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# VBB on Competition Law

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## MERGER CONTROL

### – EUROPEAN UNION LEVEL –

#### European Union and CMA publish post-Brexit merger guidance

On 2 December 2020, the Commission published a readiness [notice](#) addressing the effect of the end of the Brexit Transition Period on EU antitrust and merger review. The UK Competition and Markets Authority (“CMA”) published its own [guidance](#) document on 1 December 2020.

While the UK officially withdrew from the EU on 31 January 2020, during the Transition Period expiring on 31 December 2020, the competences of the Commission and the CMA have remained largely unaffected by Brexit. However, as of 1 January 2021, the EU’s “one-stop-shop” merger review process will cease to apply to the UK. Merging parties will need to consider notifying their transaction both to the Commission and to the CMA, and each jurisdiction will undertake its own, independent review.

The Commission and CMA notices provide guidance on how mergers that are still “live” at the end of the Transition Period will be handled. In particular, the Commission will retain exclusive jurisdiction to review any merger that is formally and validly notified to it under the EU Merger Regulation (“EUMR”) before 31 December 2020, including to assess its effects on UK national or sub-national markets and to impose remedies affecting these markets. The same applies to any merger that, before the above deadline, has either been referred to the Commission under Article 22 EUMR or for which the merging parties have requested the Commission to exercise jurisdiction under Article 4(5) EUMR (provided the conditions for such a request are met and the deadline for Member States to object has expired).

Even after the end of the Transition Period, the CMA retains the right to request that the UK part of a case, initiated before the end of the Transition Period and under review by the Commission, be referred to the CMA pursuant to Article 9 EUMR.

The Commission also clarifies that due to the UK’s exit from the internal market, the Commission will no longer need take into account the impact of a transaction on UK

national markets when such transaction is notified after the end of the Transition Period. Finally, the Commission’s notice underscores that any decisions that it has taken, or will take, on transactions notified before the end of the Transition Period will remain effective in the future. The Commission will also retain the ability to monitor and enforce any commitments in such transactions that affect the UK – including ones that only affect national or sub-national markets – though these competences may be transferred to UK authorities by mutual agreement. The CMA notice enumerates the scope of its powers to monitor and enforce such commitments.

The CMA guidance also underscores that, even though the merger review process in the two jurisdictions will be fully separate going forward, it will endeavour to communicate and coordinate with the Commission during its merger review process, as it already does with other competition agencies.

#### Commission conditionally clears Google’s acquisition of Fitbit

On 17 December 2020, following a Phase II investigation, the Commission approved Google’s acquisition of Fitbit subject to commitments. Fitbit is an American company that develops and sells wearable fitness devices such as smartwatches and fitness trackers, as well as related software and services. US tech giant Google, among other things, develops operating systems for smartphones, smartwatches, and health and fitness devices. It also supplies IT information and research services to the health-care industry.

Fitbit does not have a sizeable EU market presence in smartwatches, as a number of other, larger competitors operate in this space. The Commission determined that Fitbit has limited horizontal overlaps with Google. Nevertheless, the Commission raised concerns that competition in a number of markets would be adversely affected

as the result of Google's use of data collected through Fitbit devices and by issues relating to the interoperability between Fitbit and Google's Android devices.

First, the Commission observed that the merger would harm competition in advertising, by giving Google access to Fitbit's user health and fitness database. This would dramatically increase the amount of data that Google could use to generate personalised advertising, making it more difficult for rivals to enter or compete in the "ad-tech" ecosystem.

Second, the Commission feared that Google might restrict competitors from accessing the Web Application Programming Interface ("Web API") that provides services to Fitbit users and allows them to upload their health data. This might stifle the emergence of start-ups in the growing European digital healthcare space.

Finally, the Commission noted that the merger might incentivise Google to degrade the Android smartphone interoperability of rival Android (operating system) wrist-worn devices that compete with Fitbit.

Google offered a package of commitments to deal with each of these three concerns:

With regard to advertising, Google committed to maintain Fitbit health and wellness user data separate, not to use such data to generate advertising through Google Ads, and to allow users to choose whether such data are shared with other Google applications.

Second, Google committed to maintaining third party access to user data through the Fitbit Web API. Finally, Google agreed to license to all Android OEMs the public APIs covering the functionalities needed for Android wrist-worn devices to interoperate with Android smartphones.

Google also agreed to a set of commitments designed to ensure that the intended effect of this commitment cannot be circumvented nor interoperability be degraded in the future.

The commitments entered into by Google will last for ten years, but the Commission may extend the duration of the advertising commitments by an additional ten years if it can justify an ongoing need to do so.

Finally, market participants and public interest groups had also raised concerns relating to the volume of private health and wellness data that would be concentrated in the hands of Google— both with respect to entrenching Google's position in the digital health sector and with regard to data privacy. The Commission, however, dismissed these concerns, noting that the digital healthcare sector is still emergent in Europe and has many active players, such that the concentration of databases did not raise a competitive concern. The Commission also found that the EU General Data Protection Regulation (commonly referred to as the "GDPR") and other regulatory controls were more appropriate tools to address data privacy issues.

## FOREIGN DIRECT INVESTMENT

### – MEMBER STATE LEVEL –

#### GERMANY

##### **German Government prohibits Chinese acquisition under foreign direct investment rules**

On 2 December 2020, the German Government prohibited on public security grounds the sale of the German Institut für Mobil- und Satellitenfunktechnik ("IMST"), a specialist in satellite and communications technologies, to Addisino, a subsidiary of State-owned defence group China Aerospace Science and Industry Corp ("CASIC"). This is only the second time that the German Government has decided to prohibit a transaction on the basis of the Foreign Trade and Payments Ordinance, and is technically the first decision to be implemented as the first transaction was abandoned following the prohibition decision.

