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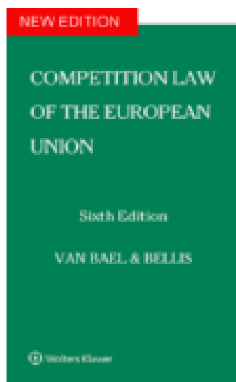

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FOREIGN DIRECT INVESTMENT

– EUROPEAN UNION LEVEL –

European Commission proposes updated list of projects and programmes of EU interest annexed to FDI Screening Regulation

On 29 September 2021, the European Commission ("Commission") adopted a draft delegated regulation updating, for the second time, the list of projects and programmes of Union interest annexed to the EU Regulation establishing a framework for the screening of foreign direct investments into the Union (the "FDI Screening Regulation", Regulation (EU) 2019/452 of 19 March 2019).

The Commission proposes to add seven new projects and programmes of European Union ("EU") interest to the list in the Annex to the FDI Screening Regulation, namely: (i) the Union Space Programme and the European Union Agency for the Space Programme; (ii) Horizon Europe; (iii) the Research and Training Programme of the European Atomic Energy Community for the period 2021-2025 complementing Horizon Europe; (iv) the Connecting Europe Facility; (v) the Digital Europe Programme; (vi) the European Defence Fund; and (vii) the Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027. These additions will bring the list of projects and programmes of EU interest to a total of 18.

When a Member State receives comments from other Member States or an opinion from the Commission within the cooperation mechanism, it must give such comments or opinions "due consideration". Where the Commission considers that a foreign direct investment is likely to affect projects or programmes of Union interest on grounds of security or public order, the Commission may issue an opinion addressed to the Member State where the foreign direct investment is planned or has been completed. In that case, the Member State must "take the utmost account" of opinions issued by the Commission on investments likely to affect one of the projects or programmes listed. The final decision on whether a foreign investment undergoing screening is authorised lies with the Member State where the investment takes place within the scope of a national screening mechanism.

The European Parliament and the Council of the EU now have two months to examine the text proposed by the Commission. If they do not oppose it (or extend their time to scrutinise it) by the end of November 2021, the delegated regulation will enter into force.

Furthermore, the Commission published an updated version of its FAQ document on the FDI Screening Regulation on 22 June 2021. The updated version elaborates on the scope of the Regulation, particularly regarding indirect changes of control or ownership and relevant factors in determining whether an investment is considered as "foreign". It also expands on the anti-circumvention clause and public procurement.

Austria and Germany update their FDI screening mechanisms

Austria

Following the entry into force of the Austrian Cartel and Competition Law Amendment Act 2021, the Federal Competition Authority ("FCA") is required to transmit merger filings submitted from 10 September 2021 to the Federal Minister for Digital and Economic Affairs which is responsible for the screening of foreign direct investments under the Federal Investment Control Act ("ICA") immediately upon filing.

Investors established outside the EU, EEA and Switzerland will need to carefully consider whether they are under an obligation to seek authorisation under the ICA in addition to a merger filing. Any failure to comply with the notification requirement under the ICA is more likely to be detected by the Austrian authorities now that the FCA is sharing information with the Federal Minister for Digital and Economic Affairs. The failure to comply with the authorisation requirement under the ICA may result in the transaction being considered null and void, in custodial sentences and fines.

As a result, it is likely that more acquisitions by foreign investors will be subjected to scrutiny under the ICA. According to a statement by the Austrian Federal Minister for Digital and Economic Affairs, the number of screening procedures carried out has already increased very significantly with around 70 transactions being screened in the year following the introduction of the new legislation, compared to 25 investigations conducted within eight years under the old mechanism. Notably, around three-quarters of investigations under the new ICA regime concerned transactions with a link to the United States, according to the statement. The Minister also confirmed that Austria has issued comments on foreign direct investments carried out in other Member States, through the EU cooperation mechanism.

Germany

On 1 May 2021, the amendment of the German Foreign Trade Ordinance entered into force. The amendment transposes the EU FDI Screening Regulation (Regulation (EU) 2019/452 of 19 March 2019) and further tightens German FDI screening rules. It focuses on defining critical technologies which will be subject to cross-sector screening for investments above a 20% stake. The number of sectors for screening was previously expanded from 11 to 27, with a focus on future and key technologies such as artificial intelligence, autonomous driving, quantum technology, aerospace technology, robotics and cyber-security.

