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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission clears Telia's acquisition of Bonnier in Phase II subject to behavioural commitments

On 12 November 2019, the European Commission ("Commission") conditionally cleared Telia Company's acquisition of Bonnier Broadcasting Company after a Phase II investigation.

Telia is a Swedish telecommunications company that provides fixed and mobile telecommunications, broadband and television services in Sweden, Denmark, Finland, Lithuania and Norway. Bonnier, also Swedish, is a TV broadcasting company that is primarily active in Sweden and Finland, but which also has limited activities in Denmark and Norway.

The Commission opened an in-depth investigation in May 2019, citing concerns that, because the merging parties are active in related markets, consumers in Finland and Sweden might face higher prices and reduced choice for retail television distribution as a result of the merger. The Commission ultimately cleared the merger subject to a behavioural remedy package that addressed the Commission's specific concerns in these markets.

In particular, the parties agreed: (i) to license access to free and basic pay TV channels and premium pay TV sports channels to rival TV distributors in Sweden on fair, reasonable and non-discriminatory terms (including streaming rights, network personal video recorder ("NPVR") rights and certain over-the-top rights relating to distribution over the internet); (ii) not to limit end users' access to the merged entity's own streaming services and internet applications; (iii) not to discriminate against competitors in the sale of television advertising space on channels offered by the merged entity; and (iv) to protect confidential information obtained from competing telecom providers, TV broadcasters and distributors by establishing information barriers between the resale and wholesale arms of the merged entity's business.

The parties committed to abide by the terms of the commitments for a period of ten years.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court fines three companies for failing to notify acquisitions

In late October 2019, the Austrian Cartel Court imposed fines in three cases for failing to notify mergers which exceeded the notification thresholds set by Austrian competition rules. The parties contested none of the decisions which have therefore become final.

On 25 October 2019, the Austrian Federal Competition Authority ("FCA") announced that the Cartel Court had fined the motorbike and sports car company KTM AG and design consultancy Kiska GmbH a total of € 60,000. KTM AG had acquired a 1.1% stake in Kiska GmbH's nominal capital and thus increased its overall stake in Kiska GmbH to 26%. In Austria, a transaction that leads to a shareholding above 25% must be notified. Yet despite meeting the threshold, the acquisition was not notified.

On the same day, the FCA also announced that the Cartel Court had imposed a fine of € 30,000 on the investment company Eurazeo SE, which failed to notify the indirect acquisition of a 58.8% stake in 2R Holding SAS specialising in protective gear for motorcycle and other outdoor sports. This transaction put Eurazeo SE in sole control for the period between 17 July 2018 and 9 May 2019 and should have been notified under Austrian merger rules.

Finally, on 28 October 2019, the FCA also announced that the Cartel Court had fined Aktieselskabet af 5.5.2010 (part of the HEARTLAND group) € 75,000 for failing to notify the FCA in advance of acquiring a share of around 29% in the clothing and shoes retailer Asos Plc in 2012. The merger had been notified retrospectively in August 2018 and was cleared in September 2018 in a Phase I procedure.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

UNITED KINGDOM

Royal Mail loses its appeal against a £50 million fine for price discrimination

On 12 November 2019, the UK's Competition Appeal Tribunal (CAT) upheld the UK communication regulator's (Ofcom's) record £50 million fine against Royal Mail for price discrimination against Whistl, a competitor in the market for the processing of bulk mail. Ofcom found that Royal Mail, a former state-owned postal monopoly, "pursued a deliberate strategy of pricing discrimination against Whistl, which was its only major competitor for delivering business mail".

Whistl processes bulk mail but relies on Royal Mail to deliver the mail to the final addressee. In 2014, Whistl considered expanding its business so as to deliver the mail itself to the final addressee ("end-to-end delivery") in certain geographic areas. However, Whistl abandoned those plans after Royal Mail announced price changes that would result in higher prices to undertakings like it that also engaged in end-to-end delivery on certain routes. Royal Mail subsequently abandoned these new price proposals.

