SLAUGHTER AND MAY

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European Commission fines AB InBev for abusing dominant position by restricting cross-border sales of beer

On 13 May 2019 the European Commission announced that it had fined Anheuser-Busch InBev NV/SA over €200 million for abusing its dominant position on the Belgian beer market. The Commission concluded that AB InBev pursued a "deliberate strategy" to restrict cross-border sales between the Netherlands and Belgium. AB InBev cooperated with the Commission in its investigation, which resulted in a 15 per cent reduction of its fine.

Background

AB InBev is the world's biggest beer brewer, with its Jupiler brand representing approximately 40 per cent of the total Belgian beer market in sales volume. AB InBev sells Jupiler to retailers and wholesalers in other EU Member States, including in the Netherlands, where it sells Jupiler at lower prices than in Belgium.

On 30 June 2016 the Commission opened an investigation to assess whether AB InBev had abused its dominant position on the Belgian beer market by hindering beer imports from neighbouring countries, after the Commission identified import restrictions through market monitoring. At the time, consumers, national competition authorities and the European Parliament had voiced concerns that food and drink prices could vary significantly and without objective or justified reason within the European internal market.

On 30 November 2017 the Commission sent a Statement of Objections to AB InBev, stating its preliminary view that the company had abused its dominant position on the Belgian beer market, by hindering cheaper imports of its Jupiler and Leffe beers from the Netherlands and France into Belgium. The Commission's concerns relating to the Leffe brand were ultimately left out of the Commission's infringement decision, and concerns relating to imports from France seem to have been addressed by AB InBev's proposed remedy.

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

Abuse of dominance

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of a dominant market position, which may affect trade between Member States.

The Commission found that AB InBev is dominant on the Belgian beer market. Key factors included:

- AB InBev's persistently high market share;
- the company's ability to increase prices independently from other beer manufacturers;
- the existence of barriers to significant entry and expansion; and
- the retailers' limited countervailing buyer power, because some of AB InBev's beer products are viewed as essential.

The Commission found that AB InBev abused this dominant position between 9 February 2009 and 31 October 2016 in breach of EU competition rules. In particular, it found that AB InBev had pursued a deliberate strategy to restrict supermarkets and wholesalers' ability to import cheaper Jupiler beer products from the Netherlands into Belgium, in order to maintain higher prices in Belgium. EU Competition Commissioner Margrethe Vestager noted that "*attempts by dominant companies to carve up the single market to maintain high prices are illegal*".

The Commission described four business practices put in place by AB InBev which created anti-competitive obstacles to trade and partitioned the EU's single market, in breach of Article 102 TFEU:

- AB InBev made some Jupiler beer products supplied in the Netherlands harder to sell in Belgium, by removing French language mandatory information from the label, as well as changing the design and size of cans.
- AB InBev limited the volumes of Jupiler beer supplied to a wholesaler in the Netherlands in order to restrict their sales into Belgium.
- AB InBev refused to sell essential products in Belgium to one retailer unless the retailer agreed to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium.
- AB InBev made customer promotions offered to a retailer in the Netherlands conditional upon the retailer not offering the same promotions in Belgium.

Cooperation and fine

The Commission imposed a fine on AB InBev of €200,409,000. In determining the level of the fine, the Commission took into account the value of AB InBev's sales of Jupiler beer in Belgium and the Netherlands, the gravity of the infringement and its duration, as well as the fact that AB InBev cooperated with the Commission during the investigation.

The Commission noted AB InBev's cooperation beyond its legal obligations, in particular by acknowledging the facts and the infringement of EU competition rules and by offering a remedy, which the Commission decision has made legally binding. The remedy ensures that the packaging of existing and new products in Belgium, France and the Netherlands will include mandatory food information in both Dutch and French for the next five years.

AB InBev's cooperation with the Commission during the investigation and the remedy it proposed led to the Commission granting AB InBev a 15 per cent fine reduction.

Some observations

In this case the Commission made use of its enforcement powers under Article 102 TFEU to tackle a parallel trade restriction issue. This shows that, in addition to parallel trade agreements with resellers which may be caught under Article 101 TFEU, unilateral measures taken by a dominant company, such as the removal of mandatory information in other languages from packaging in order to restrict cross-border sales, may be considered a breach of EU competition rules.

The case also serves as an example of the Commission's recent practice of granting a fine reduction for an informal settlement in a non-cartel case in return for the undertaking under investigation acknowledging the infringement, cooperating with the Commission and offering a remedy.

Other developments

Antitrust

Stigler Center Report suggests US should create a new specialist "Digital Authority" to better regulate digital platform markets

A **study** commissioned by the University of Chicago Booth School of Business has recommended that the US should create a new specialist "Digital Authority" to better regulate digital platforms such as Facebook and Google.

