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Table of contents

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Table of contents

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MERGER CONTROL

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority approves brewery merger subject to conditions

On 27 August 2020, the Austrian Federal Competition Authority ("FCA") announced its conditional approval of the acquisition of 63% of the shares and sole control of the brewery company Fohrenburg Beteiligungs-Aktiengesellschaft ("Fohrenburg") by Austria's largest brewery, Brau Union Aktiengesellschaft ("Brau Union") following a Phase II investigation.

The FCA and Federal Cartel Prosecutor initially raised concerns over potential exclusionary and foreclosure effects on the market for the production and distribution of beer and on the general beverage wholesale market. As part of the commitments offered to secure clearance of the transaction, Brau Union firstly undertook to submit to extensive monitoring in relation to any rebates granted in the area of food retail for the next three years. In order to make this possible, Brau Union committed to provide all relevant data, including about costs, to the FCA and Federal Cartel Prosecutor. Secondly, Brau Union agreed not to lease or acquire any restaurants or pubs in the area of Vorarlberg for the next five years. Finally, Brau Union agreed to refrain from acquiring any breweries based in other regions of Austria within the same timeframe. The FCA and Federal Cartel Prosecutor considered the remedies proposed by Brau Union to be sufficient to eliminate any competition concerns and approved the merger subject to these commitments.

FRANCE

French Competition Authority issues first prohibition decision

On 28 August 2020, following an in-depth examination that was announced on 29 October 2019, the French Competition Authority ("FCA") blocked the acquisition of joint control by Soditroy and Association des Centres Distributeurs E.Leclerc ("ACDLec") of a Géant Casino hypermarket located in Barberey-Saint-Sulpice, a commune close to Troyes in the Grand Est region of northeastern France. This is the first time the FCA has blocked a merger since being granted the power to do so in 2009.

Soditroy operates various supermarkets, hypermarkets and other stores in the Troys area, all under the E.Leclerc brand. ACDLec is an association that provides its members the right to use the E.Leclerc brands and defines E.Leclerc's brand strategy.

The FCA's analysis revealed significant concerns that the deal would harm consumers in the Barberey-Saint-Sulpice area. Consumers would enjoy less choice and product diversity, as they would be left with the choice of shopping at only a local Carrefour or an E.Leclerc hypermarket. The target hypermarket would become an E.Leclerc store, and its products and marketing policies would likely be harmonized with those of E.Leclerc. Moreover, the FCA noted that the target store would have little incentive to lower its prices, which it would likely have done had it remained independent, as high regulatory barriers reduced the likelihood that a new competitor would enter the market.

The FCA also held that the deal raised a substantial risk of coordinated effects. According to the FCA, the merger would essentially have created a stable duopoly of E.Leclerc and Carrefour in the Barberey-Saint-Sulpice area. The FCA found that the retail market was transparent, facilitating coordination on pricing and promotions and enabling each of the two remaining players to retaliate against the other for diverging from any common policy. The FCA also rejected any claims that efficiency gains would offset the risks linked to the merger.

To address the FCA's concerns, the parties proposed to reduce the surface area of the target store from 8210 m² to 6000 m². However, the FCA found that this would not elim-

inate the concerns it had raised, and would diminish the product range available to consumers. The FCA rejected the remedies proposed by the parties and blocked the merger.

GERMANY

Düsseldorf court dismisses appeal of slide bearing producers against FCO prohibition decision

On 26 August 2020, the Higher Regional Court of Düsseldorf ("the Court") dismissed as inadmissible an appeal by Miba and Zollern, two producers of hydrodynamic slide bearings, against a January 2019 decision of the German Federal Cartel Office ("FCO") prohibiting them from creating a joint venture (see VBB on Competition Law, Volume 2019, No. 2). Following the FCO's prohibition, the companies applied for Ministerial Authorisation of the transaction, which the Federal Minister of Economic Affairs and Energy granted in August 2019 with conditions.

The two companies implemented the joint venture the merger in compliance with the ministerial conditional authorisation . They nevertheless challenged the validity of the FCO's decision in court. The parties argued the FCO had erred in its market definition by considering bearings of different sizes as part of the same market and, as a result, considered the parties close competitors in an already concentrated market. The parties argued that unconditional clearance by the FCO based on a correct market definition would have been more advantageous than the ministerial conditional authorisation.

The Court ruled that the parties were no longer burdened by the FCO's prohibition decision and therefore dismissed their primary motion to annul the decision. The Court also dismissed the parties' subsidiary motion for a declaratory judgment of illegality as the parties had failed to demonstrate an ongoing interest in the proceedings, such as the risk of recurrence or the preparation of a liability claim against the German State.

The draft amendment of the German Act against Restraints of Competition (see the *Legislative, Procedural and Policy Developments section* below), aims to change the provisions regarding Ministerial Authorisations by requiring the parties to appeal an FCO decision in court or, at least, to seek a preliminary injunction prior to applying for a Ministerial Authorisation. The amendment would guarantee that the lawfulness of an FCO merger decision would be judicially reviewed before a Ministerial Authorisation is issued. This would avoid the situation that existed in the present case where the Authorisation was granted prior to judicial review of the FCO's decision.

HUNGARY

Hungarian Competition Authority imposes gun-jumping fine on three venture capital funds

On 22 September 2020, the Hungarian Competition Authority ("GVH") imposed fines totalling HUF 15.4m (approximately € 42,000) on three venture capital funds, two of which are controlled by the state-owned venture capital firm Hiventures Zrt, for failing to notify in a timely manner their acquisition of joint control over Talentuno Technologies Zrt, an employment placement agency.

While the GVH cleared the concentration, it found that the parties had only notified the deal in March 2020, although it had been closed almost a year earlier. The parties argued that the delay in notifying the transaction was permissible under an exception provided in Article 25(1) of the Hungarian Competition Act ("HCA") that applies to "temporary acquisitions of control or ownership" by "asset management organisations" in "preparation of a resale", as the parties did not intend to hold control for longer than a year. The GVH, however, found that the conditions for this exception were not satisfied. The documentary evidence revealed that the acquirers had anticipated that their control over the target company would last longer than a year. Moreover, the GVH considered that the acquirers exercised control over the target beyond what was "strictly necessary" under the exception, by participating in the adoption and subsequent modification of the target's business plan.

UNITED KINGDOM

Amazon fined £ 55,000 for delayed compliance with CMA document request

On 8 September 2020, the UK's Competition and Market Authority ("CMA") issued a decision fining Amazon for failing to provide 189 documents by the deadline set by the CMA. The document request came during the CMA's investigation of Amazon's purchase of a 16% stake in the

food-delivery company Deliveroo, which was ultimately cleared last month. The fine is the largest fine the CMA has issued to date for failure to comply in a timely manner with information requests.

The CMA imposed two fines, of £ 25,000 and £ 30,000, for each Section 109 information request with which Amazon failed to comply. The CMA noted that, although Amazon ultimately did provide all of the information required, the CMA considered that Amazon's behaviour caused unnecessary delays to the investigation, as some documents were provided almost two months late within the course of a six-month investigation.

The CMA's Section 109 notices, issued under the Enterprise Act 2002, set out the information or documents companies are required to provide to the CMA, as well as a deadline for complying. The CMA can fine a company up to £ 30,000 for each breach. The CMA has imposed fines on five companies for failing to comply with such information requests. In 2019, the CMA fined Sabre Holdings £ 20,000 for failing to produce documents quickly enough (see VBB on Competition Law 2019, No. 10), and in 2017, Hungryhouse was fined £ 20,000 for failing to comply with a document request.

CMA blocks Hunter Douglas' completed acquisition of 247 Home Furnishings

On 14 September 2020, the UK's Competition and Markets Authority ("CMA") ordered the blinds supplier Hunter Douglas to sell off its majority stake in 247 Home Furnishings, which also sells blinds. The CMA found that the deal, which had already been completed, would substantially lessen competition, as it would result in a reduction from three to two large firms in the market for online sales of made-to-measure blinds, with few effective alternative providers remaining after the merger.

In 2013, Hunter Douglas acquired a minority stake in 247 Home Furnishings and subsequently acquired the whole of the company in 2019. In its decision, the CMA ruled that Hunter Douglas must sell the 51% share in 247 Home Furnishings that it acquired in 2019.

The CMA took a remarkably narrow view of the relevant market in its decision, as it considered that the online retail supply of made-to-measure blinds in the UK was not in the same market as the supply of made-to-measure blinds in brick and mortar stores. It also found ready-made blinds to be only a distant competitor of made-to-measure blinds.

Based on this narrow market definition, the CMA found evidence showing that the merged entity's online rivals were much smaller and that competition from other retail channels and alternative products was limited. The CMA also found that any growth by existing rivals was likely to be limited and effective entry by new rivals in the market was unlikely.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Advocate General opinion in Deutsche Telekom v European Commission (Case C-152/19) and Slovak Telekom v European Commission (Case C-165/19)

On 9 September 2020, Advocate General ("AG") Saugmandsgaard Øe issued his opinion in *Deutsche Telekom v. European Commission* (Case C-152/19) and *Slovak Telekom v. European Commission* (Case C-165/19) advising the Court of Justice ("ECJ") to dismiss the parties' challenges to the Commission's finding that they had abused their dominant position on the Slovak broadband services market.

In 2014, the Commission fined Slovak Telekom ("ST") and Deutsche Telekom ("DT") (ST's parent company) € 38.8m for infringing Article 102 TFEU by refusing to provide alternative operators with fair terms of access to ST's local loop network, and for imposing a margin squeeze on alternative operators of broadband services in Slovakia. DT was fined a further € 31m for recidivism, as it had already been fined in 2003 for margin squeeze practices in the German broadband market.

In its decision in 2018, the General Court ("GC") largely upheld the Commission's decision but reduced the fines. It held that the fine imposed on DT for recidivism was too high and that the Commission had failed to prove part of its findings that ST's pricing was anticompetitive. The GC also confirmed the Commission's decision that DT held decisive influence over its Slovakian subsidiary and was therefore was liable as its parent company. The parties then appealed the decision to the ECJ.