Under the German Foreign Direct Investment ("FDI") screening rules, the Government has the power to assess whether an investment by a foreign entity in a German company is likely to affect public order or security or endangers the country's essential security interests. If the assessment reveals concerns, the Government usually approves the transaction subject to conditions addressing such concerns. However, in this case, remedies were deemed insufficient to address the Government's concerns with regard to IMST's activities in the fields of (i) military applications and (ii) 5G technology. More specifically:

1. **Military applications:** IMST developed a key component for the German earth observation satellite TerraSAR-X. The Federal Ministry of Defence used the satellite's data to generate a high-precision 3D elevation model for military purposes (reconnaissance, command and control, simulation and weapons systems). The Government was concerned that if the acquisition by CASIC had been allowed, such know-how would leak/be transferred to China.
2. **5G technology:** IMST has been involved in commercial radio technology for 25 years and was found to be one of the world's leading research companies in radio communications. Since 5G technology represents a

key digital technology, there were concerns that the acquisition would endanger Germany's technological sovereignty in the field of future communication systems.

Another key reason behind the prohibition appeared to be the fact that IMST, a spin-off of the University of Duisburg-Essen, received significant public funding in the last 10 years, which made up approximately 40% of IMST's revenue.

#### THE NETHERLANDS

##### **Dutch legislator implements FDI Screening Regulation**

On 17 November 2020, the Dutch Senate passed a law (the "Implementing Law") implementing Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the "FDI Regulation").

The Implementing Law contains provisions giving effect to the obligations contained in the FDI Regulation, which entered into force on 11 October 2020. In particular, the FDI Regulation requires the designation and establishment of a so-called "contact point" in each Member State in order to facilitate and support confidential information exchange between Member States and the Commission on foreign direct investments which pose potential risks to public order and security. The Implementing Law designated the Dutch Minister for Economic Affairs and Climate Change as the contact point in the Netherlands.

Further, the Implementing Law designates the Ministers responsible for the cooperation mechanism under the FDI Regulation. Responsibility depends on whether the cooperation involves a foreign direct investment in the Nether-

lands and whether the Netherlands has a mechanism in place for the specific foreign direct investment at hand.

The Implementing Law was published in the Dutch Official Journal on 3 December 2020 and entered into force on 4 December 2020.

## ABUSE OF DOMINANT POSITION

### – MEMBER STATE LEVEL –

#### UNITED KINGDOM

##### **CMA accepts Essential Pharma's commitments to continue supply of vital bipolar medicine to the UK market**

On 18 December 2020, the UK Competition and Markets Authority ("CMA") announced that it had accepted Essential Pharma's commitments to continue supplying a bipolar medicine to the UK market.

Essential Pharma is a supplier of both Priadel and Camcolit, long-term treatments for individuals suffering from bipolar disorder. In October 2020, the CMA opened an investigation examining whether Essential Pharma may have abused its dominant position in relation to the supply of Priadel and/or Camcolit in the UK. The specific conduct under scrutiny was Essential Pharma's proposal to discontinue the supply of Priadel in the UK. Such proposal would have forced medical practitioners to switch their patients to alternative treatments, with the most likely candidate being the more expensive Camcolit, also supplied by Essential Pharma. In addition to the direct cost implications of having to purchase a more expensive medicine, the CMA found that switching patients from Priadel to Camcolit would have also posed certain health risks. In its decision, the CMA pointed out that patients who are stabilised on either of these two medicines are generally not switched to the other, as their therapeutic equivalence is unclear.

Following the opening of the CMA's investigation, Essential Pharma retreated from its original proposal and immediately entered into pricing negotiations with the Department of Health and Social Care ("DHSC"), eventually reaching an agreement to continue supplying Priadel in the UK. Whilst the CMA considered this to be a step in the right direction, the agreement did not remove the threat that Essential Pharma could withdraw Priadel from the UK market in the future, presumably if the price offered by DHSC was lower than Essential Pharma's expectations. The CMA held that the continued threat of withdrawal could be enough to coerce the DHSC to later have to purchase more expensive alternative medicines or be forced to accept worse terms to ensure the continued availability of Priadel.

Against this backdrop, Essential Pharma formally committed to ensuring an appropriate and continued supply of Priadel in the UK for a period of five years and to ensuring that adherence to these commitments would not be jeopardised in the event it divested or licensed out the rights to supply Priadel. By formally accepting Essential Pharma's commitments, the CMA ended its investigation without taking a decision as to whether or not the conduct in question actually amounted to an abuse of dominance.

This is yet another demonstration of the CMA's readiness to intervene if it considers that the conduct of a pharmaceutical company has negatively impacted the availability or affordability of a pharmaceutical products. In the press release accompanying its decision, the CMA highlighted the particular importance of the case due to the financial strain being placed on the NHS as a result of the coronavirus pandemic. With the impact of the pandemic being far from over, it can be expected that the already thorough CMA's scrutiny of the pharmaceutical sector will only intensify.

This case also highlights the expedient manner by which a suspected anticompetitive practice can be identified and addressed by the CMA. As the main purchaser of pharmaceuticals in the UK, the DHSC is well-placed to notice if the price or availability of a medicine develops in a manner that raises warning signs, and recent practice strongly indicates that it will not hesitate to refer any suspicions it may have to the CMA for further investigation. Indeed, this case, as well as other notable past cases brought by the CMA (e.g., the excessive pricing case brought against Pfizer and Flynn) were initiated following concerns raised by the DHSC.

In the present case, the swift detection of the allegedly problematic practices was matched by the expediency of which the CMA (and Essential Pharma) were able to bring the case to a conclusion, with less than three months passing between the opening of the CMA's investigation and the acceptance of binding commitments.

## CARTELS AND HORIZONTAL AGREEMENTS

### – MEMBER STATE LEVEL –

#### ITALY

#### **Italian Administrative Court annuls fines imposed for infringement in the automotive financial services sector**

On 24 November 2020, the Italian Regional Administrative Court for Lazio ("IRAC") annulled a decision issued by the Italian Competition Authority ("ICA") in the automotive financial services cartel case in which a total fine of € 678 million was imposed ("Decision").

On 20 December 2019, the ICA had found that a number of lenders operated a cartel in the sale of financial products in the motor vehicle sector between 2003 and 2017 in violation of Article 101 TFEU. Two trade associations were also fined (see [VBB on Competition Law, Volume 2019, No. 1](#)).

