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VBB on Competition Law

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MERGER CONTROL

– MEMBER STATE LEVEL –

UNITED KINGDOM

JD Sports wins appeal against CMA prohibition of Footasylum deal

On 13 November 2020, the UK Competition Appeal Tribunal ("CAT") upheld an appeal brought by JD Sports against the Competition and Markets Authority's ("CMA") decision to prohibit its already completed acquisition of rival retailer Footasylum. On 6 May 2020, the CMA had blocked the merger between the two sports-fashion retailers, concluding that the parties were close competitors and that the transaction would lead to a substantial lessening of competition nationally in the sports-inspired casual footwear and clothing market (see VBB on Competition Law, Volume 2020, No. 5). In order to restore competition, the CMA had ordered JD Sports to divest Footasylum to a suitable purchaser.

JD Sports challenged the CMA's decision on several grounds. The core argument that the CAT sustained on appeal was that the CMA had acted irrationally by failing to properly assess the effect of the COVID-19 pandemic on the transaction. In particular, JD Sports argued that the CMA had not properly taken the pandemic's impact into account, both when evaluating the competitive constraint that Footasylum would have exercised on JD Sports in the counterfactual scenario, and when considering whether the parties' major footwear suppliers would exercise an increased competitive constraint on the merged entity due to the growth of their own direct-to-consumer ("DTC") retail channels in the future.

The CMA had acknowledged that the pandemic was a relevant and important factor in its analysis, and in the course of its investigation it had sent questionnaires about the effects of COVID-19 to the parties' suppliers and to Footasylum's lender. However, the CMA described the responses it received from the market as being "wholly unilluminating", as the suppliers and lender were not able to offer any concrete predictions about how the pandemic would likely affect their businesses and/or interactions with the parties. The CMA therefore concluded that it would not be fruitful to conduct any follow-up with the suppliers or lender on this issue.

The CAT faulted the CMA for failing to ask further COVID-19 related questions of the suppliers or lender. In particular, the CAT noted that the CMA's original questionnaires were sent out in early March 2020, just as the UK was beginning to enter the first wave of the pandemic. While the effects of the pandemic were uncertain at that time, it was entirely possible that before the end of the CMA's statutory deadline to examine the transaction in May, the suppliers and lender might well have formed a clearer idea of what the effects of COVID-19 might be. The CAT found that the CMA acted "irrationally" by refusing to do any follow-up in April and instead summarily concluding that any responses it would have received to such follow-up would not have any probative value.

In essence, the CAT concluded that the CMA had established the importance of the pandemic to its analysis but then failed to put itself in a position to have sufficient evidence to assess the question before it. Notably, in quashing the CMA's decision on procedural grounds, the CAT did not determine that the suppliers and lender's feedback on the pandemic would have altered the outcome of the decision, merely that the CMA did not take adequate steps to gather sufficient feedback from them on this issue.

While JD Sports prevailed on procedural grounds, the CAT dismissed JD's substantive grounds of appeal. The CAT has now remitted the case to the CMA for reconsideration with regard to the effects of the COVID-19 pandemic. It has noted that this question is sufficiently material to bear on the CMA's assessment of the transaction as a whole.

CAT dismisses Facebook's challenge to freeze-order in Giphy merger

On 13 November 2020, the UK's Competition Appeal Tribunal ("CAT") dismissed Facebook's appeal against an order by the UK's Competition and Markets Authority ("CMA") preventing Facebook from integrating with Giphy, a company it had acquired while the CMA conducted its investigation into the transaction.

In June 2020, the CMA launched an investigation into Facebook's completed acquisition of the visual expression company Giphy, citing concerns that the deal could reduce competition in the UK. It also issued an Initial Enforcement Order ("IEO") preventing the two companies from integrating while the CMA conducted its initial investigation. Facebook requested that the CMA grant derogations or "carveouts" to the IEO and asked for a substantial part of its business to be exempt from the order. However, the CMA refused the request and noted that it did not receive the "necessary information from Facebook to reach a decision".

Facebook then appealed the decision to the CAT under three grounds: firstly, that the CMA's refusal to grant derogations to the IEO was irrational and disregarded the statutory purpose; secondly, that the CMA's refusal was disproportionate, as due to the international nature, size and scale of Facebook it was impractical to comply with the IEO; and thirdly, that the CMA's decision infringes the requirement of legal certainty.

The CAT dismissed all three grounds of appeal. In relation to Facebook's first ground of appeal, the CAT found that the CMA "acted rationally in deciding that it would not determine the carveout requests without further information." In relation to Facebook's second ground of appeal, the CAT ruled that although "Facebook would appear to have good grounds for submitting that the IEO is unnecessarily wide and burdensome", the CMA needed the relevant information that it had requested in order to carry out its assessment of Facebook's carveout requests. In relation to Facebook's third ground of appeal, the CMA found that the IEO did not breach the requirement of legal certainty and was a clear document with "well-recognised terms which are capable of understanding".

The Chief Executive of the CMA, Andrea Coscelli, reacted by saying that "companies seeking a reprieve from an IEO must provide sufficient information to the CMA before a decision can be made to release them from parts of it – it is therefore vital that they engage with the CMA as early as possible". Facebook is reportedly now considering its options.

UK's CMA blocks already completed investment technology merger

On 5 November 2020, the UK's Competition and Markets Authority ("CMA") ordered the platform technology provider FNZ to sell GBST after finding that the completed merger between the two rivals would result in a substantial lessening of competition, which would lead to higher prices and a reduction in the quality of service.

Following an in-depth Phase 2 investigation, the CMA concluded that the deal raises significant competition concerns in the supply of retail platform solutions to investment platforms in the UK. These platforms are used by consumers to administer their pensions and other investments. The CMA noted that the merged entity would be the largest supplier of platform solutions, with almost 50% of the UK market.

In its investigation, the CMA analysed evidence such as the companies' own tender data and internal documents, as well as information provided by customers and competitors. The CMA found that the two companies compete with each other closely, even though there are differences in their business models. The CMA also found there to be few other suppliers of similar standing and that there was no basis to suggest that entry or expansion by other suppliers would mitigate the harm caused by the merger.

The CMA dismissed a number of remedies put forward by the parties as being insufficient to resolve the competition concerns arising from the transaction and concluded that ordering FNZ to sell GBST was the only way to address these concerns. FNZ will now have to begin the process of divesting GBST, demonstrating the danger of completing a merger in the UK without first seeking merger clearance.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

General Court upholds Commission decision finding that Lithuania Railways abused its dominant position by dismantling a railway connecting Lithuania and Latvia

On 18 November 2020, the General Court ("GC") issued its judgment confirming the European Commission's ("Commission") decision to fine Lithuanian Railways for the abuse of its dominant position on the Lithuanian rail freight market. The GC rejected all of the appellant's complaints, but reduced the fine from € 27.87 million to € 20 million.

A particularly noteworthy aspect of the GC's decision is the insight it provides into when it may be appropriate to assess a dominant company's behaviour in light of the case law on refusal to provide access to essential facilities (which sets a higher threshold for the finding of an abusive practice).

In addition to managing Lithuania's railway infrastructure, Lithuanian Railways also provides rail transport services. In 1999, it concluded an agreement with the oil company, Orlen, to transport Orlen's products from its oil refinery to the Lithuanian seaport of Klaipėda. When the two parties found themselves in dispute as to the rates to be paid pursuant to the 1999 agreement, Orlen sought to shift its export business to alternative seaports in Latvia, and to engage the services of the Latvian national railway company ("LDZ"), which would transport its products via a short railway line connecting the two countries.

However, these plans were scuppered when Lithuanian Railways – acting in its capacity as rail infrastructure manager – decided to dismantle the railway line in question, citing damage to the tracks. In the absence of any other feasible rail routes, Orlen was forced to abandon its plans to engage the services of LDZ.

