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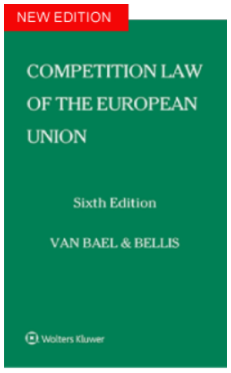
Highlights



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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission prohibits shipbuilding merger

On 13 January 2022, the European Commission ("Commission") announced its decision to prohibit Hyundai Heavy Industries Holdings' ("HHIH") acquisition of rival Korean shipbuilder Daewoo Shipbuilding & Marine Engineering Co., Ltd ("DSME").

The Commission was concerned that the transaction would give rise to problematic overlaps in the markets for the construction of oil tankers, container ships, liquefied petroleum gas carriers and liquefied natural gas ("LNG") carriers. Following an in-depth Phase II investigation, the Commission concluded that the transaction would give the merged entity a dominant position in the market for large LNG carrier construction, resulting in a reduced choice of suppliers and ultimately higher prices for direct customers and, downstream, for European energy consumers.

In particular, the Commission found that the market for the construction of LNG carriers is already highly concentrated and that the market shares of both HHIH and DSME have been increasing over time. According to the Commission, the merged entity would hold a market share of over 60% and would face direct competition from only one other large shipbuilder and a distant fourth competitor that could not act as effective competitive constraints. Moreover, these remaining competitors would not have the capacity to cover projected market demand, further heightening the competitive position of the combined entity. The Commission also found that the highly complex nature of LNG vessels created high barriers to entry from other shipbuilders, while the fragmented customer base for LNG carriers did not generate any countervailing buyer power. As the parties did not offer any formal remedies to address these concerns, the Commission issued a decision prohibiting the transaction. This is the tenth merger that the Commission has prohibited in the past decade.

The transaction was originally notified in November 2019; however, the Phase II review clock was stopped three separate times due to HHIH's failure to provide requested information, leading to an unusually long Phase II review.

To some extent, the Commission's assessment of this transaction mirrors its concerns regarding the concentration in the cruise shipbuilding market of *Fincantieri/Chantiers de l'Atlantique*, which was notified in 2019 and withdrawn in 2021 in the midst of a Phase II review. In both cases, the Commission expressed concern regarding consolidation and high barriers to entry given the complex nature of the large ships at issue. However, unlike the cruise shipbuilding market, which was heavily affected by the outbreak of COVID-19, the Commission found that the pandemic had little overall effect on the competitive dynamics affecting the market for large LNG shipbuilding.

– NATIONAL LEVEL –

LUXEMBOURG

Luxembourg consults on introduction of merger control regime

On 21 January 2022, Luxembourg, the only EU Member State that currently has no merger control regime, initiated a public consultation on the introduction of a national merger control system.

The Luxembourg Competition Council's working group has concluded that a national merger control regime should be introduced, following an evaluation process that began some years ago. The Ministry of the Economy, in cooperation with the Competition Council, is now assessing the different options available to develop national legislation providing the power to conduct pre-merger reviews. To gather the views of interested parties, the Ministry of the Economy has decided to launch a public consultation, the results of which are intended to inform preparatory work that will take place during 2022 with a view to presenting draft legislation at a later date.

Any interested party may submit a response to the consultation up until 31 March 2022 by completing the Ministry's online questionnaire and sending the response by email to concentrations@eco.etat.lu.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

General Court overturns Commission's Intel decision

On 26 January 2022, the General Court of the European Union annulled most of the decision of the European Commission ("Commission"), which had imposed a fine of € 1.06 billion on Intel for having abused its dominant position on the worldwide market for x86 processors between October 2002 and December 2007 by implementing a strategy aimed at excluding its competitor AMD from the market based on the grant of exclusivity rebates and payments as well as so-called "naked restrictions". The General Court, on remand, found that the Commission had not established to the requisite legal standard that the rebates and payments at issue were capable of having, or were likely to have, anticompetitive effects.

In its 2009 decision, the Commission alleged that Intel had abused its dominant position by implementing a strategy aimed at foreclosing Advanced Micro Devices ("AMD") from the market. This strategy allegedly consisted of: (i) granting rebates and payments to OEM customers on the condition that they purchase from Intel all or almost all of their x86 CPUs (either in total or for a particular segment of the OEM market); (ii) granting rebates and payments to OEM customers on the condition that they delay or postpone the sale of computers containing AMD chips (so-called "naked restrictions"); and (iii) awarding payments to retailer Media-Saturn ("MSH"), which were conditional on the exclusive sale of computers containing Intel's x86 CPUs.

In 2014, an action for annulment brought by Intel against the contested decision was dismissed in its entirety by the General Court. However, in a 2017 judgment on further appeal, the European Court of Justice set aside that judgment and referred the case back to the General Court. According to the Court of Justice, the existing case law concerning fidelity rebates (in particular Case 85/76, *Hoffmann-La Roche*) needed clarification, and it found that, where an undertaking submits evidence during the administrative procedure that its conduct is not capable of restricting competition, the Commission is required to consider the extent of the dominant position, the share of the market covered by the practice, the conditions and arrangements for granting the rebates (including duration and amount) and the possible existence of a strategy aimed at excluding from the market competitors that are at least as efficient as the dominant undertaking ("AEC test").

In that regard, the Court of Justice criticised the General Court for having presumed that fidelity rebates granted by an undertaking in a dominant position by their very nature restrict competition, with the result that it was not necessary to analyse all the circumstances of the case or to carry out an AEC test. One of the peculiarities of the Commission decision is that it included an in-depth examination of those circumstances, which led it to conclude that an as-efficient competitor would have had to offer prices which would not have been viable and that, as a result, the rebates at issue were capable of having foreclosure effects. However, that analysis did not form part of the reasoning on which the Commission relied to establish the infringement: the Commission claimed that the economic analysis was performed solely for the purpose of determining whether the case was consistent with its priorities, but the sole legal basis for the decision was its formalistic reading of the Hoffmann-La Roche case law. It was on that basis that the General Court had refused to examine Intel's arguments about the errors made by the Commission in applying the AEC test.

In its judgment, the General Court recognised that the setting aside of its 2014 judgment was based on its failure to consider Intel's challenge to the Commission's AEC test and that, as a result, the scope of the referral was limited to that point. Thus, the General Court considered the findings of the 2014 judgment concerning the naked restrictions and their unlawfulness under Article 102 TFEU as having been accepted. The General Court also noted that Intel had withdrawn its pleas in law regarding jurisdiction and procedural irregularities.

