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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears PKN Orlen / Grupa Lotos oil and gas merger

On 14 July 2020, the European Commission (the "Commission") conditionally approved PKN Orlen's acquisition of rival Grupa Lotos ("Lotos") after a Phase II investigation. The parties are large Polish oil and gas companies active in Poland and in a number of other Central European, Eastern European and Baltic countries.

The Commission's investigation revealed a number of horizontal concerns, including in the markets for the wholesale and retail supply of motor fuels in Poland, the supply of jet fuel in Poland and the Czech Republic and the supply of by-products in Poland. With regard to wholesale fuel supply, the Commission found that the transaction would result in a quasi-monopoly position, as the combined entity would control all refineries in Poland. It would also become the only supplier of diesel, gasoline and other fuels. On the retail fuel market, the transaction would remove PKN Orlen's main competitor in Poland, making the combined entity four times larger than its remaining rivals. The merged entity would also be the only entity able to supply jet fuel to several Polish and Czech airports. With respect to the sale of by-products, the merger would reinforce PKN Orlen's position as a leading supplier of bitumen and lubricants in Poland and in several other countries.

PKN Orlen offered an extensive package of commitments to address these concerns. These include: (i) divesting a 30% stake in Lotos' Polish refinery, including strong governance rights; (ii) divesting nine fuel storage depots in Poland, as well as creating a jet fuel import terminal to be ceded to an independent party; (iii) releasing most capacity Lotos had booked with independent fuel storage depots; (iv) divesting approximately 80% of Lotos' retail gas stations in Poland; (v) selling 50% of Lotos' stake in a jet fuel marketing joint venture with BP; (vi) making 80,000 tonnes of jet fuel available per year to competitors in the Czech Republic; and (vii) divesting two Polish bitumen plants. The Commission considered that purchasers of these divestments would be able to compete effectively on the relevant Polish and Czech markets and therefore cleared the transaction.

– MEMBER STATE LEVEL –

HUNGARY

Hungarian Competition Authority requires modification of non-compete provisions

On 29 June 2020, the Hungarian Competition Authority ("GVH") published a decision in which it accepted undertakings from a group of companies and private individuals that amended non-compete clauses in the context of an acquisition of a controlling stake in CodeCool, a Hungarian start-up company specialising in the training of software developers.

The GVH found that the non-compete clauses were only justified with respect to those natural and legal persons who held shares in CodeCool at the moment of the acquisition, and that such non-compete clauses could not extend beyond two years after the persons in question have divested their shares in CodeCool. By contrast, the non-compete clause concerning one person who, at the time of the acquisition, no longer held shares in CodeCool was unjustified.

As concerns the geographic scope of the non-compete clauses, the GVH noted that, at the time of the acquisition, CodeCool had already demonstrated its ability to enter the markets of countries near Hungary. Therefore, the GVH found that it was justified for the geographic scope of the non-compete clause to cover the territories of not only Hungary, but also Austria, Bulgaria, Croatia, the Czech Republic, Poland, Romania, Serbia, Slovakia and Slovenia.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Advocate General Pitruzzella offers guidance on fee structure used by the Belgian collecting society SABAM

On 16 July 2020, Advocate General ("AG") Pitruzzella issued an opinion in Case C-327/19, advising the Court of Justice of the European Union ("ECJ") on whether the method for calculating royalties used by SABAM, the Belgian collecting society, amounts to an abuse of a dominant position under Article 102 TFEU. The case came before the ECJ by way of a request for a preliminary ruling from the Antwerp Business Court (Ondermingsrechtbank Antwerp).

The Antwerp court issued the request in the context of disputes between SABAM and festival organisers Weareone. World and Wecandance over unpaid royalties for music used in the Tomorrowland and Wecandance festivals between 2013-2016. In response, the organisers claimed that the royalty fees charged by SABAM were abusive.

These fees were determined based on a tariff – "Tariff 211" – which included a minimum rate determined by the size of the festival space and number of available tickets, as well as a degressive rate calculated on the basis of the artistic budget or gross revenues from ticket sales. Discounts to the tariff were also available if the proportion of music from SABAM's repertoire used during a festival amounted to less than one-third, or two-thirds of the full festival playlist. (It should be noted that SABAM has since implemented a new discount system based on increments of 10% to measure the proportion of SABAM music used.)

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

In his opinion, AG Pitruzzella recalled the *United Brands* test used in assessing unfair pricing, i.e., whether there is a significant difference between the price charged by the dominant undertaking and the price the undertaking would have charged in a (hypothetical) market with effective competition (the "benchmark price"), or the "economic value". However, AG Pitruzzella went on to note that the *United Brands* test is not suitable for determining the economic value of the service provided by collecting societies, in particular the economic value of musical works.

With respect to the inclusion of the "external elements" to determine the applicable rate, AG Pitruzzella noted that – although the success of a music festival depends not only on the music itself – it seems "undeniable" that the music constitutes the "principal" element of the product offered by festival organisers. However, it is for the national court to decide if this is the case. According to the AG, the inclusion of "external elements" such as the festival's artistic budget should be considered reasonable, as it would also be too difficult to decide precisely which non-music costs to deduct.

In light of these considerations, according to AG Pitruzzella, it is for the national court to determine whether SABAM's rates are "significantly and sustainably high" compared to the benchmark price under the relevant circumstances. While recognising that there is no single suitable methodology for calculating the benchmark price, AG Pitruzzella recalled the ECJ's approach in *AKKA/LAA* (see VBB on Competition Law, Volume 2017, No. 9), suggesting that the national court could look to rates set by other collecting societies in the EU, as well as those previously charged by SABAM in similar situations.

Finally, with respect to SABAM's discount rule, AG Pitruzzella noted that SABAM's fee structure can be compatible with Article 102 TFEU – referring to both the original 1/3 and new 10% increments – but only if the collecting society has no more accurate means to quantify the extent to which works from its repertoire are used. It is for the national court to ask whether such means exist, as well as whether they uphold the same rights for artists and do not impose an undue burden on the collecting society.

In conclusion, the opinion advised the ECJ to rule that the fee structure adopted by collecting societies, such as SABAM, is not necessarily abusive under Article 102 TFEU, although it is not excluded that the application of such an incremental fee structure could be abusive based on a thorough assessment by the national court of all the factors identified in his opinion.

Aspen offers commitments in Commission investigation into excessive pricing for critical off-patent cancer medicines

On 14 July 2020, the Commission invited interested parties to submit comments on the commitments offered by global pharma company Aspen to address competition concerns in relation to Aspen's excessive pricing for six critical off-patent cancer medicines in several national markets (excluding Italy).

