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MERGER CONTROL

– EUROPEAN UNION LEVEL –

General Court annuls Commission's prohibition of Three/O2 merger with potentially significant implications for EU merger control policy

1. Summary

On 28 May 2020, the EU General Court handed down a ruling annulling the European Commission's ("Commission") decision prohibiting the proposed acquisition of Telefónica UK ("O2") by Hutchison 3G UK ("Three"). The ruling has potentially significant implications for mergers in the telecoms sector, as well as for EU merger control more broadly. In particular, the General Court has provided important guidance as to how the Commission should apply the "significant impediment to effective competition" ("SIEC") standard when evaluating mergers that do not create or strengthen a dominant player in an oligopolistic market.

2. The Commission decision

In 2016, the Commission analysed a proposed merger between Three and O2, two of the network operators active on the mobile telephony retail market in the UK. The UK mobile network sector features four main players: Three, O2, BT/EE and Vodafone. Several smaller, "virtual" mobile operators – including Tesco Mobile and Virgin Media – also operate on the UK retail market, by purchasing wholesale network access from these four network operators. In addition, the four network operators have concluded two network sharing agreements: Three and EE are part of the Mobile Broadband Network Limited joint venture ("MBNL") and O2 and Vodafone are part of the "Beacon" network sharing agreement.

The Commission concluded that the €10 billion transaction posed a significant impediment to effective competition based on three theories of harm:

- First, the Commission found that the proposed merger would have removed an important competitor in the oligopolistic mobile telecommunications market, reducing the number of UK mobile operators from four to three. The Commission concluded that this would have led to an increase in prices, a restriction of choice for consumers and a reduction in the quality of service for consumers.

- Second, the Commission considered that the merger would negatively impact the two network sharing agreements in the UK. As a member of both arrangements, the merged entity might weaken EE and Vodafone and have an incentive to reduce investment in network infrastructure to the detriment of consumers.

- Third, the Commission felt that the merger would negatively affect the wholesale market by reducing the number of mobile operators wanting to host "virtual" mobile operators on their networks.

The parties offered a range of remedies designed to address the Commission's concerns. However, the Commission rejected the remedies as insufficient and prohibited the transaction.

The hard line that the Commission took on this transaction was not unexpected, as under Competition Commissioner Margrethe Vestager, the Commission has generally opposed "four-to-three" mergers in the telecommunications sector that did not provide for remedies allowing for the entry of a new market player. Shortly before this prohibition decision, another proposed "four-to-three" merger between Telenor and TeliaSonera in Denmark collapsed after the parties withdrew from the transaction citing Commission opposition. While the Commission had emphasized that it had no "magic rule" as to how many operators were necessary to maintain effective competition, its prohibition of this merger appeared to confirm the view that each country needed a minimum of four.

3. The General Court judgment

The General Court, in a rare ruling, annulled the Commission's decision in its entirety, rejecting each of the Commission's theories of harm on substantive grounds. The General Court first analysed how the EU Merger Regulation ("EUMR"), and specifically the SIEC standard, should be applied in oligopolistic markets. It then considered whether the Commission had met the SIEC test with regard to each of its theories of harm.

3.1. The legal framework

In 2004, the introduction of the new EUMR changed the test that the Commission applies in assessing whether a merger should be cleared or prohibited. Under the previous version of the Merger Regulation, the Commission was required to assess whether a transaction would create or strengthen a "*dominant position*". As a result, the Commission had technically no power to prohibit a transaction that did not create or strengthen a dominant position, even if the merger would significantly impede effective competition by increasing the probability of collusion (coordinated effects) or removing important competitive constraints produced by a particular competitor (unilateral effects). While the concept of a collective dominant position, developed by the Commission and endorsed by the Court of First Instance in *Gencor* (Case T-102/96, *Gencor v. Commission,* 25 March 1999), made it possible to address coordinated effects, unilateral effects could not be captured under the original dominance-based test. To plug this perceived enforcement gap, the current EUMR specifies that the Commission is empowered to prohibit any transaction that would "*significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position*"¬¬. This is known as the SIEC test. The Three/O2 judgment is an occasion for the European Courts to clarify how the Commission should apply this test.

The General Court held that the SIEC test must be interpreted as allowing the Commission to prohibit concentrations that, while neither creating nor strengthening a dominant position, are liable to affect the competitive conditions on the market to an "*equivalent*" extent, and give the merged entity the power to "*determine, by itself, the parameters of competition*" and to "*become a price maker instead of remaining a price taker*".

The General Court consequently considered that for the SIEC test to be met, these significant "non-coordinated effects" of the transaction (namely where the merged entity is able to unilaterally exercise market power) must result in both: a) the "*elimination of important competitive constraints that the merging parties had exerted on each other*" and b) "*a reduction of competitive pressure on the remaining competitors*". Importantly, the General Court clarified that the "*mere effect*" of reducing competitive pressure on the remaining competitors is not enough for a transaction to satisfy the SIEC test. If it were, then any merger reducing the number of competitors in an oligopolistic market – which would inevitably reduce competitive pressure – could be prohibited.

The General Court then examined the standard of proof that is required for the Commission to meet when applying the SIEC test. The judgment finds that the more prospective or uncertain a theory of harm, or the more it stems from a cause-and-effect relationship which is difficult to establish, the "*more demanding the Courts of the European Union must be*" in examining the evidence submitted by the Commission. Specifically, the EUMR requires that the significant harm to effective competition posed by a merger be direct and immediate to justify a prohibition. The General Court therefore concluded that when a Commission's prohibition decision rests on a body of complex indicia pointing to multiple theories of harm, the Commission "*is required to produce sufficient evidence to demonstrate with a strong probability*" that the transaction will pose a significant impediment to effective competition. The General Court clarified that this standard of proof was stricter than an "*on the balance of probabilities*" assessment, for which the Commission had argued, but should be less strict than "*beyond all reasonable doubt*".

The General Court then examined whether the Commission had correctly applied the SIEC test and met this burden of proof with respect to each of the three grounds on which it had prohibited the transaction.

3.2. The three theories of harm in the Commission decision

1.1.1 Non-coordinated effects on the retail market

The Commission claimed that the transaction would have significantly impeded effective competition on the retail

market for mobile telecommunications in the UK. Specifically, the Commission found that Three is an important competitive force on the market and that Three and O2 compete closely. The Commission also relied on an upward pricing pressure assessment to show that the transaction would likely lead to higher prices on the retail market.

The General Court, however, held that the Commission had failed to show that Three was an "important competitive force". Specifically, it found that the Commission had made both an error of law and an error of assessment in concluding that an undertaking exercising an "important competitive force" does not need to necessarily stand out from its competitors in terms of its impact on competition. This position, the General Court noted, would allow the Commission to treat any undertaking exerting competitive pressure in an oligopolistic market as an "important competitive force" and to block any such merger on this basis. The General Court then concluded that the Commission's assessment of the evidence produced in this case – relating to Three's gross add share (*i.e.*, the share of new customers won), the development of its customer base, its pricing policies and its historical role on the market – was insufficient to demonstrate that Three should be considered an important competitive force.

