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EU Competition Law Newsletter

Highlights

— The Commission Fines Five Banks Over €1 Billion For Participating In Two Foreign Exchange Spot Trading Cartels

— The Commission Fines AB InBev €200 Million For Abusing Its Dominance On The Belgian Beer Market By Restricting Cross-Border Sales

The Commission Fines Five Banks Over €1 Billion For Participating In Two Foreign Exchange Spot Trading Cartels

On May 16, 2019,[1] the Commission announced that it had adopted two settlement decisions implicating a total of six banks and confirming their participation in two separate foreign exchange spot trading cartels in breach of Article 101 TFEU. The "Three Way Banana Split" cartel—named after one of the two online chat rooms at the center of the investigation—involved Barclays, RBS, Citigroup, JP Morgan, and UBS and led to total fines of €811 million. The "Essex Express" cartel involved Barclays, RBS, Bank of Tokyo-Mitsubishi (now MUFG Bank), and UBS, and total fines of €258 million. The Commission started its investigation in September 2013 following an immunity application from UBS which revealed the existence of both cartels and thus avoided total fines of around €285 million.

The Commission's Investigation

The Commission found that between 2007 and 2013 certain forex traders,[2] who were responsible for aspects of spot trading at each of their respective banks, used online chat rooms to exchange sensitive information and trading plans relating to the G11 currencies.[3] The Commission found that the traders often knew each other personally and based on "closed circles of trust" with the "Essex Express" chat room—so named because most of the traders shared the same train from Essex to London.

The Commission concluded that these exchanges enabled the traders "to make informed market decisions" on whether and when to sell or buy the currencies they had in their portfolios. On

[1] Settlement Decisions "Forex – Three Way Banana Split" and "Forex – Essex Express." *See* Commission Press Release IP/19/2568.

[2] Foreign Exchange, or "Forex" refers to currency trading. When companies exchange large amounts of a certain currency, they do so through a human Forex trader or an algorithm. The main customers of Forex traders include asset managers, pension funds, hedge funds, major companies, and other banks.

[3] The G11 currencies are the most traded currencies by volume, namely: the Euro; Pound Sterling; Japanese Yen; Swiss Franc; US, Canadian, New Zealand, and Australian Dollars; and Danish, Swedish, and Norwegian crowns.

occasion, the exchanges also allowed the traders to identify "opportunities for coordination." For instance, traders agreed to a practice known as "standing down," where some traders may have temporarily refrained from trading currencies to avoid interfering with a competing trader's activities.

All of the banks agreed to settle with the Commission and admit to their traders' wrongdoing, receiving a 10% fine reduction. In addition, with the exception of MUFG, all of the banks also applied successfully for leniency, and received fine reductions ranging from 100% to 10%. The Commission issued two separate settlement decisions, which correspond to the two sets of online chat rooms the traders used to communicate with each other. Details of each bank's involvement in the infringements, including the duration of their participation and respective fines and reductions, are summarized in the table below.

Three Way Banana Split Infringement

Company	Start of infringement	End of infringement	Leniency Reduction	Settlement Reduction	Fine (€ M)
UBS	10/10/2011	31/01/2013	100%	10%	0
Barclays	18/12/2007	01/08/2012	50%	10%	116
RBS	18/12/2007	19/04/2010	30%	10%	115
Citigroup	18/12/2007	31/01/2013	20%	10%	311
JP Morgan	26/07/2010	31/01/2013	10%	10%	229
Total Fine					**811**

Essex Express Infringement

Company	Start of infringement	End of infringement	Leniency Reduction	Settlement Reduction	Fine (€ M)
UBS	14/12/2009	31/07/2012	100%	10%	0
Barclays	14/12/2009	31/07/2012	50%	10%	94
RBS	14/09/2010	08/11/2011	25%	10%	94
MUFG	08/09/2010	12/09/2011	0%	10%	70
Total Fine					**258**

Implications

The Commission noted that it "will continue pursuing other ongoing procedures concerning past conduct in the Forex spot trading market." These investigations take place under an "ordinary" non-settlement procedure, and involve at least Credit Suisse's participation in "an alleged infringement which may have taken place in another chat room."[4] In addition to these other forex related infringements, the Commission is also investigating an alleged infringement concerning U.S. dollar supra-sovereign, sovereign and agency bonds traded via online chat rooms between 2009 and 2015, as well as an alleged infringement resulting from the trading of eurozone sovereign bonds from 2007 to 2012.

