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December 2015

ANTITRUST & COMPETITION LAW DIGEST

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BADEN, SWITZERLAND. November 2nd, 2015. The new General Electric logo has been installed at the former Alstom thermal power headquarters after successful merger and acquisition.

EUROPEAN UNION

Mergers: Conditional approval of the GE/Alstom transaction

Case n°COMP/M.7278 – *General Electric / Alstom (Thermal Power – Renewable Power & Grid Business)*, September 8, 2015

On Monday November 2, 2015, U.S.-based General Electric ("GE") completed its acquisition of the energy (power and grid) businesses of Alstom, one of the French industry's flagships, following the European Commission's (the "Commission") clearance.

After an in-depth investigation, the European watchdog has decided to approve the transaction, subject to commitments. Under the project as originally foreseen by the parties, GE should have acquired Alstom's thermal power generation, renewables and grid businesses. The Commission's concerns were focused on one thermal power generation business, in particular, that of heavy-duty gas turbines.[1] The Commission feared that the worldwide market for heavy-duty gas turbines would be affected by the transaction. In the EEA in particular, the two parties were direct competitors, GE being the market leader and Alstom the third largest manufacturer, in a market that consists of only four players.

Following the transaction, the two companies would have held more than 50% of the EEA and worldwide markets for heavy-duty gas turbines operating at 50 Hz, and the number of suppliers would have been reduced from four to

[1] The other businesses that are part of the transaction, namely Alstom's thermal power generation (other than gas), renewables and grid businesses, did not raise any competition concerns.

three. According to the Commission, these restrictions of competition would have led to higher prices and reduced customer choice, and would have harmed innovation in a key industry, "[…] *advanced heavy duty gas turbine technology* [being] *crucial to face the challenges of climate change and modernizing our energy supply*."[2]

In order to remedy the competition concerns raised by the Commission, GE has offered to divest major assets of Alstom's heavy-duty gas turbines business to the Italian company Ansaldo. In order to give an additional guarantee to the Commission, GE has offered to come up with an "*up-front buyer*," meaning that GE undertook not to close the transaction until a binding agreement providing for the business's divestment to a purchaser approved by the Commission has been concluded.

This case's magnitude provided the competition authorities with an opportunity to demonstrate the paramount importance of international cooperation in order to ensure the consistency of remedies requested from the parties. The Commission has collaborated in particular with the U.S. Department of Justice, which gave its approval on the same day as the European authority.

[2] Statement of commissioner in charge of competition policy.

EUROPEAN UNION

The Court of Justice confirms that cartel facilitators infringe Article 101 of the Treaty

Case C-194/14 P of the Court of Justice, AC-Treuhand v. Commission, October 22, 2015

In a judgment rendered on October 22, 2015, the European Court of Justice (the "Court") confirmed that enterprises acting as cartel facilitators are not immune to antitrust proceedings and that substantial fines can be imposed on them.[1]

Here, the Commission had fined the Swiss consultancy firm AC-Treuhand AG nearly €350,000 for its participation in a cartel in the heat stabilizers sector. According to the Commission, AC-Treuhand had played an essential role by organizing several meetings between competing producers, which it attended and in which it participated actively. On the one hand, it collected data on sales and communicated them to the producers, and on the other hand, it acted as a moderator when tensions arose among the producers, at the same time encouraging them to find a compromise. These services were provided for remuneration. It is not the first time AC-Treuhand has been found liable for participating in a cartel: in 2003 it had to pay a €1,000 symbolic fine for having provided secretarial services to cartel participants in the organic peroxides case.[2]

Contrary to the Advocate General's opinion, the Court confirmed that the behavior of a consultancy firm acting as a facilitator to a cartel is covered under Article 101(1) of the Treaty on the Functioning of the European Union (the "Treaty"). In order to ensure full effectiveness of this provision, its application should not be limited to undertakings active on the markets affected by the infringement. The Court noted in particular that the services provided by the consultancy firm had as their very purpose the realization of the anticompetitive objectives of the cartels, in full knowledge of the facts. This conclusion illustrates the increasingly broad interpretation given in case law to the concepts of agreement and concerted practice pursuant to Article 101 of the Treaty. Already in 1980, the Commission had considered that a consultancy firm had infringed Article 101 of the Treaty in the Italian cast glass case.[3]

[1] Case T-27/10 of the General Court, AC-Treuhand v. Commission, February 6, 2014; Decision COMP/38589 of the Commission, Heat Stabilisers, November 11, 2009.

