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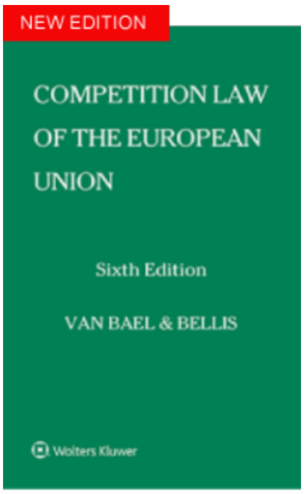

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MERGER CONTROL

– MEMBER STATE LEVEL –

UNITED KINGDOM

Third time unlucky: CMA (again) decides to block completed sports-retail merger, but could an(other) appeal be on the horizon?

On 5 November 2021, the UK's Competition and Markets Authority ("CMA") published its final remittal report into the completed acquisition by sports-inspired casual footwear and apparel retailer JD Sports ("JD") of rival Footasylum, deciding (once again) to block the transaction. This is the latest twist in a saga that has now gone on for over two-and-a-half years.

Background

JD acquired Footasylum in April 2019, but – presumably given the (ostensibly) voluntary nature of the UK merger control regime – decided not to notify the completed transaction to the CMA. However, the CMA's mergers intelligence function identified the transaction as warranting an investigation, and promptly called it in for a Phase 1 review. Shortly afterwards (in May 2019), and as is standard practice in CMA reviews of completed transactions, the CMA imposed stringent hold-separate arrangements on the parties through an Initial Enforcement Order ("IEO") to ensure that the parties' businesses were managed independently throughout the investigation.

The transaction was then referred for an in-depth Phase 2 investigation in October 2019. The CMA decided to block the deal in May 2020 (the "original decision"), essentially concluding that: (i) the parties were close competitors; and (ii) the transaction would lead to a substantial lessening of competition ("SLC") in the UK markets for sports-inspired casual footwear and apparel (see VBB on Competition Law, Volume 2020, No. 5).

JD subsequently appealed the CMA's original decision to the UK's Competition Appeal Tribunal ("CAT"). In November 2020, the CAT upheld the appeal on purely procedural grounds (while all substantive grounds were dismissed).

The core argument sustained on appeal was that the CMA had acted irrationally by failing to properly assess the effect of the COVID-19 pandemic on the transaction, both when: (i) evaluating the competitive constraint Footasylum would have exercised on JD in the counterfactual; and (ii) considering whether the parties' major suppliers would in the future exercise an increased competitive constraint on the merged entity, due to growth of their own direct-to-consumer ("DTC") retail channels. In essence, the CAT concluded that the CMA had established the importance of the pandemic to its analysis but had then failed to gather sufficient evidence to assess the question(s) before it (although, importantly, the CAT did not determine that such evidence would have altered the outcome of the CMA's decision had it been considered).

The CAT, in remitting the case to the CMA for reconsideration with regard to the effects of the COVID-19 pandemic, considered this question sufficiently material so as to bear on the CMA's assessment of the transaction as a whole (see VBB on Competition Law, Volume 2020, No. 11). This prompted the CMA to conduct the remittal inquiry that has just concluded.

The CMA's reasoning

The CMA has now (once again) found – "on the basis of a significant amount of evidence" (including, in particular, evidence regarding the impact of the COVID-19 pandemic on competition, and other relevant factors impacting the competitive dynamics) – that the transaction would result in an SLC in the retail supply of sports-inspired casual footwear and apparel (in-store and online) in the UK, since it would bring together two close competitors and therefore lead to worse outcomes for Footasylum's shoppers.

However, the SLC that the CMA has now identified in its remittal differs appreciably from the SLC previously found following its (original) Phase 2 investigation, in that: (i) while the transaction (still) results in a loss of competitive constraint from Footasylum on JD; (ii) the SLC at issue is now based primarily on the removal of the constraint imposed by JD on Footasylum. This reflects the CMA's findings on market developments since its original Phase 2 investigation (including, for example, the DTC acceleration strategies of certain important suppliers), which have resulted in Footasylum becoming a weaker constraint – and other competitors becoming stronger constraints – on JD. Notably, this is the first time ever that the CMA has blocked a deal between competitors solely on such an asymmetric basis – i.e., where the CMA has found an SLC only in relation to the acquired business, and not also in relation to the acquiring business. However, the CMA also noted that the relevant market developments have not weakened Footasylum to such an extent that the transaction would no longer result in an SLC at all.

While certain other aspects of the CMA's reasoning in its final remittal report (e.g., in relation to market definition) do not differ materially from those of the (original) Phase 2 final report, the following elements of the CMA's (updated) analysis are particularly noteworthy:

1. Regarding the parties' (counterfactual) argument that Footasylum is vulnerable to "progressive disintermediation" by certain suppliers looking to reduce the number of third-party retailers it works with, considering all the evidence (including the range and volume of products Footasylum has received from certain suppliers since 2019), the CMA concluded that the most likely scenario absent the transaction is that Footasylum would continue to receive products from those suppliers (such that "it could compete…in a similar way as it does today").

2. In the CMA's view, the evidence (including surveys and the parties' internal documents) shows that JD is an especially close competitor and strong competitive constraint on Footasylum in the relevant markets – though the CMA also recognises that other companies (including certain suppliers) have become stronger competitors since the CMA's original Phase 2 investigation. However, overall, the CMA considers that JD "is by far the closest competitor to Footasylum", and that the merged entity "will have a strong incentive to worsen Footasylum's offering". That said, the CMA nevertheless considers that the evidence does not indicate that Footasylum is a strong constraint on JD (either in footwear, or apparel).

In light of the above, the CMA concluded that Footasylum must now be divested – in its entirety – to a CMA-approved purchaser.

The Road Ahead

At this stage, it remains unclear whether – and if so, on what basis – JD will (once again) seek to challenge the CMA's decision before the CAT. While JD has not publicly confirmed that it will appeal, in a statement following the CMA's decision, it observed that the regulator's decision "defies logic". If JD does ultimately pursue an appeal, it will be interesting to see whether and to what extent JD contests the CMA's unprecedented finding of an asymmetric SLC (particularly given that the press release accompanying the CMA's decision somewhat surprisingly refers to the UK's "thriving sports fashion market"). If that happens, it will be interesting to see whether the CAT concludes that finding an asymmetric SLC finding falls within the CMA's very wide margin of discretion. The CAT recently re-affirmed the CMA's breadth of discretion in the specific context of the share of supply jurisdictional test (see VBB on Competition Law, Volume 2021, No. 5).

Finally, and as explained above, the CMA imposed an IEO in May 2019 – shortly after completion of the transaction. As this IEO remains in place today, the merging parties have now been held separately for the duration of the CMA's review – a total period of over two-and-a-half-years, during which they will likely have incurred significant costs (and expended considerable time and resources) in ensuring continued compliance with the IEO, and negotiating numerous derogations. Thus, this case also serves as a further reminder that closing a transaction that could raise substantive competition concerns, without obtaining prior CMA approval, carries appreciable commercial, operational and reputational risks. These risks are heightened by the CMA's recent interventionist approach and its ability (and, indeed, recent willingness) to impose increasingly substantial fines on parties for IEO-related breaches (as noted below in regard to *Facebook/Giphy*).

