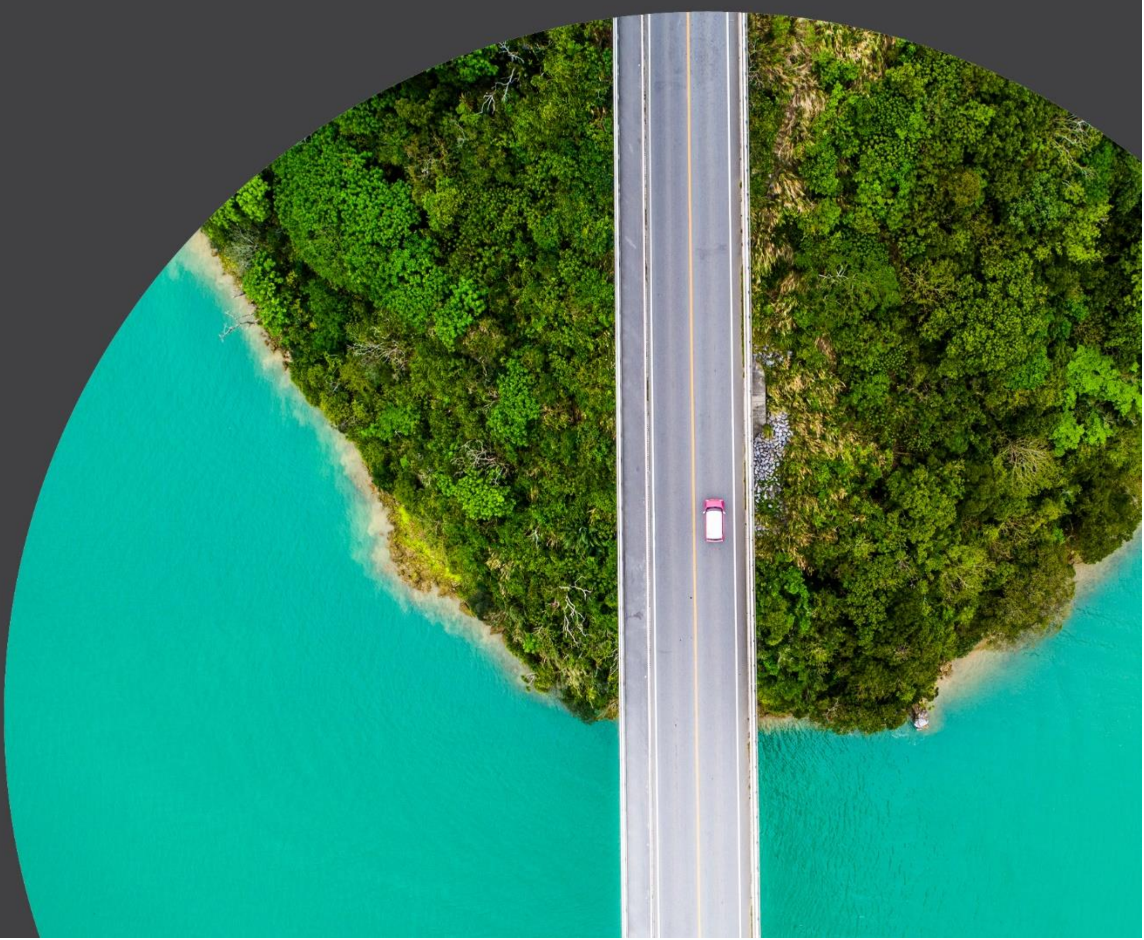
EU COMPETITION REVIEW 2019



McDermott
Will & Emery

McDermott
Will & Emery

TABLE OF CONTENTS

3 Cartels & Restrictive Agreements

33 Abuse of Dominant Position

43 Merger Control

53 State Aid

55 Legislative & Policy Developments

65 Key Contacts

AUTHORS

PHILIP BENTLEY, QC
COUNSEL (BRUSSELS)

JACQUES BUHART
PARTNER (BRUSSELS, PARIS)

WILKO VAN WEERT
PARTNER (BRUSSELS)

ANDREA HAMILTON
PARTNER (BRUSSELS)

DAVID HENRY
COUNSEL (BRUSSELS)

MAI MUTO
ASSOCIATE (BRUSSELS)

STEPHAN DE GROËR
ASSOCIATE (PARIS)

CAROLINE RUIZ-PALMER
ASSOCIATE (BRUSSELS)

HÉLÈNE DE CAZOTTE
ASSOCIATE (BRUSSELS)

For more information visit mwe.com.

CARTELS & RESTRICTIVE AGREEMENTS

COMMISSION FINES MASTERCARD EUR 570M FOR LIMITING ACCESS TO CROSS-BORDER CARD ACQUIRING SERVICES

AT.40049, MASTERCARD II, 22 JANUARY 2019

On 22 January 2019 the European Commission imposed a fine of EUR 570 million on Mastercard for limiting the possibility for merchants to benefit from lower cost card acquiring services offered by banks established in other EEA states during the period from 27 February 2014 to 8 December 2015.

Mastercard's four-party card arrangement is discussed further in our article Commission Accepts Mastercard, Visa Commitments on Minimum Inter-Regional Interchange Fees.

Mastercard applied rules when the acquirer was located in a different country from the merchant (cross-border acquiring). Although Mastercard's rules allowed cross-border acquiring, the cross-border acquirer was obliged to ensure that it did not disadvantage the cardholder, the merchant or the issuer involved. Unless the acquirer had agreed bilaterally with the issuer on the interchange fee, the acquirer was obliged to apply the applicable domestic minimum interchange fees (MIFs) of the country of the merchant.

Commission Decision

The Commission formed the view that the purpose of Mastercard's cross-border acquiring rules was to shield the domestic MIF levels in individual Member States from cross-border competition, so that they remained at the same uniform level. In light of this finding, the Commission considered that those rules clearly restricted competition "*by object*".

The Commission concluded from its investigations that Mastercard's cross-border acquiring rules resulted in retailers having to pay more in bank services to receive card payments than if they had been free to shop around for lower-priced services, creating an obstacle to cross-border trade in card acquiring services within the EEA. As a result, the Commission decided to impose a fine on Mastercard.

In setting the fine, the Commission applied an aggravating factor and increased the basic amount of the fine by 50% to take account of Mastercard's recidivism. This increase reflected the Commission's 2007 decision finding that the default MIFs set by Mastercard for intra-regional transactions in the EEA infringed EU competition rules.

However, the amount of the fine was reduced by 10% because Mastercard submitted a formal offer of cooperation with the Commission investigation, acknowledging liability for the infringement, including the underlying facts and their legal qualification.

Comment

This fining decision is also a prohibition decision. It prohibits Mastercard from continuing to apply these provisions in its cross-border acquiring rules. This completes the competition law "*regulation*" of cross-border acquiring rules, which began when Visa changed its cross-border acquiring rules at the same time that it gave its commitments on intra-regional MIFs in 2014, and the Commission did not impose a fine.

The reduction of the fine to reward Mastercard's cooperation is a recent application of the Commission's relatively novel cooperation procedure model for non-cartel infringements, notably vertical restrictions, as here. This new procedure is designed to encourage admission of infringements, cooperation with the Commission's investigators, and provision of additional evidence. This procedure has not yet been codified, but the Commission published a fact sheet in December 2018 that outlines a roadmap for cooperation in non-cartel cases.

Commissioner Margrethe Vestager, in charge of competition policy, said:

"*European consumers use payment cards every day, when they buy food or clothes or make purchases online. By preventing merchants from shopping around for better conditions offered by banks in other Member States, Mastercard's rules artificially raised the costs of card payments, harming consumers and retailers in the EU*."

COMMISSION ACCEPTS MASTERCARD, VISA COMMITMENTS ON MINIMUM INTER-REGIONAL INTERCHANGE FEES

AT.40049, MASTERCARD II, AND AT.39398, VISA MIF, 29 APRIL 2019

On 29 April 2019, the European Commission accepted commitments from Mastercard and Visa setting caps on the minimum interchange fees (MIFs) charged for card transactions with merchants established in the EEA where the issuer of the card is established outside the EEA (inter-regional transactions).

Background

These decisions are follow-ons from earlier decisions concerning Mastercard's and Visa's intra-regional MIFs—*i.e.*, MIFs for card transactions in which both the merchant and the issuer are established in the EEA. In the case of Mastercard, the Commission adopted a prohibition decision on 19 December 2007, and Mastercard gave undertakings to modify its intra-regional MIFs from July 2009. In the case of Visa, the Commission accepted formal commitments by Visa to cap its intra-regional MIFs. The Commission accepted these commitments by decision of 26 February 2014.

As a result of these initial proceedings, both Mastercard and Visa set their default intra-regional MIFs at 0.2% for debit card transactions and 0.3% for credit card transactions.

Independent of these commitments, the European Parliament and the Council adopted the EU Interchange Fee Regulation 2015/751, which capped MIFs at 0.2% of the transaction value for debit cards and 0.3% of the transaction value for credit cards. These caps, which came into force in 2015 and 2016, are of a regulatory nature and apply to all MIFs in card schemes operated in the EU where the issuer and the acquirer are not the same party (which is not the case, for example, in the basic American Express scheme).The same rules are applied by the non-EU members of the EEA, namely Iceland, Liechtenstein and Norway.

The regulatory structure described above does not apply to transactions where the issuer is established outside the EEA. The Commission continued its proceedings in relation to Mastercard's and Visa's inter-regional MIFs, *i.e.*, MIFs that apply to card transactions where the merchant is in the EEA but the card issuer is outside the EEA.

Mastercard and Visa both operate four-party card arrangements in which the participants are issuing banks, acquiring banks, cardholders and merchants. The issuing bank provides cardholders with payment cards and makes payments on behalf of cardholders. The acquiring bank collects card payments on behalf of merchants. The arrangement provides that, for each card transaction, the acquiring bank pays an MIF to the issuing bank. Thus, the MIF is a cost for the acquiring bank. The acquiring bank in turn charges a "*merchant service charge*" to the merchant. This charge covers both the cost of the MIF paid to the issuer and the remuneration for the acquiring bank. Thus the MIF is passed on to the merchant, which takes this cost into account in setting its prices for goods or services provided to consumers, even those who do not use cards.

Commission Decisions

In the Mastercard and Visa arrangements, the issuing and acquiring banks were free to negotiate bilateral MIFs to be used in clearing transactions between them. In the absence of a bilateral agreement, a default MIF set by the card system (*i.e.*, by Mastercard or by Visa) applied. The Commission found that, in practice, there were very few bilateral MIFs and so the default MIF was applied.

The Commission's legal arguments in this case were basically the same as in the prior cases that led to the undertakings and commitments on intra-regional MIFs.

The Commission argued that Mastercard and Visa were each an association of undertakings, namely an association of issuing banks and that decisions taken by Mastercard or Visa in setting default MIFs were therefore the decisions of an association of undertakings within the meaning of Article 101(1) TFEU. The Commissions said that these decisions of undertakings had as their object and effect the restriction of competition. In the Commission's view, they restricted competition because the default MIFs determined a significant component of the fees charged by acquiring banks to merchants for acquiring services, thereby limiting the acquirers' scope for reducing and differentiating their acquiring fees. The Commission found that there was no objective justification for the default MIFs and they could not be exempted under Article 101(3) from the prohibition of Article 101(1) TFEU.

The outcome of these cases was that both Mastercard and Visa gave commitments capping inter-regional MIFs at:

- 0.2% for debit cards when used in a merchant establishment (card present)
- 1.15% for debit cards when used online (card not present)
- 0.3% for credit cards, card present
- 1.50% for credit cards, card not present

These commitments were accepted by Commission Decision AT.40049 of 29 April 2019 in the case of Mastercard and by Commission Decision AT.39398 of the same date in the case of Visa.

The methodology used to determine the amount of the caps on the MIFs was the so-called merchant indifference test (MIT). According to the MIT, interchange fees should be such that, on average, the merchant service fees charged by acquiring banks to merchants do not exceed the transactional benefits that merchants derive from accepting card payments. Such transactional benefits are the direct benefits of a card payment for a merchant relative to alternative means of payment, in particular cash.

The MIT-compliant MIF caps were calculated by comparing the merchants' costs of accepting payments made by debit and credit cards to those of accepting payments made with the alternative means of payment.

For inter-regional card present transactions, the Commission considered that cash remained a valid alternative to cards for the purposes of the MIT. However, for inter-regional card not present transactions, cash could not be considered a valid alternative, and thus other means of payment were used as comparators.

The use of different comparators for card present and card not present transactions resulted in higher MIF caps for card not present than for card present transactions.

Comment

Commissioner Margrethe Vestager, in charge of competition policy, said:

"Mastercard and Visa have committed to significantly reduce the interchange fees applied to payments made in Europe with cards issued elsewhere. The commitments, which are now binding on Visa and Mastercard, will reduce the costs borne by retailers for accepting payments with cards issued outside the EEA. This, together with our January 2019 decision on Mastercard's cross-border card payment services, will lead to lower prices for European retailers to do business, ultimately to the benefit of all consumers".

This decision marks the end of Commission investigations into Mastercard's and Visa's interchange fees since 2006. These investigations illustrate how the competition rules can be used to regulate conduct in a sophisticated economic activity such as issuing debit and credit cards. Parties investigated can avoid fines provided they give timely commitments that meet the Commission's concerns, thus enabling the Commission to achieve its "*quasi-regulatory*" objectives. Such quasi-regulation also yields novel and complex economic tests such as the MIT used in these investigations.

COMMISSION FINES CAR SAFETY EQUIPMENT SUPPLIERS EUR 368M

AT.40481, OCCUPANT SAFETY SYSTEMS II, 5 MARCH 2019

On 5 March 2019, the European Commission fined car safety equipment makers Autoliv and TRW EUR 368.3 million for exchanging commercially sensitive information and engaging in illegal coordination with respect to the supply of car seat belts, airbags and steering wheels to Volkswagen Group and BMW, respectively. In return for revealing the infringements to the Commission, a third supplier, Takata, was granted full immunity from fines under the Commission's Leniency Notice.

All three suppliers agreed to settle with the Commission, thereby acknowledging their involvement in and liability for the illegal cartel activity. The decision is the 29th settlement since the introduction of this procedure for cartels in June 2008.

Background

The decision comes as part of a series of investigations aimed at establishing evidence of cartel activity in the automotive parts industry. In its first decision in November 2017, the Commission fined Autoliv and Takata for four infringements in relation to the supply of products to Asian car manufacturers, including Toyota, Suzuki and Honda (COMP/AT.39881, *Occupant Safety Systems*). The Commission also fined TRW in a February 2018 decision for a cartel relating to the supply of hydraulic braking systems (COMP/ AT.39920, *Braking Systems*).

Commission Decision

According to the Commission, the three car equipment suppliers exchanged commercially sensitive information and coordinated their market behaviour with respect to the supply of seatbelts, airbags and steering wheels to the Volkswagen Group and the BMW Group. The Commission's investigation revealed that the cartel activity in question took place through meetings at the suppliers' business premises, in hotels, in restaurants, and via telephone calls and email.

The Commission found that the cartel relating to the sales of seatbelts, airbags and steering wheels to Volkswagen Group had started on 4 January 2007. It ended on 28 March 2011 for TRW and on 30 March 2011 for Autoliv and Takata. Under the Commission's Leniency Notice, TRW and Autoliv received fine reductions of 50% and 30% respectively for their cooperation in the investigation. The reductions reflected the extent to which the evidence they provided assisted the Commission in proving the existence of the cartels, as well as the timing of their cooperation. Under its 2008 Settlement Notice, the Commission applied a further reduction of 10% to the fine in consideration of the suppliers' acknowledgment of their participation in and liability for the cartel. Thus, TRW and Autoliv were fined EUR 158.824 million and EUR 121.211 million respectively.

Regarding the cartel concerning sales of seatbelts, airbags and steering wheels to the BMW Group, the Commission's investigation revealed that the cartel had started on 28 February 2008 for Autoliv and Takata, and on 5 June 2008 for TRW. It ended on 16 September 2010 for Autoliv, and on 17 February 2011 for Takata and TRW. Fine reductions of up to 50% and 30% were granted to TRW and Autoliv, respectively, for their cooperation under the Leniency Notice, taking into account the strength and usefulness of the evidence provided and the timing of their cooperation. Pursuant to the 2008 Settlement Notice, the Commission applied a further reduction of 10% to the fine, reflecting the companies' acknowledgment of their participation in and their liability for the cartel. The fines imposed amounted to EUR 30.067 million for TRW and EUR 58.175 million for Autoliv.

Comment

The decision represents yet another example of the importance—and efficiency—of the Commission's leniency and settlement systems in the detection and unearthing of clandestine and illegal cartel activity. The cartels in this case are likely to have had a significant effect on European customers, since the Volkswagen Group and the BMW Group sell about three of every 10 cars bought in Europe.

COMMISSION ACCEPTS COMMITMENTS BY HOLLYWOOD STUDIOS AND SKY ON CROSS-BORDER PAY-TV SERVICES

AT.40023, CROSS-BORDER ACCESS TO PAY-TV, 7 MARCH 2019

On 7 March 2019, the European Commission made legally binding a set of commitments by several Hollywood film studios and a UK telecommunications company regarding cross-border pay-TV services in the EEA.

Background

Film studios Disney, NBC/Universal, Sony Pictures and Warner Bros ("*the Studios*") entered into film licensing agreements with Sky UK Ltd and Sky Ltd (collectively, "*Sky*") granting Sky an exclusive right to exhibit licensed content via satellite or online to subscribers in the United Kingdom and Ireland. Each agreement contained clauses that prohibited or limited Sky from providing its retail pay-TV services in response to unsolicited requests from consumers located in the EEA but outside the United Kingdom and Ireland. Certain agreements contained clauses that required the relevant studio to prohibit or limit pay-TV broadcasters located in the EEA but outside the United Kingdom and Ireland from responding to unsolicited requests from consumers residing or located in the United Kingdom or Ireland.

In July 2015, the Commission sent a SO to the studios and to Sky UK expressing its concerns that the licensing agreements impaired competition and had an anticompetitive object because they were *"designed to prohibit or limit cross-border passive sales of retail pay-TV services and grant absolute territorial exclusivity in relation to the content of the studios"*.

The studios sought to justify the clauses on the grounds that:

- They brought about cost and qualitative efficiencies
- They ensured that consumers could enjoy a culturally targeted, local language product, with greater choice and variety of content
- They maintained incentive for the studios, pay-tv broadcasters such as Sky, and distributors to invest in local content
- They did not eliminate substantial competition between pay-TV broadcasters in the EEA.

The Commission rejected these arguments.

In November and December 2018, Disney, NBC/Universal, Sony Pictures, Warner Bros and Sky each offered commitments aimed at addressing the Commission's concerns. (Paramount Pictures, which also received the Commission's SO, had already offered commitments in April 2016 and these were accepted by the Commission in July 2016.)

The Commitments

The studios and Sky committed, in effect, to put an end to the prohibition on passive sales to consumers outside a broadcaster's licensed territory. This was achieved by the following specific commitments

Each studio undertook not to enter into, renew or extend a pay-TV licence agreement that introduces or reintroduces any:

- a) clauses that prevent or limit a pay-TV broadcaster located in the EEA from responding to unsolicited requests from consumers residing and located in the EEA but outside the licensed territory of such pay-tv broadcaster; and/or
- b) clauses that require the studio to prohibit or limit other pay-TV broadcasters located in the EEA but outside a given pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located in the latter pay-TV broadcaster's licensed territory.

Likewise, Sky undertook not to enter into, renew or extend a pay-TV licence agreement with a studio (or Paramount) that introduces or reintroduces any:

- a) clauses that prevent or limit Sky from responding to unsolicited requests from consumers residing and located in the EEA but outside of Sky's licensed territory; and
- b) clauses that require the studio (or Paramount) to prohibit or limit other pay-TV broadcasters located in the EEA but outside a given pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located in that pay-TV broadcaster's licensed territory.

With regard to existing licence agreements, both the studios and Sky undertook not to enforce or honour any obligations that are inconsistent with the aforementioned commitments. The studios and Sky also are also generally prohibited from circumventing the commitments.

