ANNUAL REVIEW OF EU COMPETITION CASES 2020

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McDermott Will & Emery
BELGIUM LLP

TABLE OF CONTENTS

5 **Article 101 TFEU Infringements / Cartels**

1.1. EC Fines NBCUniversal EUR 14.3mn for Restricting Sales of Film Merchandise, *AT. 40433 (film merchandise)*, 30 January 2020

1.2. EC Fines Ethylene Purchasing Cartel a Total of EUR 260mn, *AT. 40410 (ethylene)*, 14 July 2020

1.3. EC Fines Hotel Group Meliá for Discriminating between Customers, *AT. 40528 (Meliá-holiday pricing),* 21 February 2020

1.4. Pay-for-Delay Agreements Likely to Constitute Restriction of Competition by Object, Case C-307/18, *Generics (UK) and others v Competition Markets Authority*, 30 January 2020

1.5. Restriction of Competition by Object, by Effect or Not at All, Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and others*, 2 April 2020

1.6. CJEU Annuls GCEU Judgment in Part, Reduces EC Fine Imposed on NKT Verwaltungs GmbH and NKT A/S for Power Cable Cartel Involvement, Case C-607/18, *NKT Verwaltung and NKT v Commission*, 14 May 2020

1.7. GCEU Confirms EC's Power of Appraisal in Rejecting Complaint, Case T-531/18, *LL-Carpenter v Commission*, 12 March 2020

1.8. GCEU Reduces Fine in Card Chip Cartel Case After CJEU Criticism, Case T-758/14 RENV *Infineon Technologies AG v Commission*, 8 July 2020

1.9. GCEU Upholds EC's Finding that International Skating Union's Eligibility Rules Prevented Market Access, Case T-93/18, *International Skating Union v Commission*, 16 December 2020

1.10. CJEU Upholds EUR 21mn Fine Imposed on Silver Plastics for Colluding in Food Packaging Markets, Case C 702/19 P, *Silver Plastics and Johannes Reifenhäuser v Commission*, 22 October 2020

1.11. GCEU Annuls in Part EC Inspection Decisions Following Suspicions of Anticompetitive Practices, Cases T-249/17, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission*; T-254/17, *Intermarché Casino Achats v Commission* and T-255/17, *Les Mousquetaires and ITM Entreprises v Commission*, 5 October 2020

1.12. CJEU Annuls EC Decision Accepting Paramount's Commitments in Challenge Brought by Canal +, Case C-132/19 P, *Groupe Canal + v Commission*, 9 December 2020

32 **Article 102 TFEU Abuse of Dominant Position**

2.1. EC Validates Broadcom's Commitments to Safeguard Fair Competition, *AT.40608* (*Broadcom*), 7 October 2020

2.2. CJEU Clarifies How to Determine Jurisdiction for Civil Liability Claim Based on Abuse of Dominant Position, Case C-59/19, *Wikingerhof GmbH & Co KG v. Booking.com BV*, 24 November 2020

37 **Merger Control**

3.1. CJEU Upholds Fines Imposed on Marine Harvest for Gun Jumping, Case C-10/18P, *Mowi, formerly Marine Harvest ASA v Commission*, 4 March 2020

3.2. GCEU Annuls EC Prohibition on Hutchison 3G UK Acquisition of Telefónica UK, Case T-399/16, *CK Telecoms UK Investments Ltd v Commission*, 28 May 2020

3.3. GCEU Defines 'Undertakings Concerned' Under EUMR in Context of Acquisition by Jointly Controlled Full-Function JV, Case T-380/17, *HeidelbergCement AG and Schwenk Zement KG v Commission*, 5 October 2020

45 **State Aid**

4.1. EC Relaxes State Aid Rules to Help Businesses During COVID-19, Communication from the EC C(2020) 1863 Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak , 19 March 2020

4.2. GCEU Annuls EC Decision in Apple State Aid Case in Light of Assessment Errors, Cases T-778/16, *Ireland v Commission*, and T-892/16, *Apple Sales International and Apple Operations Europe v Commission*, 15 July 2020

49 **Legislative and Policy Developments**

5.1. In Context of COVID-19, EC Issues Guidance on Use of Regulation (EU) 2019/452 on Foreign Direct Investment, Communication from the EC C(2020) 1981: Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 25 March 2020

5.2. EC Issues Comfort Letter in Context of Temporary Framework in Response to COVID-19 – More Comfort Letters to Come? Communication from the EC C(2020) 3200 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, 8 April 2020

5.3. Evaluation of the VBER and the Vertical Guidelines, EC Staff Working Document Evaluation of the Vertical Block Exemption Regulation {SWD (2020) 173 final}, 8 September 2020

57 **Authors**

58 **Alphabetical Index of Cases & Decisions**

60 **Chronological Index of Cases & Decisions**

62 **Office Locations**

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ABBREVIATION INDEX

CJEU Court of Justice of the European Union

EC European Commission

EEA European Economic Area

EU European Union

EUMR European Union Merger Regulation

GCEU General Court of the European Union

NCA National Competition Authority

TFEU Treaty on the Functioning of the European Union

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ARTICLE 101 TFEU INFRINGEMENTS / CARTELS

EC FINES NBCUNIVERSAL EUR 14.3MN FOR RESTRICTING SALES OF FILM MERCHANDISE

AT. 40433, *FILM MERCHANDISE*, 30 JANUARY 2020

On 30 January 2020, the EC fined several companies belonging to Comcast Corporation, including NBCUniversal LLC, EUR 14.327 million for restricting traders from selling licensed merchandise within the EEA except into territories or to customers allocated to them. These illegal cross-border restrictions concerned merchandise products featuring the Minions, Jurassic World, and other images and characters from NBCUniversal's films.

Background

In the context of its Digital Single Market strategy and its e-commerce sector inquiry, in June 2017 the EC launched an antitrust investigation into the licensing and distribution of merchandising products. In particular, it investigated whether certain licensing and distribution practices of NBCUniversal illegally restricted traders from selling licensed merchandise cross-border and online within the EU Single Market and consequently denied consumers access to wider choice and better deals.

Merchandising products include clothes, shoes, phone accessories, bags or toys on which an image or text is applied during the manufacturing process. The aim is to increase the products' attractiveness for consumers, often children or teenagers. The manufacturer (licensee) may only use such images or text if it has signed a licencing agreement with the owner of the relevant intellectual property rights (licensor).

NBCUniversal is a US company that operates cable and broadcast networks, as well as film and television production companies worldwide. A division of NBCUniversal is in charge of licensing intellectual property rights under NBCUniversal's brands for the production and sale of products featuring the Minions, Jurassic World, Trolls and other popular NBCUniversal films.

The EC investigated whether NBCUniversal, in its role as a licensor of rights for merchandising products, had breached EU competition rules by restricting its licensees' ability to sell licensed merchandise cross-border and online. Such practices could ultimately harm consumers by excluding them from greater choice and lower prices, both online and offline.

The EC Decision

The EC found that NBCUniversal's licensing practices infringed EU competition rules, in particular Article 101 TFEU, by restricting offline and online sales outside allocated territories and outside allocated customer groups.

The EC identified the following illegal practices of NBCUniversal:

- Direct measures restricting sales by licensees, such as (i) prohibition of out-of-territory passive sales; (ii) prohibition of out-of-territory active sales; (iii) prohibition of online sales; (iv) obligation to notify NBCUniversal of out-of-territory sales; (v) use of language requirements to restrict out-of-territory sales; (vi) prohibition of sales outside of allocated customer groups; (vii) obligations to pay to NBCUniversal revenues

generated from sales beyond the allocated territories and customer groups.

- Indirect measures to encourage compliance with the restrictions on sales beyond the allocated territories and customer groups. These measures included the conduct of audits and the non-renewal of contracts.
- Imposition of an obligation to pass on the sale restrictions in order to guarantee that any third party selling NBCUniversal's licensed merchandise would also comply with the territorial and customer restrictions.

The EC found that NBCUniversal implemented these illegal practices for more than six and a half years (from January 2013 until September 2019). It found that NBCUniversal carved up the EU market into a series of smaller markets, prevented licensees in Europe from selling products cross-border, and hurt consumers by preventing them from being able to choose from a wide range of products and buy at the lowest price.

In setting the amount of the fine, the EC took into account NBCUniversal's cooperation during the investigation beyond its legal obligation to do so. In particular NBCUniversal assisted the EC to prove the infringement by providing additional information, and so was granted a 30% reduction in the fine.

Comment

This decision closes the last of three antitrust investigations in the merchandising sector opened by the EC in June 2017. These investigations followed closely on the heels of publication of the EC's Report on its e-commerce sector inquiry. The other two investigations concerned similar restrictions in which Nike was fined EUR 12.555 million in March 2019 (in respect of branded products of football clubs) and Sanrio was fined EUR 6.222 million in July 2019 (in respect of products branded with Hello Kitty and other characters).

This decision and the previous two decisions send a clear message to operators that the EC will not tolerate anticompetitive restrictions to online and offline cross-border sales which undermine the EU Single Market and harm consumers' interests. Taking into account the value of the merchandising sector in Europe and around the world, the EC intends to promote cross-border online and offline trade to boost economic growth and compete with key players such as the United States and Asia in this profitable business area.

As EC Executive Vice-President Margrethe Vestager said in a press release issued on the date of the decision:

"This is the third decision dealing with sales restrictions on licensed products sold across Europe. Universal's strategy to prevent traders from selling licensed products across customer groups and countries is against EU antitrust rules. Such sales restrictions undermine the very foundations of the EU Single Market and cannot be tolerated".

EC FINES ETHYLENE PURCHASING CARTEL A TOTAL OF EUR 260MN

AT. 40410, *ETHYLENE*, 14 JULY 2020

On 14 July 2020, the EC fined ethylene purchasers Orbia, Clariant and Celanese a total of EUR 260 million for having colluded and exchanged information to lower the purchase price of ethylene, to the detriment of ethylene sellers on the ethylene merchant market. A fourth participant, Westlake, received full immunity for revealing the existence of the cartel.

Background

In June 2016, the EC initiated an investigation into companies active in the market for the purchase of ethylene, as a result of a leniency application submitted by ethylene purchaser Westlake.

Ethylene is a chemical used in the manufacture of polymers, such as polyvinyl chloride. These polymers are used in a wide variety of industrial and consumer markets such as the packaging, transportation, electrical, electronic, textile and construction industries, as well as consumer chemicals, coatings and adhesives. Ethylene purchasers usually buy ethylene under long-term supply agreements. The purchase price of ethylene is very volatile and in order to reduce the risk of price volatility, ethylene supply agreements refer to a pricing formula, which often includes a monthly contract price (MCP). The MCP is published by independent reporting agencies based on data received from a supplier and a buyer when they reach agreement on an ethylene price (referred to as a settlement). If, for the forthcoming month, two different supplier-buyer pairs reach agreement on the same price, this price is published by the independent reporting agencies as the MCP.

During its investigation, the EC found that four ethylene purchasers (namely Westlake of the United States, Orbia of Mexico, Clariant of Switzerland and Celanese of the United States) coordinated their price negotiation strategies before and during the bilateral MCP settlement negotiations with ethylene sellers to push the MCP down. The cartelists also exchanged price-related information during their negotiations with ethylene sellers, which constituted the basis for establishing the MCP as an element of the ethylene price. The ethylene purchasers therefore colluded to buy ethylene at the lowest possible price to the detriment of ethylene sellers and breached the EU Competition rules. The purchasing cartel lasted from December 2011 to March 2017. The conduct concerned markets in Belgium, France, Germany and the Netherlands. So even though the cartelists were all non-EU companies, the EC had jurisdiction to investigate the case because ethylene prices in the EU were affected.

The EC Decision

On 14 July 2020, the EC fined Orbia, Clariant and Celanese EUR 260 million for infringing the prohibition on anticompetitive agreements under Article 101 TFEU. The fourth participant in the purchasing cartel, Westlake, received full immunity for acting as a whistle-blower and revealing the existence of the cartel to the EC, avoiding a fine of approximately EUR 190 million. All four companies admitted their involvement in the cartel and settled the case.

The EC relied on its 2006 Guidelines on fines to set the fines (Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, *OJ C 210, 1.9.2006, p. 2–5*). More specifically, as the cartel concerned a collusion on purchase prices, the EC used the value of purchases in the EU, rather than the value of sales, as the measure of affected turnover for fine calculation. The EC went on to consider that those figures were presumably artificially lowered because of the particular cartel behaviour, therefore resulting in a level of fines below the economic significance of the infringement. Thus, using its discretion under the 2006 Guidelines on fines, the EC increased the amount of the fine for all companies by 10% to ensure there was no under-deterrence.

In setting the amount of the fine, the EC took account of the duration of the infringement, the individual weight of the companies in the infringement, their overall size and the fact that

Clariant had previously been sanctioned for a similar infringement.

In addition, the EC applied its 2006 Leniency Notice and granted Westlake full immunity for revealing the existence of the cartel (Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ C 298, 8.12.2006, p. 17–22* and Communication from the Commission — Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ C 256, 5.8.2015, p. 1–1).* Orbia, Clariant and Celanese benefited from reductions of their fines for cooperating with the EC at its investigation. The reductions were proportionate to the timing of their cooperation and the extent to which the evidence they provided helped the EC to prove the existence of the cartel in which they were involved. On this basis, Orbia was granted a reduction of 45%, Clariant 30% and Celanese 20%.

Finally, Orbia, Clariant and Celanese each received a further 10% discount on the fines imposed on them, for admitting their involvement in the cartel and for settling, under the EC's 2008 Settlement Notice (Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, *OJ C 167, 2.7.2008, p. 1–6*). The total fine amount imposed on each company is as follows: a fine of approximately EUR 22 million was imposed on Orbia, a fine of approximately EUR 156 million was imposed on Clariant, and Celanese was fined approximately EUR 82 million.

On 25 September 2020, Clariant appealed certain aspects of the EC decision before the GCEU, considering the imposed fine to be disproportionate (GCEU, T-590/20, *Clariant and Clariant International v Commission*). According to Clariant's statement on the case, the investigation conducted by the EC concluded that a single former employee of the company infringed competition law, resulting in Clariant being found liable for this conduct and receiving a fine.

Comment

This case is the first purchasing horizontal cartel detected in the chemical industry sanctioned under the 2006 Fines Guidelines and settled under the 2008 Settlement Notice.

By imposing such high fines, the EC conveyed the message that although not so frequent, purchasing cartels are also caught by the regulator and are to be punished as severely as cartels coordinating selling prices. Indeed, EC Executive Vice-President Margrethe Vestager, in charge of competition policy, stated: "*. . . The Commission does not tolerate any form of cartels. EU antitrust rules not only prohibit cartels related to coordination of selling prices, but also cartels related to coordination of purchasing prices. This protects the competitive process for inputs*".

The ethylene purchasers were granted an additional three months in which to pay their fines, on top of the usual three months.

The EC explained that it decided to extend the deadline for fine payments by an additional three months in light of the COVID-19 outbreak and in recognition of possible short-term liquidity issues for companies. Thus, exceptionally, companies will have six months from the notification of a fining decision in which to pay. This decision represents a positive measure for companies that has materialised for the first time in the ethylene cartel case, particularly at a time when companies from many sectors are hit by the crisis and request public aid.

EC FINES HOTEL GROUP MELIÁ FOR DISCRIMINATING BETWEEN CUSTOMERS

AT. 40528, *MELIÁ (HOLIDAY PRICING)*, 21 FEBRUARY 2020

On 21 February 2020, the EC imposed a fine of EUR 6.7 million on the Spanish hotel group Meliá for including restrictive clauses in its agreements with tour operators between 2014 and 2015 regarding the way they offered hotel accommodation. Meliá obtained a 30% reduction of its fine, under the EC's informal framework for rewarding cooperation in non-cartel cases, because it cooperated with the EC beyond its legal obligation, expressly acknowledging the facts and the infringement and providing evidence.

Background

When the EC initiated its investigation against Meliá in 2017 following a complaint from customers, several tour operators, such as Thomas Cook, TUI and REWE, were also investigated, but the EC eventually closed proceedings against them. The EC's investigation assessed whether the agreements between Meliá and the tour operators contained clauses that discriminated between consumers on the basis of their nationality or country of residence.

The EC Decision

According to the EC, the clauses partitioned the EU single market through vertical restrictions on both active and passive sales of hotel accommodation, in breach of Article 101 TFEU. "Passive" sales are sales in response to unsolicited requests from customers, while "active" sales consist of actively prospecting for customers, for instance through direct mail (including the sending of unsolicited e-mails) or visits. Bans on "passive" sales into particular territories will almost always amount to a serious breach of EU competition law.

More specifically, Meliá's standard terms and conditions for contracts with tour operators contained a clause according to which those contracts were valid only for reservations of consumers who were resident in specified countries. Meliá's contracts restricted the tour operators' ability to sell hotel accommodation freely in all EEA countries and to respond to direct requests from residents outside specified countries. The EC established that the contracts between Meliá and the various tour operators ultimately prevented consumers from booking hotel accommodation at better conditions offered by tour operators in other Member States, given that bookings at certain rates were only valid for customers living in specific countries.

Comment

This case shows that restrictions on cross-border sales in the EU/EEA continue to be seen as serious infringements of competition law because they create divisions between national markets whereas a principal objective of the EU treaties is to achieve a fully unified market. Restrictions on sales of products and services from one EU Member State into another has become an area of considerable scrutiny by the EC in recent years. For example, just a few weeks before fining Meliá, the EC fined several companies belonging to Comcast Corporation, including NBCUniversal, EUR 14.3 million for restricting traders from selling licensed merchandise within the EEA to territories and customers beyond those allocated to them (AT.40433, *Film Merchandise*, 30 January 2020).

