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EU Competition Law Newsletter

Highlights

— Commission Opens Public Consultation On The Horizontal Block Exemption Regulations

— The General Court Dismisses Campine's Appeal Against Buyer-Cartel Fine

Commission Opens Public Consultation On The Horizontal Block Exemption Regulations

On November 6, 2019, the Commission published a public consultation seeking input on the amendment of the Horizontal Block Exemption Regulations ("Horizontal BERs"), which are set to expire on December 31, 2022, and of the Horizontal Guidelines.[1] Interested parties were given until February 12, 2020 to comment on the reform of these important instruments. The consultation is part of a wider Commission evaluation to determine whether the rules should be updated to better reflect the current economy and provide clearer guidance.

In the EU, agreements between undertakings that restrict competition are prohibited under Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), unless exempted under Article 101(3) on the grounds that they generate economic benefits that outweigh negative effects.[2] The two Horizontal BERs block-exempt certain categories of horizontal agreements (among competitors or potential competitors) from the Article 101(1) prohibition on the grounds that they tend to generate such economic benefits. The Horizontal BERs' purpose is to allow businesses to engage in economically desirable cooperation with greater legal certainty.

The regulations apply to research & development agreements[3] and to specialization agreements[4] respectively. The Commission has provided further guidance on the interpretation of the Horizontal BERs in its Horizontal Guidelines,[5] which also cover other types of cooperation, notably information exchange, as well as production, purchasing and commercialization agreements. The Horizontal BERs were last updated in 2010, with further direction on standardization and information exchange.

[1] *See* https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393/public-consultation_en.

[2] Such agreements must improve the production or distribution of goods or services, or promote technical or economic progress, while allowing consumers a fair share of the resulting benefits.

[3] Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (the "R&D BER").

[4] Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (the "Specialisation BER").

[5] Communication from the Commission—Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the "Horizontal Guidelines").

The Commission, depending on the outcome of its evaluation, may decide to allow the Horizontal BERs to lapse in 2022, extend them, or revise them. Though the Commission has stressed that it does not yet know of the impending changes, it considers that updates may be necessary to reflect (i) the digitization of the economy; (ii) the strength of online platforms; (iii) the growing threat of climate change; and (iv) the perceived need for more R&D cooperation. The feedback provided by thirteen parties in response to the Commission's Roadmap, which set out its plans for the evaluation, gives a further indication of the issues that are likely to surface during the review. Respondents highlighted the following as areas in need of particular attention (i) information exchange and data pools; (ii) standardization and SEP licensing; (iii) joint purchasing; and (iv) sustainability.[6]

Interested parties seeking to contribute to the consultation should be aware that the Commission is looking for evidence-based submissions, providing qualitative and quantitative information, and concrete examples where possible. Replies will ultimately be published online alongside a summary of the submissions received. Though submissions can be anonymized, there is no procedure to apply for confidentiality. Documents can be attached, which will also be made public.

The Commission's evaluation phase (considering the current rules and their functioning) will also include a support study, consultations with national competition authorities, and possibly a stakeholder workshop. The results will be published in a report in Q1, 2021, and will be followed by a forward-looking impact assessment, to evaluate proposed reforms, before the ultimate adoption of recommended measures.

The General Court Dismisses Campine's Appeal Against Buyer-Cartel Fine

On November 7, 2019, the General Court dismissed an appeal brought by Campine against an €8.16 million fine imposed by the Commission for its participation in the battery recycling purchasing cartel.[7] Campine sought annulment of the fine, and challenged in particular the 10% increase in the fine that the Commission imposed on account of it being a purchasing cartel. The judgment is notable for the broad discretion it affords the Commission when imposing fines for infringements in cases such as purchasing cartels that do not fit easily within the standard "value of sales" methodology in its Fining Guidelines. It is, however, at odds with recent judgments in *Icap*,[8] as reported in our July EU Competition Law Newsletter, and *HSBC*,[9] as reported in our August/September EU Competition Law Newsletter, where the Commission's respective departure from and modification to its standard methodology were not endorsed by the EU Courts.

The Battery Recycling Cartel

Recycling companies purchase scrap lead-acid car batteries used to produce recycled lead. In June 2012, Johnson Controls blew the whistle on a purchasing cartel in this sector by applying for immunity, which prompted the Commission to raid several companies in September 2012. Eco-Bat submitted a leniency application during the raids, which was followed by Recylex several weeks later, and Campine in December 2012.

