SLAUGHTER AND MAY

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ECJ dismisses majority of appeals in bathroom fittings cartel case

On 26 January 2017 the European Court of Justice (ECJ) published a **press release** and handed down its judgments on appeals against the General Court's rulings in the bathroom fittings cartel case, upholding the lower court's findings in the majority of the cases. One cartelist, Laufen Austria, won its case to have one of its fines recalculated, whilst the Keramag group[1] saw the General Court's reduction of its fine overturned following an appeal by the European Commission (the Commission). Laufen Austria and Keramag's cases were both referred back to the General Court.

The Commission's decision

Following an immunity application made by Masco Corporation in July 2004 and subsequent unannounced inspections in early November 2004, the Commission launched an investigation into alleged anticompetitive behaviour among undertakings active in the bathroom fittings and fixtures sector. The Commission issued a **decision** on 23 June 2010 fining 17 bathroom equipment manufacturers[2] a total of €622 million for participation in a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union.

The infringing activity took place over various periods between 16 October 1992 and 9 November 2004 and covered Belgium, Germany, France, Italy, the Netherlands and Austria. Representatives of the undertakings attended anticompetitive meetings which resulted in (i) co-ordination of annual price increases, (ii) co-ordination of price increases in relation to specific events (such as increases in raw material costs, the introduction of the euro and the introduction of road tolls), (iii) fixing of minimum prices and rebates, and (iv) exchange of sensitive business information.

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

[1] Comprising of Sanitec Europe Oy, Allia S.A.S, Produits Céramiques de Touraine SA, Keramag Keramische Werke AG, Koninklijke Sphinx B.V., Koralle Sanitärprodukte GmbH, and Pozzi Ginori SpA.
[2] The addressees of the decision were Masco, Grohe, Ideal Standard, Roca, Hansa, Dornbracht, Sanitec, Villeroy & Boch, Duravit, Duscholux, Kludi, Artweger, Cisal, Mamoli, RAF, Teorema and Zucchetti.

Appeal to the General Court

14 of the bathroom equipment manufacturers appealed the Commission's decision to the General Court, seeking its annulment and/or a reduction in their fines. On 16 September 2013 the General Court **announced** that it had dismissed most of the appeals (including Laufen Austria's) in their entirety, but annulled some parts of the Commission's decision, and in some cases reduced fines:

- The Commission's decision against Trane Inc., Wabco Europe and Ideal Standard Italia Srl, all of which are associated with Ideal Standard, was partially annulled and their fines reduced due to an error in the Commission's calculation of their participation in the ceramics cartel in Italy.
- The Commission's findings against several Duravit companies and the Villeroy & Boch group were partially annulled due to errors in calculating the duration of their involvement in various cartels. However, their fines were not reduced.
- The Commission's decision against the Keramag group was partially annulled and the fine reduced as the Commission had failed to show that there was a ceramics cartel in the French market.
- The Commission's decision against the Roca group was partially annulled and its fine reduced, as the Commission had not taken into account Roca's cooperation with the Commission during administrative proceedings. Roca France's parent company, Roca Sanitario, also had its fine reduced as the General Court found that the parent company's liability was purely derivative of the liability of its subsidiary, and so could not exceed it.

The ECJ's judgment

In 2015 the Commission and certain of the bathroom equipment manufacturers brought appeals before the ECJ against the General Court's judgments. The majority of the cartelists' appeals were dismissed in their entirety, with the exception of Laufen Austria whose appeal was upheld by the ECJ.

In Laufen Austria's successful appeal, it argued that the General Court had wrongly upheld the Commission's calculation of its fine. The Commission found that Laufen initially took part in the cartel individually and then later as a subsidiary of the Roca group. Laufen therefore received two fines for the different time periods: an individual fine related to conduct before it joined the Roca group, and a joint and several fine with its parent company relating to conduct after it joined the Roca group. However, the individual fine was calculated based on the Roca group's turnover, a calculation which the General Court upheld. Laufen appealed this to the ECJ, arguing that the fine should have been capped at 10% of its own annual turnover, rather than at 10% of the Roca group's turnover.

The ECJ agreed with Laufen, ruling that the General Court should have found that the Commission had failed to ensure Laufen's individual fine was capped at 10% of its own annual turnover, rather than that of its parent. The ECJ sent the case back to the General Court for re-calculation of the fine.

