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VBB on Competition Law

Highlights

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MERGER CONTROL

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court agrees to amend brewery merger remedies

In 2015, the Austrian Cartel Court conditionally cleared the acquisition of brewery Vereinigte Kärntner Brauereien ("VKB") by Brau Union. One of the conditions was that the parties would operate their respective brewery sites and retail systems separately for five years after implementing the merger in order to sustain a local brewery site in Villach. The conditions provided for a prolongation of the five-year period by three years.

However, the expected pro-competitive effects of the remedy did not materialize. Instead, VKB was unable to benefit from synergies and lost customers due to the uncertainty of the market regarding the continued existence of VKB in the long term.

In a recently published decision of the Cartel Court dated 14 May 2019, the Cartel Court granted the parties' request to amend the remedies. The Cartel Court ruled that the parties may merge their sales teams in order to facilitate customer acquisition, to create synergies and to eliminate existing uncertainties. The Cartel Court also decided not to prolong the five-year period.

THE NETHERLANDS

Dutch government approves acquisition that was prohibited by the ACM

On 27 September 2019, the Dutch government approved the acquisition by PostNL N.V. ("PostNL") of rival Dutch postal delivery company SBM Beheer II B.V. ("Sandd") after an initial prohibition of the proposed concentration by the Dutch Authority for Consumers and Markets ("ACM") on 5 September 2019.

The ACM had found that the merger would effectively lead to PostNL having a monopoly position on the Dutch postal delivery market, that following the transaction PostNL could increase its prices for postal delivery services by 30 to 40 percent in the business mail segment, and that the prices of stamps would also increase to the detriment of consumers.

In defense of the acquisition, PostNL and Sandd had argued that as separate entities they could not be profitable due to a shrinking postal delivery market. The ACM had recognized that the acquisition would lead to efficiency gains. However, in its view, the benefits would not have offset the harm to consumers and corporate customers resulting from higher prices. In addition, the ACM had examined whether the acquisition would have been necessary for PostNL's performance of the universal service for which it is statutorily responsible. In this regard, the ACM had concluded that, in the next few years, PostNL would have been able to perform its universal service obligation under economically acceptable conditions.

Shortly following the prohibition, PostNL and Sandd requested the Dutch government to approve the acquisition under Article 47(1) of the Dutch Competition Act. Upon request of the parties concerned, and subject to conditions, the Dutch government decided to approve the merger considering that "important grounds of public interest" justify the concentration and outweigh the competition concerns addressed by the ACM.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

PORTUGAL

Portuguese Competition Authority imposes record fine of € 225 million in banking cartel case

On 9 September 2019, the Portuguese Competition Authority (*Autoridade da Concorrência* ("AdC")) announced that it had imposed a record total fine of € 225 million on 14 banks for exchanging sensitive commercial information between 2002 and 2013. The infringement related to the banks' offers of retail banking credit products, including mortgages and consumer and small and medium business credit products. The banks involved in the infringement were BBVA, BIC, BPI, BCP, BES, BANIF, Barclays, CGD, Caixa de Crédito Agrícola, Montepio, Santander (including Banco Popular), Deutsche Bank and UCI.

According to the AdC, the banks exchanged sensitive information on their commercial offers indicating, for example, the spreads to be applied in the near future on mortgage loans or the volume of loans made in the previous month, information that would not otherwise be available to their competitors. Thus, the banks knew, in a detailed, precise and timely manner, the credit offers that were made by their competitors, discouraging them to provide competitive offers to their clients.

The total fine of € 252 million is the largest total fine to have been imposed to date for an infringement of competition law in Portugal, and is significantly higher than the previous largest fine of € 54 million, which was imposed on insurance companies on 1 August 2019 (see VBB on Competition Law, Volume 2019, No. 8).

STATE AID

– EUROPEAN UNION LEVEL –

The General Court clarifies the application of the arm's length principle in the context of State aid investigations (Starbucks and FIAT)

On 24 September 2019, the General Court delivered two judgments in Cases T-755/15, *Luxembourg v. Commission* and T-759/15, *Fiat Chrysler Finance Europe v. Commission* and Cases T-755/15, *Luxembourg v. Commission* and T-759/15, *Fiat Chrysler Finance Europe v. Commissio*n, providing important guidance on the application of the arm's length principle in the context of State aid investigations concerning tax measures.

In both cases, the European Commission (the "Commission") had found the transfer pricing arrangements accepted by the Netherlands and Luxembourg authorities to constitute unlawful State aid when calculating, respectively, the corporate taxation of Starbucks and Fiat Chrysler. In essence, the Commission had found that the transfer pricing methodology used by these authorities conferred a selective advantage on the integrated companies through the lowering of tax liabilities by means of intra-group transactions which did not correspond to normal market conditions as compared to non-integrated or standalone companies.

The General Court noted that the pricing of intragroup transactions is not determined under market conditions. As a consequence, in cases where national tax law does not make a distinction between integrated and non-integrated undertakings in order to determine their corporate income tax liability, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of taxation rules under national law of a company in a comparable situation and operating under normal market conditions.

Therefore, the arm's length principle, as used by the Commission in both tax rulings, allows the examination of whether intra-group transactions are remunerated as though they have been negotiated under market conditions. The Court found that the Commission was entitled to apply the arm's length principle in order to assess the existence of an advantage under State aid rules under Article 107(1) TFEU.

While doing so, however, the General Court also acknowledged the inherent inaccuracies associated with transfer pricing methodologies which must be taken into account by the Commission in its assessment. The Court noted that a selective advantage is conferred only if the variation between the two comparable economic operators exceeds the inaccuracies of the transfer pricing method in question. The two judgments equally provide insight into the application of this and explain the contrasting conclusions of the Court.

