VAN BAEL & BELLIS

VOLUME 2017,
Nº 7

July 2017

VBB on Competition Law

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| MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission alleges breaches of procedural rules under EU Merger Regulation

On 6 July 2017, the European Commission sent three separate statements of objections ("SO") to companies alleging procedural breaches of the EU Merger Regulation.

Provision of misleading information

The first SO concerns the Merck/Sigma-Aldrich transaction, which was conditionally cleared by the Commission on 15 June 2015 on the basis that the parties divest certain laboratory chemical assets of Sigma-Aldrich. The Commission alleges that Sigma-Aldrich did not provide the Commission with important information about an innovation project closely linked to the divested assets, which the Commission considers, had it been aware of its existence, should have been included in the remedy package as it may have substantially increased the divested assets sales.

The second SO concerns the GE/LM Wind transaction. GE originally notified its acquisition of LM Wind on 11 January 2017 but later withdrew the notification on 2 February 2017. The transaction was later re-notified on 13 February 2017 and cleared on 20 March 2017. The Commission alleges that critical information concerning GE's research and development activities and the development of a specific product were omitted from the original notification such that it could not properly assess GE's position on the onshore and offshore wind turbine markets. Further, the Commission alleges that the missing information also hindered its ability to assess a parallel transaction in the same sector: Siemens' acquisition of Gamesa.

If the Commission later concludes that Merck or GE intentionally or negligently supplied incorrect or misleading information, it may impose a fine of up to 1% of their respective annual worldwide turnover. Recently, the Commission fined Facebook €110 million for providing incorrect or misleading information during the Commission's 2014 investigation of Facebook's acquisition of WhatsApp (see VBB on Competition Law, Volume 2017, No. 5).

Failure to file – or completion prior to clearance

The third SO concerns the Canon/Toshiba Medical Systems transaction, which was unconditionally cleared by the Commission on 19 September 2016. The Commission alleges that a two-step "warehousing" structure relying on an interim buyer essentially allowed Canon to acquire Toshiba Medical Systems. In the first step, the interim buyer acquired 95% of the share capital of Toshiba Medical Systems for €800, whereas Canon paid €5.28 billion for the remaining 5% and certain share options over the interim buyer's stake. In the second step, following the Commission's approval of the merger, the share options were to become exercisable by Canon, which would thus allow it to acquire 100% of the shares of Toshiba Medical Systems. According to the clearance decision, Canon would only have been able to exercise the share options once it obtained all the necessary antitrust clearances.

If the Commission concludes that Canon implemented its acquisition of Toshiba Medical Systems prior to notification, it could impose a fine of up to 10% of Canon's annual worldwide turnover. Previously, the Commission imposed, in two separate cases, €20 million fines on Electrabel and Marine Harvest for failing to notify their transactions prior to obtaining merger clearance. In both cases, the parties closed the deal long before notifying the Commission. Recently, the Commission also alleged Altice completed its acquisition of PT Portugal prior to clearance (see VBB on Competition Law, Volume 2017, No. 7). he three cases are only at a preliminary stage and the Commission's final decision on the alleged procedural violations will not invalidate the merger approval in any case.

– MEMBER STATE LEVEL –

IRELAND

Irish CCPC obtains commitments for below threshold media services merger

On 12 July 2017, the Irish Competition and Consumer Protection Commission ("CCPC") announced that it conditionally cleared a proposed merger between Kantar Media and New-

saccess. Both parties are active in the provision of media intelligence and media monitoring services.

Although the transaction fell below the thresholds for notification in Ireland, the CCPC retains a residual power to review and challenge such deals under the Irish Competition Act. In this case, the merging parties were 'advised' by the CCPC to notify the deal. Following an extended Phase I investigation, the CCPC identified significant competition concerns and required the buyer, Kantar Media, to agree a number of commitments, including divesting the fixed assets of Newsaccess to a new supplier, releasing a number of customers of Newsaccess from their fixed term contracts, facilitating customers of Newsaccess to receive marketing material from the purchaser of the fixed assets of Newsaccess, ensuring that Newsaccess will not enforce any clause restricting former Newsaccess employees or staff members from being employed by a competing business and committing to maintain price levels for customers of Newsaccess for a period of one year. As a result of the commitments provided, the CCPC conditionally cleared the deal.