The 16 new sectors are: (i) satellite systems; (ii) artificial intelligence; (iii) motor vehicles and unmanned aerial vehicles with automated driving/flight; (iv) industrial robots, software or technology; (v) microelectronic or nano electronic optical or non-optical circuits or discrete semiconductors; (vi) IT security products; (vii) aerospace sector; (viii) nuclear technology; (ix) quantum technology; (x) 3D printers; (xi) network technology; (xii) smart meter gateways; (xiii) Federal information and communication technology services; (xiv) critical raw materials; (xv) goods based on a secret patent or utility model; and (xvi) ownership or lease of an agricultural area of more than 10,000 hectares.

In practice, broadening the scope of FDI screening to the above sectors may appear to be a hurdle for many investors, although most transactions may not present any safety concerns.

The Czech Republic, Denmark and Malta introduce new FDI screening mechanisms

Czech Republic

On 1 May 2021, the Foreign Direct Investments Screening Act (the "Czech FDI Act") came into force. The Czech FDI Act introduces the possibility to screen potentially high-risk foreign transactions by investors from countries outside of the EU. The competent authority for screening such investments is the Czech Ministry of Industry and Trade (the "Czech Ministry").

The Czech FDI Act provides for a fully-fledged *ex ante* screening mechanism for investments carried out by non-EU entities. It introduces a notification requirement for foreign investments in key sectors (military equipment, critical infrastructures, cyber-security, dual-use goods) or any other sector if the investment could compromise the security of the Czech Republic or its internal public order. Foreign investors may also submit voluntary requests for consultation and the Czech Ministry can review foreign investments *ex officio* within 5 years of their completion.

A transaction subject to the authorisation requirement is null and void if it is carried out without authorisation. Failure to comply with the relevant provisions can expose investors to fines up to 2% of the investor's annual turnover in the preceding accounting period.

Denmark

On 1 July 2021, the Danish Investment Screening Act ("ISA") entered into force. The ISA introduces screening mechanisms for foreign direct investments and financial agreements which may pose a threat to national security or public order. The Danish Business Authority is responsible for granting approvals. The ISA provides for two distinct screening mechanisms: (1) a mandatory screening process for investments in particularly sensitive sectors; and (2) a voluntary cross-sectoral screening process. The ISA fully applies to investments and agreements implemented after 1 September 2021.

The mandatory screening process applies to foreign investors who intend to invest by acquiring, directly or indirectly, at least 10% of the shares, voting rights or similar control in a Danish company deemed to be particularly sensitive

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in relation to national security or public order. Particularly sensitive sectors and activities include: (1) companies in the defence sector; (2) companies in the field of IT security functions or treatment of classified information; (3) undertakings producing dual-use items; (4) companies in critical technology; and (5) critical infrastructure companies.

The voluntary screening process applies to foreign investors from outside the EU and EFTA who acquire, directly or indirectly, at least 25% of the shares of or voting rights in a Danish company, regardless of the sector's sensitivity in relation to national security or public order.

Malta

On 27 September 2021, Malta officially inaugurated the National Foreign Direct Investment Screening Office ("NFDIS"). In Malta, FDI screening is required in the following sectors: (i) critical infrastructures such as energy, transport and health; (ii) critical technologies such as artificial intelligence, infrastructure, and cybersecurity, as well as dual-use items; (iii) supply of critical inputs; (iv) access to sensitive information; and (v) media. The NFDIS has the power to impose administrative penalties for failure to notify, refusal to provide information, or providing incorrect, inaccurate or incomplete information.

Italian government uses "golden power" to block transactions and impose conditions

The Italian FDI screening mechanism provides for the so-called "golden power" of the Italian government which allows it to review investments in certain sectors considered to be of strategic importance. For instance, in the 5G technology sector, the scope of the golden power includes foreign entities entering into agreements for the acquisition of goods or services relating to the design, implementation, maintenance and operation of networks for broadband electronic communications services based on 5G technology; or the acquisition of technology-intensive components necessary for such implementation, maintenance or operation with entities outside the EU. Moreover, the FDI screening mechanism also covers sectors such as artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies, biotechnologies and non-military aerospace technologies.

Recently, the Italian government has made use of its "golden power" on several occasions to block FDI transactions or impose conditions. In particular, the Italian government acted in cases related to the acquisitions of: (a) goods and services in the field of 5G technology; (b) shares of a company making semiconductor components; and (c) robotic technology.

For instance, on 9 September 2021, the Italian government imposed conditions on a framework contract negotiated between Linkem and the Taiwanese Gemtek Technology for the supply of 3GPP standard user terminals (CPE), with dual mode 4G/5G functionality.

