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QUICK LINKS

Scania loses appeal against truck cartel fine

On 2 February 2022 the EU General Court (GC) dismissed Scania's appeal against a €880.52 million fine imposed by the European Commission for Scania's participation in a cartel between truck manufacturers.

BACKGROUND

In 2016 the Commission found that MAN, Volvo/Renault, Daimler, Iveco and DAF broke EU antitrust rules by colluding for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules in the EEA. Specifically, the Commission found that with regards to medium and heavy trucks, the parties had coordinated prices at gross list level and had coordinated timing for the introduction of emission technologies to comply with the increasingly strict European emissions standards. The Commission also found that the parties had coordinated to pass the costs for the emissions technologies on to customers. The Commission imposed fines totalling €2.93 billion, having reached a settlement with each of those parties.

Scania had initially participated in the settlement discussions, but ultimately withdrew and was not covered by the 2016 decision. The investigation against Scania therefore continued under the standard cartel procedure. In September 2017 the Commission fined Scania €880.52 million for its role in the cartel. Scania subsequently appealed to the GC.

GC JUDGMENT

On 2 February 2022 the GC dismissed Scania's appeal and upheld the Commission's infringement decision.

Scania had argued that the Commission's 'hybrid approach', whereby the settlement decision was adopted prior to the adoption of Scania's decision, infringed its rights of defence, the principle of good administration and the presumption of innocence. However, the GC rejected this argument, stating that "*'hybrid' procedures […] in which the adoption of the settlement decision and the decision following the standard procedure are staggered over time, do not in themselves, in all circumstances, entail an infringement of the presumption of innocence, the rights of the defence or the duty of impartiality*". It found that the Commission was entitled to adopt the settlement decision before the contested decision, on the condition that it observed those principles and rights. In this respect:

- *Presumption of innocence* – The GC found that the settlement decision could not be read as a premature expression of Scania's liability, and that the acknowledgement of liability by the addressees of the settlement decision could not lead to the implicit acknowledgement of Scania's liability. In the context of the standard procedure, Scania and the Commission were 'tabula rasa'. Given Scania did not deny it had had the

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

opportunity to challenge the facts and evidence the Commission relied on in the standard procedure, the principle of the presumption of innocence had not been infringed.

- *Rights of defence* – The GC found that, in the settlement decision, the Commission had not prejudged Scania's liability. Therefore the fact that Scania was not heard in the context of the settlement procedure could not result in an infringement of its rights of defence.
- *Duty of impartiality* – The GC found that when, in the context of the standard procedure, the Commission examines evidence submitted by the non-settling parties, it is not bound by the findings it adopted in the settlement decision. Furthermore, its refusal to adopt new investigative measures is not contrary to the principle of impartiality, unless it is shown that the absence of such measures is due to the Commission's bias.

Scania had also alleged that the concept of a single and continuous infringement required the Commission to identify several infringements of Article 101 TFEU, which are clearly interrelated. The GC rejected this argument on the basis that a "*finding of a single and continuous infringement does not necessarily presuppose that the Commission establishes a number of infringements, but rather that the Commission demonstrates that the various instances of conduct which it has identified form part of an overall plan designed to achieve a single anticompetitive objective*". The GC found that the Commission had established to the requisite legal standard that the collusive contacts which took place over time at different levels of the company formed an overall plan aimed at achieving a single anticompetitive object. It was not relevant that the participants in the conversations at the different levels of the company were unaware of the conversations taking place at other levels – awareness of the existence of a plan is assessed at the level of the undertakings involved and not at the level of their individual employees.

Scania was ordered to bear its own legal costs and to pay costs incurred by the Commission.

CONCLUSION AND NEXT STEPS

The ruling represents a significant victory for the Commission following a decade of investigation and litigation. Importantly, it validates the Commission's 'hybrid' approach to adopting settlement decisions whilst concurrently pursuing infringement decisions against non-settling parties.

It remains to be seen whether Scania will appeal the ruling to the European Court of Justice.

OTHER DEVELOPMENTS

MERGER CONTROL

META HIT WITH SECOND FINE FOR BREACH OF GIPHY HOLD SEPARATE ORDER

On 4 February 2022 the Competition and Markets Authority (CMA) announced that it had fined Meta Platforms, Inc (formerly Facebook, Inc) £1.5 million for a second breach of the requirements of an initial enforcement order (IEO) the CMA imposed on Meta on 9 June 2020 in relation to the completed acquisition by Meta of Giphy, blocked by the CMA in November 2021. Meta is currently in the process of appealing the CMA's decision ordering the divestment of Giphy (see previous edition of our newsletter).