The companies involved in the infringement were certain car manufacturers and their respective captive banks, namely Banca PSA Italia SpA, Banque PSA Finance SA, Santander Consumer Bank SpA, BMW Bank GmbH, BMW AG, Daimler AG, Mercedes Benz Financial Services Italy SpA, FCA Bank SpA, FCA Italy SpA, CA Consumer Finance SA, FCE Bank PLC, Ford Motor Company, General Motor Financial Italy SpA (now, Opel Finance SpA), General Motors Company, RCI Banque SA, Renault SA, Toyota Financial Services PLC, Toyota Motor Corporation, Volkswagen Bank GmbH and Volkswagen AG.

The IRAC annulled the Decision on procedural and substantive grounds.

The IRAC first took issue with the unreasonable duration of the pre-investigation proceedings (i.e., three years from the leniency application to the start of the investigation).

The IRAC then found that there were inconsistencies in the ICA's approach to market definition. At the start of the proceedings, the ICA considered that the relevant market comprised the financing services provided by the captive banks for the acquisition of cars, while in the Statement of

Objections and in the Decision the ICA concluded that the relevant market was the sale and leasing of cars through financing services.

In this context, the IRAC noted that, while the ICA extended the investigation to car manufacturers, it did not extend its analysis to the market for the sale and leasing of cars. Instead, the assessment carried out by the ICA concerned exclusively the financing services provided by the captive banks (i.e., the relevant market as defined at the start of the proceedings).

The IRAC held that, in doing so, the ICA had failed to analyse the competitive dynamics of the relevant market (that is, the market for the sale of cars through financial services) and, consequently, did not prove that the alleged conduct (that is, the exchange of information between the captive banks) could have an impact on the sale of the vehicles or their prices (which are determined by the car manufacturers). Furthermore, there was no evidence that the car manufacturers were involved in the alleged infringement.

According to the IRAC, the ICA's investigation was also deficient because the proceedings were not extended to certain car manufacturers (although their captive banks were under investigation) nor were they extended to certain non-captive banks offering the same financing services.

Based on the foregoing, the IRAC annulled the Decision in its entirety.

## UNITED KINGDOM

**UK Competition and Markets Authority imposes total fines of £ 15 million on two groundworks suppliers for cartel activity**

On 17 December 2020, the UK's Competition and Markets Authority ("CMA") issued an infringement decision fining two companies which supply groundworks products Vp plc and M.G.F. (Trench Construction Systems) Ltd more than £ 11.2 million and £ 3.7 million, respectively, for illegal collusion.

In its press release (the infringement decision is not currently publicly available), the CMA said that it had found that the illegal collusion between Vp and M.G.F. lasted for nearly two years and included the coordination of their commercial activities to reduce uncertainty, as well as monitoring each other's prices and challenging quotes they deemed to be too low. The CMA noted that a third groundworks company, namely Mabey Hire Ltd, also took part in the illegal conduct but was not fined as it brought the conduct to the CMA's attention and cooperated with the investigation under the CMA's Leniency Programme.

It is worth noting that this is the fourth time in the last two years that the CMA has fined a cartel in the construction sector. Last month, the CMA fined two rolled roofing lead firms a total of £ 9 million (see [VBB Competition Law, Volume 2020, No. 11](#)).

## VERTICAL AGREEMENTS

### – EUROPEAN UNION LEVEL –

#### Commission launches public consultation on VBER reform

On 18 December 2020, the Commission launched a public consultation as part of the ongoing review of the Vertical Block Exemption Regulation (“VBER”) and its accompanying Vertical Guidelines. Based on the recently completed evaluation, the Commission concluded that, while the rules are still relevant and useful to businesses, certain areas need to be adapted. By means of an online questionnaire, available [here](#), the Commission aims to gather views from stakeholders to help assess the impact of various policy options and other issues as recently detailed in the Inception Impact Assessment (see [VBB on Competition Law, Volume 2020, No. 10](#)).

The questionnaire asks stakeholders about their experiences and opinions concerning the various options under consideration by the Commission in relation to the following four areas:

- **Dual distribution** (i.e., situations where a manufacturer sells its goods or services directly to end customers, thereby competing with its own distributors at the retail level): The Commission asks for input on – among the other options it is considering – the narrowing in scope, or even the complete removal, of the current exception under Article 2(4) of the VBER that enables distribution agreements concluded by manufacturers that engage in dual distribution to benefit from the VBER. Conversely, the Commission also asks for feedback on the possible extension of the scope of the exemption provided by the VBER to dual distribution practised by wholesalers and/or importers.
- **Active sales restrictions:** The Commission is asking for input on the possibility of relaxing the rules on active sales restrictions (i.e., restrictions regarding the territory into which, or the customers to whom, the buyer can resell). The Commission is seeking feedback concerning the option of more effectively protecting selective distribution systems by exempting restrictions of sales by resellers located outside an area where a selective distribution system is used to unauthorised distributors located inside the area where a selective distribution system operates. Another option being tested is permitting exclusivity at the wholesale level in a selective distribution system.
- **Indirect measures restricting online sales:** The Commission is seeking feedback on the possibility of allowing certain measures that are currently considered to indirectly restrict online sales (e.g., dual pricing, namely the practice of charging the same distributor a higher wholesale price for products intended to be resold online than for products sold offline) and therefore to amount to hardcore restrictions.
- **MFN/parity clauses:** The Commission is considering options that would involve hardening its stance on MFN/parity obligations, which are currently exempted by the VBER. Such clauses oblige a company to offer at least as favourable conditions to a party with which it contracts (often an online platform) as it offers on other sales channels. The Commission is considering the option of removing this exemption either for all MFN/parity clauses, or only for clauses guaranteeing parity in relation to specific sales channels (such as indirect sales and marketing channels, including platforms or other intermediaries).

The surge in e-commerce is clearly the focus of the ongoing review. Apart from those questions concerning active sales restrictions, most questions asked by the Commission concerning the above topics are directly related to commercial behaviour made more prevalent by the Europe-wide switch from offline to online sales.

In addition to the above four topics, the Commission also seeks input (in the final few questions) on:

- possible efficiency gains stemming from resale price maintenance (with a view to providing clearer guidance on when, exceptionally, they might be considered to justify resale price maintenance on an individual assessment, rather than relaxing the VBER);

- whether tacitly renewable non-compete obligations should be block-exempted;
- whether the current VBER and the Vertical Guidelines serve as an obstacle to attaining sustainability objectives and whether specific guidance in relation to sustainability should be provided under the new regime (following the objectives of the European Green Deal); and
- the impact of the ongoing Covid-19 crisis (which could not be considered during the evaluation phase of the review, which pre-dated the crisis).

