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QUICK LINKS

General Court partially annuls inspection decisions in French supermarkets investigations

On 5 October 2020 French supermarket groups Casino Guichard-Perrachon (Casino) et Les Mousquetaires (Intermarché) won a partial victory over the European Commission as the European General Court (GC) in part annulled the Commission's 2017 inspection decisions following suspicions of anti-competitive practices by a number of French undertakings in the supermarket sector.[1] The GC held that the Commission did not have sufficiently strong evidence to launch unannounced inspections in respect of some of the suspected behaviour, namely in relation to the exchange of information concerning future commercial strategies. For the remainder, the GC held that the Commission had strong evidence to suspect a concerted practice amongst the supermarkets relating to the exchange of information on: (i) discounts obtained on the supply markets for certain everyday consumer products and; (ii) the prices on the market for the sale of distribution services to manufacturers of branded products. The GC also upheld the EU's system for conducting antitrust raids, rejecting the supermarkets' arguments, *inter alia*, that their defence rights were violated, and that they had no effective legal recourse against the raids.

BACKGROUND

In February 2017 (and in May 2019), the Commission carried out unannounced inspections at the premises of the Casino and Intermarché groups, as part of an investigation launched on its own initiative (but following the receipt of information concerning potential anti-competitive exchanges of information) into possible collusion between large supermarket retailers in France through purchasing alliances. In 2014 Casino and Intermarché set up Intermarché Casino Achats (INCA) as a joint venture for the procurement of their branded products. The venture was ultimately dissolved in 2018 when Casino and France's Auchan agreed to a global buying deal.

Following these inspections, during which data stored on computers was among the material seized from the premises of the companies, the Commission announced in November 2019 that it had opened a formal investigation (AT.40466) into whether Casino and Intermarché used INCA to coordinate their activities concerning both their pricing policies and the development of their retail networks. The investigation is ongoing. Having regard to their reservations as to the 2017 inspection decisions and inspection procedures, Casino and Intermarché brought actions seeking the annulment of these decisions before the GC.

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

[1] T-249/17, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v European Commission; T-254/17, Intermarché Casino Achats v European Commission; and T-255/17, Les Mousquetaires and ITM Enterprises v European Commission*; judgments of 5 October 2020.

THE GC JUDGMENT

The GC annulled in part the Commission's 2017 inspection decisions, while rejecting most of the supermarkets' arguments and reaffirming the Commission's framework for conducting dawn raids.

One argument of the supermarkets, that seizing, copying, and refusing to return data relating to the private lives of employees and managers of the companies was illegal, was ruled inadmissible. The Court noted that the companies had made no prior request for protection with respect to the data, meaning there was no decision open to challenge by which the Commission refused such a request.

The GC rejected the challenge that the Commission's very power to conduct inspections under Article 20 of Regulation 1/2003 (and the obligation on undertakings to submit to those inspections) is illegal. The Court found that the legal framework for conducting inspections did not infringe the right to an effective remedy, as the system of monitoring the manner in which inspection operations are carried out, comprising all the legal remedies made available under EU law to the inspected undertakings, satisfies the four requirements (effectiveness, efficiency, certainty and reasonable time) set out in the case-law of the European Court of Human Rights. A complaint that the framework for inspections contradicted the rights of the defence and the principle of equality of arms was dismissed on the basis that the Commission cannot be required to specify the evidence which justifies the inspection of an undertaking suspected of anti-competitive practices as such an obligation would upset the necessary balance between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking(s) concerned.

The GC also declared unfounded the plea that the Commission had infringed its obligation to state reasons for its decisions. The GC recalled that an inspection decision must state the presumed facts which the Commission intends to investigate and provide in particular a description of the suspected infringement (that is to say the market thought to be affected, the nature of the suspected competition restrictions and the sectors covered) such as to inform the undertakings concerned of the scope of their inspection and to make clear that the investigation is justified. In light of those observations, the GC found that each inspection decision states clearly and in detail that the Commission was of the view that it had sufficiently strong evidence to suspect anti-competitive practices.

