Highlights

MERGER CONTROL
Commission adjusts merger filing process in response to COVID-19 crisis
Page 4

ABUSE OF DOMINANT POSITION
European Commission accepts commitments in Transgaz abuse of dominance investigation
Page 6

UK Court of Appeal dismisses Competition Authority appeal against CAT ruling quashing fines imposed on Pfizer and Flynn
Page 9

CARTELS AND HORIZONTAL AGREEMENTS
CMA fines four drug makers £ 3.4 million for market sharing and exchanging sensitive information
Page 10

VIRTUAL AGREEMENTS
Apple fined record-breaking € 1.1 billion for anticompetitive distribution practices in France
Page 12

STATE AID
Page 14

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS
ECN statement on application of competition law during Corona crisis
Page 17

PRIVATE ENFORCEMENT
Regional Court of Munich dismisses follow-on damages claims totalling € 600 million
Page 20

Jurisdictions covered in this issue
EUROPEAN UNION 4, 6, 14, 15, 16, 17
FRANCE 10, 12
GERMANY 6, 7, 19, 20
HUNGARY 4
ITALY 4, 8
NETHERLANDS 8
PORTUGAL 4
SPAIN 10
UNITED KINGDOM 9, 10
# Table of contents

**MERGER CONTROL**

4

**EUROPEAN UNION LEVEL**

Commission adjusts merger filing process in response to COVID-19 crisis

4

**MEMBER STATE LEVEL**

Hungarian Competition Authority reopens investigation into acquisition of digital network operator Invitel by DIGI and issues new conditional approval

4

Italian Competition Authority updates its merger notification thresholds

4

Portuguese Competition Authority allows payment of gun-jumping fine in instalments due to the COVID-19 outbreak

4

**ABUSE OF DOMINANT POSITION**

6

**EUROPEAN UNION LEVEL**

European Commission accepts commitments in Transgaz abuse of dominance investigation

6

**MEMBER STATE LEVEL**

German furniture retailer XXXLutz ceases asking for discounts after FCO expresses concerns

6

German Federal Cartel Office fines quarry owner € 80,000 for restrictive practices

7

Italian Competition Authority fines Italy’s telecommunications provider for broadband market abuse

8

Highest Dutch administrative court annuls Authority for Consumers & Markets decision requiring telecommunications providers to open networks

8

UK Court of Appeal dismisses Competition Authority appeal against CAT ruling quashing fines imposed on Pfizer and Flynn

9

**CARTELS AND HORIZONTAL AGREEMENTS**

10

**MEMBER STATE LEVEL**

French Competition Authority imposes fines on moving companies

10

Spanish Competition Authority dismantles cartel affecting supply of radars to national meteorological agency

10

CMA fines four drug makers £ 3.4 million for market sharing and exchanging sensitive information

10

**VERTICAL AGREEMENTS**

12

**MEMBER STATE LEVEL**

Apple fined record-breaking € 1.1 billion for anticompetitive distribution practices in France

12

**STATE AID**

14

**EUROPEAN UNION LEVEL**


14

Change of legal regime during the State aid investigation? The Court of Justice clarifies that interested parties do not have a right to submit any comments

15

Court of Justice further clarifies the conditions in which a legal person liable to pay a tax can plead its incompatibility with the EU State aid rules before a national court

16

**LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS**

17

**EUROPEAN UNION LEVEL**

Commission appoints second Hearing Officer for competition cases

17

---

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.
## Table of contents

**MEMBER STATE LEVEL** ................................................................. 17

ECN statement on application of competition law
during Corona crisis ................................................................. 17

**PRIVATE ENFORCEMENT** .......................................................... 19

**MEMBER STATE LEVEL** ............................................................. 19

German Federal Court of Justice further clarifies prima
facie evidence and abandons restrictive causality
requirement for cartel damages actions .............................. 19

Regional Court of Munich dismisses follow-on damages
claims totalling € 600 million ..................................................... 20
MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission adjusts merger filing process in response to COVID-19 crisis

The European Commission (the "Commission") has announced that it will face delays in its merger review process as a result of the COVID-19 pandemic. In particular, the Commission has stated that it may not be able to collect information from third parties efficiently and may have limited access to databases and exchanges of information with other agencies. The Commission is therefore encouraging companies to delay originally planned merger notifications until further notice. The Commission has also relaxed its rules regarding the acceptance of electronic submissions.

Certain Member State competition authorities, notably the French Competition Authority, as well as the UK Competition and Markets Authority, have undertaken similar measures.

– MEMBER STATE LEVEL –

HUNGARY

Hungarian Competition Authority reopens investigation into acquisition of digital network operator Invitel by DIGI and issues new conditional approval

On 18 March 2020, the Hungarian Competition Authority ("GVH") conditionally re-approved fixed telecommunications service provider DIGI's acquisition of its rival Invitel. The GVH had already conditionally cleared the acquisition in May 2018 (see VBB on Competition Law, Volume 2018, No. 5). During the 2018 investigation, the GVH conducted an unannounced on-site inspection for the first time in a Hungarian merger review procedure.

At the end of 2018, the GVH found that its decision had been based on misleading facts provided by the parties and consequently withdrew its approval. At the same time, the GVH reopened the investigation and imposed a fine for the infringement. After re-investigating the transaction, the GVH found that it gave rise to concerns in relation to several significant overlaps in the parties' businesses in fixed telecommunications services in Hungary to a greater geographic extent than originally identified based on the misleading information that had been provided. The GVH consequently approved the transaction subject to an extended list of commitments.