Orlen complained to the Commission, which, following its investigation, held that Lithuanian Railways had abused its dominant position by using its control over the national rail infrastructure to foreclose competitors in the rail transport sector. Lithuanian Railways appealed the decision, which the GC has now upheld.

Of particular note, among the complaints included in the appeal, Lithuanian Railways argued that its failure to ensure access to the railway track should have been assessed in light of the case law on refusal to provide access to essential facilities. Following the decision in *Bronner* (C-7/97), a dominant company should not be compelled to grant a competitor access to its facilities other than in certain exceptional circumstances (which Lithuanian Railways argued were not present in this case).

The GC rejected this argument, holding that this was not the sort of case to which the essential facilities doctrine should be applied. It pointed out that the reason that a higher legal standard must be satisfied before a dominant company can be compelled to provide competitors with access to its infrastructure is due to the need to protect the incentive to invest in such infrastructure in the first place. In other words, if it is made too easy for a competitor to share in the benefits of another entity's investments, going forward such investments are not going to be made at all.

The GC highlighted that the incentive to invest was not at stake in this case. Lithuanian Railways' dominant position derived from a former state monopoly; rather than investing its own funds, the infrastructure in question had been built using public funds. The GC also highlighted that the essential facilities doctrine is there to protect the infrastructure owner's exclusive right to exploit its investments. However, in this case, the regulatory framework placed Lithuanian Railways under a legal obligation to grant access to public railway infrastructure (and to ensure the good technical condition of that infrastructure). In this regard, the GC stated that "*where there is a legal duty to supply, the necessary balancing of the economic incentives…has already been carried out by the legislature*".

The GC therefore confirmed that it was not appropriate to apply the essential facilities doctrine in this case, and that the Commission was correct to have simply analysed whether Lithuanian Railways' actions had had an anticompetitive foreclosure effect.

Court of Justice holds that Belgian collecting society festival fees are not necessarily abusive

On 25 November 2020, the Court of Justice (("ECJ") delivered a judgment in Case C-327/19, ruling that the fee structure for music played at festivals adopted by the Belgian collecting society SABAM is not necessarily abusive under Article 102 TFEU.

The case came before the ECJ by way of a request for a preliminary ruling from the Antwerp Business Court (Ondermingsrechtbank Antwerp). The Antwerp court issued the request in the context of disputes between SABAM and festival organisers Weareone.World and Wecandance over unpaid royalties for music used in the Tomorrowland and Wecandance festivals between 2013-2016. In response, the organisers claimed that the royalty fees charged by SABAM were abusive.

These fees were determined based on a tariff which included a minimum rate determined by the size of the festival space and number of available tickets, as well as a regressive rate calculated on the basis of the artistic budget or gross revenues from ticket sales. Discounts to the tariff were available if the proportion of music from SABAM's repertoire used during a festival amounted to less than one-third, or two-thirds of the entire festival music.

According to the festival organisers, these fees were not proportionate to the economic value of the licensing services provided by SABAM insofar as the flat rate and discount rule did not reflect SABAM's contribution in a sufficiently precise manner and were based in part on elements unrelated to those services. In its request for a preliminary ruling, the Antwerp court asked whether the use of a minimum rate and the inclusion of "external elements" – e.g., technical and artistic costs – in the regressive rate could constitute an abuse of a dominant position.

On the matter of the tariff base, the ECJ ruled that using total revenues as a tariff base does not raise any concerns under Article 102. The ECJ recognised that there is no single suitable method to more narrowly identify the contribution of music to the overall attractiveness of a live music festival, and found that requiring a collecting society to make such a calculation would be an unreasonable administrative burden. Here, the ECJ held that a turnover percentage-based remuneration can be considered a normal use of intellectual property rights which can also be applied to festival ticket sales. The ECJ pointed out that, even if SABAM's tariff structure was in principle lawful, it could still be too high and could be considered excessive. However, it is for the national court to decide whether this is the case.

On the matter of SABAM's incremental tariff, the ECJ noted that the one-third rule may be considered unreasonable in circumstances where there are more accurate ways of measuring which music is played. The ECJ noted that the rule makes for a very inaccurate estimate of the share of music from Sabam's repertoire, leading to a systematically higher levy than what SABAM would have been entitled to in light of the actual use of its repertoire. . According to the ECJ, these wide increments could be considered a violation of Article 102 if there is a better method to determine with greater precision the actual share of SABAM's repertoire, and the ECJ made it clear that, in its view, such better methods exist. The ECJ noted that there were software-based solutions that seem to allow the precise determination of SABAM's repertoire performed during a festival and states it cannot be ruled out that such technological tools are capable of identifying and quantifying the works performed with greater accuracy. In this regard, the ECJ mentioned that SABAM had switched to an incremental system with 10% increments, which makes it possible to take into account with greater accuracy the proportion of the played works that originate from SABAM's repertoire.

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority condemns exclusionary abuse in the plastic-waste recycling sector

On 27 October 2020, the Italian Competition Authority ("ICA") imposed a fine of around € 27.4 million on COREPLA (the "Consortium for the collection, recycling and recovery of plastic packaging waste") for abusing its dominant position on the national market for services for PET packaging producers relating to the compliance with their obligations under EU environmental law. The ICA's decision concerned

a strategy implemented by COREPLA to exclude CORIPET, a new rival consortium for recycling and recovery of PET bottles, from the market.

CORIPET had been granted a preliminary authorisation to operate by the Italian Ministry for the Environment. However, to obtain a definitive authorisation, CORIPET had to achieve certain operational results within two years of receiving its preliminary authorisation. The ICA's decision centred upon a strategy implemented by CORIPLA to prevent CORIPET from meeting those operational targets.

In particular, the ICA found that COREPLA: (i) did not remove the exclusivity clauses from its contracts with municipalities for the collection of plastic-waste and, on the contrary, enforced such clauses in order to prevent the municipalities from concluding new agreements with CORIPET; (ii) refused to conclude an agreement with CORIPET allocating it a quota of the plastic waste collected by the municipalities (which CORIPET required due to the absence of its own agreements with the municipalities); and (iii) continued to collect all plastic waste – including the waste of plastic producers which had since switched to using CORIPET and had stopped paying COREPLA (with the consequence that COREPLA operated at a loss).

The ICA concluded that COREPLA's conduct sought to hinder CORIPET's efforts to achieve the operational results it needed to obtain the definitive authorisation required to remain on the market. Its actions therefore prevented the emergence of a new competitor and constituted an abusive practice.

Interestingly, the ICA also noted the negative environmental impact of COREPLA's anticompetitive practices. In the ICA's view, the introduction of CORIPET – with its various initiatives to incentivise the manufacturing of more sustainable products – would have contributed to the achievement of certain environmental objectives set by EU law. The negative impact of the abusive practice on the environment influenced the ICA's assessment of the seriousness of the abuse and, consequently, the calculation of the fine.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice dismisses appeal in Power Cables cartel case

On 28 October 2020, the Court of Justice (the "ECJ") dismissed an appeal brought by Pirelli & C. SpA ("Pirelli") against the judgment of the General Court ("GC") which had upheld the Commission's decision against Pirelli in the *Power Cables* cartel case.

On 2 April 2014, the Commission imposed fines totalling € 302 million on eleven producers of underground and submarine (extra) high voltage power cables (together with their respective parent companies) for their involvement in a market-sharing cartel. The Commission found an infringement consisting of two cartels among power cable producers: (i) a domestic cartel (referred to in the decision as the "European cartel configuration"), in which EU producers allocated European Economic Area (EEA) projects amongst themselves and (ii) an international "stay-at-home" cartel, in which the EU producers agreed with non-EU producers to refrain from competing for projects in each other's home territories (that is, the EU, Japan and Korea). Pirelli was presumed liable for the infringement of its subsidiary Prysmian, whose capital was almost totally owned by Pirelli when the infringement occurred, but was subsequently sold. On an earlier appeal, the GC upheld the Commission's decision.

