October 2020

EU Competition Law Newsletter

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Commission Accepts Broadcom's Commitments For TV Set-top Boxes And Modem Chips

On October 7, 2020 the Commission accepted commitments offered by Broadcom to address concerns relating to the sale of chipsets used in TV set-top boxes ("STBs") and in internet modems.[1] This marks the end of a case that unusually combined the use of interim measures and the commitments procedure.[2] The Commission may view this case as a blueprint to achieving expedited resolutions of antitrust investigations in technology markets and beyond.

An investigation concluded in a record-breaking 16 months—at least from the opening of the investigation

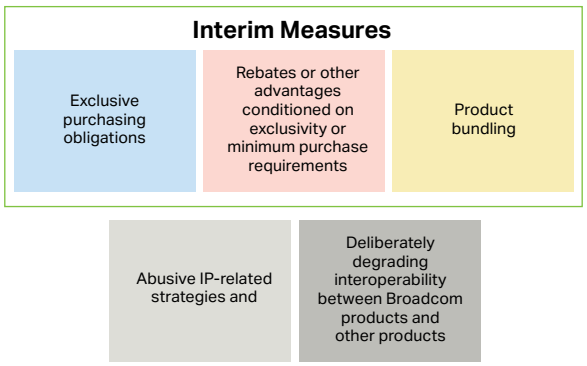
In June 2019, the Commission opened an investigation against Broadcom under Article 102 TFEU. The Commission has done so acting on informal complaints and market information received in the course of 2018. The investigation scrutinized, in particular, terms in a few, specific Broadcom contracts that allegedly involved both the bundling of certain Broadcom products, and putative exclusivity mechanisms. The Commission also announced it was investigating "IP-related

[1] *Broadcom* (Case COMP/AT.40608), Commission decision of October 7, 2020 (decision not yet available).

[2] Respectively, under Article 8 (interim measures) and Article 9 (commitments) of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 TFEU.

strategies," and whether Broadcom was making technological choices that degraded interoperability of certain chipsets.[3] The complexity of the Commission's concerns suggested complex and drawn-out proceedings.

A few months later, in October 2019, the Commission imposed interim measures—a step it had not taken since 2001. The interim measures ordered Broadcom to cease applying terms that the Commission characterized as exclusive or exclusive-like or to constitute bundling in its contracts with six specific OEMs for a period of three years. Broadcom complied with these measures but filed an action for their annulment to the General Court on December 23, 2019.[4] The interim measures did not cover the interoperability and IP-related concerns.



In parallel, and with the interim measures already in force, Broadcom entered into negotiations with the Commission where it committed, under Article 9 of Regulation No. 1/2003, to refrain from three of the practices the Commission had been investigating: (i) exclusivity practices; (ii) exclusivity-inducing rebates or other advantages; and (iii) bundling practices. The commitments will apply for seven years, subject to a standard review clause.

The scope of these commitments extends beyond that of the interim measures in two ways. First, the commitments extend to all of Broadcom's current and potential customers, not just the six OEMs identified in the interim measures. Second, the commitments contain additional provisions apparently designed for anti-circumvention. More specifically:

— At the EEA level, Broadcom will not:

- Require or induce by means of price or non-price advantages an OEM to obtain any minimum percentage of its EEA requirements for SoCs for STBs, xDSL modems and fibre modems from Broadcom; and

- Condition the supply of, or the granting of advantages, for SoCs for STBs, xDSL modems and fibre modems on an OEM obtaining from Broadcom another of these products or any other product within the scope of the commitments.[5]

— At the worldwide level (excluding China), Broadcom will not:

- Require or induce by means of price or non-price advantages an OEM to obtain more than 50% of its requirements for SoCs for STBs, xDSL modems and fibre modems from Broadcom; and

- Condition the supply of, or the granting of advantages for, SoCs for STBs, xDSL modems and fibre modems on an OEM obtaining from Broadcom more than 50% of its requirements for any other of these products, or for other products within the scope of the commitments.

To address other ways through which Broadcom could potentially achieve exclusivity-like outcomes, the commitments also include "specific provisions regarding incentives to bid equipment based on Broadcom products as well as certain additional clauses with regard to service providers in the EEA."

