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Table of contents

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Table of contents

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears merger in payment services sector

On 30 September 2020, the European Commission ("Commission") conditionally cleared Worldline's acquisition of Igenico, two French providers of payment and transaction services.

The Commission raised concerns that the parties' activities overlapped in the provision of point-of-sale ("POS") merchant acquiring services – the set of services that enable merchants to accept card payments – and in POS terminal supply and management services. As Worldline is the largest market player in these markets in Belgium, Luxembourg and Austria, and Igenico is a strong competitor, the Commission found that the deal risked creating or strengthening a dominant position.

In order to resolve these concerns, Worldline agreed to divest Igenico's Austrian and Belgian POS merchant acquiring businesses, which include POS terminal supply and management, as well as part of Worldline's merchant acquiring business in Luxembourg. This case is the latest in a wave of recent consolidations in the payment services sector.

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority imposes gun-jumping fine on gas distributors

On 15 September 2020, the Italian Competition Authority ("ICA") imposed a € 153,000 fine on three companies, Acea, Mediterranea Energia and Alma C.I.S., for failing to notify a transaction before closing.

The three acquiring companies had purchased one target, Pescara Distribuzione Gas, in March 2019. However, they only notified the deal in May 2020, arguing that it was part of a single transaction that also included the forthcoming acquisition of a second target company, Alto Sangro Distribuzione. Each of the two deals would individually trigger the Italian merger notification thresholds.

The ICA, in conformity with the European Commission's Jurisdictional Notice, concluded that the two acquisitions could not be considered as part of a single transaction, as they were not linked in either law or fact. In particular, neither transaction was conditional on the other, and at the time of concluding the first acquisition, the conclusion of the second remained a mere possibility rather than a certainty. The ICA noted that the acquirers could have resolved any doubts regarding the obligation to notify the first transaction by engaging with the authority through informal pre-notification discussions.

While the fine represents only 0.005% of the acquiring parties' turnover, it is the third highest fine imposed for gun jumping in Italy.

PORTUGAL

Portuguese Competition Authority prohibits merger in public road transport services market

On 6 October 2020, the Portuguese Competition Authority ("AdC") issued a decision prohibiting the Transdev Group's acquisition of Grupo Fundão as well as public transport service concessions currently held by Transerramar and Auto Transportes do Fundão.

Both Transdev and Grupo Fundão occupy strong positions in the market for public road transport services in various municipalities in central Portugal. The AdC concluded that the transaction risked eliminating future competition in tender procedures in public passenger road transportation services in those areas. As the parties offered no remedies to alleviate these concerns, the AdC prohibited the acquisition.

FOREIGN DIRECT INVESTMENT

– EUROPEAN UNION LEVEL –

EU FDI Screening Regulation fully enters into force

On 11 October 2020, Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the European Union adopted on 19 March 2019 (the "EU FDI Screening Regulation") fully entered into force. While the EU FDI Screening Regulation does not itself establish a screening mechanism or require the adoption of such a mechanism by EU Member States, it provides (i) common standards for Member States' screening mechanisms and common screening grounds; and (ii) rules on cooperation and communication on FDI-related matters.

In the wake of the adoption of the EU FDI Screening Regulation, and due to concerns fuelled by the COVID-19 pandemic, a number of EU Member States introduced or reformed their screening mechanisms, mostly lowering screening thresholds, expanding the scope of the mechanisms and extending review periods. The VBB FDI screening webpage (the "VBB FDIrectory") provides a regularly updated summary of FDI screening mechanisms in all EU Member States, plus the UK and Switzerland.

– MEMBER STATE LEVEL –

POLAND

Polish Competition Authority issues first decision authorising a foreign acquisition in accordance with its temporary FDI screening mechanism

On 19 October 2020, the Polish Competition Authority ("UOKiK") issued a decision authorising the Cayman Islands-based H&F Corporate Investors VIII Ltd. to acquire the Center for Electronic Settlements Polish ePayments S.A.

The transaction was not notified to the UOKiK under the normal merger review process, but was submitted for approval under the newly introduced Polish FDI screening mechanism. This new investment control law was introduced as part of Poland's "Anti-Crisis Shield 4.0" legislation to address the COVID-19 pandemic. The legislation aims to reduce the risk associated with non-EU, EEA or OECD companies acquiring Polish companies that are essential to maintaining public order, safety or health during the pandemic.

In this case, the acquirer, H&F Corporate Investors VIII, controls portfolio companies operating in the sectors of Internet services, specialised business software, media and financial services. The Polish target focuses on the processing of non-cash transactions in payment terminals. The UOKiK therefore determined that the transaction did not pose a threat in terms of access to specific technologies or software and did not oppose the acquisition.

– OTHER DEVELOPMENTS –

GERMANY: On 7 October 2020, the German Federal Cabinet adopted the Sixteenth Regulation amending the Foreign Trade and Payments Ordinance in order to ensure compliance with the EU FDI Screening Regulation. The German Federal Ministry for Economic Affairs and Energy will act as national contact point for the purposes of the EU FDI Screening Regulation.

MALTA: On 14 October 2020, the Maltese National FDI Screening Office (the "Office") became operational. Investors are required to notify FDIs such as new company incorporations, greenfield investment, transfer of shares resulting in the change of the Ultimate Beneficial Owner ("UBO") to the Office where (a) the UBO is a 'foreign investor' as defined by the EU FDI Screening Regulation and (b) where the investment within the territory of Malta is of a direct, tangible and long-lasting nature. The notification requirement extends to activities in the following sectors: (i) critical infrastructures, (ii) critical technologies and dual-use items, (iii) supply of critical inputs, (iv) access to sensitive information and (v) freedom and pluralism of the media.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Commission accepts commitments from Broadcom to ensure competition in Systems-on-a-Chip markets for modems and set-top boxes

On 7 October 2020, the European Commission accepted Broadcom's commitments to suspend its existing agreements, and to refrain from entering into any new agreements, containing exclusivity or quasi-exclusivity arrangements and/or leveraging provisions concerning Systems-on-a-Chip ("SoCs") for TV set-top boxes and internet modems.

The Commission initiated its investigation into Broadcom in June 2019. By October 2019, it had issued a decision requiring interim measures to be implemented in order to avoid irreparable damage to competition in the worldwide markets for SoCs for: (i) TV set-top boxes; (ii) xDSL modems; (iii) fibre modems; and (iv) cable modems. The interim measures required Broadcom to stop applying certain exclusivity, quasi-exclusivity and leveraging arrangements in its agreements with six of its main customers.

Following the interim measures decision, Broadcom offered commitments to address the Commission's concerns. After consultation with stakeholders and market testing, the Commission accepted a revised commitments package to apply for a period of seven years. Each of the commitments, as outlined below, apply to SoCs for TV set-top boxes, xDSL modems and fibre modems. The Commission has decided to close proceedings with regard to the other matters to which the opening of proceedings of June 2019 related (but retains discretion to investigate these in the future).

At EEA level, Broadcom commits to:

- Not requiring or inducing an OEM to obtain any minimum percentage of its EEA requirements for the relevant SoCs from Broadcom; and
- Not conditioning the supply of, or the granting of advantages for, the relevant SoCs on an OEM's obtaining from Broadcom another of these products or any other product within the scope of the commitments.

