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LEGAL INSIGHTS

EU AND COMPETITION LAW

News - Competition law and policy 1st quarter 2019

Below, you will find the edition of the competition law and policy newsletter for the 1st quarter of 2019, which compiles the most significant news in this area.

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PORTUGAL

I. Portuguese Competition Authority

Portuguese Competition Authority presents its overall results for 2018

In its February newsletter, the Portuguese Competition Authority (PCA) reported that, in 2018, it ordered two companies to pay fines in the amount of EUR 12 million and EUR 370,000. It also carried out four dawn raids and issued four Statements of Objections.

As regards merger control, the PCA adopted forty-eight decisions and two of them were preceded by an in-depth investigation (Phase II).

In 2018, the PCA also engaged in competition advocacy that included, among others, signing Protocols with the IMPI (Portuguese Institute for Real Estate and Construction) and INFARMED (National Authority of Medicines and Health Products). Additionally, the PCA carried out market studies and sector analyses (focused on the energy, telecoms and payment services sectors).

Portuguese Competition Authority clears ten mergers in the first quarter of the year

In the first quarter of 2019, the Portuguese Competition Authority (PCA) cleared ten mergers (available here).

In all the cases, the PCA found that these mergers did not lead to a significant impediment to effective competition in the markets at issue.

Portuguese Competition Authority issues opinions on the energy and transport sectors

On 7 February 2019, the Portuguese Competition Authority issued an opinion in the context of a public consultation of the Plan for the Development and Investment in Natural Gas' Distribution System for the period 2019-2023. This opinion warned about the existence of information discrepancies that benefit the distribution system operators. It also conveyed the importance of economic rationality and proportionality in evaluating the associated investments. The PCA also stressed the existence of a risk of a price increase, given the increase in the number of licenses awarded and in the investment being made, against a background where natural gas consumption is decreasing.

On 15 February 2019, the PCA drew attention, in the context of a public consultation of the Draft Regulations for the Smart Electricity Grid, to the incentive remuneration scheme that benefits the low voltage network operators in the event they install intelligent meters. The PCA stressed that a lack of reasoning in the proposal does not allow for a proper evaluation of proportionality of this scheme, as it may entail higher costs to consumers.

Lastly, on 21 February 2019, in the context of a public consultation of the Draft Regulation for the Transport Fares Rules in the context of the Legal Framework of the Public Passenger Transport, the PCA suggested making the fares more flexible in terms of setting and updating prices, and applying price discounts.

Portuguese Competition Authority issues Statements of Objections against supermarket chains and beverage suppliers

On 21 March 2019, the Portuguese Competition Authority (PCA) issued three Statements of Objections against six large food retail groups (Modelo Continente, Pingo Doce, Auchan, Intermarché, Lidl and E. Leclerc) and three beverage suppliers (Sociedade Central de Cervejas, Super Bock and PrimeDrinks).

According to the PCA, between 2003 and 2017, the said supermarket chains allegedly used their commercial relationship with the suppliers to align the different retail prices for the products of those suppliers, such as beers, flavoured waters and soft drinks.

In the PCA's view, the companies' action allegedly amounted to "hub-and-spoke" collusion insofar as retailers did not communicate directly with one another, contrary to what is usually the case in a cartel. Rather, according to the PCA, the retailers sought to set the same retail price through bilateral communications with the suppliers. The PCA also accused managers and directors of Modelo Continente, Central de Cervejas and Super Bock.

The defendants now have the opportunity to exercise their rights of defence.

EUROPEAN UNION

I. Courts

Court of Justice confirms that the European Commission violated UPS defence rights in the context of a merger proceeding

On 16 January 2019, the Court of Justice of the European Union (CJEU) upheld the conclusion of the General Court (GC) that the European Commission (EC) had breached procedural rules in the control of the acquisition of TNT by UPS, thereby rejecting the EC's plea.

In 2013, the EC prohibited this merger, having grounded its decision on an econometric model that was different from the one presented to the parties during the administrative proceedings. For that reason, on 18 October 2017, the GC annulled the enforcer's decision to block the merger.

According to the EU courts, as these changes (which were not considered to be negligible) were not communicated to the acquiring company, the EC had violated the latter's right of defence because the companies should have had the chance to know about the changes and to be heard on them.

UPS brought an action for damages against the EC, claiming the amount of EUR 1.7 billion, which is still pending.

"According to the Portuguese Competition Authority, between 2003 and 2017, the supermarket chains were involved into price fixing arrangements."

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The European Commission was ordered to pay interest after the annulment of a fine it had imposed

On 12 February 2019, the General Court (GC) ordered the European Commission (EC) to pay Printeos more than EUR 180,000 in interest, following an annulment of the fine imposed on Printeos and a refund of the sum already and provisionally paid.

Even though the EC has argued that the amount of interest to be paid should correspond to the losses suffered by the company for not having the money available, the GC decided that the EC was obliged to pay default interest on the fine amount, because the decision was retroactively annulled. To calculate the interest, the relevant period runs from the date of the provisional payment until its effective return.

