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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears LSEG's acquisition of Refinitiv

On 13 January 2021, the European Commission ("Commission") conditionally cleared the London Stock Exchange Group's ("LSEG") acquisition of financial data products provider Refinitiv following an in-depth (Phase 2) investigation. LSEG is a leading financial infrastructure company, which operates the London Stock Exchange, the Italian Stock Exchange ("Borsa Italiana"), the leading electronic fixed income trading market MTS, as well as a variety of other platforms for trading in financial instruments. In addition, LSEG is active in the post-trade space through its clearing services including the London Clearing House ("LCH") and the Italian Cassa di Compensazione e Garanzia. The target, Refinitiv, is a US-based financial markets and infrastructure provider, active primarily in the provision of desktop services and real-time and non-real time financial datafeeds to financial institutions. Refinitiv also provides financial indices, including the WM/Reuters FX foreign exchange benchmark.

The Commission's investigation raised a number of competition concerns. In particular, the transaction would combine LSEG's MTS and Refiniv's Tradeweb – two closely competing major marketplaces/platforms for the electronic trading of European Government Bonds. The Commission concluded that the proposed transaction would raise horizontal competition concerns, as the combined entity's large market share and high barriers to entry for the creating of an alternative marketplace would leave traders with few alternative options. To resolve this concern, LSEG offered to divest its stake in Borsa Italiana, which includes MTS, to Euronext.

The Commission also identified a variety of vertical concerns stemming from the transaction. First, the merger would give the combined entity a strong position both in over-the-counter trading of interest-rate derivatives and in the downstream market for clearing these transactions. This would have given LSEG an incentive to foreclose Tradeweb's rivals from accessing LSEG's clearing services or providing these on worse terms. The Commission accepted a commitment by LSEG to comply with the European Market Infrastructure Regulation ("EMIR Regulation") regarding the non-discriminatory and transparent clearing of derivatives (although normally this would cease to apply to LSEG after Brexit), and not to discriminate between Tradeweb and third parties when providing clearing services.

Second, LSEG produces trading data generated by the London Stock Exchange and UK equity indices, which are used as essential inputs for financial data feeds and desktop services. The Commission raised concerns that LSEG would have the incentive to refuse or limit Refinitiv's competitors' access to this data. Likewise, the Commission found that Refinitiv's WM/R FX benchmarks are crucial inputs for index design and calculation for which there are no viable market alternatives. LSEG would therefore have an incentive to limit its index competitors from accessing Refinitiv's benchmarking data. To resolve these concerns, LSEG committed to providing access to these inputs to all existing and future downstream competitors of the merged entity.

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority applies Covid-19-related provision to clear postal merger

On 22 December 2020, the Italian Competition Authority ("ICA") cleared the incumbent postal firm Poste Italiane's ("PI") acquisition of the sole control over its main rival Nexive Group ("Nexive"). The ICA did not apply the usual merger control rules in this case, but rather cleared the transaction under Article 75 of Decree No. 104 of 14 August 2020 (measures enacted in light of the COVID-19 pandemic).

According to this new, temporary legal provision, certain transactions could be cleared in derogation of Italian merger control rules, provided that they are notified to the ICA and subject to the ICA's approval of behavioural remedies. Specifically, this exceptional rule applies to mergers: (i) not having an EU dimension and (ii) involving undertakings that are either active in labour-intensive markets or provide services of general economic interest ("SGEIs"), provided that those undertakings have registered losses during the past three years and may stop their activities "also as a result of" the COVID-19 pandemic.

The ICA considered that all these conditions were satisfied in this postal transaction. In particular, the ICA noted that the postal sector is both labour intensive (as the labour costs account for more than 50% of total costs) and qualifies as an SGEI under Italian law. In relation to the third condition, the parties submitted that the notified transaction could be considered as a rescue merger under the failing firm defence doctrine.

The ICA concluded that, the acquisition could result in PI holding a monopoly position on several relevant markets. Nevertheless, in application of the special provision, the ICA accepted a number of behavioural commitments aimed at eliminating the risk of PI imposing higher prices or more unfavourable conditions on consumers. Specifically, PI was obliged to update its antitrust compliance programme and to grant competitors effective access to its network relating to the relevant markets.

UNITED KINGDOM

CMA breaks up vehicle and trailer parts merger

On 12 January 2021, the UK's Competition and Markets Authority ("CMA") ordered the commercial vehicle and trailer supplier Universal Components UK (which is owned by TVS Europe Distribution) to sell 3G Truck & Trailer Parts, following an in-depth Phase 2 investigation into the completed merger between the two companies.

Shortly after completion of the merger in February of last year, the CMA issued an initial enforcement order (effectively keeping the two merging businesses separate for the duration of the CMA's review) and initiated a Phase 1 investigation, ultimately referring the merger for an in-depth investigation in June.

In its final report, the CMA found that the merger would likely limit consumer choice in the commercial vehicle and trailer parts sector, which could lead to local distributors and repairers facing higher costs and a worse service. In particular, the CMA found that the two companies compete closely in the market for the wholesale supply of commercial vehicle and trailer parts to local distributors in the independent aftermarket in the UK.

In reaching this decision, the CMA looked at the companies' internal documents (an increasingly common and important- area of focus in CMA merger investigations) and found that they monitor each other closely when deciding strategies and setting prices. As a result, the CMA found that customers looking to purchase a wide range of parts from one suppler would have few alternative suppliers to choose from, which in turn could lead to the local distributors facing longer delivery times or a more limited stock range and worse quality (as well as higher costs). In this context, the CMA decided that the only effective way to address the loss of competition arising out of the merger was to order its break-up.

This decision highlights a number of takeaways for parties engaging with the UK merger control regime. In particular:

- This is the CMA's first merger prohibition of the year (in its first Phase 2 decision), continuing the CMA's recent highly-interventionist approach to merger control enforcement. Indeed, last year only one deal out of eleven that reached Phase 2 was unconditionally cleared by the CMA (with the rest being blocked, abandoned, or subject to remedies);

- The UK turnover of the target (3G Truck & Trailer Parts) was low, at only £ 10.8 million. Not only does this demonstrate once again that transactions of any size (and in any sector) can attract the attention of the CMA, but it also re-emphasises the willingness of the CMA to apply the share of supply test in order to assert jurisdiction over transactions that could raise competition concerns; and

- Following the imposition of an initial enforcement order by the CMA shortly after the completion of the merger, the merging businesses were held separately for the duration of the CMA's review – a total period of over eleven months. This is a further reminder that

completion of a transaction that could raise competition concerns without obtaining prior CMA approval carries significant commercial/operational risks.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

DENMARK

German internal combustion engine maker Deutz held to have violated Articles 101 and 102 TFEU in Denmark

On 11 January 2021, the Danish Maritime and Commercial High Court ("MCC") confirmed a decision of the Danish Competition Council ("DCC") finding that the German internal combustion engine manufacturer Deutz had both abused its dominant position and entered into an anti-competitive agreement with its Danish dealer, Diesel Motor Nordic.

