

## EU Law News

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

- US Dollar bond trading cartel
- Guess fined €40m for blocking cross-border sales
- Court rules on Slovakian telecom market
- Court reviews patent settlements
- Electricity trading capacity between Denmark and Germany
- Commission clears joint ventures by Daimler and BMW

## US Dollar bond trading cartel

On 20 December 2018 the Commission informed four banks of its preliminary view that they distorted competition in secondary market trading of bonds denominated in US Dollars.

Bonds are debt securities paying a defined rate of interest. They are first issued on the "primary market" for sale to investors through auctions or syndicates. Subsequently, bonds are traded between banks, brokers and investors on the "secondary market". Bonds can be distinguished by the identity of the issuer and the currency in which they are denominated. Supra-sovereign bonds are issued by supranational institutions or agencies, for example the European Investment Bank. Sovereign bonds are issued by central governments under a law other than their domestic law and/or in currencies other than domestic currencies e.g. bonds issued in US Dollars by European governments. Agency sub-sovereign bonds are issued by government related agencies and public authorities below the level of national government.

In its statement of objections the Commission mentioned that it is concerned that between 2009 and 2015 the banks exchanged commercially sensitive information and coordinated on prices for US dollar denominated supra-sovereign, sovereign and agency bonds. These contacts would have taken place mainly through online chatrooms.

## Guess fined €40m for blocking cross-border sales

On 17 December 2018 the Commission fined the clothing company Guess €39.8m for restricting retailers from online advertising and selling cross-border to consumers in other Member States, this is called "geo-blocking".

The Commission found that Guess's distribution agreements restricted authorised retailers. Authorised retailers may be chosen on the basis of quality criteria but must be free to offer the products covered by the distribution contract online, to advertise and sell them across borders, and to set their resale prices. Consumers must be free to purchase from any retailer authorised by a manufacturer, including across national borders. The Commission observed that the agreements allowed Guess to partition European markets. It found that in Central and Eastern European countries the retail prices of Guess products are on average 5-10% higher than in Western Europe. The Commission concluded that Guess's practices, which the company engaged in until 31 October 2017, deprived European consumers of the right to shop cross-borders for more choice and a better deal. Guess cooperated with the Commission beyond its legal obligation and revealed an additional

infringement of competition rules. The Commission granted Guess a 50% fine reduction in return for this cooperation.

The Guess decision follows on the results of a sector inquiry report of May 2017 about business practices in e-commerce. Furthermore it complements Regulation 2018/302 on unjustified geo-blocking which applies as of 3 December 2018.

## Court rules on Slovakian telecom market

On 13 December 2018 the General Court partially annulled the Commission's decision relating to anticompetitive practices on the Slovakian telecommunications market.

Slovak Telekom is the incumbent and largest telecommunications operator and broadband provider in Slovakia. Deutsche Telekom holds more than 50% of the share capital of Slovak Telekom. In the early 2000s, when the Slovakian market was opened to competition, Slovak Telekom was required to grant alternative operators unbundled access to the local loop and to related services under transparent, fair and non-discriminatory conditions.

In October 2014 the Commission concluded that the undertaking formed by Slovak Telekom and Deutsche Telekom had abused its dominant position and violated the above requirements between August 2005 and December 2010. The General Court upheld the Commission's conclusion but considered that it had failed to demonstrate that the contested pricing practice had led to exclusionary effects before 1 January 2006. As a result it reduced the amount of the fine imposed jointly on the companies from €38.8m to €38m.

The Commission had imposed an additional fine of €31m on Deutsche Telekom because of its status as a repeat infringer and its large turnover. The Court stated that where the liability of the parent company is solely derived from that of its subsidiary, the liability of that parent company can exceed that of the subsidiary only where there are factors which individually reflect the conduct for which the parent company is held liable. The Court considered that the status as a repeat infringer of the parent company, Deutsche Telekom, constituted a factor which individually reflects its conduct and justified an additional fine. By contrast the Court considered that Deutsche Telekom's turnover is not capable of reflecting its individual conduct in this infringement and that it therefore could not serve as a basis for the calculation of an additional fine. The Court reduced the amount of the additional fine imposed on Deutsche Telekom from €31m to €19m.

## Court reviews patent settlements

On 12 December 2018 the General Court annulled in part the Commission's decision regarding the restrictive agreements

by Servier and the fine imposed for an abuse of a dominant position in the market for a medicine.