The commitments do not seem to address the initial concerns the Commission had about the

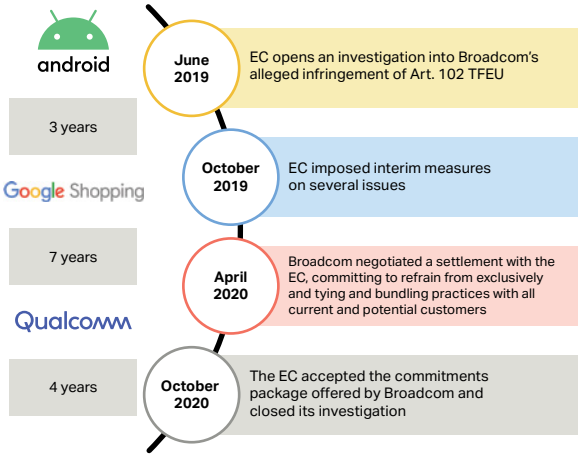
[3] Commission Press Release IP/19/3410, "Antitrust: Commission opens investigation into Broadcom and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets." June 26, 2019 (discussed in our June 2019 European Competition Law Newsletter).

[4] *Broadcom v. Commission* (Case T-876/19), case pending.

[5] SoCs for cable modems, Front End Chips for STBs and modems and/or Wi-Fi Chips for STBs and modems).

alleged abusive use of IP rights by Broadcom, suggesting the Commission abandoned its concerns in this area.[6] The commitments also do not contain a specific undertaking addressing the initial interoperability concerns. Rather, as a means of tackling potential circumvention of the other provisions, the commitments prevent Broadcom from changing standard-based interfaces in such a manner that would degrade interoperability between its products and third-party products.

The Commission's acceptance of Broadcom's commitments package ends its investigation, which lasted less than 16 months—a considerably shorter formal investigation than that in other recent abuse of dominance cases in the technology markets.



A new framework for swift resolutions in technology cases?

As explained in our June 2019 European Competition Law Newsletter, aspects of the *Broadcom* investigation may have made it appear as a good "test case" for the Commission to resuscitate the use of interim measures. In recent years, the Commission had been reluctant to make use of interim measures, in particular due to the high standard required to impose them. Under Article 8 of Regulation No. 1/2003, interim measures can only be mandated when the Commission is able to demonstrate a "*prima facie* finding of infringement" and "in cases of urgency due to the risk of serious and irreparable damage to competition."

Because, at least under the facts the Commission had alleged, *Broadcom* concerned well-established theories of harm of exclusivity or tying and bundling, the Commission likely viewed its chances of prevailing on the "prima facie finding" element as high. In its October 2019 decision,[7] the Commission claimed the urgency requirement was also satisfied due to the bidding nature of the market, the prevalence of long-term contracts, and evidence of harm to Broadcom's competitors suggesting potential "exit of the few remaining competitors."

The use of both interim measures and commitments together makes this case particularly novel. When announcing the *Broadcom* commitments, Commissioner Vestager noted that the imposition of interim measures had allowed "for commitments discussions to take place in a more efficient manner and without the risk of the market deteriorating in the meantime."[8] The *Broadcom* case demonstrates how the combined use of interim measures and commitment decisions can enable the Commission to reach resolutions of antitrust investigations more quickly by relying on instruments it already has in its enforcement toolbox.

But speed comes at a cost. The commitments resolution could raise two questions as to its appropriateness:

— The commitments decision implies that the General Court will likely no longer have the opportunity to test the Commission's reasoning in applying interim measures. The Court's assessment would have clarified whether the urgency standard was met.

[6] Initial concerns related to potentially "abusive IP-related strategies" were mentioned in the Commission Press Release IP/19/3410, "Antitrust: Commission opens investigation into Broadcom and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets." June 26, 2019. Neither the interim measures decision, nor the commitments seem to address this concern, which suggests the concern was dropped by the Commission during its investigation.

[7] *Broadcom* (Case COMP/AT.40608), Commission decision of October 16, 2019.

[8] Commission Statement 20/1853, "Statement by Executive Vice-President Margrethe Vestager on the Commission decision to accept commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes." October 7, 2020.

Broadcom had argued that the Commission based its urgency assessment only on "a series of generic claims" and that it could not identify the time period in which the harm was expected to materialize. The resolution through the Article 9 commitments, however, means we will have to wait for the confirmation of Commission's approach in a future case.