In 2010, the Danish railway company DSB sought maintenance and renovation services for diesel train engines purchased from Deutz. It eventually engaged Fleco to carry out the maintenance services, having considered Deutz's own offer too expensive. However, to carry out the renovation works, Fleco needed to obtain various unique spare parts that Deutz refused to supply.

The DCC found that Deutz's refusal to supply the spare parts to Fleco had led it to abuse its dominant position on the "market" for unique spare parts for the TCD2015 diesel train engine. It also concluded that Deutz and Diesel Motor Nordic had entered into an anti-competitive agreement to prevent parallel imports and passive sales of spare parts from Deutz's dealer network, thereby forcing DSB to by-pass Fleco and instead purchase the parts directly from Diesel Motor Nordic.

In December 2013, the DCC's decision was upheld by the Competition Appeals Board. Deutz and Diesel Motor Nordic then appealed to the MCC, which has now confirmed the DCC's finding of an infringement of both Articles 101 and 102 TFEU.

ITALY

Italian Competition Authority condemns ticketing and marketing company TicketOne for committing exclusionary abuse in the ticketing sector

On 22 December 2020, the Italian Competition Authority ("ICA") imposed a fine of around € 10.8 million on several companies belonging to the ticketing and marketing for music company, CTS Eventim-TicketOne group ("TicketOne") for abuse of its dominant position on the Italian market for the sale of tickets for pop music concerts. TicketOne was held to have infringed Article 102 TFEU by implementing a complex strategy to exclude competitors.

TicketOne's exclusionary strategy comprised of a number of behaviours. It concluded exclusive agreements with both national and local promoters of certain pop music events, which were held to restrict competition in light of their duration (which exceeded the generally acceptable period of two years) and the fact that they were concluded with the main promoters of the more lucrative music events.

TicketOne's acquisition of control of four important pop music event promoters was also found to have formed a part of the abusive strategy. These acquisitions enabled TicketOne to gain access to the upstream market for the organisation and promotion of pop music events and to prevent other ticketing operators from distributing the tickets offered by those promoters. The ICA also found that TicketOne had *de facto* transformed a number of minor ticketing operators into its intermediaries by concluding agreements requiring their websites to automatically redirect consumers to TicketOne's website. Additionally, the ICA found that TicketOne had implemented a number of retaliatory measures against local promoters that had refused to choose TicketOne as the ticketing operator for their events.

The ICA found that TicketOne's conduct had resulted in a foreclosing effect of 55% in terms of volume and 60% in terms of value and had resulted in higher commission fees and prices. By *de facto* ensuring for itself the exclusivity for the sale of tickets, TicketOne also precluded consumers from multihoming (i.e., buying tickets for the same event from different ticketing operators). In terms of the fine imposed on TicketOne, the ICA did not give any mitigating value to the fact that TicketOne had implemented antitrust compliance programmes but did reduce the initially calculated amount of the fine by 70%, given that the Covid-19 pandemic had drawn a halt to pop music events.

ROMANIA

Romanian Competition Council fines e-commerce platform for abuse of dominance

On 29 December 2020, the Romanian Competition Council (the "RCC") imposed a fine of € 6.7 million on Dante International, which owns and administers a Romanian online marketplace, for abusing its dominant position. The RCC found that between 2013 and 2019 Dante International violated the competition laws by using algorithms to prioritise its own products to the detriment of competing products offered on the platform.

Dante International received a reduction of its fine for having admitted to the infringement. In addition, the RCC required Dante International to commit to adopting a series of measures such as informing companies operating on the platform about the use of algorithms, restricting manual interventions in the operation of algorithms and ensuring non-discriminatory access to aggregated data collected on the platform. Dante International is also obliged to improve its complaints management policy by creating a set of good practices in managing the relationship with the platform's participants.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice provides guidance on end date of bid-rigging cartels

On 14 January 2021, the European Court of Justice ("ECJ") handed down a judgment on a reference for a preliminary ruling from the Finnish Supreme Administrative Court ("FSAC"), in which it provides guidance on the duration of a company's participation in a bid-rigging infringement. According to the ECJ, the infringement period corresponds to the period up to the date of signature of the contract concluded between the company and the contracting authority where that contract was awarded on the basis of a collusive tender that the undertaking had submitted (Case C-450/19, *Kilpailu v. Eltel*).

In the national proceedings, the Finnish Competition Authority ("FCA") had submitted an application to the Market Court to impose a fine of € 35 million on electricity transmission firm Eltel for colluding to fix prices, margins and share markets relating to the design and construction of electricity transmission lines in Finland in breach of Article 101 TFEU. The Market Court dismissed the application on the grounds that the infringement was time-barred. The FCA appealed against this decision before the FSAC, which stayed the proceedings and referred a request for a preliminary ruling to the ECJ requesting guidance on the point in time at which the involvement of a company in a bid-rigging cartel ends. In particular, the FSAC requested guidance on whether the infringement should be considered to end: (i) on the date of the tender submission (in this case being 4 June 2007); (ii) the signature of the contract (in this case being 19 June 2007); (iii) the discharge of contractual obligations (in this case being 12 November 2009); or (iv) the last payment (in this case being 7 January 2010). According to the FCA, the infringement lasted until the date of the last payment or, in the alternative, until the date on which the works were completed.

In its judgment, the ECJ first noted that the alleged infringement consisted of the holding of meetings between representatives of the companies concerned, during which they: (i) agreed on prices and margins for future public tenders for the construction of electric power transmission lines; (ii) allocated these between them; and (iii) submitted concerted bids. This conduct was characterised as a single and continuous infringement.

The ECJ further noted that the concerted bid submitted in response to the call for tenders constituted the last act by Eltel that the FCA considered to fall within the single and continuous infringement of Article 101(1) TFEU. The FCA considered that Eltel implemented the agreement on the prices of the respective bids by submitting coordinated offers.

In those circumstances, subject to a final assessment by the FSAC, the ECJ considered that the duration of Eltel's participation in the alleged infringement of Article 101(1) TFEU covered the entire period during which that undertaking implemented the anticompetitive agreement. This included the period during which the fixed-price offer that it submitted was in force or could have been converted into a definitive contract.

However, contrary to what the FCA had argued, the ECJ took the view that the duration of Eltel's participation could not go beyond the date on which the essential characteristics of the public works contract were definitively determined, in particular the global price to be paid. According to the ECJ, the restrictive effects of a bid-rigging cartel on competition in principle disappear, at the latest, at the time when the essential characteristics of the tender, and in particular the overall price to be paid, have been definitively determined by the conclusion of a contract between the winning bidder and the awarding authority. It is on this date that the contracting authority is definitively deprived of the possibility to obtain these goods, works or services under normal market conditions.

In this regard, the ECJ rejected the FCA's argument that the harmful economic effects of the pricing agreement lasted until the time of payment of the last instalment or until the date on which the works were completed and could have detrimental economic repercussions downstream. The ECJ distinguished between restrictive effects of the cartel on competition and wider adverse economic effects caused on other market players, pointing out that, regarding the latter effects, customers and end customers can claim damages for such harm before national courts.