Ruling on Pirelli's appeal against the GC's decision, the ECJ found in its recent judgment that the GC had not committed any errors of law in rejecting Pirelli's challenge to the Commission's decision.

With respect to the obligation to state the reasons for which Pirelli was presumed liable for the infringement of its subsidiary, the ECJ ruled that the Commission has to explain why elements of fact and law adduced by a parent company are not sufficient to rebut the presumption that it exercises decisive influence over a wholly-owned (or near wholly-owned) subsidiary. Nevertheless, the ECJ found that the Commission does not have to address all the arguments made by a parent company, in particular when they are manifestly irrelevant, unimportant or ancillary. Based on the facts, the ECJ ruled that Pirelli's arguments were not sufficient to rebut the presumption of decisive influence and that the GC was right to have held that some of these arguments were not aimed at the application of the presumption by the Commission.

In addition, the ECJ rejected Pirelli's arguments on a breach of the presumption of innocence, its rights of defence and the principles of legality and proportionality of criminal offences and penalties. According to the ECJ, joint liability of the parent company which exercises decisive influence over its subsidiary is consistent with the principle of personal responsibility, and is even an expression of that principle since both undertakings form a sole economic entity, liable for the infringement. The ECJ underlined the rationale of this presumption, which seeks to achieve a balance between the aims of repression and deterrence of competition law infringements and the respect of general principles of EU law.

Furthermore, the ECJ rejected Pirelli's argument that the GC had breached the principles of joint and several liability, proportionality and equal treatment, since this joint liability was applied to both Pirelli and its subsidiary, while only the latter infringed competition law. The ECJ ruled that the principle of equal treatment had not been infringed, as both Pirelli and its subsidiary were in the same situation, that is forming part of the same economic entity. With regard to the principle of joint and several liability, the ECJ recalled that this mechanism is only an additional tool for the Commission in order to enhance its effectiveness of the recovery of fines.

Finally, the ECJ ruled that the GC was right to have rejected Pirelli's arguments concerning the allocation of the fine between Pirelli and its subsidiary. Recalling that the unlimited jurisdiction to review decisions whereby the Commission has fixed a fine enables the GC to cancel, reduce or

increase the fine, the ECJ ruled that this unlimited jurisdiction cannot extend to assessments falling outside the Commission's power to fine undertakings, such as determining the allocation of the fine between co-debtors. According to the ECJ, the Commission must remain free to ask for the payment of the fine from the undertaking of its choice, letting the co-debtors discuss their share of liability and the reimbursement of a part of the fine to the undertaking that paid the latter.

– MEMBER STATE LEVEL –

ITALY

Italian Supreme Administrative Court upholds ICA's findings in health sector

By two separate judgments published respectively on 17 and 23 November 2020, the Italian Supreme Administrative Court ("ISAC") overturned the judgments previously issued by the Lazio Court of First Instance ("TAR Lazio") concerning a decision of the Italian Competition Authority ("ICA") finding three separate violations of Article 101 TFEU during public tenders for oxygen and ventilation home therapies in Lombardy, Campania and Marche ("Decision").

On the merits, the ISAC confirmed the consolidated case law on the proof required to establish a concerted practice. In addition, the ISAC made interesting observations on the calculation of the fine. Specifically, according to the ISAC, the fact that the ICA imposed three fines in the same decision does not entail that the infringements can be considered as a single violation for the purpose of the calculation of the 10% fining ceiling. In fact, while concerning the same services, the ISAC pointed out that the violations were different in many aspects such as: (i) the conduct involved, (ii) the place the conduct was implemented and (iii) the time it was implemented. Consequently, the ISAC confirmed that the 10% ceiling refers to each fine and not to the sum of the three.

UNITED KINGDOM

UK CMA fines two rolled lead suppliers total of £9 million for roofing lead cartel

On 4 November 2020, the UK's Competition and Markets Authority ("CMA") imposed fines totalling £9.5 million on two of the UK's largest rolled lead suppliers for their role in a roofing lead cartel. The CMA fined Associated Lead Mills Ltd and H.J. Enthoven Ltd (trading as BLM British Lead) £1.5 million and £8 million respectively. Both companies had previously admitted to their roles in the cartel.

The CMA said in its press release (the infringement decision has not yet been made publicly available), that four anticompetitive arrangements between the two companies included collusion on prices, sharing the rolled lead market by arranging not to target certain customers, and arranging not to supply a new business because it risked disrupting the firms' existing customer relationships. The illegal conduct took place between October 2015 and April 2017. Each of the arrangements also involved illegal exchanges of commercially sensitive information.

This case is one of a number of probes into cartel activity in the construction sector in recent years and Michael Grenfell, Executive Director of Enforcement at the CMA noted that the construction sector will continue to be "firmly under [the CMA's] spotlight".

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Commission study shows territorial supply constraints apparently prevalent but rarely tackled by NCAs

On 19 November 2020, the European Commission ("Commission") published a study on territorial supply constraints ("TSCs") in the EU retail sector (the "Study"), available here. The Study is the outcome of a fact-finding mission commissioned by DG GROW and clarifies the prevalence and effects of TSCs in the Single Market. TSCs are barriers imposed by operators in the supply chain, which impede or limit the ability of retailers and wholesalers to source, or to distribute, goods in EU Member States other than those where they are based.

The Study finds that such TSCs are prevalent in the EU: almost half of the retailers and wholesalers consulted mentioned having faced them. These include refusals to supply, destination obligations, quantitative limitations and product/packaging differentiation. Focusing on the markets for branded goods, such as drinks, food, toiletries and detergents, the Study suggests that the Single Market is fragmented by the presence of TSCs.

By contrast, none of the 17 national competition authorities surveyed are currently dealing with cases concerning TSCs in the retail sector, nor have they received any official complaints related to TSCs. The Study could therefore prompt the Commission, which is best placed to deal with cross-border restrictions, to take action under the competition rules to prevent fragmentation of the Single Market. An example of a recent Commission decision involving TSCs is the decision issued against AB InBev in May 2019 for abuse of dominance under Article 102 TFEU (see VBB on Competition Law, Volume 2019, No. 5).

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines champagne supplier and distributors for maintaining exclusive import agreements in the French Antilles

In a decision published on 29 October 2020, the French Competition Authority ("FCA") fined champagne supplier Champagne Nicolas Feuillatte and two importer-distributors € 642,800 for having concluded exclusive import agreements in the French Antilles (i.e., Saint-Martin, Saint-Barthélemy and Martinique).

The decision was adopted under the "Lurel Law", which prohibits agreements and concerted practices that grant exclusive import rights in the French overseas territories unless the undertakings concerned prove that exclusive import rights are more efficient than non-exclusive import rights. The main purpose of this law is to improve competition in the French overseas territories, where prices tend to be higher than in mainland France. As most products are not produced in the overseas territories, manufacturers usually deal with importer-distributors who sell on the goods to retailers.

In this case, the FCA found that the exclusive import rights granted to the two importer-distributors (either contractually or *de facto*) were not justified by economic efficiencies which ensured a fair allocation of the benefit to consumers. The FCA however concluded that the agreements at issue only caused limited damage to the economy, taking into account the strength of inter-brand competition and the price-sensitivity of the consumer.

IRELAND

Irish Competition and Consumer Protection Commission extends verticals declaration until 2022

On 30 October 2020, the Irish Competition and Consumer Protection Commission (the "CCPC") announced its decision to extend the validity of its Declaration in Respect of Vertical Agreements and Concerted Practices (the "Declaration"), which was due to expire on 1 December 2020, until 1 December 2022.

In terms of content, the Declaration resembles its EU equivalent, the Vertical Block Exemption Regulation ("VBER"), which is currently under review by the European Commission ("Commission"), ahead of its expiry in May 2022.

