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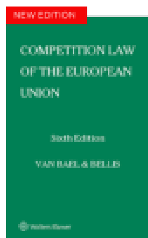

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MERGER CONTROL

– NATIONAL LEVEL –

UNITED KINGDOM

Cargotec/Konecranes: Another sign of emerging divergence between EU and UK merger control policy?

Introduction

On 29 March 2022, the UK Competition and Markets Authority ("CMA") announced that – following an in-depth, Phase 2 investigation – it had prohibited the proposed merger between Cargotec and Konecranes. The CMA noted that it was not satisfied with the remedies package proposed by the parties, who subsequently abandoned the transaction. The CMA's decision differs from that of the European Commission ("Commission"), which had previously announced on 24 February 2022 that it had conditionally cleared the very same transaction at Phase 2, subject to remedies which were identical to those rejected by the CMA.

This article: (i) explores how (and why) the CMA and the Commission arrived at such different conclusions in *Cargotec/Konecranes*; and (ii) considers whether this latest decision is likely to be an isolated incident, or instead part of a wider trend towards divergence between the two authorities in the area of merger control.

A somewhat chequered history of parallel review outcomes post-Brexit?

Even before *Cargotec/Konecranes* – the CMA and the Commission's approaches to merger control appear to have been deviating (albeit rather subtly). For instance, in February 2021, the CMA's Chief Executive publicly stated that certain behavioural remedies the Commission had accepted in its conditional clearance of *Google/Fitbit* probably would not have been accepted by the CMA (although the CMA did not actually review that deal).

Moreover, whilst there have been several high-profile post-Brexit transactions in which the outcomes of parallel CMA and Commission merger control reviews were entirely consistent (such as *AstraZeneca/Alexion* and *Microsoft/Nuance*) – reflecting the general assumption that, at least in the short term, UK and EU competition law and policy would remain broadly aligned – other cases have nevertheless indicated that cracks may already be starting to appear in this veneer of consistency.

Perhaps the most notable example of such emerging discrepancies is *Meta/Kustomer*. The Commission referred that transaction to Phase 2, and only conditionally cleared it (in January 2022) after Meta committed to offering long-term access remedies to address various vertical concerns. However, the CMA had already unconditionally cleared the same transaction at Phase 1 (and, in so doing, had also dismissed identical vertical concerns). *Meta/Kustomer* also illustrates that the CMA does not always adopt a tougher stance than the Commission when it comes to divergence. For further details, please see VBB on Competition Law, Volume 2022, No. 3.

The differing CMA and Commission assessments in Cargotec/Konecranes

Cargotec and Konecranes each offer container handling equipment and services to port terminals and industrial customers worldwide. In October 2020, the parties agreed to a $5 billion merger, which was notified to multiple competition authorities (notably, the CMA, the Commission, and the US Department of Justice ("DOJ")).

In order to address concerns raised by the CMA and the Commission during their respective Phase 2 reviews (as well as those raised by certain other competition authorities also investigating the deal), the parties proposed a "mix-and-match" remedies package that would have involved carving out portions of assets from within each of their existing container handling equipment businesses, which could then be sold together as a new, combined business.

The Commission concluded that this remedies package was sufficient to address its concerns, finding that any divestment implementation risk could be effectively mitigated by including an up-front-buyer clause (i.e., preventing the parties from completing the deal without first reaching an agreement with a divestment purchaser approved by the Commission). In approving the transaction, Commissioner Vestager specifically noted that "[f]*ollowing the remedies offered by the two companies, customers in Europe will continue to have sufficient choice of port equipment and will continue benefitting from competitive prices and a great choice of technology*". In a later speech, Vestager went even further, asserting that the Commission had ensured that the proposed remedies package fully addressed its concerns, through the divestiture of "*viable standalone businesses*" (and, in a subsequent speech, added that the package had received positive market feedback).

Conversely, and only a few days later, the CMA announced its decision to prohibit the transaction in its entirety. In so doing, the CMA essentially explained that it had assessed exactly the same remedies package as the Commission, and – even after some further improvements offered by the parties during the Phase 2 process – found it to be overly complex, giving rise to too many implementation risks.

