



# **Recent developments at the Court of Justice of the European Union**

CMS EU Competition Law Briefing

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29 July 2022

# Agenda

## Welcome and introduction



### Cartels

- Scania/Commission
- Air cargo carriers/Commission



### Abuse of a dominant position

- Intel/Commission
- Qualcomm/Commission
- Servizio Elettrico Nazionale



### Merger control

- Illumina/Commission
- Canon/Commission
- thyssenkrupp/Commission



### Procedural issues

- Sped-Pro/Commission
- bpost
- Nordzucker



# Cartels

# Scania/Commission – General Court – 2 February 2022

## Facts

- **2010:** Commission launches investigations into trucks market
- **2016:** all participants except Scania agree to a settlement with the Commission
  - **Collusion with respect to:**
    - pricing
    - gross price increases in the EEA
    - timing and passing on of costs for the introduction of emission technologies
  - Duration infringement 1997 to 2011
  - Total fine EUR 2.93 billion
- **2017:** Commission decision Scania
  - Fine EUR 880 million



## General Court

### GC rejects Scania's appeal:

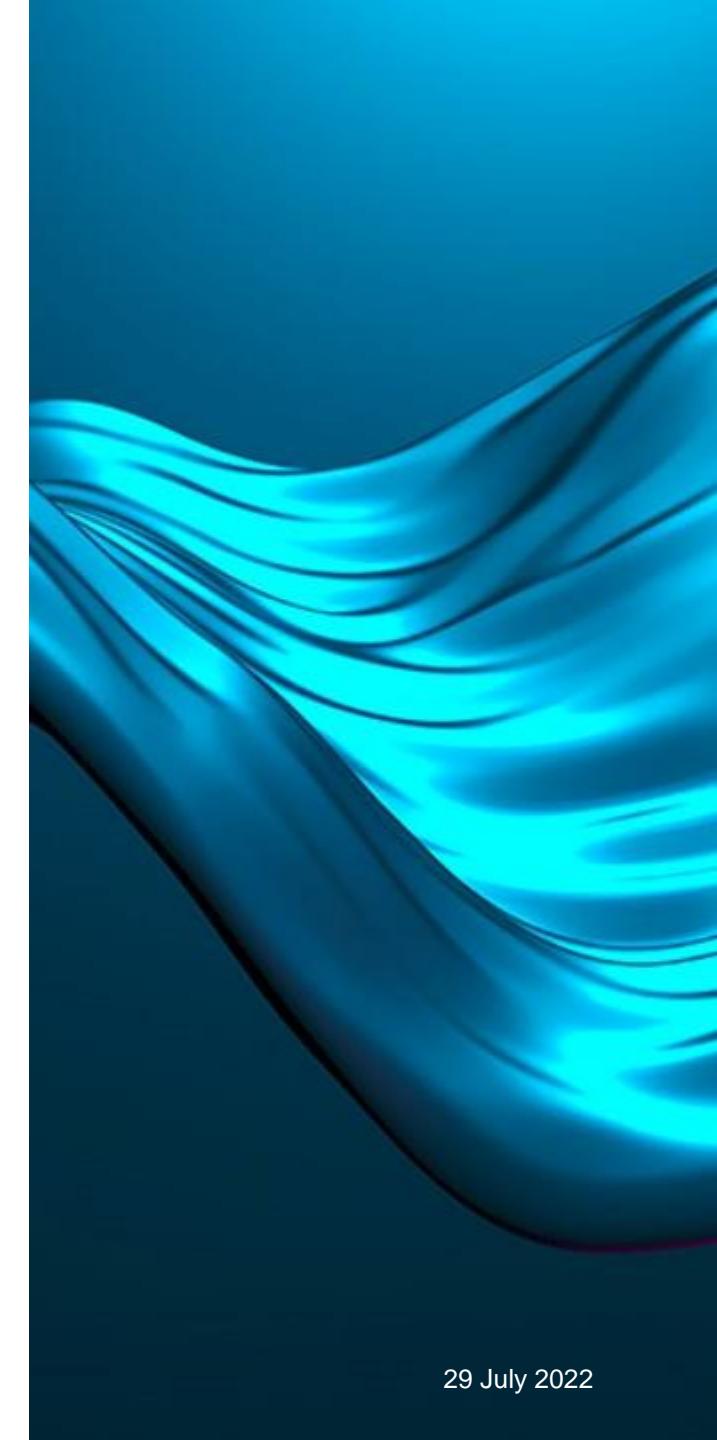
- Use of hybrid procedure does not entail a violation of the presumption of innocence, rights of defence or other principles alleged
- Commission is entitled to adopt a settlement decision and then go on to adopt a decision following the standard procedure
- Single and continuous infringement by the Truck manufacturers confirmed, although three levels of collusive contacts were identified

