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EUROPEAN COMPETITION LAW

With this European Competition Law Newsletter we will inform you of recent developments in competition law at European Union level. We hope that this newsletter contributes to your awareness of pitfalls in overseas business.

DISTINCT CRITERIA FOR QUANTITATIVE AND QUALITATIVE SELECTIVE DISTRIBUTION SYSTEMS

In a quantitative selective distribution system the supplier is not obliged to use selection criteria that are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants. This follows from a recent preliminary judgment of the Court of Justice in a case between Auto 24 and Jaguar Land Rover France (case C-158/11).

Refusal to grant application for authorised distributor

Auto 24, a company which sells motor vehicles and products of the brand LAND ROVER, applied to be an authorized distributor for Jaguar Land Rover France in the region of Perigieux. This candidature was denied by JRL with regard to the 'numerus clausus' it had drawn up, which did not provide for the appointment of a distributor of new vehicles in this town. Afterwards one of the authorized distributors of JRL opened a secondary outlet in a town close by Perigieux. Auto 24 brought proceedings before the court to seek compensation for losses caused by JRL's refusal to grant Auto 24's application. Eventually Auto 24 brought the case before the Cour de Cassation, arguing that the numerus clausus qualified as a quantitative selective distribution system and that accordingly JRL violated its obligation following from the Motor Vehicles Exemption Regulation (Regulation) to make use of quantitative selection criteria that are specific, objective, proportionate to the aim pursued and implemented in a non-discriminatory manner when selecting its distributors. The Cour the Cassation stayed the proceedings to ask the Court in a preliminary procedure what is to be understood by the words "specified criteria" in the Regulation as regards quantitative selective distribution.

Selective distribution systems for motor vehicles

The Regulation provides that a quantitative selective distribution system for the sales of new motor vehicles can benefit from an exemption to the application of article 101 TFEU. A selective distribution system is defined in the Regulation as a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers selected on the basis of specified criteria. In its preliminary ruling the Court assessed whether the term "specified criteria" must be understood as meaning that, in order for a selective distribution system to be exempted, it is required to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants for authorization.

Specified criteria

According to the judgment of the Court this was not the case. The Court considered that it follows from the context of the Regulation that the term specified criteria must be interpreted as referring to criteria whose precise content may be verified. It is not necessary for such criteria to be published, as this may compromise business secrets and lead to collusive behaviour.

Furthermore the Court judged that it does not follow from the definition of quantitative selective distribution system that it includes the requirement that criteria must also be objectively justified and applied in a uniform and non-differentiated way. The Court based this judgement on the distinction between qualitative and quantitative selective distribution systems. The provision in the Regulation regarding qualitative selective distribution system requires the use of criteria that

are required by the nature of the goods or services, laid down uniformly and not applied in a discriminatory manner. For quantitative selective distribution systems such a requirement does not exist. The Court considered that it is not apparent from the scheme of the Regulation that the legislature intended to impose the same conditions of exemption for the two systems of selective distribution: on the contrary, distinct exemption conditions were envisaged. The fact that this renders it impossible for a supplier to prevent the opening of a secondary place of business by one of its authorized distributors was considered irrelevant. The outcome of the Court's ruling is thus that in order to benefit from the exemption it is not necessary for a quantitative selective distribution system to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all candidates for the authorisation.

Restrict circle of distributors

This judgement clarifies that the use of a quantitative selective distribution system for the sales of new motor vehicles does not require that the supplier provides for a justification of the criteria within that system or that it ensures the non-discriminatory application of those criteria. The circle of distributors may therefore be restricted without further requirements other than that the criteria that limit the amount of distributors can be verified.

COMMISSION ENFORCEMENT ACTION IN THE PHARMACEUTICAL SECTOR

For several years now the pharmaceutical sector has been subject to increased competition law scrutiny. This started with the sector inquiry that the Commission concluded in 2009, the results of which indicated a number of structural shortcomings in the companies' practices potentially leading to distortions of competition and delays to the entry of innovative and cheaper generic medicines to market. In the years after the Commission has undertaken to perform a monitoring on patent settlements. Recently the report of the third monitoring has been published.

