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EUROPEAN COURTS RULE ON RANGE OF COMPETITION ISSUES IN PRE-CHRISTMAS CASE-LOAD CLEARANCE

To Our Clients and Friends:

The General Court of the European Union ("***General Court***") delivered three Judgments on 16 December 2020 which confirmed different aspects of the scope of the powers enjoyed by the European Commission ("***the Commission***") in its application of competition rules in the European Union ("***EU***"). In a nutshell, the General Court has confirmed that the Commission:

- is entitled to apply competition rules to sports activities;
- has a very wide discretion in determining whether or not there is sufficient "Community interest" for it to pursue an infringement action under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("***TFEU***"); and
- has a broad discretion in interpreting commitments given in merger proceedings to ensure they are in line with other EU policies.

I. Competition Law and Sports Associations: Case T-93/18 – *International Skating Union v. Commission*

In relation to the role of sports in the EU, Article 165 TFEU provides that: "*The Union shall contribute to the promotion of European sporting issues, while taking account of the specific role of sport, its incentives based on voluntary activity and its social and educational function*". The General Court has confirmed that Article 165 TFEU does not prevent the Commission from determining whether rules adopted by sporting associations are contrary to the terms of Articles 101 or 102 TFEU (the EU equivalent of Sections 1 & 2 of the Sherman Act). In doing so, it rejected the appeal of the International Skating Union (the "***ISU***") to overturn an earlier Commission's Decision.[1]

Commission Decision

Following a complaint by two Dutch professional speed skaters, the European Commission initiated proceedings in relation to the ISU's eligibility rules that provided that skaters who participated in events that were not authorized by the ISU would become ineligible to participate in all ISU events. The Commission concluded that these rules had both the object and effect of restricting competition and therefore breached EU competition rules.

In its Decision, the Commission referred to the *Meca-Medina* Case, in which the Court of Justice found that the rules relating to the organisation of competitive sport were subject to EU competition law but might fall outside the application of Article 101 TFEU under certain circumstances, namely:

1. the overall context in which the rules were made or produced their effects, and their objectives;

2. whether the consequential effects which restricted competition were inherent in the pursuit of the objectives behind the rules; and

3. whether the rules were proportionate in pursuing such objectives.[3]

In the present case, the Commission found that the eligibility rules did not fall outside the application of Article 101 TFEU because they were neither inherent in the pursuit of legitimate objectives nor proportionate to achieve legitimate objectives, in particular in view of the disproportionate nature of the ISU's ineligibility sanctions (possibly resulting in a lifetime ban).

General Court

Citing precedents from both Articles 102 and 106 TFEU, the General Court found that the ISU had placed itself in a position of potential conflict of interest because it had the powers of a regulator (*inter alia* by being responsible for the adoption of membership rules and setting the conditions of tournament participation) and was acting as a commercial body (in organising competitions as part of its commercial activities). That conflict of interest was - consistent with the administrative practice of the Commission and supported by the European Courts - likely to give rise to anti-competitive results.[4] This was borne out by the fact that the eligibility rules adopted by the ISU were not based on criteria that were clearly defined, objective, transparent, and non-discriminatory in nature. They allowed the ISU to retain a very broad discretion to refuse the authorisation of competitions proposed by third parties.[5] Finally, the severity of the penalties exacted by the ISU was disproportionate to the alleged infringements of such rules, both when considered in the light of ill-defined categories of infringement and the duration of the penalties relative to the average career length of a skater.[6]

In the circumstances, the General Court agreed with the Commission’s conclusion that the ISU’s rules went beyond any objectives outlined in Article 165 TFEU and, as such, constituted a restriction of competition law “by object”.[7]

The only aspect of the Commission’s analysis with which the Court did not agree related to the Commission’s conclusion that the exclusive arbitration procedure endorsed by the ISU where its decisions were challenged did not constitute an aggravating factor for the purpose of calculating the fine imposed on the ISU. According to the General Court, recourse to arbitration proceedings before the Court of Arbitration for Sport (CAS) did not constitute an aggravating circumstance in the determination of the level of the fine, as the CAS was an independent body that was appropriately placed to adjudicate disputes between the ISU and its members.[8]

Conclusions

The Judgment is not unexpected and is in line with previous case-law. It has been well established that EU competition rules apply to many elements of professional sport, similar to how the antitrust rules in the US have a long track record of being applied in a sporting context.[9] Such applicability does not undermine the essential social and cultural aspects of sport, which inevitably give rise elements of "solidarity" between competitive athletes that are necessary for the sustainability of competition in team and individual sports. As there has recently been a Complaint lodged against Euroleague,[10] this will inevitably prove to be an area which generates more competition issues in the future.