The studios stated expressly that nothing in their commitments should be interpreted as a limitation on, or a waiver of:

- Rights that the studios would otherwise have to enter into pay-TV licence agreements that require a pay-TV broadcaster to employ geo-filtering technology and/or equivalent measures for the verification purposes permitted under the EU Portability Regulation 2017/1128 and in compliance with EU law
- Rights of the studios under copyright law, including the right to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law
- Rights of the studios or a pay-TV broadcaster to decide unilaterally to employ geo-filtering technology and/or equivalent measures to limit access to retail pay-TV services by consumers residing and/or located in or outside of the EEA

The Commission adopted a decision on 7 March 2019 making these commitments legally binding pursuant to article 9(1) of Regulation 1/2003 and closing the proceedings. The commitments apply throughout the EEA for five years across satellite and online TV, including video-on-demand.

Comment

The background to the Commission's decision was informed by its earlier decision of 26 July 2016 concerning Paramount and Sky. That 2016 decision was challenged before the GCEU by Canal +, supported by the French Republic, the Union des producteurs de cinéma and two other parties. The GCEU rejected Canal +'s challenge (judgment of 12 December 2018, Case T-873/16) and made several pertinent observations regarding how EU competition law and copyright law co-exist in the EU legal order. The Commission paraphrased these observations in its 2019 decision concerning the studios and Sky.

The Commission observed that the copyright that protects a film and the right deriving from it—namely, that of exhibiting the film—are not as such subject to the prohibition contained in Article 101(1) TFEU. The exercise of those rights, however, may fall within that prohibition depending on the circumstances.

Where a license agreement relating to a film protected by copyright is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other economic or legal circumstances justify a finding that such agreement is not liable to impair competition. Where an agreement grants a licensee the exclusive right to exhibit or transmit a film protected by copyright, including via satellite and internet transmission, and contains clauses imposing additional obligations designed to ensure compliance with territorial limitations on the exploitation of those licences, there is a restriction of competition by object. Such clauses prohibit broadcasters from effecting cross-border provision of services relating to the licensed film. This, in turn, enables each broadcaster to be granted absolute territorial protection.

An intellectual property right is intended to protect the holder's right to commercially exploit the protected subject matter via the grant of licences in return for remuneration. An intellectual property right does not guarantee the right holder the opportunity to demand the highest possible remuneration. As stated by recital 10 of the preamble to the Copyright Directive 2001/29/EC, right holders can only expect "*an appropriate reward for the use of their work*".

The Commission concluded that, although a licensee may be charged a premium for territorial exclusivity, such premium cannot be charged in order to guarantee absolute territorial exclusivity. Absolute territorial exclusivity results in partitioning of markets and artificial price differences between the partitioned markets. This is irreconcilable with the fundamental aim of the treaty, which is completion of the internal market. Such a premium cannot therefore be regarded as forming part of the "*appropriate reward*" for the right holder.

In the *Studios/Sky* case, it was not for the Commission to provide guidelines on what an appropriate reward for the right holder would be for a licence that did not guarantee absolute territorial exclusivity. Instead, this was done by the CJEU in *Football Association Premier League and Others* and repeated by the GCEU in *Canal +*. As the GCEU stated at paragraph 55 of its judgment:

"*...in the context of a system of licences without clauses intended to partition the markets according to national borders, there is nothing to prevent the holder of the rights from negotiating an amount that takes account of the potential audience both in the Member State for which the exclusive licence is granted and in any other Member State in which the broadcasts forming the subject matter of the distribution agreement are also received. In fact, the technology necessary to receive the works covered by the rights in question makes it possible to determine the actual and potential audience, by breaking down that audience by country of origin of the purchase request (see, to that effect, judgment of 4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 112 and 113). The same technology also makes it possible to regulate active promotion activities in order to limit them to the territory for which an exclusive licence is granted".*

CJEU APPLIES ECONOMIC CONTINUITY PRINCIPLE TO PRIVATE ENFORCEMENT OF ARTICLE 101 TFEU

C-724/17, VANTAAN KAUPUNKI V SKANSKA INDUSTRIAL SOLUTIONS OY AND OTHERS, 14 MARCH 2019

In a landmark case, the CJEU ruled on 14 March 2019 that EU law governs the determination of the undertaking liable to pay compensation for damage caused by an infringement of Article 101 TFEU. This ruling extends the scope of the principle of economic continuity to damages claims, so that an undertaking that continues a cartelist's commercial activity is liable to compensate the cartel's victims.

Background

In 2009, the Supreme Administrative Court of Finland found that seven companies had been involved in a cartel in the Finnish asphalt market between 1994 and 2002. Between 2000 and 2002, the cartel participants were acquired by other companies pursuant to a voluntary liquidation process. The Supreme Administrative Court of Finland applied the economic continuity test to fine the acquirers.

On the basis of the Supreme Administrative Court's decision, the City of Vantaa brought an action for damages against the acquirers. The city claimed that it had incurred harm as a result of the cartel when it concluded agreements with cartel participants during the cartel period.

The case led to contradictory judgments by the first instance and appeal courts on the question of the economic continuity test's application to private damages claims. The procedure went up to the Finnish Supreme Court, which asked the CJEU whether:

Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, *in which all the shares of the companies which have participated in a cartel prohibited by that article were acquired by other companies, which dissolved the former companies and carried on their commercial activities, the acquiring companies may be held liable for the damage caused by that cartel.*

The CJEU Decision

In line with Advocate General Wahl's Opinion, the CJEU started by recalling that the full effectiveness of Articles 101 and 102 TFEU would be at risk if compensation for loss caused by infringement of these provisions could not be claimed. The CJEU observed that:

"*it is settled case-law that the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (judgment of 5 June 2014, Kone and Others, C 557/12, EU:C:2014:1317, paragraph 21 and the case-law cited)".*

The CJEU recognised that it is for Member States to lay down the rules governing the exercise of the right to claim compensation, provided that the principles of equivalence and effectiveness are respected. However, the CJEU ruled that the determination of the entity which is liable to compensate loss caused by an infringement of Article 101 TFEU is directly governed by EU law. As the Court stated:

"It is true that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 5 June 2014, Kone and Others, C 557/12, EU:C:2014:1317, paragraph 24 and the case-law cited)".

When applying the economic continuity principle, the CJEU recalled the principles governing the definition of "*undertaking*" in the context of restructuring and when the participant of a cartel has ceased to exist. According to the CJEU:

"As regards the restructuring of an undertaking, such as that at issue in the main proceedings, in which the entity which committed the infringement of EU competition law has ceased to exist, it must be recalled that, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical (see, to that effect, judgments of 11 December 2007, ETI and Others, C 280/06, EU:C:2007:775, paragraph 42; of 5 December 2013, SNIA v Commission, C 448/11 P, not published, EU:C:2013:801, paragraph 22; and of 18 December 2014, Commission v Parker Hannifin Manufacturing and Parker-Hannifin, C 434/13 P, EU:C:2014:2456, paragraph 40)".

The CJEU explained that private damages claims following an infringement of the EU competition rules are an integral part of the enforcement system. Private enforcement ensures the full effectiveness of Articles 101 and 102 TFEU and discourages infringement. The CJEU stated that the notion of undertaking cannot have a different meaning with regard to public enforcement of the competition rules (imposition of fines) compared with private enforcement (claims for damages). Therefore, the CJEU stated that acquirers of companies that participated in a cartel may be held liable for the damage caused by the cartel when those acquirers continue the commercial activities of the cartel members.

Comment

This ruling emphasises the importance of engaging in a robust, rigorous and extensive due diligence process when contemplating the acquisition of a company and continuation of its commercial activities. The judgment also lays down uniform conditions under which private damages claims may be brought throughout the EU Member States, thus averting the risk of forum shopping.

The consequences of this judgement go beyond the principle of economic continuity, in that the CJEU ruled that EU law governs the notion of "*undertaking*" with regard to both public and private enforcement of the competition rules. As such, the meaning of "*undertaking*" in the context of public enforcement of the competition rules will also apply in a private enforcement setting. If an authority fines an undertaking for cartel activity, such undertaking should be aware that private damages claims may follow.

GCEU REQUIRES THE COMMISSION TO STATE REASONING AT EACH STAGE OF FINE CALCULATION SO THAT EQUAL TREATMENT OF ALL THE CARTELISTS IS REFLECTED

T-433/16, POMETON SPA V COMMISSION, 28 MARCH 2019

On 28 March 2019, the GCEU exercised its power of unlimited jurisdiction and significantly reduced the fine imposed on a cartelist that withdrew from settlement discussions with the Commission in the steel abrasives cartel case. The GCEU found that the Commission failed to provide an adequate statement of reasons at each stage of the fine calculation, in particular when it applied point 37 of the 2006 Fining Guidelines and thus departed from the standard methodology.

Background

Following the opening of a Commission investigation, five producers of steel abrasives requested the benefit of the cartel settlement procedure. Italian producer Pometon SpA ('Pometon') later withdrew from this procedure. As a result, the Commission was engaged in a hybrid cartel proceeding in which a settlement procedure and a contradictory procedure were conducted in parallel. This hybrid proceeding resulted in two decisions: one in April 2014, whereby the Commission fined the four participants in the settlement procedure a total of EUR 30.7 million, and another one in May 2016, whereby it fined Pometon EUR 6.2 million.

During the settlement procedure, the Commission discovered that calculating the fine in accordance with its own guidelines would take the amount above the statutory limit of 10% of turnover for most of the companies. Application of the 10% of turnover cap would result in fines that did not reflect the respective gravity of each company's participation in the cartel.

The Commission therefore applied reductions to each of the fines in the April 2014 decision, and also reduced the calculated amount of Pometon's fine in the May 2016 decision. In so doing, the Commission relied on paragraph 37 of its 2006 Fining Guidelines, which provides: "*Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology*".

In August 2016, Pometon challenged the Commission's May 2016 decision before the GCEU on the following grounds:

- The Commission violated the principles of fair trial, presumption of innocence and impartiality. The Commission also violated Pometon's rights of defence, because although Pometon was not an addressee of the settlement decision, it was mentioned several times in this decision as a participant in the cartel. Therefore, before Pometon had the opportunity to defend itself, the Commission had already presumed its fault.
- The Commission lacked sufficient evidence in incriminating Pometon as a participant in the cartel.
- The Commission violated article 101 TFEU and article 53 of the EEA Agreement in finding that the cartel was a restriction of competition by object.
- The Commission's findings on the duration of the infringement were incorrect.
- The Commission failed to provide an adequate statement of reasons and violated the principles of proportionality and equal treatment when departing from the standard fining methodology by applying point 37 of the Fining Guidelines in the calculation of Pometon's fine.

GCEU Findings

The GCEU upheld Pometon's last plea and rejected all the others.

Pometon's first plea is noteworthy, despite being rejected by the GCEU, because the Commission may be in a delicate position when conducting a settlement procedure and a contradictory procedure in parallel. The Commission must avoid drawing any conclusion in the settlement procedure that could prejudice the rights of the defence of the party or parties subject to the contradictory procedure.

In evaluating this plea, the GCEU referred to the 27 February 2014 judgment of the European Court of Human Rights in *Karaman v Germany* (points 64 and 65), according to which the conduct of separate criminal trials successively is consistent with the principle of the presumption of innocence provided that the following conditions are satisfied:

- The case involves several accused parties who cannot be judged at the same time.
- It is indispensable, in order to assess the guilt of the parties, to mention in the first judgment the participation in the offence of an accused party who will be judged in a subsequent trial.
- In its first judgment, the court does not state more information than necessary for the assessment of the criminal liability of the accused parties in the first trial.

The GCEU found that mentioning Pometon's behaviour in the settlement decision was useful to describe the cartel precisely. The GCEU considered that the Commission took all the necessary editorial precautions in the settlement decision because it expressly excluded Pometon's culpability, mentioning that the examination of this company's case was to take place in a subsequent contradictory procedure. The GCEU concluded that the references to Pometon in the settlement decision could not be regarded as an indication of the Commission's lack of impartiality, nor as a lack of respect for the principle of the presumption of innocence. The GCEU thus rejected Pometon's first plea.

In contrast, the GCEU upheld Pometon's last plea, regarding the Commission's inadequate reasoning in the calculation of the fine. The GCEU stated that in the case of a hybrid procedure, the Commission must specify all the relevant elements to enable the Court to assess whether the undertaking that withdrew from the settlement procedure was in a comparable situation to that of the undertakings that participated in the settlement procedure to the end.

The Commission's May 2016 decision was unclear as to the methods and criteria used at the second stage of the calculation. In this contradictory procedure, the Commission decided to reduce the amount of Pometon's fine on the grounds of point 37 of the Fining Guidelines. The Commission thus departed from the standard fining methodology but failed to explain clearly the final mathematical approach. The GCEU concluded that with regard to the calculation of the fine, Pometon could not determine whether it was in a situation comparable to that of the other cartel participants, nor whether the Commission had treated the parties equally. Therefore, the GCEU annulled article 2 of the Commission's May 2016 decision regarding the amount of the fine imposed on Pometon.

Finally, in exercising its power of unlimited jurisdiction, the GCEU re-calculated the amount of the fine. The GCEU took into account Pometon's individual liability, its size and its ability to affect competition, and compared these factors with the situation of the other cartelists. In consideration of these factors, the GCEU applied an exceptional reduction rate of 75% on the total amount of the fine instead of the 60% reduction factor applied by the Commission. This gave a net fine of EUR 3.8 million, compared to the EUR 6.2 million initially imposed by the Commission.

On 6 June 2019, Pometon filed an appeal against the GCEU's decision before the CJEU. Pometon seeks annulment of the CGEU's judgment in its entirety and annulment of the Commission's May 2016 decision. This appeal is pending.

Comment

A participant in a settlement procedure has the right to withdraw from such procedure and be examined under a contradictory procedure, in accordance with the universal principle of no penalty without trial. This right is well established, and the judgment in *Pometon* does not question this right. However, the conduct of a settlement procedure and a contradictory procedure in parallel, or in quick succession, creates difficulties for the protection of the rights of the defence of the party or parties that withdraw from the settlement procedure (or that never even entered into settlement discussions).

The judgment in *Pometon* illustrates the challenge for the Commission to provide adequate reasoning that enables all parties to understand how the other parties were treated and to be able to check that there was no unequal treatment of like situations (or equal treatment of materially different situations). As for the Commission's duty of impartiality, the judgment could have taken a stronger line on the references made in the settlement decision of April 2014 to Pometon's participation in the infringement. It is not just a question of justice being done, but of justice being seen to be done.

CJEU CLARIFIES APPLICATION OF DAMAGES DIRECTIVE BEFORE AND AFTER IMPLEMENTATION

C-637/17, COGECO COMMUNICATIONS INC V SPORT TV PORTUGAL SA AND OTHERS, 28 MARCH 2019

In a seminal judgment demonstrating continued appetite for private litigation in the European Union, the CJEU ruled on the temporal application of Directive 2014/101 (the Damages Directive) and held that Cogeco Communications' competition law damages action should not be time-barred under Portuguese damages law.

Background

Cogeco was a shareholder of Cabovisão – Televisão Por Cabo SA between 3 August 2006 and 29 February 2012. On 30 July 2009, Cabovisão filed a complaint against Sport TV Portugal and others with the Portuguese competition authority, alleging that Sport TV Portugal had abused its dominant position by engaging in illegal price discrimination.

On 14 June 2013, the Portuguese competition authority held that Sport TV Portugal had abused its dominant position within the meaning of both Article 102 TFEU and the corresponding national provision. The competition authority imposed a fine of EUR 3.73 million on Sport TV Portugal.

Sport TV Portugal appealed to the Portuguese Competition, Regulation and Supervision Court, which reduced the fine to EUR 2.7million. The Court found that Article 102 TFEU was not applicable to the present case on the ground that it had not been shown that the anticompetitive measure in question affected trade between the Member States.

Sport TV Portugal brought a further appeal before the Portuguese Court of Appeal, which upheld the court of first instance's ruling.

On 27 February 2015, Cogeco brought an action before the Tribunal Judicial da Comarca de Lisboa against, *inter alia*, Sport TV Portugal and its parent companies. The action sought compensation for the harm that Cogeco suffered as a result of Sport TV Portugal's anticompetitive practices between 3 August 2006 and 30 March 2011.

Prior to rendering its ruling on the matter, the Tribunal asked the CJEU the following questions: In a context in which the action was brought before the deadline to transpose Damages Directive, and in which the Damages Directive had not yet been transposed into Portuguese law:

1. Must Article 22 of the Damages Directive be interpreted as meaning that the Damages Directive is applicable to the proceedings at hand?
2. Must Article 102 TFEU and the principles of equivalence and effectiveness be interpreted as precluding national legislation which (a) lays down that the limitation period concerning actions for damages is three years and commences from the date on which the injured party was aware of its right to compensation (even if it was unaware of the identity of the person liable and the full extent of the damage), and (b) does not allow for the possibility of suspending or interrupting that period during the proceedings before the national competition authority?
3. Do Article 102 TFEU and the principles of equivalence and effectiveness preclude national legislation which provides that a national competition authority's infringement finding is not binding on the assessment of a national court before which an action for damages has been brought, or do they merely establish a rebuttable presumption in that regard?

The CJEU's Preliminary Ruling

As to the first question, regarding the temporal scope of the Damages Directive, the CJEU noted that Article 22(1) of the Directive required Member States to ensure that national measures transposing the *substantive* provisions of the Directive do not have retroactive effect.

Article 22(2) of the Damages Directive also required Member States to ensure that national measures transposing its *procedural* provisions do not apply to actions for damages of which a national court was aware prior to 26 December 2014. According to the

CJEU, this provision meant that Member States could choose whether the national rules transposing the Damages Directive's procedural provisions would apply to actions brought between 26 December 2014 and the date of transposition or the expiry of the transposition period. They could also decide that procedural rules would not have retroactive effect in the first place.

In the view of the CJEU, Portugal could therefore legitimately decide that national rules transposing the procedural provisions of the Damages Directive are not applicable to actions for damages brought before the effective date of the national provisions. Damages actions brought after 26 December 2014, but before the Portuguese transposition law entered into force, were therefore to be governed only by the national procedural rules that were already in force before the transposition of the Damages Directive. The same applies to national rules transposing the Damages Directive's substantive provisions, which must not apply retroactively.

Because Cogeco's action was brought before the expiry of the deadline for transposing the Damages Directive, and before that Directive's transposition into national law, the CJEU held that the Damages Directive did not apply to the dispute at hand.

Regarding question two, the CJEU held that short limitation periods that begin before the injured person is able to ascertain the identity of the infringer may make it practically impossible or excessively difficult to exercise the right to compensation. In order for an injured party to be able to bring an action for damages, it must know who is liable for the infringement of competition law. The same goes for short limitation periods that cannot be suspended or interrupted for the duration of proceedings, following which a final decision is made by the national competition authority or a review court.

The CJEU stated that:

"In the absence of EU rules governing the matter that are applicable ***ratione temporis****, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an abuse of dominant position prohibited under Article 102 TFEU, including those on limitation periods, provided that the principles of equivalence and effectiveness are observed (see, by analogy, judgment of 5 June 2014, Kone and Others, C 557/12, EU:C:2014:1317, paragraph 24).*

Accordingly, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (judgment of 5 June 2014, Kone and Others, C 557/12, EU:C:2014:1317, paragraph 25).

In that regard, and specifically in the context of competition law, those rules must not jeopardise the effective application of Article 102 TFEU (see, to that effect, judgment of 5 June 2014, Kone and Others, C 557/12, EU:C:2014:1317, paragraph 26)".

In the light of those considerations the CJEU concluded that Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority.

Regarding question three, the CJEU pointed to settled case law according to which it may refuse to rule on a question referred for a preliminary ruling from a national court where it is obvious that the requested interpretation of EU law bears no relation to the facts or purpose of the main action, where the problem is hypothetical, or where the CJEU does not have the factual or legal material necessary to provide a useful answer.

The Court observed that:

"In that regard, it should be noted that, according to settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 20 December 2017, Núñez Torreiro, C 334/16, EU:C:2017:1007, paragraph 38 and the case-law cited)".

The CJEU noted that the original infringement decision in this case had been partially annulled on appeal because no appreciable risks to trade between Member States had been demonstrated. The subject matter before the referring court therefore was not an action for damages following a finding of an infringement of Article 102 TFEU made by a national competition authority or a review court.

Thus, the CJEU held that it was obvious that the interpretation of Article 102 TFEU and the principles of equivalence and effectiveness bore no relation to the actual facts or purpose of the main action, and accordingly the question was inadmissible.