PAY-FOR-DELAY AGREEMENTS LIKELY TO CONSTITUTE RESTRICTION OF COMPETITION BY OBJECT

C-307/18, *GENERICS (UK) AND OTHERS V COMPETITION MARKETS AUTHORITY*, 30 JANUARY 2020

On 30 January 2020, the CJEU detailed the conditions under which pay-for-delay agreements in the pharmaceutical sector between a manufacturer of originator medicine and manufacturers of the generic medicine constitute by their object an anticompetitive practice prohibited by Article 101 TFEU.

Background

In 2016, the UK Competition Market Authority (CMA) fined GlaxoSmithKline (GSK) and several manufacturers of generic medicines £45 million for having entered into pay-for-delay agreements. The CMA's investigation showed that in order to settle disputes over the validity of GSK's patents relating to the manufacture process of its antidepressant paroxetine (originator), the generics manufacturers agreed to delay entry on the market of their own generics in return for payments from GSK. The CMA concluded that these pay-for-delay agreements infringed the competition law prohibition on anticompetitive agreements. The CMA also found that GSK had abused its dominant position by entering into several agreements of this sort with potential generic competitors.

The parties appealed this decision to the UK Competition Appeal Tribunal, which referred to the CJEU the question of whether an agreement to settle a dispute over the validity of a pharmaceutical patent constitutes a restriction of competition by object or effect (Article 101 TFEU), and whether such settlement in combination with other agreements constitutes abuse of a dominant position (Article 102 TFEU).

The CJEU Judgment

Article 101 TFEU

The CJEU first gave thorough details on how to assess whether generic manufacturers might be potential competitors with the originator manufacturers. For the CJEU, there should be real and concrete possibilities for the generic manufacturers to join that market and compete with the originator manufacturers. The existence of potential competition should not be purely hypothetical or uncertain, but must be assessed in light of the structure of the market and its economic and legal context.

The CJEU noted several indications of a generic manufacturer's firm intention to enter the market, meaning that it has taken sufficient preparatory steps "to enable it to enter the market concerned within such a period of time as would impose competitive pressure on the manufacturer of originator medicines". Those steps include having secured the required administrative marketing authorisations, having an adequate stock of the generic medicine, having undertaken legal steps with a view to challenging the process patents held by an originator manufacturer, and conducting marketing initiatives.

The CJEU then stated that the market entry of such generic manufacturer must not meet barriers to entry that are insurmountable. The CJEU noted that the outcome of the patent dispute is of "no relevance" in the assessment because the existence of the patent is not deemed insurmountable to market entry.

The CJEU noted several other factors showing that the originator manufacturer perceives a risk for its own commercial interests posed by the

generic manufacturer, and which thus constitute evidence of potential competitive pressure.

Next, the CJEU detailed the conditions under which pay-for-delay provisions within a settlement agreement would be considered as a restriction of competition by object, if national tribunals deem the parties to be potential competitors.

The CJEU stressed that settlement agreements whereby a generic manufacturer seeking to enter a market commits to cease challenging the patent held by an originator manufacturer "cannot be considered in all cases to be a restriction by object within the meaning of Article 101(1) TFEU". The CJEU nonetheless warned that such settlement agreements in patent disputes where the generic manufacturer also commits not to enter the market "are liable to have effects that restrict competition".

The fact that such an agreement involves transfers of value is also insufficient ground to classify the agreement as a restriction by object, since those transfers of value may prove to be justified by the legitimate objectives of the parties to the agreement.

However, the CJEU added that the practice should be considered as a restriction of competition by object when it is clear that the transfers of value "cannot have any explanation other than the commercial interest of both [parties] not to engage in competition on the merits". The CJEU explained that in the absence of any other plausible explanation, such agreements and transfers of value indicate that it is not the generic manufacturer's perception of the patent's strength, but the originator manufacturer's large payment, that has led the generic manufacturer to delay its entry on the market and to end disputes over the patent's validity.

It follows that pay-for-delay agreements originating from a settlement agreement in a patent dispute are not as such a restriction of competition by object, unless it is clear that the net gain from the transfers of value can have no explanation other than the commercial interest of the parties to the agreement not to engage in competition on the merits.

This conclusion gives an indication of how the CJEU might review the GCEU's judgment in the complex pending *Perindopril* case, in which the GCEU concluded that settlement agreements in patent disputes should be considered as a restriction of competition by object when the generic manufacturer obtains incentives from the originator manufacturer to refrain from entering the market. The GCEU followed a similar approach in the *Lundbeck* case, where it upheld the EC's findings that the agreements by which Lundbeck paid substantial amounts and provided other incentives to generic manufactures in return for their commitment not to enter the market constituted a restriction of competition by object.

Article 102 TFEU

In order to define the market of the dominant pharmaceutical group, there should be a sufficient degree of interchangeability between the originator medicine and the generic medicine concerned, the CJEU stated. This is the case where generic manufacturers are in a position to enter the market within a short period after expiry of the patent, and with sufficient strength to counterbalance the originator medicine already on the market. Then, under these conditions, the generic medicine should be taken into consideration for the purposes of defining the relevant market.

In the paroxetine market, the CMA and the Competition Appeal Tribunal had found that the set of settlement agreements concluded on GSK's

initiative were part of an overall strategy which had, if not as its object, at least the effect of delaying the market entry of generic medicines. The CJEU held that such oriented strategy "constitutes, in principle, a practice that impedes, while adversely affecting at least the national health systems if not the final consumer, the growth of competition in the market of a medicine."

The CJEU concluded that "it could not be ruled out" that the agreements concluded between GSK and the several generic manufacturers had generated cumulative effects from restrictive agreements that were liable to strengthen GSK's dominant position. Therefore, GSK's strategy may prove to be abusive, which the CJEU let the Competition Appeal Tribunal determine, by balancing the favourable and unfavourable effects on competition of the practice concerned.

Following this ruling, the case will now go back to the Competition Appeal Tribunal for a final judgment on the appeals.

Comment

Pay-for-delay agreements are thoroughly scrutinised by competition authorities, which are aware that these agreements are often entered into in the context of a settlement in patent disputes between originator and generic manufacturers. However, the EC stated in its Report on Competition Enforcement in the Pharmaceutical Sector that most patent dispute settlements (about 90%) are considered unproblematic from a competition law perspective because parties are able to settle in a manner that is not anticompetitive.

The preliminary ruling in the GSK case is the first CJEU judgment on pay-for-delay agreements in the pharmaceutical sector. The CJEU took the (expected) position that such agreements might very well be considered as restrictions of competition by object, which endorses what the GCEU and the EC have articulated in different cases over the last few years. (See for instance: GCEU, T-691/14, *Servier and Others v Commission*, [2018] EU: T:2018:922 and GCEU, T-472/13, *Lundbeck v Commission*, [2016] EU: T:2016:449, as well as EC decision in AT.39685, *Fentanyl*, 10 December 2013.) As indicated in the discussion of the "by object" restriction above, the CJEU framed this issue as an "if/unless" test. There is a restriction "by object" *if* the agreement has no other explanation than the commercial interest of the parties, *unless* there are proven pro-competitive effects giving rise to a reasonable doubt that the agreement causes a sufficient degree of harm to competition.

The pending appeal before the CJEU in the *Lundbeck* case will provide further details on how to handle pay-for-delay agreements. In *Lundbeck*, the pay-for-delay agreements did not originate from a settlement in a patent dispute before a tribunal. Rather, Lundbeck was found to have paid large amounts to generic manufacturers that committed in exchange to refrain from entering the market. The GCEU ruled that those agreements constituted a restriction of competition by object, and stated that Lundbeck could have found other ways to protect its patents, such as a settlement agreement.

RESTRICTION OF COMPETITION BY OBJECT, BY EFFECT OR NOT AT ALL

C-228/18, *GAZDASÁGI VERSENYHIVATAL V BUDAPEST BANK NYRT. AND OTHERS,* 2 APRIL 2020

On 2 April 2020, the CJEU delivered its judgment in the *Budapest Bank* case, analysing in detail the conditions for assessing and identifying "by object" infringements of competition law, *i.e.*, certain forms of collusion between undertakings which can be regarded by their very nature as being injurious to the proper functioning of normal competition.

Background

In August 1996 seven banks, including Budapest Bank, ING, OTP and Erste, concluded an agreement which introduced a uniform Multilateral Interchange Fee (MIF) relating to payments made through the credit card systems of Visa Europe Ltd ('Visa') and MasterCard Europe SA ('MasterCard') (MIF agreement). MIFs are the fees paid by the merchant's bank (the acquiring bank) to the card holder's bank (the issuing bank) when a payment transaction takes place with the use of a card issued by a bank member of the card payment systems offered by Visa or MasterCard.

In September 2009, the Hungarian Competition Authority found that the MIF agreement constituted a restriction of competition by both object and effect, having an anticompetitive purpose and impact on the relevant market. The Competition Authority fined Visa and MasterCard EUR 1.75 million each and imposed fines in varying amounts on the seven banks for concluding the MIF agreement.

Visa, MasterCard and six of the banks appealed the decision before the Administrative and Labour Court of Hungary, which dismissed their application. Later, these parties (except for MasterCard) appealed the decision before the High Court of Hungary, which ruled in their favour and annulled the decision of the Hungarian Competition Authority.

The latter subsequently appealed the High Court's decision before the Supreme Court of Hungary, which referred four questions regarding the application of Article 101(1) TFEU to the CJEU for a preliminary ruling. The Hungarian Supreme Court asked first whether the same conduct can be regarded as a restriction of competition by both object and effect, and second, whether an agreement such as the MIF agreement at stake may constitute a restriction by object. Third, the Hungarian Court asked whether Visa and MasterCard can also be considered parties to the MIF agreement even though they were not directly involved in it, but facilitated its adoption and accepted and implemented it. Fourth, the Hungarian Court asked whether the interpretation of Article 101 TFEU leads to the conclusion that it is not necessary to distinguish between participation in the MIF agreement and acting in concert with the banks that participated in the MIF agreement.

The CJEU Judgment

First Question

The CJEU referred to the language of Article 101(1) TFEU, which states that in order for an agreement to be anticompetitive, it must have as its "object or effect" the prevention, restriction or distortion of competition within the internal market. The CJEU explained that the expression "object or effect" first requires an assessment of whether the agreement constitutes a restriction of competition "by object". If a "by object" restriction is found to exist, there is no need for the competent authority or court to also examine the effects of that restriction.

However, as the CJEU observed, it is clear from case law dating from 1987 that the same anticompetitive conduct can restrict competition "by object" and also "by effect":

Although it thus follows from the case-law of the Court […] that, where an agreement is classified as a restriction of competition "by object" under Article 101(1) TFEU, there is no need to demonstrate, in addition, the effects of that agreement for the purposes of finding that it is prohibited pursuant to that provision, the Court has, on the other hand, already held, with regard to the same conduct, that that conduct had both the object and the effect of restricting competition.

(See to that effect, *inter alia*, CJEU, C-311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, [1987], EU:C:1987:418, para. 17; CJEU, C-27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC.*, [1988], EU:C:1988:183, paras. 14 and 15; CJEU, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to 129/85, *Ahlström Osakeyhtiö and Others v Commission*, [1988] EU:C:1988:447, para. 13; and CJEU, C-231/14 P, *InnoLux v Commission*, [2015] EU:C:2015:451, para. 72).

In light of the established case law, one may wonder why the referring court asked the question. It seems that the referring court was concerned by the fact that, in the case of a restriction of competition "by object", it is more difficult to justify an exemption under Article 101(3) TFEU than in the case of a restriction "by effect", and second, a restriction "by object" is more severely punished than a restriction "by effect". The CJEU dismissed these considerations, observing that they did not prevent a finding that the same conduct amounted to a restriction of competition "by object" and also "by effect".

Finally, as far as the evidence is concerned, the CJEU (and the Advocate General) stressed that if a competent authority or court decides to assess both the object and the effect of an agreement, it is still obliged "first, to support its findings for that purpose with the necessary evidence and, second, to specify to what extent that evidence relates to each type of restriction thus found to exist".

Second Question

The CJEU answered the second question essentially as follows:

"*[An agreement] cannot be classified as an agreement which has "as [its] object" the prevention, restriction or distortion of competition, within the meaning of [Article 101(1) TFEU], unless that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine*". (CJEU, C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, [2020] EU:C:2020:265, para. 86).

Thus the CJEU did not answer specifically the question whether an agreement, such as the MIF agreement, amounts to a restriction "by object". The CJEU's answer provides a general formulation which is wholly consistent with the decided case law. It is now up to the referring court to apply this general formulation to the facts of the case. The interest of the CJEU's judgment lies in some of the additional observations it makes about aspects of the MIF agreement that the referring court could take into consideration when applying this general formulation.

The CJEU recalled the case law according to which there are three necessary steps for determining whether an agreement qualifies as a "by object" infringement (CJEU, C-67/13 P, *CB v Commission*, [2014]EU:C:2014:2204, para. 53; CJEU, C-32/11, *Allianz Hungária Biztosító and Others v Gazdasági Versenyhivatal*, [2013]

EU:C:2013:160, para. 36; CJEU, C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, [2009] ECR I-9291, para. 58; CJEU, C-403/08, C-429/08, *Football Association Premier League and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, para. 136; and CJEU, C-439/09, *Pierre Fabre Dermo-Cosmétique v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, [2011] ECR I-9419, para. 35):

1. The content of the agreement must be examined in order to evaluate the potential for the agreement to harm competition by its very nature.

2. Any illegitimate objectives restrictive of competition must be identified.

3. The legal and economic context of the agreement must be assessed, taking into consideration the nature of the goods or services affected and the real conditions of the functioning and structure of the market.

With regard to the first point, "content", the CJEU observed that:

Although the list of types of agreements mentioned in Article 101(1) TFEU does not include agreements such as the MIF agreement, this list is not exhaustive. It cannot therefore be ruled out from the outset that the MIF agreement does *not* amount to a restriction "by object" (see *supra* C-228/18, para.63).

- An agreement such as the MIF agreement does not directly set the service charges paid by merchants to acquiring banks. It standardises an aspect of the cost met by these banks, namely the interchange fee paid to the issuing banks when cards issued by the latter are used as a means of payment. This standardisation of cost has effects both from the point of view of competition between Visa and MasterCard for the custom of acquiring banks, and from the point of view of competition among the acquiring banks concerning the service fees charged by them to merchants (see *supra* C-228/18, para. 61)
- It had to be examined whether the MIF agreement determined "indirectly" the service charges paid by merchants to acquiring banks (see *supra* C-228/18, para.63, para.62).
- Last of all, it was necessary to prove that the above elements were harmful to competition in order to conclude that there was a restriction "by object" (see *supra* C-228/18, paras. 65, 67).

Turning to the second point, "objectives":

- The CJEU stressed that regard must be had to the two-sided nature of the market where the issuing activities and the acquisition activities interact with one another. The CJEU observed that it cannot be ruled out that the MIF agreement pursued the objective of establishing and maintaining a balance between the two sides of the market, preventing excessively high interchange fees and therefore excessively high merchant service charges (see *supra* C-228/18, para.73).
- Taking into account the potential pro-competitive effects of the agreement, the CJEU clarified that a counterfactual analysis, assessing what the competition of the market would have been if the agreement had not existed, is necessary. Such an analysis falls within the scope of the examination of the effects of the agreement (see *supra* C-228/18, para. 75)

- The CJEU clarified that, in order for an agreement to be classified as a by object infringement, there must be "robust and reliable experience" proving that the agreement is by its very nature capable of restricting competition. The view of the CJEU was that such sufficient experience does not seem to exist in the present case. The referring court should therefore proceed to a detailed assessment of the effects of the MIF agreement on the market (see *supra* C-228/18, para.76).

On the third and last point, "the context of the MIF agreement":

- The CJEU observed that the complexity of the card payment systems of the type at issue in the main proceedings, their bilateral nature and the existence of vertical relationships between the different economic operators concerned are not, in themselves, capable of precluding classification of the MIF agreement as a restriction "by object". In making this statement, the CJEU pointed to its judgment of 14 March 2013 in the case *Allianz Hungária Biztosító* case (see *supra* C-32/11, para 43), in which it held that the existence of vertical relationships "in no way exclude[d] the possibility that the agreement at issue in the main proceedings constitute[d] a restriction of competition 'by object'". That said, the CJEU emphasised that such an anticompetitive object must be established (see *supra* C-228/18, para.80).
- The CJEU observed that a counterfactual analysis would be particularly relevant because competition between card payment systems tended to cause an increase in the MIFs contrary to the decrease in prices that competition triggers in one-sided markets. If the referring court found "strong indications" that, in the absence of the MIF agreement, there would have been an upward pressure on the MIFs, the agreement could not be classified as a restriction "by object" (see *supra* C-228/18, paras. 81, 83).

Third and Fourth Questions

The CJEU did not rule on the third and fourth questions. These were considered to be hypothetical.

It is now for the Hungarian Supreme Court to decide whether the MIF agreement constitutes a restriction of competition by object or by effect, taking into account all the relevant guidance given by the CJEU in reply to the first and second questions.

Comment

We now have three CJEU judgments about the nature of the restriction of competition involved in an agreement fixing or setting limits on interchange fees paid by acquiring banks to issuing banks.