The Commission opened its formal investigation into Aspen's conduct on 15 May 2017, citing serious concerns that Aspen had been abusing its dominant position by charging excessive prices for the aforementioned medicines. According to the Commission, Aspen's alleged conduct included very high price increases – by almost 300% on average – from May 2012 onwards, raising concerns of excessive pricing in most national markets. Based on the Commission's preliminary analysis of Aspen's accounting data, Aspen has consistently earned disproportionately high profits from the sale of its cancer medicines in the EEA in comparison to those of similar companies in the industry. In the course of the Commission's investigation, no justifications for Aspen's profit levels were found.

According to the Commission's press release, Aspen has offered to resolve its concerns by committing:

- to reduce its net prices across the EEA for each of the six medicines by an average of 73%;
- to charge no more than the proposed prices for the next ten years, taking effect retroactively from 1 October 2019 onwards (the date when Aspen first approached the Commission with a concrete proposal for commitments);
- to guarantee the supply of the medicines for the next five years, and – for a further five years – to either continue to supply the medicines, or to make its marketing authorisation available to other suppliers.

Interested parties have until 15 September 2020 to submit comments.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court refuses injunction against electricity congestion-management procedures at Austrian-German border

On 13 July 2020, the Austrian Federal Competition Authority ("FCA") announced the rejection of a claim brought by several private undertakings against the electricity network operator TenneT TSO GmbH ("TenneT") by an Austrian court in a judgment dated 25 February 2020.

The Austrian paper industry association Austropapier, welding company Voestalpine, electricity provider VERBUND and the Austrian energy exchange EXAA had together brought an action against the German electricity transmission system operator TenneT. They alleged that TenneT abused its dominant position by introducing electricity congestion-management procedures at the Austrian-German border in 2018. TenneT's actions, however, were adopted pursuant to a decision of the Agency for the Cooperation of Energy Regulators ("ACER") in 2016 and subsequent orders taken by national regulators.

The Cartel Court rejected the claim. It doubted whether it was technically feasible to implement the remedies sought and considered that TenneT's conduct was covered by the regulated conduct defence. Firstly, the relevant EU legislation and single market for energy meant that TenneT could not implement the remedies alone. Secondly, as challenges to the ACER decision had been unsuccessful, that decision had full effect and did not leave any room for discretion to the transmission system operators, according to the Court. The complainants did not challenge the judgment which has therefore become final.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice upholds European Commission's right to continue inspection at Brussels premises in Power Cables cartel case

On 16 July 2020, the Court of Justice of the European Union (the "ECJ") delivered a judgment dismissing the appeal by Nexans France and its parent company Nexans (together "Nexans") against the judgment of the General Court of the European Union (the "GC") in the *Power Cables* cartel case.

By way of background, in 2014, the European Commission adopted a decision in which it imposed fines totalling €302 million on a number of producers of underground and submarine high voltage power cables for their involvement in a customer and market allocation cartel. Nexans was fined € 70,670,000 for its involvement in the infringement. In its decision, the Commission had found that the cartel comprised two configurations.

The first configuration, consisting of European, Japanese and South Korean undertakings, pursued a market and customer allocation agreement as follows: Japanese and Korean producers would refrain from competing for projects in the European territory, while European producers would stay out of Japan and Korea (the "A/R cartel configuration"). The second configuration involved the allocation of territories and customers by or to the European producers for projects inside the European territory (the "European cartel configuration").

On appeal, the GC rejected the action by Nexans seeking the annulment of the Commission's decision (Case T-449/14). Nexans lodged an appeal against the GC's decision before the ECJ, which in its recent judgment rejected each of Nexans' four heads of appeal.

First, the ECJ ruled that the GC was right in dismissing the claims by Nexans that the Commission was not entitled to make a copy-image of a hard drive and copies of sets of emails without carrying out a meaningful examination of those documents beforehand. The ECJ noted that Article 20(2)(b) of Regulation 1/2003 permits the Commission to examine books and other records related to the business of the undertakings concerned, irrespective of the medium on which they are stored. According to the ECJ, although the Commission's powers of investigation are strictly circumscribed, the relevant provisions of Regulation 1/2003 should not be interpreted narrowly. The ECJ clarified that the Commission's right to make copies even without prior examination of the underlying data affects neither the procedural safeguards laid down by Regulation 1/2003 nor the other rights of the undertaking under inspection, provided that the Commission, after completing its examination, places on the file only documents which are relevant to the subject matter of the inspection.

Second, the ECJ found that the GC had not erred in confirming that the Commission was entitled to continue the inspection in question at its premises in Brussels. The ECJ noted that, as pointed out by the GC, Article 20(2)(b) of Regulation 1/2003 does not provide that the examination of the books and records related to the business of undertakings under inspection must be carried out exclusively, and in all circumstances, at their premises. The ECJ pointed out that the time required for processing electronic data may prove to be considerable. Thus, the ECJ considered that the Commission can continue an inspection at its premises in Brussels, if doing so is justified in the interests of the effectiveness of the inspection or to avoid excessive interference in the operations of the undertaking concerned, and provided that such continuation neither gives rise to any infringement of the rights of defence, nor constitutes an additional encroachment of the rights of the undertakings concerned, beyond that inherent in an inspection of their premises. Finally, the ECJ underlined that Nexans had not disputed in its appeal that the Commission had acted in strict compliance with the company's rights of defence during the continuation of the examination at the Commission's premises in Brussels.

Third, the ECJ rejected the claim by Nexans that the GC had made a legal error by failing to exercise its unlimited jurisdiction to assess whether the fact that, according to Nexans, the majority of sales covered by the infringement in question had not been affected by that infringement, was a decisive factor in setting the gravity factor for the infringement in question. The ECJ acknowledged that, although point 22 of the Fining Guidelines states that the Commission is not required to take into account the actual impact of the infringement on the market, these Guidelines are not binding on the GC. However, the ECJ noted that the GC had taken into account other factors, such as the nature of the infringement, the combined market share of the parties concerned and its geographic scope, in reaching its assessment that the alleged lack of effects of the infringement in question was not capable of persuading it to reduce the fines imposed on Nexans.