— It is difficult to square the combined use of interim measures and commitments with the policy goals of the two instruments. Interim measures require a demonstration of *prima facie* infringement, making them particularly suitable for well-established theories of harm in clear-cut cases. But in these types of cases, the Commission would typically seek to issue fines and findings of infringement that facilitate third-party litigants' ability to bring actions for damages against the infringing company. Resolving the case through Article 9 commitments means that neither of these things will happen. It will be interesting to see how the Commission strikes this balance in future cases.

News

Court Updates

General Court Clarifies The Role Of Privacy Protections In Commission Investigations

October 2020 saw important developments with respect to the procedural framework surrounding the Commission's evidence-gathering powers. A General Court judgment on the appropriateness of dawn raids at three French supermarket chains and the Court's interim order regarding the Commission's ongoing probe into Facebook's data practices both have practical implications for companies under investigation.

French Supermarkets Obtain The Partial Annulment Of EU Dawn Raids In A Judgment That Nonetheless Confirms The Commission's Investigatory Powers

In 2017, the Commission raided three French supermarkets—Casino, Intermarché, and Les Mousquetaires—over suspected infringement of Article 101 TFEU. The three supermarkets each appealed the inspection decisions and presented three broad categories of arguments:[9] First, all three unsuccessfully argued that the Commission's investigatory powers breached their rights to effective remedies and their rights of defense. Second, Les Mousquetaires challenged the Commission's seizure of data relating to employees' private lives and the refusal to delete such data. While accepting the existence of rights attached to private data, the General Court held the challenge itself was inadmissible. Third, all three appellants claimed that the dawn raids were not based on sufficient evidence—a claim the General Court partially upheld.

Pleas of illegality. All three supermarkets claimed the application of Article 20(1) (concerning the Commission's power to carry out inspections) and Article 20(4) (concerning undertakings' obligations to comply with decision-ordered inspections) of Regulation No. 1/2003 breached their right to an effective remedy. The supermarkets reasoned that their ability to appeal an inspection was uncertain, unavailable within a reasonable timeframe, and in breach of the principle of equality of arms and the right of defense as they could not access the evidence available to the Commission. The General Court rejected these claims.

First, the General Court recalled that the right to an effective remedy requires it to be effective, efficient, certain, and provided within a reasonable time. The Court held that these criteria were met by the six different routes to remedy available to companies that had been subjected to a dawn raid, *i.e.* the ability to: (i) appeal an inspection decision;

[9] *Casino, Guichard-Perrachon and AMC v. Commission* (Case T-249/17) EU:T:2020:458; *Intermarché Casino Achats v. Commission* (Case T-254/17) EU:T:2020:459; and *Les Mousquetaires and ITM Entreprises v. Commission* (T-255/17) EU:T:2020:460.

(ii) appeal any decision taken by the Commission following its inspection decision (such as a refusal to grant protection over privileged materials); (iii) appeal the Commission's final decision at the end of an investigation; (iv) bring an action for interim relief; (v) bring a tort action; and (vi) issue requests to the Hearing Officer. The Court therefore dismissed the claim that Articles 20(1) and (4) of Regulation No. 1/2003 violated the companies' rights to an effective remedy breaching their legal rights.

Second, the General Court further explained that the administrative procedure governed by Regulation No. 1/2003 consists of investigative and adversarial stages. Dawn raids are part of the investigative stage, during which an undertaking is entitled to know the conduct it is being investigated for. A company's right to further detail on the exact evidence available to the Commission only arises, however, during the adversarial stage of the procedure, which only starts when the Commission has issued a Statement of Objections.

Challenge of the Commission's seizing of data relating to employees' private lives. Les Mousquetaires also disputed the legality of the Commission seizing and refusing to delete personal data relating to employees. The General Court acknowledged that undertakings have a right to protect the private lives of their employees, similar to their right to protect privileged information. The General Court nonetheless found Les Mousquetaires' challenge to be inadmissible. As Les Mousquetaires had failed to request the data not be seized on privacy grounds during the investigation, there was no formal Commission decision to refuse the request. Since no decision was taken and since only decisions can be appealed, Les Mousquetaires' challenge was inadmissible. Les Mousquetaires later made a demand in writing that the Commission delete its employees' private data, the Court found that this demand failed to identify the specific documents in question, leaving the Commission unable to respond.