In *CB Cartes Bancaires*, the GCEU found that the agreement in that case restricted competition "by object". However, this finding was annulled by the CJEU on appeal and referred back to the GCEU (see *supra* C-67/13 P,). Upon re-examination, the GCEU found that the agreement in question restricted competition "by effect" (GCEU, T-491/07 RENV-*CB v Commission*, [2016] EU:T:2016:379).

In *MasterCard,* the EC identified certain factors that pointed to the existence of a restriction of competition by object, but ultimately the EC based its analysis only on the agreement's restrictive *effects* on competition in the acquiring markets (GCEU, T-111/08, *MasterCard and others v Commission,* [2016], EU:T:2012:260, para. 27). MasterCard's challenge to these findings was dismissed by the GCEU and, on appeal, also by the CJEU (CJEU, C-382/12 P,

MasterCard and others v Commission, [2014] EU:C:2014:2201).

In its preliminary ruling in case C-228/18, the CJEU only provides some guiding principles that a national competition authority or court must follow when deciding whether an agreement fixing interchange fees constitutes a restriction "by object" or "by effect".

What these three decided cases tend to show is that the question of whether an agreement on interchange fees restricts competition "by object" is far from clear. It cannot be excluded that such an agreement constitutes a "by object" restriction, but to get to this conclusion one must to cross the threshold of demonstrating that the agreement is, by nature, so harmful to competition that it is not necessary to undertake an analysis of its actual effects.

In practice, the EC's DG COMP or a national competition authority would be on far safer ground demonstrating that, on the particular facts of the case, the agreement in question had the effect of restricting competition. For the purposes of such a demonstration, it is necessary to assess competition within the actual context in which it would occur if the agreement had not existed in order to assess the impact of that agreement on the parameters of competition, such as the price, quantity and quality of the goods or services.

It would be interesting to speculate whether the principles developed by the CJEU in the cases on payment card interchange fees could also be applied to other two-sided markets, for example, a multi-sided internet platform. Like a card system, a multi-sided internet platform seeks to maintain a balance between the platform's participant groups because success on the market depends largely on the direct and indirect network effects of the various participant groups.

CJEU ANNULS GCEU JUDGMENT IN PART, REDUCES EC FINE IMPOSED ON NKT VERWALTUNGS GMBH AND NKT A/S FOR POWER CABLE CARTEL INVOLVEMENT

C-607/18, *NKT VERWALTUNGS AND NKT A/S V COMMISSION*, 14 MAY 2020

On 14 May 2020, the CJEU annulled in part the GCEU's judgment that upheld an EC decision against NKT Verwaltungs GmbH and NKT A/S, ruling that the EC had breached the company's rights of defence, and reduced the fine imposed upon them.

Background

This case follows on from the EC's power cable cartel decision of 2 April 2014, pursuant to which fines totalling EUR 302 million were imposed on 11 companies active in the underground and submarine cable industry. The defendants, comprising two Korean, three Japanese and six European companies, had shared markets and customers on an almost global scale for ten years, starting in 1999. Two of the European companies were NKT Verwaltungs GmbH and NKT A/S, referred to collectively herein as NKT.

NKT, along with 15 other companies, challenged the fines imposed upon them by the EC before the GCEU. By judgment of 12 July 2018, the GCEU upheld the amount of the fines imposed by the EC, including the EUR 3.88 million fine imposed on NKT.

The CJEU Judgment

NKT appealed to the CJEU, requesting that the GCEU's judgment be set aside in whole or in part and that the EC's decision be annulled in whole or in part. The CJEU partially set aside the judgment of the GCEU on the grounds that it

contained three errors of law. The CJEU also annulled the EC's decision in part and reduced the fine imposed on NKT by EUR 200,000.

First Error of Law

In its Statement of Objections, the EC excluded from the geographic scope of the alleged infringement the activities of the cartel relating to sales in countries that are not members of the EU or the EEA. NKT argued that it had no opportunity to defend itself in relation to the inclusion of these activities in the scope of the EC's decision, yet Article 27 of Regulation 1/2003 provides that the EC shall base its decisions only on objections on which the parties concerned have been able to comment. The requirements of Article 27 are strict. The CJEU noted at paragraph 57 of its judgment:

"*Where the party concerned was not afforded the opportunity to conduct its defence properly during the administrative procedure with regard to a particular objection, an infringement of the rights of the defence capable of leading to the judgment under appeal being set aside must be found (see, to that effect, CJEU, C-612/12 P, Ballast Nedam v Commission, [2014] EU:C:2014:193, paras. 25-31, 38).*"

The CJEU therefore held that the GCEU had erred in law in holding that the rights of the defence of NKT had not been infringed.

Second Error of Law

The CJEU held that the GCEU had erred in finding that the EC was not required to establish that NKT was aware of, or could reasonably have foreseen, certain practices of the cartel consisting of a collective refusal to supply accessories and technical assistance to competitors not participating in the cartel. The GCEU said this on the theory that, because these practices were not an essential part of the cartel, the EC did not have to prove that NKT was aware of or could reasonably have foreseen their existence.

According to the CJEU's case law, an undertaking which has participated in a single and complex infringement, by its own conduct, and intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement. For this, the EC must show that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants. The EC must also show that this undertaking was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives, or that this undertaking could reasonably have foreseen the offending conduct and was prepared to take the risk (see, to that effect, CJEU, C-99/17 P, *Infineon Technologies v Commission*, [2018] EU:C:2018:773, para. 172; CJEU, C-441/11 P, *Commission v Verhuizingen Coppens*, [2012] EU:C:2012:778, para. 42; CJEU, C-293/13 P, *Fresh Del Monte Produce v Commission*, [2015] EU:C:2015:416, para.157).

The CJEU ruled that this case law does not distinguish between practices which are "essential" and those which are not. The EC was therefore required to prove that the defendants were aware of the practices or could reasonably have foreseen them given that they had not participated directly. The GCEU erred in law by ruling that the EC was relieved of this burden of proof because the practices were not an essential part of the overall infringement.

Third Error of Law

The CJEU considered that the GCEU violated the presumption of innocence in finding that NKT had participated in another aspect of the infringement, the allocation of underground power cable projects in the EEA, prior to 21 November 2002.

According to the CJEU, the sole piece of evidence on which the EC relied did not establish that NKT had participated in the allocation of underground power cable projects in the EEA prior to 21 November 2002. The sole piece of evidence (an email sent by Nexans in September 2002) was not sufficient to establish NKT's participation in the cartel for this period.

Partial Annulment of the GCEU's Judgment

The CJEU set aside the judgment of the GCEU in so far as it rejected NKT's pleas relating to the three errors above. The appeal was dismissed as to the other pleas raised by NKT.

The CJEU examined the question of whether the GCEU's judgment should be set aside in its entirety because of these three errors of law. The CJEU observed that, although NKT had succeeded in proving these three errors of law, it had not demonstrated that the GCEU erred in law by confirming the EC's finding that NKT had participated in a single and continuous infringement. The CJEU therefore set aside the GCEU's judgment only as far as concerned these three errors of law and also in so far as the GCEU dismissed NKT's request for a reduction in the amount of the fine.

Partial Annulment of the EC's Decision

The CJEU considered that it could give judgment itself on the action for annulment brought by NKT against the EC's decision, and that it was not necessary to refer the matter back to the GCEU.

With regard to the conduct related to sales in countries outside the EU and the EEA, the CJEU observed that NKT was not afforded the opportunity to conduct its defence properly during the administrative procedure as regards this aspect of the infringement. The CJEU therefore annulled the EC's decision in so far as it imposed liability for this aspect of the infringement.

With regard to the collective refusal to supply accessories and technical assistance to competitors not participating in the cartel, the CJEU held that the EC's decision did not establish that NKT was aware of this aspect of the infringement or could reasonably have foreseen it. The CJEU therefore annulled the EC's decision in so far as NKT was held liable for this aspect of the infringement.

With regard the allocation of underground power cable projects in the EEA in the period from 3 July 2002 to 21 November 2002, the CJEU noted that the EC did not identify any evidence that would demonstrate that NKT had participated in this aspect of the infringement during that period. The CJEU therefore annulled the EC's decision in so far as NKT was held liable for this aspect of the infringement during that period.

In exercise of its unlimited jurisdiction, the CJEU also reduced the fine imposed on NKT by EUR 200,000, from EUR 3.88 million to EUR 3.68 million.

Comment

Three important points can be distilled from this case:

- Respect for the rights of the defence is paramount.
- The conditions for holding a cartel participant liable for certain conduct of other cartel participants in which that first participant did not participate must be proved strictly.
- Evidence on which the EC relies must be assessed critically, with regard for the presumption of innocence.

GCEU CONFIRMS EC'S POWER OF APPRAISAL IN REJECTING COMPLAINT

T-531/18, *LL-CARPENTER V COMMISSION*, 12 MARCH 2020

On 12 March 2020, the GCEU confirmed the EC's decision to reject a complaint brought by LL-Carpenter, a Czech distributor of motor vehicles, against various companies of the Subaru group for breach of Articles 101 and 102 TFEU.

Background

LL-Carpenter lodged two consecutive complaints against Subaru with the Czech Competition Authority in 2010 and then with the EC in 2012. LL-Carpenter denounced various practices implemented by the Subaru Group in breach of Czech and EU competition rules, such as refusing to make LL-Carpenter an authorised distributor and refusing to provide spare parts to LL-Carpenter.

In 2014, the Czech Competition Authority informed LL-Carpenter that it was closing its investigation on the grounds that there was not enough evidence to demonstrate that the defendant had committed any breach of Czech or EU competition law.

In 2018, the EC rejected LL-Carpenter's complaint. This rejection falls into two parts.

First, the complaint contained certain allegations that were identical to those already brought unsuccessfully before the Czech Competition Authority. These allegations were rejected pursuant to Article 13(2) of Regulation 1/2003, according to which the EC can reject a complaint when the same matter has already been brought before an NCA which has "dealt with the case".

Second, there was an allegation that had not been made before the Czech Competition Authority (*i.e.,* a restriction imposed by Subaru preventing its authorised distributors from dealing with LL-Carpenter). The EC rejected this allegation on the basis of its discretion in enforcement matters. Pursuant to Article 7 of Regulation 773/2004 relating to the conduct of proceedings, the EC can reject a complaint when "[it] considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint". In the present case, the EC considered that the probability of finding an infringement was limited.

The GCEU Judgment

LL-Carpenter appealed to the GCEU, which upheld the EC's decision. The GCEU recalled the principle of Article 13(2) of Regulation 1/2003 and held that in order for the EC to be able to consider that a complaint has been "dealt with", the NCA must have taken certain active steps beyond merely receiving the complaint. Although the Czech Competition Authority did not adopt a formal decision, the EC observed that the Authority had invited Subaru to submit observations on the alleged restrictive practices and had informed LL-Carpenter, through a letter, of the results of its investigation. This informal decision terminating the investigation procedure was sufficient for the GCEU to consider that the complaint had been "dealt with" by the Czech Competition Authority.

With respect to the other allegation, the GCEU confirmed that the EC is entitled to give differing degrees of priority to the complaints brought before it. In so doing, the EC must weigh the significance of the impact of the alleged infringement against the probability of establishing its existence and the extent of the investigative measures required. In the present case, the GCEU found that LL-Carpenter had failed to demonstrate a manifest error of

assessment in the EC's finding that the probability of establishing the existence of the alleged infringement was limited.

Comment

This ruling confirms the EC's margin of discretion in deciding whether to initiate investigations pursuant to a competition law infringement (See GCEU, T 432/10, *Vivendi v Commission*, [2013] EU:T:2013:538, para. 22, and GCEU, T-355/13, *EasyJet Airline v Commission*, [2015] EU:T:2015:36, para. 17). The EC is entitled to decline the pursuit of a particular case following an initial assessment, for reasons of administrative priority.

From a practical point of view, the case shows that the EC cannot be considered as a sort of appeal body to which a complainant may take its case if it is not satisfied with the way it was dealt with by the NCA. A complainant must decide at the start whether its case has an EU-wide dimension, in which case it could consider whether it would be appropriate to make its complaint before the EC rather than the NCA. If the case does not have an EU-wide dimension, the complaint should be made before the NCA and should be pursued vigorously before the latter, because there will be no chance of appeal to the EC once the NCA responds.

GCEU REDUCES FINE IN CARD CHIP CARTEL CASE AFTER CJEU CRITICISM

T-758/14 RENV *INFINEON TECHNOLOGIES AG V COMMISSION*, 8 JULY 2020

By decision of 8 July 2020, the GCEU reduced a fine that the EC had imposed on Infineon for its participation in the Smart Card Chips Cartel (AT. 39574, *Smart Card Chips*, 3 September 2014) by almost EUR 6 million, from EUR 82.78 million to EUR 76.87 million.

The GCEU made this reduction in the fine having regard for the limited number of anticompetitive contacts (*i.e.,* ten) that Infineon actually had with other cartel members and the fact that an 11th anticompetitive contact was not proved by the EC.

Background

In 2014, the EC imposed fines totalling EUR 138 million on Infineon, Philips, Samsung and Renesas for infringing article 101 TFEU, specifically for having coordinated their pricing policy through a network of bilateral contacts and exchanges of commercially sensitive information between 2003 and 2005 in the smart card chip market. The practices were considered to amount to a "single and continuous infringement". Infineon's fine at EUR 82.78 million was the highest of all, even though the company obtained a reduction of 20% because its participation in the cartel was limited to arrangements with Samsung and Renesas.

In 2016 Infineon brought an action before the GCEU seeking annulment of the EC's decision or, alternatively, a reduction in the fine imposed. By judgment of 15 December 2016, the GCEU rejected Infineon's action in its entirety (GCEU, T-758/14, *Infineon Technologies v Commission*, [2016] EU:T:2016:737, not published).

Infineon lodged an appeal before the CJEU against the GCEU's judgment.

Before the CJEU, Infineon argued that the GCEU examined only five of the 11 allegedly illegal contacts found by the EC, whereas Infineon had disputed all those contacts.

On 26 September 2018, the CJEU held that the GCEU had failed to respond to the argument

raised by Infineon that the EC had infringed the principle of proportionality by setting the amount of the fine without taking into account the limited number of contacts in which Infineon participated. It reminded the GCEU that it is "bound […] to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement." (CJEU, C-99/17P, *Infineon Technologies v Commission*, [2018] EU:C:2018:773, para. 195).

The case was referred back to the GCEU for reconsideration of Infineon's claim for a reduction in the amount of the fine.

Upon Reconsideration by the GCEU

In light of the CJEU's judgment, the GCEU examined the six contacts which it had not examined before and found that Infineon had participated in at least five of them, and that those five contacts were all anticompetitive. However, it found that the EC had not succeeded in proving to the requisite legal standard the existence of one of these six alleged anticompetitive contacts, *i.e.,* the EC had erred by not examining all the factual and legal circumstances of the case.

As a result, the GCEU held that the EC had proved to the requisite legal standard a total of 10 anticompetitive bilateral contacts between Infineon and other cartel participants, namely the five contacts examined in its original judgment and five of the six contacts examined in its second judgment.

As regards the determination of the amount of the fine, the GCEU held that "even though [Infineon's] participation in the cartel cannot be classified as secondary, it must be concluded that, in the light of the limited number of contacts in which the applicant participated, the 20% reduction in the amount of the fine on account of mitigating circumstances was not sufficient." The GCEU therefore applied an additional fine reduction of 5%.

GCEU UPHOLDS EC'S FINDING THAT INTERNATIONAL SKATING UNION'S ELIGIBILITY RULES PREVENTED MARKET ACCESS

T-93/18, *INTERNATIONAL SKATING UNION V EUROPEAN COMMISSION*, 16 DECEMBER 2020

On 16 December 2020, the GCEU upheld the EC's findings that the International Skating Union's (ISU's) eligibility rules, consisting of excessive and arbitrary penalties for violation of a pre-authorisation system, prevented market access by other organisers of skating events and restricted the freedom of professional skaters to provide sporting services.

Background

ISU is the sole international sports federation recognised by the International Olympic Committee as responsible at worldwide level for regulating ice skating. It is composed of national associations of which professional ice skaters are individual members.

ISU has power to determine the rules of affiliation which its members are required to observe. Certain of these rules, called "the eligibility rules", require ISU's members to obtain ISU's prior authorisation in order to participate in events organised by parties other than ISU.

Under the 2014 version of the eligibility rules, violation of the pre-authorisation requirement exposed professional skaters to the penalty of a lifetime ban from any competition organised by

ISU. In 2016 these rules were relaxed to provide for:

- A warning in the case of a first infringement
- A ban of up to five years in the event of negligent participation in non-authorised events
- A ban of up to ten years for deliberate participation in non-authorised events
- A lifetime ban for very serious infringements.

ISU's rules also provided that the sole means of appeal against an ineligibility decision was before the Court of Arbitration for Sport established in Switzerland.

On 23 June 2014, the EC received a complaint lodged by professional speed skaters, alleging that the pre-authorisation rule, the penalties and the arbitration clause contained in the 2014 version of ISU's eligibility rules were incompatible with Article 101 TFEU.