Finally, the ECJ rejected the argument that defining an infringement period which is too short would infringe the obligation to give full effect to Article 101 TFEU, since limitation rules would lead to a higher number of unpunished infringements. The ECJ held that the recognition of limitation rules under EU law cannot justify an artificial extension of the infringement period in order to allow the prosecution of such infringements.

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Bonn dismisses BayWa's claim for state liability against Federal Cartel Office

On 2 December 2020, the Regional Court of Bonn ("Court") dismissed a claim of € 72.8 million by crop protection producer BayWa against the German Federal Cartel Office ("FCO"). BayWa argued that the FCO had violated its procedural rights, in particular the principle of equal treatment, in the context of a cartel investigation.

In December 2014, the FCO had received an anonymous tip-off, naming BayWa as the ringleader of a cartel, but without further details of the identity of the other cartel members. While the decision-making department responsible for the chemicals sector decided not to pursue the case any further, a case handler from the department responsible for the agricultural sector contacted three companies in the crop protection sector, allegedly suggesting that investigations would be carried out and recommending that the companies file for leniency, if they thought it was necessary. The case handler did not disclose to any of the companies contacted that he (and other officials) considered the anonymous tip-off to be insufficient to begin an investigation. Rather, he led them to believe that there was already a concrete suspicion which made a leniency application advantageous. Two out of the three companies contacted applied for leniency, the first on the same day as the case-handler's call. Based on the information in the leniency applications, dawn raids were carried out. BayWa, which had not been contacted by the FCO, filed for leniency on the day of the dawn raids.

At the conclusion of its investigation in 2020, the FCO imposed a total fine of € 154.6 million against seven producers of crop protection products for agreeing on price lists, rebates and retail prices between 1998 and 2015. The first leniency applicant benefited from immunity. All other producers, including BayWa, cooperated with the FCO during the proceedings and settled with the FCO. BayWa, which had to pay the highest fine of € 68.6 million, brought an action against the FCO (and, thus the State), claiming €72.8 million in damages (i.e., the amount of the fine and € 4.2 million in legal costs).

BayWa claimed that the FCO's choice of which companies to contact on the basis of the tip-off was arbitrary and that either all or no companies should have been called, but not just certain ones.

Under German law, public officials can be held liable for damages for violation of official duty, if: (i) they acted in the exercise of their official duties; (ii) they violated an official duty which serves to protect a third party; (iii) there is a fault of the public official; (iv) damage has occurred; and (v) there is causality between the action of the official and the damage incurred. Liability is excluded if the injured person has intentionally or negligently failed to avert the damage by taking legal action.

The Court dismissed BayWa's claim, stating that no violation of an official duty had occurred. Interestingly, the Court opined that the calls made by the case handler did not in principle constitute an illegal investigation method. Furthermore, the Court considered the case handler's decision not to contact the ringleader was not arbitrary, stating that he could assume that a ringleader is less likely to cooperate but, instead, more likely to obstruct the investigations compared to cartel participants with a less prominent role.

Regarding the alleged violation of the principle of equal treatment, BayWa argued that the FCO determined the order in which leniency applications were filed by choosing individual calls as a method which *per se* does not allow for all potential cartelists to be informed simultaneously. According to the Court, pursuant to the principle of "no equality in injustice", BayWa could not claim exemption or mitigation from its own punishment based on the fact that other offenders had escaped punishment altogether.

Furthermore, the Court ruled that BayWa had not demonstrated the causal connection between the case handler's actions and BayWa's fine, since several alternative scenarios could have led to a discovery of the cartel and a fine, and BayWa did not argue that it was preparing to apply for leniency at the time of the calls.

Finally, the Court rejected BayWa's claim because BayWa had settled and not appealed against the FCO's fining decision. Liability for breach of official duty is excluded if the claimant could have averted the damage by taking legal action, in this case by appealing against the FCO's decision.

This judgment sheds light on an FCO practice t which appears to undermine the functioning of the leniency system in general. In view of this, it is surprising that the Court did not content itself with rejecting the claim for lack of causality or because BayWa had not appealed against the FCO's fining decision, but instead elaborated that such practice does not constitute a breach of an official duty.

German FCO fines aluminium forgers € 175 million for price fixing

On 23 December 2020, the German Federal Cartel Office ("FCO") announced that it had fined five aluminium forging companies and ten responsible individuals a total amount of approximately € 175 million for price fixing between April 2006 and April 2018. Automotive and motorcycle manufacturers and suppliers were among the key customers of the aluminium forging companies.

The companies involved in the infringement were Otto Fuchs Beteiligungen, Leiber Group, Strojmetal Aluminium Forging, Presswerk Krefeld and Bharat Forge Aluminiumtechnik. The companies were found to have agreed to pass on procurement costs and cost increases to their customers. Company executives were found to have met 23 times within twelve years in the so-called "Aluminium Forging Group". During these meetings they exchanged information on individual procurement costs and cost increases for aluminium, energy and processing and discussed how to pass on cost increases to customers.

The investigation had been initiated following a leniency application by Hirschvogel Aluminium, which benefited from immunity. Bharat Forge Aluminiumtechnik and Presswerk Krefeld also filed for leniency, leading to a reduction of their fines.

German FCO fines manufacturers of manhole covers € 6 million for price fixing

On 14 January 2021, the German Federal Cartel Office ("FCO") announced that it had fined two manufacturers of manhole covers approximately € 6 million for price fixing and coordinating their respective offers for two large contracts. The companies manufacture products such as manhole covers and street drainage grids made of cast iron or cast concrete.

The companies involved in the infringement were MeierGuss Sales & Logistics and Hydrotec Technologies. Company executives were found to have met at a trade exhibition and to have communicated over the phone in order to increase net prices and cut rebates on several occasions between May and November 2018. Additionally, they were found to have coordinated their offers regarding two large contracts with construction materials traders in August 2018.

The investigation had been initiated following an anonymous tip-off. Both companies agreed to a settlement.

ROMANIA

Romanian competition authority fines nine companies for price fixing on market for agricultural equipment

On 7 January 2021, the Romanian Competition Council ("RCC") imposed fines totalling € 26.5 million on nine companies for fixing the prices of agricultural machinery and equipment between 2014 and 2018. The companies involved in the infringement were Claas Global Sales,

Amazonen-Werke H. Dreyer, Claas Regional Center South East Europe, Serv Class, Agrocomert Holding, Proinvest, Proagroservice, Ursa Mare Comprod and Tehnoland.

Following an investigation launched in 2017, the RCC found that the companies colluded pricing by using as a reference point the database established by the Romanian Agency for the Financing of Rural Investments which sets reference prices for the financing of projects as part of the National Rural Development Programme. Two companies received a fine reduction for having acknowledged their participation in the prohibited practices.

Romanian competition authority fines Romanian Association of Financial Companies and financial companies for exchanging sensitive information

On 12 January 2021, the Romanian Competition Council ("RCC") imposed fines totalling € 8.47 million on the Association of Romanian Financial Companies and sixteen of its members for exchanging commercially sensitive information such as information concerning assets values, current and future financing values, periods of financing and portfolios.