The judgment places the burden on the company to make clear at the time of the inspection that they believe the documents being seized are likely to include data concerning their employees' private lives that are covered by their right to privacy. Following the judgment a company in this situation should consider promptly following-up in writing with the Commission identifying as precisely as possible the specific documents that may fall within the scope of such a claim.

Challenge of the inspections' legal basis. Finally, the supermarkets claimed that the Commission's decision was arbitrary, because it was not based on sufficient evidence. The appellants challenged both the nature of the evidence relied upon and its persuasiveness.

The appellants observed that the bulk of the evidence relied upon consisted of interviews between the Commission and suppliers that were not recorded but simply summarized by Commission officials in written reports. The General Court dismissed these concerns, on the basis that evidence collected informally is not subject to the same formalistic requirements as evidence collected in the context of a formal investigation. The Commission was not under an obligation to record the interviews. The Court also dismissed the suggestion that as the reports were authored by Commission officials could be used without further evidence to suggest these were not accurate accounts of the interviews.

As for the persuasiveness of the evidence, the General Court stated that to justify an inspection, the Commission must have "serious enough evidence to suspect the existence of illegal conduct,"[10] and recalled that the evidence must be assessed as a whole. The Commission's decision to inspect relied on two suspicions: one relating to alleged information exchanges regarding discounted products and the other pertained to information exchanges between Casino and Intermarché on their future commercial strategies. With respect to the first of the two concerns, the General Court pointed to the evidence collected in the interviews conducted by the Commission

[10] *Casino, Guichard-Perrachon and AMC v. Commission* (Case T-249/17) EU:T:2020:458, para. 97.

and held that these constituted serious enough evidence. But with respect to the second concern, the General Court found that it was almost entirely based on the fact that an employee of INCA (a joint venture between Intermarché and Casino) attended Intermarché's 2016 annual convention. The General Court found that there was no evidence of any secret meeting or exchange of information at this event, and that Intermarché's disclosure of certain information during this convention does not suffice to create the suspicion of a collusion between the two undertakings. On this basis, the General Court annulled the inspection decision in part. In practice this means the Commission can therefore continue its investigation based on the evidence collected during its 2017 dawn raids in relation to the first of these suspicions only.

General Court Mandates A Data Sharing Mechanism To Protect Private Information In Commission's Facebook Investigation

Another noteworthy development in relation to the protection of companies' rights of defense stems from the European Commission's investigation into Facebook's data practices, which began in the fall of 2019. This investigation appears to have involved a number of requests for information ("RFIs") sent to Facebook. One RFI was appealed in July 2020, for reasons of "excessive demands." Facebook claimed the request involved a significant volume of private and sensitive user data. Facebook sought interim measures on this basis.

On October 29, 2020, the General Court outlined in an interim order a data-sharing framework enabling the Commission to access the data requested whilst seeking to ensure that sensitive data benefits from "strong legal protections."[11] In practice, this will involve a virtual data room that will house any sensitive documents identified by Facebook. A limited number of Commission lawyers will be able to consult this data while Facebook lawyers will monitor them. Should the two sides disagree over the sensitivity of a document, Facebook will be able to make their case to a senior EU official to adjudicate. While Facebook welcomed this development, it also announced that it would continue its main appeal against the information request.

This framework is not unlike the already common practice where the lawyers of the investigated company are able to monitor Commission officials' access to data collected during a dawn raid to protect legal privilege and to verify that documents fall within the scope of an investigation. This judgment appears to extend this practice to Commission RFIs, where this would not previously have been general practice, it also provides companies with a clear right to make privacy-focused claims against the disclosure of specifically identified documents.

While it is difficult to determine the general applicability of the interim order at this early state, the possible long-term impact is significant. First, the order may induce the Commission to reconsider its general approach to issuing document requests. There is a broad consensus that the Commission's requests have become increasingly onerous for companies to comply with. Separating particularly sensitive documents and limiting access to them via a virtual data room may go some way to protect the fundamental rights of the data subjects whose data is exposed. It may also act as a limiting factor on the breadth of requests for practical reasons. Second, both this judgment and the French Supermarket judgment suggests companies have a mandate to invest time and resources into determining with some precision not only which documents may enjoy legal privilege, but also which may contain information protected by their employees' right to privacy.