The CCPC's extension therefore bridges the gap until after the Commission has completed its review and a new VBER enters into force. In this context, the CCPC declared that it will consider any potential changes to the VBER resulting from the Commission's review and will subsequently consult with stakeholders on potential revisions to the Declaration.

Finally, the CCPC also announced that the associated Notice in Respect of Vertical Agreements and Concerted Practices (the equivalent of the Commission's Vertical Guidelines) remains unchanged.

POLAND

Polish competition authority imposes € 114,000 fine on Yamaha for setting minimum online resale prices

According to a press release of 5 November 2020, the Polish Office of Competition and Consumer Protection (the "UOKIK") imposed a fine of PLN 511,806.92 (approximately € 114,000) on musical equipment manufacturer Yamaha for setting minimum prices at which its products could be sold by distributors in online stores. The UOKIK found that, since 2004, Yamaha has been setting minimum prices based on a specific mathematical formula and has monitored their implementation by distributors. Those distributors that did not respect Yamaha's recommended online resale prices risked losing preferential trade conditions previously agreed with Yamaha. As well as being monitored by Yamaha, distributors also monitored compliance among themselves.

The initial fine was reduced by 50% as a result of Yamaha's participation in the leniency programme and by another 10% due to its voluntary submission to the fine.

Similar investigations have been prevalent in the musical instrument industry. The UOKIK noted a previous decision in December 2011 concerning the Polish branch of musical instrument manufacturer Roland, as well as other investigations into practices by musical instrument manufacturers elsewhere in Europe. Specifically, the UOKIK referred to decisions earlier in 2020 by the Austrian and UK competition authorities concerning the illegal setting of resale prices for musical equipment including by Yamaha.

UNITED KINGDOM

UK's CMA fines ComparetheMarket £ 17.9 million for use of wide MFN clauses

On 19 November 2020, the UK's Competition and Markets Authority ("CMA") fined the price comparison website ComparetheMarket, and its parent companies, £ 17.9 million for breaching the UK and EU competition rules. The CMA found that ComparetheMarket breached the prohibition of anti-competitive agreements contained in Chapter I of the UK's Competition Act 1998 and Article 101(1) TFEU by applying "wide" most-favoured nation (MFN) clauses.

Under a wide MFN clause, a supplier or retailer using a price comparison website is usually required to publish prices and conditions on the site which are at least as favourable as those which it publishes *in any other sales channel*. In contrast, a less restrictive "narrow" MFN clause usually requires a supplier or retailer to publish prices and conditions which are at least as favourable as those published *on their own websites* (meaning that the scope of the obligation not to publish better terms elsewhere is narrower than under a wide MFN). In the past, the CMA has generally found wide MFN clauses to be anti-competitive but has found narrow MFNs to have potential efficiency benefits outweighing any harm caused by the clause.

According to a summary of its decision (the full decision is not available at the time of writing), the CMA found that ComparetheMarket included wide MFN clauses in its contracts with a number of home insurers between December 2015 and December 2017, prohibiting them from offering lower prices on other price comparison websites. These obligations were found to be enforced in practice by ComparetheMarket. According to the CMA, this practice reduced price competition between the various price comparison websites (with internal documents apparently suggesting that competition would increase if they were eliminated) and restricted the expansion of rival websites allowing ComparetheMarket to maintain or strengthen its market power. Evidence of ComparetheMarket's market power was provided by its market share of over 50%, well above its nearest rivals. The CMA also considered that these clauses likely resulted in higher home insurance premiums for end-customers.

This case is one of a number of probes conducted by the CMA into the legality of MFN clauses used by various online platforms, which were also addressed in the CMA's Digital comparison tools market study. Previously, the CMA has carried out investigations into hotel bookings and private car insurance online platforms, as well as price-comparison sites for energy products. The significant fine imposed in this case is noteworthy, particularly as the case did not involve either a finding of abuse of dominance or what is typically considered to be a restriction by object.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Düsseldorf refers questions regarding the licensing of standard essential patents in multi-layered supply chains to the Court of Justice

On 26 November 2020, the Regional Court of Düsseldorf ("Düsseldorf Court") decided to request a preliminary ruling from the Court of Justice of the European Union ("ECJ") in patent infringement proceedings involving Nokia and Daimler. The questions give the ECJ the opportunity to offer guidance on much-disputed questions concerning the licensing of standard essential patents ("SEPs") in multi-layered supply chains.

At the core of the dispute are the following opposing views: Nokia, the SEP holder, maintains that it can decide freely on which level of a complex production and supply chain it will grant the licence in its patents on fair, reasonable and non-discriminatory (FRAND) terms. In contrast, Daimler takes the view that Nokia is obliged to offer an unlimited licence for all patent-relevant types of use of the SEP to any willing licensee. Priority should therefore be given to Daimler's suppliers asking to take out a licence and these licences would protect the entire supply chain. According to Daimler, this would also correspond to the standard procedure in the automotive industry.

The Düsseldorf Court was asked to decide whether Nokia abused its dominant position on the licensing market when filing for injunctive relief against Daimler based on patent infringement. Specifically, should an SEP holder such as Nokia be held in breach if it refused to grant a licence to a component manufacturer which implemented the SEP, but then turns around to sue Daimler, an end-device manufacturer that incorporated the SEP-based component?

The Düsseldorf Court stayed the proceedings and, in essence, asked the ECJ for an answer to the following questions: (1) Is the SEP holder obliged to prioritise potential licensees on the supply level; (2) Must the component supplier be granted an unlimited licence for all patent-relevant types of use on FRAND terms for the products implementing the standard so that the distributor of the end-device (or its upstream suppliers) incorporating the components does not need to take out an own licence to avoid a patent infringement; (3) In case question 1 is answered in the negative, are there criteria that restrict the SEP patent holder when picking the target of a possible injunction along the different levels of the supply chain.

In addition, the Düsseldorf Court asked for further guidance on the requirements that may flow from the ECJ's judgment in *Huawei v ZTE* (see VBB on Competition Law, Volume 2015, No. 7). It asked the ECJ to clarify: (1) when the parties must comply with the obligations defined by the ECJ, i.e., whether the infringement alert, the licensing request, the licence offer on FRAND terms, and a prior licence offer on the supply level which generally must be made prior to bringing the claim can exceptionally still occur during the court proceedings; (2) whether a valid licence request requires the implementer to be willing to enter into a licence at whatever terms are in fact FRAND, even if, in the absence of a licence offer, these terms are still unclear for the prospective licensee. Sub-questions include: (a) whether unwillingness of the alleged infringer to take a licence can be established if he has not responded to the infringement alert for several months but then requests a licence; (b) whether a missing licence request can be implied in the conditions of the implementer's counter offer, with the result that the SEP holder may obtain an injunction without prior assessment as to whether his licence offer is FRAND and (c) whether such a finding is possible if the conditions of the counter offer are such that it is neither evident nor decided by the highest court that they are non-FRAND.

The full text of the questions referred can be found in the press release of the Düsseldorf Court of 26 November 2020.

The request for a preliminary ruling by the Düsseldorf Court comes in the wake of a series of judgments in Germany that decided in favour of the SEP holder. The Regional Court of Mannheim in its judgment *Nokia v Daimler* of 18 August 2020 (see VBB on Competition Law, Volume 2020, No. 8) and the Regional Court of Munich in its judgments *Sharp v Daimler* of 10 September 2020 (see VBB on Competition Law, Volume 2020, No. 9), *Conversant Wireless v Daimler* of 23 October 2020 and Nokia v Daimler of 30 September 2020 (see VBB on Competition Law, Volume 2020, No. 10) decided in each case that Daimler had been unwilling to take out a licence on FRAND terms and, on that basis, granted an injunction to the SEP holder.