The companies involved in the infringement were Alpha Leasing Romania, BCR Leasing, BRD Sogelease, BT Leasing Transilvania, Idea Leasing, Impuls Leasing Romania, Motoractive, OTP Leasing Romania, Piraeus Leasing Romania, Porsche Leasing Romania, Raiffeisen Leasing, RCI Leasing Romania, RD Leasing, Țiriac Leasing, Unicredit Leasing Corporation, Vista Leasing.

According to the RCC, the practices increased market transparency and enabled competitors to adjust their commercial strategies on the market. In addition, the RCC found that the Association of Romanian Financial Companies facilitated the implementation of the practices. Finally, one company that applied for leniency received immunity from fines and another received a fine reduction.

Romanian competition authority fines 31 companies for bid-rigging on wood market

On 19 January 2021, the Romanian Competition Council ("RCC") imposed fines totalling € 26.6 million on 31 companies for engaging in concerted practices aimed at sharing wood lots and supply sources on the wood processing market. The RCC found that the companies coordinated their conduct between 2011 and 2016 through exchanging sensitive information concerning: (i) their needs for raw materials; (ii) their wood supply policy; and (iii) their bidding strategy in the context of calls for tenders organised in the wood market. Thirteen companies received a fine reduction for settling, having admitted to infringing the competition rules.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines PC gaming platform operator Valve and five video game publishers € 7.8 million for geo-blocking practices

On 20 January 2021, the European Commission (the "Commission") **announced** that it had fined the US company Valve, owner of the popular online PC gaming platform "Steam" ("Steam"), and five publishers of video games (Capcom, Bandai Namco, Koch Media, Focus Home Inter-active and ZeniMax Media) a total of around € 7.8 million.

The case concerned cross-border restrictions on the sale and use of video games in the EEA agreed between (i) the publishers (individually) and Valve concerning the use of games on Valve's Steam platform and (ii) the publishers (individually) and some of their distributors concerning the sale of games by the distributors.

Steam is one of the world's largest online PC gaming platforms. It allows its users to directly download or stream PC video games from the platform, as well as allowing them to activate on and play through the platform a physical or digital version of a video game bought elsewhere. In order to play games on Steam which they have purchased from distributors other than Valve, players can use so-called "Steam activation keys" ("keys"), which are included in their physical or digital purchases of games. These keys are supplied by Valve to publishers, who in turn provide them to distributors for the sale of their games.

By attaching a territory control function to the keys with the help of Valve, publishers can restrict the geographic use of the games based on where they are activated. Steam detects the location of the user and then prevents users who are located outside the territories accepted by the key from activating their PC video game on the Steam platform (a practice which amounts to a form of 'geo-blocking'). For example, the territory control function could be used to prevent a game bought in, say, the Czech Republic (whether physically or digitally) being activated and played on Steam by users located in France.

Under the facts of the case, the Commission found that, between September 2010 and October 2015, Valve and each of the five publishers restricted cross-border purchases of certain video games by means of geo-blocked Steam activation keys, which prevented activation of the games outside of the Czech Republic, Poland, Hungary, Romania, Slovakia, Estonia, Latvia and Lithuania. This prevented passive sales of the games to parts of the EEA where they could not be activated.

In addition, the Commission found that four of the publishers imposed restrictions on passive sales within the EEA in the licensing and distribution agreements concluded with some of their distributors, other than Valve, for periods ranging from 3 to 11 years during the overall period between March 2007 and November 2017.

These practices were found to partition the EEA market, denying consumers the benefits of the Digital Single Market, and thereby violated Article 101 TFEU and Article 53 of EEA Agreement.

The case is a further example of the recently reinvigorated enforcement practice of the Commission against cross-border sales restrictions, in particular restrictions of passive sales. Recent cases have concerned restrictions in both distribution and licensing agreements, covering both physical and increasingly also intangible goods or services protected by national intellectual property rights such as copyright which, as a matter of intellectual property law, may be infringed by unauthorized cross-border sales (a factor which appears to have been relevant to the current case). The Commission has taken the robust view that contractual restrictions on cross-border sales may infringe Article 101 even where those sales would infringe intellectual property rights. Examples of this recent enforcement crack-down include the three merchandising licensing infringement decisions (see VBB on Competition Law, Volume 2019, No. 3, VBB on Competition Law, Volume 2019, No. 7 and VBB on Competition Law, Volume 2020, No. 1) and the cross-border pay TV commitment decisions (see VBB on Competition Law, Volume 2019, No. 3).

A novel feature of this case appears to be the application of Article 101 to the use by the publishers of activation keys to achieve geographic restrictions on the use of their products (in contrast, the contractual cross-border sales restrictions agreed with distributors/licensees appear similar to those found to constitute infringements in other recent cases). Geo-blocking practices which do not involve contractual restrictions on distributors would normally amount to unilateral conduct and thereby fall outside of the scope Article 101, only infringing EU law if either (i) they are engaged in by a dominant firm (as in *ABInbev*, see VBB on Competition Law, Volume 2019, No. 5), which apparently was not the case in these proceedings, or (ii) they fall within the scope of the Geo-blocking Regulation (Regulation 2018/302), which copyrighted intangible content such as video games (at least currently) do not. However, in this case the Commission brought the practice within the scope of Article 101 by virtue of the upstream contractual relations that existed between the publishers and the supplier of the devices they used to geo-block their games, Valve. It will be interesting to analyse the full facts and precise legal reasoning applied by the Commission when the decision is published, as, for example, a supplier of inputs which permit a customer to engage in geo-blocking in respect of the latter's own products may not, at least generally speaking, assume that it could be liable for that conduct.

Finally, the case is also of procedural interest as it constitutes a form of hybrid settlement (albeit outside of the scope of the formal settlement procedure which only applies to cartel cases). Whereas the publishers finally decided to cooperate with the Commission and acknowledge the facts and the infringements (in exchange for what were modest reductions in their fines compared to those achieved under the informal cooperation procedure in other vertical cases), Valve did not and, as a result, the decision against it was adopted under the ordinary, adversarial antitrust procedure. Nonetheless, the Commission decided to issue its decisions against both the five publishers and Valve at the same time, presumably cognisant of the risk that the adoption of the decisions against the 'settling' parties first might, in certain circumstances, violate their rights of defence. While the case law does not preclude dual-track proceedings, it has created the perception that decisions produced together are "safer" in terms of respecting the rights of defence of all the parties (as illustrated by the 2017 ruling in *ICAP*, see VBB on Competition Law, Volume 2017, No. 11).

– MEMBER STATE LEVEL –

CZECH REPUBLIC

Chairman of Czech NCA upholds € 1.6 million fine for resale price maintenance levied against childcare products supplier Baby Direkt

On 5 January 2021, on appeal against a decision by the Czech Office for the Protection of Competition ("Czech NCA"), the Chairman of the Czech NCA (the "Chairman") upheld a fine of € 1.6 million levied by his organisation in November 2019 against childcare products supplier Baby Direkt.

Baby Direkt was found to have concluded agreements with its distributors obliging them to follow set resale prices. These agreements were enforced by the company through illegally threatening or sanctioning non-compliant distributors (e.g., by withholding supplies).