The General Court then carried out an in-depth review of the AEC test carried out by the Commission with respect to the rebates and payments granted by Intel to Dell, HP, NEC, Lenovo and MSH and concluded that numerous errors vitiated the Commission's analysis, as explained below:

- Dell: the Commission had not demonstrated to the requisite legal standard that the assessment of the contestable share of Dell's demand was well founded. In addition, the General Court noted that there was a contradiction in the contested decision which had determined that the rebate granted to Dell was capable of having a foreclosure effect throughout the whole infringement period while the finding that Intel had passed the AEC test was restricted to only a few quarters of the relevant infringement period.

- HP: the Commission had not established to the requisite legal standard that, during the period from November 2002 to May 2005, Intel's rebate to HP was capable of having an anticompetitive foreclosure effect or was likely to have such an effect, since it had not demonstrated that there was such an effect in the period between November 2002 and September 2003.

- NEC: the Commission erred in: (i) calculating the value of the conditional rebate that Intel had granted to NEC and (ii) relying on data relating solely to the fourth quarter of 2002 in order to draw conclusions regarding the capability of Intel's practices to foreclose an as-efficient competitor between the fourth quarter of 2002 and November 2005.

- Lenovo: the Commission had not adduced sufficient evidence regarding the capacity of the rebate granted to Lenovo to have a foreclosure effect, due to errors made by the Commission in the assessment of the value of the conditional rebates at issue.

- MSH: the Commission had not established to the requisite legal standard that, during the period from the last quarter of 1997 to 12 February 2008, Intel's payments to MSH were capable of having or were likely to have anticompetitive effects. In that respect, the General Court criticised the Commission for basing Intel's capacity to foreclose throughout the infringement period on the conditional rebate received by NEC – which represented 4% of MSH computer requirements – over a single quarter.

Finally, the General Court concluded that the contested decision was vitiated by other errors in that, contrary to what is required by the Court of Justice's judgment, the Commission: (i) did not properly consider the criterion relating to the share of the market covered by the contested practice; and (ii) failed to examine the duration of the rebates.

In light of all of the above, the General Court annulled the contested decision insofar as it had found the rebates and payments at issue to infringe Article 102 TFEU. As the General Court considered that it was not in a position to identify the amount of the fine related solely to the part of the decision that was not annulled, namely the naked restrictions, the € 1.06 billion fine imposed on Intel was annulled in its entirety.

– NATIONAL LEVEL –

GERMANY

Federal Cartel Office finds Google to be of "paramount significance for competition across markets", triggering right of accelerated intervention against Google's business practices

According to a press release of 5 January 2022, the German Federal Cartel Office ("FCO") has decided that Alphabet Inc., including its subsidiary Google ("Google"), is of paramount significance for competition across markets pursuant to Section 19a of the German Act against Restraints of Competition ("ARC"). Although the FCO has also initiated Section 19a proceedings against other large digital platforms, this marks the first time that the FCO has adopted a formal "paramount importance" decision under Section 19a.

As a result, the FCO can now use the enhanced powers provided under Section 19a to intervene against Google's business conduct. This means that the FCO will have powers to intervene and "regulate" digital markets that are strikingly similar to the European Commission's ("Commission") powers envisaged under the EU's forthcoming Digital Markets Act ("DMA").

The FCO, along with other national competition authorities ("NCAs"), have repeatedly argued that DMA enforcement powers should be shared between the Commission and the NCAs (see VBB on Competition Law, Volume 2021, No. 6). These arguments have so far been largely unsuccessful, as the EU legislature appears to favour more centralised enforcement powers in digital markets under the DMA.

The FCO's decision against Google under Section 19a nevertheless clearly signals its intent to use its powers under national competition law to maintain an active role in digital markets. Risks of overenforcement and of inconsistent enforcement will therefore remain.

The FCO's Section 19a decision

Section 19a ARC was introduced in January 2021 to allow the FCO to identify positions of particular market power and to more effectively control allegedly anticompetitive conduct by large digital platforms with a so-called gatekeeper function, without having to go through the investigative steps of a regular competition law case. A two-step mechanism applies: in a first step, the FCO must establish a company's paramount significance for competition across markets. The validity of such a decision must be limited to five years from the date on which it becomes final. Based on such a decision, the FCO can, in a second step, proactively prohibit various types of conduct it considers abusive (see VBB on Competition Law, Volume 2021, No.1).

The FCO's finding of Google's paramount significance for competition applies across all of Google's activities and is not limited to a particular market or markets. The FCO reasoned that Google offers a number of important advertising-financed services as well as services related to online advertising, and holds an economic position across markets that is not sufficiently constrained by competition. The FCO considered the following specific findings particularly relevant:

- Google is dominant on the market for general search services in Germany, with a market share of more than 80%, and is the main search advertising provider;
- Google's wide range of services in Germany enables it to reach a large number of users;
- Within its digital ecosystem, Google can set rules for its (potential) users and advertisement customers across markets as well as third-party access rules;
- Google has unparalleled access to user data from different services which it can use as shareable input across services and devices and to improve existing services and develop new ones; and
- Google has significant financial power, as reflected in its market capitalisation.

On 4 January 2022, Google decided not to appeal against the FCO's decision, although it also confirmed that it did not necessarily agree with all of the FCO's findings. The decision therefore is final and will remain in force until 4 January 2027.

Since the FCO's "paramount importance" decision, Google has offered remedies to settle an ongoing investigation by the FCO into Google's News Showcase, although the attempt to work out a consensual remedy is in line with Google's strategy in similar investigations and may not have been prompted by the Section 19a decision. It remains to be seen whether ongoing proceedings of the FCO under Section 19a ARC against Meta (Facebook), Amazon and Apple will lead to equally rapid results and will also remain largely uncontested.

THE NETHERLANDS

Apple subject to periodic penalty payments for failure to bring App Store payment rules into line with EU competition law

On 24 January 2022, the Dutch Authority for Consumers and Markets ("ACM") decided to impose periodic penalties on Apple for its failure to comply with a decision of 24 August 2021 requiring Apple to change its App Store payment rules. In that decision, the ACM found that Apple had abused its dominant position and infringed Article 102 TFEU by limiting developers of dating apps in their choice of a payment system, in particular by prohibiting them from referring customers to outside-app payment options. In December 2021, the Rotterdam Court of First Instance affirmed the ACM's decision and ordered Apple to comply with the remedies imposed by the ACM by 15 January 2022. The ACM has now decided that Apple has failed to implement proper remedies and must pay a weekly penalty payment of € 5 million, up to a maximum of € 50 million until it complies with the ACM's order.