AG Saugmandsgaard Øe's opinion advising the ECJ to dismiss the parties' challenges is most notable for its comments on the scope of the judgment in *Bronner* (Case C-7/97). Pursuant to Bronner, a dominant entity's refusal to grant access to its infrastructure will only amount to an abuse if, *inter alia*, access to that infrastructure is indispensable to the ability of competing undertakings to carry on their businesses.

ST did not explicitly refuse access to its local loop, but nevertheless argued that the unfair contract terms it imposed on alternative operators were akin to an implicit refusal to grant access. On this basis, the parties argued that the case involved a refusal to supply and that it was therefore necessary to show that access to the local loop was indispensable for the alternative operators (and not just desirable).

AG Saugmandsgaard Øe disagreed with this approach and proposed that the ECJ reject the very concept of an *implicit refusal to grant access*. In other words, he proposed that the concept of a refusal to grant access (and consequently the requirement to satisfy the *Bronner* criteria) be limited only to explicit or categorical refusals to supply. He added that even a limited concept of an implicit refusal to grant access (i.e., restricted only to the most serious abusive practices, such as *very* unfair prices) would "be a serious mistake." This would create business uncertainty and the, in AG Saugmandsgaard Øe's view, somewhat counter-intuitive consequence that what he considered the most serious abuses would have to comply with the *Bronner* criteria and therefore be harder to prove. He added that the Court had never applied the conditions in *Bronner* to unfair contract terms.

AG Saugmandsgaard Øe pointed to the rationale underpinning the conditions laid down in *Bronner* to explain why, in his mind, they should not be applied to the unfair contract terms imposed by the parties in the case. He explained that there is a fundamental difference between penalising the terms of an agreement on one hand and penalising a refusal to deal on the other. To penalise the (explicit) refusal to deal is to encroach on the right to choose one's trading partners, whereas penalising the imposition of unfair contract terms (irrespective of how unfair) does not. Because obliging an undertaking to deal with a third party against its will amounts to a serious infringement of the freedom to contract, a higher legal standard (i.e., the need to demonstrate indispensability) is required for a categorical refusal to supply to amount to an infringement of Article 102. AG Saugmandsgaard Øe also pointed to the fact that forcing

undertakings to deal with competitors may have a detrimental impact upon competition in the long run as the incentive to invest in efficient facilities would be reduced if competitors were, upon request, able to share the benefits.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority imposes fines of € 444 million on Novartis, Roche and Genentech for abusive efforts to segment market

Background

On 9 September 2020, the French Competition Authority (the "FCA") imposed a fine of € 444 million on Genentech, Novartis and Roche for abusing their collective dominant position on the market for the commercialisation of drugs for the treatment of age-related macular degeneration (AMD) (an eye condition). The FCA's decision concerned two virtually-identical products developed and manufactured by Genentech (a subsidiary of Roche): (i) Avastin - a lower-priced product indicated for the treatment of certain forms of cancer, and (ii) Lucentis - a higher-priced product indicated for the treatment of certain eye diseases, including AMD. For commercialisation purposes, Genentech licensed Lucentis to Novartis (which owns 33.3% of Roche), whilst Avastin was to be commercialised by Roche. Avastin was the first product to reach the market, receiving a marketing authorisation ("MA")for a cancer indication in January 2005, whilst Lucentis was approved in 2007 for ophthalmology indications.

Despite their different indications, doctors realised that Avastin was also effective against AMD, and began prescribing Avastin "off-label" because it was significantly less expensive than Lucentis. This triggered efforts by the companies to reinstate their intended segmentation of the market and to protect the higher-priced sales of Lucentis. The FCA found that the parties had carried out anticompetitive strategies to hinder the off-label use of Avastin to treat AMD in order to preserve sales of Lucentis.

Infringement 1: Denigration of Avastin

The FCA found that Novartis had carried out a structured communication campaign aimed at disparaging the use of Avastin to treat AMD in order to preserve Lucentis' strong position on the market. In its communications with ophthalmologists, key opinion leaders, patient associations and the general public, Novartis was found to have exaggerated the risks of using Avastin "off-label". According to the FCA, Novartis went beyond mentioning the objective differences between Lucentis and Avastin in the following ways:

- Novartis emphasised the safety profile of Lucentis for treating AMD (as there had been a number of clinical studies), whilst highlighting the lack of clear data on the safety of Avastin to treat AMD. The FCA considered that such statements were in contradiction with Novartis's internal documents which acknowledged that there was no proven clinical difference.

- Novartis relied on a selective and biased presentation of scientific data. It highlighted certain results out of context and focused its statements on the methodological limits of the studies. It also refrained from presenting the general conclusions of these studies, which showed that there was no material clinical difference between the two products.

- Novartis communicated the change made by the European Medicines Agency to the side effects listed on Avastin's Summary of Product Characteristics ("SmPC") but did not mention the similar change to the Lucentis SmPC. By doing so, Novartis implied that the EMA had only updated the Avastin SmPC. Whilst Novartis' statements about the Avastin SmPC were truthful, the silence in relation to Lucentis was considered to be misleading and therefore anticompetitive.

The FCA found that this conduct caused healthcare professionals to limit prescriptions of Avastin "off label" to treat AMD and other eye conditions. As a result, healthcare authorities were prevented from using Avastin as a comparator that would justify a reduction in the price of Lucentis. This conduct not only kept the Lucentis price higher than it otherwise would have been, but also led to an artificially high price for Eylea, a competing treatment that entered the market after Lucentis, and whose price was set using Lucentis as a benchmark. This latter finding is important as the French health authorities will likely seek to force the parties to also repay the damages caused by the higher price of this competing product in addition to that of Lucentis, the product directly affected by the conduct.

Infringement 2: Interference with Regulatory Authorities

The FCA found that Novartis, Roche and Genentech had disseminated alarming and sometimes misleading information to public authorities regarding the risks of using Avastin to treat AMD. The FCA determined that such conduct was intended to block or delay government initiatives to administratively secure the use of Avastin for the treatment of AMD. Examples of conduct criticised by the FCA include the following:

- For over a year, Roche refused to provide certain samples and information to the National Medicines Safety Agency to enable its study on the use of Avastin to treat AMD to progress. Pending the results of the study, ophthalmologists were urged to be cautious about using Avastin to treat AMD. Roche was also found to have misled the National Medicines Safety Agency by presenting the study results in a biased manner.

- Novartis was found to have presented information from comparison studies selectively and out of context.

- In 2014, France introduced its "temporary recommendation for use" system. In the event that doctors were using a drug to treat a particular indication, but the pharmaceutical company that developed the drug did not intend to obtain an MA for that indication, a "temporary recommendation for use" could be issued. When the authorities announced the possibility of issuing such an authorisation so that Avastin could be used to treat AMD, Roche and Novartis increased their interactions with authorities exaggerating the risks related to the use of Avastin in ophthalmology.

This decision follows the FCA's recent win at the Paris Court of Appeal in the Janssen case, and demonstrates the FCA's continued focus on the conduct of pharmaceutical companies when interacting with regulatory authorities.

The infringement in this case is largely based on the misleading nature of the parties' interactions with the French authorities, causing delays in the various initiatives to facilitate the use of Avastin to treat AMD. However, the FCA also made it clear that it would closely scrutinize interactions between an originator and regulatory authorities, even where no misleading statements are made. More specifically, the FCA restated the principle from Janssen that "*any debate related to public health and in particular to the safety of medicines, whether well founded or not, almost inevitably leads to a slowing down of the decision-making process, and thus to possible anticompetitive effects which no pharmaceutical company can ignore*".

Abuse of "Collective Dominance"

The FCA's decision is based on a finding that the parties were "collectively dominant". This is an unusual approach and shows that the FCA will be aggressive in finding ways to prosecute companies engaging in what the FCA considers misleading conduct in pharmaceutical markets. In an earlier Italian case based on the same fact pattern, the Italian authority took the more conventional approach of dealing with the infringement as an illegal agreement between competitors.

The FCA dealt with the parties as a collective entity in light of: (1) their cross shareholdings (Roche holds 100% of the shares in Genentech, and Novartis owns 33.33% of the shares in Roche) and (2) their contractual links (i.e., the licence agreement between Genentech and Novartis for the marketing of Lucentis, and between Genentech and Roche for the marketing of Avastin). The FCA also pointed to the fact that any use of Avastin at the expense of Lucentis would have led to a loss of earnings for all three parties.

GERMANY

German Federal Court of Justice rejects appeal against prohibition of exclusivity clauses in online sales of event tickets

In December 2017, the German Federal Cartel Office ("FCO") prohibited ticketing services provider CTS Eventim from using exclusivity agreements with event organisers and ticket offices. CTS Eventim had to amend its contractual clauses and allow trading partners to sell at least 20% of their annual ticket volume via a platform of their choice when contracts were concluded for a period of two years or more (see VBB on Competition Law, Volume 2017, No. 12).

CTS Eventim's appeal was rejected by the Higher Regional Court of Düsseldorf (see VBB on Competition Law, Volume 2019, No. 6) which applied the ECJ's reasoning concerning rebates in *Intel* (Case C-413/14P) to the exclusivity clauses

in the present case. The Higher Regional Court of Düsseldorf further excluded leave to appeal. Appeal proceedings only take place if the lower appellate court grants leave to appeal in its judgment, or if specifically allowed by the court of appeal.

On 3 June 2020, the Federal Court of Justice ("FCJ") rejected the request to grant leave to appeal, stating that the Higher Regional Court of Düsseldorf's conclusion was in line with established case law. In an obiter dictum, the FCJ however pointed out that, contrary to the Higher Regional Court of Düsseldorf's interpretation of the *Intel* ruling, it cannot be inferred from that case that an exclusivity clause can only be deemed to constitute an abusive behaviour if its concrete ability to restrict competition and foreclose as efficient competitors ("AEC") is demonstrated. The FCJ went on to distinguish between exclusivity clauses and rebates, stating that the foreclosure effect of an exclusivity clause already follows from the degree of exclusivity (total or partial) and the duration of the obligation and leaves no room for an AEC test.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

ECJ dismisses Prysmian's appeal against power cable cartel fine

On 24 September 2020, the Court of Justice ("ECJ") rejected the Italian power-cable manufacturer Prysmian's appeal against the € 104.6 million fine imposed on it by the Commission in 2014 for its involvement in the *Power Cables* cartel case. The ECJ upheld the earlier ruling by the General Court ("GC") confirming Prysmian's liability for the whole duration of the cartel and also rejected Prysmian's arguments that the Commission had been wrong to take copies of unexamined evidence during a dawn raid, which was inspected at a later stage at the Commission's own offices.

