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RECHTSANWÄLTE

European Law - News

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(1) European antitrust law: Unannounced inspections by the European Commission at the premises of a German garment company on 22nd June 2021

In the event of suspected EU antitrust law violations, the Commission may carry out unannounced inspections. According to a press release, the Commission was prompted to do so on 22nd June 2021 on the premises of a German garment company. Until proven otherwise, the presumption of innocence applies to the company. It has the right to defend itself and to be heard in the course of proceedings. There is no fixed deadline by which the investigations must be completed. Now that COVID-19 figures are declining, it cannot be ruled out that in the future the Commission will once again increasingly take such measures should there be reason for suspicions of behaviour contrary to antitrust law. Companies ought to pay attention to strict compliance with antitrust regulations and, if necessary, involve relevant expertise from an early stage onwards.

(2) Liability for anticompetitive conduct: Opinion of Advocate General Pitruzzella in Sumal, S. L. v Mercedes Benz Trucks España S. L., Case C-882/19, of 15th April 2021

In the "Sumal" case pending before the ECJ, Advocate General Pitruzzella commented on the question of the extent to which a subsidiary can be obliged to compensate for damage caused by the parent company's **anticompetitive conduct** as the sole addressee of the fine imposed by the Commission. The Advocate General took the so-called *theory of economic unity* as a starting point and considered, on the one hand, the conditions that would be decisive for an **ascending liability of the parent company** for the anticompetitive behaviour of its subsidiaries. In addition to an *economic unity*, a *determining influence* of the parent company is required. However, the subsidiary does not exercise such a determining influence in the scenario of liability on the parent company's conduct. Nevertheless, the determining influence is a necessary prerequisite for the existence of an economic unit. Liability of the subsidiary could now be considered if the

activity of the subsidiary was, to a certain extent, *necessary* for the realisation of the anticompetitive behaviour, for example, because it sold cartel-involved goods. For a **descending liability**, the subsidiary had to be active in the same field in which the parent company had engaged in the anticompetitive conduct and made it possible to specify the effects of the infringement by its market conduct. The subsidiary and parent company were then jointly and severally liable. The injured party had the choice of which company to claim against. The decision of the ECJ is currently being awaited.

(3) State aid law: Judgment of the European General Court in Dansk Erhverv v. Commission of 9th June 2021, Case T-47/19 (Non-charging of a deposit on drinks packaging in border areas)

If beverages in one-way packaging are sold in the border area exclusively to customers in Denmark with the obligation to consume them and to dispose of their packaging outside Germany, authorities in Schleswig-Holstein and Mecklenburg-Vorpommern held the view that there should be **no obligation for border shops to charge a deposit** contrary to other cases. A Danish trade association considered this to be granting unlawful aid incompatible with the internal market. However, the European Commission did not uphold the complaint lodged by the association, so the association brought an action for annulment before the European General Court. In a judgement of 9th June 2021, the (first-instance) Court declared the **Commission's decision** null and void. In particular, the Court objected to the fact that the Commission had denied the condition relating to "State resources" required for aid without examining whether interpretive difficulties on which it relied were only temporary and inherent in the gradual clarification of the rules.

(4) State aid law: Judgment of the European General Court in Ryanair ./. European Commission of 9th June 2021, Case T-665/20 (compensation for Condor)

The judgment on state aid law of 9th June 2021 at the initiative of Ryanair concerning compensation granted to Condor contains detailed guidance on the circumstances under which aid may be granted to **compensate damage** caused by natural disasters or other extraordinary events. Aid measures must be suitable to make up for the damage caused by exceptional occurrences and the amount of compensation must be limited to what is necessary to rectify the damage suffered by the beneficiaries of the measure in question. In addition, there must be a causal link between the damage caused by the event in question and the occurrence of other causes, which must be specifically examined. The Commission must explain its decisions in detail so that this is comprehensible. In the specific case, the General Court found this was not the case with regard to essential aspects.

