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EU General Court rules that France must recover illegal aid granted to SNCM

On 1 March 2017 the EU General Court (GC) **confirmed**[1] the European Commission's 2013 decision that France must recover €220 million of illegal State aid that was provided to the Société Nationale Corse-Méditerranée (SNCM) and the Compagnie Méridionale de Navigation (CMN). The aid relates to certain maritime transport services that were provided between Marseille and Corsica from 2007 to 2013, and the Commission only found this aid to be incompatible for some of the transport services provided.

As the services were provided under a public services agreement, the Commission decision had undertaken a detailed analysis of whether the 'Altmark' criteria – which apply in the context of services of general economic interest (SGEI) – were met, in order to determine whether the compensation provided to the beneficiaries amounted to aid at all.

The Altmark criteria

SGEI are services that public authorities recognise as being of particular importance to citizens, and which require State support and resources to continue (or to continue under the same conditions). The provision of transport services can fall under this category.

State aid problems can arise where a State compensates a public service provider or operator so generously that it can use the excess to cross-subsidise its other commercial activities, therefore providing an unfair advantage and distorting competition. In order for public service compensation not to confer a selective economic advantage and therefore not be aid, it must satisfy four cumulative 'Altmark' criteria[2]:

(i) The recipient of the compensation must have clearly defined public service obligations;

(ii) The parameters for calculating the compensation must be objective, transparent and established in advance;

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

[1] The full judgment, currently only available in French, can be accessed **here**.

[2] As established in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* , judgment of 24 July 2003 (**the Altmark decision**).

(iii) The compensation cannot exceed what is needed to cover the costs incurred in providing the service; and

(iv) If the recipient of the compensation is not selected to provide the service through a public procurement procedure (which would establish the market price for the services in question) the level of compensation must be determined on the basis of the costs of a typical well-run company.

The Commission decision

In its decision of 2 May 2013 the Commission **held** that the financial compensation granted to SNCM and CMN amounted to State aid, as the first and fourth conditions mentioned above were not satisfied. Further, such compensation amounted to illegal State aid as it was granted without prior notification to the Commission. However, only the financial compensation paid to SNCM for the services provided during peak seasonal periods (the additional service) was considered incompatible and therefore as needing to be recovered, whereas the compensation for the services provided all year round (the basic service) was considered compatible with the internal market.

In relation to the first Altmark condition, Member States are generally given a wide discretion to determine whether an activity needs to be provided as an SGEI. However, in this case the Commission noted that maritime transport services fall under the scope of an EU regulation.[3] Therefore, for a maritime transport service provider to be entrusted with carrying out a public service obligation, (i) there must be a real public need for the service, and (ii) the scope of the service must be necessary and proportionate to that need. The Commission considered this to be the case for the basic service, but not for the additional service. The additional service was not necessary and proportionate to the real public service need, due to the substitutability of the additional service with other services and insufficient evidence of a shortage of private initiative.

In relation to the fourth condition, the Commission had found that the tendering process carried out in relation to SNCM had failed to ensure that the chosen candidate would provide the relevant services at the least cost to the community.

The Commission accordingly ordered France to recover €220 million of aid, in relation to the additional service, from SNCM by 3 September 2013. In summer 2013 both SNCM and CMN brought an action before the GC for the annulment of this decision.

The General Court decision

The GC has confirmed the Commission's analysis in relation to the satisfaction of the Altmark conditions and has also upheld the Commission's decision to assess the basic and additional services separately, concluding that this distinction was apparent from both the wording and the implementation of the public services agreement. The GC has also confirmed that the amount of aid the Commission had ordered France to recover was correctly calculated.

[3] Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

SNCM or France could appeal the decision to the European Court of Justice (ECJ).

Interestingly, in a separate parallel action brought by the Commission, the ECJ held in a **decision** of 9 July 2015 that France had failed to fulfil its obligation to recover the money from SNCM and CMN within the prescribed period. However, that decision did not substantively assess the merits of the dispute.

Other developments

Antitrust

UK High Court stays Microsoft Mobile's damages claim against participants in lithium ion battery cartel

On 28 February 2017 UK High Court judge Mr Justice Marcus Smith handed down a **judgment** in Microsoft Mobile's damages claim against participants in a lithium ion battery cartel.[4]

Microsoft Mobile (a wholly owned subsidiary of Microsoft Corporation) filed the claim in the High Court in September 2015. It brought the proceedings in its own right and as assignee of the rights of Nokia Corporation, whose mobile devices business the Microsoft group of companies acquired in September 2013. Microsoft Mobile and Nokia manufacture and distribute mobile telephones, which contain lithium ion batteries.

Microsoft Mobile claimed damages for loss allegedly caused by anti-competitive conduct between 1999 and 2011 by four suppliers of lithium ion batteries: Sony Europe Limited, Sony Corporation, LG Chem Limited and Samsung SDI Co Limited.[5]

Sony Europe sought a stay of the proceedings against it on the basis that an arbitration clause subsisting between it and Nokia is unaffected by the assignment of Nokia's rights to Microsoft Mobile and that the arbitration clause is sufficiently wide to catch the current proceedings.