The rules on membership adopted by the ISU are viewed in a very similar way to how the Commission would look at the membership rules of trade associations and standardisation bodies. If there are foreclosure risks, the rules must be non-discriminatory and objective.[11] It is also interesting that the Court expressed concerns that the market 'regulator' was also having commercial activities.[12] One can envisage that this principle, especially with the General Court embracing Article 106 precedents, arguably provides the Commission with additional (albeit indirect) support in its actions against digital platforms engaged in so-called "self-preferencing" practices. At the heart of any theory of harm based on concerns about self-preferencing lies the view that the digital platform self-preferencing its own services is a *de facto* 'regulator' of the market in parallel with its role as a market player.[13]

In addition, the Judgment sets out some clear principles for the identification of a competition restriction "by object". As is made clear by the Court, whether any given practice satisfies the "by object" characterisation turns not only on the nature of the offence but also on its particular market context and on the necessary implications for market actors likely to be affected by such restrictions. Although the General Court is not breaking new ground in this respect,[14] the clarity of its approach is welcome.

Finally, the General Court has not sought to challenge the traditional appellate hierarchy established by many international sporting bodies, which choose to settle their disputes either through litigation or arbitration in institutions lying outside the EU.

II. Community Interest and Competition Law Enforcement: Case T-515/18 – *Fakro v. Commission*

The General Court dismissed the appeal of FAKRO Sp. z o.o. ("***Fakro***") in its attempt to overturn a Commission Decision rejecting Fakro's complaint that Velux, its roof-window specialist rival, had abused its dominant position by inter alia engaging in several categories of abuse, including a selective pricing policy (such as rebates, predatory pricing and price discrimination), by introducing "fighting brands" with the sole purpose of eliminating competition, and by brokering exclusive agreements.[15]

In so holding, the Court confirmed again that the Commission has a very large margin of discretion in determining whether or not to pursue complaints on the ground that they lack sufficient Community interest.[16]

Commission Decision

In its 2018 Decision, the Commission found that there were insufficient grounds to pursue claims that Velux had abused its dominant position in the market for roof windows and flashings, and that it would be disproportionate to conduct a further investigation into the alleged behaviour based on the resources that would be needed.[17] Fakro appealed, arguing that the Commission had*:*

1. committed a manifest error in concluding that there would be no "Community interest" in pursuing the action, as the Commission had not taken a definitive position either in relation to the finding of dominance or in relation to the elements of abusive behaviour that had been identified by Fakro;

2. infringed the principle of sound administration set forth under the Article 41 of the EU's Charter of Fundamental Rights,[18] especially by taking as long as 71 months to adopt the Decision rejecting Fakro's Complaint, thereby effectively preventing Fakro from approaching National Competition Authorities until national statutory limitation periods had elapsed; and

3. infringed Article 8(1) of Regulation 773/2004 by refusing Fakro access to the Commission's file, thereby undermining its rights of defence.[19]

General Court

The General Court rejected all three pleas in their entirety.

First, the General Court did not look kindly on what it considered to be the lack of probative evidence submitted by Fakro. In such circumstances, it was wrong to expect that the Commission was in any position to establish the existence of the alleged abusive behaviour by Velux. Accordingly, the General Court was unwilling to oblige the Commission to engage on a speculative fact-finding exercise, holding that: "*As the Commission is under no obligation to rule on the existence or otherwise of an infringement it cannot be compelled to carry out an investigation, because such investigation could have no purpose other than to seek evidence of the existence or otherwise of an infringement, which it is not required to establish*".[20]