These practices were said to have caused a long-term distortion of competition, as they had taken place for more than seven years (between 2011 and 2018) and concerned most of Baby Direkt's products. A further aggravating factor in the setting of the fine was that the Czech NCA had already alerted the company to the anti-competitive character of the practices back in 2014. The Czech NCA commented that the fine could have been over three times higher but was limited by the legal maximum of 10 % of the company's turnover. The Chairman argued that the decision did not fully prove the impact on the broader EU market. Therefore, the Chairman dismissed the claim under EU competition law. The amount of the fine, however, was upheld, as the claim under the Czech Act on the Protection of Competition was left intact.

The fine is one of the highest fines ever imposed for resale price maintenance ("RPM") in the Czech Republic and is further evidence that RPM remains high on the agenda of European competition law authorities.

SWEDEN

Swedish Competition Authority adopts a stricter position toward RPM concerning online sales

On 16 December 2020, Markslöjd AB, a supplier of lighting products, accepted to pay a fine of SEK 1,780,000 for resale price maintenance. The Swedish Competition Authority ("SCA") found that Markslöjd AB had violated competition law by entering into agreements with one of its resellers to fix resale prices for home and Christmas lighting between April 2018 and August 2018. The SCA characterised resale price maintenance ("RPM") as a serious competition law violation, and considered that in this case the harmful effects were even more serious as the RPM extended to online sales. Markslöjd AB agreed to pay the fine, thereby avoiding an action being started by the SCA before the Patent and Market Court.

The SCA's formalistic analysis in *Markslöjd* signals a significant shift in the SCA's attitude toward online RPM. In its 2014 13:Protein Import decision, the SCA investigated a similar online RPM arrangement. It concluded, after a careful assessment of the relevant facts and effects of the arrangement, that the arrangement did not create material competition law concerns and closed the file. *Markslöjd* suggests that the SCA, unfortunately, is falling into line with the European mainstream when assessing RPM arrangements under Article 101 TFEU.

STATE AID

– EUROPEAN UNION LEVEL –

European General Court provides guidance on the standing to challenge Commission decisions rejecting State aid complaints and the concepts of "State resources" and "imputability" with regard to decisions adopted by industry associations: *Bezouaoui and HB Consultant v Commission* (case T-478/18)

On 13 January 2021, the European General Court ("GC") delivered a judgment providing guidance on the standing to challenge European Commission ("Commission") decisions rejecting State aid complaints, and on the concepts of "State resources" and "imputability" within the meaning of Article 107(1) TFEU.

The background of the dispute concerns the reimbursement of costs related to training courses for construction plant driving safety in France. In short, French labour law requires workers in charge of driving certain construction vehicles to receive professional training, which can be delivered either by training organisations or by the employer. The employer can ask for reimbursement of the costs related to those training sessions from the industry association ("OPCA") to which his or her undertaking is affiliated. In this regard, there are two types of training sessions that workers can choose between for the purpose of proving their fitness to drivie construction vehicles safely. The first provides a certificate called "CACES" (Handling Equipment Safe Operation Certificate), which was set up by the National Health Insurance Fund for Employees ("CNAMTS", a State body) and is delivered upon receiving training from certain organisations that are authorised by the CNAMTS. The second type is provided by Mr. Bezouaoui's private company HB Consultant (the "Applicant") and leads to a certificate called "PCE" (Machinery Driving Licence).

In the present case, the Applicant had filed a complaint before the Commission alleging that the French rules discriminated between PCE and CACES. In particular, the Applicant complained about the fact that the OPCA refused to reimburse employers for the costs related to PCE training. This refusal was the result – according to the Applicant – of the control exercised by the French authorities over the OPCA, and constituted State aid. The Applicant's complaint was rejected by the Commission decision (challenged before the GC), on the ground that, *inter alia*, the refusal by OPCA was not imputed to the French authorities and that, as such, the alleged discrimination did not qualify as "State aid" in the sense of Article 107(1) TFEU.

In its judgment of 13 January 2021, the GC upheld the Commission's findings and rejected the action for annulment.

As regards the admissibility of the action for annulment, the GC recalled that when a Commission decision is adopted – as in the present case – at the stage of the preliminary examination phase of the investigation, an "interested party" (in the sense of Article 108(2) TFEU) can challenge the merits of the Commission's assessment before the General Court only if it meets the conditions set out in Article 263(4) TFEU. For that purpose, the interested party can rely on the fact that the aid measure assessed by the Commission "substantially affects" its market position. In the present case, the GC found, *inter alia*, that this condition was met, since the PCE and the CACES are the only two certificates delivered for the purpose of construction plant driving safety training in France. The alleged aid would thus substantially affect the market position of the Applicant, since employers would *de facto* be encouraged to choose CACES instead of PCE training courses, in order to ensure that the OPCA would reimburse the costs incurred in that context.

As regards the merits of the action, the GC first noted that the conditions for reimbursement are set by the OPCA and not by French legislation. In particular, such conditions are autonomously decided by the board of the OPCA (which is composed of an equal number of private representatives of employers and workers of the affiliated under-

takings), with reference to general criteria established by the French labour code. Moreover, the resources used to reimburse the costs of the training courses are drawn from financial contributions made by the affiliated undertakings – and not from the State purse. The GC also noted that the fact that the Statute of the OPCA is subject to formal control and authorisation by the French authorities does not demonstrate that the French State exercises decisive influence over the OPCA's decision-making process with regard to the reimbursement of the costs of the CACES and PCE courses.

In addition, the GC rejected the Applicant's arguments according to which the French State had promoted the CACES training course instead of the PCE course, and thus led the OPCA to decide not to reimburse the latter. The GC noted that the CACES training course is not mandatory under French law. In fact, the legislation is essentially neutral as to which type of course is followed by the workers (CACES or PCE), provided that they achieve the results required by the law. The GC then also addressed and dismissed several allegations concerning presumed *de facto* influence by the French authorities over employers' choosing between the CACES and PCE training course.

Mainly for the above reasons, the GC concluded that OPCA's decision whether or not to reimburse the costs of training courses is not attributable to the French State and does not involve the use of State resources within the meaning of Article 107(1) TFEU.

European Commission adopts 5th amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak

On 28 January 2021, the European Commission ("Commission") amended the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the "Temporary Framework"). Below we outline the most relevant amendments:

- The application of the Temporary Framework is prolonged until 31 December 2021.

- The aid ceilings set out in section 3.1 ("Limited amounts of aid") and section 3.12 ("Aid in the form of support for uncovered fixed costs") of the Temporary framework are increased. The new ceilings are € 225,000 per company active in primary production of agricultural products (previously € 100,000), € 270,000 per company active in the fishery and aquaculture sector (previously € 120,000), and € 1.8 million per company active in all other sectors (previously € 800,000). As before, these aid amounts can be combined with *de minimis* aid. For companies especially hit by the coronavirus crisis, Member States can contribute to the part of the fixed costs of companies that are not covered by their revenues, in an amount up to € 10 million per company (previously € 3 million).

