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Cartels & Restrictive Agreements

CJEU's Eye-Opening Ruling on Antitrust Compliance and Off-Label Misinformation

C-179/16, *Hoffman-La Roche and Others v AGCM*, 23 January 2018

On 23 January 2018, the CJEU (Court of Justice of the European Union) rendered its judgment in the case *Hoffman-La Roche and Others v AGCM*, providing clarification on important aspects of competition law in the pharmaceutical sector.

The CJEU rendered its judgment pursuant to a request for a preliminary ruling by the Italian Council of State on the interpretation of Article 101 TFEU (Treaty on the Functioning of the European Union).

Background

Genentech, a US subsidiary of Hoffman-La Roche (Roche) developed Avastin and Lucentis, two biotech medicines derived from the same active substance. Avastin was designated for oncologic applications, while Lucentis was designed to treat ophthalmological diseases. Genentech, which was only active in the United States, granted licenses to Roche for the commercialisation of Avastin outside the United States, and to Novartis for the commercialisation of Lucentis.

The European Medicines Agency (EMA) approved Avastin in 2005 for the oncology applications, and approved Lucentis two years later for the treatment of eye diseases. Before Lucentis's EMA approval, however, eye doctors in Italy had been using Avastin as an off-label treatment for eye diseases. This use continued even after the approval of Lucentis, because of Avastin's lower price.

In a 27 February 2014 decision, the Italian competition authority (AGCM) imposed two fines, each amounting to more than EUR 90 million, on Roche and Novartis for having concluded an illegal agreement intended to communicate misleading information regarding the safety of Avastin in order to favour the commercial performance of the more expensive Lucentis. This information involved misleading doctors and the public that use of Avastin for ophthalmologic purposes was unsafe.

The CJEU's Judgment

On further appeal, the Italian Council of State sought clarification from the CJEU on the interpretation of Article 101 TFEU. One question was whether Avastin and Lucentis could be considered as competing products. Another question was whether concerted practices intended to devalue one medicinal product (Avastin) over another (Lucentis) could be considered as a restriction of competition "by object" if there was no scientific evidence to justify the claim that one product was unsafe for ophthalmologic purposes.

With regard to whether Avastin and Lucentis are part of the same market, the CJEU found that:

- In principle, medicinal products that may be used for the same therapeutic indications belong to the same market, but medicinal products that are manufactured or sold unlawfully cannot be regarded as substitutable for lawful products.

- EU rules do not prohibit the off-label prescription of a medicinal product or its repackaging for such use, provided that certain conditions are met. It is up to regulatory authorities or national courts—not competition authorities—to determine whether the necessary conditions have been respected.
- In so far as the regulatory authorities and courts have examined whether those conditions are unlawful, competition authorities must take account of the outcome of that examination.
- Where two products are marketed for completely different conditions, but used (off-label) for the same condition, they can be viewed as substitutable, provided that national courts and regulatory authorities have not established the off-label use of a medicine as unlawful.
- Article 101 TFEU must be interpreted as meaning that a national competition authority may include in the relevant market, in addition to the medicinal products authorised for the treatment of the diseases concerned, another medicinal product whose marketing authorisation does not cover that treatment but which is used for that purpose and is thus actually substitutable with the former.

With respect to whether the safety claims constituted a restriction of competition "by object", the CJEU held that:

- In determining whether an arrangement can be considered a by object restriction—*i.e.,* agreements which reveal a degree of harm to competition sufficient for a holding that there is no need to examine the effects—"regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part".
- The fact that Novartis and Roche colluded with each other with a view to disseminating information specifically relating to the product marketed by only one of them might be evidence that such dissemination pursued objectives unrelated to pharmacovigilance. Indeed, responsibility for the requirements that might need to be taken for pharmacovigilance rests with the market authorisation holder alone.
- It is for the national court to decide whether the information is misleading. If that is the case, the arrangement must be regarded as restricting competition by object.
- Information is misleading if it is intended to confuse relevant authorities about the safety profile of a medicinal product and gives rise to public concerns regarding the safety of the off-label use of that product.
- In this case, it was likely that the dissemination of the information would encourage doctors to refrain from prescribing Avastin for eye diseases, resulting in the expected reduction in demand for Avastin.

Ramifications

The judgment provides valuable guidance to stakeholders in the pharmaceutical sector in relation to antitrust compliance. The CJEU clarifies, first of all, that a medicine which is used off-label can be found to compete with an authorised product if the two are therapeutically substitutable. The CJEU also ruled that the dissemination of misleading information about a pharmaceutical product's characteristics can be found to infringe competition rules by devaluing the seemingly offending pharmaceutical product in relation to a competing product.

GCEU Confirms EC Refusal of Bid for Cartel Document Access

***T-611/15, Edeka-Handelsgesellschaft Hessenring mbH v Commission*¸ 5 February 2018**

This judgment arises out of an application by Edeka-Handelsgesellschaft Hessenring mbH (Edeka) for access to the EC's decision and table of contents of the file in settlement proceedings concerning four banks involved in the Euro Interest Rate Derivatives (EIRD) cartel. The judgment illustrates the strength of the general presumption of confidentiality that the EC (European Comission) can rely on in relation to documents in the file of cartel proceedings under Article 101 TFEU. It also shows that private parties cannot rely upon the public interest exception to obtain access to documents that might assist them in pursuing a claim for damages against cartel participants.

In preparation for a possible claim for damages, Edeka requested access to all documents drawn up since 2006 containing information on the way in which the cartel's members had manipulated the Euribor rate. The EC's Directorate-General for Competition (DG Competition) refused Edeka's request for access to documents on the following bases:

- The first indent of Article 4(2) of Regulation No 1049/2001 (obligation to refuse access where this would endanger the protection of commercial interests of a natural or legal person)
- The third indent of the same Article 4(2) (obligation to refuse access where this would endanger the protection of the purpose of inspections, investigations and audits)
- Article 4(3) of the same Regulation (obligation to refuse access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter in which a decision has not been taken by the institution and where disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure)
- A general presumption of confidentiality linked to the exception provided for in the third indent of the same Article 4(2)

The EC also refused partial access to the documents requested.

Edeka then asked the EC's Secretariat-General to re-examine this decision. Edeka stated that the refusal to grant partial access was disproportionate and that DG Competition was required at least to allow access to the table of contents of the file in the EIRD proceeding.

The Secretary-General confirmed the decision based on the reasons given by DG Competition. The Secretary-General added that the refusal to grant access was based on consistent interpretation and application of the different rules and objectives provided for by Regulation No 1049/2001, on the one hand, and by the regulations governing the conduct of investigations under Article 101 TFEU, on the other. As regards the table of contents, the Secretary-General observed that it formed part of the file in the case, which had not yet closed, with the result that it was covered by the general presumption of confidentiality which prevented both full and partial access.

Two and a half months after the Secretary-General's decision, Edeka made a second request, this time for access to the EIRD decision and the table of contents. DG Competition rejected this second application on the grounds that the two documents requested were already covered by the first request. The arguments for refusing the first request applied mutatis mutandis to the second request. Edeka asked the Secretary-General to re-examine this second decision of DG Competition.

The Secretary-General confirmed the reasoning in the second decision of DG Competition. In addition, the Secretary-General drew attention to the fact that the EC had not yet finalised the preparation of a non-confidential version of the EIRD decision, and that the EIRD proceeding continued against the parties that were not willing to settle. It also observed that the second refusal of access was merely confirmatory of the first refusal, which had become final because no court action had been brought against it within the prescribed period.

Edeka applied to the GCEU (General Court of the European Union) within the prescribed period seeking annulment of the Secretary-General's second refusal of access. The GCEU confirmed the Secretary-General's decision and rejected Edeka's complaint.

General Assumption of Confidentiality

The GCEU repeated the existing principles developed in the case law concerning access to documents in antitrust proceedings pursuant to Article 101 TFEU. Access is regulated restrictively through Regulation No 1/2003 and 773/2004 to balance the opposing interests of different interested parties. The granting of access to documents to members of the public based on Regulation No 1049/2001 must not undermine the above-mentioned Regulations. The GCEU stressed that, because of the functionally comparable situation of access to files in the context of the proceedings pursuant to Article 101 TFEU and of the right of access to documents under Regulation No 1049/2001, the general presumption of confidentiality under the procedure laid down in Article 101 TFEU also must apply to access to documents under Regulation No 1049/2001.

It was also made clear that the general presumption of confidentiality does not depend on the number of documents covered by the request for access—i.e., even a single document could be covered by the presumption of confidentiality. It is not a question of quantity but of a qualitative criterion, namely whether the documents relate to the same proceeding that determines whether a general presumption of refusal of access may apply.

This presumption also covers the table of contents of the file of a cartel procedure, since it sorts the file; summarises its content; lists, titles and identifies the documents contained in it; reflects the totality of the file; and makes visible all the measures taken up by the EC in the antitrust proceedings.

General Considerations for the Reasoning of the Presumption of Confidentiality

The GCEU also made it clear that, regarding the general presumption of confidentiality, the EC only has to base the refusal of access on general considerations without having to make a specific assessment of the content of each individual document. The reference to the protection of the purpose of investigations and the interpretation of the rules in light of Regulations No 1/2003 and No 773/2004 were therefore sufficient to justify the refusal of access.

No Prevailing Public Interest

The GCEU also stated that the presentation of general considerations is not sufficient to justify a prevailing public interest in the disclosure of the documents concerned. Rather, the necessity of access to those documents must be demonstrated in order to enable the EC to balance the interests. Moreover, an interest which only consists of damage to a private company in the context of an infringement of Article 101 TFEU cannot be classified as "public".

CJEU Upholds EC Fines on Freight Forwarding Cartel Participants

C-263/16, *Schenker Ltd v Commission*, 1 February 2018

In four separate judgments of 1 February 2018, the CJEU upheld fines imposed by the EC on freight forwarders for participating in cartels in the international air freight forwarding services sector. The case is interesting for its consideration of (i) the fact that the EC relied on evidence provided by an immunity applicant that was represented by a lawyer also representing another cartel participant; (ii) the now expired exemption of transport services from the competition rules; and (iii) the sales to be taken into account in determining the fine.

This case follows on from the EC's freight forwarding cartel decision of 28 March 2012, pursuant to which fines totalling EUR 169 million were imposed on 14 freight forwarding companies, including Kuhne Nagel, Panalpina, Schenker Ltd and its parent company Deutsche Bahn, for agreeing on the fixing of various pricing mechanisms and surcharges in relation to four distinct areas:

- A pre-clearance system for exports from the United Kingdom to countries outside the EEA (European Economic Area)
- Submission of data to the US customs authorities pursuant to US legislative provisions that require companies to submit such data in advance of shipment of goods to the United States
- The application of a temporary rate adjustment factor
- A monetary adjustment factor to manage foreign exchange risks between the Chinese renminbi and the US dollar

In particular, the EC imposed a fine on Schenker Ltd for its participation in the cartel for New Export Systems (NES), a pre-clearance system for exports from the United Kingdom to countries outside the EEA. The EC found that, during a meeting, several freight forwarders agreed to introduce a surcharge for NES declarations, and agreed on the levels of the surcharge and the timing of its application. Following that meeting, the companies exchanged several emails in order to monitor the implementation of the agreement on the market. The anticompetitive contacts lasted from 1 October 2002 to 10 March 2003.

Schenker Ltd challenged the EC's decision before the GCEU in Case T-265/12. The GCEU upheld the amount of the fines imposed by the EC. On appeal to the CJEU, the EC's decision and the GCEU's review of that decision were upheld in their entirety.

Two of the grounds of challenge presented to the CJEU are particularly interesting. First, Schenker Ltd claimed that under the principle of "double representation", the GCEU should have declared the evidence submitted by Deutsche Post AG inadmissible because its lawyers had a conflict of interest in respect of another client, the Freight Forward Association, which represented the interests of freight forwarders.

Second, Schenker Ltd submitted that the GCEU should have considered that the NES cartel was exempt from Regulation 17 of 6 February 1962, the predecessor of Regulation 1/2003 implementing Articles 101 and 102 TFEU, by virtue of Article 1 of Regulation 141, which exempted certain activities in the transport sector from the application of the EU competition rules. Schenker Ltd considered that the exemption covered all services directly related to transport services and therefore also applied to the freight forwarding sector. The CJEU rejected both grounds of appeal.

Regarding the first ground of appeal, the CJEU held that the GCEU did not err in law by dismissing Schenker's plea of a breach of the principle of "double representation", stating that "there are no provisions of EU law which state that the Commission is not entitled to use information or evidence submitted to it by an undertaking in an application for immunity, where the lawyer who has acted for that undertaking has infringed the prohibition on double representation or the duty of loyalty to his or her former clients".

Regarding the second ground of appeal, the CJEU ruled that "the services provided by freight forwarders, whose activity consists in supplying, in one package, a number of services that are distinct from the transport operation in itself, is not excluded […] by Article 1 of Regulation No 141". According to the CJEU, one of the recitals of Regulation No 141 stated that the "distinctive features of transport" make it justifiable to exempt conduct from the scope of Regulation No 17, which is "directly related to the provision of transport services". Consequently, the CJEU held that the NES cartel did not fall under the (now expired) exemption of Regulation No 141.

Another interesting ground of appeal concerned the value of sales to be taken into account for calculating the basic amount of the fine. Schenker Ltd argued that the EC had wrongly used the value of sales for the entire international freight forwarding market as a starting point to set its fines, as it viewed this as a package of services, whereas in Schenker Ltd's opinion, the EC should have taken the value of the surcharges as a basis for calculating the fine.

The CJEU declared that the GCEU was correct in holding that it was appropriate to base the calculation of the amount of the fines on the value of sales associated with freight forwarding services as a package of services on the trade routes concerned. The CJEU determined that Schenker Ltd "confuses the infringements in question with the definition of the relevant market affected by those infringements". In this regard, the CJEU noted that the EC's fining guidelines allow it to calculate fines based on the value of sales to which infringements are "directly or indirectly" related. The CJEU pointed out that "the concept of 'value of sales' must be understood as referring to sales on the market concerned by the infringement". Therefore, it was appropriate to take account of the value of the sales on the market for international air freight forwarding services, since the sales falling within the sphere of the infringements at issue were made on that market.

No Exhaustion of Rights in Luxury Product Trade Marks

I-20 U 113/17, *Kanebo,* 6 March 2018

The Higher Regional Court of Düsseldorf decided that neither online nor offline sellers can invoke exhaustion of rights under Article 15(1) of the EU trademark regulation if they sell high-quality, prestigious cosmetic products without appropriate presentation to avoid impairment of reputation.

Circumstances of the Decision

Kanebo focuses on the sale of cosmetics and fragrances. It sells these products exclusively via selective distribution systems. Real, a German retail chain that sells products in stores and via an online shop, offered Kanebo's products online and offline. These products were marked with Kanebo's registered EU trademarks. Kanebo sought a preliminary injunction against Real to stop the online and offline sale of products that carried Kanebo's registered EU trade marks.

The Regional Court of Düsseldorf issued a preliminary injunction, but it was repealed by another chamber of the Regional Court after Real filed an objection. Upon appeal by Kanebo, the Higher Regional Court of Düsseldorf reinstated the initial injunction.

Regional Court: No Legitimate Interest Justifying Non-Exhaustion

The Regional Court held that Kanebo had not substantiated the existence of a trade mark infringement. Kanebo had placed the products on the EU market, which led to exhaustion of rights under Article 15(1) of the EU trademark regulation, according to the Regional Court. In particular, the Court pointed out that there was no substantiation of an exception for a "legitimate interest" in accordance with Article 15(2) of the EU trade mark regulation. The judges explained that impairment of reputation can constitute such an interest, but in the present case, there was no such danger. The only retail store in which Real sold Kanebo products was a pilot project with up-market competing products and presentation. Regarding online sales, the Regional Court held that the consumer is used to being able to purchase luxury products online. Thus, it was not apparent that there was any negative effect on Kanebo's image.