ITALY

Italian Competition Authority updates its merger notification thresholds

The Italian Competition Authority ("AGCM") has raised the turnover thresholds applicable to merger notifications effective 23 March 2020. Under the new thresholds, a merger must be notified and approved by the AGCM prior to implementation where:

- € 504 million in combined turnover is achieved in Italy by all the companies involved in the operation; and
- € 31 million in turnover is achieved in Italy by each of at least two of the companies involved.

PORTUGAL

Portuguese Competition Authority allows payment of gun-jumping fine in instalments due to the COVID-19 outbreak

In September 2019, the Portuguese Competition Authority ("AdC") imposed a fine of € 155,000 on Hospital Particular do Algarve ("HPA") for gun-jumping, finding that HPA had acquired sole control of Hospital de São Gonçalo de Lagos without the AdC’s prior approval.

The AdC has recently announced that it has accepted the payment of the gun-jumping fine in several instalments in order to avoid any adverse impact on HPA’s ability to provide healthcare services during the COVID-19 outbreak.
The AdC explained that by agreeing to receive payment of the fine in instalments, it maintained the continuity of competition law enforcement with a sense of responsibility towards the common good.
ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission accepts commitments in Transgaz abuse of dominance investigation

On 6 March 2020, the European Commission adopted a decision imposing commitments on Transgaz to free up capacities at interconnection points in order to allow for increased natural gas exports from Romania to Hungary and Bulgaria.

According to the Commission’s press release, Transgaz – the Romanian state-controlled natural gas transmission system operator – allegedly abused its dominant position in the market for the provision of natural gas by restricting exports of natural gas from Romania to Hungary and Bulgaria. In particular, the Commission’s press release notes that Transgaz restricted exports by allegedly: (i) underinvesting in or delaying construction of infrastructure for gas exports; (ii) imposing interconnection tariffs for gas exports making such exports commercially unviable and (iii) using unfounded technical arguments as a pretext for restricting exports.

The Commission’s press release also indicates that in addition to possibly contravening the EU competition rules, such conduct is contrary to the objective of an Integrated Energy Union and the aims of the new European Green Deal, which promote the free flow of energy across borders and the supply of secure energy to consumers and businesses.

In response to the Commission’s investigation of June 2017, Transgaz offered a first set of commitments in September 2018 to address the Commission’s concerns. According to the Commission’s press release, Transgaz subsequently amended its proposed commitments in light of the Commission’s market test results to ensure market participants could access significant volumes of export capacities via the relevant interconnection points between Romania and neighbouring Member States. Under the final commitments, Transgaz will: (i) make available minimum export capacities of 1.75 billion cubic metres of natural gas per year at the interconnection point between Romania and Hungary and 3.7 billion cubic metres per year at two interconnection points between Romania and Bulgaria; (ii) ensure its tariff proposals to the Romanian national energy regulator do not discriminate between export and domestic tariffs and (iii) refrain from using any other means of hindering exports.

According to the Commission, the final commitments adequately address the identified competition concerns. The commitments are now legally binding on Transgaz and will remain in force until 31 December 2026 with compliance monitored by an appointed trustee. Non-compliance by Transgaz could be subject to a fine of up to 10% of the company’s worldwide turnover, without the need for the Commission to prove a violation of EU competition rules. Commitments decisions do not conclude as to whether there has been a violation of the EU’s antitrust rules, but render proposed commitments legally binding on the relevant company.

– MEMBER STATE LEVEL –

GERMANY

German furniture retailer XXXLutz ceases asking for discounts after FCO expresses concerns

According to a press release and case report of 27 February 2020, the German Federal Cartel Office (“FCO”) found in a preliminary assessment that requests for special rebates of furniture retailer XXXLutz could have been abusive. After the retailer changed its conduct, the FCO decided not to examine the case any further.

For its 75th anniversary, XXXLutz had requested a 7.5% “anniversary rebate” from its suppliers, mostly small and medium-sized furniture manufacturers. The discount was to be applicable for six months. In exchange, XXXLutz promised a “substantial increase of turnover”, which was to be achieved through increased marketing activities. The suppliers received these demands via circular, with a draft
discount agreement attached, and were asked to confirm the conditions within fourteen days.

In a preliminary assessment, the FCO concluded that the above conduct may constitute an abuse of superior market power. In this respect, it is recalled that the German Act against Restraints of Competition prohibits not only the abuse of a dominant position but also the abuse of relative market power and economic dependence. It is abusive to invite or induce a dependent company to grant advantages without any objective justification.

The FCO recalled the case law of the Federal Court of Justice (“FCJ”) with regard to “wedding rebates” following the merger of grocery store Edeka and Plus (see VBB on Competition Law Volume 2018, No. 2), according to which any special discount demands must be objectively justified by an appropriate consideration. Absent such consideration, it will be assumed that the demand is not objectively justified. This assumption is rebuttable if at the time of the discount demand a guaranteed and performance-related consideration for the supplier is objectively identifiable, such as a listing or purchase guarantee for a certain period of time.

In the present case, the FCO had serious doubts as to whether the above conditions for objective justification were met. The FCO found that a flat-rate rebate which was neither supplier-specific, nor related to the goods, created an imbalance between the conflicting interests of the manufacturer and the retailer. The rebate would have amounted to a participation in the retailer’s general (advertising) costs and unilaterally promoted the interests of the dominant retailer in passing on such costs.

The FCO concluded that the mere announcement of advertising measures and expected additional sales were not sufficient consideration. It found that the amount of 7.5% of the demanded anniversary rebate was derived only from the 75-year anniversary, and was so substantial that the imbalance between the claim and the consideration was obvious.

The FCO informed XXXLutz of its assessment. XXXLutz then agreed to negotiate amount and duration of any rebates individually with each supplier and submitted the agreements to the FCO. Consequently, the negotiated discounts averaged a much lower amount than the initial 7.5% and XXXLutz offered consideration to its suppliers. In view of the considerable reduction in amount and the shorter time limits, the FCO decided not to investigate further.