It remains to be seen when and how Apple will comply with the ACM's order, as it may find non-compliance and maintaining its restrictive App Store rules pending appeal more profitable, given the (by Apple's standards) relatively modest penalty payments. Nevertheless, the developments in

this case send a clear signal that at least certain national competition authorities in the EU are willing to aggressively enforce EU competition law against allegedly anticompetitive conduct from large digital platforms and will not wait for the European Commission to intervene.

The ACM's case

In its 2021 decision, the ACM concluded that Apple had abused its dominant position by imposing unfair conditions on app developers who are dependent on Apple's offer and have no choice but to accept these conditions if they wish to offer their apps on the App Store, and therefore infringed Article 102(a) TFEU and its national equivalent.

The ACM's case focused on the contractual conditions regarding the use of the "In-App Purchase-Application Programming Interface" ("IAP-API") in the Apple Developer Program License Agreement ("ADPLA") for app developers offering paid in-app content, subscriptions and/or services. Those terms are, among others, the following:

- According to Article 1.1. of the ADPLA, the IAP-API may only be used for the provision of content, functionalities or services that can be used within the app (e.g., digital books, additional game levels, access to a turn-by-turn map service). The API may not be used to offer goods or services to be used outside of the app such as those provided by third parties outside the app (e.g., a taxi ride or a hotel room);

- According to Article 2 of the ADPLA, it is not allowed to enable users to create a pre-paid account or otherwise create balances, credits or to otherwise purchase currency of any kind through the IAP-API that the users can redeem or use to make purchases of content, functionalities, and services within the app.

Before an app can be offered on the App Store, Apple verifies that the application source code submitted by the app developer is compliant with the ADPLA requirements by using its Review Guidelines, which impose requirements regarding the safety, design and functionality of the apps, as well as its adherence to the IAP-API related terms.

The ACM considered that Apple had a 100% market share in a market limited to App Store services on the mobile operating system iOS. In the ACM's view, this narrow, single-brand market was justified as dating app developers did not have sufficient substitution possibilities for app stores as Apple allows iPhone users to download or purchase apps only through Apple's own App Store and not through third-party app stores. In its analysis, the ACM also took into account that the majority of Dutch consumers only have access to one mobile operating system with the respective app store ("single-homing"), and that, in order to maximise network effects for the dating services, app developers must multi-home, i.e., offer their apps on both Apple's App Store and Google's Play Store.

The ACM concluded that Apple could behave independently of the app developers which needed Apple's approval of the apps they developed (which in turn required adherence to the ADPLA and the Review Guidelines) in order to be able to offer them on the App Store. The ACM stated that when participation in services offered by a large digital platform is practically unavoidable, the special responsibility of dominant undertakings becomes all the more relevant. In these circumstances, the platform must ensure that the conditions it imposes do not disadvantage a specific group of its customers to such an extent that the conditions are disproportionate for that group.

The ACM found that the payment restrictions were disproportionate as they completely prevented dating app developers from referring their customers to alternative payment options outside of the app, thereby limiting their free choice and obliging them *de facto* to use Apple's IAP-services. In this context, the ACM also observed that a substantial part of dating app developers with access to the Google Play Store opted for a payment method other than Google's Play Billing.

The ACM also rejected Apple's attempt to justify the contractual conditions. Similarly to other cases, Apple's defence focused on privacy and safety concerns, as Apple argued that outside payment options would expose iPhone users to significant security risks and possible fraud, and that consumers would lose certain functionalities related to the use of the IAP-API (such as parental control and family sharing, although these do not appear to be particularly relevant for dating apps). Apple also raised concerns that its reputation as the safest and most reliable technology platform would be severely and irreversibly damaged if outside payment options turned out to malfunction or facilitate fraud.

The ACM found these arguments unpersuasive, pointing out that Apple already allows certain groups of app developers to use their own payment systems outside of Apple's system (so-called Schedule 1 app developers) or to enable in-app purchases through a payment service provider ("PSP") of the app developers' choice (so-called Schedule 2 app developers). These exceptions, in the ACM's view, demonstrated that Apple's safety and security concerns could not justify the otherwise applicable restrictive payment conditions, and that elsewhere Apple was willing to assume certain reputational risks.

In light of this reasoning in the ACM's decision, the interim measures judge of the Rotterdam Court of First Instance considered that the ACM had made out a plausible case that Apple was acting in violation of Article 102 TFEU and its Dutch equivalent. The judge also affirmed the ACM's order requiring Apple to adjust these conditions by 15 January 2022 so that dating app developers: (i) could use other payment methods either next to or instead of Apple's own payment system through the App Store; and (ii) have the ability to refer to other payment options in their apps.

On 17 January 2022, the ACM stated that it was going to assess the adjustments that Apple had made to its policy for dating apps in the App Store. After a finding of non-compliance, it decided to impose periodic penalty payments on Apple.

Concluding observations

While Apple's high-profile battle with Epic Games concerning the App Store's restrictive payment rules continues before US courts, the ACM's case is a useful reminder that EU competition law often provides complainants with an effective route to attack allegedly anticompetitive practices by dominant players, including large digital platforms.

In addition, it can be expected that the ACM's decision will not be the only instance where Apple's restrictive App Store conditions were found to infringe EU competition law. Although the ACM's case is in principle limited to the Netherlands and dating app developers, its approach is in line with the European Commission's 2021 Statement of Objections in the context of App Store rules for music streaming providers. Here, the Commission took the preliminary view that (i) the rules regarding the use of the IAP-API and (ii) the limited ability of app developers to inform users of alternative purchasing possibilities distort competition in the market for music-streaming services by raising the costs of competing music-streaming app developers. According to the Commission, this in turn leads to higher consumer prices for their in-app music subscriptions on iOS devices. Moreover, the Commission expressed concerns that Apple would become the intermediary for all IAP transactions and take over the billing relationship between app developers and their customers.

If the Commission confirms these – at this point, preliminary – views and concludes that these practices infringe Article 102 TFEU, the same conclusions could then be drawn for all apps offered on Apple's App Store providing in-app paid content.

The ACM's case also highlights an additional problem for large digital platforms, as the ACM and a few other national competition authorities are eager to provide a venue for complainants and to run their own cases, rather than deferring to the Commission's enforcement activities. This problem was also highlighted by the Italian competition authority's recent infringement decision against Amazon's "Fulfilment by Amazon" policy, which it adopted while the Commission is investigating Amazon for exactly the same policy (see VBB on Competition Law, Volume 2021, No. 12). Although the EU's proposed Digital Markets Act ("DMA") will likely confer centralised DMA enforcement powers on the Commission (against the clearly stated preferences of some national competition authorities), it can be expected that this will not prevent national competition authorities from continuing to actively bring cases against large digital platforms under EU competition law.