By way of background, in 2014, the Commission fined a total of eleven manufacturers of underground and submarine high voltage power cables € 302 million for their involvement in a customer and market-allocation cartel. Prysmian was fined € 104.6 million, with its successive parent companies, Pirelli and Goldman Sachs, being each jointly and severally liable with Prysmian for € 67.3 million and € 37.3 million respectively (see VBB on Competition law, Volume 2014, No. 4).

In its decision, the Commission found that the infringe¬ment comprised two cartel configurations running from 1999 to 2009. The first configura¬tion consisted of Japanese and Korean producers who refrained from competing for projects in the European ter¬ritory, while European producers would stay out of Japan and Korea. The parties also allocated projects in most of the rest of the world. The second configuration involved the allocation of territories and customers between European producers for projects inside the Euro¬pean territory.

The ECJ dismissed Prysmian's arguments alleging that the GC had erred in applying the principle of economic succession to confirm Prysmian's liability for the whole period of the infringement. Between 1999 and 2005, Prysmian was owned by Pirelli and was known then as PirelliCS, until 2001 when it became PirelliCSE. In 2005, PirelliCSE was sold to Goldman Sachs, becoming Prysmian. At the ECJ, Prysmian claimed that the GC had erred in applying the principle of economic continuity by identifying PirelliCSE as the legal successor of Pirelli CS. It instead claimed that the GC breached the principles of individual liability and legal certainty and that it is for the natural or legal person managing the undertaking at the time of the infringement of EU competition law to answer for that infringement.

However, in its judgment the ECJ noted that when an entity that has committed an infringement of EU competition law is subject to a legal or organisational change, this change does not necessarily create a new entity free of liability for the unlawful conduct attributable to its predecessor in law, provided that, at the least, from an economic point of view, the two entities are identical. The ECJ noted that PirelliCSE and PirelliCS were under the control of the same parent and given the close economic and organisational links between them, carried out the same commercial instructions. On this basis, the ECJ found that the GC had correctly concluded that PirelliCSE was the economic successor of PirelliCS and liability for the infringement prior to 2001 had been transferred to PirelliCSE.

Prysmian also argued that the Commission had unlawfully examined documents copied at Prysmian's premises during dawn raids. Prysmian claimed that the Commission should have first assessed the relevance of the documents before taking copies of them en masse. However, the ECJ disagreed and stated that Regulation 1/2003 allows the Commission to take copies of unexamined evidence to later inspect it at its offices in the presence of the company's lawyers when this is in the interest of its investigation or to avoid excessive interference in a company's operations.

The ECJ also dismissed all the other arguments raised by Prysmian, including those related to the starting point of its involvement in the infringement and the calculation of the fine.

This ruling against Prysmian follows several losses at the ECJ for other cable makers implicated in the case. In December 2019, LS Cable, Brugg Kabel, VISCAS and ABB largely lost their appeals against the General Court judgment upholding the Commission's decision (see VBB on Competition Law Volume 2019, No. 12), while in July 2020 Nexans also had its appeal against the Commission's fine rejected by the ECJ. However, in May 2020 NKT had its fine reduced (see VBB on Competition Law Volume 2020, No. 5).

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice overrules Higher Regional Court of Düsseldorf's decision to terminate proceedings against bid-rigging cartel

On 25 August 2020, the German Federal Court of Justice ("FCJ") overturned the decision of the Higher Regional Court of Düsseldorf to terminate proceedings against members of a bid-rigging cartel fined by the FCO in 2018. The FCJ ruled that the Higher Regional Court of Düsseldorf had erred in terminating the proceedings due to expiry of the limitation period.

The FCJ confirmed previous case law according to which in cases of bid rigging, the limitation period only begins to run when the contract which is based on the anti-competitive agreement has been performed and the final invoice has been issuedFurthermore, the FCJ ruled that, in application of the principle that cartel members are joint offenders, the last action (contract implementation and issuance of an invoice) of one of the cartel members is relevant to determine the starting point of the limitation period for all the other offenders, including those which, in accordance with the cartel agreement, refrained from submitting bids.

Accordingly, the FCJ considered that the limitation period started to run from the date of the final invoice and not from the end of the bidding procedure. While, for the case at hand, the FCO's decision might not necessarily make a difference because the absolute limitation period (after which an offence can no longer be prosecuted and suspensions of limitation period are no longer taken into account) expired approximately one month after the FCJ's ruling, the clarification will impact future cases

SPAIN

Spanish Competition Authority imposes fines in bid-rigging cartel in school transport sector

On 9 September 2020, the Spanish Competition Authority ("CNMC") imposed fines totalling € 3.36 million on 33 school transport companies and fined one association € 15,000 for their involvement in a bid-rigging cartel in the school transport sector in the region of Navarre from 1 December 2013 until 1 December 2018.

The investigation was opened after the Public Accounts Department of the Government of Navarre informed the Consumer, Arbitration and Antitrust Service of potentially anticompetitive practices in the school transport market. In its decision, the CNMC found that the members of the cartel colluded to share a number of public tenders for the provision of school transport services issued by the Government of Navarre's School Board. According to the CNMC, school transport companies were able to coordinate their actions through the Navarre Association of Road Transport and Logistics Operators, which organised meetings at its headquarters. The CNMC also found that the participating companies established various temporary joint ventures in order to illegally share the contracts at issue.

In addition to the financial sanctions levied, the CNMC also prohibited the infringing companies from entering into contracts with the public administration. The exact duration and conditions of this prohibition will be determined by the State Public Procurement Advisory Board in a subsequent decision.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission publishes report on the Evaluation of the VBER

On 8 September 2020, the European Commission ("Commission") published a report on the Evaluation of the Vertical Block Exemption Regulation (the "Evaluation Report"). For further information, see the *Legislative, Procedural and Policy Developments section* below. The Evaluation Report reflects the findings and views of the Commission's staff following the extensive consultations conducted for the purpose of evaluating the functioning of the Verti-cal Block Exemption Regulation ("VBER") and the Verti-cal Guidelines.

The Evaluation Report, which draws on multiple sources of information (including consultations with experts, national competition authorities and stakeholders), consists of two documents: (i) a 3-page summary and (ii) a 232-page Staff Working Document.

The evidence gathered is said to support the continued need for a block exemption and guidelines to facilitate self-assessment of vertical agreements and to provide a common legal framework across the EU. It therefore seems very likely that a new VBER will be adopted, together with new Vertical Guidelines. Nonetheless, the current VBER and Vertical Guidelines are not considered to fully achieve the key twin objectives of providing legal certainty for stakeholders and a common framework of legal assessment for national competition authorities and national courts. This has resulted sometimes in divergent enforcement approaches across the EU thereby reducing legal certainty for stakeholders. The evaluation therefore identifies key areas where the effectiveness of the rules could be improved, in particular as regards: (i) the overall clarity and current (at times excessive) degree of complexity of the rules and (ii) their ability to address recent market developments, such as the growth of online sales and online platforms.

Areas where further guidance on how to apply the existing rules is advocated include resale price maintenance (where the potential justifications briefly described in the current Vertical Guidelines have found little traction), agency (where there is uncertainty about the treatment of, in particular, agreements with online platforms), non-compete clauses, franchising and the combination of distribution models.

In light of the major increase in online sales and the emergence of online platforms, the evaluation suggests that the rules are not fully equipped to provide guidance on modern distribution models which often combine both online and offline distribution. Particular areas where further guidance may be needed include online sales and advertising restrictions (including platform and price comparison site restrictions in the wake of *Coty*), dual pricing, the distinction between active and passive sales, retail parity clauses and other forms of MFNs (on which no guidance is currently provided) and dual distribution (a subject that has assumed greater practical importance given the growth in direct sales by brands).

As the detailed analysis of the current substantive rules to be found in Annex 4 to the Staff Working Document is largely limited to describing the often conflicting arguments made by different stakeholders as to what changes should (or should not) be made, the Evaluation Report does not give many indications of the Commission's own thinking on specific legal issues. Nonetheless, as well as striving for greater clarity and completeness, it seems that the Commission is considering some targeted softening of approach with respect to certain hardcore restrictions (in order to further reduce the risk of 'false negatives', i.e., the risk of not exempting an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) TFEU).

The evaluation further suggests that, to the extent possible, there is a need for 'future-proof' rules which not only address known issues but also offer bright-line principles capable of addressing new types of vertical agreements.

Next steps

Now that the evaluation phase is complete, the impact assessment phase will be launched. During this phase, the Commission will verify the existence of problems identified during the evaluation phase and analyse potential solutions and their effects. Stakeholders will first be given an opportunity in the coming weeks to comment on an (apparently brief) inception impact assessment document to be followed by a public consultation at the end of the year. The Commission plans to publish draft revised rules for comment during next year.

– MEMBER STATE LEVEL –

CZECH REPUBLIC

Czech garden equipment supplier fined approx. CZK 7.7 million (approx. € 285,000) for resale price maintenance

According to a press release issued by the Czech Competition Authority (the "Authority") on 3 September 2020, the Authority has imposed a fine of CZK 7,687,000 on garden equipment supplier V-GARDEN for engaging in resale price maintenance.

The Authority reported that, during the period from August 2017 to September 2019, V-GARDEN contacted distributors and required them not to sell its products at prices lower than those set by V-GARDEN, a requirement which most distributors complied with.

DENMARK

Danish design company fined DKK 6 million (approx. € 800,000) for resale price maintenance

According to a press release issued by the Danish Competition Authority (the "Authority") on 18 September 2020, Danish design company GUBI A/S has entered into a settlement with the Authority and accepted to pay a fine of DKK 6 million (approximately € 800,000) for having engaged in resale price maintenance and price fixing with a number of dealers. According to the press release, the infringement had both vertical and horizontal elements, and lasted at least from 2017 to February 2020.