Interest from the date of the GC ruling to the date of full payment of the interest due must be added to this amount. In this case, the interest rate is equal to the rate applied to the European Central bank's refinancing operations, which is 3.5 %, the same interest rate applicable to companies that fail to pay their fines on time.

"According to the Court of Justice, having regard to the autonomous concept of undertaking under EU competition law, the economic successors of the companies that have ceased to exist or were restructured are liable for the former companies' infractions."

Court of Justice clarifies that private claimants are entitled to seek damages against dissolved or restructured companies

Finland's Supreme Court referred the following questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling: (i) whether the determination of which companies caused the damage and, as such, are liable for the compensation of harm caused by the infringements of competition law should be governed by internal law or by EU law; and (ii) if EU law applies, whether the rule of continuity of the economic unit applies to these cases.

On 14 March 2019, the CJEU decided that the determination of which companies are liable to pay compensation for anticompetitive practices is a matter of EU law. According to the CJEU, actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules.

Concerning the second question, the CJEU held that the principle of economic continuity is also to be applied in private enforcement proceedings. Thus, having due regard to the autonomous concept of undertaking under EU competition law, the economic successors of the companies which have ceased to exist or were restructured are liable for the latter's infractions.

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These questions were raised after seven companies were imposed fines for allegedly participating in a cartel in the country's asphalt market between 1994 and 2002. After the sanctions, three of the companies were voluntarily dissolved. The sole shareholders of the former companies bought the assets of their subsidiaries and continued the latter's economic activity.

II. European Commission

European Commission approves state aid of EUR 320 million to support biomass energy installations

On 8 January 2019, the European Commission approved a state aid scheme that supports biomass energy installations located close to forest areas that have a critical fire risk.

This scheme is aimed at incentivising forest owners to clean the forests by using the forest residues to produce biomass energy.

This aid entails a top-up payment over the market price of a unit of electricity, as well as an environmental tariff premium linked to the use of biomass from Portuguese forests that have a critical fire risk.

European Commission opens an in-depth investigation into the tax treatment offered by the Netherlands to Nike

On 10 January 2019, the European Commission (EC) opened an in-depth investigation into five rulings of the Dutch Tax Authority issued between 2006 and 2015 regarding the calculation method used by Nike to determine the royalties paid by two group companies located in the Netherlands.

The case concerns an alleged more favourable tax treatment linked to obtaining licences to use intellectual property rights. Specifically, these two companies obtained the licences from two other group entities, but the latter are considered "transparent" for tax purposes (i.e., not subject to corporate income tax).

The EC is investigating whether this calculation method reflects the current economic situation. Depending on the investigation, the Dutch tax rulings could amount to a selective advantage and thus contrary to the European Union's state aid rules.

European Commission conditionally approves the acquisition of Solvay's nylon business by BASF

On 18 January 2019, after an in-depth investigation (Phase II), the European Commission (EC) cleared the acquisition of Solvay's nylon business by BASF. Both companies have a strong position along the supply chain of this product, which is used in different industries.

The EC identified, as competitive concerns, the reduction in suppliers of this product, the likely increase in prices and the possibility of access by other competitors to production goods in this product chain being made more difficult.

BASF and Solvay put forward the following commitments to address the concerns and therefore to be granted the clearance: (i) divestment of several of Solvay's facilities to a third-party buyer; (ii) the creation of a joint venture between the merged company and the said third-party buyer to produce adipic acid; (iii) and lastly, the conclusion of a long-term supply agreement for adiponitrile to meet the divestment business' requirements.

European Commission issues Statement of Objections against eight banks for collusion in the market for European government bonds

On 31 January 2019, the European Commission (EC) issued Statement of Objections against eight banks for allegedly participating in a collusive scheme that distorted competition in the market for European Government bonds issued by the Eurozone central banks.

According to the EC, between 2007 and 2012, these banks exchanged commercially sensitive information and coordinated trading strategies, thereby affecting the issuers of bonds but also the buyers of those bonds in the secondary market. According to the evidence gathered by the EC, these banks allegedly communicated through online chatrooms.

The defendants have now the opportunity to exercise their rights of defence.

"After an in-depth investigation, the Commission prohibited the merger of the economic activities of manufacture of railway and metro signalling systems and high-speed trains undertaken by Siemens and Alstom."

European Commission prohibits Wieland's acquisition of Arubis and the stake Arubis held in Schwermetall

On 5 February 2019, after an in-depth investigation (Phase II), the European Commission (EC) decided not to authorise Wieland's proposed acquisition of Arubis and the shares in Schwermetall owned by Arubis. Both Wieland or Arubis produce copper products that are used in several European industries. Schwermetall is held in a joint venture by Arubis and Wieland and it produces a product used by both of them.

According to the EC, through this acquisition of Arubis, Wieland could eliminate price competition by gaining a dominant position in the market through a market share of more than 50 %. All these factors combined could lead to a sale price increase.

Concerning the acquisition of the shares in Schwermetall, the EC found that, in that event, this company would lose its autonomy in determining the conditions of sales to third parties. Additionally, with this acquisition, Wieland could raise Schwermetall's product price when selling to Wieland's direct competitors and gain access to their confidential information.