At worldwide level, Broadcom commits to:

- Not requiring or inducing an OEM to obtain more than 50% of its requirements for the relevant SoCs from Broadcom; and
- Not conditioning the supply of, or the granting of advantages for, the relevant SoCs on an OEM's obtaining from Broadcom more than 50% of its requirements for any other of these products, or for other products within the scope of the commitments.

– MEMBER STATE LEVEL –

FRANCE

French Supreme Court confirms that incumbent horserace betting operator PMU abused its dominant position

On 14 October 2020, the French Supreme Court ("Cour de Cassation") confirmed the Court of Appeals' finding that horserace-betting company Pari Mutuel Urbaine ("PMU") abused its dominant position in the market for physical horserace betting by pooling bets with those in the online market.

Historically, the gambling sector in France was characterised by two public monopolies, Française des Jeux ("FDJ") for gaming and sports betting and PMU for horserace betting. At the request of the Commission and in light of its view that the French legal framework was incompatible with Article 56 TFEU, France was asked to modify its laws with a view to breaking up the duopoly.

France adopted new legislation in 2010 which aimed to liberalise online sport and horserace betting, but nonetheless preserved PMU's exclusive right to operate offline horserace betting, thereby retaining PMU's monopoly over physical outlets. However, in 2011, the French Competition Authority ("FCA") issued an opinion outlining the adverse

effects of the 2010 legislation on competition. The FCA recommended several remedies, including the creation of separate databases for offline and online players, and the use of different logos and branding for offline and online activities.

In 2012, one of PMU's Maltese competitors, Betclic, filed a complaint with the FCA claiming that PMU had breached French and EU competition law by abusively leveraging its dominance in offline betting to create a monopoly in the online horserace betting market. In an effort to alleviate these concerns, PMU committed to stop pooling its online and offline bets by the end of 2015, while also creating separate websites and databases for online and offline betting and separating its commercial and marketing departments.

In 2015, following the FCA's decision, Betclic sued PMU for € 172 million in damages before the French courts on the grounds that PMU had abused its dominant position and benefited from a competitive advantage over new entrants by pooling online and offline bets into a single database.

In February 2018, the French Court of First Instance found that PMU had abused its dominance on the market for online race betting and damaged Betclic by pooling its physical monopoly bets with online ones between 2010 and 2015. The decision was subsequently appealed, but ultimately confirmed by the Court of Appeals.

PMU appealed this judgment before the French Supreme Court. It argued that legal certainty and its legitimate expectations were undermined because it was not aware that the failure to separate its physical from its online betting pools could be characterised as an abuse of a dominant position under Article 102 TFEU and its French equivalent. In fact, PMU argued that the provisions of the French Civil Code dealing with tortious conduct were applicable, but that it had not, in any event, committed a tort.

The French Supreme Court held that, even though Article 102 Treaty on the Functioning of the European Union and its French equivalent do not list the type of abuse condemned by the lower courts, that does not mean that a company could not determine that its behaviour breached those rules.

As regards the substance of the abuse, the French Supreme Court held that, according to EU case law, an abusive exploitation encompasses the behaviour of a dominant company in a market with weakened competition, and that, although a monopolist can enter other markets, it must not limit competition on the newly entered market. Ultimately, the French Supreme Court held that the Court of Appeal was correct in finding that PMU had abused its dominant position.

SWITZERLAND

Swiss COMCO fines UPC CHF 30 million for abusing its dominant position in market for ice hockey broadcasting

On 20 October 2020, the Swiss Competition Commission ("COMCO") fined UPC (a group member of Liberty Global) CHF 30 million for abuse of dominance for refusing to supply live broadcasts of the Swiss Ice Hockey Championship to Swisscom.

UPC was found to be dominant on the basis of its exclusive rights to broadcast Swiss Ice Hockey Championship matches for the seasons 2017 to 2022. UPC broadcasted matches through its Pay TV programme, MySports, and refused to supply other TV platform operators (such as Swisscom) with live ice hockey broadcasts. COMCO deemed this refusal to supply by the holder of an exclusive license to be contrary to competition law and ordered UPC to grant all requesting TV platforms in Switzerland (not only Swisscom) access to either the raw signal of the ice hockey broadcasts or the transmission of the MySports programme service (containing the relevant ice hockey content) on non-discriminatory terms.

By this decision, COMCO reaffirms its position that a dominant company's decision to withhold its rights may constitute an anticompetitive refusal to supply. This, according to COMCO, even applies if the company considered to hold a dominant position is not the initial holder of these rights, but has acquired them by way of an exclusive license.

COMCO's decision can be appealed to the Swiss Federal Administrative Court.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Advocate General Hogan recommends reducing fine imposed on Pometon in Steel Abrasives cartel case

On 8 October 2020, Advocate General ("AG") Hogan issued his opinion in *Pometon SpA v European Commission* (Case C-440/19) in connection with the *Steel Abrasives* cartel case. In his opinion, the AG advises the Court of Justice ("ECJ") to partially uphold the appeal in so far as the General Court ("GC") breached the principle of equal treatment in calculating the fine imposed on Pometon SpA. The AG recommends that the basic amount of the fine be exceptionally reduced by 83% (instead of 75%, as determined by the GC) and the fine set at € 2.6 million.

In June 2010, the Commission started an investigation that was prompted by a leniency application by one producer, Ervin, which revealed the existence of a cartel in the steel abrasives sector. In April 2014, the Commission issued a decision under its settlement procedure, finding that four of the companies under investigation, which had settled the case (Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Wrth), had participated in a cartel in breach of Article 101 Treaty on the Functioning of the European Union ("TFEU") and imposing fines totalling € 30 million. Pometon did not settle with the Commission and the Commission's investigation into Pometon therefore continued under the standard (non-settlement) investigation procedure. On 25 May 2016, the Commission issued an infringement decision against Pometon and imposed a fine of € 6.197 million. Pometon appealed to the GC.

On 28 March 2019, the GC issued its judgment, in which it partially upheld the appeal. While dismissing all of Pometon's pleas as regards the Commission's substantive application of Article 101 TFEU, the GC upheld Pometon's plea that the Commission had failed to state reasons when departing from the standard fining methodology by applying point 37 of the Fining Guidelines in fixing the amount of the fine imposed on Pometon. The GC considered that the Commission had not provided Pometon with sufficiently precise information as regards the method of calculation used to determine the fine imposed on it. In exercising its power of unlimited jurisdiction, the GC re-calculated the fine and applied an exceptional reduction rate of 75% to the basic amount of the fine imposed on Pometon (from € 6.2 million to € 3.8 million) (see VBB on Competition Law, Volume 2019, No. 4). Pometon appealed the decision to the ECJ.

AG Hogan's opinion is notable for his recommendation to set aside the judgment of the GC to the extent that it breached the principle of equal treatment by according disproportionate importance to the criterion of the size of the undertaking in the assessment of the reduction of the basic amount of the fine.