Some of the suggested policy options, if adopted, could substantially broaden the freedom of businesses to shape their distribution systems, moving away (at least in part) from complex and formalistic rules on active sales and online sales. There is a real risk, however, that substantial uncertainty will be introduced if the Commission decides to narrow the scope of the exemption provided by the VBER in relation to the now prevalent phenomenon of dual distribution, as well as in respect of MFN/parity clauses. Businesses would therefore be well-advised to consider how the proposed policy options would impact their activities and participate in the public consultation.

The deadline for providing feedback on the public consultation process is 26 March 2021. The VBER expires on 31 May 2022 and the Commission aims to finish the impact assessment process by the fourth quarter of 2021. At a later stage in this process, stakeholders will also be able to comment on a draft of the revised rules.

## – MEMBER STATE LEVEL –

### FRANCE

#### **French competition authority fines high-end tea producer for restricting its retailers' ability to set online prices**

In a decision published on 3 December 2020, the French Competition Authority ("FCA") fined tea producer Dammann Frères ("Dammann") € 226,000 for violating Article 101 TFEU and its French law equivalent by restricting the ability of its retailers to set online prices.

The FCA found that Dammann engaged in conduct which had the same effect as imposing fixed resale prices through a combination of: (i) informing its retailers of so-called "recommended" prices in annual catalogues; (ii) meticulously monitoring compliance with these prices; and on occasion (iii) retaliating against retailers which did not in practice charge these prices. Through these measures, Dammann aimed at aligning the prices of independent websites with its own online prices.

According to the FCA, Dammann encouraged its retailers to inform Dammann when competing retailers diverged from the recommended prices. Retailers which failed to respect the recommended prices would face retaliatory measures such as the removal or modification of discounts, delayed deliveries, the removal of the retailer's contact details from the Dammann online list of distributors and, in some cases, termination.

The FCA rejected Dammann's arguments aiming to exclude the application of EU law. The FCA argued that trade between Member States was likely to have been affected since the case at issue concerned online sales of one of the main producers of high-end tea in France, with more than 400 websites selling its products.

However, the FCA did not follow the view of its investigation services, which had advocated finding the prohibition of resale of Dammann products on third party platforms to infringe competition law. Instead, the FCA applied the European Court of Justice's ("ECJ") reasoning in *Coty* (see [VBB on Competition Law, Volume 2017, No. 12](#)) and concluded that the agreements containing this prohibition were exempted by the Vertical Block Exemption Regulation ("VBER"). As Dammann – unlike *Coty* – did not operate a selective distribution system, the FCA's finding is consistent with the view that the ECJ's reasoning in *Coty* concerning the application of the VBER to prohibitions of resale on a third-party platform can be applied in the context of any type of distribution system.

## STATE AID

### – EUROPEAN UNION LEVEL –

**“Belgian excess profit”:** Advocate General Kokott suggests annulling the judgment of the General Court and provides guidance on the concept of “aid scheme” in cases of tax rulings (Case C-337/19 P, *Commission v Belgium and Magnetrol International*)

On 3 December 2020, Advocate General Kokott delivered her opinion on the appeal brought against the judgment of the General Court in case *Belgium and Magnetrol International v Commission* (Cases T-131/16 and T-263/16) of 14 February 2019 (the “Judgment under appeal”) (See [VBB on Competition Law, Volume 2019, No. 2](#)), which had annulled Commission Decision (EU) 2016/1699 of 11 January 2016 on the Belgian excess profit exemption (the “Contested Decision”).

The background to the dispute concerns the Belgian rules on the adjustment of the profit made by a resident company part of a multinational group, which are set out in the Belgian income tax code of 1992 (“CIR 92”). The Contested Decision found that certain tax rulings granted on the basis of Article 185(2)(b) of the CIR 92, in the period between 2004 and 2014, **constituted an “aid scheme”** within the meaning of Article 1(d) of Regulation 2015/1589. In this regard, it should be noted that Article 185(2)(b) of the CIR 92 allows for a downward adjustment of the profit made by a resident company that is part of a multinational group (the so-called “excess profit exemption”). This adjustment must be carried out on a case-by-case basis by the Belgian tax authorities. According to the Commission, the **systematic practice** of the Belgian authorities of adjusting profits, beyond the scope of Article 185(2)(b) of the CIR 92, constituted an aid scheme. The Commission also found that this aid scheme was illegal – i.e., in breach of the requirements set out in Article 108(3) TFEU – and incompatible with the internal market, and ordered recovery.

The Judgment under appeal annulled the Contested Decision. The General Court ruled that that the Commission had wrongly classified the above-mentioned tax rulings as an overall “aid scheme” within the meaning of Article 1(d) of Regulation 2015/1589.

In her Opinion of 3 December 2020, Advocate General Kokott expressed her disagreement with the findings of the General Court. She therefore suggested that the Court should set aside the Judgment under appeal and refer the case back to the General Court.

The reasoning followed by the Advocate General is centred on the three cumulative conditions under which a measure can be classified as an “aid scheme” within the meaning of Article 1(d) of Regulation 2015/1589. It should be recalled that these conditions are: (i) that there must be an “act”; (ii) the aid must be granted on the basis of that “act” without further implementing measures being required and (iii) the undertakings to which the aid is granted must be defined in the act in a general and abstract manner. According to Advocate General Kokott, the General Court erred in law in its assessment of all three conditions.

First, with regard to the first condition, the Advocate General stressed that the **concept of “act”** must be **broadly interpreted**. It is not necessary for the aid scheme to be based on a specific legal act for it to fall under that provision. In this regard, she noted that the General Court did not rule out the possibility that a systematic approach by public authorities could theoretically be classified as an “aid scheme”, but found that, in the present case, the Commission had not demonstrated a consistent administrative practice which could meet the requirements set out in Article 1(d) of Regulation 2015/1589. On that basis, Advocate General Kokott essentially noted that it cannot be ruled out that a “bundle” of tax rulings could fall under the definition of “aid scheme”, insofar as they result from a **systematic** and **consistent** administrative practice. However, for such a practice to be considered as an “aid scheme”, it must go beyond the exercise of the powers provided by the law on which basis it was adopted – otherwise, the law

itself (and not the administrative practice) would constitute the "aid scheme". In order to assess whether this is the case, the Commission is allowed to take a **representative sample** of tax rulings into account. However, it must, *inter alia*, demonstrate that the sample is sufficiently representative in the relevant State aid decision.

