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General Court protects the European Commission from financial liability for its errors in assessing the UPS/TNT merger

On 23 February 2022 the European General Court (GC) refused to award the €1.742 billion claimed by UPS from the European Commission, despite finding that the Commission breached its procedural rules when it blocked UPS's acquisition of rival, TNT.

BACKGROUND

In 2013 the Commission blocked UPS's proposed €5.2 billion acquisition of its rival, TNT, finding that the acquisition would have restricted competition in the market for express delivery of small parcels across several EU Member States. Following a series of attempts to save the acquisition through behavioural and structural remedies packages, UPS announced its decision to abandon the acquisition on 14 January 2013 in a press release in which it stated that the Commission had communicated the latter's intention to prohibit the transaction. On 30 January 2013 the Commission adopted its decision blocking the merger. TNT was acquired by FedEx in 2016.

In January 2017 UPS appealed to the GC, which annulled the Commission's decision. The European Court of Justice (CJ) confirmed in 2019 that the Commission had infringed UPS's rights of defence by changing its econometric model without informing the parties. UPS, arguing that it suffered losses both on the abandoned acquisition and due to the subsequent sale of TNT to its rival, sued the Commission for damages at the end of 2017.

GENERAL COURT FINDINGS

UPS sought damages for losses stemming from breaches of its rights under the Commission's procedural rules, for making an error in its assessment of the proposed acquisition and for failing to justify the block. Included in the damages claim were the costs of the merger review process, the break fee paid by UPS following the block and loss of profits flowing from being unable to complete the acquisition.

The GC set out three conditions for the Commission to incur non-contractual liability:

- the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious;
- actual damage must be shown to have occurred; and
- there must be a direct causal link between the breach of the obligation and the damage sustained.

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BREACHES OF UPS'S RIGHTS

As regards its claim that its procedural rights had been infringed, UPS claimed that the Commission had not communicated to it the final version of the econometric model used to analyse the concentration, nor the criteria for assessing efficiencies arising from the proposed merger, and had not provided access to information provided by FedEx during the administrative procedure. The GC found that the Commission's failure to communicate the final version of the econometric model was a serious breach of UPS's rights of defence; in contrast, it did not accept that the Commission was required to communicate the criteria for assessing efficiencies, the burden of proof for showing efficiencies resting with the merging parties. The GC did not find that the Commission had infringed UPS's right of access to documents provided by FedEx – UPS had not exercised its rights of access in due time and in the manner prescribed, so did not meet the conditions for obtaining compensation for the damage it alleged had resulted.

Regarding UPS's claim that the Commission failed to justify blocking the deal, the GC noted that an inadequate statement of reasons does not in itself give rise to liability on the part of the European Union.

As for UPS's allegation that the Commission had made an error in its assessment of the proposed acquisition, the GC confirmed that the Commission had made certain errors, but considered that they were not sufficiently serious breaches of EU law as to give rise to non-contractual liability. The GC also considered that UPS had failed to demonstrate the existence of certain errors in assessment that it had alleged, and to provide any indication of unequal treatment between the decision at issue and that relating to the FedEx/TNT transaction.

DIRECT CAUSAL LINK

Having established that only the failure to communicate the final version of the econometric model used was sufficiently serious to satisfy the first condition for non-contractual liability, the GC considered whether there was a direct causal link between that and the damages claimed by UPS. As regards UPS's claim for the costs associated with the merger control procedure and the break fee paid by UPS following the block, the GC found that participation in the merger control procedure was the result of UPS's free choice, and the payment of the break fee stemmed from a contractual obligation – the illegalities vitiating the Commission's prohibition decision were not the determining cause of those costs. Regarding the alleged loss of profits, the GC held that sufficient causation was not proven because UPS failed to provide evidence showing that the breach was sufficient to invalidate the entirety of the economic analysis and the finding of a significant impediment to effective competition.

The GC therefore concluded that UPS had not established that the infringements of its procedural rights were the determining cause of the damage claimed, and dismissed the action for damages in its entirety.

IMPLICATIONS

The Commission may find its confidence in using creative, non-standard metrics or analysis methods, as with the econometrics in this case, bolstered. For parties, this judgment may make damages claims against the Commission yet less attractive. It will be interesting to monitor the impact on parties' aptitude to sue the Commission for damages following erroneous merger blocks. The decision will no doubt be of interest to companies which have recently or are currently appealing merger blocks by the Commission.