In deciding to reduce the amount of the fine imposed on Pometon, the GC considered: (i) Pometon's individual liability and the concrete influence of its conduct on price competition; (ii) Pometon's weight in the infringement in light of its value of sales in the EEA and (iii) Pometon's size. AG Hogan considers that the GC breached the principle of equality by granting Pometon the same exceptional reduction rate of 75% as producers Ervin and Winoa (which had a more active role in the cartel), even though the GC had found (based on criteria (ii) and (iii) above) that the situation of Pometon was more similar to that of MTS (which received a 90% reduction of the basic amount of the fine).

Thus, AG Hogan recommends that the GC's judgment be set aside in so far as it fixed the exceptional reduction rate under point 37 of the Fining Guidelines at 75% of the basic amount of the fine and set the amount of the fine imposed on Pometon at € 3.8 million. AG Hogan recommends, on the basis of the principle of equality, that the exceptional reduction rate granted to Pometon of the basic amount of the fine should be between 75% (the rate granted to Winoa) and 90% (the rate granted to MTS), namely 83%. Accordingly, the AG advises that the fine be reduced to € 2.6 million and that the rest of the appeal be dismissed.

The ECJ will give its judgment on the appeal in due course.

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice remits Beer cartel case for new trial due to flawed assessment of causality and limitation period

On 13 July 2020, the German Federal Court of Justice ("FCJ") overturned an earlier judgment of the Higher Regional Court of Düsseldorf to terminate proceedings against the brewery Carlsberg and Carlsberg's managing director for their role in the *Beer* cartel case.

In 2014, the Federal Cartel Office ("FCO") fined eleven breweries, an association and fourteen responsible individuals a total of almost € 338 million for price fixing (see VBB on Competition Law, Vol. 2014, No. 1). On appeal by Carlsberg, the Higher Regional Court of Düsseldorf terminated the proceedings due to the expiry of the absolute limitation period. Under German law, for cartel infringements, the absolute limitation period ends ten years after the end of the administrative offence, after which the offence can no longer be prosecuted.

The FCJ ruled that the Higher Regional Court of Düsseldorf had erred in terminating the proceedings. The Higher Regional Court of Düsseldorf had calculated the limitation period from the last act of the unlawful exchange of information since it found no evidence of implementation on the market. The FCJ ruled that the Higher Regional Court of Düsseldorf had erred by not taking into account the presumption under EU law of causality between a concerted practice and its implementation. According to the FCJ, similar to a rebuttable presumption of causality in cartel damages claims, such principles can be taken into account as circumstantial evidence in administrative and criminal proceedings. The principle of causality states that when competitors exchange information for the purpose of colluding, there is a high probability that their future market behaviour will be affected, particularly where, as in the case at hand, competitors promptly engage in similar conduct after discussing a coordinated approach. The FCJ found the Higher Regional Court of Düsseldorf's assessment of evidence to be flawed because it did not address the principle of causality in the grounds of its judgment.

The FCJ furthermore confirmed previous case law, according to which an infringement generally continues until the end of the cartel. This also applies to concerted practices which, in addition to collusion, require practical cooperation on the market. As long as the agreement is implemented on the market, the infringement continues. The FCJ found that, in the case of price fixing, the cartel infringement is not terminated after the last act of an information exchange, but only when the products affected are no longer available on the market at the increased price. This can be the case if the effect of the price increase ends through another price change, e.g., the introduction of a new pricing architecture.

Finally, the FCJ stated that, as a consequence of not finding evidence of practical cooperation on the market, which the FCJ reiterates is a necessary element to a finding of concerted practices which consist of both elements (collusion and implementation), the Higher Regional Court should have acquitted Carlsberg and its manager since acquittal takes precedence over terminating proceedings on other grounds.

The FCJ accordingly remitted the case to the Higher Regional Court of Düsseldorf for a new trial.

ITALY

Italian Supreme Administrative Court rules on bid-rigging cartel

On 6 October 2020, the Italian Supreme Administrative Court (*Consiglio di Stato*) ruled on the appeals lodged by the Italian Competition Authority and seven companies in relation to a big-rigging cartel case in the auditing and consulting sector, confirming the Competition Authority's initial finding of the existence of a cartel. These judgments originated from the Competition Authority's finding of a

concerted practice in violation of Article 101 TFEU that involved a bid-rigging scheme concerning public tender procedures which was found to restrict competition by object. In its ruling, the Supreme Administrative Court overturned the judgments issued by the Lazio Regional Administrative Court and confirmed the Competition Authority's decision.

In its judgment, the Supreme Administrative Court confirmed the existence of a concerted practice based on the evidence gathered by the Competition Authority, which indicated that the amount of the discounts offered by the consulting companies were substantially the same (around 10-15% in the tender lots they were not interested in and around 30-32% in the opposite cases), and that there were no overlapping bids between the best offers in each of the nine lots. Citing the judgment of the Court of Justice in *Wood Pulp*, the Supreme Administrative Court concluded that parallelism in the offers could constitute evidence of a concerted practice since it was the only plausible explanation for the conduct.

ROMANIA

Romanian Competition Authority fines five companies for bid-rigging cartel in public tender for street refurbishment

On 24 September 2020, the Romanian Competition Council ("RCC") imposed fines totalling € 468,000 on five companies for engaging in bid-rigging in relation to public tenders concerning the refurbishment of certain streets in the Romanian city of Pitesti.

The investigation started in 2018 following a complaint filed by the Pitesti Public Domain Administration acting as the contracting authority. The RCC found that the five companies had submitted a joint bid for the public tender which was made up of five lots. This was the only bid submitted in the context of the public tender procedure, which was subsequently cancelled by the contracting authority.

Following its investigation, the RCC discovered that the five companies had reached an agreement not to compete with each other by dividing the public contracts relating to the five lots amongst themselves. Three companies received a reduction of their fine for having admitted to the violation of the competition laws.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission reveals initial options for the reform of the VBER

On 23 October 2020, the European Commission ("Commission") published an Inception Impact Assessment (the "Inception Assessment") (available here) as part of the revision of the Vertical Block Exemption Regulation ("VBER") and the Vertical Guidelines in anticipation of the expiry of the VBER on 31 May 2022. The Inception Assessment is a four-page document (described by the Commission as a roadmap) which briefly summarises various policy options that the Commission is considering in order to address perceived shortcomings in the current rules identified during the evaluation phase of the VBER (see VBB on Competition Law, Volume 2020, No. 9). As a next step, and subject to comments on the Inception Assessment, the Commission currently plans to review these options in detail in an impact assessment process to be completed by the fourth quarter of 2021. This detailed review process will be preceded by a public consultation to be opened by the end of this year. In the meantime, the Commission invites stakeholders to provide their initial feedback on the contents of the Inception Assessment by 20 November 2020.

Overall, the Commission will consider how to clarify and simplify the existing rules, as well as how to fill in some gaps in relation to, in particular, certain (now-prevalent) online sales restrictions and the treatment of new market players such as online platforms. The Commission specifically refers to:

- the possibility of providing greater clarity by engaging with business concerning instances in which the setting of minimum retail prices could be justified by efficiencies (apparently, it seems, in the form of individual guidance), as well as
- no longer excluding (from the exemption provided by the VBER) non-compete obligations that are tacitly renewable beyond 5 years.

