SLAUGHTER AND MAY

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European Court of Justice partially accepts one appeal in power cable cartel case, but dismisses two others entirely

On 28 November 2019 the European Court of Justice (CJ) handed down three judgments concerning appeals by companies that were members of a power cable cartel between 1999 and 2009. The appeal by ABB was partially accepted, whilst appeals by Brugg Kabel and LS Cable & System were dismissed in their entirety.

Background

In 2014 the European Commission fined underground and submarine power cable companies for operating a cartel. From 1999 to 2009 the companies had agreed on market and customer allocation on an almost worldwide scale. These companies included ABB, Brugg Kabel and LS Cable & System. As the whistle-blower, ABB received full immunity from fines. Brugg Kabel was fined €8.5 million and LS Cable & System was fined €11.3 million.

Appeals

Most of the companies implicated in the Commission decision appealed to the European General Court (GC), but on 12 July 2018 the court rejected all of the appeals in fifteen separate judgments.

Most of the companies brought further appeals before the CJ. On 28 November 2019 the CJ handed down judgments on the appeals by ABB, Brugg Kabel and LS Cable & Systems. Whilst ABB was partially successful, the other firms lost their appeals.

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

ABB

Despite receiving full immunity, ABB appealed the GC's ruling in order to limit its exposure to follow on damages claims. The CJ agreed with ABB that the GC had failed to have regard to evidential requirements in finding that a collective refusal to supply power cable accessories extended to accessories for underground power cables with voltages of 110kv to 220kV. The Commission had not put forward concrete evidence to support such a finding.

Nevertheless, the CJ dismissed the rest of ABB's arguments, confirming the GC's finding that the Commission had proved, to the requisite legal standard, that the cartel covered projects for underground cables between 110 kV and 220 kV and that ABB was aware of this aspect of the infringement. The CJ also rejected ABB's claim that there had been a breach of the principles of equal treatment and the presumption of innocence regarding the start date of its involvement in the infringement.

Brugg Kabel

The CJ dismissed each of the grounds of appeal raised by Brugg Kabel and its parent Kabelwerke Brugg.

In particular, it disagreed with Brugg's arguments that notification of the statement of objections and various requests for information in English rather than German had breached its rights of defence. Nor was it persuaded by Brugg's claim that the GC had imposed excessive requirements for allowing one company to access another's response to the statement of objections. The CJ found that Brugg had failed to adduce evidence that the material requested would be useful in its defence.

The CJ also dismissed arguments that the presumption of innocence was breached by the application of too little evidence in determining the start date of Brugg's participation in the cartel, and that basing the fine calculation on 2004 revenues (a year in which Brugg had sold an unusually high number of cables) breached principles of legality and proportionality.

LS Cable & System

The CJ rejected all grounds of appeal put forward by LS Cable & System. In particular, the CJ held that the GC was correct to find that the company's attendance at a meeting in Tokyo at which elements of the cartel were discussed led to a rebuttable presumption of participation in anti-competitive behaviour. LS Cable & System did not establish that it had distanced itself publicly from the cartel during that meeting. Moreover, in circumstances where the infringement concerned participation in anti-competitive meetings, it was not sufficient for LS Cable & System to claim that its conduct after the meeting (i.e. making sales in the EEA) had distanced it from the cartel.

Other cartel members

An appeal by fellow cartelist Silec Cable SAS was previously dismissed on 14 November 2019. Appeals by other members of the cartel, Viscas, Furukawa, Fujikura, NKT, Nexans, Prysmian and Pirelli were heard between July and November 2019.

Other developments

Merger control

European Commission conditionally approves Varta AG's acquisition of Energizer's divestment business

On 3 December 2019 the European Commission **announced** that it has decided to approve Varta AG as an appropriate purchaser of assets divested by Energizer, which was a condition of Energizer's acquisition of Spectrum Brands' batteries and portable lighting, conditionally approved by the Commission on 11 December 2018.

Under the remedies package agreed in December 2018 Energizer was required, inter alia, to sell its business of Varta branded and unbranded household and specialty batteries to a suitable purchaser. Energizer informed the Commission that Varta AG, a German company active in the market for microbatteries and energy storage solutions, had agreed to purchase the divested assets. On 3 December the Commission decided to approve Varta AG as a suitable purchaser of the Energizer assets, removing its concerns in in some European countries in several branded product markets for batteries and portable battery chargers.

