November 2023

VBB on Competition Law

Issue Highlights

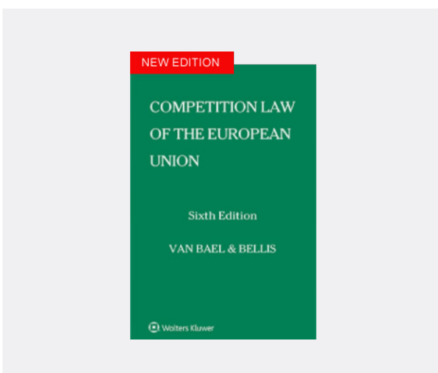
MERGER CONTROL
ECJ upholds (slightly reduced) gun jumping fine against Altice
Page 3

FOREIGN DIRECT INVESTMENT
German Court for the first time annuls a government decision prohibiting a foreign acquisition under the German FDI rules
Page 6

CARTELS AND HORIZONTAL AGREEMENTS
From smoke-filled backrooms to online chatrooms: European Commission fines Rabobank for participation in bonds cartel
Page 8

VERTICAL AGREEMENTS
Apple and Amazon's restrictions on sales of Apple brand products on Amazon Marketplace subject to a further larger fine
Page 11

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS
11th Amendment to the German Act against Restraints of Competition introduces new intervention instruments for the German Federal Cartel Office
Page 14



Jurisdictions covered in this issue

EUROPEAN UNION........3, 8
BELGIUM........5
GERMANY........6, 14
ITALY........7
SPAIN........11

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

vbb@vbb.com
www.vbb.com

Table of contents

MERGER CONTROL 3

European Union level 3

ECJ upholds (slightly reduced) gun jumping fine against Altice 3

National level 5

Belgian Competition Authority closes Proximus investigation following the divestment of its recently acquired rival 5

FOREIGN DIRECT INVESTMENT 6

National level 6

German Court for the first time annuls a government decision prohibiting a foreign acquisition under the German FDI rules 6

Italian case proves that Foreign Direct Investment regime can also bite non-usual suspects 7

CARTELS AND HORIZONTAL AGREEMENTS 8

European Union level 8

From smoke-filled backrooms to online chatrooms: European Commission fines Rabobank for participation in bonds cartel 8

Court of Justice provides guidance on non-compete clauses, ancillary restraints and 'by object' restrictions 8

VERTICAL AGREEMENTS 11

National level 11

Apple and Amazon's restrictions on sales of Apple brand products on Amazon Marketplace subject to a further larger fine 11

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 14

National level 14

11th Amendment to the German Act against Restraints of Competition introduces new intervention instruments for the German Federal Cartel Office 14

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances.
The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

© 2023 Van Bael & Bellis

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

European Union level

ECJ upholds (slightly reduced) gun jumping fine against Altice

On 9 November 2023, the European Court of Justice ("ECJ") issued a judgment upholding the European Commission's ("Commission") imposition of a gun jumping fine on Altice in connection with its acquisition of PT Portugal. Although the ECJ reduced the amount of the original €124.5 million fine to €115.5 million, the decision confirms the Commission's strict approach to procedural enforcement in merger control.

In 2018, the Commission issued the (then) largest gun jumping fine in its history on Altice for implementing the acquisition of PT Portugal by exercising decisive influence before notifying the transaction and achieving merger clearance. Specifically, the Commission concluded that the pre-closing covenants went beyond what was necessary to preserve the value of the target and provided Altice the possibility of exercising "decisive influence" over PT Portugal. The covenants gave Altice a right to co-determine (amounting to a veto power over) major elements of PT Portugal's commercial policies including: the modification of PT Portugal's pricing policies outside the ordinary budget, the appointments, dismissals and contract terms of its officers and directors as well as the termination or modification of certain commercial contracts. The Commission further found that Altice had made use of these rights to exercise decisive influence over PT Portugal – a finding corroborated by the exchange of sensitive commercial information between the parties during the pre-closing period. The Commission fined Altice €64.5 million for the violation of the EU Merger Regulation's ("EUMR") notification requirements under Article 4(1) and a further €64.5 million for violating the standstill provision under Article 7(1) EUMR.