On 8 December 2017, the EC adopted Decision C (2017) 8230 in which it concluded that:

- The relevant market was the worldwide market for the organisation and commercial exploitation of speed skating.
- Professional speed skaters provide services on that market by providing the athletic participation necessary for skating events to be organised.
- ISU was able to influence competition on the relevant market because it was the governing body and the only regulator of speed skating, and it had the power to authorise international competitions for that discipline. ISU also was responsible for organising the most important speed skating events (to which it held the rights) and had substantial market power.
- The eligibility rules constituted a decision by an association of undertakings within the meaning of Article 101 TFEU.
- The eligibility rules (both the 2014 and the 2016 versions) constituted a restriction of competition "by object", which prevented professional skaters from taking part in events organised by third parties and deprived the latter of the services of the professional skaters.
- The arbitration rules, although not themselves a restriction of competition, reinforced the restrictions of competition created by the eligibility rules.

The EC ordered ISU to bring the infringement to an end within 90 days of formal notification of the decision. In the event of failure to comply, ISU would be subject to a default penalty equal to 5% of its average daily turnover of the preceding year.

ISU challenged the EC's decision before the GCEU. In particular, ISU challenged the EC's characterisation of its conduct as constituting a restriction of competition "by object".

The GCEU Judgment

The GCEU upheld the EC's finding that the eligibility rules constituted an infringement "by object" of Article 101(1) TFEU.

The GCEU recalled the well-established case law in the following terms:

The concept of restriction of competition by object can be applied only to certain types of coordination between undertakings that reveal, by their very nature, a sufficient degree of harm to the proper functioning of normal competition that it may be found that there is no need to examine their

effects (see, to that effect, CJEU, C-56/65, Société Technique Minière v Maschinenbau Ulm, [1966] EU:C:1966:38, p. 249; CJEU, C-67/13P, CB v Commission, [2014] EU:C:2014:2204, paras. 49, 50, 58 and the case-law cited, and CJEU, C-172/14, ING Pensii, [2015] EU:C:2015:484, para. 31).

In the light of this case law, particularly *ING Pensii*, the GCEU observed that it had to examine ISU's eligibility rules in the light of their alleged objectives and their specific context, in order to ascertain whether the EC was fully entitled to classify those rules as restricting competition "by object."

The GCEU began this examination by extracting the following principle from the important case of *MOTOE* (CJEU, C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008] EU:C:2008:376, paras. 51, 52):

". . . when a rule entrusts a legal person, which itself, organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised, it grants that entity an obvious advantage over its competitors. Such a right may therefore lead the undertaking making use of it to prevent access by other operators to the market concerned. The exercise of that regulatory function should therefore be made subject to restrictions, obligations and review, so that the legal person entrusted with giving that consent may not distort competition by favouring events which it organises or those in whose organisation it participates."

ISU argued that the case of *MOTOE* applied only to an abuse of a dominant position under Articles 102 and 106 TFEU. The GCEU rejected this contention on the grounds that in *Ordem dos Técnicos Oficiais de Contas* (CJEU, C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, [2013] EU:C:2013:127, paras. 88, 92), the CJEU applied the *MOTOE* case law by analogy in a case concerning the application of Article 101 TFEU to the rules adopted by an association of undertakings which was both an operator in, and the regulator of, the relevant market, as in ISU's case.

The GCEU therefore continued its examination, based on the above principle taken from the *MOTOE* case, and rejected ISU's challenge to the EC's characterisation of the infringement as being "by object". The considerations taken into account by the GCEU included the following:

- The lack of a direct link with legitimate objectives. The authorisation criteria are not clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market. Consequently, ISU had broad discretion to refuse to authorise events proposed by third parties, which could lead to the adoption of refusal decisions on illegitimate grounds.
- The severity of the penalties. Considering that the average length of a skater's career is eight years, the penalties set out in 2016, even those with a fixed time limit of five to ten years, continue to be disproportionate. Moreover, they do not clearly distinguish infringements deemed to be very serious from those which are not. It follows that the system of penalties is unpredictable and presents a risk of arbitrary application.
- The objective pursued by the eligibility rules of protecting the integrity of speed skating from the risks associated with betting. The protection of the integrity of the sport constitutes a legitimate objective. However,

in this case, the rules go beyond what is necessary to achieve such goal.

- The objective of adequate protection of the economic interests of the ISU. Seeking to protect its own economic interests is not in itself anticompetitive. Yet, the pre-authorisation system in the present case goes beyond what is necessary. ISU imposes unnecessary obligations on third-party organisers to disclose information of a financial nature and does not provide for specific requirements and time limits for dealing with requests for authorisation, which could also give rise to arbitrary decisions.
- Context. The intention is not a necessary factor in determining whether a decision by an association of undertakings is restrictive by object.

The GCEU annulled the EC's finding that the arbitration rules reinforced the restrictions of competition.

The GCEU found that the arbitration clause did not reinforce the restrictions of competition given that:

- Arbitration is a generally accepted method of binding dispute resolution.
- The binding and exclusive nature of arbitration may be justified by legitimate interests linked to the specific nature of the sport. Specifically, in this case, high-level international skating events are organised in different countries by organisers having their seat in different States, and they are often open to skaters throughout the world. In that context, recourse to a single, specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty.
- The full effectiveness of EU competition law is not compromised by the arbitration rules. Any person is entitled to bring proceedings before a national court and claim compensation for the harm suffered from a practice prohibited under Article 101 TFEU. Moreover, skaters and third-party organisers who have been the subject of an ineligibility decision or a refusal to grant authorisation may also lodge a complaint with a national competition authority or the EC.

As a result of the findings discussed above, the GCEU annulled the EC's decision in so far as it found that the arbitration clause constituted an infringement of competition. The GCEU upheld the EC's decision as to the rest, namely in so far as it required ISU to amend its eligibility rules.

Comment

This case will remind all sporting associations that they are engaged in an economic activity and are therefore subject to the EU competition rules. It also illustrates the conflicts of interest that a sporting association can have if, in addition to its economic activity of organising events, it also exercises a regulatory function, whether this function was created *de facto* or by law. Even though a sporting association pursues laudable objectives, such as prevention of doping, it must ensure that its rules do not subject its members to disproportionate restrictions on their ability to take part in events organised by other associations.

This decision is not surprising, as the solution is in line with previous case law. Concerning the definition of restriction by object, the GCEU faithfully applied the long-established *LTM* definition (see *supra* C-49/07). Regarding the specific obligations of a regulator, the GCEU strictly applied the principles fixed in *Ordem dos Técnicos Oficiais de Contas* (see *supra* C-1/12). Interestingly, concerning the legality of an

arbitration clause, the GCEU referred to the European Court of Human Rights' *Mutu and Pechstein v. Switzerland* case (40575/10 & 67474/10, *Mutu & Pechstein v Switzerland*, [2018] ECHR 324), which reflects the dialogue between both European jurisdictions.

CJEU UPHOLDS EUR 21MN FINE IMPOSED ON SILVER PLASTICS FOR COLLUDING IN FOOD PACKAGING MARKETS

C-702/19 P, *SILVER PLASTICS AND JOHANNES REIFENHÄUSER*, 22 OCTOBER 2020

The CJEU dismissed an appeal by a German plastic package maker against a GCEU judgment. The CJEU rejected all the grounds, including breach of procedural rules in not summoning and hearing a witness, error of law in the characterisation of a single and continuous infringement and of an economic unit, and wrongful inclusion of a former subsidiary's turnover in the calculation of the parent company's fine.

Background

On 24 June 2015, the EC fined ten manufacturers of retail food packaging trays a total of EUR 115.8 million for having participated in a single and continuous infringement consisting of five separate cartels and aiming at fixing prices, allocating customers and markets, bid-rigging and exchanging commercially sensitive information. The cartel, which covered a large part of the EEA and took place between 2000 and 2008, was discovered following a leniency application made by Linpac Group Ltd. in September 2012.

Amongst the cartelists, Silver Plastics and its parent company Johannes Reifenhäuser (JR) took part in collusions affecting two markets:

- Polystyrene foam trays and polypropylene rigid trays in North-West Europe between June 2002 and June, for which JR and its German subsidiary, Silver Plastics GmbH & Co. KG, were fined EUR 20.3 million jointly and severally
- Polystyrene foam trays in France between September June 2005 and October 2005, for which JR and its French subsidiary, Silver Plastics s.à.r.l., were fined EUR 0.9 million jointly and severally.

Before the GCEU, Silver Plastics and JR brought an action for annulment of the EC decision and, in the alternative, for a reduction of the fines. The GCEU dismissed the action by decision of 11 July 2019, which the appellants challenged.

Before the CJEU, the grounds of plea against the GCEU judgment were mainly:

- Infringement of the rights of defence and right to an "examination in person" by not hearing a witness who was the source of the leniency statements made by Linpac, by basing its review on his written statements and refusing the claimants' request that they themselves be allowed to question him as an incriminating witness
- Error in law in characterising a single and continuous infringement relating to the rigid trays which covered the period from June 2002 to August 2004 market by not demonstrating the existence, during that period and on the market concerned, of an overall plan
- Error in law in characterising an economic unit constituted by Silver Plastics and JR on

the basis that the latter held 99.75% of the equity capital in Silver Plastics

- Error in law by wrongly including in the calculation of the fine the turnover generated by the activity of a subsidiary company of JR although, when the EC decision was adopted, JR no longer held a shareholding in that company.

The CJEU Judgment

Relativising the Right to a Witness's Oral Testimony

Concerning the breach consisting of not summoning and hearing the witness, the CJEU answered that the right to a fair hearing does not confer on the accused person an absolute right to obtain the attendance of witnesses, whose choice falls under the Court's discretion. Specifically, the CJEU stated, "in the light of the subject matter of the action and the material in the file, it was neither necessary nor appropriate to grant the appellants' request that the witnesses be heard" (para. 33).

Interestingly in this case, not only were the witness's oral statements unnecessary, but they were also unwelcome because some of the claims made by the witness were barely credible, if at all, since they were contradicted by other evidence (para. 42).

Furthermore, the CJEU concluded in the inapplicability of the solution in *Gambino and Hyka* (CJEU, C-38/18, *Massimo Gambino and Shpetim Hyka v Procura della Repubblica presso il Tribunale di Bari and Others*, [2019] EU:C:2019:628), which decided that those who have the responsibility for deciding the guilt or innocence of an accused person in criminal proceedings must be able to hear witnesses in person and assess their trustworthiness. An action for annulment of an administrative decision imposing a fine on the appellants is not a "criminal proceeding" (para 38).

Concerning the breach consisting of the refusal of cross-examination of the witness by the claimants, the CJEU declared, in line with *Siemens v Commission* (CJEU, C-239/11, *Siemens v Commission*, [2013] EU:C:2013:866), that such a possibility is solely open to an "incriminating witness", which the witness was not, as an employer of Linpac. Irrespective of the fact that the witness was the main source of the inculpating statements, Linpac remained liable for those statements as they were made with knowledge of the potential negative consequences of submitting inaccurate information (para. 53).

Defining the "Single and Continuous Infringement" and the "Economic Unit"

As regards the "single and continuous infringement", the CJEU recalled the solution in *Villeroy & Boch v Commission* (CJEU, C-644/13, *Villeroy & Boch v Commission*, [2017] EU:C:2017:52) according to which this concept presupposes the existence of an "overall plan". It consists of various acts, each of which has the identical object of distorting competition in the internal market, irrespective of the fact that one or more of those acts could also separately constitute an antitrust infringement (para. 81).

Applied in this case, even if the first meeting concerning the rigid trays took place only on 24 August 2004, this fact would be irrelevant to the claimants' participation in a single and continuous infringement covering both foam trays and rigid trays. The implementation of the "overall plan", which also included the actions relating to rigid trays, began on 13 June 2002 (para. 85).

As regards the "economic unit", the CJEU validated the presumption that, in the particular case in which a parent company holds, directly or

indirectly, all or almost all of the capital in a subsidiary which has committed an antitrust infringement, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary. This solution is in the continuity of the CJEU's case law (see to that effect, CJEU, C-155/14, *Evonik Degussa and AlzChem v Commission*, [2016] EU:C:2016:446).

Advocating for a Fine Reflecting the Undertaking's Real Economic Situation

Under Article 23 of Regulation No 1/2003, for each undertaking and association of undertakings which have participated in an antitrust violation, the fine imposed may not exceed 10% of its total turnover in the preceding business year.

In determining the "preceding business year", the EC must assess, in the light of the context and the objectives pursued by the penalties, the intended impact on the undertaking, taking into account a turnover, which reflects the undertaking's real economic situation during the period of the infringement. In line with *Garantovaná v Commission* (CJEU, C-90/13, *Garantovaná v Commission*, [2014] EU:C:2014:326), the EC is even entitled to refer to another business year in order to make a correct assessment of the financial resources of that undertaking and to ensure that the fine has a sufficient and proportionate deterrent effect (para. 102).

Yet in this case, the CJEU made a standard application of this concept by choosing 2013/2014 as the preceding business year. It pointed out that the problematic demerger of a subsidiary of JR took place on a date significantly later than the period during which the infringement in question was committed, thus later than the preceding business year 2013/2014 (para. 103).

Comment

The plastic package cartel case reflects the ongoing trend pursuant to which once the EC demonstrates a cartel, questioning the materiality of the cartel under reviewing courts is almost impossible (*e.g.,* the power cable cartel). Therefore, the only way to attenuate the financial aftermath for the cartelists is to build their defence on the contestation of the amount the fine. As such, Silver Plastics was granted a 10% diminution by the EC on the French market fine for lesser involvement. Similarly, another cartelist, Coopbox, saw its EC decision annulled by the GCEU on the grounds of insolvency.

GCEU ANNULS IN PART EC INSPECTION DECISIONS FOLLOWING SUSPICIONS OF ANTICOMPETITIVE PRACTICES

T-249/17, *CASINO, GUICHARD-PERRACHON AND ACHATS MARCHANDISES CASINO SAS (AMC) V COMMISSION;* T-254/17, *INTERMARCHE CASINO ACHATS V COMMISSION;* AND T-255/17, *LES MOUSQUETAIRES AND ITM ENTREPRISES V COMMISSION*, 5 OCTOBER 2020

In three separate judgments rendered on 5 October 2020, the GCEU held that the EC's decisions to conduct dawn raids in 2017 on the French retailer groups Intermarché and Casino were partly unlawful because the EC had insufficient evidence of certain alleged competition law infringements, at the time, to support its decisions to conduct dawn raids. As a result, the GCEU annulled the decisions as far as they concerned the alleged infringements for which the EC did not have sufficient evidence to support its decision to conduct dawn raids.

Background

In February 2017, the EC conducted dawn raids at the premises of several companies active in the food and non-food distribution sector in France, before opening a formal investigation in October 2019. The EC suspected that the retailers had exchanged information about discounts and prices for the supply of everyday consumer goods in several EU Member States, especially France, through a joint purchasing venture, Intermarché Casino Achats (INCA), which the two retailers had set up in 2014 for the joint procurement of their branded goods. The EC also suspected that the retailers had exchanged information concerning future commercial strategies. In the context of this investigation, the EC had carried out inspections at the premises of Casino and Intermarché and seized several documents from the companies. The EC's inspection decisions were adopted pursuant to Article 20(1) and (4) of Regulation No 1/2003 on the implementation of the rules on competition, which determines the powers of the EC as regards inspections in the event of a suspected infringement of competition law.

The GCEU Judgment

Casino and Intermarché, as well as INCA, brought actions before the GCEU to seek annulment of the EC's inspection decisions, claiming, inter alia, that the EC had insufficient evidence to initiate inspections and that it had failed to state its reasons for the dawn raids. The companies also challenged the legality of the dawn raid regime. In support of that plea of illegality, the applicants relied on a disregard of the companies' fundamental right to an effective remedy under EU law.

The GCEU rejected the plea of illegality of the dawn raid regime in general, because it complies with the four conditions for an effective remedy laid out by the European Court of Human Rights.

The GCEU also declared unfounded the plea that the EC had infringed its obligation to state reasons for the inspection in the inspection decisions. The GCEU explained that the inspection decisions must only state the alleged facts which the EC intends to investigate, including a description of the suspected infringement, the market thought to be affected, the nature of the suspected competition restrictions and the sectors covered. In each case, the GCEU found that the inspection decisions stated clearly and in detail that the EC was of the view that it had sufficiently strong evidence which led it to suspect anticompetitive practices.

However, the GCEU recognised that the EC's inspection powers are limited and that the EC had failed to demonstrate, in the present case, that it had "sufficient strong evidence" to reasonably suspect, at the time it carried out the inspections, the exchange of information concerning future commercial strategies. On the other hand, the GCEU agreed that the EC had sufficient strong evidence to suspect a concerted practice as regards exchanges of information with respect to discounts and prices for everyday consumer goods.

In this regard, the GCEU pointed out that the level of proof required by the EC to launch an inspection is lower than that allowing a finding of a concerted practice, such as the exchange of commercially sensitive information.

The parent company of Intermarché (Les Mousquetaires) argued that the EC had violated the right of a company to protect its employees' personal and private data during the dawn raid by seizing some documents. However the GCEU said that the company must make a clear and precise request to the EC, which, in the present case, Les Mousquetaires had failed to do.

Comment

While the GCEU confirms the legality of the dawn raid regime, it nonetheless reminds the EC that its investigation powers are not absolute. In exercising its powers to conduct dawn raids, the EC must be able to demonstrate it had sufficient strong evidence to suspect an identified competition law infringement.

CJEU ANNULS EC DECISION ACCEPTING PARAMOUNT'S COMMITMENTS IN CHALLENGE BROUGHT BY CANAL +

C-132/19 P, *GROUPE CANAL + V COMMISSION*, 9 DECEMBER 2020

Paramount Pictures International Ltd and its parent company Viacom Inc. (collectively, Paramount) concluded licensing agreements on audio-visual content with the main pay-TV broadcasters in the European Union, including Sky UK Ltd and Sky plc (collectively, Sky) and Groupe Canal + SA.