In upholding Ofcom's decision, the CAT addressed the interesting question of whether the mere announcement of potentially discriminatory prices can constitute an abuse. The CAT distinguished the *MEO* judgment, in which the Court of Justice of the European Union (the "ECJ") concluded that discriminatory prices could not be found abusive absent an analysis of, *inter alia*, the amount of the price differences, on the grounds that the *MEO* judgment only applied to the review of whether prices were discriminatory. In contrast, the CAT concluded that *MEO* was not relevant to determine whether price announcements could also constitute an abuse. Noting the potential that price announcements may have on competition by influencing the business plans of competitors, the CAT concluded that mere price announcements could constitute an infringement. At the same time, however, the CAT accepted that the announcement of discriminatory prices could only constitute an infringement based on an assessment of the capability of the announced prices to foreclose competition, an analysis that must follow the factors set out in *MEO*.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In this section, we give a factual overview of significant case developments at EU level, and then provide a more detailed analysis of the developments addressed.

Summary of Significant Case Developments

General Court reduces fine imposed on Campine Recycling in Car Battery Recycling cartel case

On 7 November 2019, the General Court ("GC") ruled on an appeal lodged by Campine Recycling NV ("Campine") against the Commission's decision fining Campine € 8,158,000 for its involvement in the *Car Battery Recycling* cartel. In its decision, the Commission found that Campine had agreed with others to fix prices of scrap lead-acid automotive batteries in France, Germany and the Netherlands (T-240/17, *Campine and Campine Recycling*).

In its judgment, the GC concluded that the Commission had wrongly found that Campine had participated in a single and continuous infringement. While the GC agreed with the Commission that Campine had participated in anticompetitive contacts with other cartel participants, intentionally contributed to an overall anticompetitive plan and was aware of the unlawful cartel conduct, the GC criticised the Commission for not establishing Campine's participation in the cartel during two periods of eleven months (over a total cartel period of three years). Thus, the GC found that Campine had committed a single and repeated infringement and that the Commission had erred in fining Campine for the whole duration of the infringement. In addition, the GC determined, in the exercise of its unlimited jurisdiction, that an 8% fine reduction instead of a 5% reduction on account of mitigating circumstances would be appropriate in light of Campine's limited role in the infringement. Accordingly, the fine was reduced from €8,158,000 to €4,275,648 (for further analysis, see below).

Court of Justice dismisses appeal lodged by Silec in Power Cables cartel case

On 14 November 2019, the Court of Justice of the European Union ("ECJ") dismissed in its entirety the appeal brought by Silec Cable SAS and General Cable Corp. ("Silec") against a General Court judgment upholding the Commission's decision in the *Power Cables* cartel case (C-599/18, *Silec Cable and General Cable v Commission*).

In its judgment, the ECJ rejected Silec's claim that its conduct underwent significant change following its acquisition by General Cable and that, as a result, it should be considered as a fringe player to the infringement (with a corresponding 10% fine reduction). The Commission had found that Silec's involvement in the infringement was substantially limited, as a result of which Silec received a 5% fine reduction. According to the ECJ, an undertaking on which a fine was imposed for its participation in a cartel, in breach of competition rules, cannot request the annulment or reduction of that fine on the ground that another participant in the same cartel was not penalised in respect of a part, or all, of its participation in the cartel.

Analysis of Important Substantive and Procedural Developments

Car battery recycling cartel case – Concepts of single and continuous infringement and continuous and repeated infringement

The concept of a single and continuous infringement was developed by the Commission to impute liability to undertakings which had not been involved in every single cartel contact or had not engaged in every aspect of the infringing conduct. According to EU case law, an undertaking is considered to have participated in a single and continuous infringement if: (i) there is an overall plan by the parties pursuing a common objective; (ii) there is an intentional contribution of the undertaking to that plan and (iii) the undertaking is aware (actually or presumably) that they are contributing to that overall plan.

Under these circumstances, a fine may be imposed on the undertaking for the whole duration of the infringement in which it took part. If, however, the participation of the undertaking in the single infringement has been interrupted and the undertaking participated in the infringement prior to and after that interruption, the infringement may then be considered as single and repeated. In this regard, although a fine may be imposed in respect of the whole of the period of the infringement, it may not be imposed for the period(s) during which the infringement was interrupted.

In the *Car Battery Recycling* cartel case, the Commission had determined that Campine had taken part in a single and continuous infringement from 23 September 2009 to 26 September 2012. Campine argued before the General Court ("GC") that the Commission had not correctly assessed the duration of the infringement, which should instead have been classified as a single and repeated infringement due to the limited number of contacts over a period of years. More specifically, Campine argued that the six collusive contacts it had allegedly taken part in did not prove that it had participated in a single and continuous infringement over a period of three years (i.e., the duration of the infringement). Rather, as those contacts were few in number, sporadic and isolated, and that long intervals had elapsed between them, they could at most establish that it had committed a single and repeated infringement.