In the present case, the Advocate General noted that the Commission had examined a sample representing one third of the tax rulings; all of those were granted by the same Belgian tax authority and concerned profit adjustments in favour of undertakings which were part of a multinational group. The Contested Decision explained why this sample was representative; it also demonstrated that the approach followed by all those rulings was consistent – in that it essentially derogated from the relevant provisions of the CIR 92. With all the above in mind, according to Advocate General Kokott, the General Court erred in law by considering that the chosen sample was unrepresentative, and thus insufficient to demonstrate a consistent administrative practice.

Second, the Advocate General found that the first error in law also affected the findings of the General Court with regard to the question whether the "aid scheme" at issue required **implementing measures** (i.e., second condition under Article 1(d) of Regulation 2015/1589). In particular, the General Court started from a wrong premise – as to the classification of the "act" at stake (first condition) – which led it to wrong conclusions – as to the question whether that act required implementing measures (second condition). In this regard, Advocate General Kokott noted that, in the present case, the "aid scheme" – i.e., the administrative practice of the Belgian tax authorities – did not require any implementing measures. In fact, according to her, if a consistent administrative practice constitutes the "act" under assessment, there are **generally no further implementing measures required**.

Third, the Advocate General found that the General Court incorrectly classified the definition of beneficiaries in the act – in this case the consistent administrative practice – as not being general and abstract (third condition under Article 1(d) of Regulation 2015/1589).

For all the above reasons, Advocate General Kokott suggested that the European Court of Justice should annul the Judgment under appeal and refer the case back to the General Court.

### **Commission authorises Pan-European Guarantee Fund for companies affected by the Covid-19 outbreak.**

On 14 December 2020, the Commission authorised the creation of a € 25 billion Pan-European Guarantee Fund managed by the European Investment Bank ("EIB") to support companies affected by the coronavirus outbreak. The creation of this Pan-European Guarantee Fund (the "Fund") was endorsed by the European Council in April 2020. All Member States are entitled to participate in this Fund – so far 21 have decided to do so. The participants will contribute to the Fund – in proportion to their contribution to the EIB capital – in the form of guarantees granted on the basis of their national budget. Eligible undertakings will then be allowed to benefit from these State guarantees, to cover part of their losses related to the Covid-19 outbreak. Based on the information provided in the press release (the State aid decision is not yet publicly available), the Commission has concluded that the state aid to be provided by the Fund will contribute to managing the economic impact of the coronavirus in the 21 participating Member States. These measures are necessary, appropriate and proportionate to remedy a serious disturbance in the economy, in line with Article 107(3)(b) TFEU and the general principles set out in the Covid-19 State aid Temporary Framework.

## LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

### – EUROPEAN UNION LEVEL –

#### European Commission proposes Digital Markets Act and Digital Services Act

On 15 December 2020, the European Commission (the "Commission") presented a legislative package consisting of a proposed Regulation on a Single Market for Digital Services ("Digital Services Act" or "DSA"), which creates new rules applicable to providers of online intermediary services, as well as a proposed Regulation on Contestable and Fair markets in the Digital Sector ("Digital Markets Act" or "DMA"), which is designed to regulate the conduct of large online platforms that can be classified as "gatekeepers". The two proposed Regulations would have far-reaching implications for digital markets in the EU.

The DSA provides for a wide range of obligations applicable to providers of online intermediary services, including access providers, hosting services, and online platforms. These include measures to counter illegal goods and online content, safeguards for users of online services and transparency measures for online platforms. Specific rules on risk management, transparency, data accessibility and crisis response cooperation would be applicable to very large platforms. National competent authorities ("Digital Service Coordinators") and the Commission would share enforcement powers, with a European Board for Digital Services providing oversight, advice and coordination.

With the DMA, the Commission seeks to introduce a regulatory framework for large digital platforms or "core platform services", which can include marketplaces, app stores, search engines, social networking services, operating systems, cloud services and advertising services. The DSA is designed to address perceived "structural competition problems" in digital markets caused by the very strong position of certain service providers. The Commission believes that the DMA rules and enforcement powers will improve competition in digital markets in Europe. The goal and scope of the DMA to some extent resemble those of the "new competition tool" proposed by the Commission earlier in 2020 ([see VBB on Competition Law, Volume 2020, No. 6](#)), although the DMA is less ambitious and the Com-

mission's enforcement powers are less far-reaching than what was envisaged under the Commission's proposed "new competition tool".

Under the DMA, the Commission may designate as "gatekeepers" those platforms which meet the following cumulative criteria:

- The platform has a significant impact on the market and is active in multiple EU Member States. In this respect, a platform will be presumed to meet this criterion if it has an annual EEA turnover exceeding € 6.5 billion in the last three financial years or an average market capitalisation in the last financial year exceeding € 65 billion, and provides a core platform service in at least three Member States.
- The platform enjoys a strong intermediation position, in the sense that it links a large user base to a large number of businesses. In this respect, a company will be presumed to satisfy this criterion if it operates a core platform service with more than 45 million monthly active users in the EU and more than 10,000 yearly active business users established in the EU in the last financial year.
- The platform benefits from an entrenched and durable – existing or emerging – position in the market. In this respect, companies that have met the first and second criteria in the last three financial years will be presumed to satisfy this criterion.

A platform provider which meets the above criteria must notify the Commission. In turn, the Commission will decide whether the platform should receive this designation. In addition, the Commission may, after a market investigation, designate platforms as gatekeepers when they meet the three qualitative criteria outlined above, but not the quantitative criteria triggering a gatekeeper presumption.