In *Luxembourg v. Commission* and *Fiat Chrysler Finance Europe v. Commission*, the General Court found that the Commission was right to find that the arrangements for the application of the transactional net margin method (TNMM) applied in the tax ruling at stake were incorrect and that the whole of Fiat Chrysler Finance Europe (FFT) capital should have been taken into account and a single rate should have been applied. The Court concluded that the transfer pricing methodology used by Luxembourg minimised FFT's remuneration, on the basis of which FFT's tax liability is applied, resulted in a reduction of the tax burden of FFT and, therefore, a breach of the arm's length principle which sufficed to confer an advantage.

In *Netherlands v. Commission* and *Starbucks and Starbucks Manufacturing Emea v. Commission*, however, the General Court reached the opposite conclusion with regard to the transfer pricing methodology used by the Netherlands. The Court held that the non-compliance with an established methodology does not necessarily lead to a reduction of the tax burden. The Commission should have demonstrated that the methodological errors identified did not allow a reliable approximation of an arm's length outcome to be reached and that they led to a reduction

of the tax burden. In essence, the General Court stated that the mere fact that the Netherlands opted to use the TNMM in favour of a more direct method – such as the comparable price method – did not suffice to prove the existence of an advantage conferred.

General Court provides further guidance with regard to the concept of State aid in the context of fiscal measures favouring port authorities

On 20 September 2019, the General Court delivered three judgments (Cases T-673/17, *Port autonome du Centre and de l'Ouest and Others v. Commission*, T-674/17, *Le Port de Bruxelles and Région de Bruxelles-Capitale v. Commission*, T-696/17, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v. Commission*). The underlying decisions of the European Commission (the "Commission") concern a State aid scheme regarding ports taxation in Belgium. The Belgian Income Tax Code exempted a number of Belgian ports from the scope of application of the corporate tax. These port authorities were instead subject to the tax on legal persons, which is lower than the corporate taxation. In the contested decisions the Commission took the view that these tax exemptions constituted State aid within the meaning of Article 107(1) TFEU and were incompatible with the internal market.

The General Court first confirmed the settled case law concerning the concepts of economic activities and undertakings under Article 107(1) TFEU. The Court ruled that, insofar as the Belgian ports carry out economic activities (e.g., providing port infrastructure to shipping companies and shipbuilders), they are undertakings within the meaning of Article 107(1) TFEU. It emphasized in this regard that these activities are provided for remuneration. The Court noted that the fact that the price is unilaterally set by the port authorities does not mean that this does not take the relevant market dynamics (e.g., the demand) into account. In addition, the fact that these economic activities are connected with the exercise of public powers – e.g., the revenue from these activities is used to finance the non-economic activities carried out by the port authorities – is insufficient to prove that they are indissolubly linked with the exercise of State authority.

Second, the General Court provided further guidance with regard to the "selectivity test" of general fiscal measures under Article 107(1) TFEU. The Belgian authorities essentially argued before the Commission and the General Court that port authorities were exempted from corporate tax pursuant to the general rules and criteria of the Belgian tax system. These rules and principles provide that "companies" are subject to corporate tax, whereas resident legal persons other than companies are subject to the tax on legal persons. Since ports are not "companies", they are subject to the tax on legal persons. In this regard, the General Court repeated that the port authorities in question carry out economic activities for remuneration. Under the common rules of income taxation applicable in Belgium, companies operating for profit are subject to the corporate taxation. As such, the exemption granted to port authorities constitutes a derogation from the "common or normal" rules on taxation. Moreover, the General Court noted that none of the elements raised by the Belgian authorities were capable of distinguishing the situation of port authorities from that of other companies; for instance, the fact that port authorities use part of their revenues from economic activities to finance their non-economic activities does not make them any different from other companies subject to corporate taxation.

The General Court further held that the exemption would be selective even if it were not to constitute a derogation from the reference system. In fact, in cases such as the present one, where a fiscal measure is designed in a way to favour certain categories of undertakings (in this case, port authorities) and discriminate between economic entities in a comparable situation, the measure is to be considered as "a priori selective". In other words, even in the absence of a formal derogation from the common rules of taxation, such a fiscal measure constitutes State aid within the meaning of Article 107(1) TFEU.

Finally, the General Court stated that the measure derogated from the ordinary tax regime without being justified by the nature or scheme of the tax system, since it was not based on the measure's logic or the technique of taxation but resulted from the legislature's objective of favouring organisations regarded as socially deserving.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Current Commissioner for Competition Margrethe Vestager nominated for re-appointment

On 10 September 2019, it was announced that Commissioner for Competition Margrethe Vestager has been nominated for a second term in the same role. Commissioner Vestager has also been nominated for the broader role of "Executive Vice-President for a Europe fit for the Digital Age".

In her mission letter to Commissioner Vestager, Ursula von der Leyen, president-elect of the European Commission, suggests that Commissioner Vestager focus on strengthening competition enforcement and reviewing the European Union's competition rules. Von der Leyen furthermore requests Commissioner Vestager to consider sector enquiries into new and emerging markets and to review EU State aid rules in view of EU industry strategy. Von der Leyen also asks Commissioner Vestager to review how she could better tackle the distortive effects of foreign state ownership and subsidies in the internal market. Finally, von der Leyen urges Commissioner Vestager to proactively share, while fully taking into account the confidentiality of competition procedures, any relevant general market knowledge within the Commission.

Commissioner Vestager's appointment is subject to a plenary vote. If she gains the backing of the European Parliament, she will formally take office on 1 November 2019 for a term of five years.

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