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Investigation into retail motor fuel markets

On 23 June 2022 the Commission opened an in-depth investigation to assess the proposed acquisition of OMV Slovenija by MOL as the proposed transaction may reduce competition in the retail motor fuel markets in Slovenia.

MOL and OMV Slovenija are the third and second largest fuel suppliers in Slovenia after Petrol, the partially state-owned incumbent. By acquiring OMV Slovenija, MOL would hold high market shares in the fuel retail markets and, together with Petrol, they would hold a very large share of the market. All other competitors are significantly smaller and unlikely to pose any significant competitive constraint on MOL or Petrol after the transaction. Furthermore, due to relatively high barriers to entry and expansion, such as the cost to set up a network of petrol stations, regulatory constraints and the scarcity of attractive locations, a new entry on any significant scale seems unlikely.

ECJ widens scope on claims for damages

On 22 June 2022 the European Court of Justice (ECJ) specified the temporal scope of the rules governing the limitation period for bringing an action for damages against cartel members.

In 2016, the Commission found that by agreeing prices of trucks from 1997 to 2011 and on the timing and passing on of costs for the introduction of emission technologies, Volvo and DAF Trucks participated in a cartel with other truck manufacturers. A customer who bought three trucks manufactured by Volvo and DAF during 2006 and 2007, sought compensation for the harm suffered at a Spanish Commercial Court. The Court relied on the presumption established by Spanish legislation transposing Directive 2014/104 on the compensation of victims of anti-competitive practices. Volvo and DAF Trucks were ordered to pay compensation corresponding to 15% of the purchase price of the trucks. Volvo and DAF Trucks appealed before the Provincial Court, disputing the applicability of the legislation, on the ground that the cartel had ceased before the entry into force of that directive.

The ECJ recalls that the temporal applicability of Article 10 of Directive 2014/104 protects both the aggrieved person and the person responsible for the harm, and is a substantive provision, for which the retroactive application of the transposing provisions is excluded under the directive. However, the Court ruled that the limitation period of the action for compensation should begin to run on the day of publication of the summary of the Commission's decision, in which the identity of the perpetrators of the infringement, its duration and products concerned are known.

New Vertical Block Exemption

On 1 June 2022 the new Vertical Block Exemption Regulation (VBER) and Vertical Guidelines, entered into force.

Based on the evaluation of the 2010 rules, the VBER exempts from the prohibition in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) agreements between companies that are active at different levels of the production or distribution chain. The new rules narrow the scope of the safe harbour as regards (i) dual distribution, where a supplier sells its goods or services through independent distributors but also directly to end customers, and (ii) parity obligations which require a seller to offer the same or better conditions to its counter-party as those offered on third-party sales channels, and/or on the seller's direct sales channels. The rules enlarge the scope of the safe harbour as regards: (i) certain restrictions of a buyer's ability to actively approach individual customers, and (ii) certain practices relating to online sales, namely the ability to charge the same distributor different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems.

In addition, there is guidance on selective and exclusive distribution and agency agreements. The rules are also updated regarding the assessment of online restrictions, vertical agreements in the platform economy and agreements that pursue sustainability objectives. Luther published an **article** about the specific topic of online platforms.

ECJ rules on criteria for defining a dominant position

On 12 May 2022 the ECJ set out the criteria for defining a dominant position in the context of the liberalisation of the electricity market in Italy.

Enel which held the monopoly in electricity generation in Italy and had also been active in the distribution of electricity, underwent an unbundling of its distribution and sales activities. The initial operator in the protected market was

Servizio Elettrico Nazionale SpA (SEN), a company in the Enel Group. In a subsequent phase, these captive customers were gradually allowed access to the free market, where Enel Energia SpA (EE), another company in the Enel Group, competed with third party electricity suppliers. In 2018 the national competition authority decided that, between 2012 to May 2017 SEN and EE, coordinated by Enel, had abused their dominant position. During the companies' appeal procedure against the decision, the Council of State asked the ECJ questions relating to the interpretation and application of Article 102 in cases relating to exclusionary practices.

The ECJ stated that a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could adversely affect, by using resources or means other than those governing normal competition, the effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers. It also concluded that evidence produced by an undertaking in a dominant position demonstrating that there are no actual exclusionary effects cannot be regarded as sufficient in itself, however, that factor if supported by other elements, can constitute evidence that the conduct at issue is incapable of producing these effects.

An undertaking which loses its legal monopoly must refrain during the entire liberalisation phase of the market, from using means available to it but are not available to its competitors. When a dominant position is abused by one or several subsidiaries belonging to one economic unit, the existence of that unit is sufficient to regard the parent company as being also liable for that abuse. However the parent company may show that, despite holding such a percentage of the capital of those companies, it did not have the power to define their conduct and those companies were acting independently.

General Court annuls Qualcomm decision and fine

On 15 June 2022 the General Court annulled the Commission decision about Qualcomm and the EUR 1 billion fine.

Qualcomm develops and supplies chipsets which are used in smartphones and tablets to connect to cellular networks and which are sold to original equipment manufacturers, including Apple. In 2018 the Commission fined Qualcomm EUR 1 billion for abuse of dominance on the worldwide market for chipsets compatible with the Long Term Evolution (LTE) standard between 2011 to 2016. The Commission decided that agreements providing for incentive payments, under which Apple had to obtain its requirements for LTE chipsets exclusively from Qualcomm, had anticompetitive effects.

The General Court annulled the decision because of procedural irregularities when the Commission was putting together its case, which affected Qualcomm's rights of defence. The Commission failed to record and make available the precise content of all interviews conducted during the investigation. Whereas the statement of objections concerned abuse both on the market for LTE and UMTS chipsets, the Commission ought to have given Qualcomm the opportunity to be heard, and where necessary to adapt its analysis. In concluding that the payments were capable of restricting competition for all of Apple's LTE chipset demand, the Commission failed to consider all relevant facts.

Statement of objections regarding Apple Pay

On 2 May 2022 the Commission informed Apple of its preliminary view that it abused its dominant position in markets for mobile wallets on iOS devices.

Apple Pay is a mobile wallet solution on iPhones and iPads used to enable mobile payments in physical stores and online. Apple enjoys significant market power in the market for smart mobile devices and a dominant position on mobile wallet markets. The Near-Field Communication (NFC) 'tap and go' technology standard embedded on Apple mobile devices enables communication between a mobile phone and almost all payment terminals in stores. Compared to other solutions, NFC offers a more seamless and more secure payment experience and enjoys wider acceptance in Europe. The Commission takes issue with the decision by Apple to prevent third party mobile wallets app developers from accessing the necessary hardware and software ('NFC input') on its devices, to the benefit of its own solution Apple Pay.

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