The more detailed substantive discussion in the document concerns four areas in which the Commission considers that the current rules may need to be revised. In relation to each of these areas, the Commission proposes different options for the scope of the possible revisions, which it plans to assess against the alternative of retaining the current rules. These are summarised below.

Risk of stricter treatment of dual distribution and MFNs

The Commission will consider options to apply a generally more restrictive approach in relation to two areas, namely the rules concerning dual distribution (i.e., situations where a manufacturer sells its goods or services direct to end customers, thereby competing with its own distributors at the retail level) and parity clauses (so-called most-favoured-nation ("MFN") clauses, requiring a business to offer the same or better conditions to its contracting party as those it offers: (i) to third parties in another sales channel and/or (ii) in its own direct sales channel). The options the Commission will explore could result in the scope of the exemption provided by the revised VBER being limited in these areas (without, however, creating any new hardcore restrictions). While the Commission recognises that this would require additional self-assessment by businesses and thereby increase their costs, it could reduce the likelihood of agreements with anti-competitive effects being implemented.

- **Dual distribution**: The Commission suggests that such agreements, which have become far more prevalent with the increase of online sales, may result in significant horizontal concerns which no longer justify exempting them under the VBER. Therefore, as possible alternatives to the option of retaining the exemption for dual distribution that currently applies under the VBER, the Commission will consider either: (i) to remove the exemption for dual distribution from the VBER altogether or (ii) to limit the exemption by, for example, setting a market share threshold (in relation to the contracting parties' combined shares in the relevant retail market) above which the exemption would no longer apply. (Admittedly, the options

the Commission is considering in this area are not exclusively restrictive as, should an exemption for dual distribution be retained, an option would be to broaden its scope to include comparable agreements concluded by wholesalers and/or importers whose agreements with retailers, unlike those of manufacturers and service providers, do not currently benefit from the VBER.)

- **MFN clauses**: The Commission confirms that all parity obligations (whether price or non-price related, at wholesale or retail level) are exempted under the current VBER. The Commission notes that national competition authorities and courts have found certain of these obligations to have anti-competitive effects. The Commission consequently proposes, as possible alternatives to the option of retaining the current approach, that either: (i) the benefit of the VBER should be removed entirely for all parity clauses or (recognising that concerns are particularly prevalent as regards parity obligations that relate to indirect sales and marketing channels, including platforms and other intermediaries) (ii) the benefit should be removed only for agreements concerning specific types of sales channels.

- **Possible greater freedom to impose active sales restrictions and certain obligations on online sales**

The Commission will consider options to relax the rules concerning two other areas: (i) active sales restrictions (i.e., restrictions regarding the territory into which or the customers to whom the buyer can resell) and (ii) indirect measures restricting online sales.

- **Active sales restrictions**: The Commission recognises that, although certain active sales restrictions are currently permitted under the VBER, there are calls for more clarity (given the great complexity of the existing rules) and increased flexibility to design distribution models, for example, with respect to allowing 'shared exclusivity' between distributors in a particular territory or combining exclusive and selective distribution (in the same or different territories). In response, the Commission will consider the option of expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs (which presumably would allow active sales to be restricted into a territory where exclusivity was shared). In addition, it will consider the option of more effectively protecting selective distribution systems by exempting restrictions on sales from outside a selective distribution system territory to unauthorised distributors inside that territory.

- **Indirect measures restricting online sales (e.g., dual pricing)**: The Commission will consider options to relax the treatment of indirect measures which might be considered to make online sales more difficult, but fall short of amounting to prohibitions on online selling. In particular, the Commission recognises that '[o]*nline sales have developed into a well-functioning sales channel over the last decade, whereas physical stores are facing increasing pressure*'. As a result, one option the Commission will consider would see measures, such as dual pricing (i.e., charging the same distributor a higher wholesale price for products intended to be resold online than for products sold offline), no longer being considered hardcore restrictions under the VBER, thereby no longer barring suppliers from setting different wholesale prices for online and offline sales. The Commission further floats the idea of no longer requiring manufacturers to impose the equivalence principle in selective distribution systems (i.e., the prohibition against imposing criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar shops) since the two sales channels are '*inherently different*'.

A number of the options under review, if adopted, could have a substantial impact on future distribution models, some positive and some negative depending on the specific business model of the company. The possibility of a measured loosening and simplification of the complex and formalistic rules on active sales and certain online sales obligations is likely to be widely welcomed. There is, however, a real risk of substantial uncertainty being introduced in relation to the now ubiquitous phenomenon of dual distribution, in the apparent absence of empirical evidence of material competition concerns. Businesses would be well advised to consider how each of the options may impact their future activities and make use of the option to provide feedback by weighing in on the Commission's review, in particular at the stage of the second full public consultation to be launched towards the end of 2020. The

Commission will publish a draft of the revised VBER and Vertical Guidelines in 2021, by which time it may well be too late to materially impact the new regime.

European Commission publishes stakeholder questionnaire as part of its evaluation of the Motor Vehicle Block Exemption Regulation

On 12 October 2020, the Commission launched a public consultation with a view to receiving comments from stakeholders on the ongoing evaluation of the 2010 Motor Vehicle Block Exemption Regulation ("MVBER") regime. The public consultation aims to collect facts, views and evidence to assist the Commission's evaluation of the performance of the current rules in order to inform its decision on whether to allow the MVBER to lapse, to prolong its duration or to revise it upon its expiry on 31 May 2023. The MVBER and the Supplementary Motor Vehicle Guidelines complement the 2010 Vertical Agreements Block Exemption and Vertical Guidelines, which – as discussed above – are also currently under review and will expire one year earlier on 31 May 2022. As part of its evaluation, the Commission will consider the application of the full spectrum of these rules.

Interested parties can contribute to the evaluation by completing an online questionnaire, available here, before 25 January 2021. The questionnaire focuses on evaluating the following: (i) the effectiveness of the current regime; (ii) whether the rules have resulted in efficiencies, in particular, whether they have reduced costs for undertakings and competition authorities in ensuring compliance with Article 101 TFEU; (iii) the relevance of the current rules to current needs; (iv) the coherence of the current rules both internally and with other EU rules; and (v) whether the same results could be achieved with action only at national level. The questionnaire is similar to the questionnaire issued in relation to the Vertical Agreements Block Exemption in 2019, tailored to the specificities of the motor vehicle sector. It asks questions both in relation to market experience and the functioning of detailed provisions of the legal rules.

Notably, the Commission explicitly invites market participants in the questionnaire to offer their views on whether they have encountered any hardcore restrictions in contracts to which they are party (such as resale price maintenance). Depending on what is reported in the responses to the questionnaire, this could well result in enforcement action against individual companies as has occurred, for example, as a consequence of company-specific information provided to the Commission in sector inquiries.