Third monitoring report

The sector inquiry in 2009 showed that a significant amount of patent settlements have been agreed on between producers of originator medicines and producers of generic medicines, which agreements may harm competition. This is why the Commission decided to launch an annual monitor into these patent settlement agreements. The monitor intends to enlarge the comprehension into the use of patent settlements in disputes and to identify those settlement agreements which pose a possible threat to competition. Although settlements are considered a legitimate way to end disputes, patent settlements may be problematic from a competition law perspective as they may delay or block the market entry of generic, cheaper medicines. Especially those patent settlements that include a value transfer to a generic company in exchange for delayed generic market entry after expiry of an original medicines patent protection may cause a distortion of competition. Also agreements to not challenge the legality of a patent could compromise competition, especially when the originator company is aware that is does not fulfil the patent requirements or the patent has been granted on the basis of incorrect information. The monitoring report shows that the number of potentially problematic settlements has stabilised at the low level of 11%. Meanwhile the overall number of settlements continues to increase, which causes the Commission to stay vigilant in this area in the close future.

Statements of objections

Following the increased control in the pharmaceutical sector the Commission has issued statements of objections to over fourteen producers of medicines. The Commission has informed these companies of its preliminary view that they have acted in breach of the prohibition on cartels and/or abuse of a dominant position.

The first set of statements of objections is addressed to Danish pharmaceutical company Lundbeck, producer of the blockbuster antidepressant citalopram, and to four of its generic competitors. The Commission is of the preliminary view that Lundbeck entered into agreements with these competitors which aimed at preventing the market entry of cheaper generic medicines. Generic entry became possible upon expiration of the patents on citalopram. The agreements served the purpose of delaying this generic entry by foreseeing a substantial value transfer to the generic producers, who subsequently abstained from entering the market with generic alternatives. This may have caused substantial harm to consumers.

Also statements of objections have been issued to French pharmaceutical company Servier, which is the manufacturer of perindopril, a cardio-vascular medicine, and several of its generic competitors. The Commission formed objections against practices which could have aimed at preserving Servier's position with regard to perindopril, which was about to reach the end of its patent protection. Servier is now accused of having acquired scarce competing technologies essential to the production of perindopril, rendering generic market entry more difficult or delayed and to have unduly protected its market exclusivity by inducing its generic competitors to conclude patent settlements. Such behaviour may infringe articles 101 and 102 TFEU.

Ongoing investigation

The Commission will continue to monitor the developments in the pharmaceutical sector closely in the future. Companies active in the pharmaceutical sector can expect to remain subjected to increased competition law scrutiny by the Commission. It is therefore advisable to perform a legal check on patent settlement agreements or agreements and business practices, in order to ensure their conformity with competition law.

STORAGE OF DATA NOT AN ECONOMIC ACTIVITY

Activities consisting in storing and providing data which companies are obliged to submit on the basis of statutory obligations and in prohibiting the re-use of that data are not to be considered economic activities in the sense of the TFEU. Therefore the competition rules do not apply to an entity exercising these activities. This follows from a preliminary judgment of the Court of Justice (case C-138/11).

The collection of data

In Austria companies are statutory obliged to provide certain data which will be collected and stored in the Austrian Firmenbuch. Until 2001 Compass Datenbank was free to make use of the data of the Firmenbuch in order to exploit a digital database for the provision of information services. After that time the Austrian Republic appointed several billing agencies to provide the data to the public in exchange for a remuneration, at which time the Republic initiated actions to stop Compass Datenbank from making use of the data. Compass started a procedure in order to receive access to the data upon payment. In the course of the proceedings Compass Datenbank argued that the Austrian Republic made abuse of a dominant position as prohibited in Article 102 TFEU. The question arose whether this Article was applicable to the Republic in the exercise of its activities, which lead to preliminary questions to the Court.

Economic activities or not?

The central question was whether the activity of a public authority, consisting in the storing of data which undertakings are statutory obliged to report in a database, in permitting interested persons to search for that data and/or in providing them with print-outs thereof in return for payment, while prohibiting any other use of that data – that authority relying on the sui generis protection granted to is as maker of the database in question – constitutes an economic activity meaning that that public authority is to be regarded as an undertaking within the meaning of Article 102 TFEU.

With reference to established case-law the Court considered that any entity which exercises an economic activity – any activity consisting in offering goods and services on a given market – is to be considered an undertaking under competition law. A State or State entity may thus act as an undertaking, entirely or in relation to only part of its activities that qualify as economic activities. Activities which fall within the exercise of public powers do not constitute economic activities. If the public entity exercises an economic activity which can be separated from the exercise of its public powers it acts as an undertaking as regards that activity. If the economic activity cannot be separated from the exercise of public powers, they as a whole remain activities connected with the exercise of those public powers. Also the Court considered that the fact that remuneration, laid down by law and not determined directly or indirectly by the public entity, is not alone sufficient to classify the exercise of a service as an economic activity.