- Member States are allowed to convert repayable instruments (e.g., guarantees, loans, repayable advances) granted under the Temporary Framework into other forms of aid (such as direct grants), until 31 December 2022. Such conversion may not exceed the new ceilings for limited amounts of aid (see above) and must meet certain conditions.

- The temporary removal of all countries from the list of "marketable risk" countries under the Short-term export-credit insurance Communication is extended until 31 December 2021.

In view of the above, the Commission notes that Member States may envisage modifying existing aid measures approved under the Temporary Framework in order to prolong their period of application until 31 December 2021. Furthermore, they may also increase the budget of existing aid measures or introduce other amendments to align those measures with the amended Temporary Framework. For that purpose, Member States are invited to notify to the Commission a list of all existing aid measures they envisage modifying and to provide the necessary information listed in the annex of the Communication on the 5th amendment to the Temporary Framework. The Commission envisages adopting one single decision covering the entire list of notified measures.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

European Commission seeks feedback on EU competition rules on collective bargaining agreements for self-employed individuals

On 6 January 2021, the European Commission ("Commission") launched an inception impact assessment on an initiative that seeks to clarify the applicability of EU competition rules to collective bargaining agreements involving "solo" self-employed individuals.

The initiative stems from several studies and surveys which concluded that a growing number of individuals engage in so-called "platform work", where they find themselves in situations of unbalanced negotiating power vis-à-vis certain firms/buyers of labour. As a result, many self-employed in the "gig economy" face challenging working conditions, including low income, poor job security and lack of representation. The Commission considers that uncertainty as to the applicability of EU competition rules to self-employed individuals – which are considered as undertakings for the purposes of Article 101 TFEU and therefore subject to the prohibition against entering into agreements that restrict competition – may have a chilling effect on collective bargaining which could improve working conditions of the self-employed.

The initiative aims at clarifying the applicability of EU competition rules and providing legal certainty as to the conditions under which the self-employed would be allowed to bargain collectively. To this end, the Commission has identified four possible policy options:

- Under Option 1, all the solo self-employed who provide their labour through online platforms would have access to collective bargaining. This option would cover all individuals working through platforms, doing online and/or on-location work through platforms.

- Under Option 2, all the solo self-employed providing their labour through online platforms or to professional customers of a certain size, would have access to collective bargaining. This option would include traditional professions which are found in the off-line economy (e.g., independent contractors and freelance workers), where those professions are not already dealt with by other specific competition law provisions.

- Under Option 3, all the solo self-employed who provide their labour through online platforms or to professional customers of a certain size, except regulated or liberal professions (who are not generally perceived as being in a weak negotiating position), would have access to collective bargaining.

- Under Option 4, all the solo self-employed who provide their labour through online platforms or to professional customers regardless of their size would have access to collective bargaining.

According to the Commission, collective bargaining under all four options should be confined to the improvement of working conditions. Collective agreements on prices charged to private consumers and unilateral price-setting agreements should not be covered by this initiative.

Interested stakeholders and individuals can submit their feedback on the initiative until 3 February 2021. A public consultation is scheduled to take place in the second quarter of 2021 and the Commission is expected to publish a proposal for a regulation in the second quarter of 2022.

This is another initiative exploring how EU competition law can be reshaped to accommodate non-competition goals (such as the improvement of working conditions, income distribution, access to social protection). It remains to be seen whether the Commission will be able to develop a proposal that would effectively serve the goal of improving the working conditions of self-employed individuals in the "gig-economy", while fully respecting Article 101 TFEU's prohibition against agreements among competitors that restrict competition.

Court of Justice confirms European Commission's power to issue a request for additional information after statement of objections

On 28 January 2021, the European Court of Justice ("ECJ") handed down a judgment in Case C-466/19 P (*Qualcomm Inc. and Qualcomm Europe v. European Commission*).

Following a complaint submitted in 2010 by Icera Inc., a producer and distributor of soft chipsets which deliver high-performance communication engines for cellular products, the European Commission ("Commission") opened an investigation regarding Qualcomm, Inc. and Qualcomm Europe's (together "Qualcomm") possible abuse of dominance in the form of predatory prices on the market for baseband chipsets compliant with the Universal Mobile Telecommunications System ("UMTS") standard.

After issuing several requests for information pursuant to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"), the Commission opened a formal investigation against Qualcomm. On 8 December 2015, the Commission adopted a statement of objections, on which Qualcomm subsequently presented its observations. Considering the criticism raised in Qualcomm's observations, the Commission first addressed a simple request for additional information, which Qualcomm opposed. As a result, on 31 March 2017, the Commission adopted a decision of request for additional information ("request for additional information"), under a periodic penalty payment of € 580,000 per day of delay, pursuant to Article 18(3), of Regulation 1/2003.

Qualcomm challenged the Commission's decision before the General Court ("GC"), which considered that the Commission could address a request for additional information after issuing a statement of objections, as long as the information requested was necessary, and that the request was adequately reasoned and proportional in light of the needs of the investigation (Case T-371/17). Accordingly, the GC rejected Qualcomm's challenge.

On 18 June 2019, Qualcomm appealed the GC's judgment before the ECJ.

Qualcomm notably argued that the GC had committed errors of law and fact in finding that: (i) the request for additional information had not extended the scope of the Commission's investigation as defined in the statement of objections; (ii) the Commission was empowered to request information relating to time periods outside the scope of the investigation and (iii) the information requested was necessary. In this respect, the ECJ found that the statement of objections is preparatory in nature and may be amended, and that the factual considerations it contains do not bind the Commission. On the contrary, the Commission must take into account the observations submitted by the addressee(s) to adapt and complete the reasoning which supports the objections raised in the statement. Therefore, the Commission has the right to request additional information in order to better define the scope of the infringement or adjust its methodology, as long as this information is necessary.

In the case at hand, the ECJ held that the Commission could not be criticised for requesting price information relating to periods adjacent to the infringement period defined in the statement of objections. This request was not expanding the temporal scope of the investigation, but was rather seeking to establish a price-cost test in accordance with the revenue recognition principles applied by Qualcomm, as outlined in its observations on the statement of objections.

Additionally, Qualcomm argued that the GC's judgment had not taken into proper consideration the workload imposed on Qualcomm to identify, retrieve and analyse the documents necessary to answer the Commission's questions. In particular, Qualcomm insisted that the request for additional information had obliged it to examine around 25,000 pages of documents which were stored in an external facility and which it had no obligation to maintain. In this regard, the ECJ found that the GC had expressly acknowledged the significance of that request, but had considered that this workload had to be balanced against the needs of the investigation.

Qualcomm also took issue with the mandatory nature of the format for replying to the Commission's questions, and argued that it went beyond what was necessary in light of the investigation. However, the ECJ rejected Qualcomm's argument. It relied on the GC's finding that the format suggested by the Commission for replying to its questions was not compulsory and that Qualcomm had the option

of adapting it if that proved more suitable. The GC had also found that the format in the Commission's request for information tended in practice to facilitate the respondents' task. Accordingly, the GC had not manifestly exceeded the limits of a reasonable assessment.