Regarding the closeness of competition between Three and O2, the General Court held that while the Commission might have established that the parties were relatively close competitors in some segments of the concentrated market, that factor alone was "*not sufficient to prove, in the present case, the elimination of important competitive constraints, which the parties exerted upon each other and cannot suffice to establish a significant impediment to effective competition*". In other words, in an oligopolistic market, the Commission could not simply show that the parties were close competitors but should have assessed whether they were particularly close competitors to one another as compared to the remaining competitors.

Finally, the General Court confirmed that, while the Commission could take an "upward pricing pressure" ("UPP") into account, by its own admission the results of this analysis relied on a limited number of inputs. Therefore, the General Court concluded that the Commission's analysis did not demonstrate to the requisite evidentiary standard that the transaction would lead to an increase in prices, nor did it adequately justify why this increase should be considered significant. The General Court also found that the Commission's quantitative model should have taken into account certain standard efficiencies, such as the reduction in employees or elimination of duplicate structures, as part of the calculation of whether the merger was capable of producing restrictive effects.

In short, the General Court concluded that the Commission's assessment that the concentration would give rise to a significant impediment to effective competition on the retail market was not supported by the evidence and analysis the Commission had produced in its decision.

1.1.2 Non-coordinated effects from disrupting network sharing agreements

The two network sharing agreements between the four mobile network operators in the UK allow the mobile network operators to share the costs of expanding their networks, while still competing at the retail level. The Commission found that the transaction would hinder the future development of the mobile network infrastructure in the UK, as the merged entity would have been party to *both* network sharing agreements, while its remaining two competitors would each be party to only one. According to the Commission, the merged entity's interests would no longer be aligned with those of its network partners, leading it to potentially favour one of the two network sharing agreements or reduce spending on network infrastructure overall. Moreover, the Commission contended that the merged entity would have visibility into the network plans of both competitors and that this increased transparency would reduce the level of competitive pressure between operators.

The General Court, however, observed that although network sharing arrangements could be pro-competitive, the Commission did not show that the possible disruption or even termination of these agreements would meet the SIEC test. Indeed, their disruption could alternatively result – as Three had argued – in greater infrastructural competition between parties to the agreements. The General Court also concluded that the Commission had failed to show that the other party to the network sharing agreement would simply cease to invest in the network as a result of the merger. Finally, the General Court also concluded that the Commission's concerns about increased trans-

parency between the network plans of both competitors were unfounded, as they were premised on the continued existence of two distinct network sharing arrangements post-merger – a scenario that the Commission's own analysis had revealed to be unlikely.

1.1.3 Non-coordinated effects on the wholesale market

Lastly, the Commission had argued that the loss of Three as an "important competitive force" and the reduction in the number of host mobile network operators would have placed the virtual mobile network operators (such as Virgin Media and Tesco Mobile) in a weaker negotiating position in obtaining wholesale network access.

The General Court disagreed, noting that Three's wholesale market share (0-5%) does not suggest that its absence would result in a significant impediment to effective competition, nor that it should be considered an "important competitive force". Moreover, the combined market share of the two parties would likewise not suggest that the merger would pose a significant impediment to effective competition on the wholesale market.

4. Conclusions

The General Court's ruling has established that, where the Commission assesses the non-coordinated effects of a merger in an oligopolistic market, it can only prohibit a transaction in which there is a significant impediment to effective competition "equivalent" to that of the creation or strengthening of a dominant position because the transaction both eliminates important competitive constraints the parties had imposed on each other and reduces competitive constraints on the remaining competitors. The General Court has also clarified that the evidentiary burden the Commission must meet to demonstrate this effect is higher than a mere balance of probabilities.

This ruling raises the evidentiary bar for the Commission to block mergers in oligopolistic markets where the merger does not result in the creation or strengthening of a dominant position, not just in the telecommunications sector but in other industries as well. As the Commission will need to meet a high evidentiary standard in such cases, it is likely that case teams will request even more detailed information from the merging parties, as well as third parties, in order to bolster its case in the event of an appeal. The EU merger control process has already become far lengthier and document-heavy in recent years, and this development may further add to the costs and burdens on the merging parties.

Given the implications of the ruling, it seems very likely that the Commission will appeal the ruling to the Court of Justice of the European Union. The Commission has said that it is "urgently analysing" the ruling. It has two months and ten days from the date of notification of the decision to decide whether to appeal.

Commission conditionally clears Elanco's acquisition of Bayer's animal health division

On 8 June 2020, the Commission announced its conditional clearance of Elanco's purchase of Bayer's animal health division ("BAH"). Both Elanco and BAH are global developers and suppliers of veterinary pharmaceuticals, and the transaction will establish the largest animal health company worldwide.

During its Phase I investigation, the Commission raised a number of competition concerns with regard to the supply of particular veterinary products. Specifically, the Commission considered that both companies held strong positions or faced a limited number of competitors with regard to otitis treatments for pets, anticoccidials for cattle and sheep and parasiticides for pets.

To address these concerns, Elanco offered to divest BAH's family of pet endoparasiticides at EEA and UK level (Drontal and Profender brands). Elanco also offered to divest its own pet otitis treatment (Osurnia) and its anticoccidial for cattle and sheep (Vecoxan) globally. These commitments included the divestment of these brands, as well as all related pipeline products, licences, contracts, studies and data. The divestments eliminated the horizontal overlaps between the parties that had raised concerns, and the Commission cleared the transaction in Phase I.

Commission maintains adjustments to merger filing process made in response to COVID-19 crisis

The European Commission (the "Commission") continues to encourage companies to discuss the timing of any proposed mergers with the relevant case team in light of the COVID-19 pandemic, as it anticipates that it may still

face difficulties in collecting the information necessary to conduct its review, in particular from third parties such as customers and competitors. Nevertheless, the Commission notes that it is ready to assist parties that demonstrate a compelling reason why their merger notification should proceed quickly. The Commission is also maintaining its relaxed rules regarding the acceptance of electronic submissions.

OECD holds session on "start-ups, killer acquisitions and merger control"

From 10-12 June 2020, the OECD held its 133rd Meeting of the Competition Committee. This session was devoted to assessing the sufficiency of current merger control frameworks to investigate and – where needed – prohibit mergers that eliminate nascent competition that would otherwise challenge incumbent companies.

These so-called "killer" acquisitions have become an increasing focus of competition authorities, both in the EEA and in other jurisdictions. Start-ups or companies with promising pipeline products that have not yet acquired significant turnover or market share can nevertheless play an important role as competitive constraints to more established market players. The acquisition of these nascent companies and their elimination from the market by larger rivals can therefore harm future competition and consumers. However, because most national merger thresholds take into account either past turnover or market share, competition authorities often lack the ability to review these killer acquisitions. Moreover, the theories of harm and methods of assessment that competition authorities have historically used to assess the impact of more conventional mergers may not be ideally suited to evaluate accurately the competitive impact of mergers with nascent competitors.