CARTELS AND HORIZONTAL AGREEMENTS

– NATIONAL LEVEL –

GERMANY

German Federal Cartel Office provides guidance on when sustainability goals can justify horizontal cooperation agreements in food retail sector

On 18 and 25 January 2022, the German Federal Cartel Office ("FCO") issued two press releases concerning cooperation agreements in the food industry, which provide insight into when the pursuit of sustainability objectives may be sufficient to exempt such agreements from the cartel prohibition pursuant to Article 101(3) TFEU and equivalent provisions of national law.

The FCO allows companies to submit cooperation initiatives to it for review and assessment under the competition rules, particularly initiatives related to sustainability goals. This practice is easily accessible for companies and provides legal certainty in cases where there is no established case law. In this context, the FCO recently reviewed three different cooperation initiatives involving horizontal agreements between competitors under Article 101 TFEU (and its German equivalent), which were submitted to it for assessment.

Multiple scandals in recent years related to inhumane conditions in the food industry's supply chains led the German legislator to adopt the Supply Chain Act (*Lieferkettengesetz*), which aims at strengthening the level of human rights protection both in domestic and international supply chains. The three proposed cooperation initiatives recently examined by the FCO illustrate the attempts made by the food industry to improve its Environmental, Social and Governmental ("ESG") impact. In all three cases, the envisaged cooperation would likely lead to a price increase for consumers on the relevant markets. However, the cases examined by the FCO show what companies should consider when determining and pursuing their ESG goals and which joint sustainability efforts may be considered to outweigh their potentially negative price effects.

Living wages in the banana industry

The first cooperation examined by the FCO involved a pilot project of the German Development Organisation *Gesellschaft für Internationale Zusammenarbeit GmbH* ("GIZ"). GIZ is a 100% subsidiary of the German Federal Government and supports the government in achieving its objectives in the field of international cooperation for sustainable development.

GIZ and the German food retail sector are developing a voluntary cooperation, which will ultimately provide for voluntary common industry standards and strategic goals for banana procurement to promote living wages in the banana industry. A major part of the cooperation is to include procurement practices and develop monitoring standards for transparent wages in the supply chain. This cooperation will not allow the exchange of purchase prices, other costs, production quantities or margins between the participants. At the same time, the participating companies intend to increase their purchases of bananas that are grown at and sold by farms providing living wages for their workers.

While higher wages in other countries will likely increase banana prices for consumers, the FCO considered the initiative to be in line with German competition law. In this context, the FCO considered as determinative the fact that there is no illegal information exchange between the parties, that no minimum prices or surcharges are introduced, that the cooperation is voluntary and that providing workers with living wages is a sustainable goal.

Animal welfare

The second cooperation agreement examined by the FCO involved an animal welfare initiative. This initiative is based on an agreement between the agricultural, meat produc-

tion and food retail sectors and is financed by the four largest food retailers in Germany EDEKA, REWE, Aldi and the Schwarz Group. The initiative intends to reward livestock owners for improving the living conditions of animals. The scheme includes a standard premium payment for pigs and poultry and is planned to be extended to cattle as of the beginning of 2022.

Compared to the living wage scheme for banana growers, the FCO was more critical towards the scheme as it involves a standardised payment to the livestock owners, which will likely lead to a price increase in the final product for consumers. The FCO had already previously stressed the importance of transparent labelling, which informs consumers about the living conditions and the origin of the animals. This point was reiterated when granting the coordination temporary approval until 2024 for the next phase of the project concerning cattle-fattening. The FCO further urged the parties to include more competitive elements in the financing scheme. In this context, it proposed, for example, to replace the current standard premium by a recommendation to pay compensation for animal welfare costs.

Milk surcharges

While animal welfare and providing banana growers a living wage were considered to be justifiable sustainable goals, not every cooperation provides such positive benefits, which would outweigh the competition concerns they otherwise generate.

In the third cooperation examined by the FCO, milk producers in Germany proposed an agreed financing concept in favour of raw milk producers, which they claimed is necessary to stabilise the raw milk price and to allow milk producers to cover their production costs.

The proposed cooperation submitted to the FCO for assessment would first determine the average milk production costs throughout the sector and then use these as the basis for standard surcharges on the milk price, which would be continually adapted. Milk producers claimed that the surcharge would be instrumental in the transformation of the domestic agricultural sector, without referring to any further sustainability criteria.

The FCO concluded that the initiative – without any substantial criteria for the development of sustainable agriculture – would lead to an industry-wide increase in milk prices without leaving switching alternatives to consumers. The FCO indicated that such surcharges without the goal of increasing sustainability are merely price-fixing schemes, which cannot be exempted under competition law or under the new sustainability standards for the agricultural sector set out in the newly introduced European Regulation establishing a common organisation of the markets in agricultural products. The FCO stated that it does not categorically reject cooperation initiatives in the agricultural sector, but pointed out that this sector already enjoys privileges allowing it to cooperate and improve its bargaining position.

Accordingly, the FCO provided clear guidance that future cooperation initiatives that aim to increase prices without delivering any added value to consumers will not benefit from the exemption rules. In particular, the fact that the price of certain products may be volatile and a surcharge may stabilise this price is not a sufficient ground for exemption, as the FCO's guidance has shown. It rather requires goals which are not only price-related (because those would likely be considered price-fixing schemes), but rather the clear pursuit of ESG-related objectives.

Future development towards a sustainable and "green" competition law

In light of the European Green Deal, Germany's goal to become climate neutral by 2045 and the obligations under the Supply Chain Act, the German food and agricultural sector (among others) is trying to address ESG and to look for solutions to long-standing issues like low wages, poor animal welfare and the general resilience of the industry in the face of climate change. Cooperation agreements among industry players may play an important part in achieving these goals.

In this spirit, in its recent decisions, the FCO has offered an insight into its understanding of sustainability. Sustainability does not always need to come in the same form and shape, but it must be clearly identifiable. In its decisions, the FCO has pointed out that consumers need to be informed and should have a choice of products.

Thus, while sustainability goals are important, the way these goals are achieved is essential and the consumer's informed choice continues to be a major factor in determining the added value that might outweigh competition concerns.

In this context, it is also interesting to note that the Austrian legislature recently amended Austrian competition law to explicitly refer to a "significant contribution to ecological sustainability or a climate-neutral economy" as a ground for exemption under the national equivalent of Article 101 TFEU. It appears that the FCO – even in the absence of a specific provision in the German Act against Restraints of Competition – also recognises ecological sustainability as a possible justification when assessing cooperation initiatives. It will remain to be seen whether the German legislature will follow and also see a necessity for an explicit reference to sustainability objectives in national competition law.