CMA goes after Facebook for (repeated) IEO non-compliance, imposing a record fine (and separately prohibits the deal in its entirety)

On 20 October 2021, the UK's Competition and Markets Authority ("CMA") announced its decision to impose a record-breaking fine of £ 50.5 million on Facebook, for multiple (and serious) breaches of an Interim Enforcement Order ("IEO") imposed as part of the CMA's investigation into the tech company's completed acquisition of Giphy (an online provider of animated images and stickers ("GIFs")).

Although just the latest development in a long-running and highly adversarial case that has already had many unusual features (see VBB on Competition Law, Volume 2021, No. 4), the nature and size of this fine are particularly significant – and should, as the CMA rather ominously puts it, "serve as a warning to any company that thinks it is above the law".

Background

Facebook acquired Giphy in May 2020 but chose not to notify the (completed) transaction to the CMA. However, the CMA's mergers intelligence function identified the transaction as warranting an investigation, and called it in for a Phase 1 review.

Not long after (in June 2020), the CMA imposed an IEO. In essence, an IEO: (i) ensures the parties' businesses are managed independently throughout the CMA's review; and (ii) prevents parties from taking "pre-emptive action" (i.e., (any) action that could either prejudice the outcome of the CMA's review, or otherwise impede it from taking any appropriate remedial action, such as unwinding the deal).

Facebook then quickly sought various derogations from the IEO, requesting (among other things) that a substantial part of its existing business be excluded from its scope (the "Carve-out Requests"). The CMA refused these requests, on the basis that it had received insufficient information from Facebook to properly consider them. Facebook appealed this decision – first to the CAT, and then to the Court of Appeal ("CoA"). Neither challenge succeeded, as both courts not only: (i) unanimously dismissed all of Facebook's grounds of appeal (essentially endorsing the CMA's strict approach to IEOs and calling for parties seeking derogations to cooperate more closely with the CMA when providing supporting information); but also (ii) delivered withering critiques of Facebook's approach. In particular, the CAT found it "undesirable that Facebook has chosen to take what might be regarded as a high-risk strategy not to comply with outstanding IEO requirements and not to inform the CMA of the actions it is taking or the changes it is making to its business that might fall within the scope of the IEO". The CoA later found that Facebook was "entirely the author of its own misfortune" regarding the CMA's inability to narrow the IEO's scope by granting an appropriate derogation. Such criticisms – and the CMA's concerns regarding Facebook's conduct in relation to complying with the IEO more broadly – appear in large part to have led to the CMA imposing the penalty decision.

Meanwhile, on 30 November 2021, the CMA announced its (now Phase 2) Final Report, deciding to prohibit the transaction in its entirety and essentially finding – in line with its earlier Provisional Findings – that the deal: (i) would reduce competition between social media platforms; and (ii) has already removed Giphy as a potential challenger in the display advertising market. As a result, the CMA concluded that its competition concerns can only be addressed by Facebook divesting Giphy – in its entirety – to a CMA-approved purchaser. Shortly after the CMA's announcement, a Facebook spokesperson noted as follows (which suggests this may not be the end of the (substantive) story): "We disagree with the decision. We are reviewing the decision and considering all options, including appeal."

The CMA's penalty decision

The CMA found that Facebook adopted "a high-risk strategy" by deciding not to comply fully with its obligations under the IEO, manifesting in a number of specific breaches, including in particular:

1. repeatedly failing to submit fortnightly IEO compliance statements in the appropriate form, and instead submitting such statements with significant qualifications ("Breach 1"); and

2. changing its Chief Compliance Officer – on two separate occasions – without first seeking the CMA's consent ("Breach 2").

Breach 1 mostly relates to Facebook's conduct following the CMA's rejection of the Carve-out Requests described above (a modified form of which were ultimately granted in June 2021). More specifically, despite repeated CMA warnings (and scathing criticism from the CAT and CoA, as explained above), for the period from the CMA's rejection of the Carve-out Requests until the granting of the modified requests, in the CMA's view Facebook "approached its compliance obligations as if its derogation request had been granted when it had not" (i.e., by unilaterally excluding parts of its business activities and staff from the scope of its compliance statements). The CMA therefore considered Breach 1 to be "the core, and most egregious, manifestation of Facebook's decision not to fully comply with its obligations under the IEO", and further denounced this breach as "not just a serious, flagrant, and intentional contravention to the IEO, but […] also persistent as it manifested itself through the submission of qualified compliance statements every two weeks for approximately one year".

Regarding Breach 2, since the Chief Compliance Officer was responsible for ensuring Facebook's compliance with the IEO (and had been nominated to provide compliance statements), the CMA found this individual to be a key member of staff. Thus, Facebook's decision to (twice) change this person – without prior CMA consent – constituted a breach of the relevant IEO provisions.

In light of the above – and since the CMA concluded that Facebook had no reasonable excuse for its failure(s) to comply with the IEO (particularly Breach 1) – the CMA considered that it would be appropriate and proportionate to achieve its policy objectives (i.e., incentivising compliance with interim measures, and deterring future non-compliance by both Facebook and other companies) to impose on Facebook a total fine of £ 50.5 million (£ 50 million for Breach 1, and £ 0.5 million for Breach 2).

Comment

This fine is – by a very considerable margin – the largest ever imposed by the CMA for IEO non-compliance (or, indeed, any procedural merger control violation). In fact, it is over 150 times the previous highest penalty for IEO-related breaches (a 2020 fine of £ 325,000, imposed on ION) – and, notably, even the smaller fine imposed in relation to Breach 2 would itself have set a new record.

The CMA's press release emphasises that this is the first time a company has been found to have breached an IEO by "consciously refusing" to report all the required information, and considers Facebook's failure to comply to be "deliberate".

In its initial response to the CMA's decision, a Facebook spokesperson observed that Facebook's punishment of what was a "best efforts compliance approach" was "unfair". As both the CAT and CoA have already provided highly critical opinions on Facebook's approach to very similar matters of IEO-related compliance, this could discourage the tech giant from challenging the CMA's decision – allowing it to focus instead on deciding whether to appeal the CMA's Phase 2 Final Report. It is therefore unclear whether Facebook will pursue an appeal against the IEO-related penalty decision.

The sheer magnitude of this fine should serve as a reminder that ensuring compliance with the CMA's (strict) procedural merger control rules is critically important – and that there are potentially very severe consequences for failing to do so (particularly intentionally). Moreover, the CMA could easily have imposed an even higher penalty on Facebook, both in absolute and relative terms (the respective fines for Breaches 1 and 2 each represented under 0.1% of Facebook's global turnover, far below the statutory maximum of 5%). It is therefore likely that future CMA penalties (especially for similar breaches) will be even larger.

More generally, this is another illustration of the CMA's recent highly interventionist approach to merger control enforcement, particularly in digital/technology markets. Notably, Giphy appears not to generate any UK turnover (and the CMA therefore asserted jurisdiction on the basis of its extremely flexible share of supply test). Therefore, the CMA's penalty decision also provides further evidence of the very significant risks associated with closing transactions that could raise substantive competition concerns – even if lacking an obvious UK nexus – without obtaining prior CMA approval (especially in sectors more likely to attract heightened CMA scrutiny).

FOREIGN DIRECT INVESTMENT

– EUROPEAN UNION LEVEL –

European Commission releases first FDI Screening Report

On 23 November 2021, the European Commission published its first Annual Report on the screening of foreign direct investment ("FDI") into the Union. Key messages of the report are: (i) a growing number of Member States are introducing new, or broadening the scope of existing, FDI screening mechanisms; (ii) only one fifth of notified investments were formally screened, and, of those, a mere 2% were prohibited; and (iii) the three sectors with the highest number of transactions were manufacturing, ICT, and wholesale and retail.