The OECD Competition Committee considered these concerns in consultation with representatives of competition authorities from a variety of jurisdictions and other competition law experts and practitioners. The OECD issued a background paper on the topic, which is available here. The European Commission and authorities from Belgium, France, Germany, Norway, Portugal and Spain submitted position papers addressing the issue from the viewpoint of the applicable legislation in their respective jurisdictions. The European Commission's contribution, available here, noted in particular that while killer acquisitions raise complex issues, the current EU merger control tools appear sufficiently flexible and sound to cope with the challenges that these acquisitions raise.

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch court annuls State Secretary's authorisation of acquisition of Sandd by PostNL

On 11 June 2020, the Rotterdam District Court (the "Court") annulled the authorisation of the acquisition of postal services provider Sandd by rival PostNL. The transaction had been authorised by the State Secretary for Economic Affairs and Climate Policy (the "State Secretary") after receiving an initial prohibition from the Dutch Authority for Consumer & Markets ("ACM").

In April 2019, PostNL had requested an authorisation from the ACM for the planned acquisition of Sandd. On 5 September 2019, the ACM refused to grant a Phase 2 authorisation, after it found that the merged entity would hold a monopoly on the Dutch postal delivery market, as well as lead to other significant obstacles to effective competition post-transaction.

In the event the ACM refuses to grant an authorisation for a concentration, the Dutch Competition Act authorises the State Secretary to allow the transaction to proceed, if he or she considers that "serious reasons" of general public interest override the anticipated adverse effects on competition. The State Secretary granted such an authorisation on 27 September 2019, at PostNL's request. The State Secretary attached several conditions to the authorisation. In particular, she obliged PostNL to grant other postal operators access to its network.

Two third parties appealed this authorisation to the Court on both procedural and substantive grounds.

With respect to the procedure, the Court found that the four-day consultation period established by the State Secretary was insufficient for third parties to express their views on PostNL's obligation to grant access to its network.

With regard to the substance, the Court first stressed that a high standard of review should be applied to the facts, interests and reasoning underpinning the State Secretary's decisions in such cases. The authorisation functions as an exception to the Dutch Competition Act, according to which competition concerns normally take precedence. Therefore, the State Secretary has an obligation to clearly disclose the "serious reasons" of public interest she identifies, the expected impediments to competition that exist, and explain her reasoning as to why the balance of these concerns necessitates granting the authorisation.

The Court held that the State Secretary had not sufficiently substantiated her authorisation. First, the Court ruled that the State Secretary had not sufficiently laid out the anticipated impediments to competition. In particular, she did not address the risks to competition in adjacent markets as identified by the ACM.

Second, the Court found that the State Secretary had insufficiently substantiated that serious public interests existed in this case. In particular, the State Secretary failed to rebut the findings of the ACM, and relied only on findings made by PostNL and an analysis submitted by PWC, which was commissioned by PostNL, in conducting her risk assessment. The Court also rejected the argument that Sandd would have exited the market due to being in poor financial condition. The ACM had previously found that Sandd would have likely remained on the market absent the acquisition by PostNL. Finally, the Court found that the State Secretary had not sufficiently demonstrated that risks to employment were greater without the merger.

The Court consequently annulled the State Secretary's authorisation decision. The Court noted that it was aware that the annulment would have far-reaching consequences and that it did not know whether the merger could, in fact, still be unwound. The Court, however, refused to maintain the legal consequences of the authorisation as requested by PostNL.

It is uncertain whether the State Secretary will grant a new authorisation for the merger or not. However, it is reported that the State Secretary will appeal the judgement.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice preliminarily confirms Facebook's abuse of dominance and makes the order to amend Facebook's data processing practices immediately enforceable

On 23 June 2020, the German Federal Court of Justice ("FCJ"), in summary proceedings, preliminarily confirmed the finding of the Federal Cartel Office ("FCO") that Facebook had abused its dominant position. It overturned the decision of the Higher Regional Court of Düsseldorf that had suspended the FCO's order against Facebook to amend its data processing practices.

On 6 February 2019, the FCO concluded administrative proceedings (see VBB on Competition Law 2019, Volume No. 2) finding that Facebook abused its dominant position on the German market of social networks financed through targeted advertisement by making the private use of the Facebook social network ("Facebook.com") by users residing in Germany contingent upon the processing of user and device-related data: (i) from several services belonging to Facebook such as WhatsApp, Oculus, Masquerade and Instagram and (ii) from third-party websites and mobile apps via programming interfaces ("Facebook Business Tools"), and by attributing that information to Facebook.com user accounts without the users' consent. The decision did not assess the processing of data on the use of the Facebook social network itself.

The FCO concluded that Facebook's comprehensive processing of personal data from other corporate services and Facebook Business Tools violated data protection requirements including those in the GDPR. The processing of data was not considered to be justified since, due to the lack of genuine or free choice, there was no voluntary consent of users to the Facebook terms and the data processing was not considered necessary for the performance of the contract. The FCO found that Facebook's dominant position was causal for the violation of data protection requirements. It prohibited Facebook's data processing policy under investigation and ordered Facebook to amend its data and cookie policies accordingly within a period of twelve months.

Facebook appealed the decision to the Higher Regional Court of Düsseldorf and requested an injunction against the immediate application of the measures imposed by the FCO.

On 26 August 2019, the Higher Regional Court of Düsseldorf granted Facebook's request for an injunction (see VBB on Competition Law 2019, Volume No. 8). As a result, Facebook was not obliged to comply with the FCO's requirement to change its data processing policy pending its appeal.

In the summary proceedings, the Higher Regional Court of Düsseldorf expressed serious doubts about the legality of the FCO decision. In its view, the FCO had failed to prove that Facebook engaged in an exploitative abuse by imposing terms and conditions that differ from those that would probably result from effective competition. In relation to the alleged exclusionary abuse, it found that the conduct did not have anticompetitive effects. It considered that the transmission of user data to Facebook could easily be duplicated, that the FCO did not sufficiently demonstrate that Facebook engaged in excessive data processing and that users did not lose control over their data, as they gave free consent without being under coercion. The user's failure to read the terms and conditions did not result from Facebook's dominant position, but from the indifference or convenience of the average Facebook user.

The Higher Regional Court of Düsseldorf did not assess whether Facebook's data processing policies comply with data protection rules, as it did not consider this relevant for the question whether the conduct is harmful to competition. It preliminarily concluded that Facebook's dominance did not cause an infringement of data protection law.

Upon further appeal by the FCO, the FCJ overturned the decision of the Higher Regional Court of Düsseldorf to suspend the FCO's order against Facebook's data processing practice. According to the press release, the FCJ did not have any serious doubts about Facebook's dominant position in the German market for social networks nor about the fact that Facebook is abusing this dominant position with the terms of use prohibited by the FCO.