# Scania/Commission – General Court – 2 February 2022



## Takeaways

- ✓ Being the odd one out in hybrid cases is challenging:  
Commission has a lot of leeway
- ✓ Incentive to pursue settlement procedure:
  - Decreased fine
  - Shorter period during which damaged parties can claim damages
- ✓ Concept of single and continuous infringement continues to increase its breadth



# Air cargo carriers/Commission – General Court – 30 March 2022



## Facts

- **2010:** Commission decision #1
  - Airfreight
  - Price fixing
    - Fuel and security surcharges
    - Refusal to pay commission on surcharges
  - Fine EUR 790 million
- **2015:** GC annuls Commission decision
  - Defective statement of reasons: internal contradictions likely to undermine rights of defense
- **2017:** Commission decision #2
  - Infringement remains “untouched”
  - Fine EUR 776 million



## General Court

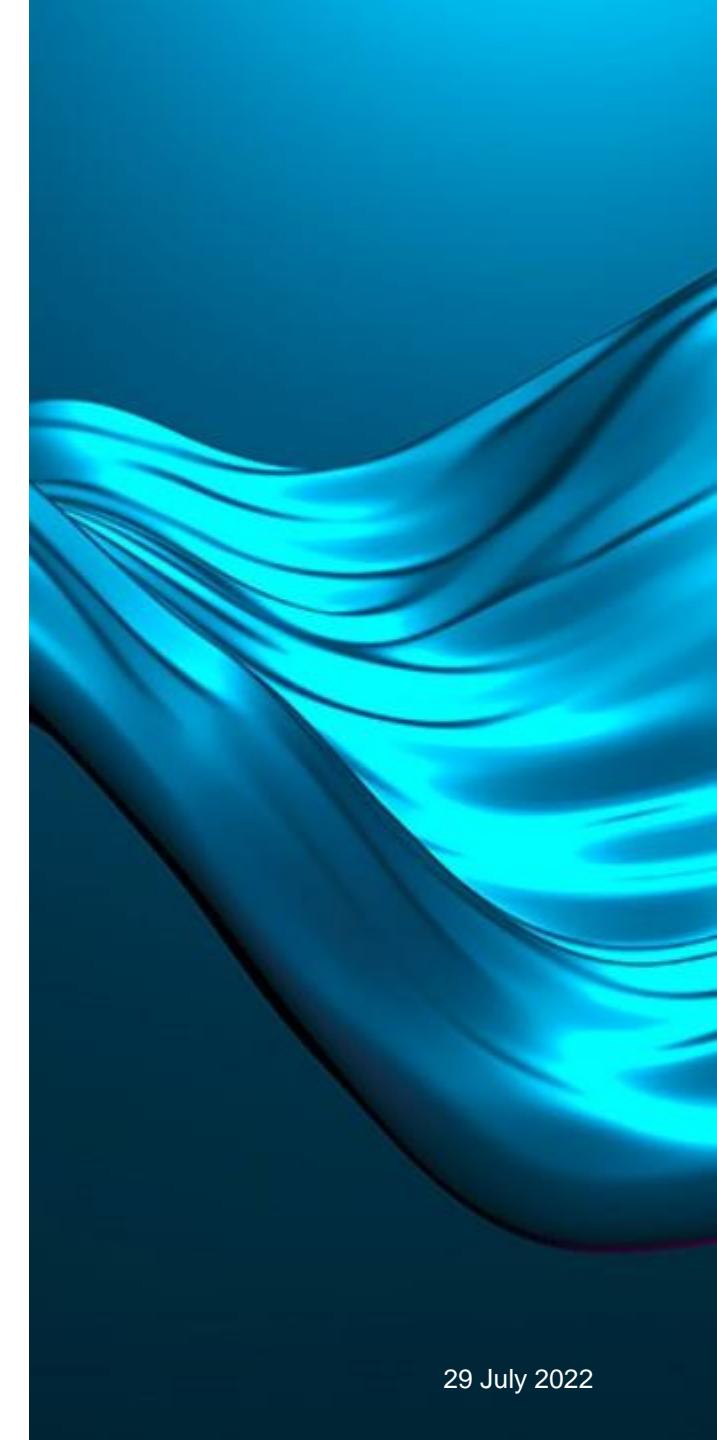
- **GC dismisses actions brought by:**
  - Martinair
  - KLM
  - Cargolux
  - Air France-KLM
  - Lufthansa
  - Singapore Airlines
- **GC partly annuls decision against others (and reduces fines):**
  - Japan Airlines
  - Air Canada
  - British Airways
  - Cathay Pacific
  - SAS
  - Latam Airlines