The Authority reportedly considered as mitigating circumstances that GUBI had contacted the authority on its own initiative, acknowledged the violation and cooperated with the Authority. It further took into account that GUBI had implemented a compliance programme.

GERMANY

German Federal Court of Justice grants FCO leave to appeal against the Higher Regional Court's ruling in Booking

On 14 July 2020, the German Federal Court of Justice ("FCJ") granted the Federal Cartel Office ("FCO") the right to appeal on points of law against the judgment of the Higher Regional Court of Düsseldorf in *Booking*. The Higher Regional Court of Düsseldorf (see VBB on Competition Law, Volume 2019, No.6) had overturned the FCO's decision which prohibited the use of narrow price parity clauses, (see VBB on Competition Law, Volume 2016, No. 1), and had excluded leave to appeal. In allowing the appeal to proceed, the FCJ stated that the case is of fundamental legal importance. The FCJ is now expected to rule on the legality of the narrow price parity clauses or, if necessary to guarantee a uniform application of the law, submit a request for a preliminary ruling to the European Court of Justice.

In a related development, the FCO published its own findings in *Booking* in a detailed paper on 28 August 2020 (see the Legislative, Procedural, and Policy Developments section below).

THE NETHERLANDS

Dutch Court of Appeal upholds legality of Nike's platform sales restrictions applying Coty

On 14 July 2020, the Amsterdam Court of Appeal (the "Court") handed down its judgment in the dispute between Nike European Operations Netherlands B.V. ("NEON") and Action Sport SOC. COOP, A.R.L. ("Action Sport"), an Italian retailer of Nike's sportswear, footwear and related products. The Court upheld the findings of the District Court that Nike's platform sales restrictions are legal (see VBB on Competition Law, Volume 2017, No. 10).

The facts of the case were that Action Sport, a member of NEON's selective distribution system in Europe, had offered Nike products on Amazon, contrary to the terms of NEON's Distribution Policy (the "Policy"), which only permitted a NEON authorised retailer to display Nike products for sale online either on its own webstore or on a webstore of another NEON authorised retailer. While NEON had appointed e-tailers/platforms such as Zalando, La Redoute and Otto as authorised retailers, Amazon was not a NEON authorised retailer. As a result, NEON requested Action Sport to cease sales on Amazon and, when the company failed to comply with the request, NEON terminated its agreement with Action Sport. Grounded on Action Sport's failure to comply with the Policy, NEON requested a declaratory judgment to confirm the legal validity of the termination of the agreement with Action Sport. In defence, Action Sport argued, among other claims, that the Policy was null and void because it violated competition law.

The District Court sided with NEON and held that NEON's platform sales restrictions were compatible with competition law and that, by offering Nike products via Amazon, Action Sport failed to comply with its contractual obligations, giving NEON the right to terminate the distribution contract.

Action Sport appealed this judgment and brought forward twenty grounds of appeal which concerned, among other matters, the legality of NEON's Policy with EU competition law.

The Court stated that it would first consider whether the Policy was exempted under the Vertical Agreements Block Exemption Regulation ("VABER"). If not exempted, it would consider whether the Policy complied with Article 101(1) TFEU.

The Court found that the Policy established a selective distribution system within the meaning of the VABER and was exempted under it for the following reasons.

First, the Court rejected Action Sport's unsupported claim that NEON's market share exceeded the VABER threshold of 30%, which it was the burden of the party making such a claim to prove.

Second, the Court held that the exemption for selective distribution systems under the VABER was not limited to selective distribution systems for luxury products. Provided it met the conditions of the VABER (including the absence of hardcore restrictions), NEON's Policy benefitted from the VABER and the question whether Nike products qualify as luxury products was irrelevant.

Third, the Court considered that the specific restriction in the Policy which prohibited distributors from selling the products via a non-authorised web shop did not amount to a hardcore restriction under the VABER. The Court relied on the *Coty* judgment of the Court of Justice of the European Union ("ECJ") (see VBB Competition Law, Volume 2017, No.12) where the ECJ found that a ban on selling over a third party platform in a manner discernible to the consumer was exempted under the VABER. Further, the Court noted that the ECJ reached that conclusion not by relying on the luxury nature of the product, but because: i) such a platform sales ban does not amount to an internet sales ban (as the distributor may still otherwise sell over the internet); ii) it is not a customer restriction (as it does not appear possible to define a particular group of third-party platform customers to whom sales are prevented) and iii) Coty's distribution agreement allowed distributors to advertise via the internet thus allowing customers to find retailers' offerings online. As this reasoning also applied in the current case, the Court found that the platform sales restriction of NEON was exempted and further noted that its sales restriction was even less farreaching than that which was assessed in *Coty* (in that NEON's authorised retailers were permitted to sell over certain platforms because they were members of NEON's selective distribution system).

Lastly, the fact that entities in the Nike Group other than NEON may have sold Nike products over Amazon including in the US was, in the Court's view, irrelevant as the current case concerned the European distribution policy of NEON.

The ruling reflects the mainstream interpretation of Coty, which considers that restrictions on sales by authorised distributors over unauthorised third party platforms are exempted under the VABER regardless of the type of products concerned. The Dutch Court's finding that the

manner in which a group may distribute its products outside the EU/EEA is irrelevant to an assessment of the group's European distribution practices is also well founded in case law of the ECJ (in particular, *Cartier*).

UNITED KINGDOM

CMA fines two musical instrument manufacturers £ 5.5 million for RPM, issues its first decision fining a retailer for RPM and launches novel price monitoring tool

On 29 June 2020, the UK's Competition and Markets Authority ("CMA") issued decisions fining two musical instrument manufacturers, Roland and Korg, a combined total of £ 5.5 million for individually infringing the Chapter 1 prohibition of the Competition Act and/or Article 101 Treaty on the Functioning of the European Union. The two manufacturers were found to have engaged in retail price maintenance ("RPM") by requiring their respective retailers to sell their products online at or above a minimum price. Separately, on 17 July 2020, the CMA issued a third infringement decision imposing a fine of £ 278,945 on GAK, a retailer of musical instruments, for engaging in RPM with Yamaha, a manufacturer of these products. The finding against GAK represents the first time the CMA has taken enforcement action against a retailer in an RPM case.

The Roland and Korg Decisions. In separate decisions, the CMA found that: (i) Roland required its electronic drum kits, related components and accessories not to be advertised or sold online below a minimum price between January 2011 and April 2018, while (ii) Korg engaged in the same conduct with respect to its hi-tech music equipment and synthesizers between June 2015 and April 2018. Both Roland and Korg were found by the CMA to have used price monitoring software to verify whether retailers priced the products at or above the minimum price. Retailers themselves also used such software to monitor each others' prices and complained to the manufacturers about the low prices charged by other retailers. If Roland or Korg found retailers selling the products below the minimum price, they would directly contact the retailers requesting that they increase their prices, and such requests were at times coupled with at least a credible threat of sanctions for a failure to do so (including a threat of termination, and restrictions on access to product).

Although the CMA considered there were reasonable grounds to suspect that a considerable number of retailers were subject to the manufacturers' minimum price restrictions, for reasons of administrative efficiency the CMA decided in each case to limit itself to establishing that the manufacturer had entered into an agreement and/or concerted with a single retailer (which was found to have acquiesced in the manufacturers' minimum price policy by complying with requests to increase prices).

The fine imposed on Roland of £ 4,003,321 reflected a 20% reduction under the CMA's leniency programme, after Roland admitted to the conduct and agreed to cooperate with the CMA, and a further 20% under the CMA's settlement procedure. Korg's fine of £ 1,504,707 reflected a 20% reduction under the settlement procedure. In both cases, however, the aggravating factors relevant to the infringement (the involvement of senior management and the intentional nature of the infringement) were found to outweigh the mitigating factors (including steps taken to ensure future compliance), resulting in uplifts of 5% (in the case of Korg) and 15% (in the case of Roland) in the calculation of the respective fines.

The GAK/Yamaha Case. The CMA found that, between March 2013 and March 2017, GAK and Yamaha agreed that GAK would not discount the online price of certain Yamaha musical instruments below a minimum price. GAK was found to have actively participated in Yamaha's pricing policy. The CMA found that GAK used price-monitoring software to help ensure that it and other resellers were complying with the pricing, and would inform Yamaha if it considered that other resellers were not complying. The CMA also found that Yamaha actively tried to minimise written records of the pricing policy by responding to GAK's complaints with e-mails stating that resellers were free to set their own prices, but following up by phone or in-person with instructions contradicting the e-mails. The CMA noted that the contradictory nature of these instructions showed that GAK was aware, or should have been aware, of the likely anti-competitive nature of its conduct.

Although GAK received a 20% reduction in the fine under the settlement procedure, it is noteworthy that the amount of the fine was increased by 15% after it emerged that the infringement continued after GAK received an advisory letter from the CMA indicating that it was aware of evidence suggesting that GAK was engaging in RPM.

Yamaha was granted total immunity from fines under the CMA's leniency programme as it was the first to bring the conduct to the attention of the CMA. In contrast to the European Commission's leniency programme which only applies to horizontal cartels, the CMA's programme also applies to vertical infringements including a price fixing element.

Overall trend and future monitoring. These three decisions follow fines recently imposed on two other leading suppliers in the musical instrument sector, Casio and Fender (see VBB on Competition Law Volume 2020, No. 2 and Volume 2019, No. 8 respectively). The CMA has in recent years focused its enforcement activities on tackling RPM and has launched five separate investigations into RPM in the musical instruments sector alone, and has issued warning letters to almost 70 suppliers and retailers in this sector. In addition to issuing a new open letter to players in this sector warning them of the risks of RPM, the CMA has launched a novel deterrence device in the form of its own in-house price monitoring tool allowing the CMA to automatically monitor price levels amongst musical instrument retailers. The CMA also intends to use this as a tool to monitor suspicious pricing activity in other sectors in the future.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Munich rules in favour of Sharp against Daimler in SEP patent proceedings

On 10 September 2020, the Regional Court of Munich ("Munich Court") ruled in favour of Sharp that Daimler had infringed a standard essential patent ("SEP") of Sharp.