The FCJ sees the abuse of dominance in the use of terms and conditions that leave no choice to private Facebook users whether: (i) they want to use the social network with a highly customised user experience, which comes with potentially unlimited access of Facebook to characteristics of their "off-Facebook" internet use, or (ii) whether they only want to agree to a personalisation based on the data they themselves disclose on facebook.com.

The FCJ concluded that the lack of choice for Facebook users restricts their personal autonomy and the protection of personal information, also safeguarded by the GDPR. In view of the high barriers for users to switch (lock-in effects), it also constitutes an exploitative abuse under competition law because, due to Facebook's dominant position, there is no longer an effective control mechanism. If competition in the market for social networks were functioning properly, an offer for users who would prefer a lower level of disclosure of personal data would likely exist. Users for whom the extent of data disclosure is an essential decision criterion could switch.

The FCJ further found that the terms used by Facebook likely restrict competition. Facebook's access to a considerably larger database further reinforces the already existing lock-in effects. In addition, this larger database improves the possibilities of financing the social network with the proceeds from advertising contracts, which also depend on the scope and quality of the available data.

Furthermore, in view of the negative effects on competition in relation to advertisement contracts, the FCJ does not rule out that Facebook also engages in an abuse on the online advertisement market. It explains that, contrary to the opinion of the Higher Regional Court of Düsseldorf, there is no need to establish that there is a separate market for online advertising for social media and that Facebook also has a dominant position on this market. According to the FCJ, the restriction does not have to occur on the market where the company is dominant but may also concern a non-dominated market.

The decision of the FCO was followed with great interest because it was the first time that an abuse of dominance was based on the infringement of data protection law. Interestingly, neither the Higher Regional Court of Düsseldorf nor the FCJ considered it necessary to assess whether Facebook's data processing policy infringed GDPR in order to decide on an abuse of dominance under competition law.

Facebook's main appeal is still pending with the Higher Regional Court of Düsseldorf.

THE NETHERLANDS

Dutch Court of Appeal dismisses claim that Funda's self-preferencing strategy was abusive

On 26 May 2020, the Amsterdam Court of Appeal (the "Court") handed down its judgment in the dispute between the real estate agent association VBO ("VBO") and Funda Real Estate ("Funda") and the Dutch Association of Real Estate Agents ("NVM"). The Court upheld the judgment of the District Court finding that Funda's self-preferencing strategy which favoured advertisement by NVM, a Funda founder and shareholder, on its online platform did not constitute an abuse of a dominant position.

The website www.funda.nl is an online real estate platform in the Netherlands and is owned by Funda. NVM is co-founder of the website and indirectly holds shares in Funda. Funda has agreements with other real estate associations, such as VBO, the terms of which allow members of those associations to post property advertisements on Funda's online platform. NVM members receive preferential treatment in terms of lower tariffs, more functionalities and a higher ranking of their properties on the online platform. VBO initiated civil proceedings against the preferential treatment of NVM, which it viewed as discriminatory against it.

In March 2018, the District Court ruled that the application of unequal conditions by a company holding a dominant position is not as such prohibited, as abuse can only occur if the competitive position is affected. According to the District Court, VBO had failed to demonstrate that the discrim-

ination regarding tariffs and functionalities and the higher ranking of NVM properties on Funda's online platform distorted the competitive position between real estate agencies. VBO appealed the findings of the judgment.

The Court upheld the decision of the District Court. Referring to the *MEO/Autoridade da Concorrência* judgment of the Court of Justice of the European Union, the Court noted that there is no specific conduct that *per se* leads to abuse; rather, to prove an abuse of a dominant position, individual analysis and investigation of the circumstances are necessary. To analyse whether the discriminatory conduct of Funda produced a competitive disadvantage for VBO vis-à-vis other real estate agencies on the downstream markets for real estate services, VBO had to provide the Court with the relevant parameters of competition, such as a description of the downstream markets, their supply and demand structure, the existence of entry barriers and other relevant factors. The Court noted that VBO had not furnished such evidence.

The Court found that VBO had not sufficiently demonstrated that a lower ranking could lead to a distortion of competition between real estate agents. The Court also rejected the comparison made with the Commission decision in the *Google Search (Shopping)* case. The Court reasoned that persons looking to buy real estate property generally undertake a long, intensive and targeted search on the website, and will not presume that the highest-ranked search result is necessarily the best option. Therefore, the Court considered the ranking in the present case to be of minor importance.

The Court also found that VBO had not demonstrated that the higher tariffs paid by VBO members and the limited access to the platform's functionalities compared to those enjoyed by NVM members resulted in a competitive disadvantage for VBO members.

Lastly, the Court also dismissed VBO's claim that Funda should grant access on the same terms as NVM members to the NVM database which includes information on previous real estate transactions. The Court noted that VBO had not demonstrated that this database should be considered as an *essential facility*, as access to the NVM database on the same terms as NVM members was not indispensable for VBO members to compete in the relevant markets.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

UNITED KINGDOM

Mastercard and Visa lose UK Supreme Court appeal on interchange fees

On 17 June 2020, the UK Supreme Court dismissed Mastercard and Visa's appeal against a 2018 ruling by the Court of Appeal of England and Wales and ruled that their multilateral interchange fees ("MIFs") unlawfully restricted competition. The Supreme Court's ruling potentially exposes Mastercard and Visa to further damages claims from retailers.

The case follows a European Commission decision from 2007 finding that Mastercard's MIFs, which are charged between a retailer's and card issuer's banks when a purchase is made, breached antitrust rules and were illegally high for more than 15 years. In 2014, the Court of Justice of the European Union (the "Court of Justice") also ruled that MIFs were a "by effect" restriction of Article 101(1) TFEU that forbids anticompetitive agreements.

Mastercard and Visa had previously asked the Court of Appeal to dismiss follow-on damages claims launched against them by Sainsbury's, Asda, Morrisons and Argos, arising out of the Court of Justice's ruling. However, the Court of Appeal found that it was bound by the Court of Justice's ruling confirming that interchange fees are an anticompetitive agreement under EU law. Nonetheless, it sent the claims against Mastercard back to the Competition Appeal Tribunal ("CAT") to determine if the MIFs could benefit from Article 101(3) TFEU, which permits otherwise anticompetitive agreements if they provide sufficient economic benefits.

Visa and Mastercard appealed against the Court of Appeal's ruling before the Supreme Court. They argued, first, that the Court of Justice's ruling was not binding because the UK damages claims concerned domestic rates rather than MIFs across the European Economic Area ("EEA"). Secondly, they argued that the Court of Appeal required them to satisfy too high an evidential standard to show that their MIFs were exempt under Article 101(3) TFEU. Thirdly, Visa disagreed with the Court of Appeal saying that, in order to show that consumers receive a fair share of the benefits generated by the MIFs, which is necessary to meet Article 101(3) TFEU, Visa had to prove that the benefits to merchants outweighed the disadvantages. Lastly, both credit card companies claimed that the Court of Appeal wrongly required them to prove the exact amount of loss that retailers passed on to consumers in order to reduce damages.