Such a dramatically divergent outcome appears to have been driven primarily by the CMA's lower risk tolerance regarding complex, global remedies packages – rather than any differences attributable to unique national UK market circumstances. Perhaps most strikingly, and in stark contrast to the Commission's own assessment:

1. The CMA found that the "mix-and-match" structure of the proposed remedies package would give rise to serious composition risks in relation to the viability of the divestment business. In particular, the CMA's Phase 2 Final Report notes that "[a] *broad portfolio of CHE products and services assembled from a mixture of assets from each of the Parties (a so-called 'mix-and-match' approach) would, however, create additional composition risks, such that the divestiture package will not function effectively. In this regard, we consider that there is a material risk that merging and integrating the KAS Divestiture Business and MEQ Divestiture Business would lead to a weakening of their competitive position in the short to medium term, undermining the effectiveness of the remedy*".

2. The CMA also expressed concern that carving out the divestment business would present further challenges, finding that "[t]*he Parties' Remedy Proposal does not involve the divestiture of fully standalone businesses, but comprise carve-outs of assets, operations, employees and customer and supplier contracts. The carve-out risks relating to the identification, allocation, and transfer of assets to be carved-out of the Parties' existing businesses are substantial and have the potential to significantly impair the competitive capabilities of the divested businesses*".

An anomaly, or part of a wider trend?

Cargotec/Konecranes therefore appears to be the most significant (but not the first) example to date of post-Brexit divergence between the CMA and the Commission in parallel merger investigations.

However, to consider *Cargotec/Konecrane*s in its proper context, and therefore assess whether such divergence is likely to be repeated in future cases, one must also bear in mind that:

1. Other prominent competition authorities reviewing the transaction had also expressed concerns, including in relation to the proposed remedies package. For instance, on the same day as the CMA prohibition, the DOJ noted that the transaction "*would have led to illegal consolidation*", and that it "*will not accept patchwork settlements that do not replace the competition that is lost by a merger*". As such, the DOJ's position may well have provided the CMA with some additional "cover" for its own opposition (which the CMA may not have the benefit of in future transactions subject to parallel CMA and Commission reviews), thus potentially allowing the CMA to adopt a more cautious approach.

2. This is arguably the first time that the CMA has assessed such a complex, global remedies package. Pre-Brexit, major transactions requiring similarly complicated remedies were almost always reviewed exclusively by the Commission. The Commission therefore has significantly more experience than the

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CMA in assessing such remedies, which could help to explain why it was willing to adopt a more pragmatic approach than the CMA in *Cargotec/Konecranes*. That said, it remains to be seen whether – as the CMA gradually gains more experience in reviewing global transactions involving complex remedies packages – its risk appetite will move closer to that of the Commission.

Thus, certain case-specific factors may have contributed to the differing outcomes in *Cargotec/Konecranes* – and it may therefore be premature to identify any particular "trend" towards post-Brexit divergence between CMA and Commission merger control practices. Indeed, and as above, in various other parallel reviews the CMA and Commission outcomes have been fully aligned (implying that the level of successful cooperation and consistency between the two authorities is generally high).

That said, the CMA's decision in *Cargotec/Konecranes* strongly suggests that it has a materially lower risk appetite than the Commission when it comes to major, complex divestment remedies. It also seems likely, at least based on this case, that the DOJ's position is closer to the CMA's. This case should serve as a reminder that failing to account for the possibility that different regulators and market participants in different jurisdictions could potentially reach opposing conclusions in relation to an identical global remedies package could ultimately prove fatal to a transaction. Moreover, the CMA's earlier comments regarding the Commission's approach in *Google/Fitbit* may imply that – when it comes to remedies more generally – there is in fact already a broader conceptual divergence between the two authorities.

It will therefore be crucial for businesses to bear in mind the potential for such unpredictable differences when seeking to secure parallel Commission and CMA approval for complex transactions with a global nexus – especially if remedies are likely to be required. To maximise the chances of achieving consistent merger control outcomes, businesses should continue to prioritise early engagement with, and facilitate genuine cooperation between, the relevant competition authorities.

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FOREIGN DIRECT INVESTMENT

– EUROPEAN UNION LEVEL –

EU Guidance indicates Russian and Belarusian investments are a potential threat to EU security and public order

On 6 April 2022, the European Commission published its Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions ("Guidance"). The purpose of the Guidance is to address the heightened risk that foreign direct investments ("FDI") with connection to the Russian or Belarusian governments may represent to the security or public order in the EU, especially in the case of investments into critical assets.