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OTHER DEVELOPMENTS

MERGER CONTROL

EUROPEAN COMMISSION FINDS THAT HUNGARIAN VETO OF INSURANCE MERGER BROKE EU MERGER CONTROL RULES

On 21 February 2022 the European Commission announced that it had concluded that Hungary's decision to block the purchase by Vienna Insurance Group (VIG) of the Hungarian subsidiaries of the AEGON Group breached Article 21 of the EU Merger Regulation (EUMR). This acquisition forms part of a larger transaction, previously cleared by the Commission, whereby the AEGON Group would purchase several businesses from VIG across Turkey and Eastern Europe.

In early 2021 the Hungarian government vetoed the planned takeover of the Hungarian subsidiaries involved in the transaction, using emergency foreign direct investment legislation put in place in response to the Covid-19 pandemic. Furthermore it was argued that that the proposed transaction would threaten the country's legitimate interests.

The Commission's latest announcement marks the end of the investigation and confirms the Commission's preliminary finding of 20 January 2022 that the veto violated Article 21 EUMR.[1] In its press statement, the Commission clarified that it "*had reasonable doubts as to whether the veto genuinely aimed to protect Hungary's legitimate interests within the meaning of the EUMR*" and went on to say that "*it is unclear how the acquisition by VIG of AEGON's Hungarian assets would pose a threat to the fundamental interest of society*" given that both parties already had assets and business in Hungary.

The Commission found that Hungary should have communicated its intention to veto the transaction to the Commission prior to its implementation and that its failure to do so was a breach of EU law. In addition, it found that the veto restricted VIG's right to engage in a cross-border transaction, and that the Hungarian authorities failed to show that the measure was justified, suitable and proportionate. The Commission therefore concluded that the veto infringed Article 21 EUMR. The Commission has ordered Hungary to withdraw its veto by 18 March 2022.

SAMR CONTINUES STRICT APPROACH TO GUN-JUMPING ENFORCEMENTS

In the latest example of the Chinese competition authority's (SAMR's) strict approach to gun-jumping cases, on 14 February 2022 SAMR announced that it had issued a fine of RMB 300,000 (approximately £35,500) to Muenchener Rueckversicherung (Munich Re) for acquiring a 15 per cent stake in Covanta Europe Assets without filing a notification with the authority. This case is significant because it involved the acquisition of a relatively small stake by a financial investor. While it is unclear how the transaction came to SAMR's attention, it highlights the zero tolerance approach of SAMR once it becomes aware of un-notified transactions.

Munich Re is a German insurer and re-insurer, while Covanta is an Irish waste-to-energy business. Before the deal, Covanta was jointly controlled by Green Investment Group, DIF Infrastructure V, and Covanta Holding. On 26 July 2019 Munich Re agreed to acquire a 15 per cent stake in Covanta from DIF which SAMR determined in its decision constituted the acquisition of joint control over Covanta. The decision did not discuss SAMR's analysis of why it considered Munich Re's 15 per cent stake to constitute joint control, but this must have arisen from the governance rights that were attached to the 15 per cent stake.

While the deal was not found to have the effect of eliminating or restricting competition, the transaction fell within the scope of the Anti-Monopoly Law (AML) thus SAMR found that it should have been notified. It is notable

[1] Article 21 EUMR sets out that the Commission has exclusive competence to examine concentrations with an EU dimension and Member States are allowed to take decisions only when they are compatible with the provisions and general principles of EU law. Furthermore, any such decisions must be genuinely aimed at protecting a legitimate interest of the Member State.

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that, unlike SAMR's recent approach to gun-jumping cases in the technology sector, it did not impose the maximum fine permitted under the AML of RMB 500,000 (approximately £59,000) on Munich Re.

See also a previous edition of our Newsletter for the proposed tougher penalties on gun-jumping in the revised AML.

ANTITRUST

UK GOVERNMENT CONSULTS ON NEW VERTICAL RULES

On 21 February 2022 the UK Government's Department of Business, Energy and Industrial Strategy (BEIS) launched a consultation on the draft Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (the draft Order). This follows on from the CMA, in November 2021, recommending the replacement of the retained EU Vertical Agreements Block Exemption Regulation (VABER) with a new UK Order when it expires on 31 May 2022, tailoring it to the need of UK businesses and consumers.