[2] Decision COMP/E-2/37.857 of the Commission, Organic Peroxides, December 10, 2003; confirmed by Case T-99/04 of the General Court, AC-Treuhand v. Commission, July 8, 2008.

[3] Decision 80/1334/EEC of the Commission, Italian cast glass, December 17, 1980.

EUROPEAN UNION

Clarification on the application of Article 102 of the Treaty on rebate schemes in an ECJ preliminary ruling

Case C-23/14 of the Court of Justice, Post Danmark v. Konkurrenceradet, October 6, 2015

In a recent judgment, the Court replied to a request submitted by a Danish court for a preliminary ruling on how to assess retroactive loyalty rebates.

The facts of this *Post Danmark II* judgment are relatively simple. The Danish postal operator had a 95% market share of the Danish market for bulk mail, 70% of which was conferred by a statutory monopoly. It was applying to its clients a scheme of retroactive rebates. The level of the rebate depended on customers' reaching certain volume thresholds over a one-year period. Both volumes delivered under the monopoly provisions and on the liberalized part of the market were taken into account by Post Danmark to determine the level of the rebate.

The Court reaffirmed that the key question is whether the rebate scheme might produce an exclusionary effect on competitors. Such was the case here, given especially the retroactivity of the scheme, its large material and geographic scope and the long duration of the reference period. These circumstances made it more difficult for customers to choose competing operators and, at the same time, created barriers to entry for potential competitors.

Further—and this is why this case is interesting—the Court ruled that it was not necessary to apply the "*as-efficient competitor*" test that the Commission referred to in its Guidance on enforcement priorities in applying Article 102 of the Treaty to abusive exclusionary conduct. Indeed, the Court specified that such test is only "*one tool amongst others*," and thus not a prerequisite to finding an abuse in the case at hand, where "*the structure of the market makes the emergence of an as-efficient competitor practically impossible*." This led to the final consideration that "*the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking*."

EUROPEAN UNION

State Aids: The Commission tackles tax rulings

Decision SA.38374 of the European Commission, *State aid implemented by the Netherlands to Starbucks*, October 21, 2015

Decision SA.38375 of the European Commission, *State aid that Luxembourg granted to Fiat*, October 21, 2015

On October 21, 2015, the Commission adopted its first decisions on the compatibility of tax rulings under state aid rules. It found that tax-saving schemes granted to Starbucks by the Netherlands and to Fiat by Luxembourg infringed state aid rules.

Tax rulings are decisions by which tax authorities offer to individual taxpayers or companies binding written interpretations of tax laws. Tax rulings are widely used by companies to obtain clarity on the future enforcement of sometimes complex rules and achieve a certain degree of legal certainty. These rulings may, *inter alia*, be aimed at determining "transfer prices," i.e., prices set for the transfer of goods and services between companies belonging to the same group.

In the present cases, the Commission determined that tax rulings granted to Starbucks and Fiat endorsed methodologies used to establish "*transfer prices with no economic justification and which unduly shift profits to reduce the taxes paid by the company*."

In *Starbucks*, the Netherlands authorities set transfer prices between the coffee-roasting company of the group and the other subsidiaries. In *Fiat*, Luxembourg tax authorities set the value of financial services, such as intra-group loans, provided by Fiat Finance and Trade to other Fiat group companies in Europe.

