Newsletter

Week XXXVIII - XXXIX: 16th to 27th September 2024

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All times are 9:30 unless otherwise stated.

Week XXXVIII 16th to 20th September

Wednesday 18th September

General Court

Judgment in Case T-334/19 Google and Alphabet v Commission (Google AdSense for Search)

(Competition – Dominant position)

Google and its parent company Alphabet (referred to as 'Google') have operated an advertising platform called AdSense since 2003. Google has developed various services in this respect, including, in particular, an advertising intermediation service for online searches called AdSense for Search ('AFS').

AFS enabled website publishers to display advertisements linked to online searches that users could perform on websites containing an integrated search engine ('online search ads'). That way publishers could receive part of the revenue generated by the display of these advertisements.

To use AFS, publishers had the choice of either entering into an individually negotiated 'Google Services Agreement' ('GSA') with Google or a standard non-negotiable 'online contract'.

In 2010, a German company filed a complaint with the German Federal Cartel Office. This complaint was transferred to the European Commission. Between 2011 and 2016, Microsoft, Expedia, Initiative for a Competitive Online Marketplace and Deutsche Telekom filed additional complaints.

In 2016, the Commission opened proceedings focusing on exclusivity, placement and prior authorisation clauses. It identified a potential abuse of a dominant position. In September 2016, Google removed certain clauses from its AFS agreements.

In March 2019, the Commission found that Google and, from October 2, 2015, Alphabet had committed three separate infringements which together constituted a single and continuous infringement from January 2006 to September 2016. It imposed a fine of €1,494,459,000 on Google, including €130,135,475 jointly and severally with

Don't forget to check the diary on our website for details of other cases.

Alphabet (Commission's decision of 20 March 2019 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (AT.40411 — Google Search (AdSense) – see summary).

Google asked the General Court to annul (in whole or in part) the mentioned Commission's decision and/or to annul or reduce the fine imposed.

Background Documents T-334/19

There will be a press release for this case.

Thursday 19th September

Judgment in Joined Cases C-555/22 P United Kingdom v Commission and Others, C-556/22 P ITV v Commission and Others and C-564/22 P LSEGH (Luxembourg) and London Stock Exchange Group Holdings (Italy) v Commission and Others

(Competition – State aid)

In 2019, the European Commission found that, between 2013 and 2018, the United Kingdom had granted unlawful state aid to certain multinational groups by conferring tax advantages on them.

It considered that the reference framework, which is relevant for examining the existence of a selective advantage, is limited solely to the rules applicable to controlled foreign companies (CFCs) and that the exemptions granted constituted a derogation from that framework.

The United Kingdom and ITV challenged the Commission's decision (Commission Decision (EU) 2019/1352) before the General Court of the European Union.

In 2022, the General Court rejected their appeals, upholding the Commission's arguments (judgment of the General Court of 8 June 2022, Joined cases United Kingdom and ITV v Commission T-363/19 and T-456/19).

By their respective appeals, the United Kingdom of Great Britain and Northern Ireland (C-555/22 P), ITV plc (C-556/22 P) and LSEGH (Luxembourg) Ltd and London Stock Exchange Group Holdings (Italy) Ltd (together 'LSEGH') (C-564/22 P) seek to have the General Court's judgment set aside.

Background Documents C-555/22 P, C-556/22 P and C-564/22 P

There will be a press release for these cases.

Thursday 19th September

Judgment in Case C-264/23 Booking.com and Booking.com (Deutschland)

(Competition)

Booking.com, a company incorporated under Dutch law and headquartered in Amsterdam (Netherlands), offers a global online intermediation service for booking accommodation.

Hotels pay Booking.com a commission for every reservation made by travellers using the platform. Although hotels may use alternative sales channels, they are prohibited from offering overnight stays at prices lower than those offered on the Booking.com website.

Initially, this prohibition applied both to offers on hoteliers' own sales channels and to offers on sales channels operated by third parties (the so-called “extended parity” clause). Since 2015, a restricted version of this clause only prohibits the offer of nights at a lower price through the hotelier's own sales channels.

The German courts, without questioning the Court, ruled that the price parity clauses (restricted or extended) used by hotel reservation platforms were contrary to EU competition law in particular. The German Federal Competition Authority had already reached the same conclusion.

Following an application by Booking.com for a declaration that the parity clauses employed by that company were valid, the Amsterdam court decided to refer questions to the Court of Justice for a preliminary ruling on the compatibility of both extended and restricted price parity clauses with EU competition rules.

