# BRUSSELS REGULATORY BRIEF: MARCH 2020

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## ANTITRUST AND COMPETITION

### The Court of Justice of the EU Upholds the Commission's Powers to Impose High Fines on Companies that "Jump the Gun"

On March 4, 2020, the Court of Justice of the EU ("CJEU") dismissed the appeal from a Norwegian salmon farmer, thereby confirming a European Commission gun jumping decision in the context of the salmon farmer's acquisition of his competitor. The decision from 2014 had imposed two fines of EUR 10 million each to the salmon farmer: one for failing to notify the acquisition of a controlling shareholding over his competitor and the other one for breaching the standstill obligation, i.e. the prohibition against implementing a transaction prior to merger control clearance – so-called "gun jumping."

Under EU merger control rules, a transaction must be notified to the Commission if it: (i) results in the acquisition of control by a party over another; and (ii) meets a certain turnover threshold. Control is widely defined. Control can be constituted by rights, contracts or any other means that, either separately or in combination, confer the possibility of exercising "decisive influence" over another company. Simply put, decisive influence arises where a company acquires the ability to determine the strategic commercial decisions of another company (e.g. a minority shareholder can block the adoption of annual budgets or business plans or the appointment of key management). There is no defined shareholding level at which decisive influence arises and, depending on the circumstances, acquisitions of minority shareholding are caught by the EU merger control rules. The Commission can fine companies up to 10% of their turnover in the preceding year both for failing to notify an acquisition of control and for breaching the standstill obligation.

In 2012, the salmon farmer acquired 48.5% of the shares of his competitor but only after eight months it notified the transaction to the Commission. Although the transaction was conditionally cleared, in 2014 the Commission fined the salmon farmer EUR 20 million for gun jumping. The Commission decision was appealed and upheld by the EU General Court, which found that the salmon farmer had prematurely implemented the transaction before clearance and had been negligent in not notifying to the Commission its initial purchase of the shares in his competitor.

Before the CJEU, the salmon farmer argued that it had been fined twice with respect to the same conduct, in breach of the *ne bis in idem* principle. The CJEU found that the ne bis in idem principle protects companies from being found liable for conducts which have already been dealt with by an earlier decision. The principle does not apply in this case which concerns two different infringements. The obligation to notify reportable transactions is an obligation to act (i.e. reportable transactions must be notified before implementation), whereas the standstill

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obligation is an obligation not to act (i.e. reportable transactions which have been notified must not be implemented until clearance is granted). In addition, the infringement of the obligation to notify reportable transactions is an instantaneous infringement, whilst the infringement of the standstill obligation is a continuous infringement, which is triggered when the notification is made and ends when the Commission clears the transaction. On this basis, the CJEU confirmed that the Commission can impose separate fines for failing to notify a reportable transaction and for breaching the standstill obligation.

This judgement and the recent decisional practice of the Commission emphasizes the high significant risks for companies that fail to notify their reportable transactions and/or to comply with the standstill clause in the EU. For example, a telecom company and an imaging and optical products manufacturer were recently fined by the Commission EUR 124.5 million and EUR 28 million, respectively, for gun jumping. In the context of multi-jurisdictional merger filings, companies must also be aware of the different tests applied by the competent competition authorities globally. Transaction parties should be aware of the competition authorities' aggressive focus on gun jumping globally and take measures to reduce their exposure to significant fines for gun jumping violations.

## The CJEU Ordered Italy to Pay Pecuniary Penalties for Failure to Recover Unlawfully Granted Aid

On March 12, 2020, the CJEU issued a judgment in case C-576/18, Commission v Italy, by which it ordered Italy to pay pecuniary penalties for failing to recover aid unlawfully granted to the hotel industry in Sardinia.

The origin of the dispute dates back to 1998, when the Commission authorized a regional aid scheme of assistance to the hotel industry in the Italian region of Sardinia. In 2003, the Commission received a complaint alleging the misuse of aid. After five years of investigation, the Commission decided in July 2008 that Italy had unlawfully amended the notified measure rendering it incompatible with the terms of the approval decision. Consequently, Italy was required to recover the unlawful aid (of a total amount of approximately EUR 13.7 million) immediately and effectively from the beneficiaries. A challenge brought by the Region of Sardinia against the Commission's Decision was unsuccessful.