# Air cargo carriers/Commission – General Court – 30 March 2022



## Takeaways

- ✓ Commission decision stands, although appeals of all carriers before CJEU pending
- ✓ Pleas regarding lack of jurisdiction (e.g. inbound routes) Commission all dismissed
- ✓ No impact on pending cartel damage claims cases before national courts in Member States



# Abuse of a dominant position

# Intel/Commission – General Court – 26 January 2022

## Facts

- **2009:** Commission decision
  - Central Processing Units (CPU's) – microprocessors
  - Abuse of dominance
    - “Naked restrictions”
    - Conditional rebates
  - Fine EUR 1.06 billion
- **2014:** GC rejects appeal Intel
- **2017:** CJEU upholds appeal Intel, sets aside the judgment of the GC and refers the case back to the GC



## General Court

**GC annuls the Commission in part (but strikes the fine in its entirety):**

- Loyalty rebates not a per se infringement: only a presumption
- Five factors need to be analysed (if the dominant undertaking puts forward evidence that conduct was not capable of effecting competition):
  - Extent of dominance
  - Coverage
  - Conditions and arrangements of rebate
  - Duration and amount
  - Whether strategy to exclude AEC's
- AEC-test Commission contained a number of errors

# Qualcomm/Commission – General Court – 15 June 2022



## Facts

- **2018:** Commission decision
  - Chipsets (LTE)
  - Abuse of dominance:
    - Incentive payments to Apple (exclusivity rebates)
  - Fine EUR 997 m



## General Court

### GC annuls Commission decision and fine

- Procedural errors
  - Meetings were not recorded (sufficiently)
  - Notes were not completed or only three years later
  - Scope of investigation was changed without informing Qualcomm
    - Statement of Objections: LTE and UMTS market
    - Economic analysis Qualcomm based on both markets
    - Decision: only LTE market
- Economic analysis flawed
  - No anticompetitive effect payments as Qualcomm was the only entity capable of producing chips for Apple I-phones
  - Insufficient analysis as to whether the payments had actually reduced incentive to switch to another supplier

# Servizio Elettrico Nazionale – Court of Justice – 12 May 2022



## Facts

- **2007 onwards:** progressive liberalization of the electricity market in Italy
  - Incumbent ENEL divides between subsidiaries:
    - EE: supply electricity free market
    - SEN: management of enhanced protection service
- **2018:** Italian competition authority imposes fine EUR 93 million
  - Abuse dominant position (transferring customer base of SEN to EE)
  - Fine later reduced by Italian courts
- **2020:** preliminary reference Italian Council of State
- **2021:** opinion Advocate-General Rantos



## Court of Justice

### CJEU considers:

- Abuse does not require direct negative impact on consumers: only structure of the market is relevant
- A competition authority does not have to prove intent to exclude competitors
- Legitimate business conduct can constitute abuse if:
  - Exclusionary effects
  - No competition on the merits
- A practice that cannot be adopted by a hypothetical AEC because it relies on the use of resources or means inherent to the holding of a dominant position cannot be regarded as competition on the merits
- An undertaking that loses a legal monopoly must refrain during the entire liberalisation phase of the market from using means available on account of its former monopoly

# Merger control

# Illumina/Commission – General Court – 13 July 2022



- **2020:** Illumina seeks to acquire Grail
  - Genomic sequencing/cancer screening test
  - EU/national merger notification thresholds not met
  - Commission receives third party complaint
- **2021:** Commission and Member States take measures:
  - Invitation letter Commission to Member States
  - Article 22 EUMR referral request France
  - Information letter Commission to Illumina and Grail
  - GR, BE, NO, IS and NL join request France
  - Article 22 Guidance Commission published
  - Acceptance of referral requests
  - Illumina/Grail transaction closed
  - Commission initiates gun jumping investigation
  - Illumina/Grail deal closed