The General Court ("GC") confirmed the Commission's decision on appeal, but reduced the fine under Article 4(1) EUMR by 10% based on the principle of proportionality, given that Altice had notified the transaction of its own volition shortly after the problematic SPA was signed (see VBB on Competition Law, Volume 2021, No. 8-9).

On further appeal to the ECJ, Altice argued, among other things, that the GC substantively erred in its application of the concept of "implementation" or "partial implementation" of a concentration. First, Altice contended that it did not partially or wholly implement the transaction before clearance merely by virtue of the pre-closing covenants. These SPA provisions were not necessary to contribute to a lasting change in control of the target (indeed they were meant to govern only the interim pre-closing period) and as such did not have any "direct functional link" with the implementation of the concentration itself. The SPA's pre-closing covenants should, Altice argued, be considered steps that are ancillary or preparatory to the transaction, which the ECJ concluded in *Ernst & Young* do not amount to partial implementation (see VBB on Competition law, Volume 2018, No.5). Second, Altice argued that it had not received veto rights in the pre-closing covenants that amounted to a change in control. Rather, the covenants only obliged PT Portugal to seek Altice's consent before taking certain actions. If consent was withheld, PT Portugal was not obliged to defer to Altice, but merely required to indemnify it for any resulting losses.

The ECJ refuted Altice's arguments. On partial implementation, the ECJ observed that although a concentration must result in a *lasting* change of control, the steps that bring about such a change (and that constitute partial implementation) do not themselves need to be of indefinite duration to constitute implementation. The ECJ also clarified that its judgment in *Ernst & Young* does not require a measure to be "necessary" to effect a lasting change in control in order for it to constitute partial implementation of a concentration. On the subject of whether the SPA conferred veto rights, the ECJ observed that Altice did not dispute that the covenants required PT Portugal to seek Altice's approval for commercial policy matters, attached a penalty if PT Portugal did not do so, and that the scope of these covenants extended beyond what was necessary to preserve the value of the target. This finding was enough for the GC to validly

© 2023 Van Bael & Bellis

find that Altice had the possibility to exercise decisive influence, whether or not these rights could formally be characterized as veto powers over PT Portugal's decisions.

Altice also argued that the Commission could not validly issue fines for breaches of both Article 4(1) and 7(1) EUMR cumulatively, without violating the principles of proportionality and double jeopardy. The ECJ dismissed this argument relying on its analysis of the same arguments raised in *Marine Harvest* (see VBB on Competition Law, Volume 2017, No. 10).

Finally, Altice contended that the Commission had inadequately explained why it had fined Altice exactly the same amount for the violation of Article 4(1) EUMR as for the violation of Article 7(1) EUMR, even though the former was an instantaneous infringement whereas the latter was a continuous one. The ECJ found that the GC had erred in rejecting this argument and held that the Commission had indeed failed to state its reasons for the fine issued for the violation of Article 4(1). It therefore took the initiative to lower the fine for that violation to €52.9 million.

In sum, the ECJ's ruling is consistent with the approach taken in *Ernst & Young* and that taken by the GC in *Canon* (see VBB on Competition Law, Volume 2022, No. 6). There is clearly a narrow line for merging parties to tread between acts that are merely preparatory and will not result in gun jumping and those that have a sufficient "functional link" to the change in control to constitute partial implementation of the concentration. The GC noted that in *Ernst & Young* the ECJ did not establish a fixed test or set of criteria to determine whether a step is purely preparatory or not. Despite directly acknowledging the GC's observation, the ECJ nonetheless chose not to outline any such criteria in this judgment. This is a missed opportunity, as there remains a wide grey area in which merging parties must judge whether pre-closing steps may constitute partial implementation of a transaction.

For now, merging parties are advised to limit closing conditions in SPAs to those necessary to preserve the value of the business, and to avoid conferring any veto rights over any matters falling outside these bounds (regardless of whether such rights are actually exercised in practice).

MERGER CONTROL

National level

BELGIUM

Belgian Competition Authority closes Proximus investigation following the divestment of its recently acquired rival

On 6 November 2023, the Belgian Competition Authority ("BCA") closed its investigation of Proximus for allegedly abusing its dominant position by acquiring failing rival EDPnet.

The BCA had opened an investigation following the March 2023 *Towercast* judgment, in which the ECJ confirmed that national competition authorities could examine mergers that do not meet merger control thresholds under the Article 102 TFEU abuse of dominance rules (see VBB on Competition Law, Volume 2023, No. 3).

