

## EU Law News

A bi-monthly review of EU legal developments  
affecting business in Europe

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- Competition law and Siemens-Alstom decision
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## Commission approves RWE's acquisition of E.ON assets

On 26 February 2019 the Commission approved the acquisition by RWE of E.ON's renewable and nuclear electricity generation assets.

German energy companies RWE and E.ON are active across the whole electricity supply chain, from generation and wholesale to distribution and retail of electricity. The two companies are engaged in a complex asset swap. RWE will focus on upstream electricity generation and wholesale markets, and E.ON on the distribution and retail of electricity and gas. RWE would acquire the majority of E.ON's renewable and nuclear generation assets and a minority interest in E.ON as part payment for the assets it is selling to E.ON.

The Commission found that the transaction is unlikely to hinder effective competition in the generation and wholesale supply of electricity. RWE has a market share slightly above 20% and the increment created by the transaction is very small. The nuclear capacity transferred to RWE will be decommissioned by 2022. The increment would not materially enhance RWE's incentives to influence market prices through withholding electricity supply. At the moment E.ON's acquisition of RWE's distribution and retail business is still under review.

## Competition law and Siemens-Alstom decision

On 19 February 2019 France and Germany called for a reform of EU competition law that could give the Council of Ministers the ability to overrule Commission decisions. The proposal was linked to a joint manifesto for a European industrial policy.

It came shortly after the Commission's decision on 6 February 2019 to prohibit Siemens' proposed acquisition of Alstom. Siemens and Alstom offer broad portfolios of rail automation, electrification and signalling systems, technology solutions for high-speed trains, metros, trams and e-buses, and digital mobility. The Commission stated that the merged company would lead to the foreclosure of smaller competitors and to higher prices. The proposed transaction would have removed one of the two largest manufacturers in Europe of very high-speed trains operating at 300 km per hour or higher. Its combined high market share would also be felt worldwide except in South Korea, Japan and China which are not open to competition.

The Commission considered the competitive landscape and future global competition from Chinese suppliers. For signalling systems it stated that Chinese suppliers are not present in Europe today and it would take a very long time before they would become credible suppliers for European infrastructure managers. For very high-speed trains the Commission

considered it highly unlikely that new entry from China would represent a competitive constraint on the market in the foreseeable future. In the view of the Commission, the parties did not bring forward any substantiated arguments to explain why the transaction would create merger specific efficiencies. The remedy proposed for signalling was a complex mix of Siemens and Alstom assets, and the remedy for a very high-speed technology licence was subject to multiple restrictive terms and carve-outs.

## Commission prohibits acquisition in copper products manufacturing

On 6 February 2019 the Commission prohibited Wieland's proposed acquisition of Aurubis Rolled Products and Aurubis' stake in Schwermetall. Wieland and Aurubis both produce rolled copper products and copper alloys that are used in the manufacturing of many products. Schwermetall is a 50/50 joint venture of Wieland and Aurubis which sells pre-rolled strip to both its owners as well as to other copper manufacturers. Schwermetall is responsible for over 60% of European pre-rolled strip sales.

On rolled copper products the acquisition would give Wieland a market share of more than 50% in value, leaving KME/MKM as the only other large player with more than 20% market share in Europe. European customers cannot rely on non-European suppliers due to import duties and just-in-time delivery requirements, as well as superior technical capabilities of EU suppliers. Imports represent a low percentage of European consumption while European producers export around 30% of their production to the US and Asia.

Regarding pre-rolled strip the Commission found that Schwermetall currently has operational independence from its parent companies, Wieland and Aurubis, when it comes to sales of pre-rolled strip to third-parties. The merger would eliminate this independence and could raise input costs for smaller competitors who need to source a significant part of their pre-rolled copper strip from Schwermetall. Wieland was not able to demonstrate that its acquisition of Aurubis' stake in Schwermetall would result in efficiencies that could not be achieved by other means. Whilst Wieland was ready to divest two Aurubis plants that manufacture rolled copper products, it was not willing to divest Aurubis' 50% stake in Schwermetall.

## Objections against European government bonds cartel

On 31 January 2019 the Commission informed eight banks of its preliminary view that they have breached EU antitrust rules by colluding, from 2007 to 2012, to distort competition when acquiring and trading European government bonds (EGBs).