Inseparable from public powers

Applied to this case the Court judged that a data collection activity on the basis of a statutory obligation on undertakings to disclose data as well as related enforcement powers fell within the exercise of public powers. With regard to the activities consisting in maintenance and making available to the public of the data, the Court was of the opinion that they were not economic activities, as such activities cannot be separated from the public powers of collecting the data. The collection would be rendered largely useless in the absence of a database to store the data for consultation by the public. As the sole remunerations received for the provision of the data were laid down by law and not directly or indirectly by the public authority itself, the charging of such remuneration could be regarded as inseparable from the making available of the data, so that this mere fact could not change the legal classification of the activity into an economic activity.

Prohibiting the re-use of data

Also the question arose whether the activity consisting in a prohibition on billing agencies to re-use the data in order to provide their own information services, and in particular the fact that the public authority relied on the sui generis protection granted to it as maker of a database, amounts to an economic activity. The Court ruled that a public entity relying on the intellectual property rights of a database it created does not act by reason of that fact alone as an undertaking. The public authority is not obliged to authorize free use of the data, and may legitimately prohibit re-utilisation of data if it considers this necessary or mandatory, so as to respect the interest of the companies that disclosed the data as required by law. In this case a statutory limitation on re-use followed from Austrian law. The fact that the making available of data was remunerated did not affect the classification of an activity as economic or not, again provided that it was imposed by law and not by the public

authority itself. To the extent that the remuneration fulfilled these criteria and would therefore be limited to and regarded inseparable from the making available of data, the reliance on intellectual property right in order to protect that data and prevent its re-use is inseparable from the making available of the data and cannot be considered an economic activity.

Public authorities acting on the market

As the activities exercised by the Austrian Republic do not constitute economic activities, the public authority did not act as an undertaking so that its behaviour could not be tested against the prohibition of abuse of a dominant position. In this judgment the Court gives a rather extensive ruling on the application of the term "economic activities" with regard to the actions of public entities. The definition of economic activities is essential for the applicability of competition rules and accordingly the possibility to seek enforcement of competition rules to public authorities. In order to assess either which obligations and rules are applicable to the exercise of activities (for public authorities) or which procedure must be followed to appeal against the behaviour of a public authority it will therefore be crucial to examine and substantiate the nature of the activities (economic or not). In this perspective it is noteworthy that since 1 July 2012 the Dutch competition rules have been extended with rules governing the market behaviour of public entities and relating enforcement powers for the Dutch competition authority.

VOLUNTARY AND MORE STRINGENT STANDARD OF PROOF BINDING UPON COMMISSION

Attributing liability to parent companies of a subsidiary which committed the infringement has been subject of numerous court proceedings. In a recent case, the Court of Justice partially annulled a decision of the Commission in which the Commission held the parent company accountable for the infringements committed by its subsidiary (cases C-628/10 P and C-14/11 P).

Background

WWTE, Agroexpansion and Taes were all processors of raw tobacco active on the Spanish market. In 2004 the Commission adopted decisions holding those companies responsible for forming a cartel between 1996 and 2001. It also attributed the infringement committed by WWTE to its parent company, TCLT. For holding TCLT liable, the Commission did not rely exclusively on that presumption of decisive influence but held that other evidence supporting the presumption had to be present. This was due to the uncertainty regarding the standing of the case-law at that time, as to whether control by a parent company of the entire share capital of its subsidiary could alone bring into play the presumption that the parent company exercised decisive influence and thus, could be held liable for the infringements committed by the subsidiary.

On appeal, the General Court held that, by proceeding in this manner, the Commission raised the standard of proof for itself. The Commission was entitled to do so. However, according to General Court, none of the material relied on by the Commission in the decision supported the conclusion that TCLT exercised decisive influence over the conduct of WWTE and that, consequently, the Commission was not justified in attributing WWTE's unlawful conduct to TCLT or in holding it jointly and severally liable for payment of the fine. The General Court rejected the argument of the Commission that according to recent caselaw of the EU Courts it was entitled to rely on the presumption of decisive influence. This would lead to discrimination of TCLT by comparison with the parents companies of Agroexpansion and Taes (Intabex, Universal and Universal Leaf) as in those cases the more onerous standard of proof was applied. On that ground, the General Court partially annulled the Commission's decision.