Although the Enterprise Court of Ghent had approved the sale to Proximus as part of EDPnet's judicial reorganization, the BCA opened an investigation noting that Proximus was likely dominant and its acquisition might eliminate its only competitor on the market for high-speed access over copper/fibre networks. The acquisition could also hinder the entry and development of a new mobile operator on the retail market for fixed broadband access for residential customers and very small businesses. In June 2023, the BCA imposed interim measures citing these concerns (see VBB on Competition Law, Volume 2023, No. 6). Ultimately, Proximus divested EDPnet to Citymesh, prompting the BCA to close its investigation.

The *Proximus* investigation is significant in that it is one of the first applications of the *Towercast* judgment and has resulted in a success from the authority's point of view. In the past year, many of the gaps allowing transactions to escape antitrust assessment are closing. Under the Commission's new policy toward Article 22 referrals, it now accepts merger referrals from national competition authorities even if no national merger control thresholds are met in the EU. With *Towercast*, national competition authorities have yet another tool in their arsenal to assess potentially problematic transactions that otherwise would have escaped review.

© 2023 Van Bael & Bellis

FOREIGN DIRECT INVESTMENT

National level

GERMANY

German Court for the first time annuls a government decision prohibiting a foreign acquisition under the German FDI rules

On 15 November 2023, the Berlin Administrative Court[1] ("Court") annulled the decision of the German Federal Ministry for Economic Affairs and Climate Action ("Ministry") prohibiting the acquisition by Chinese Aeonmed group of German medical device manufacturer Heyer Medical, which produces respiratory devices (such as ventilators). The Ministry had prohibited the acquisition in April 2022 on the grounds of a likely negative effect of this foreign investment on public order or security in Germany.

The Court now annulled the Ministry's decision on procedural grounds, by ruling that the opening of the Ministry's investigation was time-barred, and that the Ministry had breached the parties' right to be heard. The Ministry had last given the acquirer an opportunity to be heard as much as one year before the prohibition decision was issued. The Court held that the Ministry should have given the acquirer an opportunity to comment on the facts and allegations on which its decision was to be based before prohibiting the acquisition. The Court did not rule on the substance of the Ministry's decision, i.e., whether the investment likely posed a risk to public order or security and thus whether the Ministry's theory of harm was well-founded.

Aeonmed's acquisition of Heyer Medical had in fact already closed in July 2019 without being investigated by the Ministry, as the transaction was not subject to a mandatory notification requirement under the FDI rules in force at the time. The Ministry only became aware of the transaction in April 2020 through a news article. In July 2020, Aeonmed applied to the Ministry for a so-called "certificate of non-objection", which may be requested under the German FDI rules with a view to obtaining legal certainty that the Ministry will not investigate a transaction. This is important as the Ministry may investigate a foreign acquisition within a period of five years from the conclusion of the purchase agreement, provided that the Ministry had not become aware of the transaction earlier. Under the FDI rules applicable at the time, the Ministry could only start an investigation within three months of becoming aware of the transaction (under the current FDI rules, this time-limit is reduced to two months).

Instead of granting the requested certificate of non-objection, the Ministry opened an investigation in August 2020. However, since the Ministry had already become aware of the transaction in April 2020, the Court ruled that the investigation was time-barred. According to the Court, Aeonmed's application for a certificate of non-objection in July 2020 triggered a separate time-limit of two months for the opening of an investigation. However, this did not change the fact that the first time limit, which started to run when the Ministry became aware of the transaction, had already expired when the Ministry opened its investigation.

The Court's ruling supports the frequently expressed criticism of German FDI proceedings, which are said to be largely politically motivated and to lack transparency. This first judgment annulling an FDI prohibition decision could therefore send an important signal that German FDI proceedings have to better respect the rights of the parties and thereby also become more transparent. The German Ministry can still appeal the judgment to the Higher Administrative Court of Berlin-Brandenburg.