In 2012, the CJEU ruled that Italy had failed to fulfil its obligations by not taking all the measures necessary to recover the aid. In 2018, the Commission brought a second case against Italy resulting in the latest ruling from the CJEU. The Court found that Italy failed to recover the unlawful aid in full (in 2019, 83% of the total capital amount along with interest had been recovered) and that Italy had not proven its claim that it was impossible to do so. Moreover, the CJEU also ruled that Italian courts do not have a competence to grant any stay of the recovery of the unlawful aid and that Italy cannot avoid recovering the aid on the basis of the legitimate expectations of the beneficiaries of unlawful aid.

Given the seriousness of the infringement and its considerable duration, the CJEU ordered the payment of a lump sum of EUR 7.5 million and a daily penalty payment of EUR 80,000 for further delay with the implementation of the measures stemming from the Court's 2012 Judgment.

## The French Competition Authority Fines Apple EUR 1.1 Billion for Engaging in Cartels and Abusing a Situation of Economic Dependency on its "Premium" Independent Distributors

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The fine of EUR 1.1 billion imposed on Apple is the highest fine ever imposed by the French Competition Authority on a single company and follows dawn raids carried out at the headquarters of Apple and its wholesalers, two of which, Tech Data and Ingram Micro, were also fined, respectively EUR 76 million and EUR 62 million, bringing the total fine to EUR 1.24 billion.

According to the French Competition Authority, the abuses occurred between 2005 and 2017, but were first brought into light in 2012, following a complaint by an independent reseller, eBizcuss. Apple was accused of having implemented three separate anticompetitive practices within its distribution network of electronic products, such as iPads and personal computers, except for iPhones.

Those practices included the allocation of products and customers between its two above-mentioned wholesalers, Tech Data and Ingram Micro, thereby stifling competition; imposing sell prices on Apple Premium Resellers ("APRs") by aligning the prices of Apple products for end consumers; and the abuse of a situation of economic dependency upon APRs. By imposing multiple and complex contractual clauses, the abuse of a situation of economic dependency implied in particular supply difficulties, discriminatory treatment and unstable remuneration conditions for SMEs, leading to their weakening, and in some cases exclusion, as in the case of eBizcuss.

According to the French regulator, APR contracts imposed on APRs almost exclusive sale of Apple products and prohibited them, during their term and up to six months thereafter, from opening any shop specialising in the exclusive sale of a competing brand within Europe.

This exclusionary strategy operated by Apple with regard to APRs placed many companies at a commercial disadvantage compared to Apple Stores, and contributed to serious financial difficulties resulting in a decrease in their turnover.

### The Commission Clears, Subject to Conditions, the Acquisition of Joint Control Over a Wireless Network Infrastructure Company by an Italian and a British Telecom Operator

In a remarkable decision and in the context of the EU's push for a fast roll out of 5G technology across the continent, the European Commission has approved, under the EU Merger Regulation, the proposed acquisition of joint control over a wireless network infrastructure company by Italy's biggest phone group and British network provider.

The two telecommunication operators are active in the provision of mobile and fixed telecommunication services to consumers and businesses in Italy and plan to jointly roll out 5G in the country. The wireless network infrastructure joint venture will bring together the Italian and British operators' telecommunication towers located in Italy.

After a first assessment the Commission found that the Italian operator and the British operator would have complete control over the vast majority of towers in most regions in Italy. As a consequence, the proposed transaction would have reduced competition in the market for renting out space on towers to telecommunication operators, pushing them out of the market in Italian municipalities with more than 35,000 inhabitants.

Network sharing has become a common practice for network providers it reduces cost and facilitates the roll-out of electronic communications networks. The Commission has endorsed such type of cooperation, but only under specific circumstances. In fact, it has found in various occasion that network sharing agreements can restrict competition, notably in a case regarding two major operators in the Czech retail mobile telecommunications

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market. In this case, the Commission concluded that, instead of leading to greater efficiencies and higher service quality, the network sharing agreement would have removed the incentives for the two mobile operators to improve their networks and services to the benefit of users.

To address the Commission's competition concerns, the Italian and British operators offered a series of commitments to ensure that the joint venture would give a fair treatment of third parties wishing to have access to the towers. This would be done by giving appropriate publicity to the towers, adopt a procedure to timely respond to third parties' requests for access to the towers, and committed to only refuse to provide space on such towers for technical reasons. Finally, the joint venture, the Italian and the British operators would not exercise any early termination right as regards all existing hosting contracts and framework agreements in place and would offer the opportunity to extend those contracts and agreements.