Finally, the ECJ found that the GC had not erred in finding that, because of the participation of Nexans in the European cartel configuration in addition to the A/R cartel configuration, the Commission was entitled to increase the gravity factor used to calculate the amount of the fines imposed on Nexans by 2%. According to the ECJ, this ground of appeal was based on a misreading by Nexans of the GC's decision, which had clearly stated that the European cartel configuration implied a further commitment to allocating projects which went beyond the existing allocation rules in the A/R cartel configuration. The close connection between those two configurations did not alter the fact that the European cartel configuration constituted, by its very nature, a commitment to allocating projects not inherent in the A/R cartel configuration.

In conclusion, the ECJ dismissed the appeal on all grounds.

European Commission imposes fines totalling € 260 million on ethylene purchasers in cartel settlement

On 14 July 2020, the European Commission (the "Commission") announced that it had adopted a decision fining three ethylene purchasers a total of € 260,443,000. The companies concerned namely, Orbia (Mexico), Clariant (Switzerland), Calanese (United States) and Westlake (United States), were found to have been involved in a cartel for the purchase of ethylene in the territories of Belgium, France, Germany and the Netherlands between December 2011 and March 2017.

Ethylene is a flammable chemical that is used in a range of industries and applications including the production of plastics and glass, regulating the ripening of fruits and the fabrication of metals. As the purchase price of ethylene is volatile, the main component of the price charged in ethylene supply agreements is based on a Monthly Contract Price. The Monthly Contract Price is derived from individual negotiations between ethylene buyers and sellers and then published by specialised market information providers as an industry reference.

According to the Commission's press release, the ethylene purchasers coordinated their price negotiation strategies before and during the Monthly Contract Price negotiations in order to lower the value of the Monthly Contract Price to the detriment of ethylene sellers. The companies also allegedly exchanged price-related information during their negotiations with ethylene sellers.

The investigation was initiated following an immunity application submitted by Westlake, who was exempted from fines. To set the level of the fines, the Commission used the value of purchases in the EU and then increased that value by 10% for each of the three companies in order to offset the artificially low purchase prices of ethylene over the examined period. Orbia, Clariant and Celanese, who were respectively fined the amounts of € 22 million, €155 million and € 82 million, benefited from certain reductions in their fines ranging from 20% to 45% for cooperating with the Commission's investigation. The companies also received a 10% reduction in their fines as they had acknowledged their participation in the cartel under the Commission's settlement procedure. The due date to pay these fines was extended from three months to six months from the date of notification of the Commission's decision in light of the impact of COVID-19.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority imposes € 93 million fine on cartel in ham and cold meat sector

On 16 July 2020, the French Competition Authority ("FCA") imposed a € 93 million fine on twelve ham and cold meats manufacturers (Cooperl Arc Atlantique, Les Mousquetaires, Fleury Michon, Coop, Savencia, Campofrio, Aubret,

Sonical, La Financiere du Haut Pays, CA Animation, Nestle, Salaison du Maconnais) for concerting to purchase ham from slaughterhouses at reduced prices and/or to fix prices for the cold meat products that they would then propose to mass-market retailers for their branded and economy products, contrary to Article L.420-1 of the French Commercial Code (*Code de commerce*) and Article 101 TFEU. The FCA found that the cartel had distortive effects both on the upstream market, between the manufacturers and slaughterhouses as well as on the downstream market, between the manufacturers and the mass-market retailers and impacted a very large number of everyday consumer products such as raw ham, cooked ham, sausages, rosette and chorizo.

The practices came to the FCA's attention as a result of the leniency procedure, which allows companies to disclose their involvement in a concerted practice in exchange for full or partial exemption from a fine. In this case, Campofrio (in October 2012) and Coop (in September 2013) applied for leniency and supplied information in support of the investigation. Additional evidence was seized during several dawn raids carried out by the FCA.

The FCA's investigation revealed that, on the upstream side, between 2011 and 2013, the twelve manufacturers would, through individual calls, discuss the weekly price variation of a cut of pork known as "ham, flank removed" (*jambon de mouille*) which is generally purchased by cold meat manufacturers to produce cooked hams after processing. As a result of these exchanges, the ham and cold meats manufacturers presented a united front in negotiations with slaughterhouses and either resisted price increases or secured price reductions.

Cold meat manufacturers also concerted on the downstream side. Through bilateral telephone calls or multilateral meetings they coordinated on the prices of cold meat and cooked products which they would then propose to mass-market retailers for their branded or economy products.

Ultimately, the FCA found that these practices seriously distorted business relationships and replaced effective competition on the market. In determining the fine, the FCA, pursuant to Article L.464-2 of the French Commercial Code, took several elements into consideration: (i) cooperation through the leniency procedure; (ii) the significant negotiating power of mass-market retailers; (iii) the precarious economic situation in the cold meat sector; (iv) the individual financial difficulties that some companies were experiencing; and (v) the effects of the COVID-19 pandemic.

With respect to the first element above, the FCA, for the second time in its decisional practice, did not grant full exemption from fines to the first-in leniency applicant on the grounds that Campofrio had failed to fully cooperate with the FCA (by failing to disclose a meeting on raw cold meat products in which it had participated). However, the second leniency applicant, Coop, benefited from total exoneration from fines under the "leniency plus" procedure on the grounds that it had provided evidence that had allowed the FCA to extend the duration of the infringement.

In addition to the fines, the FCA also ordered the companies to publish a summary of the decision in the print and online edition of French newspapers such as Le Monde, Les Échos and the Revue Porc Mag. However, it appears that the FCA's decision will be challenged, as Cooperl, Les Mousquetaires and Fleury Michon have already made known their intention to appeal.

GERMANY

German Federal Cartel Office approves Intersport's joint distribution platform

On 25 June 2020, the German Federal Cartel Office ("FCO") approved Intersport's online distribution model through a joint online platform under the Intersport umbrella brand for small retailers. Intersport is the world's largest association of medium-sized companies in the sports retail sector. Its more than 900 members operate approximately 1,500 sports retail outlets in Germany.

Intersport changed its online distribution model in January 2019. Under the new model, Intersport Digital ("IDG") operates the online sales platform for associated retailers. The platform sells the products directly to end customers. The sales contract is thus concluded between IDG and the end customer, not between the retailer and the customer.

According to the FCO's press release, retailers indicate the price for which they are ready to sell a given product

to IDG, which then forwards orders based on an internal distribution plan to one or more retailers for order processing and delivery. IDG selects retailers depending on their delivery capacities and geographical proximity to the customers.