UNITED KINGDOM

CMA issues final decision in long-running ICE/Trayport saga

On 7 July 2017, the UK's Competition and Markets Authority ("CMA") published its final report on a single question referred back to it by the UK's Competition Appeals Tribunal ("CAT") concerning a financial-trading product distribution arrangement entered into between ICE and Trayport during the CMA's review of that transaction. The CMA has now concluded (once again) that the distribution agreement must be undone. In particular, the CMA considers that the competition issues identified in the original merger investigation would not be comprehensively remedied if the agreement remained in place. Further, the CMA regarded the commercial agreement as a "legacy effect" of ICE's control over Trayport and risked the ability of Trayport's future owner to set its own commercial strategy towards ICE.

Previously, the CMA ordered ICE to unwind its acquisition of Trayport in October 2016, which resulted in the first vertical merger prohibited by the CMA since the amalgamation of the OFT and CC in April 2014 (see VBB on Competition Law, Volume 2016, No. 10). Following an appeal of that prohibition decision by ICE to the CAT, the prohibition decision was upheld but the CMA was ordered by the CAT to reconsider whether ICE should undo its distribution agreement entered into with Trayport to allow ICE to distribute a range of ICE products on Trayport's trading platform (see VBB on Competition Law, Volume 2017, No. 3). ICE has since announced that it will now complete the divestment of Trayport and terminate the agreement as ordered by the CMA.

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| ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch Competition Authority fines Dutch rail operator NS record fine of almost € 41 million for various abuses in winning tender

On 29 June 2017, the Dutch Competition Authority ("DCA") published the non-confidential version of a decision of 22 May 2017 imposing a €40.95 million fine on Dutch rail operator Nederlandse Spoorwegen ("NS") for abusing its dominant position in the context of a tender for public transport services in the Dutch Province of Limburg ("Limburg"). The fine is the highest individual fine ever imposed by the DCA.

The case concerns public tender proceedings, launched by Limburg in 2014, for the grant of a concession for train and bus transport in the region. NS participated in this tender through its subsidiary Abellio alongside rival transport companies Veolia and Arriva. While Abellio was initially awarded the tender, Limburg later granted the concession to Arriva instead, following reports of irregularities during the proceedings.

In its decision, the DCA determined that NS, as the concession holder of the main rail network in the Netherlands between 2015 and 2025, held a dominant position in the market for the exploitation rights of the main rail network. The DCA further found that NS relied on its dominance in this market to engage in abusive conduct in the separate market for the concession to exploit the regional transport network in Limburg.

The DCA identified that NS had abused its dominant position in two respects. First, NS was found to have engaged in predatory pricing by submitting a loss-making bid, which was impossible for its rivals to equal or better. In particular, the DCA found that NS had overestimated its expected return on the Limburg concession and failed to take into account certain known cost risks without substantiating the reasons for doing so.

Second, the DCA found that NS had undertaken certain related actions aimed at diminishing the chances of its competitors obtaining the concession. In particular, the company was found to have deceitfully obtained confidential information about its rival, Veolia, which held the concession for regional rail transport in Limburg at the time of the tender. NS apparently obtained this information from Veolia's former concession manager whom it had hired through a scheme arrangement and provided it to Abellio for the purposes of improving its bid.

Furthermore, the DCA found that NS gave Abellio relevant information concerning the main rail network which was not made available to its rivals. In addition, it was established that NS was legally required to offer its rivals access to certain facilities and services operated by NS's subsidiaries, such as staff rooms and service desks at train stations in Limburg. The DCA found that NS gave incomplete or delayed responses to rivals' requests for information concerning such access, which hampered the preparation of their respective bids.

NS and its sole shareholder, the Dutch Ministry of Finance, announced that it will lodge an administrative appeal against the DCA's decision.