Comment

The *Cogeco* decision represents another seminal judgment in the area of private damages litigation and extends the rights of claimants to seek damages for breaches of the EU competition rules. *Cogeco* and the recent judgment in *Skanska* (Case C-724/17, 14 March 2019) highlight the ongoing trend of private litigation in the European Union, and underscore the critical role that damages actions play in the effective enforcement of the competition rules.

COMMUNICATIONS THROUGH PROFESSIONAL ONLINE PLATFORMS FOUND TO BE ILLEGAL CONDUCT

AT.40135, FOREX, 16 MAY 2019

The illegal exchange of commercially sensitive information between competitors received renewed attention in two foreign-exchange-related cases, where a number of individuals working for competing banks communicated through professional online platforms. This activity led the European Commission to investigate and fine five banks for taking part in two cartels in the spot foreign exchange market for several currencies.

The first decision (in the so-called Essex Express cartel) led to a total fine of EUR 258 million imposed on Barclays, Royal Bank of Scotland (RBS) and MUFG Bank. The second decision (in the so-called Three Way Banana Split cartel) led to a total fine of EUR 811 million for Barclays, RBS, Citigroup and JPMorgan.

UBS remained shielded from fines as the first-through-the-door leniency applicant.

The Commission found that certain individual traders in charge of foreign exchange spot trading for their employers exchanged commercially sensitive information and sometimes even coordinated their trading conduct through various online professional chatrooms. The information exchanged in these chatrooms related to actual outstanding orders, bid-ask spreads (*i.e.*, prices) applicable to specific transactions, open risk positions held by the banks, and other details of current or planned trading activities.

These communications, combined with a tacit understanding among the traders involved in the scheme, allowed them to make informed market decisions on whether and when to sell or buy the currencies they had in their portfolios. Moreover, the communications allowed the traders to directly identify coordination opportunities, for example through a practice called "*standing down*", whereby some traders would temporarily refrain from a certain trading opportunity to avoid interfering with another trader active on the platform.

This case teaches that even if communications take place on a password-protected subscription-based professional platform, there is no protection against one of the members stepping forward to the European Commission with a leniency application denouncing the practice. In addition, in its investigation, the Commission was able to access all relevant communications, since these remained stored on the platforms' servers and could be produced by the leniency applicant.

Finally, it is noteworthy that the matter was settled with the Commission. The parties were able to benefit from a reduction in fines in exchange for acknowledgment of their involvement in and liability for the cartels. The parties also received further credits by cooperating actively with the Commission. This led to the cumulative application of the settlement reduction of 10%, plus reductions for leniency according to the parties' rank in the leniency queue and the value of the evidence provided in support of the investigation.

COMMISSION FINES SANRIO EUR 6.2M FOR RESTRICTING OUT-OF-TERRITORY LICENSEE SALES

AT.40432, CHARACTER MERCHANDISE, 9 JULY 2019

On 9 July 2019, the European Commission fined Japanese company Sanrio Company, Limited, EUR 6.222 million for restricting cross-border sales of licensed merchandise within the EEA, whether offline or online.

Background

Sanrio's business includes the design, licensing, production and sale of products based on its proprietary characters, including its best-known character, Hello Kitty. Sanrio also licenses its characters to other undertakings that produce and distribute merchandise incorporating those characters, such as toys, clothing, shoes and bags. The Commission's decision pertains to this latter licensing activity and the restrictions on licensee sales of licensed merchandise.

The Commission opened an antitrust investigation in June 2017 into Sanrio's licensing and distribution practices to assess whether Sanrio illegally restricted traders from selling licensed merchandise cross-border and online within the EU single market.

Sanrio agreed to the settlement procedure (with a consequent 10% reduction in fine). Sanrio also cooperated fully, and immediately wrote to its licensees informing them that the territorial restrictions on sales of licensed merchandise no longer applied. In consideration of this cooperation, the Commission granted Sanrio an additional fine reduction of 40%.

Commission Decision

The Commission's investigation found that Sanrio's non-exclusive licensing agreements breached EU competition rules. More precisely, the Commission found that during the relevant period, a series of practices restricting active and passive cross-border sales of licensed merchandise were put in place throughout Sanrio's merchandising business. These practices concerned both offline and online sales of licensed merchandise products throughout the EEA. In addition to explicit contractual restrictions, Sanrio would on occasion ask licensees to limit their activities to the territories assigned to them in their licensing agreements. Similarly, licensees had to request Sanrio's permission to engage in or accept cross-border sales. Finally, it appeared that Sanrio would often ask licensees to cease any cross-border sales of licensed products to the territories not falling within their assigned territory.

The Commission found that through its practices restricting out-of-territory sales, Sanrio restricted the ability of its licensees to sell licensed merchandise cross-border, thereby restoring the divisions between national markets. The Commission further noted that Sanrio engaged in that behavior by different direct means, including putting into practice different measures prohibiting or preventing licensees from concluding active and passive out-of-territory sales, both online and offline. According to the Commission, these practices had as their object the restriction of competition within the meaning of Article 101 (1) of the TFEU.

The Commission also clarified that the hardcore nature of these practices would prevent Sanrio from claiming the benefit of the exemptions in the Vertical Block Exemption Regulation, the Technology Transfer Block Exemption Regulation and in Article 101(3) of the TFEU itself.

The Commission decision noted that Sanrio implemented additional indirect measures to support the out-of-territory restrictions and reinforce its direct measures restricting out-of-territory sales. These practices allowed Sanrio to monitor and/or encourage compliance with the restrictions regarding out-of-territory sales within the EEA.

Finally, the Commission concluded that Sanrio's practices were part of an overall business strategy aimed at controlling the territories in which the licensees could sell the products, to the detriment of competition. According to the Commission, those practices led to a reduction in the choice available to consumers and potentially increased product prices as a direct result of compartmentalizing the EU territory.

Fine Calculation

Certain features of the Commission's calculation of the fine are interesting. First, the turnover taken into account was the total of annual license fees received by Sanrio from licensees in the EEA, not the value of the licensees' sales of the licensed merchandise.

Second, the coefficient for gravity was 8%, which is low given that the maximum limit in the Commission's fining guidelines is 30%. The coefficient was low because the infringement although out-of-territory restrictions restrict competition, "*vertical restraints are generally less harmful than horizontal ones*".

Third, the Commission stated that Sanrio cooperated beyond its legal obligations by providing information on the duration of the infringement and acknowledging the existence of a single and continuous infringement for the whole period. Even before formal proceedings were opened, Sanrio provided guidance on competition law compliance to its Europe-based employees and changed its template agreement, removing the clauses restricting competition. Finally, Sanrio sent clarification to all licensees whose licensing contracts had not yet been modified to reflect the revised template. Consequently, the Commission granted Sanrio a 40% reduction in return for its cooperation.

Ramifications

This decision illustrates the fact that creators of characters such as "*Hello Kitty*" cannot exploit the intellectual property rights to attempt to divide the EEA territory in separate markets applying different prices. These merchandising techniques are subject to the same rules as all sales, distribution and merchandising. They cannot escape from the basic prohibition against partitioning the EEA territory and restricting sales from one part of the territory to another.

The decision also shows that the Commission is refocusing on export prohibitions. For instance, in March 2019, the Commission imposed fines on Nike for restricting cross-border sales of merchandising products (AT.40436, Ancillary sports merchandise, 25 March 2019).

The reduction in fine of 40% for cooperation is impressive and shows that companies may benefit from a reduction but most importantly avoid infringements when they put in place an internal compliance program.

COMMISSION LOSES ATTEMPT TO REINSTATE CARTEL FINE IMPOSED ON ICAP

C-39/18 P, ICAP AND OTHERS V COMMISSION, 10 JULY 2019

On July 10, 2019, the CJEU upheld the GCEU's partial annulment of the European Commission's 2015 decision to fine UK-based broker ICAP for its involvement in the Yen Interest Rate Derivatives cartel.

The Commission had imposed six fines on ICAP, totaling EUR 14.96 million. The GCEU annulled the fines for insufficient reasoning concerning the determination of their amount. (Certain other aspects of the Commission's decision were also annulled but are not examined here.) The Commission appealed to the CJEU, which confirmed the GCEU's annulment of the fines for insufficient reasoning.

Background

On 29 October 2013, the Commission initiated proceedings against various financial institutions and against ICAP for infringement of Article 101 TFEU in connection with the manipulation of the London Interbank Offered Rate and the Tokyo Interbank Offered Rate interbank reference rates on the Japanese Yen interest rate derivatives market (AT.39861, *Yen Interest Rate Derivatives*). The financial institutions agreed to submit to a settlement procedure, and the Commission imposed fines on them on 4 December 2013. ICAP did not agree to submit to the settlement procedure, so its case was dealt with under the contradictory procedure. The Commission found that ICAP had facilitated six infringements committed by the financial institutions and so imposed six fines on ICAP, totaling EUR 14.96 million.

In determining the amount of the fines, the Commission observed that because ICAP was not active on the Japanese Yen interest rate derivatives market, taking into account the value of sales (namely the brokerage fees received) would not reflect the gravity and nature of the infringements at issue. The Commission therefore decided to depart from its standard methodology, as permitted by paragraph 37 of its 2006 Fining Guidelines, which provides that, "*[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology*".

GCEU Judgement

ICAP challenged the fines before the GCEU, arguing, *inter alia*, that the Commission's reasoning for its determination of the fine amounts was insufficient.

The GCEU set out the basic principle governing the statement of reasons as follows:

It is established case-law that the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which such a decision is based is in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgments of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P; 11 July 2013, Ziegler v Commission, C-439/11 P; and of 13 December 2016, Printeos and Others v Commission, T-95/15).

After observing that the application of this general principle depends on the circumstances of each individual case, the GCEU remarked as follows:

When the Commission decides to depart from the general methodology set out in the 2006 Guidelines and relies, as in the present case, on point 37 of those guidelines, the requirements relating to the duty to state reasons must be complied with all the more rigorously (judgment of 13 December 2016, Printeos and Others v Commission, T-95/15).

Coming to the specifics of the fine calculation, the GCEU said

... . it is appropriate to refer to the settled case-law to the effect that the Guidelines lay down a rule of conduct indicating the approach to be adopted from which the Commission cannot depart, in an individual case, without giving reasons which are compatible with, inter alia, the principle of equal treatment (see judgments of 30 May 2013, Quinn Barlo and Others v Commission, C-70/12 P; and of 11 July 2013, Ziegler v Commission, C-439/11 P). Those reasons must be all the more specific because point 37 of the Guidelines simply makes a vague reference to "the particularities of a given case" and thus leaves the Commission a broad discretion where it decides to make an exceptional adjustment of basic amount of the fines to be imposed on the undertakings concerned. In such a case, the Commission's respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance (see judgment of 21 November 1991, Technische Universität München, C-269/90).

The GCEU then criticized the Commission's reasoning in the following terms:

. . . the contested decision does not provide details on the alternative method favoured by the Commission, but is limited to a general assurance that the basic

amounts reflect the gravity, duration and nature of ICAP's involvement in the infringements at issue, as well as the need to ensure that fines have a sufficiently deterrent effect.

In the light of these considerations, the GCEU concluded that the Commission's decision did not enable the applicants to understand the justification for the methodology favored by the Commission, nor did it allow the Court to verify that justification. Consequently the GCEU annulled the Commission's determination of the fines for insufficient reasoning.

CJEU Judgement

The Commission appealed to the CJEU, arguing that the GCEU:

. . . failed to have regard to the case-law resulting from the judgments of 8 December 2011, Chalkor v Commission (C-386/10 P), and of 22 October 2015, AC-Treuhand v Commission (C-194/14 P), according to which the Commission fulfils [its obligation to state reasons] when it indicates to an undertaking held liable for an infringement of Article 101 TFEU, for its role as facilitator, the factors which enabled it to determine the gravity of the infringement and its duration, and it is not required to indicate all the figures and calculations made to determine the amount of the fine.

The Commission also invoked the fact that it had explained its methodology to ICAP in the exchanges it had with ICAP in the administrative procedure. The Commission explained to the CJEU that it first took as a basis the value of sales and the global turnover applied to the participating banks. It then took into account the duration of ICAP's participation and, finally, applied a reduction to the hypothetical basic amount in order to obtain an adequate and proportionate lump sum fine.

The CJEU confirmed the GCEU's analysis and rejected the Commission's appeal. In particular, the CJEU observed that the Commission fulfils its obligation to state reasons when "*it sets out, in its decision, the factors which enabled it to determine the gravity of the infringement and its duration (judgment of 22 October 2015, AC-Treuhand v Commission, C-194/14 P).*" The CJEU went on to confirm that the Commission is not required to provide all of the figures relating to each of the intermediate steps relating to the method of calculation, but "*it is nevertheless incumbent on it . . . to explain the weighting and assessment of the factors taken into account (judgment of 8 December 2011, Chalkor v Commission, C-386/10 P).*"

The CJEU also observed that, where the Commission departs from the 2006 Guidelines and applies another methodology, disclosure of that methodology is all the more important because it *"contributes to the fairness, impartiality and quality of the Commission's decisions which, ultimately, is the basis of the trust that the public and business place in the legitimacy of the Commission's action in competition matters".* The CJEU further noted that *"[a]n explanation provided at the stage of the proceedings before the Court could not be taken into account for the purposes of assessing whether the Commission has complied with its obligation to state reasons".*

Ramifications

The CJEU's judgment does not criticize the Commission for departing from the standard methodology set out in the 2006 Fining Guidelines, nor does it criticize the fact that paragraph 37 of those guidelines allows the Commission to do this when justified by "*the particularities of a given case or the need to achieve deterrence*". The Court criticizes the Commission for not having stated sufficient reasons for the methodology used.

The obligation to state sufficient reasons is a fundamental principle of EU law. Without it, the EU courts would not be able to control the legality of the Commission's action, and the parties concerned would not be able to defend their rights under EU law. One can expect that, in future, the Commission will provide clearer explanations when it invokes paragraph 37 of its 2006 Fining Guidelines. This will also expose the Commission to scrutiny as to the methodology actually used.

CJEU CLARIFIES NATIONAL COURTS' JURISDICTION TO HEAR CARTEL DAMAGES ACTIONS

C-451/18, TIBOR-TRANS V DAF TRUCKS, 29 JULY 2019

On 29 July 2019, the CJEU issued a preliminary ruling in response to a request from the Court of Appeal of Hungary (the *"referring court*") in the context of an action for damages brought by Hungarian logistics company Tibor-Trans Fuvarozó és Kereskedelmi Kft. ("*Tibor-Trans*"), against the Dutch truck maker DAF Trucks NV. The action followed the Commission's July 2016 decision in Case AT. 39824 *Trucks*, finding that several truck manufacturers had participated in a single and continuous infringement of Article 101 TFEU by colluding on truck prices throughout the EEA, and on the timing and passing on of costs for the introduction of emission technologies required by the Euro 3 to 6 standards.

In July 2017, Tibor-Trans brought an action for damages against DAF Trucks before the Hungarian Gyor Regional Court of First Instance, claiming damages for the allegedly higher lease payments it made to an unrelated Hungarian leasing company as a result of the cartel. Tibor-Trans argued that the cartel was EEA-wide, that Tibor-Trans suffered the same harm as a direct purchaser of trucks, and that it should therefore be given the same legal treatment.

DAF Trucks contested the Hungarian Regional Court's jurisdiction, arguing that none of the cartel's collusive meetings took place in Hungary and that there was no contractual relationship between DAF Trucks and Tibor-Trans. The Hungarian Regional Court accepted DAF Trucks' argument and found that it did not have jurisdiction to hear the case because no event giving rise to the damage occurred in Hungary. Thus the Hungarian Regional Court ignored the Commission's finding that the cartel was EEA-wide.

Tibor-Trans appealed to the Hungarian Court of Appeal ("*the referring court*"). This court was uncertain as to the applicability of the reasoning derived from the CJEU's preliminary ruling (C-352/13, EU:C:2015:335) because there was no direct contractual relationship between Tibor-Trans and DAF Trucks, assuming that the above mentioned Hungarian leasing company was unrelated to DAF which as proved was not the case. The referring court also had reservations concerning the possibility that that judgment could lead to the establishment of a broad *forum actoris* rule, which would be contrary to the objective pursued by Regulation No 1215/2012, the so-called "*Brussels I bis Regulation".* The court accordingly referred its queries to the CJEU and requested a preliminary ruling.

The CJEU summarised the question referred in the following terms:

*"… whether Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that, in an action seeking compensation for damage caused by an infringement of Article 101 TFEU, consisting, **inter alia**, of collusive arrangements on pricing and gross price increases for trucks, the place where the victim claims to have suffered that damage may be considered to be 'the place where the harmful event occurred', even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations."*

Legal Context

Article 4(1) of Regulation No 1215/2012 sets out the general rule of jurisdiction as follows: "*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*"

Article 7(2) of the same Regulation sets out various rules of special jurisdiction, including in relevant part: "*A person domiciled in a Member State may be sued in another Member State:*

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur"

In *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335) the CJEU ruled that, by virtue of Article 5(3) of Regulation No 44/2001 (now Article 7(2) of Regulation No 1215/2012), a victim of a cartel can choose to bring an action for damages before the courts of the place in which the cartel was definitively concluded or, as the case may be, the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or before the courts of the place where its own registered office is located.

CJEU Preliminary Ruling

The CJEU began by making three preliminary points:

- First, Regulation No 1215/2012, the so-called "*Brussels I bis Regulation*", repeals and replaces Regulation No 44/2001, which itself replaced the Convention of 27 September 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Case law firmly establishes that the CJEU's interpretation of the provisions of the predecessor instruments also applies to Regulation No 1215/2012 whenever those provisions may be regarded as "*equivalent*".
- Second, an action seeking legal redress for damage resulting from alleged infringements of EU competition law comes within the definition of "*civil and commercial matters*", within the meaning of Article 1(1) of Regulation No 1215/2012, and therefore falls within the scope of that regulation (see judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 38).
- Third, as the CJEU has repeatedly held in its case law concerning Article 7(2) of Regulation No 1215/2012, the notion of "*place where the harmful event occurred*" is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (*flyLAL-Lithuanian Airlines*, C-27/17, EU:C:2018:533, paragraph 28 and the case-law cited).

The CJEU observed that the question referred was solely about the determination of the place where the alleged damage occurred. The CJEU observed from the referring court's file that Tibor-Trans was a national and international freight transport company which, from the start of 2000 and until 2008, increasingly invested in the purchase of new trucks. As an end user, Tibor-Trans could not make direct purchases from the manufacturers, as it was obliged to use dealerships established in Hungary. It received financing from leasing companies, also established in Hungary. It can be seen that the cartel caused damage to Tibor-Trans directly because it inflated artificially the prices at which Tibor-Trans acquired the trucks under the leasing arrangements.

The CJEU made an important distinction between "*initial damage, resulting directly from the event giving rise to the damage*" and "*subsequent adverse consequences*". The CJEU observed that:

"As regards the determination of the place where such damage occurred, it must be noted that that place depends on whether the issue concerns the initial damage, resulting directly from the event giving rise to the damage, in which case the place where such damage occurred may provide a basis for jurisdiction under Article 7(2) of Regulation No 1215/2012, or whether it concerns subsequent adverse consequences which are not capable of providing a basis for jurisdiction under that provision (see flyLAL-Lithuanian Airlines, C-27/17, EU:C:2018:533, paragraph 31)."

The CJEU found that the loss suffered by Tibor-Trans' was the initial damage resulting directly from the restrictive agreement among truck manufacturers entered into in another Member State thereby providing a basis for the jurisdiction of the courts of the Member State in which the damage occurred. Hungary was one such Member State because the Commission found that the infringement extended to the whole of the EEA.

The CJEU reassured itself that its approach was consistent with the objectives of proximity and predictability of the rules governing jurisdiction for three reasons:

- The courts of the Member State in which the affected market is located are best placed to assess such actions for damages
- An economic operator engaging in anticompetitive conduct can reasonably expect to be sued in the courts having jurisdiction over the place where its conduct distorted the rules governing healthy competition
- Under Article 6(3)(a) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), the law applicable to actions for damages based on an act restricting competition is that of the country where the market is, or is likely to be, affected.