Bonds are debt securities paying a defined rate of interest, which enable entities to raise funding in international financial markets,

and which are subsequently held as investments or traded like any other financial instrument. EGBs are sovereign bonds issued in Euros by the central governments of the Eurozone. The Commission's statement revealed that traders employed by the banks exchanged commercially sensitive information and coordinated on trading strategies. These contacts would have taken place mainly through online chatrooms.

The Commission's investigation relates to certain traders at eight banks and does not imply that the alleged anti-competitive conduct was a general practice in the EGBs sector. If the Commission's preliminary view would be confirmed, such behaviour would violate competition rules prohibiting business practices such as collusion on prices. The statement about EGBs is supplementary to the Commission's statement of 20 December 2018 regarding bonds nominated in US Dollars reported in EU Law News of November – December 2018.

## Mastercard fined €570m on cross-border card payment services

On 22 January 2019 the Commission fined Mastercard €570m for limiting the facility that enables merchants to benefit from better conditions offered by banks established elsewhere in the EU. Mastercard is the second largest card scheme in Europe in terms of consumer card issuing and value of transactions. Banks offer card payments-related services under the common card brands Mastercard and Maestro. Mastercard acts as a platform through which issuing banks provide cardholders with payment cards, ensure the completion of the card payment transaction and transfer funds to the retailer's acquiring bank. The Commission takes the view that Mastercard and its licensees together form an association of undertakings.

European consumers and businesses make more than half of their non-cash payments through cards. When a consumer uses a debit or credit card in a shop or online the acquiring bank pays an "interchange fee" to the cardholder's bank. The acquiring bank passes this fee on to the retailer who includes it in the final prices for all consumers. Mastercard's rules obliged acquiring banks to apply the interchange fees of the country where the retailer was located. Prior to 9 December 2015, when the Interchange Fee Regulation introduced caps, interchange fees varied considerably from one country to another.

In April 2013, the Commission started an investigation against Mastercard and in July 2015 issued a Statement of Objections. The investigation found that Mastercard's rules made retailers pay more in bank services to receive card payments than if they had been free to shop around for lower-priced services. This led to higher prices for retailers and consumers, to limited cross-border competition and to an artificial segmentation of the Single Market. The Commission concluded that Mastercard's rules breached EU competition law. The infringement ended when

Mastercard amended its rules in view of the entry into force of the Interchange Fee Regulation. The Commission granted Mastercard a 10% fine reduction in return for its cooperation.

## ECJ: Commission loses UPS-TNT merger appeal

On 16 January 2019 the European Court of Justice (ECJ) confirmed the General Court's conclusion that the Commission's decision prohibiting the acquisition of TNT Express by UPS must be annulled.

In 2013 the Commission prohibited the acquisition by UPS's €5.2bn acquisition of TNT on the ground that it would have led to a significant impediment to effective competition on the market for the international express delivery of small parcels in 15 Member States. On 7 March 2017 the General Court annulled the Commission's decision on the ground that UPS's rights of the defence had been infringed. It found that the price concentration econometric model ultimately used by the Commission differed considerably from that disclosed to UPS during the administrative procedure, without the Commission giving UPS the opportunity to submit observations on the amendments made.

The ECJ pointed out that, where the Commission intends to base its decision on econometric models, the methodological basis must be as objective as possible in order not to prejudge the outcome of that analysis one way or another. This contributes to the impartiality and quality of the Commission's decisions in a merger control procedure. The Commission must reconcile the need for speed with observance of the rights of the defence and cannot claim that it was not required to disclose the final econometric analysis model to the applicant before adopting the decision. The ECJ also upholds that failure to disclose an econometric model to the parties can lead to the Commission's decision being annulled, provided the irregularity has denied them the chance to better defend themselves. It need not be proven that, but for that procedural irregularity, the decision would have been different in content.

The companies abandoned the deal in 2013 before the Commission gave its final opinion. UPS paid TNT a €200m break-up fee and TNT was eventually acquired by rival courier Fedex in 2016 for €4.2bn. UPS has already filed a claim before the EU's General Court for €1.7bn in damages.

**This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.**

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