As the result of an investigation opened in January 2014, the EC sent a statement of objections to Paramount in July 2015 concerning two clauses in the licensing agreements which Paramount had concluded with Sky. The first clause was intended to exclude or limit Sky's ability to respond favourably to unsolicited requests from consumers resident in the EEA but outside the United Kingdom and Ireland, for the purposes of the provision of television distribution services. The second clause required Paramount to insert a clause in agreements which it concluded with broadcasters established in the EEA but outside the United Kingdom and Ireland, containing a similar prohibition in respect of those broadcasters in relation to such requests from consumers residing in the United Kingdom or in Ireland.

The EC considered that these clauses led to absolute territorial exclusivity and so were capable of constituting a restriction of competition "as their object" within the meaning of Article 101 TFEU. In December 2015, the EC communicated its assessment to Groupe Canal + in the latter's capacity as an interested third party.

Paramount offered commitments in order to address the concerns raised by the EC. Paramount said that it was prepared, *inter alia*, not to comply with or enforce the clauses that created the broadcasters' territorial protection.

In July 2016, having received observations from other interested third parties, including Groupe Canal +, the EC accepted Paramount's commitments and made them binding, pursuant to Article 9 of Regulation No 1/2003.

Paramount then notified Groupe Canal + that it would comply with the terms of the commitments. Canal + brought an action before the GCEU seeking annulment of the EC's decision to accept Paramount's commitments. The GCEU dismissed Canal +'s action on 12 December 2018 (GCEU, T-873/16, *Groupe Canal+ v Commission*, [2018] EU:T:2018:904). Canal + appealed to the CJEU.

The CJEU Judgment

The CJEU agreed with the GCEU on three main points, but disagreed on a fourth point concerning the proportionality of the commitments.

First, the CJEU considered that the GCEU was entitled to reject the argument that the EC had misused its powers because, by accepting the commitments, it circumvented the legislative process relating to geoblocking. The CJEU agreed that, since the legislative process relating to geo-

blocking had not resulted in the adoption of a legislative text, that process was without prejudice to the powers conferred on the EC by Article 101 TFEU and Regulation No 1/2003.

Second, the CJEU upheld the GCEU's rejection of Groupe Canal +'s arguments that the relevant clauses were lawful in the light of Article 101(1) TFEU and that there was therefore no basis for the EC's concerns. The GCEU was entitled to find that such clauses were capable of giving rise to competition concerns for the EC, particularly having regard for the preliminary nature of an assessment under Article 9 of Regulation No 1/2003. Moreover, in this "preliminary" context, an exemption under Article 101(3) TFEU could not be considered.

Third, the CJEU concurred with the GCEU's finding that the relevant clauses could validly raise competition concerns as regards the whole of the EEA, without the EC being under an obligation to analyse the relevant national markets one by one. Since the relevant clauses were intended to partition national markets, the GCEU rightly observed that such agreements could jeopardise the proper functioning of the single market.

Fourth, the CJEU examined the allegation that the GCEU infringed the principle of proportionality in its assessment of the effect of the decision at issue on the contractual rights of third parties, notably Groupe Canal +.

The CJEU observed that, in the context of Article 9 of Regulation 1/2003, the EC is required to verify not only whether commitments are appropriate to address competition concerns, but also whether the effect of the commitments is to render the rights of third parties meaningless. Groupe Canal + was not a party to Paramount's commitments. The EC's acceptance of these commitments therefore amounted to an interference with Groupe Canal +'s contractual freedom and so went beyond the provisions of Article 9 of Regulation No 1/2003.

The CJEU considered that it was no solution for the GCEU to say that the contracting parties could apply to the national courts to enforce their contractual rights. Such action would infringe the provisions of Article 16(1) of Regulation No 1/2003, which prohibit national courts from adopting decisions running counter to an earlier EC decision on the same matter. A decision of a national court requiring an operator to breach its commitments which have been made binding by an EC decision would clearly run counter to that decision. In addition, given that Article 16(1) of Regulation No 1/2003 requires national courts to avoid giving decisions which conflict with a decision contemplated by the EC, the GCEU also erred in law by holding that a national court could declare the relevant clauses compatible with Article 101 TFEU, whereupon the EC could reopen the proceedings and adopt a decision making a formal finding that there had been an infringement.

In light of all these considerations, the CJEU set aside the judgment of the GCEU.

The CJEU also took the view that the state of the proceedings permitted final judgment to be given without referring the matter back to the GCEU. The CJEU considered that the EC infringed the principle of proportionality by accepting commitments which rendered the contractual rights of the third parties meaningless vis-à-vis Paramount. For this reasons, the CJEU annulled the EC's decision accepting Paramount's commitments.

Comment

The case is interesting from two points of view.

First, it illustrates how a third party that is directly and individually concerned by an EC competition law decision addressed to a principal party has standing to challenge that decision. This applies whether the decision is the acceptance of commitments pursuant to Article 9 of Regulation No 1/2003 (as in the present case) or whether it is a formal decision ordering the principal party to cease an illegal practice. The factual context is different in the two cases, however. When accepting commitments, the EC acts on the basis of a preliminary view, whereas when issuing a prohibition decision, the EC makes a final and definitive finding that there is an infringement of competition law.

Second, the case illustrates the clear division of competence organised by Article 16(1) of Regulation No 1/2003 between the EC's Competition Directorate and the courts of the Member States. National courts may not "take decisions running counter to" a decision already adopted by the EC or "which would conflict with a decision contemplated by the [EC] in proceedings it has initiated."

ARTICLE 102 TFEU ABUSE OF DOMINANT POSITION

EC VALIDATES BROADCOM'S COMMITMENTS TO SAFEGUARD FAIR COMPETITION

AT.40608, *BROADCOM*, 7 OCTOBER 2020

On 7 October 2020, the EC made commitments proposed by Broadcom legally binding and closed its investigation into alleged abuse of dominance. The commitments included an undertaking by Broadcom to suspend all existing agreements containing exclusive or quasi-exclusive arrangements and/or leveraging provisions concerning systems-on-a-chip (SoCs) for TV set-top boxes and internet modems. Broadcom also undertook not to enter into new agreements comprising such provisions.

Background

Broadcom is the world's top developer and provider of integrated circuits for wired communication devices. It has global leadership in several markets for chipsets used in TV set-top boxes and modems, including SoCs.

The SoCs gather electronic circuits of various components into a single unit, which constitutes the matrix or "brains" of a set-top box or modem. Their purpose is to bring the television signals and connectivity to consumers' proximity.

Initiation of Formal Antitrust Investigation

On 26 June 2019, the EC opened a formal antitrust investigation to examine whether Broadcom was harming competition through anticompetitive

practices in the area of components for TV set-top boxes and residential gateways.

At this initial stage of the investigation, the EC indicated that these practices could include:

- Setting exclusive purchasing obligations
- Granting rebates or other advantages conditional on acceptance of exclusivity or minimum purchasing obligations
- Product tying and bundling.

At the same time, the EC issued a Statement of Objections outlining its intention to impose interim measures pursuant to Article 8 of Regulation No 1/2003 considering that these could be indispensable to ensuring the effectiveness of any final decision taken by the EC in the investigation.

The Statement of Objections was based on suspicions of Broadcom's dominance on the markets for the supply of SoCs for TV set-top boxes and modems, on the suspected abuse created by the above-mentioned practices, and on the probable detrimental effect that they might have on competition and innovation.

Imposition of Interim Measures

On 16 October 2019, invoking Article 8(1) of Regulation No 1/2003 for the first time after almost 20 years, the EC imposed interim measures on Broadcom. The EC's provisional findings showed that the two conditions for adoption of provisional measures, namely the existence of a *prima facie* case and urgency, were satisfied.

On the condition of a *prima facie* case, Broadcom appeared to hold a dominant position on three distinct markets for SoCs (TV set-top boxes, fibre modems and xDSL modems), and it appeared to be abusing this apparent dominant position. The EC noted in particular that Broadcom entered into agreements with six original equipment manufacturers (OEMs) for TV set-top boxes and modems in which:

- It offered rebates in return for the OEM purchasing solely or quasi-solely from Broadcom.
- It offered commercial advantages in the above three markets in return for the OEM purchasing SoCs for cable modems solely or quasi-solely from Broadcom.

Regarding urgency, the EC considered that if Broadcom's conduct were allowed to continue, it would likely affect several tenders in the future. This would lead to other chipset suppliers not being in a position to compete with Broadcom and ultimately might lead to their marginalisation or exit from the market.

The EC therefore required Broadcom, within 30 days of its decision and for a period of three years, to cease to apply in the European Union the apparently anticompetitive provisions and to refrain from including the same provisions or other provisions with equivalent object or effect in other agreements.

Broadcom's Offer of Commitments

On 1 April 2020, while the substantive investigation of the case continued, Broadcom offered commitments to the EC pursuant to Article 9 of Council Regulation (EC) 1/2003, without making any admission that any of its conduct infringed competition law.

On 30 April 2020, the EC published a notice in the Official Journal seeking feedback on the commitments offered by Broadcom.

In light of the outcome of this market test, Broadcom amended and improved its proposed commitments in July 2020.

EC Decision Accepting Broadcom's Commitments

On 7 October 2020, the EC adopted a decision making Broadcom's commitments binding for dealings with all device OEMs.

Specifically, Broadcom undertook:

- At EEA level:
  - Not to require or induce by means of price or non-price advantages an OEM to obtain any minimum percentage of its EEA requirements for SoCs for TV set-top boxes, xDSL modems and fibre modems from Broadcom
  - Not to condition the supply of, or the granting of advantages for, SoCs for TV set-top boxes, xDSL modems and fibre modems on an OEM obtaining from Broadcom another of these products or any other product within the scope of the commitments (*i.e.,* SoCs for cable modems, front end chips for set-top boxes, and modems and/or wi-fi chips for set-top boxes and modems).
- At worldwide level (excluding China):
  - Not to require or induce an OEM by means of certain types of advantages to obtain more than 50% of its requirements for SoCs for TV set-top boxes, xDSL modems and fibre modems from Broadcom
  - Not to condition the supply of, or the granting of advantages for, SoCs for TV set-top boxes, xDSL modems and fibre modems on an OEM obtaining from Broadcom more than 50% of its requirements for any other of these products, or for other products within the scope of the commitments.

The commitments also included specific provisions regarding incentives to bid equipment based on Broadcom products as well as certain additional clauses with regard to service providers in the EEA.

The commitments apply for seven years.

Executive Vice-President Margrethe Vestager commented:

"The commitments will ensure that existing chipset makers competing with Broadcom and potential new entrants will be able to compete on the merits. Producers of set-top-boxes and Internet modems, telecom and cable operators and ultimately consumers will benefit from competition between chipmakers in terms of lower prices and more innovative products."

Following this decision, the EC closed the proceedings without any fine.

Comment

The case illustrates that, in policing competition law, the EC does not just have the power to make findings of infringements of competition law, but also has the power to issue cease-and-desist orders and impose fines. It can also put an end to suspected infringements by initiating proceedings and encouraging an investigated party to give commitments. In all cases, the EC can adopt interim measures to prevent irreparable harm to competition provided the two strict conditions of a *prima facie* case and urgency are satisfied.

CJEU CLARIFIES HOW TO DETERMINE JURISDICTION FOR CIVIL LIABILITY CLAIM BASED ON ABUSE OF DOMINANT POSITION

C-59/19, *WIKINGERHOF GMBH & CO KG V BOOKING.COM BV*, 24 NOVEMBER 2020

In the context of a preliminary ruling request, the CJEU ruled that a civil liability action, in so far as it is based on a legal obligation to refrain from abusing a dominant position, is a matter relating to "tort, delict or quasi-delict" within the meaning of Article 7(2) of Regulation (EU) No 1215/2012 (Brussels Regulation). Therefore the applicant may bring the claim before the competent court of the "place where the harmful event occurred or is likely to occur" (in the absence of any valid agreement conferring jurisdiction on courts of another place).

Background

Wikingerhof GmbH & Co. KG, a company governed by German law, operates a hotel in Germany and concluded a contract in 2009 with Booking.com BV, a company governed by Dutch law that operates a hotel reservation platform based in the Netherlands. In 2015, Booking.com introduced new terms and conditions to the contract that allowed Booking.com:

- To affix to the price specified by Wikingerhof, without the latter's consent, the indication "preferential price" or "discounted price" on the accommodation reservation platform
- To withhold from that platform the contact information provided by its contracting partners (of which Wikingerhof was one)
- To make the placement of Wikingerhof's hotel in response to search requests dependent on a commission in excess of 15%.

Wikingerhof claimed that it had no choice but to accept these terms, and applied for injunctive relief against Booking.com before the German courts, based on an allegation of abuse of a dominant position in breach of competition law.

Booking.com argued that the German courts did not have jurisdiction because a clause in the contract conferred jurisdiction on the courts of Amsterdam. This argument was accepted both at first instance by the Regional Court of Kiel and also on appeal by the Higher Regional Court, Schleswig. These two courts found that neither the jurisdiction of the court "for the place of performance of the contractual obligation" (within the meaning of Article 7(1) of the Brussels Regulation) nor the jurisdiction of the court "for the place where the harmful event occurred in matters relating to tort, delict or quasi-delict" (within the meaning of Article 7(2) of the Brussels Regulation) was established.

Wikingerhof therefore appealed on a point of law to the Federal Court of Justice of Germany. The Federal Court referred a question to the CJEU for a preliminary ruling. The Federal Court asked whether Article 7(2) of the Brussels Regulation applies to an action seeking an injunction to stop certain practices implemented in the context of the contractual relationship between the claimant and the defendant, based on an allegation of an abuse of a dominant position by the latter in breach of competition law.

The CJEU Judgment

The CJEU first recalled that Article 4(1) of the Brussels Regulation establishes the general rule that the courts having jurisdiction shall be the courts of the domicile of defendant.

However Article 7(1)(a) and Article 7(2) of the Brussels Regulation provide for special jurisdiction. Article 7(1) (a) allows a claimant in matters relating to a "contract" to bring an action before "the courts of the place of performance of the contractual obligation". Article 7(2) allows a claimant in "matters relating to tort, delict or quasi-delict" to bring an action before "the courts of the place where the harmful event occurred or may occur".

Finally, the CJEU observed that Article 25(1) of the Brussels Regulation provides that:

"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State."

The CJEU did not have to consider Article 25(1) because the Federal Supreme Court said that the agreement was not validly concluded in accordance with the requirements of Article 25. The CJEU's examination was therefore limited to Article 7 of the Brussels Regulation.

The CJEU noted that it is for the court hearing the action to decide whether a claim between contracting parties is connected to matters relating to a contract (within the meaning of Article 7(1)(a)), or to matters relating to tort or delict (within the meaning of Article 7(2) of the Brussels Regulation).

The CJEU explained that an action will concern matters relating to a contract within the meaning of Article 7(1) (a) if the interpretation of the contract between the parties to the proceedings appears to be indispensable to establish the lawful or unlawful nature of the conduct subject to complaint. By contrast, if an obligation imposed by law applies to the defendant independently of that contract, the cause of the action is a matter relating to tort, delict or quasi-delict within the meaning of Article 7(2).

The CJEU observed that the legal issue at the heart of the case was whether Booking.com had committed an abuse of a dominant position in breach of German competition law. In order to answer this question, it was "not indispensable" to interpret the contract between the parties. At most, interpretation of the contract was necessary to establish that certain conduct occurred. The CJEU therefore decided that it should rule on the case only in so far as it was based on the legal obligation to refrain from any abuse of a dominant position. This was a matter relating to tort, delict or quasi-delict within the meaning of Article 7(2). It remained for the referring court to determine whether the abuse of a dominant position in breach of German competition law was established.

On this understanding, the CJEU answered the question referred by the Supreme Federal Court by saying that Article 7(2) of the Brussels Regulation:

". . . must be interpreted as applying to an action seeking an injunction against certain practices implemented in the context of the contractual relationship between the applicant and the defendant, based on an allegation of abuse of a dominant position by the latter in breach of competition law."

Comment

The CJEU followed the Advocate General Saugmandsgaard Øe, who opined that a civil liability action based on a competition law infringement falls within the scope of "matters relating to tort, delict or quasi-delict" even when a contract exists between the claimant and the

defendant and the alleged anti-competitive conduct materialises in their contractual relationship.

In summary, victims of an abuse of dominance may bring their claim against the author of the abuse (the defendant) either before the courts of the defendant's domicile, pursuant to Article 4 of the Brussels Regulation, or before the courts of the place "where the harmful event occurred" pursuant to Article 7(2) of the Brussels Regulation. This could be the place of the claimant's domicile, which would be more convenient than the place of the defendant's domicile.

This conclusion assumes that the claimant and defendant have not agreed a valid contractual provision determining the courts of jurisdiction for this type of claim.

MERGER CONTROL

CJEU UPHOLDS FINES IMPOSED ON MARINE HARVEST FOR GUN JUMPING

C-10/18P, *MARINE HARVEST V COMMISSION*, 4 MARCH 2020

On 4 March 2020, the CJEU dismissed an appeal lodged by Norwegian seafood company Marine Harvest against a 2017 GCEU ruling.

Background

On 26 October 2017, the GCEU dismissed Marine Harvest's appeal against two EUR 10 million fines imposed by the EC in 2014 for implementing the acquisition of Morpol, a Norwegian salmon producer, before obtaining the required clearance under the EUMR.