INTELLECTUAL PROPERTY/ LICENSING

– NATIONAL LEVEL –

UNITED KINGDOM

UK IP exhaustion regime and parallel trade: asymmetry (and uncertainty) remains

Following its public consultation on the future of the UK's IP exhaustion regime (as previously referenced in VBB on Competition Law, Volume 2021, No. 6), on 18 January 2022, the UK's Intellectual Property Office ("IPO") announced that it had not been possible to make a decision based on the responses received.

More specifically, the UK IPO's announcement notes as follows:

> *The government has completed an initial analysis of the recent consultation. Unfortunately, there is not enough data available to understand the economic impact of any of the alternatives to the current UK+ regime. As a result, it has not been possible to make a decision based on the criteria originally intended. However, the government remains committed to exploring the opportunities which might come from a change to the regime. Further development of the policy framework needs to happen before reconsidering the evidence and making a decision on the future exhaustion of* [the] *IP rights regime.*

Although the announcement adds that there is currently no timeframe for such decision, the UK IPO notes that it will provide a further update to stakeholders and businesses "*in due course*".

In the meantime, however, the current regime will remain in force.

The current (asymmetric) regime

As things stand – and perhaps for the foreseeable future, given the UK IPO's recent announcement – the UK continues to recognise "regional exhaustion" in the EEA (now referred to as "UK+").

Essentially, this means that IP rights in goods put on the EEA market with the rights-holder's consent are considered exhausted in the UK (and the EEA); and, accordingly, rights-holders cannot then prevent such goods being parallel imported into the UK invoking (solely) IP rights.

In contrast, however, the IP rights in goods first put on the market in the UK are not exhausted in the EEA. Thus, in practical terms, rights-holders can prevent goods first put on the market in the UK from later being parallel imported into the EEA.

Although the continuity offered by UK+ is an obvious benefit, under the current regime rights-holders seeking to prevent their goods from being imported into the UK have more limited (and uncertain) options. In particular, while it may be possible to insert a contractual clause prohibiting all sales (including passive sales) into the UK, the future treatment of such a restriction by the CMA and the UK courts – and, in particular, whether this would be viewed as a restriction of UK competition law – remains unclear.

Potential options for the future?

During its consultation (which ran for 12 weeks from June to August 2021), the UK IPO sought the views of stakeholders in relation to four potential options for the future of the UK's IP exhaustion regime – each of which has advantages and disadvantages:

1. the continuation of the "UK+" regime;
2. an international regime, whereby IP rights would be exhausted in the UK once goods are put on the market in any country (by or with the consent of the rights-holder), and rights-holders would therefore be unable to prevent any parallel imports on this basis;

3. a national regime, whereby exhaustion of IP rights would apply only when goods are first marketed in the UK by the rights-holder (or with his/her consent) and rights-holders could therefore prevent all parallel imports into the UK. However, since it would appear very difficult to reconcile such a regime with the Northern Ireland Protocol (which requires that parallel imports from the Republic of Ireland and other EU Member States be allowed without restriction), it seems unlikely that this option would be favoured by the UK Government; and/or

4. a mixed (or hybrid) regime, whereby the applicable exhaustion regime would vary depending on the sector in question. Although this option would have the obvious advantage of flexibility, it could easily become unruly and extremely complicated.

In the corresponding summary of consultation responses also published by the UK IPO on 18 January 2022, it is noted that some 150 responses were received (from a range of industry groups, businesses and other stakeholders, but with the pharmaceutical and creative industries being most heavily represented).

Against this background, and given the substantial number and range of (often rather inconsistent) views referenced in the summary document, it is perhaps unsurprising that the UK IPO does not currently feel able to make a firm decision on the way forward.

Nevertheless, it is perhaps worth noting that, of those respondents who expressed a preference for one of the potential options (and approximately a quarter did not express any such preference):

1. the majority favoured the continuation of the existing "UK+" regime;

2. over a third favoured a national regime;

3. a small number favoured an international regime; and

4. a few favoured a mixed/hybrid exhaustion regime.

While it therefore appears that the consultation responses suggest at least some degree of (current) support for the continuation of the existing "UK+" regime, this was by no means unanimous – and it remains to be seen which approach the UK IPO will ultimately decide to follow (or, indeed, when such decision might be expected).

However, given the uncertainty created by the current (asymmetric) regime, it can only be hoped that whichever model is selected will provide businesses with some much-needed clarity and comfort, most likely only after at least the CMA makes its position clear on the application of UK competition law to direct or indirect restrictions imposed on EEA traders wishing to export products to the UK.

STATE AID

– EUROPEAN UNION LEVEL –

Advocate General Pikamäe challenges Commission's approach in respect of tax rulings assessment

On 16 December 2021, Advocate General Priit Pikamäe delivered an Opinion in Case C-898/19 P, *Ireland v Commission and Others*, concerning fiscal advantages granted by Luxembourg to a Fiat group subsidiary, which – if followed by the European Court of Justice – could substantially change the European Commission's approach in assessing Member States' tax rulings.

Background

On 3 September 2012, the Luxembourg tax authorities issued a tax ruling whereby they approved the request of an advance transfer pricing agreement submitted by Fiat Chrysler Finance Europe, formerly known as Fiat Finance and Trade Ltd ("FFT"). Following the opening of a formal investigation, on 21 October 2015, the Commission adopted a decision declaring that the tax ruling at issue constituted incompatible State aid. The Commission considered that the tax ruling conferred a selective advantage on FFT, insofar as it lowered the latter's tax liability in Luxembourg by deviating from the tax which FFT would have been liable to pay under the ordinary corporate income tax regime, as a stand-alone company. The Commission had in fact considered that the methodology accepted by Luxembourg for the determination of FFT's taxable profits in Luxembourg departed from a methodology that would have led to a reliable approximation of a market-based outcome and thus from the arm's length principle.

In December 2015, both FFT and Luxembourg brought an action against the Commission decision. The General Court rejected all their pleas and dismissed the actions (Cases T-755/15 and T-759/15). On 31 January 2020, Ireland and FFT, supported by Luxembourg, appealed against the judgment of the General Court, contesting, among other elements, the Commission's analysis finding that the measure entailed an economic advantage on the basis of the arm's length principle (more correctly, a specific methodology of application of that principle).

The Advocate General's Opinion

In essence, the Opinion tries to answer the question whether the Commission has the power to apply the arm's length principle when assessing the existence of an economic advantage, even if such principle (or particular methodology) has not been incorporated into national law.

