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BY VASSILIS KARAGIANNIS, DR. JURA, PARTNER,
LITO DOKOPOULOU, LL.M, ASSOCIATE



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Editorial

Antitrust and Patent Settlements in pharma sector: pay for delay restricts competition

Admittedly agreements by which an originator pays another drug manufacturer for cancelling or more often for delaying the entrance of its generic product in the market are restrictive. Such agreements distort competition to the detriment of social security systems and of consumers (patients). However, the Court had the opportunity to clarify in the past that not all patent agreements are restrictive as they might in some cases be generally justified (e.g., patent settlements resolving longstanding patent litigation). Consequently, patent settlements cannot be considered as a priori restrictions “by object” (See CJ, Generics (UK) and Others, C-307/18).

The Court by a series of judgments of the same day (25.3.2021) further clarifies the application of the “restriction by object” approach in the cases of pharma patent settlements. It reiterates its position that patent settlements are not in general per se restrictive. However, it suggests a more rigorous test by stating that “a ‘restriction by object’ must be adopted where it is plain from the analysis of the settlement agreement concerned that the transfers of value provided for by that settlement agreement cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits”. This rebuttable presumption is similar to the reasoning applied by the Court in its notorious judgment Wood pulp II (C-89/85, paragraphs 61-72) concerning the question whether a concerted practice can be inferred only from a parallel conduct in the market. According to said approach the Commission is entitled to establish sufficiently the infringement based on an objective economic analysis of the agreement in question, but the incriminated parties have the possibility to adduce evidence of existence of another plausible explanation other than the willingness not to engage in competition on the merits by sharing the relevant profits.

You can access below, the relevant judgements of the Court:

C-614/16 P - Merck v Commission

To read the full judgement, click [here](#).

C-611/16 P - Xellia Pharmaceuticals and Alpharma v Commission

To read the full judgement, click [here](#).

C-601/16 P - Arrow Group and Arrow Generics v Commission

To read the full judgement click [here](#).

C-591/16 P - Lundbeck v Commission

To read the full judgement click [here](#).

C-588/16 P - Generics (UK) v Commission

To read the full judgement click [here](#).

C-586/16 P - Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission

To read the full judgement, click [here](#).

Antitrust

C-440/19 P -Pometon v Commission

In this case, the Court annulled the judgement of the General Court on the grounds of breach of the principle of equal treatment in the calculation of fine. It is characteristic that the European Court of Justice issued its first ruling on the use of so-called 'hybrid settlement' procedures in cases in which settlement decisions do not cover all parties to an infringement.

To read the full judgement click [here](#).

C-694/19 P - Italmobiliare and Others v Commission

The ECJ found a cartel in the retail food packaging sector, rejecting Italmobiliare's argument that it should benefit from immunity as regards infringements in one geographic market and a greater fine reduction with respect to infringements in two others.

To read the full judgement, click [here](#).

Commission sends Statement of Objections to Apple on App Store rules for music streaming providers

The Statement of Objections concerns the application of these rules to all music streaming apps, which compete with Apple's music streaming app "Apple Music" in the European Economic Area (EEA). It follows-up on a complaint by Spotify. The European Commission has informed Apple of its preliminary view that it distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store. The Commission takes issue with the mandatory use of Apple's own in-app purchase mechanism imposed on music streaming app developers to distribute their apps via Apple's App Store. The Commission is also concerned that Apple applies certain restrictions on app developers preventing them from informing iPhone and iPad users of alternative, cheaper purchasing possibilities.

To read the full press release, click [here](#). See also related [Editorial](#) regarding Commission's combat against techno giants of C&RR Issue 2020/5.

Commission fines investment banks € 28 million for participating in SSA bonds trading cartel

The European Commission has fined Bank of America Merrill Lynch, Crédit Agricole, and Credit Suisse a total of € 28 494 000 for breaching EU antitrust rules. Deutsche Bank was not fined as it revealed the existence of the cartel to the Commission. The four banks took part in a cartel in the secondary trading market within the European Economic Area of Supra-sovereign, Sovereign and Agency (SSA) bonds denominated in US Dollars.