The GC agreed with Campine, holding that the Commission was wrong to find that Campine had participated in a single and continuous infringement and that its participation was in fact interrupted between 10 February 2010 and 10 January 2011 and between 4 April 2011 and 7 March 2012. The GC found that Campine had participated in a single infringement with an overall plan pursuing a common objective, that it had intentionally contributed to the overall plan and that Campine was fully aware of the anticompetitive nature of the contacts. Nonetheless, the GC noted that a single infringement may be either continuous or repeated, based on the way the infringement was committed.

According to the GC, the concept of a continuous infringement assumes that an infringement has not been interrupted even if, in relation to a specific period, there is no evidence of the participation of the undertaking concerned in that infringement, provided that the undertaking participated in the infringement prior to and after that period, and there is no proof or indication that the infringement was interrupted so far as concerns that undertaking. The GC held that the period separating two manifestations of infringing conduct is a relevant criterion to establish the continuous nature of an infringement. However, that period must be long enough to constitute an interruption of the infringement. This cannot be examined in the abstract and needs to be assessed in the context of the functioning of the cartel in question. If the participation of an undertaking in the infringement is found to have been interrupted, and that it has participated in the infringement prior to and after that interruption, that infringement may be categorised as repeated if – as for a continuing infringement – there is a single objective which it pursued both before and after the interruption. In such a case, the Commission may impose a fine over the period of the infringement but not during the period in which the infringement was interrupted.

In this case, Campine was found to have been involved in only six collusive contacts. There was no direct evidence of its participation in any anticompetitive contacts during two periods separating those collusive contacts, namely two intervals of approximately 11 months each. The GC noted that these two periods, amounting to 22 months in total, were significant in relation to the overall duration of the cartel, which was slightly more than 36 months. The GC found that, in finding that Campine had participated in the cartel during these two intervals, the Commission essentially relied solely on the fact that it had not publicly distanced itself from the cartel. It noted that while public distancing is not the only means available to an undertaking implicated in a cartel to show that it has ceased participating in that cartel, such distancing constitutes an important fact capable of establishing that anticompetitive conduct has come to an end. The GC concluded that, in a case where, as here, over the course of a significant period of time, several collusive meetings had taken place without the participation of the representatives of the undertaking in question, the Commission must also base its findings on other evidence.

Therefore, as the infringement was classified as single and repeated, not single and continuous, the duration of liability attributable to Campine was for a duration of only 14 months as opposed to the overall 36-month duration

of the cartel in question. The GC accordingly reduced the amount of the fine to take into account the reduced duration of the infringement in which Campine was involved, applying a duration multiplier of 1.17 in the calculation of the fine (instead of the multiplier of 3.01 originally determined by the Commission).

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority imposes € 3.8 million fine on ASTRE transport association for market sharing

On 28 October 2019, the French Competition Authority ("FCA") imposed a fine of € 3.8 million on ASTRE, an association of small and medium-sized transport companies, for having introduced in 1997 a non-competition clause into its internal rules of procedure, its articles of association and its membership agreement, whereby its members were forbidden from prospecting "listed clients", i.e. clients identified as belonging to another member.

While these non-competition clauses were removed in 2016 from ASTRE's internal rules of procedure, its articles of association and its membership agreement, the non-competition obligation continued to apply in calls for tender. The FCA found that ASTRE had intervened on numerous occasions to request its members to refrain from responding to requests from clients belonging to other members and for establishing a priority rule between its members. According to the priority rule, when a call for tenders was requested from a client already working with members of the association, ASTRE only sent that call for tender to these members because it considered them to be the best positioned to submit a bid.

Moreover, the FCA also considered relevant the existence of a monitoring regime and a sanction mechanism through a point-based system. According to this mechanism, each member had a "scorecard" with 12 points that could be removed in the event of non-compliance with the obligations set out in the internal rules of procedure, including the non-competition clause. Losing points led to sanctions varying from financial penalties to the ultimate exclusion from the association in the event that all points were lost.