In both cases, the Commission highlighted the lack of consistency between market prices for such goods

and services, and the transfer prices accepted by the tax authorities. The Commission held that the level of the transfer prices artificially lowered taxes paid by the two companies. The Commission therefore ordered the Netherlands and Luxembourg to recover the alleged unpaid taxes, amounting in each case to €20-30 million.

Margrethe Vestager, Commissioner in charge of the competition policy, stated that these decisions do not consider tax rulings as per se illegal state aid, and that only "*artificial and complex methods to establish taxable profits*" that "*do not reflect economic reality*" would be considered as unlawful. The Commission has clearly showed its intention to pay particular attention to tax rulings. The Commission is currently looking into tax rulings applied to Apple and Amazon, respectively, by Ireland and Luxembourg, and announced on December 3, 2015 that it has launched a formal investigation into Luxembourg's tax treatment of McDonald's.

Special attention will be paid to these decisions once they are published, as well as to the appeals before the European courts (Starbucks and Luxembourg have already announced their intention to refer the decisions to the General Court).

FRANCE

The Booking.com hotel pricing probes: Contrasting approaches to an identical practice

- Decision n°15-D-06 of the Autorité *concerning practices implemented in the online hotel booking sector*, April 21, 2015 (English press release)
- Decision of the Swedish competition authority, April 15, 2015, 596/2013
- Decision of the Italian competition authority, April 21, 2015 (press release)

Online travel agencies ("OTAs") such as Booking.com operate Internet platforms on which consumers can search for, compare and book hotel rooms free of charge. Hotels pay a fee to an OTA for its services each time a booking is made through it.

The current hotel pricing probes were triggered by Booking.com's practice of imposing a price parity provision (or "most favored nation clause") on hotels wishing to be referenced on its website. Price parity clauses essentially require the hotels to offer room prices on Booking.com's platform that are the same as or better than the prices they offer on their other sales channels, including the hotel's own direct sales channels, whether this be online or offline.

France, Italy and Sweden launched investigations to establish whether the price parity clauses provided in Booking.com's contracts with hotels infringed Article 101 of the Treaty (and Article 102 of the Treaty in the case of France).

In order to resolve these competition concerns, Booking.com offered commitments to these respective authorities, which were market-tested and subsequently approved by all three jurisdictions. In essence, the adopted commitments prevent Booking.com from requiring hotels to offer room prices through Booking.com that are the same as or better than the prices they offer through competing OTAs such as Expedia and HRS. In addition, Booking.com cannot prevent

hotels from offering discounted room prices, provided that these are not made available online.

The Booking.com cases were consequently closed in France, Italy and Sweden simultaneously, and formal probes were avoided in several other EU countries, including Ireland, Greece, Poland and Denmark, as a result of Booking.com's settlement offer.

In stark contrast with France, Italy and Sweden, the German competition authority (the "Bundeskartellamt") has rejected Booking.com's proposed commitments. The Bundeskartellamt is concerned that allowing Booking.com to continue to prevent hotels from offering discounted room prices on their own websites will discourage hotels from reducing the room rate they offer to OTAs that lower their commissions. It remains unclear when the authority will issue its decision.

In any event, these probes in relation to hotel pricing contracts by Booking.com have demonstrated the limits of the Commission's coordination powers within the European Competition Network. Indeed, it is likely that Germany will be at odds with the French, Italian and Swedish competition authorities with the issuance of a prohibition decision.

In order to limit this risk and to improve coordination, the Commission has announced it is setting up a working group with various national competition authorities in order to monitor the effects of the different remedies proposed by Booking.com and Expedia, which is under investigation for implementing similar pricing practices. In light of the increased scrutiny of such pricing practices, and especially as regards the most favored nation clauses, it would also be reasonable for the competition authorities to provide clearer guidance on their assessment.