While stressing that FDI regimes remain each Member State's responsibility, the Commission reiterates its call upon Member States to ensure that effective FDI screening mechanisms are in place. FDI screening goes beyond investments by persons or entities subject to the sanctions packages already adopted in response to Russia's military action against Ukraine, which makes it an important strategic tool in the current situation.

National screening mechanisms are already in force in 18 EU Member States, and the Commission has urged the remaining nine Member States to urgently set them up and called for accelerated adoption by those countries already preparing to implement additional measures. The Commission also called for enhanced cooperation between FDI screening authorities and enforcing authorities for sanctions.

The Guidance sets out the assumption that Member States may rely on when assessing the potential effects of a given investment, stating that "[i]n the current circumstances, there is a heightened risk that any investment directly or indirectly related to a person or entity associated with, controlled by or subject to influence by the Russian or Belarusian government into critical assets in the EU may give reasonable grounds to conclude that the investment may pose a **threat to security or public order in Member States**".

Additionally, it draws special attention to the importance of anti-circumvention measures, stating that although investments by one or more entities established in the Union do not fall within the scope of the FDI Screening Regulation, the screening mechanisms should provide for the necessary measures to "cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and **circumvent the screening mechanisms** and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country".

The Annex to the Guidance provides an overview of assets in the European Union already under the control or influence of Russia or Belarus by type of controlled and controlling entity or sector.

– NATIONAL LEVEL –

GERMANY

German government moves to safeguard German oil and gas supply

At Member State level, Germany has intervened against investment plans by oil company Rosneft and taken steps in response to a transaction concerning shares in Gazprom.

According to press reports, the German Ministry of Economics initiated an investment screening procedure into the planned acquisition of a refinery in Schwedt (Brandenburg) by the Russian state-owned company Rosneft. Last year, Rosneft exercised its pre-emptive right to take over 37.5% of the shares of oil refinery PCK from Shell, thereby increasing its stake in the refinery from 54.17% to 91.67%.

Despite the clearance of the Federal Cartel Office, the Ministry of Economics raised concerns of danger to the public order or security of the Federal Republic of Germany, since the deal involves the operation of critical infrastructure and acquisition by a state-owned entity. According to media reports, potential scenarios include even expropriation/nationalisation of the refinery.

The Federal Ministry of Economics also issued a legal order for Gazprom Germania's business in gas trading and the operation of natural gas storage facilities to be held in trust by the Federal Network Agency. The Russian parent company Gazprom had ceded shares to a straw man without notifying the change in control under the Foreign Trade and Payments Ordinance and announced the liquidation of the German subsidiary, which would have led to the disappearance of many favourable gas supply contracts that subsidiaries of Gazprom Germania had concluded with German municipal utilities.

HUNGARY

Hungary withdraws veto against transaction after order from European Commission

Hungary has withdrawn a 2021 veto against the acquisition of AGEON's Hungarian subsidiary by Vienna Insurance Group AG ("VIG"). The veto was issued by the Ministry of the Interior under national emergency FDI legislation introduced to address the COVID-19 pandemic while the European Commission's investigation of the concentration was ongoing. The Ministry argued that the merger threatened its legitimate interests, without notifying those to the Commission.

In February 2022, the Commission found that this decision violated Article 21 of the EU Merger Regulation ("EUMR") and gave Hungary until 18 March 2022 to withdraw the veto or risk the Commission bringing an infringement procedure against it before the European Court of Justice for failure to uphold EU law (see VBB on Competition Law, Volume 2022, No. 2). The decision illustrates the hierarchy between national FDI legislation and EU Merger Control: Article 21(4) EUMR provides that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the EUMR such as public security, plurality of the media and prudential rules. Any other public interest, including e.g., public order, which is protected by national FDI legislation, must be communicated to the Commission by the Member State concerned. The Commission will assess its compatibility with the general principles and other provisions of EU law. Therefore, where a transaction meets the EU merger filing thresholds, the national FDI review that Member States can exercise without oversight appears to be limited in scope to the above-mentioned legitimate interests.

Further clarification of this point is expected from a request for preliminary ruling filed with the European Court of Justice ("ECJ") on 15 February 2022 by the Budapest High Court. The request concerns a Hungarian government veto of a concentration in the construction market where the bidder was a foreign investor. The request asks the ECJ to clarify whether Hungarian FDI law is in accordance with the EU FDI Screening Regulation. If the reply is affirmative, the Budapest High Court asks whether the fact that the Commission approved a concentration affecting the ownership structure of the foreign investor precludes use of the screening mechanism under national law.