The FCA found that the practice, which lasted for more than 20 years, consolidated the position of each transport company, strongly limited their commercial independence and resulted in a reduction of alternatives for clients and a reduction of price competition. The association did not contest the findings and sought to benefit from the settlement procedure. The Competition Authority took this into account and issued a fine of €3.8 million, which may be the subject of an appeal.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court imposes € 378,000 fine on bicycle producer for retail price maintenance and resale restrictions

On 31 October 2019, the Austrian Federal Competition Authority ("FCA") announced that the Cartel Court had, in June 2019, imposed a fine of € 378,000 on Specialized Europe, a bicycle and bicycle equipment producer. Specialized Europe was found to have infringed the competition rules between January 2011 and November 2016 by engaging in retail price maintenance, as well as by restricting passive sales and sales over the internet. Specialized Europe did not challenge the decision which thus became final. The fine handed down in this case was significantly higher than a fine imposed on bicycle maker KTM Fahrrad GmbH ("KTM") for similar infringements in 2015 (€ 111,000), where KTM benefited from fine reductions for cooperating with the FCA.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

SPAIN

Barcelona Court of Appeal applies narrow reading of exhaustion principle to trade marks with common origin

On 22 July 2019, the Barcelona Court of Appeal ("Audiencia Provincial de Barcelona") delivered a judgment on an appeal by Schweppes SA ("Schweppes") against a judgment of the Commercial Court of Barcelona in which it held that the evidence provided by Red Paralela, a parallel importer, was insufficient to apply the principle of the exhaustion of trade mark rights as developed by the Court of Justice of the European Union (the "ECJ") to the importation of Schweppes® branded products from the United Kingdom into Spain. The Court of Appeal found that there were no economic links between the different owners of the Schweppes® brand, namely The Coca-Cola Company ("TCCC") and Schweppes, and that the essential function of the trade mark "Schweppes" had not been infringed.

Facts

Since 1999, the ownership of the "Schweppes" brand has been in the hands of two different firms. TCCC owns the Schweppes® brand in the United Kingdom and in ten other EU Member States, while Orangina Schweppes Holding BV ("OSHBV") owns the brand in Spain and in 16 other EU Member States. Schweppes is the exclusive licensee of the Schweppes® brand in Spain. This fragmented situation results from the Commission's objection to the transfer of the Schweppes trademarks in all Member States to TCCC alone.

Schweppes took issue with parallel imports of Schweppes-branded products from the United Kingdom (originating with TCCC) into Spain and initiated infringement proceedings against Red Paralela, the main parallel importer. Schweppes argued before the Commercial Court of Barcelona that the marketing in Spain of those products infringes its trade mark rights, given that the bottles had not been produced and placed on the market by itself or with its consent. In response to Schweppes' claim, Red Paralela contended that the rights of OSHBV in Spain were exhausted and that Schweppes was thus no longer able to oppose the commercialisation in Spain of products originating in the UK and produced by TCCC.

On 17 May 2016, the Commercial Court of Barcelona referred a request for a preliminary ruling to the ECJ concerning the scope of the principle of exhaustion provided for by Article 7(1) of the now abolished trade mark Directive 2008/95/EC and Article 15(1) of the current trade mark Directive 2015/2436. According to these provisions, a trade mark does not give its proprietor the right to prohibit its use in relation to goods which have been put on the market in the European Union under that trade mark, whether by the proprietor itself or with its consent. According to the case law, the proprietor's consent includes situations in which the trade marks have a common origin (Case 192/73, *Van Zuylen*, but reversed in Case C-10/89, *HAG GF*) or are held by "economically linked" entities (Case C-9/93, *IHT Internationale Heiztechnik*).

Preliminary ruling on exhaustion of trade mark principle

On 20 December 2017, the ECJ held that the principle of exhaustion of trade mark rights covers the situation of branded products whose trade marks do not have a common ownership but are nonetheless considered to be "economically linked" in substance, if not in form (Case C-291/16, *Schweppes v. Red Paralela and Others*).

The ECJ specified that trade mark rights are exhausted: (i) when the owner actively promotes, independently or in coordination with a parallel trade mark holder, the appearance of a single global trade mark, thereby generating or increasing confusion on the part of the public concerned as to the commercial origin of goods bearing that mark ("*essential function*" test); or (ii) when there are

economic links between parallel rights holders, inasmuch as they coordinate their commercial policies or reach an agreement in such a way as to make it possible for them to determine, directly or indirectly, the goods to which the trade mark applies and to control the quality of those goods ("*economic links*" test)(see VBB on Competition Law, Volume 2017, No. 12).