(5) <u>Product liability law</u>: Judgment of the European Court of Justice of 10th June 2021, Case C-65/20 - Krone-Verlag (herbalist Benedikt)

A reference for a preliminary ruling was made to the European Court of Justice from Vienna on whether a daily newspaper that published an inaccurate health recommendation by an independent newspaper columnist in a daily column can be sued on the basis that it distributed a defective product within the meaning of the Directive on liability for defective products (85/374/EEC). In the Austrian case in question, a reader of the Kronen-Zeitung had claimed that she had suffered damage to her health by following the recommendation of the "herbalist Benedikt". Instead of applying grated horseradish poultices for rheumatic pain according to the article of two to five hours, two to five minutes would have been correct. The ECJ **denied liability without fault of the newspaper publisher**. A copy of a printed newspaper **was not to be regarded as a defective product** within the meaning of the Directive on liability for defective products, because it was not a question of a defect inherent in the physical product itself, but of an alleged defect in the intellectual content, in this specific case in relation to a service. However, this did not mean that other rules of contractual or non-contractual liability could not be applicable, which, like liability for hidden defects or for fault, were based on other grounds.

(6) <u>Foreign currency loans for consumers</u>: judgments of the European Court of Justice in BNP Paribas Personal Finance of 10th June 2021, Cases C-776/19; C-777/19; C-778/19; C-779/19; C-780/19; C-781/19; C-782/19

The facts of these judgments date back to 2008 and 2009. At the time, consumers had taken out mortgage loans with BNP Paribas Personal Finance to purchase real estate or shares in real estate companies. The loans were denominated in Swiss francs but repayable in Euros. Although the **foreign exchange risk** was not explicitly mentioned in the loan agreements, it could be indirectly foreseen. After consumers had difficulties with the payment of the monthly instalments, they took legal action in France. One of the key questions was whether clauses in the loan agreements that exposed consumers to an unlimited foreign exchange risk were to be regarded as unfair within the meaning of the Directive on unfair terms in consumer contracts (Directive 93/13/EEC). If this were the case, they would not be binding and would be regarded as non-existent from the beginning.

The ECJ held, following a request for a preliminary ruling by the Tribunal de grande instance de Paris, that a consumer's application for a declaration of unfairness of a contractual term is not subject to a limitation period, because in the case of an unfair term it is to be regarded as never having existed. However, from the ECJ's point of view, a limitation period may be provided for by national legislation for an action claiming reimbursement resulting from such a finding of unfairness. However, the limitation period for the repayment must not have been

already expired before the consumer had the opportunity to become aware of the unfairness of such a term.

From the ECJ's point of view, the **requirement of transparency is not satisfied** by providing the consumer with a lot of information upon conclusion of the contract if it is based on the hypothesis that the exchange rate between the account currency and the payment currency will remain stable throughout the term of the contract. Given the knowledge of the professional party to the contract of the foreseeable economic context and the better means available to the professional party to foresee the foreign exchange risk and a significant risk relating to foreign exchange variations, the ECJ states that such clauses may cause a **significant imbalance** in the parties‘ rights and obligations arising under the loan agreement, to the detriment of the consumer.

(7) Individual arbitration agreements: Opinion of Advocate General Kokott, 22nd April 2021, Case C-109/20

In her opinion regarding the case Republic of Poland v PL Holdings Sàrl, Advocate General Kokott had to deal with the question to what extent the **so-called Achmea case law** of the ECJ regarding a general arbitration clause in investment agreements between Member States for the benefit of investors should also apply to an individual arbitration agreement between an EU Member State and an investor. Specifically, the ECJ had decided in Achmea (judgment of 6th March 2018, case C-284/16) that arbitration clauses in favour of investors in investment agreements between Member States are incompatible with the EU law. On the other hand, the Advocate General demonstrates in her current opinion that the ECJ accepts rules on **commercial arbitration** based on private autonomy, at least to a certain extent (judgments Nordsee C-102/81 and Eco Swiss C-126/97), if the EU rules concerned are not of a fundamental nature. In contrast, the Advocate General does not regard the current case between a Member State and a private investor as a trade dispute of the same order, but emphasises the connection with the exercise of sovereign powers. As a result, she argues in favour of **full range EU legal control** and thus for an application of the Achmea principles to the case constellations now under consideration. It remains to be seen whether the ECJ will follow this Advocate General’s Opinion.