Background Documents C-264/23

There will be a press release for this case.

Thursday 19th September

Judgment in Joined Cases C-512/22 P Fininvest v ECB and Others and C-513/22 P Berlusconi v ECB and Others

(Economic and monetary policy)

Fininvest is a holding company under Italian law, which was majority-owned by Mr Silvio Berlusconi. It held shares in Mediolanum, a financial company listed on the stock exchange, which in turn held 100% of the capital of Banca Mediolanum, a credit institution.

In 2014, the Bank of Italy ordered, among other things, the disposal of Fininvest's stake in Mediolanum exceeding 9.99%. This was motivated by the fact that Mr Berlusconi had been convicted of tax fraud and therefore no longer fulfilled the requirement of good repute.

This decision by the Bank of Italy was overturned by the Council of State, Italy on March 3, 2016. Meanwhile, in 2015, Mediolanum was absorbed by its subsidiary Banca Mediolanum.

Following the absorption of Mediolanum by Banca Mediolanum and the above-mentioned judgment of the Council of State, the Bank of Italy and the European Central Bank (ECB) considered that Mr Berlusconi and Fininvest had acquired a qualifying holding in the capital of Banca Mediolanum (see Article 4 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms).

EU law provides that such an acquisition should be preceded by a notification and assessed by the competent national authority, which then sends the ECB a proposal for a decision (see above mentioned Regulation (EU) No 575/2013 and Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms).

It is for the ECB to decide whether or not to oppose the acquisition of a qualifying holding. Referred to by the Bank of Italy, the ECB opposed the acquisition in question on the grounds that Mr Berlusconi did not satisfy the good repute criterion.

The action brought by Mr Berlusconi and Fininvest for annulment of the ECB's decision was dismissed by the General Court.

Fininvest and Mr Berlusconi's successors appealed against that judgment.

Background Documents C-512/22 P and C-513/22 P

There will be a press release for these cases.

Thursday 19th September

Judgment in Case C-23/23 Commission v Malte (Derogations for research purposes)

(Environment)

In the European Union, wild finches are protected by the Birds Directive ("Directive"). The primary objective of the Directive is the preservation of all bird species diversity, forbidding the deliberate killing or capture of birds and the use of large scale or non-selective methods to do so. Despite this, the Directive, however, prescribes specific

circumstances whereby the general prohibition may be derogated from.

When Malta joined the EU, the relative Accession Treaty provided for a transition period whereby Malta obligated itself to gradually phase out the activities of bird trapping since such practice is prohibited under the Directive.

After successfully banning finch trapping, in 2014 Malta adopted the recreational derogation regime provided for under the Directive to enable the trapping of seven species of wild finches as a recreational activity.

In 2018, the Court in Commission v Malta (C-557/15 – see also Press Release No 90/18) declared that this regime failed to meet the respective derogation conditions, namely the criterion relating to "small number" (known as the "knowledge gap") and consequently Malta repealed it.

In 2020 Malta adopted the Finches Project under Framework Regulations 2020, which provided for the live capture of the same seven species of wild finches, this time however under a different derogation - the derogation for purposes of research under the Directive. The Commission views this as simply a 'cover up' to enable to continuation of the previous recreational regime, and for this reason, and amongst others, has initiated the present infringement action.

On December 3, 2020 the Commission sent Malta a letter of formal notice indicating that the Finches Project is inconsistent with the provisions of the Directive. Malta replied claiming that the Project is indeed justified by the derogation since it serves research purposes, particularly that of answering the research question; "where do finches that migrate over Malta during post-nuptial (autumn) migration come from?". Ultimately, the Commission delivered its reasoned opinion on June 9, 2021 expressing the same grievances as in the formal notice.

Following discussions between the two parties, Malta repealed Framework Regulations 2020 and adopted Framework Regulations 2021 on October 19, 2021. On December 20, 2023, the Commission lodged its application requesting the Court to declare that Malta has failed to fulfil its obligation under the Birds Directive.

Malta filed its defence on April 21, 2023 requesting the Court to dismiss the action on the basis of inadmissibility or, in the alternative, as unfounded. An oral hearing was held on March 7, 2024 in Luxembourg.

On May 30, 2024, Advocate General Tamara Ćapeta delivered her opinion on this case.

Background Documents C-23/23

There will be an Info Rapide for the case (available on request).