FRANCE

The Paris Court of Appeal cuts the fine imposed on EDF in Solaire Direct case

Judgment of the Court of Appeal of Paris, *Electricité de France v. Solaire Direct*, May 21, 2015

On May 21, 2015, the Paris Court of Appeal partially annulled a decision of the French Competition Authority (the "Autorité") of December 17, 2013, which found EDF guilty of abusing its dominant position. The Autorité had fined EDF for making available to its subsidiary EDF ENR, active in the photovoltaic energy sector, its brand image and reputation (and in particular the use of the brand *Bleu Ciel* on various means of communication) (first objection), as well as the client database (second objection), both acquired by EDF as the incumbent supplier of electricity.

The Court upheld all of the Autorité's findings with respect to the second objection as well as the first one, but only with respect to the period between 2007 and 2009.

Indeed, in 2009, EDF had ceased commercializing EDF ENR's offers using the brand Bleu Ciel. However, EDF ENR had kept a brand and logo similar to those of the electricity incumbent. Contrary to what the Autorité held, the Court decided that EDF did not abuse its dominant position since: (i) the connection between the market in which EDF occupied a dominant position and the market in which EDF ENR was using the similar brand and logo was not relevant, (ii) no market study confirmed the Autorité's allegations that demand in the photovoltaic energy sector came from individuals with a low level of expertise and particular sensitivity to brand image and reputation, (iii) there was no evidence that small- and medium-size operators with no brand image would have had difficulties in accessing the market, (iv) the purchase of photovoltaic equipment by individuals might not have represented such a significant investment, given the existence of subsidies, and (v) the increase in demand in 2009-2010 indicated that the latter could be qualified as "limited."

The Court then annulled the 25% increase to the fine imposed by the Autorité for repeated infringement. Indeed, EDF had been found guilty in 2000 for having infringed the French provision relating to abuses of dominance, for predatory pricing practices and for conclusion of agreements of excessive duration. The Autorité had stated in 2013 that the practices in question were similar in their object (abuse of dominance) and nature (exclusionary practices) to the ones EDF was punished for in 2000. In its decision, the Court of Appeal ruled that the practices sanctioned in 2013 were not identical to those in question in 2000. Unlike the Autorité (and the Commission), the Court of Appeal thus does not seem to consider that all exclusionary practices would be per se "identical or similar" practices, exposing the offender to an increase of the fine for repeated infringement.

FRANCE

Mergers: Green light to the consolidation of regional press, subject to maintenance of its quality and diversity

Decision n°15-DCC-63 of the Autorité *on the acquisition of sole control of Les Journaux du Midi Group by La Depeche du Midi Group*, June 4, 2015

On June 4, 2015, the Autorité cleared, subject to conditions, the acquisition of sole control of Les Journaux du Midi Group by La Depeche du Midi Group.

The Autorité found that the merged entity would achieve a monopoly position in the regional daily press market in two French departments, Aude and Aveyron.

The Autorité found that, despite creating a monopolistic position, the transaction would not cause a price increase, since (i) readers are price-sensitive and would stop purchasing the newspapers in the case of a price increase, and (ii) a reduction in the number of readers would involve a simultaneous drop in advertising income.

However, the Autorité considered that the transaction would likely result in a decrease in sales volume and that there was a risk of reduction in quality and diversity of regional daily newspapers caused by harmonization of the newspapers' content.

To address these concerns, La Depeche du Midi Group committed to not harmonizing its newspapers' content, to maintaining a distinct, dedicated editorial board for each newspaper and to continuing to distribute all its regional daily press publications in the two departments.

The singularity of this decision, although not unprecedented, lies in the approval by the Autorité of purely behavioral commitments despite the fact that the transaction leads to a monopolistic situation. In the regional daily press sector, the Autorité has already accepted purely behavioral commitments: in its decision n°13-DCC-46 of April 16, 2013 concerning *the takeover, by the Rossel group, of the Champagne-Ardenne-Picardie Hub of the Hersant Média group* and in its decision n°11-DCC-114 of July 12, 2011 concerning *the acquisition of the Est Républicain Group by Crédit Mutuel*.