Higher Regional Court: Impairment and Legitimate Interest

The Higher Regional Court, by contrast, considered that Kanebo had a "legitimate interest" within the meaning of Article 15(2) of the EU trade mark regulation, thus preventing any exhaustion of rights in the circumstances.

First, the Higher Regional Court summarised the prior CJEU decisions and concluded that impairment of reputation can give rise to a legitimate interest (see CJEU, judgments of 4 November 1997 – C-337/95 – *Dior/Evora*, paragraph 43, and 23 April 2009 – C-59/08 – *Copad/Dior*, paragraph 55). Luxury products and products with prestigious character may only be sold in a manner that respects the interests of the trademark owner. Thus, the seller may not damage the appeal of a product or use means or circumstances that go against the trademark owner's interests. For example, products may not be sold in a context that contradicts the products' image (CJEU, *Dior/Evora*, paragraph 45).

Adoption of CJEU's Approach – *Coty* for Trade Marks

The Higher Regional Court stated that the possibility of an impairment of reputation by itself is not sufficient. The court based its ruling on CJEU case law, which repeatedly emphasises that luxury images are worth protecting and may also be part of selective distribution systems to maintain such images. In Coty (judgment of 6 December 2017 – C-230/16, paragraph 34) the CJEU emphasised, contrary to the decision in *Pierre-Fabre* (judgment of 13 November 2011 – C-439/09), that suppliers of luxury products can prohibit distributors from using online sales platforms if the product's luxury image is otherwise impaired.

According to the Higher Regional Court, the CJEU's findings in *Coty* are applicable to trade mark law. Kanebo sold high-quality and prestigious products in a selective distribution system. According to its policy, distributors were not supposed to present the product adjacent to other, image-damaging, products. Furthermore, the sale of certain contractually identified products was prohibited entirely. Additionally, Kanebo provided distributors with examples of how to present a product.

Online Sales

The Higher Regional Court concluded that the way Real presented the products online could turn them into ordinary, everyday products from the consumer's viewpoint, leading to an impairment of reputation. The judges noticed that the online platform offered all kinds of goods (e.g., electronics, cosmetics, clothes, household goods) and did not properly differentiate between everyday and luxury goods, nor between brands. Furthermore, third parties could offer products via the online platform. In addition, the online platform was designed for expediency and focused on special offers. There was no consultation whatsoever between a potential customer and the platform. For these reasons, the court held that the prestigious image of Kanebo's products could not be highlighted, thus negating their luxurious and exclusive appeal.

The fact that another distributor, Douglas, had an online shop that met Kanebo's criteria was no reason to negate an impairment of reputation by Real's sales. Douglas' website was designed differently; it focused less on special offers and categorised its products, which, unlike Real's, were not products of all kinds, but select product categories, such as cosmetics.

The fact that Kanebo's products were sold via Amazon and eBay was not accepted as an argument to negate an impairment of reputation. Kanebo showed that sellers on Amazon and eBay were not authorised distributors and so were selling grey market commodities.

Offline Sales

The Higher Regional Court also found an impairment of reputation in the case of offline sales. The mere fact that the Real store in which Kanebo's products were sold was an up-market retail store is insufficient to negate an impairment of reputation, since it is still a department store that offers a wide variety of goods across all price ranges. The store also focused on food without clear spatial separation from cosmetic goods, and thus there was no "aura of exclusivity".

Regarding the other Real stores, in which none of Kanebo's products had not yet been presented, the Higher Regional Court assumed that there was a risk of repetition of the trademark infringement based on the existence of the first trademark infringement. The assumption could be taken as grounds for injunctive relief, since there was a clear possibility that Real would otherwise present Kanebo's products in its other stores, even though they were designed differently.

Practical Implications

The Higher Regional Court's judgment creates a link between the CJEU's antitrust evaluation in *Coty* and the assessment under trademark law by applying the former in order to analyse the existence of a "legitimate interest" according to Article 15(2) of the EU trade mark regulation. The court pointed out that a legitimate interest not only exists with regard to products which are traditionally categorised as "luxury", but also with regard to those which can objectively be considered as meeting a "high-quality" standard, for example, due to their contents, additional services such as consultation, or remarkably higher prices compared to competitors. It follows that the connection between *Coty* and the assessment under trademark law widens its scope of application in favour of manufacturers. Selective distribution systems which meet the requirements of *Coty* are not only compatible with Art. 101 TFEU but enable manufacturers also to succeed with injunctions based on trademark law against retailers that are not part of the distribution system.

German Court Decides Legality of eBay Ban for Network Marketing

3 U 250/16, *Aloe2GO*, 22 March 2018

The Higher Regional Court of Hamburg had the opportunity to establish a position regarding potential restrictions of competition in selective distribution arising out of bans on selling products through eBay and similar platforms.

The Higher Regional Court referred to recent case law of the CJEU (judgments of 13 November 2011 – C-439/09 – *Pierre-Fabre*, and 6 December 2017 – C-230/16 – *Coty*) regarding selective distribution. The Higher Regional Court found that not only luxury products and technically high-quality products can be subject to qualitative selective distribution, but also other products, provided that they are of high quality and destined to be accompanied by skilled consultation aimed at emphasising the product's quality and preserving and strengthening its image. Consequently, a ban on selling products through eBay and comparable sales platforms can be justified if its objective is to preserve the product image and enable skilled consultation, as well as to prevent liability for distributors' illegal business practices.

Circumstances of the Decision

The respondent sold food supplements, cosmetics and other products via network marketing. Distributors could pay EUR 9.90/month to be able to sell via an online retail shop controlled by the respondent. In 2007 and 2008, several German courts held the respondent accountable for misleading statements made by distributors, mainly via eBay. In the aftermath, the respondent changed its policy and rules for online distribution. Websites had to fulfil criteria which ensured that the quality and image of the product were portrayed correctly. Sale via eBay and comparable platforms was explicitly prohibited for the time being, since these platforms could not properly display the product portfolio and enable the necessary skilled consultation with customers.

The appellant used eBay for sale and was consequently sued for injunction preventing such sales. Both the Regional and Higher Regional Courts granted the injunction. The high quality of the products and their special image and marketing were undisputed between the parties.

The Higher Regional Court's Ruling and Reasoning

The Higher Regional Court found no violation of the cartel ban according to § 1 ARC (*Gesetz gegen Wettbewerbsbeschränkungen*, Act Against Restraints of Competition). The court did not examine whether there were cross-border implications in the sense of Article 101 TFEU since § 1 ARC is interpreted in the same way as Article 101. Furthermore, the prohibition against use of eBay and comparable platforms did not violate §§ 20 (1), 19 (2) Nr. 1 ARC (unreasonable obstruction of relative market power).

In accordance with CJEU case law, beginning with the judgment of 25 October 1977 – C 26/76 – *Metro II*, a system of authorised selective distribution does not represent a restriction of competition. It requires the selection of distributors according to qualitative factors and non-discriminatory application of those factors, as well as products that require such a distribution network. Furthermore, the prohibition may not reach further than required to accomplish the purpose pursued.

The Requirements for an Authorised Selective Distribution System Were Met

The Higher Regional Court found that these requirements were met. The existence of the platform ban does not create a quantitative distribution system, according to the judges. The business policy explains explicitly that the ban is justified by eBay's inability to properly portray the entire product range and the need to establish personal contact with customers. Furthermore, there is no indirect quantitative limitation since there are no distributors that sell exclusively via eBay.

The product's constitution also requires a selective distribution system. In the past, the CJEU took this stance regarding luxury products and technically high-quality products (judgments of 25 October 1977 – C 26/76 – *Metro II*, paragraph 26, and 23 April 2009 – C-59/08 – *Copad/Dior*).

According to the Higher Regional Court, there is no reason for the requirements to be limited to these product groups. Whether a selective distribution system is required is determined by the special nature of the product.

There is no reason for a general differentiation between luxury products and other products that, without being luxurious, stand out because of their high quality or other features. In addition, by using a selective distribution system, the seller can underline and maintain the product's value and offer complementary consultation and information.

In the case at hand, the Higher Regional Court considered the respondent's products as sufficiently special to allow the implementation of a selective distribution system. The Court found that the high quality of the respondent's products, as well as the consulting and support services accompanying the sale of these products, granted the respondent leeway to set the prices for these products. In addition, these features of the respondent's product are able to convince the customer that the respondent offers an overall high-end product (*e.g.,* that it is a product with particularly positive nutritional properties). Furthermore, the respondent was able to build and maintain a special product image.

The Higher Regional Court also observed that the pursued business concept could not be achieved via eBay and similar sales platforms since the current structure of such sales platforms does not allow the respondent to present the entire product portfolio in a way that emphasises its qualities and allows the customer access to skilled consultation.

No Opposing Prior CJEU Decisions

The Higher Regional Court stated that this decision is in accordance with CJEU case law. In *Pierre-Fabre* (judgment of 13 November 2011 – C-439/09), the CJEU held that maintaining the prestigious character of the product (in this case, cosmetics) does not justify use of a selective distribution system. However, the CJEU stated explicitly in *Coty* (judgment of 6 December 2017 – C-230/16, recital 34) that the decision in *Pierre-Fabre* did not intend to prohibit bans on internet sales in general, but only concerning the affected product groups of cosmetics and body care products. Implicitly, the Higher Regional Court applied the *Coty* ruling, which only deals with luxury products, and applied it to high-quality products. Although cosmetics was one of the product groups in the case at hand, the Higher Regional Court held that the CJEU did not decide on the distribution of cosmetics in general. The case at hand also differed from the *Pierre-Fabre* case because the respondent allowed the online sale of its products and even opened online retail shops where its distributors could sell the products against payment.

Member States Not Required to Extend Extradition Prohibition to Citizens from Other Member States

C-191/16, *Romano Pisciotti v Bundesrepublik Deutschland*, 10 April 2018

In its judgment of 10 April 2018, the CJEU decided that Germany did not infringe EU law by extraditing an Italian national to the United States. An EU Member State is not required to extend a prohibition on the extradition of its own nationals to all EU citizens, but before proceeding to extradition of a citizen of another Member State it is required to give that State the possibility of prosecuting its citizen for the same offence. This case also shows that EU citizens who have been involved in anticompetitive behaviour in the United States are potentially liable to be extradited to and imprisoned in the United States for their infringements of competition.

Mr Pisciotti, an Italian national, had been accused in the United States of participation in anticompetitive concerted practices and agreements in the market for marine hoses. During a stopover of his flight from Nigeria to Italy, Mr Pisciotti was arrested in Germany. On the basis of the EU-US agreement on extradition, he was extradited to the United States, where he was subsequently fined and imprisoned for two years.

Mr Pisciotti brought an action before the Regional Court of Berlin, Germany. He claimed the payment of damages by Germany because Germany had refused to extend to him the benefit of the prohibition in the German Basic Law of the extradition of any German national. He argued that Germany had thus infringed EU law, in particular, the general principle of non-discrimination. The Regional Court of Berlin referred the matter to the CJEU for a preliminary ruling on a question of EU law.

The CJEU held that EU law was applicable in a situation like this one, where an EU citizen is the subject of a request for extradition to the United States on the basis of the EU-US agreement, and has been arrested for the purposes of potentially acceding to that request, in an EU member state other than the one of which he or she is a national. EU law is applicable because the EU citizen, Mr Pisciotti, had made use of his right under EU law to move freely within the European Union by stopping over in Germany during his return journey from Nigeria. The fact that he was only in transit did not cast doubt on this finding. The fact that the request for extradition was made under the EU-US agreement was an additional reason why EU law was applicable.

According to the CJEU, an EU Member State is allowed to draw a distinction, on the basis of a rule of constitutional law, between its own nationals and nationals of other Member States, and to prohibit extradition of the former while granting extradition of the latter. However, the implementation of such a distinction is subject to an essential prerequisite: the requested Member State (in this case, Germany) must put the competent authorities of the Member State of which the citizen is a national (in this case, Italy) in a position to seek the surrender of that citizen pursuant to a European arrest warrant. If the latter Member State does not take any action in that regard, the requested Member State may proceed with extradition.

The CJEU's reasoning was as follows. The EU-US agreement allows a Member State, on the basis of either the provisions of a bilateral treaty (such as the Germany-US Treaty on extradition) or rules of its constitutional law (such as the German Basic Law), to provide for a particular outcome for its own nationals by precluding their extradition. The CJEU found, first of all, that this could entail unequal treatment of EU citizens who are nationals of another Member State (such as Mr Pisciotti) and thus a restriction of the freedom of movement within the meaning of Article 21 TFEU.

The CJEU then recalled the case law according to which "measures which restrict a fundamental freedom, such as that laid down in Article 21 TFEU, may be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures" (*Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291; *Petruhhin*, C-182/15, EU:C:2016:630).

The CJEU considered that preventing the risk of impunity for persons who have committed an offence was a legitimate objective capable of justifying such a restriction. The question remained whether Germany could have adopted a course of action which was less prejudicial to the exercise of Mr Pisciotti's right to free movement. A less restrictive measure could have been to surrender Mr Pisciotti to Italy, his Member State of origin, provided that Italy had jurisdiction to prosecute him for the same offences as those alleged against him in the request for extradition.

In the present case, Germany informed the Italian consular authorities of Mr Pisciotti's situation. However, the Italian judicial authorities did not issue a European arrest warrant before the request for extradition at issue was granted. In these circumstances, Germany's extradition of Mr Pisciotti to the United States did not infringe EU law.

Luxury Perfume Provider May Prohibit Third-Party Website Distribution

11 U 96/14 (Kart), *Coty German/Parfümerie Akzente*, 12 July 2018

This judgment of the Higher Regional Court of Frankfurt/Main of 12 July 2018 applying the preliminary ruling of the CJEU of 6 December 2017 in the case *Coty Germany GmbH v Parfümerie Akzente GmbH* will reassure manufacturers of luxury products that they can protect such products from unauthorised distribution over third-party websites.

Coty wanted to prohibit Parfümerie Akzente from distributing Coty products via third-party undertakings that were not authorised Coty distributors. Coty brought proceedings against Parfümerie Akzente before the Higher Regional Court of Frankfurt/Main.

The Higher Regional Court suspended the case temporarily and referred to the CJEU a preliminary question on the interpretation of Article 101 TFEU in this context.

In its judgment, the CJEU stated first of all that a selective distribution system for luxury goods designed primarily to preserve the luxury image of those goods does not breach the prohibition of agreements, decisions and concerted practices laid down in Art 101 (1) TFEU if the following conditions are met:

- Resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion.
- The criteria laid down do not go beyond what is necessary.

The CJEU acknowledged that the aura is an essential aspect of luxury goods because it enables consumers to distinguish them from other similar goods and that therefore any impairment to that aura of luxury is likely to affect the actual quality of those goods.

Further, the CJEU noted that the EU law prohibition of agreements, decisions and concerted practices does not preclude a contractual clause which prohibits authorised distributors of a selective distribution network of luxury goods designed primarily to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for internet sales of the goods in question, provided that the following conditions are met:

- The clause has the objective of preserving the luxury image of the goods in question.
- The clause is laid down uniformly and not applied in a discriminatory fashion.

- The clause is proportionate in light of the objective pursued.

The CJEU observes that, subject to the Oberlandesgericht's inquiries, the clause at issue appears to be lawful. In particular, given the absence of any contractual relationship between the supplier and the third-party party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors, an authorisation for those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the prohibition at issue.