Nevertheless, the GC ruled that the Commission had breached the undertakings' right to inviolability of the home (a concept which encompasses places of business) – a safeguard against arbitrary inspection – because the Commission relied on flimsy information about part of the alleged collusion. With regard to the form of certain evidence which justified the inspection decisions, the GC held that interviews with suppliers carried out prior to the opening of the investigation are capable of being evidence, even if they have not been recorded, available to the Commission from the date on which they took place. Nonetheless, with respect to the tenor of the evidence, the GC did partially agree with the supermarkets, recalling first of all that the threshold at which it is recognised that the Commission has gathered sufficiently strong evidence to justify a dawn raid must of necessity be placed below that allowing a finding of a concerted practice. In light of those considerations, the GC found that the Commission did have sufficient evidence to suspect a concerted practice relating to the exchange of information in two areas: firstly, on discounts obtained on the supply markets of certain everyday consumer products; secondly, on prices on the market for the sale of services to manufacturers of branded products. However, the GC did agree with the supermarkets that the Commission had failed to demonstrate that it had sufficient evidence to suspect information exchange concerning the future commercial strategies of the two supermarket chains. The Court therefore upheld the plea alleging infringement of the right to the inviolability of the home as regards the latter infringement, and annulled the inspection decisions for that part.

CONCLUSION

This judgment is noteworthy because it is rare that courts, either at the EU level or at the national level, deem inspections by competition authorities to be illegal. Often, the authority is given the benefit of the doubt and the challenge is dismissed. However, this judgment suggests that competition authorities should not always expect leniency from courts: they may be called back if they exceed their powers.

It is still unclear whether the Commission intends to appeal the decision, and what the consequences of the judgment are for its investigation as whole.

OTHER DEVELOPMENTS

MERGER CONTROL

GENERAL COURT REJECTS APPEAL AGAINST COMMISSION PROHIBITION DECISION IN HEIDELBERGCEMENT/SCHWENK/CEMEX CROATIA AND HUNGARY

In a judgment issued on 5 October 2020 the General Court (GC) dismissed an appeal by Heidelberg Cement and Schwenk Zement against a European Commission decision on 5 April 2017 to prohibit, under the EU Merger Regulation, the proposed joint acquisition by Heidelberg Cement and Schwenk Zement of Cemex Croatia and Cemex Hungary. In its prohibition decision, the Commission concluded that: (i) the proposed transaction would significantly reduce competition in grey cement markets in Croatia, and (ii) the proposed commitments would not have allowed a supplier to compete effectively and on a lasting basis with the merged company. In its judgment, the GC upheld the Commission decision.

The applicants argued that the transaction did not meet the EUMR's thresholds, so did not qualify for review by the Commission. They claimed that that the turnover of the two parent companies should have been attributed to the joint venture making the acquisition (rather than regarding its parents as separate undertakings concerned). In doing so, they relied on a narrow interpretation of the Jurisdictional Notice. The GC rejected this argument and concluded that in order to guarantee the effectiveness of merger control, it is necessary to take into account the "*economic reality of the real players*" behind a concentration in accordance with the circumstances of fact and law specific to each case. The GC further clarified that "*therefore, the identification of the undertakings concerned is necessarily connected to the way in which the acquisition process was initiated, organised and financed in each individual case*".

The GC also rejected the claim that the geographic market definition was wrong and confirmed the Commission's analysis of cement markets as geographically differentiated markets, particularly in light of security of supply concerns and transport costs. The Commission has issued a press release welcoming the GC's judgment. In particular, it refers to the GC's confirmation that the Commission was correct in its decision that the acquisition of Cemex Croatia (a leading cement producer in Croatia) by its close competitor Duna-Dráva Cement would have significantly reduced competition and have led to higher prices for grey cement in Croatia. The GC further confirmed the Commission's decision to reject as insufficient the remedies offered by Heidelberg Cement and Schwenk - that would have granted a competitor access to a cement terminal in Southern Croatia - as this would not have allowed other suppliers to compete effectively with the merged entity over the long-term.