The Italian government, furthermore, imposed conditions on contracts for the supply of 5G technology from Chinese companies, ZTE and Huawei, to Italian companies: TIM on 5 September 2021, Fastweb on 30 June, 8 July and 5 August 2021, Linkem on 15 March 2021 and Vodafone Italia on 20 May 2021. Although official publicly available information is limited due to the confidentiality of screening decisions, the main conditions that have been imposed on 5G deals appear to concern the obligations: (a) to implement a monitoring committee and the introduction of a security officer within the company; (b) to diversify suppliers; and (c) not to disclose information related to the contract, as well as to limit remote access to such information.

The Italian government also used its veto power to block one transaction involving Fastweb on 23 October 2020 related to the purchase of supply of equipment for its 5G core network. According to press reports, the rationale behind this prohibition lies in the government's will to diversify Fastweb's suppliers.

In March 2021, the Italian government also vetoed the acquisition of 70% of the shares in LPE (a manufacturer of components for semiconductors) by Schenzhen Inveland Holdings. Finally, in September 2021, the financial police reportedly completed a dawn raid to ascertain a violation of the notification obligation in relation to the acquisition of Alpi Aviation (a drone manufacturer, *inter alia*, for the Italian army) by companies linked to the Chinese government. In this case, according to the national FDI law, the Italian government can impose a fine for gun jumping and order the restoration of the *status quo*.

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In conclusion, the recent Italian practice on the application of the FDI rules indicates that the Italian government is willing to use its "golden powers" to safeguard strategic public interests, as well as to generally protect the national industrial security system and technological know-how. Italy thus seems to be very keen on protecting its industry concerning new technologies (5G, chips or drones).

New FDI screening regime to enter into force in the United Kingdom

In July and September 2021, the UK government provided further updates on the new National Security and Investment Act 2021 (the "NSI Act"), publishing a series of draft statutory instruments and guidance notes in order to help businesses prepare for the new regime (available here). The NSI Act will come into force on 4 January 2022. It will establish a standalone UK investment screening mechanism, combining mandatory and voluntary notifications for certain acquisitions which may pose a risk to the UK's national security. Notifications under the new regime will be reviewed by the recently established Investment Security Unit within the Department for Business, Energy and Industrial Strategy. The regime provides the UK government with wide powers to scrutinise transactions in 17 key sectors of the UK economy. The rules are very broad and also include a "call-in" power to review any deal which has closed since 12 November 2020 and may give rise to national security concerns. With that in mind, companies and investors, even those with limited UK presence, will need to be aware of the new rules and factor them into their acquisition strategies.

For further details on FDI Screening mechanisms in all EU jurisdictions, Switzerland and the UK, please consult our website.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European General Court dismisses appeals in electrolytic capacitors cartel case

On 29 September 2021, the European General Court ("EGC") dismissed in five separate judgments appeals lodged by Japanese producers, namely NEC Corporation, Nichicon Corporation, Tokin Corporation, Rubycon and Nippon Chemi-Con Corporation, against a decision adopted by the European Commission ("Commission") in connection with the electrolytic capacitors cartel case (Cases T-341/18, *Nec Corporation*; T-342/18, *Nichicon Corporation*; T-343/18, *Tokin Corporation*; T-344/18, *Rubycon* and T-363/18, *Nippon Chemi-Con Corporation*).

By way of background, in March 2018, the Commission adopted a decision fining eight Japanese producers of electrolytic capacitors a total of € 253.9 million. The companies involved in the infringement, namely Elna, Hitachi, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, Ruycom and Sanyo, were found to have taken part in a cartel for the supply of aluminium and tantalum electrolytic capacitors between 1998 and 2012. Capacitors are electrical components that store energy electrostatically in an electric field and are used in a wide number of electric and electronic products (see VBB on Competition Law, Volume 2018, No. 3).

The companies that appealed the Commission decision before the EGC raised a number of pleas, two of which will be discussed below.

Increase in fine for repeat infringement (Case T-341/18, NEC Corporation)

NEC Corporation argued that the Commission was wrong to increase the basic amount of its fine by 50% on account of a repeat infringement. According to NEC Corporation, the increase in the amount of the fine for repeat infringements was at odds with the derivative nature of its liability as Tokin Corporation's parent company.

The EGC dismissed NEC Corporation's claim. It recalled that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary. That being said, factors that are specific to the parent company may justify its liability being assessed differently to that of the subsidiary, even if the liability of the former is based exclusively on the unlawful conduct of the latter.

In the present case, the EGC noted that NEC Corporation had already been held liable for anticompetitive conduct in the *DRAM* cartel case. Thus, because that situation was specific to NEC Corporation (and not to its subsidiary, Tonkin Corporation), the EGC upheld the Commission's finding that it could assess NEC Corporation's liability and that of its subsidiary Tonkin Corporation differently, and that the increase in the amount of the fine for repeated infringement was not at odds with the derivative nature of NEC Corporation's liability.