In 2018, the FCO had already expressed concerns about a different rebate scheme of XXXLutz (see VBB on Competition Law Volume 2018, No. 2). At the time, the retailer had asked its suppliers to retroactively apply more advantageous contract conditions granted to Möbel Buhl subsequent to a merger clearance between XXXLutz and Möbel Buhl in November 2017. After the FCO communicated its concerns, the retailer had dropped that practice as well.

**German Federal Cartel Office fines quarry owner € 80,000 for restrictive practices**

According to a case report of 18 February 2020, the German Federal Cartel Office (“FCO”) imposed two fines totalling € 80,000 on Constantia Forst (“Constantia”) on 2 December 2019. Constantia owns two basalt quarries which are leased to two different companies: Vogelsberger Basaltwerk (“VBW”) and an unnamed competitor.

As of May 2017, Constantia repeatedly threatened VBW with premature termination of its contract in order to induce it to operate the quarry in future on the basis of a joint venture in cooperation with its competitor, as had been the case between 2000 and 2004. The FCO found that this conduct infringed section 21(2) No.1 of the German Act against Restraints of Competition (“ARC”) pursuant to which it is prohibited to threaten other undertakings with disadvantages in order to induce them to engage in conduct which may not be made the subject matter of a contractual commitment.

Constantia eventually terminated the contract prematurely in June 2017, effective January 2018, in order to have VBW exit the market and to compel VBW to sell its production assets to the competitor. Constantia expected this to increase its sales-related rental income. According to the FCO’s assessment, this conduct infringed section 21(3) No. 2 of the German ARC according to which undertakings may not compel other undertakings to merge with other undertakings.

Constantia settled without acknowledging a liability. The fining decisions are final.
ITALY

Italian Competition Authority fines Italy’s telecommunication provider for broadband market abuse

On 25 February 2020, the Italian Competition Authority (“AGCM”) fined Telecom Italia (“TIM”) € 116 million for abusing its dominant position in the broadband market by hindering its competitors’ investments in ultra-fast broadband. TIM is currently the largest telecommunication provider in Italy.

According to its press release of 6 March, the AGCM found that TIM had a dominant position on both the wholesale and retail markets for broadband and ultra-wideband services in Italy. According to the AGCM, the abuse dated from December 2016, following the entry of Open Fiber onto the markets for broadband and ultra-wideband services in Italy. In particular, TIM was found to have attempted to delay the development of fibre optic services (including FTTH, “fibre-to-the-home”) in Italy by obstructing tenders launched by the Italian government to support investment in ultra-wideband network infrastructure in disadvantaged areas (the National Ultra-Wideband Strategy, targeting so-called “white areas”).

According to the AGCM, TIM did so by: (i) unprofitably amending its coverage plans for the white areas for the duration of the tender process; (ii) undertaking legal initiatives designed to delay the tenders; (iii) restructuring its tariff pricing and terms in broadband/ultra-wideband contracts throughout Italy to foreclose Open Fiber from the relevant markets and (iv) launching promotional offers in the retail markets to lock final customers in to using TIM services.

In view of the extraordinary circumstances in Italy arising from the Covid-19 outbreak and the high amount of the fine, the AGCM’s press release notes that it has granted TIM an extended timeframe – until 1 October 2020 – in which to pay the € 116 million fine. Ordinarily, when the payment of a fine is not received by the deadline set by the AGCM, the fine can be doubled and the AGCM may order the suspension of an undertaking’s activities for up to 30 days.

THE NETHERLANDS

Highest Dutch administrative court annuls Authority for Consumers & Markets decision requiring telecommunications providers to open networks

On 17 March 2020, the Dutch Trade and Industry Appeals Tribunal (“Appeals Tribunal”) reversed a decision of the Authority for Consumers & Markets (“ACM”) which required telecommunications provider KPN and cable provider VodafoneZiggo to open their fixed networks to other providers.

On 27 September 2018, the ACM decided that KPN and VodafoneZiggo would be required to open their fixed networks to other telecom providers as of 1 October 2018 (the “Decision”).

The ACM considered on the basis of the General Court’s Airtours and Impala judgments that KPN and VodafoneZiggo jointly held a position of significant market power and were able to use that position to raise prices, adjust conditions to their advantage or delay investments. The ACM found that other providers required access to their networks to offer their services (i.e., business services and broadband access for consumers). According to the ACM, this would have given consumers more options, in addition to increasing competition. Prior to the publication of the Decision, the ACM had submitted its draft decision to the European Commission for review. On 31 August 2018, the European Commission agreed with the draft decision and provided some comments which the ACM incorporated into the Decision.

KPN and VodafoneZiggo, as well as their competitors T-Mobile and Tele2, appealed the Decision before the Appeals Tribunal. T-Mobile and Tele2 claimed that the measure adopted by the ACM was not sufficient to curb the significant market power jointly held by KPN and VodafoneZiggo.

The Appeals Tribunal first pointed out that the relevant question was not whether competition or consumer welfare on the retail market for (bundles of) internet access services would increase if KPN and VodafoneZiggo were required to provide network access under regulated condi-
tions. Instead, the relevant question was whether the ACM had met the relevant burden of proof in establishing the risk that KPN and VodafoneZiggo jointly held significant market power. The Appeals Tribunal further considered that the ACM should have based its Decision on the relevant facts and the balancing of interests. According to the Appeals Tribunal, this standard also applies to markets included in the Recommendation on relevant markets. Finally, with respect to the Airtours criteria, the Appeals Tribunal considered these together, rather than individually, ruling that the ACM failed to prove KPN and VodafoneZiggo jointly held significant market power and that the ACM’s arguments were not sufficient to demonstrate that KPN and VodafoneZiggo were engaged in tacit coordination in the retail markets for (bundles of) internet access services.