Second, the General Court reminded Fakro that the Commission is "*entrusted* […] *with the task of ensuring application of Articles* [101 and 102 TFEU], *is responsible for defining and implementing Community competition policy and for that purpose has a discretion as to how it deals with complaints*".[21] While acknowledging that the Commission's discretionary powers are not unfettered, the General Court nevertheless concluded that the Commission was entitled to give different levels of priority to complaints and that it is not required to establish that an infringement has not been committed in order to decide not to open an investigation.[22]

As regards the length of the investigative procedure, the General Court acknowledged that a period of 71 months between the Complaint being lodged and the Decision to reject the Complaint is a "*particularly long* [period of time] *accentuated by the fact that the applicant denounced the practices as soon as* [July 2012]".[23] However, the General Court also held that: (i) the length of the procedure was

explained by the particular circumstances of the case; (ii) Fakro had not demonstrated that the Commission's Decision to reject the Complaint was affected by the length of the procedure; and (iii) the length of the procedure could not, in and of itself, serve as a basis for an action for annulment.[24] Moreover, Fakro had failed to demonstrate to the General Court why it was impossible to pursue claims under Article 102 TFEU before National Competition Authorities or national courts.

Third, the General Court dismissed Fakro's argument regarding access to the file, citing settled case-law according to which "*the complainants' right of access does not have the same scope as the right of access to the Commission file afforded to persons, undertakings and associations of undertakings that have been sent a statement of objections by the Commission, which relates to all documents which have been obtained, produced or assembled by the Commission Directorate-General for Competition during the investigation, but is limited solely to the documents on which the Commission bases its provisional assessment*".[25]

Conclusions

The General Court usefully delved deep into the evidence before arriving at its conclusions, rather than dismissing Fakro's application with a blanket endorsement of the Commission's wide discretion to reject competition law complaints. Clearly, Fakro's shortcomings in producing sufficient evidence played a material role in the assessment of the Court.

By the same token, we have witnessed over the years a steady rise in the elevation of rights conferred under the EU's Human Rights Charter being assimilated into the rights of the defence in competition cases. It might not be stretching the imagination too far to suggest that, absent the poor evidentiary record of abuse that was laid before the Commission, the European Courts might at some point in the future consider it unacceptable that a period as long as 71 months can be taken by the Commission to arrive at the threshold conclusion that it is not obliged to pursue a competition infringement action. Such delays do not sit comfortably with the principle of "good administration".

III. Commission holds the whip-hand in the interpretation of the scope of commitments: Case T-430/18 – *American Airlines*

American Airlines (the "***Applicant***") failed in its appeal against a Commission Decision granting Delta Air Lines (the "***Intervener***") permanent rights to slots at London Heathrow and Philadelphia airports, which it had obtained in the context of commitments given by American Airlines and US Airways in order for their merger to be approved.[26]

Commission Decision

In the merger review proceedings, Delta Air Lines had submitted a formal bid for slots in order to operate on the London Heathrow – Philadelphia International Airports routes. By Decision of 19 December 2014, the Commission approved the Slot Release Agreement concluded between Delta Air Lines and American Airlines, appending the Agreement to its merger clearance Decision. The commitments provided that Delta Air Lines would acquire slot rights, provided it made "appropriate use" of the slots.

However, in September 2015, the Applicant claimed that Delta Air Lines had failed to operate the relevant slots in accordance with the terms of the Agreement because it had not operated them in accordance with the frequency that it had proposed in its bid for the slots, thereby under-using them. As a result, American Airlines claimed that the Delta Air Lines had not made 'appropriate use' of the slots remedy.

On 30 April 2018, the Commission adopted a Decision rejecting the Applicant's claim, concluding that the Intervener had made an appropriate use of the slots,[27] despite the fact that the commitments did not include a definition of such term. The Commission concluded that the term 'appropriate use' should be interpreted as meaning 'the absence of misuse', and not as 'use in accordance with the bid', as had been argued by the Applicant.