The DMA imposes on gatekeepers responsibilities that should ensure a fair and open online environment for consumers and businesses. Accordingly, gatekeepers will have to refrain from certain practices that allegedly limit contestability or could be considered unfair, including any practices that would have equivalent effects. These include favouring their own services over those of their business users, combining data collected through different service offerings, restricting possibilities for business users to make offers and concluding contracts outside the platform or preventing users from un-installing pre-installed software or applications. Additionally, gatekeepers will have to abide by burdensome obligations, such as ensuring the interoperability of the platform with third party apps, sharing the data provided or generated by business users and their customers in their use of the platform, and providing rival search engine providers with access on FRAND terms to certain search data.

The list of regulated practices is extraordinarily long, although it appears primarily to reflect complaints and experiences in individual competition cases, rather than a systematic and coherent attempt to identify practices that clearly harm market outcomes for consumers. The Commission could even determine additional obligations if it identifies more practices it perceives as unfair or undermining contestability, although it could also suspend certain obligations for a gatekeeper upon request.

Moreover, gatekeepers will have to inform the Commission of any intended transaction that is considered a concentration within the meaning of the EU Merger Regulation ("EUMR") involving any other provider of a core platform service or of any other services provided in the digital sector, regardless of whether the transaction is notifiable under the EUMR or national merger control rules.

As regards enforcement, the DMA grants the Commission broad investigative powers. Companies which fail to comply with their obligations under the DMA may receive fines of up to 10% of their world-wide annual turnover. Failure to provide relevant information can result in fines of up to 1% of a platform's world-wide annual turnover. Acts considered to obstruct investigations can result in periodic penalty payments of up to 5% of the average daily turnover. Should the Commission find that a platform committed systematic infringements of the DMA, it may impose additional remedies. The DMA favours behavioural remedies, but does not

rule out structural remedies provided they are more effective or less burdensome for the gatekeeper.

The DSA and DMA will now be submitted to the European Parliament and the Council for examination. Clearly, both would confer on the EU extraordinary powers to regulate digital markets in the EU, but whether such cumbersome regulatory intrusion in highly dynamic industries will improve market outcomes for consumers and lead to more innovation remains to be seen.

### **Court of Justice annuls Commission's Paramount settlement decision for its failure to consider adverse effects on third party interests**

On 9 December 2020, the European Court of Justice ("ECJ") upheld Canal +’s appeal against the General Court’s ("GC") judgment that had upheld the Commission’s commitments decision in the *Paramount* case, and annulled the GC’s judgment as well as the Commission decision (Case C-132/19 P). The ECJ, following the Advocate General’s opinion, found that the Commission had failed to take the adverse effects on third-party interests into account when accepting Paramount’s commitments.

In 2014, the Commission opened an investigation regarding possible restrictions affecting competition in the supply of pay television services through licensing agreements. The Commission raised concerns regarding: (i) territorial exclusivity clauses by which a studio would grant an exclusive territorial licence to a broadcaster, while at the same time committing not to grant to any other third party any licensing rights on the territory concerned; and (ii) clauses which prevented broadcasters from responding to any unsolicited service requests from customers located in a Member State different from that of the broadcaster. The Commission took the preliminary view that these clauses had the object of eliminating cross-border competition between broadcasters in breach of Article 101 TFEU.

To address these competition concerns, the US film studio Paramount offered a commitment whereby it would not implement the contested provisions over a five-year period. These commitments were made binding by a Commission decision of 26 July 2016 (see [VBB on Competition Law, Volume 2016, No. 8](#)). Subsequently, Paramount notified broadcasters with which it had concluded licensing agreements – including French broadcaster Canal + – that it no

longer intended to ensure compliance with the absolute territorial exclusivity rights granted to them. However, Canal + took the view that the contractual clauses in question did not restrict competition and, more generally, geographic exclusivity favoured cultural diversity and supported creative activities by enabling right holders to receive adequate remuneration. Therefore, it sought the annulment of the Commission decision before the GC. On 12 December 2018, however, the GC dismissed Canal +'s appeal (see [VBB on Competition Law, Volume 2018, No. 12](#)).

Ruling on Canal +'s appeal against the GC's judgment, the ECJ first found that the GC had not committed any error when rejecting Canal +'s plea that the Commission had misused its powers as it circumvented the EU's legislative process relating to geo-blocking. The ECJ found that the challenged decision was adopted under powers conferred on the Commission by Article 101 TFEU and Regulation 1/2003, prior to the completion of the legislative process on geo-blocking.

In addition, the ECJ rejected Canal +'s arguments that the GC committed an error of law regarding the lawfulness of the contested provisions. As the contested provisions aimed at creating absolute territorial protection for broadcasters, they were likely to raise competition concerns and could be considered a restriction of competition by object, without prejudice to any decision definitively finding the existence or absence of an infringement of Article 101 TFEU. Recalling that commitment decisions adopted under Article 9 of Regulation 1/2003 were based only on a preliminary assessment of the conduct at issue, the ECJ ruled that the GC had correctly found that Article 101(3) TFEU would be applicable only if an infringement of Article 101(1) TFEU has first been found. Thus, an analysis under Article 101(3) TFEU is not required when assessing the legality of a commitment decision.

Along the same lines, the ECJ found that the GC correctly held that the Commission was not obliged to analyse potential competition effects in each geographical market, since the provisions were intended to partition national markets, a practice which constitutes a restriction of competition by object on the EEA-wide market as a whole.

Nevertheless, the ECJ found that the GC committed an error of law when assessing the proportionality of the challenged decision regarding third-party interests. According

to the ECJ, the Commission had to assess not only whether the proposed remedies responded to the competition concerns, but also whether they affect the interests of third parties, to ensure that third-party rights are not rendered meaningless. Like the GC, the ECJ found that the Commission's decision interfered with the contractual freedom of the contracting partner and therefore went beyond the provisions of Article 9 of Regulation 1/2003. The ECJ, however, ruled that the GC incorrectly assumed that Canal + could enforce its contractual rights before national courts. The ECJ clarified, that if a national court were to uphold Canal +'s contractual rights, this would infringe Article 16 of Regulation 1/2003, which prohibits courts from adopting decisions contradicting a Commission decision or a decision the Commission may contemplate in the future. In the case at hand, such a conflict could arise if the Commission reopened the proceedings with a view to adopting an infringement decision.

The ECJ therefore set aside the GC's judgment, considering that the intervention of national courts could not adequately remedy the Commission's failure to consider the proportionality of its commitment decision in relation to third parties' contractual rights.