The judgment of the Appeals Tribunal is final and cannot be subject to appeal. Telecom providers without networks are therefore no longer able to demand access to KPN or VodafoneZiggo’s networks.

UNITED KINGDOM

UK Court of Appeal dismisses Competition Authority appeal against CAT ruling quashing fines imposed on Pfizer and Flynn

On 10 March 2020, the UK’s Court of Appeal dismissed the Competition and Market Authority’s (“CMA”) appeal against a 2018 ruling by the Competition Appeals Tribunal (“CAT”) that quashed the CMA’s 2016 fine imposed on Pfizer and Flynn for charging excessive and unfair prices for phenytoin sodium (an anti-epilepsy drug) capsules. Pfizer had originally been fined £84.2 million, which is a record for UK competition law, while Flynn was fined £5.2 million.

In its 2016 decision, the CMA found that Pfizer had abused its dominant position in the market for anti-epilepsy capsules. According to the CMA, Pfizer sold the anti-epilepsy drug capsules under the brand name Epanutin before transferring the UK distribution rights to Flynn. The CMA found that, after acquiring the rights, Flynn de-branded Epanutin and began to sell it as a generic medicine in the UK, meaning that it was no longer price regulated. Flynn increased the price of the drug by 2,400%. The investigation was launched when the UK’s Department of Health complained to the CMA’s predecessor, the Office of Fair Trading.

In its judgment of 10 March 2020, the Court of Appeal rejected the CMA’s claim that the fines imposed on Pfizer and Flynn should be reinstated and it largely upheld the CAT’s findings from 2018. However, the Court of Appeal did refer elements of the decision back to the CMA for further analysis.

The Court of Appeal found that the CAT was correct to find that the CMA had not sufficiently analysed comparative drugs, for example, phenytoin sodium in tablet form rather than in capsule form. It also referred the analysis in the decision on patient benefit in assessing the economic value of the medicine back to the CMA for further consideration. However, the judgment noted that the CAT was wrong to say that the CMA had to investigate comparative drugs in all cases. The Court of Appeal also found that the CAT erred in saying that the CMA is required to adopt a single approach to determine whether prices are excessive.

The case has been seen as an important test of the CMA’s powers with regard to drug pricing. The CMA has repeatedly said that it has serious concerns about price increases imposed by a number of drug companies and the CMA has reacted to this judgment by saying that it will continue to move forward with this case. Pfizer and Flynn may still face financial penalties for their conduct in due course.
CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority imposes fines on moving companies

On 23 March 2020, the French Competition Authority ("FCA") imposed fines totalling € 462,000 on five moving companies operating in the French overseas territory of Réunion for having colluded in the provision of moving services to the French army between Réunion and the French mainland. The companies involved in the infringement were AGS Réunion, A.T. Océan Indien, DEM Austral, Transdem and T2M.

The investigation started following a tip-off to the FCA from a former director of AGS Réunion alleging that players in the moving sector regularly engaged in providing cover quotes when bidding for business. Following on-the-spot inspections, the FCA found that between 2008 and 2012 the companies implicated had shared information on cost estimates of moving services between Réunion and the French mainland.

AGS Réunion was fined € 279,000, DEM Austral € 159,000 and T2M € 20,000. Transdem and A.T. Océan Indien were each fined € 2,000. Two other companies involved in the infringement, namely Cheung Déménagements and DLD Déménagements Transports, both in financial difficulty following their winding-up, were not fined.

SPAIN

Spanish Competition Authority dismantles cartel affecting supply of radars to national meteorological agency

On 13 February 2020, the Spanish Competition Authority ("CNMC") imposed fines totalling € 610,000 on three companies involved in cartelising the market for the supply of radars to the Spanish national meteorological agency ("AEMET") between autumn 2014 and the end of 2018.

At national level, the CNMC found that the members of the cartel, namely Adasa Sistemas, Schneider Electric España and DTN Services and Systems Spain, colluded to share among themselves a number of public tenders issued by the AEMET for the supply and maintenance of weather radar equipment and for the provision of related spare parts. In particular, the CNMC found that the companies involved had established various joint ventures with the sole purpose of illegally sharing the contracts at issue.

On top of the financial sanctions levied, the CNMC also imposed on the infringing companies a prohibition against entering into contracts with the public administration. The exact duration and conditions of this prohibition will be determined by the State Public Procurement Advisory Board in a subsequent decision.

UNITED KINGDOM

CMA fines four drug makers £ 3.4 million for market sharing and exchanging sensitive information

On 4 March 2020, the UK’s Competition and Markets Authority ("CMA") fined four pharmaceutical companies a total of £ 3.4 million for breaching competition law in relation to the supply of the antidepressant drug nortriptyline. The companies involved in the infringement were
King Pharmaceuticals, Auden Mckenzie, Lexon and Alissa Healthcare Research. The CMA also disqualified a director of one of the infringing companies, King Pharmaceuticals, from being a director of any UK company for seven years. The disqualification of other directors is also being considered.

In its decision, the CMA found that King Pharmaceuticals and Auden Mckenzie (now owned by Accord-UK) infringed Chapter I of the Competition Act 1998 and Article 101 Treaty on the Functioning of the European Union by sharing between themselves the supply of nortriptyline to a pharmaceutical wholesaler from September 2014 to May 2015. The CMA also fined King Pharmaceuticals, Lexon and Alissa Healthcare Research for illegally sharing commercially sensitive information, regarding prices and volumes, in order to increase nortriptyline prices between 2015 and 2017.