General Court

The General Court upheld the Commission's Decision and held that the term 'appropriate use' of the slots had to be interpreted as the *absence of misuse*. However, the General Court also held that the two interpretations were not irreconcilable and that "*the term 'appropriate' implies a use of slots which may not always be completely 'in accordance with the bid' but nonetheless remains above a certain threshold*".[28] In order to determine that threshold, the General Court made reference to the "use it or lose it" principle that lies at the heart of the Airport Slots Regulation. According to that principle, use of 80% slot capacity constitutes a sufficient use of the allotted slots.[29] Based on this principle, the General Court concluded that "*it cannot be considered to be self-evident that the entrant is expected to operate, in principle, the airline service in its bid at 100% in order to acquire Grandfathering rights*".[30]

Conclusions

The effectiveness of behavioural remedies to address competition problems in a merger review, especially those remedies that involve some form of access to infrastructure, have proven at times to be especially difficult for the Commission to monitor. That task is rendered somewhat easier for the Commission where the activities concerned are already subject to a regulatory regime which mandates access. This gives the Commission a benchmark in terms of the legal standard that needs to be satisfied.

In this particular case, the Commission went one step further. It relied on the Airport Slots Regulation to provide the basis of interpretation of the scope of an access remedy involving access to airport slots, rather than merely the modalities of access. In this way, any ambiguity in the meaning of the behavioural remedies that formed part of the Commission's conditional clearance Decision involving the American Airlines' merger could be resolved by reference to the structure and policy purpose behind the Regulation.

Even when analysing the significance of the commitments by reference to their precise language, the General Court purported to do so by interpreting their scope in accordance with the meaning attributed under the Airport Slots Regulation to the "misuse" of those rights. In this way, the Commission and the Court have both attributed higher value to the policy direction of a regulatory instrument in the sector rather than the express words agreed under the commitments. Merging parties may not find this to be a precedent to their liking, as it is arguably a case which adds little to the goal of legal certainty - unless

of course the Ruling can be limited to the very specific facts of the case and the particular dynamics of the airline sector.

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[1] Judgment of 16 December 2020, *International Skating Union v. Commission*, Case T-93/18, EU:T:2020:610.

[2] Commission Decision of 08.12.2017 in Case AT.40208 – *International Skating Union's Eligibility Rules.*

[3] Judgment of 18 July 2006, *Meca-Medina*, Case C-519/04 P, ECLI:EU:C:2006:492, para. 42. The Commission added that the case-law of the Court of Justice does not create a presumption of legality of such rules. Sporting rules are not presumed to be lawful merely because they have been adopted by a sports federation.

[4] Although the Commission's action against the Applicant was brought under Article 101 TFEU, recourse to Article 102 TFEU precedents (and by extension, Article 106) was appropriate given that multilateral conduct otherwise falling under Article 101 was effected by an "association of undertakings" in this case, which can also be the subject of action under Article 102 where that association of undertakings (as was the case with the Applicant) holds a dominant position.

[5] See Paragraph 118 of the Judgment.

[6] See Paragraphs 90-95 of the Judgment.

[7] A competition restriction by object is contrary to the terms of the prohibition of Article 101 (1) TFEU because it is highly likely to generate anti-competitive consequences given its very nature and contextual setting. In some respects, the concept is related, but not identical to, the concept of a *per se* offence under US antitrust rules.

[8] Refer to discussion at Paragraphs 155-164 of the Judgment.

[9] For example, refer to *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Denver Rocket v. All-Pro Management, Inc*, 325 F. Supp. 1049, 1052, 1060 (C.D. Cal. 1971); *Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976); *Brown v. Pro Football, Inc*., 116 S.Ct. 2116 (1996). See also, more recently, a complaint against the *Fédération International de Natation*, available at: https://swimmingworld.azureedge.net/news/wp-content/uploads/2018/12/isl-lawsuit.pdf.

[10] ULEB, the organization bringing together national basketball leagues in Europe, filed a complaint against Euroleague, claiming that Euroleague illegally boycotts the participation of the winners of some leagues in its competition. *See* Mlex "*Euroleague targeted by fresh EU antitrust complaint from national leagues*" (01.10.2020), available at: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1229542&siteid=190&rdir=1.

[11] For example, see Judgment of 10 March 1992, *ICI v. Commission*, Case T-13/89, EU:T:1992:35; Judgment of 30 January 1985, *BNIC*, Case C-123/83, EU:C:1985:33; Judgment of 7 January 2004, *Aalborg Portland v. Commission*, Case C-204/00 P, EU:C:2004:6.

[12] For example, see Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paras. 209 to 211.

