



## Legal latest

### Competition, EU and Regulatory newsletter

May 2017

#### Decisions

##### **Akzo Nobel and parental liability**

On 27 April 2017, the Court of Justice dismissed Akzo Nobel's appeal relating to the heat stabilisers cartel.

The General Court had partially annulled the Commission's decision in so far as it imposed fines on two Akzo Nobel subsidiaries for the first period of the cartel infringements. It had held that the limitation periods had expired and that the Commission was time-barred from imposing fines on the two subsidiaries during the relevant period. However, it also held that this did not preclude Akzo Nobel, the parent company, from being held liable regarding that infringement period.

The Court of Justice held that the fact that penalties could no longer be imposed on certain companies because the limitation period has expired does not preclude another company, which is considered personally responsible and jointly and severally liable with those companies for the same anti-competitive behaviour, and in respect of which the limitation period has not expired, from having proceedings instituted against it.

The Court went on to hold that its conclusion was unaltered by the fact that Akzo Nobel's liability in respect of the first infringement period arose exclusively from the direct participation of its subsidiaries in the cartels.

##### **Facebook fined €110 million for providing misleading information about WhatsApp takeover**

Facebook has been fined €110 million for providing incorrect or misleading information during the Commission's merger review of Facebook's acquisition of WhatsApp in 2014.

When Facebook notified the Commission of its intention to acquire WhatsApp, it informed the Commission that it was unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts.

However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

The Commission has now concluded that, contrary to Facebook's statements during the 2014 merger review process, the technical possibility of linking WhatsApp users' phone numbers with Facebook users' identities existed in 2014 and Facebook were aware of this.

The €110 million fine imposed does not however have any impact on the Commission's decision to allow the acquisition.

This is the first time that the Commission has adopted a decision imposing fines on a company for providing incorrect or misleading information since the entry into force of the 2004 Merger Regulation.

##### **Advocate General opinion regarding EU merger control regime**

On 27 April 2017, Advocate General Kokott handed down an opinion on a request for a preliminary ruling from the Austrian Supreme Court regarding the EU merger control regime.

This case involved an asphalt plant which was owned by a construction company. It was proposed that the asphalt plant would be operated jointly by its current owner and another construction company.

The Austrian Supreme Court was asked whether a change in the control structure of an existing undertaking is to be regarded as a concentration for EU merger control purposes even where the joint venture resulting from that transaction is not a full-function undertaking.

The Advocate General opined that the transfer of an existing undertaking or part of an undertaking from sole control to joint control by its current operator and another company unrelated to it constitutes a concentration only where the joint venture resulting from that transaction performs on a lasting basis all of the functions of an autonomous economic entity.

## EU policies & guidance

### State aid to ports, airports and cultural and the outermost regions

The Commission has approved new state aid rules that exempt certain public support measures for ports, airports, culture and the outermost regions from notification to the Commission.

The exemption covers:

- investments in regional airports handling up to 3 million passengers per year
- operating costs of small airports handling up to 200,000 passengers per year
- investments of up to €150 million in sea ports and up to €50 million in inland ports
- the costs of dredging in ports and access waterways

In addition, the Commission will only look at bigger state aid cases that involve a higher amount of aid for culture projects (and only if these measures actually constitute state aid) and for multi-purpose sports arenas.

The Commission has also made it easier to compensate companies for the additional costs they face when operating in the EU's outermost regions.

## Practice note

### EU Merger Control Thresholds

There are two alternative tests to establish whether a merger requires notification to the Commission under the EU Merger Regulation, as follows:

#### Test 1:

- The combined worldwide turnover of all the undertakings concerned is more than €5 billion.
- The EU turnover of at least two of the undertakings concerned is more than €250 million.
- Each of the undertakings concerned do not achieve more than two-thirds of its EU turnover in the same Member State.

#### OR, Test 2:

- The combined worldwide turnover of all the undertakings concerned is more than €2.5 billion.
- The aggregate EU turnover of at least two of the undertakings concerned is more than €100 million.
- In at least three Member States, the combined turnover of all the undertakings concerned is more than €100 million.
- In those same 3 Member States, the turnover of at least two of the undertakings concerned is more than €25 million.
- Each of the undertakings concerned do not achieve more than two-thirds of its EU turnover in the same Member State.

## Merger determination – advertising platforms

### Landmark/Benchwarmers

This case involved the proposed acquisition of BenchWarmers Limited by Landmark Digital Limited.

The Landmark group publishes various newspapers in the State and sells advertising space in each of its newspapers. It also sells advertising space on the websites of each of its newspapers.

The Landmark group also controls two radio stations in the State and sells advertising airtime on both. It does not sell online advertising space on the websites of these two radio stations.

In addition, the Landmark group operates an online news website, [www.breakingnews.ie](http://www.breakingnews.ie) and an online recruitment website, [www.recruitment.com](http://www.recruitment.com). Both websites sell advertising space.

BenchWarmers owned the domain names for two websites, one of which was a sports news website (which sells online advertising) and the other (which was not yet active) will produce entertainment news.

The CCPC had previously determined that newspaper advertising competes in a different product market to other media advertising platforms (eg television, radio and online), and saw no reason to depart from this view in the current case.

Therefore, the CCPC considered that the Landmark group, when selling advertising space in its newspapers and on its two radio stations, does not compete in the same product market as BenchWarmers, which solely sells advertising space online.

While there was a minor horizontal overlap with respect to the supply of online advertising space in the State, the CCPC was of the view that this raised no competition concerns in the State. The CCPC noted that BenchWarmers was likely to generate minimal turnover in the State from the sale of online advertising.

The CCPC therefore concluded that the proposed transaction would not substantially lessen competition in any market for goods or services in the State.



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