Despite citing concerns that US antitrust law has been under-enforced over the last few years, the report argued that with digital markets – which are characterised by high barriers to entry – even effective antitrust enforcement under the current legal regime is unlikely to address potential competition concerns. As a result, the report makes a number of proposals for reform to US antitrust law, including the creation of a specialist regulator to oversee companies active in digital markets, in particular those with "*bottleneck power*" because "*consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers…by other service providers prohibitively costly*". The report goes on to suggest that the new authority should police non-discrimination rules, collect data on digital transactions, and separately consider mergers that involve digital platforms alongside the antitrust regulator. Favouring these bold changes, the report rules out the possibility of self-correction of the market, its findings suggesting that such an outcome would be "unlikely" in markets dominated by large digital platforms.

The report builds on both the **Furman Review** in the UK as well as the **European Commission's study on competition in the digital era**. Parallels can be drawn in particular between the proposed creation of the "Digital Authority" and the proposal by the Furman Review to create a digital markets unit. However, in many ways, the Stigler Center Report goes beyond the Furman review – even going as far as to propose an automatic rebuttable presumption that all mergers between dominant US firms and substantial competitors (or potential competitors) should be presumed unlawful. The report notes that such a presumption would be of particular importance to large digital platforms.

Hong Kong Competition Tribunal hands down first two judgments under the Competition Ordinance

On 17 May 2019 the Hong Kong Competition Tribunal (Tribunal) **handed down** two judgments in respect of the first two cases brought by the Hong Kong Competition Commission (Commission) before the Tribunal since the Competition Ordinance (Ordinance) came into effect in December 2015.

The **first case** was brought against five information technology companies on 23 March 2017, involving allegations of bid-rigging in a tender for the supply and installation of a new server. The Tribunal concluded that all but one of the companies had engaged in bid-rigging and as such had breached the First Conduct Rule of the Ordinance, which prohibits anti-competitive agreements (the equivalent of Article 101 TFEU). The Tribunal dismissed the Commission's case in respect of one of the respondents, SiS International Limited, on the basis that the SiS employee's conduct in submitting the tender was not attributable to SiS.

The **second case** was brought against ten construction and engineering companies on 14 August 2017 (less than 5 months after the first case). The Tribunal concluded that each of these companies had engaged in market sharing and price fixing in the provision of decoration works at a public rental housing estate, in breach of the First Conduct Rule.

The judgments of the Tribunal can be appealed to the Court of Appeal. A crucial factor in the decision of whether the respondents will appeal is likely to be the quantum of pecuniary penalties imposed, which remains to be decided by the Tribunal.

Overall, as **noted** by Ms. Anna Wu, Chairperson of the Commission, the two judgments "*represent a key milestone for the Hong Kong competition law regime*". Please see our separate **Client Briefing** for further details and analysis, including in relation to important points of law decided by the Tribunal.

State aid

European General Court annuls European Commission's decision concerning Polish tax on the retail sector

On 16 May 2019 the General Court (GC) **annulled** a previous **Commission decision** which found that a progressive turnover tax on the retail sector in Poland constituted an unlawful State aid measure pursuant to Article 107 TFEU. The tax, which came into force in September 2016, applies to all retailers in Poland - irrespective of their legal status - with a monthly turnover above 17 million Polish zloty (approximately €4 million). The Commission had found the tax to be selective, its progressive nature favouring companies with lower revenues.

The GC accepted that granting certain undertakings favourable tax treatment could constitute State aid, notwithstanding that it involves no transfer of state resources. The GC, however, annulled the

Commission's decision that the tax rates imposed by the Polish government had been "selective"[1] i.e. that the tax measures derogated from the common or "normal" system of taxation in a way which could result in certain companies - in comparable factual and legal situations - being treated differently from the selected undertakings.

The GC found the Commission's analysis was based on a finding that the "normal" tax rate was a flat rate of tax from the first Polish zloty. However, the GC found that - as such a tax system is hypothetical - it was not the correct starting point for the assessment. Instead, the GC decided that given the sectoral nature of the tax in question, and the absence of differentiated tax rates for certain undertakings, the "normal" tax system was the progressive tax rate on the retail sector itself. Furthermore, the GC found that the contested tax measure aligned with the objective of the Polish government of "tax redistribution". Therefore, the GC stated that the progressive nature of the tax was consistent with the objective of redistribution and "*an adaption criterion in the form of progressive taxation as from a certain threshold, even a high threshold, which may reflect the intention to tax the activity of an undertaking only when that activity reaches a certain level, does not, in itself, imply the existence of a selective advantage*".

The GC also held that it was not the place of the Commission to exercise control over a Member State's tax measures (notwithstanding that such measures may constitute State aid) except in cases of manifest inconsistency.

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[1] To be categorised as State aid under Article 107(1) of the TFEU, a measure must confer a selective advantage on an undertaking - see Case C-399/08 P *Commission v Deutsche Post*, judgment of 2 September 2010.