Conversely, the Commission won its appeal against the General Court's €7 million reduction of the Keramag group's fine. The Commission argued that, in determining there was no cartel in France, the General Court made errors in its analysis. The ECJ concluded among other things that:

- The General Court had infringed the obligation to state reasons and the rules applicable to the taking and appraisal of evidence as it relied only on a recital of Roca's leniency application when determining if the application had probative value.
- The General Court made an error of law in holding that the Commission was required to adduce additional proof because one leniency statement cannot corroborate another.
- The General Court made an error of law by deciding that a table relating to a meeting of the Association française des industries de céramique sanitaire should prove by itself the existence of an infringement, and failed to look at other evidence.
- The General Court erred by failing to consider if the statements of Ideal Standard and Roca could be corroborated by monthly tables containing confidential sales figures.

Keramag's case was also sent back to the General Court for re-examination.

All other appeals from the bathroom equipment manufacturers were dismissed. The ECJ's rulings are final, and cannot be appealed.

Other developments

Merger control

CMA consults on proposed changes to mergers de minimis exception

The Competition and Markets Authority (CMA) has a statutory duty (under the Enterprise Act 2002) to refer a merger to an in-depth Phase 2 investigation where it believes there to be a realistic prospect that the merger will result in a substantial lessening of competition. This duty is, however, subject to a number of discretionary exceptions, including in relation to markets of insufficient importance (the de minimis exception). Guidance on the application of this exception is included in the CMA's Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (issued by its predecessor, the Office of Fair Trading, in 2003 and adopted by the CMA board in 2014) (the **Guidance**).

On 23 January 2017 the CMA launched a **consultation** on amendments to the Guidance.

Following an internal review, the CMA is proposing to amend the Guidance by increasing the market size thresholds:

- over which the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference from £10 million to £15 million (the upper bound threshold); and
- below which the CMA will generally not consider a reference from £3 million to £5 million (the lower bound threshold).

The CMA considers that these amendments will reduce (i) the costs faced by the CMA in investigating mergers (and allow it to devote this resource to the delivery of its other discretionary functions such as antitrust investigations) and (ii) the burden of merger control on businesses. The consultation will close on Monday 13 February 2017.

Antitrust

High Court delivers judgment on liability issues in damages action against MasterCard

On 30 January 2017 the High Court delivered its **judgment** in favour of MasterCard in relation to damages actions brought by a group of retailers (including Asda, B&Q, Next, New Look and Morrisons) regarding the multilateral interchange fees (MIFs) which MasterCard had set since 2006 and which acted as a floor on the price they paid to accept debit and credit cards.

In rejecting the retailers' claims that these MIFs had infringed EU competition law (and domestic UK and Irish competition law), Popplewell J held that MasterCard had charged its MIFs at a lawful level that did not amount to an unlawful restriction of competition. Although the UK and Irish MIFs amounted to a restriction of competition, this was justified on the basis that if they had been set at zero or a significantly lower level (the two potentially plausible counterfactuals), the MasterCard scheme would have collapsed as a result of issuers switching to the Visa scheme (the death spiral argument). The High Court therefore concluded that the UK and Irish MIFs were objectively necessary to the main operations of the MasterCard scheme as a whole which was neutral or positive in its competitive effect. In addition, the majority of the MIFs as set by MasterCard were below the exempt and exemptible levels which the High Court had determined under Article 101(3).

The High Court also determined that, in light of the different facts before the court, the different periods covered by the claims and the different market conditions, it was not obliged simply to "read across" the findings of the European Commission in its 2007 **decision** against MasterCard. Similarly, the High Court was not bound by the Competition Appeal Tribunal's 2016 **judgment** against MasterCard.

General competition

China's State Council emphasises focus of antitrust enforcement in the 13th Five-Year-Plan for Market Supervision

On 23 January 2017 China's State Council published the **13th Five-Year-Plan for Market Supervision** outlining the plan to strengthen antitrust enforcement in sectors including public utilities (water, electricity and gas supply, postal services etc.), franchised monopolies (such as tobacco), healthcare, elderly care, education, online market, the sharing economy, high-tech and consumer products and consumer services which closely relate to people's livelihoods. Relevant antitrust agencies have been asked to step up enforcement on certain anticompetitive conducts, including price violations, forced transactions, bundling, the imposition of unreasonable trading conditions and the abuse of intellectual property rights.

The enforcement priorities outlined above are consistent with enforcement trends of the relevant agencies in 2016. It was **reported** that the State Administration for Industry and Commerce (SAIC) and SAIC's regional branches investigated 1,267 cases in the nationwide campaign against anticompetitive conduct of public utilities in 2016, imposing sanctions of RMB 167 million (USD 24 million) and ordering refunds of RMB 470 million (USD 68 million). The only two conditional approvals for merger filings granted by the Ministry of Commerce (MOFCOM) in 2016 were in the healthcare and consumer products sectors. In

addition, two out of the six fines for failure to notify mergers to MOFCOM were also in the healthcare sector. Similarly, all of the three cases in which fines were imposed by the National Development and Reform Commission (NDRC) in 2016 concerned the healthcare sector.

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