GREECE

Athens Administrative Supreme Court upholds finding that Athenian Brewery abused its dominant position in the Greek beer market by granting exclusivity incentives

On 4 July 2017, the Administrative Supreme Court in Athens upheld the substance of a 2015 decision of the Hellenic Competition Commission ("HCC") against Athenian Brewery, a subsidiary of Heineken active in the production and distribution of beer in Greece, for abusing its dominant position in violation of Article 2 of the Greek Competition Act and Article 102 TFEU.

As part of its ruling, the Supreme Court made a technical adjustment to the original fine imposed on Athenian Brewery, reducing it from € 31 million to € 26.7 million. This new fine equates to 8.5% of the company's relevant turnover, in

comparison to the maximum 10% which the HCC had originally imposed on the company. € 26.7 million nevertheless remains the highest individual fine for a violation of antitrust law imposed in Greece.

Following an investigation lasting 12 years, the HCC issued a decision in 2015 finding that Athenian Brewery abused it dominant position by adopting and implementing a single and targeted policy that sought to exclude its competitors on the on-trade-consumption market (e.g. HORECA chains and other retail outlets) (see VBB on Competition Law, Volume 2015, No. 12). This policy consisted of making payments to customers and implementing loyalty and target rebates aimed at exclusivity. Athenian Brewery was also found to have offered wholesalers significant economic motives to promote exclusivity and pressured them not to trade competing brands. The anticompetitive behavior was said to have run for 15 years.

Macedonian Thrace Brewery, one of Athenian Brewery's competitors and a complainant in the investigation, publically welcomed the ruling. In February 2017, it launched a € 100 million damages action against Heineken before a court in Amsterdam. The case is ongoing.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice dismisses appeal in gas insulated switchgear cartel case

On 6 July 2017, the European Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by Toshiba against a judgment of the General Court ("GC"), which upheld the European Commission's decision to re-impose fines on Toshiba for its involvement in the gas insulated switchgear cartel. The Commission's 2007 decision had been annulled by the GC due to errors in the calculation of the fine (see VBB on Competition Law, Volume 2011, No. 7).

In its judgment, the ECJ endorsed the view of the GC that the Commission was not required to adopt another statement of objections prior to the re-adoption of its 2012 decision. The ECJ considered that the annulment of the 2007 decision due to an error in the calculation of the fine (i.e., the use of different reference years for assessing the basic amount of the fine in breach of the principle of equal treatment) had not called into question the validity or content of the 2006 statement of objections. The holding of the ECJ is in line with the opinion of Advocate General Tanchev (see VBB on Competition Law, Volume 2017, No. 4).

The ECJ also upheld the Commission's approach to the calculation of the new fine imposed. In particular, the ECJ considered that the Commission was not under an obligation to reduce the fine imposed on Toshiba under the 1998 Fining Guidelines due to the fact that Toshiba had participated in only one of two components of the infringement (i.e., in the worldwide arrangement but not in the European arrangement). According to the ECJ, the fact that Toshiba was not involved in the European cartel was a natural consequence of Toshiba's participation in the world-wide cartel under which Japanese companies would stay out of the European market (in exchange for the European companies' agreeing to stay out of the Japanese market). The Court thus considered that Toshiba's conduct was not less serious than that of the European producers.

– MEMBER STATE LEVEL –

BULGARIA

Bulgarian Competition Authority approves commitments offered by energy companies to curb anticompetitive contracts and information exchanges

On 26 June 2017, the Bulgarian Competition Authority accepted commitments from six Bulgarian energy companies aimed at combatting anti-competitive agreements and exchanges of information in the sector.

Lukoil Bulgaria, Eco Bulgaria, Shell Bulgaria, OMV Bulgaria, NIS Petrol and Petrol have agreed to incorporate a number of measures into their internal procedures. These include a ban on contracts and exchanges of information with competitors and their employees, and a ban on sharing commercial information within the framework of the Bulgarian Petroleum and Gas Association. Disciplinary measures will also be introduced for employees who do not comply with the confidentiality requirements for commercial information.