To read the full press release, click [here](#).

HCC's publication of final report on sectoral inquiry into basic consumer goods

The HCC published its Final (market study) Report in the field of production, distribution and marketing of basic consumer goods and in particular food products, as well as cleaning and personal hygiene products.

To read the full press release of HCC, click [here](#) and for the executive summary of the report, [here](#).

HCC's nationwide survey in the context of the Sector Inquiry on e-commerce

The HCC in the context of its on-going Sector Inquiry on e-commerce under article 40 of the Greek Competition Act (Law 3959/2011), invites consumers to participate in its nationwide survey on e-commerce practices in Greece.

The e-survey is available at HCC website (in Greek), [here](#).

To participate in the e-survey click [here](#) and to read the full press release of HCC [here](#).

HCC's Market Investigation in the Construction Sector

On January, 8th 2021, the HCC has decided ex officio to launch a market investigation in the construction sector and on April, 7th 2021, the HCC has issued its first interim report. According to the interim report, in the construction sector and in particular in the market for public works, there is a lack of effective competition, which cannot be remedied with the application of Articles 1, 2 and 5-10 Law 3959/2011.

To read the full press release of HCC, click [here](#) and for the interim report, [here](#).

Statement of Objections on the compliance of the company "ARGOS SA Press Distribution Agency" with condition II.3 of the HCC Decision no. 687/2019, pursuant to article 25 par. 5 of Greek Law 3959/2011.

To read the full press release of HCC, click [here](#).



Merger

Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control

The European Commission has published today a Staff Working Document that summarises the findings of the evaluation of procedural and jurisdictional aspects of EU merger control. Following the results of the evaluation, the Commission decided to adopt a communication providing guidance on the application of the referral mechanism between Member States and the Commission set out in Article 22 of the Merger Regulation, and launch an impact assessment on exploring policy options for further targeting and simplification of merger procedures.

To read the full press release, click [here](#).

Commission clears acquisition of GrandVision by EssilorLuxottica, subject to conditions

To read the full press release, click [here](#).

Commission clears acquisition of Eaton Hydraulics by Danfoss, subject to conditions

To read the full press release, click [here](#).

Commission approves acquisition of certain Suez waste management companies by the Schwarz Group, subject to conditions

The approval is conditional on the divestiture of Suez's lightweight packaging ("LWP") sorting business in the Netherlands.

To read the full press release, click [here](#).

Commission opens in-depth investigation into proposed acquisition of Trimo by Kingspan

The Commission is concerned that the proposed transaction may reduce competition and lead to price increases in the market for mineral fibre sandwich panels in a number of Member States and the UK.

To read the full press release, click [here](#).

HCC's Assessment of the effectiveness of ATTICA's commitments

The Commitment Decision No. 658/2018 approved the merger concerning the acquisition of sole control by ATTICA of Hellenic Seaways, subject to commitments, in accordance with article 8 of Law 3959/2011, as in force. The HCC convened to assess the conditions of competition and the effectiveness of the commitments undertaken by ATTICA.

To read the full press release of HCC, click [here](#) and [here](#).

Assessment by the HCC of specific commitment terms proposed by "DELTA SA" and "MEVGAL SA" so as to address competition concerns according to 650/2017 Decision of HCC in the market of fresh cow milk

To read the full press release of HCC, click [here](#).

Clearance of proposed acquisition by «OPAP SA» of sole control over the Greek and Cypriot activities regarding online games of «Kaizen Gaming International Ltd»

To read the full press release of HCC, click [here](#).

Clearance of the proposed acquisition by «BELTERRA INVESTMENTS LIMITED» of sole control over «MELBERY INVESTMENTS LIMITED»

To read the full press release of HCC, click [here](#).

Clearance of the concentration concerning the acquisition of joint control by "ALPHA SATELLITE TELEVISION SA" and "NEW TELEVISION SA" over the company "GREEN PIXEL PRODUCTIONS SA".

