EC, is that

> "Amazon has a dual role as a platform: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers".

When Amazon acts as a "host", it continuously collects data about the activity on its platform. The EC's preliminary view is that this includes commercially sensitive data about sellers, their products and transactions on the marketplace.

The EC's investigation is to focus (1) on the standard agreements between Amazon and marketplace sellers which allow Amazon to analyse such data; and (2) potential use of competitively sensitive marketplace seller information in the selection of winners of the so-called "Buy Box". The latter is displayed prominently on the Amazon platform and allows customers to add items from a specific retailer

[271] For example, Digital Competition Expert Panel, "Unlocking Digital Competition" (March 2019), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf[*Accessed 7 February 2020*]*.

[272] With thanks to Marilena Nteve. EC, "Report from the EC to the Council and the European Parliament—Final report on the E-commerce Sector Inquiry" (2017), COM(2017) 229 final, available at: *https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf* [Accessed 7 February 2020].

[273] Case AT.40462—*Amazon Marketplace* EC Press Release IP/19/4291, 17 July 2019.

[274] For more information, see *Bundeskartellamt* Press Release (17 July 2019) available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17_07_2019_Amazon.pdf?__blob=publicationFile&v=4* and Federal Competition Authority, "BWB informs: Amazon modifies its Terms and Conditions" (17 July 2019), available at: *https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/* [Both accessed 7 February 2020].

directly into their shopping carts. The EC states that its investigation is under arts 101 and 102 TFEU.

Broadcom—interim measures

In October 2018, the EC opened a preliminary investigation into the US chipmaker Broadcom.

In June 2019, the EC then decided to launch a formal antitrust investigation to assess whether Broadcom was restricting competition through exclusivity practices.[275] In parallel, it issued an SO with the purpose of imposing interim measures. A decision taking interim measures against Broadcom was then adopted in October 2019, ordering the company to cease applying certain provisions contained in agreements with six of its main customers.[276]

The EC stated that Broadcom is the world's largest producer of integrated circuits for wired communication devices, including markets for "systems-on-a-chip", "front-end chips", Wi-Fi chipsets and central office/head end equipment. "Systems-on-a-chip" are chipsets combining electronic circuits that constitute the "brain" of a set-top box or modem. They are important components essential to bring TV signals and connectivity to consumers' premises.

The EC states that it is investigating whether Broadcom is pursuing exclusionary strategies about these products. The practices may include: (1) setting exclusive purchasing obligations; (2) granting rebates or other advantages conditioned on exclusivity or minimum purchase requirements; (3) product bundling; (4) abusive IP-related strategies; and (5) deliberately degrading interoperability between Broadcom products and other products.

Article 8 of Reg. 1/2003 sets out two conditions for the imposition of interim measures: (1) there is a prima facie infringement of EU competition rules; and (2) there is an urgent need to intervene owing to the risk of serious and irreparable damage to competition if the infringement continues. In addition, the measures taken should be appropriate and proportionate to address the antitrust concerns.

In this case, the EC considered that the two conditions were met.

First, the EC found that Broadcom is prima facie dominant in the markets for systems-on-a-chip for: (1) TV set-top boxes; (2) fibre modems; and (3) xDSL modems.

Second, the EC found that Broadcom is prima facie infringing the competition rules. In particular, Broadcom has entered into exclusivity arrangements with six manufacturers of TV set-top boxes and modems. Notably, the EC states that Broadcom has included:

- clauses containing exclusive or quasi-exclusive purchasing obligations and commercial advantages, such as rebates and other non-price related advantages, that are conditional on the customer buying systems-on-a-chip for TV set-top boxes, fibre modems and xDSL modems exclusively or quasi-exclusively; and
- clauses granting customers for systems-on-a-chip for TV set-top boxes, fibre modems and xDSL modems commercial advantages

[275] With thanks to Marilena Nteve. EC Press Release IP/19/3410, 26 June 2019.
[276] Case AT.40608—*Broadcom* EC Press Release IP/19/6109, 16 October 2019.

which are conditional on the customer buying systems-on-a-chip for cable modems exclusively or quasi-exclusively from Broadcom.