Before concluding, the CJEU addressed the fact, pointed out by the referring court, that Tibor-Trans brought an action against only one of the cartel participants. The CJEU noted that these circumstances did not call into question the CJEU's findings as regards the rule on jurisdiction laid down in Article 7(2) of Regulation No 1215/2012 because:

"…a single and continuous infringement of competition law involves the joint and several liability of all of the undertakings that committed the infringement."

In conclusion, the CJEU ruled formally as follows:

"Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, must be interpreted as meaning that, in an action for compensation for damage caused by an infringement of Article 101 TFEU, consisting, ***inter alia****, of collusive arrangements on pricing and gross price increases for trucks, 'the place where the harmful event occurred' covers, in a situation such as that at issue in the main proceedings, the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations."*

Comment

This judgment consolidates the CJEU's case law in *CDC Hydrogen Peroxide* and *fly LAL-Lithuanian Airlines* on the determination of jurisdiction in cartel damages cases based on the "*place where the harmful event occurred*".

The judgment highlights three important factors. First, in a cartel damages action, the claim is based on tort, not on contract. The claimant therefore does not therefore need to establish a contractual relationship with the party sued.

Second, the claimant has the choice between suing a cartel participant in the jurisdiction where the illegal cartel activity took place or in the jurisdiction where the claimant suffered the damage (namely, the place where it has its registered office). In the latter case, the claimant must show that the damage it suffered was "*initial damage, resulting directly from the event giving rise to the damage*" and not damage resulting from "*subsequent adverse consequences*".

Third, all participants in a cartel are jointly and severally liable for damage caused by the cartel to a claimant. Thus a single company can be faced with having to pay the total bill for the cartel's wrongdoings. Such company can, in principle, claim contributions from the other cartel participants, but the mechanics can be costly and time consuming.

It is hardly surprising that, in its press releases about decisions imposing fines on cartels, the Commission points out that parties who have suffered loss as a result of the cartel may bring an action for damages before the competent national court. The risk of damages claims creates a strong deterrent in addition to the large fines that the Commission generally imposes.

FRENCH TRIBUNAL FINES AMAZON FOR IMPOSING SIGNIFICANT IMBALANCE ON THIRD-PARTY SELLERS

RG NO. 2017050625, AMAZON, 2 SEPTEMBER 2019

On 2 September 2019, the Paris Commercial Tribunal imposed a fine of EUR 4 million on Amazon Service Europe and Amazon France Services (collectively, Amazon) for breaching the French law prohibition of "*Subjecting or attempting to subject a trading partner to obligations creating a significant imbalance in the rights and obligations of the parties*". The Tribunal also ordered Amazon to modify seven clauses that caused significant imbalance in Amazon's contractual relationships with third-party sellers ("*Sellers*").

This ruling follows a broad investigation by the French Directorate General for Competition, Consumer Affairs and Repression of Fraud (DGCCRF) between 2015 and 2017 into online marketplaces' commercial practices vis-à-vis professionals selling products on their platforms. The DGCCRF scrutinized the main marketplaces in France, such as Fnac.com, eBay, Cdiscount and Amazon, and identified several prohibited practices in this sector. In particular, the DGCCRF found that Amazon imposed unfair contractual terms on Sellers. Based on these findings and the prohibition in French law against imposing obligations that create a significant imbalance in the contractual relationship. The French Minister of Economy Bruno Le Maire brought Amazon before the Tribunal, requesting the imposition of a EUR 10 million fine and the modification of 11 contractual clauses.

Amazon's contracts with Sellers contained a clause conferring jurisdiction on the courts of Luxembourg. However, the Tribunal considered that this did not oust the jurisdiction of the French courts. The Tribunal noted that the case concerned tortious, not contractual, liability. Therefore the relevant geographic factor was the place where the damage occurred, namely, Amazon's marketplace in France. Moreover, the prohibition against imposing obligations that create a significant imbalance in the contractual relationship is a matter of French public policy. The Tribunal therefore declared that it had jurisdiction.

The French Commercial Code prohibits significant imbalance when one or more parties to the relationship impose or attempt to impose contractual oppression (Condition 1) which creates a significant imbalance in the rights and obligations of the parties (Condition 2), and the relationship is not rebalanced by other advantages (Condition 3).

Condition 1: Imposition of Contractual Oppression

Contractual oppression is considered to exist mainly in situations where one of the contracting parties is unable to negotiate, generally in standard form adhesion contracts. When analyzing whether contractual oppression exists, the French tribunals take into account concrete elements in the contractual relationship, such as the negotiating power, and any general or vague wording of contractual clauses.

Here, the Tribunal had no difficulty establishing that there was contractual oppression. Amazon's contracts left no room for Sellers to negotiate and the Tribunal found that there was a clear disproportion of forces in favor of Amazon. Moreover, Amazon held the most important position on the market for online business-to-consumer marketplaces and consequently was an unavoidable counter-party for small third-party sellers.

Condition 2: A Significant Imbalance

The Tribunal carried out a detailed *in concreto* assessment of the contractual clauses between Amazon and the Sellers, in terms of both wording and practical application in the relationship. The Tribunal concluded that, out of the 11 clauses identified by Bruno Le Maire, seven created an unjustified significant imbalance in favor of Amazon:

- A clause allowing Amazon to modify any contractual provision without any prior notice or information to the Sellers, thereby creating the possibility for Sellers to unknowingly infringe the contract.
- A clause allowing Amazon (and the Sellers) to suspend or terminate the contract at any time, for any reason, without prior notice. The Tribunal noted that although the clause was bilateral, Amazon only risked losing one seller out of more than 170,000, whereas individual Sellers risked losing a significant part of their business.
- A clause allowing Amazon to vary its performance indicators without prior notice and without explanation of how the indicators were determined or the consequences of such variation. The Tribunal held that although evaluation of the Sellers' performance was legitimate, in this instance the clauses were too imprecise and discretionary.
- A clause with general and imprecise wording allowing Amazon to delay, suspend or refuse the sale of a product on the platform at its sole discretion. The problem with this clause was that some of the Sellers' products competed with Amazon's products.
- A clause obliging the Sellers to reimburse dissatisfied customers, even where the

product had not been returned to the Seller, and even where the customer's claim appeared to be unjustified.

- A clause requiring equality between different market channels, including in the price of the product. The clause allowed Amazon to benefit automatically from the most advantageous conditions negotiated or used by the Sellers in other market channels with other marketplaces.
- A clause exempting Amazon from any liability in the event of loss or damage to the product during shipment and delivery abroad, and when Amazon was the handler or depositary and thus held the product in its warehouse.

The Tribunal found that three other clauses did not cause a significant imbalance, and a fourth was set aside because Amazon had already modified the wording.

Condition 3: Contractual Relationship Not Rebalanced by Other Advantages

The Tribunal admitted that the assessment of the contractual imbalance had to be general and broad, and that one clause might rebalance another. However, the Tribunal observed that although the use of the platform was a source of undeniable benefits for the Sellers, the Sellers paid Amazon for those benefits through commissions. Furthermore, the Tribunal held that the imbalance primarily benefited Amazon, because it could build customer loyalty through the clauses. Moreover, Amazon had only a small number of employees dedicated to the Sellers, because many of the services offered by Amazon were automated.

The Fine

The Tribunal ordered Amazon to remove or amend the seven offending clauses within 180 days. The Tribunal also imposed a fine of EUR 4 million on the company. The amount of the fine was set at 25% less than the maximum possible to take account of the good faith shown by Amazon during the procedure.

Comment

While online marketplaces offer outstanding visibility for Sellers, they also make sellers vulnerable with regard to customer satisfaction and prices.

It would be unrealistic to believe that the contractual relationship between Amazon and its more than 170,000 Sellers will be completely balanced once Amazon amends the clauses, but French Sellers should now be able to benefit from more fair contractual conditions, where Amazon might send (automated) emails to provide notice of any relevant contractual information.

The Tribunal's decision might encourage the competition authorities of other Member States to investigate online marketplaces, particularly in light of EU Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which enters into force in July 2020.

COMMISSION FINES PARTICIPANTS IN CANNED VEGETABLES CARTEL

AT.40127, CANNED VEGETABLES, 27 SEPTEMBER 2019

On 27 September 2019, the European Commission imposed a EUR 31.6 million fine on Netherlands-based Coroos and on the French Groupe CECAB for their participation in a cartel for the supply of canned vegetables to retailers and food service companies. The Commission granted immunity to a third participant, France-based Bonduelle, which revealed the existence of the cartel to the Commission.

This is the second cartel case at the European level regarding canned food. In 2014 the Commission fined Bonduelle and two other producers of canned mushrooms in a cartel settlement procedure (Case No. 39965, *Mushrooms*, 25 June 2014).

Background

The investigation started in 2013, when Bonduelle filed an application under the Commission's 2006 Leniency Notice to reveal the cartel, which led the Commission to carry out unannounced inspections.

During the investigation, Coroos, Groupe CECAB and Bonduelle agreed to settle the case and admitted their participation in the cartel, which lasted from January 2000 until the end of 2013 and covered the entire EEA. The investigation revealed that the three companies shared a common objective to preserve or strengthen their positions on the market, to maintain or increase selling prices, to reduce uncertainty regarding their future commercial conduct, and to formulate and control marketing and trading conditions to their advantage. The Commission found that the companies had set prices, agreed on market shares and volume quotas, allocated customers and markets, coordinated their replies to tenders, and exchanged commercially sensitive information.

The Commission found that the participants' conduct led to a single continuous infringement of Article 101 TFEU through three agreements:

- The first agreement involved all three companies, which covered private label sales to retailers in the EEA for canned vegetables (e.g., green beans, peas, peas-and-carrot mix and vegetable macedoine).
- The second agreement, in which Coroos was not involved, covered private label sales to retailers in the EEA for canned sweetcorn.
- The third agreement, in which Coroos was not involved, covered both own brands and private label sales to retailers and to the food service industry in France for canned vegetables.

In the same context, the Commission opened proceedings against a fourth company, Conserve Italia, which did not participate in the settlement procedure and will be the subject of a separate Commission decision.

The Fines

Under the 2006 Leniency Notice, the Commission may grant full immunity to a cartel member that is the first to provide sufficient information for the Commission to start an inspection. When full immunity is no longer available, the Commission may reduce the fine of cartel members that cooperate during the investigation and provide evidence which represents "*significant added value*" to the case.

Under the 2008 Settlement Notice, the Commission grants a 10% reduction of the fine under a settlement agreement for parties that admit their involvement in the infringement and comply with all the requirements of that Notice.

The Commission first applied the Leniency Notice to grant full immunity to Bonduelle. Bonduelle thus escaped a potential fine of about EUR 250 million. Groupe CECAB was the second company after Bonduelle to provide evidence of significant added value, and the Commission reduced Groupe

CECAB's fine by 30%, to EUR 18 million. Coroos's fine was reduced 15% to EUR 13.6 million, which indicates that although this cartelist disclosed its participation after the two others, it provided important evidence that the Commission did not already possess.

Next, under the Settlement Notice, the Commission made an additional 10% reduction in fine, because each of the three cartelists acknowledged their liability for the infringement, including its implementation, the main facts and its legal characterization.

Finally, the Commission reduced the fine imposed on one of the participants because the company invoked financial difficulties that rendered it unable to pay the full amount of the fine. It is not easy to obtain a reduction in fine on the grounds of financial difficulties, and the Commission did not grant this reduction until it had assessed the company's financial statements for recent years, projections for the current and coming years, ratios measuring its financial strength, profitability, solvency, liquidity, and relations with outside financial partners and with shareholders.

In conclusion, the Commission fined Coroos €13.6 million and Groupe CECAB €18 million, while, according to the Commission press release, Bonduelle avoided a €250 million fine.

Comment

Margrethe Vestager, commissioner for competition policy, stated:

"European consumers should have access to food at affordable prices. Competition enables that. But instead of competing with each other, Coroos and Groupe CECAB agreed to divide the market among themselves and to fix prices for canned vegetables across Europe. They did so for over a decade. These cartels ultimately hurt European consumers and with today's decision we send a clear message to companies that cartels are not accepted.

The message "food at affordable prices" illustrates how competition policy focuses on anti-competitive practices that harm the ordinary consumer. Companies that harm consumers in this way will not be popular with the Commission's competition directorate."

It is notable that Bonduelle had already been fined in the 2014 canned mushroom cartel case. Proceedings in that case were initiated in April 2013. A few months later, Bonduelle applied for immunity in the cartel in the canned vegetables sector and ultimately escaped a fine for this cartel. This shows that fines do encourage companies to clean up their act and "*confess*" to illegal anticompetitive conduct. Of course, the best policy is to have a compliance programme and avoid infringements in the first place. The Commission is committed to detecting EU law infringements in all areas, including competition law, and for this purpose launched a complementary tool through the Whistle-Blower Directive adopted on 7 October 2019 (Directive (EU) 2019/1937).

CJEU DISMISSES APPEAL TO SUSPEND COMMISSION INVESTIGATION

C-403/18 P, ALCOGROUP AND ALCODIS V COMMISSION, 17 OCTOBER 2019

On 17 October 2019, the CJEU upheld a GCEU ruling that dismissed Alcogroup's request to suspend two European Commission investigations and to annul an inspection decision because the Commission had looked at documents designated as legally privileged.

Background

In October 2014, the Commission carried out an inspection at Alcogroup's premises in the context of an ongoing investigation into possible collusion between companies in the oil and biofuel sectors. This was followed by a second inspection in March 2015 in relation to a separate investigation into price fixing and market sharing in the bioethanol market.

Prior to the second inspection, the Commission agreed, at the request of Alcogroup's lawyers, to set aside documents retrieved in the course of the first investigation and labelled as privileged. However, the Commission's electronic searches carried out as part of the second inspection tagged communications marked as legally privileged, including documents relating to the first investigation. Following objections by Alcogroup's lawyers, all documents marked as legally privileged were separated into a different file with the exception of one document, which was returned later.

In April 2015, Alcogroup requested the suspension of both investigations due to the Commission's review of privileged documents prepared as part of Alcogroup's defence concerning the first investigation. In a letter addressed to Alcogroup in May 2015, the Commission rejected the request.

Alcogroup appealed the Commission's decision to initiate a second investigation and its refusal to suspend both investigations as a violation of Alcogroup's rights of due process and the principles of inviolability of the home, good administration of justice and proportionality.

In April 2018, the GCEU dismissed the appeal brought by Alcogroup. Alcogroup appealed the GCEU's decision before the CJEU, which upheld GCEU's ruling in its entirety.

CJEU Judgement

The CJEU confirmed the inadmissibility of both the action against the Commission's decision to undertake the second investigation, and the action against the Commission's refusal to suspend both investigations.

Regarding the decision to initiate the second inspection, the CJEU confirmed that the legality of an "*act*" should be assessed in light of the facts and the applicable law at the date when the "*act*" was adopted. Consequently, the irregular conduct of an investigation could not undermine the legality of the initial decision to initiate such an investigation (see judgements of 17 October 1989, Dow Benelux/Commission, 85/87). Thus, the alleged procedural violations, being subsequent to the decision to initiate the second investigation, did not jeopardize the legality of the second investigation.

In its appeal, Alcogroup's main argument was based on the lack of "*precautionary measures*" taken by the Commission in its decision to initiate the second investigation, in order to prevent its inspectors from examining documents marked as "*legally privileged*". In response, the CJEU highlighted the fact that the Commission's inspectors could not have interpreted the fact that the Commission had not taken precautionary measures as an authorization to review privileged materials. The CJEU upheld the GCEU's analysis, confirming that respect for legal privilege is part of due process, which is implicit to all the Commission's investigations. Consequently, there was no need for explicit reference to "*precautionary measures*" in the Commission's decision to initiate the second investigation.

Where Alcogroup challenged the GCEU's analysis of the Commission's refusal to suspend both investigations, as a preparatory as opposed to a final decision, the CJEU confirmed the analysis of the GCEU. It reaffirmed that the Commission's letter on the above-mentioned request could not be analyzed as rejecting applicant's claim for confidentiality protection, nor as providing a final decision as to whether the documents were legally privileged.

The CJEU further stressed the fact that the Commission, in its letter rejecting the request for suspension of both investigations, had not confirmed the allegation that its officials had read the privileged documents. Rather it stated that the documents were only "*tagged*" but not read due to their capture with other, non-privileged documents to which they related. Finally, all documents marked as legally privileged were subsequently separated into a different file.

Since the CJEU dismissed Alcogroup's actions as inadmissible, it did not rule on the substance of the dispute.

Comment

The judgment provides insight into the difficulties related to the use of software to review thousands of electronic documents, sort them into families and tag them for the purposes of an inspection. Companies should note two key points:

- It cannot be inferred that a document has been read simply because the Commission "*tagged*" it during an inspection.
- The CJEU confirmed that the legality of an "*act*" should be assessed in light of the facts and the applicable law at the date when the ruling was adopted, independently from possible irregularities occurring afterwards.

PERSONS THAT GRANT LOANS ON CARTEL-AFFECTED MARKET MAY CLAIM DAMAGES

C-435/18, OTIS AND OTHERS V LAND OBERÖSTERREICH AND OTHERS, 12 DECEMBER 2019

The CJEU ruled on 12 December 2019 that persons that are neither suppliers nor purchasers on a market affected by a cartel can nonetheless claim compensation for loss incurred as a result of the cartel. Specifically, this finding applies to a public entity that granted larger loans to the cartelists' customers than it would have granted absent the cartel, thus depriving the public entity of the opportunity to use the loaned money more profitably.

Background

In 2007, the European Commission and the Austrian competition authority both found that Otis, Schindler, Kone and ThyssenKrupp (and others) had participated in cartels concerning the installation and maintenance of elevators and escalators in several EU Member States, including Austria.

In 2010, the Land Oberösterreich (Province of Upper Austria) and 14 other entities applied to the Vienna Commercial Court for compensation from Otis, Schindler, Kone and ThyssenKrupp for the harm the cartel caused. During the cartel period, the Province of Upper Austria granted promotional loans for construction project financing to the cartelists' customers. The Province claimed before the Commercial Court that the lift-installation costs included within the overall construction costs were increased because of the cartel. The Province argued that it had been forced to grant larger loans than it would have done had there been effective competition. As a result, it was not able to profitably invest the difference between what it lent and what it would have lent absent the cartel.

The case proceeded to the Austrian Supreme Court, which found that Austrian law precluded compensation for indirect victims that do not operate on the affected market as suppliers or purchasers, because they do not fall within the scope of the losses which the antitrust regulations were intended to prevent. The Austrian Supreme Court referred a question to the CJEU, asking in essence whether:

Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market, may seek an order that the undertakings which participated in that cartel pay compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel, those persons were unable to use that difference more profitably.

The CJEU Ruling

Following Advocate General Kokott's opinion, the CJEU stated that effective protection against the consequences of anti-competitive conduct, as laid down in Article 101 TFEU, would be "*seriously undermined*" if damages were limited to actors actually operating in the market affected by the cartel. National rules relating to procedures for the exercise of the right to compensation must not undermine the effective application of Article 101 TFEU, the CJEU stated.

The CJEU noted that it is not necessary for a victim's loss to have a specific link to the protection objective of Article 101 TFEU. Established case law, recently recalled in the *Skanska* case (14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, see also 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04), points out that Article 101 confers the right to claim compensation to "*any person*" who has suffered loss caused by conduct liable to restrict or distort competition. There must, however, be a causal link between the loss incurred and the competition law infringement. This applies regardless of the market on which a victim operates.

The CJEU concluded that persons must be able to claim compensation when they have suffered loss because they were forced to grant larger loans and thus were precluded from investing more profitably the difference between what was actually lent and what would have been lent absent the cartel. The CJEU held that it was for the national court to determine whether the Province of Upper Austria had actually suffered loss, by verifying that it could have made more profitable investments and that a causal link existed between that loss and the elevator cartel case.

Comment

This is the second time that the CJEU has replied to a question from the Austrian courts regarding damages claims in the same elevator cartel case. The first time was in the *Kone and Others* decision (C-557/12, 5 June 2014), where the CJEU had already accorded the right to claim damages to victims that did not have a contractual relationship with the members of the cartel. The CJEU ruled that, subject to the existence of a causal link between the harm incurred and the infringement of the competition rules, victims of so-called umbrella pricing can obtain compensation for loss caused by cartel members, even if the victims have no contractual links with those members.