ROMANIA AND THE NETHERLANDS

New FDI legislation in Romania and the Netherlands

In Romania, Government Emergency Ordinance no. 46/2022 on measures for implementation of the EU FDI Screening Regulation (Regulation 2019/452) entered into force on 18 April 2022. Only one day later, the Dutch Parliament passed the Investment Screening Bill (Wet veiligheidstoets investeringen, fusies en overnames).

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ABUSE OF DOMINANT POSITION

– NATIONAL LEVEL –

ITALY

The Italian Administrative Court annuls TicketOne decision and indicates that mergers cannot be assessed for abuse of dominance under Article 102 TFEU

On 24 March 2022, an Italian administrative court ("TAR Lazio" or "court") annulled the Italian Competition Authority ("ICA") decision imposing a fine of €10.8 million on several companies belonging to the music ticketing and marketing group CTS Eventim-TicketOne ("TicketOne") for abuse of its dominant position on the Italian market for the sale of tickets for pop music concerts.

Background

As reported in VBB on Competition Law, Volume 2021, No. 1, TicketOne was held to have infringed Article 102 TFEU by implementing a complex and single strategy to exclude competitors by various means. These included: (i) exclusive agreements with both national and local leading promoters of certain pop music events; (ii) the acquisition of control of four important pop music event promoters, enabling it to gain access to the upstream market for the organisation and promotion of pop music events and to prevent other ticketing operators from distributing the tickets offered by those promoters; (iii) *de facto* transformation of a number of minor ticketing operators into its intermediaries by concluding agreements requiring their websites to automatically redirect consumers to TicketOne's website; and (iv) retaliatory measures against local promoters that had refused to choose TicketOne as the ticketing operator for their events.

Judgment

In this judgment, the TAR Lazio took issue with the ICA's finding of a single exclusionary strategy in relation to the acquisitions (item (ii) in the preceding paragraph). The court held that the ICA did not adequately prove the existence of a link between the acquisitions and the overall anticompetitive intent. In other words, according to the court, there was no evidence that the acquisitions were part of an exclusionary strategy. In this regard, it upheld TicketOne's argument that the purpose of these acquisitions was rather to counter-act the expansion of its main competitor at the time (Live Nation/TicketMaster Group).

The judgment under comment raises a broader question concerning the relationship between Article 102 and the EU Merger Regulation ("EUMR"). At the EU level, the European Court of Justice ("ECJ") has never expressly confirmed whether *Continental Can*, which found that an acquisition of a company by an undertaking can amount to an abuse of a dominant position, remains applicable following the adoption of the EUMR.

In the present case, the Italian court held that *Continental Can* was no longer applicable due to the presence of a specific legal tool for assessing merger control (i.e., the EUMR). According to the TAR Lazio, the *Continental Can* case law was issued when there was no merger control regime in the EU at all. Now that such a regime is in place, *Continental Can* is no longer relevant, and thus competition authorities cannot assess EU concentrations under Article 102 TFEU. The TAR Lazio considered that Article 21(1) EUMR, which states that the EUMR alone shall apply to concentrations as defined in Article 3 of this same regulation, to the exclusion of certain regulations including the Regulation on the implementation of the competition rules laid down in Articles 101 and 102 of the Treaty, prevents competition authorities from assessing concentrations ex post under the EU competition rules.

The Italian judgment is not, however, likely to be the final word on the subject, as the Paris Court of Appeal (France), following the French Competition Authority's rejection of a complaint on the grounds that a merger that did not meet any thresholds (EU or national) could not constitute an abuse of a dominant position, requested a preliminary rul-

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ing on the possibility of assessing under Article 102 TFEU those mergers that did not meet the EUMR's thresholds (Case C-449/21, *Towercast v Autorité de la concurrence, Ministère de l'Économie*).

