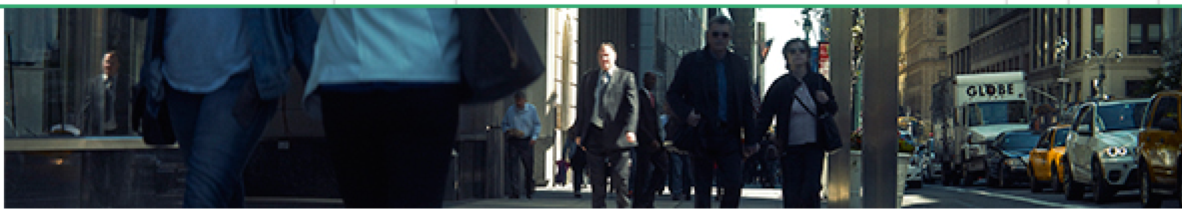

Competition Law Newsletter

July 2016

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1. Court of Justice dismisses appeals in the Calcium Carbide Cartel

On 16 June 2016, the Court of Justice ("**the Court**") dismissed two appeals brought by **Evonik Degussa GmbH** ("**Degussa**") and **SKW Stahl-Metallurgie Holding AG** ("**SKW Holding**") concerning the Commission decision relating to the calcium carbide cartel. The Court's judgments deal with the concept of the liability of a parent company holding all or almost all capital in a subsidiary. The judgments confirm that there is a high threshold to rebut the presumption that a parent company has actually exercised decisive influence over its subsidiary.

In 2009, the Commission adopted a decision relating to a price-fixing cartel on the calcium carbonate and magnesium market between 2004 and 2007. In particular, the Commission found that SKW Stahl-Metallurgie GmbH ("**SKW**") had participated directly in the cartel. Due to the fact that SKW was a subsidiary of Degussa between April 2004 and August 2004, and of SKW Holding between September 2004 and January 2007, the Commission also held these subsequent parent companies liable for SKW's participation. After the General Court ("**GC**") dismissed most of their grounds of appeal against the decision in 2014, both Degussa and SKW Holding appealed to the Court [see our **February 2014 newsletter**].

Degussa had explicitly instructed SKW not to participate in any competition law infringement. The GC, rather counter-intuitively, found that the fact that SKW participated in the infringement in contravention of Degussa's instructions was a strong indication of the actual exercise of decisive influence by Degussa over SKW. Degussa objected to this reasoning. The Court of Justice sided with Degussa, stating that although an express instruction can be a strong indication of the actual exercise of decisive influence by a parent over a subsidiary, the fact that a subsidiary does not comply with that explicit instruction cannot be regarded as such an indication. Despite this, the Court held that Degussa had failed to prove that it was SKW's normal practice not to carry out instructions from its parent company. Therefore, the Court concluded that the GC had not erred in law in finding that Degussa had failed to rebut the presumption that it exercised decisive influence over SKW.

SKW Holding argued in its appeal that its right to be heard was infringed because the Hearing Officer refused a request for a closed hearing during the administrative proceedings before the Commission. SKW Holding had wished to put forward arguments concerning the role of Degussa in the period following the sale of SKW to SKW Holding, without Degussa being present during such hearing. The Hearing Officer had refused, arguing that SKW Holding's right of defence did not take priority over that of Degussa.

The Court held that the Hearing Officer should not have refused SKW Holding's request. As Degussa was never accused of having participated in the cartel in respect of the period following the sale of SKW to SKW Holding, it was a third party to the proceedings in respect of that period. Accordingly, Degussa's right of defence would not have been harmed. Notwithstanding this error, the Court held that SKW Holding had failed to show that the outcome of the proceedings would have been different had the closed hearing been granted.

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2. General Court confirms that the financial position of shareholders and the possibility to increase credit facilities are relevant when assessing an inability to pay request

On 2 June 2016, the General Court ("**GC**") **dismissed** an appeal lodged by four companies in the Celsa-group ("**GSW**") against the European Commission's prestressing steel decision. The companies raised several grounds of appeal which were all rejected by the GC. Of particular interest is that the GC refused to accept the application for inability to pay by the companies.

If the imposition of a fine "irretrievably jeopardises the economic viability of the undertaking concerned and causes its assets to lose all their value", the Commission may reduce the fine. The four companies requested such a reduction, arguing that they were unable to pay the EUR 54 million fine and that their economic viability would be jeopardised if the fine was imposed. The Commission rejected their requests on two grounds. First of all, it considered that GSW should be able to increase its short-term credit facilities. Secondly, it found that the Celsa-group and its family owners had sufficient financial resources at their disposal, which they could use to aid GSW.

GSW appealed this decision before the GC. The GC considered that if it could be shown that GSW had opportunities to increase its credit facilities or that its shareholders possessed important financial means, the rejection of GSW's request based on inability to pay would be justified. Taking into account the non-used credit facilities, total assets, consolidated cash flow and a recent refinancing, the GC agreed with the Commission that it was possible for the companies to obtain the necessary funding or guarantees from credit institutions. Moreover, the GC considered that GSW had not submitted the information that was necessary to assess the importance of the shareholder's assets. According to the GC, this "lack of diligence" on behalf of the companies was enough to reject their application, as it falls to the company submitting an application for inability to pay to provide the necessary factual information to the Commission.