The CJEU's ruling in *Otis* extends actions for damages to a significant additional group of potential claimants before national courts, and therefore emphasizes the critical role that damages actions play in the effective enforcement of competition law.

ABUSE OF DOMINANT POSITION

CMA FINDS NO GROUNDS FOR ACTION IN REMICADE DISCOUNT SCHEME

50236, MERCK SHARP & DOHME LIMITED, MERCK & CO., INC, 14 MARCH 2019

The UK Competition and Markets Authority (CMA) found no grounds for action under section 25 of the Competition Act 1998 regarding the discount scheme introduced by Merck Sharp & Dohme Limited (MSD) in England. In doing so, the CMA confirmed the effects-based approach to assessing loyalty-inducing rebates by dominant companies.

Background

In December 2015, the CMA opened an investigation into MSD due to a possible infringement of the Competition Act and Article 102 TFEU. The CMA was concerned that MSD may have abused its dominant position by offering loyalty-inducing rebates for the sale of its infliximab product, Remicade. Remicade is a biological immunosuppressant medicine used to treat autoimmune inflammatory disorders such as Crohn's disease and rheumatoid arthritis.

Since expiry of the Remicade patent, three biosimilars had received European marketing authorisations and were licensed for the same indications as Remicade.

The CMA was concerned that MSD's discount scheme could induce the National Health Service (NHS) to remain loyal to Remicade, making it more difficult for biosimilar suppliers to compete with MSD. In particular, the CMA noted that:

- MSD's rebate scheme was designed such that suppliers of biosimilars would have to sell at very low prices in order to compensate the NHS for the discount it would lose on purchases of Remicade if it also purchased biosimilars.
- Under the criteria and rules of MSD's scheme, the NHS had to purchase Remicade for most of its infliximab requirements in order to benefit from the discount.
- The NHS generally understood how MSD's scheme worked and had concerns about the cost and price implications of purchasing biosimilars in addition to Remicade. This cost pressure had the potential to affect decisions within the NHS, discouraging the use of biosimilars and potentially making it harder for biosimilar suppliers to win sales from MSD. Any such effect was likely to be felt for some time, as clinical caution towards using biosimilars needed to be overcome by the NHS.

CMA Decision

In assessing whether MSD's conduct was abusive, the CMA considered all the relevant circumstances, including the market context at the time the conduct took place. The CMA stated that, to be abusive, the rebate scheme must produce an anti-competitive effect, and that "*the anticompetitive effect must not be purely hypothetical; rather, it must be likely*".

For MSD's discount scheme to have a likely exclusionary effect, the market context at the time the scheme was introduced would have needed to reflect certain broad assumptions made by MSD. In particular, MSD had assumed that prescribers and the NHS would not be likely to switch existing patients already using Remicade. MSD therefore structured the rebate on the basis of that assumption.

The likelihood of MSD's Scheme to produce an exclusionary effect, by inducing the NHS to remain loyal to Remicade, depended both on the strength of the financial incentive created by MSD's Discount Scheme and on how long the cost pressure was likely to persist.

In practice, however, the CMA found that these assumptions were incorrect in a number of respects:

- The NHS's degree of clinical caution and likely attitude towards using biosimilars were different from what MSD had assumed when it designed its rebate scheme. As a result, the financial incentive created by MSD's scheme was likely to be overcome more quickly than MSD had assumed.
- The relative strength of the financial incentive created by MSD's scheme at the time it was introduced was not as strong as MSD had planned.

Therefore, although MSD's discount scheme was originally designed to foreclose competitors, the CMA ultimately found that in practice this scheme was unlikely to produce an exclusionary effect. The CMA thus closed the case.

Comment

Since the CJEU's 2017 *Intel* decision, which introduced a more effects-based assessment of loyalty rebates, competition authorities and courts have modified their approach when dealing with loyalty rebate cases, basing their analyses on the specific circumstances of the case and on the market situation.

The CMA's decision regarding MSD's discounts scheme can be considered an application of the approach adopted by the CJEU in *Intel*. Companies that offer some form of loyalty rebate should consider not only the CJEU's approach in *Intel*, but also the difficulties of making a correct "*effects-based*" assessment, as illustrated by the CMA's change of mind in the Remicade case.

COMMISSION FINES GOOGLE FOR ABUSE OF DOMINANT POSITION IN ONLINE SEARCH ADVERTISING INTERMEDIATION

AT.40411 – GOOGLE SEARCH (ADSENSE), 20 MARCH 2019

On 20 March 2019, the European Commission fined Google EUR 1.49 billion for abuse of a dominant position and hindering competition on the EEA market for online search advertising intermediation between 2006 and 2016.

Background

On 14 July 2016, the Commission initiated proceedings against Google and Google's parent company, Alphabet Inc., concerning a possible breach of Article 102 TFEU. This provision prohibits the abuse of a dominant position. The statement of objections sets out the Commission's preliminary views that Google had abused its dominant position by artificially restricting the ability of third-party websites to display search advertisements placed through the intermediation of Google's competitors

Websites such as newspaper websites, blogs or travel site aggregators often have a search function embedded. When a user searches using this search function, the website delivers "*search results*" and also "*search adverts*". Search adverts appear alongside search results.

Google acts as an intermediary, like an advertising broker, between advertisers that want to place adverts alongside search results, and website owners that want to sell themselves advertising space around their search results pages. Such website owners are also referred to as "*publishers*". Google calls this intermediation service "*AdSense for Search*". In technical terms, AdSense for Search is described as an "*online search advertising intermediation platform*". Companies that provide such services in competition with Google, include Microsoft and Yahoo.

The Commission Decision

The Commission found that Google was dominant on the market for online search advertising intermediation in the EEA since at least 2006. This was evidenced by Google's very high market share on both the market for online search advertising intermediation and the neighbouring markets for general search and online advertising from 2006 to 2016. In 2016 Google held market shares generally above 90% in the national markets for general search and above 75% in most of the national markets for online search advertising where it is present with its flagship product, the Google search engine, which provides search results to consumers. The market is also characterized by high barriers to entry. These include significant initial and ongoing investments required to develop and maintain general search technology, a search advertising platform, and a sufficiently large portfolio of both publishers and advertisers.

The Commission found that it was not possible for Google's competitors in online search advertising intermediation, such as Microsoft and Yahoo, to sell advertising space in Google's own search engine results pages. Therefore, third-party websites represented an important entry point for these other suppliers of online search advertising intermediation services to increase their business and compete with Google.

Google's provision of online search advertising intermediation services to the most commercially important publishers took place via agreements that were negotiated individually. The Commission reviewed many such agreements and found that:

- Starting in 2006, Google included exclusivity clauses in its contracts. Website owners were prohibited from placing on their search results pages any search adverts from Google's competitors. The Commission decision concerns publishers whose agreements with Google required such exclusivity for all their websites.
- As of March 2009, Google gradually began replacing the exclusivity clauses with so-called "*premium placement*" clauses. These required publishers to reserve the most profitable space on their search results pages for Google's adverts and to request a minimum number of Google adverts. As a result, Google's competitors were prevented from placing their search adverts in the most visible and most clicked-on parts of the publishers' search results pages.
- As of March 2009, Google also included clauses requiring publishers to seek written approval from Google before making changes to the way in which any rival adverts were displayed. This meant that Google could control how attractive, and therefore how frequently clicked-on, competing search adverts could be.

In summary, Google first imposed an exclusive supply obligation, which prevented Google's competitors from placing any search adverts on the most commercially significant websites. Then Google introduced what it called its "*relaxed exclusivity"* strategy aimed at reserving the most valuable positions for its own search adverts and controlling competing adverts' performance.

The Commission found that Google's practices covered more than half the market by turnover throughout most of the period of 2006 to 2016. Other providers of online search advertising intermediation services were not able to compete with Google on the merits, either because there was an outright prohibition on them appearing on third-party websites, or because Google reserved for itself the most valuable commercial space on those websites, while at the same time controlling how rival search adverts could appear.

Based on a broad range of evidence, the Commission found that Google's conduct harmed competition and consumers, and stifled innovation. Google's competitors were unable to develop and offer alternative online search advertising intermediation services. As a result, website owners had limited options for monetizing their website space and were forced to rely almost solely on Google.

The Commission also found that Google did not demonstrate that the clauses created any efficiencies capable of justifying its practices.

The Commission found that Google had abused its dominant position on the market for online search advertising intermediation services in the EEA, and thereby had infringed Article 102 TFEU and Article 54 of the EEA Agreement.

The Fine

The Commission fixed the fine imposed on Google and its parent company, Alphabet Inc., at just over EUR 1.49 billion, which amounts to about 1.29% of Google's turnover in 2018 and thus is well below the maximum limit of 10% of turnover. In accordance with the Commission's 2006 Fining Guidelines, the fine was calculated based on the value of Google's revenues from online search advertising intermediation in the EEA and the gravity of the infringement.

Google ceased the illegal practices a few months after the Commission issued its statement of objections in July 2016. The decision required Google to cease its illegal conduct, to the extent it had not already done so, and to refrain from any measure that has the same or equivalent object or effect. Google has appealed this decision in June 2019 arguing on the market definitions and the economic effects of its conduct (T-334/19, Google and Alphabet v Commission).

Ramifications

This case illustrates the complexity of certain online services that are several stages removed from the underlying product or service provided to the consumer. The online search service is provided free to consumers. This creates the potential to sell advertising space next to the search results, in turn creating the potential for intermediation in the sale of such advertising space. The case illustrates that one cannot escape application of the competition rules by inventing a service that is far removed from the sale of an underlying product or service to consumers. The competition rules apply at all levels. Moreover, the sophistication involved is likely to create barriers to market entry—in this case, the significant initial and ongoing investments required to develop and maintain general search technology, a search advertising platform, and a sufficiently large portfolio of both publishers and advertisers. Barriers to market entry reinforce the harmful effects of any anticompetitive practice.

It is not illegal to hold a dominant position. But dominant companies have a special responsibility to exercise their market power fairly and in a way that does not distort competition. *The Google Search (AdSense)* case is a warning to all companies operating in sophisticated markets based on information technology, even if they have created the market.

COMMISSION FINES AB INBEV EUR 200 MILLION FOR ABUSING ITS DOMINANT POSITION BY PREVENTING PARALLEL IMPORTS

AT. 40134, AB INBEV BEER TRADE RESTRICTIONS, 13 MAY 2019

Facts

In May 2019, the European Commission fined brewing giant Anheuser-Busch InBev (AB InBev) more than EUR 200 million for abusing its dominant position in the Belgian beer market by restricting cheaper imports of Jupiler, the company's most popular beer brand from the Netherlands into Belgium.

AB InBev is the world's largest beer brewer. Its most popular beer brand in Belgium is Jupiler, which represents approximately 40% of the total Belgian beer market in terms of sales volume. AB InBev also sells Jupiler beer in other EU Member States, notably the Netherlands and France. In the Netherlands, AB InBev sells Jupiler to retailers and wholesalers at lower prices than in Belgium because of greater competition.

In 2012 and 2013, the Commission gathered market information from individual retailers and retailer associations about the existence of price differences for identical (branded) Fast Moving Consumer Goods in Europe, in particular between Belgium and other Member States, including France and the Netherlands. On the basis of this market information, the Commission started an *ex officio* investigation. In 2015 it conducted inspections at the premises of a Dutch wholesaler and at the premises of AB InBev. In June 2016 it initiated formal proceedings to assess whether AB InBev was abusing its dominant position in the Belgian wholesale beer market by illegally hindering imports of cheaper beer into Belgium from neighboring countries, in breach of EU antitrust rules, in particular article 102 TFEU.

The Commission found that AB InBev held a dominant position on the Belgian beer market due to the company's consistently high market share, its ability to increase prices independently of other beer manufacturers, the existence of significant barriers to entry and expansion, and the limited countervailing buyer power of retailers given the "*essential*" nature of some beer brands sold by AB InBev. The Commission characterized these brands as "*essential*" because retailers considered that they would lose significant sales and/or clients if they did not obtain them.

The Commission also found that AB InBev had abused its dominant position by restricting the possibility for supermarkets and wholesalers to buy lower-priced Jupiler beer in the Netherlands and subsequently import it into Belgium. The overall objective of this practice was to maintain higher prices in Belgium.

Consequently the Commission imposed a fine of EUR 200 million on AB InBev. This amount is net of a 15% reduction granted by the Commission in consideration of the fact that AB InBev cooperated beyond its legal obligation to do so, in particular by expressly admitting its infringement of EU competition rules and by proposing a remedy. The remedy is that the packaging of all existing and new products in Belgium, France and the Netherlands will include mandatory food information in both Dutch and French for the coming five years. The Commission decision makes this remedy legally binding on AB InBev. Failure to comply exposes AB InBev to a potential daily default fine of 2.5% of annual turnover.

Assessment of AB InBev's abuse of dominance

The Commission begins its analysis by recalling the relevant CJEU case law according to which market dominance is not, as such, illegal under EU competition rules. However, the CJEU emphasized that a dominant undertaking has a special responsibility not to allow its behavior to impair genuine, undistorted competition on the internal market. The scope of this special responsibility is determined in light of the specific circumstances of the case.

The Commission found that AB InBev restricted the possibility for supermarkets and wholesalers to buy cheaper Jupiler beer in the Netherlands and subsequently import it into Belgium, through the following four practices:

- (a) implementing changes in the packaging of beer products supplied to Dutch retailers to make it harder for them to sell in Belgium, particularly by removing the French version of mandatory information from the label, as well as changing the design and size of beer cans
- (b) limiting the volume of Jupiler beer supplied to a Dutch wholesaler to restrict imports of these products into Belgium
- (c) refusing to sell these products to a retailer in Belgium unless the retailer agreed to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium
- (d) making customer promotions for beer offered to Dutch retailers conditional upon the retailer not offering the promotions in Belgium, with the overall aim of maintaining higher prices and profits in Belgium.

The Commission observed that, taken individually, each of these practices constituted an infringement of Article 102 TFEU in its own right. However, taken together, they constituted a single and continuous infringement of that disposition. In coming to this conclusion, the Commission relied on the commonality of the object of these practices—namely, to restrict imports of AB InBev beer products into Belgium. It also relied on the fact that these practices were all implemented during the period 9 February 2009 to 31 October 2016 as part of a common overall aim to maintain higher prices and profits for AB InBev beer products in Belgium.

Through this single and continuous infringement, AB InBev harmed EU consumers directly by cutting off the possibility for them to have more choice on the market and obtain a better deal when shopping.

The finding of a single and continuous infringement was important for the Commission because it could then calculate the fine on the basis of its 2006 Fining Guidelines using a duration of seven-and-three-quarters years. The other fine factors were a gravity coefficient of 10% (the maximum being 30%), a 10% increase for deterrence and the aforementioned 15% reduction for cooperation.

Comment

Competition Commissioner Vestager stated in her press release:

"Consumers in Belgium have been paying more for their favourite beer because of AB InBev's deliberate strategy to restrict cross border sales between the Netherlands and Belgium. Attempts by dominant companies to carve up the Single Market to maintain high prices are illegal. Therefore we have fined AB InBev €200 million for breaching our antitrust rules."

As is clear from many of her statements following the imposition of fines, Commissioner Vestager is committed to ensuring that consumers do not suffer as a result of breaches of the competition rules. The size of the fine shows that Commissioner Vestager considers that this is a very serious offence. Indeed, avoiding the carving up of the single market is one of the lynch pins of EU competition policy. Such cases more commonly concern illegal agreements between suppliers and sellers that restrict or prevent parallel imports and thereby infringe Article 101 TFEU. The *AB Inbev* case warns dominant suppliers that they risk heavy fines if they implement unilateral policies that are designed to prevent retailers from making parallel imports within the EEA.

Although AB InBev's commitments are binding only on companies in the AB InBev group, dominant suppliers would be well-advised to review their packaging and labelling practices to ensure that they are not creating barriers to cross-border trade within the EEA without objective justification.

COMMISSION FINES QUALCOMM, AND SIGNALS COMMITMENT TO FIGHTING PREDATORY PRICING

AT. 39711, QUALCOMM (PREDATION), 18 JULY 2019

Procedural Background

On 18 July 2019, the European Commission fined chipset manufacturer Qualcomm, a chipset manufacturer, EUR 242 million for abusing its market dominance in 3G baseband chipsets. Qualcomm sold its products below cost, with the aim of forcing its competitor Icera out of the market, thereby infringing article 102 TFEU.

The Commission opened its formal investigation in July 2015. In fact, Icera had complained to the Commission about Qualcomm's conduct several years earlier.

The investigation itself was highly litigious. At one stage, the Commission requested additional information from Qualcomm, at first through a simple letter and subsequently through a formal decision of 31 March 2017. In June 2017, Qualcomm challenged this decision before the GCEU (Case T-371/17R). Qualcomm raised six pleas:

- (i) infringement of the principle of necessity
- (ii) infringement of the principle of proportionality
- (iii) infringement of the obligation to state reasons
- (iv) reversal of the burden of proof
- (v) infringement of the right to avoid self-incrimination
- (vi) infringement of the principle of good administration.

Qualcomm also applied for interim measures suspending the Commission's decision. The GCEU dismissed the application for interim measures on 12 July 2017, and dismissed the main case —the challenge to the request for information— on 9 April 2019.

Qualcomm subsequently lodged an appeal to the CJEU (Case C-466/19 P) which is still pending. Although only of a procedural nature, this appeal is not without object. If the CJEU were to find that the Commission's decision requesting additional information was illegal, it could invalidate the whole procedure that led to the imposition of the fine on Qualcomm.

Commission Decision

The case concerns chipsets complying with the Universal Mobile Telecommunications System third generation (UMTS 3G) standard. These are key components for the connection of smartphones and tablets to the internet.

The Commission found that Qualcomm held a dominant position in the worldwide market for this type of chip between 2009 and 2011. This dominant position resulted from Qualcomm's market share of approximately 60% in the global market—almost three times the market share of its biggest competitor—along with the existing high barriers to market entry. These included the significant initial investments in research and development required to design UMTS 3G chips, and various barriers arising out of Qualcomm's intellectual property rights. In addition, Qualcomm's dominance on the market could not be countered by its customers' commercial strength.

The Commission found that Qualcomm abused its dominant position by supplying its UMTS 3G chipsets to two of its key customers, Chinese phone manufacturers Huawei and ZTE, below cost with the intention of eliminating Icera, then its main rival in the market segment offering advanced data rate performance. Qualcomm's overall plan consisted of preventing Icera from gaining the reputation and scale necessary to challenge Qualcomm's dominance in the chipset market, thus depriving equipment manufacturers from access to an alternative source of chipsets for their mobile phones and reducing consumer choice.

It comes as no surprise that Icera soon abandoned the baseband chipset market. In May 2011, Icera was acquired by US tech company Nvidia, which decided to wind down its baseband chipset business line in 2015.

To establish the abuse, the Commission relied on economic models showing that Qualcomm sold chips at a loss, as well as contemporaneous evidence. In particular, the Commission employed a price-cost test first established by the CJEU in its Akzo judgment. During its investigation, the Commission also identified internal documents detailing Qualcomm's intention to prevent Icera from building market presence by maximizing the negative impact on its business. There was no evidence that Qualcomm's conduct created any efficiencies that would justify its practice.

The Commission concluded therefore that Qualcomm's conduct significantly harmed competition on the market, reduced innovation and ultimately reduced choice for consumers. It consequently imposed on Qualcomm a fine of EUR 242 million, taking account of the duration and gravity of the infringement.

On 1 October 2019, Qualcomm filed an application with the CGEU seeking judicial review of the Commission's decision, arguing that "*there were no facts supporting a finding of anti-competitive conduct*". At the time of writing this appeal is pending and no further details are available.

Comment

According to Competition Commissioner Margrethe Vestager, cases involving predatory pricing are not common. In fact, this is the first Commission fine imposed for predatory pricing in 16 years. Commissioner Vestager explained that the investigation took a long time because the Commission issued a supplementary statement of objections, held two oral hearings and engaged in detailed exchanges with Qualcomm concerning additional information required for the investigation. The case also involved the aforementioned litigation over the Commission's formal decision requesting additional information.

It is true that predatory pricing cases tend to require complex economic assessments based on intricate economic modelling. Notwithstanding the complexity of such cases, nor the fact that they are relatively uncommon, business operators should heed Commissioner Vestager's warning:

"*But no matter how difficult and complex these cases are, we remain committed to fighting predatory pricing by dominant companies*."