In circumstances such as those of the main proceedings, the prohibition at issue on the use, in a discernible manner, of third-party undertakings for internet sales does not constitute a restriction of customers or a restriction of passive sales to end users—restrictions which are automatically excluded from the benefit of a block exemption because they are liable to have severely anticompetitive effects.

The Higher Regional Court then re-opened the proceedings in order to apply the preliminary ruling of the CJEU to the facts of the case.

Since the CJEU had ruled that ensuring the luxury image of products that have a special prestigious character can justify the establishment of a selective distribution system, the Higher Regional Court concluded that a selective distribution system was necessary to safeguard the high-quality presentation of Coty's products. If distribution on the websites of third-party undertakings, such as Amazon's German website, amazon.de, were possible, the luxury character of Coty's products could not be ensured.

After hearing witnesses, the Higher Regional Court concluded that the quality criteria of Coty's selective distribution system had been laid down uniformly and applied in a non-discriminatory way.

Independent of the question whether the agreement constituted a restriction of competition, the Higher Regional Court decided that it could be exempted under Article 101(3) TFEU and the VBER (Vertical Block Exemption Regulation), at any rate, because the requirements were fulfilled in this case. In particular, no customer groups were delimited (see Article Art. 4(b), VBER).

CJEU Rejects Request to Prevent Publication of Alleged Confidential Info in *Power Cables*

C-65/18 P(R), *Nexans France and Nexans v Commission,* 2 February 2018

By order of 12 June 2018, the Vice President of the CJEU dismissed the appeal lodged by Nexans France SAS (Société par Actions Simplifiée) and Nexans SA (collectively, Nexans) against the order of the President of the GCEU of 12 July 2017. The latter rejected Nexans's application for an interim injunction to prevent the EC from publishing a non-confidential version of the *Power Cables* decision that allegedly contained confidential information. Nexans sought to prevent such publication at least until the GCEU had ruled on Nexans's action for annulment of the EC's decision (T-449/14).

Order

The CJEU first set out the cumulative conditions under Article 156(4) of the GCEU's Rules of Procedure for an interim measure to be granted concerning confidential information. The CJEU said that "it is only when, first, the applicant for interim measures alleges that the information whose publication he [or she] wishes provisionally to prevent constitutes business secrets or is covered by professional secrecy and, second, that allegation satisfies the condition that there is a *prima facie* case, that the judge hearing an application for interim measures is in principle required, when examining the condition of urgency, to start from the premiss that the information constitutes business secrets or is covered by professional secrecy" (para. 21).

The CJEU then held that Nexans's claim that the information was confidential did not satisfy the condition relating to a *prima facie* case on the ground that Nexans did not seek to demonstrate the reasons why the allegedly confidential information, by its very nature, had not lost its secret or confidential nature despite the passing of time. According to the case law, information that has been secret or confidential, but is at least five years old, must be considered historical and therefore as having lost its secret or confidential nature—unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of the party's commercial position or that of interested third parties.[1]

Regarding Nexans's argument that the publication of the alleged confidential information would cause it serious and irreparable harm resulting from consequential damages actions, the CJEU found that Nexans had not produced any evidence to establish that the alleged harm was serious in nature. Nor had Nexans provided any evidence making it possible to establish whether and to what extent the publication of the *Power Cables* decision could worsen the alleged damage to Nexans's reputation.

German Federal Court of Justice Allows Claim for Cement Cartel Damages

KZR 56/16, *Grauzementkartell II*, 12 June 2018

This landmark judgment of the German Federal Court of Justice concerns an action for damages relating to the German cement cartel. However, the judgment has much wider implications and is relevant for damage claims relating to other cartel infringements.

The Federal Court extended the temporal application of Section 33 (5) of the German Act on Restraints of Competition (ARC) (now Section 33h (6) ARC), which provides for the suspension of the limitation period under certain circumstances. Consequently, the decision favours the plaintiff's side and reduces the complexity of the trial because defences based on the limitation period should now play a role in far fewer cases. According to Section 33 (5) ARC, suspension of the limitation period is triggered by the initiation of proceedings by the authority.

Furthermore, according to Section 849 BGB, and thus irrespective of the application of Section 33 (3) ARC (now Section 33a (4) ARC), the claimant shall have the right to obtain interest calculated at the rate of 4 per cent p.a. as from the date the damage occurred.

Questions remain regarding the statute of limitations, however. It is still not clear which EC procedural steps trigger the suspension of the limitation period under Section 33 (5) ARC. Moreover, the question arises whether the knowledge-independent maximum limitation period of Section 199 (3) No. 1 BGB is applicable to antitrust claims for damages.

The action was brought by Kemmler Beton GmbH, a trader of building materials, against HeidelbergCement AG. Kemmler claimed damages caused by overcharged prices for cement from 1993 to 2002. During this period, Heidelberg had entered into territorial and quota agreements with other cement manufacturers in violation of antitrust law, which was confirmed by the Federal Cartel Office in 2003. This decision was upheld by the Federal Court of Justice and thus became final in 2013 (BGH, decision of 26 February 2013 – KRB 20/12).

Limitation Periods

With regard to limitation periods, the Federal Court of Justice held that Section 33 (5) ARC also applies to claims for damages based on cartel violations that had already been committed and were not yet time barred when this provision came into force on 1 July 2005. According to this provision, the limitation period for a damages claim is suspended if the Federal Cartel Office or the EC initiates proceedings against the infringers. The judgment confirms the view of the majority of Higher Regional Courts in Germany and overrules the interpretation of the Higher Regional Court of Karlsruhe.

In the absence of a transitional regulation, the Federal Court of Justice found that the application of Section 33 (5) ARC depends on the principles of intertemporal private law. One of those principles, introduced by the Imperial Court of Justice (Reichsgericht) and adopted by Articles 169, 231 § 6, 229 § 6 of the Introductory Law to the Civil Code, provides that in the event of an amendment to the statutory provisions on limitation, the new Act shall apply to claims which arose previously but had not yet become time barred when the Act entered into force. However, the commencement, suspension and interruption of the limitation period for the period prior to the entry into force of the new Act is determined in accordance with the existing provisions. An exception is made only if the change in the statute of limitations is accompanied by a fundamental and substantive change in the claims concerned, which the Federal Court found not to be the case in the present matter.

The Right to Obtain Interest

Another important aspect concerns the right to obtain interest on the damage caused by anticompetition law infringement. The Federal Court of Justice held that the claimant has a right to obtain 4 per cent interest on the damage amount as of the date the damage occurred, even if Section 33 (3) ARC was not yet in force.

This finding is based on Section 849 of the German Civil Code (BGB). While generally applied to torts against objects belonging to or in the possession of the victim, it is already settled that the withdrawal of money also triggers this provision. The Federal Court of Justice has now extended the application of Section 849 BGB by likening the withdrawal of money to loss caused by a cartel infringement.

CJEU Clarifies Special Jurisdiction for Matters Relating to Tort and Branches, Agencies, Other Establishments

C-27/17, *flyLAL-Lithuanian Airlines*, 5 July 2018

On 5 July 2018, the CJEU handed down a judgment in response to a request for a preliminary ruling from the Lithuanian Court of Appeal in which it provided welcome clarifications of the interpretation of Articles 5(3) and 5(5) of Regulation No 44/2001 (Brussels I Regulation). These articles concern special jurisdiction in matters relating to tort or to acts of branches. Although these Articles have now been replaced by Articles 7(2) and 7(5) of Regulation No 1215/2012, the wording is identical, and so the CJEU's interpretation continues to be applicable.

Background

The main proceedings concerned a damages claim by AB flyLAL-Lithuanian Airlines against Starptautiskā lidosta "Rīga" VAS (Riga Airport) and Air Baltic Corporation AS that arose out of (i) an allegedly anticompetitive agreement concluded between Riga Airport and Air Baltic, (ii) abusive rebates granted by Riga Airport to Air Baltic, and (iii) abusive predatory pricing applied by Air Baltic.

FlyLAL claimed that, pursuant to the agreement between Riga Airport and Air Baltic, Riga Airport granted preferential rebates to Air Baltic. The financial benefit resulting from that agreement enabled Air Baltic to engage in predatory pricing on certain flights to and from the Vilnius Airport that ousted flyLAL from the market. Riga Airport's grant of rebates was found by the Latvian Competition Council to constitute an abuse of a dominant position in breach of Article 102 TFEU.

Against this background, the Lithuanian Court of Appeal asked the following questions in essence:

- Is the notion "place where the harmful event occurred" in Article 5(3) of Regulation No 44/2001 to be understood as meaning the place of conclusion of the defendants' unlawful agreement or the place of commission of acts by which the financial benefit obtained from that agreement was exploited?
- Can the loss of income suffered by the applicant on account of the specified unlawful acts of the defendants be regarded as damage for the purpose of Article 5(3) of [Regulation No 44/2001]?
- Are the operations of the branch of Air Baltic Corporation in the Republic of Lithuania to be regarded as "operations of a branch" within the meaning of Article 5(5) of Regulation No 44/2001]?

The CJEU Judgment

As a preliminary to its discussion of these three questions, the CJEU recalled the general rule in Article 2(1) of Regulation No 44/2001, which attributes jurisdiction to the courts of the Member State in which the defendant is domiciled. The CJEU then observed that the Regulation makes provision for certain special jurisdictional rules, such as those laid down in Article 5(3) and (5). In relation to these special rules, the CJEU observed:

"Given that both the jurisdiction of the courts for the place where the harmful event occurred, within the meaning of Article 5(3) of Regulation No 44/2001, and the jurisdiction of the courts for the place in which a branch, agency or other establishment is situated, as regards disputes arising out of their operations, within the meaning of Article 5(5) of that regulation, constitute rules of special jurisdiction, they must be interpreted in an independent and strict manner, which does not permit an interpretation going beyond the cases expressly envisaged by that regulation (see, to that effect, with regard to operations of a branch, judgment of 22 November 1978, *Somafer*, 33/78, EU:C:1978:205, paragraphs 7 and 8; and, with regard to tortious liability, judgment of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, paragraph 25 and case-law cited)."

As regards the specific notion of the "place where the harmful event occurred" in Article 5(3) of Regulation No 44/2001, the Court recalled that this term:

"…is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (see, *inter alia*, judgments of 19 April 2012, *Wintersteiger*, C-523/10, EU:C:2012:220, paragraph 19; of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paragraph 45; and of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, paragraph 28 and the case-law cited)."

Against the background of these preliminary observations, the CJEU examined the three questions, beginning with the second.

The Second Question

The CJEU agreed with Advocate General's Opinion that a distinction must be drawn between the initial damage resulting directly from the event giving rise to the damage which is capable of providing a basis for jurisdiction under Article 5(3) of Regulation No 44/2001 and subsequent adverse consequences which are not. The CJEU then held that loss of income, consisting of, *inter alia*, loss of sales incurred as a result of anticompetitive conduct contrary to Articles 101 and 102 TFEU, may be regarded as damage capable of providing a basis for jurisdiction under Article 5(3) of Regulation No 44/2001.

With regard to the place where the loss in sales occurred, the CJEU concluded that the loss in sales occurs in the market which is affected by that conduct and on which the victim claims to have suffered those losses. In the case of flyLAL, the CJEU considered that the main market affected was the Lithuanian market where flyLAL conducted the main part of its sales activities relating to flights operated to and from the Vilnius Airport which were affected by the alleged anticompetitive conduct.

The First Question

The CJEU clarified that in the case of an infringement of Article 101 TFEU, the place where an anticompetitive agreement was definitively concluded is the place of the event giving rise to the damage. In the case of the main proceedings, the place of the event giving rise to the damage was Latvia in relation to the loss caused by the alleged anticompetitive agreement between Riga Airport and Air Baltic.

In the case of an infringement of Article 102 TFEU, the CJEU clarified that the court for the place where the abusive conduct was implemented would have jurisdiction under Article 5(3) of Regulation No 44/2001. Unlike damage arising from a cartel, the event giving rise to the damage in the case of abuse of a dominant position is based on the acts performed by the dominant undertaking to put the abuse into practice, in particular by offering and applying predatory pricing in the market concerned. The CJEU added that it would be for the referring court to identify the event of most importance among the acts implementing a common strategy to oust a competitor.

The Third Question

In view of the necessity to strictly interpret Article 5(5) of Regulation No 44/2001, the CJEU clarified that in the case of actions based on tortious liability, in order for the dispute to be regarded as arising out of the operations of a branch, that branch must have actually and significantly participated in some of the actions constituting the tort.

Comment

The CJEU's clarifications regarding special jurisdiction are welcome, but they also leave some questions. In particular, in complex abuse of dominance cases, it might not be straightforward to determine the event of most importance among the acts implementing a common strategy, particularly in light of the broad definition of a single and continuous infringement. Such event might have occurred in several Member States or even outside the EEA. Also, when can a branch be considered to have actually and significantly participated to give jurisdiction to the place where it is established? Would it be sufficient for it to simply apply abusive pricing instructed by the headquarters, or should it participate in the pricing decision? It will be interesting to see how the case law will develop at the national level.

GCEU Annuls EC Cartel Fine Determination for Insufficient Reasoning

T-58/14, *Stührk Delikatessen Import v Commission*, 13 July 2018

In this difficult case, the EC had to reduce the fines calculated for each of the cartel participants so as to remain within the unalterable limit of 10 per cent of total worldwide group turnover. The EC claimed that it had sought to treat the various cartel participants equally in making the reductions, but in the GCEU's view, the EC failed to state adequate reasons for the different reductions applied. The GCEU, therefore, annulled the EUR 1.132 million fine imposed on the applicant, Stührk Delikatessen Import. In the future, one can expect the EC to provide more detailed explanations when it is obliged to reduce the amount of a fine so as to be within the legal limit of 10 per cent of group worldwide turnover.

In November 2013, the EC imposed fines in a total amount of EUR 29 million on four European North Sea shrimp traders for operating a price-fixing and market allocation cartel in breach of Article 101 TFEU over a period of almost nine years. Applying its Fining Guidelines, the EC calculated amounts which, for all the cartel participants, were well over 10 per cent of total annual group turnover, which is the legal upper limit of the fine fixed by Article 23(2) of Regulation No 1/2003. The EC, therefore, had to reduce the amounts calculated so as to be under the 10 per cent limit. This necessarily required a departure from the standard method of calculating fines, something which is permitted by paragraph 37 of the Fining Guidelines.

The GCEU recognised that the EC was entitled to make these reductions, provided that it respected the principle of equal treatment. The GCEU noted that the EC considered that the case was unique, as all the participants were active on the same market and involved in the infringement for a significant period. In these circumstances, the amounts resulting from a standard application of the Fining Guidelines would exceed the legal limit of 10 per cent of group worldwide turnover, and so each participant would have a fine equal to 10 per cent of its group worldwide turnover. The EC considered that such a result would cause difficulties with respect to the principle of the individuality of fines and sanctions, and could lead to a situation in which the gravity of a participant's involvement in the infringement and any mitigating circumstances would no longer have any effect on the amount of the fine.

The EC accordingly reduced the fines by the following percentages: 70 per cent for Stührk Delikatessen Import, 75 per cent for Heiploeg and Klaas Puul, and 80 per cent for Kok Seafood. The EC said that it determined these reductions by considering three cumulative criteria: the concentration of total turnover on the parties' sales of North Sea shrimps (*i.e.*, the relationship between the worldwide sales of North Sea shrimps by the parties to the cartel and their total worldwide turnover), the differences between the parties to the cartel as regards their individual participation in the infringement, and the need to ensure that the fine still had a deterrent effect.