1 The text of the judgment is not yet available, but the Court has issued a press release on its judgment.

FOREIGN DIRECT INVESTMENT

National level

ITALY

Italian case proves that Foreign Direct Investment regime can also bite non-usual suspects

On 16 November 2023, the Italian Government issued a decree stating that it had applied the golden powers (i.e., the national foreign direct investment screening legislation) to prohibit Safran USA Inc's (a US-based subsidiary) proposed USD 1.8 billion acquisition of the Italian defence company Microtecnica. The target is an Italian-based subsidiary which provides actuation and flight control systems for commercial and military aircrafts. Despite the clear link to defence, the application of the FDI legislation to this transaction is striking considering that the parent company Safran SA – the world's second largest aircraft equipment manufacturer – is based in another EU country (France) and its biggest shareholder is the French Government, with other important investors established in the US, the UK and France. Although the full reasoning behind this decision is not public, it appears that the main reason lies in the consideration that the deal may have threatened supplies to national armed forces, and would have caused potential interruptions to logistics chains.

Following its introduction in 2012, the national FDI regime has almost exclusively been used to block foreign investments based on links to countries, such as China or Russia, that are perceived to pose a threat to national essential interests. For instance, the investing companies have been either directly from such countries (e.g., Alpi Aviation and Mars Info Technology in 2022, or Fastweb and Huawei in 2020), or had connections to Russian-based entities (see Nebius and Tecnologia Intelligente, 2023). A notable precedent where the national FDI regime was applied to an investor without ties to China or Russia again involved France, namely when in 2017 Vivendi, a French mass media holding company, failed to notify the Italian government that it had allegedly *de facto* control of TIM (one of Italy's biggest telephone companies). The government then used the golden powers to block certain strategic decisions of TIM and to impose certain conditions on its activities, citing again the need to defend national interests for defence and security.

Thus, whilst not uncommon, it remains a highly unusual move from the Italian Government to block an investment from another EU and NATO member. It appears that this time its focus, rather than on acquirer risk, was on the sensitivity of the target assets and the need to retain them and their control within the country. The case will not make the already enigmatic law any easier to apply in practice to foreign investments. The regime was previously criticised due to the broad definitions given to the strategic sectors falling under the FDI control, as a result of which a significant increase in precautionary filings under the new pre-notification procedure had already occurred. The Safran case could further increase the hesitance of non-Italian investors.

© 2023 Van Bael & Bellis

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

From smoke-filled backrooms to online chatrooms: European Commission fines Rabobank for participation in bonds cartel

On 22 November 2023, the European Commission ("Commission") imposed a €26.6 million fine on Rabobank, a Dutch banking and financial services multinational company, for its participation between 2006 and 2016 in a cartel together with Deutsche Bank, a German multinational investment bank and financial services company. Deutsche Bank avoided a fine of €156 million by reporting the infringement to the Commission through the Leniency Programme.

According to the Commission, certain traders employed at the companies' London and Frankfurt offices used online chatrooms, emails, and messages to exchange commercially sensitive information and to coordinate their trading and pricing strategies for Euro-denominated SSA bonds and Government Guaranteed bonds. The information shared concerned (i) prices, volumes, and trading strategies, (ii) the identities of counterparties and (iii) what the traders looked for when purchasing or selling bonds.

The investigation began in 2017 following Deutsche Bank's immunity application under the 2006 Leniency Notice. The Commission issued a Statement of Objections in December 2022 after having initially considered the possibility of settlement, and later deciding to continue with the case under the standard infringement procedure due to a lack of progress.

According to the Commission, the impact of the banks' conduct was not only felt in Europe, with a class action lawsuit involving the two undertakings having been filed in the US in December 2022 by several pension funds.

The banking sector has been subject to intensive scrutiny by competition authorities in the last decade: in December 2021, fines were imposed by the Commission on several banks for having participated in two cartels on foreign exchange markets by sharing sensitive information in online chatrooms (i.e., the Forex cartels). In 2018, the UK Competition and Markets Authority launched an investigation into the exchange between banks in online chatrooms of competitively sensitive information regarding British government bonds trading and has recently issued a Statement of Objections.

Over the past decade, concerns over the use of inter-dealer chatrooms by traders to share commercially sensitive information had caused certain of the banks involved in various cartel investigations to assess their partial banning, and to begin limiting their use, at least for the length of the investigations by the relevant competition authorities.