Week XXXIX 23rd to 27th September

Wednesday 25th September

General Court

Judgments in Cases T-446/21 Commission de régulation de l'énergie v ACER, T-472/21 RTE v ACER, T-476/21 TransnetBW v ACER, T-482/21 TenneT TSO and TenneT TSO v ACER, T-484/21 Polskie sieci elektroenergetyczne v ACER and T-485/21 BNetzA v ACER

(Energy)

Under EU law (Regulation (EU) 2015/1222), the transmission system operators (TSOs) of each region must propose a common methodology for allocating the costs of redispatching and counterparty exchanges.

The proposal of the region comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia (CORE region) should have been submitted by March 17, 2018 at the latest.

The TSOs of the CORE region submitted such a proposal to all the national regulatory authorities (NRAs) of this region after the deadline: i.e. March 27, 2019. These NRAs had six months to decide on this proposal.

On September 26, 2019, at the request of those NRAs, the European Union Agency for the Cooperation of Energy Regulators (ACER) decided to extend by six months the time-limit set for them to approve that proposal, i.e. until March 27, 2020.

On March 27, 2020, the Chairman of the Forum of Energy Regulators of the CORE region announced that the NRAs of the CORE region were not in a position to take a decision on the submitted proposal by the same day, as the proposal was considered to be largely incomplete to such an extent that the NRAs were not in a position either to approve it or to request a modification.

On the same day, ACER declared itself competent to adopt a decision on the proposal. On November 30, 2020, ACER adopted, by Decision No 30/2020, the methodology for cost allocation.

Following actions for annulment of that decision before ACER's Board of Appeal, on May 28, 2021 ACER confirmed the decision. Several NRAs brought actions before the General Court of the European Union against the decision of the Board of Appeal ('the Decision').

Background Documents T-446/21
Background Documents T-472/21
Background Documents T-476/21
Background Documents T-482/21
Background Documents T-484/21
Background Documents T-485/21

There will be one press release for these cases.

Wednesday 25th September

General Court

Judgment in Case T-483/21 Polskie sieci elektroenergetyczne v ACER

(Energy)

The European legislator has put in place a legal framework to guarantee the proper functioning of the internal electricity market and, in particular, the operational security of regional electricity networks (see in particular Regulation (EU) 2019/943 on the internal market for electricity and Commission Regulation (EU) 2017/1485 establishing a guideline on electricity transmission system operation).

One of the measures for coordinating this safety is the development of a 'safety methodology (ROSC)'. In particular, this document identifies the risks associated with network operation and develops common procedures in the event of incidents.

The safety methodology (ROSC) is proposed jointly by all the entities responsible (TSOs) for the management, maintenance and development of the electricity network in the region concerned. It also requires the approval of the national regulatory authorities. If the national regulatory authorities fail to reach an agreement within a given timeframe, or at their joint request, the European Union Agency for the Cooperation of Energy Regulators (ACER) decides on such a proposal.

On December 4, 2020, following an extensive period of consultation and discussion, ACER took a decision containing the security methodology (ROSC) for the region comprising thirteen Member States.

Polskie sieci elektroenergetyczne S.A. - the TSO responsible for the electricity network in Poland - applied to have this decision annulled. Having lost the case before the ACER Board of Appeal, the company brought an action before the General Court of the European Union.

In particular, it contested ACER's power to depart from the initial proposal drawn up by the TSOs. In addition, it considers that certain elements of the contested

methodology infringe the powers of the TSOs in a way that is incompatible with EU law.

Background Documents T-483/21

There will be a press release for this case.

Wednesday 25th September

General Court

Judgments in Cases T-570/22 Herbert Smith Freehills v Commission and T-311/23 British American Tobacco Polska Trading v Commission

(Provisions governing the institutions – Access to documents)

The applicants – Herbert Smith Freehills LLP (case T-570/22) as well as British American Tobacco Polska Trading sp. z o.o. on its own behalf and on behalf of 4 other British American Tobacco group companies (case T-311/23) – asked the General Court for the annulment of two Commission decisions pursuant Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents: Commission Decisions C (2022) 4816 and C (2023) 5443.

The applicants asked for access to documents the Commission used to adopt the Delegated Directive 2022/2100, amending Directive 2014/40/EU as regards the withdrawal of certain exemptions in respect of heated tobacco products.

They included, *inter alia*, all documents containing data from the EU's common electronic entry point on the volume of sales of tobacco products by category (expressed in number of cigarettes/cigars/cigarillos or in weight) per Member State between January 1, 2015 and December 31, 2020.