Partial immunity from fines (Case T-344/18, Rubycon)

Rubycon first claimed that the Commission was wrong to refuse to grant it partial immunity from fines under point 26, third paragraph, of the 2006 Leniency Notice. Under that provision, where an undertaking provides evidence with significant added value that increases the gravity or the duration of the infringement, the Commission may not take such additional facts into account in setting the fine imposed on that undertaking. In the present case, Rubycon had submitted evidence concerning certain cartel meetings (the so-called ECC and CUP meetings) with the expectation that it would benefit from partial immunity from fines, but it did not.

In its judgment, the EGC found that the Commission had clearly set out the reasons why it had not granted Rubycon partial immunity from fines under point 26 of the Leniency Notice, namely that the evidence concerning the ECC and CUP meetings submitted by Rubycon had not enabled the Commission to establish additional facts increasing the gravity of the infringement. According to the Commission, the ECC and CUP meetings were not different in nature from the other manifestations of collusive conduct in the present case, all of which conduct constituted concerned practices and/or price agreements which formed part of the same serious infringement of Article 101(1) TFEU.

Rubycon then argued that the Commission had erred in using the evidence submitted by it concerning the CUP and ECC meetings to hold it liable for all aspects of the infringement, including those meetings. The EGC dismissed this argument on the basis that partial immunity from fines provided in the third paragraph of point 26 of the Leniency Notice concerns only the amount of the fine. According to the EGC, where the conditions for benefiting from partial immunity are satisfied, the only consequence flowing from this is that the Commission cannot rely on the evidence at issue to determine the gravity or the duration of the leniency applicant's infringement. In other words, the Commission cannot take those facts into account when setting the amount of the fine.

Thus, the partial immunity from fines provided for in the third paragraph of point 26 of the Leniency Notice has no impact on the extent of liability for the infringement found in respect of undertakings which have benefited from such immunity.

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VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice rules that Porsche's selective distribution system limiting the supply of new vehicles and spare parts to tuning services providers is a by-object restriction (*Porsche Tuning II*)

On 6 July 2021, the German Federal Court of Justice ("FCJ") upheld an injunction against Porsche and its German distributor ("Porsche" or the "Defendants") in favour of an industry association whose members manufacture and distribute customised parts for tuning purposes (the "Association"). The Association brought an action for injunctive relief against certain clauses of the relevant dealer agreements used by the Defendants in the context of the selective distribution system which they operated. The action had originally been dismissed by the Regional Court of Stuttgart but granted on appeal by the Higher Regional Court of Stuttgart. In its recent ruling, the FCJ found that the provisions in the dealer agreements constitute restrictions of competition by object which could not be exempted under the Vertical Block Exemption Regulation ("VBER") or the Motor Vehicle Block Exemption Regulation.

The disputed provisions of the dealer agreements prohibited the sale of new Porsche vehicles to unauthorised resellers who acquire the vehicles either for resale after tuning or for the purpose of exhibiting tuning products ("Restriction A"). These agreements also prohibited the sale of Porsche parts and accessories to resellers outside Porsche's distribution network who either install them in vehicles of other brands or, with respect to Porsche vehicles, use them for purposes other than carrying out repair and maintenance (which, in effect, prohibited their use in tuning Porsche vehicles) ("Restriction B"). In contrast, the sale of Porsche parts and Porsche accessories to consumers and to workshops which use them only for the repair or maintenance of Porsche vehicles was permitted. The agreements also provided for a contractual penalty in the case of breaches of the above restrictions.

Following a 2015 FCJ ruling which found that a refusal to supply the car tuner TechArt constituted an abuse of Porsche's dominant position and an abuse of economic dependence (see VBB on Competition Law, Volume 2016, No. 2), the Defendants allowed dealers to supply tuning firms which are economically dependent on the brand.

In its July 2021 ruling, the FCJ found that the above clauses constituted a restriction of competition by object which infringed Section 1 of the German Act against Restraints of Competition ("ARC").

In relation to Restriction A (i.e., the clause restricting the sale of new Porsche vehicles), the FCJ found that the prohibition to sell the vehicles to the customer group of Porsche tuners restricted both companies that offered Porsche tuning services and Porsche dealers. The FCJ recognised that, although qualitative selective distribution systems are meant to exclude supply to unauthorised resellers, the definition of unauthorised reseller must be objective and cannot be defined arbitrarily by the manufacturer. The Defendants' definition of "unauthorised resellers", which included companies that purchase Porsche vehicles for resale after tuning as well as for use as exhibition vehicles for tuning products, did not meet the objectivity criterion. The FCJ clarified that, in the context of selective distribution, a vehicle is only considered to be 'resold' when it is sold as new and without (substantial) modifications, which is not the case where modifications such as those that occur through, for example, tuning are made. As a result, the existence of a selective distribution system does not justify a prohibition on sales of vehicles by dealers to tuners who themselves sell the vehicles after they have been tuned.