Judgment of Barcelona's Court of Appeal

In the light of the ECJ judgment, the Commercial Court of Barcelona dismissed Schweppes' action on 9 April 2018. As a result, Schweppes could not object to the parallel importation into Spain by Red Paralela of UK Schweppes® branded products which originated with TCCC. The Commercial Court based its judgment on the promotion of a single brand image by TCCC and Schweppes, as well as on the existence of economic links between the two parallel rights owners. Schweppes disagreed and appealed this judgment.

On 22 July 2019, the Barcelona Court of Appeal overturned the earlier judgment because it considered that the evidence provided by Red Paralela to show an "economic link" between the Schweppes® trademarks was not sufficient.

First, the Barcelona Court of Appeal held that the reference by Schweppes on its website to the British origins of the Schweppes® trademark was not sufficient to conclude that Schweppes "h*as actively and deliberately continued to promote the appearance or image of a single global brand, thereby generating or increasing confusion on the part of the public concerned as to the commercial origin of the goods bearing that mark*". According to the Court, Schweppes is entitled to evoke the origins of its Schweppes® brand in 1783, regardless of the later fragmentation of the trade mark.

Second, the Court of Appeal held that the supposed existence of economic links between the two trade mark owners cannot be inferred from the fact that Schweppes granted TCCC a licence to manufacture and distribute its Schweppes® products in the Netherlands, where Schweppes is the exclusive proprietor of the trade mark. The existence of a single licence agreement does not allow the conclusion that there is a general arrangement for the European market which points to economic links.

The other evidence which Red Paralela adduced to show economic links between TCCC and Schweppes were summarily rejected.

On this basis, the Barcelona Court of Appeal concluded that Schweppes was entitled to object to the commercialisation in Spain of Schweppes® branded products originating in the United Kingdom and produced by TCCC. It thus refused to apply the exhaustion of trade mark rights principle.

UNITED KINGDOM

High Court of England and Wales dismisses on jurisdictional grounds abuse of dominance claim in FRAND patent case

On 21 October 2019, the High Court of England and Wales (the "High Court") dismissed an abuse of dominance claim which had been brought by Vestel, a manufacturer of electronic consumer products, against Advance and Philips for an alleged refusal to license standard essential patents ("SEPs") used in the manufacture of high definition televisions on fair, reasonable, and non-discriminatory ("FRAND") terms. The case was dismissed because the High Court considered that it did not have jurisdiction over the case.

In April 2017, Vestel attempted to negotiate with Advance a licence for SEPs used in the manufacture of high definition televisions (referred to as "High Efficiency Video Coding" or "HECV"). In May 2017, Advance sent to Vestel a draft license agreement which included applicable royalty rates, which Vestel considered to be excessive. In parallel, Vestel approached Philips to discuss a licence for the SEPs owned by Philips. In July 2018, Philips offered a royalty tied to that offered by Advance, which Vestel also claimed to be non-FRAND.

Following a breakdown in the negotiations, Vestel brought an action before the High Court alleging that Advance and Philips abused their dominant position in breach of Article 102 TFEU and/or Section 18 of the Competition Act 1998 for, *inter alia*, failing to offer a licence for the HECV patents on FRAND terms.

In its judgment, the High Court ruled that it did not have jurisdiction over the claim brought by Vestel under Article 7(2) of Brussels I Recast on the ground that there was no evidence that Vestel had suffered any direct damage in the UK as a result of the defendants' conduct. The High Court added that any possible damage suffered would have been a result of Vestel entering into a licence on abusive terms with the defendants, which Vestel did not do. On these grounds, the action was dismissed.

STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice provides further guidance with regard to the selectivity assessment of environmental taxes in the framework of autonomous communities (C-105/18 to C-113/18, *UNESA*)

On 7 November 2019, the Court of Justice of the European Union (the "ECJ") delivered a judgment on a request for a preliminary ruling by the Spanish Supreme Court. The request was made in proceedings between several hydroelectricity producers and the Spanish authorities, with regard to the lawfulness of a Spanish tax on the use of inland waters for the production of electricity (the "inland waters tax"). The referring Court asked, *inter alia,* whether the inland waters tax constitutes State aid within the meaning of Article 107(1) Treaty on the Functioning of the European Union ("TFEU").