Also, they requested documents containing supporting data and interim documents created within the Commission (including relevant statistics and findings) relating to the Commission's conclusion (recorded in the summary record of the Tobacco Policy Expert Group meeting of December 2, 2021 and presented to the same Group) that developments in the market for heated tobacco products constituted a significant change in the situation within the meaning of Directive 2014/40.

Indeed, after that Tobacco Policy Expert Group meeting, the Commission had informed the representatives of the Member States that "developments in the market for heated tobacco products constituted a significant change in the situation" within the meaning of Directive 2014/40.

On June 15, 2022, the Commission published a report setting out significant developments in the situation for heated tobacco products under Directive 2014/40.

Following the report, on June 29, 2022, the Commission adopted Delegated Directive

2022/2100.

On March 11, 2022 (T-570/22) and on November 4, 2022 (T-311/23), the applicants made distinct applications to the Commission for access to documents under Regulation No 1049/2001.

The documents requested were based on elements extracted from three different databases, namely Euromonitor, the "EU-CEP" and the "Tracking System".

On April 8, 2022 and on January 17, 2023, the Commission partially rejected the requests of access, however disclosing access to some documents corresponding to the subject of the requests the Commission had identified (the "disclosed documents").

The applicants took the view, first, that the Commission had not disclosed all the relevant interim documents and, second, that the Commission should have given it access to information from the relevant underlying databases which can be regarded as existing documents.

On July 3, 2022 and on August 4, 2023, the Commission adopted the two contested decisions (Commissions decisions C (2022) 4816 and C (2023) 5443, maintaining that it did not hold any documents other than those it had already disclosed.

The applicants challenged both decisions, asking the General Court to annul them, contesting that the Commission had no other documents than those disclosed.

In support of their action, the applicants raise, *inter alia*, the alleged infringement of Regulation No 1049/2001, by refusing access to the data contained in the three databases which it used to prepare the report: Euromonitor, the 'EU-ECP' and the 'traceability system'.

Background Documents T-570/22
Background Documents T-311/23

There will be one Info Rapide for these cases (available on request).

Thursday 26th September

Judgment in Case C-768/21 Land Hessen (Data protection authority's duty to act)

(Principles, objectives and tasks of the Treaties – Data protection)

In Germany, a savings bank found that one of its employees had consulted a customer's personal data on several occasions without being authorised to do so.

The savings bank did not inform the customer, as its data protection officer had deemed that there was no high risk to him.

In fact, the employee had confirmed in writing that she had not copied or stored the

data, that she had not passed it on to third parties and that she would not do so in the future. In addition, the Sparkasse had taken disciplinary action against her. The Sparkasse nevertheless notified the Land's data protection commissioner of this violation.

After incidentally becoming aware of this incident, the customer lodged a complaint with the Data Protection Commissioner. After hearing the Sparkasse, the data protection commissioner informed the customer that he did not consider it necessary to take any remedial action against the Sparkasse.

The customer then brought an action before a German court, asking it to order the Data Protection Commissioner to take action against the Sparkasse and, in particular, to impose a fine.

The German court asked the Court of Justice to interpret the General Data Protection Regulation (GDPR) in this regard.

Background Documents C-768/21

There will be a press release for this case.

Thursday 26th September

Judgment in Case C-600/22 P Puigdemont i Casamajó and Comín i Oliveres v Parliament

(Law governing the institutions)

Following the holding, on October 1, 2017, of the referendum on the self-determination of Catalonia (Spain), criminal proceedings were brought against Carles Puigdemont i Casamajó and Antoni Comín i Oliveres (who, at the time, were President and Member of the Autonomous Government of Catalonia, respectively).

They fled Spain. National arrest warrants were issued against them. Mr Puigdemont and Mr Comín subsequently stood as candidates and were elected in the elections to the European Parliament which were held in Spain on May 26, 2019.

On May 29, 2019, the then President of the European Parliament issued an instruction for the purposes of (i) refusing all the candidates elected in Spain access to the “special welcome service” provided to persons newly elected to the European Parliament and (ii) suspending those candidates’ accreditation until official confirmation of their election.

On June 14, 2019, Mr Puigdemont and Mr Comín requested the President of the European Parliament to take note of the results of the elections, as set out in the list of

elected candidates declared by the Spanish Central Electoral Commission on June 13, 2019, in which their names were included. They also requested the President to withdraw the Instruction of May 29, 2019 so that they could, *inter alia*, take their seats and enjoy their rights as Members of the European Parliament from July 2, 2019, the date of the first plenary session following the elections.