Shortly after the Commission, the Swiss competition authority also issued its settlement

[4] Statement from Commission spokesperson as reported by the Financial Times on May 16, 2019. *See too* Credit Suisse Securities (Europe) 2018 Annual Report, page 115.

decision fining Barclays, JPMorgan, Citi, and RBS a total of €91 million for similar conduct. The foreign exchange-related misconduct addressed in the Commission's decisions have also been scrutinized by financial regulators in at least the U.S., U.K., and Switzerland, where fines in excess of US$4 billion have been imposed on a number of banks.[5]

Compliance and leniency strategies matter. Taken as a whole, the Commission's scrutiny of bankers' conduct from an antitrust perspective underscores the importance of maintaining robust and comprehensive compliance programs. In the current case, a single JP Morgan employee's conduct in the "Three Way Banana Split" infringement led to a fine in excess of €200 million. In addition, early detection systems and a pre-formulated leniency strategy can be crucial in damage mitigation efforts, as evidenced by UBS' avoidance of a nearly €300 million fine through its successful immunity application.

The Commission Fines AB InBev €200 Million For Abusing Its Dominance On The Belgian Beer Market By Restricting Cross-Border Sales

On May 13, 2019, the Commission fined AB InBev €200 million for abusing its dominant position on the Belgian beer market by restricting the ability of Belgian customers to purchase cheaper products from the neighboring Netherlands between February 9, 2009, and October 31, 2016.[6] The Commission's investigation commenced on June 30, 2016, just a month after it had concluded an in-depth examination of several EU beer markets, including Belgium, in its merger review of AB InBev/SABMiller ("SABMiller Decision").[7]

The Commission's Decision

Dominance. The Commission found that AB InBev is dominant on the Belgian beer market for four reasons: (i) its consistently high market shares, (ii) its ability to price independently from competitors, (iii) high barriers to significant entry and expansion by competitors in Belgium; and (iv) the limited countervailing buyer power of customers, in large part because several of AB InBev's brands are considered essential for retailers to stock. The Commission's findings in this case are similar to those in its SABMiller Decision where the Commission similarly identified, for Belgium, AB InBev's high market shares in excess of 50% and resulting ability to lead pricing, as well as significant barriers to entry, "must-have" brands, and fragmented supermarket purchasing behavior.

Infringement. The Commission found that AB InBev abused its dominance by trying to prevent Belgian supermarkets and wholesalers from importing Jupiler beer from the Netherlands, where it was cheaper than in Belgium. This type of cross-border restriction on sales by a dominant company is a well-recognized form of abuse.[8] The Commission's press release describes four specific methods that AB InBev used to implement this strategy:

First, AB InBev changed the packaging of its Jupiler products in the Netherlands, which made them harder to sell in Belgium. This included changing the labelling of its products to remove any French language content, which was necessary to sell the beer products in bilingual Belgium. AB InBev also altered the size of its products, and introduced design differences to Dutch Jupiler beer cans to make them less appealing to Belgian consumers, such as adding the language "Jup Holland Jup," a variant of the

[5] FCA Press Release, "FCA fines five banks £1.1 billion for FX failings and announces industry-wide remediation programme," November 12, 2014; CFTC Press Release (7056-14), "CFTC Orders Five Banks to Pay over $1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates," November 12, 2014; and, FINMA Press Release, "FINMA sanctions foreign exchange manipulation at UBS," November 12, 2014.

[6] Commission Press Release IP/19/2488, "Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer," May 13, 2019.

[7] *AB InBev/SABMiller* (Case COMP/M.7881), Commission decision of May 24, 2016.

[8] *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission* (Joined cases 40 to 48, 50, 54 to 56, 111, 113, and 114-73), EU:C:1975:174.

popular "Hup Holland Hup" or "Go Holland Go" football chant.