GERMANY

German Competition Authority will not enforce fines imposed on three sausage producers for their involvement in sausage cartel case

In a press release of 26 June 2017, the Federal Cartel Office ("FCO") reported that it will not be able to enforce the fines imposed against Bell Deutschland Holding (€ 99.6 million), Marten Vertrieb (€ 3.2 million) and Sickendieck Fleischwarenfabrik (€ 6.9 million) following their restructuring.

On 15 July 2014, the FCO imposed fines totalling approximately € 338 million on 21 sausage manufacturing companies and 33 individuals for illegal price-fixing agreements (see VBB on Competition Law, Volume 2014, No. 7). So far, fines against eleven companies and 15 individuals have become final (amounting to fines totalling approximately € 71 million). Other fining decisions have been appealed.

In October 2016, the FCO reported that two cartel members could avoid fines due to internal restructuring (see VBB on Competition Law, Volume 2016, No. 10). Before the adoption, on 9 June 2017, of the 9th amendment to the German Act against Restraints of Competition, a company could avoid competition law fines in Germany by first transferring major assets to other companies of the same group and then by dissolving itself. The 9th amendment has introduced a change to the liability of legal successors. It establishes that an undertaking that has taken over or continues the economic activity of an entity that has infringed competition law can be held liable for such an infringement (see VBB on Competition Law, Volume 2017, No. 5).

German Competition Authority imposes fines totalling € 28 million on two industrial battery producers

On 27 June 2017, the German Federal Cartel Office ("FCO") imposed fines on Hawker and Hoppecke Batterien for agreeing on a surcharge for lead batteries. The investigation was triggered by a leniency application in 2014 from Exide Technologies, which was granted immunity.

According to the findings of the FCO, the battery manufacturers had agreed in 2004 to pass on price increases for lead and lead alloys to customers in the form of a sector-wide surcharge on the sales price of stationary batteries (these are used, for instance, for emergency power supply). The surcharge was linked to the raw material price as quoted on the London Metal Exchange. Until a dawn raid in 2014, this agreement was regularly confirmed by the parties in trade association meetings. The companies applied a similar agreement in the market for traction batteries for industrial trucks between 2012 and 2014. In both cases, there was no agreement on the details of the surcharge.

The fine imposed on Hoppecke Batterien was considerably lower than the fine imposed on Hawker because the former had fully cooperated with the FCO.

German Competition Authority imposes total fines of € 9.6 million on three manufacturers of heat shields

On 13 July 2017, the German Federal Cartel Office ("FCO") announced in a press-release that it had fined three car parts manufacturers a total of € 9.6 million for colluding to pass on the cost of a component part for automobile engine heat shields to car manufacturer Volkswagen. The companies involved in the infringement are Elring Klinger Abschrimtechnik (Switzerland), Estamp (Spain) and Lydall Gerhardi (Germany). Carcoustics International (Germany) was the first company to inform the FCO of the existence of the cartel, thereby avoiding fines.

The companies manufacture heat shields, which are made of aluminium plates and which serve to protect the passenger compartment and the fuel tank from heat that radiates from the engine compartment and the exhaust gas system. The heat shield manufacturing companies were accused of agreeing to pass on the cost of aluminium to their common customer, Volkswagen. Furthermore, they exchanged highly sensitive information on the status of negotiations with Volkswagen.

The FCO closed the proceedings by settling with all three companies.

SLOVAKIA

Slovak Constitutional Court upholds € 45 million fine on construction companies for bid rigging

On 17 July 2017, the Constitutional Court of the Slovak Republic ("CCSR") dismissed appeals against a judgment of the Slovak Supreme Court ("SSC") which upheld a 2006 decision of the Slovak Antimonopoly Office ("SAO") which had imposed fines totalling € 45 million on six construction companies for participating in a bid-rigging cartel. In doing so, the CCSR confirmed the SSC's 2016 finding that the SAO was correct to fine Mota-Engil, Doprastav, Skanska, Inzenierske stavby, Kosice, Strabag and Betamont for coordinating bids in a tender for the construction of a section of a motorway (see VBB on Competition Law, Volume 2016, No. 11). Previously, in 2008, the Regional Court in Bratislava had overturned the SAO's decision for lack of clear evidence of the anti-competitive behaviour and because the amount of the fine had not been properly set (see VBB on Competition Law, Volume 2008, No. 12).