King Pharmaceuticals and Alissa Healthcare Research admitted to the illegal conduct and so were fined a reduced amount of £ 75,573 and £ 174,912, respectively. Lexon did not admit to breaching competition law and so was fined £ 1.2 million. Accord-UK, as the economic successor to Auden Mckenzie, was fined nearly £ 1.9 million and agreed to make a £ 1 million payment to the UK’s National Health Service (NHS), which had paid inflated prices as a result of the illegal conduct.
VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

Apple fined record-breaking € 1.1 billion for anticompetitive distribution practices in France

According to a press release of 16 March 2020, the French Competition Authority (the “FCA”) imposed a record-breaking fine of €1.1 billion on Apple for anticompetitive practices in the distribution of Apple products (excluding iPhones). These practices included: (i) restricting resale opportunities for Apple wholesalers; (ii) coordinating prices between Apple’s own stores and independent retailers; and (iii) imposing unfair terms & conditions on Apple retailers.

Apple’s two approved wholesalers, Tech Data and Ingram Micro, were also fined €76.1 million and €62.9 million respectively. The total fine imposed on the three parties is the highest fine imposed by the FCA in a single case to date.

By way of background, Apple’s distribution system in France includes two wholesalers and approximately 2,000 retailers which are supplied directly by Apple and/or by the two wholesalers. Retailers are categorised into two main categories: (i) Retailers, including large generalist stores (Auchan, Casino, Carrefour, E. Leclerc, etc.) and specialised electronics goods stores (Fnac, Darty, Bou­artner); and (ii) Resellers, including specialised authorised Apple resellers which are either Apple Authorised Resellers (AARs) or Apple Premium Resellers (APRs). In addition, Apple sells its products directly to end-consumers via its own stores (online and brick and mortar).

The FCA’s investigation was opened following a complaint by an APR, eBizcuss, in 2012.

Anticompetitive practices identified by the FCA:

1. Allocation of products and customers between Apple and its wholesalers

Apple was found to have infringed competition law by allocating retail customers between itself and each of its two wholesalers between 2005 and 2013. In particular, Apple determined the quantities of certain products each wholesaler was authorised to deliver to particular retailers.

The FCA found this practice to be anticompetitive as Apple restricted the commercial freedom of its wholesalers and limited “intra-brand” competition between the wholesalers and Apple. In addition, the FCA considered that this practice reduced downstream competition as retailers were not able to benefit from competing offers. The FCA also noted that Apple used this practice to favour its own stores.

2. Practices indirectly fixing resale prices of Apple products

According to the FCA, Apple was also found to have infringed competition law by implementing several measures which effectively dissuaded APRs from deviating from Apple’s recommended resale prices.

In particular, Apple published “recommended” resale prices for its products on numerous media, including its own webstore. In addition, the FCA noted that Apple restricted the ability of APR retailers to run promotions by requiring APRs to adhere to restrictive provisions on the use of the Apple brand and marketing materials during promotional campaigns. Failure to comply could result in immediate termination of the contract. Finally, Apple used a price monitoring system and retaliated against retailers that ran non-authorised promotions by refusing to supply products. Testimony by retailers also suggested that Apple contacted retailers that did not adhere to recommended resale prices.

These measures were collectively found to restrict the resale prices at which resellers could sell Apple products.
3. Abuse of the economic dependence of APRs on the sale of Apple products

Apple was further found to have infringed Article L. 420-2, paragraph 2, of the French Code of Commercial Law (“Code de commerce”), which prohibits the abusive exploitation by a company of the economic dependency of its customers (“abus de dependence économique”). In particular, the provision requires that a manufacturer which keeps its distributors dependent on it must take care not to abuse this dependence; it may, for example, not restrict their commercial freedom beyond the tolerable limits and not put them at a disadvantage vis-à-vis its own internal distribution network. The FCA's decision presents a rare example of a finding of an infringement of this Article, which has seldom been observed in the decision-making practice of the FCA and its predecessor (Conseil de la concurrence).

The FCA first found that APRs were in a situation of economic dependence on Apple as a result of multiple contractual clauses and practices. Namely, APR contracts required them to sell Apple products almost exclusively (as Apple products must represent at least 70% of their total sales to maintain the APR status), and APRs were prohibited during the contract term and six months post-contract from opening stores for competing products across Europe.

Moreover, the must-have status of Apple products was highlighted by statements of the APRs: all stressed that their customers were strongly attached to the Apple brand and that leaving the Apple network would result in the total loss of value of their goodwill and sunk investments. Given their already fragile situation stemming from their dependence on Apple, incurring costs for redeveloping stores and retraining of staff was impossible for APRs.

The FCA then identified several practices implemented by Apple which collectively constituted an abuse of this economic dependence through excessive restrictions on the commercial freedom of APRs, in particular: (i) delays in the supply of products and (ii) uncertain supply conditions and discount conditions.

• Delays in the supply of products

In the particular circumstances of the case, the delays and restriction of supply were considered abusive, especially as this occurred often at the time new products were launched or at the end of the year, and was not a result of stock shortages (as the same products were available on Apple's own online stores and at Retailers).

This discriminatory treatment of APRs was all the more serious in view of their particular situation. On one hand, APRs are commercially independent operators, unlike the Apple Stores, and must purchase goods in order to exercise their distribution activity. On the other hand, they are contractually forced to source Apple products and are thus placed under Apple's economic dependence, unlike Retailers, who exercise a generalist distribution activity and are not dependent on Apple.

• Uncertain supply and discount conditions

The FCA noted that APRs also faced uncertainty regarding the volume of products supplied, as well as rebates which were granted to APRs on a discretionary basis. Given the significant importance of rebates in the profitability of APRs, the unpredictability in relation to the products supplied and rebates granted constituted an abuse of their economic dependence.