The Commission is obliged to issue its evaluation report by 31 May 2021.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court finds second musical instruments maker to have engaged in resale price maintenance

According to a press release issued by the Austrian Federal Competition Authority ("FCA"), the Austrian Cartel Court ruled on 24 September 2020 that musical instruments maker Roland Germany GmbH ("Roland Germany") had violated the competition rules by entering into agreements fixing minimum resale prices for electronic musical instruments and related equipment and software between 2010 and 2018. As previously reported, the Cartel Court recently found that Yamaha, another musical instruments manufacturer, had also engaged in resale price maintenance (see VBB on Competition Law, Volume 2020, No. 8). As in the Yamaha case, no fine was imposed in the current case as Roland Germany cooperated with the FCA under the leniency procedure. The finding by the Cartel Court is final. Both the Roland and Yamaha groups were also recently fined for resale price maintenance in the UK (see VBB on Competition Law, Volume 2020, No. 9).

HUNGARY

Hungarian Competition Authority fines Heineken approximately € 250,000 for failing to comply with reporting obligations under commitments to limit exclusivity contracts

By decision of 19 October 2020, the Hungarian Competition Authority ("GVH") imposed a fine of HUF 75 million (approximately € 250,000) on beer maker Heineken for failing to comply with its reporting obligations under its commitments to reduce the amount of beer sold under exclusivity contracts. The commitments in question date from 2015, when Heineken, together with two other breweries, committed to gradually decreasing the amounts of

beer sold to restaurants under exclusive contracts. The GVH's follow-up investigation found that Heineken had not followed the agreed upon methodology when reporting on its compliance with the commitments, and that considerable efforts were required on the part of the GVH to obtain the necessary information.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Munich rules in favour of Conversant Wireless and Nokia against Daimler – Continuation of patent-holder friendly case law in SEP proceedings

On 23 October 2020, the Regional Court of Munich granted Conversant Wireless an injunction against Daimler over Standard Essential Patents ("SEP") used for connected cars. The injunction is reportedly open to enforcement by Conversant Wireless against a collateral of € 5 million, pending appeal.

Furthermore, on 30 October 2020, the Regional Court of Munich reportedly ruled in favour of Nokia in SEP proceedings also against Daimler. The collateral to enforce the judgment pending appeal is said to amount to € 18 million. Both judgments have not yet been made publicly available.

The Munich judgments form part of a series of patent-holder friendly judgments in certain German courts that followed the ruling of the Federal Court of Justice on 5 May 2020 in *Sisvel v. Haier* (see VBB on Competition Law, Volume 2020, No. 5). That judgment offered an interpretation of the landmark judgment of the Court of Justice ("ECJ") in *Huawei v. ZTE* (Case C-170/13) (see VBB on Competition Law, Volume 2015, No. 7).

Daimler has now been subject to several adverse judgments ruling that it infringed the relevant SEPs.

STATE AID

– EUROPEAN UNION LEVEL –

Another "EPIC" judgment: General Court provides additional guidance on the scope of the presumption of advantage granted by State guarantees (*France and IFPEN v Commission*, Joined Cases T-479/11 RENV and T-157/12 RENV)

On 5 October 2020, the General Court delivered another important judgment in the so-called EPIC saga – where "EPIC" is a French acronym standing for "*Établissement Public à caractère Industriel et Commercial*" ("Publicly owned industrial and commercial establishment").

The EPICs came under the Commission's scrutiny because of the implied and unlimited State guarantee that is conferred by their status. In particular, as legal entities governed by public law, French law provides that EPICs are not subject to the ordinary law applicable to insolvency procedures.

The Commission has already assessed the State guarantee conferred by EPIC status in its *La Poste* decision of 2010 (OJ 2010 L 274, p. 1). In this context, it found that this guarantee constitutes State aid for the purposes of Article 107(1) TFEU, insofar as it allowed *La Poste* to obtain more favourable borrowing terms than those it would have obtained under ordinary market conditions. The *La Poste* decision was confirmed on appeal by the Court of Justice (*France v Commission*, C-559/12 P – hereinafter "*La Poste*"). The Court ruled, *inter alia*, that the Commission can rely on a rebuttable presumption that the grant of an implied and unlimited State guarantee results in an improvement in the financial position of the recipient. In particular, in the context of a State aid investigation, the Commission can rely on that presumption to prove that the recipient has benefited from an advantage in the sense of Article 107(1) TFEU.

The judgment of 5 October 2020 concerns the validity of another Commission decision (OJ 2012 L 14, p. 1 – the "Contested decision") which found that *IFP Énergies Nouvelles* ("IFPEN") benefited from a selective advantage as a result of the State guarantee attached to the EPIC status. This judgment follows the Court of Justice's annulment – and referral back to the General Court – of an earlier General Court judgment dealing with the same Contested decision (judgment of 26 May 2016, *France and IFP Énergies Nouvelles v Commission*, Joined Cases T-479/11 and T-157/12, which was set aside on appeal in the judgment of 19 September 2018, *Commission v France and IFP Énergies Nouvelles*, Case C-438/16 P).

The judgment of 5 October 2020 partially annuls the Contested decision. Moreover, following the instructions set out in the Court of Justice's referral, the judgment sheds light on several important aspects concerning the assessment of State guarantees under Article 107(1) TFEU.

Can the Commission rely on the presumption of advantage established by the La Poste judgment with regard to IFPEN's dealings with suppliers and customers?

Yes, the Commission can theoretically do so. Even though the *La Poste* judgment concerned the relationship between an EPIC on one hand, and banks and financial institutions on the other hand, the presumption can also be applied with respect to other dealings, in particular those between the EPIC and its suppliers and customers.

However, the General Court – following the instructions received from the Court of Justice – clarified that the presumption established in the *La Poste* judgment is based on the hypothesis that, thanks to the guarantee associated with its status, the EPIC concerned benefits or could benefit from better financial conditions than those which are normally granted on the financial markets. Therefore, the application of that presumption to the EPIC's dealings with suppliers and customers is justified only in so far as such more advantageous conditions also arise in the EPIC's dealings on the markets concerned.

This concretely implies that, when the Commission seeks to apply that presumption, it must first examine the economic and legal context of the market affected by the dealings in question. In particular, the Commission is required to verify whether the conduct of players on the market justifies a hypothesis of an advantage similar to that found in the EPIC's dealings with banks and financial institutions.

In the present case, the Court found that the Commission did not carry out such an assessment insofar as the dealings of IFPEN with suppliers and clients are concerned. In particular, with regard to the suppliers, the Commission confirmed at the hearing that it did not carry out any empirical and concrete examination of the prices paid by the suppliers, but rather relied on a presumption that, as a result of the EPIC status, these prices would be lower than under ordinary market conditions. In the same way, the Commission also limited itself to relying on a statement by one interested party, which allegedly reported that the prices paid by clients were influenced by the guarantee granted by the EPIC status. It did not, however, carry out any concrete examination of the market conditions in which IFPEN operated.

In conclusion, the General Court found that, in the present case, the Commission did not meet the standards of proof required to apply the simple presumption established in the *La Poste* judgment with regard to the dealings of IFPEN with its suppliers and clients.

Did the Commission correctly rely on the presumption established by the La Poste judgment with regard to IFPEN's dealings with banks and financial institutions?