Court of Justice provides guidance on non-compete clauses, ancillary restraints and 'by object' restrictions

On 26 October 2023, the Court of Justice ("ECJ") delivered its judgment in Case C-331/21, *EDP v. Autoridade de Concorrência*, in which it provides guidance on the interpretation of Article 101 TFEU in relation to the concepts of potential competition, ancillary restraints and restrictions of competition by object. The case stems from a preliminary ruling request by the Court of Appeal of Lisbon, arising from an appeal lodged against a decision of the Portuguese competition authority - the *Autoridade da Concorrência* ("ADC") - fining Modelo Continente ("MC") and EDP Energias a total of €34.5 million for infringing the Portuguese equivalent of Article 101 TFEU. In its decision, the ADC had taken the view that certain non-compete obligations agreed to by EDP and Modelo Continente amounted to market sharing.

Background

MC is a Portuguese company active in the food distribution and consumer products sector and is part of the Sonae group, which is active in the energy sector. EDP Energial

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

and EDP Comercial (EDP Group) is the largest Portuguese player on the markets for the production, distribution, and supply of electricity.

The main proceedings concerned an association agreement which was concluded between EDP Comercial and MC in 2012. At the time that agreement was concluded, MC was active on the market for the retail sale of food products and consumer products in Portugal, while EDP Comercial was active on the markets for the supply of electricity and natural gas in Portugal. The agreements provided reductions in electricity prices for those customers holding a "Continente Card", a discount card issued by MC as part of a loyalty program. To benefit from a 10% reduction on their electricity consumption, customers had to both conclude a contract for the supply of low-voltage electricity with EDP Comercial and to hold the Continente Card. Initially, the amount of the reductions was borne entirely by EDP Comercial, later it was agreed that MC would bear part of it.

The agreement included a reciprocal non-compete obligation. MC undertook not (i) to engage in the activity of supplying electricity and natural gas in Portugal nor (ii) to conclude with any other electricity or natural gas supplier agreements which could grant discounts relating to electricity or natural gas. EDP undertook corresponding obligations on the market for the retail distribution of food products in Portugal.

The ECJ's findings

In assessing the compatibility of the non-compete obligation with Article 101 TFEU, the ECJ's judgment touched upon several interesting points, including the concepts of potential competition, ancillary restraints and restrictions of competition by object under Article 101 TFEU.

Regarding the interpretation of the definition of potential competition, the ECJ recalled its case law in the pay-for-delay cases in the pharma sector (in particular, its 2020 judgment in *Generics* (Case C-307/18)). The ECJ stated that, in liberalised sectors with lower market entry barriers, it is much more likely that undertakings might be viewed as potential competitors as, *inter alia*, it is not necessary for them to take preparatory steps to enter the market. The ECJ also took the view that the conclusion of a non-compete clause is itself a strong indicator that there is potential competition because, if the parties to a non-compete agreement did not perceive themselves as potential competitors, they would, in principle, have no reason to conclude such an agreement. Therefore, the crucial question was whether there was a real and concrete possibility for MC to enter the market for the supply of electricity. On this point, the ECJ found that the activities in the energy sector of the Sonae Group, to which MC belonged, can be particularly relevant, irrespective of the question whether Sonae and MC formed one undertaking for competition law purposes.

Regarding the interpretation of the concept of ancillary restrictions, the ECJ recalled that, in *Mastercard* (Case C-382/12 P), it had stated that, if a given operation or activity is not caught under Article 101(1) TFEU, the restriction of the commercial autonomy of the participants in that operation does not breach competition law, if it is objectively necessary to the implementation of that operation and is proportionate to its objectives. The test of necessity is interpreted strictly by the ECJ: the question is whether it would be impossible for the company concerned to carry out the operation/activity in the absence of the restriction in question. Though leaving the factual assessment of the case to the referring court, the ECJ noted that the non-compete: (i) exceeded the duration of the association agreement by one year and (ii) was not limited solely to the supply of low voltage electricity. The ECJ recalled that, in order to determine whether a non-compete was necessary to protect business secrets, the referring court should carefully assess whether there were less restrictive solutions available to the parties.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Regarding the interpretation of the category of 'by object' restrictions, the ECJ recalled that a market sharing agreement can be viewed as being so harmful to competition as to constitute a restriction of competition by object. In the present case, the ECJ ruled that the referring court will need to take account of the fact that the non-compete clause coincided with the final phase of liberalisation of the market for the supply of electricity in Portugal and it will also need to assess whether any pro-competitive effects were in fact specific to the non-compete clause itself and not simply connected with the association agreement as such.