The Commission's report shows an expected decrease in FDI into the EU due to the COVID pandemic: the amount of investments fell by 71% to € 98 billion compared to € 335 billion in 2019. The five main countries of origin of the ultimate investor, in the cases notified to the Commission, were the US, the UK, China, Canada and the United Arab Emirates.

The report shows that 24 out of 27 EU Member States took some action relating to FDI legislation, either adopting new national FDI screening instruments, amending existing mechanisms, or initiating consultations with a view to adopting or amending such legislation. While in 2017, when the proposal for the EU FDI Screening Regulation was tabled, only 11 Member States had a national FDI screening mechanism, as of 1 July 2021 that number had increased to 18. The Commission reiterated its call to all Member States to "set up and enforce a fully-fledged FDI screening mechanism to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU. The Commission expects that it will be only a question of time before all 27 EU Member States adopt national FDI screening mechanisms.

The report provides aggregate statistics of FDI screening in the EU Member States under their own legislation. During 2020, Member States reported that they had reviewed 1,793 requests for investment approval. Of these requests, 80% were ultimately not formally screened, because: (i) of an evident lack of impact on security or public order; or (ii) of falling outside the scope of the national screening mechanism. Twenty percent of cases were formally screened in the reporting Member States.

Of the formally screened cases, 91% were approved, the large majority (79%) without conditions, and 12% subject to conditions. Seven percent were abandoned by the parties for unknown reasons and only a very small percentage (2%) were prohibited, making prohibitions a small exception. As a result, it can be said that the EU remains very open to FDI despite the recent introductions of new screening mechanisms and updates to existing ones.

From 11 October 2020, when the EU FDI Screening Regulation became fully operational, until 30 June 2021, a total of 265 notifications were submitted to the Commission by eleven Member States through the cooperation mechanism. More than 90% of these notifications originated in one of the following five Member States: Austria, France, Germany, Italy and Spain, i.e., Member States that already had FDI experience before the EU FDI Regulation was even tabled.

A significant number of notifications were reported to have involved one or more of the factors for consideration listed in the EU FDI Screening Regulation, including critical infrastructure, technology and dual use items, and access to sensitive information, as well as possible government ownership or control of, or influence over, the foreign investor. The cases notified, furthermore, included health-related investments which are being scrutinised more thoroughly in light of the current pandemic.

Notified transactions for the majority ranged in value between € 10 million and € 100 million, with transactions in the ICT sector representing the highest deal value. The lowest deal-value reported was €1,200, and the highest approximately € 34 billion.

The FDI assessment of notified transactions follows two phases. Eighty percent of the cases notified were closed by the Commission in Phase 1, 14% of cases required a more detailed assessment since the cases could possibly affect security or public order in more than one Member State, or create risks to projects or programmes of Union interest. Six percent of the cases were still ongoing. As already mentioned, the highest number of transactions took place in three sectors: manufacturing, ICT, and wholesale and retail. Manufacturing and ICT accounted for 67% of all Phase 2 cases. The Commission only issued an opinion in less than 3% of all cases notified and only when and if required by the circumstances of a case, more specifically the risk profile presented by the investor and the criticality of an investment target.

It can be concluded that many of the notified investments had no relevance for, or impact on, security or public order in the EU Member States. For investors, it is however important to note that notifications under the EU FDI Screening Regulation will provide awareness of transactions that may not have been notified under a given national mechanism between Member States, which may prompt a national screening authority to act "ex officio". It should further be noted that some Member States foresee sanctions for failure to notify. For further details on national screening mechanisms, please consult our FDI website.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Google Shopping – European General Court confirms that "self-preferencing" by a digital platform can infringe Article 102 TFEU

On 10 November 2021, the European General Court ("EGC" or "Court") delivered its landmark *Google Shopping* judgment, the first judicial pronouncement on "self-preferencing" as a viable theory of harm under Article 102 TFEU. The EGC fully endorsed the European Commission's ("Commission") decision that Google abused its dominant position by favouring its own comparison-shopping service ("CSS") over competing CSSs in search results. In dismissing Google's appeal, the Court not only upheld the Commission's analysis, but went even further and added its own rationale to condemn Google's self-preferencing practices. *Google Shopping* thus confirms that self-preferencing by a dominant firm can, in certain circumstances, infringe Article 102 TFEU.

Importantly, however, the EGC also clarified that not every self-preferencing strategy by a dominant firm will necessarily be a competition law violation. Unfortunately, *Google Shopping* provides little guidance on objective standards that can be used in future cases to distinguish lawful self-preferencing strategies of dominant firms from those that raise concerns under Article 102 TFEU.

The contested decision

In June 2017, the Commission fined Google € 2.42 billion for abusing its dominant position in national search markets. The Commission found that Google had given an unlawful advantage to its own CSS by prominently displaying the Google CSS in search results, while demoting competing providers of CSSs, a practice that the Commission considered to be at least capable of having the effect of restricting competition (AT.39740, *Google Shopping* – "Commission's Decision").

Google appealed the Commission's Decision on a number of grounds, including that its conduct amounted to competition on the merits, was not likely to have anti-competitive effects, and was objectively justified.

Google's self-preferencing practices did not constitute "competition on the merits"

In its appeal, Google argued that the practices condemned by the Commission should be viewed as part of its efforts to improve the quality of its search services, making it easier for users to more directly find information they were looking for, and therefore constituted a form of legitimate "competition on the merits", rather than anti-competitive conduct.

Setting out the framework for its review of the Commission's Decision, the EGC characterised "leveraging" as a "generic term" which may include different practices such as tying, margin squeeze or loyalty rebates, practices that are not, as such, prohibited by Article 102 TFEU. The Court also confirmed that the mere extension of an undertaking's dominant position to an adjacent market is not necessarily conduct that departs from "normal competition" or "competition on the merits," even if it leads to the disappearance or marginalisation of competitors.

Turning to the Commission's analysis, the EGC noted that the Commission did not simply refer to leveraging practices to conclude that Google's self-preferencing infringed Article 102 TFEU. Rather, the Court considered that the Commission had correctly identified three specific reasons why Google's self-preferencing was anti-competitive: (i) the traffic generated by Google's general search engine for CSSs was important; (ii) users typically concentrate on the first few results; and (iii) the "diverted" traffic accounted for a large proportion of traffic to competing CSSs which could not be effectively replaced by other sources.

The EGC then addressed a number of additional points that, in its view, supported the finding of an infringement. It observed that, in light of the universal nature of a general search engine, Google's promotion of its own, specialised results involved a "certain form of abnormality", as a search engine is in principle an "open" infrastructure, in contrast to other infrastructures referred to in the case law whose value depends on the proprietor's ability to retain exclusive use. The Court even opined that limiting search results to its affiliated services was not consistent with what it considered as the intended purpose of a general search service. Such conduct could even be deemed irrational, save for Google's dominant position which made the entry of competing search engines in the short run impossible.

Importantly, the EGC framed its analysis – to a much greater extent than the Commission – as an issue of discrimination, focusing on the "unjustified difference in treatment" between Google's own CSS and those of its competitors. Thus, the Court appears to assume that Google's search services are under an equal treatment obligation and that any differentiated treatment between Google's affiliated services and the competing services of third parties would, at least, be inherently suspect. In support for this approach, the Court relied on the general principle of equal treatment under EU law, the European Union's net neutrality rules, as well as case law precedent.