[13] A classic case in point is the Commission's Decision in the *Google Shopping Case*, Commission Decision AT.39740 of 27 June 2017, with the issue of self-preferencing being raised in Google's appeal of the Commission Decision to the General Court, Case T-612/17, *Google and Alphabet v. Commission*, OJ C 369 from 30.10.2017, p. 37 [pending].

[14] For example, see Judgment of 6 October 2009, *GlaxoSmithKline Services and Others v. Commission and Others*, Joined Cases C-501/06 P etc., EU:C:2009:610; Judgment of 20 November 2008, *Beef Industry Development and Barry Brothers*, Case C-209/07, EU:C:2008:643; Judgment of 14 March 2013, *Allianz Hungaria Biztosito and Others*, Case C-32/11, Eu:C:2013:160.

[15] Judgment of 16 December 2020, *Fakro v. Commission*, Case T-515/18, EU:T:2020:620. On 21 December 2020, Fakro announced that it would lodge a further appeal to the Court of Justice of the European Union.

[16] This type of threshold assessment is necessary under the terms of procedural Regulation 1/2003 in order to determine whether it is the Commission or the Member States that are best placed to entertain particular types of competition law complaints.

[17] Commission Decision of 14.06.2018 in Case AT.40026 – *Velux*.

[18] Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, pp. 1-22.

[19] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU and 102 TFEU], OJ L 123, 27.4.2004, pp. 18-24, Article 8(1): "*Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings*".

[20] Refer to discussion at Paragraph 208 of the Judgment. See also Judgment of 18 September 1991, *Automec v. Commission*, Case T-24/90, EU:T:1992:97, para. 76; Judgment of 16 October 2013, *Vivendi v. Commission*, Case T-432/10, EU:T:2013:538, para. 68; Judgment of 23 October 2017, *CEAHR v. Commission*, Case T-712/14, EU:T:2017:748, para. 61.

[21] Refer to discussion at Paragraph 66 of the Judgment. See also Judgment of 26 January 2005, *Piau v. Commission*, Case T-193/02, EU:T:2005:22, para. 80 ; Judgment of 12 July 2007, *AEPI v.Commission*,

Case T-229/05, EU:T:2007:224, para. 38; and Judgment of 15 December 2010, *CEAHR v. Commission*, Case T-427/08, EU:T:2010:517, para. 26.

[22] Judgment of 4 March 1999, *Ufex e.a. v. Commission*, Case C-119/97 P, EU:C:1999:116, para. 88; Judgment of 16 May 2017, *Agria Polska e.a. v. Commission*, Case T-480/15, EU:T:2017:339, para. 34.

[23] Refer to discussion at Paragraph 83 of the Judgment.

[24] Indeed, as regards the application of the competition rules, exceeding reasonable time limits can only constitute a ground for annulment of infringement decisions and on condition that it has been established that this has infringed the rights of defence of the undertakings concerned. Apart from this specific type of case, the failure to comply with the obligation to act within a reasonable time does not affect the validity of the administrative procedure under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1) (see Judgment of 15 July 2015, *HIT Groep v Commission*, Case T-436/10, EU:T:2015:514, paragraph 244).

[25] Refer to Paragraph 43 of the Judgment. See also Judgment of 11 January 2017, *Topps Europe/Commission*, Case T-699/14, EU:T:2017:2, para. 30; Judgment of 11 July 2013, *Spira v Commission*, T-108/07 and T-354/08, EU:T:2013:367, paras. 64 and 65.

[26] Judgment of 16 December 2020, *American Airlines v. Commission*, Case T-430/18, EU:T:2020:603. The grandfathering rights are defined as "*The Prospective Entrant will be deemed to have grandfathering rights for the Slots once appropriate use of the Slots has been made on the Airport Pair for the Utilization period. In this regard, once the Utilization period has elapsed, the Prospective Entrant will be entitled to use the Slots obtained on the basis of these Commitments on any city pair ('Grandfathering')*".

[27] Commission Decision of 30.04.2018 in Case M.6607 – *US Airways / American Airlines.*

[28] Refer to Paragraph 105 of the Judgment.

[29] Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, OJ L 1993, 18.01.1993, p. 1, Article 10(2).

[30] Refer to Paragraph 147 of the Judgment.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition Practice Group, or the following authors in Brussels:

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