Following a complaint of Daimler and other players in the automotive industry that Nokia is abusing its dominant position, the European Commission started an inquiry into the licensing of patents for the connected car industry. In addition, in its IP Action Plan which it published the day before the referral of the Düsseldorf Court, the European Commission expressed a preference for "*industry-led initiatives to reduce frictions and litigations*".

German Federal Court of Justice rules on burden of proof for showing exhaustion of trade mark right

On 15 October 2020, the German Federal Court of Justice ("FCJ") issued a judgment on the burden of proof for showing the exhaustion of trade mark rights in a case pitting Coty against Amazon.

After having made a test purchase from Amazon of two bottles of a perfume bearing the "JOOP!" trademark on the amazon.de platform, Coty, authorised by the trademark owner belonging to the Coty group, claimed trade mark infringement and applied for an injunction prohibiting Amazon from continuing the sale of the "JOOP!" products.

Under EU trade mark law, the EU trade mark rightsholder cannot prohibit the use of the trade mark in relation to goods that were put on the EEA market under that trade mark by him or with his consent. In such a case, the rightsholder's trade mark rights are considered to have been exhausted. Coty claimed that the products sold by Amazon in Europe were goods which it had sold to a customer based in Dubai. For its part, Amazon maintained that it had acquired the products from an authorised distributor of one of Coty's EU subsidiaries.

The Regional Court of Munich granted the injunction, which the Higher Regional Court of Munich confirmed upon appeal in July 2018. The Higher Regional Court of Munich held that Amazon had infringed the trade mark and could not rely on the theory of exhaustion. According to the court, it would have been for Amazon to demonstrate the facts pointing to exhaustion which it had failed to do.

On further appeal, the FCJ overturned the judgment of the Higher Regional Court of Munich and sent the case back to Munich to allow the parties to produce further evidence. The FCJ confirmed that, as a rule, the party which invokes exhaustion must provide proof that the products bearing the trade mark were put on the EEA market by the trade mark owner or with his consent. However, the protection of the free movement of goods requires a shift of the burden of proof, if a burden on the potential trade mark infringer to reveal its supply source would allow the trade mark holder to partition national markets and thus facilitate the maintenance of price differences which may exist between Member States. In this case, it would be for the trade mark owner to establish that the products were initially placed on the market outside the EEA by him or with his consent.

This rule had already been established by the Court of Justice of the European Union ("ECJ") in *Van Doren + Q.*, (Case C-244/00), a case in which the trade mark owner sold its products in the EEA through an exclusive distribution system. The ECJ reasoned that if the alleged infringer were required to prove where the goods were first put on the market by the trade mark owner or with his consent by revealing his supply source, the trade mark owner would then be in a position to obstruct the continued sale of the goods.

According to the FCJ, this reasoning also applies to a selective distribution system. The FCJ acknowledged that a selective distribution system which prohibits the supply of non-authorised distributors is not – as such – sufficient to give rise to a risk of market partitioning. However, contract conditions that restrict sales among members

of the selective distribution system in different Member States together with price differences between different Member States trigger the presumption of a risk of market partitioning. In such a case, it is for the trade mark owner to rebut that presumption and to prove that the price differences are caused by reasons other than the selective distribution system.

The FCJ added that these rules are not contrary to the precedent established by the ECJ in *Coty* (Case C-230/16). In that case, the ECJ held that the prohibition imposed on resellers to sell luxury goods on third party online platforms in a manner discernible to consumers is compatible with Article 101(1) Treaty on the Functioning of the European Union provided the prohibition is intended to ensure the luxury image of those goods (see VBB on Competition Law, Volume 2017, No.12).

According to the FCJ, a selective distribution system that is permissible under competition law may still lead to a risk of market partitioning if sales to authorised distributors in other Member States are restricted. Coty might be allowed to impose qualitative restrictions on its members of the selective distribution system to protect the luxury image of its products and to sanction infringements of such restrictions, such as the sale to Amazon. In trade mark infringement proceedings, such selective distribution system should however not allow the trade mark owner to create market partitioning risks and maintain price differences between Member States. Therefore, even if there is no infringement of competition law, the free movement of goods may be put in jeopardy which, in turn, requires a shift of the burden of proof onto the shoulders of the trade mark owner in trade mark infringement proceedings.

It will now be for the Higher Regional Court of Munich to assess whether there were price differences for the product at issue between different Member States. If these differences are confirmed, a risk of market partitioning will be presumed to exist. This is because the FCJ already found that Coty's selective distribution system contains contract conditions that restrict sales among its members in different Member States. In particular, the FCJ found that Coty sells cosmetics in a selective distribution system that allows cross sales between its members in different EEA Member States but contains conditions that de facto restrict such sales, such as a general prohibition on members of the selective distribution system to act as wholesalers and minimum purchase targets which required purchases directly from Coty and excluded such which were sold on to members of the selective distribution system in other EEA Member States. Still, Coty could rebut this presumption by showing that the price differences are due to reasons that have nothing to do with its selective distribution system.

STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice clarifies conditions under which request for *de minimis* aid can be modified to comply with ceiling under Regulation 1407/2013 (INAIL v Zennaro, C-608/19)

On 28 October 2020, the Court of Justice ("ECJ") answered a reference for a preliminary ruling from the Consiglio di Stato (Council of State, Italy) concerning the interpretation of Articles 3 and 6 of Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 TFEU to *de minimis* aid (the "*de minimis* Regulation").

The background of the case is a dispute between the Italian company Zennaro and the Italian National Institute for Insurance against Accidents at Work ("INAIL"). In June 2014, Zennaro applied for funding by INAIL under an aid scheme providing incentives for undertakings to implement plans concerning health and safety at work. In October 2014, INAIL informed Zennaro that its project was accepted for funding for an amount of € 130,000. This aid was supposed to be granted on the basis of the *de minimis* Regulation since it was below the € 200,000 ceiling and, at the time of the application, Zennaro complied with the conditions concerning the cumulation with previous aid. However, in the period between June and October 2014, Zennaro had received other State funding. The cumulation of these other funds with the € 130,000 State aid promised by INAIL would bring the overall amount to a sum of € 213,469, which exceeded the *de minimis* ceiling.

With this in mind, in 2015, Zennaro asked INAIL to amend the application made in June 2014 and reduce its request for financial assistance to ensure that the overall amount would not exceed the ceiling. This request was rejected by INAIL, which took the view that Zennaro could not modify its original request and that, in order to receive its financial assistance, it would have to reimburse the aid granted by the other public body(ies).

Zennaro challenged INAIL's rejection before the competent Italian administrative court (the "TAR Veneto"). It is interesting to note that, in the context of these proceedings, the TAR Veneto asked the European Commission's Directorate General for Competition ("DG COMP") to provide its guidance as to the correct interpretation of the *de minimis* Regulation. On the basis of that interpretation, it ruled in favour of Zennaro and found that INAIL's rejection had to be annulled.

The issue was brought on appeal before the Consiglio di Stato, which took the view that it was necessary to refer two questions to the ECJ with regard to the interpretation of the *de minimis* Regulation in order to solve the dispute.

The first question asked to clarify whether an undertaking, to which a Member State intends to grant *de minimis* aid, may opt, before such aid is actually paid out, to reduce the funding required or to forgo previous aid received, so as not to exceed the ceiling set out under the *de minimis* Regulation.

This question required, first, clarifying the date at which compliance with the conditions under the *de minimis* Regulation must be assessed by the national authorities. Second, it had to be clarified whether, prior to that date, these authorities were allowed to grant applicant undertakings the right to amend their applications for aid by reducing the amount of the requested funding or by forgoing aid previously received.