Nor did Google's argument that the promotion of its own CSS represented a product improvement and therefore competition on the merits convince the Court. The Court found Google's argument, focusing on the promotion of its own CSS, insufficient as the Commission's Decision had considered two, combined practices – Google had promoted its own CCS, while demoting the CSSs of competitors – and Google's product improvement argument could not explain why rival CSSs had been demoted. In addition, the EGC found that product improvement arguments could be relevant only in the context of objective justifications, and not in the initial assessment of whether certain conduct is liable to restrict competition.

The Court's extensive analysis to support the Commission's finding of abuse raises several questions. For example, it is unclear on what objective basis the Court could conclude that Google's conduct was a "certain abnormality" and was inconsistent with the purpose of a general search engine. It is even less clear how similar concepts should be applied in future cases. Google's argument that it was normal for a search engine to seek to improve the quality of search results and provide users with direct access to relevant results they were actually looking for appears to be at least equally plausible and legitimate as the Court's own opinion on how search engines should operate and run an open platform that treats all providers of related services equally. Leaving it to a regulator or court to determine, *ex post*, what is normal or abnormal, and therefore lawful or not, is bound to create significant uncertainty for market operators.

Similarly, the EGC condemned Google's strategy to abandon its unsuccessful efforts to establish Froogle, a dedicated comparison-shopping webpage, and instead promote its CSS in its general search service. This, once again, creates the risk that legitimate efforts to improve a product and make it more relevant for consumers could, if successful, subsequently be condemned as unlawful. Such an approach could disincentivise efforts to innovate and improve products for the benefit of consumers.

The refusal to deal case law applies only in narrowly circumscribed circumstances

Google argued that "self-preferencing" could only constitute an abuse if it meets the conditions of the *Bronner* judgment (Case C-7/97, *Bronner*) on access to essential facilities (refusal to supply). In particular, Google criticised the Commission for concluding that the practices at issue constituted a "refusal to supply" without verifying the indispensable nature of the general results pages and Google's own specialised results.

In its analysis of this argument, the EGC went – once again – beyond the Commission's own analysis. It held that Google's practices had to be distinguished from a refusal to supply, and that the relevant issue was the conditions under which Google provided access to competing CSSs on its general results pages. Referring to a number of previous judgments that had addressed a similar question, including *Slovak Telekom* and *TeliaSonera*, the Court emphasised that the strict *Bronner* conditions to identify an unlawful refusal to supply are only relevant in cases of "outright" or "explicit" refusals, but not when a practice could be characterised as an implicit refusal to supply which "merely" makes market access more difficult. In this case, the Court found that Google had engaged in discriminatory conduct, rather than an explicit refusal to supply a service.

The EGC's refusal to apply the *Bronner* case's refusal to deal criteria to Google's conduct was in line with case law precedent. At the same time, though, it is worth noting that the Court acknowledged similarities between Google's general results page and an essential facility which could lead rival CSSs to consider Google's traffic to be indispensable for their own services. In this context, there appears to be a powerful logic behind Google's argument that, if there was no assessment of whether a total refusal of access to its "search service facility" could have been lawful under *Bronner*, there could then be no finding that a practice that was clearly much less restrictive than a total refusal infringed Article 102 TFEU.

In addition, if a firm has invested in a facility that is considered essential, the same balance between short-term effects on competition and long-term effects on incentives to invest, as encapsulated in the *Bronner* criteria, would appear to be equally relevant in a situation whereby the firm does not refuse access to the facility "outright", but rather grants access on terms that competitors find burdensome. *Google Shopping*, however, confirms that these arguments will get little traction in EU competition law.

Establishing potential anti-competitive effects is sufficient, although the effects analysis must not be too speculative

The EGC also rejected Google's argument that the Commission had failed to demonstrate that Google's conduct had anti-competitive effects. The Court confirmed that it was sufficient for the Commission to establish that conduct was capable of having potential anti-competitive effects, as there was no requirement to establish actual exclusionary effects under Article 102 TFEU. The Court found that the Commission had correctly identified potential harmful effects, by finding that Google's conduct was capable of leading competing CSSs to cease their activities, reducing incentives to innovate, and limiting the ability of consumers to access the best-performing CSSs.

The Court distinguished its own case law, as it had recently held in *Servier* that – except in the case of a restriction of competition by object – the Commission had to demonstrate actual anti-competitive effects to establish an infringement of Article 101 TFEU. According to the Court, *Servier* was not relevant because different evidentiary requirements apply under Article 101 and Article 102 TFEU.

In this context, the EGC also rejected Google's argument that the Commission had failed to undertake a counterfactual analysis to determine the effects of Google' conduct and that Google's conduct was the cause of the diminished traffic to rival CSSs. In the Court's view, the Commission could not be required to engage in such an analysis, neither on its own initiative nor in response to a submission by the defendant. Such a counterfactual analysis, the Court reasoned, would be necessary to examine actual anti-competitive effects which the Commission was not required to do in an Article 102 case. Instead, the Court found that the Commission had established the necessary evidence by observing a correlation between the relevant conduct and market developments, for which it was sufficient to rely primarily on evidence submitted by complainants and other competitors.

The EGC did uphold Google's appeal on one narrow ground. It found that the Commission's analysis of anti-competitive effects in national markets for general search services was insufficient. For this analysis, the Commission had relied solely on a few Google internal documents expressing concerns that proliferating rival CSSs might diminish Google's search revenues. The Court considered this analysis too speculative, even under the less demanding potential effects standard under Article 102 TFEU.

No objective justification

Google also failed to persuade the EGC that the Commission had wrongly dismissed objective justification arguments. Here, once again, the Court relied on what it considered to be the discriminatory nature of Google's conduct. For example, the Court dismissed Google's argument that its strategy was aimed at improving search results. It observed that, even if there has arguably been an improvement of user experience, Google had failed to apply the same positioning and display criteria to its CSSs and those of its rivals. The Court also sided with the Commission in stating that equal treatment would have been better for competition than presenting users most prominently with the results of a single CSS.

Nor was the EGC willing to accept Google's argument that it was technically impossible to apply the same ranking and display criteria to rival CSSs, since it had no insight into their databases, cataloguing processes, or algorithms.

The Court did not conclude that Google's arguments were incorrect, but simply held that the alleged efficiency gains did not outweigh the harmful effects of Google's conduct, and that Google had not demonstrated to the requisite level that it was in fact prevented from applying the same processes and methods across all CSSs.

The impact of Google Shopping

Google Shopping is certain to embolden the Commission in its efforts to "reign in" big-tech companies. As the specific facts of digital cases pending before the Court and the Commission are different from *Google Shopping*'s, the judgment should not determine the outcome of any other cases. Nevertheless, the judgment sends a clear signal that the Commission, as it continues to target big tech in its competition law enforcement efforts, will continue to receive substantial deference by the Court.