The Servier pharmaceutical group developed perindopril, a cardiovascular medicine treating hypertension and heart failure. The patent expired over the course of the early 2000s. The active pharmaceutical ingredient of perindopril takes the form of a salt named erbumine. A new patent relating to erbumine and its manufacturing processes was granted in 2004. Following disputes in which the validity of that patent was challenged, Servier entered into various settlement agreements with a number of generic companies, by which each of those companies was to refrain from entering the market or challenging that patent.

In July 2014 the Commission decided that the agreements constituted restrictions of competition by object and by effect. It also found that Servier had implemented by those agreements an exclusionary strategy which constituted an abuse of a dominant position. The General Court emphasised that settlement agreements are not necessarily contrary to competition law. However, Servier granted generic companies advantages inducing them to refrain from entering the market or challenging the patent. Such agreements must then be considered a market exclusion agreement and restrict competition by object.

Regarding the abuse of a dominant position by Servier the Court found that the Commission made errors in defining the relevant market. The Commission wrongly considered that perindopril differed, in terms of therapeutic use, from other such inhibitors, underestimated the propensity of patients to change medicines and attributed excessive importance to the price factor. The Court stated that the Commission failed to show that the finished products market was limited to the perindopril molecule alone and reduced by €103m the fines imposed on Servier.

## Electricity trading capacity between Denmark and Germany

On 7 December 2018 the Commission adopted a decision rendering legally binding commitments offered by German grid operator TenneT to significantly increase cross-border flows of electricity between Denmark and Germany.

TenneT is the largest of the four German transmission system operators (TSOs) that manage the high-voltage electricity network in Germany. TSOs transport electricity over the grid from generation plants to regional or local distribution operators and large industrial electricity consumers. The Commission investigated whether TenneT infringed antitrust rules by systematically limiting southward capacity at the electricity interconnector between Western Denmark and Germany. This conduct would prevent the export of cheap electricity from the Nordic countries where it is largely generated from renewable energy sources. It would also be contrary to an integrated Energy Union.

In light of its market test results, the Commission made the following commitments which are legally binding for nine years. TenneT will make available to the market the maximum capacity compatible with the safe operation of the interconnector between Western Denmark and Germany and will guarantee a minimum hourly capacity of 1,300 megawatts. Following the planned expansion of interconnectors in 2020 and 2022, TenneT will progressively increase the capacity to 2,625 megawatts by 1 January 2026. It may reduce the capacity offered only in exceptional circumstances.

## Commission clears joint ventures by Daimler and BMW

On 7 November 2018 the Commission approved the creation of six joint ventures by Daimler and BMW subject to conditions. Daimler and BMW will bring together the companies' mobility services in five business fields: free-floating car sharing services, via DriveNow (BMW) and car2go (Daimler), ride hailing, parking and charging, as well as other on-demand mobility services. The sixth joint venture will manage the brands and license them out to the five joint ventures.

The Commission examined the effects of the proposed transaction taking into account other means of transportation, such as station-based car sharing or public transport. It found that the proposed transaction would raise competition concerns for car sharing in six cities, namely Berlin, Cologne, Düsseldorf, Hamburg, Munich and Vienna. The activities of Daimler and BMW overlap significantly in free-floating car sharing services, which is a newer and expanding form of urban mobility. In addition, the Commission examined vertical relationships arising from the merging companies' activities. After the transaction, Daimler and BMW would have the ability and incentive to shut out rival providers of integrator apps, to the benefit of Daimler's own integrator app "moovel", as well as rival car sharing providers, to the benefit of their own car sharing services.

To address the Commission's competition concerns Daimler and BMW offered a two-fold remedy package for the six relevant cities. First, by granting application programming interface ("API") access to third party aggregator platforms for mobility solutions, so that they can also re-direct users to Daimler and BMW's car sharing services. Second, by offering access to Daimler's "moovel" integrator app to interested car sharing providers.

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

Luther, EU Law Center  
Avenue Louise 326, 1050 Brussels, Belgium  
Phone +32 2 6277 760, Fax +32 2 6277 761  
helmut.janssen@luther-lawfirm.com

Luther Rechtsanwaltsgesellschaft mbH advises in all areas of business law. Our clients include medium-sized companies and large corporations, as well as the public sector.

Berlin, Brussels, Cologne, Dusseldorf, Essen, Frankfurt a. M., Hamburg, Hanover, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

Luther Corporate Services: Delhi-Gurgaon, Kuala Lumpur, Shanghai, Singapore, Yangon

Further contacts can be found on our website [www.luther-lawfirm.com](http://www.luther-lawfirm.com)



**Hits the mark. Luther.**