Finally, the ECJ considered that the state of proceedings permitted it to adopt a final judgment on the matter, in accordance with Article 61 of its Statute. The ECJ examined the Commission decision and determined that the commitments made binding by the decision affected territorial exclusivity obligations that were of an essential nature. It concluded that the Commission had rendered essential contractual rights of third parties – including Canal +'s rights vis-à-vis Paramount – meaningless and had therefore infringed the principle of proportionality. As a result, the ECJ annulled the Commission decision.

## – MEMBER STATE LEVEL –

### DENMARK

#### **Danish Competition and Consumer Authority publishes new guidelines on joint bidding**

On 11 December 2020, the Danish Competition and Consumer Authority ("DCA") published new guidelines on joint bidding consortia under the title "*When companies bid jointly – guidelines for joint bidding under competition law*"

(the “New Guidelines”). The New Guidelines replace the Guidelines on Joint Bidding published by the DCA in 2018. The New Guidelines contain guidance on the assessment that companies should make when they consider bidding for a contract together with one or more companies.

The New Guidelines were prepared following a judgment handed down by the Danish Supreme Court in November 2019, which found that the so-called Road-Marking Consortium was illegal. The most important changes consist in the insertion of a new section referring to the DCA’s order of enforcement priorities. Additional practical examples have also been incorporated. In this regard, the New Guidelines include, for instance, examples where the ability to place individual bids on lots of the contract was relevant to the assessment of whether undertakings were competitors for a specific contract. The New Guidelines also include several examples of consortia agreements that have been considered restrictions by object since they constituted a market-sharing agreement or a joint-pricing agreement.

## FRANCE

### **French Parliament transposes ECN+ Directive into national legal system**

On 3 December 2020, the French Parliament adopted Law no. 2020-1508 containing various provisions adapting national law to European Union law on economic and financial matters (the “Law”).

The Law transposes several EU directives and regulations. With respect to competition law, it authorises the Government to issue decrees within six months to transpose Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to become more effective enforcers and to ensure the proper functioning of the internal market (the “ECN+ Directive”).

More importantly, the Law also enhances the investigation and enforcement powers of the French Competition Authority (“FCA”) beyond the requirements of the ECN+ Directive, by improving the efficiency of existing procedures and increasing its powers in overseas territories. For example, one single liberty and custody judge will be appointed to issue authorisations for dawn raids taking place simultaneously at several locations across France. The Law also

adjusts the need for a police presence during dawn raids, requiring the presence of only one police officer per site visited. Other measures include simplifying the leniency procedure and broadening the types of decisions that may be adopted by a single member of the FCA (e.g., gun jumping and the review of commitment decisions). In the same vein, the Law extends the scope of the simplified litigation procedure (which does not require a preliminary report) and allows the FCA to impose fines above the previously applicable ceiling of € 750,000 under this procedure.

The Law was published in the French Official Journal on 4 December 2020 and entered into force on 5 December 2020, with the exception of the simplification of the leniency procedure, which will become applicable after the adoption of a decree by the Council of State.

## ROMANIA

### **Romanian competition authority publishes study on Big Data**

On 3 December 2020, the Romanian Competition Council (“RCC”) published a study on the effects of Big Data on competition (the “Study”).

The Study explains that the use of algorithmic models helps companies adjust their prices in real time, depending on changes in market demand. However, these models also enable competitors to align their prices and to maintain these prices at an artificially high level, to the detriment of consumers. The Study also indicates that competition can be undermined by companies which restrict or refuse to grant access to their data or which make access to data conditional on the use of their own analytics services.

In addition, the Study shows that the Romanian digital data market registered between 2013 and 2019 a higher growth rate than the average European growth rate. The Study also notes that the number of Romanian data providers increased significantly, from approximately 2,400 in 2013 to 5,750 in 2019.

Finally, the Study shows that large foreign companies usually develop and supply Big Data software, while national providers – which are often start-ups – usually develop algorithms and artificial intelligence for specific analytics needs or for software developed by third parties.

The Study is available in Romanian on the [website](#) of the RCC.

UNITED KINGDOM

**UK Government announces the establishment of a Digital Markets Unit within the CMA to regulate tech companies from April 2021**

On 27 November 2020, the UK Department for Business, Energy & Industrial Strategy and the Department for Digital, Culture, Media & Sport announced the creation of a Digital Markets Unit within the Competition and Markets Authority ("CMA") which, from April 2021, will introduce and enforce a new code of conduct to govern the behaviour of online platforms that currently dominate the market, such as Google and Facebook.

The UK Government believes that the new regime will give consumers more choice and control over their data, help small businesses thrive, and ensure news outlets are not forced out by their bigger rivals. This announcement follows the CMA publishing its final report on the CMA's Online Platforms and Digital Advertising Market Study which called for the Government to establish a digital markets unit and an enforceable code of conduct and flagged concerns about the market power of Google and Facebook (see [VBB on Competition Law, Volume 2020, No. 7](#)).

Under the new code of conduct, platforms that have considerable market power are required to be more transparent about the services they provide and how they are using consumers' data, to give consumers a choice over whether to receive personalised advertising. Large online platforms are also prevented from placing restrictions on their customers that make it hard for them to use rival platforms.

The UK Government has said that the new Digital Markets Unit will be informed by the work of the CMA's Digital Markets Taskforce, which was set up to provide advice to the Government on the potential design and implementation of pro-competitive measures. The UK Government has said that in early 2021 it will consult on the form and function of the Digital Markets Unit before preparing legislation.

## PRIVATE ENFORCEMENT

### – MEMBER STATE LEVEL –

#### GERMANY

#### German Federal Court of Justice rules on passing-on defence in damages claims proceedings

In a recently published judgment of 23 September 2020, the German Federal Court of Justice ("FCJ") ruled once again on the private damages claims of a public transport company following on from the Federal Cartel Office's rail track cartel decision (see [VBB on Competition Law, Volume 2012, No. 7](#) and [Volume 2013, No. 7](#)).

With reference to its previous judgments on follow-on damages, the FCJ confirmed that damages cannot only be claimed for goods acquired from cartelists but also for goods purchased from non-cartelists, provided the cartel led to increased prices on the relevant market overall (the "umbrella effect").