The Court's position that a platform such as Google's general search services is subject to an equal treatment obligation, akin to a public utility, is of particular significance and certain to create considerable debate. After *Google Shopping*, there remains considerable uncertainty about when the equal treatment principle could be applied to dominant firms in other situations, as the Court appeared to derive an equal treatment obligation from the particular nature of Google's general search services and their important role in the market. Clearly, the vague concepts used by the Court – Google's conduct was "abnormal" and departed from "competition on the merits" – provide no limiting principles that could narrow the scope of an equal treatment obligation in a predictable manner. The Court's position, and its dismissive approach to Google's argument that its business model justified displaying its own CSSs more prominently, creates a considerable risk that competition law enforcement pursuing self-preferencing cases with similarly vague standards could hinder experiment and innovation by digital platforms.

All this raises the question whether self-preferencing should be considered a viable theory of harm at all. Arguably, it would be preferable to examine conduct that could be characterised as self-preferencing using a much more standard anti-competitive foreclosure analysis, which would consider the ability and incentives of a dominant firm to foreclose, as well as the effects of the strategy and whether it would prevent equally efficient competitors/competitors that can offer equally attractive products from competing effectively.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission issues guidance letter following Commission decision in the car emissions cartel case

On 15 November 2021, the European Commission ("Commission") issued a guidance letter to the three German car manufacturers involved in the car emissions cartel case. The letter sets out the type of technical discussions the car makers are allowed to have as regards the roll-out of the new environmental technology at issue in the Commission's cartel decision on the matter, which would comply with EU competition law, as opposed to discussions which would be considered as anti-competitive collusion.

The guidance letter comes in the wake of the car emissions settlement decision of 8 July 2021, in which the Commission imposed a fine totalling € 875 million on BMW and the Volkswagen group. Daimler, the immunity applicant, was exempt from any fine. The Commission found that the three car manufacturers had entered into agreements and/or engaged in concerted practices between 2009 and 2014 which, by their nature, were liable to restrict competition. According to the Commission, the car manufacturers discussed and coordinated certain aspects of the development and introduction of exhaust gas cleaning systems for new diesel passenger cars. Under these systems, car engines were fitted with liquid Selective Catalytic Reduction ("SCR") systems, which removed up to 90% of the harmful nitrogen oxides pollutants ("NOx") from the exhaust gas flow through a chemical process based on the injection of a mixture of substances registered under the trade name AdBlue.

In its decision, the Commission found that the three car manufacturers agreed on AdBlue tank sizes, refill ranges and exchanged information on the average consumption of AdBlue of diesel passenger cars for the European Economic Area ("EEA"). The Commission found that this conduct constituted a restriction of competition by object under Article 101(b) TFEU, which prohibits restrictions on technical development, since that conduct limited technical development in the field of NOx cleaning with selective catalytic reduction ("SCR") systems for new diesel passenger cars in the EEA, and also limited customer choice.

A finding of infringement was found even though the car manufacturers had never actually implemented AdBlue tanks with uniform sizes and ranges.

In the press release dated 8 July 2021, Executive Vice-President of the Commission Vestager stated that the "decision is about how legitimate technical cooperation went wrong". In order not to dissuade legitimate cooperation, on the same day as the decision was issued, but only made public on 15 November 2021, the Commission clarified in a guidance letter the type of technical cooperation that Daimler, VW and BMW could have had as regards the roll-out of the new technologies at issue without falling afoul of Article 101 TFEU. According to the Commission, there is no reason to further investigate the following conduct:

- the joint development of a software platform for AdBlue dosing as such;
- the decision to focus joint development on liquid SCR systems;
- the standardisation of the AdBlue filler neck;
- the joint preparation of charge sheets for parts of SCR systems;
- the discussion of quality standards for AdBlue;
- the discussion of warning strategies aimed at ensuring the timely refill of AdBlue;
- the discussion of the build-up of an appropriate infrastructure for AdBlue supply; and
- the discussion and preparation of a common position of the car manufacturers concerning future legislative proposals concerning car emission cleaning (as long as it is not used to coordinate market conduct).

While it provided some welcome clarification for the car manufacturers involved in the decision on the type of conduct which normally does not restrict competition, the guidance letter makes clear that it reflects the views of the Directorate-General for Competition but does not constitute a Commission decision.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority condemns Amazon and Apple for discriminatorily limiting access to Amazon Marketplace

On 23 November 2021, the Italian Competition Authority ("ICA") imposed a fine of € 68.7 million on Amazon and € 134.5 million on Apple for infringing Article 101 Treaty on the Functioning of the European Union ("TFEU") with regard to the distribution of Apple products over Amazon Marketplace ("Decision"). As explained further below, this Decision provides an important national perspective on the application of Article 101 TFEU to partial platform restrictions within both open and selective distribution systems.

Background

According to the Decision, Apple operates a dual distribution system in Italy, selling its products directly to consumers as well as through resellers. For sales through resellers, Apple runs both an open distribution system (for most of its products) and a selective distribution system (for Beats Wireless products). Within its open distribution system, Apple has concluded distribution agreements with certain "official resellers", and offers these resellers discounts to incentivise them to support the sale of Apple's products.

In 2018, Amazon (one of Apple's official resellers) renewed its global distribution agreements with Apple. These renewed agreements required Amazon's Italian affiliate to only grant access to its e-commerce platform, Amazon Marketplace, to a limited list of twenty Apple resellers. According to the ICA, these twenty resellers (including Amazon itself) were handpicked by the parties without reference to any objective criteria. According to the agreements, all other resellers (including official resellers) were prevented from selling Apple products over Amazon Marketplace.

The ICA's assessment

The Decision concerned two relevant markets: (i) the national market for intermediation services for sales on marketplaces; and (ii) the national market for the online retail sale of consumer electronic products. According to a previous ICA decision, Amazon holds a dominant position on the former market, while Amazon and Apple are competitors on the latter.

The ICA's investigation did not assess the lawfulness of Apple's distribution system as such (which allowed online sales) but only the alleged discriminatory foreclosure of access to Amazon Marketplace. The ICA found that the clauses in the Amazon-Apple agreements foreclosing access to Amazon Marketplace infringed Article 101 TFEU insofar as they unjustifiably and discriminatorily prevented economic operators that were not among those permitted by the agreements from accessing a prominent distribution channel.

The applicability of the VABER and Coty

First, the ICA concluded that the Vertical Agreements Block Exemption Regulation (Regulation 330/2010, "VABER") did not apply to the agreements for several reasons:

1. the restrictions at issue concerned the intermediation services provided by Amazon (which holds a market share of more than 70-75%);

2. the VABER applies only to conditions under which the parties may purchase, sell or resell certain goods or services, while the clauses at issue related to third-party access to Amazon Marketplace;

3. even if the clauses had concerned Apple's supplies to Amazon, the VABER would still not have applied since Amazon's direct sales to consumers of consumer electronic products exceeded 30% of the total sales on the market for online retail sales of these products;

4. none of the dual distribution exceptions provided under Article 2(4) of the VABER in relation to non-reciprocal vertical agreements between competitors applied, as: (a) the exceptions should be interpreted restrictively; (b) the agreement was reciprocal (in that Apple recognised Amazon as "official reseller" in exchange for Amazon conferring on Apple and a limited number of handpicked resellers exclusive access to its marketplace services); and (c) the parties are competitors as regards both production and distribution.

Notably, the ICA referred to both the Commission's proposed new draft of the VABER and to its draft Vertical Guidelines to support its conclusion that: (i) providers of online intermediation services with a hybrid function (i.e., that both provide intermediation services and sell goods/services in competition with the undertakings to which they provide such services) cannot benefit from the dual distribution exceptions; and (ii) the VABER does not apply to restrictions relating to the conditions for the provision of online intermediation services to third parties.