Judgment of Court of Justice

The Commission appealed against the judgment of the General Court at the Court of Justice. After repeating its case-law regarding the presumption of decisive influence of the parent companies holding majority of the shares in a subsidiary, the Court of Justice held that the Commission was not bound to rely exclusively on that presumption when establishing decisive influence. By doing so, the Commission imposed upon itself, in respect of the assessment of whether liability for the cartel at issue could be attributed to the parent companies, a standard of proof of the actual exercise of decisive influence which was more onerous than that which, as a general rule, would have been regarded as sufficient, in the light of the case-law of the EU Courts.

None of the evidence in the contested decision was capable of supporting the presumption that TCLT actually exercised decisive influence over WWTE. As the Commission did not attribute liability to the parent companies of the other subsidiaries which committed the infringement due to lack of evidence supporting the presumption, the Commission could not apply the presumption to the TCLT without discriminating against it as compared with Intabex and as compared with Universal and Universal Leaf.

According to the Court of Justice the General Court was right to held that the principle of equal treatment required that, where the Commission adopts a method such as that in the present case in order to determine whether liability should be attributed to parent companies whose subsidiaries have taken part in the same cartel, the Commission must,

save in specific circumstances, rely on the same criteria in the case of all those parent companies.

To sum up: when attributing liability to a parent company of a subsidiary which committed the infringement, the Commission is entitled to apply a more onerous standard of proof than the one which is regarded as sufficient by the EU Courts. However, when the Commission does so in a particular case, it may not deviate from the standard in that case and seek recourse to the less stringent standard of proof even if the latter is regarded as sufficient by the EU Courts if such a deviation results in different treatment of the members of the same cartel.

ECONOMIC AND LEGAL CONTEXT IS DECISIVE

An agreement which at first sight seems to be in contradiction with the cartel prohibition may fall outside the ambit of that prohibition, depending on the economic and legal context in which it functions.

Fines

In 2009, the Commission imposed a fine of €553 million on each of the energy companies E.ON and GDF Suez for infringing EU competition law by concluding a market-sharing agreement in respect of the French and German markets for natural gas.
That agreement was concluded in 1975 when Ruhrgas AG (now part of E.ON) and GDF decided to construct together the MEGAL gas pipeline across Germany in order to import Russian gas to Germany and France. By that agreement the undertakings agreed not to sell gas conveyed by that gas pipeline on each other's national markets.

As regards the German market, the Commission used 1 January 1980, the date on which the MEGAL gas pipeline became operational, as the date when the infringement began. Contrary to the situation in France, there was no monopoly on the German market before the liberalisation of that market in 2000. The Commission thus found that GDF should have been regarded as a potential competitor of Ruhrgas' prior to liberalisation.

E.ON and GDF Suez each brought an action against that decision before the General Court. One of the pleas of the parties was that they were not competing undertakings on the German market until 2000.

Absence of competition

The General Court held that the cartel prohibition applies only to sectors open to competition. The examination of conditions of competition must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal contexts within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter the relevant market and compete with established undertakings. In order to determine whether an undertaking is a potential competitor in a market, the Commission is required to determine whether, if the agreement at issue had not applied, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings. Such a demonstration must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy.

As regards the German market, the General Court described the situation in Germany until 1998. Until 1998, demarcation agreements, namely those by which public service companies agreed among themselves not to supply gas in a particular territory, and exclusive concession agreements, namely those by which a local authority granted an exclusive concession to a public service company allowing it to use public land to construct and operate gas distribution networks, were exempt under the relevant paragraph of the relevant German law. The responsible authority almost never prohibited such agreements in Germany. Although there was no legal prohibition against other companies supplying gas. the simultaneous use of demarcation agreements and exclusive concession agreements had the effect of establishing de facto a system of areas of exclusive supply within which a single gas undertaking could supply customers with gas. According to the General Court, that situation was likely to result in the absence of any competition, not only actual, but also potential, on that market and the fact that there was no legal monopoly in Germany was irrelevant. The General Court therefore held that the Commission had not established the existence of potential competition, between the two companies on the German market for gas from 1980 to 1998 and annulled the decision of the Commission partially.

Economic approach

This judgment is a fine example of the economic approach that the European Courts apply when analyzing agreements within the scope of article 101 TFEU. It might thus be rewarding for undertakings which are subject to investigations of competition authorities in Europe to describe the economic and legal context of the agreement if they believe that it might be in their favor.

FINES AND INVESTIGATIONS COMMISSION

13 million EUR fine imposed on producers of water management products

Two producers of water management products used in heating, cooling and sanitation systems have been fined by the Commission for having breached the prohibition on cartels and restrictive business practices.