COMMISSION IMPOSED INTERIM MEASURES ON BROADCOM: THE RE-AWAKENING OF A ONCE-DORMANT TOOL?

AT.40608, BROADCOM, 16 OCTOBER 2019

On 16 October 2019, the European Commission found, on a *prima facie* basis, that Broadcom abused its dominant position. In order to avert the risk of serious and irreparable damage to competition, the Commission ordered Broadcom to cease its *prima facie* abusive conduct with almost immediate effect. This is the first time in 18 years that the Commission has made use of such measure and could signal the re-awakening of a once-dormant tool.

Interim Measures Under EU Competition Law

The imposition of interim measures by the Commission is a relatively rare occurrence. Since the CJEU's judgment in *Camera Care* (Case 792/79 (1980)), which held that the Commission has a right to impose interim measures, the Commission has done so on only nine occasions, with the majority being in abuse of dominance cases.

The Commission's right to impose interim measures is now codified in Art. 8(1) of Regulation 1/2003, pursuant to which the Commission may impose interim measures where the following conditions are met: There is a *prima facie* finding of infringement of competition law (Condition 1), and there is an urgent need for such measures to avert the risk of serious and irreparable damage to competition (Condition 2). Discharging the burden of proof for establishing "*irreparability*" is particularly onerous, which explains why Art. 8(1) had never been invoked—until 16 October 2019, when the Commission ordered Broadcom to stop applying certain provisions contained in agreements with six of its customers.

Interim Measures in *Broadcom*

In June 2019, the Commission opened an investigation into whether Broadcom restricted competition in various markets for chipsets and components for so-called central office/head end equipment by engaging in certain practices, including tying, bundling and exclusivity. In parallel, the Commission sent Broadcom a SO preliminarily concluding that interim measures regarding certain aspects of its conduct may be required to ensure the effectiveness of any final decision. On 16 October 2019, the Commission formally decided to impose interim measures on Broadcom. Conditions 1 and 2 of Art. 8(1) of Regulation 1/2003 were met, in the view of the Commission.

Regarding Condition 1, Broadcom was, on a prima *facie basis*, found to hold a dominant position on three distinct markets for systems-on-a-chip: TV set-top boxes, fibre modems and xDSL modems.

Broadcom was found at first sight to be abusing its *prima facie* dominant position on the three aforementioned markets by having entered into anticompetitive clauses in agreements with six of its original equipment manufacturers for TV set-top boxes and modems. Specifically:

- With a view to reinforcing its dominance, Broadcom offered commercial advantages (*e.g.*, rebates) in return for the customer purchasing solely or quasi-solely from Broadcom.

- With a view to leveraging its prima facie dominance from the above-mentioned markets into the separate market for systems-on-a-chip for cable modems, Broadcom offered commercial advantages in these markets in return for the customer purchasing systems-on-a-chip for cable modems solely or quasi-solely from Broadcom.

Regarding Condition 2, the urgent need for interim measures, the Commission considered that if Broadcom's conduct were permitted to continue, it would likely affect a number of tenders in the future, including in relation to the upcoming introduction of the WiFi 6 standard for modems and TV set-top boxes. This would in all probability lead to other chipset suppliers not being in a position to compete with Broadcom and ultimately might lead to their marginalisation or even exit.

The Commission therefore required Broadcom, within 30 days of its decision and for a period of three years, to cease to apply the anticompetitive provisions and refrain from agreeing the same provisions or other provisions with equivalent object or effect in other agreements. The substantive investigation of the case remains ongoing.

Interim Measures – Alive and Kicking?

The *Broadcom* interim measures decision is the first time that Art. 8 of Regulation 1/2003 has been invoked. The last interim measures decision dates back 19 years, when the Commission used this tool against IMS Health in 2001 (and ultimately withdrew it in 2003).

Until now, the Commission has been reticent to make use of this procedural tool in light of the heavy burden of proof required. The high risk that its decisions would subsequently be challenged before the EU courts has led the Commission to leave the use of interim measures to national competition authorities (NCAs). These NCAs often operate under a lower burden of proof when imposing such measures. For example, in France, where such powers are more regularly used, the French authority "*only*" needs to prove a serious and *immediate* damage to competition—which implies a lower burden of proof than that pertaining to the concept of "*irreparability*" enshrined in Art. 8(1) of Regulation 1/2003.

Nevertheless, the Commission's reticence to invoke Art. 8(1) appears to be fading. This is particularly the case with respect to fast-moving technology markets—owing perhaps in part to the vociferous criticism the Commission received for having taken so long to conclude the *Google Shopping* case. Indeed, following the *Broadcom* decision, Margrethe Vestager, competition commissioner and chief coordinator of the digital portfolio, warned that in fast-moving technology markets she is now "*committed to making the best possible use of this important tool*" in order to enforce competition rules "*in a fast and effective manner*".

In further testimony of the Commission's change of heart, DG Comp is now actively screening all cases to see whether they are candidates for the application of interim measures. In doing so, the Commission will likely seek to draw inspiration from the significant experience that NCAs have with this procedural mechanism.

While Broadcom has challenged the Commission's interim measures decision, a re-awakening of the interim measures mechanism would have its advantages. For example, interim measures taken by the Commission have effect throughout the European Union and thus avert any risk of different Member States taking contradictory positions.

On the other hand, the speed with which interim measures are imposed is often critical. Given the length of time it took the Commission to impose interim measures in Broadcom (three months from issuance of the SO), unless the Commission finds a way to expedite the procedure, it may be more advantageous to seek interim measures from national courts. Such national courts can impose, within a matter of days, interim measures, which could also have extra-territorial reach if sought by litigants under Recast Brussels I Regulation (No 1215/2012), and more precisely Article 35.

MERGER CONTROL

CJEU UPHOLDS ANNULMENT OF COMMISSION'S PROHIBITION DECISION IN UPS/TNT EXPRESS

C-265/17 P, COMMISSION V UNITED PARCEL SERVICE, 16 JANUARY 2019

On 16 January 2019, the CJEU dismissed the European Commission's appeal against the GCEU's 2017 judgment annulling in its entirety the Commission's decision to block the proposed acquisition of TNT Express NV by United Parcel Services (UPS). The judgment reminds the Commission that it must ensure that parties to a merger are given a chance to comment all the documents it relies upon to reach its decision.

Background

By decision of 30 January 2013, the Commission blocked UPS's proposed acquisition of TNT (M.6570) after it found that it would have restricted competition in 15 Member States on the market for the express delivery of small packages to another European country. The Commission found that in these Member States, the acquisition would have reduced the number of significant players to only 3 or 2, leaving sometimes DHL as the only alternative to UPS.

On 7 March 2017, the GCEU annulled the Commission's decision in its entirety on the grounds that (i) the Commission infringed UPS's rights of defence by failing to communicate to UPS the final version of an econometric model on which it relied in its prohibition decision, and that (ii) UPS might have been better able to defend itself if it had at its disposal the final version of that model.

The Commission challenged the GCEU judgment before the CJEU. First, the Commission argued that it was not required to communicate the final econometric analysis to UPS. Second, the Commission claimed that even if UPS's rights of defence had been infringed, the GCEU should have dismissed UPS's plea alleging infringement of the rights of the defence as ineffective because a significant impediment to effective competition (SIEC) could in any event be established in Denmark and the Netherlands without reliance on the econometric model concerned.

CJEU Judgement

The CJEU rejected the Commission's argument that it was not required to communicate the final econometric analysis to UPS. Failure to do so was contrary to the principle of observance of the rights of defence and Article 18(3) EUMR. Article 18(3) EUMR requires the Commission to "*base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.*"

For the CJEU, which referred by analogy to the *Sabou* case (22 October 2013, *Sabou*, C-276/12) *"[o]bservance of the rights of the defence before the adoption of a decision relating to merger control […] requires the notifying parties to be put in a position in which they can make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on"* (paragraph 31). The CJEU considers that an econometric model should be regarded as one of those factors in view of its use to "*[allow for a] better understanding of the planned operation by identifying and, where relevant, quantifying some of its effects, and thus [contribute] to the quality of the Commission's decisions*" (paragraph 33).

Accordingly, econometric models that the Commission intends to base its decision on must be communicated to the notifying parties, taking into account the fact that "*The Commission is required to reconcile [the] need for speed with observance of the rights of the defence*" (paragraph 38).

In *UPS/TNT*, the final version of the econometric model had been adopted on 21 November 2012, more than two months before the adoption of the prohibition decision. The amendments included in the final version were not negligible. Nevertheless, the Commission did not send the final version to UPS. Nor did it provide any information indicating the specific reasons that it would have been impossible, at that time, to give UPS a short deadline to comment on the final version. Consequently, the CJEU rejected the Commission's argument.

The CJEU found that the GCEU rightly annulled the decision by applying a correct test, according to which a decision should be annulled when the applicant's rights of defence are infringed *"provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself"* (judgment of 7 March 2017, *United Parcel Service v Commission*, T-194/13, EU:T:2017:144, paragraph 57).

The CJEU pointed out that *"[g]iven the importance of econometric models for the prospective analysis of the effects of a merger",* applying a different test with a higher standard of proof, as suggested by the Commission, *"would run counter to the objective of encouraging it to show transparency in the development of econometric models used in merger control procedures and undermine the effectiveness of subsequent judicial review of its decisions"* (paragraph 55).

Accordingly, the CJEU concluded that the GCEU was not entitled to reject as ineffective UPS's plea alleging infringement of the rights of the defence even though the Commission found that there was an SIEC in the Danish and Netherlands markets, irrespective of any consideration of the econometric model.

Comment

In the face of an increasing amount of internal documents to review, the Commission is under enormous pressure to complete its merger reviews within the fixed timetable. That being said, as AG Kokott points out, *"if the [EC] decides to conduct complex economic analyses in competition proceedings […], then it is above all its own responsibility […] to conduct them with such promptness that they fit without difficulties into the procedural timetable envisaged by the [EU] legislator"* (opinion of 25 July 2018, *Commission v United Parcel Service*, C-265/17 P, EU:C:2018:628, paragraph 58). As such, the "*need for speed*" must not be realized at the expense of the rights of defence, observance of which is a general principle of EU law.

As for the direct implications of this judgment, the proposed acquisition of TNT by UPS will not be resurrected. The only remedy UPS could obtain as a result of the annulment of the Commission's prohibition decision would be compensation from the Commission. In this regard, UPS brought an action for damages against the Commission before the GCEU in December 2017 requesting compensation of EUR 1.742 billion and applicable interest (T-834/17).

BIG IS BEAUTIFUL . . . OR MAYBE NOT: THE SIEMENS/ALSTOM RAILWAY MERGER

M.8677, SIEMENS/ALSTOM, 6 FEBRUARY 2019

The European Commission recently reaffirmed that industrial policy objectives have no role to play when it comes to applying the EU merger control rules. Despite unusually intense industrial and political pressure to get the Siemens/Alstom railway merger done, Competition Commissioner Vestager has forcefully reiterated that the substantive test under the EU Merger Regulation remains exclusively competition based.

In Depth

Prior to the promulgation of the EU Merger Regulation (EUMR), the issue of whether industrial policy should be factored into the Commission's review of a merger was a heated one. Industrial policy has, however, been categorically excluded as a factor to be taken into account when reviewing a transaction's compatibility with the EU internal market. The test under which transactions are assessed under the EUMR is, and has always been, exclusively competition based. *General Electric/Honeywell* (2001), *Schneider/Legrand* (2001), *Volvo/Scania* (2000) and, more recently, *Deutsche Börse/NYSE Euronext* (2012) bear testimony to the Commission's historical reluctance to take into account (national) industrial policy and bow to political pressure. The Commission's *Siemens/Alstom* decision of 6 February 2019 confirms this stance.

The EUMR and Industrial Policy

The substantive test under the EUMR is a competition test. Specifically, the Commission asks whether a merger would "**significantly impede effective competition**" (SIEC), in particular as a result of the creation or strengthening of a dominant position. The EUMR therefore leaves no scope for industrial policy or wider public interests to be taken into account.

The Commission's strict adherence to a competition-based test lies at the core of the debate surrounding the Siemens/Alstom merger. France and Germany in particular have advocated supporting the Siemens/Alstom merger with a view to creating an industrial champion in the railway sector. Calling upon the Commission to apply "*obsolete*" competition rules more flexibly, the French and German Governments have been strong proponents of relaxing the merger control rules to accommodate the creation of a European champion faced with (some say unfair) competition from Chinese state-owned enterprises (in this case, CRRC Corp. Ltd).

Industrial policy arguments in support of reinforcing the industrial strength of the European Union have been rejected once again. In deference to the SIEC test, and echoing the sentiments of Sir Leon Brittan at the time of the promulgation of the original EUMR, Competition Commissioner Vestager has repeatedly stated that European champions cannot be built by undermining competition. Moreover, any competitive threat out of China based on unfair competition can be best addressed through recourse to other measures, such as challenging the grant of that country's subsidies under World Trade Organisation rules.

The Siemens/Alstom Merger – Strict Application of the SIEC Test

Competitions Concerns

In September 2017, Siemens and Alstom agreed to merge their rail assets, hoping to create a European industrial champion. In June 2018, the transaction was notified to the Commission. Upon review of the merger, the Commission found that the transaction would lead to higher prices, reduced choice, and less innovation with respect to rolling stock and signaling solutions. Specifically:

- **Rolling stock (*i.e.,* trains)**: Whether seen from a European Economic Area (EEA) or worldwide perspective, the merged entity would be the undisputed market leader, more than three times larger than the closest competitor in the EEA, according to the Commission. The merged entity would also become the market leader in mainline (including regional trains) and metro rolling stock in the EEA. After the proposed transaction, competitors in the sector would have difficulty competing against the merged entity's track record and installed base of rolling stock.
- **Signalling solutions**: The merged entity would become the undisputed market leader, with around three times the market share of the closest competitor, and would be unlikely to face significant competitive pressure.

Furthermore, the Commission found that new entry, in particular with respect to Chinese suppliers, was unlikely given, *inter alia*, high safety and technical standards in the European Union—despite repeated arguments by the parties to the contrary.

Complex Cocktail of Remedies Rejected

In a bid to allay the Commission's concerns, the parties' opening gambit was to offer to divest either Alstom's global Pendolino high-speed train business or the technology of Siemens' current very-high-speed Velaro trains, together with an exclusive five-year license for the forthcoming update, known as Velaro Novo in the EEA, as well as various signaling assets from both parties.

This initial package was met with a storm of protest: competitors and customers voiced concerns as to the adequacy of the proposed remedies. In an unusual move, the national competition authorities (NCAs) of the United Kingdom, the Netherlands, Belgium and Spain openly opined that the proposed remedies "*fall far short of what would be required to address all concerns to the required standard*". Moreover, the NCAs argued that the China threat is overblown, as "*barriers to entry and expansion for new or emerging players are very significant*".

Faced with such staunch criticism of their remedy proposal, the parties tweaked the initial remedies package to expand the geographic scope of some licenses beyond the limits of the EEA and to include licenses to additional technologies. Such revised package was again deemed insufficient. The German competition authority, in particular, was of the view that a "*mix and match*" approach involving the divestment of signaling businesses of both parties would not lead to a viable competitive rival. In a last-ditch attempt to overcome the Commission's concerns, the parties offered to sell signaling assets as well as longer licensing agreements, and identified potential acquirers.

In the end, the Commission was not convinced by the parties' proposed remedies and prohibited the transaction on 6 February 2019.

Comment

The Siemens/Alstom merger bears renewed testimony to the fact that the EU merger control rules show no sign of being relaxed to accommodate industrial policy objectives, such as the creation of a European champion. Time will tell whether the EU merger control rules will be changed to take into account industrial policy. Any such change would require legislative tinkering with the EUMR by unanimous decision of all Member States, which would be difficult to secure. As things currently stand, competition-based principles continue to prevail.

COMMISSION FINES GENERAL ELECTRIC FOR PROVIDING INCORRECT INFORMATION IN LM WIND ACQUISITION

M.8436, GENERAL ELECTRIC COMPANY/LM WIND POWER HOLDING, 8 APRIL 2019

In April 2019, the European Commission fined General Electric (GE) EUR 52 million for failing to provide correct information in its merger notification form, even though GE had re-submitted the form with corrected information in 2017 and the Commission had subsequently cleared the transaction. This case highlights the importance of submitting complete and accurate information throughout the merger review process.

Facts

On 11 January 2017, General Electric (GE), a wind turbine manufacturer, notified the Commission's Merger Task Force of its proposed acquisition of LM Wind, a wind turbine blade manufacturer. In its notification GE stated that it did not have any higher power output wind turbine for offshore applications in development beyond its existing six-megawatt turbine. However, a third party informed the Commission that GE in fact offered a 12 megawatt power output offshore wind turbine to potential customers.

GE withdrew its notification and re-submitted it on 13 February 2017, this time including information on its ability to offer 12 megawatt power output offshore wind turbines.

In its review of the proposed acquisition under the EUMR, the Commission assessed whether the vertical integration of LM Wind and GE would lead to detrimental effects on any of the affected markets.

The Commission conducted an investigation of the relevant upstream and downstream markets, and concluded that the proposed acquisition would not significantly impede competition in the EU single market. Therefore, the Commission cleared the transaction on 20 March 2017.

In July 2017, the Commission sent a SO to GE claiming that GE violated its procedural obligations to provide accurate information under the EUMR. According to article 14 (1)(a) of that regulation, the Commission can impose fines on companies that intentionally or negligently provide incorrect or misleading information during the notification phase. The Commission claimed that GE's failure to provide correct information in the merger notification form obstructed a comprehensive assessment of the merger and constituted a serious infringement.

In April 2019, the Commission imposed a fine of EUR 52 million on GE. The Commission considered the fine amount to be both proportionate and deterrent. Nevertheless, the imposition of the fine decision had no impact on the Commission's approval of the transaction under the EUMR, because the approval was based on rectified information contained in GE's second notification.

Comment

This case illustrates the Commission's very strict approach to enforcing the obligation not to provide "*incorrect or misleading*" information in notifications under the EUMR. Three years ago, Facebook was fined EUR 110 million for providing misleading information about its WhatsApp acquisition. Two other well-known companies are currently under investigation and have received SO in relation to allegedly incorrect merger notifications.

EU Competition Commissioner Margrethe Vestager noted that it is vital for the Commission to receive information that is correct and not misleading because the merger review process has to be transparent and effective. As she stated in a relevant press release, *"our merger assessment and decision-making can only be as good as the information that we obtain to support it".* She went on to warn companies that the Commission will continue to take breaches of procedural obligations under the EUMR very seriously.

Fines are imposed whether the "*incorrect or misleading*" information was provided intentionally or negligently and the amounts are significant. Such fines are also bad for a company's public image. Companies should therefore scrutinise their merger control notifications to avoid providing any information that might be "*incorrect or misleading*". This applies to both the initial notification and to any additional information provided subsequently, including information provided pursuant to an Article 11(2) EUMR simple request from the Commission. It is noteworthy that when the Commission makes a request by decision pursuant to Article 11(3), the company must ensure not only that the information is not "*incorrect or misleading*" but also that it is not "*incomplete*".

M&A AND "PARKING" STRUCTURES: COMMISSION FINES CANON FOR GUN JUMPING

M.8170, CANON/TOSHIBA, 27 JUNE 2019

On 27 June 2019, the European Commission fined Canon EUR 28 million for breaching the EUMR notification requirement and standstill obligation when acquiring Toshiba Medical Systems Corp. (TMSC).

Background

In early 2016, with a view to overcoming serious financial difficulties before the publication of its 2016 financial results, Toshiba decided to divest itself of TMSC. Toshiba needed to receive the funds for TMSC's sale before 31 March 2016. To that end, Toshiba organized a bidding process in which Canon participated and won.

Canon's acquisition of TMSC involved a two-step transaction structure:

- In the first step, by agreement executed on 17 March 2016, Canon acquired one non-voting share and 100 share options attached to TMSC's ordinary voting shares (as long as the share options were not exercised, the voting rights attached to the underlying shares could not be exercised. The share options could not be exercised before all relevant antitrust approvals were obtained) for EUR 5,280 million, corresponding to the full price of the acquisition of TMSC from Toshiba. Under another agreement concluded on the same day, MS Holding, a special purpose vehicle created specifically for the purposes of the transaction acquired 20 remaining voting shares from Toshiba (for approx. EUR 800). Both operations are together referred to as "*Interim Transaction*".