## General Court

### GC upholds Commission decision:

- Acceptance referral requests contestable decisions
- Commission competent to accept article 22 EUMR request and assume jurisdiction
  - Literal, historical and contextual interpretation
  - Four conditions:
    - Referral request made by one or more Member States
    - Transaction must be concentration without meeting thresholds
    - Concentration must affect trade between Member-States
    - Significant impact
- Not only in the absence of merger control regime in a given Member State

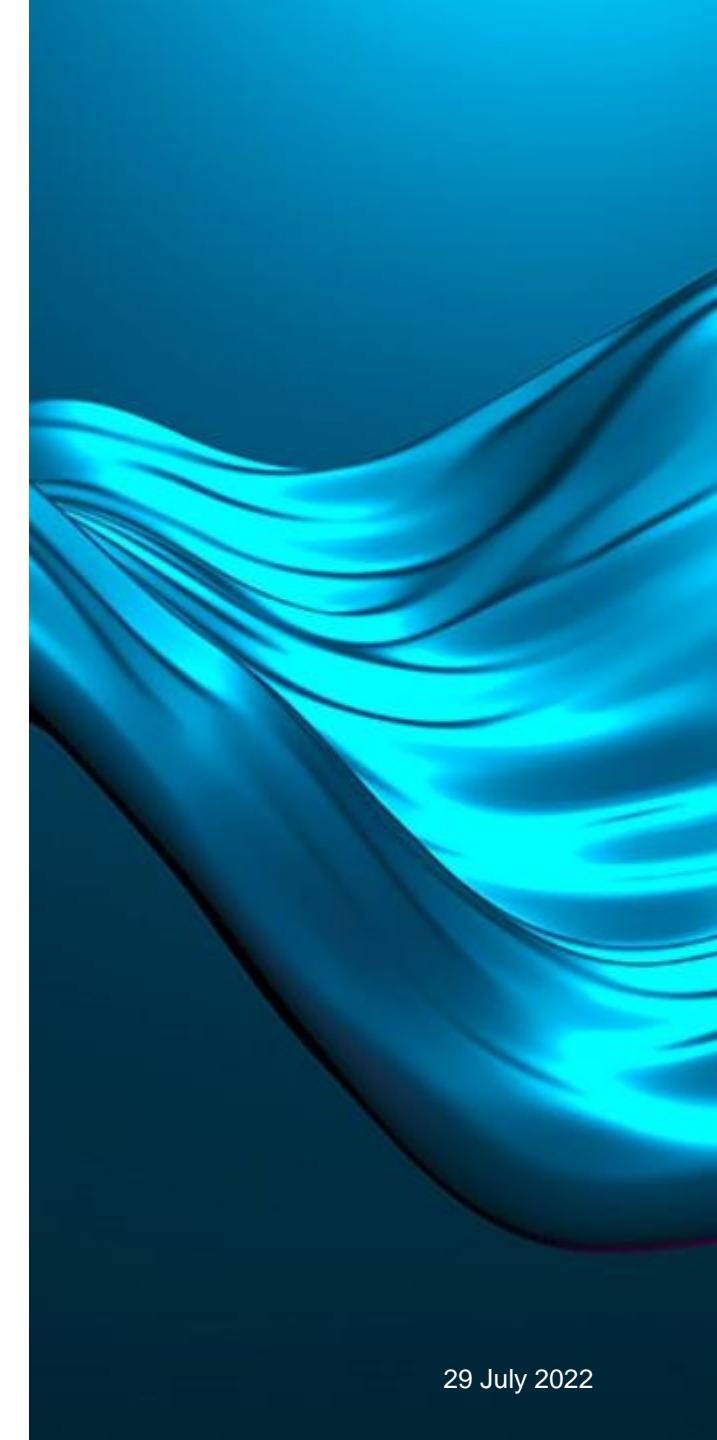
# Illumina/Commission – General Court

## – 13 July 2022



### Takeaways

- ✓ Deal certainty very much affected! Non-notifiable transactions potentially notifiable: due diligence required
- ✓ Background: killer acquisitions / mergers concerning an undertaking whose significance for competition is not reflected in its turnover