By dismissing the appeals, the GC confirmed that the test for inability to pay requests is applied strictly. In assessing such an application many factors will be relevant, such as the financial position of the shareholders of the applicant but also the possibility for the company to obtain additional financial means via a bank credit or, for example, the issuing of shares.

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3. General Court confirms illegality of non-compete clause in telecoms transaction

On 28 June 2016, the General Court ("**GC**") ruled on appeals by **Telefónica** and **Portugal Telecom** ("**PT**") against the decision of the European Commission to impose fines of EUR 67 million and EUR 12 million respectively. The judgments confirm the findings of the Commission that the non-compete clause agreed upon between the parties amounted to a market sharing agreement with the object of restricting competition. The GC, however, referred the case back to the Commission as it found that the Commission had erred in calculating the amount of the fine.

Telefónica and PT together held the shares in the Brazilian telecom company Vivo Participações through a joint venture company. In 2010, Telefónica and PT concluded a stock purchase agreement by which Telefónica acquired sole control over Vivo. That agreement included a non-compete clause prohibiting the companies from conducting business in the telecommunications sector that "can be deemed to be in competition with the other in the Iberian market", excluding economic activities already performed by the companies.

In its judgements, the GC ruled that the Commission had rightfully concluded that the non-compete clause amounted to a market-sharing agreement with the object of restricting competition. The GC clarified that the non-compete clause did not qualify as an ancillary restraint as the parties were not able to prove that the restriction was necessary for the implementation of the Vivo transaction.

The GC, however, ruled that the Commission had erred in law in calculating the amount of the fine as it had failed to conduct a detailed legal and economic assessment of the sales directly or indirectly relating to the infringement. As the non-compete clause only covered activities in which the parties were actual or potential competitors, the Commission should have excluded sales which were not covered by the clause.

The judgments show that non-compete clauses in the context of a transaction require careful review and confirms that such clauses have to be necessary to the implementation of the transaction to qualify as an ancillary restraint. The judgments also show that once the Commission decides to calculate the fine on the basis of the sales relating to the infringement, it should conduct a detailed analysis before calculating the correct amount of sales.

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4. District Court of Rotterdam rejects the applicability of arbitration clauses in antitrust damages litigation

On 25 May 2016, the District Court of Rotterdam ("**the Court**") **ruled** that it had jurisdiction to hear one of the elevator follow-on damages litigation claims. The Court declined to apply the arbitration clauses relied upon by the defendants, taking the view that those clauses did not cover antitrust damages claims.

The case has its origins in a 2007 infringement decision, in which the Commission fined several elevator manufacturers for participating in anticompetitive practices. Following that decision, 41 housing associations joined forces and established Stichting De Glazen Lift ("**DGL**"), to which they assigned their alleged antitrust damages claims. DGL subsequently initiated damages proceedings before the Court. In turn, defendants Kone B.V., ThyssenKrupp Liften B.V., Otis B.V. and Mitsubishi Elevator Europe B.V. ("**the elevator manufacturers**") contested the jurisdiction of the Court. The elevator manufacturers based this motion on the arbitration clauses contained in the supply and service agreements that they had concluded with the housing associations during the relevant period.

Referring to the Court of Justice's judgment in ***CDC HP*** the Court dismissed the motion. In *CDC HP*, the Court of Justice had ruled that jurisdiction clauses can only validly derogate from the EU jurisdictional rules if the clause clearly refers to disputes concerning liability incurred as a result of an infringement of competition law. The Court applied this reasoning by analogy to the arbitration clauses invoked by the elevator manufacturers. Given that these clauses broadly subjected "every dispute arising between parties" to arbitration, the housing associations could not reasonably foresee antitrust damages claims falling within their scope. Therefore, according to the Court, the arbitration clauses did not apply.

The Court further considered that even if DGL's claims were to fall within the scope of the arbitration clauses, their application would nevertheless be unacceptable according to the reasonableness and fairness principle under Dutch law. According to the Court, application of the arbitration clauses would be contrary to the principle of effectiveness of EU law, since the housing associations would have to verify for thousands of elevators whether claims should be brought before a district court or an arbitration panel.

Several Dutch courts have already rejected the applicability of arbitration clauses in follow-on damages proceedings (e.g. **ECLI:NL:RBAMS:2014:3190** and **ECLI:NL:GHAMS:2015:3006**) [see also our **January 2014 newsletter**]. The judgment of the District Court of Rotterdam shows that (i) the phrasing of the arbitration clauses needs to specifically cover antitrust damages claims, but (ii) even then Dutch courts may decline to refer the dispute to arbitration due to reasonableness and fairness considerations, depending on the specifics of the case.