Based on the commitments above, the Commission concluded that a balance was found between co-operation and competition, furthermore a fast roll-out of 5G technology in Italy would benefit Italian consumers and businesses. Therefore, the transaction was cleared.

This decision also comes hand in hand with the European Commission's introduction of a new Industrial Strategy and recent Communication from the Commission for the secure 5G deployment in the EU. The Commission has in fact stated that a fast and efficient roll-out of 5G is fundamental to ensure the European industry's competitiveness in an increasingly digital society.

## DIGITAL ECONOMY

### The European Commission Reaches an Agreement with Holiday Rental Platforms on Data Sharing

On March 5, 2020, the Commission reached an agreement with four holiday rental platforms on data sharing, which will for the first time allow the statistical office of the EU, Eurostat, to access and publish reliable data about short-stay accommodation offered through the four collaborative economy platforms. The agreement, signed between each platform and Eurostat, on behalf of the Commission, provides that:

- Each platform will share data on a regular basis, including on the number of nights reserved and number of guests.
- As concerns privacy, data provided by the platforms will not consent the identification of individual guests (users) and hosts (property owners) and the privacy of citizens will be protected via the applicable EU legislation.
- Data provided by the four platforms will be aggregated at the municipal level and will be subject to statistical validation. Eurostat will publish data for each Member States and for several individual regions and cities by combining the information received.

The agreement should be seen in the context of the rapid development of the collaborative economy in the tourism sector, which consists in the offer of peers-to-peers services through sharing platforms as an alternative to professional tourism services of accommodation, transportation and leisure. While collaborative economy

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provides economic opportunities, promoting tourism and new sources of revenue for citizens, it also creates challenges for local communities in terms of integrity, rent rates increase etc.

For these reasons, the agreement is expected to inform future policy-making, and, as mentioned by Commissioner Thierry Breton, responsible for Internal Market, "the Commission will continue to support the great opportunities of the collaborative economy while helping local communities address the challenges posed by these rapid changes."

The first statistics are expected to be released in the second half of 2020.

## ECONOMIC AND FINANCIAL AFFAIRS

### European Commission Launches Process to Overhaul Non-Financial Reporting Standards

The European Green Deal's ambitious mission cannot be achieved without the redirection of private capital towards green activities. The European Commission ("Commission") notes that the current regulatory framework on non-financial reporting provided by the Non-Financial Reporting Directive ("NFRD") creates uncertainty and complexity for companies on what, how and when to disclose non-financial information. More concretely, the Commission mainly attributes the NFRD shortcomings to the fact that the companies under its scope either report partially or do not report at all the non-financial information that market participants deem necessary.

In light of this, the Commission, on January 30, 2020, initiated the review process of the NFRD by publishing an Inception Impact Assessment. The Impact Assessment indicated that the Commission was considering three policy options: (i) keeping the current NFRD non-binding guidelines approach and updating them; (ii) endorsing an existing or possible voluntary future standard on non-financial reporting; and (iii) revising and strengthening the provisions of the NFRD by pushing for more binding standards.

Following the European Securities and Markets Authority ("ESMA") recent recommendation to amend the NFRD to allow for the development of binding measures, the Commission, on February 20, 2020, launched a public consultation on the NFRD review, aiming to ensure that non-financial information becomes more standardised and comparable across the EU. In this context, it is important to highlight the following consultation questions on whether:

Companies should be required to disclose additional non-financial information beyond the standard sustainability factors, namely on environmental, social, employment, human rights, bribery and corruption aspects. The consultation also asks whether companies should report non-financial information regarding intangible assets or related factors such as intellectual property, software, customer retention and human capital;

Legal provisions related to non-financial reporting should define environmental matters on the basis of the six objectives set out in the Taxonomy regulation: climate change mitigation; climate change adaptation; sustainable use and protection of water and marine resources; transition to a circular economy; pollution prevention and control; and protection and restoration of biodiversity and ecosystems;

The development of a common European non-financial reporting standard would improve the quality of the reported information. In this regard, Valdis Dombrovskis, Commission's Executive Vice-President, recently stated

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that the European Financial Reporting Advisory Group would begin preparatory work on the development of pan-European non-financial reporting standards;

In the event that a common European non-financial reporting standard were to be developed, to what extent it should incorporate the principles and content of the international initiatives such as: the Task Force on Climate-related Financial Disclosures the UN Guiding Principles Reporting Framework (human rights), the questionnaires of the CDP (formerly the Carbon Disclosure Project), and the standards of the Carbon Disclosure Standards Board;