On February 8, 2017, the Commission fined the companies for coordinating prices for the purchase of scrap lead-acid car batteries with the aim of reducing purchase prices and increasing profit margins.[10] In setting the fines, the Commission found that the usual value of sales baseline, used as a starting point for the fine calculation, did not reflect the gravity and nature of the infringement, because the cartel concerned

[6] *See* https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393/feedback_en?size=10&p_id=5763121.

[7] *Campine and Campine Recycling v. Commission* (Case T-240/17) EU:T:2019:778.

[8] *Commission v. Icap and Others* (Case C-39/18 P) EU:C:2019:584.

[9] *HSBC Holdings plc and Others v. Commission* (Case T-105/17) EU:T:2019:675.

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

purchases—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."[11]

The Commission therefore departed from its Fining Guidelines[12] to increase each undertaking's fine by 10% for deterrence, but reduced Eco-Bat's and Recylex's fines by 50% and 30% respectively for being the first and second companies to provide additional evidence of significant added value. Campine's leniency application was unsuccessful, as it consisted largely of comments on documents seized by the Commission that provided no additional insight into the cartel.[13]

Campine's Appeal

Eco-Bat, Recylex, and Campine appealed on various grounds, including a challenge to the 10% increase in the amount of the fine. Eco-Bat's appeal was inadmissible, having been brought out of time, while Recylex's appeal—which also challenged the 10% uplift—was dismissed. The General Court accepted that the value of purchases used was imperfect because it could have been biased downward as a result of the cartel, and for this reason alone, it was legitimate for the Commission to apply a 10% increase to ensure an adequate deterrent, as reported in our May EU Competition Law Newsletter.

In Campine, the General Court reduced the fine from €8.1 million to €4.3 million because the Commission (1) lacked evidence of Campine's participation for 22 months of the cartel's duration and (2) should have recognized Campine's minor role in the cartel by applying a higher penalty discount. However, the Court unsurprisingly followed its *Recylex* judgment in upholding the 10% uplift, this time providing more details on its reasoning.

In sum, the General Court held that the Commission did not need to establish that the cartel had been successfully implemented and resulted in a reduction of purchase prices or to quantify such reduction. It was held to be sufficient that "unlike in the case of a sales cartel, achieving the aim of a purchase cartel would result in a fine lower than would be the case in the absence of the infringement and … would not therefore have any deterrent effect."[14] In other words, the mere aim of the cartel to reduce the purchase price was enough to support the increase; there was no need for the Commission to further justify its application.

The General Court did not require the Commission to justify the exact level of the increase either, deferring to the Commission's broad discretion and satisfying itself with the explanation in the Commission's decision that "the percentage of 10% is justified by the fact that this is the first time that [the Commission] has imposed an increase in a case concerning a purchase cartel."[15] This suggests that in its next buyer-cartel fine, the Commission will be under greater scrutiny to provide a detailed reasoning justifying the level of the uplift.

The judgment sits uncomfortably with the EU Courts' recent judgments in *Icap* and *HSBC*. Like in *Recylex* and *Campine*, the Commission in *Icap* departed from its general fining methodology, as it would not have adequately reflected Icap's role as a cartel facilitator, and used a "complex five-stage test" instead. The Court annulled Icap's fine in its entirety because the Commission did not disclose this test to the parties, thereby breaching Icap's rights of defense. In *HSBC*, by contrast, the Commission followed the methodology set out in the Fining Guidelines, but did not sufficiently reason the reduction factor that it applied.[16] The

[11] *Ibid*, para. 364.

[12] 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.*").

[13] *Car battery recycling* (Case COMP/AT.40018), Commission decision of February 8, 2017, paras. 407–409.

[14] *Campine*, para. 345.

[15] *Ibid*., para. 347.

[16] The Commission assessed the value of sales by reference to cash receipts to which it applied a reduction factor.

Court annulled the fine in full.

Both *Icap* and *HSBC* invoke the Commission's duty to provide reasons, in particular where it departs from the general fining methodology in the Fining Guidelines. It is debatable whether the reasons provided in both *Recylex* and *Campine* meet this standard. These judgments, upon comparison, reveal another distinct pattern. The EU Courts annulled those cases in which the Commission attempted a more elaborate fining analysis, but otherwise validated blanket uplifts and lump sums.[17] As deviating from the standard "value of sales" methodology could have significant consequences for the ultimate amount of the fine, clarification and closer scrutiny from the Court of Justice is welcome.