As to the first issue, the ECJ noted that the wording of Article 3 of the *de minimis* Regulation, which defines *de minimis* aid, and Article 6 thereof, which concerns the monitoring carried out by the Member States when such aid is granted, must be strictly interpreted. With this in mind, the ECJ first clarified that the wording of Article 3 indicates that the moment at which it is necessary to assess whether cumulation with other *de minimis* aid exceeds the ceiling is that of the "grant" of the aid. In this regard, Article 3(4) specifies that such an aid is "granted" at the moment the right to receive the aid is conferred on the undertaking, irrespective of the date of payment of the aid to the undertaking. The ECJ also noted that Article 6 indicates that the

monitoring carried out by the Member States, to ensure that the rules on cumulation are complied with, must take place "before granting the aid". In light of this, the ECJ ruled that the exact date when the aid was "granted" to Zennaro must be assessed by the national court, in light of the relevant domestic procedural rules.

Second, the ECJ held that the *de minimis* Regulation does not contain any legal basis for the applicant undertaking to amend its aid application by reducing the amount thereof or by forgoing previous aid, so as to comply with the *de minimis* ceiling. In the absence of any such explicit rule, the national authorities are free to grant applicant undertakings the right to amend their applications for aid before such aid is granted or by forgoing previous aid. In short, the *de minimis* Regulation does not oppose either of the two options – i.e. allowing the applicant undertaking to reduce the amount or requiring the forgoing of previous aid – as long as this occurs before the aid is "granted". In this regard, it is interesting to note that the interpretation provided by the ECJ appears to be essentially aligned with that given by DG COMP in the context of the proceedings before the TAR Veneto.

Having clarified that, the Court turned to the second question referred by the Consiglio di Stato. This essentially asked to clarify whether national authorities must allow undertakings – such as Zennaro – to modify their applications for aid and reduce the amount of financial assistance requested in order to comply with the *de minimis* ceiling, even though the national rules do not provide any provisions allowing for such a modification.

In this regard, the ECJ referred to its reasoning concerning the first question, and ruled that Member States are not required to allow applicant undertakings to amend their applications for aid before it is granted in order not to exceed the *de minimis* ceiling. However, the ECJ specified that the referring court would be required to assess the legal consequences of the fact that undertakings do not have the option of making such changes.

All things considered, the take-away from this judgment seems to be that there is very little room under the *de minimis* Regulation to amend an application for aid in order to comply with the *de minimis* ceiling. This reinforces the need for undertakings applying for *de minimis* aid to carefully assess if their request complies with the conditions set out in that Regulation, prior to filing it before the competent national authorities.

Grand Chamber of the Court of Justice clarifies application of *CELF* case law with regard to State aid for SGEIs in breach of notification requirement under Article 108(3) TFEU (Viasat Broadcasting UK, C-445/19)

On 24 November 2020, the Grand Chamber of the European Court of Justice delivered a judgment that. It provides important guidance with regard to the obligation for national courts to order the recipient of an unlawful aid (aid that was granted in breach of the prior notification rule) to pay the so-called "illegality interest" in case that aid is ultimately found to be compatible with the internal market (see, with regard to the notion of "illegality interest", paras 39 and ff. of the Commission's Notice on the enforcement of State aid law by national courts, OJ 2009 C 85, p. 1).

The judgment was delivered in the context of a reference for a preliminary ruling from the Østre Landsret (High Court of Eastern Denmark) on the basis of Article 267 TFEU. The background of the dispute concerns the aid measures granted by Denmark to TV2/Danmark A/S ("TV2") – a broadcasting company with the public-service mission of producing and broadcasting national and regional television programmes – between 1995 to 2002. In the past, the ECJ had already delivered several judgments with regard to those aid measures. These judgments essentially found that the aid granted to TV2 was compatible with the internal market on the basis of Article 106(2) TFEU (judgments of 8 March 2017, Viasat Broadcasting UK v Commission, C-660/15 P, of 9 November 2017, TV2/Danmark v Commission, C-649/15 P, Commission v TV2/Danmark, C-656/15 P and Viasat Broadcasting UK v TV2/Danmark, C-657/15 P).

The dispute before the referring court concerns another aspect of the assessment of those aid measures in light of the State aid rules. In particular, given that the aid measures at stake were granted in breach of Article 108(3) TFEU (prior notification rule), the referring court is uncertain as to whether TV2 is required to pay the "illegality interest" to Denmark for the period up to its authorisation by the Commission.

In this regard, it should be noted that well-established case law had already clarified that the obligation to pay the "illegality interest" is applicable, as a general rule, in situations where unlawful aid (aid that was granted in breach of the prior notification rule) does not have to be repaid if it is ultimately found to be compatible with the internal market by the Commission (judgment of 12 February 2008, CELF and Ministre de la Culture et de la Communication, C-199/06).

The novelty of the questions raised in the present case concerns the application of the CELF case law in a scenario where the unlawful aid is found to be compatible on the specific basis of Article 106(2) TFEU. In particular, the first question asked whether Article 108(3) TFEU requires national courts to order a recipient of unlawful aid to pay the "illegality interest" in respect of that aid, even where the Commission finds that the aid is granted to an undertaking performing a Service of General Economic Interest ("SGEI") in accordance with Article 106(2) TFEU.

The ECJ answered in the affirmative – on the grounds of, *inter alia*, the following reasons.

First, the ECJ recalled the general principles concerning Article 108(3) TFEU. It stressed that the notification requirement is one of the fundamental features of the system of control put in place by the TFEU in the field of State aid. Moreover, it referred to the *CELF* case law and recalled that a decision by the Commission finding that an unlawful (because it was granted in breach of the prior notification rule) aid is compatible with the internal market does not have the effect of retroactively "regularising" the measures, and that national courts are bound to order the aid recipient to pay the "illegality interest" in respect of the period of unlawfulness of the aid.

Second, the Court noted that, under Article 106 TFEU, Member States are entitled to define the scope and the organisation of their SGEIs – in particular the public broadcasting service – in view of the objectives pertaining to their national policy, and that they enjoy a broad margin of discretion in that context. However, the power to define what constitutes SGEIs must be exercised in accordance with EU law.

With this in mind, the Court clarified that the question whether a measure must be categorised as State aid arises upstream of the question that involves examining if it is compatible and whether it is necessary to the performance of the tasks of SGEIs pursuant to Article 106(2) TFEU. In this sense, the Commission must, before any consideration of a measure under that provision, be in a position to review whether that measure constitutes State aid, which requires prior notification of the intended measure, in accordance with Article 108(3) TFEU.

Third, the Court stressed that State aid which is not exempted from the prior notification rule laid down in the first sentence of Article 108(3) TFEU remains subject to that obligation. With regard to aid to SGEIs, the Court noted that there is no legal basis in the EU primary and secondary rules to exempt such aid from the duty of notification. Therefore, Member States are obliged not to implement such measures until the Commission has taken a final decision in relation to them.

In view of the above, national courts are bound to draw all the consequences from breaches of the obligation set out in Article 108(3) TFEU and to adopt the measures that are appropriate to remedy them, including requesting the recipient of unlawful aid to pay the "illegality interest" in respect of that aid, even if the recipient is an undertaking entrusted with the operation of an SGEI in accordance with Article 106(2) TFEU.

Against that background, in the context of the second and third questions referred to it by the national court, the ECJ also clarified that Article 108(3) TFEU must be interpreted as meaning that the obligation of national courts to order the recipient of State aid implemented in breach of that provision to pay the "illegality interest" also applies to aid which that recipient has transferred to affiliated undertakings, and to aid it received from a publicly controlled undertaking.

To conclude, it can be noted that this judgment made clear that Article 106 TFEU does not grant any preferential treatment to SGEIs insofar as the prior notification duty set out in Article 108(3) TFEU and the obligation to pay the "illegality interest" are concerned. As a general rule, financial assistance to SGEIs can be caught under the notification and standstill requirements as in the case of any other form of aid.