At the outset of its analysis, the Advocate General recalls that the examination of the national tax system applicable to the beneficiary of the measure is required to determine the existence of an advantage deriving from a measure of a fiscal nature. It is in fact necessary to define the "normal" taxation which the company would have had to pay if the measure had not been granted. According to the Advocate General, the "normal" taxation should be identified using the same criteria laid down by the case law for the purpose of identifying the reference framework in the selectivity test (i.e., the first step of the well-known three-step test). The three-step test consists in: (i) identifying the common or normal tax system applicable in the Member State; (ii) demonstrating that the tax measure at issue is a derogation from that reference system, insofar as it differentiates between economic operators who, in light of the objectives of the system, are in a comparable factual and legal situation; and (iii) assessing whether that differentiation is justified or not by the nature or general scheme of the system.

According to the Advocate General, that "normal" taxation must be determined only on the basis of *positive* law, including rules of national law, as well as EU law and international law transposed into the domestic legal system. Conversely, the reference framework cannot be defined "by rules that are extraneous to that system, given that such a replacement would render the reference framework, in the Court's words, 'incomplete or fictitious'".

Against this background, the Advocate General shared Ireland's view that the approach adopted by the Commission and endorsed by the General Court is vitiated by an error of law, insofar as it introduced into the national tax sys-

tem constituting "normal" taxation a rule "which is extraneous to that system". Most importantly, the Advocate General considered that the inclusion of an uncodified rule in the Luxembourg tax system would ultimately infringe the Treaty provisions governing the division of competences between the European Union and the Member States which excludes harmonisation in the field of taxation.

The conclusions of the Advocate General are completely opposed to the position of the Commission, according to which the "arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form" (Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, para. 172). According to the Advocate General, in fact, Article 107(1) TFEU, which lays down a general prohibition on the granting of State aid, in no way establishes a general principle requiring equal treatment of taxpayers.

The practical implications of this debate are significant, as it will likely decide the future approach of the Commission on Member States' tax rulings. It remains to be seen whose side the European Court of Justice will take in its judgment.

General Court sets higher standard of proof in investigating measures aimed at rescuing companies in difficulty

On 15 December 2021, the Tenth Chamber of the General Court (Extended Composition) annulled a Commission decision that found the measures taken by Romania to support Oltchim – a petrochemical company – to be incompatible State aid (Case T-565/19, *Oltchim v Commission*).

The facts of the dispute

Oltchim SA is one of the largest petrochemical companies in Romania and South-East Europe, in which the Romanian State itself has a 54.8% shareholding. Starting from 2007, Oltchim's financial situation deteriorated significantly, resulting in a first intervention in 2009, which consisted in the conversion of the company's public debt into shares. Romania notified the measure to the Commission, which however concluded that it did not constitute State aid.

In 2012, the government and certain public authorities of Romania (including the Authority Administrating Assets of the State ("AAAS")) signed a Memorandum of Understanding with various of Oltchim's creditors – among which State-owned banks and companies (including CET Govora, Electrica SA and Salrom SA), as well as two private banks – for the financing of the resumption of Oltchim's production ("Memorandum"). Having learned of the Memorandum, the Commission opened an *ex officio* investigation.

In January 2013, Oltchim entered insolvency proceedings, which led to a reorganisation plan of the company in 2015. Both the creditors' assembly and the judicial authority approved the plan that, among other measures, envisaged a partial cancellation of Oltchim's debts.

In 2016, the Commission opened a formal investigation. In its Decision of 17 December 2018, the Commission considered as incompatible State aid the three following measures and ordered their recovery:

1. non-recovery and further accumulation of debt by a public authority – AAAS – between September 2012 and January 2013 ("Measure 1"),

2. support to the operations of Oltchim in the form of continued unpaid supplies and further accumulation of debt by a public company (CET Govora) between September 2012 and January 2013 ("Measure 2"), and

3. partial cancellation of debt by AAAS, the National Water Administration and two public companies (Electrica SA and Salrom SA), in the context of the 2015 reorganisation plan ("Measure 3").

The General Court's judgment

On 14 August 2019, Oltchim lodged an annulment action against the decision at issue and, on 15 December 2021, the General Court delivered its judgment whereby it partially upheld the applicant's claims.

At the outset of its analysis, the General Court took a position that had a significant impact on the subsequent examination. In the contested decision, the Commission found that the three Measures were *intrinsically linked* and were

part of the same main objective to support and maintain the applicant in the market and to protect the jobs of its employees. According to the Commission, that objective was clearly set out in the Memorandum and in a number of public statements of Romanian officials ("public statements"). In light of this, the Commission found that the three Measures could not be separated and that they constituted a series of tied interventions imputable to the State which gave the applicant an advantage.

Contrary to the Commission's position, after considering all legal and factual elements of the case at hand, the General Court found instead that the three Measures were not so closely linked that it would have been impossible to separate them, as mandated by the relevant case law. More specifically, the General Court found that the Memorandum and the public statements did not sufficiently demonstrate that the three Measures should be considered as intrinsically linked. In light of this interpretation, the General Court concluded that the three Measures should be examined separately.

Measures 1 and 2

In the contested Decision, the Commission found that the granting public authority had conferred an economic advantage on the applicant because of the non-recovery and accumulation of debts during the period from September 2012 to January 2013, on the ground, in essence, that it had not acted as a private creditor would have done (i.e., adopting measures to attempt to enforce its claims).

In this regard, the General Court clarified that, although there are no rules as to the promptness with which a creditor must act in order to enforce its claims, hypothetical private creditors cannot be expected to demand that the undertaking be declared insolvent as soon as it fails to pay its debts and not to take any account of its longer-term potential. As a matter of fact, the private creditor test does not require an application to be made for the immediate winding-up of the undertaking in difficulty, since it could be possible that a private creditor might have an interest in maintaining the activity of a debtor undertaking for a certain period, if the cost of immediate liquidation could be higher than the cost of granting aid.

In light of the above and other factual considerations, the General Court found that the Commission had failed to demonstrate that a hypothetical private creditor in a situation comparable to that of the public authority at issue would have enforced its claims or adopted other protective measures. Consequently, it failed to demonstrate that Measure 1 conferred an advantage on the applicant and that it therefore constituted State aid.

As far as Measure 2 was concerned, the General Court dismissed the applicant's argument claiming a manifest error of assessment in finding that the public company's conduct did not satisfy the private creditor test. The General Court agreed in fact with the Commission's finding that the company had decided to continue to supply electricity and steam to the applicant "free of charge", without requesting advance payments or other measures to protect its claims.