Yes, the Commission did not make any error in this respect. The Commission was allowed to presume that, thanks to the guarantee associated with its status, an EPIC benefits or could benefit from better financial terms than those available on the financial markets – i.e. in its relationship with banks and financial institutions. The Court specified that, in order to rely on that presumption, the Commission was not required to show the actual effects produced by the guarantee at issue on the market.

As regards the rebuttal of the presumption, the General Court recalled that it can be rebutted only if it is shown that, in light of the economic and legal context in which the guarantee associated with the EPIC status concerned is placed, the interested EPIC did not obtain in the past and – "*according to any plausibility*" – will not obtain in the future, any real economic advantage from that guarantee.

In the present case, the findings of the Contested decision showed that the presumption had been rebutted for the period before 2010. On the other hand, for the subsequent period, the arguments provided by the French State and IFPEN were not enough to rebut it. Therefore, the Commission did not make any error in this regard.

Was the Commission allowed to require IFPEN to transfer to it every year a list of data concerning its dealings with suppliers, clients and creditors?

The Contested decision required IFPEN to provide to the Commission an annual report containing several pieces of information, such as: (i) the value, interest rate and contractual terms of the loans subscribed to by IFPEN; (ii) the value of goods and services sourced by IFPEN from suppliers and (iii) the value of the economic activities carried out by IFPEN. The Applicants argued that these reporting duties were disproportionate and violated the State aid rules.

The General Court found that the requirement to submit annual reports does not per se run counter to the principle of proportionality – it is, in fact, aimed at ensuring an effective control of State aid. However, insofar as the reporting obligations concerned the dealings of IFPEN with clients and suppliers – for which the Court found that the Commission had not met the required standards of proof – these obligations were not justified. Accordingly, the General Court found that, insofar as they concerned suppliers and clients, these reporting obligations were illegal.

Advocate General criticises the Commission's approach to progressive taxation in Poland and suggests that the Court dismisses the appeal (Case C-562/19 P, *Commission v Poland*)

On 15 October 2020, Advocate General Kokott delivered her opinion in Case C-562/19 P, *Commission v Poland*, concerning the appeal of the General Court's judgment of 16 May 2019 (Joined Cases T-836/16 and T-624/17). The judgment under appeal annulled the Commissions' decision to open a formal State aid investigation (T-836/16)

and the final decision (T-624/17) regarding alleged State aid granted by the Polish retail sector tax on turnover.

Advocate General Kokott suggests that the Court dismisses the appeal. The most interesting section of her reasoning concerns the first part of the first ground of appeal, and the definition of the reference framework.

First, the Advocate General says that the first ground of appeal puts forward the question whether the determination of the reference framework for assessing selectivity should be done by the Commission or by the Member State.

The Advocate General considers that only Member States are competent to define what the normal level of taxation is. This implies, in the case at hand, that the national legislature must determine the object of taxation, as well as the basis of assessment and the rate structure. Hence, according to the Advocate General, Poland did not violate the State aid rules when establishing a turnover-based income tax for retailers with a progressive average rate from 0% to just below 1.4%. The different average rates resulting from the progressive scale constitute normal taxation – i.e. they do not grant any selective advantage to the taxpayers concerned.

The Advocate General also emphasises the difference between the Polish measures at stake and those assessed in *Gibraltar* (Joined Cases C-106/09 P and C-107/09 P). In *Gibraltar*, the tax measures were intended to circumvent the rules on State aid, by using purportedly general profit-based income taxation to establish very low taxation on offshore companies. In short, the law was designed in such a way as to discriminate between undertakings in comparable legal and factual situations. The findings of the Court in *Gibraltar* heavily relied on the inconsistency in the legal framework applicable at national level.

In the present case, the General Court rightly found – says the Advocate General – that there is no such inconsistency in the Polish legal framework. The normal system applicable in that Member State was based on a progressive structure, which resulted in heavier taxation of undertakings with higher turnover and lower taxation of undertakings with smaller turnover. This was the logical consequence of the redistributive purpose associated with a progressive rate.

Second, the Advocate General dismisses the argument of the Commission, according to which the establishment of a turnover-based income tax would be inconsistent with the logic of the relevant national framework. According to the Advocate General, the national legislature can choose whether to use profit or turnover as an indicator of ability to pay for tax purposes. Both profit and turnover-based taxes have advantages and disadvantages; it is not up to the Court or the Commission to decide how to weigh these pros and cons. This must be done by a "democratically mandated legislature". The rules on State aid do not allow the Commission to decide whether a Member State should opt for one indicator or the other.

In the same sense, the fact that the Polish measure establishes a progressive rate does not point to any inconsistency. Progressive rates are a common means in income taxation of achieving taxation according to financial capacity. There is no legal reason – says the Advocate General – to consider that progressive rates should only be applied in the context of taxation of natural persons.

Whether the Grand Chamber will follow the interpretation put forward by the Advocate General or not, it is evident that her Opinion provides a lot of food for thought for State aid and tax experts – but also, more generally, for anyone dealing with EU law. Advocate General Kokott appears to plead in favour of a more "limited" and State aid-specific approach to the review of fiscal measures adopted by Member States on the basis of Article 107(1) TFEU. Moreover, her remarks about the prerogatives of national parliaments in the definition of the "normal level of taxation" might also have an impact in other areas of EU law.

Court of Justice clarifies the concept of "State resources" with regard to financial contributions collected by an authorized private Eco-body (*Eco TLC*, C-556/19)

On 21 October 2020, the Court of Justice answered a request for a preliminary ruling made by the French *Conseil d'État* ("Council of State"), which raised interesting questions with regard to the notion of "State resources" within the meaning of Article 107(1) TFEU.

The background of the case concerns certain provisions of the French environmental code, which require companies placing textile clothing products, household linens and footwear products ("TLC products") on the market,

to contribute to or to provide for the recycling and treatment of waste arising from those products. These companies must either themselves provide waste treatment for their TLC products, or transfer that responsibility to an approved body – and pay, for that purpose, certain financial contributions.

The case before the referring court pertained to certain resources transferred by Eco TLC – that is, the only body approved to provide the above-mentioned waste treatment services in France – to sorting operators. In fact, for the purpose of treating TLC products on behalf of companies which place them on the market, Eco TLC entered into contracts with sorting operators and granted them various forms of financial support. The question arose as to whether these contributions granted by Eco TLC to sorting operators amount to State aid within the meaning of Article 107(1) TFEU.

The Court provided a negative answer. In short, it found that Eco TLC's funds do not amount to "State resources" within the meaning of the State aid rules.

In this regard, the Court observed that the French provisions at issue in the main proceedings require, first, the transfer of financial contributions from private undertakings to a company governed by private law – namely, Eco TLC – and, second, the transfer of these contributions from that company to other private undertakings – namely, the sorting operators. These funds never pass through the public authorities. Moreover, France did not relinquish any resources, in whatever form (such as taxes, duties, charges, etc.) which, according to national legislation, should have been paid to the State by Eco TLC or the sorting operators. In other words, the financial contributions made to Eco TLC, and thereafter transferred to the sorting operators, remain private throughout their entire life cycle.