FRANCE

Private enforcement: EDF claims against suppliers of high-tension cables unsuccessful

Judgment of the Court of Appeal of Paris, *Electricité de France and ERDF v. Nexans et Prysmian*, July 2, 2015

On July 26, 2007, the Autorité (then known as the French Competition Council) fined several cable suppliers for collusion in the context of two successive public tenders organized by EDF.[1] The investigation, initiated by a complaint lodged by EDF, led to sanctions being imposed upon Nexans and Prysmian (neither contested the alleged facts).

Following the decision of the Autorité, EDF and ERDF sued Nexans and Prysmian in order to obtain the annulment of the contracts and the reimbursement of the amount they paid, or alternatively, the payment of damages for the prejudice caused by the anticompetitive practices. On July 2, 2015, the Court of Appeal of Paris confirmed the dismissal of these demands by the Tribunal of Commerce.[2]

On the one hand, with respect to the claim for annulment of the contracts and the reimbursement of the price paid, the Court of Appeal stated that EDF and ERDF did not prove fraudulent misrepresentation as the relevant contracts "*had not been awarded to the lowest bidder*" and the contractual prices were very close to the "*objective prices*" set out by EDF itself. Further, the Court ruled that the applicants could not allege in good faith that the relevant contracts should be void since they had pursued negotiations and had signed these contracts despite the fact that they were perfectly aware of the prohibited practices.

On the other hand, regarding the claim for damages, the Court of Appeal stated that EDF did not prove that it suffered any harm since the prices applied by Nexans and Prysmian were not above-market prices. Indeed, the Court was not convinced by the arguments presented by EDF, according to which the harm it suffered had been established using the "before/after" method.[3] The Court was more convinced by the fact that the prices offered by another company, which did not take part in the anticompetitive practices, were higher than those offered by Nexans and Prysmian. This assessment is surprising given the fact that absent the cartel, the defendants could potentially have offered even lower prices. In addition, the Court ruled that EDF did not prove that competition was effective prior to the organization of the public auctions.

In any event, this case highlights the reluctance of French courts to award damages, even if the existence of a violation of competition law is established by the Autorité, and the underlying difficulty of calculating the amount of damages.

[1] Decision n°07-D-26 of the Autorité *regarding practices implemented in the sector of high-voltage electric cables*, July 26, 2007.
[2] Paris Trib. Commerce, November 4, 2013, RG J2011000785.
[3] Method consisting of comparing the competitive situation over the period considered with the situation in the same market before the implementation of the anticompetitive practices.

GERMANY

The German Federal Cartel Office investigates Apple and Audible.com

The Bundeskartellamt opens proceedings against Audible/Amazon and Apple, November 16, 2015

On November 16, 2015, the Bundeskartellamt opened an investigation into alleged exclusive long-term agreements between Apple Computer, Inc. ("Apple") and Amazon subsidiary Audible.com ("Audible").

Audible is one of the leading creators of audio books in Europe and also retails audio books in Germany. Its audio books are available on Amazon.com as well as directly via Audible.com. Apple runs the iTunes platform, where it also sells audio books. The investigation was opened following a complaint by the German book dealers' association concerning Audible's alleged practice of supplying audio books exclusively to Apple's iTunes store.

As a first step, the Bundeskartellamt and the European Commission will have to consider which authority is better placed to investigate the allegations. The Commission can take on a case, thus preempting action by national authorities. Where the Commission does not do so, national authorities remain free to make decisions on the basis of Article 101 of the Treaty (and national equivalents). However, while the legal rules are consistent, their interpretation can vary. This was recently illustrated by the hotel platform decisions (see *The Booking.com hotel pricing probes: contrasting approaches to an identical practice*), where the Bundeskartellamt prohibited the intended price parity provisions in toto, while other national authorities were more lenient and upheld them at least in part.

In terms of substance, it would seem that the Bundeskartellamt takes offense at an alleged exclusive supply of audio books by Audible to the Apple iTunes platform. First and foremost, exclusive supply agreements are typically considered to be non-compete agreements, certainly if their duration is for more than five years. In addition, exclusive supply agreements can give rise to foreclosure concerns where other suppliers of audio books are excluded from access to the iTunes platform (requiring market power of the iTunes platform) or other platforms are precluded from accessing Audible's audio books (requiring market power on the part of Audible).

