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European Law - News

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(1) <u>European competition law</u>, judgment of the Court of Justice of the European Union of July 8th, 2020 (T-758/14 RENV) – Infineon Technologies ./. Commission

In its judgment of July 8th, 2020, the Court of Justice of the European Union (ECJ) ordered the reduction of a fine imposed on Infineon amounting to nearly EUR 6 million. The fine of initially more than EUR 82 million had been imposed on Infineon for participating in a cartel in the smart card chip market. After first judgment, dated December 15, 2016, the General Court initially upheld this high fine (T-758/14). Following Infineon's appeal against the first judgment of the General Court, the ECJ found that the General Court had checked only five of the eleven contacts. Due to incomplete judicial control, the ECJ set aside in part the first-instance judgment in its judgment of September 26, 2018 (C-99/17 P). The ECJ has now ruled on July 8th, 2020 that the Commission had not sufficiently taken into account Infineon's individual involvement in the antitrust infringement and therefore reduced the fine.

(2) <u>European State aid law</u>: Appeal lodged by the Commission with the ECJ (C-211/20 P) against the judgment of the General Court of March 12, 2020 in the case of Valencia Club de Fútbol ./. European Commission

In a judgment of March 12, 2020 (T-723/16), the European General Court annulled the decision of the European Commission concerning aid measures in favour of the football club Valencia CF. Following this judgment, the European Commission has appealed to the ECJ on May 22, 2020 (C-211/20 P). The Commission argues that the General Court erred in law by incorrectly interpreting Article 107 (1) of the Treaty on the Functioning of the European Union, in particular with regard to demonstrating the existence of an advantage. Specifically, according to the

Commission, the General Court misinterpreted the Commission Notice in the application of relevant Treaty‘s articles to State aid in the form of guarantees in connection with the Communication from the Commission regarding the revision of the method for setting the reference and discount rates and misinterpreting the decision at issue.

Additionally, the Commission submits that the General Court erred in law with regard to the standard of the burden of proof concerning the existence of an advantage arising from an individual guarantee and as to the Commision’s obligation of due diligence in a formal investigation procedure. Lastly, according to the Commission, the General Court distorted the facts.

(3) Glyphosate - legal standing of a federal regional entity: Opinion of the Advocate General in the matter of Région de Bruxelles-Capitale ./. Commission (C-352/19 P)

The Brussels-Capital Region had brought an action for annulment before the General Court to regulate the renewal of the approval of the active substance glyphosate. The court ruled this lawsuit as inadmissible, because the region was not directly affected and therefore it lacked legal standing (T-178/18). The Region appealed against it to the ECJ. In his opinion of July 16, 2020, Advocate General Michal Bobek came to the conclusion that the court wrongly denied the Region's right of action (decision of February 28, 2019, T-178/18). It is true that federal regional and local entities are not allowed to contest EU legal acts that affect their interests only in a general way. In contrast, however, the existence of a direct concern can be assumed as a prerequisite for a right to bring an action if there is a direct restriction in the exercise of a constitutionally assigned specific power. It remains to be seen whether the ECJ will join the General Court or the Advocate General. The decision is also of interest to German Federal States and, if applicable, other regional entities.

(4) Advocate General at the ECJ on access to environmental information regarding "Stuttgart 21"

On July 16, 2020, Advocate General Gerard Hogan presented his opinion on public access to environmental information in connection with the project "Stuttgart 21" (C-619/19). The core of the preliminary ruling questions, submitted by the German Federal Administrative Court (Bundesverwaltungsgericht) to the ECJ in these proceedings, deal with the interpretation of the term "internal communications" within the meaning of Article 4 of the European Environmental Information Directive (2003/4/EC). If a request for information concerns “internal communications”, national regulations may provide the refusal of access to environmental information. However, the public interest in disclosure of this information must be taken into account. Spe-

cifically, an applicant had submitted a request for environmental information to the State Ministry of Baden-Württemberg, with which he demanded access to certain documents from the State Ministry that were related to the logging of trees in the “Schlossgarten” for the “Stuttgart 21”-project. On the one hand, these documents have to do with information from the head of State Ministry about the investigative committee "Work-up of the police operation on September 30th, 2010 in Stuttgart’s Schlossgarten" and, on the other hand, notes from the State Ministry on an arbitration procedure carried out in connection with the project "Stuttgart 21" from 10th and 23rd November 2010. Unlike the State Ministry and the Administrative Court, the Higher Administrative Court in Mannheim did not consider these documents to be protected as internal communications in the second instance, since such protection only exists for the duration of an official decision-making process. The State of Baden-Württemberg then appealed against this decision to the Federal Administrative Court, which asked the ECJ for a preliminary ruling on some essential questions of interpretation with regard to “internal communications”.

The Advocate General now proposed to the ECJ that all documents intended to be addressed to someone and which have not yet left the internal area of an authority on the date on which a competent authority make a decision on the request which has been made to it, should be regarded as internal communications. The area of application should be unlimited in time, but the past time should be taken into account when weighing interests. It is now the ECJ's turn to decide whether to follow the Advocate General before the national jurisdiction continues the dispute.

(5) Judgments of the General Court of July 8th, 2020 on European banking supervision: Fines imposed by the European Central Bank on credit institutions are partially annulled (T-203/18, T-576/18, T-577/18, T- 578/18)

As part of its supervision, the European Central Bank (ECB) imposed fines on various credit institutions. Following an appeal by the credit in question, the General Court annulled these fines partially. In Case T-203/18, the credit institution relied on the illegality of an ECB decision accusing the credit institution of breaching Art. 77 (1) lit. a) of the European Capital Adequacy Regulation (Regulation (EU) No. 575/2013) by buying back own shares without first obtaining permission from the respective authority. The ECB then imposed a fine of 1,600,000 euros, which corresponds to 0.03% of the bank's turnover. The credit institution filed a suit against it and contradicted the finding of a violation. It also did not consider the imposition of a fine to be proportionate. Finally, the credit institution also objected to the publication of this fine on the ECB's website. The General Court rejected all the pleas in law.

In three further decisions, against which actions for annulment had been brought in Cases T-576/18, T-577/18 and T-578/18, the ECB had accused three credit institutions of contravening Article 26 (3) of the aforementioned EU Regulation for having classified capital instruments as

instruments of their Common Equity Tier 1 without obtaining prior consent from the respective/appropriate/responsible authority. The ECB assessed this as negligent violations and imposed fines. Here the General Court has partially annulled the decisions due to insufficient reasons. The contested decisions did not contain any precise information on the methodology used by the ECB to calculate the fines imposed, but only a few considerations on the gravity of the breach, its duration and the gravity of the alleged breach of duty as well as the assurance that one or more attenuating circumstances were taken into account.

(6) <u>European data protection law:</u> Transfer of data to the USA on the basis of the Privacy Shield rejected by the ECJ in its judgment of July 16, 2020 (C-311/18 - Schrems II)

On July 16, 2020 in response to questions submitted by the Irish High Court, the ECJ ruled that the European Commission's decision 2016/1250 on the adequacy of the protection offered by the EU-US data protection shield ("Privacy Shield") was invalid. The ECJ justified this by stating that this decision did not adequately guarantee that transmitted data to the USA are subject to the same level of protection as in the EU. The Commission's decision 2010/87/EU on standard contractual clauses for the transfer of personal data to third countries is, however, valid. Nevertheless, it must be ensured that data in third countries are protected in an "equivalent" way compared to the EU. For further details, see article by Bettina Backes, attorney-at-law, from July 31, 2020: "ECJ declares Privacy Shield invalid - what does this mean for companies?"

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