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| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office publishes guidance document concerning vertical price fixing in the food retail sector

On 12 July 2017, the Federal Cartel Office ("FCO") published a guidance document on vertical price fixing in the food retail sector ("guidance"). The guidance seeks to provide clarification, especially to small and medium-sized companies, on the delineation between prohibited and permissible market practices.

This guidance was triggered by a series of proceedings concerning vertical price fixing in this sector which were concluded by the FCO in December 2016 and resulted in the imposition of 38 fines totalling € 260.5 million on 27 companies (see VBB on Competition Law, Vol. 2016, No. 12).

In this guidance, the FCO sets out the legal and economic background of price fixing, with a focus on possible anti-competitive effects and efficiency gains of vertical price fixing. It examines possibilities for, and limits to, coordination between retailers and manufacturers. The FCO provides detailed examples for the assessment of the compliance of communications with competition law rules, in particular with regard to minimum prices, recommended retail pricing, planning of promotional activities and transmission of sales data.

In addition, the FCO explains the aspects it takes into consideration when deciding whether or not to initiate proceedings, such as the market position of the manufacturer and the distributor, the duration and extent of the supposed infringement, the extent of competitive harm to consumers as well as the deterrence effect to be achieved. The FCO states that it gives particular importance to systematic or repeated infringements and infringements which are not limited to vertical price fixing, but that promote or facilitate horizontal collusion.

An English version of the document has been announced, but at the time of writing this article was not yet published.

GREECE

Hellenic Competition Commission hits Colgate-Palmolive and five supermarkets with fines totalling almost € 11 million for restricting parallel trade

On 19 July 2017, the Hellenic Competition Commission ("HCC") fined Colgate-Palmolive and several supermarket chains € 8.6 million for restricting parallel imports of glass cleaning products. Colgate-Palmolive was furthermore fined € 748 518 for abuse of its dominant position in the market for glass cleaning products. Additionally, an administrative fine of € 400 000 was imposed on Colgate-Palmolive for supplying misleading data during the course of the HCC's investigation.

On the basis of an *ex-officio* investigation, the HCC found that Colgate-Palmolive and five supermarket chains (AB Vassilopoulos, Sklavenitis, Makro Cash & Carry, Pente and Kipseli) entered into supply agreements which contained clauses preventing the import of their products from other Member States. The implementation of this prohibition was found to be a violation of Articles 1 and 2 of the Greek Competition Act and Articles 101 and 102 TFEU. The HCC also found that the rebate scheme operated by Colgate-Palmolive which was "intrinsically" linked to compliance with the prohibition on parallel trading constituted an abuse of its dominant position in the market for glass cleaning products. According to the HCC, the infringements of competition law lasted from 1999 and 2008.

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| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

European Commission sends Statement of Objections to Teva for alleged pay-for-delay agreement

On 17 July 2017, the European Commission issued a Statement of Objections against pharmaceutical companies Teva and Cephalon (which is now a subsidiary of Teva) alleging that Teva breached Article 101 TFEU by concluding an agreement with Cephalon not to market a cheaper generic version of a medicine, modafinil, in exchange for receiving a substantial transfer of value from Cephalon.

Modafinil is a medicine used to treat sleep disorders. Cephalon owned a range of the patents with regard to the active substance modafinil. Following the expiry of specific EEA patents in modafinil, Teva entered the UK market with a cheaper generic version. However, Cephalon brought proceedings against Teva alleging that Teva infringed processing patents associated with modafinil. The parties ultimately settled their patent litigation in the UK and the US in a world-wide agreement concluded in 2005 which, as far as the EEA is concerned, provided for the transfers of value and other benefits to Teva. The Commission took the preliminary view that this arrangement created an artificial paid-for delay of the market entry of a cheaper generic version of modafinil.