On June 17, 2019, the Spanish Central Electoral Commission notified the European Parliament of the list of candidates elected in Spain. The names of Mr Puigdemont and Mr Comín were not on that list because they had not taken the oath to respect the Spanish Constitution, as required by national law.

The Central Electoral Commission therefore declared that their seats were vacant and that all the prerogatives attaching to their duties were suspended.
By letter of June 27, 2019, the President of the European Parliament informed Mr Puigdemont and Mr Comín that he could not regard them as future Members of the European Parliament because their names were not on the list of elected candidates officially communicated by the Spanish authorities.

The following day, Mr Puigdemont and Mr Comín brought an action for annulment before the General Court of the European Union, essentially directed against the refusals of the President of the European Parliament to grant them access to the special welcome service and to recognise their status as Members of the European Parliament (Case T-388/19).

At the plenary session of January 13, 2020, the European Parliament decided to take note, following the delivery of the judgment of the Court of Justice in the case Junqueras Vies (C-502/19 – see also Press Release No 161/19) of the election of Mr Puigdemont and Mr Comín to the Parliament with effect from July 2, 2019.

By judgment of July 6, 2022, the General Court dismissed the action brought by Mr Puigdemont and Mr Comín as inadmissible on the ground that the disputed refusals of the President of the European Parliament were not open to challenge.

Mr Puigdemont and Mr Comín then brought an appeal before the Court of Justice.

Background Documents C-600/22 P

There will be a press release for this case.

Thursday 26th September

Judgment in Case C-792/22 Energotehnica

(Charter of Fundamental Rights – Social policy)

Following the death of an electrician due to electrocution during an intervention, administrative proceedings were opened against his employer. At the same time, criminal proceedings for negligence and manslaughter were opened against the foreman. The victim's family also joined the criminal proceedings.

The administrative court hearing the case concluded that this was not an 'accident at work'. It annulled the administrative sanctions imposed on the employer and foreman. According to national legislation, as interpreted by the Romanian Constitutional Court, this administrative decision prevents the criminal court from reconsidering whether the accident was an accident at work.

In this context, the Court of Appeal of Brașov (Romania) questions the Court of Justice on the compatibility between this national law, as interpreted by the Constitutional Court, and EU law on the safety of workers (Council Directive 89/391/EEC).

Background Documents C-792/22

There will be a press release for this case.

Thursday 26th September

Judgment in Case C-330/23 Aldi Süd

(Consumer protection)

A German consumer association is challenging before a German court the way in which the discounter Aldi Süd advertises in its weekly leaflets by means of price reductions or 'shock prices' such as, for example, for bananas and pineapples.

According to the consumers' association, Aldi is not entitled to calculate a price reduction on the basis of the price immediately prior to the offer (in the first example €1.69), but, in accordance with EU law, should do so on the basis of the lowest price charged by Aldi in the last 30 days (in the first example EUR 1.29; however, that price is identical to the allegedly "reduced" price).

It would not be sufficient simply to mention the lowest price over the last 30 days in the advertisement. The same considerations would apply to the designation of a price as a 'shock price'.

The German court asked the Court of Justice about this.

Background Documents C-330/23

There will be a press release for this case.

HEARINGS OF NOTE*

Court of Justice

Tuesday 17th September 2024: **09:00** – Case C-19/23 Denmark v Parliament and Council (Adequate minimum wages) (Freedom of movement for workers) (**streamed on Curia**)

General Court

Tuesday 17th September 2024: 09:30 – Case T-596/22 PGI Spain and Others v Commission (Competition – State aid)

Tuesday 17th September 2024: 14:30 – Case T-643/22 Yanukovych v Council and Wednesday 18th September 09:30 – Case T-642/22 Yanukovych v Council (Restrictive measures – Ukraine)

Friday 20th September 2024: 09.30 – Case T-334/22 Danske Fragtmænd v Commission (Competition – State aid)

Monday 23rd September: 14:30 – Case T-289/23 Khan v Council (Restrictive measures – Ukraine)

Tuesday 24th September: 09.30 – Case T-329/23 Czech Republic v Commission (Law governing the institutions)

Wednesday 25th September: 09.30 – Joined cases T-577/22 and T-648/22 ClientEarth v Council (Fisheries policy)

Wednesday 25th September: 09.30 – Case T-281/23 Dana Astra v Council (Restrictive measures – Belarus)

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