The acquisition of Morpol, a listed company at that time, took place in three stages:

- In December 2012, Marine Harvest acquired 48.5% of the shares in Morpol from two companies controlled by Morpol's founder.
- This acquisition triggered a mandatory public offer for Morpol's remaining shares, which was successfully closed in March 2013.
- The acquisition was completed in November 2013 followed by a de-listing of Morpol.

The acquisitions were only formally notified on 9 August 2013, and on 30 September 2013 the EC cleared the transaction subject to divestment commitments.

In July 2014, Marine Harvest was subject to two fines because the EC considered that, by acquiring a 48.5% stake in December 2012, Marine Harvest

had acquired *de facto* sole control over Morpol at that time. The EC concluded that by implementing the acquisition eight months prior to the formal notification to the EC, and more than nine months before the EC's authorisation of the transaction, Marine Harvest had breached Article 4(1) of the EUMR (obligation of prior notification) and Article 7(1) of the same (standstill obligation pending authorisation).

The CJEU Judgment

Before the CJEU, Marine Harvest argued two main grounds of appeal, each of which was rejected.

Marine Harvest argued that it should have benefitted from the specific exemption from the standstill obligation under Article 7(2) of the EUMR, which allows "*the implementation of a public bid or of a series of transactions in securities . . . by which control within the meaning of Article 3 [of the EUMR] is acquired from various sellers.*"

Pursuant to this provision, the acquisition of control from various sellers through a public bid, or a series of transactions in securities, can be implemented prior to clearance. This applies only if the transaction is notified to the EC "without delay" and the "acquirer does not exercise the voting rights attached to the securities in question". According to Marine Harvest, the acquisition of a 48.5% stake was one of a "series of transactions", and Marine Harvest was therefore not obliged to notify the EC of the acquisition of the initial minority shareholding in 2012.

The CJEU rejected that ground, holding that the exemption under Article 7(2) of the EUMR only applies to transactions where control is obtained through public bid or a series of transactions with various sellers. In this case, Marine Harvest had already obtained control by acquisition of the 48.5% stake in December 2012 from only two companies controlled by Morpol's founder. It was not, therefore, an acquisition by public bid or by a series of transactions with various sellers, but merely a transfer of control from Morpol to Marine Harvest in one transaction, and therefore the exemption did not apply.

The second argument Marine Harvest raised was that it had effectively been fined twice for the same offence, and that this went against the principle of "*ne bis in idem*", according to which a company cannot be been fined twice for the same offence.

In this regard, the CJEU found that the infringements of Articles 4(1) and 7(2) of the EUMR are different in nature and are therefore not substitutes to each other. Whilst the infringement of the notification obligation is an instantaneous infringement, the infringement of the standstill obligation is a continuous infringement, both being subject to different time limitations (a three-year limitation period applies for a failure to comply with the notification obligation, while the standstill obligation triggers a limitation period of five years). The CJEU therefore upheld the GCEU's ruling that Marine Harvest was properly fined both for failure to notify and for carrying out the concentration before the EC had cleared the acquisition.

Comment

This is not the first time that the EC has imposed two fines for a breach of the notification obligation and a breach of the standstill obligation. Two cases are currently pending before the GCEU: Altice/PT Portugal (GCEU, T-425/18, *Altice Europe v Commission*, *not published*) and Canon/Toshiba Medical Systems Corporation (GCEU, T-609/19, *Canon v Commission*). In both of these cases, the EC imposed two fines for a breach of the

notification obligation and a breach of the standstill obligation. This ruling is important as it provides guidance to companies on the stage at which parties to a series of transactions should notify the EC, and confirms that the imposition of two separate fines is indeed justified.

GCEU ANNULS EC PROHIBITION ON HUTCHISON 3G UK ACQUISITION OF TELEFÓNICA UK

T-399/16, *CK TELECOMS UK INVESTMENTS LTD V COMMISSION*, 28 MAY 2020

On 28 May 2020, the GCEU dealt the EC a significant blow by quashing the latter's prohibition of Hutchison 3G UK's (Three's) proposed acquisition of Telefónica UK (O2) (CJEU, T-399/16, *CK Telecoms UK Investments Ltd v Commission*, [2020] EU:T:2020:217).The case arose in the context of a four-to-three operation that would have created a leading, although not dominant, operator in the UK mobile telephony market.

The GCEU's judgment rules on various aspects of a non-coordinated effects assessment in so-called "gap" cases, including how the significant impediment to effective competition (SIEC) test is to be applied, how the concept of "important competitive force" (ICF) is to be interpreted, how "closeness of competition" is to be assessed, and how quantitative analyses (specifically the upward pricing pressure test) are to be employed. For the first time, the GCEU also set out in detail what the requisite standard of proof is under the EUMR.

The GCEU Judgment

The GCEU comprehensively annulled the EC's prohibition decision of 11 May 2016 and upheld CK Telecoms' arguments pertaining to the three theories of harm employed by the EC. With respect to the standard of proof incumbent on the EC under the EUMR, the GCEU held that the prospective analysis thereunder requires that the EC take a two-fold approach:

- **Step 1:** An evaluation of the future conduct which the EC contends will be engaged in by the merged entity and the other operators post-merger by means of an assessment of the economic outcome attributable to the merger which is "most likely to ensue"(see *supra* T-399/16, para. 113)
- **Step 2:** An assessment, by means of a prospective analysis of the reference market, of whether that future conduct will "probably" lead to a situation in which effective competition in the relevant market is significantly impeded (see *supra* T-399/16, para. 115)

Noting that Step 2 is the result of an assessment based on hypotheses, the GCEU held that the EC is required to show that the scenarios and theories of harm underlying its assessment are sufficiently realistic and plausible, and are not only conceivable from a theoretical point of view. Specifically, the GCEU found that "the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration" (see *supra* T-399/16, para. 118)

In light of the above, the GCEU reached the conclusion that the EC had not met the requisite standard of proof in this case. The GCEU found that the EC had merely made "cursory references" to general evidence, which were insufficient to show that the transaction would lead to an SIEC (see *supra* T-399/16, para. 288) The GCEU evaluated the EC's three theories of harm as follows.

Theory of Harm 1

The EC concluded that the transaction would have removed an important competitor on the UK telecommunications market, and that the merged entity would have faced competition from only two mobile network operators, Everything Everywhere (EE) and Vodafone. The sharp reduction in competition would probably have led to an increase in prices for mobile telephony services in the United Kingdom and a restriction of choice for consumers. In reaching this conclusion, the EC principally relied on the notion that Three was an ICF within the meaning of para. 37 of the EC's Horizontal Merger Guidelines, and the concept of closeness of competition between O2 and Three.

The EC had contended that, as regards the elimination of an ICF, a mere decline in the competitive pressure which would result from the loss of an undertaking with more influence on competition than its market share, is sufficient, in itself, to prove an SIEC (*CK Telecoms*, para. 160) The GCEU disagreed, holding that to be considered an ICF, an undertaking must stand out from its competitors in terms of impact on competition. To hold otherwise would, according to the GCEU, allow the EC to treat as an ICF any undertaking in an oligopolistic market. This, the GCEU held, would amount to a *de facto* prohibition on horizontal mergers in oligopolistic markets and would infringe the principle of legal certainty (see *supra* T-399/16, paras. 174, 175)

Furthermore, according to the GCEU, the EC fell short of meeting the requisite legal standard for establishing that Three was an ICF. Three's "gross add share" of between 10% and 20% was "very low" (see *supra* T-399/16, para. 183) (while the mere growth in gross add shares over several consecutive years does not in itself constitute sufficient evidence of Three's power on the market or the elimination of important competitive constraints that the parties to the concentration exert upon one another (see *supra* T-399/16, para. 195).

As to the notion of closeness of competition, the EC found that Three and O2 were "close competitors on the overall retail market" (see *supra* T-399/16, para. 227). However, the GCEU disagreed with the EC's conclusions. The evidence relied upon by the EC demonstrated that Three and O2 were only "close competitors" to one another, but not "particularly close competitors" to one another. In the view of the GCEU, a failure to establish that they were particularly close competitors would mean that any concentration resulting in a reduction of competition from four to three operators would as a matter of principle be prohibited (see *supra* T-399/16, paras. 242, 249).

Theory of Harm 2

On the retail market relating to network sharing in the United Kingdom, the EC concluded that the transaction would also be likely to have a negative influence on the quality of services for UK consumers, hindering the development of mobile network infrastructure in the United Kingdom. Indeed, a particular characteristic of the retail market was that BT/EE and Three, on the one hand, and Vodafone and O2 on the other, had shared their networks through network sharing agreements. This enabled BT/EE and Three, and Vodafone and O2, to share the costs of rolling out their respective networks while continuing to compete on retail trade. In the view of the EC, however, the merged entity would be party to both network-sharing agreements, and BT/EE and Vodafone would no longer have a "fully committed partner", such that BT/EE and Vodafone would incur higher costs and/or lower quality, thereby reducing their ability and incentives to compete post-merger (see *supra* T-399/16, para. 296). This finding was based on a

(novel) theory of alignment of interests between the parties to a network sharing agreement, which the transaction was liable to disrupt.

The GCEU disagreed with the EC's finding that a misalignment, disruption or termination of the existing network sharing would constitute in and of itself an SIEC (see *supra* T-399/16, para. 347). The GCEU found that:

"*the Commission has not proved to the requisite legal standard […] that a possible increase in costs would reduce BT/EE's ability to invest. Nor has it indicated which types of investment would be impacted or likely to be shared as opposed to those that would not be. [The EC's findings] are based on rather improbable assumptions concerning the absence of any reaction by BT/EE, which, it is claimed, would simply cease to invest, following an increase in its costs (see supra T-399/16, paras. 372, 388).*"

Furthermore, with respect to novel theories of harm, such as the theory of alignment of interests between the parties to a network sharing agreement, the GCEU made it clear that the EC has a heightened burden of proof (see *supra* T-399/16, para. 332).

Theory of Harm 3

On the wholesale market, the EC concluded that the transaction would have a detrimental impact on the mobile virtual network operators (referred to as 'non-MNOs'), such as Tesco Mobile, Virgin Mobile and TalkTalk, on the UK mobile telephony market. In particular, the disappearance from the market of Three as an ICF, a corollary being a reduction in the number of host mobile networks, would have placed non-MNOs in a weaker bargaining position to obtain favourable wholesale access conditions (see *supra* T-399/16, paras. 419, 423).

The GCEU found that neither Three's wholesale market shares (between 0% and 5%) nor their recent increase justified its classification as an ICF. The mere fact that Three had more of an influence on competition than its market share would suggest is not sufficient to establish the existence of an SIEC, particularly as it was not disputed that Three's market share was small (see *supra* T-399/16, para. 435) Moreover, even if the factors taken into account by the EC were such as to be capable of characterising Three as an ICF, they did not show that Three and O2 exerted upon on each other important competitive constraints which would be eliminated following the transaction (see *supra* T-399/16, para. 453)

Furthermore, the GCEU found that the EC did not at any point specify in the contested decision whether the non-coordinated effects identified would be "significant" or would result in the present case in an SIEC (see *supra* T-399/16, para. 289).

Comment

CK Telecoms is the first case since the inception of the EUMR in which the EU courts have pronounced on the conditions for the application of the EUMR to a concentration in an oligopolistic market, which does not result in the creation or strengthening of an individual or collective dominant position (a so-called "gap" case).

In terms of implications that flow from the GCEU's ruling, it is clear that the EC will be required to revisit the rigor and robustness of its merger assessments going forward, and the manner in which it relies on evidence to substantiate its findings—at least until the CJEU renders its judgment in *Commission v CK Telecoms UK Investments* (CJEU, C-376/20 P, appeal brought on 7 August 2020 by EC). Indeed, the *CK Telecoms* judgment makes it abundantly clear that the GCEU will not shy away from

interceding where the EC does not act within the strict confines of the legal test enshrined in the EUMR or does not meet the requisite standard of proof (which, controversially in light of previous case law, is based on there being a "strong probability" of the existence of an SIEC).

In practice, it cannot be ruled out that the strict legal standards established by the GCEU will lead to closer scrutiny and more time-consuming review of mergers by the EC, resulting in an additional burden for merging parties in the form of longer information requests, for example. That being said, the GCEU's ruling could facilitate mergers in concentrated industries in relation to which the EC's recent approach has acted as a deterrent to consolidation—witness the European telecommunications sector. Indeed, increased consolidation and synergies may be just panacea to overcome the current COVID-19 pandemic.

GCEU DEFINES 'UNDERTAKINGS CONCERNED' UNDER EUMR IN CONTEXT OF ACQUISITION BY JOINTLY CONTROLLED FULL-FUNCTION JV

T-380/17, *HEIDELBERGCEMENT AND SCHWENK ZEMENT*, 5 OCTOBER 2020

The GCEU ruled that, in the case of an acquisition by a jointly controlled full-function joint venture (JV), the turnovers to be taken into account for the purposes of ascertaining whether the EC has jurisdiction are those of the JV's parent companies—as the "undertakings concerned"—if they are the real players involved in the initiation, organisation and financing of a transaction. This is important because the thresholds for notification of a transaction under the EUMR are more likely to be triggered by the parent companies than by a JV.

Background

HeidelbergCement AG and Schwenk Zement KG (collectively, the Applicants) are German producers and distributors of building materials, including cement, operating in the EEA. Duna-Dráva Cement Kft. (DDC, or the JV) is a full-function JV company owned equally and jointly controlled by the Applicants. It is active, *inter alia*, in Hungary and Croatia.

In April 2015, Cemex S.A. B. de C.V initiated a process for the sale of its subsidiaries, Cemex Hungary and Cemex Croatia (Target Companies), which were the Applicants' direct competitors.

In August 2015, the Applicants and Cemex entered into a share purchase agreement pursuant to which the JV would acquire 100% of the shares in the Target Companies. Following this, the Applicants notified the EC of the proposed concentration.

The EC preliminarily considered that the Applicants were, in view of their significant involvement in the initiation, organisation and financing of the transaction, the real players behind the transaction, and thus were the "undertakings concerned" within the meaning of the EUMR. Consequently, the EC found that the concentration had a Community dimension since the EU turnover thresholds were met.

After an in-depth investigation, and despite the commitments offered by the Applicants, the EC declared the transaction to be incompatible with the internal market by decision C(2017) 1650 final of 5 April 2017.

On 16 June 2017, the Applicants challenged the EC decision before the GCEU.

The GCEU Judgment

The Applicants claimed that the EC was not competent to review the transaction since it does not have a Community dimension within the meaning of Article 1(2) of the EUMR. That provision requires that at least two undertakings concerned have, individually, a turnover in the EU of more than EUR 250 million.

Because DDC would acquire the Target Companies on completion of the transaction, the Applicants argued that the "undertakings concerned" within the meaning of the EUMR were only the Target Companies and DDC as the acquiring company (and not the Applicants). The turnover of the Applicants should not, therefore, have been considered separately by the EC, but should have been added to the turnover of DDC. A corollary of this, according to the Applicants, was that the transaction did not meet the turnover thresholds for review by the EC. This is because the turnover of the Target Companies did not meet the relevant turnover threshold of the EUMR.

The GCEU disagreed with the Applicants, rejecting as a preliminary matter the argument that a full function JV, such as DDC, should automatically be regarded as an 'undertaking concerned' for the purposes of Article 1(2) of the EUMR. In this regard, the GCEU specifically pointed out that "a joint venture, which is fully functioning and, therefore, from an operational point of view, economically autonomous, does not mean that it enjoys autonomy as regards the adoption of its strategic decisions" (para. 112). Rather, the GCEU considered that the economic reality behind the transaction must be taken into account, holding, in line with *Verband der freien Rohrwerke and Others v Commission*, that "the existence of financial and structural indirect links [between parent companies and the JV] is a factor which must be taken into account in the assessment of a concentration" (GCEU, T-374/00, *Verband der freien Rohrwerke and Others v Commission*, [2003] EU:T:2003:188).

The economic reality behind a transaction is principally assessed in two scenarios (paras.123 to 125):

» When the parent companies use a "shell company" for an acquisition

» When the parent companies are the real players behind the transaction due to their "involvement in the initiation, organization and financing of the transaction". In the present case, the EC found that the transaction came within this second scenario.

In the assessment of the economic reality behind a transaction, "all the relevant elements, which enable the real players behind the transaction to be determined, must be taken into consideration" (para.122). In practice, the significant involvement of the parent companies in the transaction may be deduced from a consistent body of evidence, even if none of that evidence, taken in isolation, is sufficient to reveal the economic reality of the transaction.

In this regard, the GCEU upheld the EC's findings with respect to the evidence relied on by the EC, which demonstrated that the parent companies were the real players behind the transaction in question (paras.181 to 185). Notably:

- HeidelbergCement took decisions concerning the implementation and composition of the steering committee; the timing, preparation and submission of an indicative offer; and the structure of the due diligence and the related responsibilities.
- HeidelbergCement's representatives on the steering committee attended negotiations with Cemex and prepared detailed documentation, deal valuation and

components of the business case for the decision of the HeidelbergCement management board and supervisory board to approve the acquisition.

- HeidelbergCement negotiated the non-disclosure agreements with Cemex, and organised and conducted the due diligence and the implementation planning.
- Prior to the signature of the share purchase agreement, a verbal agreement on the main terms was concluded between HeidelbergCement and Cemex.
- Following that verbal agreement, HeidelbergCement negotiated open issues directly with Cemex.