The first practice would be to strengthen Broadcom's prima facie dominance on these markets. The second practice would be to leverage that prima facie dominance into the market for systems-on-a-chip for cable modems.

Third, as regards the need for urgent action, the EC noted that Broadcom's conduct would likely affect a number of tenders that would be launched in the future, also in relation to the introduction of the WiFi 6 standard for modems and TV set-top boxes. This would be likely to lead to competitors being unable to compete with Broadcom and could lead to serious and irreparable harm in the form of their exit or marginalisation.

The interim measures took the form of an order to cease to apply the anti-competitive provisions and to refrain from equivalent provisions or practices within 30 days. The interim measures were to apply for the earlier of three years or the adoption of the EC's final decision on the case, or closure of its investigation.

Comment

This is interesting, above all, since many have been saying for years that the EC should be more willing to order interim measures.

It will be recalled that the ECJ confirmed the EC's first case, *Camera Care*, in 1980[277] and the last EC case, *IMS Health*, was in 2001.[278] Since then, many understand the EC to have been reluctant to act because of the additional demands and risks of the interim measures procedure and appeals, on top of the ordinary procedure, whereas would-be applicants/complainants argue that it is the only way to protect competition, pending the final outcome of the investigation.

This is all the more relevant now, since many are now saying that interim measures are particularly important in fast-moving technological markets, if irreparable harm is to be avoided.

Broadcom has announced its intention to appeal against the decision on interim measures, while complying with the EC's order.

Competition and regulation

At a time when the interaction of EU competition law and other policies is a hot topic, notably in terms of merger control and industrial policy; sustainability and competition law[279]; and competition and the digital economy,[280] it may be of interest simply to recall that generally this is not new.

Clearly, many EU regulations interact with competition, directly or indirectly. A specific example this year is in the EC *Mastercard* decision, where the end date of the infringement was the EU Regulation on Interchange Fees.[281] There are many other examples in EU telecoms, energy and financial services law.

[277] *Camera Care v Commission* (792/79 R) EU:C:1980:18; [1980] 1 C.M.L.R. 334, Order of 17 January 1980.
[278] COMP D3/38.044, *NDC Health/IMS Health: Interim Measures* [2002] OJ L59/18, 28 February 2002.
[279] See the section on review of the Horizontal Restraints Block Exemptions in John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018–2019: Part 1" [2020] I.C.C.L.R. 109.
[280] See, e.g., the Geoblocking Regulation, Regulation 2018/302, [2018] OJ L601/1, 2 March 2018.
[281] See the summary of this case above.

What is new, however, is the degree of disruptive innovation which is occurring now through the digital economy, which is provoking much discussion over whether more specific regulation is required for the issues raised, and, if so, where competition law enforcement would fit in that new regulatory landscape.

Report on Competition Enforcement and the Pharmaceutical Sector

In January 2019, the EC published a report by the EC to the EU Council and the European Parliament on *Competition Enforcement in the Pharmaceutical Sector from 2009 to 2017*.[282] The aim of the report is to show how competition law enforcement has contributed to more "affordable and innovative medicines".

The report was prepared by the EC in co-operation with NCAs of the 28 Member States. It is a very useful summary of ECN practice and cases. A related table including links to cases is on the EC's website.

ECN members have taken some 29 decisions against unlawful practices between 2009 and 2017, with more than 100 market monitoring or advocacy actions. Notably, there is discussion of: (1) cases on pay-for-delay (at EU level and in the UK); (2) cases on disparagement practices to discourage the uptake of newly launched generic products (in France); (3) cases on excessive pricing (in Italy, the UK and Denmark); (4) co-ordination/bid-rigging cases; and (5) cases involving denying pharmaceutical suppliers' access to either customers or production inputs. There are also summaries on merger cases, notably on innovation aspects.