- In the second step, upon receipt of the relevant merger clearances, Canon exercised the 100 share options to acquire the underlying voting shares in TMSC, whereas TMSC acquired the non-voting share from Canon (for approx. EUR 40) and the 20 remaining voting shares from MS Holding (for approx. EUR 300,000) (together referred to as the "*Final Transaction*").

  The Interim Transaction and the Final Transaction are hereinafter together referred to as "*Concentration*".

Canon, Toshiba and MS Holding completed the Interim Transaction on 17 March 2016. Canon completed the Final Transaction on 19 December 2016, after having obtained the last of the relevant merger clearances (i.e. China).

On 12 August 2016, Canon notified the acquisition of sole control over TMSC by way of acquisition of 100% of its shares to the Commission under Article 4 EUMR. When assessing the Concentration, the Commission found that it would not lead to serious competition concerns and cleared it unconditionally pursuant to Article 6(1)(b) EUMR on 19 September 2016.

On 29 July 2016 the Commission informed Canon that it was carrying out an investigation under Articles 14(2)(a) and (b) EUMR for possible breaches of the notification requirement and the standstill obligation respectively enshrined in Articles 4(1) and 7(1) EUMR.

On 6 July 2017 the Commission issued a Statement of Objections, reaching the preliminary conclusion that Canon had breached Articles 4(1) and 7(1) EUMR. On 30 November 2018 the Commission issued a Supplementary Statement of Objections, reaching the preliminary conclusion that Canon had breached Articles 4(1) and 7(1) EUMR but this time taking into account the CJEU's judgment in Case C-633/16 *Ernst & Young P/S v. Koncurrenceradet ("Ernst & Young")* of 31 May 2018).

Commission Decision

On 27 June 2019, the Commission confirmed its preliminary view that by carrying out the Interim Transaction on 17 March 2016 Canon partially implemented, within the meaning of Articles 4(1) and 7(1) EUMR, the Concentration by which it acquired lasting control over TMSC prior to its notification to and clearance by the Commission. As a result, the Commission imposed a fine on Canon of EUR 28 million for breaches of Articles 4(1) and 7(1) EUMR. The Commission's reasoning behind its decision to fine Canon is as follows:

<u>A. The Interim Transaction and the Final Transaction were together a single concentration</u>

Both the Interim Transaction and the Final Transaction were to be seen as "*a single concentration within the meaning of Article 3 EUMR and the case law of the Courts*" (see *e.g. Case T-282/02 Cementbouw Handel & Industrie v. Commission* of 23 February 2006). This was because, although being legally separate successive transactions, they were part of a "*single economic project through which Canon acquired control over TMSC*". Moreover the successive transactions closely reflected the type of single concentration structure described in paragraph 35 of the Commission's Consolidated Jurisdictional Notice ("*CJN*") concerning so-called "*warehousing schemes*". Specifically, the Interim Transaction and the Final Transaction were seen as a single concentration with the meaning of the EU merger control rules for the following reasons:

- Based on evidence collected, the Commission considered that the Interim transaction was solely undertaken in view of the Final Transaction.
- The agreements and internal documents of Canon showed that, from the beginning, it was expressly intended that MS Holding only act as an interim buyer. Further its sole rationale was to "*facilitate the acquisition by Canon of control over TMSC", as evidenced by"(i) the fact that Canon proposed, and actively participated in, the setting up of MS Holding, including the design of its corporate structure, and (ii) MS Holding's lack of genuine economic interest in TMSC beyond its role as interim buyer for which it was remunerated at a fixed price*".
- Only Canon could determine the identity of TMSC's final acquirer, either "*(i) by exercising its share options after receiving all antitrust approvals, or (ii) in the event of the absence of antitrust approvals, by selling the share options to an acquirer of its choice*". By pre-paying the full amount (EUR 5 280 million) for TMSC, Canon carried the "*economic risk*" of the overall operation.

<u>B. The Interim Transaction contributed to a lasting change of control over TMSC</u>

According to the Commission, the Interim Transaction contributed to a lasting change of control over TMSC. The Interim Transaction was "*necessary*" to achieve a change of control in the sense that it presented a "*direct functional link*" with the implementation of the concentration for the following reasons:

- The two-step structure of the transaction involving an interim buyer was proposed by Canon, and agreed with Toshiba during the bidding process for TMSC. This structure was put in place to allow that, at the time of the Interim Transaction, Canon would transfer the full price of the Final Transaction and TMSC would cease being controlled by Toshiba (which is the first step for the change from Toshiba's control over TMSC to Canon's control). In the absence of the two-step transaction structure proposed by Canon, it would have been "*impossible for Toshiba to relinquish control over TMSC and receive the TMSC payment irreversibly before end March 2016, because Toshiba would have needed to wait for antitrust clearances regarding the TMSC sale*".
- Canon was "*heavily involved*" in the sale of the voting shares in TMSC to MS Holding at the time of the Interim Transaction.
- Via the irreversible payment of the full price for the acquisition of TMSC already at the time of the Interim transaction, "*Canon became the only party that could ultimately determine the identity of TMSC's ultimate acquirer and bore the economic risk of the overall operation*" from the very beginning. MS Holding's control was therefore, according to the Commission, temporary by definition.

In light of the above, the Commission concluded that, because the Interim Transaction was "*necessary*" to achieve a lasting change in control over TMSC and thus, had a "*direct functional link*" with the change of control over TMSC, the Interim Transaction contributed (at least in part) to the change of control over TMSC within the meaning of the *Ernst & Young* judgment.

Comment

Under the EUMR, a concentration is deemed to occur where e.g. one or more undertakings acquire direct or indirect control over the whole or parts of another undertaking. "*Control*" is defined as the possibility to exercise "*decisive influence*" over one or more other undertakings (Art. 3(2)). Furthermore, the CJN provides that control "*is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company*" (para. 56).

As far as the Concentration is concerned, by virtue of the first step Canon only acquired 5% of TMSC's (non-voting) share capital. It is therefore far from obvious, in principle, how Canon would, at the time of the first step, have had the possibility of exercising decisive influence over TMSC within the meaning of the EUMR. Even if Canon had a call on 95% of TMSC's shares, in between the first and second step Canon could not exercise the call and therefore did not have the possibility to exercise decisive influence.

Canon has since brought an action before the GCEU seeking either the annulment of the Commission decision, or the annulment or substantial reduction of the fines (Case T-609/19, *Canon v. Commission*). The GCEU will hopefully provide clarity on how the fact that Canon did not have the possibility to exercise decisive influence over TMSC under the first step (given the acquisition of a mere 5% non-voting interest in TMSC) can be reconciled with a breach of the notification and standstill obligations under the EUMR.

Furthermore, the *Canon* decision bears testimony to the Commission's continued close focus on gun-jumping issues. Companies found to have jumped the gun likely will be subject to significant fines, as suggested by this case and the Commission's recent decision to fine Altice EUR 124.5 million for breaching the EUMR notification and standstill obligations. More broadly, the *Canon* decision underscores the Commission's continued zero tolerance stance towards breaches of the EUMR's procedural rules. This was demonstrated by the Commission's EUR 110 million fine on Facebook for supplying incorrect or misleading information during the investigation of Facebook's acquisition of WhatsApp, and the Commission's fine of EUR 52 million on GE for providing incorrect information during the investigation of GE's planned acquisition of LM Wind.

COMMISSION BLOCKS MERGER OF STEELMAKERS THYSSENKRUPP, TATA STEEL

M.8713, TATA STEEL/THYSSENKRUPP, 11 JUNE 2019

On 11 June 2019, the European Commission blocked the proposed joint venture between ThyssenKrupp and Tata Steel because of the likely reduction in competition, the possibility of price increases for certain types of steel products and the lack of appropriate proposed remedies.

Background

In September 2017, both companies announced that their European activities would be merged to create the second largest steelmaker in the EEA. The companies said that the merger would create synergies of more than EUR 300 million after tax, and would result in the elimination of about 4,000 jobs. A year later, the Commission opened an in-depth investigation under the EUMR.

During the investigation, the Commission received feedback from various companies active in the steel sector or dependent on steel products as inputs for their businesses. The Commission found that customers in the packaging and automotive industries were concerned that the merger could increase prices for their inputs.

Commission Decision

On 11 June 2019, the Commission decided to block the merger between ThyssenKrupp and Tata Steel. The Commission had several concerns that the deal would impede effective competition, reduce the choice of suppliers and lead to price increases. Specifically, the Commission raised concerns about the following steel products:

- Metallic coated and laminated steel products for packaging
- Automotive hot dip galvanised steel products.

The proposed merger not only would have created a market champion, but also would have reduced competition by eliminating important competitors for the above-mentioned steel-related products.

The Commission found that customers for the relevant products were not able to resort to imports to offset potential price increases caused by the proposed merger. There are several reasons for this, notably the qualitative requirements for these special steel types, which are higher than for commodity steels, and the difficulty of meeting short delivery times required by customers' supply chains.

Finally, the Commission considered that the divestment remedies proposed by the parties were not sufficient to overcome competition concerns.

The Commission therefore declared the merger incompatible with EU competition law.

Comment

Steel is a key sector for European industry. It employs more than 360,000 people in more than 500 production centres throughout Europe. The indirect importance of the sector is even wider, with millions of Europeans employed in the packaging and automotive sectors, which use steel products.

Commenting on the case, Competition Commissioner Margrethe Vestager said:

Steel is a crucial input for many things we use in our everyday life, such as canned food and cars. Millions of people in Europe work in these sectors and companies depend on competitive steel prices to sell on a global level. Without remedies addressing our serious competition concerns, the merger between Tata Steel and ThyssenKrupp would have resulted in higher prices. So we prohibited the merger to avoid serious harm to European industrial customers and consumers.

The commissioner noted that this was only the 10th merger blocked in 10 years, whereas more than 3,000 were approved in the same period. It is striking, however, that this was the second merger to be blocked in 2019. In February 2019, the Commission blocked the railway merger between Siemens and Alstom.

Mergers designed to create "*champion*" companies with high market shares will likely continue to come under strong scrutiny by the Commission's Merger Task Force.

ThyssenKrupp has challenged the Commission's decision before the GCEU. The GCEU's judgment could chart the path to be followed by the Commission in its assessment of mergers involving companies with high market shares in sectors where competition is fierce.

STATE AID

GCEU ANNULS COMMISSION DECISION ON BELGIAN EXCESS PROFIT EXEMPTION SYSTEM

T-131/16, T-263/16, BELGIUM V COMMISSION, 14 FEBRUARY 2019

On 14 February 2019, the GCEU annulled the European Commission's decision on the Belgian excess profit exemption system (SA.37667) in its entirety on the ground that the Commission erroneously categorized the system as an "*aid scheme*".

Background

Since June 2013, the Commission has been investigating the tax practices of Member States. In the context of this investigation, on 11 January 2016, the Commission found that the so-called Belgian excess profit exemption system constituted an aid scheme that was incompatible with the internal market, and that it had been implemented in breach of Article 108(3) of the TFEU. By the same decision, the Commission ordered that the Kingdom of Belgium recover the aid from the beneficiaries.

The excess profit exemption system allows Belgian entities of multinational companies to reduce their tax base in Belgium by deducting so-called "*excess profit*" from their actually recorded profit. That excess profit is determined by first estimating the hypothetical average profit that a standalone company carrying out comparable activities could be expected to make in comparable circumstances, and next subtracting that amount from the profit actually recorded by the Belgian group entity concerned. To benefit from the excess profit system, multinational groups were required to obtain advance rulings from the Belgium Ruling Commission in respect of new situations (i.e., substantial investments, the creation of employment or the relocation of activities to Belgium).

The Kingdom of Belgium and Magnetrol International (one of the 55 beneficiaries listed in Annex to the decision) brought appeals against the decision.

GCEU Judgement

The GCEU first flatly rejected the appellants' claim that the Commission encroached upon the Kingdom of Belgium's tax jurisdiction by examining the compliance of the excess profit exemption system with State aid rules. The GCEU stated that:

"In that respect, it must be noted that, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, Commission v Spain, C 269/09, EU:C:2012:439, paragraph 47 and the case-law cited). On the other hand, it is undisputed that the Commission is competent to ensure compliance with Article 107 TFEU".

Since the Commission is competent to ensure compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers by examining the compliance of the excess profit exemption system with State aid rules.

The GCEU agreed with the appellants that the Belgian excess profit exemption system did not constitute an "*aid scheme*" within the meaning of Article 1(d) of Regulation 2015/1589. According to Article 1(d), an aid scheme means "*any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner [...]*".

The GCEU found that the Belgian excess profit exemption system did require further implementing measures for the following reasons:

- First, some of the essential elements of the excess profit exemption system, including the above-mentioned two-step methodology and the new situation requirement, did not "*emerge from the acts on which the scheme at issue is based, but from the advance rulings themselves". Accordingly, "those acts must necessarily be the object of further implementing measures*".
- Second, for the existence of further implementing measures to be precluded, the national authorities that apply the aid scheme cannot have any margin of discretion as regards the determination of the essential elements of the aid concerned and whether it should be awarded. According to the GCEU:

  "It should be noted that the fact that a prior request for approval must be submitted to the competent tax authorities in order to benefit from an aid does not imply that those authorities have a margin of discretion, when they merely verify whether the applicant meets the requisite criteria in order to benefit from the aid in question (see, to that effect and by analogy, judgment of 17 September 2009, Commission v Koninklijke FrieslandCampina, C 519/07 P, EU:C:2009:556, paragraph 57)".

However, the Belgium Ruling Commission enjoyed "*a margin of discretion over all of the essential elements of the alleged aid scheme*". The Ruling Commission carried out a qualitative and quantitative assessment of each request on a case-by-case basis, in the light of the reports and evidence provided by the taxpayer. In the GCEU's view, this assessment was not a mere technical application of the system.

Moreover, the GCEU ruled that the beneficiaries were not defined in a general and abstract manner by the acts on the basis of which the excess profit exemption is granted. In its decision, the Commission found that the beneficiaries were companies forming part of a multinational group in the context of their reciprocal cross-border relationships. The beneficiaries corresponded to a specific category, *i.e.*, companies forming part of a multinational group which seek the exemption by a request for an advance ruling and which make investments, create jobs or centralize activities in Belgium.

Consequently, the GCEU concluded that the Commission erroneously considered that the Belgian excess profit system constituted an aid scheme and annulled the decision in its entirety.

Comment

This judgment represents a major setback in the Commission's ardent campaign against alleged anticompetitive tax practices of Member States. The Commission will need to be more careful when collectively challenging individual rulings in one decision relying on the concept of an aid scheme.

At the same time, the judgment confirmed that it is the Commission's responsibility to examine whether national tax measures comply with EU State aid rules (except the UK following Brexit). The GCEU observed that:

"Thus, interventions by Member States in areas which have not been harmonised in the European Union, such as direct taxation, are not excluded from the scope of the State aid rules. Accordingly, the Commission may find that a tax measure constitutes State aid provided that the conditions for making

such a finding are met (see, to that effect, judgments of 2 July 1974, Italy v Commission, 173/73, EU:C:1974:71, paragraph 13; of 22 June 2006, Belgium and Forum 187 v Commission, C 182/03 and C 217/03, EU:C:2006:416, paragraph 81; and of 25 March 2015, Belgium v Commission, T 538/11, EU:T:2015:188, paragraphs 65 and 66). The Member States must therefore exercise their competence in the field of taxation consistently with EU law (judgment of 3 June 2010, Commission v Spain, C 487/08, EU:C:2010:310, paragraph 37)".

Also, the judgment did not rule on any substantive aspects, notably the issue of a selective advantage. The judgment thus has no direct implications on other State-aid tax cases concerning individual tax rulings for individual companies.

The Commission appealed against the judgment before the CJEU (C-337/19 P).

LEGISLATIVE AND POLICY DEVELOPMENTS

COMMISSION REPORT: COMPETITION ENFORCEMENT PROMOTES AFFORDABLE, INNOVATIVE MEDICINES

REPORT FROM THE COMMISSION, COMPETITION ENFORCEMENT IN THE PHARMACEUTICAL SECTOR

On 28 January 2019, the European Commission published a report overviewing the activities of both the Commission and national competition authorities (NCAs) in the pharmaceutical sector between 2009 and 2017. The report is entitled "*European competition authorities working together for affordable and innovative medicines*".

This report followed the Commission's 2009 inquiry into the pharmaceutical sector, and the European Council and European Parliament's concern that anticompetitive practices might harm patients' access to affordable and innovative essential medicines.

Between 2009 and 2017, the Commission and NCAs investigated more than 100 cases in the pharmaceutical sector. They adopted 29 antitrust decisions, which led to sanctions and fines of more than EUR 1 billion. During the same period, the Commission assessed more than 80 mergers in the sector, 19 of which raised concerns, mostly regarding price increases or diminished innovation.

The report describes competition enforcement in the pharmaceutical sector as well as particularities of this sector, and draws the conclusion that rigorous enforcement of competition law promotes access to affordable medicines and innovation.

Competition Enforcement Supports Affordable Medicines

The report states that generic and biosimilar medicines are the only source of price competition when a product is no longer patent protected. The prices of medicines drop by 40% on average when the generic product enters the market. Originator companies therefore adopt strategies to diminish the impact of generic or biosimilar entry on the market.

The report analyses Commission and NCA decisions on anticompetitive behavior in the pharmaceutical sector designed to prevent or delay generic entry. Such behavior prevents the price reductions consequent upon generic entry onto the market and therefore harms patients and healthcare systems directly.

One recurrent infringement of Article 101 TFEU is pay-for-delay agreements between competitors, by which the originator company offers advantages to the generic company in order to restrict or delay the generic entry on the market. In the *Fentanyl* case

(AT.39685, 2013), for example, the Commission found that a subsidiary of Johnson & Johnson concluded a co-promotion agreement with Sandoz, preventing Sandoz from launching its generic in exchange for monthly payments calculated to exceed the profits expected from the sales of the generic. The report also examines other anticompetitive behavior that prevents or delays generic entry, such as misuses of the regulatory framework or disparagement of the generic entrant.

The report assesses Commission and NCA decisions on unfair or excessive pricing that results from abuse of a dominant position. Such conduct is prohibited by Article 102(a) TFEU and under the conditions laid out in the 1978 Court of Justice of the European Communities *United Brands* case. For instance, the Italian NCA found that Aspen abused its market power by imposing price increases between 300% and 1,500%, and fined the company EUR 5.2 million (*Aspen*, A480, 2016).

The report also examines merger control and observes that mergers can free companies from competitive constraints, likely resulting in higher prices for medicines, especially if the market power increases post-merger. For instance, in 2016, the Commission assessed one of the largest mergers in the pharmaceutical sector (*Teva/Allergan*, M.7746) and found that the two parties to the merger exerted a unique pricing competitive pressure on each other on a specific market product. The Commission approved the transaction after one party committed to divest part of its relevant business to independent buyers.

Competition Enforcement Supports Innovation and Wider Choice of Medicines

The report considers innovation to be "*of key importance*" in the pharmaceutical sector, as research and development (R&D) often leads to new, more effective or less expensive medicines. Companies in this sector must innovate constantly to remain competitive with new medicines protected by patent. To ease this pressure, they set up strategies which can sometimes be anticompetitive and harmful to patients and healthcare systems. The report concludes that competition enforcement by NCAs and the Commission helps to maintain innovation and the availability of multiple choices of medicines.

After analyzing relevant antitrust decisions, the report observes that some companies try to block or delay the market entry for competing medicines, and that those restrictions reduce the incentive to innovate. The report concludes that antitrust enforcement is helpful to ensure that companies do not abuse their power or enter into agreements holding back innovation.

However, the report recognizes that certain synergies could encourage innovation and that cooperation in R&D could promote technical and economic progress. That is why the EU Block Exemption Regulation on R&D Agreements (No 1217/2010) exempts some of these practices from the prohibition of Article 101 TFEU.