UNITED KINGDOM

Excessive pricing in the pharmaceutical sector: the *Auden McKenzie/Actavis* case on hydrocortisone tablets

On 31 March 2022, the CMA published one of its longest decisions (1077 pages), in which it imposed fines of £155 million on Accord-UK (previously Auden McKenzie/Actavis) for excessive price increases on hydrocortisone tablets after they were de-branded and fell outside the UK NHS price regulations. The CMA also imposed additional fines of £111.5 million for cartel agreements entered into when other parties threatened to enter the market (UK Competition and Markets Authority, Case 50277, *Auden McKenzie/Actavis*, 15 July 2021).

An unusual aspect of the decision compared to other excessive price decisions is that Auden/Actavis received an unintended competitive advantage due to the application of the Orphan Medicines Regulation. In 2011, a separate company (Shire Pharmaceuticals – now ViroPharma SPRL) obtained an orphan designation and licence for a different form of hydrocortisone (Plenadren), which had the indirect consequence of limiting the competition faced by Auden/Actavis for hydrocortisone tablets. In particular, only marketing authorisations granted before Plenadren's marketing authorisation (i.e., before November 2011) could include the full indication, which included only 10mg and 20mg hydrocortisone tablets produced by Auden and 20mg tablets produced by a separate company Waymade. After November 2011, all other marketing authorisations granted could only include a more limited label ("skinny label").

Applying the standard two-limb test first established in *United Brands*, the CMA found that Auden McKenzie and Actavis charged excessive and unfair prices for 10mg tablets between October 2008 and July 2018, and for 20mg tablets between October 2008 and January 2018 (Actavis took over Auden McKenzie's hydrocortisone tablet business in 2015 and was therefore liable for its conduct before that date).

Excessive Limb: The CMA applied a 'cost plus' test in relation to the 10mg and 20mg hydrocortisone tablets. It found that 'cost plus' was, in this case, the most appropriate measure by which to determine whether its prices were excessive under the excessive limb. The CMA rejected both arguments against the relevance and application of the 'cost plus' test. Auden/Actavis claimed that this test was detached from market reality and the approach taken in *Napp* by the Director General of Fair Trading ("DGFT") should have been followed (i.e., a price would be excessive where it is above that which would exist in a competitive market). Additionally, Auden/Actavis claimed that this test is not appropriate for portfolio businesses, and also mentioned the criticisms around the components of the CMA's 'cost plus' calculation. On this latter point, the CMA explained that on a number of occasions when required to make assumptions, the CMA has erred in favour of Auden/Actavis'.

The CMA concluded that prices were excessive when compared to the costs, as the differences between the two were 'material'. For instance, between September 2015 and January 2017, the average selling price for 10mg hydrocortisone tablets was £65.31 and the cost was £2.29, resulting in a differential of £63.02 (2752%). For 20mg hydrocortisone tablets, the average selling price was £60.77 and the cost was £2.91, so the differential was £63.02 (1190%). To corroborate its findings, the CMA relied on: (i) Auden's prices initially set for the sale of its hydrocortisone in April 2008 (which were £4.54 per pack of 10mg tablets and £5.14 per pack of 20mg tablets); (ii) the prices applied from February to April 2021 of competing hydrocortisone tablets; (iii) Actavis's prices applied from February to April 2021; and (iv) the prices that were projected to prevail if competition emerged. The CMA also explained that its conclusions did not change even if alternative measures were used for the allocation of common costs or the rate of return.

Unfair Limb: The CMA found that Auden/Actavis's prices were unfair in themselves and also when compared to competing products, i.e., the 'current prices' of competing hydrocortisone tablets. The CMA decided that 'all competing hydrocortisone tablets', which include both skinny and full label hydrocortisone tablets, allowed for a meaningful comparison between competitors' prices and Auden/Actavis's prices. The CMA also explained that it had used the 'current prices' (from February to April 2021) of these

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competing products as meaningful comparators because these prices were set in conditions of effective competition between Auden/Actavis's competitors, in the absence of Auden/Actavis's market power.

The CMA found that no other products provided a meaningful comparator against which to assess whether Auden/Actavis's prices were unfair. In particular, the parties claimed that Plenadren and soluble hydrocortisone tablets should be also seen as potential comparators. But the CMA noted that these products are not sufficiently similar to Auden/Actavis's hydrocortisone tablets, first, because these products are innovative products which incurred development costs that Auden/Actavis's products did not incur, and, second, because these medicines had 'niche uses' and were sold at a very low volume. In addition, the CMA noted that the prices set for each of these two potential comparators were fundamentally different from those of hydrocortisone tablets and that there was no evidence that these prices were set in conditions of effective competition.