Joint bidding

Joint bidding is also an important issue to watch, for two reasons. First, because there appear to be many recent cases at NCA level, not just about classic cartel-like co-ordination, but also about whether companies can lawfully co-operate in order to bid for projects. Second, because of a drive into the topic through the OECD[283] and competition authorities. For example, there are recent guidelines from the Danish Competition Authority.[284]

Commissioner Vestager's agenda

In September 2019, Margrethe Vestager was again proposed, subject to EP approval, as the European Commissioner for Competition, a post which she has held since November 2014. Ms Vestager was also proposed as Executive Vice-President, with the mandate of making "Europe fit for the Digital Age". The decision to entrust Ms Vestager with a double role is controversial. However, it

[282] With thanks to Lukas Šimas. EC Press Release IP/19/741, 28 January 2019. The report is available at: *https://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/index.html* [Accessed 7 February 2020].

[283] OECD, "Fighting Bid Rigging in Public Procurement", available at: *http://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm* [Accessed 7 February 2020].

[284] Danish Competition and Consumer Authority, "Joint Bidding Under Competition Law—Guidelines" (2019), available at: *https://www.en.kfst.dk/media/53640/joint-bidding-guidelines-2019.pdf* [Accessed 7 February 2020].

appears to reflect the close relationship between some competition enforcement issues and regulatory policy in digital markets.[285]

The main responsibilities of Commissioner Vestager, as explained in the mandate letter of Ursula von der Leyen (the new EC President) are the following:

As regards *competition*, the Commissioner's task is to focus on boosting competition enforcement in all sectors, shortening the time taken for investigations and reinforcing co-operation among NCAs and between them and the EC.

Considering the fast-paced economic changes brought about by digitalisation, Commissioner Vestager is also given the task of examining how competition rules should fit into the digital age. This will concern the antitrust regulations that will expire during the mandate, as well as an evaluation and review of merger control and State aid rules. Commissioner Vestager is expected to launch sector inquiries into new and emerging markets.

With regard to Ms Vestager's *digital responsibilities*, her main task as Executive Vice-President is to ensure that Europe makes the most of the potential of the digital age. Ms Vestager is responsible for strengthening EU's industry and innovation capacity, as well as its technological sovereignty and strategic autonomy in some critical technology areas. Notably, considering the emergence of digital technologies, she is asked to co-ordinate work on a European approach to artificial intelligence, including its human and ethical implications:

> "This should also look at how we can use and share non-personalised big data to develop new technologies and business models that create wealth for our societies and our businesses."[286]

She is to co-lead the work on a new long-term strategy for Europe's industrial future. Ms Vestager is also tasked with co-ordinating work on a new Digital Services Act. The aim is to upgrade liability and safety rules for online platforms, services and products,

> "making sure that the way companies collect, store and use data does not harm the fundamental values of our society".

Finally, the Executive Vice-President will co-ordinate work on digital taxation to find consensus at an international level by the end of 2020, or to propose a fair European tax.

As when previously appointed, Ms Vestager says that she does not see the competition portfolio as a "lonely portfolio".[287] Competition enforcement alone will not suffice to face the challenges that the digital transformation creates for Europe.

All this confirms impressions already given in speeches by Commissioner Vestager and Mr Laitenberger when Director-General that more digital enforcement and regulation is coming.

[285] With thanks to Alessia Varieschi. EC, "Answers to the European Parliament Questionnaire to the Commissioner-designate Margrethe Vestager—Competition", available at: *https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_ep_hearings/vestager-reply_en.pdf* [Accessed 7 February 2020].

[286] See Ms von der Leyen's Mission letter to Margrethe Vestager of 10 September 2019, available at: *https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margrethe-vestager_2019_en.pdf* [Accessed 7 February 2020].

[287] EC, "Answers to the European Parliament Questionnaire to the Commissioner-designate Margrethe Vestager—Competition".

It will be interesting to see how the Executive Vice-President-Designate plans to deal with safeguarding the independence and objectivity of the competition decision-making role in digital cases, while being involved in regulating the same sector.