Therefore, the ECJ dismissed the appeal on all grounds, thereby confirming the power of the Commission to issue a new request for information after the issuance of a statement of objections, so long as the request is adequately reasoned, proportional and necessary considering the needs of the investigation.

– MEMBER STATE LEVEL –

DENMARK

Danish Competition Council publishes report on competition in the legal profession

On 14 January 2021, the Danish Competition Council ("DCC") presented its analysis of competition in the legal profession ("Analysis"), which is based on a thorough study of the market for legal services in Denmark.

The Analysis contains a wide range of proposals that have the potential to improve competition in the legal profession, while still taking account of the necessary social considerations. The DCC states that the proposals should reduce barriers to entry for new players and allow existing firms to grow, without undermining continued confidence in the independence of lawyers.

The DCC notes that public procurement of legal services is not effectively used to create effective competition in the legal profession. For instance, the Danish State has bought a significant part of its legal assistance from a single Danish law firm for over 85 years, under an agreement without expiration provision. The Analysis suggests that many municipalities and regions could further increase competition by relying on public procurement procedures to purchase legal services.

The DCC also recommends partially abolishing the prohibition against so-called "client fishing", which takes place where an unsolicited lawyer targets a client by offering a lower fee. However, the prohibition should continue to apply to criminal proceedings or cases involving particularly vulnerable or vulnerable persons.

Finally, the Analysis puts forward a number of recommendations that aim to strengthen competition in the sector of bankruptcy estates and trustee estates.

GERMANY

10th amendment of the German Act against Restraints of Competition enters into force

On 19 January 2021, the 10th Amendment of the German Act against Restraints of Competition ("ARC") entered into force. The 10th Amendment, also referred to as the "Digitalisation Act", introduces significant changes to German Competition Law. A previous issue of this newsletter (VBB on Competition Law Volume 2020, No. 9) reported in detail on the draft bill tabled by the German government (the "Draft Bill"). Although many of the proposals contained in the Draft Bill were adopted, several important amendments were inserted during the legislative process.

In the field of abuse of dominant position, the Digitalisation Act introduces a new Section 19a ARC, which confers new powers on the German Federal Cartel Office ("FCO") to more effectively control so-called "digital giants" by introduc-ing the concept of "paramount importance for competition across markets". The FCO has been authorised to issue an order establishing the paramount importance of a com-pany acting on multisided markets. The indicators of such "paramount importance" are: (i) a dominant position on one or more markets; (ii) financial strength or access to other resources; (iii) its vertical integration and activities on oth-erwise interrelated markets; (iv) access to competition-rele-vant data; and (v) the importance of activities for third-party access to procurement and sales markets as well as related influence on the business activities of third parties.

If the FCO establishes the paramount importance of a company, it can proactively prohibit various types of conduct it deems particularly harmful to competition. The Digitalisation Act now provides specific examples of the types of conduct which can be prohibited. They include: (i) self-preferencing, particularly by pre-installing own software on devices or integrating own products in other offers; (ii) preventing or hindering companies from advertising their own offers or reaching customers through other means of access than those provided by the company with paramount importance; or (iii) making the use of services conditional upon user consent to the processing of data from other services of the same provider or from third parties.

The legislative process also brought a number of last-minute changes with respect to findings of "paramount importance". First, such a finding is valid for five years as of the FCO's decision. Second, while most decisions of the FCO can first be appealed to the Higher Regional Court of Düsseldorf, an order by the FCO finding that a company is of "paramount importance" and subsequent prohibitions can only be appealed to the German Federal Court of Justice. While the FCO stresses the advantage of accelerated proceedings, the downside is that, when seeking judicial redress, the companies are limited to one stage of appeal.

The FCO was impatiently awaiting the adoption of the new Section 19a ARC. Only days after the amendment had entered into force, the FCO announced that it would extend the scope of its proceedings against Facebook and assess whether Facebook might be subject to the new rules applying to companies of paramount importance for competition across markets and whether linking the use of Oculus virtual reality products to a Facebook account is abusive conduct under the new provision.

While the legislator wanted to extend the FCO's toolbox to deal with digital companies, it should be noted that the application of this amendment is – as such – not limited to digital players.

Other provisions, such as those relating to the concept of "intermediary power" (i.e., the power of a company acting as an intermediary in multi-sided markets) as a criterion for: (i) assessing the existence of dominance; (ii) the broadening of relative or superior market power to the benefit of large companies and (iii) the right to access data against dominant companies, were not subject to further changes. These are discussed in VBB on Competition Law Volume 2020, No. 9.

In the field of **merger control**, the Digitalisation Act increases the domestic turnover thresholds (i.e., the turnover achieved by the parties in Germany) beyond those proposed by the Draft Bill. With the Digitalisation Act, the first domestic turn-over threshold is raised to € 50 million (from € 25 million) and the second domestic turnover threshold is raised to € 17.5 million (from € 5 million). These thresholds are rele-vant for both the turnover-based test and the transaction value test. In addition, as already envisaged in the Draft Bill, the threshold for minor (or *de minimis*) markets where the transaction is not subject to the FCO's review is increased from € 15 to € 20 million.

The reduced number of notifications resulting from the increased turnover thresholds have to be analysed in the context of a new instrument that empowers the FCO to order companies for a duration of three years to notify future concentrations with a target active in one or several sectors specified by the FCO, even if the general turnover thresholds are not met. The conditions set out in the Draft Bill and explained in VBB on Competition Law Volume 2020, No. 9 remained unchanged. This provision aims to allow the FCO to scrutinise so called "killer acquisitions" and the creation of a dominant position through successive acquisitions of smaller competitors or newcomers. The combination of these provisions should provide the FCO with greater flexibility to allocate its resources in merger control.

As proposed in the Draft Bill, the Phase II review has been extended to five months.

German competition law allows the Federal Minister of the Economy to overrule a merger prohibition decision of the FCO. The Draft Bill would have obliged the parties to a transaction to seek judicial review of an FCO prohibition decision prior to an appeal to the Federal Minister for the Economy. However, this would have significantly prolonged the proceedings and entailed increased costs for the parties. This obligation was therefore set aside in the legislative process, and the ARC allows the parties to seek a ministerial authorisation for their transaction from the Federal Minister for the Economy, without first seeking judicial review.

Regarding **cartel** fines, the Digitalisation Act introduces new provisions which expand the possibility of imposing fines on associations and of enforcing such fines against the associ-ation's member companies. Notably, under the new provi-sions, the FCO can base the fine calculation on the turnover of the members of the association. The Digitalisation Act also codifies the FCO's so-called "comfort letter" and the leniency programme.

Finally, the Digitalisation Act facilitates **private enforcement** by suppliers as well as direct and indirect customers by introducing a rebuttable presumption in favour of claim-ants according to which transactions on goods or services with cartel participants are affected by the cartel if they fall within its material, geographic and temporal scope.

The provisions in the field of cartel fines, leniency and private enforcement were not subject to further amendments compared to the Draft Bill. In this respect, we refer to the explanations in VBB on Competition Law Volume 2020, No. 9.