News

Commission Updates

Commission Approves The Acquisition of Bonnier By Telia Subject To Behavioral Commitments

On November 12, 2019, the Commission cleared the proposed acquisition of Bonnier Broadcasting Holding AB, a TV broadcasting company primarily active in Sweden and Finland, by Telia Company AB, a telecommunications operator in the Nordic region.[18]

The Commission had opened an in-depth investigation based on vertical concerns in the wholesale supply and retail distribution of TV channels in Finland and Sweden. The Commission was concerned that Telia would be able to foreclose its competitors by denying access to Bonnier's TV channels, streaming services, and advertising space. The Commission eventually cleared the merger, subject to behavioral remedies.

To address the Commission's concerns, Telia committed to grant its competitors access, on fair, reasonable, and non-discriminatory ("FRAND") terms to (i) free-to-air and basic pay-TV channels, and premium pay-TV sport channels; (ii) the merged entity's streaming services; and (iii) TV advertising space. Telia also committed to protect its competitors' confidential information by establishing information barriers between the merged entity's wholesale and retail activities.

Commission Investigates Retail Grocery Sector In France

On November 3, 2019, the Commission opened a formal investigation of potential anticompetitive coordination between two French supermarket chains, Casino and Intermarché. The Commission suspects that the parties' 2014 joint purchasing alliance, Intermarché-Casino Achats, might have led to them colluding in certain downstream markets, in particular on the development of shop networks and consumer pricing.[19] The Commission's decision to open an investigation follows the dawn raids that it carried out in May 2019 in cooperation with the French Competition Authority, as reported in our May EU Competition Law Newsletter.

EU competition law is generally favorable towards purchasing alliances. Guidelines on Horizontal Cooperation Agreements recognize that such arrangements may lead to lower prices and higher quality.[20] However, buying alliances that do not adequately protect against negative spillover effects into downstream markets may quickly raise antitrust concerns. Indeed, joint purchasing alliances have recently attracted increased antitrust scrutiny in Europe: the Italian Competition Authority accepted commitments proposed by five grocery retailers to end their joint purchasing venture *Centrale Italianato* in September 2014; the French Competition Authority opened an investigation in July 2018

[17] *See also AC-Treuhand* (Case C-194/14 P) EU:C:2015:717, where the Court endorsed a lump-sum fine imposed on a cartel facilitator.

[18] *Telia/Bonnier* (Case COMP/M.9064), decision not yet published. *See* Commission Press Release IP/19/6271.

[19] *Alliance Casino & Intermarché* (Case AT.40466), Commission Press Release IP/19/6216.

[20] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, para. 194.

after several grocery retailers announced their plans to form new purchasing alliances; and the Belgian Competition Authority conducted dawn raids at Cora, Match and Louis Delhaize's premises in May 2019, as also reported in our May EU Competition Law Newsletter.

Court Updates

The Court Of Justice Issues Judgments In Four Power Cables Cases

In November 2019, the Court of Justice issued judgments in four cases arising out of the Commission's 2014 decision in *Power Cables*. In the decision, the Commission found several European, Japanese, and Korean high-voltage power cables producers to have engaged in a cartel and imposed fines totaling €302 million.[21] The scope of the infringement included both the power cables and their accessories. Most of the addressees challenged the decision in the General Court, in each case unsuccessfully, and subsequently in the Court of Justice. This month, the Court of Justice rendered judgments on the appeals filed by ABB Ltd and ABB AB ("ABB"), Silec, Brugg Kabel, and LS Cable, partially upholding ABB's appeal while dismissing the other three appeals.[22]

The Court of Justice partially upheld ABB's appeal, finding that the General Court's evidential standard for reviewing the scope of the infringement was incorrect. In rejecting Silec's appeal, the Court discussed, in particular, the significance of public distancing in cartel cases. Similarly, the Court rejected both Brugg's and LS Cable's appeals, finding the grounds of their appeals unfounded.

The Court Of Justice Partially Upheld ABB's Claim That The General Court Had Exercised A Wrong Evidentiary Standard

On November 28, 2019, the Court of Justice partially granted the appeal brought by ABB and annulled a part of the Commission's *Power Cables* decision.[23] In particular, the Court of Justice upheld ABB's argument that the Commission did not adduce sufficient evidence that the cartel extended to accessories for power cables with voltages between 110 kV and 220 kV. The Court of Justice criticized the General Court for using a wrong evidentiary standard in reviewing the Commission's decision.