Schwenk was also considered a real player behind the transaction despite having a lesser degree of involvement in the transaction. The GCEU held that where two parent companies hold 50% of the shares and 50% of the voting rights in a JV, both of them are presumed to exercise decisive influence over that JV and its conduct (para. 260). In the present case, such presumption based on capital holdings is reinforced by other decisive elements: both HeidelbergCement and Schwenk decided to pursue the acquisition of the Target Companies with DDC as ultimate purchaser, and HeidelbergCement submitted the indicative offer for the purchase of the Target Companies after having received oral approval from Schwenk (paras. 261 to 267).

The GCEU also upheld the EC's findings with respect to the evidence relied on by the EC, which demonstrated that the JV's involvement in the transaction was not such as to preclude a finding that the Applicants were the real players behind the transaction (paras. 205 to 253). Specifically:

- The fact that DDC conducted the due diligence, set up the financing of the transaction and negotiated with the banks does not detract from the important role played by the Applicants.
- Even if DDC was responsible for securing the financing and negotiating with the banks, such responsibility arose from an order given by HeidelbergCement to DDC, which was motivated by a specific financial and economic need of HeidelbergCement.
- The fact that a full-function JV might have a "strategic interest" or "its own interest" in a concentration cannot prevent the parent companies from being classified as undertakings concerned.
- The fact that DDC was party to the final purchase agreements and financed 80% of the purchase price via bank loans and the remaining 20% out of its own funds does not alter the fact that it was the Applicants, and not DDC, which designed the financing structure of the transaction and the corporate structure.

In the end, the GCEU upheld the EC's finding that the real players behind the transaction were not the JV, but the parent companies whose respective turnovers had to be taken into consideration when determining whether the merger had a Community dimension.

Comment

The significance of the GCEU's ruling lies in the clarification it provides on the application of the turnover thresholds enshrined in the EUMR to acquisitions by JVs.

Parent companies cannot blindly rely on the fact that a jointly controlled JV is full-function to assume that their respective individual turnovers will not be taken into account for the purposes of determining whether the transaction has a Community dimension. The EC will examine the underlying factual reality behind a full-function

JV to assess whether the real business players' behind a transaction are in fact the parent companies.

It is therefore essential to identify who the "real players" behind a transaction are in light of who is in fact involved in the initiation, organisation and financing of a transaction. This is important not only for the purposes of determining the deal timeline, but also because failure to properly identify the "undertakings concerned" may result in an inadvertent breach of the standstill obligation under the EUMR, resulting in the imposition of high fines. In this regard, this risk also applies at Member State level, with some Member States' merger control rules applying the same jurisdictional principles as those enshrined in the EUMR.

STATE AID

EC RELAXES STATE AID RULES TO HELP BUSINESSES DURING COVID-19

COMMUNICATION FROM THE EC C(2020) 1863 TEMPORARY FRAMEWORK FOR STATE AID MEASURES TO SUPPORT THE ECONOMY IN THE CURRENT COVID-19 OUTBREAK, 19 MARCH 2020

On 19 March 2020, the EC adopted a temporary framework in the form of a communication that allows Member States to grant certain State aid to businesses to help them face the economic and financial consequences of the health crisis. This framework is applicable until 30 June 2021, and until 30 September 2021 as regards recapitalisation support.

Background

The temporary framework is based on Article 107(3)(b) TFEU, which allows for State aid "to remedy a serious disturbance in the economy of a Member State." It is relatively rare to have recourse to this provision. The framework is complementary insofar as the mainly used classic procedure of State aid authorisations under articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU remains available.

Being aware of the limited EU budget, which is insufficient to overcome the economic crisis induced by COVID-19, the EC sought to enable the Member States to use the State aid rules following the most flexible interpretation possible by means of a temporary framework.

At the same time, the EC aimed to set safeguards to limit the anticompetitive impact of these new State aids. Such safeguards come in the form of thresholds based on crisis-relevant indexes such as turnover or liquidity needs, but also in the form of conditions which ban businesses from abusing from the instrumentation of the COVID-19 argument. Indeed, companies which were in difficulty before 31 December 2019 are not eligible for this framework.

On 3 April 2020, the EC expanded the temporary framework to include additional types of measures aiming to accelerate the research and development of COVID-19-relevant products, to protect jobs and to further support the economy.

On 5 May 2020, the EC introduced additional aid schemes in the form of recapitalisation aid and subordinated debt while safeguarding undue distortions of competition in the Single Market. As such, recapitalisation can only be granted as a last resort, must follow transparent proceedings, and should strictly aim to restore the business instead of creating undue benefits.

On 29 June 2020, the EC added the possibility to provide support to micro and small companies even if they were in financial difficulty before 31 December 2019 because they are particularly vulnerable to the situation. Yet again, the EC warned against any disturbance in the free play of competition that the State aids might encourage, and encouraged private investors to participate in joint recapitalisation aids with the Member States as a counterpart to measures under the new amendment.

On 13 October 2020, the applicability of the framework was prolonged generally until 30 June 2021, and with regard to recapitalisation measures, until 30 September 2021.

Content of the Temporary Framework

The temporary framework currently in place provides for authorisation of several types of aid:

- Direct grants, selective tax advantages and advance payments of up to EUR 800,000 (The support is also available for micro and small companies already in financial difficulty before 31 December 2019.)
- State guarantees for loans taken by companies from banks
- Subsidised public loans to companies
- Safeguards for banks that channel State aid to the real economy (The temporary framework makes clear that such aid is considered as direct aid to the banks' customers, not to the banks themselves.)
- Short-term export credit insurance
- Support for COVID-19-related research and development
- Support for the construction and upscaling of testing facilities
- Support for the production of products relevant to tackle the COVID-19 outbreak
- Tax payment deferrals and/or suspensions of social security contributions
- Wage subsidies for employees
- Recapitalisation aid and subordinated debt
- Support covering part of the beneficiaries' fixed costs, up to a maximum amount of EUR 3 million per undertaking facing a decline in turnover of 30%.

In support of the temporary framework, the Council of the European Union also endorsed, on 23 March 2020, the activation, for the first time, of the general escape clause of the Stability and Growth Pact, which enables Member States to depart from their normal budget requirements in a coordinated and orderly manner.

Based on this temporary framework, the EC has authorised almost 280 aid schemes from 21 March to 1 November 2020. Some of them were given a green light in a record time of 48 hours upon notification and in accordance with Article 107(3)(b) TFEU and the temporary framework.

To illustrate, the EC has authorised financial schemes including:

- A EUR 10 billion French guarantee scheme to support the domestic credit insurance market
- A German aid scheme allowing for direct grants, repayable advances tax or payment advantages, loans, guarantees and equity
- Loan schemes allowing the German State-owned Kreditanstalt für Wiederaufbau and other regional authorities and promotional banks to provide subsidised loans.

Obviously, many aids are sector-specific and target the most vulnerable businesses:

- A EUR 1.2 billion French Solidarity Fund scheme for small enterprises
- A EUR 2.2 million Belgian aid measure to support Flemish airports in the context of the COVID-19 outbreak
- A EUR 99.4 million Danish scheme to support cafés, restaurants, nightclubs and disco.

Comment

The temporary framework appears to be an efficient tool, as 280 State aids were authorised from its adoption until 1 November 2020, compared to only 50 aids authorised under standard State aids proceedings during the same period. Such a difference arises out of the softer conditions under the framework, but also from the speed of the procedure.

For example, only two days after the adoption of the temporary framework, the EC authorised within 48 hours three separate French support schemes expected to mobilise more than EUR 300 billion of liquidity. These consisted of two schemes enabling Bpifrance to provide State guarantees on commercial loans and credit lines for enterprises with up to 5,000 employees, and a scheme to provide State guarantees to banks on portfolios of new loans for all types of companies.

GCEU ANNULS EC DECISION IN APPLE STATE AID CASE IN LIGHT OF ASSESSMENT ERRORS

T-778/16, *IRELAND V EC*, AND T-892/16, *APPLE SALES INTERNATIONAL AND APPLE OPERATIONS EUROPE V EC*, 15 JULY 2020

On 15 July 2020, the GCEU annulled an EC decision that required Ireland to recover EUR 13 billion from Apple plus interest of EUR 1.2 billion. This amount corresponded to the tax benefits that Apple had received and which the EC qualified as illegal State aid.

Background

While Within the Apple Group, Apple Operations International is a fully owned subsidiary of Apple Inc. Apple Operations International fully owns the subsidiary Apple Operations Europe (AOE), which in turn fully owns the subsidiary Apple Sales International (ASI). ASI and AOE are both established in Ireland but are not tax resident in the country.

In 1991 and 2007, the Irish tax authorities adopted "tax rulings" as to Apple's liability for corporate taxes in Ireland. The rulings approved proposals made by Apple on the method for determining the chargeable profits and therefore the tax bases of ASI and AOE.

The EC Investigation

Following a two-year investigation, the EC adopted a decision in 2016, concluding that the two tax rulings constituted illegal State aid. The effect of these rulings was to reduce the base on which the taxable profits of ASI and AOE were calculated and so to reduce the tax paid by these two companies. In a 15 July 2020 press release, EC Executive Vice-President Margrethe Vestager said:

"The Commission's decision concerned two tax rulings issued by Ireland to Apple, which determined the taxable profit of two Irish Apple subsidiaries in Ireland between 1991 and 2015. As a result of the rulings, in 2011, for example, Apple's Irish subsidiary recorded European profits of US$ 22 billion (c.a. €16 billion) but under the terms of the tax ruling only around €50 million were considered taxable in Ireland".

The reduction of the tax base was specific to these two companies, conferred an advantage on them, was financed out of State resources (namely the tax revenue that Ireland would have collected in the absence of these rulings) and affected trade between Member States. It was therefore State aid within the meaning of Article 107(1) TFEU. Moreover, because it had not been notified to the EC, it was illegal State aid. The EC therefore ordered Ireland to recover the aid from ASI and AOE.

Ireland challenged the EC's decision before the GCEU in November 2016, and ASI and AOE followed suit in the following month.

The GCEU Judgment

As a preliminary point, Ireland challenged the GCEU's jurisdiction to rule on matters of internal Irish taxation. The GCEU rejected this, stating that, according to settled case law, direct taxation remains a Member State competence, but such competence must nonetheless be exercised consistently with EU law. Thus, direct taxation is not excluded from the scope of the rules on State aid control.

On the substance, the GCEU examined, one by one, a large number of highly technical complaints formulated by Ireland, ASI and AOE. For some of these complaints, the GCEU found that the EC had erred.

Because of these errors, the GCEU had no choice but to annul the EC's decision. The EC filed an appeal before the CJEU. In the meantime, the recovered funds of EUR 13 billion (plus about EUR 1.2 billion in interest) remain in an escrow account pending the CJEU's final judgment.

What Does This Mean for Future EC "Tax" State Aid Investigations?

The press statement EC Vice-President Vestager released on the day of the judgment is instructive.

First, Vestager emphasised that the EC would study the case and learn from its mistakes: "*We will carefully study the judgment and reflect on possible next steps*." She also noted the positive points of the judgment, points on which the EC's approach had been upheld:

"…[the GCEU] confirmed the [EC]'s approach to assess whether a measure is selective and whether transactions between group companies give rise to an advantage under EU State aid rules based on the so-called "arm's length principle".

Second, Vestager was clearly undeterred by this set-back:

"The [EC] stands fully behind the objective that all companies should pay their fair share of tax. If Member States give certain multinational companies tax advantages not available to their rivals, this harms fair competition in the EU. It also deprives the public purse and citizens of funds for much needed investments—the need for which is even more acute during times of crisis."

Businesses which obtain favourable tax rulings on matters such as determination of the taxable base should be on their guard against schemes that may constitute illegal State aid that later must be reimbursed with interest. Vestager warned that:

"… [the EC] will continue to look at aggressive tax planning measures under EU State aid rules to assess whether they result in illegal State aid. At the same time, State aid enforcement needs to go hand in hand with a change in corporate philosophies and the right legislation to address loopholes and ensure transparency."

LEGISLATIVE AND POLICY DEVELOPMENTS

IN CONTEXT OF COVID-19, EC ISSUES GUIDANCE ON USE OF REGULATION (EU) 2019/452 ON FOREIGN DIRECT INVESTMENT

COMMUNICATION FROM THE EC C(2020) 1981 GUIDANCE TO THE MEMBER STATES CONCERNING FOREIGN DIRECT INVESTMENT AND FREE MOVEMENT OF CAPITAL FROM THIRD COUNTRIES, AND THE PROTECTION OF EUROPE'S STRATEGIC ASSETS, AHEAD OF THE APPLICATION OF REGULATION (EU) 2019/452 (FDI SCREENING REGULATION) C(2020) 1981, 25 MARCH 2020,

As part of the overall response to the COVID-19 emergency, the EC issued a Communication on 25 March 2020 on the issue of foreign direct investment (FDI) screening and the application of Regulation (EU) 2019/452 (FDI Regulation).

Background

On 19 March 2019, the European Parliament and Council adopted the FDI Regulation establishing a framework for the screening of FDI in the EU. The FDI Regulation is applicable as from 11 October 2020. Previously, there was no comprehensive framework at the EU level for screening FDI from the perspective of security and public order.

The three main provisions of the FDI Regulation are as follows:

- Although there is no obligation for Member States to have screening mechanisms, the FDI Regulation imposes minimum requirements that apply if a Member State has such mechanisms. These minimum requirements are about non-discrimination, transparent procedural rules and timeframes, and lists of factors that indicate that an FDI might be dangerous.
- The EC may issue a non-binding opinion if it considers that an FDI is likely to affect security or public order in a Member State or in the EU as a whole. The opinion can target an FDI irrespective of whether it has been screened by the relevant Member State. Non-binding opinions can also be issued by other Member States.
- There is a cooperation mechanism whereby the Member States and the EC are required to exchange information on FDI. The same mechanism applies to exchanges of information amongst the Member States themselves.

The substantive enforcement of FDI remains the exclusive jurisdiction of each Member State, and the FDI Regulation does not establish a control at the EU level.

The main points of the EC's 25 March 2020 Communication on the FDI Regulation in context of the COVID-19 emergency are summarised below.

Scope of the FDI Screening Regulation

The Communication emphasises that foreign investment review and, when required, the adoption of measures preventing or conditioning an investment within the scope of the FDI Regulation on grounds of security of public order, is the ultimate responsibility of Member States. The EC may address opinions recommending specific action to the Member State concerned, in particular when there is a risk that the investment may affect projects and programmes of EU interest.

The Communication urges Member States to be particularly vigilant to ensure that the current health crisis does not result in a sell-off of Europe's business and industrial actors, including small and mid-sized enterprises.

The Role of FDI Screening in a Public Health Emergency

The Communication points out that the FDI Regulation refers explicitly to risks to critical health infrastructure and supply of critical inputs amongst the factors to be considered when screening a foreign investment.

The Communication emphasises that screening of FDI does not necessarily result in prohibition of the investment. There are instances where the adoption of mitigating measures may suffice (for instance, conditions guaranteeing the supply of medical products/devices). The EU interest may dictate that such supply commitments extend beyond the predicted needs of the host Member State. In certain cases, Member States may be able to intervene using measures falling outside the FDI Regulation, for instance by imposing compulsory licences on patented medicines in the event of a national emergency such as a pandemic.

Finally, an acquisition by a foreign investor which is likely to affect projects or programmes of EU interest will be subject to closer scrutiny by the EC, whose opinions Member States will have to take into utmost account. This would be the case, for instance, with regard to foreign investment in EU undertakings that have received funding under the EU Research and Innovation programme Horizon 2020, particularly for projects in the health sector, including future projects in response to the COVID-19 outbreak.

What Can Investors Expect?

The Communication states that national screening mechanisms are already in force in 14 Member States. It calls upon those Member States to make full use of their existing screening mechanisms in accordance with the FDI Regulation and other requirements of EU law.

The Communication also calls upon those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a fully-fledged mechanism. In the meantime, these Member States should consider other available options, in full compliance with EU law and international obligations.

The Communication warns that if a foreign investment does not undergo a national screening process, Member States and the EC may provide comments and opinions within 15 months after completion of the investment. This could lead to the adoption of measures by the Member State concerned, which would represent a major issue for investors, who most likely would already have completed the acquisition of control.

The Communication explains that portfolio investments do not constitute FDI because they do not confer on the investor effective influence over management and control of a company. Where portfolio investments represent an acquisition of at least a qualified shareholding that confers certain rights on the shareholder under national company law (*e.g.,* a 5% holding), they could be of relevance in terms of security or public order. They may be screened by the Member States in compliance with the TFEU provisions on free movement of capital, discussed further below.

The Communication recognises that, besides investment screening, Member States may retain special rights in certain undertakings by holding

so-called "golden shares". Such rights may enable the State to block or set limits on certain types of investments in the companies concerned. The scope of such measures will depend on the powers granted to the State by the golden share. Like other restrictions on capital movements, they must be necessary and proportionate to the achievement of a legitimate public policy objective.

Justifications for Restrictions on Capital Movement

Article 63 TFEU provides for free capital movements not only within the EU but also with third countries.

In the case of "predatory buying" of strategic assets by foreign investors, the most relevant exception to the free movement of capital is that for "public policy or public security", set out in Article 65 TFEU. This could justify, for instance, restrictive measures necessary to ensure security of essential supplies or the provision of essential public services. Restrictive measures may also be taken to address threats to financial stability. In addition, the CJEU has recognised public health as an overriding reason in the general interest (See CJEU, C-531/06, *Commission v Italy*, [2009] ECR I-4103, para. 51).