© 2023 Van Bael & Bellis

VERTICAL AGREEMENTS

National level

SPAIN

Apple and Amazon's restrictions on sales of Apple brand products on Amazon Marketplace subject to a further larger fine

On 12 July 2023, the Spanish National Markets and Competition Commission (CNMC) imposed a fine of €50,5 million on Amazon and €143,6 million on Apple for infringing Article 101 TFEU in relation to the distribution of Apple products over Amazon Marketplace in Spain. The CNMC has since published its full decision. The decision reveals in particular:

- a debatable assessment of certain restrictions on the online sale and promotion of Apple and competing products as restrictions of competition by object; and
- a narrow approach to retail market definition by distinguishing separate markets for online and offline sales channels.

Facts

In 2018, Amazon renewed its global distribution agreements with Apple. Under the new agreements, Amazon gained access to the full range of Apple products (whereas the previous distribution agreements authorized Amazon to distribute only a limited selection of Apple products). In addition to regulating Amazon's conditions as an authorized Apple reseller, the agreements contained (i) Brand Gating Clauses, requiring Amazon to limit the number of resellers of Apple products that could operate on Amazon Marketplace to certain resellers specifically identified by Apple, (ii) Advertising Clauses, preventing Amazon from displaying advertisements for competing non-Apple products in response to keyword searches related to Apple products, and (iii) Marketing Limitation Clauses, preventing Amazon from running marketing campaigns targeting customers that had purchased Apple products from Amazon designed to encourage such customers to switch from an Apple product to that of a competitor (including for a period of two years after the term of the distribution agreement). Only a small proportion of Apple products were sold under selective distribution, and these were not subject to the proceedings.

In 2021, Apple and Amazon were both fined for agreeing restrictions substantially similar to the Brand Gating Clauses by the Italian Competition Authority (see VBB on Competition Law, Volume 2021, No. 11), a decision that was later annulled by an Italian administrative court on procedural grounds, while a parallel investigation is reportedly ongoing in Germany.

CNMC's Decision

The CNMC considered that the three types of clauses were not covered by the Vertical Agreements Block Exemption Regulation (VBER) because – although forming part of distribution agreements – they did not relate to the conditions of purchase, sale, or resale of the contracted goods or services. In the alternative, the CNMC reasoned that the exemption under Article 2 VBER would have been inapplicable because (i) Amazon and Apple were actual competitors in both the distribution and manufacturing of electronic devices (and the latter factor prevented the application of the dual distribution exception in Article 2(4) VBER) and (ii) the 30% market share threshold was exceeded by both Amazon (on the market for the provision of online intermediation services and on the market for online sales of electronic products in Spain) and Apple (on the market for the manufacture of electronic products and on various narrower markets for the manufacture of smartphones and tablets, and of wearable devices).

The CNMC concluded that the Brand Gating Clauses restricted competition by object under Article 101(1) TFEU since they were aimed at (i) creating dissimilar conditions

VERTICAL AGREEMENTS

National level

for access to Amazon Marketplace by resellers, (ii) limiting the number of resellers on Amazon Marketplace, and (iii) preventing resellers established in other Member States from selling in Spain via Amazon Marketplace. Even if these clauses would not be considered to have the object of restricting competition, the CNMC concluded that they would in any event be considered to infringe Article 101(1) TFEU by effect, taking into account that 90% of the resellers that had been using Amazon Marketplace in Spain to sell Apple products were prevented from doing so after the implementation of the Brand Gating Clauses. This led to those resellers losing an important sales channel, thereby reducing competition in the (narrowly defined) market for online sales of electronic products in Spain. In addition, the CNMC argued that the resulting concentration of sales in the hands of Amazon led to an increase in the relative prices paid by consumers for purchasing Apple products on Amazon Marketplace in Spain, presumably to the advantage of Amazon itself as a reseller of Apple products.

The CNMC concluded that the Advertising Clauses also constituted restrictions by object, as they aimed at limiting the competitive pressure of other brands on Apple's products. Concerning the Marketing Limitation Clauses, the CNMC also likened this type of restriction to a non-compete obligation, in the sense that it limited Amazon's ability to approach customers to encourage them to switch to a competing non-Apple product.