Measure 3

As regards Measure 3, the Court found, first, that the Commission had failed in demonstrating to the requisite legal standard that the measure involved a transfer of State resources in respect of one of the companies involved (Electrica SA). Despite the high degree of influence of the State in the latter company (the State held 48.78% of shares), there were no elements to conclude that the resources at issue were under State control. Not even the fact that the company signed the Memorandum could change this assessment.

As regards the rest of the entities concerned by Measure 3, the General Court examined whether the votes that these entities cast for the approval of the reorganisation plan should have been imputed to the State and whether their votes alone could have been decisive.

In the Court's opinion, the Commission had only managed to demonstrate the imputability to the State of the votes of AAAS and the National Water Administration. By contrast, it had failed in demonstrating the same to the requisite legal standard in respect to the two public companies concerned. The General Court noted in fact that it is not possible to deduce the imputability of a measure to the State from the mere fact that that measure was taken by a public undertaking. Therefore, in the absence of more significant indicators, the votes of the two public companies in favour of the reorganisation plan could not be imputed to the State.

With regard to the second limb of the examination, the General Court considered that the entities whose votes were imputable to the State could neither adopt the plan alone – i.e., without the vote in favour of the rest of the creditors – nor block its approval by the creditors' assembly. Therefore, Measure 3 could also not be imputed to the State and, consequently, it did not constitute State aid.

Conclusion

The General Court concluded that the Commission had not demonstrated to the requisite legal standard that Measures 1 and 3 constituted State aid and therefore annulled the relevant articles of the contested decision. By contrast, it dismissed the applicant's pleas concerning Measure 2.

Overall, despite the strong elements that suggested the existence of a general strategy of the Romanian authorities to rescue Oltchim, the General Court dismissed this interpretation by adopting a strict approach in its analysis. As a result, the Commission will have to meet a high standards of proof in the future when investigating measures aimed at supporting companies in difficulty.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission publishes final report on consumer Internet of Things ahead of final DMA negotiations, indicating material competition concerns in digital assistant markets

On 20 January 2022, the European Commission ("Commission") issued its (short) final report on the sector inquiry into consumer Internet of Things ("Report"), along with an explanatory Commission staff working document. The Report identifies various practices that may limit competition and justify the initiation of investigations and enforcement actions, as well as the enactment of sectoral regulation.

The consumer Internet of Things ("IoT") includes a very wide range of services, devices and technologies that support the interaction of consumers with connected devices, which in turn collect and exchange data over the internet. There are two key "nodes" for connecting the different components of a consumer IoT ecosystem: voice assistants ("VAs"), which act as voice-activated gates to features such as playing music, listening to the news, controlling smart home devices, or plan routes, and smart mobile operating systems ("OSs"), which remain the most popular interfaces to access smart devices and other consumer IoT services. The most widely used general-purpose VAs in the EU, the Report explains, are Amazon's Alexa, Google's Google Assistant and Apple's Siri, while the two leading smart mobile OSs are Google's Android and Apple's iOS.

The Report starts by pointing to the "prohibitively high" investments required to enter, or expand operations in, the market for VAs. According to respondents to the sector inquiry, these costs constitute insurmountable barriers to effectively competing with the leading, vertically integrated, providers of VAs and smart mobile OSs, and therefore to developing new IoT products and services. As a result, competing in the IoT ecosystem requires full interoperability with the existing systems. Yet, interoperability is subject to non-negotiable terms and conditions, technical requirements and certification processes.

The Report also finds that leading IoT players may sometimes be in a position to limit the functionality of third-party smart devices and services. In addition, the Report refers to a finding in the sector inquiry whereby leading IoT providers typically engage in pre-installation, default-setting and prominent placement practices in favour of their own products and services or those of major creative content providers such as radio broadcasting companies and e-book providers, thereby undermining the visibility of third-party products and services. The Report also claims that certain VA providers have attempted either to secure exclusivity, or to otherwise prevent the concurrent use of another VA, on a given device. It gives the example of the currently limited possibility of switching between different VAs by using a simple action word. Additionally, it finds that consumer IoT players at times refuse to license their apps on a standalone basis and instead attempt to license their VA services as a bundle with other apps and technologies.

The Report also echoes the disintermediation concerns expressed by some respondents to the sector inquiry. Because consumers mainly interact with a general-purpose VA to activate consumer IoT services, third-party apps are concerned about a potential loss of brand recognition and attribution. And, because third-party IoT providers heavily rely on leading VAs and smart mobile OSs to resolve access and technical issues, they appear concerned that their own brand image will be affected by delays or unresponsiveness on the part of those large players.

In terms of standards, the consumer IoT is described as a heterogeneous sector which relies on a diversity of open standards and protocols, as well as proprietary and open-source technologies, all of which come under different combinations. And although standardised technologies are normally predominant at the level of basic enabling

technologies, such as Wi-Fi or Bluetooth, innovative solutions are typically brought to market by the leading providers of VAs and smart mobile OSs in the form of proprietary technologies. In this respect, diverging views have been expressed as to the need for standardisation. However, the Commission notes with concern that this general landscape is liable to perpetuate fragmentation, and therefore parallel ecosystems.

Another key concern pinpointed by the Report relates to data. The main feature that distinguishes the consumer IoT from the industrial IoT, which was not covered by the sector inquiry, is that it typically collects a wide range personal data. While certain providers of consumer IoT services submit that they effectively enable consumers to exert their GDPR right to data portability, this possibility remains uncommon and is almost unheard of when it comes to VAs. Moreover, leading VAs and smart mobile OSs, which have access to extensive amounts of data, frequently restrict access to and use of such data by third-party businesses. Interestingly, while it insists on the importance of privacy considerations, the Report finds that privacy claims can also serve as a pretext to justify limiting third-party access to these data. Finally, the accumulation of data can be used by leading providers not only to improve their own products and services but can also be monetised to extract significant remuneration for user profiling and advertising services.

Observations

Although market participants may find it difficult (for a variety of reasons) to compete with their IoT services and products, it is notable that the Report does not even attempt to provide more context and a more balanced picture. For example, the Report does not properly acknowledge that there is fierce competition among the developers of the leading VAs, and that this competition has created major benefits for consumers.

In addition, while the Report highlights the substantial investments required to enter the VA market, it fails to explicitly recognise that the existing main players in the VA space have incurred at least the same investments (including at a time when there was a more uncertain prospect of recoupment) and continue to further invest in VA services.

"Do no harm" should always be the principal rule guiding any regulatory or enforcement intervention. One has to be concerned that if there is intervention in the future, it might not take sufficiently into account that the incentives of the main VA developers to compete and innovate should not be undermined, and it may not sufficiently acknowledge that leading VA providers may have developed, from the outset, their own, specific business models with the legitimate aim to recoup their major investments into this technology.