The GCEU stated that it was far from clear how the EC had calculated the reductions, however, and that its reasoning was insufficient to enable the GCEU to carry out its own legality check. The GCEU therefore annulled the EC's decision with regard to the fine of EUR 1.132 million imposed on the now insolvent Stührk Delikatessen Import.

EC Fines Electronic Goods Manufacturers for Resale Price Maintenance

AT.40465, *Asus*; AT.40469, *Denon & Marantz*; AT.40181, *Philips*; AT.40182, *Pioneer*, 24 July 2018

Vertical restrictions, including resale price maintenance (RPM), have not generally been an EC enforcement priority over the last 10 years, but a series of rulings in July 2018 signalled a potential change in that trend.

Although the EC considers RPM to be a "hardcore restriction" of competition, to which the Vertical Block Exemption Regulation does not apply, there have been relatively few decisions at the EU level lately. Prior to the EC's July 2018 decisions in *Denon & Marantz*, *Asus*, *Pioneer* and *Philips*, the last time the EC imposed a fine for RPM was in the 2003 case of *PO/Yamaha*. The recent spate of cases, therefore, bears testimony to an increased interest by the EC in vertical restrictions, particularly in online markets. This shift in focus comes in the wake of the EC's Digital Single Market agenda and the related E-commerce Sector Inquiry.

In its final report on the E-commerce Sector Inquiry of 10 May 2017, the EC identified a number of business practices that may restrict competition in the sector, including online pricing of consumer goods. Furthermore, the final report warned that "[w]ith pricing software, detecting deviations from 'recommended' retail prices takes a matter of seconds and manufacturers are increasingly able to monitor and influence retailers' price setting. . . . The wide-scale use of such software may in some situations, depending on the market conditions, raise competition concerns".

The EC's Decisions in *Denon & Marantz*, *Asus, Pioneer* and *Philips*

On 24 July 2018, in four separate decisions, the EC fined the electronic goods manufacturers Denon & Marantz, Asus, Pioneer and Philips a total of EUR 111.2 million for pressuring online retailers to maintain higher prices (a form of RPM) in breach of Article 101 TFEU. Such pressure was often found to have been exerted not only by junior staff, but also by senior management.

Specifically, retailers that offered their products at low prices were required to increase their prices under threat of penalties, including cuts in supplies and bonuses. Furthermore, in *Pioneer,* the company was also found to have limited the ability of its retailers to sell cross-border to consumers in other Member States—for example, by blocking orders of retailers that sold cross-border—so as to be able to sustain different resale prices in different Member States. In the *Pioneer* case in particular, the increase in resale prices and the prevention of cross-border online sales to other EEA countries was achieved via serial number tracking that allowed Pioneer to identify a lower-pricing retailer or parallel trader.

Many (online) retailers were found to have used pricing algorithms, which automatically adapted retail prices to those of competitors. While the EC did not view the use of such software in and of itself as a breach of the competition rules, it was found to have reinforced the effects of the pricing restrictions imposed by the manufacturers. Moreover, the use of monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene promptly in the event of price decreases.

While not explicit in the EC's decisions in *Denon & Marantz, Asus, Pioneer* and *Philips*, it is likely that the algorithm-enabled price monitoring in these cases may have increased the "gravity" percentage of the fines imposed, because such price monitoring can constitute a rigorous implementation of RPM.

According to the EC, the price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers. Specifically, the EC found that the manufacturers' conduct constituted a "by object" infringement of Article 101 TFEU. In other words, the EC confirmed that RPM and the hindrance of parallel trade practices by their very nature restrict competition and so cannot qualify for exemption pursuant to Article 101(3) TFEU.

None of the retailers involved were fined. Pioneer was fined EUR 10.2 million, Denon & Marantz was fined EUR 7.7 million, Asus was fined EUR 63.5 million and Philips was fined EUR 29.8 million. However, each of these manufacturers received generous reductions in fines (40 to 50 per cent) because they cooperated with the EC beyond their legal obligation. This was achieved by (i) providing additional evidence that strengthened the EC's ability to prove the infringement and so represented significant added value with respect to the evidence already in the EC's possession, (ii) acknowledging that the conduct constituted an infringement of Article 101 TFEU, and (iii) waiving certain procedural rights, resulting in administrative efficiencies.

Comment

The EC is increasingly taking an interest in vertical restrictions, in particular in online markets. Companies must, therefore, ensure that they have robust compliance programmes in place to make sure that staff are appropriately trained in what they can and cannot do in terms of controlling the activities of their retailers. Given the EC's emphasis on manufacturers' use of software tracking tools to identify price decreases, companies' compliance programmes should take into account the risk that such software may create suspicion that it is being used to help enforce an RPM scheme.

GCEU Confirms Parental Liability for Non-Pure Financial Investors

T-419/14, *The Goldman Sachs Group v Commission*, 12 July 2018

On 12 July 2018, by its judgment in Case T-419/14 *The Goldman Sachs Group v Commission*, the GCEU entirely dismissed the appeal brought by The Goldman Sachs Group, Inc., against an EC decision in Case AT. 39610 *Power Cables*, fining Goldman Sachs EUR 37.303 million for its parental liability arising out of an infringement of EU competition law by one of Goldman Sachs's former indirect subsidiaries.

EC Decision

On 2 April 2014, the EC imposed fines on suppliers of underground and submarine high-voltage power cables for their participation in a global market and customer sharing cartel. Prysmian Cavi e Sistemi Srl took part in the cartel from 18 February 1999 until 28 January 2009. Goldman Sachs was an indirect parent of Prysmian from 29 July 2005 until the end of the infringement by this company.

The EC held Goldman Sachs jointly and severally liable with Prysmian on the basis that Goldman Sachs was presumed to have exercised and actually exercised decisive influence over Prysmian between 29 July 2005 and 3 May 2007, and between 29 July 2005 and 28 January 2009, respectively.

According to the established case law, where a parent company has a 100 per cent shareholding in a subsidiary, the parent company is able to exercise decisive influence over the conduct of the subsidiary, and there is a rebuttable presumption that the parent company does, in fact, exercise a decisive influence over the conduct of its subsidiary. From 29 July 2005 to 3 May 2007, leaving aside an initial 41 days, Goldman Sachs held a shareholding of between 84.4 per cent and 91.1 per cent in Prysmian, falling short of 100 per cent. Nevertheless, the EC applied this case law to Goldman Sachs on the basis that Goldman Sachs held indirectly 100 per cent of the voting rights in Prysmian during this period.

The EC also found that Goldman Sachs indeed exercised decisive influence over Prysmian before and after 3 May 2007, the date on which shares in Prysmian were offered to the public in an initial public offering. The EC made this finding on the basis of objective factors, having regard to the economic, organisational and legal links between Goldman Sachs and Prysmian, including Goldman Sachs's appointment of the board of directors, its power to call for shareholder meetings and to propose to revoke directors, and interlocking directors between the two companies, as well as those directors' important role on other committees, receipt of regular updates and monthly reports, and broad powers of management.

GCEU Judgment

Goldman Sachs challenged the EC decision before the GCEU. In particular, Goldman Sachs disputed the EC's application of the presumption of exercise of decisive influence and the findings regarding the rebuttal of the presumption and the actual exercise of decisive influence.

The GCEU upheld the EC's application of the presumption of exercise of decisive influence. The GCEU confirmed that where a parent company is able to exercise all the voting rights associated with its subsidiary's shares, that parent company is in a position to exercise total control over the conduct of that subsidiary without any third parties, even if it does not hold all or virtually all the share capital of the subsidiary. The GCEU then found that even after Goldman Sachs's divestments of its equity interests in Prysmian, Goldman Sachs continued to be able to exercise 100 per cent of its voting rights because the divestments were subject to conditions ensuring that the new shareholders could not exercise any voting rights associated with their shareholding.

The GCEU also upheld the EC's finding that Goldman Sachs failed to adduce sufficient evidence to rebut the presumption, and agreed that Goldman Sachs indeed exercised decisive influence over Prysmian during the entire period from 29 July 2005 until 28 January 2009.

With regard to Goldman Sachs's claim that no parental liability should be attributed to it because it was purely a financial investor, the GCEU reiterated the case law that no parental liability should be attributed to a "pure financial investor", *i.e.*, "an investor who holds shares in a company in order to make a profit, but who refrains from any involvement in its management and in its control". The GCEU found that Goldman Sachs failed to demonstrate that it refrained from any involvement in the management and control of Prysmian. The fact that Goldman Sachs's employees who sat on the various Prysmian boards of directors did not have the qualifications or expertise to manage Prysmian's business was incapable of calling into question the fact that those employee directors were involved in Prysmian's commercial policy in so far as they sat on the boards of directors of that company and on its strategic committee and held delegated management powers. Goldman Sachs's claim that it had no interest in controlling Prysmian was also contradicted, *inter alia*, by the fact that it appointed all the boards of directors of that company during the infringement period and that its appointees sat on the company's strategic committee after the initial public offering.

The GCEU dismissed all the other arguments made by Goldman Sachs and dismissed Goldman Sachs's case in its entirety.

Comment

Following the case law, the GCEU accepted that parental liability is not applicable to "*pure* financial investors". However, the GCEU made it clear that investment banks and private equity firms should not fall automatically under the category of "pure financial investors" just because they are investment professionals. They need to refrain from *any* involvement in the management and control of the subsidiary to be considered as pure financial investors.

In light of the difficulty of qualifying as pure financial investors, investment professionals should implement risk mitigation measures, including stricter due diligence before the acquisition of portfolio companies, and the introduction and reinforcement of antitrust compliance programmes in their portfolio companies.

An appeal by Goldman Sachs to the CJEU is pending (C-595/18 P).

CJEU Refers Smart Card Chips Cartel Case Back to GCEU, Dismisses Philips Appeal

C-98/17 P, *Philips and Philips France v Commission*; C-99/17 P, *Infineon Technologies v Commission*, 26 September 2018

On 26 September 2018, the CJEU considered that the GCEU had not taken into account certain possibly mitigating circumstances—namely the relatively small number of Infineon's unlawful contacts with other cartel participants—and therefore referred the case back to the GCEU for reconsideration on this point. On the same day, the CJEU dismissed an appeal lodged by Philips in its entirety.

In September 2014 the EC issued an infringement decision in the smart card chips case and imposed fines totalling EUR 138 million on Infineon, Philips, Renesas and Samsung for exchanging commercially sensitive information and for coordinating their pricing behaviour through bilateral contacts between September 2003 and September 2005.

Infineon and Philips challenged the EC's decision before the GCEU, disputing the existence of a cartel and the amount of the fines.

Before the GCEU, Infineon argued that it had participated in only a few bilateral contacts and therefore asked the GCEU to consider whether it was liable for participating in the alleged infringement. It also argued that the amount of the fine as set by the EC did not take into account the fact that its participation in the bilateral contacts was limited, and thus the level of the fine was inappropriate. The GCEU ruled that the finding of a single and continuous infringement must be distinguished from the question of whether an undertaking is liable for that infringement in its entirety.

The GCEU upheld the EC's findings that each company had participated in anti-competitive information exchanges constituting restrictions of competition by object, and that there was a single and continuous infringement. Infineon and Philips also alleged procedural errors by the EC and errors in the calculation of the fines imposed.

On 15 December 2016, the GCEU dismissed both cases, prompting Infineon and Philips to lodge appeals with the CJEU.

Inter alia, Infineon and Philips disputed the GCEU's assessment of the existence of a cartel. Infineon and Philips also claimed that the EC and the GCEU failed to have regard to the conditions for establishing a single and continuous infringement. Infineon also claimed that the EC and the GCEU erred in law in respect of the calculation of the fine imposed on Infineon.

With regard to the finding of the existence of an infringement of Article 101(1) TFEU, the CJEU held that a company can infringe Article 101 TFEU even if it has only exchanged information with some of the competitors involved in the collusion by means of bilateral communication. The CJEU also upheld the GCEU's finding that the existence of a single and continuous infringement was a separate question from the question of whether an undertaking should be held liable for the entire infringement. The CJEU held that Infineon was liable for the overall infringement even though it had not participated in all aspects of the single and continuous infringement, and thus rejected this ground of appeal in its entirety.

In its appeal before CJEU, Infineon also claimed that, on the question of the calculation of the fine, the GCEU erred in law by taking into account only five of the 11 bilateral contacts the EC relied upon to hold Infineon liable for participating in the single and continuous infringement.

The CJEU held that, in the exercise of its unlimited jurisdiction in relation to the fine imposed, the GCEU should have considered all complaints based on issues of law to assess whether the relatively small number of Infineon's unlawful contacts justified a reduction in the fine that went beyond the reduction the GCEU had already granted on account of other mitigating circumstances. The CJEU referred the case back to the GCEU to assess the proportionality of the fine. The GCEU is under a strict obligation take into account each and every factor that may have an impact on the gravity of the infringement and therefore on the final amount of the fine.

On the other hand, Philips's claim that the EC had applied a disproportionate fine was dismissed. The CJEU held that it is only in cases where the fine is "excessive to the point of being disproportionate" that the CJEU will find that the GCEU erred in law.

Application of Jurisdiction Clauses to Competition Damages Actions Depends on Cause of Action

C-595/17, *Apple Sales International and Others*, 24 October 2018

The CJEU recently ruled that a jurisdiction clause does not need to refer expressly to disputes arising from a breach of competition law where damages are claimed based on Article 102 TFEU (*i.e.,* for abuse of a dominant position). This contrasts with the CJEU's position in follow-on cartel damages claims (under Article 101 TFEU), where a jurisdiction clause must specifically refer to disputes concerning an infringement of competition law.

When a private claim is made in relation to an alleged infringement of competition law, the claimant may be able to sue in a number of different jurisdictions. It might be thought that one way for the allegedly infringing company to limit forum-shopping by claimants would be to include a jurisdiction or arbitration clause in its agreements. Such jurisdiction or arbitration clauses are quite standard and are included, for good reason, in most commercial contracts. They can benefit both parties by enhancing predictability and allowing the parties to choose a dispute-resolution forum with which they are familiar and comfortable. Jurisdiction clauses are therefore given special protection by Article 23(1) of the Brussels Regulation (now Article 25 of Brussels Recast), the EU legislation that regulates the division of jurisdiction between the courts of EU Member States.

Yet the CJEU in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others* (CDC) ruled that Article 23(1) "must be interpreted as allowing, in the case of actions for damages for an infringement of Article 101 TFEU [relating to anticompetitive agreements] . . . account to be taken of jurisdiction clauses contained in contracts for the supply of goods . . . *provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law*" (emphasis added). Needless to say, it is unlikely that many jurisdiction clauses will refer to the possibility of competition law infringement. As a result, claimants in cartel follow-on claims will likely be able to ignore jurisdiction clauses to which they signed up, thus potentially multiplying the number of jurisdictions in which alleged infringers will have to defend themselves and increasing the risk of forum-shopping.

The *eBizcuss* Case

In another judgment rendered on 24 October 2018 in *Apple and Others* v MJA (known as the *eBizcuss* case), the CJEU reached a different conclusion in relation to Article 102 TFEU, which relates to abuse of a dominant position.

EBizcuss was a former authorised distributor of Apple products in France. In 2012 eBizcuss lodged a damages claim before the Paris Commercial Court against Apple. EBizcuss claimed that certain discriminatory practices on the part of Apple had caused eBizcuss to incur significant financial damage and that Apple's practices were abusive within the meaning of Article 102 TFEU.