To read the full press release of HCC, click [here](#).

Clearance of the concentration, concerning the acquisition by "Assicurazioni Generali - Societa per Azioni" regarding the acquisition of sole control over "Axa Insurance S.A".

To read the full press release of HCC, click [here](#).

State Aid

Joined Cases C-434/19 and C-435/19- Poste Italiane Riscossione Sicilia SpA

In these joined cases, the Court ruled that a measure requiring agents responsible for collecting the Italian municipal real estate tax ("ICI") to hold a current account with Poste Italiane (to enable taxpayers to pay that tax) and to pay a fee for the related management qualifies as State aid if the referring court, i.e. in this case, the Supreme Court, ascertains that the requirements under Art. 107 TFEU, as clarified by the Court of Justice in its judgment, have been met.

To read the full judgement, click [here](#).

C-596/19 P - Commission v Hungary and C-562/19 P - Commission v Poland

The Polish tax on the retail sector and the Hungarian tax on advertisements do not infringe EU law on State aid. The Court of Justice accordingly dismissed the Commission's appeals and upheld the judgments of the General Court.

To read the full judgements, click [here](#) and [here](#).

C-425/19 P - Commission v Italy and Others

The Court of Justice dismissed the appeal brought by the Commission against the judgment of the General Court concerning the measures adopted by a consortium of Italian banks to support one of its members. It held that the General Court rightly found that those measures do not constitute State aid because they are not imputable to the Italian State.

To read the full judgement, click [here](#).

C-362/19 P - Commission v Fútbol Club Barcelona

The Court of Justice set aside the judgment of the General Court by which the Commission's decision classifying as State aid the tax scheme of four Spanish professional football clubs had been annulled. The action which had been brought by Fútbol Club Barcelona against that decision was examined in the substance by the Court and definitively rejected.

To read the full Judgement click [here](#).

C-890/19 P - Fortischem v Commission

This case referred to an appeal against the General Court's judgment in Case T-121/15 which dismissed an action for annulment of the Commission's decision of 15 October 2014 which found, amongst other things, that a Slovakian chemical company (NCHZ), the predecessor company of Fortischem, benefitted from unlawful State aid during its bankruptcy procedure (Case SA.33797). The appeal was dismissed.

To read the full judgement, click [here](#).

C-847/19 P - Achemos Grupė and Achema v Commission

This case referred to appeal of the General Court's judgment in Case T-417/16 which dismissed an action for the annulment of the European Commission decision of 20 November 2013 finding that aid granted for the construction of the Lithuanian LNG Terminal in the Klaipėda Seaport was compatible with the State aid rules (Case SA.36740). The appeal was dismissed.

To read the full judgement, click [here](#).

C-704/19 - Commission v Spain (TNT en Castille-La Manche)

This case referred to an action brought by the Commission against Spain, claiming that Spain failed, during the period prescribed to it by the Commission, to take measures to recover aid declared incompatible with the internal market (The illegal aid related to State aid granted to Telecom Castilla-La Mancha SA). The Court of Justice issued its judgment in which it upheld the Commission's action for failure to fulfil obligations, finding that, on the expiry of the time-limit set by the Commission, Spain had not taken the measures necessary to recover the illegal aid. The Court of Justice also found that Spain failed to inform the Commission of the measures taken within the prescribed period following the notification of the Commission's decision.

To read the full judgement, click [here](#).

Commission adopts revised Regional Aid Guidelines

The European Commission has adopted revised EU guidelines on regional State aid (the "Regional Aid Guidelines"), setting out the rules under which Member States can grant State aid to companies to support the economic development of disadvantaged areas in the EU, while ensuring a level playing field between Member States. The revised Guidelines will enter into force on 1 January 2022.

To read the full press release, click [here](#).

Commission refers United Kingdom to European Court for failure to fully recover illegal tax exemption aid of up to around €100 million in Gibraltar

On 19 December 2018, the Commission adopted a Decision regarding Gibraltar's corporate tax exemption regime for passive interest and royalties in Gibraltar, declaring those measures unlawful and incompatible with State aid rules. The European Commission has decided to refer the United Kingdom to the Court of Justice of the European Union for failing to fully recover illegal State aid of up to around €100 million.