This said, it should however be noted that financial assistance can still be granted to SGEIs without any prior notification to and authorisation by the Commission – for instance, where the aid measure complies with the conditions laid down in the *Altmark* case law (see judgment of 24 July 2003, Altmark Trans and Regierungspräsidium Magdeburg, C-280/00). In fact, if those conditions are fulfilled, the financial assistance would not be considered as State aid within the meaning of Article 107(1) TFEU, and would consequently fall outside the scope of Article 108(3) TFEU.

EFTA Court defines notions of "undertaking" and "economic activities" with regard to services in support of Norwegian digital health infrastructure (Case E-9/19 Abelia and WTW AS v EFTA Surveillance Authority)

On 17 November 2020, the EFTA Court dismissed an application for annulment against the EFTA Surveillance Authority ("ESA") Decision No 57/19/COL of 10 July 2019 (the "Contested decision"). The Contested decision found that the public financing of eHealth and digital health infrastructure in the Norwegian healthcare system, as well as the provision of certain support services and registers, did not constitute State aid within the meaning of Article 61(1) of the Agreement on the European Economic Area ("EEA agreement"), which corresponds to the State aid prohibition set out in Article 107(1) TFEU. In particular, the Contested decision found that the activities carried out by third party providers Norsk Helsenett SF ("NHN") and the Norwegian Directorate of eHealth ("NDE"), which were financed by the aid measures at stake, did not constitute "economic activities" and that NHN and NDE could not be considered as "undertakings" within the meaning of Article 61(1) EEA agreement.

The EFTA Court confirmed the findings of ESA. It first recalled that the notion of "economic activity" for the purpose of Article 61(1) encompasses those activities that, in view of their nature, aim and the rules to which they are subject, have an economic character which justifies the application of the EEA competition rules. In this regard, it also noted that insofar as a public entity carries on an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking. However, if that same economic activity cannot be separated from other activities connected with the exercise of public powers, the activities of that entity as a whole are to be considered as connected with the exercise of public powers.

In this regard, the EFTA Court noted that the Contested decision found: (i) that public financing – including, in particular, block grants from the State budget – accounts for more than 85% of total health expenditure, and comprises financing from the central and local governments and the National Insurance Scheme and (ii) that the Norwegian health system is founded upon the principle of solidarity, entailing that the individual patient's use of public healthcare services has only a negligible bearing on that patient's contribution to the system's financing, which is ensured through general tax revenue.

In such circumstances, the EFTA Court ruled that the ESA correctly considered that the NHN and NDE activities carried out in support of the eHealth and digital health infrastructure were exercised on the basis of public powers. As such, they do not constitute "economic activities" in the sense of Article 61(1) EEA.

Interestingly, the interpretation of "undertaking" and "economic activities" set out by the EFTA Court in this judgment appears to be aligned with that provided by the Court of Justice, with respect to the corresponding EU competition law concepts. It is also noteworthy that the EFTA Court referred multiple times to judgments of the Court of Justice in the context of its reasoning. Needless to say, coordination and alignment on the definition of the scope of application of the State aid rules provided by the EEA agreement and the TFEU are welcome and much needed, and contribute to the overall performance of the market in the European Economic Area.

Commission publishes the results of "Fitness check"

On 30 October 2020, the Commission published the results of its policy evaluation of the State aid modernisation ("SAM") reform launched in 2012 (the "Fitness Check"). The Fitness Check concerned the State aid rules provided in the General Block Exemption Regulation, the *de minimis* Regulation, the Regional Aid Guidelines, the Research, Development and Innovation Framework, and many others.

The purpose of the Fitness Check was to provide an overall assessment of these rules, and evaluate whether they are still "fit for purpose" – taking into account the general SAM objectives and the specific objectives of the legal frameworks relevant for the rules under examination. The Fitness Check specifically focused on five criteria: effectiveness, efficiency, relevance, coherence, and EU added value.

The most important take-home messages of the Fitness Check appear to be:

- The post-Covid-19 scenario will have to lead to some rethinking of the State aid rules. Future policy-making in this field must take into account the imbalances created in the Member States' economies as a result of the pandemic. (However, it should be noted that the Fitness Check's assessment was carried out pre-Covid-19.)

- So far, the existing rules have proven to be appropriate to contribute to the EU policy objectives. However, these rules do not fully reflect the recent EU policy developments and Commission priorities for the future, in particular the Green Deal, as well as the Digital and Industrial Strategies. Specific amendments to the current State aid rules will be necessary in the future in order to contribute to these objectives.

- The Fitness Check suggests that the SAM architecture and State aid rules which were reformed under the SAM initiative are broadly fit for their purpose. There is no need to reform the State aid system of SAM as such. However, the single market State aid rules (e.g., Regional Aid Guidelines, Research, Development and Innovation Framework, etc.) need revision and/or updates, including clarifications, in order to further streamline and simplify them. Moreover, adjustments to reflect recent legislative developments, current priorities, and market and technology developments, will also be required.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Government plans to reverse amendments to Occasional Traffic Act to enable increased competition

As previously reported in this Newsletter, in September 2020 the Austrian Federal Competition Authority ("AFCA") published the results of a sector inquiry into the taxi and private hire car market. The AFCA found that certain planned amendments to the Occasional Traffic Act ("AOTA") would eliminate competition, limit consumer choice and stifle innovation (see VBB on Competition Law, Volume 2020, No. 9). On 18 November 2020, the Austrian Cabinet decided to revise the planned amendments to the AOTA in view of the results of the AFCA's sector inquiry (the "Proposed Amendments").

The Proposed Amendments would provide greater flexibility in relation to the regulation of fares by providing that journeys concluded via communication services (including mobile phone apps) are not covered by the obligation to use a taximeter and that such journeys fall outside the mandatory fare regulation provisions. However, provincial governments may still determine both minimum and maximum fares and surcharges for such trips. In the absence of a provincial regulation, a statutory minimum fee of € 5 would apply.

Several passengers will also be able to share the costs of a trip if the journey is ordered through a communications service, as long as the price of the shared journey is lower than what the price of an individual trip would have been.

The AFCA's Director General, Theodor Thanner, welcomed the Proposed Amendments, commenting that they "*appear to enable continued price and innovation competition*" and that they will allow new technology-based business models to continue operating on the market and provide choices to consumers.

LITHUANIA

Enforcement powers of the Lithuanian Competition Authority enhanced

On 1 November 2020, several amendments (the "Amendments") to the Law on Competition of the Republic of Lithuania entered into force. In line with Directive (EU) 2019/1, which seeks to harmonise the investigative and sanctioning powers of the national competition authorities in enforcing EU competition law, the Amendments bolster the Lithuanian Competition Authority's ("LCA") enforcement powers..

First, the Amendments clarify rules pertaining to immunity from or a reduction in fines where undertakings provide the LCA with substantial evidence on anti-competitive agreements. In particular, the Amendments explicitly exclude civil liability for those undertakings which file for leniency.

Second, the Amendments seek to strengthen guarantees of the LCA's independence from any instructions of government officials, state institutions and public or private entities.

Third, the Amendments clarify and broaden the LCA's enforcement powers. For example, the LCA will be empowered to impose higher fines in cases of continuous or repeated infringements. In addition, the Amendments seek to avoid the situation whereby companies that have been found to have breached competition law escape fines by way of corporate restructuring, by codifying the concepts of "single economic entity" and "economic succession". However, the LCA has lost its rarely used power to investigate acts of unfair competition (such as the use of commercial secrets by other undertakings).

The Amendments apply to infringements started after 1 November 2020 as well as to infringements started before 1 November 2020 but continued after this date.

SPAIN

Spain extends its temporary FDI screening mechanism

On 19 November 2020, an amendment of the Spanish temporary foreign direct investment ("FDI") screening mechanism entered into force (the "Amendment"). The Amendment broadens the screening regime introduced in March 2020, notably to also include investments from EU and EFTA investors.

First, from 19 November to 30 June 2021, the regime will also apply to FDI (in companies listed in Spain, or in unlisted companies provided the investment value exceeds € 500 million) made by: (i) residents of the EU or EFTA owning 10% or more of the company share capital or (ii) residents of Spain, whose beneficial owners are EU or EFTA residents.