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5. Update on changes in antitrust damages claims legislation in the Netherlands

On 7 June 2016, a **legislative proposal** to enact the EU Antitrust Damages Directive (the "**Proposal**") was submitted to the House of Representatives (Tweede Kamer). The Proposal serves to implement the **Damages Directive** in various sections of the Dutch Civil Code ("**DCC**") and the Dutch Code of Civil Procedure ("**DCCP**"). EU Member States must implement the Damages Directive by 26 December 2016.

The Proposal concerns various issues such as the tortious nature of EU competition law infringements and the presumption that they cause loss, joint and several liability for joint behaviour, the validity of the passing-on defence and an evidentiary presumption that overcharges are passed on to indirect purchasers [see our **our November 2015 newsletter**].

Several individuals and working groups, including the *Vereniging voor Mededingingsrecht* and the *Werkgroep Private Enforcement and collective redress in European competition law*, both chaired by Stibbe partner Jeroen Kortmann, gave feedback on the Proposal through a public consultation. After the public consultation and an advice from the Council of State (Raad van State), only few amendments have been made to the Proposal.

The provisions of the Proposal are only applicable to competition law infringements that affect trade between EU Member States. For example, the presumption of Article 6:193l DCC that an infringement of competition law causes harm, only applies to infringements within the meaning of Article 101 or 102 TFEU or provisions of national law that are applied in the same cases in parallel to EU competition law. The government will deal with purely national infringements in a separate legislative proposal. Also follow-on litigation in relation to cartels in the United States, for example, is excluded from the scope of application.

In order to encourage amicable settlements, Article 6:193o DCC will enable a once-and-for-all settlement. The article provides that the claim of the settling injured party on the remaining infringers is reduced by the settling infringer's share of the liability. To avoid the settling infringer continuing to be jointly and severally liable, the remaining claim can only be pursued against non-settling co-infringers. Furthermore, the non-settling co-infringers cannot recover a contribution from the infringer who settled.

The most notable amendment concerns the limitation periods. In the draft proposal, the limitation periods would be interrupted in case of an alternative dispute resolution process or an investigation of a competition authority. Article 6:193t DCC now states that, in the event of an alternative dispute resolution process, the short-stop limitation period of five years will be extended by the duration of this process. When a competition authority starts an investigation, the limitation period will be extended by the duration of the investigation plus one year. The extensions are effected by operation of law.

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6. New maximum fines for competition law infringements in the Netherlands as of 1 July 2016

On 1 July 2016, the new **law** increasing the maximum fines that the Dutch Authority for Consumers and Markets ("ACM") can impose for an infringement of competition law will enter into force. The legislative proposal was adopted by the Dutch parliament at the end of 2015. The main purpose of the new law is to increase the deterrent effect of fines [see our **August 2014 newsletter**].

Under the previous fining rules, the ACM can impose fines of up to EUR 450,000 or 10% of the company's annual turnover, depending on which amount is higher. According to the new rules the maximum fine will increase to EUR 900,000 or, if higher, 10% of a company's turnover, multiplied by the number of years in which the cartel was in place subject to a maximum of four years. This means that the new maximum fine for cartel infringements in the Netherlands is now 40% of a company's worldwide annual turnover.

As a result, the ACM's fining guidelines will also be adjusted from 1 July 2016. In addition to a new maximum fine of EUR 900,000, these guidelines set out a new methodology for the fining of natural persons. The **guidelines** now distinguish between different ranges of the basic fine for individuals, which are in particular linked to the annual turnover of the company.

The previous fine maximums remain applicable to infringements of competition law that started before 1 July 2016, even if they come to an end after this date. This means that the new maximum fines will only apply to infringements starting on or after 1 July 2016.

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7. General Court rules that an implicit and unlimited guarantee does not necessarily constitute State aid

On **26 May 2016**, the General Court ("**GC**") **annulled** a decision of the European Commission concerning an implicit and unlimited guarantee granted by the French government to the French Petroleum Institute ("**FPI**"). The French government and the FPI alleged that the FPI did not benefit from the guarantee and therefore the guarantee did not qualify as State aid.

The FPI was governed by private law until it was re-established under public law status in 2006. The Commission held that the grant of that status had the effect of conferring an unlimited public guarantee on FPI's activities, as it was no longer subject to insolvency proceedings.

The Commission alleged that the FPI benefitted from this guarantee in its relationships with suppliers and customers, qualifying the guarantee as an advantage. Furthermore, the Commission deemed this a *selective* advantage since the FPI's competitors, which are established under private law, are subject to insolvency proceedings. The Commission took a similar view with regard to an unlimited implied guarantee in the ***La Poste case***.

The FPI and the French State appealed the decision, arguing that the guarantee did not qualify as State aid. The GC allowed the appeal. While it shared the Commission's view that the public undertaking status of the FPI implies an unlimited guarantee, the GC ruled that the Commission should have shown the *actual effects* produced by the guarantee. According to the GC, the Commission did not prove that the FPI actually benefitted or was likely to benefit from the guarantee. In particular, the Commission did not demonstrate that the FPI's suppliers treated or were likely to treat it more favourably, for instance by offering lower prices or not requiring a guarantee themselves.

As a result the GC annulled the decision of the Commission. The parties may appeal to the Court of Justice against this judgment on points of law only.

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