Regarding the cartel agreements, the CMA found that Auden/Actavis had entered into market exclusion agreements with two other suppliers who had threatened its position. From July 2011 to April 2015, Auden/Actavis paid Waymade £1.8 million to stay out of the market with its own 20mg hydrocortisone tablets, and £70,000 to stay out of the market with its own 10mg tablets in October 2012. Additionally, Auden /Actavis paid AMCo £21 million to stay out of the market with its own 10mg hydrocortisone tablets from October 2012 to June 2016. The CMA concluded that these cartel arrangements allowed Auden/Actavis to charge high prices and preserve its monopoly position.

Auden/Actavis filed an appeal with the UK Competition Appeal Tribunal in October 2021 (Competition Appeal Tribunal, Case No: 1413/1/12/21, *Auden McKenzie (Pharma) Limited & Another v Competition and Markets Authority*, 27 October 2021). The appellants contend that the CMA erred in its assessment of the concepts of: (i) the relevant market; (ii) dominance; (iii) abuse; and (iv) duration and that the fines are disproportionate. The appeal is currently pending.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

General Court rules on re-adopted Commission decision in *Airfreight* case

On 30 March 2022, the General Court of the European Union ("General Court") handed down thirteen separate judgments on appeals brought by airfreight carriers against the Commission's re-adopted decision in the *Airfreight* case.

Background

In November 2010, the European Commission ("Commission") adopted a decision finding that, between December 1999 and February 2006, several airfreight carriers had engaged in anticompetitive contacts with a view to coordinating their pricing behaviour ("2010 Decision"). According to the Commission, the carriers coordinated their conduct in the imposition of flat-rate fuel surcharges ("FSC") on all relevant airfreight shipments. The Commission found that, after 2001, this approach was extended to security surcharges ("SSC") to address the cost of newly introduced security measures. The Commission also found that the carriers had agreed not to pay commissions to freight forwarders on the surcharges levied. Carriers typically remunerated freight forwarders for their services through paying a commission calculated on the airfreight rate and, as a result of the coordinated refusal by carriers to pay commission on surcharges, freight forwarders were remunerated solely on the basis of the base rate. According to the Commission, the refusal to pay commission on surcharges was intended to ensure that surcharges did not become the subject of the negotiation of discounts with customers.

The Commission found that the coordination affected: (i) routes between airports within the EEA ("intra-EEA routes"); (ii) routes between airports within the EU and airports outside the EEA ("EU-third country routes"); (iii) routes between airports in countries which are party to the EEA Agreement but which are not EU Member States and airports in third countries ("non-EU EEA-third country routes") and (iv) routes between airports within the EU and airports in Switzerland ("EU-Switzerland routes"). Applying Article 101 TFEU, Article 53 of the EEA Agreement, and Article 8 of the EC-Switzerland Agreement on Air Transport, the Commission imposed fines on the carriers concerned totalling €799 million. Lufthansa and its subsidiary Swiss International Airlines obtained full immunity from fines under the Commission's 2002 Leniency Notice.

In 2015, the General Court handed down judgments on the actions brought by the carriers concerned against the 2010 Decision annulling the decision in its entirety. In essence, the Court held that there was a contradiction between the operative part of the decision – which appeared to identify separate infringements covering each of the four categories of routes described above and attributed liability among the carriers based on their activities on the routes in question – and the grounds for the decision – which described one single and continuous infringement covering all four categories of routes.

In March 2017, the Commission re-adopted the decision (the "re-adopted decision") and sought to address the contradiction between the operative part of the decision and the statement of reasons identified by the General Court, while maintaining its substantive analysis.

The carriers that had challenged the 2010 Decision brought new actions before the General Court, seeking annulment of the re-adopted decision or a reduction of the amount of the fines imposed on them. In its recent judgments, the General Court dismissed the actions brought by Martinair, KLM, Cargolux Airlines, Air France-KLM, Air France, Lufthansa, Singapore Airlines and Singapore Airlines Cargo and upheld the fines imposed. However, the General Court partially annulled the re-adopted decision in so far as it concerned Japan Airlines, Air Canada, British Airways, Cathay Pacific Airways, SAS Cargo Group, Latam Airlines Group and Lan Cargo ("Latam/Lan").