The FCA found that the particular situation of eBizcuss demonstrated the concrete impact of Apple's abuse of a situation of economic dependence. Since eBizcuss was unable to receive the Apple products necessary to satisfy the demand of its own customers or to compete with Apple's own stores in terms of price or level of service, eBizcuss stores located in Paris and Lyon were placed at a commercial disadvantage compared to Apple's own stores, resulting in a 15% decrease in turnover of these stores.

The full text of the decision has not yet been published. The decision may be appealed before the French courts and each of Apple, Ingram Micro and Tech Data have issued statements indicating their intent to appeal.
STATE AID

– EUROPEAN UNION LEVEL –


In the wake of the Covid-19 outbreak and its repercussions on businesses, Member States announced that they will adopt all necessary measures to help undertakings in difficulty. The Commission, well-aware of this, has already adopted measures to guide Member States and ensure that their aid measures comply with State aid rules.

First, on 13 March 2020, the Commission adopted the Communication on the Coordinated economic response to the COVID-19 outbreak. Insofar as the EU State aid rules are concerned, the Communication, in essence, lists the options available to Member States that fall outside the scope of EU State aid control (e.g., non-discriminatory measures applicable to all undertakings, such as a suspension of payments of corporate tax) and/or that are allowed under the existing State aid legislation.

Second, on 19 March 2020, the Commission adopted the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (“Covid-19 Temporary Framework”), which complements the above-mentioned Communication. The Covid-19 Temporary Framework outlines the conditions that the Commission will apply in the context of the analysis of aid granted by Member States under Article 107(3)(b) TFEU.

As a general rule, Member States must notify their planned State aid to the Commission and demonstrate that it is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned. Moreover, the aid must comply with the specific conditions set out in the Covid-19 Temporary Framework.

In essence, this Temporary Framework identifies five categories of State aid that can, under certain conditions, be authorised.

1. Direct grants, selective tax advantages and advance payments: i.e., “temporary limited amounts of aid to undertakings that find themselves facing a sudden shortage or even unavailability of liquidity” of up to € 800,000 per undertaking, which should be granted no later than 31 December 2020 (with specific provisions for agricultural, fisheries and aquaculture sectors for which the maximum amount is lower).

2. State guarantees for loans taken by companies from banks: this type of State aid is described as “public guarantees on loans for a limited period and loan amount”, with minimum levels of guarantee premiums and specific limits on the amount of the loan principal for loans with a maturity beyond 31 December 2020. The duration of the guarantee is maximum six years and the guarantee cannot cover the entirety of the loan principal.

3. Subsidised public loans to companies: subsidised interest rates for loans of maximum six years, with specific limits on the amount of loans with a maturity beyond 31 December 2020, are authorised, provided that several conditions are met. It should be noted that the same loan cannot benefit from both a State guarantee under point 2 above and a subsidised interest rate.

4. Guarantees and loans channelled through credit institutions or other financial institutions: aid that will benefit “undertakings facing a sudden liquidity shortage […] through credit institutions and other financial institutions as financial intermediaries”. In order to limit distortions to competition, Member State must ensure that “the financial intermediary shall be able to demonstrate that it operates a mechanism that ensures that the advantages are passed on to the largest extent possible to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates”.

© 2020 Van Bael & Bellis
5. **Short-term export credit insurance: marketable risks** (i.e., commercial and political risks on public and non-public debtors established in certain countries) cannot as a general rule be covered by export-credit insurance with the support of Member States. However, due to the current outbreak, “certain countries cover for marketable risks could be temporarily unavailable”. In this context, the Covid-19 Temporary Framework gives Member States some flexibility on how to demonstrate that certain countries are non-marketable risks, which will allow them to offer short-term export credit insurance.

The Covid-19 Temporary Framework will be applied by the Commission to all relevant notified measures as of 19 March 2020 (even if the measures were notified prior to that date) and until 31 December 2020.

**Change of legal regime during the State aid investigation? The Court of Justice clarifies that interested parties do not have a right to submit any comments**

On 11 March 2020, the Court of Justice of the European Union (the “ECJ”) set aside the General Court’s (“GC”) judgment of 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v. Commission* (T-263/15, the “GC judgment”), which had annulled the Commission Decision on State aid SA.35388, concerning the setting up of Gdynia-Kosakowo airport in Poland (the “Contested decision”).

The ECJ’s judgment is interesting insofar as it clarifies the rights of interested parties in the context of State aid investigations.

At the outset of the present case, interested parties were invited to submit comments on the Commission’s decision to open the formal State aid investigation. *After* the deadline to submit these comments had expired and *before* the Commission had adopted the Contested decision, the EU legal regime applicable to the analysis of the proposed State aid changed from the *Guidelines on national regional aid for 2007-2013* to the *2014 Guidelines on State aid to airports and airlines*. The General Court answered in the **affirmative**. It held that the fact that the Commission did not invite the interested parties to comment on such a change constituted a violation of essential procedural requirements. The Contested decision was thus annulled.

On appeal, the ECJ took the **opposite view**. According to the ECJ, the fact that interested parties did not have an opportunity to submit comments on the relevance of the *2014 Guidelines on State aid to airports and airlines* could not (in itself) lead to the annulment of the Contested decision.

In this regard, the ECJ clarified that where there is a change in the applicable legal regime *after* the Commission has given the interested parties the opportunity to submit their comments and *before* it has adopted its decision, and where the Commission bases that decision on the *new legal regime* without inviting those parties to submit their comments on it, the difference between the legal regime on which those parties were given the opportunity to submit their comments and that on which the decision is based is not *per se* sufficient to annul that decision.

In particular, the ECJ ruled that the General Court erred in law when it held that the interested parties’ right to submit comments is an essential procedural requirement the infringement of which leads to the annulment of the decision, *without it being necessary* to establish that this infringement impacted on the analysis in the Contested decision.