Furthermore, the Court also noted that Eco TLC's funds could not be considered as "State resources" on account of the fact that they would be under public control. The Court found, *inter alia*, that the French State does not, at any moment, have access to those funds, and that Eco TLC has no prerogatives corresponding to those of a public authority. Moreover, the Court noted that the funds collected by Eco TLC are exclusively used for carrying out the tasks which have been legally assigned to it. This requirement is an indication that *prima facie* excludes public control of the funds, since the French State is not entitled to require Eco TLC to use them in any manner other than what is provided for under the French rules.

The Court also dismissed several other arguments which had been invoked to support the view that Eco TLC's funds would amount to "State resources". Ultimately, it concluded that, subject to certain determinations which are for the referring court to carry out, the funds used by Eco TLC to pay financial support to sorting operators are not under constant public control, and that they do not constitute "State resources" within the meaning of Article 107(1) TFEU.

Commission prolongs and expands COVID-19 Temporary Framework to further support companies facing significant turnover losses

On 13 October 2020, the Commission prolonged the scope of the COVID-19 Temporary Framework adopted on 19 March 2020. All sections of the Temporary Framework have been prolonged for six months (i.e. until 30 June 2021), and the section to enable recapitalisation support is prolonged for three months until 30 September 2021. In addition, the Commission also approved certain amendments to the Temporary Framework:

1. **Support for uncovered fixed costs of companies**. This amendment allows Member States to support companies facing a decline in turnover during the eligible period of at least 30% compared to the same period of 2019 due to the coronavirus outbreak. The support will contribute to a part of the beneficiaries' fixed costs that are not covered by their revenues, up to a maximum amount of € 3 million per undertaking.

2. **Exit of the State from previously State-owned companies**. The Commission also amended the conditions for recapitalisation measures. The amendments concern in particular the scenario of a State's exiting from the recapitalisation of enterprises where the State was an existing shareholder prior to the recapitalisation.

3. **Extension of the temporary removal of all countries from the list of "marketable risk" countries**. The Commission has extended the temporary removal of all countries from the list of "marketable risk" countries under the *Short-term export-credit insurance Communication* until 30 June 2021.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

President of the General Court suspends RFIs requiring the production of documents containing sensitive personal data until specific virtual data room procedure is set up

On 29 October 2020, the President of the General Court ("GC") issued two orders suspending the operation of requests for information ("RFIs") issued to Facebook Ireland Ltd ("Facebook") by the European Commission ("Commission") concerning documents that are not related to Facebook's commercial activities and that contain sensitive personal data, until a specific virtual data room procedure is put in place to control access to these documents (Facebook Ireland v. Commission, Joined Cases T-451/20 R and T-452/20 R). The RFIs were addressed to Facebook in connection with two ongoing antitrust investigations, i.e., Case AT.40684 – Facebook Marketplace and Case AT.40628 – Facebook data-related practices).

Factual background

In November 2019, the Commission issued an RFI whereby it required that Facebook provide internal documents which had been prepared by or for, or received by, certain custodians, and which were identified with specific search terms or search query syntaxes. Facebook expressed concerns regarding the necessity and proportionality of the proposed search terms. Following exchanges between Facebook and the Commission aimed at refining the search terms and reducing the number of documents identified, the Commission issued a new RFI on 4 May 2020 containing revised search terms ("Decision").

On 15 July 2020, considering that the requested documents contained personal information which was unrelated to its commercial activities, Facebook lodged an action for annulment of the Decision before the GC. In parallel, Facebook filed an application for interim measures requesting the President of the GC to suspend the Decision until a final judgment is rendered on the main proceedings.

Prima facie case

Pursuant to established case law, the prima facie case requirement is satisfied where at least one of the pleas in law put forward by the party seeking interim measures in support of the main action appears, at first sight, not to be unfounded. The GC considered that two of the pleas submitted by Facebook did not appear unfounded and required a detailed examination in the context of the main proceedings. The GC therefore concluded that the prima facie case requirement was satisfied.

First, Facebook alleged that the Commission misused its powers and infringed the principles of necessity as well as Facebook's rights of defence by requesting the production of numerous documents that are irrelevant to its investigations. The GC noted that the information requested by the Commission was identified on the basis of a wide range of search terms, which would give rise to the production of documents irrelevant to the investigations, without there being a method of verifying the relevance of the requested documents. In addition, the GC compared the RFIs in this case to unannounced inspections carried out at the premises of companies and ruled that it was "not unreasonable to consider" that the procedural guarantees enjoyed by companies in the context of those dawn raids should also apply in the case of requests for infomation. Accordingly, the GC found that this plea could be considered as well-founded in the main proceedings and therefore lead to the annulment of the Decision.

Second, Facebook alleged that by requiring it to produce documents that have a private character and that are irrelevant to its investigation, the Commission violated the fundamental rights to privacy and good administration, as well as the principle of proportionality. Given the significant number of documents concerned by the RFIs and the sensi-

tive personal data they are likely to contain, the GC held that it cannot be ruled out that the RFIs went beyond what is necessary to attain the objectives they pursue and that the Commission therefore infringed the fundamental right to privacy.

Urgency

In addition to finding that there was a prima facie case, the GC considered that interim measures were urgent to prevent serious and irreparable harm to private individuals concerned by the sensitive personal data contained in the requested documents (e.g., Facebook's employees). Under normal circumstances, the ability of Commission officials to become acquainted with personal data in the context of an investigation cannot in itself cause serious and irreparable harm. However, the documents required by the Decision contained sensitive personal data (e.g., medical information and political affiliations), which are generally only shared within an individual's most private sphere. Accordingly, individuals would suffer serious and irreparable harm because of the increased number of people who would have access to these sensitive personal data. The GC noted, in particular, that the harm caused could not be reversed by the subsequent annulment of the Decision and thus had an irreversible nature.

By contrast, the GC found that Facebook itself would not suffer serious and irreparable harm because: (i) the requested documents would only be accessed by Commission officials; (ii) Commission officials are bound by rigorous obligations of professional secrecy and (iii) disclosure to third parties would only relate to non-confidential parts of the documents.

Balance of interests

Finally, the GC balanced the two sets of interests at hand, namely the prevention of serious harm resulting from the disclosure of sensitive personal data, on one hand, and the effectiveness of competition enforcement, on the other hand. In that respect, it concluded that it is necessary to establish a virtual data room procedure for the examination of documents that are likely to include sensitive personal data.

Under this procedure, Facebook will identify documents which include sensitive personal data and transmit these documents to the Commission using a separate electronic support. The Commission will then store these documents in a virtual data room which a limited number of Commission officials will be able to access, in the presence of an equivalent number of Facebook's lawyers. After examining the documents and giving Facebook's lawyers the possibility to provide their observations, Commission officials will add the relevant documents to the investigation file. In case of disagreement about the classification of a document, Facebook's lawyers will have the right to state the reasons for their disagreement. The Director for Information, Communication and Media of the Commission's Directorate-General for Competition may ultimately be consulted to resolve the continued disagreement.

Based on the above considerations, the GC suspended the Decision in so far as it covers documents that contain sensitive personal data, emphasising, however, that the effects of the suspension apply only until the virtual data room procedure is implemented by the Commission.