The FCO found that the shared platform affects competition between the retailers only to a minimal extent, since the largest part of their sales are generated on site. The FCO noted that it would be very difficult for many especially smaller Intersport retailers to operate a sustainable online business on their own and to compete with the online shops of large online retailers or manufacturers. The FCO found that the shared platform provides them with an opportunity to operate an online business and offers consumers a larger online choice. Ultimately, the Intersport platform was therefore found to strengthen competition in sports retailing.

Finally, the FCO emphasised that access to the platform must be available to all Intersport retailers who fulfil the access criteria on a non-discriminatory basis. The access criteria must be available for consultation to all retailers and they must not discriminate against smaller retailers generating less turnover.

UNITED KINGDOM

CMA fines private hospital and consultant eye doctors £1.2 million for price-fixing

On 1 July 2020, the UK's Competition and Markets Authority ("CMA") fined the private hospital owner Spire Healthcare Limited and its parent Spire Healthcare Group Plc (together "Spire") £1.2 million for instigating and facilitating a price-fixing cartel with seven consultant ophthalmologists based in a hospital in the north of England.

The private consultant ophthalmologists, who treat eye disorders, set their own prices for initial consultations for self-pay patients. However, following a dinner attended by Spire's management and five of the consultants, a Spire employee at the hospital sent an email to all seven consultants suggesting that the agreed price for initial consultations for self-pay patients should be £200. Following the email, four consultants raised their prices from £180 to £200, while the other three were already charging £200. Spire then liaised with its customer service team to facilitate the arrangement.

The CMA said that the competition law infringement carried on for almost two years, from at least August 2017 to July 2019. As well as fining Spire £1.2 million, the CMA also fined six of the seven consultants between £2,978 and £642 each. The seventh consultant was given total immunity as he brought the activity to the CMA's attention and cooperated with the investigation. The CMA discounted each of the fines by 20%, as the parties admitted to the arrangement and cooperated with the CMA in its investigation.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

DENMARK

Danish Competition Council orders Hugo Boss and retailers Kaufmann and Ginsborg to cease anticompetitive information exchange in rare dual distribution case

On 24 June 2020, the Danish Competition Council ("DCC") adopted two separate decisions concerning anticompetitive conduct engaged in: (i) between the clothing manufacturer, supplier and retailer Hugo Boss Nordic ApS ("Hugo Boss") and the retailer Axel Kaufmann ApS ("Kaufmann") and (ii) between Hugo Boss and the retailer Ginsborg ApS and Ginsborg Frederiksberg Centret ApS ("Ginsborg"). In short, the DCC found that the parties illegally exchanged information on prices, discounts and quantities in relation to future retail sales by Hugo Boss, which constituted a restriction by object in violation of Section 6 of the Danish Competition Act and Article 101(1) TFEU.

The DCC found that Hugo Boss has a vertical relationship with both Kaufmann and Ginsborg through its role as a supplier of clothing to these retailers. In addition, since Hugo Boss also operates its own retail business, the DCC considered that it is also their competitor at the retail level. While the DCC recognised that information exchange in a vertical relationship will often not raise competition concerns, it considered that the information exchanged in this case would result in a restriction of competition at the retail level given the horizontal competitive relationship between the parties at that level. In particular, the exchange of information on future prices, discounts and quantities planned by Hugo Boss' own retail business gave Hugo Boss and Kaufmann/Ginsborg the ability to coordinate their future sales which could have led to a reduced range of products on sale and lower discounts. In this regard, the DCC considered it important that the conduct enabled the retailers to know which products Hugo Boss would *not* discount acting as a retailer.

The fact that Hugo Boss had apparently maintained a "Chinese wall" between its wholesale and retail departments did not alter the DCC's findings. In this respect, the DCC asserted that e-mail exchanges demonstrated that the wholesale department had, in fact, relayed detailed information concerning the actions of Hugo Boss' retail division to Kaufmann and Ginsborg. Furthermore, the effectiveness of the Chinese wall was considered to be further undermined by the fact that the Administrative Director of Hugo Boss, who was in charge of both the wholesale and retail division, was included on certain of the e-mail correspondence with the retailers.

The DCC rejected the parties' argument that the conduct should be considered to benefit from the Vertical Agreements Block Exemption Regulation ("VABER") on the grounds that the exchange should be considered to be part of the parties' vertical relationship. Although vertical agreements in "dual distribution" relationships (i.e., where a supplier to a retailer also operates as a retailer) are in principle covered by the VABER, the DCC took the view that the relevant conduct in this case was horizontal as opposed to vertical. It further suggested that, even if the exchange of information was considered to occur as a result of the vertical agreement, it would not be covered by the VABER as it concerned information related to Hugo Boss' future competing sales at the retail level.

The DCC ordered the parties to cease the illegal conduct and to refrain from similar conduct in the future. The cases will be referred to the relevant State Prosecutor to bring criminal charges for the imposition of any penalty.

The decision is a very rare example of enforcement action taken in respect of information exchange in a dual distribution system. The paucity of such cases is not surprising as it is debatable whether a supplier should properly be considered to be a competitor of its retailers when it operates a retail business given that, for example, extensive restrictions on retail sales by a supplier (e.g., an obligation not to sell at retail level in a certain area or not to sell to certain end customers) would apparently be covered by the VABER (to protect the investments of the supplier's

retailers), whereas they would normally be considered to be restrictions by object when agreed between horizontal competitors. In addition, regardless of whether a supplier also has a retail business, it is apparent that a supplier has a legitimate need for information concerning sales by its retailers, including concerning their future plans, in order to operate an efficient distribution system (which, factually speaking, does not seem to have been an issue in this case). In any event, in the absence of further guidance at EU level, the case illustrates the risks associated with sharing sensitive information concerning future retail sales between a supplier and its retailers, in particular information concerning the supplier's future retail sales in a dual distribution context which – as illustrated by this case – could be considered by some authorities to exceed the scope of application of the VABER.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice clarifies obligations of parties in SEP licensing negotiations on FRAND terms

In its judgment of 5 May 2020, the Federal Court of Justice ("FCJ") overturned the appeal ruling of the Higher Regional Court of Düsseldorf (the "Düsseldorf Court") and found that Haier's mobile telephones and tablets infringed Sisvel's standard essential patent ("SEP") and that Sisvel had not abused its dominant position when negotiating SEP licensing terms that are fair, reasonable and non-discriminatory ("FRAND") (see VBB on Competition law, Volume 2020, No. 5). It was the FCJ's first opportunity to tackle the licensing of an SEP on FRAND terms following the landmark judgment of the Court of Justice of the European Union ("ECJ") in *Huawei v ZTE* (C-170/13) (see VBB on Competition Law, Volume 2015, No. 7).