Even though the companies offered some divestments as a form of commitment to eliminate the EC's concerns, Wieland was not willing to divest its Schwermetall assets and, for that reason, the EC prohibited this operation.

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European Commission prohibits the merger between Siemens and Alstom

On 6 February 2019, after an in-depth investigation (Phase II), the European Commission (EC) prohibited the merger of the two economic activities undertaken by Siemens and Alstom of the supply of railway and metro signalling systems and high-speed trains. This merger would have been implemented through the creation of a new company controlled by Siemens.

According to the EC, this merger would have created an undisputable market leader in certain signalling system market sectors and a dominant position in the high-speed train market, thereby decreasing supply and competition within these markets.

Siemens proposed a set of commitments to address these concerns but, in the EC's view, they fell short and for that reason, the EC prohibited the merger.

According to the EC, the Chinese companies that operate in this sector have not yet entered into the European market and it is not clear whether, in the future, they will represent a competitive constraint on the merging parties.

European Commission fines car safety equipment suppliers EUR 368 million for cartel settlements

On 5 March 2019, the European Commission (EC) fined Autoliv and TRW EUR 368 million for cartel settlements. The Company Takata was not fined as it disclosed the practice to the EC.

According to the EC, the parties entered into two different anticompetitive agreements for the supply of different car safety equipment. From 2007 to 2011, the three companies exchanged commercially sensitive information and coordinated their market behaviour as regards the supply of this equipment to Volkswagen and BMW groups.

All three companies were (i) leniency applicants and (ii) agreed to settle the case, thereby acknowledging their participation in the infringements. Therefore, Autoliv and TRW were granted a substantial fine reduction and Takata received full immunity, as it was the first company to bring the practice to the attention of the EC.

European Commission decides to open a Phase II investigation and invites comments from interested third parties in the tax exemptions in the Madeira Free Zone

On 15 March 2019, the European Commission (EC) published the notification previously issued to Portugal regarding Madeira Free Zone, giving interested third parties the opportunity to submit comments within a month of that publication.

On 6 July 2018, the EC had decided to open an in-depth investigation (Phase II) into tax exemptions for companies established in the Madeira Free Zone, having asked Portugal to submit relevant information and documents.

The EC doubts that the tax rules in question did not comply with the conditions previously decided by the EC which allowed it to be considered a compatible aid. The EC also criticised the lack of control by Portugal as regards the fulfilment of these conditions.

To guarantee compatibility with the internal market, economic activity and job creation associated with this more favourable tax regime must be shown to exist in Madeira.

"The Commission fined Google EUR 1400 million for abusing its dominant position in the market for the brokering of online search adverts."

European Commission launches new online tool – "eLeniency" making it easier for companies to cooperate in antitrust proceedings

On 19 March 2019, the European Commission (EC) launched "eLeniency", a new online tool designed for companies to submit statements and documents, in particular under leniency and settlement proceedings.

Leniency applicants and settlement parties can now provide the EC with corporate statements and documents on a dedicated secure server. Furthermore, oral statements under the leniency programme no longer need to be made in-person.

According to the EC, this tool offers the same guarantees in terms of confidentiality and legal protection as under the previous procedures.

Google hit with EUR 1.4 billion fine for abuse of dominance

On 20 March 2019, the European Commission (EC) fined Google EUR 1400 million for an alleged abused of dominance in the market for the brokering of online search adverts.

Allegedly, according to the EC, Google, as an intermediary, through AdSense for Search, started by imposing exclusive supply obligations, which prevented competitors from placing any search adverts on the commercially most significant websites. At a later stage, Google is accused of allegedly having introduced contractual clauses aimed at reserving for its own search adverts the most valuable positions and at controlling competing adverts' performance.

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According to the EC, considering that Google's market share exceeded 85% for most of the period, these practices prevented the websites' owners from soliciting better business conditions from other brokers, therefore harming the competition in this market.

In June 2017, the Commission fined Google EUR 2.42 billion for having allegedly abused its dominance as a search engine by giving an illegal advantage to Google's own comparison shopping service. In July 2018, the Commission fined Google EUR 4.34 billion for alleged illegal practices regarding Android mobile devices to strengthen the dominance of Google's search engine.

European Commission fines Nike EUR 12.5 million for restricting cross-border sales

On 25 March 2019, the European Commission (EC) fined Nike EUR 12.5 million for restricting cross-border sales of its products.

According to the EC, between 2004 and 2017, Nike, as licensor, imposed the inclusion of direct and indirect measures on the contracts concluded between Nike and the licensees in order to limit them to selling within a specific EU single market territory. These included (i) clauses explicitly prohibiting out-of-territory sales; (ii) raising the royalties for out-of-territory sales and (iii) threatening to end their contracts if the licensees sold out-of-territory.

As Nike acknowledged its participation in the infringement and provided the Commission with information and evidence that allowed the competition enforcer to extend the scope of the investigation, a 40% fine reduction was granted, having regard to the fact that the company cooperated with the Commission beyond its legal obligation to do so. ■

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