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In relation to Restriction B (i.e., the clause restricting the sale of Porsche parts and accessories), the FCO found that this also amounted to a customer restriction as it prohibited sales to tuning companies focused on Porsche.

According to the FCJ, these clauses could not be exempted under the VBER. The FCJ found that the prohibition on the sale of new vehicles to the entire category of tuning services providers (Restriction A) constituted a hardcore customer restriction under Article 4 (b) VBER. The Court found that the same applies in relation to the prohibition on sales of Porsche parts and accessories (Restriction B). It noted that, although Porsche offers its own tuning programmes (in competition with members of the Association), it considered Restriction B to be too broad in scope to benefit from the specific exception provided by Article 4 (b) (iv) VBER (which permits a supplier of parts provided for the purpose of incorporation into other products to prevent resale of those parts to buyers who manufacture products competing with the supplier's products).

Furthermore, the FCJ found that the Defendants failed to demonstrate that the 30% market share threshold of Article 3 VBER was not exceeded. Concerning market definition, the FCJ explained that the contract containing the clause prohibiting the resale of new vehicles (Restriction A) is concluded between the German Porsche distributor and the Porsche dealers. Therefore, contrary to the findings of the appeal court, the relevant market could not be the market for the tuning of Porsche vehicles, on which the German Porsche distributor is not active, but was instead the relevant vehicle market. The FCJ left open whether the relevant vehicle market should be defined as the market for the sale of all new vehicles or, alternatively, only new sports vehicles. Concerning the clause on parts and accessories (Restriction B), the FCJ found – as it had done in its 2015 ruling – that there is a brand-specific market comprising original parts bearing the trademark of the motor vehicle manufacturer (OEM parts), original parts manufactured and distributed by original parts suppliers (OES parts) and parts produced by other parts manufacturers which are of equivalent quality to the original parts.

The FCJ also discussed the question whether and to what extent the content of the Porsche dealership agreement may in principle constitute a business secret of the Defendants. Applying the finding of the European Court of Justice in *Auto 24* (C-158/11) that the selection criteria used in a selective distribution system must be reviewable in civil proceedings, the FCJ found that the operator of a selective distribution system cannot invoke a right to secrecy where a review of its agreements is required for the protection of competition and the effective enforcement of Union law. Furthermore, the FCJ held that it is irrelevant in which way the Association gained knowledge of the content of Porsche's dealership agreement, and even whether the Association's former legal representative obtained a copy of the dealership agreement in violation of criminal law or a professional code of conduct.

The ruling is a rare example of a case requiring interpretation of the VBER at the level of a national supreme court, and its restrictive approach imposes a significant limitation on the contractual rights which brand owners may use to ensure that their products are only sold to consumers by members of their selective distribution. Typically, suppliers operating a selective distribution system prevent their authorised resellers from modifying their goods without their consent in order to protect the quality of the goods and the reputation of the supplier. However, this ruling suggests that suppliers may not be able to prevent customers of their authorised resellers from making significant modifications to their products and then reselling the modified products (still under the supplier's trade mark) outside the authorised network. If followed more widely, this approach could significantly dilute the contractual rights of a brand owner to ensure the integrity of its products.

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STATE AID

– EUROPEAN UNION LEVEL –

European Court of Justice finally ends the Spanish goodwill saga

On 6 October 2021, the European Court of Justice ("ECJ" or the "Court") delivered a number of judgments (Case C-50/19 P *Sigma Alimentos Exterior v Commission*; Joined Cases C-51/19 P *World Duty Free Group v Commission* and C-64/19 P *Spain v Commission*; Case C-52/19 P *Banco Santander v Commission*; Joined Cases C-53/19 P *Banco Santander, Santusa v Commission* and C-65/19 P *Spain v Commission*; Case C-54/19 P *Axa Mediterranean v Commission*; and Case C-55/19 P *Prosegur Compañía de Seguridad v Commission*) dismissing the appeals brought against the ruling of the European General Court ("EGC") that upheld the Commission decision declaring the tax rule on amortization of financial goodwill in Spain as incompatible State aid.