Second, AB InBev restricted sales of Jupiler to a Dutch wholesaler that presumably made significant onward sales to Belgian customers, which the Commission found had resulted in restrictions of imports to Belgium.

Third, AB InBev refused to sell its "must-have" products—essential stock for Belgian retailers—to a particular retailer unless it agreed to limit its imports of cheaper Jupiler from the Netherlands.

Fourth, AB InBev required a retailer that was active in both Belgium and the Netherlands to only offer certain customer promotions to its Dutch customers.

Remedy and fine. AB InBev acknowledged and ceased its abusive conduct, and committed to provide mandatory food information in French and Dutch on all new and existing products sold in Belgium, the Netherlands, and also France (which was not part of the abusive conduct) for a period of five years. These changes will facilitate easier cross-border sales by eliminating the need for Belgian importers to relabel French and Dutch products. In exchange for this cooperation, the Commission granted AB InBev a 15% fine reduction.

Implications

Continued scrutiny of cross-border sale restrictions. The decision represents yet another example of the Commission's ongoing enforcement focus against commercial behavior that restricts cross-border sales within the EU. The AB InBev investigation also confirms that in challenging conduct, the Commission will not only characterize companies' behavior as restrictive agreements in breach of Article 101 TFEU,[9] but also as unilateral abusive conduct under Article 102 TFEU where an undertaking is dominant.[10]

Interestingly, changes to a product's labelling, size, and other packaging features are commercial and marketing decisions that companies routinely make for perfectly legitimate reasons. The fact that the Commission placed so much importance on AB InBev's behavior in this regard—both in the length dedicated to the abuse in its press release and in agreeing to a commitment centered on preventing it in future—strongly suggests that its investigation discovered considerable evidence that AB InBev made its alterations with the specific intent of impeding cross-border sales.

A Dutch can of Jupiler. The Commission's press release placed particular importance on AB InBev's decision to change the packaging of its beer products.

Benefits of cooperating in non-cartel cases. AB InBev received a 15% fine reduction in exchange for active cooperation with the Commission, including acknowledgement of the infringement and providing assistance in formulating a remedy. Although the reduction demonstrates the benefits of cooperating with the Commission, it may be contrasted with the significantly higher reductions offered in the Guess and Nike investigations, for instance, where both companies received fine reductions of 40-50%.

Although the Commission's full reasoning for the relatively smaller reduction in AB InBev's case has not yet been published, it is noteworthy that Guess and Nike settled with the Commission prior to any statement of objections, whereas in AB InBev's

[9] *See* the Commission's decisions fining Nike and Guess for imposing territorial restriction in their distribution agreements for consumer goods, reported in our March 2019 and December 2018 newsletters, respectively. *See too*, the Commission's decision to accept commitments by a number of media companies not to impose passive sales restrictions on cross-border sales of Pay-TV services, also covered in our March 2019 newsletter.

[10] In this regard *see* the Commission's decision imposing obligations on Gazprom not to impede cross-border flows of natural gas through contractual restrictions with customers, reported in our Q2 2018 report. *See too*, the Commission's on-going investigation into Qatar Petroleum's territorial restrictions in its agreements with its natural gas customers, which the Commission is investigating under both Articles 101 and 102 TFEU.

case the company disputed the Commission's case until at least that point. To the extent that the Commission is more likely to grant a higher fine reduction for early cooperation, companies should carefully assess not only to what extent they should contest the Commission's allegations, but also at what stage in the investigation—if any—to cooperate.

Recent Fine Reductions For Cooperation In Non-Cartel Antitrust Procedures

Decision	Type of cooperation	Before/After SO	Reduction
ARA (2016) – Article 102	Structural remedy	After SO	30%
Pioneer (2018) – Resale Price Maintenance	Evidence	Before SO	50%
Philips (2018) – Resale Price Maintenance	Evidence	Before SO	40%
Demon&Marantz (2018) – Resale Price Maintenance	Evidence	Before SO	40%
Asus (2018) – Resale Price Maintenance	Evidence	Before SO	40%
Guess (2018) – Territorial sales restrictions	Evidence	Before SO	50%
Mastercard (2019) – Territorial sales restrictions	Acknowledgement only	After SO	10%
Nike (2019) – Territorial sales restrictions	Evidence	Before SO	40%
AB InBev (2019) – Territorial sales restrictions	Evidence and remedy	After SO	15%