In this regard, the ECJ held that, in the present case, the Commission had put forward sufficiently sound reasons to justify the conclusion with regard to the compatibility of the State aid, irrespective of the application of the 2014 *Guidelines on State aid to airports and airlines* to the measure at stake. These autonomous reasons sufficed to justify the findings of the Commission. Therefore, the fact that the Commission had not invited the interested parties to submit comments on the relevance of the *2014 Guidelines on State aid to airports and airlines* could not result in the annulment of the Contested decision.
Court of Justice further clarifies the conditions in which a legal person liable to pay a tax can plead its incompatibility with the EU State aid rules before a national court

On 3 March 2020, the Grand Chamber of the Court of Justice (the “ECJ”) delivered another judgment in the field of taxation and State aid (Vodafone Magyarország Mobil Távközlési Zrt., C-75/18). While this judgment does not substantially develop the case law in this field, it contains useful clarifications with regard to the conditions in which a legal person liable to pay a tax can plead its incompatibility with the EU State aid rules before a national court.

The judgment follows a reference for a preliminary ruling in proceedings between the Hungarian subsidiary of Vodafone and the Hungarian Tax authorities concerning the payment of a tax on turnover in the telecommunications sector (the “Special tax”). In this context, Vodafone argued, in essence, that the legislation providing for this tax is contrary, inter alia, to State aid rules.

In response to the allegations concerning the incompatibility of this tax with State aid rules, the ECJ held that Vodafone could not rely, before the referring court, on the argument that the exemption enjoyed by other persons from the Special tax constituted State aid, in order to avoid payment of that tax. Therefore, the Court declared the reference for a preliminary ruling inadmissible, insofar as it concerned State aid rules.

In particular, the ECJ noted, first, that Vodafone would only have the possibility to rely on the incompatibility of the tax with State aid rules if the dispute in the main proceedings concerned not an application to be exempted from the contested tax, but the legality of the rules relating to that tax. This, however, was not found to be the case in the dispute before the referring court.

Second, only taxes that form an integral part of a State aid measure – which means that their revenue is allocated for the financing of an aid measure and has a direct impact on the amount of that aid – are caught by the State aid rules. If a tax is not hypothecated to an aid measure, the unlawfulness of the aid contested under EU law is not capable of affecting the lawfulness of the tax itself.

In the present case, the tax burden borne by Vodafone is the result of a general tax. The revenue from this tax is transferred to the State budget and not allocated to the funding of a tax advantage to a particular category of recipients. In such circumstances, any illegality under EU law of the exemption from the Special tax is not capable of affecting the legality of that tax itself.
LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission appoints second Hearing Officer for competition cases

On 13 March 2020, the Commission announced that Ms. Dorothe Dalheimer has been appointed as Hearing Officer for competition cases. Her nomination follows a recruitment procedure launched by the Commission on 28 January 2019. Ms. Dalheimer took office on 16 March 2020 and joined Wouter Wils, who has been acting in the same capacity since 2010.

From 2000 to 2014, Ms. Dalheimer served in the Directorate-General for Competition, where she contributed to the preparation of Regulation 1/2003 governing the enforcement of antitrust rules, as well as to the creation of the European Competition Network (ECN). Prior to her appointment as Hearing Officer, Ms. Dalheimer worked in the European Anti-Fraud Office (OLAF), where she provided legal advice to investigators, ensured the respect of procedural guarantees, and handled cases before the European Ombudsman and the European Courts.

Hearing Officers act as independent arbiters in disputes related to the effective protection of procedural rights arising in the context of merger or antitrust proceedings. Equipped with a number of decision-making powers, they conduct oral hearings in these proceedings. To guarantee their independence, Hearing Officers are not members of the Directorate-General for Competition, but report directly to the Commissioner for Competition.

The ECN explains that it "understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers". Given this state of affairs, the ECN "will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply". According to the ECN, such measures would not be anticompetitive: either they would not amount to a restriction of competition or they would be exempted as the efficiencies generated would outweigh any such restriction. The ECN invites any company in doubt regarding the legality of a possible cooperation initiative to contact the Commission, the European Free Trade Association ("EFTA") Surveillance Authority or an NCA for informal guidance.

At the same time, the ECN also stresses that products considered essential to protect the health of consumers during the COVID-19 crisis (e.g., face masks and sanitising gel) should remain available to them at competitive prices. Therefore, the ECN declared that it would "not hesitate to take action against companies taking advantage of the current situation by cartelising or abusing their dominant position". The ECN also reminds manufacturers that they can impose maximum resale prices for their products, so as to limit unjustified price increases at the distribution level.

This Statement echoes the position recently adopted by several NCAs.

ECN statement on application of competition law during Corona crisis

On 23 March 2020, the European Competition Network (ECN), which includes the European Commission and the national competition authorities of the EU (NCAs), issued a statement on the application of competition law during the Corona crisis (the "Statement").

For instance, on 27 February 2020, the Italian Competition Authority ("AGCM") had already issued a request for information in response to complaints lodged by consumers and associations concerning claims related to hand sanitisers and disposable respiratory protection masks. The complaints relate to the alleged effectiveness of those products to protect against and/or counteract COVID-19, as well as to their unjustified and significant increase in price over the course of the previous days.
On 19 March 2020, while the Spanish Competition Authority (“CNMC”) announced that it would suspend the timelines and deadlines of all on-going investigations until 30 March 2020, as a consequence of the restrictive measures imposed by the Spanish government due to the health crisis caused by COVID-19, it added that it may continue to direct proceedings that are closely related to the COVID-19 health crisis or that are essential to protect the general interest or the basic operation of services.