The tax measure at issue – which was introduced in 2001 – allowed Spanish companies to amortise the goodwill resulting from the acquisition of shareholdings in foreign companies. Conversely, it did not allow amortisation for the goodwill resulting from the acquisition of shareholdings in Spanish companies. Following various complaints, in 2007, the Commission initiated a formal investigation and eventually, by decisions of 28 October 2009 and 12 January 2011, found that the measures at issue constituted State aid which was incompatible with the internal market. Hence, it ordered recovery of the aid (Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7. p. 48) and Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1)).

A judicial saga developed on these decisions. First, on 7 November 2014, the EGC annulled them on the ground that the Commission did not establish the selectivity of the measures. Following the appeal of the Commission, by a landmark judgment (C-20/15 P, *Commission v World Duty Free Group*) the ECJ set aside that judgment, finding that the EGC had erred in law in interpreting the selectivity criterion. Thus, the ECJ referred the cases back to the EGC, which in the end confirmed that the measures were selective and therefore dismissed the action brought by the appellants. In 2019, these judgments were again subject to a number of appeals.

In the cases at hand, the appellants mainly based their claims on the errors that the EGC would have allegedly committed in determining the reference system, which in turn would have led it to consider the measure as selective. This ground of appeal gave the ECJ the opportunity to further clarify certain aspects of the three-step test that the Commission is required to carry out to find a measure selective. By way of reminder, the three-step test consists of (i) identifying the common or normal tax system applicable in the Member State; (ii) demonstrating that the tax measure at issue is a derogation from that reference system, insofar as it differentiates between economic operators who, in light of the objectives of the system, are in a comparable factual and legal situation; (iii) assessing whether that differentiation is justified or not by the nature or general scheme of the system.

In the judgments of 6 October 2021, the ECJ to a large extent recalled previous case law regarding the selectivity of tax measures. However, it also made some interesting new observations.

Identification of the reference system

As regards the general principles, the ECJ noted that the correct identification of the reference system applicable in the Member State concerned is of primary importance. Being the first part of the three-step test, an error made in its determination may in fact vitiate the whole selectivity analysis.

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The Court also explained that when the measure is not severable from the legal system of which it forms part, the entire legal system is to be considered as the reference framework. Conversely, where the measure is clearly severable from that system, the measure itself may be considered as the system of reference, in particular where it appears having its own legal logic and it is not possible to identify a broader and consistent body of rules external to that measure. As for the methods to be used, the Court highlighted that the identification of the reference system must be made in light of objective criteria, in order to enable judicial review of the assessment. The language used by the Court is such as to emphasise that the Commission must comply in this context with very high standards.

As regards the identification of the reference system in the case at hand, the ECJ found that, despite the different wording used by the Commission and the EGC, the reference system adopted by the Commission is clear and was, basically, the same as that identified by the EGC (the corporate tax system governing goodwill in general). Therefore, the ECJ dismissed the claim according to which the EGC replaced the findings of the Commission as to the reference system. It should be noted that the Court's reasoning is quite interesting as it endorses a very loose approach to the requirement on the EU courts not to replace any part of the reasoning set out in the contested decision.

Derogating from the reference system

In Case C-50/19 P, the Court also emphasised that the mere fact that the measure at issue is of a general nature – in that it may *a priori* benefit all undertakings subject to corporate tax – does not mean that it cannot be selective. By recalling previous case law, the Court explained that selectivity may result not only from specific characteristics of the beneficiaries but also from the transaction that they may decide to carry out.

Another interesting point relates to the possible existence of a link between the first and the second step of the three-step test. Quite interestingly, the Court rejected the position of the EGC that found the existence of links – or even a common line of reasoning – between the first two steps. As a matter of fact, according to the ECJ, the delimitation of the reference framework is an analysis separate from the subsequent analysis of whether the measure differentiates between economic operators.

The appellants also claimed that the objective of the measure identified by the EGC was in no way reflected in the Commission decision. On this point, the ECJ agreed with the appellant and found that the EGC erred in law, by substituting its own reasoning for that of the decision at issue. Nevertheless, after clarifying that the examination of comparability at the second stage of the three-step test must be carried out in light of the objective of the reference system and not that of the measure at issue, the Court ruled that the fact that EGC substituted its own reasoning was not enough to invalidate the judgment.

For all the above reasons, the ECJ dismissed the appeals and – as already mentioned at the outset – ended the Spanish goodwill judicial saga. Despite providing some additional guidance on the selectivity criterion and the three-step test, the Court has left open the door to new procedural and substantive doubts regarding the substitution of the grounds of Commission decisions by EU courts' rulings. Considering the effects that the substitution of grounds may have on the applicants' procedural rights and means of appeal, the question will definitely need further clarification by the EU courts as soon as possible.