The sole application of existing international standards such as the Global Reporting Initiative, the framework of the International Integrated Reporting Council, and the standards of the Sustainability Accounting Standards Board, would enable companies to comprehensively meet the current disclosure requirements of the NFRD;

A simplified standard or reporting format should be exclusively developed for SMEs taking into account that requiring SMEs to apply the same standards as large companies may be a disproportionate burden;

The scope of the NFRD should be expanded beyond large companies with securities listed in EU regulated markets, large banks (whether listed or not) and large insurance companies (whether listed or not) provided that they all have more than 500 employees;

The current segregation of non-financial information in separate non-financial and corporate governance statements within the management report provides for effective communication with users of company reports; and

EU law should impose stronger assurance requirements for non-financial information reported by companies under the scope of the NFRD.

The consultation also seeks input on the administrative burden detailed reporting imposes on companies and its potential digitalisation, which could enhance the quality of reported information.

The consultation will run until May 14, 2020.

## TRANSPORT

### Commission Interprets EU Passenger Rights Amid COVID-19 Pandemic

On March 18, 2020, the Commission published an Interpretative Notice on EU passenger rights regulations for transport by air, rail, bus, and sea or inland waterways, with an aim to apply EU rules on the matter uniformly across the EU, to provide transport businesses with legal certainty in that regard, and to reassure passengers that their rights are protected.

The Notice complements guidelines on passenger rights previously issued by the Commission for transport by air, rail, bus, and sea or inland waterways.

The Notice acknowledges the difficulties carriers may have to provide rebooking during the COVID-19 crisis and acknowledges that reimbursement or rebooking for a later date may be necessary. It also addresses the case in which passengers cannot travel or want to cancel a trip, and provides that the grant of vouchers does not affect the rights of passengers for reimbursement or rebooking under EU rules. Lastly, it specifies that should EU

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Member States adopt specific national rules under national laws, such rules do not fall under the scope of EU law and are therefore not addressed by EU rules and the Commission's Notice.

More specifically, the Notice states that wherever applicable, passenger's right to information and to assistance remains unchanged by the current circumstances. The same goes for the passengers' right to reimbursement or rebooking, although the Commission states that circumstances surrounding the outbreak of the virus have to be taken into account when assessing the "earliest opportunity" for rebooking, should passengers opt for that option. That being said, the current circumstances do not exempt service providers to duly inform passengers of the uncertainties created by the outbreak, of various government measures enacted to contain them, and of the impact of those measures on their rebooking or maintaining their journey.

On passengers' right to compensation in the case of delay or cancellation, the Commission's interpretation of EU passenger rights depends on the transport mode. For bus and rail, the Notice says that passengers' right to compensation remains unaffected by the COVID-19 outbreak. For example, in the context of rail transport, the Notice unequivocally states that "the existence of extraordinary circumstances, if any, does not affect the right to compensation in cases of delays." The Notice takes a different approach with regard to air and sea and inland waterways transport. After recalling that passengers' right to compensation may be waived under extraordinary circumstances, the Commission goes on to consider that such circumstances arise where public authorities take measures to fight against the spread of the virus, measure which prevent to carrier from providing its transport service, and represent extraordinary circumstances under EU rules.

Lastly, on air passengers' right to care, the Commission recalls that this right come to an end when a passenger chooses to be reimbursed, and that the circumstances surrounding the virus outbreak do not change that. Such right subsists only when the passenger opts for rebooking, which, as stated above, may take considerable time. Nonetheless, the Notice states that "the air carrier is obliged to fulfil the obligation of care even when the cancellation of a flight is caused by extraordinary circumstances." This right must therefore be respected by air carriers.

The Notice does not replace existing guidelines but complements them; it will be valid as long as the virus outbreak is triggering drastic measures from governments and public authorities to limit the number of casualties. Although passengers' rights to information, care, and assistance are not affected by current events related to the virus outbreak, the Commission has adapted its interpretation of passengers' right to rebooking, and to compensation in the air and sea and inland waterways transport sectors.

In light of the difficulty airlines have been having implementing air passengers' right to reimbursement, as well as their propensity to offer vouchers instead of reimbursement – even when passengers reserve their right to claim reimbursement, the Commission has confirmed that it is working to "further clarify" the application of EU passenger rights rules during these particular times, and so we can probably expect another Notice on this subject in the near future.

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