The Supreme Court rejected the first ground and held that the EEA MIFs that were found to be restrictive of competition by the ECJ were materially indistinguishable from the UK MIFs. On the second ground, the Supreme Court said that the Court of Appeal was right to require that Mastercard and Visa meet a more onerous evidential standard by supplying more facts and empirical data on the benefits and efficiencies of the interchange model to prove that it should benefit from Article 101(3) TFEU. On the third ground, the Supreme Court said that the Court of Appeal was correct to say that to satisfy Article 101(3) TFEU, it was not enough to only refer to benefits for cardholders. However, on the last ground the Supreme Court agreed that the Court of Appeal had erred in requiring Mastercard and Visa to prove the exact amount of loss that retailers passed on to consumers in order to reduce damages.

Importantly, the Supreme Court also approved an additional cross-appeal brought by three of the retailers objecting to the Court of Appeal's ruling sending the claim against Mastercard back to the CAT to determine if Article 101(3) TFEU had been met. The Supreme Court in its judgment said that Mastercard had failed to discharge the burden on it of demonstrating that a MIF set at any positive level would have met the test for exemption under Article 101(3) TFEU.

The Supreme Court's ruling now allows Sainsbury's, Asda, Morrisons and Argos, as well as other retailers who wish to launch claims against Mastercard and Visa, to proceed to trial to assess the amount of their damages.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

Paris Court of Appeal upholds dismissal of French car repairers' complaints against Hyundai's alleged discrimination in determining membership of its authorised repair network

On 4 June 2020, the Competition Chamber of the Paris Court of Appeal (the "Court") handed down a judgment dismissing the appeal filed by three car repairers (the "Claimants") against a decision of the French Competition Authority (the "FCA") to reject their complaint against Hyundai Motor France ("Hyundai") for alleged discrimination in the appointment to Hyundai's authorised repair network.

By way of background, in 2016, two of the Claimants received notice of the termination of their respective authorised repairer agreements from Hyundai. The third Claimant had its request to be appointed as an authorised stand-alone repairer rejected by Hyundai. As a result, the Claimants submitted a complaint to the FCA, arguing that Hyundai maintained a general discriminatory policy within its selective distribution system aimed at excluding from its network stand-alone repairers which were not also authorised car dealers. This, they argued, infringed Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and the French law equivalent. Although the FCA accepted that, under the current competition law regime, all qualified candidates should be appointed as stand-alone repairers (assuming the market share thresholds of the Vertical Agreements Block Exemption are exceeded), it dismissed the complaint finding that it was not sufficiently supported. In so doing, it noted that Hyundai's specified repairer selection criteria appeared to comply with the competition rules in that they were qualitative and, furthermore, there was no indication that Hyundai indirectly applied other quantitative criteria which excluded stand-alone repairers such as the Claimants. As noted in the FCA's press release (but not the decision), there were in fact specific, objective reasons why the Claimants had been excluded, even if Hyundai had not informed them of these reasons at the time.

Before the Court, the Claimants challenged a number of aspects of the analysis underlying the FCA's decision, alleging that this in effect conferred on Hyundai more discretion than was consistent with the strict requirements of the case law of the Court of Justice in *Metro v. Commission* (according to which a selective distribution network escapes the prohibition of Article 101(1) TFEU only if it is based on objective criteria which are necessary for the proper distribution of the products and are applied in a uniform and non-discriminatory manner to all potential resellers). They criticised the FCA for, among other reasons, failing to examine the *validity* of the reasons put forth *ex post* by Hyundai to justify the terminations of/refusal to appoint the Claimants, arguing that only serious violations of commercial or financial obligations could justify their exclusion. The fact that Hyundai had not invoked these reasons at the time the Claimants were excluded, citing at that time only its contractual freedom to do so, was argued by the Claimants to support their claim that Hyundai engaged in a general discriminatory policy, along with other evidence they claimed had been ignored by the FCA. The Claimants also faulted the FCA for having failed to examine the anticompetitive effects of the exclusion of stand-alone repairers from Hyundai's authorised repairer network.

In response, the Court found that Hyundai's failure to specify reasons at the time of termination was not evidence of illegal conduct. This is because the head of an authorised network may always terminate agreements concluded for an indefinite duration, such as Hyundai's authorised repairer agreements, provided it complies with the contractual terms (which in this case allowed for termination, without cause, on two years' notice). Similarly, the head of an authorised network may also decline to admit into its network an operator which does not satisfy the admission criteria. On this basis, the Court rejected

the claim that the FCA had been wrong to recognise that a network operator has a certain degree of discretion in deciding the composition of its network. But the Court considered that the FCA had rightly recognised the limits to this degree of contractual freedom, by emphasising how *Metro* required that the selection criteria should be applied in a uniform and non-discriminatory manner.

The Court considered that the evidence submitted to the FCA by Hyundai demonstrated that the reasons for the terminations/refusal to appoint were both objective and non-discriminatory. These reasons related to the financial distress of the contracting party, the violation of the prohibition on reselling new Hyundai vehicles outside the authorised dealership network and the breakdown of trust between the parties. Beyond this, it would be fair to say that the Court did not require a particularly rigorous application of the *Metro* criteria. First, it held there was no need for the FCA to determine whether the Claimants had committed serious violations of their commercial or financial obligations, as that was not relevant in establishing whether there was discrimination. Second, in this type of proceeding, the Court considered that it did not need to assess the merits of Hyundai's reasons to terminate/refuse to appoint.

In addition, pointing to the facts of other cases of termination and overall trends within the network, the Court did not view the evidence as suggesting that Hyundai maintained a general discriminatory policy excluding standalone repairers.

Finally, since the evidence was insufficient to establish the existence of the alleged discriminatory policy, the Court considered that the FCA was under no obligation to further examine the anticompetitive effects of the alleged conduct.

As a result, the Court upheld the FCA's decision.

Subject to any appeal to the French Supreme Court, the ruling confirms that, while the head of an authorised network has the freedom to invoke the contractual right to terminate agreements with its authorised repairers without reason or to refuse to appoint certain repairers, there must be (at least) objective, non-discriminatory reasons for so doing in order to prevent the system failing to meet the *Metro* criteria.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

UNITED KINGDOM

UK High Court rules that complying with a court-ordered disclosure in patent infringement proceedings does not breach competition law

On 2 June 2020, the UK High Court delivered a judgment in a case pitting pharmaceutical companies Teva UK Limited ("Teva") against Chiesi Farmaceutici ("Chiesi") in which Mr Justice Birss ruled that complying with a court-ordered disclosure in patent infringement proceedings does not breach Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and the equivalent provisions of the UK Competition Act.

In October 2019, Teva brought an action against Chiesi seeking to have three patents held by Chiesi over asthma treatments revoked. Chiesi countered that Teva had threatened and intended to infringe the patents at issue by developing a competing product. It therefore requested the court to order Teva to disclose information related to its asthma treatment product. Teva refused, arguing that the provision of this information would in and of itself constitute collusion between the parties and would amount to the unlawful sharing of commercially sensitive information, which is prohibited under Article 101 TFEU. According to Teva, this was particularly true since Teva and Chiesi could be regarded as potential competitors within the meaning of EU law (as applied, in particular, in Case C-307/18, *Generics (UK) and Others*).