Sharp is the patent holder of EP 2667676B1 which is standard essential for the Long-Term Evolution ("LTE") telecommunications standard. Sharp made a commitment vis-à-vis the European Telecommunications Standards Institute ("ETSI") to grant a licence on fair, reasonable and non-discriminatory ("FRAND") terms to prospective users. Daimler manufactures vehicles that use telematic modules that rely on the LTE standard for connected cars. Daimler purchases the modules from various suppliers that joined the proceedings on the side of Daimler.

The German Federal Cartel Office, along with a number of suppliers, had intervened in the proceedings and requested the Munich Court to make a request for a preliminary ruling to the Court of Justice of the European Union ("ECJ"). Balancing the interests at stake, however, the Munich Court refused to make a reference to the ECJ, as the interest of the patent holder to enforce its patent should prevail. The suspension of the proceedings resulting from a request for a preliminary ruling to the ECJ would leave the patent holder practically without protection. Additionally, the Munich Court observed that Sharp had not outright ruled out granting a licence to prospective licensees on the component manufacturer level and had entered into a licensing agreement with Huawei. The Munich Court also rejected a request to suspend the proceedings pending Daimler's request to the Federal Patent Court to have Sharp's patent invalidated.

Based on the FRAND case law of the Federal Court of Justice, the Munich Court rejected Daimler's FRAND objections finding that it had not been willing to take a FRAND licence at "*whatever terms are in fact FRAND*" and that Daimler had rather insisted that its suppliers should take a licence.

The Munich Court took the view that not only the formal steps set out in Huawei (Case C-170/13, *Huawei Technologies v. ZTE Deutschland*) have to be taken into account. It also considered relevant that Sharp, even before trying to conclude a licence agreement directly with Daimler as of May 2019, had formed part of the Avanci patent pool since the second half of 2017. This patent pool had also made attempts to conclude a licence agreement with Daimler since 2016. Already in this context, Daimler had taken the view that licences should be concluded with its suppliers. The Munich Court considered the counter-offer made by Daimler in December 2019 as too late and insufficient to remedy Daimler's initial unwillingness to take a licence. According to the Munich Court, the longer it takes the licensee to signal its willingness to conclude a licence agreement, the higher the bar is for finding willingness on the part of that prospective licensee.

The Munich Court also pointed out that, in bringing its counter-offer, Daimler had acknowledged that it was the correct addressee of the licence offer and that the position of its suppliers on whether or not to take a licence was therefore irrelevant.

Furthermore, the Munich Court held that Sharp did not act abusively or in a discriminatory fashion when initially trying to conclude a licence agreement with the manufacturer of the end device only. First, Sharp was generally willing to license to component suppliers, as borne out by the licence which it had granted to Huawei. Second, while licensing agreements on the suppliers' level may be common in the automotive sector, the Munich Court observed that Daimler's products no longer squarely form part of the automotive sector. In so far as these products belong

to the mobile communication sector, the licensing practices of that industry are also relevant. Third, the Munich Court held that Sharp was not obliged to grant a licence to the suppliers. It only had to ensure access to the standard concerned by its SEP which implies the possibility of dealing with Daimler, rather than Daimler's suppliers.

On the question of which prospective licensees Sharp should become engaged with, the Munich Court interestingly pointed out that in the FRAND undertakings provided to ETSI ("ETSI declaration"), the SEP owner commits to licensing to third parties, but not to interested parties on all levels of the value chain. According to the Munich Court, such an obligation does not follow from competition law or from the ETSI declaration.

The Munich Court ordered Daimler to cease and desist the patent infringement, recall and destroy the infringing products, provide information on the offending products to Sharp and pay damages. The order to recall and destroy can be complied with if Daimler removes or deactivates the modules embodying the SEP.

Sharp has the right to enforce the judgment provisionally if it provides a security of € 5.5 million, reflecting the licence fee which Daimler would have to pay. The Munich Court rejected as unrealistic a request made by Daimler for a higher security that would take account of the value of the vehicles at issue. Given the Munich Court's patent holder-friendly ruling, it is not surprising that reportedly Daimler has agreed to enter into a licensing agreement with Sharp.

STATE AID

– EUROPEAN UNION LEVEL –

The Court of Justice finetunes the scope of the TWD case law and clarifies some aspects of State aid related to social security contributions (Compagnie de pêche de Saint-Malo, case C-212/19)

On 17 September 2020, the Court of Justice (the "ECJ" or "Court") answered several questions raised by a request for a preliminary ruling from the French *Conseil d'État*, with regard to the interpretation of Commission Decision 2005/239/EC (the "Decision at issue"). This Decision concerned certain aid measures adopted by France to compensate fish farmers and fishermen for the damage suffered as a result of environmental disasters that occurred in 1999. The Decision at issue classified some of those measures – providing for a reduction of the fishermen's social security contributions – as illegal and incompatible State aid and, consequently, ordered their recovery.

As the recovery order was left unexecuted for several years, the Commission brought France before the ECJ on the basis of Article 108(2) Treaty on the Functioning of the European Union ("TFEU"). By judgment of 20 October 2011 (*Commission v. France*, case C-549/09), the Court declared that France had failed to fulfil its obligations under EU law and ordered it to take the necessary steps to comply with the Decision at issue. As a result, on 22 February 2013, *Compagnie de pêche de Saint-Malo* – a French fisheries undertaking – was ordered to pay back an amount corresponding to the reduction in its employees' social security contributions (together with interest) resulting from the aid measures at stake.

The request for a preliminary ruling under discussion was made in the context of proceedings before the French *Conseil d'État* concerning the repayment order pending on *Compagnie de pêche de Saint-Malo*. The referring Court asked the ECJ to clarify, in essence, whether the reduction of social security contributions had granted an advantage either to the employers (i.e. *Compagnie de pêche de Saint-Malo)* or to the employees (i.e. the fishermen working for *Compagnie de pêche de Saint-Malo*) and whether that would have an impact on the classification of the measure as State aid, and on the scope of the recovery order. This request gave the ECJ an excellent opportunity to clarify the scope of its well-known *TWD* case law (judgment of 19 March 1994, *TWD Textilwerke Deggendorf*, C-188/92) as well as some important issues concerning the notion of State aid within the meaning of Article 107(1) TFEU.

The Court further clarifies the scope of the TWD case law

In *TWD*, the ECJ held that a recipient of aid, who could undoubtedly have challenged a State aid decision on the basis of Article 263 TFEU (but did not do so), cannot call into question the legality of that decision before the national courts, in an action brought against the national measures implementing that decision. Since, in the present case, neither France nor any of the beneficiaries of the aid measures had challenged the legality of the Decision at issue by way of an action for annulment under Article 263 TFEU, the question arose as to whether the request from the *Conseil d'État* was admissible in light of *TWD*. This question raised, in turn, several complex procedural issues.

First, the Court observed that the questions submitted by the referring court were directed at clarifying what the correct **interpretation** of the Decision at issue was. This would have *prima facie* excluded the application of the *TWD* case law in the present case – insofar as this case law only concerns situations in which the **validity** of an EU act is at stake. However, the Court made an additional step in its reasoning and noted that even though these questions "formally" concerned the interpretation of the Decision at issue, it was appropriate, in order to give a full answer to the referring court, to also examine the validity of that decision. Hence the *TWD* case law could be applied in the present case. As a result, the Court would not be able to assess the validity of the Decision at issue, if and insofar as *Compagnie de pêche de Saint-Malo* would undoubtedly have had standing to bring an action for annulment against the Decision at issue on the basis of Article 263 TFEU.

This part of the Court's reasoning on the admissibility of the requests contains important *obiter dicta*. In particular, the *TWD* case law is also applicable in a scenario where the Court raises a question of validity on its own motion.

While this is not entirely unprecedented in the case law (see e.g. judgment of 18 July 2007, *Lucchini*, C-119/05, para. 56), it is one of the first times in which this caveat was expressly spelled out by the Court. This development may have consequences far beyond the realm of State aid, since the TWD case law is applicable to any field of EU law. Moreover, it may change the way in which the *rationale* of this case law is currently understood. In fact, *TWD* has so far been read as intended to ensure that "*remedies made available to litigants by EU law are not abused*" (see Opinion of Advocate General Sanchez-Bordonna of 27 February 2018 in *Georgsmarienhütte*, C-135/16) and ensure legal certainty. The judgment under discussion seems to focus only on this second aspect. In fact, the anti-abuse *rationale* arguably explains the limit placed on the right for litigants to question the legality of EU acts before national courts, once the time limit provided in Article 263 TFEU has expired. It cannot, however, explain why the the Court would be limited to raise on its own motion the illegality of an EU measure under assessment in proceedings before it. Evidently, in such a scenario, the Court would not "abuse" any procedure.

In any event, in the present case, the application of the TWD case law was ultimately excluded by the Court, on the ground that there was no doubt that *Compagnie de pêche de Saint-Malo* did not have standing to challenge the Decision at issue. The Court held that it was unclear whether *Compagnie de pêche de Saint-Malo* would have had an interest to seek the annulment of that measure. In fact, the social security contributions concerned by the Decision at issue were not borne by the fisheries undertakings (i.e. *Compagnie de pêche de Saint-Malo*) in their capacity as employers, but rather by their employees. Thus, only the employees, as the actual beneficiaries of the aid measures, had an interest to bring an action for annulment against the aid measure. For these reasons, the Court found that, in the present case, the question referred to the ECJ by the *Conseil d'État* was admissible.

The Court identifies the actual recipient of the social security contributions at stake and annuls the Decision at issue

The Court observed that the social security contributions examined in the Decision at issue were payable by the employees. The fisheries undertakings (i.e. *Compagnie de pêche de Saint-Malo*) only acted as intermediaries *vis-à-vis* the French administration, insofar as they deducted the contributions from the salary slips of the employees and then transferred the corresponding amount to the competent social security bodies. In this sense, the beneficiaries of the reductions in the contributions resulting from the aid measure at stake were not the fisheries undertakings but rather their employees. This finding has important consequences for the assessment of the Decision at issue, because the employees are not "undertakings" for the purpose of Article 107(1) TFEU and, thus, these measures cannot be classified as State aid.

With this in mind, the Court found that the Decision at issue had wrongly considered that the reductions in social security contributions were measures favouring fisheries undertakings, and annulled it insofar as it classified these reductions as State aid within the meaning of Article 107(1) TFEU.