Expiry of limitation period

In the *Japan Airlines*, *Latam/Lan*, and *Cathay Pacific* actions, the applicants claimed that, through making a finding of infringement and in imposing penalties on them in respect of intra-EEA routes and EU-Switzerland routes in the readopted decision, the Commission had breached the limitation period laid down in Article 25 of Regulation 1/2003. In essence, under Articles 25(5) and 25(6) of Regulation 1/2003, the Commission has a maximum period of ten years from the end of an infringement to adopt a decision imposing penalties and that limitation period is suspended for as long as the Commission's decision is the subject of proceedings before the EU Courts.

According to the applicants, since the operative part of the 2010 Decision had not held them liable for an infringement on intra-EEA routes or EU-Switzerland routes and their actions against the 2010 Decision had therefore not sought the annulment of any finding of infringement relating to those two categories of routes, Article 25(6) of Regulation 1/2003 did not have the effect of suspending the limitation period for the duration of the original annulment proceedings before the General Court. Since the infringement had ended in February 2006, the applicants argued that the Commission's readoption of the decision in 2017 and its imposition of penalties on them in respect of intra-EEA routes and EU-Switzerland routes was time-barred.

In its analysis, the General Court held that the suspension of the limitation period attached to judicial proceedings by Article 25(6) takes effect only *inter partes*. Accordingly, the fact that, in the 2010 Decision, the Commission had found other carriers liable for infringements on intra-EEA routes and EU-Switzerland routes and that those carriers had appealed against those findings in the original annulment actions was irrelevant to the limitation period applicable to the applicants, who had not been found liable in relation to those two categories of routes in the 2010 Decision.

The General Court held that the subject matter of the actions against the 2010 Decision had to be confined to the operative part of that decision, in so far as it concerned the applicants, and to the grounds which constituted the necessary basis for the operative part. The operative part of the 2010 Decision had not found the applicants liable for the conduct relating to intra-EEA and to EU-Switzerland routes and, therefore, did not constitute an aspect of the decision that concerned the applicants. Accordingly, the General Court held that the applicants' actions against the 2010 Decision were not capable of suspending the limitation period provided by Article 25(5) of Regulation 1/2003. In the absence of an extension, the Commission's exercise of the power to impose penalties in respect of such conduct was time-barred as of February 2016 (i.e., ten years after the single and continuous infringement ceased).

Since the Commission did not claim it had a legitimate interest in finding the existence of unlawful conduct notwithstanding that the power to impose fines was time-barred, the General Court annulled the re-adopted decision in that part.

Awareness of element of single and continuous infringement

In the *Latam/Lan* action, the applicants succeeded in arguing that the re-adopted decision had not established to the requisite legal standard that Lan participated in the element of the single and continuous infringement relating to the FSC or the SSC and the refusal to pay commission. As regards the FSC infringement, the General Court found that, taken together, Lan's contacts with Lufthansa were not capable of establishing the requisite knowledge by the applicants either of: (i) the extent of the network of contacts revealed by the Commission's investigation; or (ii) the expectation that discipline would be maintained with regard to the FSC; or (iii) the multi-level structure in which the FSC was implemented. Accordingly, the General Court annulled the 2010 Decision to the extent that it held the applicants liable for the single and continuous infringement relating to FSC prior to July 2005. Furthermore, the General Court found that the email exchanges relied on by the Commission were not in themselves sufficient to establish that the applicants were aware of the element of the single and continuous infringement relating to the SSC. As regards the refusal to pay commission, the General Court found that the email relied on by the Commission was ambiguous and insufficient to show the applicants' knowledge of the existence of a broader, bilateral and multilateral coordination going beyond its bilateral exchanges with Lufthansa.

In the *SAS Cargo Group* action, the applicant argued that the Commission had wrongly considered that, in view of its involvement in the elements of the infringement relating to FSC and SSC, the applicant could reasonably have foreseen and was prepared to take the risk of the conduct of the other carriers concerning the refusal to pay commission. The General Court agreed that the Commission was wrong to merely presume that the applicant was aware of the element of the single and continuous infringement relating to the refusal to pay commission on the basis of its identity of object with the other two elements of that infringement. Accordingly, the General Court held that, objective economic complementarity between the surcharges and the refusal to pay commission could not, even if established by the evidence, suffice to establish the element of reasonable foreseeability.