In response, Chiesi argued that:(i) a court-ordered disclosure was not tantamount to an illegal exchange of information within the meaning of Article 101 TFEU because there was no concerted practice or any sort of collusion between the parties, as explained by paragraph 60 of the Horizontal Guidelines, and (ii) there was no suggestion that the practical cooperation between the parties was being knowingly substituted for the risks of competition, as mandated by EU law (and, in particular, Case C-8/08, *T-Mobile Netherlands and Others*).

In his judgment, Mr Justice Birss sided with Chiesi. While Mr Justice Birss considered that the exchange of information alone could violate competition rules if it constitutes a concerted practice within the meaning of Article 101 TFEU, this exchange in the context of court proceedings does not meet the standard for an infringement. He also noted that complying with a court-ordered disclosure does not constitute an instance of practical cooperation between the parties working as a substitute for the risks of competition. To the contrary, Mr Justice Birss noted that resolving disputes between potential competitors about patent validity and infringement are part of patent litigation and that, if conducted properly, was inherently pro-competitive, irrespective of whether the result leads to a patent being upheld or not. Interestingly, Mr Justice Birss also noted that the situation would be different if the parties were to use litigation with the intent of facilitating an anti-competitive information exchange (*i.e.*, a sham). There was no evidence that this was the case here.

For the sake of completeness, Mr Justice Birss also considered whether the requested disclosure is permitted under the theory of ancillary restraints in the event such a disclosure infringed Article 101 TFEU (which it did not in the present case). According to the ancillary restraints defence, an otherwise unlawful agreement would not fall within the scope of Article 101 TFEU if the restraints are found to be objectively necessary to achieve a broader legitimate and pro-competitive aim. In the present case, Mr Justice Birss ruled that the ancillary restraints doctrine would have applied since the requested disclosure was objectively necessary to proceed in the litigation.

The High Court is now expected to rule on the merits of the case once Teva complies with the disclosure request.

STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice clarifies conditions governing legality of injunction issued at same time as decision to open formal State aid investigation (Case C-456/18 P, *Hungary v. Commission*)

On 4 June 2020, the Court of Justice of the European Union (the "Court of Justice") delivered an important judgment clarifying the conditions under which the European Commission (the "Commission") can issue an injunction on the basis of Article 11 of the former State aid procedural Regulation No 659/1999 (now, Article 13 of Regulation (EU) 2015/1589). The judgment sets aside the appealed ruling of the EU General Court and annuls the Commission decision challenged at first instance. In the two cases which gave rise to the judgment under appeal, Hungary had brought actions challenging suspension injunctions adopted *at the same time* and *by the same decision* as the initiation of the formal investigation procedure in respect of the two aid measures.

There are two particularly interesting aspects of the reasoning followed by the Court.

First, the Court of Justice clarified that, if the conditions under Article 11 of Regulation No 659/1999 (now, Article 13 of Regulation (EU) 2015/1589) are met, the Commission can – is not required to – adopt an injunction. More specifically, the Court of Justice noted that the Commission must comply with the principle of proportionality, *i.e.*, not exceed the limits of what is appropriate and necessary in order to attain the objective of the injunctions. Therefore, the Commission should only adopt an injunction if it is *necessary* to ensure compliance with the prohibition of putting aid plans into effect until the final decision on their compatibility is adopted.

Second, the Court of Justice clarified that the Commission can adopt an injunction both *after* initiation of the formal investigation procedure and *at the same time* as the decision to initiate the formal investigation procedure. However, in this second scenario, it must demonstrate that there is sufficient evidence to presume that the Member State concerned does not have the *intention of suspending* implementation of the measure under investigation, and to *anticipate that an action* for a declaration of failure to fulfil obligations will consequently have to be brought before the Court. In the present case, the Court of Justice found that the Commission did not provide sufficient reasons to justify the adoption of injunctions at the same time as the decision to open the formal investigation procedure.

Court of Justice narrows down the concept of "undertaking" with regard to health insurance bodies (Cases C-262/18 P and C-271/18 P, *Commission v. Dôvera*)

The Court of Justice of the European Union's (the "Court of Justice") judgment of 11 June 2020, *Commission v. Dôvera zdravotná poist´ovňa* is another brick in the case law concerning the concept of "undertaking" with regard to health insurance bodies.

The background of the case is a Slovak compulsory health insurance system. In short, in Slovakia, compulsory health insurance services are provided both by State-owned and private insurance bodies. However, the legislation requires State-owned and private insurance bodies to have the legal status of a *profit-seeking* joint stock company governed by private law.

At first instance, the General Court upheld an action for annulment brought against a decision of the Commission, which found that State-owned Slovak insurance bodies do not fall within the definition of "undertakings" for the purpose of the State aid rules. The General Court relied, inter alia, on the fact that these bodies are allowed, first, to make, use and distribute profits. In particular, the General Court noted that the fact that Slovak health insurance companies are freely able to seek and make a profit shows that, regardless of the performance of their public health insurance task and of State supervision, they are pursuing financial gains and, consequently, their activities in the

sector fall within the economic sphere. The strict conditions framing the subsequent use and distribution of profits which may result from those activities did not call into question the economic nature of such activities. Moreover, the General Court noted that the State-owned insurance bodies compete to a certain degree in terms of quality and services offered with private insurance companies.

On appeal, the Court of Justice set aside the judgment of the General Court and dismissed the action at first instance. In short, the Court of Justice found the judgment under appeal had wrongly considered that insurance bodies were "undertakings" for the purpose of the State aid rules.

First, as regards the fact that the State-owned insurance bodies are required to have the legal status of a profit-seeking company, the Court noted that this is irrelevant in the context of the assessment whether these bodies carry out economic activity for the purpose of competition law rules. Moreover, the ability of insurance bodies to seek, use and distribute profits is strictly framed by law, and is aimed at preserving the viability and continuity of compulsory health insurance.

Second, as regards the degree of competition in the health insurance market, the Court noted that the presence of competitive elements in the Slovak compulsory health insurance scheme is secondary, as compared with the scheme's social, solidarity and regulatory aspects, and, as such, is not capable of changing the nature of that scheme. The ability of insurance bodies to compete with each other cannot extend either to the amount of the contributions or to the compulsory statutory benefits, so that those bodies can only differentiate themselves, in a residual and ancillary manner in relation to the latter benefits, in terms of the scope and quality of services.