Source: European Commission

News

Commission Updates

The Commission And The Belgian Competition Authority Simultaneously Raid French And Belgian Grocery Retailers

On May 20, 2019, the Commission carried out dawn raids at the premises of two grocery retailers in France, Casino and Intermarché-Les Mousquetaires.[11] On the same day, the Belgian Competition Authority raided Carrefour and Provera, a joint purchasing venture of grocery retailers Cora, Match, and Louis Delhaize. Although the two series of dawn raids occurred simultaneously, the Commission's press release leaves open whether the raids were coordinated.

The Commission suspects that Casino's and Intermarché-Les Mousquetaires' joint purchasing venture Intermarché Casino Achats ("INCAA")—which at the time of its creation in 2014 accounted for about 26% of the French purchasing grocery retail market—may have breached EU antitrust rules.[12] The Commission already raided Casino and Intermarché in relation to INCAA in February 2017, suspecting anticompetitive information exchanges concerning rebates for hygiene and cleaning products.[13]

Both companies appealed the 2017 dawn raid decision, with their appeals pending before the General Court. Although the Belgian competition authority's press release does not disclose the nature of its concerns, according to public sources its investigation may concern Carrefour and Provera's newly created joint purchasing venture.

These investigations arise in the context of increasing scrutiny from EU and national

[11] Commission Press Release MEMO/19/2689, "Antitrust: Commission confirms unannounced inspections in the grocery retail sector in France," May 22, 2019.

[12] French Competition Authority, Opinion No. 15-A-06, para. 121.

[13] MLex, "French, Belgian retailers face EU cartel probe over consumer-goods buying, May 5, 2017 and French retailers appeal EC raids over alleged information exchanges," May 15, 2017.

competition authorities into the practices of joint purchasing ventures between competitors in the grocery retail sector. Joint purchasing agreements have traditionally been recognized as procompetitive insofar as they "usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers."[14] However, the recent proliferation of joint purchasing ventures in the food retail sector has led to a high concentration of buyer power, and customers have raised concerns that this has in fact reduced competition and retailers' incentives to pass on the benefits of possible price decreases to consumers.

Competition authorities have, in turn, started to apply stricter scrutiny to the possible anticompetitive effects that could result from these joint ventures. For example, in July 2018, as Auchan/Casino/Metro/Shiever and Carrefour/Système U announced their plans to form new purchasing alliances, the French Competition Authority opened an investigation and subsequently extended it to Carrefour/Tesco.[15] The investigation is in all likelihood still pending (as the French Competition Authority has not issued any subsequent public statements). Similarly, in 2014, the Italian Competition Authority accepted commitments proposed by five grocery retailers to end their joint purchasing venture *Centrale Italianato*.[16]

Commission Opens Investigation Into Data Sharing By Irish Industry Association

On May 14, 2019, the Commission announced the opening of an investigation into Insurance Ireland, an industry association of Irish insurers that includes Allianz, Hertz, Liberty, AIG, and AXA. Insurance Ireland is suspected of impeding prospective members' access to its "Insurance Link" data pool.[17]

Insurance Ireland's members share claims data through Insurance Link to combat fraud and verify the accuracy of information provided by potential policyholders. Irish competition and data protection authorities had already intervened in the motor insurance market in 2016, where certain insurers, including Allianz and AXA, undertook to ensure that insurance companies using a data sharing software platform could not access competitors' pricing information.[18] In July 2017, the Commission raided several Irish vehicle insurers over suspected infringements of Articles 101 and/or 102 TFEU.[19] It is unclear whether these raids prompted the current investigation.

The Commission's press release explains that it is not questioning that data pooling arrangements can foster competition and directly benefit consumers, *e.g.*, by ensuring more suitable products and competitive prices. The Commission is nevertheless concerned that the terms and conditions of access to Insurance Link may place nonaffiliated insurers at a competitive disadvantage on the Irish motor insurance market compared to affiliated insurers. If proven, these practices could breach Article 101 TFEU. The Commission's investigation, which will be carried out "as a matter of priority," is another example—like the *Bundeskartellamt*'s Facebook decision and the Commission's ongoing investigation into Amazon Marketplace—of increasing antitrust scrutiny of data access rules.