Second, in order to adapt the definition of FDI in accordance with the previous development, the Amendment: (i) eliminates any reference to non-EU/EFTA residents so as to broaden the scope of the screening mechanism to all investors and (ii) clarifies the meaning of "control", which is to be understood in accordance with the criteria of Article 7.2 of the Spanish Competition Act.

Third, the Amendment extends the scope of the sectors subject to the regime, by: (i) replacing the reference to dual-use "items" with dual-use "technologies"; (ii) including a reference to technologies that are key to industrial leadership and capability and (iii) including technologies developed under programmes and projects of particular interest to Spain, including telecommunications, advanced materials, advanced manufacturing systems, and strategic connectivity services. In addition, prior authorisation is now required where there is a serious risk that the foreign investor is engaged in criminal or illegal activities that affect public safety, public order or health in Spain.

Finally, the Amendment empowers the Spanish Government to: (i) exempt certain categories of operations; (ii) establish the amounts below which FDI operations will be exempt from the screening regime and (ii) limit the scope of the sectors to which the regime applies.

UNITED KINGDOM

UK Government's National Security and Investment Bill ushers in new FDI regime with extensive powers for government intervention

On 11 November 2020, the UK Government published the National Security and Investment Bill ("NSIB"). The NSIB proposes the introduction of a standalone foreign direct investment ("FDI") regime for the first time in the UK. It introduces a hybrid mandatory and voluntary notification regime with wide-ranging powers for the UK Government to intervene in transactions which it considers likely to harm the UK's national security.

Unlike most other European countries, the UK does not currently have a separate FDI regime. Instead, the Enterprise Act 2002, which also governs the UK's merger control regime, includes provisions enabling the Secretary of State for Business, Energy and Industrial Strategy ("Secretary of State") to intervene in mergers in certain sectors for reasons of national security, financial stability, media plurality and public health emergencies, which may raise certain public interest concerns. However, the UK Government has very rarely used these powers, and has only reviewed twelve transactions since the existing regime was introduced in 2003. Instead, under the new regime, the UK Government estimates that between 1,000 and 1,830 transactions will be notified each year.

The NSIB proposes a mandatory notification obligation for the acquisitions of certain shares or voting rights in entities in sectors perceived to be of the highest national security risk. Transactions in the following seventeen sectors are expected to be subject to mandatory notification: (i) civil nuclear; (ii) communications; (iii) data infrastructure; (iv) defence; (v) energy; (vi) transport; (vii) artificial intelligence; (viii) autonomous robotics; (ix) computing hardware; (x) cryptographic authentication; (xi) advanced materials; (xii) quantum technologies; (xiii) engineering biology; (xiv) critical suppliers to government; (xv) critical suppliers to the emergency services; (xvi) military or dual-use technologies and (xvii) satellite and space technologies. Nonetheless, the UK Government will be launching an eight-week consultation in order to determine which parts of these seventeen sectors will be subject to mandatory notification.

The NSIB proposes that the mandatory notification regime will be supported by a voluntary notification regime, with parties encouraged to notify certain transactions which they consider may be of interest from a national security perspective, and the UK Government has stated that it encourages parties to approach the responsible authority early in order to assess whether the transaction could be of interest.

The NSIB proposes allowing the UK Government to review a broad range of transactions, including those with low levels of shareholding and a broad range of asset types. Transactions will be reviewable under the mandatory or voluntary regime provided they involve the acquisition of:

- 15% or more of the votes or shares in a qualifying entity (where the acquirer previously held less than 15%); or

- control of a qualifying entity (defined as: (i) more than 25%, 50% or 75% of the votes or shares in a qualifying entity; or (ii) the acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of the entity).

The NSIB also proposes no turnover, asset, or market share thresholds, which a transaction must meet to be reviewed. As a result, the new regime will likely capture a very wide range of transactions. The UK Government will also benefit from a "call-in" mechanism allowing it to review transactions that have not been notified and which it feels may affect national security, for up to five years post-completion.

The national security assessment will be separated from any merger control analysis. Therefore, the Competition and Markets Authority ("CMA") will no longer be involved in national security assessment. Instead, the Secretary of State along with a new government body called the Investment Security Unit will undertake the national security assessment and decide on the outcome of the review.

The NSIB proposes that where a notification is submitted by the parties (either via a mandatory notification or a voluntary notification), the Secretary of State will have 30 working days to decide whether to review the transaction. The Secretary of State will then have a further 30 working days to review the transaction, which is extendable by a further 45 working days. The Secretary of State then must decide whether to approve the transaction, to approve it subject to conditions or to prohibit the transaction.

When considering whether or not to review a transaction, the Secretary of State will consider: (i) the target risk – the nature of the target and whether it is in an area of the economy where the government considers risks more likely to arise; (ii) the trigger event risk – the type and level of control being acquired and how this could be used in practice; and (iii) the acquirer risk – the extent to which the acquirer raises national security concerns.

The NSIB will now be subject to approval and amendment by the UK Parliament. The UK Government will not be able to review transactions under this new regime until the NSIB is passed into law by Parliament. However, importantly, the NSIB has retrospective application in that it proposes allowing the UK Government to be able to "call-in" transactions that occur during the transition period between the NSIB's introduction to Parliament and its entry into force. Foreign investors in the UK should therefore make sure to bear this in mind before entering into transactions, and if investors are involved in transactions which could be caught by the new regime, the UK Government has stated that it welcomes early engagement from investors and businesses that are interested in discussing potential transactions.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Grand Chamber of the Court of Justice clarifies special jurisdiction rule for actions based on a breach of competition law under Brussels I *bis* Regulation

On 24 November 2020, the Grand Chamber of the Court of Justice (the "ECJ") ruled that the special jurisdiction rule for tort disputes under Regulation 1215/2012 (the "Brussels I *bis* Regulation") applies to actions based on a breach of competition law, even within the context of a contractual relationship (Case C-59/19, Wikingerhof v. Booking.com).

The German hotel Wikingerhof had concluded a contract with Booking.com in order to be listed on the latter's platform. After Booking.com notified changes in its general terms and conditions to Wikingerhof, the latter decided to sue Booking.com before a German court on the grounds of abuse of a dominant position based on the imposition of unfair terms and conditions.

In order to determine whether German courts had jurisdiction to hear the case, the German Federal Court of Justice requested a preliminary ruling from the ECJ on the interpretation of Article 7(2) of the Brussels I *bis* Regulation. This Article provides that "in matters relating to tort, delict or quasi-delict, [a case may be brought] in the courts for the place where the harmful event occurred or may occur".

In its recent judgment, the ECJ followed Advocate General Saugmandsgaard Øe's opinion, according to which a civil action based on an infringement of competition law concerns a non-contractual obligation and falls within the scope of Article 7(2) of the Brussels I *bis* Regulation, even when raised in the context of a contractual relationship (see VBB on Competition law, Volume 2020, No. 9).

According to the ECJ, national courts must examine the obligation founding the claim in order to determine which provision on special jurisdiction applies to an action between contracting parties. A claim relates to contractual matters if the interpretation of the contract is necessary to establish the lawful or unlawful nature of the alleged conduct. However, a claim relates to tort within the meaning of Article 7(2) of the Brussels I *bis* Regulation, when such a contractual interpretation is not indispensable for the assessment of the lawfulness of the defendant's conduct, which is alleged to be in breach of an obligation imposed by law independently of the contract.

In the present case, the civil action based on a breach of competition law refers to a non-contractual obligation, that is, a general prohibition of abuse of a dominant position. The interpretation of the contractual relationship, while useful to establish whether the practices concerned occurred, is not necessary to assess whether this rule was breached and Article 7(2) of the Brussels I *bis* Regulation is thus applicable.

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