The reasoning of the FCJ has now become publicly available and contains the following highlights.

Dominance

In relation to dominance, the FCJ confirmed with reference to *Magill* (C-241/91) that the ownership of intellectual property rights does not automatically confer a dominant position. Still, dominance will often arise and the FCJ agreed with the Court of Appeal of England and Wales in *Unwired Planet v Huawei* (see VBB on Competition Law, Volume 2018, No. 10) that in the case of an SEP, it will only be possible to rule out dominance under exceptional circumstances. The FCJ did not find such exceptional circumstances in the present case. The SEP in question was considered not to be substitutable by another technology. The FCJ rejected the position of Sisvel that there was no dominance due to the market power ascribed to the implementer which used the SEP for its products. According to the FCJ, market power needs to be assessed in relation to the entire market, rather than in relation to a specific party. Similarly, dominance is also not called into question by the attempt of the alleged infringer to draw out the licensing negotiations until the patent is no longer patent protected ("patent hold-out"). However, the SEP holder's dominant position only exists as long as that party is able to prevent products implementing the patent from appearing or remaining on the market. The structurally superior market position therefore ends with the expiry of the patent.

Abuse

Unlike the Düsseldorf Court, the FCJ found that Sisvel had not abused its dominant position by seeking a prohibitory injunction as well as the recall and destruction of the products relying on the patent. This is because Haier had failed to show a willingness to conclude a licence agreement on FRAND terms.

On this occasion, the FCJ clarified what it expects from the parties when taking the steps described in *Huawei v ZTE*.

Infringement alert by SEP holder

Prior to bringing an action, the SEP holder must alert the alleged infringer by designating the patent and specifying the way in which it has been infringed. However, the FCJ appears to limit the need for an infringement alert to cases where the infringer is not yet aware of its patent infringement. Designating the patent and specifying the way in which it was infringed does not require technical or legal explanations regarding the alleged infringement. The provision of claim charts is sufficient but not mandatory. The infringer must be able to understand the allegation which may require that he takes out technical or legal advice. The patentee can expect that the infringer will contact him within a short period of time if the infringer takes the view that the information provided by the patentee is insufficient.

Willingness of implementer to take a licence

If the alerted infringer has clearly and unequivocally expressed his willingness to take a licence on FRAND terms but is not in a position to determine what is FRAND, then special obligations rest on the patentee. For example, the patentee will have to provide detailed reasoning for its claim that should allow the alleged infringer to assess whether the patentee is liable to abuse its dominant position.

In relation to the willingness of the implementer to take a licence, the FCJ specified that it is insufficient if he considers concluding a licence or negotiating. The implementer must rather proactively participate in the licence negotiations. The FCJ subscribed to the principle embraced by the High Court of England and Wales in *Unwired Planet v Huawei* that "*a willing licensee must be one willing to take a FRAND licence on whatever terms are in fact FRAND*". The FCJ explained that an infringer who does not react for several months after the infringement alert cannot be considered to be willing to take a licence. The FCJ further referred to the condition set out in its judgment of 2009 in *Orange-Book-Standard* that the willingness to take a licence must be unconditional and cannot be made dependent on, for example, the validity of the patent.

Based on Haier's statements to Sisvel, the FCJ concluded that Haier had not been willing to take a licence. The fact that Haier insisted on receiving claim charts for all patents was considered an indication that, in view of the approaching expiration of the patent, Haier was not interested in concluding the negotiations but rather in prolonging them. Additionally, Haier could not rely on a statement made after the expiry of the patent as proof of its willingness to take a licence because, at that time, Sisvel was no longer in a dominant position.

Since Haier failed to exhibit its willingness to take a licence, Sisvel was under no obligation to specify how the royalty was calculated.

Portfolio licences

The FCJ clarified that offering portfolio licences does not infringe competition law as long as: (i) the alleged infringer is not requested to pay for patents that are not standard essential; and (ii) the licence fee is calculated in a way that does not prevent users from developing a product for a limited territory.

Obligations on the patentee

The patentee is only obliged to provide a concrete licence offer to the implementer after the implementer expressed its willingness to take a licence.

The obligation on the patentee to explain the licence conditions is especially important if he is not willing to license out solely the patent used by the infringer, but insists on licensing a patent portfolio.

According to the FCJ, the scope, detail and timing of the information to be provided by the patentee is subject to a case-by-case assessment that also has to consider the reaction of the alleged infringer.

FRAND

The FCJ did not define FRAND but explains that it is subject to a case-by-case assessment. The FCJ recalls that the prohibition to discriminate does not imply that the patentee is obliged to apply a 'uniform tariff' which would guarantee the same conditions for all users. There may be an objective justification for unequal prices.

Sisvel had offered a licence on more favourable terms to a Chinese state enterprise and claimed that these terms resulted from coercion by the foreign authorities. The Düsseldorf Court had outright excluded that such facts could constitute a justification for unequal pricing. By contrast, in an *obiter dictum*, the FCJ found that the Düsseldorf Court had been wrong in finding that the licence terms offered to Haier were discriminatory. According to the FCJ, this is because a patentee which accepted a lower offer from a specific user, for example due to limited possibilities to enforce its patent rights and collect royalties, had a valid reason not to extend such exceptional conditions to other users to which it continues to offer the usual conditions as long as these are adequate and do not harm the competitive position of the other licensees.

Generally, the burden of proof to show discrimination or unfair treatment is on the implementer, while the patentee must justify unequal treatment.

Damages

The German Patent Act stipulates that the infringer which intentionally or negligently uses the patented invention is liable for damages. The FCJ confirmed that negligence applies even prior to the first infringement alert of the claimant.

The FCJ observed that bringing an action for damages resulting from a patent infringement does not generally constitute an abuse of dominant position by the SEP holder. As a result, the infringer can only bring a counterclaim for damages based on the impossibility of entering into a FRAND licence agreement. However, this presupposes that the alleged infringer asked for a licence agreement on FRAND terms and that the patent holder unlawfully rejected such a request or offered licence terms that are not FRAND. Due to Haier's lack of willingness to enter into a licence agreement while the patent was still valid, the FCJ rejected Haier's counterclaim for damages.