Travel Agents File Complaint Against Airline Trade Association

On May 24, 2019, the European Travel Agents' and Tour Operators' Associations ("ECTAA") filed a complaint with the Commission against airline trade association IATA for alleged breaches of Articles 101 and 102 TFEU.

[14] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11/1, para. 194.

[15] French Competition Authority, "Joint purchasing agreements in the food retail market sector – The Autorité de la concurrence deepens its investigations and opens inquiries," July 16, 2018.

[16] Italian Competition Authority, Case I768, "*Centrale d'aquisto per la grande distribuzione Organizzata*," September 17, 2014.

[17] Commission Press Release IP/19/2509, "Antitrust: Commission opens investigation into Insurance Ireland data pooling system," May 14, 2019.

[18] Competition and Consumer Protection Commission, Relay Investigation, https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/closed-investigations/relay-investigation/. (last visited May 19, 2019.)

[19] Commission Statement STATEMENT/17/1910, "Antitrust: Commission confirms unannounced inspections in the motor insurance market in Ireland," July 4, 2017.

According to ECTAA's press release, commercial relationships between travel agents and airlines have fundamentally changed over the past several years as airlines have started to compete directly with travel agents for the distribution of tickets. ECTAA claims that while commission-based remuneration schemes have been abandoned, IATA has maintained "very strict, unilateral and disproportionate contractual constraints" on travel agents' ability to sell tickets. Accordingly, ECTAA claims IATA is abusing its dominant position by favoring airlines over travel agents in the market for air ticket distribution, thereby reducing competition.

ECTAA noted that its complaint follows years of failed negotiations with IATA to modernize its air ticket distribution program. It will be interesting to see whether the Commission will examine this case, and if ECTAA's complaint prompts IATA to reform its air ticket distribution program so as to avoid a full investigation, as happened 14 years ago when ECTAA complained against IATA before the Commission.

Court Updates

The General Court Dismisses Recylex's Appeal Against Buyer Cartel Fine

On May 14, 2019, the General Court dismissed Recylex's application for annulment of a Commission decision that imposed a fine on Recylex for its participation in a buyer cartel in the battery recycling sector.[20]

Battery recycling companies purchase scrap lead-acid car batteries, which they use to produce recycled lead. In June 2012 Johnson Controls blew the whistle on a cartel in this sector by applying for immunity. This prompted the Commission to raid several companies. Eco-Bat submitted a leniency application during the raids, as did Recylex several weeks later. On February 8, 2017, the Commission fined these companies and Campine for coordinating to pay lower prices for scrap lead-acid car batteries, thereby increasing their profit margins.[21] In setting the fines, the Commission found that the value of purchases—the Commission's usual starting point for setting fines—would likely underestimate the economic significance of the infringement and lead to under-deterrence, because the cartel concerned purchases and not sales. The Commission explained that "the more successful a sales cartel is, the higher the value of sales and thus the amount of the fine. The inverse is true for purchase cartels: the more successful a purchase cartel is, the lower the amount of the value of purchases and thus the amount of the fine."[22] The Commission therefore departed from its Fining Guidelines[23] and increased all fines by 10%, without explaining how it had arrived at 10%. Moreover, the Commission awarded fine reductions of 50% and 30% to Eco-Bat and Recylex, respectively, for being the first and second companies to provide additional evidence of significant added value to its investigation.

Recylex appealed, notably against this 10% increase in the amount of the fine and by claiming that Eco-Bat failed to cooperate fully with the Commission and therefore Recylex, and not Eco-Bat, should be considered the first company to provide evidence with significant added value. The General Court rejected all of Recylex's grounds of appeal. First, the General Court accepted the Commission's position that the value of purchases was imperfect because it could have been biased downward as a result of the cartel. Accordingly, "[t]hat assessment of the deterrent effect of the fine … adequately justifies its decision to apply a 10% increase to the amount of the fine imposed on Recylex."[24] The General Court also found that the Commission did not need to check whether the cartel did in fact depress the

[20] *Recyclex v. Commission*, (Case T-222/17), EU:T:2019:356.