Under the terms of the IEO, Meta is required to actively inform the CMA in advance of any "*material changes*" to its business, including the resignation of key staff on a list drawn up by the CMA. Meta must also seek the prior consent of the CMA before rehiring or redistributing responsibilities. According to the CMA, Meta failed to comply with these requirements after three "*key employees*" resigned and the company reallocated their roles. As a result, the CMA said it was not made aware of important developments at a business under investigation.

This is the second time the CMA has issued a penalty to Meta for breach of the IEO, following a first penalty of £50.5 million in October 2021 when the CMA claimed that the scope of the compliance updates that Meta was providing in respect of the IEO was *"significantly limited"*.

ANTITRUST

CMA FINES PHARMA COMPANIES FOR RESTRICTING ANTI-NAUSEA DRUG SUPPLY

On 3 February 2022 the CMA announced that it had fined four pharmaceutical companies and a private equity company over £35 million in total for agreeing not to compete in the supply of anti-nausea prochlorperazine tablets to the National Health Service (NHS).

Following an investigation into the firms' conduct, the CMA found that between June 2013 and July 2018, Alliance Pharma, Lexon and Focus (now owned by Advanz but previously owned by private equity firm Cinven) were involved in an arrangement that restricted competition in the supply of prochlorperazine 3mg dissolvable or 'buccal' tablets to the NHS. A further firm, Medreich, was also involved in the arrangement between February 2014 and February 2018.

Under the arrangement, the CMA found that Alliance Pharma appointed Focus as its distributor, and Lexon and Medreich received a share of Focus' profits from selling Alliance Pharma's product. Lexon and Medreich agreed in return not to compete in the supply of prochlorperazine tablets in the UK. Prior to entering into the arrangement, Lexon and Medreich were jointly developing a version of prochlorperazine, and Medreich had obtained a licence to supply it in January 2014 but did not supply commercial volumes of the product during the infringement period.

The CMA press release further indicated that, as a result, the prices the NHS paid for the drug rose by 700 per cent from December 2013 to December 2017, causing its annual costs to increase from £2.7 million to around £7.5 million despite the number of packs dispensed actually falling.

The fine, amounting to over £35 million, comprises a £7.9m fine imposed on Alliance Pharmaceuticals; a £7.3m fine on Lexon; a £4.6m fine on Medreich; and a fine on Focus of £15.5m, apportioned between Advanz and Cinven. Medreich received a 40 per cent discount to its fine as a result of being granted leniency for admitting its involvement and for cooperating with the CMA's investigation.

The CMA's decision is the latest development in the CMA's ongoing enforcement action in the pharmaceutical sector. For further details of other recent enforcement decisions by the CMA, including imposing another fine on Advanz of over £100 million for inflating the price for thyroid tablets, and fining pharmaceutical firms over £260 million for competition law breaches in relation to the supply of hydrocortisone tablets, see a previous edition of our newsletter.

HONG KONG COMPETITION COMMISSION ANNOUNCES INVESTIGATION INTO ONLINE FOOD DELIVERY PLATFORMS

On 27 January 2022 the Hong Kong Competition Commission (HKCC) announced that it is carrying out an investigation into the conduct of two online food delivery platforms, Delivery Hero Food Hong Kong Limited, trading as Foodpanda, and Deliveroo Hong Kong Limited.

The two major players in online food delivery in Hong Kong are being investigated in relation to exclusivity arrangements, price parity (so prices offered to the platform are the same or lower than those offered by the restaurant directly and to other platforms) and tying conditions in agreements with their partner restaurants (obliging restaurants that wish to obtain online food delivery services to also obtain other services from the platform, such as the placing of orders for collection). The HKCC considers that these requirements may weaken competition and hinder entry and expansion by new or smaller online food delivery platforms, leading to potential adverse effects on consumers and partner restaurants.

The HKCC called for restaurants to complete a questionnaire on its website to raise concerns or provide information by 11 February 2022. A number of restaurant industry associations have been invited by the HKCC to distribute the questionnaire to their members.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650