In its analysis, the ECJ focused on the selectivity requirement laid down in Article 107(1) TFEU and on two aspects of the inland waters tax.

- First, the ECJ assessed whether the measure grants a selective advantage to producers of electricity from other sources (e.g., fossil fuels). In fact, the tax is only payable by hydroelectricity producers using inland waters.

  The ECJ noted that the tax criterion relating to the source of production of the electricity does not derogate formally from the reference framework. However, the effect of this criterion is that it excludes from the scope of the tax those electricity producers whose source of production is not water. As such, it confers an advantage on those producers of electricity.

  Nevertheless, the ECJ found that such an advantage does not constitute State aid, given that electricity producers not using water as a source are not, in view of the objective pursued by the inland wathers tax, in a comparable factual and legal situation to that of electricity producers using water. The ECJ emphasized that the purpose of the tax is to protect the environment and improve the ecofriendly use of inland water resources. It is logical, therefore, that only electricity producers using such inland waters are required to pay the tax.

- Second, the ECJ assessed whether the measure grants a selective advantage to electricity producers operating within river basins encompassing a single Spanish autonomous community. The tax is, in fact, only applicable to those producers using river basins extending over the territory of more than one autonomous community.

  The ECJ noted that the selective nature of a measure must be examined with regard to the legal limits of the powers of the public authority which adopted it. In essence, the ECJ reasoned that the relevant reference framework cannot extend beyond the limits of the powers of the granting authority.

  The ECJ observed that, according to the Spanish authorities, the inland waters tax was adopted by the national legislature, which is only competent to pass laws with respect to river basins extending over the territory of more than one autonomous community. For smaller river basins, the competence lies within the competent autonomous community.

  With this in mind, the ECJ found that the reference framework for examining the selectivity requirement is the taxation of hydroelectricity production within river basins encompassing more than one autonomous community. Those producers operating within the river basin encompassing a single autonomous community are not in a comparable situation to those using river basins extending over the territory of more than one autonomous community. As such, the measure does not favour the second category of hydroelectricity producers compared to the first.

Court of Justice clarifies that the alteration of an aid scheme aimed at tightening the criteria for having access to the aid measure must be notified to the Commission (C-585/17, Dilly's Wellnesshotel)

On 14 November 2019, the Court of Justice of the European Union (the "ECJ") delivered a judgment on a request for a preliminary ruling by the Austrian Supreme Administrative Court. The request was made in proceedings relating to the alteration of an authorized aid scheme (the "existing aid scheme"). The Austrian legislator modified this existing aid scheme by restricting those eligible for the aid. The referring Court asked, *inter alia*, whether this modification constitutes an alteration to existing aid within the meaning of Article 4 of Regulation No 794/2004, which must be notified to the Commission on the basis of Article 108 Treaty on the Functioning of the European Union ("TFEU").

The ECJ recalled that, according to Article 4 of Regulation No 794/2004, "*alterations to existing aid*" are subject to notification insofar as they imply any change to the aid scheme, other than modifications of a *purely formal or administrative* nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. The ECJ also noted that under Article 4(2)(c) of Regulation No 794/2004, tightening of the criteria for the application of an authorized aid scheme is one of the alterations to existing aid which must, in principle, be notified.

In the present case, the ECJ found that the modification of the existing aid scheme was caught by the notification requirement. In fact, this alteration has a direct impact on the assessment of the aid measure – in particular on the verification of the selectivity requirement – and cannot be considered as a purely administrative or formal modification. In this regard, the ECJ also emphasized that the review by the Commission under Article 108 TFEU of a plan to alter an aid scheme is not limited to verifying whether the alteration concerned has led to a reduction of those eligible, but also involves an assessment of whether the change in the application criteria resulting from that alteration distorts or threatens to distort competition. It is the prior notification of such an alteration that makes it possible for the Commission to verify precisely whether or not that is the case.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority's number of dawn raids higher than ever

At the 13th Annual St Martin's Conference organised by the Czech competition authority in Brno on 13 November 2019, a senior official of the authority reported that the Austrian Federal Competition Authority ("FCA") had carried out a record number of dawn raids since the beginning of the year.