[21] *Car battery recycling* (Case COMP/AT.40018), Commission decision of February 8, 2017.

[22] *Ibid*, para. 364.

[23] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2, para. 37. ("Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.")

[24] *Recylex*, para. 127. (emphasis added.)

value of purchases, since the conduct amounted to a *per se* (by object) infringement, for which the Commission does not need to prove effects. In other words, the Commission's assumption that the value of purchases could have been imperfect and artificially deflated was enough to support the fine increase; there was no need for the Commission to further justify the increase or its size.

Second, the General Court rejected Recylex's claim that it, not Eco-Bat, should be treated as the first company to provide evidence of significant added value due to Eco-Bat's alleged failure to cooperate fully with the Commission (as required by the Leniency Notice). The General Court held that "[e]ven if Eco-Bat had failed to fulfil its duty to cooperate fully with the Commission, the fact remains that Recylex was the second undertaking to provide evidence that had significant added value."[25] In other words, failure to fulfil the duty to cooperate does not affect the order in which leniency applications are deemed to have arrived. Accordingly, Recylex could only enjoy a reduction of up to 30% of the fine as the second company to provide evidence with significant added value—regardless of the quality of Eco-Bat's cooperation.

The judgment affords the Commission a wide margin of discretion in setting fines in situations where its Fining Guidelines do not readily apply—like buyer cartels. It may lead the Commission to increase fines in other buyer cartels, to the extent that the Commission can sufficiently explain its methodology. However, in *Icap*, the Commission departed from its Fining Guidelines when fining two cartel facilitators, but did not detail its methodology to the companies concerned. As reported in this edition of the newsletter, both the General Court and Advocate General Tanchev in the pending appeal found that the methodology was "an important element on which the Commission based its decision"[26] that should have been disclosed to Icap.

The General Court Rejects KPN's Challenge To Vodafone/Liberty Global Joint Venture

On May 23, 2019, the General Court rejected KPN's attempt to annul the Commission's conditional approval of Vodafone's and Liberty Global's joint venture in the Netherlands.[27]

In May 2016 the Commission approved the formation of a joint venture (the "JV") between Vodafone and Liberty Global that would combine their respective Dutch telecommunications businesses.[28] To address concerns that the JV's formation would reduce competition in the markets for the provision of fixed line and fixed mobile multiple-play services in the Netherlands, the parties offered to divest Vodafone's retail consumer fixed line business. The Commission also considered whether the JV's formation would lead to any anticompetitive vertical effects, but concluded that anticompetitive foreclosure was unlikely.

In 2017, KPN appealed the Commission's decision, arguing that the Commission made a manifest error of assessment regarding (i) the definition of the relevant market, and (ii) the transaction's vertical foreclosure effects. In addition, KPN claimed that the Commission failed to give sufficient reasons in support of its conclusions. The General Court rejected all of KPN's grounds of appeal.

As regards market definition, the General Court held that the Commission did not commit a manifest error of assessment by failing to sub-segment the market for the wholesale supply and acquisition of premium pay TV sports channels. The court specifically pointed to evidence from the Commission's market investigation confirming demand-side substitutability between premium pay TV sports channels, in particular as between Ziggo Sport Totaal and Fox Sports. As regards the Commission's vertical assessment, the General

[25] *Recylex*, para. 153.

[26] *Commission v. NEX International Limited* (Case C-39/18 P), opinion of Advocate General Tanchev, EU:C:2019:359, para. 48.

[27] *KPN BV v. Commission* (Case T-370/17), EU:T:2019:354.

[28] *Vodafone/Liberty Global/Dutch JV* (Case COMP/M.7978), Commission decision of August 3, 2016.

Court noted that KPN's arguments called for an assessment of vertical foreclosure in markets that were not impacted by the JV's formation, and further held that the Commission did not commit a manifest error of assessment by concluding that the parties would not have the ability to engage in an input foreclosure strategy in the affected markets.