Mr Justice Smith agreed with this analysis, ruling that Microsoft Mobile must seek to resolve the dispute through arbitration before proceeding with a damages suit.[6] He rejected Microsoft Mobile's contention that the arbitration clause should be disregarded as incompatible with its rights as a damages claimant under EU competition law.

He further reasoned that it did not matter that Microsoft Mobile's claim was grounded in competition law torts rather than contractual breach, otherwise "*it would be easy for a claimant to circumvent the scope of an arbitration or jurisdiction clause by selectively pleading or not pleading certain causes of action. It*

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[4] *Microsoft Mobile v Sony Europe and others* [2017] EWHC 374 (Ch).

[5] The suit initially also named Panasonic Corporation and its Sanyo Electric Co. Ltd subsidiary but Microsoft Mobile settled with these companies. A number of the defendants in the case before the High Court had already been subject to penalties imposed by the European Commission in its decision in Case AT.39904 – Rechargeable Batteries.

[6] Microsoft Mobile's damages claim against the cartelists in the US was also referred to arbitration in December 2015 and October 2016.

would be an extraordinary outcome were a claimant successfully to be able to contend that, because a contractual claim had not been pleaded, a "parallel" claim in tort arising out of exactly the same facts and with a scope defined by that contract fell outside the scope of such a provision".[7]

As regards the other defendants,[8] the court ruled that it had no jurisdiction to hear the claim against them. Mr Justice Smith found that, taking into account his findings on the effect of the arbitration clause, Microsoft Mobile had not demonstrated sufficient evidence to draw the dispute away from its apparent centre in Asia, where the defendants are based.

China's NDRC and MOT announce results of the joint investigation into pricing practices of liner shipping companies

On 21 February 2017 China's Ministry of Transport (MOT) announced its **decision** to impose fines totalling RMB 2.39 million (US$347,247) for failure to file freight rates, or applying freight rates inconsistent with the filed records (including offering 'zero rates' on some routes), against 14 liner shipping companies.[9] Subsequently, on 1 March 2017 China's National Development and Reform Commission (NDRC) announced in a **press release** that 11 liner shipping companies have committed to reduce Terminal Handling Charges (THCs) by amounts ranging from 12.8% to 21.9%.[10] According to the NDRC's estimate, this will reduce by around RMB 3.5 billion annually the costs incurred by importing and exporting companies.

The above announcements are the result of a joint investigation by the NDRC and the MOT which began in the first half of 2015, following complaints by domestic Chinese shippers. In addition to requests for information, the NDRC conducted raids on some of the liner shipping companies subject to the investigation.

It is expected that the NDRC will, alongside the MOT, continue to monitor charges levied by the shipping lines and competition in the sector more generally.

Regulatory

Royal Mail avoids price controls following Ofcom regulatory review

On 1 March 2017 Ofcom completed its **review** of the regulation of Royal Mail, which covered a wide range of areas, including: Royal Mail's efficiency and financial sustainability; competition in the parcels and letters sector; levels of customer satisfaction; and, the appropriateness of the current regulatory regime. Ofcom concluded that the current regulatory framework, which had been due to expire in 2019, would be retained until 2022.

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[7] Paragraph 72(ii), *Microsoft Mobile* v *Sony Europe and others* [2017] EWHC 374 (Ch).

[8] Sony Corporation, LG Chem and Samsung SDI.

[9] The 14 liner shipping companies are: Hamburg Sud, Gold Star Line, Wan Hai, Wan Hai (Singapore), Heung-A Shipping, Korea Marine Transport, Evergreen Marine, CMA CGM, MCC, COSCO, Zim, Hyndai Merchant Marine, Maersk and NYK Line.

[10] The 11 liner shipping companies are: COSCO, Maersk, MSC Mediterranean Shipping, CMA CGM, American President Lines, Hapag-Lloyd, Evergreen Marine, Hyndai Merchant Marine, NYK Line, Mitsui O.S.K. Lines and Sinotrans.

In response to significant pressures on the universal postal service Ofcom introduced a new seven year regulatory framework for the postal sector in March 2012. This framework was designed to give Royal Mail greater commercial and operational flexibility in order to return the universal service to a position of financial sustainability. It also included three safeguards:

(i) A monitoring regime to track Royal Mail's performance in respect of the universal service, efficiency levels, pricing and competition;

(ii) A price cap for Second Class stamps for letters and parcels up to 2kg to protect vulnerable customers; and

(iii) A requirement for Royal Mail to continue to provide access to its network for 'letter competitors'.

A number of significant developments in the postal market, including the improvement in the financial position of the universal service and the exit of Whistl (Royal Mail's only significant competitor) from the end-to-end letter delivery market, prompted Ofcom to announce a review of this regulatory framework on 16 June 2015.

The review has found that the current framework and safeguards are generally working, with the "*majority of consumers… satisfied with postal services… stamps represent[ing] fairly or very good value for money… [and] satisfaction levels… high amongst SMEs*".[11]

Significantly, Ofcom has decided not to impose new controls on Royal Mail's wholesale or retail prices on the basis that it already has strong commercial incentives (in particular market conditions and shareholder discipline) to improve its efficiency.

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[11] Paragraph 1.15, Review of the Regulation of Royal Mail published 1 March 2017.