The Commission opened the investigation against Teva as far back as April 2011. Teva has since acquired Cephalon, in October 2011, and entered into a settlement agreement with the US Federal Trade Commission in May 2015.

The Commission's proceedings against Teva constitutes its fourth "pay-for-delay" case, the first three of which all resulted in fines. These cases concerned Lundbeck (see VBB Competition Law, Volume 2013, No. 6; upheld on appeal before the General Court, see VBB on Competition Law 2016, Volume 2016, No. 9), Johnson & Johnson (see VBB on Competition Law, Volume 2013, No. 12) and Servier (see VBB on Competition Law, Volume 2014, No. 7).

– MEMBER STATE LEVEL –

SPAIN

Schweppes SA offers commitments to address Spanish Competition Authority's concerns of parallel trade restrictions

On 5 July 2017, the Spanish Competition Authority reported that it had concluded an inquiry into Schweppes SA after the company agreed to binding commitments to end concerns of restrictions of parallel trade in Schweppes tonic.

The Coca-Cola Company ("Coca-Cola") owns the Schweppes brand in the United Kingdom and in ten other EU Member States, while Orangina Schweppes Holding BV ("OSHBV") owns the brand in Spain and in 16 other Member States. Schweppes SA is the exclusive licensee of the Schweppes brand in Spain.

According to a press release, at the end of 2013, Schweppes SA took issue with the fact that several independent distributors were selling on the Spanish territory Schweppes tonic products that were imported from the United Kingdom. To prevent further commercialisation in Spain, which according to Schweppes SA infringed its rights on the Schweppes brand, Schweppes SA launched legal proceedings against those distributors. These proceedings ended with the signing of several agreements which prevented those distributors from importing into Spain Schweppes tonic products which were not manufactured by Schweppes SA.

In September 2015, the Spanish Competition Authority opened formal proceedings against Schweppes SA because it considered that these agreements may have exceeded Schweppes SA's trademark rights. This is because these agreements not only prevented the importation from the United Kingdom of Schweppes tonic products manufactured by Coca-Cola, but they may have also limited the parallel trade of Schweppes tonic drinks produced by OSHBV and its subsidiaries located in other Member States.

To address the concerns of the Spanish Competition Authority, Schweppes SA offered, in June 2017, the following binding commitments, which the Spanish Competition Authority accepted.

1. The existing agreements between Schweppes SA and certain distributors have to be amended to indicate that Schweppes SA only opposes the import, distribution and/or marketing of Schweppes tonic products from the United Kingdom and manufactured by Coca-Cola;

2. The scope of future agreements will be limited to the prohibition of import, distribution and/or marketing of Schweppes tonic products imported from the United Kingdom and manufactured by Coca-Cola;

3. The scope of on-going judicial proceedings whereby Schweppes SA is challenging certain distributors will be limited to the import, distribution and/or marketing of Schweppes tonic products imported from the United Kingdom and manufactured by Coca-Cola. Schweppes SA must ensure that future judicial decisions are in line with the present commitments and, if they are not, Schweppes SA must notify the court to rule in accordance with such commitments.

These commitments seem to be in line with settled EU case law. Under the exhaustion doctrine, the owner of an intellectual property right is legally barred from invoking his right to prevent the importation of products which have been sold by himself, an affiliated company or licensee, or otherwise with his consent in another Member State. By contrast, the exhaustion doctrine does not apply to branded products whose trademarks do not have 'common ownership', which appears to be the case for Schweppes originating in jurisdictions where Coca-Cola owns the trademark rights.

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| STATE AID

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 14 July 2017, the European Commission again found that the exemption for transfer and transit passengers from the Irish air travel tax involved no state aid within the meaning of the EU rules. After conducting an in-depth investigation (see VBB on Competition Law, Volume 2015, No. 10), the Commission concluded that the exemption was in line with the underlying logic of the air travel tax, which was to tax journeys by air originating from Ireland. If a passenger transfers or transits in Ireland they are on a single journey from their airport of origin to their airport of destination, and not on two separate journeys arriving in and originating from Ireland. Moreover, the Commission found that the exemption avoids double taxation and that the tax did not in itself induce undue discrimination among airlines. This decision follows a judgment by the General Court of 25 November 2014 (see VBB on Competition Law, Volume 2014, No. 12). In its judgment, the General Court annulled a previous Commission decision finding that the exemption did not result in state aid without opening an in-depth investigation, on the grounds that the Commission's analysis was incomplete and insufficient.