Apple and eBizcuss had inserted a jurisdiction clause in their distribution contract. The jurisdiction clause stipulated that the Irish courts were to have jurisdiction in the event of any dispute arising out of the contract. In light of this clause, the Paris Commercial Court declined jurisdiction. On appeal, the Paris Court of Appeal upheld the Paris Commercial Court's rejection of the case on the basis that the French courts lacked jurisdiction.

However, the Court of Cassation and the Versailles Court of Appeal took a different view and referred the case back to the Paris Commercial Court. On further appeal by Apple to the Court of Cassation, the latter stayed proceedings and asked the CJEU for clarification of Article 23 of the Brussels Regulation.

The CJEU held that Article 23 of the Brussels Regulation does not exclude the invocation of a jurisdiction clause in an action for damages based on Article 102 TFEU merely because that clause does not expressly refer to disputes relating to liability resulting from an infringement of competition law. The CJEU's ruling in *eBizcuss*, therefore, stands in contrast to the position taken in CDC in the context of a follow-on cartel damages action based on Article 101 TFEU. In support of its contrasting position, the CJEU held that "while the anti-competitive conduct covered by Article 101 TFEU, namely an unlawful cartel, is in principle not directly linked to the contractual relationship between a member of that cartel and a third party affected by the cartel, the anticompetitive conduct covered by Article 102 TFEU, namely the abuse of a dominant position, can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms".

Comment

With its judgment in the *eBizcuss* case, the CJEU added another piece to the puzzle in clarifying how Article 23(1) of the Brussels Regulation (now Article 25 of Brussels Recast) is to be interpreted in the context of the applicability of jurisdiction clauses in competition law damages actions based on Article 102 TFEU (i.e., for abuse of a dominant position). The *eBizcuss* judgment repeats the CJEU's finding in *CDC* that choice of jurisdiction clauses are enforceable only in actions "directly linked to the contractual relationship" in the context of which the jurisdiction clauses have been concluded. Not surprisingly, the Court considers that actions based on Article 102 TFEU are more likely to be directly linked to such a contractual relationship than damages actions for breach of Article 101 TFEU.

One piece of the puzzle that remains to be identified is whether arbitration (as opposed to jurisdiction) clauses should be considered binding in relation to damages claims based on Articles 101 and 102 TFEU. The CJEU missed the opportunity to address that issue at the time of the *CDC* judgment in 2015. By contrast, the Advocate General in *CDC* opined that an arbitration clause is not in itself inapplicable in the context of a competition law damages action, but that in the case of a clandestine cartel, claimants would likely have had insufficient knowledge of an infringing agreement and its unlawful nature to give consent to an arbitration clause covering claims arising from an illicit agreement. The Advocate General opined that in such circumstances, the invocation of an arbitration clause should be precluded. It remains to be seen whether the CJEU will follow that approach, which would strike a blow against arbitration in Europe.

Geo-Blocking: EC Fines Guess EUR 39.8 Million

AT. 40428, *Guess*, 17 December 2018

On 17 December 2018, the EC announced its decision to fine the clothing and accessories company Guess EUR 39.821 million for restricting retailers from online advertising and selling cross-border to consumers in other Member States. By doing so the company was able to maintain artificially high retail prices. This practice is called geo-blocking and is in breach of Article 101 TFEU. Under EU competition rules, customers must be able to purchase from any authorised retailer across the EU Member States.

Guess operates a selective distribution system in the EEA, whereby it chooses authorised retailers through whom it sells its products. In June 2017, the EC opened a formal investigation into Guess's distribution practices. This followed upon the EC's final report on the E-Commerce Sector Inquiry published in May 2017, in which the EC highlighted the fact that retailers commonly experienced cross-border sales restrictions in their distribution agreements.

The EC found that, between 1 January 2014 and 31 October 2017, Guess's distribution agreements restricted authorised retailers from using the Guess brand names and trademarks for the purposes of online search advertising, and from selling online without prior authorisation from Guess. The company had full discretion over the grant of this authorisation, which was not subject to any specified quality criteria. Guess also applied other illegal restrictions that prevented retailers from selling to consumers located outside the authorised retailers' allocated territories; cross-selling among authorised wholesalers and retailers; and independently deciding on the retail price at which they sold Guess products.

The EC found that through these restrictions, Guess was able to partition the European market. The EC noted that retail prices for Guess products in Central and Eastern European markets were on average 5 to 10 per cent higher than in Western Europe.

Guess's fine was reduced by half because the company cooperated with the EC "beyond its legal obligation to do so". For instance, Guess informed the EC of the restriction on the use of Guess's brand name and trade marks in online advertising not yet known to the EC, provided evidence of significant added value, and acknowledged the infringements.

The EC's decision closely followed the 3 December 2018 entry into force of Regulation 2018/302 on unjustified geo-blocking. The Regulation bans geo-blocking within the EEA and other forms of discrimination based on customers' nationality, place of residence or place of establishment, including automatically re-directing customers to another website or the application of discriminatory conditions for payment transactions. The ban on geo-blocking has become a priority under the EU digital single market strategy, which was published on 6 May 2015.

Abuse of Dominant Position

EC Fines Qualcomm for Abuse of Dominant Position on Chipsets Market

AT.40220, *Qualcomm*, 24 January 2018

On 24 January 2018 the EC fined Qualcomm EUR 997 million for hindering competition on the market for Long-Term Evolution (LTE) basebands chips, in breach of Article 102 TFEU.

Baseband chipsets, which enable smartphones and tablets to connect to cellular networks, are used both for voice and data transmission. Basebands chipsets comply with the 4G LTE standard.

Qualcomm entered into an agreement with its key customer, Apple, between 2011 and 2016, by which Qualcomm committed to make significant payments to Apple in return for Apple using exclusively Qualcomm's LTE baseband chips in its mobile and tablet devices. Moreover, under the agreement, Apple was required to return a large part of Qualcomm's payments if it decided to switch chip suppliers.

The EC opened an investigation in July 2015 and issued a Statement of Objections against Qualcomm in December 2015.

The EC determined that Qualcomm held a dominant position on the worldwide LTE chipset market, which is characterised by high barriers to market entry. Indeed, more than 90 per cent of chipsets sold worldwide are produced by Qualcomm. Comprehensive research and development is required to produce LTE baseband chipsets, and Qualcomm's protection, through its intellectual property rights, constituted a significant barrier.

On examination of Apple's internal documents, the EC found that Qualcomm had abused its dominant position on the worldwide market for LTE chipsets from 25 February 2011 through 16 September 2016.

First, the exclusivity payments reduced Apple's incentives to switch to competing LTE chipset suppliers. The agreement made clear that Qualcomm would cease these payments if Apple launched commercially a device with a chipset supplied by a competitor of Qualcomm. According to the EC, the costs of switching were set so high that Apple would have had little incentive to switch suppliers.

Second, Qualcomm's competitors, such as chipmaker Intel, were denied the possibility of competing effectively on the market. Apple is an attractive customer for LTE chipset suppliers because of its importance for entry or expansion in the worldwide LTE chipset market. Thus, Qualcomm foreclosed competing companies.

Last of all, Qualcomm did not demonstrate that these exclusivity payments were counterbalanced or outweighed by advantages in terms of efficiency that also benefited the consumer.

The amount of the fine takes account of the duration and gravity of the infringement, and is aimed at deterring Qualcomm and its competitors from engaging in future anti-competitive conduct. The fine comes close to the EUR 1.06 billion fine imposed by the EC on Intel in 2009 for payment of exclusivity rebates. The anti-competitive foreclosure effects of the behaviour were paramount in both cases.

CJEU Clarifies Concept of Competitive Disadvantage from Discriminatory Pricing on Downstream Market

C-525/16, MEO – *Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, 19 April 2018

The CJEU held that a finding of a "competitive disadvantage" as the result of discriminatory pricing by a dominant undertaking on a downstream market does not require demonstration of an actual and quantifiable deterioration of a customer's competitive situation on that market. This notion requires only the demonstration of a possible effect on said competitive situation, after a concrete examination of all relevant circumstances.

GDA is a nonprofit collecting society and the sole body responsible for the collective management of artists' and performers' rights in Portugal. Between 2010 and 2013, GDA applied three separate wholesale tariffs on various pay-TV service providers for the transmission of signal and content. GDA charged one of the suppliers, MEO, a tariff set by an arbitration decision of 10 April 2012, in default of an agreement reached during the negotiation of the rights.

On 24 June and 22 October 2014, MEO lodged a complaint with the Portuguese competition authority alleging abuse by GDA of a dominant position, namely excessive pricing and the application of unequal terms and conditions between MEO and another pay-TV supplier, NOS.

On 19 March 2015, the Portuguese competition authority opened an investigation. A year later, on 3 March 2016, the investigation was discontinued on the grounds that there was insufficient evidence of abuse of a dominant position.

MEO brought an action against this decision before the Portuguese Competition, Regulation and Supervision Court, arguing that it was vitiated by an error of law, since the Portuguese competition authority had examined whether there was a significant and quantifiable distortion of competition, instead of assessing the criterion of competitive disadvantage, as interpreted by CJEU case law. According to MEO, the authority should have examined whether the conduct at issue was capable of distorting competition.

The national court decided to stay proceedings and refer eight questions to the CJEU for a preliminary ruling, essentially asking whether the concept of "competitive disadvantage" within the meaning of subparagraph (c) of the second paragraph of Article 102 TFEU must be interpreted as requiring analysis of the specific effects of differentiated prices applied by a dominant undertaking on the competitive situation of the undertaking affected, and, as the case may be, whether the seriousness of those effects should be taken into account.

The CJEU stated that in order to make a finding of a "competitive disadvantage" within the meaning of Article 102(c) TFEU, there must be a finding not only that the conduct of a dominant undertaking is discriminatory, but also that it tends, in light of all the circumstances of the case, to distort that competitive relationship—that is to say, that it hinders the competitive position of some of the customers of that dominant undertaking.

However, the CJEU also stated that no further evidence of an actual and quantifiable deterioration in the competitive situation of customers taken individually can be required. On the other hand, the competition authority or the competent national court is required to carry out a specific examination of all the relevant circumstances in order to determine whether price discrimination produces or is likely to produce a competitive disadvantage within the meaning of subparagraph (c) of the second paragraph of Article 102 TFEU.

The CJEU then clarified what it means by specific examination. It affirmed that it is open to a competition authority or court to assess:

- The undertaking's dominant position
- The negotiating power as regards the tariffs
- The conditions and arrangements for charging those tariffs
- Their duration and their amount

- The possible existence of a strategy to exclude from the downstream market a customer that is at least as efficient as competitors on that market

Even if it is for the national court to verify those points in order to determine whether the differentiation in the main proceedings was liable to cause a competitive disadvantage against MEO, the CJEU itself undertook review of each of those points in the instant case.

With regard to the dominant position and the negotiating power, the CJEU observed that there are indications that GDA's main customers—MEO and NOS—have a certain negotiating power vis-à-vis GDA, and that in this case GDA merely applied the prices fixed by the arbitration decision.

With regard to the duration of application and the amount of the tariffs in question in the main proceedings, the CJEU noted that the differentiated tariffs were applied between 2010 and 2013, and that the amounts represented a relatively small percentage of the total costs borne by MEO in the context of its service offer, so that the differentiation of tariffs had a limited influence on MEO's profits in that context. In the CJEU's view, however, where a tariff differentiation does not have a significant impact on the costs borne by the operator which considers itself to be wronged, or on the profitability and profits of that operator, it may, in some circumstances, be deduced that that tariff differentiation is unlikely to have any effect on the operator's competitive position.

Finally, with regard to a possible foreclosure strategy, the CJEU observed that in the present case the undertaking in a dominant position had, in principle, no interest in foreclosing one of its trade partners from the downstream market.

CJEU: Abuse of Dominance Fine Calculation Does Not Have to Include Actual Effects of Infringement

C-123/16 P, *Orange Polska v Commission*, 25 July 2018

On 25 July 2018 the CJEU dismissed an appeal by Orange Polska SA against a GCEU judgment upholding an EC decision that imposed a fine of more than EUR 127 million on Orange for abusing its dominant position. The CJEU confirmed that, as in the case of a cartel, the EC does not have to take account of the actual effects of the infringement in its assessment of the gravity of the infringement for purposes of calculating the fine in a case of abuse of dominance.

EC Decision

By decision of 22 June 2011, the EC found that Orange, a telecommunications company, had abused its dominant position in the wholesale bit-stream access market and the wholesale local-loop unbundling market by developing and implementing a strategy aimed at limiting competition at all stages of the procedure for access to its network by alternative operators.

In determining the proportion of the value of sales to be used to establish the basic amount of the fine, the EC took into account, in particular, the nature of the infringement, the geographic scope, the market shares and the fact that the infringement had been implemented. In assessing the nature of the infringement, the EC noted that because Orange was aware of the illegality of its conduct, the abuse negatively affected the competition and consumers.

GCEU Judgment

On appeal to the GCEU, Orange submitted (i) that the EC failed to state reasons for its assessment of the actual effects of the infringement (although it did take them into account), and (ii) that the EC committed errors in assessing the likely effects of the infringement.

The GCEU rejected those arguments. The GCEU found that the EC did not take account of the actual effects of the infringement, nor its likely effects, in assessing the gravity of the infringement. Thus, Orange's second argument was ineffective.

With regard to Orange's first argument, the GCEU held that in this case, the EC did not have to show the existence of the actual effects of the infringement, in accordance with the CJEU judgment in *Prym and Prym Consumer v Commission*. In *Prym* (a cartel case), the CJEU held that the actual impact of the infringement is an optional element in the assessment of the gravity of the infringement, but if the EC decides to take that element into account, it must provide specific, credible and adequate evidence with which to assess the actual influence that the infringement may have had on competition.

CJEU Judgment

Before the CJEU, Orange argued (i) that the GCEU distorted the EC decision in finding that the EC took account of neither the actual effects nor the likely effects of the infringement, and (ii) that the GCEU failed to exercise its power to review the evidence of the likely effects of the infringement that were taken into account in calculating the fine.

The CJEU found that the GCEU did not distort the EC decision in finding that the EC had not taken into account the actual or likely effects of the infringement in the assessment of the gravity of the infringement for the purposes of the calculation of the fine. The CJEU then held that the GCEU was correct in finding that the EC did not have to show the existence of the actual effects of the infringement. The CJEU also upheld the GCEU's rejection of Orange's argument regarding the likely effects as ineffective.

The CJEU dismissed Orange's second argument because of its erroneous premise that the EC took into account the likely effects of the infringement in the assessment of the gravity of the infringement.

Comment

In his Opinion on this case, Advocate General Wathelet maintained that, in the case of abuse of a dominant position, the judgment in *Intel Corporation v Commission* should apply, by analogy, to calculation of the basic amount of the fine. In *Intel*, the CJEU considered that the analysis of the capability to restrict competition should be carried out in light of all the circumstances, including an examination of all the arguments and evidence to the contrary submitted by the accused undertaking, thereby adopting a more effects-based approach to abuse of dominance cases.

By confirming that there was no distortion of the EC decision, the CJEU did not have to address this issue directly. However, in line with *Prym*, the CJEU confirmed that the actual effects of the infringement constitute an optional element in the assessment of the gravity of the infringement in abuse of dominance cases just as in cartel cases. The CJEU remains silent about whether the *Prym* judgment applies to the likely effects of the infringement, but appears to consider that the EC is not obliged to take account of those effects in the assessment of the gravity of the infringement.

Going forward, in order to avoid the complex and laborious task of reflecting the actual or likely effects of the infringement in the assessment of the gravity, the EC is likely to avoid references in its fining decisions that could be interpreted as referring to effects of the infringement, such as negative impact on competition and consumers.