European Court of Justice provides guidance on the assessment of distortion of competition in case of statutory monopolies

On 6 October 2021, in joined Cases C-174/19 and C-175/19, the European Court of Justice ("ECJ") dismissed the appeals against the judgements rendered by the European General Court ("EGC") that partially annulled Commission decision SA.39078 (2014/N) regarding the financing of an infrastructure project between Denmark and Germany (Cases T-630/15, *Scandlines Danmark and Scandlines Deutschland v Commission* and T-631/15, *Stena Line Scandinavia v Commission*).

The dispute concerned the financing of the Fehmarn Belt, a connection project between Rødby in Denmark and Puttgarden in Germany. In particular, the project consisted of an immersed tunnel, equipped with a railway line between the two countries (the "fixed link"), and the expansion and upgrade of a series of road and rail hinterland connections in Denmark (the "hinterland connections"). The two-fold project was financed by two Danish public companies – Femern (the fixed link) and Femern Landanlæg (the hinterland connections) – by means of loans covered by the Danish State's guarantee or sub-

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sidiary loans from the National Bank of Denmark. After being notified to the Commission, the financing measures of the project were eventually approved, as the Commission found that they did not constitute State aid and that, even if they did, they would have been compatible with the internal market under Article 107(3)(b) TFEU. Following this decision, two annulment actions were lodged in 2015 by companies providing cabotage services between Germany and Denmark (Scandlines Danmark ApS, Scandlines Deutschland GmbH and Stena Line Scandinavia). On 13 December 2018, the GC partially annulled the decision at issue on the ground that the Commission had wrongly decided not to raise any objections to the measures granted by Denmark to Femern for the planning, construction and operation of the fixed link. The EGC dismissed the action as to the remainder. These judgments were appealed by the applicants at first instance, in particular as for the hinterland connections.

The judgment

In the judgment at hand, the ECJ found that the EGC was not wrong to consider the two parts of the project as separate. Despite the fact that the fixed link and the hinterland connection constitute an integrated project and have been developed with the aim of providing transport services between Germany and Denmark, the ECJ concluded that the activities of the two projects are separate. They can in fact be used independently of each other, they have different purposes and different beneficiaries.

The main point of interest of the judgment consists in the analysis of the distortion of competition potentially caused by the financing measure at issue. According to the Commission Notice on the notion of State aid, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. The Notice also clarifies that, when public authorities assign a public service to a provider, distortion of competition is excluded if the following cumulative conditions are met: (a) a service is subject to a legal monopoly; (b) the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question; (c) the service is not in competition with other services; and (d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded.

By their appeal, the appellants claimed that the market for the management and operation of the railway infrastructure in Denmark was open to competition both in fact and in law and, therefore, was threatened by the financing measures implemented by Denmark.

Despite the appellants' allegation, the ECJ found that there was no distortion on the market. Such finding was based on a combination of different considerations that fulfilled the conditions provided in the Notice. In particular, the ECJ found that (a) the right to manage and operate the national railway infrastructure is a statutory monopoly in Denmark; (b) Banedanmark, the public company in charge to operate and manage the national railway (which includes the hinterland connections), will remain responsible for it after the completion of the project; (c) although the Danish legislation allows companies other than Banedanmark to obtain a licence to manage and operate certain sections of the railway network, this does not imply that they can compete with Banedanmark on or for the market for the management and operation of the national railway infrastructure; (d) even if Danish legislation allows foreign operators to rely on permits issued in their country of origin, the market for the management and operation of railway infrastructure in Denmark could not be deemed, for that reason alone, as open to competition.

In sum, ECJ found that there was no distortion of competition, because no competition was envisaged by the Danish law for the operation and management of the national railway for which Banedanmark holds a statutory monopoly. The Court concluded that granting the measures at issue to Femern Landanlæg, a public company exclusively established to ensure the financing, operation and maintenance of the rail hinterland connections of the Fehmarn Belt in Denmark, is not such as to alter that finding.

Lastly, the ECJ found that the fact that there is no competition on or for the market concerned prevents companies established in other Member States from penetrating that market. Therefore, the ECJ confirmed that the EGC did not err in law in holding that there was no effect on trade between Member States. On these grounds, the ECJ dismissed the appeals of the applicants.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Dawn raids are back on the agenda for competition authorities – is your company prepared?

Dawn raids are firmly back on the competition authorities' agenda. Recent European Commission dawn raids in the animal health and wood pulp sectors signal the start of a new wave of unannounced inspections across Europe over the coming months, which will concern many different sectors and different types of suspected competition law violations. Now is therefore the right time to review and update companies' internal dawn raid response strategies, to ensure that they are effective and adapted to "modern" dawn raids.