The Grand Chamber of the Court of Justice clarifies the scope for State aid rules in the nuclear energy sector covered by the Euratom Treaty, as well as their relationship with the general principles of environmental law (Austria v. Commission, case C-594/18 P)

On 22 September 2020, the Grand Chamber of the Court of Justice (the "Court") dismissed the appeal brought by Austria against the judgment of the General Court (case T-356/15) that rejected its application for annulment against Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) (the "Contested Decision"). The Contested Decision had authorised an aid measure envisaged by the United Kingdom to support the development of Hinkley Point C nuclear power station on the basis of Article 107(3)(c) TFEU.

The Contested Decision and the proceedings before the EU Courts touched upon fundamental issues of EU environmental policy (e.g. the choice between using nuclear energy or other renewable resources). The political relevance of this case is also demonstrated by the large number of Member States that intervened in the proceedings.

At the same time, however, the case is also of utmost relevance from the viewpoint of State aid rules. In particular, the grounds relied upon by the Appellant raised interesting questions about the relationship between the Euratom Treaty and the State aid rules, the conditions under which aid can be authorised on the basis of Article 107(3)(c) TFEU, as well as the link between State aid law and general rules and principles of EU law. Even if the Court dismissed the appeal and confirmed the legality of the Contested Decision, its answers will most likely affect future compatibility assessments carried out on the basis of Article 107(3) TFEU.

The judgment includes a number of interesting findings by the Court.

First, the Court answered an argument made by Austria to the effect that the Euratom Treaty would not permit the grant of State aid for the construction or development of nuclear power stations to be authorised on the basis of Article 107(3)(c) TFEU. The Court noted that the TFEU and the Euratom Treaty have the same legal value, and that the Euratom Treaty does not contain any rules concerning State aid. With this in mind, insofar as the rules of the Euratom Treaty are silent on the issue whether State aid to promote nuclear plants can be granted, the provisions contained in Articles 107 TFEU and following articles are to be applied also in the sector covered by the Euratom Treaty.

Second, the Court clarified the relationship between State aid rules and the general principles and rules of EU environmental law. In this regard, the Court observed that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market on the basis of Article 107 TFEU. Hence, insofar as Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector, any such aid cannot be authorised unless it is demonstrated that it complies with the rules and principles of EU law, including those in the environmental field. In particular, State aid must respect the principles of EU environmental law enshrined in EU primary and secondary legislation, such as the precautionary "polluter pays" and "sustainability" principles. On this point, the Court of Justice took a different view from that of the General Court at first instance (which instead rejected the argument that these principles were relevant for the purpose of assessing the compatibility of State aid). According to the Court , when assessing the first condition set out in Article 107(3)(c), the Commission must take into account all principles and rules of EU environmental law.

Having said that, the Court specified that, in the present case, the Contested Decision did not however violate any rules or general principles of EU environmental law. The Court stressed that Article 194(1)(a) and (b) TFEU provides that the EU energy policy aims to ensure the functioning of the energy market and security of energy supply within the EU, and that this security is one of the fundamental objectives of this policy. It also added that these provisions leave the choice as to whether or not to exploit nuclear energy to the Member States. Accordingly, insofar as Member States are free to develop and exploit nuclear energy, State aid granted for that purpose is not incompatible with any rule or principle of EU environmental law.

Third, the Court clarified that, unlike Article 107(3)(b) TFEU, letter (c) of that same paragraph does not make the compatibility of the aid dependent on its pursuing an objective of common interest. In order to be declared compatible on the basis of Article 107(3)(c), State aid must meet two conditions: first, it must be intended to facilitate the development of certain economic activities or economic areas; and second, it must not adversely affect trading conditions to an extent contrary to common interest. The Court emphasised that this second condition is phrased in the negative – meaning that it does not require the State aid to actively promote a common interest.

Fourth, the Court issued guidance as to the scope of the second (i.e. the negative) condition set out in Article 107(3)(c) TFEU. As noted above, this condition requires the State aid not to adversely affect trading conditions to an extent contrary to common interest. The Court first clarified that the assessment of this condition must only cover the effects of the planned aid, in light of the information available to the Commission at the time when it adopts its decision. It cannot take into consideration, in that context, the effects that an authorisation would have as a "prec-

edent" for future State aid decisions and the cumulative effects of the authorised aid and other aid plans that may arise in the future.

Moreover, the Court explained that the examination of the second condition laid down in Article 107(3)(c) TFEU requires taking into account the negative effects of the aid on competition and trade between Member States, but does not require any negative effects other than those to be taken into account. In particular, the Commission is not required to assess, in that context, whether the envisaged aid measure would be compatible with the precautionary "polluter pays" and "sustainability" principles. These principles are to be considered by the Commission only when assessing the first condition set out in Article 107(3)(c) TFEU.

To conclude, besides the many technical aspects, which are mostly relevant for aid granted on the basis of Article 107(3)(c), the judgment under discussion provides an excellent example of how the Court conceives the **interaction** between State aid rules and the rest of the EU legal order. In short, the Court confirmed that State aid rules do not exist in a vacuum. When assessing the compatibility of aid measures, the Commission cannot limit itself to considering the aid measures' impact on competition and trade, but must also take the broader EU legal landscape into account. This confirms the broad scope of the jurisdiction conferred upon the Commission by Article 107 TFEU.

The General Court dismisses the actions for annulment in the "Spanish tax lease" saga (Spain and Others v. Commission, joined cases T-515/13 RENV,T-719/13 RENV)

On 23 September 2020, the General Court delivered another judgment in the "Spanish tax lease saga", concerning certain aid measures granted through tax provisions applicable to agreements put in place for the financing and acquisition of vessels in Spain. This judgment follows the annulment and referral back by the Court of Justice of the earlier General Court's judgment on the same aid measures (judgment of 17 December 2015, *Spain and Others v. Commission*, cases T-515/13 and T-719/13, which was set aside on appeal in the judgment of 25 July 2018, *Commission v. Spain and Others*, case C-128/16 P).

The judgment of 23 September rejected all pleas in law put forward by the Applicants and confirmed the validity of Commission Decision 2014/200/EU of 17 July 2013 on State aid SA.21233 C/11 (the "Contested Decision").

First, the General Court found that the Commission did not violate Article 107(1) TFEU with regard to the definition of the aid measures as "selective" within the meaning of that provision. In this regard, the Court noted that the Contested Decision did not carry out the standard "three step analysis" (i.e. (i) system of reference; (ii) derogation thereto; and (iii) possible justification) required by the case law in the field of tax measures. However, the decision considered that the aid measures at stake were selective insofar as the tax administration had a discretionary power to decide whether (and under which conditions) the advantage conferred by the tax measures would be granted to the recipient. In particular, the Spanish authorities had to grant a prior authorisation to the recipient in order for it to be able to benefit from the advantageous tax treatment.

In this regard, the General Court noted that the existence of a system of prior authorisation does not per se imply that the aid measures at stake are selective. In particular, that is not the case where the competence of the administration is limited to assess whether the relevant objective conditions – provided for by the law in order to achieve a certain result – are complied with. On the contrary, the system of prior authorisation could be considered as selective where the authority is competent to decide the conditions under which the tax treatment is to be granted. With this in mind, the General Court noted that, in the present case, the authorisation required by the Spanish rules was granted under conditions that were neither clearly defined by the law, nor codified by the tax administration (e.g. by means of an administrative circular). Moreover, the tax administration had the power to ask applicants for the authorisation to provide information and documents to assess whether they were eligible for the advantageous tax treatment. The tax administration could also modulate the tax advantage and subject it to conditions. For all these reasons (and others), the General Court found that the aid measures at stake were selective, insofar as the relevant rules were designed in such a way as to confer onto the administration significant discretionary power to grant the prior authorisation. Importantly, the Court also ruled that the fact that, in practice, this power was exercised in a consistent manner – and that, *de facto*, almost all applicants had been granted the advantageous tax treatment upon their request – did not rule out the selectivity of the aid measures.

Second, the General Court dismissed the arguments concerning the alleged violation of the duty to state reasons under Article 296 TFEU. It referred in this regard to the fact that the Court of Justice held, in the judgment of 25 July 2018 (*Commission v. Spain and Others*, C-128/16 P), that the Contested Decision provided sufficient reasons to justify the finding that the tax treatment granted a selective advantage within the meaning of Article 107(1) TFEU. In light of this the General Court confirmed that this decision provided sufficient reasons to comply with the standards of Article 296 TFEU.

Third, the General Court found that the Commission did not breach the principle of equality of treatment, insofar as the Contested Decision ordered the recovery of the aid measures at stake, while it had not done so in previous cases concerning similar factual and legal circumstances. In short, the General Court ruled that, in the present case, the different approach followed by the Commission was justified on the basis of objective differences between the case at stake and those referred to by the Applicants.

Fourth, the General Court assessed whether – as the Applicants argued – the Contested Decision breached the legitimate expectations of the recipients of the aid measures at stake, insofar as it ordered the recovery of the advantage for the period before the publication of the opening of the related formal State aid investigation. It is interesting to note that the General Court recalled that the principle of protection of legitimate expectations can be invoked if and insofar as three conditions are met. In short: (i) the interested party must have received precise and reliable assurances from the relevant EU Institution; (ii) the negative effects deriving from the EU measure at stake could not have been foreseen by a prudent operator; and (iii) these effects cannot be justified in light of a superior public interest which prevails over the interests affected by the EU measure at stake.

The General Court then applied each of these conditions to the present case, and found that they were not met. An important step in its reasoning concerns the possibility of relying on a letter sent by the Commissioner for Competition on 9 March 2009 to the Norwegian Ministry of Trade and Industry. This letter replied to a communication from the Ministry, which had asked the Commissioner to clarify whether the Spanish aid measures at stake constituted State aid and what the approach of the Commission would be to this issue. The Commissioner replied that they had examined the measures and found that, in light of their characteristics, they did not envisage taking any steps "*at that stage*".