Second, the ICA found that Amazon could not rely on the European Court of Justice's ("ECJ") judgment in *Coty* (Case C-230/16), which held that certain limitations on sales over online platforms are compatible with Article 101 TFEU, as the facts were different. Specifically, and in contrast to the facts at issue in Coty, the ICA found that this case did not concern restrictions agreed between Apple and its resellers, as the latter were generally allowed to use online platforms under the terms of their agreements with Apple.

Moreover, the ICA also noted that, in any event, the restrictions imposed on selling over Amazon Marketplace did not meet the conditions set out by *Coty* for platform restrictions to fall outside of Article 101(1) TFEU (the so-called "*Metro* requirements", in reference to the ECJ's ruling on selective distribution in Case 26/76) within either Apple's selective distribution or its open distribution system. In so reasoning, the ICA expressly rejected Apple's argument that the *Metro* requirements are not applicable to such restrictions in open distribution systems. In particular, the ICA considered the following:

1. there were no objective, uniform and qualitative criteria for the selection of the resellers allowed to sell over Amazon Marketplace;

2. the restriction only concerned Amazon Marketplace (instead of including also other platforms) and did not include reconditioned products;

3. the restriction did not pursue legitimate objectives relating to the protection of the image of the product or brand (based on internal documents, the ICA concluded that the aim was instead to impose a purely quantitative restriction on the number of retailers allowed to sell over Amazon Marketplace);

4. the selection of retailers was, in practice, not implemented in a non-discriminatory way, as it excluded resellers which could guarantee the same quality as Amazon or other "listed" resellers otherwise permitted to sell over Amazon Marketplace, and was carried out at Apple's complete discretion; and

5. the restrictions were not proportionate (based on the exclusion of retailers of equal quality).

Finding of a restriction by object

Considering the above, the ICA concluded that – in relation to both the open and selective distribution systems – the agreements at issue had the object of precluding access to marketplace services to undertakings that lawfully resell Apple's products, thereby hindering their access to the market. The ICA also noted that the restriction did not pursue qualitative objectives, but that it was the parties' intention to introduce a quantitative restriction for the purpose of better controlling Apple's resellers. Additionally, the ICA noted that Apple's selection of resellers constituted a geographical restriction, insofar as the agreements explicitly excluded resellers based in certain EU Member States, hindering the integration of national markets and limiting parallel trade. Moreover, the ICA found that, in practice, the parties selected only resellers that did not export to any material extent, resulting in only Italian resellers selling on Amazon's Italian marketplace.

Therefore, citing, among other things, the ECJ's judgment in *Pierre Fabre* (Case C-439/09, which concerned an outright prohibition on online sales), the ICA concluded that the clauses under discussion constituted a restriction of competition by object within the meaning of Article 101 TFEU.

The assessment of anticompetitive effects

Interestingly, the ICA also carried out an effects analysis and concluded that the relevant clauses also amounted to a restriction of competition by effect.

Reduction in competition from Apple resellers. The ICA found that the agreement had led to a reduction in the number of resellers of Apple's products on Amazon Marketplace, as well as a reduction in the volume of sales by remaining retailers, and to an increase in prices. It also found that cross-border sales of Apple's products on Amazon Marketplace had decreased.

In particular, the ICA found that Apple's handpicking of "listed" resellers, in fact, led to the exclusion of the best-performing resellers that had been active on Amazon Marketplace until then. According to the ICA, this selection process could also have reduced the incentives for resellers to compete (the ICA relied, among other things, on the fact that one of the excluded resellers asked to be readmitted in exchange for the promise not to lower its prices).

Strengthening of Amazon. In further considering effects, the ICA took into account that: (a) Amazon held a strong market position both as a provider of intermediation services on its platform and as a platform for online sales of consumer electronic products; and (b) Apple's products are particularly appealing to the public. The ICA noted that, following the agreements, Apple's turnover increased and that, in exchange for the restrictive clauses, Amazon obtained better conditions (in terms of discounts) for the purchase of Apple's products. As a result, Amazon also increased its turnover related to direct sales of Apple's products to a degree that was higher than the decrease in revenue it suffered for any loss in intermediation services (that it would have provided to other Apple resellers). From this, the ICA concluded that Amazon obtained an economic benefit and was able to increase its market share both as a marketplace and as a seller. The effects of the practice were found to be amplified by COVID-19, which made online sales the predominant selling channel at the time.

Article 101(3) TFEU

The ICA also concluded that the restrictions at issue did not meet the cumulative requirements of Article 101(3) TFEU and could therefore not be exempted on that basis. In particular, in addition to the considerations mentioned above, the ICA noted that the restrictive clauses were not necessary given that: (i) any positive effect in terms of improved variety and availability in the supply of Apple products to Amazon was unrelated to these clauses; and (ii) the parties had already introduced other (less restrictive) mechanisms to combat counterfeited products (the parties having argued that the restriction was required to limit counterfeited products).

The ICA therefore concluded that the agreement described above constituted a restriction both by object and by effect in violation of Article 101 TFEU.

Sanctions

Since the ICA considered the infringement to be "serious", it increased the amount of the fine on the parties by 50% to ensure that it would have a deterrent effect. Significantly, the ICA did not consider Apple's commitment to increase the number of resellers on Amazon Marketplace as a mitigating circumstance, as this was implemented a full year after the start of the investigation and only a few days before its conclusion. Moreover, these measures did not sufficiently restore access to Amazon Marketplace and therefore only partially addressed the competitive issues.

Finally, the ICA imposed obligations on the parties to ensure that resellers would be granted access to Amazon Marketplace in a non-discriminatory fashion through objective and qualitative criteria.

Comment

The Decision is of considerable interest as it appears to be the first detailed assessment of a partial, as opposed to a comprehensive, restriction on platform selling which, furthermore, was applicable in not only a selective but also in an open distribution system. The facts of the case appear to be quite specific, including that: (i) the restriction was agreed directly with the platform, Amazon, over which Apple resellers were restricted from selling and which itself apparently had a very strong market position as a supplier of intermediation services and more broadly in relation to online sales of the products concerned; and (ii) the platform was also a reseller of Apple products. In addition, the ICA was able to find support for parts of its assessment in the discussion of partial platform bans contained in the Commission's draft Vertical Guidelines (at para. 319).

Nonetheless, the finding that the restriction constituted a restriction both by object and by effect is controversial given that even a (more restrictive) comprehensive platform ban would not be considered to be a hardcore restriction under the VABER, as decided by the ECJ in Coty. It may be that the ICA's finding of an object restriction was influenced by the additional cross-border element which it identified in the case, with competition authorities in Spain and Germany also having already opened investigations into this issue. Furthermore, it may be that the ICA would have imposed a lower sanction had it been unable to identify appreciable anti-competitive effects resulting from the practice in addition to an anti-competitive object of that practice. In any event, the ruling in any appeal of the ICA's Decision will be of considerable interest as it will presumably need to address various contentious points of legal interpretation in relation to both the VABER and the application of Article 101(1) TFEU.