To read the full press release, click [here](#).

Commission approves French support measures for fisheries sector in the context of Brexit

The European Commission has approved, under EU State aid rules, three French schemes worth €100 million in total, to support the fisheries sector affected by the withdrawal of the United Kingdom from the EU and the consequent quota share reductions foreseen in the provisions of the EU-UK Trade and Cooperation Agreement (TCA). These are the first support measures approved by the Commission in the context of inter-institutional discussions on the proposed Brexit Adjustment Reserve ('BAR'). To read the full press release, click [here](#).

Commission approves €2.5 million compensation to Slovenian Press Agency STA for its public service

To read the full press release, click [here](#).

Commission approves prolongation of market conform asset protection scheme for banks in Greece

The existing asset protection scheme (known by the name of 'Hercules'), was approved by the Commission in October 2019, for an initial duration of 18 months. Greece notified the Commission of its plan to prolong the scheme for another 18 months, until October 2022. The Commission found that, under the prolonged scheme, the Greek State will continue to be remunerated in line with market conditions for the risk it will assume by granting a guarantee on the senior tranche of securitised non-performing loans.

To read the full press release, click [here](#).

Commission invites interested parties to provide comments on proposed revision of State aid Framework for research, development and innovation

The European Commission has launched today a **public consultation** inviting all interested parties to comment on a proposed targeted revision of the State aid Framework for research, development and innovation (the “RDI Framework”). Interested parties can respond to the consultation for eight weeks, until 3 June 2021.

To read the full press release, click [here](#).

Energy

CT-300/19 - Achema and Lifosa v Commission

The case concerned Commission decision SA.45765 that had authorised a Lithuanian scheme that supported producers of electricity from RES. Achema contested the Commission decision on the grounds that the Commission should have had serious doubts about the compatibility of the scheme and should have opened the formal investigation procedure. The General Court in judgment examined one such system of levies on electricity consumers and concluded that it was likely to infringe fundamental provisions of the EU Treaty. Consequently, the aid scheme could not be considered compatible with the internal market.

To read the full judgement of the General Court, click [here](#).

Commission opens investigation into PPC's behaviour in the Greek wholesale electricity market

The Commission is concerned that PPC may have restricted competition in the Greek wholesale electricity markets with its bidding behaviour. In particular, in light of PPC's position both at wholesale and retail levels, it may have adopted predatory bidding strategies hindering the ability of PPC rivals to compete in the wholesale and related electricity markets. If proven, this behaviour may constitute an exclusionary predatory practice, which is in breach of EU antitrust rules.

To read the full press release, click [here](#).

Commission opens investigation into possible anticompetitive behaviour by the power exchange EPEX Spot

The European Commission has opened a formal investigation to assess whether the power exchange EPEX Spot SE ('EPEX Spot') has been taking advantage of its dominant position to hinder the activities of competitors on the market for electricity intraday trading facilitation services in at least six Member States (Austria, Belgium, France, Germany, Luxembourg and the Netherlands).

To read the full press release, click [here](#).

Commission opens in-depth investigation into compensation for early closure of lignite-fired power plants in Germany

To read the full press release click [here](#).

Commission approves prolongation and modification of German scheme to support electricity production from renewable energy sources

The reduction of charges will be available to (i) energy-intensive companies and (ii) shore-side electricity supply to ships while at berth in ports. The scheme is part of the German Renewable Energy Act (“Erneuerbare Energien Gesetz” - ‘EEG 2021’). The scheme will help Germany reach its renewable energy targets without unduly distorting competition and will contribute to the EU objective of achieving climate neutrality by 2050. Payments under the scheme for 2021 have been estimated to amount to around €33.1 billion.

To read the full press release, click [here](#).

Commission approves over €1 billion support for high-efficient cogeneration of electricity and heat in Slovakia

To read the full press release, click [here](#).