In this regard, the General Court clarified that the fact that the letter was an informal act did not *per se* exclude the possibility of relying on it to ground legitimate expectations. In essence, it is enough for that purpose that the letter could be perceived by the public as an act issued by a person representing the Commission. Moreover, the fact that the letter was not addressed to the interested parties – i.e. the recipient of the Spanish aid measures – seeking to invoke the legitimate expectation was not decisive. In the present case, these parties were aware of this letter, as demonstrated by certain evidence submitted to the General Court. This would be in theory be enough to rely on it. However, in the present case, the General Court found that the letter did not provide sufficiently precise, unconditional and consistent assurances as to the fact that the aid measures did not constitute State aid.

Fifth, the General Court rejected the arguments alleging a violation of the principle of legal certainty as a result of the recovery order. In essence, it found that the Contested Decision had correctly considered that the situation of uncertainty with regard to the legality of the aid measures at stake was ended by the publication of an earlier Commission decision, which concerned situations comparable to those under assessment in the Contested Decision. In light of that decision, a prudent operator had to consider that aid measures – such as those at stake in the Contested Decision – constituted State aid within the meaning of Article 107(1) TFEU. Moreover, the conduct of the Commission after the publication of that decision was not such as to give any ground for the interested parties to rely on.

Sixth, the General Court found that the Commission correctly ordered the aid to be repaid by the investors that had actually benefited from the aid measure at stake, and not by the Spanish shipping companies. The fact that part of the advantage was transferred by the investors to these companies did not require the Commission to extend the recovery order to them.

The Commission adopts Guidelines on State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021

On 21 September 2020, the Commission published new Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021 (the "Guidelines"). These Guidelines follow the European Green Deal Communication adopted in 2019 (11.12.2019, COM(2019) 640 final). This Communication sets out a roadmap for making the EU's economy sustainable and achieve climate neutrality by 2050 by turning climate and environmental challenges into opportunities across all policy areas and making the transition just and inclusive for all.

The scope of application of the Guidelines is limited to the specific aid measures provided for in Articles 10a(6) and 10b of Directive 2003/87/EC. In essence, they are aimed at establishing a framework which would ensure that the positive effects of State aid in this field outweigh their negative effects. To this end, the Guidelines set out the conditions under which aid measures in the context of the EU emissions trading system ("ETS") may be considered compatible with the internal market under Article 107(3)(c) of the Treaty on the Functioning of the European Union. The underlying rationale of these Guidelines is that State aid must be necessary to achieve the environmental objective of the EU ETS (necessity of the aid) and must be limited to the minimum needed to achieve the environmental protection sought (proportionality of the aid) without creating undue distortions of competition and trade in the internal market.

The Guidelines will enter into force on 1 January 2021 with the start of the new ETS trading period, and replace the previous Guidelines adopted in 2012.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority criticises new rules limiting online intermediaries such as Uber

On 24 September 2020, the Austrian Federal Competition Authority (the "FCA") published its final report on the sector inquiry into the taxi and private hire car market (the "Report"). The comprehensive sector inquiry was launched in September 2019 to ascertain the effects of amendments to the Austrian Occasional Traffic Act ("AOTA") which will enter into force on 1 January 2021. The AOTA amendment introduces uniform rules for both the taxi and private hire car industries, treating the formerly separate industries as one uniform passenger transport sector. It also applies these uniform rules to online intermediation services such as Uber, Bolt, FreeNow and Holmi. Theodor Thanner, Director General of the FCA, described the result of the sector inquiry as "rather sobering" and stated that as a result of the changes to the AOTA, "*competition seems to have been done away with*".

The Report finds that the AOTA effectively bans innovative business models and only allows conventional taxi businesses to operate, thus impeding innovation and competition. As a result, customer choice is reduced even though, according to the report, 40% of customers polled in a survey would opt for one of the new innovative businesses. The Austrian legislator is also considering the introduction of fixed fares. Indeed, if introduced, these would exclude all competition based on price and force app-based business models out of the market. The Report adds that this would also disincentivise providers from competing on the basis of quality. The new rules may lead to a loss of jobs, given that the new rules require drivers to obtain special licences while the availability of exam places to obtain them is limited. In the long run, this may also result in longer waiting periods for consumers. According to the report, the overall trend in the EU is towards a deregulated market in the industry. While some countries have set maximum prices, they still generally permit some price competition. Finally, the FCA criticises the amended law's failure to preserve the benefits of the online intermediation services sector, in particular special features such as dynamic pricing, price transparency, and easy-to-use booking, payment and rating systems.

BELGIUM

Belgian Competition Authority Adopts Fining Guidelines for Abuse of Economic Dependency

On 3 September 2020, the Belgian Competition Authority adopted new guidelines on the method of setting fines for competition law infringements (the "Fining Guidelines"). The Fining Guidelines were published in the Belgian Official Journal on 16 September 2020 and entered into force immediately. They replace a previous version that was published on 25 May 2020.

The new Fining Guidelines are essentially identical to the May 2020 guidelines (which were themselves heavily inspired by the European Commission's guidelines of 2006 on the method of setting fines), except that their scope has been extended to include the sanction for abuse of economic dependency. The ban on abuse of economic dependency only recently entered into force in Belgium and before the adoption of the Fining Guidelines, it was unclear how the fines for this new infringement would be calculated.

GERMANY

German Government submits draft of the Digitalisation Act amending German Competition Law

On 9 September 2020, the German Government tabled the draft 10th amendment of the German Act against Restraints of Competition ("ARC"), also referred to as the ARC Dig-

italisation Act. The draft amendment entails significant changes in the areas of abuse of dominance, merger control, cartel fines and private enforcement.

Abuse of dominance

The amendment aims to modernise control of abuse of dominance in digital markets and particularly by digital platforms by, among other things: (i) amending the criteria to assess market power and (ii) introducing the concept of "paramount importance for competition".

It adds **access to competition-relevant data to the list of relevant criteria for assessing the market position of a company**. For assessing dominance, the amendment **introduces the concept of "intermediary power"** which refers to the power of a company acting as an intermediary in multi-sided markets. When assessing the market position of such a company, the importance of its intermediary services for accessing procurement and sales markets is to be considered. Under the current rules, only the company's own access to sales or procurement markets is taken into account. Furthermore, companies will be granted a **right to access data** against dominant big data companies.

The amendment confers new powers to the FCO to control digital giants more effectively by **introducing the concept of "paramount importance for competition"**. Under certain conditions, the FCO can establish the paramount importance of a company and prohibit various types of conduct it deems particularly harmful to competition.

The concept of relative or superior market power is broadened to also benefit large companies and not only small or medium-sized enterprises. As an example, it is noted that large companies may also depend on digital platforms.

The amendment further introduces a provision that allows the FCO to intervene if markets are at risk of tipping. Moreover, the essential facilities doctrine is adjusted with the aim to reflect the development of EU-level case law.

The amendment also clarifies the controversial issue whether a causal link between a dominant position and abusive conduct is required. For instance, in the Facebook case, the Higher Regional Court of Düsseldorf required "strict causality" for exploitative abuses, which meant that only practices which the dominant market player could enforce as a result of its dominant position could be considered abusive. The Federal Court of Justice decided in that case that exploitative abuses do not always require a causal link between dominance and the abusive conduct, but that a causal link between the dominance and the result may be sufficient. The amendment aims to clarify that abuse of dominance does not require that the company could only behave abusively due to its dominance. It advocates for a "normative causality" where the link between the abusive conduct and the goals that the ARC seeks to protect can also result from other circumstances, such as the protection of consumer choice or the protection of consumers from the exercise of power and cheating.

In order to prevent serious damage to competition or to individuals which may be difficult to remedy, it **facilitates the use of injunctions** against infringements by, e.g., powerful companies and in digital markets.

Merger Control

In the field of merger control, the proposal foresees several updates regarding: (i) notification and prohibition thresholds; (ii) new sector-specific notification requirements; (iii) review periods and (iv) the Ministerial Authorisation procedure.

The proposed amendment **increases the first domestic turnover** threshold according to which at least one merging party must have achieved a turnover of more than € 25 million in Germany **to € 30 million** in order to take inflation since introduction of the threshold into account. This adjustment is expected to reduce the number of notifications by 4% (approximately 50 cases). The amendment also raises the maximum sales volume at which a market can still be considered a **minor market** from € 15 million to **€ 20** million in the calendar year preceding the notification. Mergers in minor markets cannot be prohibited, even if the conditions for a prohibition otherwise would be met. The new provision aims to strengthen consolidation opportunities for small and medium-sized companies and to focus merger control on cases with a macroeconomic impact.

The amendment introduces a new provision which empowers the FCO, after a sector inquiry, to **order companies to notify future concentrations with a target active in one or several sectors specified by the FCO** provided that: (i) the acquirer had a worldwide turnover of € 500 million in the last financial year; (ii) it is objectively plausible that further

concentrations in a given sector will significantly restrain competition and (iii) the company accounts for at least 15% of the total supply or demand of the relevant goods or services in the specified economic sector in Germany. This instrument aims to prevent the creation of a dominant position through successive acquisitions of smaller competitors or newcomers without any review, which was for example possible in cases where the target has sales below the applicable domestic turnover threshold. Notification is only necessary if the target's turnover exceeds € 2 million, and more than two thirds of the target's turnover was generated in Germany. The obligation to notify the concentration is limited to three years from the date of the order. The new power only concerns the notification requirement but does not impact the assessment of the concentration.

The proposed amendment **extends the time limit for phase II** reviews from four to **five months**.

The draft amendment contains an additional requirement under which the Federal Minister of Economic Affairs and Energy may grant a Ministerial Authorisation of a concentration and thereby overrule a prohibition decision of the FCO. Under the amended provision, a **Ministerial Authorisation can only be granted after a court has reviewed and confirmed the FCO's prohibition** at least in summary proceedings. This is likely to significantly limit the attractiveness of this tool which will no longer offer the advantage of a speedy clearance or the possibility for the parties to avoid the legal costs of an appeal.

The FCO provides for **additional options to electronically notify concentrations**: a special electronic inbox and receipt via an internet platform will complement the already existing options. Finally, the implementation of a merger no longer needs to be notified.

Cartel fines

Newly inserted provisions expand the possibility of **imposing fines on associations and of enforcing such fines against the association's member companies**.

Previously, the scope of the fine was determined based on the turnover of the association, which was mainly based on membership fees and therefore relatively low.