(8) European data protection law: New GDPR standard contractual clauses

The European Commission has adopted new standard contractual clauses, which were published in the Official Journal on 4th June 2021 (OJEU L 199, p. 18 et seq.). In particular, these include model clauses for the **transfer of personal data** to third countries (p. 31 et seq.) - a topic that has once again received special attention, especially following the ECJ ruling in Schrems II of 16 July 2020 (Case C-311/18), when the ECJ no longer considered the transfer of personal data to the USA to be permissible on the basis of the so-called Privacy Shield. There

is now an 18-month transition period to replace contracts from the past. **Four modules** are available, in particular Module I (transfers from controller to controller), Module II (transfers from controller to processor), Module III (transfers from processor to processor), Module IV (transfers from processor to controller). However, the Conference of Independent Data Protection Authorities of the Federation and the Länder (DSK) assumes in a **communication of 21st June 2021**, as does the European Data Protection Committee (EDPC), that despite these new EU standard contractual clauses an examination of the legal situation in the third country is necessary. Additional supplementary measures may be needed, too.

(9) Company data protection officer: Order (for reference) of the Federal Labour Court of 27th April 2021, ref. no. 9 AZR 383/19 (A) to the European Court of Justice

The German Federal Labour Court (Bundesarbeitsgericht) was confronted with the question whether a company data protection officer who is also works council chairman was entitled to be dismissed from his office as data protection officer given the entry into force of the European General Data Protection Regulation (GDPR). From the perspective of German law, an important reason is required for dismissal. In contrast, the requirements under European law, Article 38 (3) sent. 2 GDPR, are more generous and only prevent a dismissal if it is made because of the performance of the data protection officer's duties. The Federal Labour Court **did not see any good cause for dismissal** under German law and would therefore now like to know from the ECJ whether these national regulations are applicable alongside the European regulation and whether the possibility of dismissing a data protection officer may thus be restricted compared to regulations under EU law. Should the ECJ agree, the question also arises from the Federal Labour Court's point of view as to whether the **offices of works council chairperson and data protection officer** may be exercised in a company in personal union or whether there instead is a conflict of interest within the meaning of Article 38 (6) sent. 2 of the GDPR.

(10) Primacy of EU law over national law or exceeding of competences? Communication of the Commission of 9th June 2021 on the initiation of infringement proceedings against Germany due to the ECB ruling of the Federal Constitutional Court

The European Commission has initiated infringement proceedings against Germany pursuant to a notification issued on 9th June 2021. Germany has two months to reply to the Commission. The background of this is the ruling of the Federal Constitutional Court of 5th May 2020, in which the highest German court partially classified the European Central Bank's government bond purchase programme, which had been approved by the ECJ, as unconstitutional and in this respect denied its legal effect in Germany. The Commission accuses Germany of having violated the **principle of the primacy of EU law** and, in particular, of not having complied with the principles of **autonomy, primacy, effectiveness, and uniform application of Union law**. The Constitutional Court, on the other hand, claims to examine within the framework of

its jurisdiction whether EU institutions, bodies, and agencies **exceed the limits of their competences** (so-called "ultra vires" doctrine). Such limits result, in its view, also in the eyes of the ECJ, from the so-called "**principle of conferred powers**". According to this principle, laid down in Art. 5 TEU, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. All competences not conferred on the EU in the Treaties remain with the Member States. The delimitation can prove very difficult in individual cases and gives **room for many additional legal opinions**, provided the unlikely case that the infringement proceedings cannot resolve the differences of opinion between the national and European levels once and for all.

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