Merger Control

EC Imposes Record EUR 124.5 Million Fine for Gun-Jumping

M.7993, *Altice/PT Portugal*, 24 April 2018

When drawing up an acquisition agreement in a transaction that will be notifiable to the EC for clearance under the EUMR (European Union Merger Regulation), the acquirer must ensure that any veto or similar rights that it has prior to implementation of the transaction are strictly limited to that which is necessary to preserve the value of the target. These rights must not enable the acquirer to exercise a decisive influence over the commercial affairs of the target prior to notification or prior to clearance of the transaction. In addition, it is strictly prohibited for the acquirer to obtain commercially sensitive information from the target prior to clearance of the transaction. Infringement of these rules can result in the imposition of enormous administrative fines.

Altice S.A. and its subsidiary, Altice Portugal S.A., entered into a share purchase agreement with the Brazilian telecom operator Oi S.A. whereby Altice would acquire sole control of Oi's subsidiary, PT Portugal, by way of purchase of shares. The transaction agreement was signed on 9 December 2014.

On the basis of the market investigation results, the EC found that the transaction raised serious doubts as to its compatibility with the internal market in Portugal. Altice formally submitted commitments on 25 February 2015 under Article 6(2) of the EUMR. On 20 April 2015, the EC adopted a decision under Article 6(1)(b) of the EUMR in conjunction with Article 6(2) thereof, declaring the transaction compatible with the internal market, subject to full compliance by Altice with the obligations and conditions annexed to the decision. On 2 June 2015, Altice publicly announced that it had closed the transaction.

The transaction agreement set out the principles by which Altice and Oi had agreed that PT Portugal should conduct its operations between the signing date and the closing date. The relevant provisions included both a positive obligation to carry out PT Portugal's activities in the ordinary course of business and in accordance with past practice unless approved by Altice, and a negative obligation not to undertake certain corporate, competitive and commercial action without Altice's prior consent. Between the signing date and adoption of the clearance decision, Oi was to send formal notices to Altice requesting its consent prior to taking certain action, and Oi actually sent nine such formal notices. In order to supplement the transaction agreement, Altice and Oi also communicated via telephone calls, emails and meetings.

The EC recognised that clauses determining the conduct of a target between signing a transaction agreement and closing the transaction in order to preserve its value are both common and appropriate in commercial transactions. However, an agreement which grants the buyer the ability to exercise decisive influence over a target prior to clearance is only justified if strictly limited to that which is necessary to ensure that the value of the target is maintained. The EC considers that the buyer and the target should remain active as independent operators before the closing date.

In this case, the contacts between Altice and PT Portugal extended beyond what was necessary and resulted in Altice being involved across all major areas of PT Portugal's activities, including the most commercially sensitive areas of the business, such as pricing. Concretely, Altice's contacts were to influence (i) the appointment of PT Portugal's senior management staff, (ii) PT Portugal's pricing policy and commercial terms and conditions with customers, and (iii) the ability to enter, terminate or modify a wide range of PT Portugal's contracts.

With regard to item (i) above, the EC concluded that having a veto right over the appointment, dismissal and changes to the terms of employment of any officer or director, irrespective of whether retention of that director or officer was integral to the value of the business, went beyond what was necessary to preserve the value of the target's business and granted Altice the ability to exercise control over PT Portugal.

As for item (ii), the EC considered that decisions on pricing form a fundamental part of a company's commercial policy, and the unfettered ability to set prices is essential for any company to compete independently and effectively in the market. Therefore, the requirement to obtain Altice's consent prior to modifying its pricing policies and standard offer prices inherently reduced PT Portugal's discretion and ability to act independently on the market. Altice's veto right over PT Portugal's commercial decisions went beyond what was necessary.

With regard to (iii), the EC considered that having veto rights over almost all commercial action with a low monetary threshold in the context of the target's business went beyond what would be necessary to maintain the value of the target. In the present case, Altice's veto rights covered a very broad range of commercial actions, including all commercial arrangements for both variable costs and fixed costs with respect to commercial, financial and administrative matters.

In this case, besides the veto rights, Altice also acquired commercially sensitive information from PT Portugal, partly prior to the date of the notification, prior to the date of the clearance decision and long after the due diligence phase had been completed. Many of these exchanges of information took place at Altice's initiative, with Altice proposing an agenda for the meetings and requesting specific information from PT Portugal in the follow-up to the meetings. The information included PT Portugal's up-to-date financial results of its business in the consumer segment, business segment and international wholesale segment. The EC indicated that such information was potentially harmful in the hands of a competitor and that it was difficult for the EC to restore the prior competitive situation once the information had been exchanged.

Furthermore, Altice was heavily involved in the decision-making process at PT Portugal between the signing date and adoption of the clearance decision. Even in situations where the transaction agreement did not require PT Portugal to obtain Altice's prior agreement, a variety of commercial decisions were not made unless and until Altice consented.

Consequently, the EC considered that Altice had the possibility to exercise decisive influence over PT Portugal's business through its veto rights and that Altice's actions constituted actual exercise of decisive influence. Therefore, Altice had infringed Article 7(1) of the EUMR by implementing the transaction prior to clearance by the EC. For this breach the EC imposed a fine of EUR 62.25 million.

Moreover, Altice's veto right over the appointment of the target's senior management; the setting of the target's pricing policies; and the conclusion, modification and termination of contracts and other commercial actions existed even prior to notification of the transaction to the EC. Furthermore, Altice actually exercised control over the target through the campaign, the contract and the meeting before notification. The EC therefore concluded that Altice had infringed Article 4(1) of the EUMR by failing to notify the transaction prior to implementation. For this infringement, the EC imposed an additional fine of EUR 62.25 million, bringing the total fines to EUR 124.5 million.

GCEU Annuls EC Rejection of Lufthansa's Request for Waiver of Fare Commitments

T-712/16, *Deutsche Lufthansa AG v Commission*, 16 May 2018

Deutsche Lufthansa AG is a joint founder member of Star Alliance, the largest global airline alliance. In addition to the Star Alliance Agreement, Lufthansa concluded with Scandinavian Airlines System (SAS) a bilateral alliance agreement, a marketing and sales agreement, and a bilateral joint venture agreement. Lufthansa also concluded five agreements at different times with Polskie Linie Lotnicze LOT S.A. (LOT): a reciprocal codeshare agreement, a special prorate agreement, a strategic cooperation agreement, an incentive programme framework agreement, and the Miles and More cooperation agreement.

After all these agreements were in place, Lufthansa acquired control of Swiss International Air Lines Ltd. This last operation was notified to and reviewed by the EC under the EUMR.

When examining Lufthansa's proposed acquisition of Swiss, the EC concluded that there were serious doubts as to the compatibility of the transaction with the internal market as far as concerned the Zurich-Stockholm (ZRH-STO) and Zurich-Warsaw (ZRH-WAW) routes. In order to dispel these doubts, Lufthansa and Swiss proposed commitments concerning slots, in particular for the ZRH-STO and ZRH-WAW routes.

By decision of 4 July 2005 (2005 Clearance Decision), the EC declared that the transaction was compatible with the internal market, subject to certain conditions and obligations contained in the commitments. These commitments contained two review clauses, worded as follows:

- 15.1 The Commission (EC) may, in response to a request from the Merged Entity justified by exceptional circumstances or a radical change in market conditions, such as the operation of a Competitive Air Service on a particular Identified European or Long-Haul City Pair, waive, modify, or substitute any one or more of the undertakings in these Commitments.
- 15.2 At the request of the Merged Entity, all the Commitments submitted herein may be reviewed, waived or modified by the Commission based on long-term market evolution. (…)

Just over eight years after the EC's approval of Lufthansa's acquisition of Swiss, Lufthansa and Swiss submitted a request seeking a waiver of the fare commitments applicable to the ZRH-STO and ZRH-WAW routes. The waiver request was based on three elements:

- The termination of the joint venture agreement with SAS
- The EC's change of policy with respect to the treatment of alliance partners in the context of merger reviews
- The existence of competition between Swiss and SAS/LOT

By decision of 25 July 2016 (the Contested Decision), the EC rejected Lufthansa's request for a waiver.

Lufthansa brought an action before the GCEU, claiming annulment of the Contested Decision. The GCEU annulled the Contested Decision with regard to the ZRH-STO route, but dismissed Lufthansa's action with regard to the ZRH-WAW route.

Before addressing Lufthansa's various pleas, the GCEU considered a preliminary matter concerning the margin of assessment available to the EC in the examination of a request that commitments be waived.

This preliminary matter was important because the established case law recognises that the EC has a certain discretion in making complex economic assessments of proposed mergers, but does not say anything about the EC's discretion in the assessment of a request for waiver of commitments given in the context of an earlier merger decision. The GCEU reasoned that "the appraisal of a waiver request entails sometimes complex economic assessments in order, in particular, to ascertain whether market circumstances, more generally, have changed significantly and on a permanent basis, so that the commitments are no longer necessary for the purpose of overcoming the competition problems identified in the merger decision that made the commitments binding".

For these reasons the GCEU decided that the EC "also has a certain discretion in the assessment of a waiver request entailing complex economic assessments". Such discretion is subject to the same principles as in merger review decisions, namely that the EC is "obliged to carry out a careful examination of that request, to conduct, if necessary, an investigation, to make the appropriate enquiries and to base its conclusions on all the relevant information."

Last of all, and of equal importance, the GCEU emphasised that the 2005 Clearance Decision had become final and so Lufthansa could not, in the context of the present proceedings, indirectly challenge the legality of that decision, particularly the legality of the commitments accepted.

Coming now to the substance of Lufthansa's case, the GCEU examined Lufthansa's argument that the review request was justified by the fact that the joint venture agreement with SAS had been terminated. The GCEU observed that, according to the 2005 Clearance Decision, Star Alliance partners, such as SAS and LOT, could not be regarded as Lufthansa's competitors and had little or no incentive to compete with Swiss post-merger. This conclusion was based on a series of agreements that resulted in extensive cooperation between Lufthansa and SAS/LOT. Consequently, the GCEU considered that the amendment or removal of these agreements appeared to be capable of removing the competition problems identified in the EC's 2005 Clearance Decision and, by the same token, capable of justifying the waiver of the commitments.

The CGEU observed that the Contested Decision contained no analysis or individual assessment of the various bilateral agreements entered into by Lufthansa, and thus it was not clear from the Contested Decision what the impact of the termination of any of those agreements would be. The GCEU held that by failing to examine the impact of the termination of the joint venture agreement, either on its own or in conjunction with the undertaking also to terminate the bilateral alliance agreement, the EC did not take into account all the relevant elements for the assessment of the waiver request.

With respect to Lufthansa's argument based on the EC's change of policy in the treatment of alliance partners in the context of merger reviews, the GCEU observed that the EC had failed to carry out a thorough examination of the argument. This argument was central to discussions throughout the administrative procedure.

As for the agreement entered into after the 2005 Clearance Decision, namely the codeshare agreement between Swiss and SAS, the GCEU concluded that although the codeshare agreement and the original agreement differed in scope, content and contracting parties, consideration should have been given to whether the codeshare agreement had sufficiently close links with the contractual relationships and competition problems addressed in the EC's 2005 Clearance Decision.

In the present case, an examination of the impact of the codeshare agreement on competition on the ZRH-STO route was necessary to determine whether, and to what extent, that agreement was liable to restrict or remove competition between Swiss and SAS. However, the Contested Decision did not evaluate in detail the impact of the code share agreement on Swiss and SAS.

As for Lufthansa's argument based on competition between Swiss and SAS/LOT as evidenced by price reductions, the GCEU observed that the Contested Decision merely stated that the parties had not adduced any compelling evidence that those price reductions had been caused by competition between Swiss and LOT and that they could also be attributed to the decline in fuel prices or to the effect of the fare commitments. The GCEU said that the EC "cannot limit itself to demanding compelling evidence––without, moreover, specifying what that evidence should consist in––but must establish the inaccuracy of the evidence put forward by the parties, make enquiries or conduct, if necessary, an investigation in order to supplement that evidence or show that it is not conclusive". On the particular facts of the case, the GCEU found that the EC had "failed to fulfil its duty carefully to examine all the relevant information, to make enquiries or to conduct the necessary investigations in order to determine whether there was competition between Swiss and SAS/LOT".

For all these reasons, the GCEU concluded that the EC made a manifest error of assessment inasmuch as it failed to take into account all the relevant information, and that the matters relied on in the Contested Decision were not capable of justifying the rejection of the waiver request relating to the ZRH-STO route.

On the other hand, the failures of the EC were not sufficient to justify annulment of the Contested Decision as it concerned the ZRH-WRW route, because there had been no change in the contractual relationship between Swiss and LOT since the adoption of the 2005 Clearance Decision.

In light of this case, business operators can be reassured that the EC is subject to the same standards of judicial review when it examines a request for review of merger control commitments as when it examines the original application for merger clearance. However, those standards recognise that the EC has an important margin of discretion. Business operators, therefore, should marshal as much convincing evidence and argument as possible when they submit a request for a review of commitments so as persuade the EC to grant it.

French Minister of Economy and Finance Uses Merger Re-Examination Power for First Time

18-DCC-95, *Cofigéo/Agripole*, 19 July 2018

Article L. 430-7-1, II of the French Commercial Code provides that the French Minister of Economy and Finance has the power to re-examine a merger within 25 working days after receiving the French Competition Authority (FCA) decision, for reasons of public interest other than safeguarding competition, including considerations linked to industrial development, the international competitiveness of the undertakings concerned, and the creation or maintenance of employment. The Minister had never exercised this right since the 2008 adoption of the new legal framework for merger control.

Agripole faced financial difficulties in early 2017 when its CEO passed away and significant accounting frauds were discovered. As a result, Agripole received financial support from the French Government, although its production facilities had stopped producing. The French commercial court approved Cofigéo as the acquirer of the ready meals branch of Agripole in October 2017.

When a target is experiencing serious economic difficulties, the French Commercial Code allows the companies to close the transaction without having to wait for the FCA's green light. The transaction must be scrutinised by the FCA ex-post, however.

On 14 June 2018, the FCA cleared Cofigéo's acquisition of Agripole's ready meals business (William Saurin, Panzani, Garbit) but determined that remedies were necessary to counteract the restrictive effects on competition. In the absence of sufficient remedies proposed by Cofigéo, the FCA conditioned its approval on the sale of the Zapetti brand and a production site to a third-party operator. This is only the second time since the FCA was granted merger control powers in 2009 that the FCA has used its power of injunction in the context of a merger authorisation and has imposed a divestment of assets (the first time being the acquisition of TPS by Canal+ in 2012).

In addition, the Minister of Economy and Finance decided for the first time to use his right to review a merger on public interest grounds. It should be noted that the Minister's review does not constitute a competition law assessment. The Minister overruled the FCA's decision authorising Cofigéo to take sole control over the companies on condition that it divest itself of the brand Zapetti and decided that Cofigéo did not have to divest Zapetti. Cofigéo thus became a major player in the ready meals sector with very high market shares, amounting to 80 per cent for Italian ready meals and 70 per cent for Asian ready meals.

The Minister indicated in his statement that "the industrial strategy which includes this merger, indispensable to revitalise this sector, would have been jeopardised by the obligation to sell assets (Zapetti)". The Minister was concerned about the impact that the FCA's remedies could have had on employment and industrial development, and so decided to re-examine the merger. In return for the Minister's intervention in its favour, Cofigéo is required to maintain employment in the group for at least two years.

Germany Maintains Close Scrutiny of Inward Foreign Investment in Sensitive Areas

State Grid Corp./50Hertz*, 27 July 2018; *Yantai Taihai Group/Leifeld Metal Spinning AG

Non-EU inward investors in Germany should be aware of recent developments in German Government policy towards foreign investment in strategic infrastructure and security sensitive areas.