This is the second judgment handed down by the General Court in a series of appeals brought by KPN against Commission merger clearance decisions. Less than two years ago, KPN successfully overturned the Commission's decision approving Liberty Global's acquisition of Ziggo on the grounds that the Commission failed to adequately assess the effects of the transaction on the market for the wholesale supply and acquisition of premium pay TV sports channels.[29] In order to comply with the General Court's judgment, the Commission reassessed the transaction this time including an assessment of all the affected markets.[30] KPN, however, also appealed the new approval decision. This appeal is still pending.[31]

Lucchini Fails To "Free-Ride" On Other Cartel Participants' Successful Appeals

On May 8, 2019, the General Court held that cartel participants that do not appeal a Commission infringement decision cannot seek reimbursement of fines paid where that decision is annulled in proceedings to which they were not a party.[32]

On September 30, 2009, Lucchini, together with seven others, was fined €14.35 million for participating in a cartel in the reinforcing bar sector.[33] Lucchini's appeal to the General Court was dismissed in its entirety.[34] Unlike other participants, Lucchini did not appeal the General Court's judgment to the Court of Justice.[35] In 2017, the Court of Justice annulled the fines imposed on the appealing participants.[36] Lucchini attempted to have the Commission reexamine its case in light of these judgments—asking first for a reimbursement of the fine paid and second, for admission to the infringement procedure reopened by the Commission for the four successful appellants. The Commission, however, refused. Lucchini lodged an action before the General Court to annul the Commission's rejection letters or, alternatively, seek compensation from the Commission on the basis of non-contractual liability.

The General Court dismissed both of Lucchini's actions. The General Court recalled, first, that an infringement decision concerning several participants—though adopted pursuant to a common procedure—consists of several individual decisions. If an appellant seeks annulment, the resulting judgment relates only to the elements of the decision that concern that specific appellant. Such judgment cannot result in the annulment of an individual decision that was not so challenged. Lucchini had not appealed the General Court's judgment. Accordingly, the General Court's judgment—and with it the infringement decision—had become final against Lucchini. Lucchini could not, therefore, benefit from the Court of Justice's upholding the other participants' appeals. Second, the General Court rejected Lucchini's claim for compensation as time-barred because the alleged harm—the payment of the fine—occurred more than five years prior.

The General Court's judgment reaffirms that addressees that do not appeal an infringement decision cannot "free ride" on other participants' successful appeals—they must mount challenges themselves. When considering whether to

[29] *KPN BV v. Commission* (Case T-394/15), EU:T:2017:756.

[30] *Liberty Global/Ziggo* (Case COMP/M.7000), Commission decision of May 30, 2018.

[31] *KPN BV v. Commission* (Case T-691/18), appeal pending.

[32] *Lucchini v. Commission* (Case T-185/18), EU:T:2019:298.

[33] Reinforcing bars, readoption (Case COMP/37.956), Commission decision of September 30, 2009.

[34] *Lucchini v. Commission* (Case T-91/10), EU:T:2014:1033.

[35] *Feralpi v. Commission* (Case T70/10), EU:T:2014:1031; *Ferriera Valsabbia and Valsabbia Investimenti v. Commission* (Case T92/10), EU:T:2014:1032; *Riva Fire v. Commission* (Case T83/10), EU:T:2014:1034; *Ferriere Nord v. Commission* (Case T90/10), EU:T:2014:1035; and *Alfa Acciai v. Commission* (Case T85/10), EU:T:2014:1037.

[36] *Feralpi v. Commission* (Case C-85/15 P), EU:C:2017:709; *Riva Fire v. Commission* (Case C-89/15 P), EU:C:2017:713; *Ferriere Nord v. Commission* (Case C-88/15 P), EU:C:2017:716; and *Ferriera Valsabbia e.a v. Commission* (Joined Cases C-86/15 P and C-87/15 P), EU:C:2017:717.

challenge an infringement decision, companies should be mindful of either planning to exhaust all avenues of appeal or not mounting a challenge at all.