HeidelbergCement & Schwenk Zement v. Commission: The General Court Provides Jurisdictional Clarity Where A Joint Venture Acts As The Acquirer

On October 5, 2020, the General Court dismissed an action for annulment by HeidelbergCement

[11] *Facebook v. Commission* (Case T-451/20), EU:T:2020:515.

and Schwenk Zement (the "parent companies") against the Commission's April 2017 decision,[12] which prohibited their acquisition of Cemex's Croatian and Hungarian subsidiaries through Duna-Dráva Cement ("DDC"), a full-function JV ("JV") equally owned and controlled by the parent companies.[13]

Clarity On When JV Parent Companies' Revenues Decisive For Determining Whether EU Revenue Thresholds Are Met

The parties claimed the Commission was not competent to review the transaction as it should have considered only the turnover of the JV, and not that of its parent companies when assessing whether the jurisdictional thresholds were met. The parent companies argued that the JV, DDC, was long-established and the direct acquirer of Cemex Croatia. They further argued that the wording of the CJN did not allow the Commission to identify the relevant parties for jurisdictional purposes on a case-by-case basis unless the JV was clearly a shell company or set up as a mere vehicle for the transaction. On this logic, the turnover of the parent companies should have been attributed to DDC and not considered separately, in which case the transaction did not meet the EU turnover thresholds because at least two undertakings did not have EU turnover exceeding €250 million.

The critical jurisdictional issue in this case related to identifying the "undertakings concerned" in an acquisition by a full-function JV. Article 1(2) of the Merger Regulation introduces but does not define the concept of "undertakings concerned." Paragraphs 145 to 147 of the Consolidated Jurisdictional Notice ("CJN") interpret the concept where a JV acquires control of another company.[14] In principle, the relevant parties for jurisdictional purposes are the full-function JV itself and the target—not the Parties that are participating in the JV. But where the JV "can be regarded as a mere vehicle for an acquisition by the parent companies," the Commission will consider both of the parent companies and the target as the relevant parties for jurisdictional purposes. This could occur in a number of instances, for example, where the JV is set up especially to acquire the target company, has not yet started to operate, or where "there are elements which demonstrate that the parent companies are in fact the real players behind the [transaction]," including because they initiated, organized, and financed the deal.[15]

The General Court dismissed the Parties' plea which was based on a "misconceived premise": "it is not only when the parent companies use a 'shell company' for the acquisition or in circumvention scenarios that it may be necessary to consider the parent companies to be the undertakings concerned, but also when they are the real players behind the transaction."[16] A full-function JV's interest in a merger cannot prevent parent companies being classified as relevant parties for jurisdictional purposes if they are the real actors behind the transaction in light of their involvement. In this case the General Court concluded that the parent companies' "decisive" involvement was evident from the facts, and most notably:

— HeidelbergCement attended the kick-off meeting, before which it "took decisions regarding the implementation and composition of the steering committee, the timing, preparation and submission of an indicative offer, the structure of the due diligence;"[17]

— The HeidelbergCement members of the steering committee "attended negotiations with Cemex and prepared detailed documentation, deal valuation and other components of the business case for the decision by the HeidelbergCement

[12] *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (Case COMP/M.7878), Commission decision of April 5, 2017.

[13] *HeidelbergCement & Schwenk Zement v. Commission* (Case T-380/17) EU:T:2020:471 ("General Court Judgment").

[14] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ 2008/C 95/01.

[15] CJN, para. 147.

[16] General Court Judgment, para. 124.

[17] General Court Judgment, para. 196.

management board and supervisory board to approve the acquisition;"[18]

— HeidelbergCement negotiated non-disclosure agreements, reached verbal agreement on the main terms of the transaction, and agreed the final purchase price with Cemex;

— Schwenk agreed to pursue the acquisition with HeidelbergCement, "was regularly informed about HeidelbergCement's organisation of the transaction and never sought to oppose HeidelbergCement's role in any way."[19]

The judgment is a helpful reminder that parent companies should be conscious that their actions with respect to a transaction can be determinative of whether or not they will be viewed as the relevant parties for jurisdictional purposes. Where parent companies are the real actors in a deal, they should expect their turnover to be included for assessing whether EU notification is necessary. This confirms an interpretation of the CJN that prevents parent companies from circumventing notification thresholds through creative transaction structures.