The publication of the Report, which was initially scheduled for the "first half of 2022", comes surprisingly early. Its findings are generally intended to inform the Commission's digital strategy, including its initiatives to clarify competition rules in relation to standard essential patents. But the Commission does not attempt to conceal the fact that the publication of the Report seeks in particular to influence the ongoing final negotiations on the Digital Markets Act, whose adoption is expected around April of this year. Last December, the Parliament adopted an amendment which extends the list of core platform services to VAs. While the Council has not made any proposal to this effect, a few Member States appear supportive of this extension. And it is not excluded that the Report's findings could further impact the scope of the obligations that will be imposed on gatekeepers. For example, the Parliament proposed that the prohibition of self-preferencing – which in the Commission's text was limited to rankings – also applies to other settings. As a result, VAs may well become banned from implementing certain self-preferencing practices identified in the Report, such as prominent placement or default setting.

General Court confirms Commission's obligation to pay default interest when repaying undue portion of a fine

In a judgment of 19 January 2022, the General Court of the European Union ("Court") awarded Deutsche Telekom AG ("DT") € 1.8 million in damages, finding that the European Commission ("Commission") had wrongly refused to pay default interest on the portion of a fine that DT had initially paid for an infringement of competition rules but for which it had later been reimbursed by the Commission after the Court had reduced the amount of the initial fine (Case T-610/19, *Deutsche Telekom v. Commission*).

On 15 October 2014, the Commission imposed a fine of approximately € 31 million on DT for abusing its dominant position on the Slovak market for broadband telecommunications services in breach of Article 102 TFEU (Case AT.39523 – *Slovak Telekom*). DT paid the fine on 16 January 2015, while also appealing against the decision. On 13 December 2018, the Court partly upheld DT's appeal and reduced the amount of the fine by approximately € 12 million (Case T-827/14, *Deutsche Telekom v. Commission*).

The Commission reimbursed DT for that amount, but adopted a decision ("Decision") rejecting DT's request for default interest for the four-year period between the date on which it had paid the fine (16 January 2015) and the date on which the Commission had repaid the undue portion (19 February 2019) ("period in question"). DT went again to court, this time asking the Court to order the Commission to pay compensation for lost revenue as a result of the loss of use during the period in question of the principal amount of the undue portion or, alternatively, compensation for the harm suffered as a result of the Decision.

The Court rejected DT's claim for compensation for lost profits as it had been prevented from profitably using the undue portion of the fine during the period in question

The Court held that DT had not sufficiently substantiated its argument that it had suffered damages because it had been unable to profitably benefit during the relevant period from the amount of the fine that the Commission had been required to repay.

DT alleged that it could have reduced borrowing expenses, or, alternatively, could have made additional profitable investments, had it been able to use the undue portion of the fine. The Court, however, found that DT had not demonstrated that it would necessarily have profited from investing in additional economic activities, and had failed to identify any specific project in which it was not able to invest because it had been unable to use the undue portion of the fine. The Court also considered it relevant that the relevant amount was tiny in comparison with DT's own capital and with other means of payment available to DT during the relevant period, which made DT's claim of lost profits implausible.

The Court upheld DT's claim that the Commission's refusal to pay default interest on the undue portion of the fine was unlawful

The Court, however, upheld DT's subsidiary claim that it was entitled to damages because the Commission's refusal to pay default interest for the undue portion of the fine was a serious violation of Article 266 TFEU.

Article 266 TFEU requires the Commission to take all necessary measures to comply with a judgment of the Court of Justice of the European Union which declares an act of the Commission contrary to EU law. The Court, referring to the Court of Justice's ("ECJ") recent *Printeos* judgment and additional, well-established case law, recalled that where an act which requires the payment of a sum to the EU is annulled by an EU court, the payment of default interest constitutes one of the necessary measures mandated by Article 266 TFEU.

This, the Court explained, would apply not only when the EU Courts had annulled the original Commission decision imposing a fine, but equally when the General Court, exercising its unlimited jurisdiction, had reduced the amount of a fine such as in DT's case. In this case, the (reduced) amount imposed by the Court retroactively replaced the initial fine with the amount that was always supposed to have been imposed by the Commission. Consequently, the obligation to pay default interest existed as of the date on which the original fine was paid.

In light of these principles, the Court rejected the Commission's argument that reimbursement obligations under Article 266 TFEU were based on an unjust enrichment rationale, and that therefore DT was not entitled to any interest payments because the Commission's placement of the undue portion of the fine paid by DT had actually yielded a negative interest. The Court reasoned that the obligation to pay default interest under Article 266 TFEU aimed at holding a company harmless for the objective loss it had suffered during the period in question because it had been prevented from using the amount it had wrongly paid. As a result, the Court also explained that when the amount of interest produced by the placement of a sum by the Commission is inferior to the default interest, including when the placement produced no interest, the Commission still had to repay default interest.

Nor was the Court persuaded by the Commission's argument that a requirement to pay default interest for the time before an EU Court's judgment annuls or reduces a fine would run counter to the deterrent function of fines imposed for violations of competition law. The Court stated that the deterrent function of competition law fines was necessarily taken into account when it decided to reduce the amount of the fine imposed on DT. It also noted that any concerns about deterrent effects had to be reconciled with the right to an effective remedy and the objectives pursued by the award of default interest.

Finally, the Court recalled that the Commission had to apply Article 83 of Commission Delegated Regulation No 1268/2012, which provided the interest rate applicable to amounts receivable not paid by their due date, to determine the amount of default interest due as a result of the annulment of a competition fine. This provision stated that the applicable interest rate was that applied by the European Central Bank to its principal refinancing operations on the first calendar day of the month in which the deadline falls, i.e., 0.05% in January 2015, increased by 3.50%. As a result, the Court decided to apply a rate of 3.55% and granted DT damages in the amount of € 1,750,522.83 in compensation for the harm suffered as a result of the Commission's serious breach of Article 266 TFEU.

Concluding comments

The Court's willingness to extend the Commission's liability for the default interest payments under Article 266 TFEU to situations where the EU Courts reduce the amount of an initially paid fine could have significant financial consequences. This becomes particularly apparent in light of the blockbuster fines the Commission has imposed in Article 102 cases involving digital platforms (or may impose in future cases). In *DT*, the reimbursed amount which formed the basis for interest payments was "only" € 12 million, but the Commission's exposure could increase materially when it has initially imposed fines of several billion Euros and the EU Courts after many years substantially reduce these fines. One can therefore expect the Commission to appeal and seek to overturn the General Court's *DT* judgment before the ECJ.

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