REGULATORY

OFGEM ISSUES STATEMENT OF OBJECTIONS TO PAYPOINT

The UK's Office of Gas and Electricity Markets (Ofgem) announced on 30 September 2020 that it has issued a statement of objections (SO) to PayPoint, a company that provides over-the-counter (OTC) payment services to prepayment energy customers in the UK.

Ofgem's investigation into a suspected infringement of Article 102 TFEU and/or the Chapter II prohibition of the Competition Act 1998, concerns PayPoint's conduct in respect of its provision of OTC payment services to 'prepayment' energy customers (i.e. customers that pay for their energy in advance). For the purposes of collecting OTC payments made by these customers, PayPoint operates a network of around 27,000 outlets in Great Britain, typically newsagents or local supermarket chains, which are paid a commission for hosting a physical terminal or till software capable of receiving payments. PayPoint subsequently manages the transfer of these payments to energy suppliers.

The SO alleges that:

- PayPoint held a dominant position in the market for OTC payment services for prepayment energy customers from at least April 2009 to October 2018, which created a special responsibility on the part of PayPoint not to act in a way that would restrict the ability of its rivals to compete;
- Paypoint included exclusivity clauses in a majority of its contracts, often applying for several years at a time, with both energy retailers and suppliers, limiting their ability to contract with competing services by either directly restricting the contracting suppliers and retailers from using rival OTC payment service providers or imposing discounts that were conditional on whether PayPoint's customers used rival providers in addition to them, resulting in the exclusion of PayPoint's competitors from the market; and
- these activities restricted competition to the detriment of consumers, and amounted to an abuse of a dominant position, breaching Chapter II of the Competition Act 1998 and/or Article 102 of the TFEU.

PayPoint now has the opportunity to make written and oral representations in response to the SO.

GENERAL COMPETITION

CMA CONSULTS ON DRAFT GUIDANCE REGARDING ITS FUNCTIONS POST-TRANSITION PERIOD

On 2 October 2020 the UK Competition and Markets Authority (CMA) launched a consultation on the content of its draft guidance on the functions of the CMA after the end of the transition period. The draft guidance explains how the United Kingdom's exit from the European Union will affect the powers and functions of the CMA for merger control, antitrust and cartel enforcement, as well as the enforcement of consumer protection legislation after the end of the transition period (11:00 pm UK time on 31 December 2020). The draft guidance also explains how live cases (cases that are being reviewed by the CMA or the European Commission on 31 December 2020) will be handled.

In respect of merger control, the draft guidance notes that save for cases subject to the terms of the Withdrawal Agreement, following the end of the transition period, the European Commission's review of a merger will no longer cover the UK and mergers may be subject to reviews by both the CMA and the European Commission. The draft guidance also explains how cases which are live at the end of the transition period are to be treated under the terms of the Withdrawal Agreement and how existing CMA guidance should be read in light of EU Exit.

In relation to antitrust (including cartels), the draft guidance notes that, under the Withdrawal Agreement, the European Commission continues to be competent for antitrust cases in the UK which it has initiated under Regulation 1/2003 before 31 December 2020 (i.e. Continued Competence Cases). The draft guidance further explains that the CMA may not open or re-open an investigation into competition concerns that are the subject of a Continued Competence Case. After 31 December 2020, the CMA may open an investigation into competition concerns which are the subject of an EC Continued Competence Case insofar as those concerns relate to effects arising from conduct **after** 31 December 2020. As regards new investigations, the draft guidance notes that after 31 December 2020, CMA investigations will relate only to suspected infringements of UK domestic competition law (and not the EU competition rules) in relation to conduct from both before and after 31 December 2020.

The draft guidance also notes that the Withdrawal Act and the (EU Exit) Competition Regulations 2019 preserve seven EU Block Exemption Regulations in the UK as 'retained exemptions'. This means that after 31 December 2020, the retained exemptions will operate as exemptions from UK Prohibitions and the guidance issued by the European Commission in relation to these EU Block Exemption Regulations will continue to be relevant.

The CMA is inviting comments from all stakeholders, with the consultation period ending on 30 October 2020 after which the CMA will publish a final version of the guidance.

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