Review of evidence – British Airways

In the *British Airways* action, the applicant argued that the Commission had made an error of assessment in concluding that it had participated in the component of the single and continuous infringement relating to the refusal to pay commission on surcharges. The General Court examined the four items of evidence on which the Commission had based its conclusion in the re-adopted decision, and found that only three emails could support the Commission's conclusion. Further, in the view of the Court, two of these emails were ambiguous and the third email had weak evidential value. In the absence of other evidence, the General Court held that the Commission had not relied on a body of evidence sufficient to prove the applicant's participation in the component of the single and continuous infringement relating to the refusal to pay commission. Therefore, the 2010 Decision was annulled in so far as it found British Airways liable for the component of the single and continuous infringement relating to the refusal to pay commission on surcharges.

Regulatory schemes of third countries

The applicants in the *SAS Cargo Group*, *Latam/Lan*, *KLM*, *Japan Airlines*, *British Airways*, *Lufthansa*, *Cathay Pacific*, and *Singapore Airlines* actions put forward various arguments in reliance on the regulatory schemes in force in the third countries at the time of the infringements, which they argue compelled or strongly encouraged coordination on surcharges.

The General Court noted that, in the absence of any binding regulatory provision requiring the anticompetitive conduct, the Commission was entitled to conclude that operators enjoyed no autonomy only where it appeared on the basis of objective, relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt state measures likely to cause them to sustain substantial losses.

The General Court rejected most of the applicants' pleas that the carriers had been subject to such state coercion. However, in the *SAS Cargo Group* action, the applicant successfully established that, as from July 2005, the rules applicable in Thailand and the conduct of the Thai authorities created a legal framework that eliminated in itself any possibility of competitive behaviour between carriers in setting the amount of the FSC applicable to flights departing from Thailand. Accordingly, the General Court annulled the contested 2010 Decision in so far as it found that Article 101(1) TFEU and Article 53 of the EEA Agreement were applicable to the applicants' conduct as regards the determination of the FSC for flights departing from Thailand in that period.

As a result of the General Court's partial annulment of the decision in these actions, the fines imposed were reduced from €35.7 million to €28.875 million for Japan Airlines, from €8.22 million to €2.244 million for Latam/Lan, from €57.12 million to €47.4 million for Cathay Pacific, and from €104.04 million to €84.456 million for British Airways.

INTELLECTUAL PROPERTY/ LICENSING

– NATIONAL LEVEL –

AUSTRIA

Austrian Supreme Court denies defence that licensor infringed Article 101 TFEU as defendant could not prove intention to seal off national markets

In its judgment of 25 January 2022, the Austrian Supreme Court granted a request by Sky, a pay-tv provider holding an exclusive licence for the broadcasting of UEFA Champions League football matches in Austria, to prohibit an inn in Austria from showing such games via a third-party pay-tv provider in a non-EU country. In doing so, the Austrian Supreme Court declined to examine whether the territorial licence agreement between UEFA and Sky was void for violating Article 101 TFEU.

UEFA had granted Sky the exclusive right to broadcast UEFA Champions League matches within Austria during the seasons 2018/2019 to 2020/2021. However, the defendant, an owner of an inn in the city of Linz, showed the football matches via a third-party provider which did not hold a licence for Austria. Sky sought a cease-and-desist order against the inn-owner to prevent the showing of the UEFA Champions League matches via the third-party provider. The lower courts rejected Sky's claim largely based on a finding that enforcing the exclusive territorial licence would violate (i) Article 56 TFEU (the freedom to provide services) and (ii) Article 101 TFEU.

With respect to the alleged violation of Article 101 TFEU, the Austrian Supreme Court observed that broadcasting licences that are restricted to the territory of only one Member State are not per se prohibited as anti-competitive. The Austrian Supreme Court reasoned that the intention to seal off national markets, and thus the prevention of the creation of a single market, was decisive. The actual content of the licensing agreement in question is, therefore, key.

The Austrian Supreme Court considered that the compatibility of a claim for enforcement of a right under national law with EU law is usually a question to be examined *ex officio* but that, in the present case, this question was one of fact and must be addressed by the parties. Given that the inn-owner, a customer of the third-party provider, did not present evidence on the content of the licensing agreement, a potential violation of Article 101 TFEU could not be established and Sky was accordingly entitled to enforce the exclusive licence.

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