Also of interest to the reader may be recent findings of the Bundeskartellamt in the following cases: *Adidas* and *ASICS* (prohibition of sales on price comparison websites and platforms is illegal); and *HRS* and *Booking.com* (most favored nation clauses of hotel platforms are illegal). For an analysis of competition between Internet platforms, see also *Oakley Capital Ltd/Elite Medianet GmbH*, a recent, very detailed, Phase II merger decision relating to the merger of two leading online dating portals.

BELGIUM

Belgian National Lottery fined for abuse of dominance

Decision of the Belgian Competition Authority, National Lottery, September 22, 2015

On September 22, 2015, the Belgian Competition Authority (the "BCA") fined the National Lottery for abusing its dominant position in the market for public lotteries. The fine, amounting to €1.19 million, was reduced by 10% because the National Lottery recognized that it had participated in the infringement and accepted the imposed penalty.

The principal abusive conduct consisted of the use of individual contact details registered in the National Lottery's database. Relying on this database, the National Lottery sent emails to lottery players in order to promote a new commercial betting service called "Scooore!" According to the BCA, this behavior did not amount to "competition on the merits," as the National Lottery took advantage of information obtained through its monopolistic position.

The BCA stressed that given the volume and the quality of the data, it would have been impossible for the National Lottery's competitors to viably replicate this information at a reasonable cost or within a reasonable time frame.

"Big Data" exploitation by dominant companies has lately been condemned by several national competition authorities (see *The Paris Court of Appeal cuts the fine imposed on EDF in Solaire Direct case*). In light of the foregoing, undertakings holding a dominant position in a market, especially incumbents, should pay particular attention when using data acquired in other markets.

UNITED STATES

Application of antitrust law to college sports organizations

Decision of the Court of Appeals for the Ninth Circuit, *O'Bannon v. NCAA*, 802 F.3d 1049, September 30, 2015

O'Bannon v. NCAA required courts to wrestle with when and how colleges can agree collectively to restrict the amount and form of compensation that student athletes may receive.

The collective value of top college football programs is measured in *billions* of dollars, *The Wall Street Journal* reports. The athletes, however, receive only a small portion of that value in the form of scholarships that cover educational and living expenses. The schools with the top football programs, acting through the National Collegiate Athletic Association (the "NCAA"), have agreed collectively to prohibit any direct compensation to college athletes for athletic performance.

In *O'Bannon v. NCAA*, current and former student athletes sued the NCAA, challenging NCAA rules capping athletic scholarships below the full cost of attending college and prohibiting athletes from receiving compensation from other sources for their athletic ability. Applying the rule of reason, the Ninth Circuit affirmed in part and reversed in part a district court decision that found that the NCAA's rules violated antitrust laws. The district court enjoined the NCAA from prohibiting schools from offering scholarships of up to the full cost of attendance plus up to $5,000 per year in deferred compensation. The Ninth Circuit held that "*the NCAA's amateurism rules are likely to be procompetitive*," but "*are not exempt from antitrust scrutiny*," and reversed only that portion of the district court's decision allowing athletes to be paid up to $5,000 per year in deferred compensation.

As future antitrust cases relating to college sports ensue, judges will have to determine how – if at all – to weigh the anticompetitive effects and procompetitive justifications of the schools' conduct. The anticompetitive effects are primarily quantitative, including restrained compensation for athletes. The procompetitive justifications the schools offer for their conduct, however, are largely qualitative, such as preserving amateurism, promoting competitive balance among the schools, and integrating academics and athletics.

Stay tuned to see how judges weigh these incommensurate quantitative and qualitative effects. The answer may help us understand how, if at all, social welfare considerations should be included in the rule-of-reason analysis. The answer may also reflect our collective understanding of the economic and social purposes of antitrust laws.

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