Advocate General Tanchev Recommends Dismissing The Commission's Appeal In Icap

On May 2, 2019, Advocate General Tanchev ("AG Tanchev") recommended dismissing the Commission's appeal against the General Court's ruling in *Icap*.[37] According to AG Tanchev, the General Court was correct in holding that the Commission's decision provided insufficient reasoning as regards the determination of the fines imposed on Icap.

On February 4, 2015, the Commission fined broker Icap (now NEX International Ltd) €15 million for facilitating a cartel in the Yen Interest Rate Derivatives ("YIRD") market,[38] as reported in our Q2 2017 newsletter. As a broker, Icap's sales from YIRD activities were limited to its brokerage fees. The Commission found that these sales did not sufficiently reflect the gravity and nature of Icap's infringements. The Commission consequently departed from its fining guidelines and used—but did not disclose—an alternative method to calculate the fine. The decision only provided a general assurance that the basic amounts reflected the gravity, duration, and nature of Icap's conduct.

On appeal, the General Court found that the decision failed to adequately explain the relevance and weighing of the factors determining the fine. Icap was therefore unable to understand the alternative method used by the Commission, nor was the General Court able to review it. On appeal, the Commission claimed that the alternative method was a mere internal calculation, and that disclosure would be "detrimental to the Commission's ability to determine adequate fines so as to achieve sufficient deterrence."[39]

AG Tanchev disagreed. The mere mention of the gravity, duration, and nature of the participation is insufficient, in particular in a situation where the Commission departs from its fining guidelines. Drawing on the Court of Justice's ruling in *UPS*,[40] reported in our January 2019 newsletter, AG Tanchev found that the Commission's alternative method was "an important element on which the Commission based its decision."[41] As such, it should have been disclosed to Icap during the administrative procedure as well as in the decision. This was all the more important because there were two facilitators (*i.e.*, Icap and R.P. Martin). There was therefore a risk that the Commission might have breached the principle of equal treatment when imposing fines on Icap.

AG Tanchev's opinion extends the reasoning from *UPS*, which concerned merger control, to antitrust decisions. Addressees of Commission decisions should be "placed in a position in which they can *effectively* make known their views as regards *all elements* on which the authorities intend to base their decision."[42] This statement potentially imposes a duty on the Commission to communicate all elements on which it intends to base its decision (potentially including internal documents). The Court will have to decide whether to take such a broad approach or limit it to disclosure of alternative methods to calculate fines.

[37] *Commission v. NEX International Limited* (Case C-39/18 P), Opinion of Advocate General Tanchev, EU:C:2019:359. ("*Icap*, Opinion of AG Tanchev.")

[38] Yen Interest Rate Derivatives (YIRD) (Case COMP/AT.39861), Commission decision of February 4, 2015, partially annulled by the General Court in *Icap and Others v. Commission* (Case T-180/15), EU:T:2017:795.

[39] *Icap*, Opinion of AG Tanchev, para. 18.

[40] *United Parcel Service v. Commission* (C-265/17 P), EU:C:2019:23.

[41] *Icap*, Opinion of AG Tanchev, para. 48.

[42] *Icap*, Opinion of AG Tanchev, para. 86.

Upcoming Events

Date	Conference	Organizer	Location
06-07/06	15th Annual IBA Competition Mid-Year Conference	IBA	Tokyo
07/06	13th Annual Conference on Trends and Developments in Global Competition Law	ICC/Baker & McKenzie	Brussels
12-13/06	Competition Law Asia	Knect365	Singapore
13/06	Vertical Restraints: Current Issues and Challenges	ERA	Brussels
14/06	New Frontiers of Antitrust 2019	Concurrences	Paris
14/06	State aid	Chillin'Competition	Brussels
17/06	GCR Live 8th Annual Telecoms, Media & Technology	GCR	London
17/06	Global Private Litigation Conference 2019	ABA	Berlin
19/06	GCR Live: DC Workshop	GCR	Washington, DC
19/06	15th ELEA Symposium on "New champions: Competition or politics?"	College of Europe	Bruges
20/06	20th Annual Policy Conference: "Strengthening Antitrust Enforcement"	AAI	Washington, DC
25/06	Competition law challenges in the motor vehicle sector	Knect365	Brussels
26/06	Vertical Restraints & Distribution Conference	Knect365	Brussels

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