Natalie Harsdorf, deputy managing director of the FCA, stated that the FCA had already conducted nearly 20 dawn raids this year with one and a half months left until the end of the year. By comparison, there were only four raids in 2018. This increase, Harsdorf suggested, is due to the authority receiving an increased number of leniency applications in 2019. She also emphasised that the FCA was taking a strong stance against bid-rigging and that its action against hard-core cartels had taken on "another dimension". Harsdorf pointed to the construction sector as one of the sectors with some of the most significant on-going cases. In July, the FCA also raided companies in the energy billing and submetering sector following suspected collusion.

According to Harsdorf, the FCA's cooperation with the police, which is authorised to record telephone calls in the context of investigations on suspected competition law infringements, is of great help. The same goes for a provision of Austrian law according to which employers may benefit from the leniency applications submitted by their employees.

FRANCE AND GERMANY

Joint paper on algorithms and competition law

On 6 November 2019, the French and German competition authorities presented their joint study on algorithms and competition at a conference in Paris. The study recognises algorithms as one of the "most important technological drivers of the ongoing digitalization process" but also identifies a concern that algorithms might facilitate certain types of anticompetitive collusion.

This joint project aims at addressing challenges raised by algorithms under competition law. It defines the concept and different types and fields of application of algorithms, with a particular focus on collusive behaviour. Furthermore, the study discusses practical challenges in investigations and provides an outlook for the future work of competition authorities.

The study highlights algorithms used for dynamic price-setting and self-learning algorithms and points out the interdependencies between algorithms and market power, which may constitute market entry barriers. It explores three types of scenarios where the use of algorithms may lead to anticompetitive practices:

- algorithms used as facilitators of pre-existing anticompetitive practices, e.g., in support of the implementation, monitoring, enforcement and/or concealment of these practices;
- algorithm-driven collusion between competitors involving a third party, e.g., an external consultant or software developer;
- collusion induced by parallel use of individual algorithms, e.g., algorithmic communication.

The joint study also discusses different approaches towards the liability of companies for the use of algorithms. One line of thought is to treat algorithmic behaviour in the same

way as employee actions, which would lead to the company's being liable simply for implementing and using an algorithm that engages in anticompetitive behaviour. Another view on accountability for algorithmic behaviour would require a breach of a reasonable standard of care and foreseeability.

The joint study concludes that the actual impact of the use of algorithms on the intensity of the collusive behaviour depends on the respective market characteristics. It adds that the alignment of prices or price parameters at code level will likely constitute a restriction by object. Concerning an alignment at data level, i.e., alignment at the level of input factors, the study recommends applying the established principles for the exchange of data.

In line with EU case law, the study notes that even the exchange of publicly available information can restrict competition if the modalities of the exchange make the companies aware of the information more easily, rapidly and directly.

To conclude, the study finds that so far, algorithms have not raised specific legal difficulties and that the identified concerns can be addressed under existing competition rules. The paper is available in English on the websites of the French and German competition authority.

GERMANY

Reform of German competition law underway

In October 2019, the German Federal Ministry for Economic Affairs and Energy published a first draft of the 10th amendment to the Act against Restraints of Competition. The text aims at reforming Germany's national competition rules for the digital age.

The draft bill suggests that a number of changes be introduced to substantive and procedural competition rules. The two most notable aspects of the proposed reform are in the fields of abuse of dominant position and merger control.

The draft bill acknowledges the importance for market players to get access to data in a competitive digital economy. Data will become an essential facility and, under the new competition rules, companies will be granted a legal action to data access against dominant big data companies.

For the assessment of dominance, the draft bill introduces the new concept of "intermediary power". This means that, in order to assess the market position of a company acting as an intermediary on multilateral markets, the position of the company with respect to the provision of intermediary services for access to procurement and sales markets shall also be taken into account. Under the current rules, only the company's own access to sales or procurement markets is taken into account.

The draft bill further redefines the concept of abusive conduct and clarifies the criterion of causality applicable to all types of abuses.

With regard to merger control, the draft bill proposes to increase the second domestic turnover threshold from 5 million to 10 million. This change is expected to reduce the number of merger notifications by about 20 percent (from approximately 1,300 - 1,400 per year to approximately 1,000 - 1,100 per year).

The draft bill furthermore introduces a legal basis for the existing practice of asking the German Federal Cartel Office for informal assessments of cooperation projects between competitors. A broad use is currently made of this informal process in support of numerous cooperation projects, particularly in the digital sector. The proposed amendment is meant to create greater legal certainty for companies.

The draft bill is still subject to changes as it requires intergovernmental coordination before entering the legislative process as a government bill.

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