The FCJ avoided a formalistic answer to the highly disputed question before the lower courts in Germany as to when the SEP holder must make its licence offer (see VBB on Competition law, Volume 2020, No. 5). According to the FCJ, the timing as well as the scope and the detail of information to be provided by the patentee have to be assessed on a case-by-case basis and should take account of the reaction of the alleged infringer. Certainly, in view of the judgment of the FCJ, implementers will have to take a more pro-active approach in SEP negotiations and show their willingness to take a licence unambiguously.

STATE AID

– EUROPEAN UNION LEVEL –

EU General Court annuls the Commission's decision in the Apple case (T-778/16 and T-892/16)

On 15 July 2020, the General Court (the "GC") annulled the European Commission's (the "Commission") decision of 30 August 2016 concerning tax rulings adopted by the Irish authorities in relation to two companies forming part of the Apple Group (the "Contested Decision").

The Contested Decision found that the tax rulings issued by Ireland with regard to the profits of Apple Operations Europe ("AOE") and its subsidiary Apple Sales International ("ASI") – both incorporated, but not tax resident, in Ireland – had granted them a selective advantage. In particular, the Contested Decision found that these rulings gave rise to a reduction of the charges that ASI and AOE would have been required to bear in the course of their business operations in Ireland, and that, accordingly, they had granted State aid to these companies. The Contested Decision specified in this regard that insofar as ASI and AOE are part of the Apple Group – which had to be regarded as a single economic unit –, the whole group had benefited from the Irish State aid.

The GC annulled the Contested Decision on the ground that the Commission was wrong to declare that ASI and AOE had been granted a selective advantage and, by extension, State aid, within the meaning of Article 107(1) Treaty on the Functioning of the European Union ("TFEU").

The judgment primarily focuses on several technical aspects of the Irish tax rules, which are highly fact-specific. In particular, the reasoning of the Court is centred on the Commission's errors with regard to the allocation of certain profits within the Apple Group. At the same time, however, the judgment also provides some interesting developments with regard to the case law in the field of State aid, which are likely to apply in a broader context than that at stake in those proceedings. Below we outline some of the aspects that appear to be most relevant for these purposes.

First, the GC confirmed the scope of the Commission's competence.

The GC found that since the Commission is competent to ensure that Article 107 TFEU is complied with, it cannot be considered to have exceeded its competence when assessing whether, in issuing the tax rulings, the Irish authorities had granted ASI and AOE favourable tax treatment by enabling them to reduce their profit as compared with that of other corporate taxpayers. The GC specified that in the context of such an assessment the Commission could – and was required to – assess the Irish tax rules in order to determine whether there was an advantage in favour of ASI and AOE.

Second, the GC addresses the relationship between the advantage and selectivity conditions, which are laid down in Article 107(1) TFEU.

The Applicants had argued that the Commission's assessment conflated the advantage and selectivity conditions, whereas it should have examined them separately.

The GC considered that, according to the case law, advantage and selectivity are two separate conditions laid down in Article 107(1) TFEU. However, it is not inconceivable that these conditions may be examined together where the examination carried out by the Commission indicates, first, that the measure in question confers an economic advantage on its recipient and, second, that that advantage is not enjoyed by undertakings in a comparable legal and factual situation.

In particular, the Court held that, with respect to aid measures granted in the form of fiscal advantages, the advantage and selectivity conditions can be examined together. In fact, they may be jointly examined as part of a single "third condition" laid down in Article 107(1) TFEU. In this regard, the Court referred to the judgment of 30 June

2016, Belgium v. Commission (C 270/15 P, paragraph 32), in which the Court of Justice had (cryptically) referred to a "third condition", according to which the Commission is required to assess whether the measure at issue confers a "selective advantage" on the recipient.

In short, while recalling that advantage and selectivity are separate conditions, the GC appears to have effectively conflated these into one single requirement. This may lead in the future to further confusion with regard to the interplay between these two conditions and the related standards of proof that the Commission is required to comply with. It will be interesting to see how this will reflect in the pending cases before the EU Courts (for instance, the action brought on 4 September 2018 by ENGIE Global LNG Holding and Others against the Commission, Case T-525/18).

Third, the Court provided guidance with regard to the identification of the framework for the analysis of the selective advantage.

An important issue at stake was whether the relevant framework had to include both resident and non-resident companies. In fact, the Contested Decision found that even though resident and non-resident companies were taxed on different sources of income, in the light of the intrinsic objective of those rules, namely the taxation of the profits of all companies subject to tax in Ireland, both types of company were in a comparable situation. The applicants, on the other hand, argued that the tax rules provided a separate charging provision applicable to non-resident companies, which were therefore not in a situation comparable to that of resident companies.

The GC noted that the purpose of the tax rulings at issue and of the legal rules of which they form part must be taken into consideration when determining the reference framework. In this regard, it is interesting to note that the Court essentially endorsed the approach to the definition of the reference framework set out in the Commission's Notice on the notion of State aid as referred to in Article 107(1) TFEU. In particular, it stressed that although that notice cannot bind the Court, it may nevertheless serve as a useful source of guidance.

Having clarified this, the Court found that, in the present case, the tax rulings form part of the general Irish corporation tax regime, the objective of which is to tax the chargeable profits of companies carrying on activities in Ireland – be they resident or non-resident. Even though the Irish rules appear to provide specific provisions for non-resident companies, their wording indicates that these companies, insofar as they carry on business in Ireland through a branch, must pay corporate taxes on all their chargeable profits. When seen from that perspective, non-resident companies carrying on business in Ireland through a branch are in a comparable situation to resident companies.

With this in mind, the Court concluded that the provisions concerning the chargeable profits of companies that are not resident in Ireland cannot in themselves constitute a specific regime that is separate from the ordinary rules. Therefore, the Commission correctly found that the reference framework encompassed the rules applicable to all these companies.

Needless to say, this approach is likely to have an important impact on future State aid cases in which resident and non-resident companies are concerned.

Fourth, the Court clarified the conditions under which the arm's length principle can be applied to assess the existence of State aid.

In the Contested Decision, the Commission relied on the arm's length principle in its analysis of whether the tax rulings gave rise to a selective advantage, in particular in its primary line of reasoning. It should be noted that this line of reasoning was based on the finding that the head offices of ASI and AOE should not have been allocated, in an arm's length context, certain profits of the branches. (Those profits should have instead been allocated to ASI and AOE's branches.)

The Court found that this line of reasoning was based on an incorrect assessment of the provisions of Irish tax law relating to the taxation of the profits of companies that are not resident in Ireland but which carry on a trade there through a branch. For this and other fact-specific reasons, the GC annulled the Contested Decision.