From Amazon's perspective, the acceptance of all three of the types of clauses under investigation was considered to have been motivated by the objective to achieve a complete and direct supply of Apple products.

Commentary

The validity of the conclusion that each element of the infringement constitutes a restriction by object is open to debate, taking into account that the partially horizontal relationship (at the manufacturing level) between the companies would not seem to have materially increased the scope for competitive harm in the context of what was a vertical supply agreement. This is an important point, as the by-object categorisation tends to amount to a legal short-cut (favoured by competition authorities) to establishing an infringement of Article 101(1) TFEU, which then puts the burden on the defendant to demonstrate that the demanding conditions of Article 101(3) TFEU are met.

First, concerning the Brand Gating Clauses, the CNMC's by-object analysis arguably sits uncomfortably with the finding of the ECJ in Coty that an outright prohibition on sales over Amazon does not constitute a hardcore restriction under the VBER because – in the ECJ's view – such a restriction cannot be assumed to sufficiently restrict a reseller's ability to sell effectively over the internet if the reseller remains free to sell through its own store. Although the concepts of hardcore restriction and restriction by object do not necessarily coincide, the reasoning applied by the ECJ suggests that such a restriction may not be considered, as required by the by-object case law, to reveal in itself a sufficient degree of harm to competition to obviate the need to assess its effects (regardless of whether the products are sold under selective distribution, and of whether the restriction is imposed directly, or as in this case, indirectly via Amazon). Furthermore, Advocate General Wahl in Coty concluded that such a restriction would be "*wholly incapable of being classified as a restriction by object*" even if it was considered to be neither objectively justifiable on quality grounds nor non-discriminatory (making it doubtful this view would apply only in the context of selective distribution).

Second, concerning the Advertising Clauses and the Marketing Limitation Clauses, the CNMC's by-object findings do not seem consistent with the ECJ's ruling in *Delimitis* that restrictions on selling competing products in a distribution context only infringe Article 101(1) TFEU where they are found to appreciably impede access to the market by third parties (thus calling for an effects-based analysis). Furthermore, the restrictions agreed

VERTICAL AGREEMENTS

National level

by Apple and Amazon were arguably less extensive than those at issue in *Delimitis* as they did not amount to prohibitions on selling competing products but only limitations on the advertising and marketing of competing products (and even the two years post-term element of the Marketing Limitation Clauses would not qualify as a hardcore restriction under the VBER). As a result, the CNMC's finding that a stricter legal standard should apply to these limitations seems questionable, especially as it is not limited to their application to Amazon's own competing products.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

GERMANY

11th Amendment to the German Act against Restraints of Competition introduces new intervention instruments for the German Federal Cartel Office

On 7 November 2023, the 11th amendment to the German Act against Restraints of Competition (ARC) entered into force. Described as a milestone in German antitrust law, the new amendment provides the German Federal Cartel Office (FCO) with new enforcement powers in the context of sector inquiries, enabling the FCO to impose structural and behavioural measures when it has determined that competition is not effective in a particular market. The 11th amendment also strengthens the power of the FCO to require disgorgement of economic benefits arising from a competition law violation and confers investigative powers on the FCO to support enforcement of the Digital Markets Act (DMA).

1. *Sector Inquiries*

The most significant amendment of the ARC strengthens the FCO's powers in the context of sector inquiries. The main objective of a sector inquiry is to examine and analyse the structures and competitive conditions in a specific economic sector or across sectors in order to provide the FCO with a comprehensive overview of the markets under investigation. Sector inquiries do not investigate suspected competition law infringements and do not target individual companies, although the FCO can initiate antitrust proceedings based on the information obtained during a sector inquiry.

Previously, the FCO concluded sector inquiries with a report explaining whether it has found malfunctioning of competition. The ARC amendment introduces new powers, enabling the FCO to impose or accept remedies when it has found a 'significant and continuing malfunctioning of competition'. For such a finding, three conditions must be met:

- A malfunctioning of competition in light of i) unilateral supply or buyer power in the market; ii) restrictions on entry, exit or the capacity of the companies to switch to another supplier or buyer; iii) uniform or coordinated conduct in the market; or iv) input or customer.