Overriding reasons of general interest recognised by the CJEU that could possibly be relevant in emergency situations also include protecting consumers, preserving the financial equilibrium of the social security system, and achieving social policy objectives.

The TFEU provides for safeguards in case of serious difficulties, or threat thereof, for the operation of the Economic and Monetary Union (Article 66 TFEU) and for balance of payments for Member States outside the euro area (Articles 143 and 144 TFEU).

In the case of foreign investment in EU companies with market valuations well below their intrinsic value, the Communication explains that restrictions could be considered taking into account the actual or potential impact on the public interest (for instance whether they may lead to over-reliance on foreign investors for the provision of essential supplies or essential services).

Finally, the Communication warns that restrictions on the free movement of capital coming from outside the EU might be easier to justify than restrictions on capital movements between Member States (Argument based on CJEU, C-446/04, *Test claimants in FII Group litigation*, [2006] ECR I-11753, para. 171).

EC ISSUES COMFORT LETTER IN CONTEXT OF TEMPORARY FRAMEWORK IN RESPONSE TO COVID-19 – MORE COMFORT LETTERS TO COME?

COMMUNICATION FROM THE EC C(2020) 3200 TEMPORARY FRAMEWORK FOR ASSESSING ANTITRUST ISSUES RELATED TO BUSINESS COOPERATION IN RESPONSE TO SITUATIONS OF URGENCY STEMMING FROM THE CURRENT COVID-19 OUTBREAK, 8 APRIL 2020

On 8 April 2020, the EC issued its first comfort letter for a competitor collaboration to Medicines for Europe (MfE) in the context of its Temporary Framework in response to COVID-19. The issuance of this comfort letter is remarkable, particularly given the paradigm shift since 2004 from the system of comfort letters under Regulation 17, towards a system of self-assessment under Regulation 1/2003. The comfort letter issued to MfE may jumpstart the introduction of a more generalised system of

comfort letter—at least for some joint ventures seeking to achieve environmental goals or develop new digital services.

Background

Under the now-defunct Regulation 17, the so-called "comfort letter" became a mainstay of competition enforcement. Comfort letters were an informal EC opinion to the parties that the notified agreement in question either did not meet the conditions for the application of (now) Article 101(1) TFEU (negative clearance letter) or merited exemption (exemption letter). Issuance of such comfort letters usually closed the file on the matter. Moreover, receipt of a comfort letter strongly discouraged third parties from challenging the validity of agreements before the national courts.

With the entry into force of Regulation 1/2003, however, Article 101(3) became directly applicable, and the system of comfort letters became obsolete. As such, since 1 May 2004, companies have been required to carry out a "self-assessment", at their own risk, of whether an agreement is compatible with Article 101. While the EC has ushered in comprehensive guidance—via block exemptions and guidelines—to assist businesses with the task of self-assessing their compliance with the EU competition rules, such guidance arguably still leaves much room for error and uncertainty. This is notably the case with respect to non-full-function joint ventures, and in particular those that are long-term, complex and high in value.

Moreover, so-called "guidance letters" within the meaning of recital 38 of Regulation 1/2003 have provided little to no legal certainty for businesses. Indeed, to the best of the authors' knowledge, no guidance letters have been issued by the EC in the last 17 years. This is the case not only because the conditions for receiving a guidance letter are extremely restrictive, but guidance letters are issued only with respect to genuinely "novel" or "unresolved" questions.

The Comfort Letter Issued to MfE

In a remarkable turn of events, and in light of the novel challenges faced by companies and consumers as a result of COVID-19, the EC decided that it would provide companies, on an exceptional basis, with discretionary *ad hoc* comfort letters regarding the legality of cooperation that requires rapid implementation. On 8 April 2020, in application of the EC's Temporary Framework, the EC issued its first *ad hoc* comfort letter in the context of COVID-19.

The comfort letter was issued to MfE within a matter of days and authorised cooperation among MfE's members and non-members, *i.e.,* pharmaceutical manufacturers, to effectively respond to the potential shortage of critical medicines for COVID-19 patients set against the EC's calls for competing pharmaceutical companies to cooperate on addressing potential shortages of COVID-19 medicines. The cooperation within MfE encompasses, inter alia, the identification and coordination of production capacity and existing stocks of medicines; the adaptation or reallocation, based on projected or actual demand, of production and stocks; and the distribution of medicines. Under normal circumstances, such cooperation would likely raise serious concerns under Article 101, since, for example, the exchange of competitively sensitive information among competitors is a quasi *per se* violation of the EU competition rules.

Subject to certain conditions being met, however, the cooperation within MfE was deemed not to raise competition concerns:

- The cooperation must be open to any pharmaceutical manufacturer willing to participate.
- Minutes of all meetings must be recorded, and copies of any agreement entered into in the context of the cooperation must be shared with the EC.
- The exchange of confidential business information among manufacturers must be strictly limited to what is indispensable for effectively achieving the objectives of the cooperation (*e.g.,* no discussion of prices). In particular, sensitive information is to be circulated among cooperating manufacturers in aggregated form only.
- The cooperation must be limited in time, *i.e.,* until the risk of shortages of critical medicines no longer subsists.

The EC was quick to emphasise that the comfort letter is subject to the pharmaceutical manufacturers not increasing prices beyond that which is justified by possible increases in costs. Subject, therefore, to the cooperation within MfE satisfying the aforementioned conditions, it could be considered competition-law compliant.

Comment

The EC's issuance of a comfort letter to MfE is clearly a welcome development. Comfort letters should not remain a one-off, however, nor should they be confined to the current COVID-19 context. Indeed, according to statements made in the latter part of 2020 by one senior EC official, the EC is in fact considering the introduction of comfort letters more generally for companies seeking to cooperate to achieve environmental goals or develop new digital services, in particular for large projects that would be impossible for companies to undertake alone. This would be a further welcome development as such operations will, in some cases at least, require (near) absolute legal certainty from a competition law point of view. Furthermore, this development could indeed be a stepping-stone towards a more generalised system of comfort letters for large and complex joint ventures in all types of industries. Only time will tell whether this will be the case. For now, at least, self-assessment remains the rule.

EVALUATION OF THE VBER AND THE VERTICAL GUIDELINES

EC STAFF WORKING DOCUMENT EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION {SWD (2020) 173 FINAL}, 8 SEPTEMBER 2020

On 8 September 2020, the EC published a Staff Working Document summarizing the conclusions of its evaluation of the Vertical Block Exemption Regulation (VBER) (Commission Regulation (EU) No 330/2010) and the accompanying Guidelines on Vertical Restraints.

Background

Vertical agreements are agreements entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Although article 101(1) TFEU prohibits agreements between undertakings that restrict competition, Article 101(3) TFEU acknowledges that some restrictive agreements may generate objective economic benefits that outweigh the negative effects of the restriction of competition, and exempts those agreements from the prohibition. In particular, such vertical agreements can be declared compatible with the Single Market, provided that they contribute to

improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits without eliminating competition.

The VBER exempts vertical agreements that meet certain conditions from the prohibition in Article 101(1) TFEU, thus creating a safe harbour for those agreements. Together with the VBER, the EC also adopted the Guidelines on Vertical Restraints, which provide guidance on how to interpret and apply the VBER, and how to assess vertical agreements falling outside the VBER safe harbour. The EU rules aim to provide legal certainty to businesses by making it easier to self-assess their agreements and by facilitating the enforcement actions of the EC, NCAs and national courts.

Evaluation Phase

On 3 October 2018, the EC launched the evaluation phase of a review procedure aimed at gathering views from stakeholders to determine whether the current VBER, which will expire on 31 May 2022, and the Vertical Guidelines are still fit for purpose since their last update in 2010.

During the evaluation phase, evidence was gathered from various sources. Between 4 February 2019 and 27 May 2019, the EC carried out a public consultation to gather stakeholder views on the functioning of the VBER and the Vertical Guidelines as well as qualitative and quantitative evidence on all five evaluation criteria (effectiveness, efficiency, relevance, coherence and EU added value). Interestingly, 164 stakeholders filled in the EC questionnaire.

The EC also conducted a targeted consultation of NCAs. On 14 and 15 November 2019, the EC held a dedicated stakeholder workshop to discuss further the issues that should be re-considered so that rules remain relevant. In addition, the EC took into consideration the feedback gathered during the E-Commerce Sector Inquiry (the results of which were published in a final report on 10 May 2017). The recent enforcement actions of the EC and the NCAs in relation to vertical restraints as well as EU and national case law were also taken into account.

In May 2020 the EC published an external evaluation support study, which elaborated on certain issues, such as resale price maintenance (RPM) and parity clauses.

On 8 September 2020, the EC published the Staff Working Document summarising the conclusions of the evaluation of the VBER and the Vertical Guidelines.

Key Findings of the Evaluation

Overall, the evidence gathered during the evaluation suggests that the VBER, together with the Vertical Guidelines, are still relevant and useful for business to self-assess and ensure that their vertical agreements are compatible with EU competition law. However, the evaluation also identified several areas where the VBER and the Vertical Guidelines are not functioning well, mainly because of important market developments such as the remarkable growth of online sales and online platforms that has occurred since the adoption of the last revision of the rules in 2010. The evaluation found that some provisions of the VBER and Vertical Guidelines lack clarity or need updating as a result of these market developments.

The issues identified regarding the current rules include the following:

- The development of e-commerce has significantly amended the traditional way in which companies do business. The current digitalised environment is characterised by

the increasing use of online sales and advertising restrictions or the entry of new market players such as online platforms. Moreover, new types of vertical restraints on online sales and advertising and parity clauses (most-favoured nation/customer clauses) have been applied on a wide basis. Distribution models have changed over the last ten years, with the use of selective distribution constantly rising. Suppliers are increasingly relying on direct sales online and on selective distribution systems, which allow for tighter control over resale conditions. Exclusive distribution is used less frequently. As the existing rules were originally put in place to address offline restrictions, there is a need for more clarity regarding the treatment of certain supply and distribution models (*e.g.,* franchising) and new online sales and advertising restrictions, including trademarks and brand names, online platform bans and restrictions on the use of price comparison websites.

- The provisions regarding the classification of agency agreements need to be clarified.
- Another issue of concern which reduces the efficiency of the rules relates to diverging interpretations of the provisions on the vertical restraints, *e.g.,* regarding the novel implementations of RPM, by NCAs and national courts.
- Case law and enforcement practice has developed significantly since the rules were implemented in 2010, and the rules need to be updated to reflect these developments. For example, in the recent *Coty* judgement (CJEU, C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941) the CJEU held that a restriction imposed on an authorised retailer not to sell goods through third-party online platforms in the context of a selective distribution system does not infringe Article 101(1) TFEU, provided that the objective of the restriction is to preserve the luxury image of the goods concerned, the restriction is applied objectively and in a non-discriminatory manner, and the restriction is proportionate. Such developments which provide guidance on retail parity clauses, restrictions on the use of price comparison websites and online sales bans need to be reflected in the revised rules so that legal certainty is ensured.
- While the evidence shows that the lists of hardcore restrictions (*e.g.,* RPM) and excluded restrictions (*e.g.,* non-compete clauses) are generally appropriate, it may be possible to further reduce the burden and cost for businesses by exempting additional vertical agreements in some specific areas, as well as by simplifying the rules.

Next Steps

On 23 October 2020, following the publication of the evaluation Staff Working Document, the EC launched the impact assessment phase to address the issues identified during the evaluation and decide whether the VBER should be prolonged, revised or allowed to lapse.

On the same day, the EC published the VBER inception impact assessment (IIA). The deadline for stakeholders to give feedback on this IIA was 20 November 2020.

Subsequently, on 18 December 2020, the EC launched a public consultation to gather more specific feedback, in particular on the impact of the policy options set out in the IIA. To this end, the EC published an online questionnaire which stakeholders are invited to use to provide their experience and views. The deadline for stakeholders to provide such feedback is 26 March 2021.

During the impact assessment phase, stakeholders will have further possibilities to provide their views. In the course of 2021, the EC will publish a draft of the revised rules for stakeholder comments, with a view to having a finalised updated version of the VBER and Vertical Guidelines by 31 May 2022, when the current rules expire.

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ALPHABETICAL INDEX OF CASES AND DECISIONS

A

Apple, Cases T-778/16, *Ireland v Commission,* and T-892/16, *Apple Sales International and Apple Operations Europe v Commission,* 15 July 2020

B

Booking.com, Case C-59/19, *Wikingerhof GmbH & Co KG v. Booking.com BV,* 24 November 2020

Broadcom, *AT.40608 (Broadcom)*, 7 October 2020

Budapest Bank Nyrt, Case C-228/18*, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and others,* 2 April 2020

C

Casino, Guichard-Perrachon, Cases T-249/17, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission;* T-254/17*, Intermarché Casino Achats v Commission* and T-255/17*, Les Mousquetaires and ITM Entreprises v Commission,* 5 October 2020

Celanese, *AT. 40410* (*ethylene*), 14 July 2020

CK Telecoms UK Investments Ltd, Case T-399/16, *CK Telecoms UK Investments Ltd v Commission,* 28 May 2020

Clariant, *AT. 40410* (*ethylene*), 14 July 2020

G

Generics (UK) Ltd, Case C-307/18, *Generics (UK) Ltd and others v Competition Markets Authority*, 30 January 2020

Group Canal+ SA, Case C-132/19 P, *Groupe Canal+ v Commission,* 9 December 2020

H

HeidelbergCement AG, Case T-380/17, *HeidelbergCement AG and Schwenk Zement* KG *v Commission,* 5 October 2020

I

International Skating Union, Case T-93/18, *International Skating Union v Commission,* 16 December 2020

Infineon Technologies AG, Case T-758/14 RENV *Infineon Technologies AG v Commission*, 8 July 2020

J

Johannes Reifenhäuser Holding GmbH & Co. KG, Case C-702/19 P, *Silver Plastics and Johannes Reifenhäuser v Commission,* 22 October 2020

L

LL - Carpenter s. r. o., Case T-531/18, *LL-Carpenter v Commission*, 12 March 2020

M

Meliá Hotels International, S.A, *AT. 40528* (*Meliá-holiday pricing*), 21 February 2020

Les Mousquetaires, Cases T-249/17, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission;* T-254/17*, Intermarché Casino Achats v Commission* and T-255/17*, Les Mousquetaires and ITM Entreprises v Commission,* 5 October 2020

Mowi ASA, formerly Marine Harvest ASA, Case C-10/18P*, Mowi, formerly Marine Harvest ASA v Commission,* 4 March 2020

N

NBCUniversal LLC, *AT. 40433* (*film merchandise*), 30 January 2020

NKT A/S, Case C-607/18*, NKT Verwaltung and NKT v Commission,* 14 May 2020

O

Orbia, *AT. 40410* (*ethylene*), 14 July 2020

S

Schwenk Zement KG, Case T-380/17, *HeidelbergCement AG and Schwenk Zement* KG v Commission, 5 October 2020

Silver Plastics GmbH & Co. KG, Case C-702/19 P, *Silver Plastics and Johannes Reifenhäuser v Commission,* 22 October 2020

W

Wikingerhof GmbH & Co. KG, Case C-59/19, *Wikingerhof GmbH & Co KG v. Booking.com BV,* 24 November 2020

CHRONOLOGICAL INDEX OF CASES AND DECISIONS

January

Case C-307/18, *Generics (UK) Ltd and others v Competition Markets Authority*, 30 January 2020

EC Decision *AT. 40433* (*film merchandise*), 30 January 2020

February

EC Decision *AT. 40528* (*Meliá-holiday pricing*), 21 February 2020

March

Case C-10/18P*, Mowi, formerly Marine Harvest ASA v Commission,* 4 March 2020

Case T-531/18, *LL-Carpenter v Commission*, 12 March 2020

Communication from the EC C(2020) 1863 Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak , 19 March 2020

Communication from the EC C (2020)1981 Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 ("FDI Regulation"), 25 March 2020

April

Case C-228/18*, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and others,* 2 April 2020

Communication from the EC C(2020)3200 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak C/2020/3200

May

Case C-607/18*, NKT Verwaltung and NKT v Commission,* 14 May 2020

Case T-399/16, *CK Telecoms UK Investments Ltd v Commission,* 28 May 2020

July

Case T-758/14 RENV *Infineon Technologies AG v Commission*, 8 July 2020

Cases T-778/16, *Ireland v Commission,* and T-892/16, *Apple Sales International and Apple Operations Europe v Commission,* 15 July 2020

EC Decision *AT. 40410* (*ethylene*), 14 July 2020

September

EC Staff Working Document Evaluation of the Vertical Block Exemption Regulation, {SWD (2020) 173 final}, 8 September 2020

October

Cases T-249/17, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission;* T-254/17*, Intermarché Casino Achats v Commission* and T-255/17*, Les Mousquetaires and ITM Entreprises v Commission,* 5 October 2020

Case T-380/17, *HeidelbergCement AG and Schwenk Zement* KG *v Commission,* 5 October 2020

EC Decision *AT.40608 (Broadcom)*, 7 October 2020

Case C-702/19 P, *Silver Plastics and Johannes Reifenhäuser v Commission,* 22 October 2020

November

Case C-59/19, *Wikingerhof GmbH & Co KG v. Booking.com BV,* 24 November 2020

December

Case C-132/19 P, *Groupe Canal+ v Commission,* 9 December 2020

Case T-93/18, *International Skating Union v Commission,* 16 December 2020

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