However, leaving these tax law technicalities aside, some aspects related to the application of the arm's length principle by the Commission are worth highlighting.

The GC noted that the dispute centred around the taxation of companies that are not tax resident in Ireland and which carry on a trade in that Member State through their branches. It did not concern the prices of intra-group transactions within a group of undertakings, where the assessment of the advantage would ordinarily require the application of the arm's length principle.

Nevertheless, the Court noted that this principle could be applied by analogy insofar as it was clear from the Irish tax law that the profits derived from the activities of the branches of non-resident undertakings should be taxed as if they resulted from the economic activities of standalone undertakings. Thus, when, in connection with the power conferred on it by Article 107(1) TFEU, the Commission examines a tax measure concerning the profits of a non-resident company carrying on business in Ireland through a branch, it may compare the tax burden of such non-resident company resulting from the application of that tax measure with the tax burden resulting from the application of the normal rules of taxation under national law to a resident company, placed in a comparable factual situation, carrying on its activities under market conditions.

This passage is particularly important and may lead to a broader application of the arm's length principle in State aid cases. However, it should be noted that the GC subjected this finding to an important *caveat*.

The GC specified that it cannot be considered that there is an obligation to apply the arm's length principle, arising from Article 107 TFEU, which would require Member States to apply that principle horizontally and in all areas of their national tax law. In particular, at the current stage of development of EU law, the Commission does not have the power to independently determine what constitutes the normal taxation of an integrated undertaking while disregarding the national rules.

Accordingly, only if the national rules – as in the present case – provide that branches of non-resident companies, as concerns the profits derived from those branches' trading activity in the relevant Member State, and resident companies are to be subject to the same conditions of taxation, Article 107(1) TFEU gives the Commission the right to check whether the level of profit allocated to the branches corresponds to the profit that would have been obtained if that activity had been carried on under market conditions.

Commission recommends not granting financial support to companies with links to tax havens

On 14 July 2020, the European Commission (the "Commission") issued a Recommendation to Member States not to grant financial support to companies with links to countries that are on the EU's list of non-cooperative tax jurisdictions. According to the Recommendation, restrictions should also apply to companies that have been convicted of serious financial crimes, including, among other matters, financial fraud, corruption, and non-payment of tax and social security obligations.

This Recommendation aims at providing a template to Member States on how to prevent public support from being used in tax fraud, evasion, avoidance or money-laundering schemes, or terrorist financing. In particular, it suggests that companies with links to jurisdictions on the EU's list of non-cooperative tax jurisdictions should not be granted public support. At the same time, the Recommendation also provides certain exceptions to these restrictions.

Member States are now required to inform the Commission about any measures taken pursuant to this Recommendation. The Commission will publish a report in this regard within three years.

Commission prolongs EU State aid rules and adopts targeted adjustments to mitigate impact of coronavirus outbreak

On 2 July 2020, the European Commission (the "Commission") announced the prolongation of several existing State aid rules which would have otherwise expired at the end of 2020, with the purpose of mitigating the impact of the coronavirus outbreak on companies. In particular:

- The following texts are prolonged by one year (i.e., until 2021): (i) Guidelines on regional State aid for 2014-2020; (ii) Guidelines on State aid to promote risk finance investments; (iii) Guidelines on State aid for environmental protection and energy; (iv) Communication on the execution of important projects of common European interest; (v) Communication on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance.

- The following texts are prolonged by three years (i.e., until 2023): (i) General Block Exemption Regulation (GBER); (ii) the *De minimis* Regulation 1407/2013; (iii) Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.

In addition, the Commission has also decided to make some targeted adjustments to the rules which are being prolonged, as well as to the Framework for State aid for research and development and innovation (which has no expiry date). Moreover, in the context of the Commission's recent proposal to prolong by three years (beyond the current expiry date of 31 December 2020) the *De minimis* Regulation 360/2012 concerning undertakings providing services of general economic interest, the Commission has now also proposed to introduce an adjustment to allow undertakings that got into difficulty because of the coronavirus outbreak to remain eligible for this type of aid for a limited period of time.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Antitrust: Commission launches sector inquiry into the consumer Internet of Things (IoT)

On 16 July 2020, the European Commission ("Commission") launched an antitrust sector inquiry into the market for the Internet of Things (IoT) for consumer-related products and services in the EU. According to the Commission, the sector inquiry will focus on consumer-related products and services that are connected to a network and can be controlled at a distance, for example via a voice assistant or mobile device. These include smart home appliances and wearable devices.

In motivating the launch of the sector inquiry, the Commission has identified concerns relating to restrictions of data access and interoperability, as well as certain forms of self-preferencing and practices linked to the use of proprietary standards. The Commission notes that IoT ecosystems are often characterised by strong network effects and economies of scale, which might lead to the fast emergence of dominant digital ecosystems and gatekeepers and might present tipping risks. The sector inquiry will cover products such as wearable devices (e.g., smart watches or fitness trackers) and connected consumer devices used in the smart home context, such as fridges, washing machines, smart TVs, smart speakers and lighting systems. The sector inquiry will also collect information about services available via smart devices, such as music and video streaming services, and about the voice assistants used to access them.

Upon launch of the sector inquiry, the Commission sent out requests for information (RFIs) to a range of players active in IoT for consumer-related products and services throughout the EU. The Commission expects to publish a preliminary report on the replies for public consultation in the spring of 2021, and a final report in the summer of 2022.

– MEMBER STATE LEVEL –

GERMANY

German FCO publishes final sector inquiry report on smart TVs

On 1 July 2020, the German Federal Cartel Office ("FCO") published the final report on the sector inquiry on smart TVs which revealed serious transparency shortcomings in the privacy policies of all major market players in Germany. The FCO concluded that almost all smart TV manufacturers active on the German market use privacy policies that violate the GDPR.

The report is based on survey responses from 21 manufacturers, accounting for almost 100% of smart TV sales in Germany. The surveys addressed market structures and market conditions with special focus on data flows between consumers and manufacturers of smart TVs and their software suppliers, data protection and security in the use of software.

The report shows that smart TVs can collect many types of personal data. A consumer's individual viewing habits, app use, surfing and clicking behaviour, voice commands, and cursor movements, as well as content played via the TV set, can be recorded and analysed. The extent to which companies have made use of these data varies.