The concerned producers are Flamco and Reflex, which have been fined a total amount of € 13,661,000. These producers were found to have operated a cartel together with a third undertaking, Pneumatex, on the German market form June 2006 until May 2008. Within this cartel the three producers coordinated the prices for water management products. The German market is the biggest market for these products in Europe. Additionally during a three months period a cartel had been operated between Reflex and Pneumatex, in which they fixed their prices on the markets of France, Belgium, Spain, Portugal, Luxembourg, Italy, Finland, Sweden, Hungary, the United Kingdom, Greece, the Netherlands and Denmark. The cartel members kept each other informed on the amount and date of planned price increases through bilateral contacts. Also the parties exchanged sensitive market information. The fines to Flamco and Reflex were reduced by 10% as the companies concerned acknowledged their participation in the cartel and their liability with regard to that participation.

Accordingly this case is the sixth cartel settlement that the Commission has agreed to. Pneumatex received full immunity from fines under the Leniency procedure.

Water management products include expansion vessels, pressure maintenance systems, water make-up systems, degassers, air vents, separators and safety valves. Any person or company affected by the aforementioned anti-competitive behaviour may try to seek damages before a national court. The Commission decision will constitute proof of the existence and the illegality of the behaviour. As the cartels affected many markets within the EU, the concerned undertakings might face damage claims from companies or consumers from within all these countries.

Re-imposition of fines to Mitsubishi and Toshiba

A decision imposing fines on Mitsubishi Electric Corporation and Toshiba Corporation for participating in a cartel has been re-adopted by the Commission following a judgment of the European General Court. In 2007 the Commission fined 20 companies active on the markets for gas insulated switchgears for a total amount of € 750 million EUR. In its decision the Commission had set the fines to Mitsubishi and Toshiba using sales figures for a different reference year than for other cartelists. The two companies therefore brought actions for annulment of the decision before the General Court on the ground that the principle of equal treatment had been violated.

The General Court entirely upheld the Commission's findings that Mitsubishi and Toshiba had breached the antitrust rules through participating in a cartel. The General Court acknowledged that the aim of the Commission to treat the two companies different, being to reflect the fact that contrary to the other participants Mitsubishi and Toshiba participated in the cartel through a joint venture in the last two years of the cartel, was a legitimate one. Nevertheless the General Court ruled that the use of different reference years constituted a violation of the principle of equal treatment. Accordingly the fines for the two companies were annulled.

The Commission has re-imposed the fines to Mitsubishi and Toshiba taking full account of the General Courts judgements, calculating the fines based on the proper reference years. This shows that it can be worthwhile to bring actions for annulment of Commission decisions in competition law cases before the European courts, as the Commission will be obliged to take another decision taking account of their judgement. This may lead to an eventual reduction of the fines even many years after the imposition.

Unannounced inspections in the sector for thermal systems for cars

The Commission has confirmed that it has undertaken unannounced inspections at the premises of companies active in the sector of thermal systems for cars and related products. The Commission has concerns that companies in this sector may have violated the antitrust rules. Officials of the relevant national competition authority assisted the Commission in the inspections.

The Commission announced that it has conducted the inspections as a part of a wider ongoing investigation into alleged cartels in the car parts sector. Thermal systems for cars are air conditioning and engine cooling products that are sold to car manufacturers. Other inspections that the Commission has carried out related to wire harnesses, occupant safety systems and bearings. The inspections into producers of wire harnesses have come to lead to the opening of a formal investigation (see below).

The car parts sector is apparently under high competition law scrutiny of the Commission and should be aware of other possible investigations or inspections and the possible opening of even more formal investigations.

Formal investigation into producers of wire harnesses for cars

Proceedings have been opened by the Commission against suspected participants of cartels in the sector of automotive wire harnesses. Wire harnesses are combined electric wire systems for cars which supply electricity necessary for the functioning of electronic components in a vehicle. The system links the car's computers to the various relevant functions to the vehicle. Once manufactured wire harnesses are supplied to car manufacturers.

The investigation into several producers of wire harnesses follows the inspections that the Commission carried out at the premises of these companies in February 2010. Apparently the findings of the Commission have caused a suspicion of cartels in the sector leading to the opening of formal proceedings. As mentioned above this case is part of a wider effort that the Commission undertakes to investigate possible cartels in the automotive sector, so that raised awareness in this sector is in place. It shows from this particular case that after inspections have been carried out there can be a long period of insecurity for the companies concerned as to whether formal investigations will be opened or not.