Commission approves Danish support for Thor offshore wind farm project

The European Commission has approved, under EU State aid rules, Danish support for the Thor offshore wind farm project, which will be located in the Danish part of the North Sea. The measure will help Denmark increase its share of electricity produced from renewable energy sources and reduce CO₂ emissions, in line with the European Green Deal, without unduly distorting competition in the Single Market.

To read the full press release, click [here](#).

Clearance of proposed acquisition by «DEPA COMMERCIAL S.A.» of joint control over the «NORTH SOLAR S.A.»

To read the full press release of HCC, click [here](#).

Statement of objections on the request put forth by DEPA COMMERCIAL S.A. for review of the Commitments undertaken by the company

According to the SO, taking into account the prevailing conditions in the domestic market for natural gas, it is estimated that the purpose of the Commitments No 1, 2, 4, 5, 6 and 7 adopted by HCC Decision No. 551/VII/2012[2], as amended, has now been fulfilled.

To read the full press release of HCC, click [here](#).



Electronic Communications & Post

C-152/19 P - Deutsche Telekom v Commission and C-165/19 P - Slovak Telekom v Commission and

The Court of Justice dismissed the appeals lodged by Slovak Telekom and Deutsche Telekom against the judgments of the General Court relating to anticompetitive practices on the Slovak telecommunications market. The fine of € 38.061.963, for which those two companies were found jointly and severally liable, and the fine of € 19.030.981, for which only Deutsche Telekom was found liable, therefore remain unchanged.

To read the full judgements, click [here](#) and [here](#).

Transport

T-388/20 - Ryanair v Commission

The General Court found that Finland's guarantee in favour of the airline Finnair to help it obtain a loan of €600 million from a pension fund to cover its working capital requirements following the Covid-19 pandemic is compatible with EU law. More specifically, the guarantee was necessary in order to remedy the serious disturbance in the Finnish economy in view of the importance of Finnair for that economy.

To read the full judgement of the General Court, click [here](#).

T-378/20 and T-379/20 - Ryanair v Commission

In these two cases, the General Court found that aid measures introduced by Sweden and Denmark for SAS for damage resulting from the cancellation or rescheduling of flights in the wake of travel restrictions caused by the Covid-19 pandemic comply with EU law. Given that SAS's market share is much higher than that of its closest competitor in those two Member States, the aid does not amount to unlawful discrimination

To read the full judgement of the General Court, click [here](#) and [here](#).

Commission fines three EU railway companies €48 million for customer allocation cartel

The European Commission has fined railway companies Österreichische Bundesbahnen (ÖBB), Deutsche Bahn (DB) and Société Nationale des Chemins de fer belges / Nationale Maatschappij der Belgische Spoorwegen (SNCB) a total of €48 million for breaching EU antitrust rules.

The companies participated in a customer allocation cartel, which concerned cross-border rail cargo transport services on blocktrains on key rail corridors in the EU. The three companies admitted their involvement in the cartel and agreed to settle the case.

To read the full press release, click [here](#).

Commission approves restructuring aid for Polish Regional Railways, as Poland commits to an accelerated opening to competition of regional passenger rail transport

To read the full press release, click [here](#).



Pharmaceuticals

Commission opens formal investigation into possible anticompetitive conduct of Teva in relation to a blockbuster multiple sclerosis medicine

The European Commission has opened a formal antitrust investigation to assess whether the pharmaceutical company Teva has illegally delayed the market entry and uptake of medicines that compete with its blockbuster multiple sclerosis drug Copaxone. The Commission will investigate whether Teva has abused a dominant market position in breach of EU antitrust rules.

To read the full press release, click [here](#).

The Court of Justice dismissed the appeals of a number of manufacturers of medicines involved in an agreement seeking to delay the marketing of the generic antidepressant citalopram. The European Commission had imposed on them fines of almost € 150 million.



KLC Law Firm

10 Kapsali Str. 10674 Athens, Greece

T. +30 210 7264500

F. +30 210 7264510 www.klclawfirm.com