From an economic point of view, there is a strong incentive to collect and use such data for advertising purposes. The more the available data about a person is advertising-relevant (e.g., interests, age, income), the better this person can be targeted by tailor-made advertising. Consumers receive supposedly more targeted advertisements which is more lucrative for the advertising industry. However, the majority of consumers in Germany have reservations about personalised advertising. Studies and market observations show that while consumers state that they attach great importance to the privacy of their personal data, they generally do not act with data protection in mind in everyday life situations.

According to the FCO, this phenomenon, known as the "privacy paradox", could be explained by the fact that consumers do not receive, understand, or research essential information for data protection relevant decisions. The reasons for this are that: (i) the effort involved is high and the expected gain in knowledge is low; (ii) there is no realistic alternative to accepting privacy policies if one wants to use a certain device or service; and (iii) consumers tend to value short-term benefits more than any long-term risks.

The FCO therefore regarded it as important that transparent information on data processing be provided prior to the purchase of a smart TV and that consumers can avoid or at least minimise the processing of their personal data during setup and use of their device.

According to the FCO's findings, it is either not possible at all or at least very difficult for consumers to find information on the use of their data prior to purchasing a smart TV. During setup, consumers usually consent to the privacy policy and terms of use as they do not see any alternatives. Consumers are usually not aware of the type of personal data being processed, the kind of behaviour that triggers certain types of data processing, the nature of data being transferred to third parties and the duration for which their data is being stored. Therefore, they cannot adapt their user behaviour to reduce the amount of personal data shared to a minimum

The FCO also assessed software data security risks of smart TVs. The sector inquiry revealed various shortcomings and a lack of a uniform data security level. Many manufacturers were found to not maintain their devices' security standards through software updates in the years following the purchase. No company was found to provide reliable information on the duration of the availability of security updates.

Following the findings, the FCO advocates introducing legislation that: (i) provides consumers with a clearly defined claim to software updates vis-a-vis manufacturers; (ii) clarifies liability issues arising from the interaction of various players in the Internet of Things; and (iii) obliges the responsible companies to provide necessary information on the product, data protection and settings in a clearer and simpler way. Based on its competences in consumer protection, the FCO cannot impose fines or infringement decisions.

The FCO recommends that consumers: (i) check prior to purchase if the product warranty includes software errors; (ii) check prior to purchase whether and for how long after the purchase the manufacturer provides software updates; (iii) share as little data as possible during the initial setup; (iv) regularly carry out security updates; (iv) uninstall any apps not in use; and (v) disconnect the device from the internet and purchase an external device for smart TV functions if software updates are no longer available.

The findings of the Smart TV sector inquiry are transferable to other complex devices on the Internet of Things which also function as platforms for different service providers. The full report is available here (in German).

Priorities of German Council presidency announced

The Programme for Germany's Presidency of the Council of the European Union which started on 1 July 2020 identifies the following goals with regard to competition law:

- The EU should be more decisive in its opposition to market distortions caused by state-controlled and subsidised companies from third countries;
- European state aid legislation should be modernised to ensure a level playing field, particularly with regard to carbon leakage and to support the implementation of the European Green Deal. State aid and cooperative projects for creating infrastructures, such as broadband and mobile phone networks, as well as the implementation of climate protection measures, should be facilitated under simplified conditions;
- In the area of merger control proceedings, the presidency is committed to ensuring that global competition is kept in mind and that companies are provided with greater legal certainty for cooperative partnerships;
- Regarding abuse of dominant position, Germany considers that the control of abuses on platform markets should be further strengthened.

UNITED KINGDOM

CMA publishes its final report on online platforms and digital marketing and calls for new pro-competitive regulatory regime

On 1 July 2020, the UK's Competition and Markets Authority ("CMA") published its final report on its year-long market study into online platforms and the digital advertising market in the UK. The CMA found that existing competition law tools are not suitable for ensuring effective competition in the sector. It recommends the creation of a new regulatory regime to regulate major online platforms funded by digital advertising such as Google and Facebook.

In its report the CMA said that although the services provided by Google and Facebook are highly valued by consumers and help many small businesses to reach new customers, it is concerned that the platforms have developed such unassailable market positions that rivals can no longer compete on equal terms. The CMA says that their large user bases, their unmatchable access to user data, their default settings nudging people into using their services and giving up their data, as well as their presence across many different markets, presents a barrier to new competition. The CMA is concerned that this weak competition in search and social media reduces innovation and choice, and results in consumers giving up more personal data than they would in a more competitive environment.

However, the CMA believes that its existing powers are not sufficient to address its concerns. It therefore proposes that the UK government create a pro-competition regulatory regime for online platforms, which would be enforced by a new "Digital Markets Unit" within the CMA. In its report the CMA says that the new unit should have the ability to: (i) enforce a code of conduct governing the behaviour of online platforms that have substantial market power; (ii) create rules to give consumers greater control over their data, such as requiring platforms to secure consumer consent for the use of their data and ordering Facebook to give consumers a choice over receiving personalised advertising; and (iii) intervene to address concerns regarding market power, such as measures to increase the interoperability between different platforms and even structural interventions, such as ordering the separation of platforms where necessary.

To further inform the UK government on the design of a new pro-competition regulatory regime, the CMA has launched a "Digital Markets Taskforce" to build on the conclusions of the market study. It will also publish a call for information and will write to several online platforms seeking their views and information. The CMA has said that the Taskforce will deliver its advice to the UK government by the end of 2020.

Interestingly, given the assertive tone of the CMA's report, the CMA has held back from launching a full market investigation, which would have allowed it to use enforcement powers in order to intervene in digital advertising markets. The CMA said that this would introduce "burdens onto businesses", which is not appropriate given the COVID-19 pandemic. Nonetheless, the CMA has suggested that if the government does not take its recommendations forward it will reconsider the option of a full market investigation.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Commission adopts Communication on the protection of confidential information in follow-on damages actions

On 20 July 2020, the European Commission (the "Commission") adopted a communication on the protection of confidential information by national courts in follow-on damages proceedings (the "Communication"). The Damages Directive provides that national courts should have the ability to order disclosure of evidence in follow-on damages proceedings under specified conditions. However, the protection of confidential information in the context of such disclosure varies between Member States.

The purpose of the Communication is to support national courts in striking the right balance between a claimant's right to access relevant information and a defendant's right to protect its confidential information. To that end, the Communication offers practical guidance in the form of presenting several measures that a national court can take to protect confidential information both during and after the court proceedings. The measures include redactions, confidentiality rings, the use of experts and a closed hearing. The availability of those measures will, however, depend on the specifics of the national procedural framework.

It should be noted that the Communication does not modify any national laws and is not binding upon national courts.

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