The FCJ further addressed the question on the relevant burden of proof that damage has occurred. It overturned the Higher Regional Court of Düsseldorf's judgment of 23 January 2019 that had held that there was a (rebuttable) presumption that the finding of a cartel results in damage, which the defendant (i.e., the cartelist) in the case had failed to rebut. The FCJ noted that although – as a matter of principle – a cartel results in economic damage, it is for the courts to assess in the specific case whether, based on the facts, it is more probable than not that the damage alleged by the claimant has indeed occurred. The claimant needs to provide evidence of the facts that prove, on the balance of probabilities, the occurrence of the alleged damage. The existence of a cartel does not shift the burden of proof for establishing damage or establish a rebuttable presumption that the claimant suffered a loss.

In relation to the application of the passing-on defence, the FCJ reiterated that the burden is on the defendant to show that its direct customers passed on the increased cartel price by raising their prices charged to their own customers. To this end, the defendant will need to show that price increases applied to its customers were due to the cartel and not to other circumstances. Furthermore,

the FCJ confirmed that the relevant standard of proof for the passing-on defence is one of balance of probabilities. Also, the passing-on defence remains available even when the claimant's business was selling at a loss (not covering its costs), was supported by public funds or the cartelised (input) prices affected only the claimant's fixed costs. However, the passing-on defence is not available if the business/end-user to which the increased cartel price was passed on (i.e., customer of the direct purchaser) had assigned its rights as a claimant to the direct purchaser who brings the claim. Allowing the passing-on defence in this scenario would result in the defendant (cartelist) being able to avoid full compensation for the damage occurred.

Most interestingly, the FCJ ruled that the passing-on defence should not be allowed if its application allows the defendant to avoid paying adequate compensation. Such exclusion applies in cases where indirect damages claims are unlikely to be made, in particular when scattered and relatively low-value damage is actually established further down the chain. Allowing the passing-on defence in such cases would disincentivise direct purchasers from bringing a claim for damages. To support its view, the FCJ recalls that not only do damages claims have a compensatory function, they also play an integral role in the "efficient enforcement of competition law".

This case predated the entry into force of the Damages Directive which was therefore not applicable. However, the FCJ takes the view that its position is in line with the Damages Directive, as Article 12(1) of the Directive aims to avoid not only overcompensation but also the "absence of liability of the infringer". The FCJ further held that its position is also in line with EU law as, according to the ECJ's judgment in *Manfredi* (Case C-295/04), it is for national law to set the criteria for quantifying damages for harm caused by a cartel, provided that the principles of equivalence and effectiveness are observed; and Article 101 TFEU neither

prevents national courts from imposing punitive damages exceeding the harm suffered nor limits damages in such a way as to exclude overcompensation.

UNITED KINGDOM

### **Mastercard faces potential £ 14 billion mass lawsuit after UK Supreme Court dismisses its appeal**

On 11 December 2020, the UK's Supreme Court sent a planned £ 14 billion class action lawsuit against Mastercard back to the Competition Appeal Tribunal ("CAT") for review. This is the first collective proceedings case of this kind to reach the Supreme Court and it addresses important questions about the correct legal requirements for certification of a claim.

The Supreme Court said that the CAT made a number of errors in deciding that the claim was not suitable for trial. If the class action is ultimately successful, it could see damages being paid out to tens of millions of UK consumers.

New consumer laws were introduced in 2015 allowing for the possibility of class actions for breaches of competition law. However, no class action has so far been allowed to proceed by the CAT, which was granted sole jurisdiction by the UK's Parliament to decide whether a competition collective action should be certified to proceed by granting a Collective Proceedings Order ("CPO").

The claim, brought on behalf of 46.2 million UK consumers, was brought against Mastercard by an individual named Walter Merricks, a former financial ombudsman. Merricks alleges that Mastercard's breaches of competition law, which stem from a 2007 Commission decision holding that Mastercard's interchange fees (i.e., bank-to-bank charges when a purchase is made on a credit card) were illegally high between 1992 and 2008, have led to people paying higher prices on goods from businesses that accepted Mastercard. However, the CAT rejected Merricks's class action and refused to grant a CPO, concluding that it was "not suitable to be brought in collective proceedings". Merricks appealed this ruling to the Court of Appeal in April 2019, which quashed the CAT's ruling. Mastercard then challenged the Court of Appeal's ruling before the Supreme Court in May 2020.

However, the Supreme Court dismissed Mastercard's appeal and confirmed the Court of Appeal's ruling, overturning the CAT's refusal to grant a CPO. The Supreme Court considered that the CAT made five errors of law in deciding to refuse a CPO allowing Merricks's claim to proceed.

First, the Supreme Court ruled that the CAT's consideration of the advantages and disadvantages of granting a CPO was undermined by a failure to appreciate the breadth of the common issues of law and fact in the claim, which should have been a powerful factor in favour of granting a CPO.

Second, the Supreme Court held that the CAT was wrong to treat the question of whether the claim was suitable for aggregate damages as a hurdle to overcome before a CPO can be granted.

Third, the Supreme Court further held that the CAT considered the question of whether the claim was suitable for collective proceedings as an abstract question, while it should have considered whether it was preferable to bring the claim in collective proceedings as an alternative to multiple individual claims. The Supreme Court noted that "individual actions brought by each consumer were plainly not a realistic alternative to collective proceedings".

Fourth, the Supreme Court ruled that the CAT should not have treated the difficulties in finding data for quantifying loss as a reason for refusing a CPO.

Finally, the Supreme Court ruled that the CAT was wrong to hold that the distribution of aggregate damages awarded as a result of collective proceedings must take into account the loss suffered by each class member. The Supreme Court said that this is not required under the new consumer laws introduced in 2015 allowing for collective competition actions.

The claim will now be sent back to the CAT for re-consideration of whether to grant a CPO. If the CAT does grant the CPO, the claim will then proceed to trial to consider the merits of the claim itself. There are currently seven competition class action proceedings waiting to be granted a CPO. This judgment will likely allow for these claims to proceed to CPO hearings and may well lead to more class actions being brought, as claimants now have greater clarity on how to structure their claims successfully.

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