National Competition Authorities provide qualified support for the New Competition Tool

Earlier this year, the European Commission (the "Commission") proposed a "new competition tool" ("NCT") to address structural competition problems. Stakeholders could express their views on the need for an NCT and its design as part of an impact assessment and an open consultation until 8 September 2020 (see VBB on Competition Law, Volume 2020, No. 6). In this context, the Commission received responses from 26 Member States' national competition authorities ("NCAs") as well as from the Icelandic Competition Authority. On 8 October 2020, the Commission published a Summary of the contributions from the National Competition Authorities to the impact assessment of the NCT (the "Summary").

From a policy perspective, the NCAs expressed overall support for the creation of an NCT to address structural problems that cannot adequately be tackled under Articles 101 and 102 Treaty on the Functioning of the European Union.

However, certain NCAs gave qualified support to the NCT's eventual design. In this respect, the NCAs' main concerns pertain to the coordination between the NCT and existing ex-ante regulation at Member State level, compatibility between the NCT and traditional competition tools, due process and judicial review, and the necessity of clear legal rules on the type of structural problems that warrant an investigation and on the imposition of remedies.

Some NCAs also emphasised that the application of the NCT should be strictly limited to cases where no infringement of Articles 101 and 102 TFEU can be found. Those NCAs are concerned that the alternative would pave the way for "forum shopping" as regards the choice of competition instruments used in a particular case.

Of particular concern to the NCAs is the interaction and cooperation between them and the Commission in the application of the NCT. The Summary points out that certain Member States have already introduced, or are about to introduce, instruments similar to the NCT, and that more Member States may adopt similar tools should the NCT be adopted.

As a result, certain NCAs are concerned about overlaps between their own regimes to deal with structural weaknesses in competition and the NCT. These co-existing regimes could have different scopes of application and consequences, thereby resulting in considerable legal uncertainty. Therefore, there is consensus on the importance of clarifying the interaction between national regimes and the NCT. NCAs suggested various solutions to design a coordination mechanism, including the application of principles similar to those which govern the allocation of cases between the Commission and the NCAs in the enforcement of Articles 101 and 102 TFEU as well as early exchanges of experience and knowledge on the markets under investigation.

Certain NCAs have proposed that an NCA concerned by a case should be informed of every major step in the investigation and be granted full access to the file and the right to be heard. It has also been suggested that the NCA concerned should be allowed to participate in the investigative measures carried out within their territory and empowered to participate in the monitoring of the implementation of the remedies adopted.

– MEMBER STATE LEVEL –

ICELAND

Amendments to the Icelandic Competition Act

On 30 June 2020, the Icelandic parliament approved a bill (the "Bill") to amend the Competition Act No. 44/2005 (the "Act"). The amendments are intended to simplify the implementation of the Act. They also modify notification thresholds as well as conditions for merger clearance, and facilitate co-operation between Nordic competition authorities.

The Bill withdraws the Icelandic Competition Authority's (the "ICA") powers to grant exemptions from Article 10 of the Act (which corresponds to Article 101 TFEU). It brings the Act in conformity with Regulation (EU) No. 1/2003 in that regard, replacing exemptions with self-assessment. The Bill also increases the turnover-based merger notification threshold by 50%: parties to a contemplated merger will have to notify the ICA if their total combined domestic turnover exceeds ISK 3 billion (instead of the previously applicable ISK 2 billion). In addition, the Bill enables the ICA to allow undertakings to notify a merger by way of a short form, even if the transaction does not meet the statutory thresholds. Finally, the Bill authorises the ICA to carry out investigations at the request of other Nordic competition authorities.

Most of the amendments have already taken effect. The provisions related to the replacement of exemptions with self-assessment are expected to enter into force on 1 January 2021.

SWEDEN

Sweden aims to enhance enforcement powers of the Swedish Competition Authority

On 1 October 2020, the Swedish government submitted a draft bill (the "Bill") to the Council on Legislation which would grant the Swedish Competition Authority ("SCA") enhanced enforcement powers.

Most importantly, the government proposes that the SCA be empowered to adopt infringement decisions in antitrust cases and issue administrative fines. This would mark a sig-

nificant change from the current regime where the SCA has to bring a case before the Patent and Market Court to obtain a court decision finding an infringement and imposing a fine. If adopted, the Bill would also enhance the SCA's powers in connection with unannounced inspections and introduce an investigative fine, i.e., a sanction against companies that defy the SCA's decisions during an investigation of a suspected infringement.

The proposals contained in the Bill are a step towards enhanced decision-making powers and stricter rules resulting from the implementation of Directive (EU) 2019/1, which aims to harmonize the investigative and sanctioning powers of the European competition authorities in their enforcement of the EU competition rules.

The legislative amendments are proposed to enter into force on 4 February 2021.

UNITED KINGDOM

CMA and SFO join forces to investigate criminal cartel offences

On 22 October 2020, the UK's Competition and Markets Authority ("CMA") and the UK's Serious Fraud Office ("SFO") signed a memorandum of understanding ("MoU") allowing the two regulators to investigate and/or prosecute individuals in criminal cartel cases.

Under UK competition law the most serious forms of anti-competitive agreements are criminal offences, such as, bid rigging, direct or indirect price fixing, and sharing customers or markets. However, only a few criminal cartel cases have been brought by the CMA. The MoU allows the two regulators to share expertise, training and information with each other, and demonstrates that the UK authorities remain committed to taking measures to prevent and punish cartel activity.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

ROMANIA

Romania establishes 20% overcharge legal presumption for damages caused by cartels

On 16 October 2020, the Romanian government published Ordinance No. 170/2020 on actions for damages in cases of violation of the competition law provisions and modifying and supplementing Romanian Competition Law No. 21/1996 (the "Ordinance"). The Ordinance provides that cartel infringements are presumed to cause an overcharge of 20%.

The Ordinance transposes Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive") into national law by amending Competition Law No. 21/1996. In June 2017, the Romanian Government had adopted a first Ordinance aimed at transposing the Damages Directive. This Ordinance was, however, subsequently found to be unconstitutional by the Romanian Constitutional Court. Romania was thus the only Member State which had not yet fulfilled its obligation to transpose the Damages Directive into national law.

The Ordinance brings an important modification to the provisions set out in the Damages Directive. Whilst Article 17(1) of the Damages Directive only holds that cartel infringements are presumed to cause harm, Article 16(2) of the Ordinance lays down a legal presumption that cartel infringements lead to a 20% overcharge. Cartel participants may, nonetheless, rebut that presumption and prove that the overcharge was lower than 20%. According to the President of the Romanian Competition Council (the "RCC"), the presumption is based on a recommendation from the European Commission according to which cartels increase the price of products or services by 20%.

The Ordinance also provides that infringements consisting in abuses of a dominant position are presumed to cause damage. However, contrary to the presumption applicable in relation to cartels, a person who seeks compensation for harm caused as a result of an abuse of a dominant position will have to quantify and prove the amount of the damage caused.

Finally, and similarly to what is provided for in the Damages Directive, the Ordinance allows for the use of evidence in the context of follow-on actions for damages. Victims of competition law infringements can now use evidence gathered by the RCC in the context of their actions for damages and the RCC will be obliged to provide the requested evidence.

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