Electricity infrastructure is an area that is particularly sensitive for strategic and security considerations. Chinese companies are currently investing heavily in power grids around the world. The goal behind this investment, according to a speech by Chinese President Xi Jinping to the United Nations in 2015, is to create a global power grid.

Against this background, the Chinese State Grid Corporation (SGCC) tried to become active on the German market and to acquire 20 per cent of Eurogrid from an Australian infrastructure fund, IFM. Eurogrid is the sole shareholder of the transmission grid operator 50Hertz, which operates the extra-high-voltage grid in eastern Germany and the Hamburg area.

Because the proposed shareholding in Eurogrid was below the 25 per cent threshold prescribed by the Foreign Trade and Payments Regulation, the Federal Government could not prohibit the acquisition by SGCC. However, SGCC was effectively prevented from acquiring the 20 per cent share in Eurogrid because the Belgian company Elia, holder of the other 80 per cent, had a right of first refusal. Elia exercised the right and assigned the 20 per cent shares to the German State-owned Kreditanstalt für Wiederaufbau, which the Federal Government mandated to hold the shares as a temporary measure.

The Federal Government justified this measure based on security policy considerations and the protection of critical energy infrastructures. The population and the economy is dependent on a reliable energy supply. In the context of a security policy assessment, it would be a cause for concern if the operation of a German transmission grid fell within the sphere of influence of investors having significant state participation from third countries.

This decision underlines the German Government's increasing concern about potentially sensitive inbound investments, in particular by state-owned investors.

The German Government also succeeded in preventing another Chinese investment. The French Manoir Industries, controlled by the Chinese Yantai Taihai Group, planned to acquire the German mechanical engineering manufacturer, Leifeld Metal Spinning AG. Manoir, therefore, applied to the Federal Ministry of Economics for a clearance certificate for the takeover. The German Government expressed security concerns, which led the Chinese party to withdraw its application for a clearance certificate.

Leifeld is the technology leader for high-strength materials used in the aerospace industry, which can also be used in the nuclear sector, in which the Chinese company was active.

The German Government is planning to enlarge the possibilities for reviewing foreign inward investments in the future. There are discussions about reducing the 25 per cent participation limit or the establishing state funds to intervene within the framework of an amendment of the Foreign Trade and Payments Regulation.

French Competition Authority Imposes EUR 20 Million Fine for Failure to Comply with Divestment Commitments

18-D-16, *Compliance with the commitments annexed to Decision 16-DCC-11 on the acquisition of sole control of Darty by Fnac*, 27 July 2018

On 27 July 2018, the French Competition Authority (FCA) imposed a EUR 20 million fine on Fnac Darty for failing to comply with its divestment commitments following Fnac's acquisition of the Darty group. This is the first time the FCA has imposed a fine on a company for failing to comply with a structural commitment.

On 27 July 2016, the FCA approved the take-over of the Darty group by Fnac, subject to the divestment of six Fnac and Darty stores in the Paris region by 1 August 2017. During its review of the case, the FCA found that the transaction was likely to harm competition in the retail markets for brown products (televisions, hi-fi and audio equipment) and grey products (personal computers, screens, peripheral devices, telephones) because of the absence of competitive pressure in several geographic areas, especially in Paris.

Fnac Darty successfully sold three of the six stores before 1 August 2017. Two Darty outlets were sold to the French electronics retailer Boulanger, and a third Darty outlet was sold to another electronics retailer, Cobrason. However, Fnac Darty failed to meet its commitments regarding the other three divestitures. By 1 August 2017, it had failed to present a sale agreement for one of the stores (a Fnac store located in Paris) and to identify a buyer for the two other stores (two Darty stores located in Paris and its outskirts). In fact, the FCA considered that the buyer presented by Fnac Darty did not meet the characteristics that would normally be expected to be able to compete effectively with the new entity in the brown and grey goods markets, and so the buyer was refused.

The FCA determined that by failing to divest itself of three of the six stores which Fnac Darty had committed to sell within the prescribed deadline, the company committed a serious breach of its obligations, preventing consumers from benefiting quickly from a new source of electronic products in Paris.

When a company does not comply with its commitments, the FCA can withdraw its decision authorising the transaction, order the parties to carry out the commitments subject to periodic default penalty payments, and apply a financial sanction.

In this case, the FCA decided to impose a fine and, in setting the amount of the fine, took into account "all of the circumstances of the case". The FCA considered the efforts made by Fnac Darty at the beginning of the commitment period to divest the first three stores, but noted that Fnac Darty did not take all the appropriate measures to fulfil its commitments.

The FCA held that the existence of particular difficulties in implementing the commitments within the time limits provided for in the FCA's clearance decision did not prevent the parties from fulfilling their obligations. When faced with such challenges, parties should make a timely request to the FCA for a review of their commitments in order to avoid breaching their obligations. In this respect, Fnac Darty should have asked the FCA to substitute other stores for those it was unable to sell.

The FCA considered that Fnac Darty's non-compliance with the commitments was particularly serious as it prevented restoration of effective competition in six local markets for the retail sale of brown and grey products in Paris.

In view of these elements, the FCA imposed a fine of EUR 20 million on Fnac Darty and ordered it to divest itself within nine months of two different Darty stores located in Paris in lieu of those that were not sold, subject to the

FCA first approving the buyer.

State Aid

Economic or Non-Economic Activity? Look for Market Operators Seeking to Make Profit

T-216/15, *Dôvera zdravotná poist'ovňa v Commission*, 5 February 2018

This State aid case gives interesting indications regarding the definition of an undertaking and the economic or non-economic nature of its activities. The GCEU pointed out that merely being in a position of competition on a given market does not determine the economic nature of an activity, but rather the presence on that market of operators seeking to make a profit.

In 1994 the Slovak health insurance system changed from a unitary system to a pluralistic system in which public and private bodies co-exist. Slovak residents can now choose between the State-owned insurance companies (SZP and VšZP), the private insurance company Dôvera zdravotná poist'ovňa, or the private insurance company Union zdravotná poist'ovňa.

In 2007, Dôvera filed a complaint with the EC regarding alleged State aid granted by the Slovak state to SZP and VšZP.

By its Decision SA.23008 of 15 October 2014, the EC assessed six measures granted by the Slovak Republic to SZP and VšZP. Those measures consisted of a capital increase in SZP, a discharge of SZP's debts, a subsidy to SZP, a capital increase in VšZP, a Risk Equalization Scheme, and the transfer of portfolios to SZP and VšZP. The EC concluded that these measures did not constitute State aid. The EC based its decision on a number of indicators pointing to the non-economic nature of the Slovak compulsory health insurance system, in particular, its social features and objectives and the fact that it is based on the solidarity principle. Consequently, neither SZP nor VšZP could be considered as an "undertaking" within the meaning of Article 107(1) TFEU.

Dôvera brought an action before the GCEU alleging, *inter alia*, errors of law and of assessment made by the EC, notably when it concluded that it could not consider that SZP and VšZP were carrying out an economic activity. Dôvera submitted that the EC wrongly found that the activities performed within the Slovak compulsory health insurance system were non-economic in nature.

Dôvera argued that various characteristics of the scheme identified by the EC demonstrated that the activities pursued were economic in nature, including:

- The presence of several public and private insurance operators
- A degree of competition between health insurers
- The existence of a profit-making activity which was considered to be open to competition by the Slovak Constitutional Court

Thus, according to Dôvera, SZP and VšZP should have been considered as undertakings, in spite of the social and solidarity aspects of the insurance scheme.

As a preliminary remark, the GCEU reiterated that the existence of State aid must be determined on the basis of objective factors.

The GCEU then began by recalling the criteria by which State aid is characterised. It also noted that, according to case law, the fact that the offer of goods or services is made without profit motive is not an element which can prevent entities which carry out those operations from being considered as undertakings, where that offer is made in competition with other operators which do seek to make a profit.

The GCEU did not contradict the EC's conclusion regarding the Slovak compulsory health insurance system's predominance of social, solidarity and regulatory features. However, the GCEU noted that the nature of the system can be determined as economic when (i) the various bodies have the ability to make, use and distribute part of their profits, and (ii) a certain amount of competition exists in the quality and scope of services provided by the various bodies.

The GCEU stated explicitly that, in its view, the economic nature of an activity is not determined by its operator's position of competition on a market, but rather by the presence on that market of operators seeking to make a profit.

For these reasons, the GCEU concluded that the EC had committed an error of assessment when it determined that the Slovak compulsory health system was not economic in nature and that consequently the State-owned health insurer could not be considered as an undertaking. Accordingly, the GCEU annulled the EC's decision.

CJEU Sets Aside GCEU Annulment of EC State Aid Decision

C-579/16 P, *Commission v FIH Holding and FIH Erhvervsbank*, 6 March 2018

When considering whether a measure constitutes State aid for the purposes of Article 107(1) TFEU and applying the well-established private operator principle, one should take into account both the private creditor test and that of the private investor depending on the nature of the transaction. Above all, one should consider only the benefits and obligations linked to the situation of the State as a private operator, to the exclusion of those connected with its situation as a public authority. This leads to the exemption of risks that a State is exposed to in its public capacity. Also, possible precedents must be distinguished carefully, if they concern the application of the private operator principle generally, or its mere application to a particular measure.

Facts of the Case

FIH, a Danish credit institution, was affected by the global financial crisis and in 2009 benefitted from a capital injection pursuant to the Danish law on State-funded capital injections and from a state guarantee pursuant to the Danish law on financial stability. The EC approved these two laws in February 2009 as aid schemes compatible with the internal market.

Between 2009 and 2011, Moody's ratings agency downgraded FIH's rating from A2 to B1 with a negative outlook. As a result of that downgrade, the approaching maturity date of certain bonds issued by FIH, and the expiry of the guarantee from the Danish State, it became apparent during 2011 that FIH would experience liquidity problems in 2012 or 2013 that were liable to lead to the loss of its banking licence and its liquidation.

The Kingdom of Denmark, therefore, notified the EC in 2012 of a series of additional measures, including:

- The most problematic of FIH's assets were to be transferred to a newly created subsidiary of FIH Holding, NewCo, in order to reduce the size of FIH's balance sheet.
- The Financial Stability Company (FSC), a public body set up by the Danish authorities in the context of the global financial crisis, was to buy the shares in NewCo for DKK 2 billion (approximately EUR 268 million) with a view to that company being wound up within a four-year period. The FSC was to finance and recapitalise NewCo during the winding-up process, should that prove necessary.
- In consideration for those measures, FIH would repay the capital injection of DKK 1.9 billion (approximately EUR 255 million) made in 2009 by the Danish authorities, which would allow the FSC to acquire NewCo without using its own funds.

By Decision C(2012) 4427 final of 29 June 2012 on State aid SA.34445 (12/C) (ex 2012/N) – Denmark, the EC opened a formal investigation procedure in respect of the measures at issue, on the ground that, in its view, they constituted State aid for NewCo and the FIH Group. The Kingdom of Denmark argued that the measures did not involve State aid, since the transactions between the FSC and the FIH Group were in line with market conditions and the group would be liable to pay all the transaction and winding-up costs in respect of NewCo. It also maintained that the plan significantly reduced the risk to which it was exposed on account of the 2009 measures.

On 3 October 2013, the Kingdom of Denmark submitted a package of proposals to address the concerns expressed by the EC in the context of the investigation procedure.

On 12 March 2014, the EC notified the Kingdom of Denmark of its decision. First, the EC classified the measures at issue as State aid, within the meaning of Article 107(1) TFEU. Second, it declared those measures compatible with the internal market, under paragraph 3(b) of that provision, in the light of the restructuring plan and the commitments made by the Kingdom of Denmark.

FIH challenged the EC's decision before the GCEU, alleging (i) infringement of Article 107(1) TFEU on grounds of the incorrect application of the private operator principle, (ii) errors in the calculation of the aid amount, and (iii) infringement of the obligation to state reasons. The GCEU upheld the first plea in law and held, consequently, that it was not necessary to examine the second plea. It also rejected the third plea. The GCEU, therefore, annulled the EC's decision in its entirety. The EC appealed to the CJEU.

Findings of the Court

The appeal raised the question of whether a selective advantage had been conferred on FIH. This is a condition for a measure to be classified as State aid for the purposes of Article 107(1) TFEU. While none of the parties disputed the applicability of the GCEU's private operator principle, it was questioned whether the EC should consider the risks to which the Danish State was exposed on account of the 2009 measures by using the private creditor rather than the private investor test.

The CJEU came to the conclusion that the EC was fully entitled, when applying the private operator principle, not to take into account risks related to State aid granted to the FIH Group by the 2009 measures:

- The CJEU noted that the test to be employed must be determined according to the nature of the transaction concerned, and that both the private investor test (used by the EC) and the private creditor test (for which the FIH Group advocated) may be taken into account.
- According to settled case law, only the benefits and obligations linked to the situation of the State as a private operator are to be taken into account, to the exclusion of those connected with its situation as a public authority (for example, redundancies, unemployment benefits). The risks to which the State is exposed and which are the result of State aid granted previously are linked to its actions as a public authority and are not among the factors that a private operator would have considered in its economic calculations.
- There is no indication that the Danish State pursued, even in part, a profit-making objective by means of the 2009 measures.

Those findings were not invalidated by the following arguments of the FIH Group:

- The FIH Group alleged that there were similarities between the factual and legal circumstances of the present case and those giving rise to the judgment of 3 April 2014 in *Commission v Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213). However, the CJEU noted that the ground of appeal, in that case, concerned the question of whether the private operator principle was applicable, and not its application to the measures concerned, as in the present case.
- The FIH Group relied upon the judgments of 5 June 2012, *Commission v EDF* (C-124/10 P, EU:C:2012:318), and of 24 January 2013*, Frucona Košice v Commission* (C-73/11 P, EU:C:2013:32), in support of the argument that the fiscal nature of a debt owed to the State by an undertaking, even if it is related to the exercise of public authority, does not preclude the application of the private operator principle in the assessment under Article 107(1) TFEU of a measure by which the State grants that undertaking a restructuring of the debt. Again, the CJEU held that the cited case law was only relevant as regards the applicability of the private operator principle but not the application of that principle in a particular case.
- The FIH Group submitted that the application of the private operator principle in the contested decision had the consequence that the economic exposure of a Member State resulting from the earlier grant of State aid and its desire to protect its economic interests may not be taken into account in the context of the review under Article 107 TFEU. However, the CJEU noted that such considerations may be taken into account by the EC in the assessment under Article 107(3) TFEU of the compatibility of any subsequent aid measure with the internal market, and may therefore lead the EC to find, as in the present case, that the measure is compatible.

GCEU Denies Standing to Appeal EC Decision Authorising German Cinema Aid Scheme

T-818/16, *Netflix International and Netflix v Commission*, 16 May 2018; T-101/17, *Apple Distribution International v Commission*, 27 July 2018

All State Aid decisions taken by the EC can be subject to an action for annulment. In practice, however, it has been very difficult for complainants to successfully bring admissible actions for annulment of EC decisions approving aid because of EU courts' strict interpretation of the *locus standi* requirements. The GCEU's recent judgment in *Netflix* and its order in *Apple* concerning an amended German aid scheme to support film production, distribution and exhibition are another testimony to this difficulty.

Background

Against the backdrop of video-on-demand services' rapidly growing share in the distribution and consumption of films, Germany decided to amend its existing aid scheme for the promotion of German cinema by levying a special tax on video-on-demand distributors located outside Germany that receive revenue from customers in Germany through an internet presence in the German language. The proceeds raised through collection of the tax are paid into a fund to promote various cultural objectives in the audiovisual sector, including the provision of financial support for the video-on-demand sector. The amendment extended eligibility for such support to video-on-demand distributors located outside Germany.