Undertakings in the sector of plastic pipes and plastic pipe fittings subject to inspections

Undertakings that are active in the sector of plastic pipes and plastic pipe fittings used in the sewage industry have been surprised by inspections of the Commission. The Commission has undertaken to inspect the premises of companies active in this sector in several Member States as the concerned companies are suspected to have violated the antitrust rules. The investigation aims at clarifying the facts concerning the possible participation of several companies in agreements or concerted practices, in order to establish whether they have acted in breach of the cartel prohibition.

Statements of Objections suspected cartel computer CD and DVD drives

No less than 13 companies supplying optical disk drives in the EEA have received Statements of Objections from the Commission. A Statement of Objection is a formal step in a competition law investigation into suspected cartels. It is issued by the Commission to inform involved companies of its preliminary view that, following the state of the investigation as performed until then, these companies may have infringed antitrust rules.

In the present case, the Commission informed the undertakings that they are being suspected of having participated in a worldwide cartel in breach of antitrust law. Optical disk drives read or write data on CDs and DVDs. The Commission has concerns that those suppliers have coordinated their behaviour in bidding events organized by two major original equipment manufacturers for optical disk drives used in personal computers and servers. These bid-rigging practices may have lasted at least five years according to the preliminary view of the Commission. Bid-rigging is considered one of the most serious breaches of competition rules.

Suspected participants of shrimps cartel receive Statement of Objections

Four traders of North Sea shrimps have been informed by the Commission of its preliminary view that they have possibly infringed the European antitrust rules. The companies are being alleged of having conducted collusive behaviour by fixing prices and allocating markets and customers in at least the Netherlands, Germany, France and Belgium. The investigation against these shrimp traders started in March 2009 when the Commission carried out unannounced inspections at the premises of a number of shrimp produces. The names of the companies concerned are not revealed in this stage of the investigation so as to respect their rights of defence and the presumption of innocence.

The food sector has been identified as a priority sector by the Commission and the national competition authorities in Europe, as they consider it important to ensure that food markets work for suppliers and consumers under the same conditions.

Supplementary Statement of Objections to Visa

Credit Card Company Visa has received a supplementary statement of objections from the Commission, in which it expresses additional concerns about possible violations of antitrust rules concerning multilateral interchange fees (MIFs). Earlier Visa already received a statement of objections in April 2009 concerning MIFs for consumer debit and credit card transactions. With regard to the debit card MIFs the matter was resolved when Visa Europe offered commitments to cap its debit card MIFs at 0.20%, which commitments were made binding by the Commission in December 2010. The proceedings regarding consumer credit MIFs however continued. The supplementary statement of objections regards all MIFs set directly by Visa for transactions with consumer credit cards.

MIFs are an important part of the total cost that retailers must pay for accepting Visa's consumer payment cards and establish a minimum price for retailers. They apply currently to all cross-border transactions within the EEA, as well as to domestic transactions in eight EU Member States. They are inter-bank fees, which are paid by merchants' banks (acquirers) to cardholders' banks (issuers) for transactions with Visa's consumer credit cards.

The Commission takes the preliminary view that these MIFs restrict competition between banks by creating an important cost element common to all acquirers. Therefore they harm competition between acquiring banks, inflate the cost of payment card acceptance for merchants and ultimately increase consumer prices. Any contribution to technical and economic progress, which could justify an exemption under Article 101(3) TFEU has not been proven yet. Also the Commission does not believe that the MIFs are set in a way where consumers are allowed to enjoy a fair share in the benefits and is not convinced that the MIFs are indispensable to the attainment of the efficiencies claimed.

NYSINGH EUROPEAN COMPETITION AND PUBLIC PROCUREMENT LAW TEAM

Nysingh 2 partner and 6 associates dedicated European competition and public procurement law team has many years of experience in competition law – in European competition law and, since the Dutch Competition Act took effect in 1998, in Dutch competition law as well. We advise companies and national and international trade associations in many sectors of the economy, such as the agro, chemical, cleaning, bicycle, fishing, care, transport, insurance, building and installation industries on competition law and regulatory matters. We advise on the application of competition law to a wide range of trade practices and agreements. In recent years we defended companies and trade associations in over 25 investigations by the Netherlands Competition Authority and the European Commission and defended clients before both national and EU Courts. The competition law team has got high rankings by Chambers during the last 4 years.

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