White paper on foreign subsidies in the Single Market

On 17 June 2020, the European Commission (the "Commission") adopted the White paper on foreign subsidies in the Single Market, launching a consultation (from 17 June 2020 to 23 September 2020) on the options to deal with the distortive effects caused by foreign subsidies in the Single Market (the "White Paper"). The White Paper identifies certain gaps in the current State aid, competition, trade defence and public procurement rules, which make the existing rules ineffective to deal with the challenges raised by foreign subsidies. To deal with these inadequacies, the Commission proposes solutions set out in three "Modules". Module 1 envisages the establishment of a general market scrutiny instrument, which should capture all market situations in which foreign subsidies may cause distortions in the Single Market. This would be complemented by Module 2, which would address distortions caused by foreign subsidies facilitating the acquisition of EU companies. Module 3 would concern the distortions caused by foreign subsidies to EU public procurement procedures. Finally, the White Paper also sets out ways to address the issue of foreign subsidies in the case of applications for EU financial support.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission proposes a "new competition tool" to address structural competition problems

In the context of the intense debate about the role of competition policy in an increasingly digital and globalised economy, the European Commission (the "Commission") has concluded that ensuring the fair functioning of markets may require a more holistic and comprehensive toolbox than that currently at its disposal.

This toolbox would be comprised of three "pillars":

- First, the continued and vigorous enforcement of existing competition rules;
- Second, the possible *ex-ante* regulation of digital platforms, including the imposition of additional requirements on those undertakings which play a gatekeeper role; and
- Third, a new competition tool ("NCT") to deal with structural competition problems which cannot be tackled effectively based on current competition rules.

Against this background, the Commission has proposed adding this NCT to its toolbox to address a perceived gap in the current EU competition rules, and initiated the legislative process on 2 June 2020 with the launch of an impact assessment and public consultation.

The NCT would target two categories of competition concerns:

- First, the NCT would aim to tackle structural risks to competition. According to the Commission, such risks arise as a result of the emergence or existence of powerful market players, with an entrenched market and/or gatekeeper position. They may also arise due to the unilateral anti-competitive conduct of non-dominant firms which, due to the absence of dominance, is not caught by Article 102 TFEU.
- Second, the NCT would aim to tackle markets characterised by a structural lack of competition. The Commission explains that such situations arise where a market is not competitive due to structural features, even though no market player is behaving anti-competitively. Examples of such systemic failures include high barriers to entry, high concentration, consumer lock-in, lack of access to data and data accumulation.

The structural risks described above would have to be identified through an initial market investigation. If a concern is identified, the Commission would be empowered to impose behavioural and, where appropriate, structural remedies. The NCT, however, would not involve any finding of infringement or imposition of fines on market participants, nor could it lead to follow-on damages claims. The Commission believes that intervention in markets based on the NCT would deliver more competitive outcomes and consumers would benefit from greater choice and enhanced innovation. In addition, the Commission expects that the NCT could be used to help small and medium-sized enterprises, notably by protecting their investments.

The Commission acknowledges that an NCT investigation would have to guarantee protection of the defendants' procedural rights. Remarkably, however, the 40-page questionnaire that forms the basis of the public consultation contains only a single question seeking feedback on the procedural rights of defendants, suggesting that this crucial issue has not yet received the required attention.

As to the scope of the NCT, four options have been submitted to the stakeholders:

- First, a **dominance-based competition tool with a horizontal scope**: the NCT would apply across all sectors but it would only address competition concerns arising from the conduct of dominant firms, without it being necessary to establish an abuse under Article 102 TFEU.

- Second, a **dominance-based competition tool with a limited scope**: this approach would be very similar to the first, the only difference being that it would only apply to certain sectors (e.g., digital or digitally-enabled markets).

- Third, a **market structure-based competition tool with a horizontal scope**: the NCT would apply across all sectors of the economy. In addition to targeting dominant firms, the Commission would be able to act whenever it identifies a structural risk to competition or a structural lack of competition by imposing remedies and recommending legislative action to improve the functioning of the identified problematic market.

- Fourth, a **market structure-based competition tool with a limited scope**: the only difference with the previous option would be that the NCT would only apply to certain sectors (e.g., digital or digitally-enabled markets).

The introduction of the NCT would represent the most fundamental change in EU competition law since 1962, and could empower the Commission to restructure European industries far beyond the digital economy.

Stakeholders from the public and private sector, including competition authorities and government bodies, academics, as well as legal and economic practitioners, may respond to the open public consultation until 8 September 2020. The Commission hopes that legislation establishing the NCT could be proposed by the end of the year, a remarkably compressed timeframe compared with other legislative initiatives.

DG Competition publishes 2019 Annual Activity Report

On 25 June 2020, the European Commission's Directorate-General of Competition ("DG Competition") published its 2019 Annual Activity Report. In the foreword, Olivier Guersent, Director-General of DG Competition, expresses the view that creating "European Champions" would be a mistake as all companies should be given a fair chance to become the most productive and innovative players on the market.

With regard to statistics, the year 2019 was characterised by the adoption of a significant number of substantial decisions in antitrust, cartels, mergers and State aid, with 15 antitrust decisions, 362 merger decisions and four State aid recovery decisions. In terms of antitrust, the settlement procedure still constitutes the most important tool used by the Commission in cartel proceedings, accounting for four out of five cartel decisions in 2019, the report says. As regards mergers, the report indicates that 78% of the notified mergers were reviewed under the simplified procedure and that the Commission adopted three prohibition decisions where the proposed remedies did not sufficiently address the competition concerns (Siemens/Alstom, Tata Steel/ThyssenKrupp/JV and Wieland/Aurubis Rolled Products). Turning to State aid, the report states that since 1 January 1999, € 37.1 billion was recovered from beneficiaries of illegal and incompatible aid, with € 159 million recovered in 2019. Furthermore, the Commission analysed more than a thousand tax rulings in 2019 and requested Member States to prepare a list of tax rulings adopted over the period of 2014-2018.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority publishes paper on challenges in the economy and competition law enforcement due to digitalisation

On 5 June 2020, the Austrian Competition Authority ("FCA") published a proposition paper on digitalisation and competition law to address the new challenges resulting from rapid technological change in the economy and in society.

The way forward, it says, should focus on advancing existing tools, strengthening the institutional framework and cooperation, integrating new tools into the existing system, refocusing merger control, speeding up procedures, revising the approach to digital market power and recognising that, in addition to existing competition rules, a variety of regulatory approach tools will be necessary to address the challenges of digitalisation.

The FCA suggests using exemplary model situations in statutory provisions or soft-law instruments to facilitate the application of legislation in the absence of precedents. The FCA also submits that an adjustment of merger thresholds would allow it to concentrate on the most important cases and advocates for the adoption of the criterion of the sig-

nificant impediment to effective competition ("SIEC") test to replace the market dominance test. It also welcomes the introduction of the EU Online Platforms Regulation and calls for reforms to facilitate early and effective action to protect the market structure in a fast-moving sector.

The FCA calls for deeper cooperation and simplified exchanges of information in order to allow for a holistic consideration of cases including from tax, State aid, employment and data protection law.