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| PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Implementation of EU directive on antitrust damages actions

The European Commission has requested Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta and Portugal to fully implement the Directive on antitrust damages actions (Directive 2014/104/EU) into national law. This Directive helps citizens and companies claim damages if they are victims of infringements of EU antitrust rules. Among other things, it gives victims easier access to evidence they need to prove the damage suffered and more time in which to make their claims. The Directive on antitrust damages actions is considered by the Commission to be an essential part of EU competition law enforcement. Member States were under an obligation to implement it into national law by 27 December 2016. The Commission has now sent reasoned opinions to the 7 Member States for failing to adopt national transposition measures. In the absence of a satisfactory reply within two months, the Commission may decide to refer them to the European Court of Justice.

– MEMBER STATE LEVEL –

UNITED KINGDOM

CAT dismisses second ever UK consumer class action against MasterCard at preliminary stage

On 21 July 2017, the UK's Competition Appeal Tribunal ("CAT") dismissed an application for certification of the second 'opt-out' collective proceedings to be brought in the UK.

By way of background, the subject of the contested collective proceeding concerns a damages claim which follows-on from the European Commission's decision in 2007 that MasterCard's multilateral interchange fees ("MIFs") applicable in the European Economic Area ("EEA") were in breach of Article 101 TFUE. In September 2014, that decision was definitively upheld by the Court of Justice of the European Union. For the purpose of UK law, this means that the Commission's decision is binding evidence of an EU competition law infringement. The collective proceedings in this case were brought on behalf of 46 million individuals in the UK suing Mastercard for approximately GBP 14 billion in damages.

However, under section 47B of the Consumer Rights Act (introduced in 2015), collective proceedings may only be brought before the CAT where it finds (and, accordingly, orders via a 'collective proceedings order') that the claim (a) is brought on behalf of an identifiable class of persons, (b) raises common issues, and (c) is suitable to be brought in collective proceedings. Central to the CAT's analysis in this case was whether the claim against MasterCard on behalf of a huge number of individuals raised "common issues" of the same, similar or related issues of fact or law, so as to be eligible to be brought before the CAT in the form of a collective proceeding.

In this regard, the CAT rejected the argument that "the individual claims [were] largely identical". Rather, the CAT identified six evidential issues which would arise in common on a claim against MasterCard by a member of the class. According to the CAT, three of these evidential issues raised concerns for lack of commonality, namely (i) the degree to which overcharges related to the MIFs were passed on to individuals in the class, (ii) the amount individuals in the class spent, and (iii) whether an individual using a credit card paid any interest to MasterCard and/or received any benefits in connection with the use of a particular MasterCard card.

Further, the CAT held that the claimants had not advanced a sustainable methodology which could be applied to calculate a sum to reflect an aggregate of individual claims for damages. The CAT cited the evidential test referred to by the Supreme Court of Canada in the 2013 Microsoft case which held that, when analysing expert evidence adduced in a collective claim form, the methodology to calculate the loss caused to the individuals in the class "must offer a realistic prospect of establishing loss on a class-wide basis". Moreover, the CAT did not consider that there was a reasonable and practicable means for distributing any award among the (vast) number of individuals in the claim.

The case is significant in the UK because it is only the second class action to date and because the GBP 14 billion claim is the largest follow-on damages claim yet filed. The CAT noted that the governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach. This case confirms that failure to reasonably determine a claimant's loss in advance, even using broad estimated methods of calculation, will result in dismissal of a class action. Indeed, although the decision will likely mean that a vast number of individuals in the UK who suffered loss may not obtain compensation, it is noteworthy that the CAT acknowledged that this is effectively the position in most cases of widespread consumer loss resulting from competition law infringements.

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