ABB argued that the Commission had not provided any evidence to support its finding that the infringement covered accessories of power cables with voltages below 220 kV but had instead drawn an inference from the fact that such accessories were included in the power cables projects tainted by the cartel.[24]

The Court of Justice agreed that the Commission should not be permitted to dismiss its evidentiary burden when establishing an infringement. In particular, it noted that "it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement."[25] The Court of Justice criticized the General Court for "effectively rel[ying] on an unsubstantiated presumption in that regard, while leaving it to the appellants to rebut that presumption in respect of those accessories."[26]

[21] *Power cables* (Case AT.39610), Commission decision of April 2, 2014.

[22] *ABB Ltd and ABB AB v. Commission* (Case C593/18 P) EU:C:2019:1027; *Silec Cable and General Cable v. Commission* (Case C-599/18 P) EU:C:2019:966; B*rugg Kabel AG and Kabelwerke Brugg AG Holding v. Commission* (Case C591/18 P) EU:C:2019:1026; *LS Cable & System Ltd v. Commission* (Case C596/18 P) EU:C:2019:1025.

[23] *ABB Ltd and ABB AB v. Commission* (Case C-593/18 P) EU:C:2019:1027.

[24] *ABB Ltd and ABB AB v. Commission* (Case C-593/18 P) EU:C:2019:1027, para. 39 and *ABB Ltd and ABB AB v. Commission* (Case T-445/14) EU:T:2018:449, para. 492.

[25] *ABB Ltd and ABB AB v. Commission* (Case C-593/18 P) EU:C:2019:1027, para. 38.

[26] *Ibid*., para. 44.

Other than ABB, no other addressee of the *Power Cables* decision has challenged the scope of the infringement found by the Commission. They are therefore unlikely to benefit from this judgment.

The Court of Justice's judgment in *ABB v. Commission* may encourage defendants in the Commission's cartel investigations to question the scope of the alleged infringement. This includes immunity applicants, for which the scope of a decision may have implications for the follow-on damages litigation.

The Court Of Justice Rejected Silec's Argument That It Had Distanced Itself From The Cartel

On November 14, 2019, the Court of Justice dismissed an appeal brought by Silec Cable.[27] In particular, the Court rejected Silec's claims that the General Court had (i) incorrectly interpreted the content of its email communications as evidencing its involvement in the cartel; (ii) erroneously applied the legal test of public distancing from the cartel (*i.e.*, Silec was not required to distance itself as it did not participate in any meetings); and (iii) wrongly denied them a 'fringe player' status, compared to another cartel participant, refusing to grant a fine reduction on this basis.

The Court of Justice noted that public distancing is only significant if the undertaking's conduct included participation in collusive meetings. Where a cartel operated through other means, the failure to publicly distance oneself is only one of the factors relevant for the assessment of an undertaking's involvement in the cartel and its duration. The General Court found that such an assessment had been carried out in Silec's case. In particular, not only did Silec fail to publicly distance itself from the cartel, but the Commission also had other evidence, including email communications, demonstrating their involvement in the cartel.

Further, the Court of Justice found that the General Court had correctly denied Silec's characterization of a "fringe player." Instead, the Court of Justice agreed that Silec had participated individually in the cartel, which was evident from Silec's direct email communications. The Court of Justice, therefore, in line with its judgments in most of the *Power Cables* cartel appeals, dismissed Silec's appeal in its entirety.

[27] *Silec Cable SAS and General Cable Corp. v. Commission* (Case T-438/14) EU:T:2018:447, upheld on appeal in *Silec Cable and General Cable v. Commission* (Case C-599/18 P) EU:C:2019:966.

Upcoming Events

Date	Conference	Organizer	Location
19–21/01	International Forum on Antitrust Regulation	Cambridge Forums	Cambridge
23/01	New European Commission: Dual Role & Industrial Policy	Concurrences	New York
24/01	Round Table Discussion - Competition law and sustainability	University of Oxford	Cambridge
28–29/01	Competition Law Nordic 2020	Knect365	Stockholm
30–31/01	Vertical Restraints In The Digital Economy: Vber Reform And The Future Of Distribution	GCLC/College of Europe	Brussels
07/02	Is the Antitrust Consent the Solution to Tackle Today's Data-Driven Markets?	University of Oxford	Oxford
16/02	A New "Consensus" on Competition Policy in Digital Markets?	Brussels School of Competition	Brussels
19/02	International Mergers Conference	Concurrences/UCL	London

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