The report observes that mergers between companies developing parallel and competing R&D programmes or pipeline products might be harmful to innovation in the pharmaceutical sector because, post-transaction, the merged entity would likely be inclined to "*discontinue, delay or redirect*" the programme or product. The report concludes that merger control is useful to ensure that a merger does not significantly impede competition, particularly competition through innovation. A useful remedy under merger control is to require divestment of relevant programmes or pipeline products. This was the case in the *Novartis/GSK Oncology* merger (M.7275, 2015), in which divestment remedies helped maintain innovative competition in the market for medicines used in the treatment of skin cancer and other tumors.

The report concludes that merger control has been preserving competition in the field of innovation for medicines throughout 2009–2017.

Ramifications

The combination of the Commission's 2009 inquiry into the pharmaceutical sector and the publication of this report shows that there are compelling policy reasons for enforcing the competition rules in this sector. One can rightly expect the Commission and NCAs to place a high priority on enforcement going forward. Pharmaceutical operators thus need to be aware that everything they do is under close scrutiny. They must steer clear of not only the anticompetitive practices mentioned in the report, but also any anticompetitive practice or transaction that contributes to high pricing or limits innovation.

EUROPEAN UNION ADOPTS NEW FRAMEWORK FOR FOREIGN DIRECT INVESTMENT SCREENING

REGULATION (EU) 2019/452 OF 19 MARCH 2019 ESTABLISHING A FRAMEWORK FOR THE SCREENING OF FOREIGN DIRECT INVESTMENTS INTO THE UNION

The Council of the European Union approved on 5 March 2019 a new framework to screen foreign direct investments (FDI) coming into the European Union on grounds of security or public order. This approval concluded the legislative process for the proposal presented by European Commission President Jean-Claude Juncker during the 2017 State of the Union speech.

The new framework is embodied in EU Regulation 2019/452 of 19 March 2019, which was published in the Official Journal of the European Union on 21 March 2019 and entered into force in April 2019.

The new screening mechanism will apply from 11 October 2020.

The main objective of the new framework is to ensure security and public order in the European Union while leaving scope for Member States to screen FDI in light of their individual situations. The Regulation does not intend to harmonize national screening mechanisms, but instead aims to enhance cooperation among Member States and between Member States and the Commission. The final decision on a transaction remains with the Member States, as the Commission has no power to block an investment.

Previously, there was no comprehensive framework at the EU level for screening of FDI on grounds of security or public order. Many important EU trading partners, such as the United States, Australia, Canada and Japan, have already developed such frameworks. Only 14 Member States have a screening mechanism in place that vets FDI on grounds of security or public order, and Member States do not currently coordinate with one another with respect to such screening.

The Regulation introduces three main changes to FDI screening in the European Union.

Member State Screening Mechanisms

The Regulation does not oblige Member States to adopt a screening mechanism, but it does impose minimum requirements if a Member State already has a screening mechanism in place or intends to adopt such a mechanism (Article 3).

Under the Regulation, national screening mechanisms must be transparent and non-discriminatory. A Member State must clearly set out the circumstances that trigger the screening procedure and the grounds on which an investment is screened (principally on the basis of security and public order concerns). A Member State also must lay down the procedural rules and timeframes that apply to the screening mechanism. The Regulation includes rules for the protection of confidential information and seeks to ensure that screening decisions can be challenged.

To guide Member States and the Commission, the Regulation provides a list of factors that may be taken into consideration when determining whether an FDI is likely to lead to security or public order concerns (Article 4).

The list includes potential effects of the FDI on critical infrastructure, critical technologies, supply of critical inputs, access to sensitive information, and the freedom and pluralism of the media. Whether the investor is directly or indirectly controlled by a foreign state can also be taken into account.

The Regulation notes a broad range of critical sectors that Member States may consider for FDI screening, such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, artificial intelligence, robotics, semiconductors, cybersecurity, nuclear technologies, nanotechnologies, biotechnologies and food security. This list is not exhaustive, and screening may be conducted in any of these sectors where FDI "*threatens security or public order*".

Non-Binding Commission Opinions

The Regulation allows the Commission to issue non-binding opinions. However, Member States are responsible for national security interests and thus have the final say on whether a specific investment should be permitted in their territory.

The Commission may issue an opinion when it considers that an FDI—whether already being screened or not—is likely to affect security or public order in one or more Member States (Articles 6.3 and 7.2). A Member State can also inform another Member State in which an FDI is planned or made if it believes that the FDI may undermine security or public order in its own territory.

The Commission may also issue a non-binding opinion to the concerned Member State if it believes that a planned FDI is likely to affect a project or programme of EU interest on grounds of security or public order (Article 8).

Cooperation Mechanisms

The Regulation creates a cooperation mechanism between Member States and the Commission. Member States are required to exchange information that allows Member States and the Commission to carry out more coordinated review of FDIs.

The framework put in place by the Regulation also encourages international cooperation on investment screening policies, including the sharing of experiences, best practices and information regarding investment trends.

Comment

The new Regulation may induce Member States to set up FDI screening mechanisms. It will also affect mechanisms already in place, particularly with respect to the timeframe in which such assessments must be made.

Companies involved in an EU transaction should factor into their investment decisions the fact that screening may prolong the investment process, given that the Commission can potentially issue an opinion and Member States may make comments on any envisaged FDI. Companies should assess upfront whether their investment could give rise to potential security or public order concerns.

COMMISSION PUBLISHES REPORT ON COMPETITION POLICY IN THE DIGITAL ERA

On 4 April 2019, the European Commission published a report exploring how competition policy should develop to promote innovation in digital markets.

Background

The report addressed a number of key issues, such as the way digital markets work and how they should be analyzed within the framework of competition law. The report also looked at the possibility of revising the EUMR thresholds to capture "*killer acquisitions*" by dominant platforms of early-stage, low-revenue, high-value innovators, and how competition law should be applied to digital platforms and data.

The report was authored by three academics appointed as special advisors by Competition Commissioner Margrethe Vestager on 28 March 2018: Heike Schweitzer, professor of law at the Humboldt University of Berlin; Jacques Crémer, professor of economics at the Toulouse School of Economics; and Yves-Alexandre de Montjoye, assistant professor of data science at Imperial College London.

Key Findings

The report outlines important characteristics of digital markets' structure and function, as well as their impact on the overall economy. The report notes that the way digital markets function may in fact favor incumbents that have strong incentives to engage in anticompetitive conduct.

This is the case because of significant network externalities such as extreme returns to scale, and network effects. Access to data can be a crucial input to many online services as well as production and logistics services. As a result, the report recommends more "*vigorous competition policy enforcement*" when dealing with digital markets.

More generally, the report recommends **changes to the standard and burden of** proof in competition enforcement, because of the high costs of "*under-enforcement*" in the digital era. A theme running throughout the report is that it is preferable for competition policy in digital markets instead to risk "*over-enforcement*" and "*err on the side of disallowing potentially anti-competitive conducts*". Consistent with this, the report argues that even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains; and that in highly concentrated markets characterised by strong network effects and high barriers to entry, it may be appropriate to require incumbent firms to show that their conduct is pro-competitive.

In particular, the report recommends changes to the standard and burden of proof in competition enforcement to address the negative consequences of "*under-enforcement*" in the field of digital markets. The report finds that "*over-enforcement*" is less of a risk in digital markets than "*under-enforcement*", and suggests that enforcers should err on the side of caution by disallowing potentially anticompetitive conduct in digital markets. The report argues that even where consumer harm cannot be measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clear benefits to consumers. Moreover, in highly concentrated markets characterized by strong network effects and high barriers to entry, the burden of proof should be reversed and placed on the incumbent to demonstrate the pro-competitive effects of their behavior. The report also proposes reducing competition policy's emphasis on market definition and placing more emphasis directly on theories of harm and identification of anticompetitive strategies.

In recent years, the Commission has been increasingly concerned about dominant platforms acquiring small, innovative start-ups with swiftly growing user bases and significant competitive potential. Larger players may carry out these transactions with the aim of eliminating potential rivals early, a strategy known as "*killer acquisitions*". Under the current EUMR thresholds, the low turnover of such targets often means that these transactions fall outside the Commission's jurisdiction, despite these start-ups' competitive potential.

The report notes that some countries such as Germany and Austria, have widened the jurisdictional coverage of their merger control regimes by introducing transaction value-based notification thresholds. The idea is to allow for the scrutiny of such acquisitions , *e.g.*, by catching high-value transactions even where the target's turnover is small. According to the report, in light of the difficulties that the introduction of a non-turnover-based threshold into the EUMR would raise, the EU should probably wait before any similar amendments be made at the EU level. In particular, the EU should assess how these new transaction value-based thresholds in Austria and Germany play out in practice and whether the referral system would ensure that transactions of EU-wide relevance are ultimately analyzed at EU level. The authors express the view that if major systemic gaps arise should the EUMR be amended. Even then, the EU should choose between strengthening and improving the referral regime or amending the EUMR's jurisdictional thresholds.

The report emphasizes the need for changes to the substantive analysis of mergers under the EUMR. Although the current significant impediment to effective competition test ("*SIEC*") is flexible enough to deal with mergers involving digital incumbents buying smaller rivals, a heightened degree of control for acquisitions of small start-ups by dominant platforms is recommended. In this regard, the substantive theories of harm to properly assess certain specific cases should be revised as well.

The report discusses how competition enforcement should tackle the challenges posed by digital platforms. The notions of multi-homing and switching, as well as interoperability and data portability, are key to ensuring that competition is maintained between platforms on the market, that new competitors can enter the market, and that consumers can switch between or use more than one platform. Dominant platforms that restrict these practices should be required to justify their conduct on efficiency grounds.

The report suggests that the use of "*wide*" most-favored-nation (MFN) clauses (which restrict price competition between digital platforms) should be prohibited. The report also observes that platforms—particularly marketplaces—effectively act as "*regulators*" by setting up the rules for user interaction. The report argues that dominant platforms that set up marketplaces must ensure a level playing field and must not use their rule-setting power to determine the outcome of competition on their platform.

With regard to data, the report elaborates on notions enshrined in the GDPR such as access to personal data, data sharing and access to data for competitors, and discusses their implications for competition law.

The report suggests that in some cases, it will be appropriate to use competition law to require dominant firms to disclose indispensable data needed by other companies to offer competing or complementary services. However, the report refers to sector-specific regulation and judicial or administrative measures rather than competition law as an appropriate solution to controlling data access in most cases.

Comment

Through a number of important—and at times controversial—points, the report emphasizes that a better understanding of the digital sector and the intersection between data and competition enforcement is necessary. Regulatory agencies should adapt their competition analyses to technological developments so that policies and enforcement become more relevant and efficient.

The report is not intended to be the final word on how the Commission will shape its competition policy in the digital era. It is envisaged that the report will be an important reference point as the Commission continues to deliberate on how competition policy can contribute to applying a new legal framework in the digital age.

EU CITIZENS AND STAKEHOLDERS VOICE OPINIONS ON EU COMPETITION RULES FOR HORIZONTAL AGREEMENTS

COMMISSION'S ROADMAP ON THE EVALUATION OF THE TWO BLOCK EXEMPTION REGULATIONS FOR HORIZONTAL CO-OPERATION AGREEMENTS, DG COMP – A1 – HT.5454, 5 SEPTEMBER 2019

In September 2019, the European Commission launched an evaluation of the horizontal block exemption regulations (BERs) to determine whether they should lapse, be prolonged or be updated in light of new market developments. As part of its investigation, the Commission held a comment period on its evaluation Roadmap, which garnered significant stakeholder input relating to digitalization in today's markets. The Commission is pursuing an ongoing public consultation process regarding the BERs, and will host stakeholder workshops this year to continue to gather feedback.

Background

The Commission's 'right of initiative' authorizes it to plan, prepare and propose new EU legislation and policies. In the context of the Commission's "*better regulation*" practice, laws and policies are evaluated on whether they are effective and have delivered the desired changes to EU businesses and citizens. On the basis of such evaluation, the Commission assesses whether the laws and policies should be continued or amended.

The Commission follows a Roadmap to define the scope of its evaluation of laws or policies. Roadmaps describe the problem to be tackled and objectives to be met, with a view to informing citizens and stakeholders about the Commission's work in order to allow them to provide feedback and participate effectively in future consultation activities. Citizens and stakeholders are therefore invited to express their opinion on the Commission's proposals and to suggest any potential solutions.

Reform of the Horizontal Block Exemption Regulations

In 2010 the Commission adopted Regulation (EC) No 1217/2010 concerning research and development agreements and Regulation (EC) No 1218/2010 concerning specialization agreements between actual or potential competitors (collectively, the

"*Horizontal BERs*"). Agreements that fall within these BERs are presumed to fall within the exemption enshrined in Article 101 (3) TFEU by contributing to technical and economic progress and enhancing consumer welfare. The Horizontal BERs are therefore intended to provide legal certainty and reduce costs for businesses by obviating the need for them to fully assess their agreements under Article 101, an often complex and uncertain task. The BERs will expire on 31 December 2022.

In September 2019, the Commission launched an evaluation of the Horizontal BERs, including the accompanying Commission Horizontal Cooperation Guidelines, by publishing a Roadmap with a view to assessing whether they should lapse, be prolonged or updated in light of new market developments. The evaluation looks at, *inter alia*:

i) Whether the hard-core and excluded restrictions enshrined in the BERs should be changed

ii) Whether the BERs' objective of reducing costs for companies and competition authorities has been achieved

iii) Whether the BERs are coherent with the Commission's overall competition practice, and their contribution to a consistent application of Article 101 TFEU.

Public Consultation

On 3 October 2019, the feedback period for commenting on the Roadmap ended. Many stakeholders, including industry associations, law firms, consumer organizations and academics, were involved in the feedback process. In terms of the content of feedback received, many comments were made on the interaction between the BERs and the ongoing digitalization of markets, which has changed consumer habits and introduced new market players. Stakeholders pointed out that today's markets are very different from when the BERs and the Guidelines were drafted, given increased digitalization. In light of such developments, a level playing field is required for all operators, manufacturers, wholesalers, distributors and retailers, whether large or small, and including all channels of distribution, be they online, offline or both.

Stakeholders also emphasized that, when reviewing the BERS, the Commission should rely on empirical market-based evidence which demonstrate real positive market effects or harm to the system, rather than any "*evidence*" based on speculation or hypothesis.

The Commission planned a 12-week consultation period which started in Q4 2019, and will host stakeholder workshops on areas of particular interest for the review process of the two Horizontal BERs. These workshops will take place this year.

As part of the ongoing public consultation, the Commission has uploaded an online questionnaire allowing interested parties to state their opinions on a range of matters, such as the extent of legal certainty provided by the BERs and the Guidelines, and the identification of pro-competitive horizontal agreements that should benefit from an exemption. Stakeholders are also invited to provide an opinion on whether the costs of applying the BERs (*e.g.*, legal fees, delays in implementation) are proportionate to the benefits generated (*e.g.*, faster self-assessment by the company in question). Stakeholders may also provide an opinion on the coherence of the BERs and the Guidelines with the Commission's overall competition law enforcement policy, as well as with case law or other existing or upcoming legislation or policies.

The contributions made to the public consultation will be published on the Commission's consultation webpage, together with a report summarizing the main findings of the consultation. The evaluation process will be closed with the adoption of a Staff Working Document at the beginning of 2021.

Comment

The Commission's public consultation engages citizens and businesses in the EU system of law-making. This public consultation procedure is in line with the European citizen's initiative, a participatory democracy instrument in the EU which allows citizens to suggest concrete legal changes in any field where the Commission has power to propose legislation.

To the extent that the BERs and the accompanying Guidelines are prolonged, they must continue to ensure legal certainty and a reduction in transaction costs for companies. If the Commission decides to prolong the BERs, it should take the developments in digital markets into account when crafting any new exemptions. Failure to adequately reflect the digitalization of markets in any new exemptions could render companies less inclined to enter into innovative agreements for fear of breaching the EU competition rules.

ABBREVIATION INDEX

ACR | Annual Competition Review

CJEU | Court of Justice of the European Union

EEA | European Economic Area

EMA | European Medicines Agency

EU | European Union

EUMR | European Union Merger Regulation

EUR | Euro €

GCEU | General Court of the European Union

GDPR | General Data Protection Regulation

MIF | Multi-Interchange Fee

NCA | National Competition Authority

SO | Statement of Objections

TFEU | Treaty on the Functioning of the European Union

UK | United Kingdom

KEY CONTACTS | BRUSSELS

PHILIP BENTLEY, QC
COUNSEL
pbentley@mwe.com

JACQUES BUHART
PARTNER
jbuhart@mwe.com

WILKO VAN WEERT
PARTNER
wvanweert@mwe.com

ANDREA L HAMILTON
PARTNER
ahamilton@mwe.com

DAVID HENRY
COUNSEL
dahenry@mwe.com

MAI MUTO
ASSOCIATE
mmuto@mwe.com

STEPHAN DE GROËR
ASSOCIATE
sdegroer@mwe.com

CAROLINE RUIZ-PALMER
ASSOCIATE
cruizpalmer@mwe.com

HELENE DE CAZOTTE
ASSOCIATE
hdecazotte@mwe.com

*With special thanks to **Souzanna Omran** and **Gabriela Karaivanova**, Stagiaires in our Brussels office, for their contributions to this annual report.*

OFFICE LOCATIONS

BOSTON
200 Clarendon Street
Boston, MA 02116-5021
USA
Tel +1 617 535 4000
Fax +1 617 535 3800

BRUSSELS
Avenue des Nerviens 9 - 31
1040 Brussels
Belgium
Tel +32 2 230 50 59
Fax +32 2 230 57 13

CHICAGO
444 West Lake Street
Chicago, IL 60606-0029
USA
Tel +1 312 372 2000
Fax +1 312 984 7700

DALLAS
2501 North Harwood Street
Suite 1900
Dallas, TX 75201-1664
USA
Tel +1 214 295 8000
Fax +1 972 232 3098

DÜSSELDORF
Stadttor 1
40219 Düsseldorf
Germany
Tel +49 211 30211 0
Fax +49 211 30211 555

FRANKFURT
Feldbergstraße 35
60323 Frankfurt a. M.
Germany
Tel +49 69 951145 0
Fax +49 69 271599 633

HOUSTON
Two Allen Center
1200 Smith Street
Suite 1600
Houston, TX 77002-4403
USA
Tel +1 713 653 1700
Fax +1 972 232 3098

LONDON
110 Bishopsgate
London
EC2N 4AY
Tel +44 20 7577 6900
Fax +44 20 7577 6950

LOS ANGELES
2049 Century Park East
Suite 3200
Los Angeles, CA 90067-3206
USA
Tel +1 310 277 4110
Fax +1 310 277 4730

MIAMI
333 SE 2nd Avenue
Suite 4500
Miami, FL 33131-2184
USA
Tel +1 305 358 3500
Fax +1 305 347 6500

MILAN
Via Dante 15
20123 Milan
Italy
Tel +39 02 36575701
Fax +39 02 36575757

MUNICH
Nymphenburger Str. 3
80335 Munich
Germany
Tel +49 89 12712 0
Fax +49 89 12712 111

NEW YORK
340 Madison Avenue
New York, NY 10173-1922
USA
Tel +1 212 547 5400
Fax +1 212 547 5444

ORANGE COUNTY
18565 Jamboree Road
Suite 250
Irvine, CA 92612-2532
USA
Tel +1 949 851 0633
Fax +1 949 851 9348

PARIS
23 rue de l'Université
75007 Paris
France
Tel +33 1 81 69 15 00
Fax +33 1 81 69 15 15

SAN FRANCISCO
415 Mission Street
Suite 5600
San Francisco, CA 94105-2533
USA
Tel +1 628 218 3800
Fax +1 628 218 3900

SHANGHAI
MWE China Law Offices
Strategic alliance with
McDermott Will & Emery
28th Floor Jin Mao Building
88 Century Boulevard
Shanghai Pudong New Area
P.R.China 200121
Tel +86 21 6105 0500
Fax +86 21 6105 0501

SILICON VALLEY
275 Middlefield Road
Suite 100
Menlo Park, CA 94025-4004
USA
Tel +1 650 815 7400
Fax +1 650 815 7401

WASHINGTON, DC
The McDermott Building
500 North Capitol Street,
NW Washington, DC 20001-
1531
USA
Tel +1 202 756 8000
Fax +1 202 756 808

WILMINGTON
1007 North Orange Street
4th Floor
Wilmington, DE 19801
USA
Tel +1 202 756 8950
Fax +1 202 756 8087

McDermott
Will & Emery

mwe.com