At the request of the German State, the EC approved the amendment to the existing aid scheme by decision of 1 September 2016 in SA. 38418. Netflix and Apple, which are required to pay a special tax under this scheme, filed an appeal against the EC's decision.

Judgment in *Netflix* and Order in *Apple*

The GCEU dismissed the appeals by Netflix and Apple on the grounds of inadmissibility.

Since the EC decision is addressed solely to the German State, Netflix's and Apple's actions for annulment are admissible, pursuant to the second and third limbs of Article 263(4) TFEU, only (i) if Netflix and Apple are directly and individually concerned by the EC decision, or (ii) if they are directly concerned by the EC decision and the EC decision is a regulatory act which does not entail implementing measures. The third limb was introduced by the Treaty of Lisbon to allow private litigants to bring a direct action against an EU act without having to meet the requirement of "individual concern" in view of the criticism levelled at the rigid interpretation of the *locus standi* requirements for private plaintiffs.

In *Netflix*, the GCEU first denied admissibility under the third limb of Article 263(4) TFEU. After recalling that the objective of this limb is to avoid an individual being obliged to infringe the law in order to have access to a court, the GCEU held that the EC's decision must be given material form by its implementing measures, *i.e.*, national acts and the various acts implementing those acts, such as tax notices, for it to have specific and actual consequences in respect of Netflix. Those acts may be challenged before the national courts. Netflix would, therefore, be entitled to access to a national court without being obliged to infringe the law.

With respect to admissibility of the action by Netflix under the second limb of Article 263(4), the GCEU held that Netflix adduced no evidence to demonstrate that its position was substantially affected by the entry into force of the amendment, such as a significant decline in turnover or a significant reduction in market share. In addition, Netflix was not part of a limited class of operators, since the entry into the market for video on-demand distribution by new participants is possible. The GCEU, therefore, concluded that the action by Netflix did not meet the strict *Plaumann* test and Netflix was therefore not individually concerned. According to the *Plaumann* test, private plaintiffs other than those to whom a measure is addressed may claim to be individually concerned only if that act affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. Consequently, the GCEU denied admissibility of the action by Netflix under the second limb of Article 263(4) TFEU as well.

Similarly, the GCEU denied admissibility of Apple's action under the second limb of Article 263(4) TFEU. The GCEU held that evidence adduced by Apple to demonstrate that its position was substantially affected by the amendment did not make it possible to assess the impact that the amendment might have on its competitive position. Apple adduced evidence that purported to show that it would benefit from the amended aid scheme less than certain other operators. The GCEU did not say why it found such evidence inadequate to show the potential effect on Apple's competitive position.

Since the order in *Apple* was rendered after the judgment in *Netflix*, the GCEU did not assess admissibility under the third limb of Article 263(4) TFEU.

Comment

The case illustrates the difficulty of challenging tax measures of general applicability before the EU courts, because such measures generally do not meet the requirement of "individual concern" and they entail implementing measures.

Apple's appeal against the GCEU's order is currently pending before the CJEU (Case C-633/18 P).

Legislative & Policy Developments

Geo-Blocking Regulation Enters into Force

Regulation (EU) 2018/302 *on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market*, 28 February 2018

The so-called Geo-Blocking Regulation, Regulation (EU) 2018/302, became directly applicable throughout the European Union on 3 December 2018.

The Regulation is part of the European Union's single market strategy to enable consumers and businesses to benefit fully from the opportunities offered by the internet and digital technologies. The strategy is based on three pillars:

- Granting consumers better access to digital goods and services across Europe
- Creating a level playing field with the right conditions for digital networks and innovative services to flourish
- Maximising the growth potential of the digital economy

The Regulation addresses unjustified online discrimination based on a customer's nationality, place of residence or place of establishment within the internal market. The Regulation prohibits such discrimination in relation to access to online interfaces, access to goods and services, and in relation to the means of payment used by a customer.

Access to Goods and Services

A trader is not allowed to apply different conditions of access to goods or services for reasons related to a customer's nationality, place of residence or place of establishment. This prohibition applies in three types of situation:

- The customer purchases goods, and the trader's general conditions offer delivery of the goods at a location in a given Member State or allow the customer to collect the goods at an agreed location in a Member State where the trader offers this option.
- The customer receives electronically supplied services from the trader, other than services the main feature of which is the provision of access to and use of copyright-protected works or other protected subject matter.
- The customer receives services from a trader, other than electronically supplied services, in a physical location within a Member State where the trader operates.

The Regulation provides for certain specific exceptions. There is also a general exception for cases where the trader is prohibited from selling the goods or services by a specific provision of EU law, or by a national law which is compatible with EU law.

Means of Payment

A trader is entitled to have a range of payment means that it accepts. However, within that range, the trader is not allowed to discriminate for reasons related to the customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider, or the place of issue of the payment instrument within the European Union. This prohibition applies where the following three conditions are satisfied concurrently:

- The payment is made electronically by credit transfer, direct debit or card-based payment within the brand and category of the range of payment means accepted by the trader.
- Authentication requirements are fulfilled pursuant to Directive (EU) 2015/2366 on payment services in the internal market.
- The payment is in a currency that the trader accepts.

There are some exceptions, notably when the customer pays with a debit or credit card for which interchange fees are not regulated by Regulation (EU) 2015/751. In such cases, the trader may impose a charge that does not exceed the direct costs of acceptance of the payment instrument.

Enforcement

Member States are obliged to set up bodies to police the application of the Regulation and to institute a system of enforcement that is effective, proportionate and dissuasive.

European Parliament, Council and EC Propose EU Framework for Foreign Direct

Investment Screening

On 20 November 2018, the European Parliament, the Council and the EC agreed on a framework for the screening of foreign direct investment (FDI) on grounds of security or public order. This new framework is embodied in the proposal for a regulation of 6 December 2018.

The main objective of the proposed regulation is to ensure security and public order in the European Union while leaving scope for Member States to screen FDI in light of their individual situation. The regulation does not have as its objective the harmonisation of national screening mechanisms, but the enhancement of cooperation between Member States, and between Member States and the EC.

To date, there has not been a comprehensive framework at the EU level for the screening of FDI on grounds of security or public order. Many important EU trading partners, such as the United States, Australia, Canada and Japan, have already developed such frameworks. Furthermore, only 13 of the 28 Member States have a screening mechanism in place that vets FDI on grounds of security or public order. Moreover, Member States do not currently coordinate with one another with respect to such screening.

It is expected that the propose regulation will be adopted in the first quarter of 2019. The regulation introduces three main changes with respect to the screening of FDI in the EU.

Screening Mechanisms of Member States

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

In particular, national screening mechanisms must be transparent and non-discriminatory. Therefore, a Member State must clearly set out those circumstances that trigger the screening procedure and the grounds on which an investment is being screened (principally on the basis of security and public order concerns), and must lay down the procedural rules and timeframes that apply to the screening mechanism. The proposed regulation also lays down rules with respect to the protection of confidential information and seeks to ensure that screening decisions can be challenged.

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

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

The regulation covers a broad but not exhaustive range of critical sectors, such as energy, transport, water, health, communications, media, data storage, aerospace, defence, electoral or financial infrastructure, artificial intelligence, robotics, semiconductors, cybersecurity, nuclear technologies, nanotechnologies, biotechnologies and food security.

Non-Binding EC Opinions

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

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

Second, when the EC considers that a planned FDI is likely to affect a project or programme of EU interest on grounds of security and/or public order, the EC may issue an opinion to the Member State concerned (Article 8).

Cooperation Mechanisms

The proposed regulation creates a cooperation mechanism between Member States and the EC. Member States are thus required to exchange information, which allows for Member States and the EC to carry out more coordinated review of FDIs.

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

Comment

This proposed regulation may induce Member States to set up FDI screening mechanisms. It will also have an impact on mechanisms already in place, in particular with respect to the timeframe in which such assessments must be made.

Therefore, companies involved in an EU transaction are advised to factor into their investment decisions the fact that the screening thereof may prolong the investment process given that the EC can potentially issue an opinion thereon, or that Member States may make comments on any envisaged FDI. Companies are also advised to assess upfront whether their investment may give rise to potential security or public order concerns.

EDPS Letter and EC Internal Rules Clarify Data Protection Implications for Competition Investigations

The application of the GDPR (General Data Protection Agreement) from 5 May 2018 has had a significant impact on the way companies manage their data in various areas. In the field of competition, the GDPR might well cause companies that face competition investigations to wonder whether they should provide personal data in responding to requests for information or applying for immunity or leniency, and if they do so, whether they should inform data subjects of that fact. Companies might also be concerned about how the EC will handle personal data that they have submitted. EC antitrust officers, in turn, have been concerned that companies might be reluctant to hand over information for fear of breaching data protection laws.

EDPS Assistant Supervisor Letter

In response to those concerns, Wojciech Rafał Wiewiórowski, Assistant Supervisor of the European Data Protection Supervisor (EDPS), sent a letter entitled "Investigative activities of EU institutions and GDPR" to four EU institutions, including the EC, on 22 October 2018 (EDPS Letter).

The EDPS Letter first noted that "GDPR is an evolution of the earlier Directive 95/46/EC19 [...]; it does, however, not radically change the approach taken there". The letter then explained that companies can rely on two legal bases for processing of personal data in providing personal data to the EC:

- Article 6(1)(c) GDPR, if companies are under a "legal obligation" to provide information to the EC. For instance, companies are under a legal obligation to respond to questions posed by EC officials at the time of a dawn raid under Article 20(2) of Regulation 1/2003, or to requests for information by decision under Article 18(3) of Regulation 1/2003.
- Article 6(1)(e) GDPR, if companies voluntarily provide information, for instance through a leniency application, to the EC in order for the EC to perform its tasks carried out in the public interest

In addition, the EDPS Letter made it clear that "[t]he provision of the personal data of an individual cannot be denied on the basis of a lack of consent of the data subject because consent does not provide the legal basis for processing activities related to investigations".

The EDPS Letter also clarified that companies do not have to inform data subjects about the disclosure of their personal data to the EC in responding to competition-case-related inquiries, because the EC is not considered a "recipient" under Article 4(9) GDPR when it starts or carries out a "particular inquiry". This approach is congruent with previous positions taken by certain national courts, according to which seizures carried out by the national competition authority do not fall within the scope of personal data processing.

EC Internal Rules

On 5 December 2018, in anticipation of the entry into force of Regulation 2018/1725 on 11 December 2018, the EC issued a decision laying down internal rules concerning the processing of personal data in the field of competition in relation to the provision of information to data subjects and the restriction of certain rights (EC Internal Rules).

Regulation 2018/1725 obliges EU institutions to provide data subjects with a series of information, including the purposes of the processing and, where applicable, the fact that they intend to transfer personal data to a third country or international organisation (Articles 14 to 16 of Regulation 2018/1725). In line with recent accountability obligations imposed by the GDPR, Regulation 2018/1725 also requires EU institutions to communicate personal data breaches to the data subject in certain circumstances (Article 35 of Regulation 2018/1725).

Those transparency obligations could potentially jeopardise the purpose of the EC's investigative and enforcement activities. For instance, when a company provides information on a cartel in its leniency application, it often includes information on representatives of other cartelists. If the EC is to provide those representatives with relevant information within one month as required by Article 15 of Regulation 2018/1725, there is a risk that they and their employers become aware of the EC investigation and destroy evidence. Companies also may hesitate to submit marker or immunity applications because they may lose the first place while gathering sufficient information to get that place.

In light of such a risk, the EC adopted the EC Internal Rules, pursuant to which the EC may restrict the application of Articles 14 to 17, 19, 20 and 35 of Regulation 2018/75 as well as Article 4 thereof (to the extent relevant) where "the exercise of those rights and obligations [set out thereunder] would jeopardise the purpose of the [EC]'s investigative and enforcement activities, including by revealing its investigative tools and methods, or would adversely affect the rights and freedoms of other data subjects". If it does so, the EC must record the reasons for any restriction applied, including an assessment of the necessity and proportionality of the restriction. Restrictions will continue to apply as long as the reasons justifying them remain applicable.

Comment

Albeit informal, the EDPS Letter provides comfort to companies willing to cooperate with the EC. First, companies may provide personal data to the EC relying either on a "legal obligation" basis or on a "legitimate interest" basis. Second, they do not have to inform data subjects of their provision of the subjects' personal data to the EC. The EDPS Letter also dismisses the idea, which some companies might have entertained, of relying on data protection laws to justify refusal to cooperate with the EC.

The EC Internal Rules make it clear that the EC will not let data protection considerations interfere with conducting competition investigations. Companies can thus consider that the innovations introduced by Regulation 2018/1725 will not affect their strategy or position, be it in cartel, merger or State aid investigations.

New Directive Empowers National Competition Authorities to Be More Effective Enforcers

On 4 December 2018, the Council adopted the Directive 2019/1 to enable Member State competition authorities to be more effective enforcers (ECN+). This adoption followed an agreement reached with the European Parliament at first reading.

In March 2017, the EC published a proposal for a new Directive that aims to increase the effectiveness of national enforcement through appropriate enforcement tools. Since 2004, the NCAs (National Competition Authorities) of EU Member States have been empowered through Regulation 1/2003 to apply EU competition rules alongside the EC, and have adopted 865 competition decisions—about 85 per cent of all competition decisions in the European Union.

The system of decentralised enforcement generally works well. National laws sometimes diverge, however, and certain NCAs lack the appropriate investigation tools and sanction mechanisms.

On 30 May 2018, the European Parliament and the Council reached an agreement on the EC's proposal to increase the independence, resources and powers of NCAs; to harmonise national leniency programmes; and to reduce burdens on undertakings.

The Directive aims to increase the effectiveness of national enforcement in five areas:

- **Independence and resources** (Articles 4 and 5): the Directive requires that NCAs be independent from political and private influence and have the appropriate human, financial and technical resources.
- **Powers of investigation, decision making and enforcement** (Articles 6 to 12): the text requires Member States to provides the NCAs with minimum effective powers to investigate. For instance, NCAs must be granted powers to search business and non-business premises (such as homes of directors, managers and staff). Articles 10 to 12 on decision making provide that NCAs must be able to adopt prohibition decisions and impose structural and behavioural remedies. NCAs must also be able to make commitment decisions to resolve competition concerns, and such commitment must bind the companies concerned.
- **Fines** (Articles 13 to 16): The Directive requires that NCAs be able to impose fines for both procedural and substantive infringements. When setting the fines, NCAs should have regard to the gravity and the duration of the infringement. The Directive also provides principles for NCAs' calculation of fines. The common maximum fine amount should not be set at a level below 10 per cent of the total worldwide turnover in the

business year preceding the decision.

- **Leniency programs** (Articles 17 to 23): the Directive harmonises the leniency programs, following the EC's Leniency Notice. Member States should thus offer immunity or reduction of fines to undertakings acknowledging or disclosing their participation in a cartel. Member States may also give criminal immunity to directors or managers when it is appropriate in their legal system.
- **Cross-border mutual assistance** (Articles 24 to 28): Chapter VII of the Directive aims to reinforce mutual assistance and cooperation tools between NCAs in the European Union. It requires that NCAs have powers to exchange information, and to investigate for the account of another NCA.

The Directive was published in the EU Official Journal on 14 January 2019. The Member States have until 3 February 2021 to implement it.

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[1] Judgment of 14 March 2017, *Evonik Degussa v Commission*, C-162/15 P, EU:C:2017:205, paragraph 64.