Business Confined To A Limited Part Of A Member State Sufficient To Trigger EC Prohibition

The parent companies also contested the Commission's substantive framework of assessment. The General Court dismissed each plea.

Most notably, the General Court endorsed the Commission's approach to finding a risk of a SIEC in a substantial part of the internal market. The Commission found the transaction was likely to impede effective competition in southern Croatia. The parent companies claimed the affected market must constitute a substantial part of the EU internal market to constitute a SIEC (as the EU Merger Regulation stipulates)—which it alleged was not the case in view of the size of the catchment area around Cemex's plant in Split. Based on surface area, population, consumption, and imports/exports, the Commission concluded that the catchment areas around Cemex's plant in Split could constitute a substantial part of the internal market regardless of their precise definition.

Reiterating its precedent,[20] the General Court upheld the Commission's methodology. It considered a surface area of 30,000 km² and a population of more than 2 million inhabitants (comparable with or greater than the population of several Member States) a substantial part of the internal market. The use of grey cement in that area was also comparable to or higher than that in several Member States. The judgment is a reminder that high market shares in localized areas can jeopardize EU merger control approval.

High Market Shares In Localized Areas Can Jeopardize EU Approval

Source: European Commission, Competition Merger Brief, Issue 3/2017

The General Court Endorses The Commission's Standard For Assessing Remedies

The parent companies claimed that the Commission's assessment of its proposed commitments was based on an incorrect and overly strict standard essentially requiring "a divestiture of a viable business comprising a production plant,

[18] General Court Judgment, para. 182.

[19] General Court Judgment, para. 264. The evidence provided in the General Court Judgment suggests that Schewenk's role was secondary to HeidelbergCement's. This raises the question of whether the actions of one of two parties to a JV can implicate the other party as the "real player" behind the Transaction. The judgment does not address the question directly. It appears to take the view that a parent company is involved if "but for" that parent company's actions and decisions, the transaction would not have gone ahead. Here, but for Schwenk approving HeidelbergCement's initiatives, the transaction would not have happened at all.

[20] *Ambulanz Glöckner* (Case C-475/99), EU:C:2001:577, para. 38.

brands, customer relationships and staff," which "must entirely eliminate, or at least substantially reduce, the overlap between the merging parties."[21]

In rejecting the parties' claim that the standard was overly exacting, the General Court highlighted that the proposed commitments—access to a Cemex cement terminal in southern Croatia without existing customers, brands, or sales staff—would not have had an effect comparable to the divestiture of an existing standalone business and therefore could not be accepted. The merged entity's capacity shares would have remained high. Reiterating the wording of the Commission's Remedies Notice, the General Court underlines the standard for a behavioral remedy is that it must be at least equivalent in its effects to a divestiture: "the commitments offered a mere, uncertain business opportunity for a new lessee to start selling, or to expand sales of, grey cement in the relevant markets, 'which [wa]s not comparable' to the divestiture of an existing standalone business."[22]

In contrast to the landmark *Three/O2* judgment, the General Court's judgment in this case provides a full endorsement of the Commission's approach to determining several critical merger control concepts.

Advocate General Pitruzzella Recommends The Court Of Justice Of The European Union Set Aside FC Barcelona's State Aid Victory At The General Court (European Commission v. FC Barcelona)

On October 15, 2020, Advocate General Pitruzzella advised the Court of Justice to overturn the General Court's annulment of the Commission's decision that had found that preferential corporate tax rates enjoyed by FC Barcelona and other clubs amounted to unlawful and incompatible State aid.[23] The Advocate General disagrees with the General Court's conclusion that the Commission failed to show to the requisite legal standard the existence of an advantage in favor of FC Barcelona and proposes to set aside the judgment under appeal on this basis.

Background

The Spanish sports law of 1990 required professional sports clubs to become limited companies. Those that had been profitable in the preceding financial year could, however, continue operating as "sport clubs" (a category of non-profit entities under Spanish law). FC Barcelona and Club Atlético Osasuna, Athletic Club, and Real Madrid fell under this exemption and so continued to operate as sports clubs, rather than becoming limited companies. The practical implication was that these four clubs benefited from a lower income tax rate than the sports clubs that were required to become limited companies.