However, as Varta AG is active on the upstream market for the manufacturing and wholesale supply of hearing aid batteries to battery brands, and the divested Varta business is a leading downstream supplier of branded hearing aid batteries to the mass retail channel, the Commission was concerned that the proposed acquisition would raise vertical competition concerns with respect to hearing aid batteries sold in the mass retail channel where Varta could foreclose supply to competitors in the downstream market.

To address these concerns, Varta AG agreed to supply hearing aid batteries globally to any company currently or potentially active in the wholesale supply of hearing aid batteries under their own brand under certain conditions for a set period of time. Other companies will also be allowed to enter the market relying on similar supply conditions from Varta AG. The Commission granted approval on the basis of full compliance with these commitments.

Antitrust

Hong Kong Competition Commission to propose range for pecuniary penalties ahead of first sanctions hearing in January 2020

The Hong Kong Competition Commission (HKCC) will propose a range for the pecuniary penalties to be recommended to the Competition Tribunal (Tribunal) in the first case to reach the fining stage.

The case, which was the second case brought by the HKCC before the Tribunal, concerns market allocation and price fixing for renovation works at a public housing estate. The Tribunal ruled in May 2019

that the arrangements among ten decoration contractors to allocate floors and use package pricing had the object of preventing, restricting or distorting competition in Hong Kong.

A four-day hearing for the Tribunal to determine pecuniary penalties has been scheduled for January 2020. This would be the first time the Tribunal imposes a fine under the Competition Ordinance, which came into full effect in December 2015. Currently, while the Competition Ordinance provides a maximum fine of 10% of the undertaking's turnover in Hong Kong for each year of the contravention (capped at the highest three years), there is no guidance setting out the HKCC's likely approach to calculating the recommended fine for the Tribunal's consideration.

At the pre-trial review on 20 November 2019, counsel for the HKCC told the Court that the HKCC would most likely suggest a range rather than a single amount in recommending fines. Instead of alluding to specific factors the HKCC would consider, counsel stressed that the HKCC would look at the totality of the matter as well as all factual evidence in the case.

As this is the first instance in which the Tribunal has to consider the issue of pecuniary penalties, the outcome of this case will set an important precedent for the HKCC's ongoing and future cases. We also expect the HKCC to set out a framework on the calculation of its recommended pecuniary penalties in due course.

General competition

European Parliament officially elects Margrethe Vestager for a further five-year term as competition chief

The European Commission led by Ursula von der Leyen entered office on 1 December 2019 for a five-year term. The new college was **approved** by the European Parliament on 27 November 2019 by 461 votes to 157 against, with 89 abstentions. The start date of the new term had been delayed due to the European Parliament's rejection of the French, Romanian and Hungarian initial nominees.

Not only has Margrethe Vestager been appointed to continue as Commissioner for Competition for a second term (unheard of in recent times), she will also take up the role of Executive Vice-President for a Europe fit for the Digital Age. (See also a **previous edition** of our Newsletter for more details.)

After a three hour **hearing** which took place on 8 October 2019 Vestager received the green light from the European Parliament Committees for industry, internal market and economic affairs. When presenting her team to the members of Parliament in Strasbourg, Von der Leyen **commented** *"Communicating with one another worldwide, access to information, progress in medicine, environmental protection, mobility, inclusion: there is no future without digitalisation. And Margrethe Vestager is the one to lead us on this journey to the future".*

Vestager, in her new dual role, will be confronted with a variety of challenges that digitalisation will bring to competition enforcement. The issues likely to be high on her agenda during her next tenure include:

- the introduction of an EU-wide digital tax

- the further development of a Digital Services Act that includes upgrading the liability and safety rules for digital platforms, services and products
- regulation of emerging technologies such as setting the rules for artificial intelligence
- putting further restrictions on the use of big data
- the digital economy and the treatment of acquisitions by incumbent platforms of nascent competitors (so-called "killer acquisitions")
- reversal of the burden of proof for digital platforms, where instead of the regulator having to prove the future negative impact of a merger in the digital economy, companies themselves should have to establish that a merger will not have a negative impact on competition.

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