The draft Order largely reflects the CMA's recommendations and does not depart too radically from the retained VABER. However, the draft Order does include a section on parity clauses, also known as 'Most Favoured Nation' agreements. Parity clauses enable a party to require that suppliers offer other goods and services on terms that are not disadvantageous when compared with the terms on offer to third parties. Such clauses have been a focus of competition enforcement for the past few years but are not included within the VABER (which is currently also being reviewed at EU level).

The draft Order draws out and particularly focuses on so-called wide parity obligations. Such obligations typically specify that a product or service cannot be offered on preferential terms on any other channels, including e.g. the supplier's own website, or via other intermediaries, such as other distributors or online platforms. The draft Order treats these wide parity obligations as hardcore restrictions. The hardcore restriction will also apply to measures that have the same effect as a wide retail parity obligation in a contractual provision. The draft Order further specifies that this hardcore restriction will apply to both online and offline intermediaries. Wide parity obligations that apply to business-to-business markets however, will not be treated as hardcore restrictions.

The draft Order also introduces some other amendments to the current regime, including:

- A widening of the regime covering both territorial and customer restrictions. The draft Order includes greater flexibility to combine exclusive and selective distribution – in particular the draft Order brings combined exclusive and selective distribution, shared distribution and measures to protect selective distribution within the exceptions to hardcore restrictions;
- A redressing of the balance of incentives for brick-and-mortar versus online retailers. This includes the removal of dual pricing as a hardcore restriction; as well as the imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar retailers in a selective distribution systems.

BEIS is inviting responses to be submitted on the UK Government website by no later than 16 March 2022.

STATE AID

EUROPEAN COMMISSION REFERS UK TO EUROPEAN COURT OF JUSTICE OVER SUPREME COURT RULING UPHOLDING ARBITRAL AWARD

On 9 February 2022 the European Commission announced that it had decided to refer the UK to the CJ over a UK Supreme Court (UKSC) judgment of 19 February 2020, allowing enforcement of an arbitral award in the Micula case and ordering Romania to pay compensation to investors, even though the Commission had found in a 2015 decision that the compensation infringed the EU State aid rules. For further details on the UKSC judgment see a previous newsletter edition. The bringing of the legal action is the latest turn in the long-running legal saga in

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this case (the background to the dispute between the parties has been covered in previous newsletters, available here and here).

A little over two years on from the UKSC judgment, the Commission set out several allegations against the UK. In its announcement the Commission says that it considers that the UK:

- "*Breached the principle of sincere cooperation*" between the UK and EU. In its press release announcing the legal action, the EU claims that this is because the UKSC inserted itself into legal proceedings that were ongoing between the Micula brothers and the European Courts and adjudicated legal issues that, at the time, the European Courts had yet to decide;
- "*[U]ndermined the Commission's decision*" by adjudicating on said questions. The UKSC declared that the Micula brothers are entitled to the arbitration award whilst the European Courts had yet to reach a final judgment on the matter. The Commission further alleges that the UKSC misinterpreted and misapplied key aspects of EU law in coming to its decision;
- "*Infringed Article 267 TFEU, by failing to make a preliminary reference to the European Court of Justice*" regarding the issues at play in the dispute; and
- Infringed Article 108(3) TFEU, by failing to respect the suspensive effect of the decision by the Commission to open a formal State aid investigation into the matter in 2014.

The Commission also signals that that Under Article 87 of the Withdrawal Agreement, it may, within four years after the end of the transition period, initiate proceedings before the CJ, if it considers that the UK has failed to fulfil an obligation under the Treaties before the end of that period. This case is the first against the UK for breaches of EU law since the end of the Brexit transition period on 31 December 2021.

The Commission further notes in its press release that the UKSC judgment has "*significant implications for the application of EU law to investment disputes, in particular for (i) arbitral awards rendered on the basis on an intra-EU bilateral investment treaty*". It further considered that "*UK courts' recognition and enforcement of such awards is incompatible with EU law and would circumvent and undermine the Commission's efforts to ensure the effective implementation of judgments reiterating the primacy of EU law over arbitral awards in the context of intra-EU investment disputes, which are incompatible with EU law and thus unenforceable*".

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