# Canon/Commission – General Court – 18 May 2022

## Facts

2019: Commission decision

- Medical equipment
- Warehousing transaction/parking structure
  - Step 1: interim buyer acquired 95% of target (for EUR 5.28 billion)
  - (Commission clearance decision)
  - Step 2: Canon triggers call option and acquires target
- Gun jumping
  - Breach of the obligation to notify
  - Breach of the standstill obligation
- Fine EUR 28 million



## General Court

**GC rejects Canon's arguments in their entirety and upholds the decision:**

- Relevant framework: Ernst & Young judgment CJEU
- Gun jumping does not presuppose any change of control
- The 'implementation' of a concentration can take place as soon as the parties to a concentration implement operations contributing to a lasting change of control of the target, i.e. possibly before the acquisition of control over such an undertaking.
- Purely auxiliary or preparatory measures that have no direct link with the implementation are not caught by the gun jumping rules. Step 1 had a direct functional link with change of control over TMSC.

# thyssenkrupp/Commission – General Court – 22 June 2022



## 2019: Commission decision

- Blocking of the creation of a joint venture by thyssenkrupp and Tata Steel
- Production and distribution of flat carbon steel
- Threat choice and increase prices for consumers of automotive and packaging steel
- First “gap-case” since CK/Hutchison: not a dominant position but a risk of significant impediment of competition (SIEC)



## General Court

### GC rejects thyssenkrupp's arguments in their entirety and upholds the decision:

- Full review!
- Lighter standard of proof: requires Commission to prove to „sufficient degree“ instead of “strong probability” of competition being harmed
- Commission correctly rejected remedies

# Procedural issues

# Sped-Pro/Commission – General Court – 9 February 2022



**2019:** Commission decision rejecting a complaint

- Sped-Pro freight forwarder in Poland
- PKP is a Polish state-owned rail-freight operator
- PKP refused to conclude a multilateral annual cooperation agreement on market conditions
- Complaint based on abuse of dominance by PKP Cargo
- Rejection of complaint as Polish competition authority best placed to examine the case



**General Court**

**GC annuls the Commission decision:**

- Examination of the impact of systemic or generalized deficiencies in the rule of law in a Member State on determining the competition authority that is best placed to examine a complaint. First time ever!
- Two step approach:
  - Is there a real risk of a breach of a fundamental right to a fair trial connected with a lack of independence of courts?
  - Does the person concerned actually run a risk?
- Sped-Pro had submitted a body of specific evidence which showed that there was a real risk
  - Dependence of the competition authority vis-à-vis the executive
  - Leniency competition authority towards PKP

# bpost – Court of Justice – 22 March 2022



## Facts

- **2010:** bpost establishes new rebate scheme
- **2011:** Belgian postal regulator imposes fine of EUR 2.3 million for infringement of the non-discrimination rule
- **2012:** Belgian competition authority imposes fined of EUR 37 million on bpost for loyalty inducing rebate scheme
- **2016:** Brussels court of appeal annuls the decision of the regulator
- **2016:** Brussels court annuls decision of competition authority on the basis of non bis in idem: proceedings conducted by postal regulator and competition authority concerned the same facts
- **2018:** supreme court of Belgium sets aside judgment and refers back – court of appeal refers the matter to CJEU



## Court of Justice

### CJEU considers:

- An undertaking can be penalized for an infringement of competition law where, on the same facts, it has already been the subject of a final decision for failure to comply with sectoral rules.
- Duplication of proceedings is subject to there being clear and precise rules to predict that there will be coordination between the two companies.
- The two sets of proceedings must have been conducted in a sufficiently coordinated manner within a proximate timeframe.
- The overall penalties must correspond to the seriousness of the offences committed.
- If not, the second authority violates the non bis in idem principle.

# Nordzucker – Court of Justice – 22 March 2022



## Facts

- **2014:** German competition authority imposes fine of EUR 195,5 million on Südzucker for market sharing arrangement in the meaning of Article 101 TFEU with Nordzucker, also in relation to Austrian market.
- **2019:** appeal Austrian competition authority before Supreme court seeking a declaration that Nordzucker and Südzucker infringed Article 101 TFEU and Austrian competition law and should be fined.
- Preliminary reference by Supreme court on non bis in idem



## Court of Justice

### CJEU considers:

- An undertaking can be fined for an infringement on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State even though that conduct has already been referred to by a competition authority of another Member State.
- The latter decision must not be based on a finding of an anticompetitive object or effect in the territory of the first Member State. In that case, the second competition authority infringement the prohibition against double jeopardy.



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