UNITED KINGDOM

UK CMA proposes a new vertical agreements block exemption order

At the start of November, the UK Competition and Markets Authority ("CMA") issued a Recommendation to the Secretary of State with respect to the terms of a new UK-specific Vertical Agreements Block Exemption Order ("VABEO") that would apply as of 1 June 2022. The VABEO would replace the retained Vertical Agreements Block Exemption Regulation ("VABER") in the UK in the post-Brexit era (for more background, see VBB on Competition Law, Volume 2021, No. 6). The Recommendation also gives an indication of the nature of the separate guidance that the CMA plans to issue concerning the assessment of vertical agreements both under and outside of the VABEO ("Verticals Guidance"). The CMA's Recommendation followed a four-month public consultation process (VBB's submission is available here). The European Commission is also currently reviewing its vertical rules and, based on the draft of the new Vertical Block Exemption Regulation and vertical guidelines published by the Commission in July this year (analysed by VBB here), the UK's approach is likely to diverge in certain respects from the approach applicable in the EU/EEA.

Dual distribution

Dual distribution refers to a situation where a manufacturer is also active at, in particular, the retail level of the supply chain where it competes with its distributors. The CMA recommends that the VABEO should continue to exempt dual distribution and should extend the currently applicable exemption to cover non-reciprocal distribution agreements concluded by wholesalers and importers with distributors with which they compete downstream (which are currently not covered by the VABER, which only applies to such agreements concluded by manufacturers with distributors). This is also the approach adopted by the European Commission in the current draft block exemption. However, unlike the European Commission, the CMA has not proposed making the exchange of information between a supplier and its distributors in the context of dual distribution subject to a lower market share threshold of 10%. As a result, vertical exchanges of information would continue to be block-exempted under the UK rules provided the generally applicable 30% market share threshold is not exceeded. This is a positive development which would spare UK businesses with low market shares the uncertainty associated with the denial of the benefit of a block exemption to vertical information exchanges. The CMA plans to provide further guidance on information exchange in dual distribution in its forthcoming Verticals Guidance.

Most Favoured Nation clauses ("MFNs")

Price parity-obligations, also known as MFNs, have been in the limelight in recent years, especially wide MFNs. A wide MFN prevents a supplier which sells a product (or service) to, or through, another party (e.g., a platform) from offering that product at a lower price through, or on, any other channel or platform, including through the supplier's own website or physical stores. The CMA recommends applying a stricter approach than the European Commission and treating wide retail MFNs as hardcore restrictions, meaning that the VABEO would not apply at all to any agreement containing a wide retail MFN (whether concluded in favour of online platforms or any other type of contracting party). This follows the CMA's recent enforcement actions in this area, including the CompareTheMarket case, in which the CMA imposed an £18 million fine on the price comparison website CompareTheMarket for its use of wide MFNs in the contracts it had entered into with home insurance providers (a decision which is currently under appeal). Under the CMA's proposed approach, business-to-business wide MFNs as well as narrow MFNs (which ensure parity only with the terms offered by a supplier's own off- and online stores) would be exempted under the VABEO.

In contrast, under the European Commission's less strict approach, no wide MFNs would be considered to be hardcore restrictions. Instead, wide MFNs in favour of (only) providers of online intermediate services would be excluded from the benefit of the block exemption (meaning that the remainder of the agreement could still benefit from the exemption, which would not be possible if they were treated as hardcore restrictions).

Territorial and customer restrictions

The CMA has proposed retaining the current basic classification of territorial and customer restrictions as hardcore restrictions. Reasons given include the need to preserve intra-brand competition within the UK as well as the integrity of the UK internal market. Whilst restrictions on passive sales (including prohibitions on internet sales) would, in principle, continue to be treated as hardcore restrictions as under the European Commission's proposed revised rules, the scope of the current exception for active sales restrictions (which is limited to active sales into exclusive territories or customer groups) would be broadened to give companies more flexibility in framing their distribution systems. Thus, restrictions on active sales into territories or customer groups where exclusivity is shared between more than one distributor would be exempted by the VABEO. The CMA has recognised that, in the context of the exponential growth of the online retail industry, more clarity both in the VABEO and in the Verticals Guidance will need to be given on the distinction between active and passive sales – especially since, in practice, not all online sales are passive sales. In addition, again taking its cue from the European Commission's proposed revised approach, the CMA proposes broadening the scope of the exception to the hardcore restriction to facilitate: (i) the combination of exclusive and selective distribution systems; and (ii) the protection of members of a selective distribution system against sales made from outside the territory where the system applies to unauthorised distributors inside that territory.

Separately, the key question of how in practice to treat territorial and customer restrictions affecting trade between the UK and the EEA (for example, a prohibition on sales into the UK by a distributor appointed outside the UK) remains largely unanswered. This is a critical question for multinational businesses operating in both the EEA and the UK, but the CMA has not addressed it in the Recommendation presumably at least in part because it is separately consulting on possible changes to the jurisdictional scope of UK competition law. The CMA has only briefly confirmed that the VABEO is to apply to agreements which "affect trade within the UK", and that hardcore restrictions which are caught by the current jurisdictional test under UK competition law may violate UK competition law even where both parties are located outside the UK. Consequently, the CMA will likely enjoy a wide margin of discretion in assessing export bans into the UK and could take a position similar to the very strict approach taken by the Swiss competition authority with respect to restrictions on imports from the EEA into Switzerland. This position would be consistent with the approach already taken with respect to the exhaustion of intellectual property rights under UK law, namely that the sale of goods in the EEA will exhaust any associated intellectual property rights in the UK (but see the ongoing UK IP consultation on this topic). Therefore, a strategy of contractually limiting exports from the EEA into the UK is liable to entail considerable risk.

Dual pricing

In line with the proposed partial softening of approach by the European Commission, the CMA has recommended no longer treating dual pricing for online and offline sales as a hardcore restriction. As a result, a supplier would, in principle, be able to charge distributors different wholesale prices depending on whether they are subsequently re-selling the products online or offline. This would enable suppliers to support traditional sales channels (i.e., physical shops, which are facing a serious challenge posed by online shopping). In the same context, the CMA is also supporting the removal of the 'equivalence requirement' for online and offline channels in selective distribution systems, which would allow a supplier to set different criteria to be met by distributors when selling on and offline. As a caveat, the CMA is minded to clarify in its Verticals Guidance that the block exemption will not apply where dual pricing or other sales criteria, in practice, amount to a restriction by object (presumably where they go so far as to prevent online sales). To protect the legal certainty which a block exemption is intended to provide to business, it is hoped that clear guidance will be given as to the presumably exceptional circumstances in which such a conclusion would be drawn.

Resale price maintenance ("RPM")

The CMA has proposed that RPM should remain a hardcore restriction in the VABEO. Although the CMA has not identified sufficient evidence of any obvious efficiency gains from RPM that would outweigh the harm that RPM can cause, the CMA remains open to being presented with any such arguments and will provide more details in its future Verticals Guidance.

Non-compete obligations

The CMA has proposed preserving the current treatment of non-compete obligations under the VABER. As a result, only non-compete obligations whose duration does not exceed five years would benefit from the VABEO, and obligations that are tacitly renewable beyond such period would not be exempted. The European Commission, on the other hand, has proposed a softening of approach with respect specifically to tacitly renewable non-competes, which would continue to be exempted under the draft block exemption for periods beyond five years provided that the buyer is realistically able to terminate the non-compete obligation after five years.

Agency

The CMA has proposed to address this area in its upcoming Verticals Guidance, as stakeholders have requested more clarity. However, one change relating to the status of online intermediaries would be reflected in the VABEO – providers of online intermediation services would be considered as suppliers under the VABEO and, as such, would not, in principle, be able to qualify as genuine agents. This follows the approach advocated by the European Commission in its draft block exemption.