FRANCE

French Competition Authority publishes study on competition and e-commerce

On 5 June 2020, the French Competition Authority ("FCA") published a study on competition and e-commerce. The study highlights that digital technologies have considerably changed the commerce and distribution landscape. Many offline retailers are now marketing their products and services online and "pure players", retailers almost exclusively active in internet sales, have emerged. In addition, the study refers to the "phygital model" where digital technologies are forming part of the sales experience in physical stores.

In the context of increased digitalisation, the study aims to provide an answer to the following question: how does the growth of online commerce impact competitive dynamics and the behaviour of customers and businesses?

First, the FCA recalls that its decisional practice tries to provide clarity to companies and stakeholders as to their online practices and merger preparations. In particular, the study highlights that the FCA must assess the extent to which online sales compete with brick-and-mortar sales. At the same time, the FCA recognises that it may need to adapt certain tools for assessing market power, such as the calculation of market shares, and identify markets combining online and physical sales.

The study then reiterates the FCA's interest in developing competition enforcement tools to effectively tackle the challenges presented in the digital markets. The most interesting part of the study for companies involved in e-commerce, whether as platforms or as users, is Part II, which addresses a variety of potentially anti-competitive practices by market actors, including:

- practices that can reduce the competitive pressure exercised by e-commerce, including price and non-price related measures;
- practices that can distort competition between e-commerce platforms, including price-parity clauses in the hotel booking industry and exclusionary practices by dominant e-commerce platforms.

The study can be accessed in full here.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

FRANCE

Orange loses follow-on damages appeal against Digicel but obtains pay-out reduction

On 17 June 2020, the Paris Court of Appeal rejected Orange's (formerly known as France Telecom) appeal against a follow-on damages claim by rival telecommunications provider Digicel (formerly known as Bouygues Telecom) but granted a reduction in the amount of damages to be paid of nearly € 100 million. Orange and Orange Caraïbe were condemned to pay Digicel French West Indies Guyana € 181.5 million in damages and an additional € 68 million in interest.

By way of background, in 2009, the French Competition Authority ("FCA") fined Orange and Orange Caraïbe € 63 million for implementing anti-competitive practices in the French West Indies and French Guyana on the mobile phone market. Despite two appeals before the French Supreme Court, the FCA's decision was ultimately confirmed.

In 2012, Digicel initiated a follow-on claim for damages on the basis of Article 1382 of the French Civil Code. The Paris Tribunal of Commerce was satisfied that the three conditions under Article 1382 were met, namely, Digicel proved the existence of: (i) a fault; (ii) an injury; and (iii) a causal link between the fault and the injury. As a result, it was ultimately awarded € 346 million in damages (see VBB on Competition, Volume 2018, No. 2).

In this context, Orange brought an appeal before the Paris Court of Appeal seeking to have the judgment set aside. It argued, *inter alia*, that its conduct did not have a concrete impact on the market and that Digicel suffered losses as a result of its own business strategy rather than because of Orange's conduct.

At the same time, Digicel introduced a cross-appeal disputing the amount of interest to be included in the fine. In so doing, it argued that the Paris Commercial Court relied on the wrong start date in calculating the interest payments and sought a higher pay-out of about € 550 million based on loss-of-opportunity cost according to the annual weighted average cost of capital ("WACC") method.

In the judgment at hand, the Paris Court of Appeal rejected Orange's arguments and ruled that the FCA had established that the fidelity programme developed by Orange constituted an abuse of a dominant position, which led to a civil tort under Article 1240 of the French Civil Code (formerly Article 1382).

Turning to the calculation of damages, the Paris Court of Appeal confirmed the approach taken by the Paris Commercial Court which consisted in establishing damages based on Digicel's lack of growth. As a result of the anti-competitive behaviour described above, the amount of damages was established at € 173.64 million. The Paris Court of Appeal granted additional costs linked to the exclusive distribution contracts imposed by Orange Caraïbe on its distributors and the exclusive repair contract, which resulted in additional damages of € 7.12 million and € 737,500 respectively.

However, regarding the compensation for Digicel's financial loss, the Paris Court of Appeal rejected the application of the WACC method as adopted by the Paris Commercial Court, insofar as it considered that Digicel failed to demonstrate that the unavailability of the sums of which it had been deprived led it to restrict its investment activity without being able to find alternative financing through borrowing or equity. Digicel also failed to show that it had to give up duly identified investment projects which were likely to yield the equivalent of the average cost of capital.

Last, according to the Paris Court of Appeal, Digicel would have made use of the sums it had been deprived of to reduce its indebtedness. The Court therefore applied to both the foregone earnings and the additional costs paid an interest rate of 5.3 % from 1 April 2003 to 31 December 2005.

Beyond that, from 1 January 2006 until 31 December 2018, the Court held that the legal interest rate should apply.

Interestingly, the 2009 FCA decision also prompted a damages action from Outremer Telecom where Orange was first ordered in 2015 to pay compensation of € 8 million, far below the company's claim for € 75 million, and in 2017 got it reduced to € 2.6 million.

According to recent reports, in light of the considerably lower damages in the Outremer case, Orange is considering bringing a further appeal before the French Supreme Court to try and overturn the damages award.

GERMANY

German Federal Court of Justice rules on damages claims in two rail track cartel cases

In December 2019, the German Federal Court of Justice ("FCJ") overturned two judgments handed down by the Higher Regional Court of Karlsruhe (the "Judgments"), which had ruled on damages claims following-on from the Federal Cartel Office's rail track cartel decision (see VBB on Competition Law, Volume 2012, No. 7 and Volume 2013, No. 7). In both cases, damages claims were initiated by regional transport companies which had acquired tracks and other products through public procurement from an unnamed cartel participant. In March 2017, the Higher Regional Court of Karlsruhe partially granted the claims.

The FCJ reiterated its recent case law on the suspension of the statute of limitations and the applicability of *prima facie* evidence. Remarkably, the FCJ ruled that the Judgments were not in line with case law posterior to the Judgments:

- Regarding the statute of limitations, the FCJ had decided in 2018 that the limitation period for cartel damages claims was suspended in the case of claims that arose prior to the entry into force of the provision setting out the suspension (see VBB on Competition Law 2018, Volume No.6). Applied to the present cases, this means that the Higher Regional Court of Karlsruhe had erred in partially rejecting the claims.

- On the matter of *prima facie* evidence, the FCJ reiterated that the assumption that the existence of a cartel leads to harm cannot be applied to quota and customer sharing cartels, such as the one at hand, as the FCJ had already clarified in a 2019 judgment (see VBB on Competition Law 2019, Volume No.1). Applied to the present cases, this means that the Higher Regional Court of Karlsruhe had erred in grounding its decision on the *prima facie* assumption that any harm had occurred to the claimants.

The FCJ remitted the cases to the Higher Regional Court of Karlsruhe for reconsideration. Finally, the FCJ provides detailed guidance for reassessing whether the applicants are entitled to damages. In particular, the Higher Regional Court of Karlsruhe will have to take provisions of EU law into account with regard to the causal relationship between harm and an agreement or practice as defined in the Court of Justice of the European Union's Case C-435/18 (*Otis*).

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