Under the new provisions, the FCO can base the fine calculation on the turnover of the members of the association. The fine shall not exceed 10% of the total turnover of those members that were active on the market on which the infringement took place. The turnover of members that were fined separately or benefited from leniency is not taken into account.

Where the association is not able to pay the fine, the FCO can set a deadline within which the association can request such payment from its members. After the lapse of such deadline, the FCO can direct the claim directly against those members that had representatives in the decision-making body of the association at the time of the infringement. In a second step, the FCO can also direct the claim against members that are active on the market where the infringement occurred. The direct claim of the FCO against members of the association is excluded if the companies can demonstrate that either they were not aware of the existence of the infringement or actively distanced themselves from it before the investigation started and did not implement the association's infringing decision. Direct claims against individual members cannot exceed a maximum fine of 10% of the total turnover of this company in the preceding financial year. Members that were fined individually in the context of the anticompetitive agreement or who benefited from leniency are exempted.

The amendment aims at implementing Articles 14 and 15 (2) of Directive (EU) 2019/1 and enables the competition authority to fine the association directly instead of carrying out investigations against numerous member companies.

These provisions expand the fining possibilities of the FCO significantly by allowing it to direct the claim potentially against any member company active on the market where the infringement occurred. While the draft amendment notes that it does not lead to a shift of the burden of proof, it is clear from the current wording (implementing the EU Directive) that it will be for companies to bring forward the facts that exempt them from liability.

Private enforcement

In the field of cartel damages, a newly inserted section sets out the **rebuttable presumption in favour of claim-**

ants according to which transactions on goods or services with cartel participants are affected by the cartel if they fall within its material, geographic and temporal scope. This provision facilitates private enforcement for suppliers as well as direct and indirect customers and is intended to ensure that injured parties can effectively claim compensation for damages suffered from the cartel. In the past, claiming damages often presented considerable difficulties because claimants, due to lack of information, were unable to prove that a particular transaction was affected by the cartel (see, e.g., VBB on Competition Law, Volume 2019, No. 1, 3 and 5 and Volume 2020, No. 3 and 6). As a result of the new rule, it is for the defendant to prove that a transaction was not affected by the cartel.

Other

The draft amendment further entitles companies to request a decision from the FCO stating that the FCO does not intend to take action against certain envisaged cooperation with competitors, if there is a substantial legal and economic interest in such a decision. The FCO has to issue the decision within six months. The FCO's "comfort letter" is expected to increase legal certainty for companies that previously had to self-assess their behaviour under competition law.

The proposed amendment also implements provisions of Directive (EU) 2019/1, the ECN+ Directive relating to procedural changes and codifies the leniency programme.

The draft will now have to be examined by the Bundestag and Bundesrat.

NORDIC COUNTRIES

Nordic competition authorities call for a balanced antitrust regulation of digital platforms

On 28 September 2020, the competition authorities of Sweden, Denmark, Finland, Norway and Iceland issued a joint memorandum setting out their perspective on competition in digital markets (the "Joint Memorandum"). As previously reported in this newsletter (see, VBB on Competition Law, Volume 2020, No 6), the European Commission is expected to bring changes to the competition framework applicable to digital gatekeepers under a proposed Digital Services Act. French and German politicians have been expressing their support for robust rules at EU level. The Joint Memorandum is highly welcome as it takes a more nuanced position in this debate, by emphasising the benefits of digital platforms for consumer and other market participants, and warning against the risks of over-regulation through a complete overhaul of competition rules. Accordingly, the Joint Memorandum recommends measures such as the adoption of new guidance for data interoperability and of a code of conduct for platforms. In addition, it calls for more guidance on the assessment of killer acquisitions or conglomerate mergers in the digital sector, to enhance legal certainty and foreseeability and promotes the extension of competition authorities' powers to order notifications of killer acquisitions. Finally, it insists that companies require clarity as to whether they are considered digital gatekeepers and to which type of regulation they will be subject, and puts specific emphasis on transparency and procedural safeguards under the proposed New Competition Tool.

SPAIN

Court of Justice holds that the Spanish Competition Authority cannot be classified as a "court or tribunal" (Case C-462/19, Anesco)

On 16 September 2020, the Court of Justice of the European Union (the "ECJ") delivered a judgment in which it ruled on the status of "court or tribunal" within the meaning of Article 267 Treaty on the Functioning of the European Union of a body which has submitted a reference for a preliminary ruling. In its judgment, the ECJ held that the Spanish Competition Authority's ("CNMC") reference in relation to the legality of a collective agreement imposing an obligation to take over the contracts of workers for the provision of cargo-handling services was inadmissible, as the CNMC cannot be classified as a "court or tribunal".

The Court of Justice considered the factors that determine whether a body is a "court or tribunal" and focused its analysis on whether the CNMC has standing as a third party and whether its decisions are adopted in the exercise of judicial functions.

In relation to the CNMC's standing as a third party, the Court of Justice considered that the Board of the CNMC maintains an organisational and operational link with the Competition Directorate of the CNMC, which makes proposals for decisions which the Board must adjudicate. This link is

based on the fact that the President of the CNMC chairs the Board which adopts decisions on behalf of the CNMC and, in that respect, exercises the functions of managing the staff and of managing, coordinating, evaluating and supervising all units of the CNMC. In addition, the President of the CNMC is responsible for proposing to the Board the appointment and dismissal of management staff. Accordingly, the Court of Justice held that the Board of the CNMC cannot be regarded as having the standing of a "third party" in relation to the authority which adopts the decision that may form the subject matter of proceedings.

The ECJ also noted that the decisions which the CNMC is required to adopt resemble administrative decisions, which precludes them from being adopted in the exercise of judicial functions. The ECJ highlighted that the CNMC is a national competition authority that may initiate penalty proceedings *ex officio* and that is required to work closely with the European Commission, such that it may be denied jurisdiction in favour of the latter. It also noted that in an action before the administrative courts against a CNMC decision, the CNMC may withdraw its own decision if the party who appealed against the decision agrees. In addition, the CNMC acts as a defendant in first instance or as an appellant or respondent in the event of an appeal in actions challenging its decisions before administrative courts. Accordingly, the ECJ held that the decisions of the CNMC are not adopted in the exercise of judicial functions.

Finally, the ECJ noted that in its judgment of 16 July 1992 (Case C-67/91, *Asociación Española de Banca Privada and Others*), it implicitly acknowledged the admissibility of a request for a preliminary ruling from the Spanish Competition Court. However, it pointed out that this judgment was delivered when the Competition Court was separate from the investigatory body in competition matters, namely the General Directorate for the Protection of Competition. Since the CNMC simultaneously exercises the functions previously attributed to the Competition Court and the General Directorate for the Protection of Competition, its request for a preliminary ruling was held inadmissible.

UNITED KINGDOM

CMA lowers discount for RPM leniency applicants

On 24 September 2020, the UK's Competition and Markets Authority ("CMA") modified its leniency guidelines so that companies that apply for leniency after the opening of a retail price maintenance ("RPM") investigation should only expect to receive a maximum 50% discount in fines.

Previously, the CMA's leniency guidelines, which came into effect in 2013, gave first-in applicants that provide evidence of a cartel that the CMA is already investigating full immunity or up to a 100% discount in fines. However, during a public consultation in July and August on the proposed change, the CMA said the previous rules were "overly generous" and are less valuable in RPM cases compared to horizontal cases. It went on to note that RPM cases are less secretive and complex than horizontal cases.

The change applies to all new RPM leniency applications made on or after 24 September 2020.

– OTHER DEVELOPMENTS –

GERMANY: On 2 September 2020, the German Federal Cartel Office ("FCO") published its Annual Report. The report provides an overview of the FCO's activities in 2019 and the beginning of 2020. It shows the FCO's focus on the digital economy and consumer protection and contains statistics on merger notifications and decisions, as well as on cartel fines imposed (a total of approximately € 848 million). The full report is available in English on the FCO's website.

GERMANY: On 28 August 2020, the German Federal Cartel Office ("FCO") published the seventh paper in the series "Competition and Consumer Protection in the Digital Economy". The paper deals with the effects of narrow price parity clauses on online sales and outlines the results of the FCO's proceedings in the *Booking* case, including the FCO's findings on the price-setting behaviour of hotels, on booking behaviour of consumers and the quantitative significance of potential "free-riding effects". The paper is available in English on the FCO's website. In a related matter, the Federal Court of Justice allowed the FCO's appeal in the Booking case in which the Court will review the legality of narrow price parity clauses (see the *Vertical Agreements section* above).

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Advocate General Saugmandsgaard Øe considers that the special jurisdiction rule for tort disputes under Brussels I Bis applies to actions based on a breach of competition law

On 10 September 2020, Advocate General Saugmandsgaard Øe rendered his non-binding opinion in the context of a preliminary reference request from the German Federal Court of Justice on the interpretation of Article 7(2) of Regulation 1215/2012 ("Brussels I Bis"). This Article provides that in matters relating to tort, delict or quasi-delict, a case can be brought in the courts for the place "where the harmful event occurred or may occur". According to the Advocate General, this provision applies to civil liability actions based on an infringement of competition law.

The German hotel Wikingerhof had concluded a contract with Booking.com to have its hotel listed on the Booking.com's platform. Wikingerhof decided to sue Booking.com before a German court alleging that Booking.com abused its dominant position by applying unfair conditions. The contract between the parties included a clause granting, in principle, exclusive jurisdiction to the Amsterdam courts. Booking.com thus claimed that the German courts did not have jurisdiction to hear the case. The case went up to the German Federal Court of Justice, which then requested a preliminary ruling from the Court of Justice of the European Union.

According to the Advocate General, the applicable provision of Brussels I Bis depends on the basis of the claim. A civil action based on an infringement of competition law is based on a non-contractual obligation and falls within the scope of Article 7(2) Brussels I Bis relating to "matters relating to tort, delict or quasi-delict". The fact that the plaintiff and the defendant are parties to a contract, and that the alleged anti-competitive conduct materialises in their contractual relationship does not change this conclusion. Thus, according to the Advocate General, the German courts would have jurisdiction regarding the case brought by Wikingerhof against Booking.com.

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