The Commission's decision of July 4, 2016 found that the Spanish sports law gave rise to a preferential corporate tax rate for certain clubs that was contrary to Article 108 (3) TFEU, and found the scheme incompatible with the internal market.[24] It ordered the Kingdom of Spain to repeal it and recover from the clubs the difference between the corporate tax rate they had paid as "sport clubs" and the rate they would have paid had they been limited companies during that period.

FC Barcelona appealed this decision before the General Court, which annulled it on February 26, 2019 on the basis that the Commission had incorrectly assessed the existence of an advantage under Article 107 (1) TFEU.[25] The General Court held that the Commission should not have concluded there was an advantage without first proving that the less beneficial tax deductions to which the parties were subjected did not offset the advantage derived from the lower tax rate they enjoyed. For this reason, the Court considered that the Commission had not discharged its burden of

[21] General Court Judgment, para. 578.

[22] General Court Judgment, para. 583.

[23] *European Commission v. Fútbol Club Barcelona* (Case C-362/19 P), Opinion of Advocate General Pitruzzella, EU:C:2020:838 (the "Opinion").

[24] *Aid to certain football clubs - ES* (Case COMP/SA.29769), Commission decision July 4, 2016, p.1.

[25] *Fútbol Club Barcelona v. Commission* (Case T-865/16), EU:T:2019:113.

proving the measure granted an advantage to its beneficiaries.[26] This is the judgment the Advocate General now proposes to overturn, for the reasons set out below.

Analysis

In his Opinion, Advocate General Pitruzella discusses whether the decision at issue concerned the examination only of an "aid scheme" or whether it also related to the provision of individual aid. This is an important distinction because when examining a scheme the Commission need only review the general characteristics of the scheme, it does not need to analyze each individual case in which it was applied.[27]

The Opinion considers that the decision at issue related to the examination of an aid scheme and not of individual aid. It is indisputable, according to the Advocate General, that the aid provided to the four clubs was on the basis of a scheme. Individual measures implementing an aid scheme cannot be categorized as "individual aid" within the meaning of Regulation No. 2015/1589, since they are not "notifiable awards of aid on the basis of a scheme."[28]

The Opinion then disagrees with the General Court's view regarding the need to balance the advantages of non-profit status against the disadvantages. The Opinion concedes that to establish if the regime conferred an advantage to its beneficiaries *vis-à-vis* other football clubs, the Commission had to take all elements of that regime into account, including both favorable and unfavorable factors. But, in the context of tax regimes which apply on a periodic basis, the Opinion considers that a review should consider at the time of adoption whether the scheme could result in a lower tax liability for its beneficiaries than under the general tax regime.[29] A finding that a regime confers an advantage to its beneficiaries therefore does not depend on whether, once the regime is applied, there is an effective advantage to such beneficiaries in a given tax year. It rather depends on whether the structure of the tax scheme, considered on an *ex ante* basis, implies that the downsides of the scheme "are able to neutralise, continually and systematically, the advantage resulting from the application of the preferential rate" so it can be consistently concluded that the regime does not confer an advantage.[30] In the case at issue, the Commission could disregard the tax deductions, since they did not "neutralise, continually and systematically"[31] the advantage derived from the lower tax rate these sports clubs enjoyed.[32]

Conclusion

This Opinion, together with other pending cases concerning Valencia CF or Elche CF, illustrates the complexity of the economic assessment in these types of State aid cases, and, in particular, the practical difficulties in the application of State aid rules to professional sport clubs.

Advocate General Hogan Recommends Second Fine Reduction For Breach Of Rights Of Defense In Steel Abrasives Hybrid Cartel Case

On October 8, 2020, Advocate General Hogan delivered his opinion to the Court of Justice in which he argued the General Court had breached the principle of equal treatment in recalculating the fine imposed in 2014 by the Commission on Italian steel abrasives producer Pometon SpA ("Pometon"). Pometon was fined

[26] *See*, Opinion, paras. 14–17.

[27] *See*, Opinion para. 86.

[28] *See*, Opinion, para. 91.