Timing and next steps

The VABEO would come into force on 1 June 2022 and be valid for 6 years (which is shorter than the 10-year period envisaged under the European Commission's draft block exemption regulation). The CMA will now focus on issuing its draft Verticals Guidance and conducting a public consultation (expected in early 2022 if not before).

Diverging regimes

It is already clear that certain important issues are likely to be treated differently under the future UK and EU regimes. On some issues, the UK approach will be less strict – for example, the European Commission is planning to introduce a lower 10% market share threshold with respect to information sharing in the context of dual distribution whereas the UK is not. On other issues, the UK's stance is likely to be stricter, as is the case with respect to wide retail MFNs, which would be considered hardcore restrictions under the UK regime without any exceptions (while, in contrast, the European Commission is not planning to qualify any MFNs as hardcore restrictions and will exclude from the benefit of its block exemption only wide MFNs in favour of online platforms).

With that in mind, multinational businesses will have to carefully consider both sets of rules and decide whether to either: (i) comply throughout the EEA and the UK with the stricter of the two regimes depending on the individual obligation in question; or (ii) apply different obligations in the UK and the EEA respectively at the expense of the coherence of their overall distribution strategy. Either choice will likely add (further) complexity to the current arrangements in place between suppliers and distributors operating both in the UK and in the EEA.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

European Commission issues Communication on 'A competition policy fit for new challenges'

On 18 November 2021, the European Commission ("Commission") published a communication on a competition policy fit for new challenges ("Communication"). There has been a significant push toward a more European Union-centred industrial policy which would support the transition to a sustainable, digital, and resilient European economy. This has raised questions about how a future EU competition policy and enforcement can be better aligned with the European Union's overarching policy goals, in particular whether competition law enforcement should become more flexible to better support industrial policy goals.

In the Communication, the Commission declares that it has been conducting a policy review "of unprecedented scope and ambition". In the end, however, the Communication identifies significant substantive changes only in the field of State aid. For antitrust and merger review, the Communication reflects a fairly conservative view – it emphasises several times that continued vigorous competition law enforcement will best facilitate the transition toward sustainability, digitalisation, and resilience objectives, and shows little appetite for significant policy changes in these areas.

Sustainability: The Commission is looking to devise a competition policy capable of supporting the ambitious targets set by the European Green Deal, including that of reaching net zero emissions by 2050. For this, State aid measures remain the principal tool. The Communication expands on a recent Commission policy brief that broadly outlined the outcome of a public consultation on the matter as well as the main strategies chosen. Accordingly, State aid reforms will be generally geared towards supporting the development of green technology and making its use economically viable. Member State measures that support the circular economy, biodiversity, clean mobility, and the energy efficiency of buildings will be favoured. Rules will be generally adapted to green objectives and to regulatory principles inherent in the Green Deal, including the "polluter pays" principle. For instance, according to revisions envisaged for the Climate, Environmental Protection and Energy Aid Guidelines (CEEAG) and the General Block Exemption Regulation (GBER), State funding for projects which involve fossil fuels are unlikely to be approved. At the same time, the Commission will take into account the negative externalities of an aid, in particular if it involves the use of some of the most polluting fossil fuels (e.g., oil, coal, ignite) as part of the assessment of the negative effects of an aid measure on competition and trade.

As regards antitrust policy, the Commission notes that competition law should facilitate sustainability agreements and support efforts by companies to cooperate in the pursuit of genuinely green initiatives. The Communication explains, however, that sustainability agreements may already comply with existing rules. Future measures will, therefore, primarily aim to clarify existing rules, both through guidance in individual cases and in the revised Horizontal Block Exemption Regulations and Horizontal Guidelines, which are currently under review.

Digital Economy: The Communication contemplates a number of changes to support the EU's digital transition. As regards State aid, the Commission expresses an openness to approving large-scale investments that support the development of infrastructure in a way that simultaneously allows for private investment and ensures such infrastructure is accessible across the EU. For instance, as regards broadband networks, the Commission is revising the Broadband State aid Guidelines to accompany and facilitate their deployment. Private operators are also encouraged to cooperate in network sharing activities.

At the same time, the Communication emphasises the importance of continued antitrust enforcement in digital markets, particularly in view of the strong network effects which can create "winner takes all" situations. The Commission is exploring enforcement tools adapted to such dynamics, including through the Digital Markets Act, which adds an *ex ante* level of control. The Communication also recognises the competitive value of certain digital assets such as data or privacy protection.

The revised Horizontal Guidelines will also touch on data-sharing, so that undertakings are able and encouraged to share data insofar as it does not distort competition. Moreover, the updated Vertical Block Exemption Regulation and Vertical Guidelines will provide guidance on new supply and distribution models, including in digital markets.

Digital markets also give rise to concerns about so-called "killer acquisitions". The Communication explains that the Commission has issued guidance under Article 22 of the EU Merger Regulation to address these concerns, encouraging Member States to refer to the Commission potentially problematic mergers that do not meet national notification thresholds. Additionally, under the new Digital Markets Act regime, the Commission will receive information from digital gatekeepers about acquisitions of companies providing digital services.

EU Resilience: The Communication explains that State aid rules will support a more resilient economy, especially in strengthening preparedness for potential health emergencies. For example, the Commission is prepared to enable public/private co-financing of Important Projects of Common European Interest (IPCEI) on Health. Also, as the shortage of semiconductors has illustrated the risks associated with overreliance on supply from a limited number of exporters, the Commission is intending to approve public support to fill possible funding gaps in the semiconductor ecosystem. At the same time, the Communication highlights the importance of a case-by-case assessment of such aid measures, in order to ensure that they are indeed necessary, appropriate, and proportionate.

The Communication also notes that, often, the best way to increase resilience is to rely on the industries in question and their strategic business decision-making. Strong enforcement of competition law will enhance the effects of this approach and ensure that European industries remain competitive.

Interestingly, the Communication also points out that merger control should focus on ensuring diversified supply chains so as to prevent dependencies, by making sure that access to crucial inputs for downstream competitors remain available at competitive conditions and that access for upstream competitors to a sufficient number of customers downstream is not foreclosed. Additionally, merger control reviews should take into account reliability of supply and predictable lead times. However, the Communication does not explain how these concerns should be incorporated into merger analysis beyond a standard significant impediment to effective competition (the "SIEC" test) analysis.

Conclusions: State aid aside, where significant reforms are envisaged, the Communication does not signal an intention by the Commission to depart in any significant way from its current policy and enforcement priorities in EU competition law to accommodate overarching EU policy goals, in particular greater sustainability, digitalisation, and resilience of the European economy. On the contrary, the Commission points out that vigorous competition is what will best secure these aims, where pending initiatives focus primarily on clarifying the scope of existing competition law rules.

– MEMBER STATE LEVEL –

BELGIUM

Damien Gérard appointed as new Chief Prosecutor of the Belgian Competition Authority

By Royal Decree of 25 October 2021, the Belgian government confirmed Mr. Damien Gérard's appointment as Chief Prosecutor in Competition Matters (*auditeur-generaal / auditeur général*) of the Belgian competition authority ("BCA"). The Royal Decree was subsequently published in the Belgian Official Journal and the appointment confirmed by a press release of the BCA on 22 November 2021. Mr. Gérard is a seasoned European Commission competition official and competition law academic. His mandate started on 1 December 2021 for a period of six years, renewable once.

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