Our dawn raid guidance provides a helpful summary of issues that a company should consider when updating its internal dawn raid response strategy, as well as a list of key "DOs" and "DON'Ts" that should guide a company during an inspection.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

European Court of Justice establishes conditions under which the victim of a competition law infringement may seek compensation from a subsidiary of the perpetrator

On 6 October 2021, the European Court of Justice ("ECJ") sitting in Grand Chamber clarified the notion of "undertaking" for the purposes of EU competition law in a long-awaited ruling (Case C-882/19, *Sumal*). The judgment establishes the possibility for the victim of a competition law infringement to bring a claim against the subsidiary of the perpetrator, provided that a number of conditions are satisfied.

The reference for a preliminary ruling in *Sumal* involved an action for follow-on damages to recover an alleged additional cost related to the acquisition of trucks caused by an infringement of Article 101 TFEU. Interestingly, the action was not brought against the undertaking which the Commission had found to violate Article 101 of the TFEU, but against its subsidiary.

The judgment in *Sumal* is based on reasoning consistent with previous case law in the area, which focuses on the direct effect of the Treaty provision at stake and the imperative of ensuring its full effectiveness. More specifically, *Sumal* follows another judgment in which the ECJ had already partly defined the notion of "undertaking" in this context (Case C-724/17, *Skanska*).

In *Skanska*, the ECJ found that a parent company could be liable to compensate harm caused by its subsidiary. It found that the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is, as such, not an issue that can be left for national tort law to determine and is rather directly governed by EU law. In that case, the companies that had been found liable for breaches of Article 101 TFEU had been liquidated and their assets and economic activity had being taken over by their parent companies. The ECJ reasoned that the effectiveness of EU competition law enforcement would be jeopardised if undertakings were able to escape liability through restructurings, sales or other legal or organisational changes. As a result, it concluded that the concept of "undertaking" in EU law designates an economic unit even where this economic unit consists of several natural or legal persons.

In *Sumal*, the subsidiary was asked to compensate for harm caused by its parent and the ECJ thus had to define further the notions of "undertaking" and "economic unit". Adopting a functional approach to the question, the ECJ held in favour of descending transfer of liability, although subjecting it to the fulfilment of a number of conditions. More specifically, the claimant must:

- establish the relevant economic, organisational and legal links between the parent company and its subsidiary. This includes consideration of, amongst other matters, whether the subsidiary essentially complies with the instructions issued by its parent; and

- establish the existence of a specific link between the economic activity of the subsidiary and the subject-matter of the infringement for which the parent company has been held responsible. On the facts of *Sumal*, the claimant had to show that the anti-competitive agreement entered into by the parent company affected the same products as those sold by the defendant (i.e., the subsidiary).

The ECJ finally held that the company against which an action is brought has all of the rights of defence available to it to prove that these two conditions are not fulfilled.

Interestingly, *Sumal* establishes that it is possible for a group to contain several economic units, and thus several undertakings, depending on the economic activity at hand. It remains to be seen whether this means that it is possible to bring actions against sister companies of that which is found to have infringed competition law, if they are part of the same economic unit. At the same time, it should not be possible to hold a subsidiary liable for infringements committed in the context of economic activities which are wholly unconnected to its own.

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– MEMBER STATE LEVEL –

ITALY

Italian court rules on probatory value of competition authority's findings in follow-on actions for damages

On 18 June 2021, the Court of Appeal of Milan issued a judgment in a damages action initiated against telecommunications provider Vodafone. This case stemmed from an investigation carried out by the Italian competition authority ("ICA") into an abusive margin squeeze by Vodafone on the market for landline communications services. The investigation was concluded by the ICA's acceptance of Vodafone's commitments and, consequently, without the adoption of a final decision finding an infringement of competition law.

Eutelia, a competitor of Vodafone on the market for landline communications services, initiated an action for damages against Vodafone. As the administrative proceedings did not result in a final infringement decision, Eutelia was unable to rely on a final infringement decision of a national competition authority pursuant to Article 9(1) of the Damages Directive and therefore had to prove the existence of both a dominant position and abusive conduct. To that end, Eutelia sought to rely on a non-confidential version of the statement of objections ("SO") to which it was granted access as a third party in the administrative proceedings.

The Court of Milan found that the SO could be considered as a piece of evidence to be assessed together with others in follow-on proceedings and it requested the ICA to submit a confidential version of the SO. The Court of Milan then concluded that Vodafone's dominant position and the abusive conduct were established on the sole basis of the SO, but that Eutelia had not established that its damage was caused by the abusive conduct.

The Court of Milan's judgment may have an adverse impact on companies' incentives to offer commitments in competition law investigations, as plaintiffs may rely on the SO irrespective of the actual outcome of the investigation.

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