[29] *See*, para. 77 of the Opinion. *See also, France Télécom v. Commission* (Case C-81/10 P) EU:C:2011:811, para. 19 and 24.

[30] Opinion, para. 105.

[31] Opinion, para. 105.

[32] The fact that these considerations are not relevant for the purposes of determining the existence of an advantage does not mean they can be ignored entirely in the Commission's analysis. They become relevant when quantifying the aid, in an *ex post* analysis of whether the advantage actually materialized.

for participating in an alleged cartel by engaging in price coordination.[33] The Advocate General recommended that the Court of Justice should reduce the fine from €3.9 to €2.6 million.

Pometon was one of five steel producers fined by the Commission[34] for allegedly agreeing on a surcharge on the sale of steel abrasives.[35] Pometon, the only non-settling party, appealed the Commission's decision to the General Court, arguing that the Commission violated the presumption of innocence and Pometon's rights of defense by referring to Pometon's behavior in the 2014 settlement decision. The General Court dismissed this ground of appeal, noting that the Commission used sufficient precautions in its drafting to avoid prejudging Pometon's liability. The General Court, however, concluded that the Commission failed to evidence to the requisite legal standard the calculation of Pometon's fine and therefore reduced it based on its own assessment from €6.2 million to €3.9 million.[36]

In his opinion, the Advocate General first argued that the General Court wrongly considered that the Commission had not breached its duty of impartiality towards Pometon and the company's presumption of innocence, as the decision was "worded in such a way as to raise doubts" as to Pometon's guilt.[37] The Advocate General concluded, however, that this error of law in the settlement decision did not affect the validity of the appealed decision, the findings of which were duly supported by evidence.[38] The Advocate General therefore called upon the Court of Justice to dismiss the three first pleas, all of which related to Pometon's presumption of innocence.

The Advocate General then argued that the fourth plea should be upheld, insofar as the General Court breached the principle of equal treatment by according "disproportionate attention" to the criterion of the size of the undertaking in the assessment of the reduction of the fine on account of mitigating circumstances.[39] In this case, Pometon's role in the infringement was less than other participants but nevertheless led to a similar fine due to its larger turnover.[40] The Advocate General said the General Court "created a form of discrimination" between the companies by "inconsistently applying its own method of calculation."[41]

This case will be a new opportunity for the Court of Justice to clarify the scope of the rights of defense of non-settling parties in hybrid settlement cases.[42] In 2019, the Court of Justice confirmed the General Court's judgment in *ICAP v. Commission*, which confirmed settlement discussions should not influence the outcome of the Commission's investigation of non-settling parties.[43] Should the Court of Justice follow the Advocate General's opinion, this will confirm that non-settling cartel participants must be treated equally with settling participants in the determination of their fine, even if they are not part of the same proceedings.

[33] *Pometon SpA v. European Commission* (C-440/19 P), Opinion of Advocate General Hogan of 8 October 2020, EU:C:2020:816 (the "Opinion"). For reporting on the 2016 Commission decision, *see,* Cleary Gottlieb's European Competition Quarterly Report Q4 2016.

[34] *Steel Abrasives* (Case COMP/AT.39792), Commission decision of May 25, 2016. The Commission fined Winoa, MTS and Wurth a combined sum of €30.7 million in 2014. Another company, Ervin, escaped penalties by filing for leniency and revealing the practices. *See, Steel Abrasives* (Case COMP/AT.39792), Commission decision of April 2, 2014.

[35] Steel abrasives are loose particles produced from steel scrap residue. They are mainly used to clean or enhance metal surfaces in the steel, automotive, metallurgy and petrochemicals industries. They are also used for cutting hard stones, such as granite and marble.

[36] *Pometon SA v. Commission* (Case T-433/16) EU:T:2019:201.

[37] Opinion, para. 74.

[38] Opinion, para. 101.

[39] Opinion, para. 120.

[40] Opinion, paras. 121–122.

[41] Opinion, para. 123.

[42] According to our analysis of public data, approximately 18% of settlements are hybrid cases (with the number of "hold-outs" ranging from 1 to 3).

[43] *ICAP v. Commission* (Case T-180/15) EU:T:2017:795. In this judgment, the General Court considered that the presumption of innocence was not preserved as the Commission specified in its settlement decision how ICAP "facilitated" the infringements.

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