On 20 March 2020, the UK Competition and Markets Authority (“CMA”) announced the creation of a “COVID-19 task-force” to tackle concerns that undertakings might take advantage of the current situation to mislead consumers, for example by charging excessive prices or making deceiving claims about their products. The CMA also issued guidance on 25 March 2020 regarding its approach to business cooperation in the context of the COVID-19 pandemic.

Similarly, the Finnish Competition and Consumer Authority (Kilpailu- ja kuluttajavirasto) indicated on 23 March 2020 that it “will resolutely intervene in cartels between companies”, and that “[t]he same will apply to abuse of a dominant position”.

On 21 March 2020, the Hellenic Competition Commission (“HCC”) also sent requests for information following numerous consumer complaints about the price of surgical masks, disposable gloves, antiseptic wipes and antiseptic solutions. The HCC made clear that it would continue to intervene, wherever and whenever necessary, to severely sanction any infringement of competition law.
PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice further clarifies prima facie evidence and abandons restrictive causality requirement for cartel damages actions

On 28 January 2020, the German Federal Court of Justice (“FCJ”) overruled a judgment of the Thuringian Higher Regional Court (see VBB on Competition Law, Volume 2017, No. 6) concerning a follow-on damages claim. The claim followed a 2013 fining decision of the Federal Cartel Office (“FCO”), which had established the existence of a bid rigging cartel in the rail track sector and imposed fines amounting to € 98 million on eight companies (see VBB on Competition Law, Volume 2013, No. 8).

The claimant, a regional transport company, acquired tracks and other products through public procurement from one unnamed cartel participant. The transport company filed a damages claim in the amount of € 42,615 before the Regional Court of Erfurt. The Regional Court of Erfurt ruled that the claimant was, in principle, entitled to damages, the amount of which was to be determined in a subsequent judgment. On appeal, the Thuringian Higher Regional Court upheld the earlier judgment. The FCJ has now overturned the judgment and remitted the case back to the Thuringian Higher Regional Court.

The issue concerned the burden of proof in the context of establishing causality and incurred damages. In principle, the burden of proof for a competition law infringement as well as for the incurred damages lies with the claimant. However, under established case law, prima facie evidence can be applied for: (i) the fact that the cartel agreement had an effect on the individual purchases (the so-called “cartel bias”) and (ii) the incurred damages. Therefore, the following reasoning would establish liability, without having to establish the actual course of events: (1) cartels typically cause damages; (2) purchases made during the duration of the cartel are typically affected by the cartel and (3) therefore, the cartel at hand must also have caused damage, unless the defendant demonstrates that the facts of the case are atypical (see, e.g., VBB on Competition Law, Volume 2019, No. 1).

First, the FCJ clarified that in determining causality, it is unnecessary to establish whether the collusive agreement actually related to the specific procurement transaction on which the claim is based, and whether the individual transaction was thus “cartel biased”. The question whether individual procurement transactions were subject to such “cartel bias” is identical to the causal link between the cartel agreement and the existence of individual damage: if it can be shown that the claimant has suffered harm that is attributable to the cartel agreement, it is also clear that the anticompetitive conduct had a detrimental effect on the transaction, in particular on the price paid.

Second, the FCJ found that the Thuringian Higher Regional Court had erred in basing its judgment on the prima facie assumption that the cartel had led to a general price increase and in finding that the defendant had failed to rebut this assumption. As the FCJ already clarified in a 2019 judgment (see VBB on Competition Law, Volume 2019, No. 1), subsequent to the Thuringian Higher Regional Court’s ruling in the present case, the prima facie approach cannot be applied to quota and customer sharing cartels, such as the one at hand.

In the present case, the FCJ reiterated that, for quota and client allocating cartels, evidence of the existence of a cartel does not amount to prima facie evidence of damages. It is not sufficient that the defendant did not rebut prima facie evidence; damages must be demonstrated by the claimant. Therefore, the FCJ stated that the Thuringian Higher Regional Court was wrong in not taking account of circumstances which would have supported the conclusion that the claimant had indeed incurred loss.

It will be for the Thuringian Higher Regional Court to reassess the case in view of the FCJ ruling.
Regional Court of Munich dismisses follow-on damages claims totalling € 600 million

On 7 February 2020, the Regional Court of Munich (the “Court”) dismissed a follow-on claim for damages brought by litigation vehicle Financialright, a registered legal services company. The claim followed a 2016 fining decision of the European Commission (the “Commission”) against participants in the truck cartel (AT.39824 – Trucks), in which the Commission had established that truck manufacturers had participated in a price-fixing cartel and imposed fines amounting to € 2.92 billion (see VBB on Competition Law, Volume 2016, No. 7).

For the purposes of the claim, Financialright bundled claims of more than 3,000 parties from 21 European countries worth over € 600 million. The claims assigned to Financialright covered approximately 85,000 individual truck acquisitions (including purchases and lease contracts). Financialright’s legal fees were paid with the help of an independent litigation financer.

The Court ruled that the assignments infringed several provisions of the German Legal Services Act and were therefore null and void. Consequently, Financialright did not have standing to bring the claims. This decision was mainly based on the finding that the Legal Services Act only authorises the provision of out-of-court legal services, such as debt collection, whereas Financialright clearly aimed at bringing an action to court.

Furthermore, the Court identified two conflicts of interests: first, between Financialright and the individual assignors since their claims were very heterogeneous as regards their chances of success; second, with regard to the litigation financer, whose profitability considerations may impact the fulfilment of Financialright’s obligations towards the assignors.

This case shows, once again, that German law maintains a restrictive approach towards class or collective claims for damages for competition law infringements.
In the centre of Europe with a global reach

VAN BAELE & BELLIS

Chausée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone:  +32 (0)2 647 73 50
Fax:    +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com