- Under the significance of the malfunctioning, it will be determined whether it has more than a minor negative effect on competition on at least one nationwide market, several individual markets or across markets.

- The malfunctioning is considered continuous if it has existed permanently over a period of three years or occurred repeatedly and there is no indication that the malfunctioning is likely to cease within the next two years.

If a sector inquiry has revealed a significant and continuing malfunction of competition, the FCO can address a decision to one or more companies which have been found to significantly contribute to the malfunctioning of competition by their conduct. Following an oral hearing in which the parties and the Monopolies Commission have a right to be heard, the FCO can order remedies or make commitments offered by the companies binding. Any measure must be imposed within 18 months after the publication of the sector inquiry report.

The non-exhaustive list of potential remedies includes far-reaching behavioural or structural obligations:

- **Behavioural measures**: i) granting of access to company's data, interfaces, networks or other facilities; ii) imposition of requirements on business

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

relationships between the companies; iii) obligation to establish transparent, non-discriminatory and open standards; iv) imposition of certain contractual requirements; v) prohibition of unilateral disclosure of information that encourages parallel behaviour; vi) organizational separation of the company's corporate or business units.

- **Structural measures**: as *ultima ratio* the FCO can order the disposal of shares or assets of companies that are either dominant or have already been found to be of paramount significance for competition across markets pursuant to Section 19a ARC.

After a sector inquiry, the FCO may also order companies active in the investigated sector(s) to notify planned concentrations if i) there are objectively plausible indications that future concentrations could significantly impede effective competition in Germany in the relevant sector(s); and ii) the acquirer has a domestic turnover of more than €50 million and the target company a domestic turnover of more than €1 million in the last business year preceding the concentration.

This is significantly below the generally applicable turnover thresholds of Section 35 (1) ARC which requires a combined aggregate worldwide turnover of all the merging companies of more than €500 million and a domestic turnover of at least one of the merging companies of more than €50 million and that of another company of more than €17.5 million. A decision of the FCO obliging parties to notify their transactions is initially limited to three years and can be extended three times for a three-year period.

2. *Disgorgment Of economic Benefits*

The 11th amendment of the ARC aims to render more effective the instrument of disgorging economic benefits of a company that had infringed competition law. Although the instrument is not new, it has not been applied in practice due to the restrictive and complex calculation requirements. To address this concern, the amendment introduces statutory presumptions that an infringement resulted in an economic benefit, and that this benefit amounts to at least 1% of the domestic turnover generated with the products or services related to the infringement. This presumption can be rebutted only by demonstrating that the worldwide profit of the control group did not reach the presumptive amount. Going forward, the FCO can estimate the economic benefit under a preponderance of probability standard. The disgorgement cannot exceed 10% of the total turnover of the group in the business year preceding the FCO's decision.

3. *DMA Enforcement*

The 11th amendment of the ARC creates a legal basis for the FCO to support the European Commission in enforcing the new DMA by extending the FCO's investigative powers to cases of suspected non-compliance with Articles 5, 6, or 7 of the DMA, and by extending the jurisdiction of the FCO and the rules on cooperation with other authorities. However, the FCO's new powers do not change the fact that the European Commission is the sole enforcement authority under the DMA.

Moreover, the 11th ARC amendment creates a private cause of action for damages where Articles 5, 6, or 7 of the DMA are infringed, and extend the procedural provisions on private competition law enforcement to actions for non-compliance with the DMA.

4. *Outlook: 12th amendment of the ARC*

Already on 6 November 2023, a day before the entry into force of the new provisions, the Federal Ministry for Economic Affairs and Climate Action announced a further amendment to the ARC. Key topics under consideration are a reform of merger control rules (including a potential revision of turnover and transaction value thresholds), a potential increase of the powers of the FCO to investigate and address infringements in the field of consumer protection law, and measures to enhance the enforcement of cartel damages claims.

Brussels
Glaverbel Building
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone:+32 (0)2 647 73 50
Fax:+32 (0)2 640 64 99

Geneva
26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone:+41 (0)22 320 90 20
Fax:+41 (0)22 320 94 20

London
Holborn Gate
330 High Holborn
London
WC1V 7QH
United Kingdom

T +44 (0)20 7406 1471

VAN BAEL & BELLIS

www.vbb.com