UNITED KINGDOM

Competition law and state aid aspects of the EU-UK Trade Cooperation Agreement

The Trade Cooperation Agreement (the "TCA") includes various provisions regulating EU and UK competition law enforcement and cooperation, which became effective as of 1 January 2021.

Competition law and merger control

The TCA provides for a mutual commitment from the UK and the EU to maintain competition law regimes regulating (i) anti-competitive agreements; (ii) abuses of dominance; and (iii) mergers, whilst also empowering EU and UK competition authorities to (continue to) cooperate and share information where appropriate.

In practical terms, therefore, the TCA changes very little of the core antitrust framework in either jurisdiction. Indeed, whilst in theory the UK will now be free to diverge from the EU in respect of competition law and merger control, both jurisdictions already operate well-established regimes overseen by sophisticated regulators. As such, there are no immediate indications (at least in the short term) of a desire on either side to pursue extensive reform.

However, and as previously reported, the end of the transition period has nevertheless heralded some very significant changes to certain aspects of the previous regime (perhaps most notably in the field of merger control). For example, as the "one-stop shop" principle no longer applies to the UK, there is a very high likelihood that many transactions will now be subject to parallel Competition and Markets Authority ("CMA") and European Commission ("Commission") investigations, provided that the relevant jurisdictional thresholds are satisfied. For many transactions, such additional complexity is likely to have considerable cost and timing implications. Similarly, as the rules allocating jurisdiction between the Commission and national competition authorities of EU Member States for the purposes of investigating alleged anticompetitive conduct (pursuant to Regulation 1/2003) no longer apply to the UK, there is now also a material risk that companies could potentially become subject to parallel Commission and CMA antitrust investigations.

Further detail regarding the impact of Brexit on competition law after the end of the transition period is provided in the respective final guidance documents recently published by the CMA and the Commission. Both guidance documents are covered in VBB on Competition Law, Volume 2020, No. 12.

State aid

Chapter 3 of the TCA requires the UK to implement a domestic State aid regime, based on high-level principles similar to those underlying the existing EU regime and covering both goods and services. UK courts must have the power to review the compatibility of UK subsidy measures with those principles (and award appropriate remedies, including the recovery of State aid).

The UK is also required to establish an independent authority to oversee its state aid regime. Although it appears likely that – in the short term at least – the CMA will be asked to perform this additional regulatory function, at the time of writing it remains unclear how it will regulate (or indeed, which regulatory powers it will possess).

Whilst the UK's new regime is likely to be relatively similar to the existing EU regime in a number of respects (particularly as regards high-level principles), its precise nature and scope are still to be confirmed. To that end, the UK Government very recently announced that it will be consulting on plans to implement its own domestic State aid regime (although it may still be some time before the finalised provisions are formally enacted, prolonging the uncertainty for many businesses).

In the meantime, it appears that a business wishing to challenge a UK State aid measure implemented after 31 December 2020 could (at least in theory) bring such challenge in the UK courts – despite the apparent absence of legislation implementing a domestic UK State aid regime (or indeed, the formal appointment of a regulator to enforce such regime), and considerable uncertainty regarding the practical implications of such a challenge.

For further details, please refer to the initial guidance and subsequent consultation materials recently published by the UK's Department for Business, Energy and Industrial Strategy.

CMA publishes final report in its funeral market investigation and orders funeral directors and crematorium operators to disclose prices

On 18 December 2020, the UK's Competition and Markets Authority ("CMA") published the final report of its market investigation into funeral services. The CMA said that it had serious concerns about the sector and it has put in place a number of "sunlight" remedies designed to make the sector more transparent for customers choosing a funeral director or crematorium.

The CMA launched its market investigation into the funeral sector in March 2019 following its 2018 market study, which revealed that funeral directors and crematorium operators were making profits that were persistently above the levels that the CMA expected from a well-functioning market. This final report confirms the CMA's provisional conclusions, which it published in August 2020.

Due to the COVID-19 pandemic the CMA said that it was unable to impose price controls on the sector but has nonetheless recommended the establishment of a regulatory regime to monitor the sector. It has also set out a number of remedies. These include an obligation on all funeral directors and crematorium operators to disclose prices, allowing customers to make more informed decisions, requiring information to be provided to a customer in advance of them purchasing a service so that they know the price they will be charged and the key terms of business, and a prohibition on payments incentivising hospitals, care homes or hospices referring customers to a particular funeral director.

The CMA has said that it will keep a close eye on this sector to make sure that its remedies are properly implemented. It has also declared that it continues to have serious concerns about the sector and would be considering whether a further market investigation may be needed once the effects of the Covid-19 pandemic dissipate and market conditions become more stable.

CAT rejects concrete producer FP McCann's procedure-based appeal against concrete pipe cartel fine

On 22 December 2020, the UK's Competition Appeal Tribunal ("CAT") rejected concrete producer FP McCann's appeal of a decision by the Competition and Markets Authority ("CMA") fining it for its participation in a cartel in the supply of pre-cast concrete drainage products. FP McCann appealed the CMA's £ 25 million fine on a number of procedure-based grounds, but the CAT sided with the CMA and rejected the claim that the CMA's conduct did not fall within its procedural powers.

The CMA fined FP McCann in October 2019 having found that the company, along with two other concrete producers – Stanton Bonna Concrete and CPM Group – broke competition law by taking part in a UK-wide illegal cartel between July 2006 and March 2013. The cartel's infringing conduct involved the fixing of prices, allocation of customers and the exchange of competitively sensitive information. As well as fining the companies following a civil enquiry, the CMA also launched a criminal enquiry which resulted in a suspended prison sentence for one director.

The CAT rejected FP McCann's argument that investigatory delays on the part of the CMA led to its fine being unlawfully inflated, as the delays led to a higher total of sales of the company's cartelised products being taken into account when calculating the fine. FP McCann also argued that the civil and criminal investigations should have been conducted in parallel to reduce delays. However, the CAT disagreed with FP McCann's arguments and said that "*neither the criminal, civil nor combined investigations were subject to inordinate or inexcusable delay, even though portions of the work may not have proceeded as swiftly as the authorities had hoped or intended*".

The CAT went on to say that the case was the largest and most complex criminal investigation that the CMA had conducted up to that point and substantial intelligence gathering was required. The CAT also acknowledged that there were good reasons not to run the civil and criminal investigations at the same time, such as: (i) the risks of contaminating evidence; and (ii) the potential for evidence to emerge during the civil investigation which might be of relevance to the later criminal investigation.

As to the size of the fine issued to FP McCann, the company said that the delay in the investigation was prejudicial to it and warranted a reduced fine. However, the CAT agreed with the CMA's arguments that the penalty was imposed for good reasons, with the aim of deterring others from entering into unlawful agreements, and that in any case the delays were not unreasonable.

In recent years, the CMA has often said that it views cartel conduct involving price fixing and market sharing as the most serious forms of anti-competitive conduct. This judgment by the CAT, according to which the way the CMA manages its investigations is essentially a matter for the CMA's own judgment, will likely strengthen the CMA's assertiveness in pursuing such investigations in future.

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